

Te Wharenga - The New Zealand Criminal Law Review

ISSN 2463-5804

[2017] NZCLR 152-313

Contents:

Articles:

Jacob Barry "Prosecutors – Should We Trust Them? A Cross-Jurisdictional Analysis of the Effectiveness and Transparency of Limits on Prosecutorial Discretion during Plea Bargaining" [2017] NZCLR 154

Katey Thom "Exploring Te Whare Whakapiki/The Alcohol and Other Drug Treatment Court Pilot: Theory, Practice and Known Outcomes" [2017] NZCLR 180

Case and Legislation Notes:

David Harvey "Case Note: Digital Property – *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678" [2017] NZCLR 195

David Harvey "Case Note: *Police v B* [2017] NZHC 526, [2017] 3 NZLR 203" [2017] NZCLR 213

Scott Optican "Case Note: Every Silver Lining Has a Cloud – the Exclusion of Improperly Obtained Evidence in Civil Proceedings: *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260" [2017] NZCLR 228

Warren Brookbanks "Case Note: *N v R* [2017] NZCA 170" [2017] NZCLR 248

Nick Chisnall "Case Note: *Cameron v R* [2017] NZSC 89 – Controlled Drug Analogues, Indeterminacy and Mens Rea under the Misuse of Drugs Act 1975" [2017] NZCLR 256

Kris Gledhill "Legislation Note: The Child Protection (Child Sex Offender Government Registration) Act 2016" [2017] NZCLR 267

Warren Brookbanks "Legislation Note: The Substance Addiction (Compulsory Assessment and Treatment) Act 2017" [2017] NZCLR 291

Book Reviews:

Don Mathias "Book Review: Robert J Frater QC *Prosecutorial Misconduct* (2nd ed, Thomson Reuters, Toronto, 2017)" [2017] NZCLR 301

Warren Brookbanks "Book Review: Graeme Brown *Criminal Sentencing as Practical Wisdom* (Hart Publishing, Oxford, 2017)" [2017] NZCLR 305

This issue has been edited by: Kris Gledhill, Scott Optican and Warren Brookbanks

Editorial assistance has been provided by: Olivia Kazmierow and David Keogh

Te Wharenga - The New Zealand Criminal Law Review is a venture supported by academics at every Law School in Aotearoa New Zealand and the Criminal Bar Association of New Zealand Inc

Te Wharenga - The New Zealand Criminal Law Review

ISSN 2463-5804

General Editor
Kris Gledhill (AUT)

General Editors (Maori)
Khylee Quince (AUT)
Māmari Stephens (VUW)

General Editors (Youth)
Alison Cleland (AUT)
Nessa Lynch (VUW)

Editors
Neil Boister (Canterbury)
Margaret Briggs (Otago)
Warren Brookbanks (AUT)
Jeremy Finn (Canterbury)
Colin Gavaghan (Otago)
Brenda Midson (Waikato)
Scott Optican (Auckland)
Wayne Rumbles (Waikato)
Debra Wilson (Canterbury)

Editorial Advisory Board:
Justice Helen Winkelmann - Court of Appeal
Justice Timothy Brewer - High Court
Justice Paul Heath - High Court
Justice Cameron Mander - High Court
Justice Simon Moore - High Court
Sir Bruce Robertson

HH Judge Anne Kiernan – District Court
HH Judge Stephen O’Driscoll – District Court

Robert Lithgow QC - Barrister
Len Andersen – Barrister
Fiona Guy Kidd – Barrister and Solicitor
James Rapley - Barrister

Copyright is vested in the publisher; requests for permission to reproduce content should be sent to the General Editor.

Notes for Contributors:

The Editors welcome contributions promoting debate on the substantive, procedural and evidential aspects of the criminal law of New Zealand, including wider policy matters.

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.

Submissions and correspondence should be addressed to Kris Gledhill at kris.gledhill@aut.ac.nz.

Te Wharenga - The New Zealand Criminal Law Review is a venture supported by academics at every Law School in Aotearoa New Zealand and the Criminal Bar Association of New Zealand Inc

PROSECUTORS – SHOULD WE TRUST THEM? A CROSS-JURISDICTIONAL ANALYSIS OF THE EFFECTIVENESS AND TRANSPARENCY OF LIMITS ON PROSECUTORIAL DISCRETION DURING PLEA BARGAINING

JACOB BARRY*

I. INTRODUCTION

In 2016, the story of “Baby Moko”¹ captured the country’s attention as we witnessed his killers come before the courts and enter guilty pleas to manslaughter and ill-treatment charges. The story of the beatings Baby Moko suffered at the hands of his caregivers is not easily forgotten.² But the other story to emerge from that case was the plea bargain negotiated between the Crown and defence lawyers which saw charges of murder downgraded to manslaughter and guilty pleas entered.³ Fierce public outcry and media scrutiny resulted, and nationwide protests were staged on the day of the caregivers’ sentencing. Suddenly, the exercise of prosecutorial discretion became the subject of national debate, with the Attorney-General even taking the rare step of publicly defending the plea deal.⁴

Whether that plea deal was justified is ultimately a matter of conjecture, but the case finally brought an important topic into the public domain – plea bargaining. The plea negotiations in the Baby Moko case are symptomatic of most similar arrangements in common law criminal jurisdictions; they involve prosecutors and defence lawyers negotiating behind closed doors, beyond the purview of the public. And New Zealand is not alone when it comes to controversial plea bargains.⁵ How then can we be confident that those entrusted with prosecuting crimes are conducting themselves within the bounds of their mandate? What checks exist to prevent potential abuses of prosecutorial discretion in plea bargaining so that the community can be assured that the decision to downgrade the charge in the Baby Moko case, and others like it, is robust and defensible?

*LLM (Harv), LLB(Hons)/BCom (Cant), former Crown prosecutor. For the avoidance of doubt, the views expressed in this article are my own and are in no way intended to reflect the views of any Crown Solicitor’s office. Also, my thanks to David Green and to the anonymous reviewers for their helpful suggestions and comments. All remaining errors are mine.

¹ Moko Rangitoheriri.

² See generally Benn Bathgate and Matt Shand “Moko Rangitoheriri’s Killers David Haerewa and Tania Shailer Sentenced to 17 Years’ Prison” *Stuff* (online ed, 27 June 2016).

³ See generally *R v Shailer* [2016] NZHC 1414.

⁴ See for example Sam Sachdeva “Attorney General Christopher Finlayson defends manslaughter charge for Moko’s killers” *Stuff* (online ed, 9 June 2016).

⁵ See for example Terry Kirby “CPS to Review Decision to Drop Charges Against Bahar Mustafa Over #killallwhitemen Controversy” *East London Lines* (online ed, London, 3 November 2015); Michael Rellahan, “I’m Not Angry’ Says Woman in Case, ‘It Makes Me Sad’” *Daily Local News* (online ed, West Chester, 12 September 2016); and Aleks Devic and Paul Toohey “Widespread Outrage as Matthew Newton’s Latest Violent Assault Charges Are Dropped” *Perth Now* (online ed, Perth, 15 November 2012).

This article surveys a number of jurisdictions (New Zealand, the United States' federal system, England and Wales, and to a lesser extent Victoria and New South Wales in Australia, and British Columbia and Ontario in Canada) with a view to identifying the principal features of their respective plea bargaining frameworks, in order to determine the extent to which those features restrain prosecutors' plea bargaining discretion. This survey will not involve a line-by-line analysis of each and every aspect of the plea bargaining frameworks, instead focusing on three broad categories of features: internal checks, third party influences and judicial oversight.

Having considered the effectiveness of these features in Parts III-V, I will then discuss the importance of a transparent plea bargaining process and argue that there is a systemic disconnect between the transparency and effectiveness of the three features examined. That is, while some of these features provide a meaningful check on prosecutorial discretion, they lack the transparency required to ensure that public confidence in the plea bargaining system is achieved, and vice versa. Finally, I will argue that it is the convergence of transparency and effective checks on prosecutorial discretion that ought to be the starting point for any reform of plea bargaining processes.

II. PLEA BARGAINING GENERALLY

A. Defining Plea Bargaining

Before turning to the substance of this article, it is important to outline precisely what "plea bargaining" means. Though different jurisdictions use the phrase in various ways,⁶ I use it to denote any negotiations and/or agreements reached between prosecutors and defence lawyers that are directed toward resolving a criminal proceeding without the need for a trial. It does not necessarily entail a case where guilty pleas are entered (although they will be the most common) and includes all cases where a prosecutor elects to withdraw charges and discontinue proceedings against a criminal defendant. Furthermore, it does not necessarily relate to agreements about the charges to which a defendant pleads guilty, but can also relate to any agreement between the parties as to sentence, or the factual basis for sentencing, practices which are particularly prominent in the United States.

Further, although at the outset of this article I cited an example of a plea bargain that attracted negative publicity because of perceived under-charging, the public's interest in plea bargaining is not so limited. The wider public's interest naturally includes ensuring that defendants' interests are adequately protected in the plea bargaining process. However, I acknowledge that many of the concerns affecting defendants in the plea bargaining process are able to be appropriately safeguarded by their legal representatives.⁷ That is not to suggest that the plea bargaining

⁶ See generally Carol Brook and others "A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States" (2016) 57 William & Mary L Rev 1147.

⁷ See Daniel McConkie "Judges as Framers of Plea Bargaining" (2015) 26 Stanford L & Pol'y Rev 61 at 80–81.

process is a completely level playing field, but it recognises that public confidence in the plea bargaining system may demand that more attention be placed on protecting the rights and interests of those who do not have a seat at the plea bargaining table (for example, victims and investigators).

B. The "Schizophrenic" Prosecutor

The reader will have been alerted to the importance placed on the "public interest" in this article. While such an amorphous phrase is difficult to define precisely, it is important to set out the specific lens through which the public interest is to be considered here.

Prosecutors are commonly described as "ministers of justice", and advocates who act on behalf of the community, whose duties are not to convict, but to do justice.⁸ However, they are also advocates, and it is this dual role as both ministers of justice and advocates that leads some commentators to describe prosecutors as suffering from an "ongoing schizophrenia".⁹ Not only that, but prosecutors also face other pressures, with the presence of fiscal and political constraints influencing the way they carry out their role. This article takes all those factors as a given; they are a reality. Instead, the article focuses on how prosecutors' power is harnessed to ensure that they are upholding their duties as advocates on behalf of the community, consistently with the community's expectations of them.

III. INTERNAL CHECKS

In this section, I explore the basic frameworks that govern the exercise of prosecutorial discretion, first through the tests that prosecutors must employ to decide whether to prosecute, and then the specific rules of engagement for plea bargaining. I then turn to consider what internal processes, if any, exist for peer review of prosecutors' charging and plea bargaining decisions.

A. Prosecution Tests

The first and most obvious check on a prosecutor's discretion in plea bargaining is the prosecution test – the test for determining whether to charge (or continue a proceeding against) a defendant. By and large, the tests across the jurisdictions have two core components: an evidential and public interest component. As will be shown below, the tests in each jurisdiction grant significant latitude for prosecutors to manipulate the outcome.

⁸ See for example Office of the Director of Public Prosecutions (NSW) *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) at 5; Michael Cassidy "Character and Context: What Virtue Theory Can Teach Us about a Prosecutor's Ethical Duty to 'Seek Justice'" (2006) 82 Notre Dame L Rev 635 at 636–637.

⁹ Daniel Medwed *Prosecution Complex: America's Race to Convict, and its Impact on the Innocent* (NYU Press, New York, 2012) at 3.

1. *The evidential component*

Common to all of the jurisdictions surveyed is the evidential test for proceeding against a defendant.¹⁰ Most jurisdictions employ a “reasonable” or “realistic prospect of conviction” test which is applied on the basis of available and admissible evidence.¹¹ But even as between these jurisdictions, the test is not applied in a uniform way. England and Wales stipulate that the test will be satisfied on a “more likely than not” standard (that is, 51 per cent),¹² whereas the New Zealand test avoids employing any “mathematical science”.¹³ The United States’ test requires a belief “that the admissible evidence will probably be sufficient to obtain and sustain a conviction”.¹⁴ The use of “probable” suggests a test at least as onerous as the “more likely than not” threshold in England and Wales.

British Columbia, on the other hand, sets out a tiered test depending on the type of case. The ordinary evidential test requires a “substantial likelihood of conviction”,¹⁵ with a special test to be applied in “exceptional circumstances”, which the applicable guidelines note “will most often arise in the cases of high risk violent or dangerous offenders or where public safety concerns are of paramount consideration”.¹⁶ In those cases, a “reasonable prospect of conviction” test will apply (implicitly, a lower standard than “substantial likelihood of conviction”). For the general run of cases, therefore, British Columbia imposes a more stringent standard on prosecutors than the test most commonly found in the other surveyed jurisdictions.

There is no particular magic in these evidential tests. They align with what one might expect; that a significant part of the decision to prosecute rests on the likelihood of conviction. And while the tests across the jurisdictions might place different standards on prosecutors in terms of the likelihood of conviction required to proceed with a prosecution, the application of the tests is uniformly subjective – prosecutors make their own judgment about whether the various objective tests are met.

¹⁰ United States Department of Justice *United States Attorneys’ Manual* (1 January 2017) at [9-27.220]; Crown Prosecution Service (England and Wales) *The Code for Crown Prosecutors* (January 2013) at [4.4] [Crown Prosecution Service (Eng)]; Crown Law Office (New Zealand) *Solicitor-General’s Prosecution Guidelines* (1 July 2013) at [5.5.1] [Crown Law Office (NZ)]; Ministry of Justice (British Columbia) *Crown Counsel Policy Manual: Charge Assessment Guidelines* (2 October 2009); Ministry of Attorney-General (Ontario) *Crown Policy Manual: Charge Screening* (21 May 2005) [Ministry of Attorney-General (Ont)]; Office of the Director of Public Prosecutions (NSW), above n 8, at [4]; and Office of the Director of Public Prosecutions (Vic) *Director’s Policy: Prosecutorial Discretion* (24 November 2014) at [2].

¹¹ Crown Prosecution Service (Eng), above n 10, at [4.4]; Crown Law Office (NZ), above n 10, at [5.5.1]; Ministry of Attorney-General (Ont), above n 10; Office of the Director of Public Prosecutions (NSW), above n 8, at [4]; and Office of the Director of Public Prosecutions (Vic), above n 10, at [2].

¹² Crown Prosecution Service (Eng), above n 10, at [4.5].

¹³ Crown Law Office (NZ), above n 10, at [5.4].

¹⁴ US Department of Justice, above n 10, at [9-27.220].

¹⁵ Ministry of Justice (BC), above n 10, at 1.

¹⁶ At 1.

2. *The public interest component*

Once the evidential threshold has been crossed, prosecutors turn to weigh wider considerations for and against prosecution, commonly referred to as the public interest test.¹⁷ This gives prosecutors the power to elect not to proceed with charges despite the evidential test being met. This is also where prosecutors have the most discretion, with reference to a myriad of factors that can be weighed as the individual prosecutor sees fit. For example, New Zealand's Prosecution Guidelines set out 31 separate non-exhaustive factors both for and against prosecution that "may be relevant and require consideration by a prosecutor when determining where the public interest lies in any particular case".¹⁸ These encompass matters such as the seriousness of the offence, the defendant's history, the victim's views, and the cost of prosecution.¹⁹ British Columbia, New South Wales, and Victoria employ very similar tests.²⁰

In the United States, the test is couched slightly differently, but is similar in effect. That test requires a consideration of whether "a substantial federal interest would be served by prosecution".²¹ That language is driven principally by the complex interplay between State and Federal prosecution systems which often sees both State and Federal prosecutors potentially responsible for conducting a prosecution. But once the "responsibility" considerations are stripped away, the test operates similarly to the New Zealand test, requiring a focus on all relevant considerations such as law enforcement priorities, the nature and seriousness of the offence, the deterrence that could be achieved by a prosecution, the offender's culpability and history, the offender's willingness to cooperate, and the probable sentence.²² And although only eight separate factors are set out, the list is "not intended to be all inclusive".²³

A more structured approach to the public interest test is utilised in England and Wales, with prosecutors first being required to address eight questions to assess whether prosecution is in the public interest.²⁴ Those questions do not address any novel considerations and cover broadly similar ground to the New Zealand and United States' tests.²⁵ Again, they are not exhaustive, and prosecutors can then

¹⁷ See Crown Law Office (NZ), above n 10, at [5.5.2]; Crown Prosecution Service (Eng), above n 10, at [4.1]; and US Department of Justice, above n 10, at [9-27.220].

¹⁸ At [5.9].

¹⁹ At [5.5]–[5.9].

²⁰ Ministry of Justice (BC), above n 10, at 4-5; Office of the Director of Public Prosecutions (NSW), above n 8, at [3]; and Office of the Director of Public Prosecutions (Vic), above n 10, at [6]–[11].

²¹ US Department of Justice, above n 10, at [9-27.220].

²² At [9-27.230].

²³ At [9-27.230].

²⁴ Crown Prosecution Service (Eng), above n 10, at [4.5].

²⁵ The questions are as follows: (a) How serious is the offence committed? (b) What is the level of culpability of the suspect? (c) What are the circumstances of and the harm caused to the victim? (d) Was the suspect under the age of 18 at the time of the offence? (e) What is the impact on the

turn to other (unspecified) considerations that affect the public interest.²⁶ The more structured approach thus seems unlikely to lead to different outcomes when compared with the tests used in the other jurisdictions canvassed.

The above discussion illustrates how much discretion is involved in the public interest test, regardless of jurisdiction. The significance of discretionary factors rests not so much in what the different jurisdictions stipulate as part of the public interest enquiry, but in the fact that so many considerations are potentially available to the prosecutor, whether they are explicitly stated or not. This is in stark contrast to the principle of legality in civil law jurisdictions, which operates to limit the prosecution test to an evidential threshold test.²⁷ Common law prosecutors, therefore, have the opportunity to reverse engineer plea bargain outcomes, first negotiating an outcome, then working back to fill in the public interest test to justify the result.

B. Plea Bargaining: the Rules of Engagement

As Brown and Bunnell have noted, “[a]ny way you slice it, plea bargaining is a defining, if not the defining, feature of the present [United States] federal criminal justice system”.²⁸ That statement is borne out empirically by the high proportion of Federal cases determined by guilty pleas, in excess of 90 per cent.²⁹ The percentage of cases where plea bargaining takes place is likely even higher, given that some sort of plea bargaining is probably attempted in cases that do go to trial. And although plea bargaining data is difficult to obtain in jurisdictions outside of the United States,³⁰ it is uncontroversial to suggest that plea bargaining plays a significant role in New Zealand and in other comparable jurisdictions, even if not to the same extent as the United States.

Given the prevalence of guilty pleas and, by natural extension, plea bargaining, it should come as no surprise that the various prosecutors’ manuals of the jurisdictions reviewed in this article provide not just for a prosecution test, but also specific rules of engagement when it comes to resolving a case by way of plea bargaining.

The most detailed and prescriptive approach to plea bargaining is set out in the United States Attorneys’ Manual. Federal prosecutors can enter three types of plea

community? (f) Is prosecution a proportionate response? (g) Do sources of information require protecting?

²⁶ Crown Prosecution Service (Eng), above n 10, at [4.5].

²⁷ See Philip Stenning “Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere” (2009) 55 Crim LQ 449 at 454.

²⁸ Mary Brown and Stevan Bunnell “Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia” (2006) 43 Am Crim L Rev 1063.

²⁹ Mark A. Motivans “Federal Justice Statistics, 2012 – Statistical Tables (2012)” (4 February 2016) Bureau of Justice Statistics <<https://www.bjs.gov/index.cfm>> at 17.

³⁰ See generally Equal Justice Project “Plea Bargaining in our Justice System” (paper prepared for Equal Justice Project symposium, Auckland, 4 October 2016) at [5.4.1]; and Fair Trials “The Disappearing Trial Report” (report, London, 27 April 2017) at [49].

agreements: charge agreements, where a defendant enters a plea to a charged offence or lesser related offence, possibly in exchange for dismissal of other charges; sentence agreements, where the prosecutor agrees to take a particular position on sentence; and mixed agreements, involving a combination of charge and sentence agreements.³¹ Again, as with the prosecution test, prosecutors have wide discretion to “weigh all relevant considerations” to determine the appropriateness of a plea bargain.³² However, one important rider on the prosecutor’s discretion is that plea agreements must ensure that the defendant pleads to a charge or charges “that is the most serious readily provable charge consistent with the nature and extent of his/her conduct”.³³ This seriousness requirement places a restriction on the prosecutor’s discretion to plea bargain, and the ability to facilitate plea bargaining generally. It means both parties to the negotiation appreciate that there is a certain offence “floor”, below which the prosecutor’s ability to bargain to extract a guilty plea is exhausted. There is, however, a small safety valve in that prosecutors are required to make an individualised assessment of the circumstances of the conduct, which includes a determination of whether the potential sentence would be proportional to the conduct.³⁴

The tiered plea agreement structure with the overarching seriousness requirement is more formal than the protocol for any of the other jurisdictions canvassed. In New Zealand, the primary consideration is what is in “the interests of justice”;³⁵ the selected charges having to “adequately reflect the essential criminality of the conduct”.³⁶ Further, prosecutors are specifically prohibited from reaching sentence agreements.³⁷ Plea discussions do, however, ordinarily involve reaching agreement on the factual basis for sentencing, which inevitably encompasses heavy negotiation over the relevant aggravating and mitigating features of the offence.³⁸ The New Zealand model more closely resembles the position in England and Wales, and the Australian and Canadian jurisdictions. The focus in those jurisdictions is on ensuring that the charges agreed upon appropriately reflect the seriousness of the offending and that the Court is left with the ability to impose a sentence that adequately reflects the offender’s culpability.³⁹

Finally, one important restriction, common to all of these jurisdictions, is that prosecutors are prohibited from overcharging in order to extract a plea, whether

³¹ US Department of Justice, above n 10, at [9-27.400]. “Pre-charge plea agreements” have been put aside for the purposes of this discussion.

³² At [9-27.420].

³³ At [9-27.430].

³⁴ At [9-27.300].

³⁵ Crown Law Office (NZ), above n 10, at [18.6].

³⁶ At [18.6.1].

³⁷ At [18.7.3].

³⁸ At [18.8].

³⁹ See Crown Prosecution Service (Eng), above n 10, at [9.1]-[9.2]; Ministry of Attorney-General (Ontario) *Crown Policy Manual: Resolution Discussions* (21 March 2005) at 1–2; Office of the Director of Public Prosecutions (NSW), above n 8, at [4]; Office of the Director of Public Prosecutions (Vic) *Director’s Policy: Resolution* (24 November 2014) at 3–4.

this is by the implicit effect of the evidential test, or explicitly stated.⁴⁰ Critics of plea bargaining generally make the argument that it provides innocent defendants with an incentive to plead guilty, or to avoid the litigation risk of receiving a higher sentence if they are found guilty at trial.⁴¹ This argument will be examined further below when considering the prosecutors' leverage during charge selection.⁴² But while the prohibition on overcharging by no means immunises against temptation, it certainly operates as a constraint by ensuring, at least in theory, that prosecutors' charging decisions are made with reference to the evidential threshold they have to satisfy, and not by some crude free market of criminal justice where charges are bartered down from unrealistic starting points. However, in general, the problem identified under the public interest test discussed above⁴³ – that prosecutors have the ability to manipulate the governing test to reverse engineer an outcome – remains true when considering the specific rules that govern plea bargaining.

C. Internal Approval

Supervision and review of prosecutors' decisions by more senior prosecutors is one way to limit abuses of discretion in individual cases. That is likely to eliminate the presence of rogue prosecutors, whose approach to plea bargaining fails to uphold the governing rules. However, it is less likely to identify systemic problems, given that those doing the supervising may be the root cause of those problems. It is also unlikely that prosecutors' decisions will be reviewed *de novo*, with deference paid to the first instance decision maker.

The US Attorneys' Manual is the only governing document to require a system of approval to be established. The Manual requires each office to establish a system for approval of plea bargains by a supervisor.⁴⁴ This provides an important back-stop to ensure that the overarching prosecution tests are being complied with. However, as will be discussed below in relation to victims, some systems provide a layer of internal appeal or review when investigators or victims do not accept a plea agreement that has been finalised.⁴⁵ New Zealand, on the other hand, does not require any formal approval of plea agreements or provide for a layer of approval in the applicable prosecution guidelines.⁴⁶ That is not to say, however, that individual Crown Solicitors' offices do not have their own internal review processes established – many do. Rather, it is to point out that we lack insight into their existence and/or efficacy.

⁴⁰ See for example Crown Law Office (NZ), above n 10, at [18.7.1]; Crown Prosecution Service (Eng), above n 10, at [6.3].

⁴¹ Daniel Medwed, above n 9, at 52–53.

⁴² See Part V.C.1.

⁴³ See Part III.A.2.

⁴⁴ US Department of Justice, above n 10, at [9-27.450].

⁴⁵ See Part IV.B.

⁴⁶ Although there is an exception for plea agreements in relation to murder charges: Crown Law Office (NZ), above n 10, at [18.9].

D. Conclusion on Internal Checks

As shown above, there is extensive uniformity between the different jurisdictions in the governing prosecution tests, and the rules of engagement for plea bargaining. Critically, we have seen that the tests provide prosecutors the opportunity to use them in ways which achieve a desired outcome, based on the way that the enumerated factors are weighed, with only basic checks acting to narrow the prosecutor's discretion.

While internal review systems are likely to mitigate those concerns, particularly in relation to rogue prosecutors, such checks are unlikely to resolve systemic issues, and these checks are also likely to suffer from problems with deference and implicit bias. In sum, the internal checks identified across the different jurisdictions are useful in providing a structure and framework for prosecutors when engaging in plea negotiations, but such checks may represent more of a theoretical – as opposed to an actualised – check on prosecutorial discretion.

IV. THIRD PARTY INFLUENCES

In this section, I consider the role that third parties (aside from the judiciary) play in fettering prosecutorial discretion. In particular, I focus on the role of victims, and to a lesser extent, investigators. Their roles are important because although they form part of the public on whose behalf the prosecutor is acting, they are more directly impacted by the decisions of prosecutors. And while on the surface prosecutors might be seen to represent their interests, the prosecutor's own interests might not always align with those of victims and investigators. In respect of victims, an obvious example is when a victim wants a defendant prosecuted to the fullest extent of the law, but the prosecutor would prefer to plead the case out early with reduced charges. Investigators, who often play the middleman between prosecutors and victims also have their own interests to protect, which may not align with those of prosecutors; particularly where investigators see a wider law enforcement objective in having a particular case prosecuted that is not commensurate with a quick plea deal (for example, prosecuting lead conspirators in drug offending cases).

A. Victims' and Investigators' Views During Negotiations

The role of victims in the criminal justice process necessitates striking an awkward balance between ensuring that a defendant's right to a fair trial and due process is secured, while also making the process sufficiently palatable for victims to want to participate. Part of that involvement extends to their role in the plea bargaining process, and the influence of victims is one of the important checks on the exercise of prosecutorial discretion.

Victims' views can be influential in a number of ways. First, if a victim is not willing to go through the Court process then, in many cases, that will be determinative of the prosecutor's decision on whether to proceed with a prosecution, particularly in

sexual offending and domestic violence cases.⁴⁷ Second, a victim may express a view on whether a negotiated plea bargain reflects the seriousness of the crime committed against them.⁴⁸ Third, they may provide opposition for a prosecutor who wants to drop a case.⁴⁹

All of the jurisdictions canvassed provide for consultation with the victim and investigator to some degree. Starting with New Zealand, which has a very detailed scheme for protecting victims' interests, victims have a right to be informed of the progress of a criminal proceeding at all material stages, and to be provided with an explanation for many of the decisions made by prosecutors during the course of a proceeding, most notably charging and plea bargaining decisions.⁵⁰ Victims must also be given an opportunity to make their position on any proposed plea agreement known to the prosecutor where practical and appropriate.⁵¹ Importantly, however, victims' views can never bind prosecutors, and final decisions must be made by the prosecutor based on "the broader public interest and the interests of justice".⁵² That makes sense; victims are not parties to plea bargaining agreements, and the prosecutor is entrusted with the decision-making power on behalf of the Executive. Investigators, of course, play the important intermediary role of informing the victim on behalf of the prosecutor, but investigators also have the right to be consulted and have their views taken into account in respect of any plea arrangements or other significant matters.⁵³ New South Wales operates a similarly detailed scheme for both victims and investigators.⁵⁴

The United States too operates a similar model for victims and investigators, through the Crimes Victims' Rights Act and the US Attorneys' Manual, but also includes a right for victims to be heard by the Court at any hearing involving pleas by the defendant.⁵⁵

In England and Wales, as with the other jurisdictions canvassed, prosecutors are required to consult with the victim and investigator, although there is less of an emphasis on ongoing consultation in respect of victims.⁵⁶ While in New Zealand victims are required to be informed of the progress of a case at all material stages,

⁴⁷ See Yvette Tinsley "Investigation and the Decision to Prosecute in Sexual Violence Cases: Navigating the Competing Demands of Process and Outcome" [2011] 17 *Canta LR* 17 at 33-34: the discussion in respect of sexual violence cases. Also published in Elisabeth McDonald and Yvette Tinsley (ed) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (VUP, Wellington, 2011). See also Louise Ellison "Prosecuting Domestic Violence without Victim Participation" (2002) 65 *Modern LR* 834.

⁴⁸ Yvette Tinsley, above n 47, at 37-38.

⁴⁹ At 35-36.

⁵⁰ See generally Victim Rights Act 2002, s 12; Crown Law Office (NZ), above n 10, at [18.5]; Crown Law Office (New Zealand) *Victims of Crime – Guidance for Prosecutors* (6 December 2014).

⁵¹ Crown Law Office (NZ), above n 10, at [18.5].

⁵² At [18.5].

⁵³ At [28.2].

⁵⁴ Office of the Director of Public Prosecutions (NSW), above n 8, at [19]-[20].

⁵⁵ Crimes Victims' Rights Act 18 USC § 3771. See also US Department of Justice, above n 10, at [9-27.420].

⁵⁶ Crown Prosecution Service (Eng), above n 10, at [9.3] and [9.5].

the victim's right to be informed and consulted in England and Wales only accrues when guilty pleas are being considered during an existing prosecution.⁵⁷

There is nothing startling about these rules. We would expect to see victims and investigators informed and consulted throughout the plea bargaining process. And while this does provide an important theoretical check on prosecutorial discretion, its effectiveness can only really be measured when we consider what avenues exist for victims and investigators when they disagree with a prosecutor's decision, which I consider next.

B. Appeals and Reviews

What happens when a prosecutor has negotiated a plea bargain, or decided to drop charges and an affected party other than the defendant is dissatisfied with the decision? In some jurisdictions, the responsible prosecutor's decision is not always binding and final, and dissatisfied parties are able to seek a review of the decision.

The first step for any review is to ensure that any negotiated plea agreements, and the basis for them, are accurately recorded in writing, a requirement common across the jurisdictions reviewed, albeit with differing levels and methods of review.⁵⁸ As discussed above, the United States requires prior approval of plea bargains by a supervising prosecutor.⁵⁹ Other jurisdictions, however, have implemented methods to respond to cases where the victim or investigator objects to a prosecutor's proposed plea bargain. In New South Wales, any such objections must be referred to a senior prosecutor for consideration.⁶⁰

The most developed appeal system is the Victims' Right to Review Scheme operating in England and Wales.⁶¹ This scheme was developed following the Court of Appeal decision in *R v Killick*, which concluded that victims ought to have a right of review of prosecutorial decisions, within clearly prescribed limits, and not be required to resort to judicial review.⁶² Any person who has suffered harm as a result of criminal conduct falls within the eligibility criteria of the scheme⁶³ and can apply for reviews of qualifying decisions, which essentially encompass decisions

⁵⁷ At [9.3].

⁵⁸ See for example US Department of Justice, above n 10, at [9-27.450]; Attorney General's Office (England, Northern Ireland and Wales) *Attorney General's Guidelines on Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (30 November 2012) at [C3]; Crown Law Office (NZ), above n 10, at [18.4]; Ministry of Justice (BC), above n 10, at 5; Office of the Director of Public Prosecutions (NSW), above n 8, at [20]; Office of the Director of Public Prosecutions (Vic), above n 39, at [15].

⁵⁹ See Part III.C.

⁶⁰ Office of the Director of Public Prosecutions (NSW), above n 10, at [20].

⁶¹ Crown Prosecution Service (England and Wales) "Victims' Right to Review Guidance" (July 2016) <http://www.cps.gov.uk/publications/docs/vrr_guidance_2016.pdf> [Crown Prosecution Service (Eng)].

⁶² *R v Killick* [2011] EWCA Crim 1608.

⁶³ Crown Prosecution Service (Eng), above n 61, at [14].

not to prosecute or proceed against a defendant.⁶⁴ It does not extend to cases where guilty pleas have been entered to a set of negotiated charges.⁶⁵ The process for review once a complaint is laid by a victim commences with an internal review, known as “local resolution” – where the decision is referred back to the office where the original decision was made.⁶⁶ Under local resolution, a new prosecutor will be assigned to review the original decision. The victim then has the opportunity to have the matter considered by an independent appeals unit if they are dissatisfied with the outcome from local resolution.⁶⁷

It is clear that this system of review provides a transparent platform for prosecutorial discretion to be reviewed. It has also proven to be a useful check on those decisions. Between April 2014 and March 2015, 1,674 appeals were lodged, with 210 being upheld (12.5 per cent).⁶⁸

The English and Welsh system is admirable for its ability to ensure that the hardest decisions – the decisions not to prosecute – have a meaningful check placed on them. Those are likely to be the cases that involve the most scrutiny by victims and the public. A widely publicised recent example is the overturning of the Crown Prosecution Service’s decision not to prosecute Lord Greville Janner, a former member of the House of Lords, who was accused of historical sexual abuse of children. An original decision by the Crown Prosecution Service not to prosecute owing to Lord Janner’s ill health was overturned following a review under the scheme.⁶⁹ However, in cases where the victim is dissatisfied with a negotiated plea bargain, victims cannot have recourse to the scheme.

I identified above the concern that internal approval systems may fail to address systemic issues within prosecutors’ offices, and suffer from an implicit bias through deference.⁷⁰ Those concerns also apply to internal appeals/reviews, though with less force. With internal appeals, the presence of a third party driving the appeal (whether it be the victim or investigator) is likely to engender a more robust approach to reviewing exercises of discretion by creating an additional layer of accountability – as against internal approval alone where prosecutors take a negotiated plea bargain to a supervisor for approval. Internal appeals are therefore likely to provide a more meaningful check on prosecutorial discretion than simple internal approval policies.

⁶⁴ At [9].

⁶⁵ At [11].

⁶⁶ At [22]–[29].

⁶⁷ At [30].

⁶⁸ Crown Prosecution Service “Victims’ Right to Review Data” (June 2017) <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/vrr_data/index.html>.

⁶⁹ Rajeev Syal “Lord Janner Found Unfit to Stand Trial for Alleged Sex Offences” *The Guardian* (online ed, 7 December 2015).

⁷⁰ See Part III.C.

C. Conclusion on Third Party Influences

The influence of third parties, predominantly victims but also investigating agencies, provides a relatively robust check on prosecutorial discretion, at least so far as those parties' interests are concerned. In different jurisdictions we see those views carrying more institutional weight than others in the way that the frameworks for decision making are established. While it must be remembered that victims and investigators are not parties to criminal litigation, their involvement in the process requires that their views be taken into account.

V. JUDICIAL SUPERVISION

One third party, not yet discussed, has potentially significant influence over the plea bargaining process: judges. Given their significance in the criminal justice system, they are deserving of separate treatment. The focus on the judiciary in this section will consider three aspects of their role. The first two, closely related, will address the scope of judicial power to influence and ultimately reject plea bargains, and then to grant judicial review in subsequent challenges to plea bargains. Finally, this section will address the Executive and Judicial separation of powers in the sentencing process, and the extent to which judges can check prosecutorial discretion when offenders are sentenced.

A. Approval of Plea Bargains

Simply put, if a judge has the ability to reject a negotiated plea bargain, this power has the potential to significantly curtail prosecutorial discretion. And in a perfect world, a judge would have sufficient time and resources to assess and weigh the evidence against a defendant, and determine whether the proposed resolution is in the public interest. This, of course, represents a counsel of perfection which criminal justice systems around the world are prepared to compromise to achieve an efficient disposition of criminal cases. And even if judges did have such resources, their assessments would likely be imperfect by not having the ability to assess witness credibility. So instead the system places a large amount of trust in the hands of the parties to criminal litigation, both (ordinarily) represented by legally qualified counsel, to strike a deal which appropriately meets the interests of both parties, as we would expect to see in a civil settlement. Criminal justice systems, therefore, need to find an appropriate balance between judicial oversight and enabling the parties to get on with the job. And across the jurisdictions we see varying degrees of judicial involvement in the plea bargaining process.

At one end of the spectrum sits the United States which prohibits judicial involvement in plea agreement discussions.⁷¹ That significantly impinges on the Court's ability to provide a robust check on plea negotiations. For one, it means judges are unlikely to have much more information than what is contained in the

⁷¹ Federal Rules of Criminal Procedure (US), s 11(c)(1).

indictment.⁷² And given that lack of first-hand knowledge, by the time plea deals are finalised, there is a real benefit to expediting the process. In a practical sense judges are incentivised to effectively rubber stamp plea deals.⁷³

Canada, on the other hand, has a system which encourages judicial intervention as part of the plea bargaining process. The Canadian Criminal Code mandates that pre-trial discussions occur between the Crown, defence, and the Judge, to determine the likely length of trial and the scope of the issues to be resolved.⁷⁴ It envisages that judges intervene to express their views on the merits of particular issues, and many judges do in fact engage in discussions regarding resolution.⁷⁵

New Zealand too uses a structured pre-trial criminal process where discussions between counsel and the Judge about the direction of the case and likelihood of trial are encouraged.⁷⁶ This emerged from the significant overhaul in criminal procedure implemented through the Criminal Procedure Act 2011, which aimed to streamline court procedures and improve efficiency.⁷⁷ Following the reforms, criminal cases are broken into three stages: Initial appearances, the case management phase, and trial. At the initial appearances, pleas are entered and (if eligible) an election is made by the defendant as to whether to pursue a trial by jury or judge-alone.⁷⁸ At the case management stage, parties are required to engage in discussions about the direction of the case, and whether a trial is necessary or if resolution can be reached in another way, such as through a sentence indication.⁷⁹ Further, judges are able to make any particular case management directions necessary to “facilitate resolution of the proceeding”.⁸⁰ If required, the case then moves to the trial stage. Each of the preliminary stages also has an associated time frame.⁸¹ It is notable, therefore, that while the New Zealand reforms place a large emphasis on simplification and efficiency improvements in the criminal justice system, that has not been to the exclusion of judicial intervention.⁸² And although the level of judicial intervention will differ from case to case, the Canadian and New Zealand frameworks at least demonstrate a willingness to facilitate that intervention.

In Australia, the courts have recognised the limited ability of judges to interfere with the exercise of discretion by prosecutors to reduce charges as part of a

⁷² Daniel McConkie, above n 7, at 63.

⁷³ At 63.

⁷⁴ Criminal Code RSC 1985 c C-46, s 625.1.

⁷⁵ Carol Brook and others, above n 6, at 1157–1158.

⁷⁶ Criminal Procedure Act, ss 56–57.

⁷⁷ See generally the discussion led by Judge David Harvey in Carol Brook and others, above n 6.

⁷⁸ Criminal Procedure Act, ss 37–44 and ss 50–53.

⁷⁹ See generally Criminal Procedure Act, ss 55–56.

⁸⁰ Criminal Procedure Act, s 58.

⁸¹ See Carol Brook and others, above n 6, at 1162–1163 for a detailed breakdown of those timeframes.

⁸² Criminal Procedure (Reform and Modernisation) Bill (243–1) (explanatory note).

negotiated plea deal, except to protect an abuse of process.⁸³ Instead, judges are only likely to be able to influence the process through expressing opinions on plea deals, which will no doubt be factored in by the prosecution.⁸⁴ The effect and extent of such opinions, however, is unknown (anecdotal accounts aside).

Judges in England and Wales too have no formal role in rejecting a prosecutor's decision to reduce charges as part of a negotiated guilty plea, although their views are obviously persuasive.⁸⁵ Perhaps the most publicised example was the plea deal agreed between the Crown and defence lawyers acting for Peter Sutcliffe, better known as the "Yorkshire Ripper". Prosecutors agreed to accept guilty pleas to manslaughter for the deaths of thirteen women on the basis of diminished responsibility. The trial Judge refused to accept that plea deal and, after the Director of Public Prosecutions was consulted, the prosecution proceeded with murder charges, ultimately resulting in convictions.⁸⁶

There is, however, an exception for cases of serious or complex fraud in England and Wales.⁸⁷ For those cases, the Attorney General has published prescriptive guidelines for the plea bargaining process, which includes provision for the Judge to conduct a merits review of the plea bargain and determine whether it is in the interests of justice.⁸⁸ This model, while useful, must be seen in the context of the cases for which it is designed: complex and serious fraud. It is doubtful whether there is any enthusiasm to extend this approach to the general run of cases, when one considers the relative simplicity of the majority of criminal cases, the resources required to implement such a system, and criminal justice policies which, as seen above, tend to place great weight on the efficient disposition of cases. However, as the New Zealand experience demonstrates, efficiency and increased judicial intervention are not wholly inconsistent goals.

For the most part, the above discussion has shown that judicial approval of plea bargains is something of a foregone conclusion with little merits review undertaken by judges either for assessing the benefit for the defendant or the wider public interest. The Canadian and New Zealand approaches (and the specific complex fraud example in England and Wales) provide a more judicially active model in which judges involve themselves at a relatively early stage to shape a plea bargain (if appropriate). This proactive involvement does alleviate some of the concerns stemming from plea bargaining occurring behind closed doors, but it is unlikely even in these jurisdictions that judges are able to immerse themselves in the case sufficiently to rise to the level of a third party arbitrator, who can provide a more rigorous check on the prosecutor's discretion. Judges are also limited by only examining the strength of the evidence on paper.

⁸³ *Maxwell v R* [1996] HCA 46, (1996) 184 CLR 501 at [25]–[26], citing *R v Brown* (1989) 17 NSWLR 472 (CA).

⁸⁴ *R v Brown*, above n 83.

⁸⁵ *R v Coward* (1980) 70 Cr App R 70 (CA) at 76.

⁸⁶ Gary Slapper and David Kelly *The English Legal System* (10th ed, Routledge, 2009) at 504.

⁸⁷ Attorney General's Office (England and Wales) *Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud* (29 November 2012).

⁸⁸ At [E4].

B. Judicial Review of Prosecutorial Discretion

The prospect of an aggrieved victim or affected party succeeding in a review of a prosecutor's charging decision in the courts is grim, let alone the practical difficulties associated with bringing a claim. The New Zealand Court of Appeal recognised this recently in *Osborne v Worksafe New Zealand* when considering an appeal against the High Court's refusal to grant judicial review of Worksafe's decision to drop charges against former Pike River Coal Ltd Chief Executive, Peter Whittall.⁸⁹

[45] The reality remains, however, that it will be difficult to make out grounds of review such as having regard to irrelevant considerations or failing to have regard to relevant considerations because of the width of the considerations to which the prosecutor may properly have regard, as well as the limited scope of considerations that are truly mandatory rather than merely permissive. That is one reason why it is said *courts will only intervene in exceptional cases* (Emphasis added).

Intervention is even more difficult in the United States where prosecutors are generally considered to be immune from judicial review,⁹⁰ their decisions being a "special province of the Executive branch".⁹¹ This rule is not absolute, and the law has carved out exceptions, such as when there has been a "retaliatory use" of prosecutorial power,⁹² or when a prosecutor has selectively prosecuted a defendant on the basis of "race, religion, or other arbitrary classification,"⁹³ or where a prosecutor induces a guilty plea through plea bargaining, only to later renege on part of the deal.⁹⁴

Canada too proceeds on the basis that the exercise of prosecutorial discretion is not "subjected to routine second-guessing by the courts", based principally on the theory that "it is the sovereign who holds the power to prosecute his or her subjects".⁹⁵ Exercises of prosecutorial discretion are only reviewable for abuses of process.⁹⁶ The Australian jurisdictions have similarly set the abuse of process standard.⁹⁷ While an abuse of process test potentially encompasses wider conduct than the narrowly drawn rule in the United States, it is doubtful whether in practice there is any difference between these tests. The reality is that very few cases will succeed in these jurisdictions.

⁸⁹ *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

⁹⁰ Ronald Cass and others *Administrative Law: Cases and Materials* (7th ed, Aspen Publishing, 2016) at 284.

⁹¹ See *Heckler v Chaney* 470 US 821 (1985) at 832.

⁹² See for example *Thigpen v Roberts* 468 US 27 (1984) at 31.

⁹³ *United States v Armstrong* 116 S Ct 1480 (1996) at 1486.

⁹⁴ *Santobello v New York* 404 US 257 (1971).

⁹⁵ *R v Anderson* [2014] 2 SCR 167 at [46] citing *Krieger v Law Society of Alberta* [2002] 3 SCR 372 at [45].

⁹⁶ *R v Anderson*, above n 95, at [51].

⁹⁷ See for example *Maxwell v The Queen* (1996) 184 CLR 501 (HCA) at 534; *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 (HCA) at [37]; and *Elias v The Queen* (2013) 248 CLR 483 (HCA) at [34].

On the other hand, England and Wales have historically provided more fertile ground for reviews of decisions not to prosecute, and the New Zealand Court of Appeal in *Osborne* indicated a preparedness to adopt a similar approach. However, that position will soon be reviewed by the Supreme Court, which has granted leave to appeal the Court of Appeal's decision.⁹⁸ English and Welsh courts will entertain review where a decision not to prosecute was based on some unlawful policy, or failure to act in accordance with the Code for Prosecutors, or was a decision that no reasonable prosecutor could have made.⁹⁹ Courts have allowed judicial review in cases where a prosecutor failed to consider the evidential sufficiency of a more serious charge,¹⁰⁰ incorrectly assessed the test for recklessness for manslaughter when determining not to charge a company,¹⁰¹ and failed to properly consider the factual findings from a court in a related civil case bearing on the prosecution.¹⁰² Reviews of decisions to prosecute, on the other hand, have a higher standard of review, requiring "dishonesty or mala fides or some other wholly exceptional circumstance...".¹⁰³ However, the availability of review in England and Wales must be seen against the review scheme available for victims in that jurisdiction, discussed above.¹⁰⁴ That scheme was specifically designed to prevent victims needing to have recourse to judicial review to challenge prosecutors' decisions. It is unlikely, therefore, that the relatively lower standard of judicial review provides an additional check on the exercise of discretion.

Two things emerge from this summary. First, those who are dissatisfied with a prosecutor's decision to prosecute or not to prosecute have very little recourse through judicial review. Second, even if a person did have such recourse, the need to seek relief through judicial review is a cumbersome (and expensive) tool, and unlikely to be taken up by an aggrieved party. The threat of judicial review is therefore unlikely to have any material influence on a prosecutor exercising their discretion negotiating over a plea bargain.

C. Sentencing

While plea bargaining, as the domain of the prosecutor, is principally a function of the Executive, sentencing remains the role of the judiciary. The ability of judges to fashion sentences which appropriately fit the culpability of defendants is one way through which prosecutorial discretion can be limited. In this section, I consider whether the division of roles between prosecutors and judges as to process (i.e., charges) and outcomes (i.e., sentences) holds true. I note at the outset that prosecutors already bind judges to a certain extent through the selection of charges and the agreed factual basis for sentencing. However, the analysis that follows focuses on what additional powers prosecutors have to fetter judicial

⁹⁸ *Osborne v Worksafe New Zealand* [2017] NZSC 90.

⁹⁹ *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App R 136 (QB) at 141.

¹⁰⁰ At 141.

¹⁰¹ *R v Director of Public Prosecutions, ex parte Jones (Timothy)* [2000] Crim LR 858 (QB).

¹⁰² *R v Director of Public Prosecutions, ex parte Treadaway* (Unreported) 31 July 1997 (QB).

¹⁰³ *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 (HL) at 371.

¹⁰⁴ See Part IV.B.

discretion. I will also address what is known as the “trial penalty” problem in the United States, where defendants are faced with severely inflated post-trial penalties during the plea negotiation process in order to encourage them to plead guilty.

As will be outlined below, sentencing has a major role in driving plea bargaining, in particular the way that prosecutors choose to exercise their discretion. This should come as no surprise; after all, the criminal justice system is a results-driven business. In the overwhelming majority of cases, it is uncontroversial to suggest defendants are not so much concerned with the scale of the offence they are charged with, but with the length or type of a potential sentence.

1. *Binding the judiciary*

The prosecutor’s power to influence sentencing outcomes through plea bargains is most evident in the United States. As outlined at the start of this paper, three types of plea bargains exist in the United States: charge agreements, sentence agreements, and agreements involving a mixture of both.¹⁰⁵ The United States Attorneys’ Manual goes to great lengths to emphasise, however, that plea agreements should not unduly impinge on the Court’s sentencing options.¹⁰⁶ While laudable, practice appears to indicate that Federal prosecutors effectively control the sentencing process, for institutional and deferential reasons.

Institutionally, the impact of mandatory minimums, sentencing enhancements and guideline sentences substantially curtail the court’s sentencing power.¹⁰⁷ Mandatory minimums, most often seen for Federal drug offending,¹⁰⁸ empower prosecutors to select between various crimes, each with different mandatory minimums, to narrow the judicial discretion in sentencing.¹⁰⁹ A special case of mandatory minimums is the use of three-strikes laws which require the imposition of a life sentence upon conviction for a third qualifying serious violent felony.¹¹⁰ New Zealand has its own version of this legislation,¹¹¹ although recent decisions of the High Court and Court of Appeal indicate a liberal judicial attitude being taken to how mandatory the minimum sentences are for those offenders on their second and third strikes.¹¹²

¹⁰⁵ See Part III.B.

¹⁰⁶ U.S. Department of Justice, above n 10, at [9-27.430].

¹⁰⁷ See for example Michael Simons “Prosecutors as Punishment Theorists: Seeking Sentencing Justice” (2008) 16 Geo Mason L. Rev 303.

¹⁰⁸ Jamie Fellner “An Offer You Can’t Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty” (2014) 26 Fed. Sent’g Rep’r 276 at 277: “In fiscal year 2012, 60 per cent of convicted federal drug defendants were convicted of offences carrying mandatory minimum sentences”.

¹⁰⁹ Michael Simons, above n 107, at 324.

¹¹⁰ Violent Crime Control and Law Enforcement Act 1994 (US).

¹¹¹ Sentencing and Parole Reform Act 2010.

¹¹² *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602; *R v Campbell* [2016] NZHC 2817.

Judicial discretion is further curtailed by sentencing enhancements. Enhancements are factors which prosecutors have discretion to charge, such as a “prior felony” enhancement in drug offence cases or for three-strikes offences,¹¹³ or the carriage of weapons during a drug offence,¹¹⁴ which dramatically increase the mandatory minimum sentence available.¹¹⁵ Finally, the much maligned Federal Sentencing Guidelines,¹¹⁶ despite having been rendered “advisory” by the Supreme Court in *United States v Booker*,¹¹⁷ still assume significant influence over the sentencing process, particularly since the Supreme Court subsequently mandated in *Gall v United States*¹¹⁸ that the first step in the sentencing process is for judges to determine the appropriate Guideline sentence, before turning to determine the appropriate sentence in the particular case. The institutional role that prosecutors play in selecting charges therefore presents a large impediment to judges, providing the necessary check at sentencing through the leverage prosecutors possess from the sentence-based charging tools used during the plea bargaining process.

The institutional control in the United States is reinforced by the judicial deference paid to prosecutorial discretion. As discussed above,¹¹⁹ where judges are presented with a plea agreement, there is generally very little incentive for them to reject such deals, driven principally by their lack of involvement and oversight of the plea bargaining process. In turn, sentence agreements are effectively rubber-stamped by the courts.

The Canadian jurisdictions also place a heavy emphasis on deference to the plea bargain when it comes to joint positions on sentence. While agreements on sentence are not binding on judges,¹²⁰ courts are obliged to accept agreed sentences except when it would bring the administration of justice into disrepute.¹²¹

In the remaining jurisdictions,¹²² courts place a heavy emphasis on the retention of judicial power in the sentencing process. In the prescribed model for complex fraud cases in England and Wales discussed above,¹²³ plea agreements must contain a joint submission on sentencing, including reference to relevant guidelines

¹¹³ Michael Simons, above n 107, at 329.

¹¹⁴ Jamie Fellner, above n 108, at 277–278.

¹¹⁵ At 277–278.

¹¹⁶ Introduced by the Sentencing Reform Act 1984, the Federal Sentencing Guidelines set prescriptive sentence ranges that were (until *Booker*) mandatory for Federal Judges to follow. A Guidelines range is primarily determined by using a notional offence level and the defendant’s history which are computed into a sentencing grid.

¹¹⁷ *United States v Booker* 543 US 220 (2005).

¹¹⁸ *Gall v United States* 552 US 38 (2007).

¹¹⁹ See Part V.A.

¹²⁰ *R v Cerasuolo* (2001) 151 CCC (3d) 445 (ONCA).

¹²¹ *R v Dorsey* (1999) 43 WCB (2d) 273 (ONCA).

¹²² England and Wales, New Zealand, and the Australian jurisdictions canvassed in the paper.

¹²³ See Part V.A.

or authorities, but there is a specific prohibition on agreeing end penalties,¹²⁴ and judges retain complete discretion to sentence as they see fit.¹²⁵

New Zealand goes a step further to specifically prohibit negotiating a plea agreement on the basis that the prosecutor will support a specific sentence.¹²⁶ And Australia goes further again by even prohibiting prosecutors from making submissions to the Court as to the appropriate sentence.¹²⁷

Evidently, there is a spectrum of prosecutorial influence in the sentencing process across the jurisdictions. In the United States and Canada, negotiated pleas have the ability to completely dictate the sentencing outcome. England and Wales, Australia, and New Zealand, on the other hand, focus on retention of the Court's discretion to sentence according to the true culpability of the offender. Of course, judicial discretion will always be curtailed by the selection of charges and the negotiation over a statement of facts,¹²⁸ but stopping short of binding judges to outcomes is a crucial step in maintaining the transparency of the criminal justice system (a theme I will return to later) and providing a check on prosecutorial discretion.¹²⁹ At a fundamental level, it represents a demarcation between the Executive and Judicial branches of government. Absent this demarcation, an important layer of scrutiny is lost, and it is easy to appreciate how negative perceptions of the criminal justice system fester.

2. *The "trial penalty" problem*

With the prevalence of plea bargaining emerges the trial penalty problem, which manifests itself in different ways across the jurisdictions. Starting with the United States, the use of sentencing enhancements was discussed in the previous section as a way in which prosecutors are able to narrow judicial discretion when it comes to sentencing offenders. Enhancements are also an important bargaining tool used by Federal prosecutors as a way of imposing a "trial penalty" on defendants.¹³⁰ The prototypical example of a trial penalty is the use of prior drug convictions. A mandatory sentence will double upon one prior conviction, and will become life imprisonment where a defendant has two prior convictions.¹³¹ Prosecutorial conduct which exerts pressure with these types of bargains has been declared constitutional.¹³² Rational actors, faced with such a staggering increase in the potential penalty when a prosecutor threatens to charge enhancements, have a strong incentive to take a plea deal that does not charge the enhancement and not gamble with their life at trial. The effects of this are acute in the case of

¹²⁴ Criminal Procedure Rules: Part IV: Further Practice Directions Applying in the Crown Court (Eng), r 45.24.

¹²⁵ At [E5].

¹²⁶ Crown Law Office, above n 10, at [18.7.3].

¹²⁷ *Barbaro v The Queen* (2014) 253 CLR 58 at 76.

¹²⁸ See for example US Department of Justice, above n 10, at [9-27.430]; Crown Law Office (NZ), above n 10, at [18.8]; Office of the Director of Public Prosecutions (Vic), above n 39, at [15].

¹²⁹ See Part VI.

¹³⁰ Michael Simons, above n 107, at 351.

¹³¹ Jamie Fellner, above n 108, at 277–278.

¹³² See for example *Bordenkircher v Hayes* 434 US 357 (1978).

innocent defendants who plead guilty to avoid significantly longer periods of incarceration, or even death, if they are convicted at trial.

The overlay of the mandatory minimums in the United States creates a complex set of prosecutorial incentives, largely not seen in other jurisdictions – while they remain present, the trial penalty problem will likely continue to exist. However, these tools are simply an amplification of the problem seen in other jurisdictions, where defendants receive generous sentence discounts in exchange for their guilty pleas.

In New Zealand, the trial penalty problem is most evident in the sentence indication procedure that was formalised in the Criminal Procedure Act 2011. The use of sentence indications as part of the resolution of cases has become commonplace. Under this framework defendants can request a sentence indication from a judge which, if accepted and guilty pleas are entered, would be binding.¹³³ A similar procedure operates in Victoria.¹³⁴

The attraction of a sentence indication is obvious. It first provides a defendant with relative certainty of what their sentence will be. If a defendant declines a sentence indication given by a judge and is ultimately convicted at trial, the sentence indication at least provides a benchmark for what their sentence will be (absent any credit for a guilty plea). Second, a sentence indication has a strategic advantage that can be used effectively by defence counsel. Sentence indications take the power out of the prosecutor's hands and put it in the hands of the judge. Inevitably busy trial judges are incentivised to give more lenient sentence indications to encourage guilty pleas.¹³⁵

Sentence indications therefore perpetuate the trial penalty problem through a different route. Informed defendants know they will not just receive credit for their guilty pleas, but also sentences which, in general, sit on the lower end of the range compared with a sentence imposed post-trial. Not only does this adversely affect defendants, but also likely affects victims who are unlikely to welcome more lenient sentences.¹³⁶ These concerns are by no measure purely academic – as was shown by the New South Wales sentence indication pilot scheme being abandoned in the 1990s amid widespread dissatisfaction about the impact that the proposals might have on both defendants and victims.¹³⁷

¹³³ Criminal Procedure Act, ss 60-65.

¹³⁴ Criminal Procedure Act 2009 (Vic), ss 60-61.

¹³⁵ Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005) at 94; and see generally Tim Conder "Sentence Indications – Some Practical Challenges" [2017] NZCLR 100.

¹³⁶ Although under s 61(3)(c) of the Criminal Procedure Act, judges are required to have a victim impact statement (where applicable) prior to passing any sentence indication.

¹³⁷ Asher Flynn "Sentence Indications for Indictable Offences: Increasing Court Efficiency at the Expense of Justice? A Response to the Victorian Legislation" (2009) 42 Aust & NZ J Criminology 244 at 256, citing Don Weatherburn and Bronwyn Lind "The Impact of the New South Wales Sentence Indication Scheme on Plea Rates and Case Delay" (1995) 18 UNSW LJ 211.

A way to avoid at least part of the ill effects of the trial penalty problem lies in the system used by the English and Welsh courts. These courts are not constrained by the same institutional concerns with mandatory minimums and sentencing enhancements as the United States, but they also have a very passive sentence indication procedure. The English and Welsh Courts forbid sentence indications as a general rule, citing the potential undue pressure on an accused as the chief grievance.¹³⁸ Instead, judges are only permitted to state, "whether the accused pleads guilty or not, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence".¹³⁹

The potential solutions do not end there, and this topic has received great attention in legal scholarship.¹⁴⁰ While an exacting analysis of potential solutions is beyond the scope of this article, it is evident that no one proposal is obviously right, with each potential solution presenting new challenges and difficulties. For example, if legislators were to do away with mandatory minimums and sentencing enhancements, prosecutors' ability to offer relatively certain outcomes to defendants dissipates, which adversely affects risk-averse defendants.¹⁴¹ Similar effects would likely be felt with the abolition of sentence indications.

D. Summary on Judicial Supervision

Regrettably, the above discussion has illuminated that the tools judges have to provide a check on prosecutorial discretion are somewhat benign. We have seen that in four respects: (1) an inability to scrutinise plea bargains before they are accepted; (2) an unattractive, and largely unattainable, remedy to override prosecutorial discretion through judicial review; (3) in the United States and Canada, a chokehold being placed on judicial discretion in sentencing; and (4) a trial penalty problem which judges are either powerless to control (as in the United States) or, ironically its chief perpetrators (as in other jurisdictions reviewed such as New Zealand). These concerns manifest themselves to varying degrees in the different jurisdictions canvassed, but each of them represents an erosion of judicial influence on prosecutors conducting plea negotiations.

VI. THE OVERLAY OF TRANSPARENCY

I now return to consider the overriding question of this article: how can the public have confidence in prosecutors to make decisions in the public interest when engaging in plea bargaining?

In Parts III, IV, and V, I considered the scope of the checks which overlay the prosecutor's decision-making power when engaging in plea bargaining. Assessed

¹³⁸ See for example *R v Turner* [1970] 2 QB 321.

¹³⁹ See *R v Turner*, above n 138.

¹⁴⁰ See for example Candace McCoy "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform" (2005) 50 Crim LQ 67; and Frank H. Easterbrook "Plea Bargaining as Compromise" (1992) 101 Yale LJ 1969.

¹⁴¹ See generally Robert Scott and William Stuntz "Plea Bargaining as Contract" (1992) 101 Yale LJ 1909.

individually, we have seen that those checks have vastly different capabilities to materially restrain prosecutorial discretion.

A quite separate issue from checks on discretion is transparency. That is, to what extent can the public see what is happening during the plea bargaining process? If a check on discretion exists, yet that check is not transparent, it is unlikely to instil in the public confidence that prosecutors are discharging their obligations. Put another way, public confidence in the plea bargaining system is a function not just of the effectiveness of the check, but also the degree to which the public is able to perceive it operating in action.¹⁴²

I argue that the only way the public can have confidence in plea bargaining processes is where effective checks on discretion are coupled with transparency. Having surveyed the effectiveness of those checks, I can now consider how transparent those checks are. And as will be discussed below, there is a marked inter and intra-jurisdictional divergence between the effectiveness of the checks and how transparent they are to the public.

Having already identified the relevant checks, it is a relatively simple exercise to identify their transparency. The analysis that follows can therefore be set out in short order.

A. Transparency of Internal Checks

In Part III, I surveyed the prosecution tests in each of the jurisdictions, as well as the additional rules for plea bargaining and the provision for internal approval of plea bargains.

Largely, the prosecution tests and plea bargaining rules are transparent, at least facially. The tests are found in publicly available documents, and the requirement for plea agreements to be recorded in writing provides an added layer of transparency by recording how the agreement was reached. But as I concluded above, the malleability of these tests in being able to reverse engineer results provides a limited check on prosecutorial discretion. While to some extent this is narrowed by prohibitions on overcharging, this does little to change the perception that prosecutors operate on an honesty policy. We therefore see a divergence between the effectiveness of the check and transparency.

With respect to internal approvals, to the extent that these provide a check in the United States (as being the only jurisdiction that mandates internal approval of plea bargains), there is a lack of transparency in the procedure used as the public cannot see how the approval process is conducted. But the remaining jurisdictions canvassed do not even mandate internal approval systems. Undoubtedly such internal approval systems will exist in many of the prosecutors' offices within these jurisdictions, but the public lacks any insight into the framework and processes of

¹⁴² See also Asher Flynn "Plea Negotiations, Prosecutors and Discretion: An Argument for Legal Reform" (2015) 49 Aust & NZ J Criminology 564 at 566.

any systems. The public also has no way of knowing which offices do not have such processes put in place.

B. Transparency of Third Party Influences

When looking at third party influences, we saw far more robust mechanisms for checking prosecutorial discretion, through the input of victims and investigators, as well as providing varying degrees of review. The advantage of third party influences is that they inject additional parties to the discussion and, to a certain extent, lift the veil on the secrecy surrounding plea negotiations, thereby introducing greater transparency to the process. Although prosecutors are the ultimate decision makers, the views of victims and investigators are clearly influential.

England and Wales have been particularly successful at achieving a degree of convergence between transparency through the input of third parties and the effectiveness of the applicable checks, particularly in relation to victims. The victims' review scheme is a robust mechanism for reviewing decisions not to prosecute, and it is readily observable by victims who are provided full reasons for the outcomes of the decisions.¹⁴³ If a victim disagrees with an outcome, that victim can at least see how that outcome was reached.

New Zealand too places a large emphasis on the involvement of third parties, particularly victims, with extensive obligations on prosecutors to keep victims (and indeed investigators) informed on the progression of cases.¹⁴⁴ Yet there is a lack of transparency with respect to how victims' and investigators' views are taken into account, and no right of review or appeal against prosecutors' decisions (excluding judicial review),¹⁴⁵ which brings us a step back from the convergence achieved in the English and Welsh model. A step closer to that model is the approach in New South Wales where objections to plea bargains by victims and investigators are considered internally by a senior prosecutor.¹⁴⁶ But again, due to the internal nature of such reviews, we lack insight into how those reviews are conducted.

Therefore, the divergence between effectiveness and transparency persists to a degree, even in relation to third parties.

C. Transparency of Judicial Supervision

Finally, we have judicial checks, which focus on the influence over and approval of plea bargains, the process of judicial review, the connection between plea bargaining and sentencing, and the trial penalty problem. We saw that across many of the jurisdictions, judicial checks and reviews on the plea bargaining process are

¹⁴³ Crown Prosecution Service (Eng), above n 61, at [40]–[48].

¹⁴⁴ See Part IV.A.

¹⁴⁵ See also the discussion in Part III.C.

¹⁴⁶ See Part IV.B.

relatively benign; principally a function of the late involvement of judges within the process. This differs in New Zealand and Canada, where criminal procedure rules encourage early judicial intervention and oversight in the resolution of cases.¹⁴⁷

Judicial checks have the obvious benefit of transparency. They inject an independent party into the process who is able to bring plea bargaining out from behind closed doors and into the purview of a public courtroom. We, therefore, see some convergence between the effectiveness of judicial checks and transparency in relation to judicial oversight of plea bargains in New Zealand and Canada.

But in the remaining jurisdictions, there is marked divergence between the transparency and the effectiveness of judicial supervision as a check on prosecutorial discretion, founded principally on the ineffectiveness of those checks. Improving the effectiveness of those checks to narrow the divergence should, therefore, be the starting point for any reform of plea bargaining processes which seeks to improve public confidence in the system.

VII. IS TRANSPARENCY A REALISTIC GOAL?

Measuring public confidence in the prosecution and plea bargaining system is undoubtedly difficult to quantify. In fact, a criticism of my argument could be that it is simply not realistic to expect that the wider public pays attention to the construction of plea bargains or the exercise of prosecutorial discretion unless there is a particular catalyst, such as the Baby Moko case, to bring issues to light. But I argue that the success of transparency does not depend on the proportion of the public that actually scrutinises plea deals. Almost any measure would be deemed to fail if its success was judged by how many people paid attention to it. Instead, I argue that transparency across all the various checks on plea bargaining that exist accumulate to improve public confidence.

I will use a few examples from above to demonstrate my point. First, take the principle of open justice. I advocated above that plea bargains which are more actively scrutinised in open court are likely to instil greater public confidence in the process. That occurs not because more parties necessarily actively review the plea deal, but I would argue principally due to the implicit threat that the deal could be reviewed because part of the process is conducted in an open forum.

Another example is through the influence of victims' views. While victims' views are required to be taken into account in all jurisdictions, only England and Wales, through the victims' review system, provide a transparent system by which those views are taken into account. Again, the number of cases scrutinised through that system is small, but it creates another possibility through which an external party can look behind plea bargaining agreements.

¹⁴⁷ See Part V.A.

While the number of individual cases that receive scrutiny from external parties and the public is slim, the accumulation of transparency across these different checks itself provides a check on the exercise of discretion, because it incentivises prosecutors to consider the potential ramifications and scrutiny by others of any plea deal. It is the growth in the collective transparency of the checks on prosecutorial discretion that is likely to build public confidence in the system, irrespective of the proportion of the population actually scrutinising plea bargains.

VIII. CONCLUSION

I have argued that public confidence in a system so heavily centred on plea bargaining depends not just on the effectiveness of the checks on prosecutors' decision making, but on the transparency of that decision making. One without the other will either lead to unbridled prosecutorial power or a robust system of checks which the public does not understand. In the Baby Moko case, it is naturally a matter of conjecture as to whether the decision to negotiate that plea bargain was the correct decision. But there was certainly a sufficient factual basis to raise a query, which illustrates the importance of a process which is not simply robust but is also transparent. This is not because as lawyers and legal policymakers we expect members of the public to regularly scrutinise negotiated plea bargains, but because a series of checks which are transparent create the right incentives for prosecutors to exercise their discretion in a way which is consistent with their overriding duty as an advocate for the wider public.

The survey of the jurisdictions in this paper has demonstrated that in some small pockets, such as third party influences, there is a degree of convergence between the effectiveness of the checks on prosecutorial discretion and the level of transparency of the process. However, in the majority of cases, there is marked divergence between the two, principally demonstrating the "one without the other" problem I have just described. I have sought to highlight this gap to demonstrate that any future reform of the plea bargaining process premised on building confidence in the overall efficacy of the plea bargaining system should have the convergence of these two primary features as its focal point.

EXPLORING TE WHARE WHAKAPIKI WAIRUA/THE ALCOHOL AND OTHER DRUG TREATMENT COURT PILOT: THEORY, PRACTICE AND KNOWN OUTCOMES

KATEY THOM*

1. INTRODUCTION

On 13 June 2017, the Minister of Justice, the Hon Amy Adams, announced a three-year extension to Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court (AODT Court).¹ The AODT Court pilot commenced in November 2012 in Waitakere and Auckland District Courts and diverts from prison people whose addiction is associated with serious offending. Participants of the AODT Court are closely supervised by the AODT Court as they undertake a rigorous treatment programme. If participants complete their treatment plan, they graduate from the AODT Court and receive an intensive supervision order. The announcement by Minister Adams suggested that although there have been positive outcomes for participants of the AODT Court, it was still too early in the pilot to get a longitudinal perspective on the efficacy of the programme.

This article examines what we know about the theoretical underpinnings, practices and outcomes of the AODT Court. The article concludes with a brief comment on what the current commitment to the AODT Court says about the Government's commitment to non-adversarial justice measures that facilitate therapeutic interventions in the criminal justice system.

II. THEORETICAL FOUNDATION OF THE AODT COURT

The foundations of the AODT Court have been recently reported in ethnographic research of the AODT Court. The authors outlined an interpretative framework called ngā whenu raranga/weaving strands composed of four key strands: law, "U.S. Best Practice", "Recovery" and "Lore", which we argued strongly underpin AODT Court processes and practices.² This section briefly explains each of these strands to provide an overview of the foundations to the AODT Court.

* PhD (Auck), Senior Research Fellow, Faculty of Medical and Health Sciences, The University of Auckland. The author would like to thank the Stella Black, Tony O'Brien and Ministry of Justice research and policy staff for their helpful reviews of this paper, and to the AODT Court judges, pou oranga and court co-ordinators for their ongoing support of the research.

¹ Hon Amy Adams MP "Alcohol and Drug Court Pilot" (13 June 2017) Beehive.govt.nz <<https://www.beehive.govt.nz/release/alcohol-and-drug-court-pilot-extended>>.

² The findings presented in this section were produced through an ongoing research programme on therapeutic specialist courts lead by the author and funded by the Royal Society of New Zealand Marsden Fund. The research on the AODT Court received approval from University of Auckland Human Participants Ethics Committee (ref 011293) and approved by the Ministry of Justice, AODT Court Steering Committee, New Zealand Police, Corrections, Odyssey House, and the Judicial Research Committee. Further details on the findings of this research so far can be found in four reports available at <<http://www.justicespeakersinternational.com/new-zealands-aodtc-court/>>.

The law strand refers to the criminal justice objectives of the AODT Court, the policy and legislation that enable these objectives, and how these objectives fit within a wider legal movement that is therapeutic in nature.³ The criminal justice aims of the AODT Court are to provide an alternative, non-adversarial approach for responding to criminal offending where it is driven by a dependency on alcohol or other drugs.⁴ The AODT Court uses the sentencing process as a mechanism to facilitate positive outcomes for participants, reduce their risk of reoffending and, increase public safety. The AODT Court operates within existing New Zealand legislation. Section 25 of the Sentencing Act 2002 allows for a judge to explicitly adjourn a sentencing matter to enable an offender to access rehabilitation. In other jurisdictions special statutes may be developed for drug courts.⁵

Addiction is viewed primarily as a health problem in the AODT Court, which corresponds with the principle of harm minimisation underpinned by New Zealand's drug policy.⁶ In their support of the piloting of an AODT Court, the New Zealand Law Commission suggested that the most fundamental problem with the Misuse of Drugs Act 1975 is that it is poorly aligned with drug policy, indicating that "the use of drugs, even by those who are dependent on them, is treated as a matter solely for the criminal law rather than health policy".⁷ The report concluded that "the abuse of drugs is both a health and criminal public policy problem and, as a matter of principle, drug laws should facilitate a multi-sectoral response designed to minimise drug-related harms".⁸ The AODT Court aligns with the Law Commission's ambition for drug laws to facilitate multi-sectoral approaches to drug-related harm in a way that balances justice and health priorities.⁹

Linkages can also be made between the AODT Court and the wider international movement focused on therapeutic design and application of the law.¹⁰ Some of the legal professionals who took part in our ethnography described the application of law and legal practice in the AODT Court as a "healing approach" (AODT Court

³ Katey Thom and Stella Black "Ngā Whenu Raranga #1: The Therapeutic Framework of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Court" (Report, University of Auckland, 2017). Available at <<http://www.justicespeakersinternational.com/new-zealands-aodtc-court/>>.

⁴ Ministry of Justice *Alcohol and Other Drug Treatment Court Handbook – Te Whare Whakapiki Wairua* (October 2014).

⁵ Although not a primary aim of the research, during interviews with AODT Court team members, there were inferences as to why New Zealand did not introduce a separate statute for the AODT Court. Reasons were varied, but appeared to mostly relate to pragmatism in that the Sentencing Act already allows judges the discretion to direct access to rehabilitative programmes prior to sentencing and that gaining support for a legislative change may impede the innovation getting off the ground quickly (AODT Court team member #32).

⁶ Inter-Agency Committee on Drugs *National Drug Policy 2015 to 2020* (Ministry of Health, August 2015).

⁷ New Zealand Law Commission *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975*. (NZLC R122, 2011) at [4.77].

⁸ New Zealand Law Commission, above n 7, at [1.61].

⁹ Thom and Black, above n 3.

¹⁰ See David Wexler "Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law" in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Auckland, 2015).

team #12), “holistic” (AODT Court team #38) or a “human approach” (AODT Court team #13). This different view of legal process and practice resonates strongly with the international scholarship that has been coined the “comprehensive law movement”. Daicoff used the term “comprehensive law movement”¹¹ to describe the collective of alternative non-adversarial approaches to law and legal practice that challenge the current legal system’s heavy reliance on the adversarial retributive model. Vectors of this movement include therapeutic jurisprudence, restorative justice, preventative law, procedural justice, collaborative justice and holistic law. Based on research from a judicial perspective, it could be argued that therapeutic jurisprudence, procedural justice, and restorative justice have significantly helped shape the practices of New Zealand specialist court practices.¹²

A second important strand of the theoretical foundations of the AODT Court is the best practice standards that have come largely from the United States.¹³ This research-based best practice is summarised in the United States National Association of Drug Court Professionals’ “Defining Drug Courts: The Key Components” and supplementary “Adult Drug Court Best Practice Standards” (Volumes I and II).¹⁴ The Key Components (the Ten Key Components) can be succinctly summarised as expectations that drug courts:

1. Integrate alcohol and other drug treatment services within justice system case processing
2. Use a non-adversarial approach
3. Allow early and prompt intervention for eligible participants
4. Provide access to a continuum of treatment and rehabilitation services
5. Monitor participants via drug testing
6. Use a coordinated strategy to govern compliance
7. Use ongoing judicial interaction
8. Evaluate progress and effectiveness
9. Provide continuing interdisciplinary education for the team
10. Forge partnerships with agencies and community organisations.

Research has indicated that drug courts are more likely to reach their goals if they closely adhere to the Ten Key Components. Failure to apply the Ten Key Components has been associated with lower graduation rates, higher recidivism and lower cost savings.¹⁵

¹¹ Susan Daicoff, “The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement” in DP Stolle, DB Wexler and BJ Winick (eds) *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, North Carolina, 2000).

¹² Thom and Black, above n 3.

¹³ Thom and Black, above n 3.

¹⁴ The National Association of Drug Court Professionals *Defining Drug Courts: The Key Components* (United States Department of Justice, October 2004); The National Association of Drug Court Professionals *Adult Drug Court Best Practice Standards: Volume I* (Virginia, 2013); The National Association of Drug Court Professionals *Adult Drug Court Best Practice Standards: Volume II* (Virginia, 2015).

¹⁵ SM Carey, JR Mackin and MW Finigan “What Works? The Ten Key Components of Drug Court: Research-Based Best Practices” (2012) 8 *Drug Court Review* 6; Leticia Guitierrez and Guy Bourgon “Drug Treatment Courts: A Quantitative Review of Study and Treatment Quality” (2012) 14 *Justice Research and Policy* 47; JM Zweig and others “Drug Court policies and practices: How program

The third strand is the particular form of recovery practised in the AODT Court, which is characterised by an abstinence based model that understands addiction as a disease. For example, the AODT Court model was conceptualised by one AODT Court judge as akin to a "chronic disease management model" used in health systems.¹⁶ Treatment of the disease, rather than punishment for moral failure, became the focus of drug courts. The conceptualisation of addiction as a disease also aligns with the idea that abstinence is the only policy to ensure long-term positive change, and links strongly with the 12-step fellowship framework which also underpins some of the treatment services that support the AODT Court.¹⁷

As with most drug court models internationally, the AODT Courts use "coerced treatment".¹⁸ Legally coerced treatment aims to divert offenders from imprisonment where their offending is seen as strongly associated with substance use.¹⁹ In providing an alternative to traditional criminal justice processes, the belief is that engagement in treatment will reduce drug-related harm and reoffending.²⁰ Under this model, addiction-related treatment is determined by the AODT Court team led by the judge, and it is expected that the externally-driven direction to treatment allows participants the opportunity to internalise motivation to change. The ultimate goal is that this process of coercion creates long term positive change in the life of participants, and therefore, by extension, their whanau (family) and the community. The external authority of the AODT Court is harnessed by the incentive of an alternative pathway to imprisonment and the implementation of a range of approaches that compel the participant to comply with the programme.²¹

Finally, although the AODT Court is modelled on similar courts operating in the United States, there are unique and important aspects within the New Zealand context that relate to cultural responsiveness and partnership with Māori. Under the Lore strand, the research described the pou orange role that was established in AODT Court in October 2013. The person employed in the position is Māori and brings knowledge of te reo, tikanga Māori and experience in providing cultural expertise in a treatment setting, as well as extensive knowledge of addiction recovery and treatment issues. The role represents a strong commitment by the

implementation affects offender substance use and criminal behavior outcomes" (2012) 8 Drug Court Review 43.

¹⁶ Thom and Black, above n 3.

¹⁷ The 12-Step Fellowship was founded in 1935 by Bill Wilson and Alcoholic Anonymous, which established a tradition of 12 step programs and traditions. 12-step methods have been adapted to address a wide range of alcoholism, substance-abuse and dependency problems. The AODT Court has enjoyed support from Alcoholic Anonymous and Narcotics Anonymous, and whanau are encouraged to seek support from Al-Anon of particular support to friends and family members of people with addictions. See "Twelve Steps to Recovery" (2015) <<http://www.12steps.nz>>.

¹⁸ The National Association of Drug Court Professionals, above n 6.

¹⁹ DA Bright and KA Martire "Does Coerced Treatment of Substance-Using Offenders Lead to Improvements in Substance Use and Recidivism? A Review of the Treatment Efficacy Literature" (2013) 48 Australian Psychologist 69.

²⁰ T Seddon "Coerced drug treatment in the criminal justice system: Conceptual, ethical and criminological issues" (2007) 7 Criminology and Criminal Justice 269.

²¹ Thom and Black, above n 3.

judiciary to the principles of Ti Tiriti o Waitangi and tikanga Māori. The pou oranga has developed a cultural framework that creates a guide for culturally meaningful and responsive practices in the AODT Court and treatment provision. Examples of such practices are described further below.

III. THE AODT COURT IN PRACTICE

There are two AODT Court sittings a week, one in Waitakere District Court on a Wednesday and other in Auckland District Court on a Friday. The day begins with a pre-court meeting attended by the multi-disciplinary AODT Court team which is composed of the AODT Court judges, case managers (who have addiction based qualifications), defence counsel, police prosecution, probation, CADs assessors and the pou oranga. Open court begins after lunch where participants are judicially monitored, new participants are officially welcomed and also involve graduations. Whanau, individuals from the recovery community, and AODT Court peer support workers may be in attendance at open court.

To briefly summarise, there are four crucial steps in a participant's journey through the AODT Court: 1) determination of eligibility and suitability; 2) participation in the three-phased programme; 3) graduation; and 4) continuing the journey.²²

A. Determination of Eligibility and Suitability

The first step in the participant's journey through the AODT Court is being determined as eligible and suitable. Potential participants are identified as early as possible so that referrals by the District Court and assessments by AOD professionals can be completed swiftly to allow the defendant to enter the AODT Court as soon as possible (ideally within 50 days of arrest, thereby aligning with U.S. Best Practice).²³ The AOD assessment is largely focused on determining a defendant's dependency to alcohol or other drugs using the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) criteria.²⁴ On the pou oranga's

²²For further details on AODT Court processes see Katey Thom and Stella Black "Ngā whenu raranga/Weaving strands: 2. The processes of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court" (Report, University of Auckland, 2017). Available at <<http://www.justicespeakersinternational.com/new-zealands-aodtc-court/>>. The Ministry of Justice also contracted Litmus to produce two process evaluations which are available at <<http://datalab.justice.govt.nz/research-and-evaluation-collection/>>. These reports are also referred to in the known outcomes section of this paper.

²³ The '50 day advisory rule' is considered important to the AODT Court programme. This rule draws on the best practice from the United States, which indicates that drug courts have the most positive impact on participants when the period between arrest, offending or violation and entry into the AODT court is no more than 50 days. This rule becomes important in this early stage of identifying and determining the eligibility of potential participants (The National Association of Drug Court Professionals, 2013).

²⁴ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, Virginia, American Psychiatric Publishing, 2013). At the time of our research, the AOD assessment still relied on the DSM-IV-TR. This manual requires a specialist AOD clinician to assess whether the defendant has a "maladaptive pattern of substance use, leading to clinical significant impairment or distress" (American Psychiatric Association, 2000). Significant impairment or distress is defined

instigation, culturally specific information is also collected during the AOD assessment weaving in aspects of the Lore strand with U.S. Best Practice and Recovery strands described in the previous section that prioritise holistic AOD assessment. If the AOD assessment identifies the defendant as having an AOD dependency, the presiding judge then refers the case to the AODT Court for a determination hearing.

The AODT Court judge leads discussions regarding new referrals with the AODT Court team, where the eligibility of the potential participant is measured against the pre-determined criteria. Various sources of information are considered during these discussions, such as the AOD assessment, RoC*RoI score (which helps identify whether the defendant may be a medium-high risk offender),²⁵ previous and current offences, and willingness of the defendant to participate in the AODT Court programme, and plead guilty. The judge may also provide an indication as to the sentence the potential participant is likely to receive if sentenced in mainstream District Court. The AODT Court judge then makes a decision as to the suitability of the defendant taking into account the number of places left in the AODT Court. Once AODT Court participants have been accepted to enter the AODT court, the pou oranga then ensures mihi whakatau²⁶ processes occur in the AODT Court. The mihi whakatau process was also described by some of the AODT Court team as creating a sense of togetherness for all participants, regardless of ethnicity.

B. Participation in Three-Phased Programme

In alignment with U.S. Best Practice, participants then undertake a three-phase programme of between 12 and 18 months, with random drug testing and graduated incentives and sanctions used along the way. Phase one takes at least four months to complete and involves the creation of a holistic and individualised treatment and rehabilitative plan by the case managers. The participant must be compliant with this treatment plan, report to the case manager at least weekly and

as composed of three or more of the seven factors listed in the manual occurring within the same 12-month period. Such factors may include indications of tolerance, withdrawal, unsuccessful attempts to control substance use, reduction in daily activities because of substance use and continuing substance use despite physical or psychological problems occurring and being made worse. The assessment, therefore, involves the collection of information about the defendant's substance use patterns and history, history of previous treatment and clinical diagnosis.

²⁵ The Roc*RoI is an algorithm used by the Department of Corrections to predict the offender's potential risk of conviction and risk of imprisonment. The combined measure considers the relationship between demographic variables and criminal history variables, including prison time, time at large, seriousness of offence and offence type. The result is a RoC*RoI score that indicates the statistical likelihood that the offender will be reconvicted in the future and sentenced to a term of imprisonment for that offence. The score range is 0.0 to 1.0, representing 0 risk to 100 per cent risk of serious reoffending (see Department of Corrections, 1997). The AODT Court considers a score between 0.5 and 0.9 as an indicator of high risk and therefore potentially suitable for the Court. Those with repeat drunk driving convictions, however, often have low RoC*RoI scores making this assessment less applicable for consideration in these cases and judicial discretion may be applied in these cases. See Ministry of Justice, above n 4.

²⁶ Official welcome.

engage with 12-step meetings. If a participant is alcohol dependent, he or she will likely be fitted with a SCRAM bracelet.²⁷ Phase two is approximately four to six months long in total and continues to involve treatment and rehabilitation, inclusive of trauma counselling and behavioural modification programmes and 12-step meetings. There is a gradual increase in intervals between court appearances for monitoring, with participants appearing every three weeks and the SCRAM bracelet may have been removed. A focus is placed on longer term solutions, including building family/whānau bonds, identifying training or employment and working towards personal goals. Phase three should see the completion of all treatment and rehabilitation programmes. Testing requirements continue as in the previous phases. Phase three involves appearance in AODT Court every four weeks and concludes with graduation from the programme. AODT Court participants make preparations for transitioning into living in the community in a stable state of recovery.

Graduated incentives and sanctions are used throughout the three-phase programme. U.S. Best Practice suggested that gradually increasing the severity of sanctions for infractions improves outcomes among offenders with addictions.²⁸ In the early parts of phase one, verbal praise and small tangible rewards aim to encourage and instil hope in AODT Court participants, who may find it difficult to achieve proximal goals (those goals a participant is able to meet now, for example, attending appointments as directed, drug testing as required). Formal recognition in open court, such as celebratory presentations of 30-day tags and a handshake from the AODT Court judge, aims to foster further positive reinforcement, especially in cases where AODT Court participants are unaccustomed to such praise. Rewards can also be used to incentivise all participants as a group. The AODT Court introduced the “fish bowl” during our observations. This refers to the procedure used in some U.S. based drug courts whereby the names of all participants who have met their proximal goals over the previous monitoring period are put into a bowl. During open court, the judge invites a team member or visitor to the Court to pull one name out of the bowl. The participant whose name is drawn out of the bowl then receives a small reward. This allows the AODT Court to reduce the amount of rewards given to every achievement of individual participants while still acknowledging the achievement.

²⁷ See Scram Systems “Beyond Crime: Tackling Alcohol Misuse” (2017) <<http://www.scramsystems.com/nz/>>. A SCRAM bracelet is worn 24/7 and provides continuous alcohol monitoring by automatically sampling participants perspiration every 30 minutes for alcohol consumption.

²⁸ A Harrell, S Cavanagh and J Roman *Final Report: Findings from the Evaluation of the D.C. Superior Court Drug Intervention Program* (The Urban Institute, Washington, DC., 1999); A Harrell and J Roman “Reducing drug use and crime among offenders: The impact of graduated sanctions” (2001) 31 *Journal of Drug Issues* 207; A Hawken and M Kleiman *Managing drug involved probationers with swift and certain sanctions: Evaluating Hawaii's HOPE* (National Institute of Justice, Washington DC, 2009); and DB Marlowe *Research Update on Adult Drug Courts* (The National Association of Drug Court Professionals, Virginia, December 2010).

1. *Graduation*

The AODT Court participants exit the AODT Court via graduation, voluntary exit or termination.²⁹ The graduation ceremony takes place in open court. Tikanga guides the graduation process, beginning by way of karakia³⁰ and waiata.³¹ The AODT Court participant is then asked to introduce any whānau/family/friends/employers that have accompanied them and then read their graduation application. AODT Court team members are invited to provide their perspective and whanau/supporters from the recovery community are invited to contribute to the event. The judge then gives the graduating participant a number of items including a graduation certificate and a recovery haka is also performed, under the oversight of the pou oranga. The ceremony closes by returning to the judge, who sentences the AODT Court participant. Each participant is sentenced to intensive supervision or supervision, the sentence being overseen by the AODT Court designated probation officers who have been members of the Court team throughout the participant's journey and know the participant reasonably well. The ceremony concludes with the pou oranga leading the full court joining in a waiata.

2. *Continuing the journey*

The AODT Court participants continue to be supported beyond their journey through the AODT Court programme. The pou oranga leads work in this regards through the development of what he described as a "continuing care body", which is the grouping of graduates from the AODT Court who continue to support one another once they leave the AODT Court. He Takitini³² ceremonies mark the coming together of graduates outside of the court environment. He Takitini is unique to the New Zealand setting and may be understood as representing belonging and strength in being connected to others. It is a crucial aspect of providing continuing support for graduates as they continue to live in recovery outside the AODT Court in the community.

²⁹ Some participants may choose to exit the AODT Court, while others may be exited by the AODT Court judge after a full exit hearing on the grounds that one or more of the exit criteria are met. Those criteria are: Further offending; Deliberate and persistent failure to comply with treatment and/or testing requirements; Violence or seriously threatening behaviour within the treatment setting or in court precincts; Being exited from treatment by a treatment provider due to serious breach of rules; Acting in a manner which causes the AODT Court to conclude that continued participation is untenable; Failing to appear in the AODT Court within 14 days after the issue of a warrant to arrest for non-appearance. If terminated or voluntarily exited, participants are remanded in custody till they are sentenced in the usual way in the District Court either by the AODT Court judge or another judge. Their progress and achievements in the AODT Court programme are taken into account during sentencing. See Litmus *Process evaluation for the Alcohol and Other Drug Treatment Court: Interim report* (Wellington, 2015). Available at <<https://www.justice.govt.nz/assets/Documents/Publications/process-evaluation-aodt-interim.pdf>>.

³⁰ Blessing.

³¹ Song.

³² The many who stand together.

IV. EXISTING EVALUATIVE DATA ON THE AODT COURT

This section provides an overview of data made available by the Ministry of Justice on the demographic profile of participants, significant strengths and weakness of the programme processes, and existing cost-benefit analysis of the AODT Court.

A. Demographic Profile of AODT Court Participants

Data obtained by the author under the Official Information Act indicates that a total of 626 people have been referred to the AODT Court for determination hearing between November 2012 and August 2017.³³ Of that total, 65 per cent (n=404) were accepted into the AODT Court programme. Thirty per cent of those accepted have graduated (n=120), 46 per cent (n=185) exited without graduating, and 25 per cent (n=99) were still participating in the programme at the time these figures were received. Although further demographic information was not provided through this request, the final process evaluation by Litmus for the Ministry of Justice does provide further details on the demographic profiles of participants in AODT Court between November 2012 and 13 April 2016. These figures suggested the participants were overwhelmingly male, with 41 per cent European, 44 per cent Maori, and 11 per cent Pacific. Most (68 per cent) had a RoC*RoI score within the target range and those that did not were reflective of the 30 per cent of participants who had excess breath alcohol charges.³⁴

B. Strengths and Weaknesses of AODT Court Processes

The final process evaluation commissioned by the Ministry of Justice reported the referral and determination processes of the AODT Court were working well. Referrals from defence lawyers and judges to CADs assessors have been lower than expected. Some stakeholders interviewed suggested there may be lack of understanding of eligibility and philosophic opposition to the AODT Court by this group. As the AODT Court does not have a waiting list, other stakeholders suggested that referrals may decrease when there is widespread knowledge of the AODT Court hitting their 50 participant cap per court. It was suggested that flexibility around the cap was needed. Overall, however, those cases that were referred to the AODT Court were more likely than anticipated to be accepted, meaning appropriate cases are being referred. The pilot has continued to maintain, or sit just under, the 50 participant cap.³⁵

A concern was raised across the two Ministry of Justice commissioned process evaluations regarding the number of accepted participants remaining on remand.

³³ Information obtained pursuant to request under the Official Information Act 1982 on 28/06/17. Information on file with the author. This data is at 8 August 2017. It is important to note that these figures may include people who have been referred for a CADs assessment and accepted into the AODT Court programme more than once.

³⁴ Litmus *Final Process Evaluation for the Alcohol and Other Drug Treatment Court: Te Whare Whakapiki Wairua* (Wellington, 2016) at 29 [Litmus].

³⁵ At 20–21.

Figures indicate that 58 per cent of cases were on remand in custody when they were accepted into the AODT Court between November 2012 and 13 April 2016. Stakeholders suggested remaining on remand significantly impacts on motivation towards treatment. CADs has introduced treatment readiness programmes assist participants in their transition to treatment settings, but concerns remain about the limited residential beds and safe housing available in Auckland.³⁶

The AODT Court team was evaluated positively across the three evaluation reports, with participants reporting a genuine and supportive relationship with team members. A turnover of case managers was sighted as disruptive for some participants, and others felt they did not develop a strong relationship with their lawyers, who they saw minimally during the programme. Peer support workers were argued to be extremely important to a participant's recovery through a shared experience of addiction and being involved in crime. The AODT Court judges were acknowledged by participants as fair, consistent in their approach, and impartial. The AODT Court team has reported largely positive experiences of working together and being involved in the AODT Court programme, with concerns largely revolving around making the sitting days more manageable.³⁷

As outlined in the previous section, AODT Court participants are expected to take between 12 and 18 months (365–547 days) to complete the three-phased programme. As of 13 April 2016, participants took on average take 543 days to graduate, meaning most are at the upper end of this expected scale.³⁸ The final process evaluation suggested that this is in accordance with international standards for drug courts, which indicated high-risk, high-need participants can take up to 18–24 months to graduate. As of 13 April 2016, 71 per cent of participants completed their community-based treatment programme, while 25 per cent completed a residential-based treatment programme. Most stakeholders agreed that flexibility in timing is required for participants experiencing complex issues.³⁹

The final process evaluation reported mixed results on the use of graduated incentives and sanctions. In total, 65 per cent of participants received one or more incentives, and 60 per cent one or more sanctions. The demographic profile of those receiving either an incentive or sanction matched the demographic profile of those participants accepted into the court. Sanctions largely included verbal reprimands from the AODT Court judges (24 per cent), or additional court appearances (23 per cent), with use of return to custody at 14 per cent. Qualitative data, however, suggested that the application of sanctions for a relapse is an area where “judicial and treatment priorities clash”;⁴⁰ and international research has been critical of the use of return to custody as a sanction when little treatment is provided. The use of return to custody was considered low by the international

³⁶ At 34.

³⁷ At 39–44.

³⁸ At 49–50.

³⁹ At 77.

⁴⁰ At 58.

standards by one AODT Court stakeholder interviewed. There was little data from participant's perspectives, other than that rewards made them feel "special" and "worthy" and acknowledgement that sanctions are a necessary part of the AODT Court programme.⁴¹

One of the greatest strengths of the AODT Court programme was detailed in the Lore strand above. This role of pou oranga and the development of a cultural framework was highlighted in the final evaluation as of international significance, in the way it has produced a culturally competent and safe drug court model. Tikanga Māori was reported to have been embraced as a normal part of the AODT Court processes. Stakeholders, participants and whānau were overwhelmingly positive about the work of the pou oranga. Work in this area continues to develop, with training for AODT Court team members taking place, and engagement with whānau being an area of growth.⁴²

The number of AODT Court participants graduating versus exiting is beginning to even out as the pilot progresses. As of April 2016, 79 participants had graduated, and 108 were exited. Graduates and those who were exited matched the demographic profile of those accepted into the programme. Sixty-three per cent of graduates were from Waitakere AODT Court, as opposed to 37 per cent in Auckland AODT Court. Of those who were exited, 40 per cent were via the AODT Court, 32 per cent due to failure to appear, and 27 per cent as a result of voluntary exit. It was noted that a slightly higher representation of participants within the target risk range and periods of being remanded in custody. Although it is difficult to make international comparisons, the evaluation suggested that the termination rate was acceptable.⁴³

V. RE-OFFENDING RATES

Data supplied to the author under the Official Information Act 1982 provides a preliminary glimpse into the reoffending rates of those participating in the AODT Court compared to those who have solely been through the mainstream court process and received a prison sentence.⁴⁴ The analysis focused on comparing rates of offending, frequency of reoffending, and imprisonment rates, with follow-up periods of 12 months, two years and three years.⁴⁵ In light of the lack of two and

⁴¹ At 52–38.

⁴² At 64–65.

⁴³ At 103.

⁴⁴ Information obtained pursuant to a request under the Official Information Act 1982 on 28/06/17. Information on file with the author.

⁴⁵ There are five models the Ministry of Justice is using to compare the effectiveness of the AODT Court in reducing reoffending. Model one compares reoffending rates over one to three years (up until 13 March 2015, offending for AODT Court participants is calculated from first treatment date, and for the matched offenders date of release from prison). Model two uses the same model as model one but reduces AODT Court sample to those that exited the programme early. Model three was redacted from the official information request and at the time of this publication we had not obtained permission to access further information. Model four compares reoffending rates over 1 year for graduates of the AODT Court and matched mainstream offender sample (up until 18

three year follow-ups on a larger sample of graduates, the following analysis should be read with these limitations in mind.

In the short-term, the data shows that overall participants of AODT Court were significantly less likely to reoffend, be re-imprisoned and reoffended less frequently.⁴⁶ AODT Court participants were 54 per cent less likely to reoffend in 12 months and 58 per cent less likely to be re-imprisoned. When looking at graduates of the AODT Court alone, they had a 62 per cent lower rate of reoffending and 71 per cent lower rate of reimprisonment than the matched sample of offenders over a 12-month period. Finally, when comparing the sample of graduates plus those who exited with the matched sample, there was a 14 per cent reduction in reoffending.

However, these positive reductions in the rate of reoffending for AODT Court accepted participants appear to reduce over time. Comparable reductions in offending were -21 per cent over two years, and -17 per cent over three years, with a similar pattern occurring over reimprisonment and frequency of reoffending rates. A similar pattern occurs with those AODT Court participants who exited the programme prior to graduation. Over the first year, they had 26 per cent lower rates of reoffending compared with the matched sample of offenders and were 20 per cent less likely to be imprisoned. However, two to three years later there is no real difference between the re-offending rates of those who exit early and the matched sample of mainstream offenders.⁴⁷

A. Cost-Benefit Analysis

With the announcement of the extension of the AODT Court pilot, the Ministry of Justice released some preliminary data related the cost-benefits of the programme. The basis of this analysis is information produced through the re-offending rates above. Figures to date indicate that the AODT Court has reduced recidivism by around 15 per cent in the short term when measured against a matched sample

December 2016, offending for AODT Court is calculated from graduate date, and for the matched offender date of release from prison). Model five is a combination of the results in model two and four. It compares reoffending rates of those who exited AODT Court early (over two years post entry) and graduated from the AODT Court with the matched sample of offenders. Information obtained pursuant to request under the Official Information Act 1982 on 28/06/17. Information on file with the author.

⁴⁶ These reductions in reoffending relate to all participants and are measured from the point of acceptance into the AODT Court. When referring to the reductions in re-offending for graduates (against the matched sample), measurements begins from within a year of graduation. This means that graduates will still be benefiting from support described in the section 'continuing the journey' above.

⁴⁷ It is important to note the small sample of graduates used to formulate this finding. Also, the sample of graduates was composed of 57 per cent drink drivers, who were predicted to have lower reoffending rates. Those who exited the court early were not mostly drink drivers and were predicted to have riskier profiles than those graduating. Information obtained pursuant to a request under the Official Information Act 1982 on 28/06/17. Information on file with the author.

of offenders who go through a standard court process.⁴⁸ This is based on very limited data and one of the reasons Cabinet decided to extend the pilot is to better track AODT Court participants over a longer period. From their perspective, this would allow for a longitudinal view of whether the AODT Court reduces reoffending once all supports have ceased for the graduate. As detailed above, the AODT Court participants often receive supports following their graduation from the AODT Court. Due to the AODT Court having a cap of 50 participants at one time and a long-term programme (12–18 months plus 12 months intensive supervision), the Ministry stated:

Measuring reoffending patterns over a longer period would be necessary for a reliable comparison between participants with more independence from the AODT Court and their matched offenders released from prison.⁴⁹

This concern of the Ministry of Justice is well founded, with international evaluation literature often having been criticised for its lack of longitudinal follow-up and the lack of statistical reliability with short term research programmes.⁵⁰ The Ministry of Justice estimates that by late 2018, they should be in a position to better assess the efficacy of the AODT Court in reducing recidivism.⁵¹

The AODT Court can be considered as part of the Government's "social investment model". This implies that the potential for the benefits to outweigh the costs of the initiative is imperative for it to become a permanent fixture of New Zealand's criminal justice system. Speculative cost-benefit modelling by the Ministry of Justice estimates that a 25 per cent reduction in reoffending by participants generates enough savings in the short-term to recover the \$1.3 million yearly additional investment into AODT Court.⁵² This is based on the seven graduates reoffending (within 12 months) and associated costs.

While the Ministry of Justice has acknowledged that savings can also be found through positive health, employment, social and quality of life outcomes of participants, it is unclear just how these kinds of outcomes will be measured and how they may also produce cost-savings and may be related to reductions in re-offending. The Ministry of justice indicates that the Integrated Data Infrastructure may be able to be used to consider such analysis. As detailed above, existing process evaluations funded by the Ministry of Justice have suggested the AODT

⁴⁸ This analysis is based on model five outlined in above n 45, which compares reoffending rates of those exited the AODT Court early and those graduated from the AODT Court with a matched sample of offenders. See also Office of the Minister of Justice and Office of the Minister of Health *Report-back on the Alcohol and Other Drug Treatment Court Pilot and other AOD-related Initiatives* (Report to Cabinet Social Policy Committee) <<http://www.justice.govt.nz/assets/Documents/Publications/Report-back-on-the-Alcohol-and-Other-Drug-Treatment-Court-Pilot-and-other-AOD-related-Initiatives-Paper.pdf>>.

⁴⁹ Office of the Minister of Justice and Office of the Minister of Health, above n 48, at 4.

⁵⁰ See Ciska Wittouck and others "The Impact of Drug Treatment Courts on Recovery: A Systematic Review" (2013) *The Scientific World Journal* 1.

⁵¹ Office of the Minister of Justice and Office of the Minister of Health, above n 48.

⁵² Office of the Minister of Justice and Office of the Minister of Health, above n 48.

Court has positively impacted on those participants who took part in the research.⁵³ There remains, however, limited in-depth research on the experiences of participants in the AODT Court that could complement statistical information.

VI. CONCLUSION

This paper has illustrated how the AODT Court weaves the separate sectors of justice, health and social services through a strong focus on recovery from addiction to reduce reoffending. This focus radically transforms the traditional role of the law, legal processes and the roles of the legal professional. The AODT Court has been carefully designed according to an evidence-base provided from over 20 years of drug court practice internationally, and developed alongside recovery and Māori communities to ensure appropriate shaping to localised need. The framework will continue to be developed as the strands are woven together while the AODT Court participants, team and wider community interact with each other, and adapt to any challenges.⁵⁴

Existing evaluations commissioned by the Ministry of Justice have indicated the AODT Court has operated as intended and it is clear from the extension of the AODT Court pilot that the Ministry of Justice is cautiously optimistic of this therapeutic model of intervention. Less is known about how participants experience the AODT Court programme, and such insights are crucial in any future development of research, practices and policy. It is also clear that the AODT Court is being subjected to high cost-benefit expectations before it may be considered a long-term feature of the criminal justice system.

Existing preliminary data suggested significant reductions in re-offending rates for AODT participants in the short term, but that there may be difficulties in sustaining such reductions over time. This indicates the importance of He Takatini as a continuing care body for ongoing support for graduates as they move away from the holistic support the AODT Court and probation provides.

The AODT Court model has received strong support from the international community. Drug court expert Judge Peggy Hora has advocated for its ability to be a leading innovation in the field through its remarkable ability to draw on the existing evidence-based practices, strong engagement with 12-step fellowship and recovery community and commitment to actualising Ti Tiriti o Waitangi through

⁵³ See Ministry of Justice “Therapeutic Courts” (14 June 2017) <<https://www.justice.govt.nz/courts/criminal/therapeutic-courts/>> for access to the formative and process evaluations.

⁵⁴ For an overview of some of the challenges faced by the AODT Court from the AODT Court team perspective see K Thom and S Black Ngā whenu raranga/Weaving strands: 4. The challenges faced by Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court (2017) Auckland: University of Auckland. Available at <<http://www.justicespeakersinternational.com/new-zealands-aodtc-court/>>.

partnership with local Māori communities.⁵⁵ Just how the evaluations will capture the holistic benefits to participants of the weaving of strands in the AODT Court is unknown, but are of benefit not just to Aotearoa New Zealand society but the wider international community.

⁵⁵ K Thom and S Black *Ngā whenu raranga/Weaving strands: 1. The therapeutic framework of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (2017) Auckland: University of Auckland. Available at <<http://www.justicespeakersinternational.com/new-zealands-aodtc-court/>>.

CASE NOTE: DIGITAL PROPERTY - *DIXON V R* [2015] NZSC 147, [2016] 1 NZLR 678

DAVID HARVEY*

I. INTRODUCTION

This article examines the Supreme Court decision of *Dixon v R* (*Dixon*).¹ It suggests that the Supreme Court characterisation of a digital file is wrong and is based on a number of incorrect assumptions and fallacies about technology. The decision demonstrates what can go wrong when Judges attempt to judicially legislate in the field of law and technology, and suggests that such policy matters should be left to the legislature.

II. THE FACTS

Mr Dixon, the appellant, had been employed by a security firm in Queenstown. One of the clients of the firm was Base Ltd, which operated the Altitude Bar in Queenstown. Base had installed a closed-circuit TV system in the bar.

In September 2011 the English rugby team was touring New Zealand as part of the Rugby World Cup. The captain of the team was Mr Tindall. Mr Tindall had recently married the Queen's granddaughter. On 11 September, Mr Tindall and several other team members visited Altitude Bar. During the evening there was an incident involving Mr Tindall and a female patron, which was recorded on Base's CCTV.

Mr Dixon found out about the existence of the recording of Mr Tindall and asked one of Base's receptionists to download it onto the computer she used at work. She agreed, being under the impression that Mr Dixon required it for legitimate work purposes. The receptionist located the file and saved it onto her desktop computer in the reception area. Mr Dixon subsequently accessed that computer, located the relevant file and transferred it onto a USB stick belonging to him.

Mr Dixon attempted to sell the footage, but when that proved unsuccessful he posted it on a video-sharing site, resulting in a storm of publicity both in New Zealand and in the United Kingdom. At his District Court trial, Judge Phillips found that Mr Dixon had done this out of spite and to ensure that no one else would have the opportunity to make any money from the footage.

A complaint was laid with the Police and Mr Dixon was charged under s 249(1)(a) of the Crimes Act 1961 (Crimes Act).

That section provides as follows:

249 Accessing computer system for dishonest purpose

* District Court Judge (retired).

¹ *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 [*Dixon SC*].

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right,—
(a) obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; ...

The indictment against Mr Dixon alleged that he had “accessed a computer system and thereby dishonestly and without claim of right obtained property.”

III. THE PROCEDURAL HISTORY

The Judge at first instance considered that the digital CCTV files were property within the meaning of the definition of that word in s 2 Crimes Act. When the matter went before the Court of Appeal, the Court disagreed.² It concluded that digital information or a data file did not fall within the definition of property.

The Court of Appeal’s decision was the subject of considerable critical comment. It was even suggested that the provisions of s 249 Crimes Act were “unfit for the purpose”. Yet the decision should not have come as any surprise, for there is a substantial body of authority, primarily in the civil arena, that supports the Court’s conclusion. Subsequently, the Court made a similar finding in the case of *Watchorn v R*.³

What the Court of Appeal did in *Dixon*, however, was to substitute another charge which could have been proffered against Mr Dixon – that he accessed a computer and dishonestly and without claim of right obtained a benefit. In its decision, the Court of Appeal went to some pains to consider the nature of a benefit and substitute it as the charge.⁴

Mr Dixon appealed against that conclusion to the Supreme Court of New Zealand. He represented himself before the Court. His argument did not concentrate on the issue of digital property, unlike the very full argument that was advanced by the Crown⁵ and that was largely adopted by the Court.

IV. THE SUPREME COURT DECISION

In its decision, the Supreme Court concluded that the Court of Appeal’s conclusion that a digital file did not amount to property was wrong. It quashed Mr Dixon’s conviction for obtaining a benefit contrary to s 249(1)(a) Crimes Act and it reinstated his original conviction for obtaining property by accessing a computer system for a dishonest purpose. Pyrrhic victory does not adequately describe the outcome from Mr Dixon’s point of view.

² *Dixon v R* [2014] NZCA 329, [2014] 3 NZLR 504 [*Dixon CA*].

³ *Watchorn v R* [2014] NZCA 493.

⁴ *Dixon CA*, above n 2, at [40]–[49].

⁵ *Dixon SC*, above n 1, at 680–683.

A. Digital Property

The Court started by considering the provisions of s 249 of the Crimes Act 1961, along with the definitions of “access”, “computer system”⁶ and “property”.⁷

Property includes “real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest”. The Court adopted the characterisation of the Crown of the definition as:

- (a) Inclusive rather than exclusive
- (b) Circular, in that property is defined as including “real and personal property”
- (c) In wide terms and includes tangible and intangible property.

The Court also noted, in particular, that digital material in the form of computer software was defined as “goods” for the purposes of the Commerce Act 1986, the Consumer Guarantees Act 1993, the Fair Trading Act 1986 and the Sale of Goods Act 1908.⁸

1. The District Court Approach

The Court also considered the approach of the District Court where Judge Phillips observed that:⁹

I see that what a computer does is receives, digests and analyses data. I consider that data can include anything that is capable of being stored on a computer system, being a word document or a programme file or a script, that enables the operator to do something quickly for example and can clearly include picture files and the like.

2. In the Court of Appeal

This approach did not find favour with the Court of Appeal. The Court of Appeal’s starting point was that digital files were not property within the meaning of the definition of the Crimes Act because they were pure information. The Court adopted what it described as an “orthodox” view that information, whether confidential or not, was not property.¹⁰

It observed that the medium upon which information could be stored would be property but the information upon it would not. Therefore, the digital “footage” could not be distinguished from information on this basis.¹¹ The Court observed that it was problematic to treat computer data as being analogous to information recorded in physical form. It observed that a Microsoft Word document may appear to be the

⁶ Crimes Act 1961, s 248.

⁷ Section 2.

⁸ Now incorporated in the Contract and Commercial Law Act 2017, s 119.

⁹ *R v Dixon* DC Invercargill CRI-2011-059-1122, 17 April 2013 at [13].

¹⁰ *Dixon* CA, above n 2, at [29].

¹¹ At [30].

same as a visible sheet of paper containing text but in fact was simply a stored sequence of bytes.¹²

The Court then considered whether or not it should depart from this orthodox view, observing that the distinction drawn between information which was not property and the medium upon which it was contained had been criticised as illogical and unprincipled. The view was that there were certain policy reasons militating against the recognition of information as property particularly in that such a decision could impact detrimentally upon the free flow of information and the freedom of speech.¹³

The Court noted that when the legislature enacted the computer crime sections of the Crimes Act, there were also amendments to the definition of “property” but that these were limited. The taking of confidential information or trade secrets was encompassed by s 230 Crimes Act.¹⁴ It considered that the provisions in s 249 relating to property were aimed at situations where a person accessed a computer and used, for example, a false or purloined credit card details to obtain goods unlawfully.¹⁵

3. *Watchorn v R*

Shortly after the Court of Appeal decision in *Dixon* the Court was confronted with a similar issue in *Watchorn v R* (*Watchorn*).¹⁶ The accused had been convicted on three charges alleging breaches of s 249 of the Crimes Act and claiming that he had access to his employer’s computer system and dishonestly or by deception and without claim of right obtained property. The property in question were computer files relating to oil exploration information gathered by the appellant’s employer.

The Court of Appeal noted its decision in *Dixon*,¹⁷ where it was held that digital CCTV footage stored on a computer was not “property” as defined in the Crimes Act and so the obtaining of such data by accessing a computer system could not amount to “obtaining property” within the meaning of s 249(1)(a) of the Crimes Act. The Court accepted that that analysis must apply to the kind of data obtained by Mr Watchorn and observed that it was bound to follow *Dixon*.

4. *Different Results in the Court of Appeal*

The Court of Appeal in *Dixon*, while holding that a digital file could not be property, decided that it could substitute a different charge – that of accessing a computer system to obtain a benefit, which was available pursuant to s 249 of the Crimes Act.

In *Dixon* the benefit had been the opportunity to sell a digital CCTV footage that had been obtained by accessing his employer’s computer. In *Watchorn* there was no evidence that the appellant had tried to sell the data, but the issue was whether or

¹² At [31].

¹³ At [33]–[35].

¹⁴ At [37].

¹⁵ At [38].

¹⁶ *Watchorn v R*, above n 3.

¹⁷ *Dixon* CA, above n 2.

not the word “benefit” was limited to a financial advantage or something wider. After considering authority, however, the Court concluded that it was not essential that the word “benefit” be linked to some form of financial advantage.

The Court concluded that the issue of what constituted a benefit in Watchorn’s case was more nuanced than that of *Dixon*. The Court considered that it was arguable on the facts of Watchorn’s case that the advantage that he gained was his ability to access the data outside his work environment and without the supervision of his colleagues, including after he had left his employment.¹⁸

Indeed, the Court said that it could be argued that he did not, in fact, exploit the advantage given to him by selling the data or making it available to his new employer. It did not, in fact, reduce the ability that he had to do any of those things.¹⁹

When it came to considering whether to substitute the charge – as had been done in *Dixon* – the problem was that the Crown did not actually formulate the nature of the benefit that Mr Watchorn might have received. The failure to articulate such a benefit meant that Mr Watchorn did not have any notice of that allegation that he could properly contest. The Court held that he was entitled to such notice.²⁰

The Court considered that the evidence that could be adduced might include whether or not there was in fact any advantage to him in having possession or control of the data and because the prosecution had restricted its theory of the case to obtaining property, the entitlement that Mr Watchorn had to prior notice of the benefit was not present. Accordingly, the Court was not prepared to substitute new verdicts and indeed the grounds for substituting such verdicts were not met.²¹

B. In the Supreme Court

1. Intangibles as Property – the Context Approach

Against this background, the Supreme Court adopted an unusual approach. It decided that it would by-pass an examination of the “orthodox view” that information was not property. The reason for this was that the Crown had approached the argument on the basis that digital files were not information but were property in that they could be owned and dealt with like any other item of personal property.²²

The Court then went on to suggest that the nature of property depended upon context.²³ The context in *Dixon* was that of the computer crimes provisions of the

¹⁸ *Watchorn v R*, above n 3, at [83]

¹⁹ At [83].

²⁰ At [85].

²¹ At [86].

²² *Dixon* SC, above n 1, at [23]–[24].

²³ At [25] (citing *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [89]: where it was stated that property “is not a term of art with one specific and precise meaning. *It is always necessary to pay close attention to any statutory context in which the term is used*” (emphasis added)).

Crimes Act. This meant that within the context of computer crimes and the dishonest acquisition of property (among other things) a digital file fell within the ambit of “property”.²⁴ Before going on to a more detailed analysis of why the Court reached that conclusion, the Court summarised the reasons why it came to this conclusion. The files were identifiable, had value and were capable of being transferred. It was conceded that although they could not be detected by the unaided senses,²⁵ it mattered not that they were intangible because the definition in s 2 of the Crimes Act included intangibles within the definition of property.

The Court then went into more detail, tracing the legislative history of the computer crimes sections of the Crimes Act. It was observed that a proposed definition of property, which did not appear in the legislation as enacted, would have put the position of a digital file beyond question.²⁶

2. *A Diversion to “Documents”*

Curiously enough the Court then went on to discuss the nature of a document and the extended definition of that term, drawing assistance from the decision of *R v Mistic* (*Mistic*)²⁷ in which the association of the medium and the message was discussed.²⁸ *Mistic* was decided before the extended definition of a document was enacted in the amendments to the Crimes Act in 2003, but pointed out that a document was a record of information and that as such a computer programme and the medium upon which it was contained were material things which together recorded and provided information and were readily comprehended by the term document.²⁹

It should be noted that *Mistic* did not deal with the issue of whether a document was property, nor did it consider whether or not the information contained upon the medium constituted property. What was considered was the conceptual requirements of a document which involved an understanding of what a document did – recorded information – and how that was achieved – the association of the information (message) with the medium for the purposes of offences involving documents under the Crimes Act. What the Supreme Court appears to have done is to take the concept of digital information associated with a medium (a document) and extended that concept to extend to property.³⁰

²⁴ At [25].

²⁵ At [25].

²⁶ At [28]–[29].

²⁷ *R v Mistic* [2001] 3 NZLR 1 (CA).

²⁸ *Dixon SC*, above n 1, at [31].

²⁹ At [31]. See *R v Mistic*, above n 27, at [34].

³⁰ At [31]. The emphasis seemed to be on materiality that arose from the medium/information association. The Court observed “the computer programme and the disc constituted ‘material things which record and provide information’ and as such were readily comprehended by the term ‘document’” (at [31]).

3. *The Scope of s 249*

The scope of s 249 came under some scrutiny. The proposition was advanced by the Court of Appeal that when one obtained property by dishonestly accessing a computer system, what was comprehended was obtaining goods by a dishonest transaction – for example using false credit card details to obtain goods.³¹ The Supreme Court considered that the term “property” in s 249 was wider than that and had a broader construction.³²

The Court looked at the concept of property within the context of the definition of a computer system which included “stored data” and then went on to consider the offence contained in the provisions of s 250. That offence specifically refers to damaging, deleting, modifying or interfering with or impairing any data or software in any computer system³³ or causing data or software in a computer system to be damaged, deleted modified or otherwise interfered with or impaired.³⁴

4. *Software or Data?*

It is difficult to understand why the Supreme Court followed this particular path. Although it is correct that the definition of a computer system includes stored data, there is a specific reference to data and software as the target of damage, for example, in s 250(2). Furthermore, it should be understood that s 250 deals with the *operation* of a computer system and creates an offence effectively of interfering with the *operation* of a computer system by damaging or interfering with data or software.

The offence recognises that data and software are essential for the operation of a computer system. Section 250 cannot be employed, directly or indirectly either to suggest that data and software are property. The Court incorrectly made the following comment:³⁵

Accordingly, there is no doubt that Parliament had stored data in mind when these provisions were drafted. Equally, there is no doubt that Parliament had in mind situations where stored data was copied.

With respect, this is a conclusion that cannot be reached on the basis of the line of reasoning employed. The separate use of the words “data” or “software” in the section would suggest that any implication that “stored data” was included would be redundant.³⁶ Furthermore, as has been noted, the use of the terms “computer system”

³¹ *Dixon* CA, above n 2, at [38].

³² *Dixon* SC, above n 1, at [34].

³³ Crimes Act, s 250(2)(a).

³⁴ Section 250(2)(b).

³⁵ *Dixon* SC, above n 1, at [35].

³⁶ “Software” is defined in the Oxford English Dictionary as: “The programs and procedures required to enable a computer to perform a specific task, as opposed to the physical components of the system” and “[t]he body of system programs, including compilers and library routines, required for the operation of a particular computer and often provided by the manufacturer, as opposed to program material provided by a user for a specific task.” The program material referred to is “data”, which is defined in

in s 250 refers to operation rather than componentry although it may be conceded that the damage to data or software may have implications for the operation of a peripheral such as a pointing device or a display.

It should also be noted that s 250 targets damaging, deleting, modifying or otherwise interfering with data or software that may impair computer operation. No mention is made of copying stored data. Indeed, stored data may be copied without creating any of the problems contemplated by s 250.

The problem is that the Supreme Court relies upon this incorrect premise to discuss the circumstances that are created when stored data is received from a computer when it is copied, leaving the data intact upon the device from which it is copied.³⁷

The Court speculated on which offence would be committed if stored data was copied from a target device. It excluded s 250 based on the lack of interference or impairment of the data. It noted that s 252 – which criminalises intentional unauthorised access to a computer system – targets access only. The only section which could apply was s 249:³⁸

where a person accesses a computer system without authority in order to locate, copy and then deal with valuable digital files contrary to the interests of the files' owner.

5. *Property Elements*

The Court then went on to consider some of the fundamental elements of property, noting that property as defined in the Property Law Act 2007 defined property as something that was capable of being owned, whether it was tangible or intangible.³⁹

The file that Mr Dixon copied onto his USB device was, as the Court described it, a compilation of sequenced images from a CCTV system that had an economic value and were capable of being sold and had a material presence⁴⁰ – the association of medium and information that was a characteristic not of property but of a document.

6. *American Authority*

The Court then gave some consideration to American authority. In this regard, care must be taken in using United States authority because there is a different approach to the concept of information as property.⁴¹ The approach of the Supreme Court was

the Oxford English Dictionary as: "The quantities, characters, or symbols on which operations are performed by computers and other automatic equipment, and which may be stored or transmitted in the form of electrical signals, records on magnetic tape or punched cards, etc." *Oxford English Dictionary* (Oxford University Press, June 2017) <<http://www.oed.com>>.

³⁷ *Dixon* SC above n 1, at [35].

³⁸ At [36]–[37].

³⁹ At [38].

⁴⁰ At [39].

⁴¹ See David Harvey *Collisions in the Digital Paradigm: Law and Rulemaking in the Internet Age* (Hart Publishing, Oxford, 2017) at 138 et seq [Harvey *Collisions in the Digital Paradigm*] for a full discussion.

to draw an analogy with cases where software had been treated as tangible property.⁴² The issue of property in the context of software is a complex one and depends very much upon the circumstances of the case. For example, software falls within the definition of “goods” for the purposes of Part III of the Contract and Commercial Law Act 2017.⁴³ The issue of the tangibility of software code for depreciation in the context of tax provides a further and different context.⁴⁴

7. *Electronic Conversion*

The Court also gave consideration to American authority which held that electronic records and databases had been held to be property capable of being converted,⁴⁵ referring to the case of *Thyroff v Nationwide Mutual Insurance Co (Thyroff)*.⁴⁶ The issue in that case was whether or not there could be conversion of electronic records which were intangible. It was held that conversion was available notwithstanding intangibility on the basis that the electronic records were functionally equivalent to tangible property.⁴⁷

8. *“Document Merger” and Conversion*

It should be noted that the problem of conversions of intangibles was addressed in the case of *Kremen v Cohen (Kremen)*⁴⁸ where the Court applied the theory of “document merger”.

The court discussed the concept of merger of intangible rights in a tangible item such as a document. This theory developed in the American Restatement of Torts recommended:⁴⁹

1. Where there is conversion of a document in which intangible rights merged, the damages include the value of such rights.
2. One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that of conversion, even though the document is itself not converted.

Kozinski J observed that courts routinely applied the tort to intangibles without inquiring whether they are merged in a document and, while it was often possible to find a document to which the intangible is connected, it was seldom one that represented the owner’s property interest. The court considered that the issue of

⁴² *Dixon SC*, above n 1, at [40] (citing *South Central Bell Telephone v Bartelemy* 643 So 2d 1240 (Lou 1994)).

⁴³ Part 3 of the Contract and Commercial Law Act 2017 contains the former Sale of Goods Act 1908.

⁴⁴ *Erris Promotions Ltd v Commissioner of Inland Revenue* [2004] 1 NZLR 811(HC).

⁴⁵ *Dixon SC*, above n 1, at [47].

⁴⁶ *Thyroff v Nationwide Mutual Insurance Co* 8 NY 3d 283 (NY 2007).

⁴⁷ Discussed in *Dixon SC*, above n 1, at [47]–[48]. For the problems of using the concept of “functional equivalence” as an argument to explain paradigmatically different types of information, see Harvey *Collisions in the Digital Paradigm* at 55-63.

⁴⁸ *Kremen v Cohen* 337 F 3d 1024 (9th Cir 2003). For a full discussion of *Kremen v Cohen*, see Harvey *Collisions in the Digital Paradigm* at 140 et seq.

⁴⁹ American Law Institute *Restatement (Second) of Torts* (4 Vols) § 242 (Philadelphia, American Law Institute, 1965).

merger was minimal, requiring only some connection to a document or a tangible object.

Kremen involved an action for a converted domain name. The “document” or collection of documents was the electronic database that comprised the Domain Name Server. Thus *Kremen* demonstrates the analytical process that does not appear to have been present in *Thyroff* which preferred to use the suspect approach of functional equivalence.

9. *Confusing Software and Data*

In *South Central Bell Telephone v Bartelemy*⁵⁰ the issue was whether or not computer software was tangible personal property and the Court in that case discussed in some detail what software does, noting that it was a program – a set of instructions that tells a computer what to do and when stored upon a medium the machine-readable code is a physical manifestation of information in binary form.⁵¹

The problem that arises from this approach is conflating software – correctly described as the instructions that make a computer work – with a data file which is information – in *Dixon* the CCTV file. Software such as Microsoft Word is recorded in machine language in binary format but has quite a different function from a data file – say a Word.docx file – that requires the software to read it. The Court of Appeal had referred to a computer file as a “stored sequence of bytes.” The file which constitutes the “stored sequence of bytes” which could not be distinguished from “pure information” is the visual representation that appears on a directory screen. The reality behind that visual representation is quite different.⁵²

The Supreme Court deconstructed this approach by commencing with a consideration of the nature of a document. But as has been demonstrated, both in the case of *Misic* and in the definition of document in the Crimes Act the important aspect is the association of information with a medium for a particular purpose. The Supreme Court then took the definition of document and the example of a Microsoft Word document and considered it odd that a Word document would not fall under the definition of property for the purposes of s 249(1)(a) of the Crimes Act.⁵³

The Court concluded, along with the Court of Appeal, that Mr Dixon’s conduct fell within the ambit of s 249 and there is no doubt that it did. The Supreme Court was prepared to hold that the computer file was property and both statutory purpose and context supported that view.

It will be plain by now that the author does not unreservedly agree. There are a number of areas where *Dixon* is in error. The first is that the findings and some of the

⁵⁰ *South Central Bell Telephone v Bartelemy*, above n 42.

⁵¹ At 1243. It should be observed that there is not complete consensus among US courts that software amounts to tangible property. See Ken Moon “The Nature of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?” (2009) 31 EIPR 396 at 399.

⁵² As discussed below.

⁵³ *Dixon* SC, above n 1, at [47].

assumptions used by the Supreme Court do not accord with technological reality. Secondly, the decision brings a significant element of inconsistency into the law. Thirdly, the decision and the holdings in *Dixon* are procedurally unsound. Finally, the decision will lead and has led, to consequences that were unintended by the Supreme Court and introduce wider scope to “digital crime” than was intended by the Crimes Act.

V. CRITIQUING DIXON

*A. Technological Reality*⁵⁴

Throughout the decision, the Supreme Court seems to assume that a digital data file is a coherent whole. The difficulty started in the argument that was advanced by counsel for the Crown, who argued that a USB stick is equivalent to a roll of film and a computer file to a paper file.⁵⁵ The Supreme Court seems to have adopted that theory of the nature of digital data in referring to the digital files as a “compilation of sequenced images from the bar’s CCTV system”⁵⁶ and a “stored sequence of bytes”.⁵⁷

1. Incorrect Comparisons

The problem with the analogies advanced by the Crown is that they use comparators that involve fundamentally different ways of retaining information or data. A roll of film is a celluloid medium which, as a result of treatment with chemicals, is capable of storing images. A paper file consists of a medium – paper – upon which information is written or printed. Both media contain information in a complete, sequential, linear and coherent form.

A digital file does not do that. The bytes that make up the file are not in a sequence. They are not in a compilation. Depending upon the medium upon which the bytes are stored, they may be arranged in fundamentally different ways.

2. Data Storage

None of this is apparent to the computer or device user. This is because of the way in which file and directory information is presented on a screen by the particular operating system. Generally the information is presented by means of a directory and file structure.⁵⁸ The term “directory” refers to the way a structured list of files and folders is stored on a computer. The hierarchical file system that is used in computing is represented in the familiar graphical interface as a collection of folders and files. But this graphical representation in no way reflects the reality of how digital data – be it software programs or data – is stored on a medium such as a hard drive. It is helpful

⁵⁴ This issue received a similar treatment to that which follows in Harvey *Collisions in the Digital Paradigm* at 135 et seq.

⁵⁵ *Dixon* SC, above n 1, at 682.

⁵⁶ At [39].

⁵⁷ At [45].

⁵⁸ Although Unix treats a directory as a type of file.

for the user for the purposes of locating, executing or accessing a program or data but really it is the information that is contained within the directory sector of the medium. This sector contains all the information about where the various bytes that make up the file or program may be located throughout the medium.

To add another layer of complexity to the issue, it should be noted that data used by a computer may be located in primary storage⁵⁹ which is directly accessible by the computer processor. Data in primary storage is volatile, unlike data in secondary storage which is not directly accessible by the processor such as hard drives, USB drives or other external storage devices.⁶⁰

It immediately becomes clear that it is unwise to make generalised assumptions about the nature of computer data when there are a number of variables that have to be considered.

3. *Common Terms*

Many of the terms that we use and the assumptions we adopt when dealing with digital data arise from our unfamiliarity with a paradigmatically different way of dealing with information. We use of familiar terms and metaphors to help us feel more comfortable in the new digital space. Thus we use the term “documents” because on a screen the information has the same visual appearance as print on paper. We “turn” the pages on our Kindles or eReaders and “put” them in files or folders. Email also mimics the traditional hard copy letter which we “write” rather than type.⁶¹

These terms and assumptions, and the way that the information is presented to us on a screen can create the misleading impression that the electronic file exists somewhere on the computer as a single, complete whole and maintains its structural integrity even when the computer is turned off in the same way that a paper document or a film continue to exist when put into a file folder or a canister.⁶²

4. *Hardware and Software Dependency*

Data in electronic format is dependent upon hardware and software. This was the subject of an oblique reference by the Supreme Court when it observed that files “have a physical presence, albeit one that cannot be detected with the unaided senses”.⁶³ However, the Court did not go on to examine the way in which the file is stored and accessed on a device.

⁵⁹ Such as data stored in the random access memory (RAM) or the read only memory (ROM).

⁶⁰ George RS Weir and Stephen Mason “The sources of electronic evidence” in S Mason (ed) *Electronic Evidence* (4th ed) (University of London, London, 2017) at 4 (available in electronic format under a Creative Commons Licence at http://humanities-digital-library.sas.ac.uk/index.php/hdl/catalog/book/electronic_evidence >) [Mason *Electronic Evidence*].

⁶¹ Burkhard Schafer and Stephen Mason “The Characteristics of Electronic Evidence” in Mason *Electronic Evidence*, above n 60, at 20.

⁶² At 20.

⁶³ *Dixon* SC, above n 1, at [25].

The data contained upon a medium such as a hard drive requires an interpreter to render it into human readable format. The interpreter is a combination of hardware and software. Unlike the paper document, the reader cannot create or manipulate electronic data into readable form without the proper hardware in the form of computers.⁶⁴

There is a danger in thinking of electronic data as an object “somewhere there” on a computer in the same way as a hard copy book is in a library. Because of the way in which electronic storage media are constructed it is almost impossible for a complete file of electronic information to be stored in consecutive sectors of a medium. An electronic file is better understood as a *process* by which otherwise unintelligible pieces of data are distributed over a storage medium, are assembled, processed and rendered legible for a human user. In this respect, the “information” or “file” as a single entity is in fact nowhere. It does not exist independently from the *process* that recreates it every time a user opens it on a screen.⁶⁵

Computers are useless unless the associated software is loaded onto the hardware. Both hardware and software produce additional digital material that includes, but is not limited to, information such as metadata and computer logs that may be relevant to any given file or document in electronic format.

This involvement of technology and machinery makes electronic information paradigmatically different from traditional information where the message and the medium are one. It is this mediation of a set of technologies that enables data in electronic format – in its basic form, positive and negative electromagnetic impulses recorded upon a medium – to be rendered into human readable form. This gives rise to other differentiation issues such as whether or not there is a definitive representation of a particular source digital object. Much will depend, for example, upon the word processing programme or internet browser used.

The necessity for this form of mediation for information acquisition and communication explains the apparent fascination that people have with devices such as smart phones and tablets. These devices are necessary to “decode” information and allow for its comprehension and communication.

Thus, the subtext to the description of the electronically stored footage which seems to suggest a coherence of data similar to that contained on a strip of film cannot be sustained. The “electronically stored footage” is meaningless as data without a form of technological mediation to assemble and present the data in coherent form. The Court made reference to the problem of trying to draw an analogy between computer data and non-digital information or data and referred to the example of the Word document.⁶⁶ This is part of an example of the nature of “information as process” that

⁶⁴ Burkhard Schafer and Stephen Mason, “The Characteristics of Electronic Evidence” in Mason *Electronic Evidence*, above n 60, at 21–22.

⁶⁵ At 22.

⁶⁶ *Dixon SC*, above n 1, at [31] and [46].

I have described above. Nevertheless, there is an inference of coherence of information in a computer file that is not present in the electronic medium – references to “sequence of bytes” are probably correct once the assembly of data prior to presentation on a screen has taken place - but the reality is that throughout the process of information display on a screen there is constant interactivity between the disk or medium interpreter, the code of the word processing program and the interpreter that is necessary to display the image on the screen.

Underlying the approach of the Supreme Court is an assumption of coherence of digital content – be it described as data or information – sequentiality and identifiability independent of the machine. This assumption is incorrect

B. Inconsistency

The Supreme Court was considering the nature of a digital file as property for the purposes of s 249(1)(a) of the Crimes Act. Thus a digital file as property was limited to that section.

However, the failure of the Court to address the “orthodox view” that there is no property in information creates confusion and inconsistency in the law. For example, the decision of *Oxford v Moss*,⁶⁷ which held that information could not be property for the purposes of a charge of theft, still remains. The Canadian case of *Stewart v R*⁶⁸ dealt with the issue of whether confidential information could be property and the subject of theft. In that case, confidential information was held to be intangible and did not qualify as “anything” under the Canadian statute and was not capable of conversion. That case might still be good authority because of the way in which the Supreme Court limited the definition of a digital file as property to charges under s 249.

The issue of the susceptibility of digital data to remedies such as a possessory lien was dealt with in the case of *Your Response Limited v Data Team Business Media Limited*,⁶⁹ where it was held that digital data could not be the subject of a possessory lien, referring to *OBG v Allen*,⁷⁰ which held that wrongful interference with contractual rights could not constitute the tort of conversion because the tort applied to chattels and not to choses in action.

As matters stood following the Court of Appeal decisions in *Dixon* and *Watchorn*, there was overall consistency in the approach of the law to the issue of property in information and digital data as a form of information. The decision of the Supreme Court muddies the water, holding that digital data is property for a particular section of the Crimes Act, but not for others. This inconsistent approach to property and digital data makes the law unclear and uncertain. The answer to the question “is there property in a digital file?” is “it depends”.

⁶⁷ *Oxford v Moss* (1979) 68 Cr App R 183 (QB).

⁶⁸ *Stewart v R* [1988] 1 SCR 963.

⁶⁹ *Your Response Limited v Data Team Business Media Limited* [2014] EWCA Civ 281.

⁷⁰ *OBG v Allen* [2007] UKHL 21, [2008] 1 AC 1.

C. Procedural Unsoundness

There were aspects of the way in which *Dixon* was heard which cause concern. The problem was partly of Mr Dixon's own making, in that he dispensed with his counsel before the appeal. Consequently, he was not equipped to argue the issue of the nature of property or provide an effective argument to those advanced on the part of the respondent. The report of the case indicated a detailed argument was advanced on behalf of the Crown,⁷¹ addressing issues of some significance for the development of the law.

Given that the decision seems to adopt many of the arguments advanced by the Crown, this commentator is of the view that on a matter as important as a consideration of the nature of property in a digital file, the Court should have appointed *amicus curiae* to provide a measure of balance in the argument.

The second area of concern lies in the way in which the Court took it upon itself to deal with the case of *Watchorn*.⁷² The Court observed that it did not agree that the digital files obtained by the defendant in that case were not property. Mr Watchorn had been convicted at trial on three charges of breaches of s 249(1)(a) but that conviction was set aside and, as has been noted, no alternative charge was substituted.

The Supreme Court observed that it considered that the files were property and that, because the other elements of dishonesty and absence of claim of right were upheld by the Court of Appeal, the conviction entered in the District Court was properly entered.

No opportunity was afforded Mr Watchorn or his counsel to argue this issue, and it appears that the Court embarked upon this discussion to make sure that there was no conflict between its holding in *Dixon* and the decision in *Watchorn*. There should have been an opportunity afforded Mr Watchorn or his counsel to be heard, especially in light of the gratuitous observation that Mr Watchorn had been properly convicted, even although that conviction had been overturned.

VI. UNINTENDED CONSEQUENCES

Even though the decision of the Supreme Court is unsatisfactory for the reasons outlined, the limitation of the definition of property in a digital file for the purposes of s 249(1)(a) should have prevented a degree of "creep" in extending the scope of the definition. That has not proven to be the case and the possible "law of unintended consequences" could well come into play.

⁷¹ *Dixon* SC, above n 1, at 680–682.

⁷² At [54].

A. Expanding Dixon – Ortmann v United States

The decision in *Ortmann v United States*⁷³ was an appeal against the decision of Judge Dawson approving the eligibility for the extradition of Kim Dotcom and his associates.

Briefly put it was necessary for the Court to consider the indictment that had been proffered in the United States and the charges which the accused appellants were to face in that country and determine whether or not they amounted to extraditable offences for the purposes of the Extradition Act 1999.

Gilbert J considered a number of different offences under New Zealand law which were “pathways” to the counts in the indictment alleging conspiracy to commit copyright infringement.⁷⁴ In doing so, the Court considered the applicability of certain offences in the Crimes Act that did not directly address copyright infringement but where the behaviour might include that activity.

A number of pathway offences were considered. One, under s 228 of the Crimes Act, involved the use of a document.⁷⁵ The definition of a document included digital material and was available. Another pathway was available pursuant to s 249(1)(a) of the Crimes Act.⁷⁶ On the basis of the holding by the Supreme Court in *Dixon* the digital files amounted to property as an element of that offence.

Gilbert J also considered the availability of s 240 of the Crimes Act as a pathway offence.⁷⁷ That section creates the offence of obtaining or causing loss by deception. There are four circumstances in which the offence may occur, all of them requiring elements of deception on the part of the perpetrator together with an absence of claim of right.

It was conceded that the element of deception could be made out as could the element of obtaining.

For the offence to be complete, property had to be obtained. Gilbert J held that the copyright protected films in digital file format were property and cited *Dixon*⁷⁸ as his authority.⁷⁹

In this commentator’s respectful view Gilbert J read *Dixon* more widely than was available to him. As has been noted *Dixon* centred around whether or not a digital file was property for the purposes of s 249 of the Crimes Act. The scope of the holding that a digital file is property is limited to the provisions of s 249 of the Crimes Act.⁸⁰ The Supreme Court held thus, and to expand the scope of the finding to include digital

⁷³ *Ortmann v United States* [2017] NZHC 189 [*Ortmann v US*].

⁷⁴ At [57]–[238].

⁷⁵ At [138]–[160] and [220]–[222].

⁷⁶ At [161]–[168] and [226]–[230].

⁷⁷ At [223]–[225].

⁷⁸ *Dixon* SC, above n 1.

⁷⁹ *Ortmann v US*, above n 73, at [225].

⁸⁰ *Dixon* SC, above n 1, at [50]–[51].

files as property for offences other than under s 249 is, in my respectful view, a misinterpretation of *Dixon*.

A consequence of this is that Gilbert J has opened the door to broaden the scope of the concept of digital files as property beyond the limited approach adopted by the Supreme Court.

B. Further consequences: Crimes Act 1961, s 246 (receiving)

One example may be found where the person who accesses a computer system dishonestly and without claim of right, and obtains a digital file containing embarrassing or damaging information. That information, if published, could have significant consequences. The “hacker”, for so he is, puts the information onto a USB stick. The information is delivered to a third party. There are no criminal implications in the hacker giving the third party the USB stick. Property in the USB stick itself and as a medium is validly transferred. What of the digital file on the USB stick? Assume that the third party is aware that the file was obtained dishonestly and by unauthorised access to a computer system.

The question which may need to be asked and answered is whether or not the receipt of the digital file on the USB stick would be sufficient to constitute the offence of receiving by the third party. If the digital file is property distinct from the USB medium, the answer would be in the affirmative.

C. Criminalising intellectual property infringement

Under the law as it stands, copying digital material that is subject to copyright exposes the copier to possible proceedings for infringement⁸¹. Because a digital file may amount to property under Gilbert J’s extension of the holding in *Dixon* it would be open to copyright owners to deploy the provisions of s 249(1)(a) to deal with what would otherwise be copyright infringement in the digital space but which may amount to criminal behaviour.

VII. CONCLUSION

In *Stevens v Kabushiki Kaisha Sony Computer Entertainment Ltd*⁸² at issue was the question of the interpretation of a provision of Australian copyright legislation. The High Court cautioned against courts getting involved in making policy decisions about legislation which was properly the bailiwick of Parliament. The Court observed:⁸³

The Parliament having chosen such an elaborate and specific definition for the key provision of the legislative scheme, a court should pause before stretching the highly specific language in order to overcome a supposed practical problem.

⁸¹ Copyright Act 1994, s 120 et seq.

⁸² *Stevens v Kabushiki Kaisha Sony Computer Entertainment Ltd* [2005] HCA 58; (2005) 224 CLR 193; (2005) 221 ALR 448.

⁸³ At [204].

The Supreme Court in *Dixon* observed in its discussion of the legislative history that Parliament had stepped away from a definition of property that would have included a digital file. That in itself should have sent a message. The Court seems to have decided to embark upon an exercise in expediency and judicial legislation which properly should have been left to Parliament. Whether the unintended consequences and extensions of the decision will eventuate remains to be seen.

CASE NOTE: *POLICE V B* [2017] NZHC 526, [2017] 3 NZLR 203

DAVID HARVEY*

I. INTRODUCTION

Police v Iyer was the first case where judicial consideration was given to the provisions of s 22 of the Harmful Digital Communications Act 2015 (HDCA, or the Act) — which creates the offence of causing harm by posting a digital communication.¹

The decision, delivered on 28 November 2016, was a ruling on a submission of no case to answer. The prosecution under the HDCA was dismissed. But the case is significant for the detailed analysis and interpretation of the provisions of the section and should provide some guidance for the future. It was also significant for another reason. It became the first case dealing with the HDCA to receive appellate consideration.

The Police appealed to the High Court against the decision to dismiss, arguing that the District Court Judge set the threshold for harm or serious emotional distress too high, and that his finding that there was an absence of evidence of actual harm arose as a result of an incorrect evaluation of the information that was placed before him.²

In this article, I shall consider first the facts of the case and proceed to briefly consider the lower court decision. I shall then move to consider the High Court approach before embarking upon a discussion of the issue of harm under s 22, and the care that must be taken in assessing whether or not a communication was causative of harm.

II. THE FACTS³

The respondent and complainant were married but had separated in May 2015. The complainant obtained a protection order against the respondent which was made final in September 2015. The events that were the subject of the charge occurred in August 2015.⁴

The complainant and the respondent were technologically literate. They used smartphones and the Internet. The defendant had access to the complainant's whereabouts by tracking her iPhone and also had access to her iCloud storage. For her part, the complainant — after the separation — set up a page on an online dating service upon which she posted photographs of herself.

* District Court Judge (retired)

¹ *Police v Iyer* [2016] NZDC 23957 [*Iyer*].

² Appellant's submissions on appeal (28 February 2017) at [4].

³ The facts are taken from the decision of Downs J in *Police v B* [2017] NZHC 526, [2017] 3 NZLR 203 at [3]–[6] (*B*) and supplemented by material from the decision of Doherty J in *Iyer*, above n 1.

⁴ *Iyer*, above n 1, at [5]–[10]; *B*, above n 3, at [3].

Early in August the complainant started dating. The respondent was aware of this and communicated with both the complainant and her date, making it clear that he knew where they had been and what they had been doing.

Later that month the complainant and the respondent met. He asked her to cancel the protection order. He also advised that he had a number of photos of her and that he would post these online if she did not stop seeing other men. The complainant was scared, anxious and felt that she was being blackmailed.

The event which gave rise to the charge occurred on 29 August. The attention of J, a friend of the complainant, was drawn to a link to a Facebook page which contained photos of the complainant in a state of semi-undress. J took a screenshot which she sent to the complainant. The complainant recognised the images as photos she had taken of herself after she had separated. She was unaware how the respondent obtained them. She was upset and made a complaint to the Police.⁵

The respondent admitted posting the image and creating the Facebook page when questioned by the Police. He was subsequently charged with an offence against s 22 of the Harmful Digital Communications Act 2015.

III. THE DISTRICT COURT DECISION

Judge Doherty identified the elements that had to be established under s 22. These are:⁶

- (a) that the respondent posted a digital communication;
- (b) that the communication was posted on or about 29 August 2015;
- (c) that the communication was posted by the respondent with the intention that it would cause harm to the complainant;
- (d) that the posting of the communication would cause harm to an ordinary reasonable person in her position;
- (e) that posting the photographs did cause harm, being serious emotional distress to the complainant.

There was little difficulty in finding that in creating the Facebook page and including the photos of the complainant the defendant posted a digital communication.

The Judge emphasised the expansive definition of a digital communication as any form of digital communication, and noted that the second part of the definition focused upon the nature of the content. A digital communication includes a photo or picture. In the definition of posting, again, the definition was wide and sufficient to include uploading a picture to a Facebook account.⁷

The Judge considered the act of posting in reference to the nature of the material posted. In this case he held that the photographs posted constituted intimate visual recordings, created by the complainant for personal use or within a confined setting

⁵ *B*, above n 3, at [4]–[6].

⁶ *Jyer*, above n 1, at [21].

⁷ At [22]–[29].

such as a dating website. They were taken within a bedroom setting where there would be an expectation of a degree of privacy. The exposure of body parts — in this case partially exposed breasts — and undergarments brought the photographs within the scope of the definition.⁸

The Judge considered the legislative history and the genesis of the use of the term “digital communication” and in particular the discussion of the distinguishing features of digital communications, referring especially to the digital paradigm property of exponential dissemination: the “capacity to spread beyond the original sender and the recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing”.⁹ There was no issue taken on appeal with the Judge’s approach or his finding.

The timing of the post was an issue. This was because it was argued for the defendant that there was a lack of certainty as to whether the communication was posted before or after the commencement of the HDCA. This element was resolved on the facts, and it was found that the communication in question was posted between 5 August and 29 August 2015, after the commencement of the Act.¹⁰

An interesting technical issue was raised by the respondent in that he claimed to the police that the Facebook page that he had created was “deactivated” after its creation. However, he claimed that Facebook reactivated the page after 28 days. This could give rise to the conclusion that the account had been created before the Act came into force on 1 July 2015.¹¹ No evidence was given to support such a contention, and Judge Doherty observed that expert evidence would be needed to prove or disprove the “reactivation” claim.¹²

The Judge resolved the problem by observing that the complainant and respondent had met sometime between 5 and 29 August. At that meeting the respondent threatened to post pictures of her online, allowing the Court to infer that the posting of the material took place after the meeting. The Judge found it implausible that the respondent would threaten to do something he had already done.¹³

Although this argument was raised as a timing issue, the suggestion that a deactivated or disabled Facebook account may be reactivated at the behest of Facebook raises a possible issue as to the intervention of a third party in the chain of causation leading to posting material. If material has been posted on a social media site and then taken down or disabled, the act of posting at that time at the instigation of the individual

⁸ *Jyer*, above n 1, at [30]–[32]. This discussion of the nature of the photographs is not so relevant to the issue of posting a digital communication – although intimate visual recordings fall within that definition – as it is to the element of harm and the likely response of the complainant to seeing such photographs available online.

⁹ At [39].

¹⁰ At [10]–[11].

¹¹ At [46].

¹² At [47].

¹³ At [49].

would be complete. If, after the material had been taken down, it was reactivated and therefore reposted, such an action would not be at the behest of the original poster but would be the actions of a third party.

It is possible for an account holder to disable or deactivate a Facebook account. In such a case the reactivation of the account will take place at the behest of the account holder.¹⁴ Facebook will not unilaterally reactivate the account. Facebook may deactivate the account for a number of reasons including a breach of terms and conditions, impersonation or engaging in conduct that is not permitted. However, reactivation of the page requires an application by the account holder.¹⁵

Judge Doherty went on to consider the issue of intention. Liability requires intent to cause harm to an identifiable victim. Harm is defined as "serious emotional distress".¹⁶ The relevant harm may include a condition short of a psychiatric illness or disorder, or distress that requires medical or other treatment or counselling.¹⁷ In considering the type of intent required, Judge Doherty referred to the need to protect free expression under s 14 of the New Zealand Bill of Rights Act 1990.¹⁸

The Judge was satisfied that there was evidence of the requisite intent on the part of the respondent. It was clear that the breakdown of the relationship was accompanied by bitterness on his part. The Judge accepted the evidence of the discussion that the complainant had with the respondent in which he threatened to post pictures of her online. There was sufficient evidence to support the prosecution contention that the respondent wanted to dissuade the complainant from associating with other men. There was also available the suggestion that the respondent wished to inflict feelings of shame, fear and insecurity on the complainant — forms of emotional distress that would have allowed him to achieve his goal.¹⁹ It was, however, open to the defence to lead evidence that the respondent was not motivated to control the complainant's life, or that he could have achieved his motive without inflicting serious emotional distress.

The Judge then moved on to consider the evaluative test that the Court must apply to determine whether the communication was harmful pursuant to s 22(1)(b) of the Act. This is a mixed objective/ subjective test. It is necessary for the prosecution to prove that the communication would cause harm to an ordinary reasonable person (the objective limb) in the position of the complainant (the subjective limb).

Section 22(2) sets out a non-exhaustive list of factors which the Court may consider. These are:

¹⁴ "How to Recover a Disabled Facebook Account" <<http://www.wikihow.com/Recover-a-Disabled-Facebook-Account>> (last accessed 16 June 2017).

¹⁵ Facebook Help Center "My personal Facebook account is disabled" <<https://www.facebook.com/help/103873106370583>> (last accessed 16 June 2017).

¹⁶ Harmful Digital Communications Act 2015, s 4.

¹⁷ Iyer, above n 1, at [60].

¹⁸ At [59].

¹⁹ At [62].

- (a) the extremity of the language used;
- (b) the age and characteristics of the victim;
- (c) whether the digital communication was anonymous;
- (d) whether the digital communication was repeated;
- (e) the extent of circulation of the digital communication;
- (f) whether the digital communication is true or false;
- (g) the context in which the digital communication appeared.

The Judge considered that factors (b), (c), (d), (e) and (g) were relevant. He concluded that the complainant was, in fact, the individual who was the target of the communication. It was also a relevant characteristic that she was the estranged wife of the defendant. The context of the relationship was likewise important. There was a protection order in place and it was clear from the respondent's police interview that he sought to control the complainant's behaviour. It was against this context that the communication should be viewed.

As Judge Doherty explained, the digital communications represented "not only an attempt to embarrass Mrs Iyer, but to control her through emotional manipulation".²⁰ Thus, feelings such as anxiety, depression or trauma would approach the serious emotional distress threshold. The complainant's characteristics together with the context of the communication would objectively be capable of causing serious emotional distress.²¹

The Judge also considered the aspect of anonymity or, in this case, pseudonymity, in that the Facebook page had been created in a name very similar to that of the complainant.²² The complainant and her supporting witness to whom the respondent had sent a message quickly concluded that it was, in fact, he who had created the page. That was a factor that the Judge took into account.²³

Although the post was not "repeated" in the sense that a deluge of SMS text messages was received, the Judge recognised that a post on a platform such as Facebook had the potential to be accessed many times so that the effect of the post was ongoing. In this discussion, Judge Doherty tacitly recognised another quality of information in the Digital Paradigm, that of "information persistence", which has: (a) been described as "the document that does not die"; and (b) means that the repetition and circulation of a digital communication are matters which may be taken into account in determining whether a post would cause harm²⁴

Information persistence, of course, goes beyond the appearance of information on one platform but recognises that the information may be redistributed by other users

²⁰ At [66].

²¹ At [66].

²² Harmful Digital Communications Act, s 22(c).

²³ *Iyer*, above n 1, at [67].

²⁴ Harmful Digital Communications Act, s 22(2)(d) and (e). For a discussion of the qualities of information in the Digital Paradigm see David Harvey *Collisions in the Digital Paradigm: Law and Rulemaking in the Internet Age* (Hart Publishing, Oxford, 2017) at 28 [*Collisions in the Digital Paradigm*].

to other locations, making it extremely difficult if not impossible, to eliminate the information altogether. However, in this context, the complainant had lost control of the information — that is, her pictures, — and as long as the information remained on Facebook it was accessible by other Facebook users. As it happens, a complaint was made to Facebook and the “false” page was subsequently disabled.

The potential disseminatory quality²⁵ of the Digital Paradigm was recognised by the Judge in his consideration of the extent of circulation of the digital communication — his Honour stating that “the nature of digital communications is that they may be disseminated widely.”²⁶ In this case, there was no evidence of widespread circulation but of the potential for dissemination. There was no evidence that the post was publicly available or in fact was accessed by anyone else, and so the audience to whom the post was communicated was small.

On the basis of these factors the evaluation of the communication was that, by a narrow margin, it would cause harm to an ordinary reasonable person in the position of Mrs Iyer. The Judge was at pains to observe that this was a finding on the basis of the prosecution evidence only, and that the evaluation could be capable of refutation by the defence.²⁷

What was critical in the evaluation was: the context of the relationship; the use of the digital communication by the respondent to exert power over his wife (with accompanying threats to do so); and the fact that, by posting the communication he did, the respondent suggested that he had access to the complainant’s intimate details and data.

The final element that had to be proven was whether or not harm, in fact, had actually been suffered. Although the prospective evaluation test in s 22(1)(b) involves a consideration of the potential for harm based upon the objective\ subjective test, it is necessary for the complainant to have actually suffered harm.

The Judge found that the complainant was frustrated, anxious, angry and very upset. She considered taking time off work but did not, in fact, recall that she had done so. Although an independent witness observed that the complainant was depressed, the Judge noted that this was not a clinical diagnosis. Although the evidence pointed to some degree of emotional distress, the Judge was not satisfied that it had reached the threshold required.²⁸ Accordingly, proof of actual harm and its immediacy to the communication was not proven.²⁹

Significantly the Judge found that the prosecution had not led cogent evidence on this last element, pointing out that there should have been more detailed and specific evidence from the complainant as to her reactions, feelings or physical symptoms and

²⁵ For a discussion of the quality of exponential dissemination, see *Collisions in the Digital Paradigm*, above n 24, at 30.

²⁶ *Iyer*, above n 1, at [69].

²⁷ At [70].

²⁸ At [52]–[60].

²⁹ At [73].

their duration. He observed that an alternative might have been to call expert evidence.

This Judge's conclusions on this final matter became the central issue on appeal.

IV. THE CASE ON APPEAL: *POLICE v B* [2017] NZHC 526 — BACKGROUND CONSIDERATIONS

In the High Court, Downs J considered the nature of the legislation and its objectives, observing that there were both civil and criminal remedies provided. His Honour noted the provisions of s 22 and the elements of the offence it created.³⁰

Downs J likewise noted the work of the Law Commission, which advocated criminalisation of digital messages that: (a) would cause substantial emotional distress and that were grossly offensive; or (b) were of an indecent, obscene or menacing character; or (c) were knowingly false. The maximum penalty proposed was three months' imprisonment.

The legislature provided for a more significant penalty of a maximum of two years imprisonment for an offence against s 22, and modified the test for a digital communication that fell within the ambit of the section.

The reference to the content of the communication was removed. Thus Downs J described the offence as content neutral. All that was necessary was that the post cause harm.

V. THE SIGNIFICANCE OF HARM

Harm was pivotal to the Law Commission approach, and there was a recognition in the Ministerial briefing paper that there was a threshold which, when communications crossed it, justified the intervention of the law.³¹ Remedies for emotional distress were not unknown to the law, and the question was whether a threshold of seriousness had to be exceeded. The Law Commission classified this as substantial emotional distress. The legislation described it as serious emotional distress — a slightly lower threshold.

How should this be proven? The Law Commission did not see great difficulties in this regard:³²

Proof of significant emotional distress may be thought to be problematic. Usually it will be sufficiently demonstrated by the nature of the communication itself: much of the material coming before the tribunal is likely to be of such a kind that it would clearly cause real distress to any reasonable person in the position of the applicant. This blended objective/subjective standard is reflected in the Harassment Act which requires, as a condition of making a restraining order, that the behaviour causes distress to the applicant, and is of such a kind that would it cause distress

³⁰ *B*, above n 3, at [12]–[25].

³¹ New Zealand Law Commission *Harmful Digital Communications* Ministerial Briefing Paper (August 2012) <<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20MB3.pdf>> (last accessed 16 June 2017) at [1.27] ff [Law Commission Briefing Paper].

³² Law Commission Briefing Paper, above n 31, at [5.56] (citations omitted).

to a reasonable person in the applicant's particular circumstances. The Privacy Act requirement that an interference with privacy must cause damage including 'significant humiliation, significant loss of dignity or significant injury to the feelings of the complainant' appears not to have been problematic.

VI. DEFINING HARM³³

Downs J went on to make five observations about the way in which harm had been defined as serious emotional distress.

First, the definition was exhaustive. The Judge observed that the Act was concerned only with serious emotional harm.

Secondly, minor emotional distress was not covered – indeed all distress short of serious emotional distress fell outside the ambit of the Act. The level of emotional distress had to be serious. The intentional causation of serious emotional distress by posting a digital communication was criminalised and the threshold had been set at the serious level to give recognition to New Zealand's ongoing commitment to freedom of expression. The Judge also observed that the words "serious emotional distress" stood alone. They were not equated with mental injury or an identifiable psychological or psychiatric condition.³⁴

Thirdly, Downs J observed that the determination of serious emotional distress is part fact, part value judgement. He observed that Parliament had set out a number of factors that he described as permissive in the context of whether or not a post would cause harm to an ordinary reasonable person in the position of the complainant.³⁵ These factors appear in s 22(2) and provide guidance in evaluating whether or not a communication may potentially be harmful pursuant to s 22(1)(b).

Fourthly, Downs J set out factors or indicia of the nature of emotional distress — that is, its intensity, duration, manifestation, and context (including whether a reasonable person in the complainant's position would have suffered serious emotional distress). These indicia appear to reflect the matters contained in s 22(2) and which are relevant to a consideration of the s 22(1)(b) evaluative element of the offending.

Finally, his Honour considered that little assistance could be derived from reference to a dictionary or thesaurus in interpreting or applying the phrase 'serious emotional distress'. Indeed, he observed that in *StockCo v Gibson*³⁶ the Court of Appeal noted that statutory words "are everyday terms having common meaning and are reasonably clear in their own right. The hard part was applying them to the facts of the case".³⁷ Little was to be gained by using synonyms of statutory language. In addition, Downs J observed that it was "a dangerous method of statutory interpretation to substitute

³³ At [21]–[25].

³⁴ In this respect, Downs J endorsed the observations of Doherty DCJ. See *B*, above n 3, at [22].

³⁵ *B*, above n 3, at [23].

³⁶ *StockCo v Gibson* [2012] NZCA 330, (2012) 11 NZCLC 98-010 at [44].

³⁷ *StockCo v Gibson*, above n 36, at [44].

words which the legislature had not chosen”, referring to the warning of Cooke P in *Telecom Corporation of New Zealand v Commerce Commission*.³⁸

Reference to broadly similar offence provisions in other jurisdictions was likewise considered of little assistance, as was elaboration upon or truncation of the statutory language. The phrase means what it says.

*Definitional Substitution*³⁹

It was argued for the Crown that, in fact, Judge Doherty had engaged in substituting different types of emotional distress for the statutory language, rather than applying the statute itself. As discussed above, that approach was rejected by Downs J. Likewise, Downs J rejected the suggestion that the District Court had done just that. His Honour observed that the Judge had noted that serious emotional distress did not require mental injury or a recognised psychiatric disorder, and was aware of the importance of balancing the serious effects of calculated emotional harm with the importance of preserving free speech.

What Judge Doherty had done was simply make some observations about the types of distress that the complainant had suffered.⁴⁰ In addition, his Honour had clearly observed that, although these exemplifications amounted to emotional distress, the serious threshold had not been reached.

Downs J then noted that he reached a different conclusion to that of the lower Court. He observed that Judge Doherty considered that more detailed evidence was required, but this was because he had dealt with the various descriptions of how the complainant felt in isolation. By contrast, Downs J considered that the evidence should be assessed in its totality.⁴¹

VII. DEALING WITH EVIDENCE OF ACTUAL HARM

Downs J noted that many of the descriptors of emotional distress were not challenged nor scrutinised in cross-examination. The use of terms like “shock” and “depressed” could well be manifestations of what Downs J described as “the age of hyperbole”⁴² (as opposed to a term’s medical meaning). Thus, although caution must be adopted when considering the lay use of such terms, his Honour concluded that the evidence did support a finding that the complainant suffered serious emotional distress. The emphasis was upon *emotional* distress rather than physical harm.⁴³

³⁸ *B*, above n 3, at [25], quoting *Telecom Corporation of New Zealand v Commerce Commission* [1992] 3 NZLR 429 (CA) at 434.

³⁹ At [32]–[34].

⁴⁰ At [34].

⁴¹ At [35].

⁴² At [36].

⁴³ At [36].

Taken cumulatively, the indicia of emotional distress Downs J identified — intensity, duration, manifestation and context — together with: (a) the threats made by the respondent; (b) the intimate nature of the photos; and (c) links to pornographic sites that had been included on the Facebook page, meant that the emotional response suffered was consistent with how a reasonable person would feel in circumstances analogous to the (non-exclusive) matters listed in s 22(2).⁴⁴

Downs J held that Judge Doherty erred by failing to consider the evidence in its totality and without reference to context. The matter was therefore returned to the District Court for further findings and disposition.

VIII. COMMENTS

A. Proving Harm

As the judgement of Downs J makes clear, proof of harm requires a consideration of the evidence in its totality. Given that emotional harm has significant subjective features, there must be a careful critical evaluation of the evidence and a proper articulation of the circumstances relied upon by the fact finder.

A difficulty arises regarding evidence in what Downs J described as the age of hyperbole. At a time where words such as “outraged”, “infuriated” “indignant” and “offended” are bandied about on social media with apparent abandon, one wonders whether or not the currency and strength of the language has been somewhat devalued. Thus self-analytical articulation of feelings or responses must be subjected to careful and critical scrutiny. Indeed, s 22 is a criminal provision that has an impact upon freedom of expression.

The element contained in s 22(1)(b) specifically provides for a mixed objective/subjective test. The problem arises in the consideration of proof of *actual* harm. How is this established? Downs J has helpfully identified the four features: intensity; duration; manifestation and context⁴⁵ — words that convey those factors referred to in s 22(2) which may be taken into account in determining whether a post *would* cause harm.

But the enquiry into the actual harm element under s 22(1)(c) must be carried out separately from what could be called the “likelihood evaluation” provided in s 22(1)(b) (as I shall discuss shortly). Is Downs J suggesting that the causation issue for the actual harm element under s 22(1)(c) can be the subject of a cross-check as to how a reasonable person might feel in the circumstances?⁴⁶ This seems to suggest that the s 22(2) factors may be taken into account in the actual harm evaluation.

With respect, it seems that s 22(1)(c) addresses the *particular* complainant and whether the communication cause harm to that individual, rather than the possibility

⁴⁴ At [38]–[42].

⁴⁵ At [24].

⁴⁶ The element set out in s 22(1)(b).

of harm to a reasonable person. It is suggested that courts must be careful not to conflate the enquiries under ss 22(1)(b) and 22(1)(c). The result could be that a finding that there is a likelihood of harm under s 22(1)(b) could lead automatically to a conclusion that there must be actual harm to the particular complainant under s 22(1)(c).

B. Communications Evaluation

Do the provisions of s 22(2) apply only to s 22(1)(b) — likelihood of harm — but not to s 22(1)(c) — actual harm? An element of the offence under s 22 is the necessity for a consideration of whether or not the posting of the communication would cause harm to an ordinary reasonable person in the position of the victim, the target of the posted digital communication.⁴⁷

Section 22(2) sets out a non-exhaustive list of factors that may be taken into account in determining whether a post would cause harm. These factors, as identified by Downs J are listed above but bear restating:

- (a) the extremity of the language used;
- (b) the age and characteristics of the victim;
- (c) whether the digital communication was anonymous;
- (d) whether the digital communication was repeated;
- (e) the extent of circulation of the digital communication;
- (f) whether the digital communication is true or false;
- (g) the context in which the digital communication appeared.

Items (a) and (f) refer to the content of the communication. Item (b) addresses particular circumstances of the victim. Items (c)–(e) address some of the technical realities of the online environment, that is: the ability to mask identity; the frequency of the communication; and whether it was subject to exponential dissemination (went viral). Item (g) is something of a catch-all, but an important one. It allows for a consideration of the surrounding circumstances as a placeholder for the communication.

The nature of the subjective arm of the test is quite expansive because it allows the position of the victim to colour the objective arm. The Court is asked to decide if a reasonable person standing in the shoes of the victim would be harmed. Thus the Court may embark upon the objective enquiry and then factor in the circumstances as seen from the perspective of the victim. Reasonableness may, therefore, be judged in light of the victim and of his or her age and characteristics (including what they were experiencing at the time, particular vulnerability, and sensitivities or life circumstances). For example, if the court is provided with evidence that shows a communication is part of a concerted strategy to attack the victim, then it can rightly decide that a communication is harmful when it might not be so minded if there were no such concerted strategy (and thus the communication was a single or isolated one).

⁴⁷ Harmful Digital Communications Act, s 22(4).

It must be emphasised that the enquiry under s 22(1)(b) does not involve a finding of actual harm but is evaluative: *would* the communication cause harm. It implies likelihood.

This evaluative or prospective process is referred to in s 22(2) where, it will be remembered, the non-exclusive list of factors is set out. Are these factors applicable, as hinted by Downs J, to the enquiry as to actual harm?⁴⁸ The language of s 22(2) allows the Court to take into account the factors “in determining whether a post *would* cause harm”. Thus it would appear that the factors can be utilised only for determining the prospective element. The use of the word “would” in s 22(2) links the application of that section to s 22(1)(b), where the same word is used. It is therefore referring to a prospective evaluation. The language does not say “in determining whether a post caused harm”, which would catch s 22(1)(c).⁴⁹ But this may be a somewhat restrictive approach to the interpretation of the statute.

Such a restrictive approach would mean that the Court is unable to take into account the circumstances set out in s 22(2). Although those factors are not expressly available, certainly the surrounding facts and context would be important in assessing whether or not harm was actually caused by the post. The causative effect of the post could not be viewed in a vacuum or in isolation. Although s 22(1)(c) requires that posting the communication caused the harm, causation cannot be limited to a consideration of the post alone. The factors in s 22(2) could be used as part of the background factual matrix to assess whether actual harm had been caused. The factors may be part of the evidence necessary for the Court to conclude beyond a reasonable doubt whether a person had been harmed.

For example, if the victim was a child, such a factor would colour the fact-finder’s determination of whether a post would be harmful under s 22(1)(b). That factor would also be taken into account by the Court to assess actual harm under s 22(1)(c). If the child is crying and unable to sleep, the court may be more minded to consider serious emotional distress. However, for an adult, something more may be required — such as evidence of behavioural change, unexplained and spontaneous weeping, or time away from work. Such matters may or may not be the subject of expert evidence.

It may well be that the communication is innocuous. But it might, on the other hand, be the final element of a chain of circumstances leading to the post and the consequence. To understand that, it would be necessary for the Court to understand the background and the context, to assess whether the posted communication actually caused harm. The communication in isolation may be nothing. In context, it may take on an entirely different meaning.

This does not mean that one immediately translates the potential for harm as evaluated in s 22(1)(b) to proof of actual harm under s 22(1)(c). It may well be that, at the time of the communication, the victim was in a particularly robust frame of mind and able to dismiss the post. That means that there must be evidence viewed in

⁴⁸ *B*, above n 3, at [27].

⁴⁹ But which might not catch section 22(1)(b).

totality, as stated by Downs J, that proves serious emotional distress actually happened to the “beyond reasonable doubt” level.

The evaluative test and the subsequent enquiry into actual harm may be something that could work to the benefit of the defence. A defendant may wish to bring background facts and context before the Court where there may have been “tit for tat” exchanges. The “flame war” — a mutual exchange of abusive posts — is a phenomenon well known to many Internet users. Context, in such circumstances, may thus be of assistance to the defence.

It might well be that, viewed objectively, an abusive Twitter exchange was harmful. However, this could be modified when the fact finder takes into account contextual factors such as the robustness of exchanges, the apparently thick skin of the participants, and the propensity of one or both of the participants to engage in this type of exchange. These matters could also be taken into account in determining whether there was actual harm, but care needs to be taken to avoid conflating the s 22(1)(b) test with that required under s 22(1)(c). For example, evidence of the victim’s previous behaviour on Twitter may be relevant to an assessment of whether, in the instant case, evidence of her being upset by something posted on Twitter really caused her harm.

The temptation might be for the Judge to apply a “he who lives by the sword dies by the sword” approach, suggesting that an abusive contributor to social media should not complain or claim serious emotional distress when the tables turn. The difficulty with that approach arises where an aggressive social media contributor becomes the target of a sustained and brutal torrent of social media abuse. The serious emotional distress arising from such an incident is no less real or damaging for that person than for anyone else.

C. Downstream Consequences

Harm underpins the entire structure of the Harmful Digital Communications Act, and some of the remarks of Downs J are of assistance in how to evaluate and consider harm (especially within the civil enforcement regime). The analysis of harm contained at [21]–[25] of the High Court decision — and particularly the matters to be taken into account in assessing harm or serious emotional distress — will be of considerable assistance to Netsafe in carrying out its tasks as the “Approved Agency” under s 7 of the HDCA.⁵⁰ It will likewise assist the District Court when called upon to consider applications for orders pursuant to ss 18 and 19.

One matter that was absent from the consideration undertaken by Downs J was any direct reference to the “communication principles” contained in s 6 of the Act (other than a mention at [14]). Nor was there a detailed consideration of any Bill of Rights

⁵⁰ Harmful Digital Communications Act, s 7. Pursuant to s 8 of the Harmful Digital Communications Act, the role of the Approved Agency — among other matters — includes: (a) advising on steps that individuals can take to resolve a problem; (b) receiving, investigating and attempting to resolve complaints where harm has been caused; and (c) supplying education and advice regarding policies about online safety and conduct on the Internet.

Act implications. It may well be that cases in the future will need to consider these aspects, especially the applicability of a breach of the communication principles.

A breach of a communication principle is critical in considering an application under ss 18 and 19, but s 6 makes it clear that in performing functions or exercising powers under the Act the courts must take account of the communications principles.

In the case under appeal, it could well have been noted that: (a) there was disclosure of sensitive personal facts about the complainant (the photographs);⁵¹ (b) the communication was (possibly) grossly offensive to a reasonable person in the position of the affected individual;⁵² (c) the digital communication was indecent;⁵³ and (d) the digital communication should not make a false allegation.⁵⁴ Although Downs J gave examples of the communication principles, none of them were specifically tied to the facts in this case.⁵⁵

Because the factors in s 22(2) are non-exclusive, it may be that, in evaluating the potential harm of the communication, a Court could derive some assistance by considering whether there has been a breach of a communication principle or principles.

IX. CONCLUSION

The decision of Downs J is helpful. It offers guidance on some of the parameters that may be taken into account when assessing harm. It makes it clear that the totality of circumstances must be taken into account when considering both the likelihood and actuality of harm.

The Judge was careful to ensure that his observations on harm were general. His Honour's preference to avoid the thesaurus approach recognises the almost infinite variety of human circumstances. Providing examples that were too specific could likewise be seen to have a restrictive effect.

Does the decision definitively answer the question: "what constitutes serious emotional distress?" No, but it provides signposts for the road that advisers and factfinders must travel. As is so often the case in the law, what amounts to serious emotional distress depends upon the circumstances. As Justice Potter Stewart of the United States Supreme Court said when trying to define pornography: "I know it when I see it".⁵⁶

⁵¹ Section 6(1), Principle 1.

⁵² Section 6(1), Principle 3.

⁵³ Section 6(1), Principle 4.

⁵⁴ Section 6(1), Principle 6 (associating the complainant with a Facebook page that was not hers).

⁵⁵ The examples involved disclosing sensitive personal facts about an individual, being threatening, intimidating, menacing, indecent or obscene, or harassing an individual. *B*, above n 3, at [14].

⁵⁶ *Jacobellis v Ohio* 378 US 186 (1964).

X. POSTSCRIPT

While this article was being considered for publication, the case came again before Judge Doherty on 24 May 2017.⁵⁷ No evidence was called for the defence and the Judge had to consider whether the evidence satisfied him beyond a reasonable doubt that actual harm was caused by the posting of the digital communication.

Judge Doherty noted that the specific evidence of the effects of the posts had to be considered against a background of a marriage breakup and the interactions and conversations that had occurred since then.⁵⁸

He reviewed the evidence of the complainant and her friend, which was largely unchallenged.⁵⁹ He found that the complainant suffered the emotional reactions of anger, frustration and anxiety, together with a degree of emotional distress.⁶⁰ However, there was an absence of elaboration of these reactions.⁶¹ There was likewise little or no evidence of the intensity or duration of these reactions.

The Judge noted that he had considered the evidence collectively and cumulatively.⁶² He was satisfied that there was evidence of emotional distress. He was not satisfied that the prosecution evidence established that the emotional distress suffered was "serious".⁶³

Accordingly, the charge was dismissed.

⁵⁷ *Police v Iyer* [2017] NZDC 9627.

⁵⁸ At [18].

⁵⁹ At [19]–[27].

⁶⁰ At [29].

⁶¹ At [29].

⁶² At [32].

⁶³ At [32].

CASE NOTE: EVERY SILVER LINING HAS A CLOUD — THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE IN CIVIL PROCEEDINGS: *MARWOOD V COMMISSIONER OF POLICE* [2016] NZSC 139, [2017] 1 NZLR 260

SCOTT OPTICAN*

I. INTRODUCTION

Section 30 of the Evidence Act 2006 (the Act) codifies New Zealand's rule for the exclusion of improperly obtained evidence in a criminal trial. Pursuant to s 30(5), "improperly obtained" evidence is real or confessional proof secured by police (or other state agents) either: (a) illegally; (b) unfairly; or (c) in violation of the New Zealand Bill of Rights Act 1990 (NZBORA). Whenever evidence has been obtained "in consequence of" (s 30(5)) one or more of these improprieties (whether directly or derivatively), s 30(2)(b) requires a court to determine whether exclusion of the material is or is not a proportional response to the police transgression at issue in the case. To make this determination, a judge must "give appropriate weight to the impropriety and also take proper account of the need for an effective and credible system of justice" (s 30(2)(b)) — a balancing process based on a number of (non-exclusive) factors set out in s 30(3). The judicial decision to exclude or to admit improperly obtained evidence will result from whatever proportionality assessment is reached.

A voluminous body of case law and academic writing exists regarding the interpretation and application of s 30.¹ However, in *Marwood v Commissioner of Police* (*Marwood*),² the Supreme Court dealt with a matter that had never been comprehensively examined in any previous consideration of the exclusionary rule. That is, since s 30 applies only to a "criminal proceeding" (s 30(1)), does a court have the jurisdiction to exclude improperly obtained evidence in a *civil* case?

II. FACTS & PROCEDURAL HISTORY

A. Facts

Marwood involved a police search of the defendant's home pursuant to a search warrant. The search uncovered evidence of a cannabis cultivation and selling operation, together with the theft of electricity (the crimes with which Marwood was eventually charged). However, in the course of criminal proceedings in the District Court, Marwood successfully challenged the validity of the warrant used to justify the

* Faculty of Law, The University of Auckland.

¹ See generally Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at [EV30.01] et seq [Mahoney and others *Act and Analysis*]. See also Scott Optican "The Supreme Court and the Law of Evidence" in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) at 426-429; Scott Optican "*Hamed, Williams* and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s 30 of the Evidence Act 2006" [2012] NZ L Rev 605 (Optican *Hamed*).

² *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 (*Marwood* SC).

search. After reviewing the police application for the search warrant, the District Court judge found that it was deficient. The warrant was based on an anonymous tip that, in addition to being conclusory, established “a suspicion of offending only”.³ Moreover, police had made no effort to validate the “reliability of the information”.⁴ Taking into account the relevant factors under the s 30 proportionality-balancing test, the judge excluded from the defendant’s trial the drug dealing material found in his home. As a result of that ruling, there was insufficient evidence for the Crown to proceed and Marwood was discharged.

B. High Court Decision

Following the dismissal of the underlying criminal prosecution, the Commissioner of Police commenced a High Court civil forfeiture action against Marwood under the Criminal Proceeds (Recovery) Act 2009 (the CPRA). Pursuant to the CPRA, a police application for civil forfeiture is independent of the initiation of, or result reached in, any criminal case.⁵ Nonetheless, the claim against Marwood sought profits resulting from the “significant criminal activity” at his residence, and was “largely based on the evidence which was excluded in the [earlier] criminal proceedings”.⁶ Accordingly, in a pre-trial motion heard by Cooper J, Marwood argued that “the evidence obtained as a consequence of the search should be excluded for the purposes of the application under the [CPRA] just as it was in the criminal case”.⁷

While not disputing that the evidence had been improperly obtained, the Commissioner argued that “by restricting s 30 of the Evidence Act to criminal proceedings, Parliament intended not to allow the remedy of exclusion to be applied in civil forfeiture proceedings”.⁸ Cooper J disagreed. Examining the High Court judgment in a 2015 review of current evidence cases, I explained his Honour’s decision as follows:⁹

Despite Parliament’s supreme law-making role, in the 2012 judgment of *Fan v R*, the Court of Appeal held that, even where evidence had not been “obtained” (s 30(5)(a)) as a result of improprieties committed by official actors, the common law discretion to exclude evidence — on any general ground that it would operate unfairly in a criminal proceeding — had survived the enactment of s 30.¹⁰

Taking such approach one step further — in the recent decision of *Commissioner of Police v Marwood* — the High Court cited *Fan* for the equally controversial proposition that a “Court may supplement the Evidence Act’s exclusionary provisions, in an appropriate case, so as to do justice

³ *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 at [8] (*Marwood CA*).

⁴ At [8] (citation omitted).

⁵ Criminal Proceeds (Recovery) Act 2009, ss 15–16.

⁶ *Marwood SC*, above n 2, at [2].

⁷ *Commissioner of Police v Marwood* [2014] NZHC 1866 at [3] (*Marwood HC*).

⁸ At [19].

⁹ Scott Optican “Evidence” [2015] NZ L Rev 473 at 524–525.

¹⁰ *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29 at [44]–[46]. See Mahoney and others *Act and Analysis*, above n 1, at [EV30.01(1)]. For criticism of this aspect of *Fan*, see Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 239–241; Law Commission, *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [2.43]–[2.49].

in cases not directly provided for by the Evidence Act”.¹¹ As a result, Cooper J relied on various provisions of the Act and the [NZBORA] to hold that jurisdiction existed to exclude — in *civil* forfeiture proceedings brought under the Criminal Proceeds (Recovery) Act 2009 — evidence of drug dealing previously excluded in the District Court *criminal* case giving rise to the forfeiture claim (a s 30 ruling, based on an unreasonable police search of the defendant’s home in breach of s 21 of the Bill of Rights, that led to dismissal of the underlying criminal charges against the accused).

While noting that the proportionality-balancing test did not specifically apply to civil forfeiture cases, Cooper J stated that s 30 “exemplifies the approach that should be taken” where an application is made to exclude improperly obtained evidence in such proceedings (a method likewise adopted by the Court of Appeal in the circumstances presented by *Fan*).¹² Importantly, his Honour also rejected the Commissioner’s claim that, because the remedy of exclusion had already been applied in the criminal trial, the defendant’s right to be free from unreasonable search and seizure under s 21 “had been sufficiently vindicated”.¹³ According to the Court:¹⁴

‘Such an approach seems to me wrong in principle. I consider it more appropriate to focus on the fact that there was a breach of rights. The fact that it is once vindicated should not have the consequence that the breach is able to be set on one side for subsequent purposes. In my view, that would diminish the importance of the right. ... Section 21 of the Bill of Rights should not cease to have effect merely because it has been applied in one relevant context when the same facts are relied on for a second time.’

Quoting the language of s 30(2)(b) — along with the Supreme Court’s approach to that provision in the 2011 decision of *Hamed v R*¹⁵ — Cooper J excluded the drug dealing evidence for the same reasons it had been ruled inadmissible in the defendant’s criminal trial. Indeed, his Honour concluded that “to allow the evidence to be relied on for the purposes of the Commissioner’s application for forfeiture orders when it has already been excluded for good reason in the criminal proceeding would not take proper account of the need for an effective and credible system of justice.”¹⁶

C. Court of Appeal Decision

The Commissioner appealed Cooper J’s ruling to the Court of Appeal. The Commissioner contended that the judge had no jurisdiction to exclude the evidence found in Marwood’s home, and that relevant evidence is admissible in a civil proceeding “even if improperly obtained”.¹⁷

The Court of Appeal agreed. Starting with the principle that all relevant evidence is admissible pursuant to s 7 of the Evidence Act — unless “excluded under [the] Act or any other Act” (s 7(1)(b)) — the Court noted that, unlike the s 8 rule requiring the exclusion of unfairly prejudicial evidence in *all* trials, the exclusionary rule codified in

¹¹ *Marwood* HC, above n 7, at [23].

¹² At [49]. See *Fan v R*, above n 10, at [44]–[46].

¹³ At [61].

¹⁴ At [61].

¹⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

¹⁶ *Marwood* HC, above n 7, at [62] (citing Evidence Act, s 30(2)(b); *Hamed*, above n 15).

¹⁷ *Marwood* CA, above n 3, at [9]. For further discussion of the Court of Appeal decision in *Marwood*, see Alexandra Franks “Admissibility of excluded evidence in later proceedings” [2016] NZLJ 386.

s 30 was clearly and deliberately limited by Parliament to *criminal* proceedings.¹⁸ The implication of these provisions was therefore clear. As Harrison J put it:¹⁹

On this construction of the combined effect of ss 7 and 30, the evidence obtained by the police on execution of the search warrant of Mr Marwood's house is plainly admissible in the CPRA proceeding. The question then is whether the [High Court] Judge was correct to find that these provisions were insufficient "to oust any relevant provisions of the [NZBORA] in the civil forfeiture context" [*Marwood* HC, above n 7, at [29]]. It was central to the Judge's reasoning that, properly construed, the NZBORA itself provides for exclusion, thereby satisfying the exception within s 7(1)(b) of the Evidence Act for "evidence excluded under any other Act".

Noting that the power to exclude unfairly obtained evidence in criminal proceedings "originated in the common law" and "preceded the NZBORA", the Court observed that "the NZBORA does not prescribe or provide for the consequences of a breach of its provisions".²⁰ For the purposes of s 7(1)(b), this meant that improperly obtained evidence was not "excluded 'under ... any other Act' — the NZBORA".²¹ Instead, pursuant to s 30, "[t]he evidence is excluded because of a judicial determination based on a discretionary evaluation of statutory criteria as they apply to the particular circumstances".²²

Summing up the Court's view, Harrison J observed that "[t]he NZBORA does not independently provide a foundation for an exclusionary rule in a civil proceeding where the legislature has chosen not to provide one". Nor did s 12 of the Evidence Act ("Evidential matters not provided for") support the judicial promulgation of such a rule. According to the Court:²³

[Section 12] simply deals with cases for which there is 'no provision in this Act or any other enactment regarding the admission of any particular evidence or the relevant provisions deal with that question only in part'. The [High Court] Judge reasoned that s 30 ... dealt with the admission of improperly obtained evidence only in part because of its limitation to criminal proceedings. For the reasons we have set out, we are satisfied that this limitation was deliberate. Admissibility generally, including in a civil proceeding, is expressly addressed by ss 7 and 8. The situation is not one where it is necessary to invoke the NZBORA to fill a lacuna of the type envisaged by s 12.

In support of the conclusions above — and after reviewing relevant pre-Evidence Act decisions from New Zealand and the United Kingdom — Harrison J noted that the Court's interpretation of the relevant statutory provisions likewise reflected "the settled common law principle affirmed by the Evidence Act, that there is no jurisdiction to exclude evidence in civil proceedings on the ground that it would be unfair to admit it because it was unlawfully obtained".²⁴

¹⁸ At [31].

¹⁹ At [32].

²⁰ At [34] (citing *R v Shaheed* [2002] 2 NZLR 377 (CA) at [8] per Elias CJ, [111] per Richardson P, Blanchard and Tipping JJ and [170] and [173] per Gault J).

²¹ At [34].

²² At [34].

²³ At [36].

²⁴ At [44].

For the sake of completeness, and in the event that it was found to be “wrong on jurisdiction”, the Court went on to consider whether Cooper J “erred in exercising his discretion to exclude the evidence”.²⁵ Asserting that the Judge did fall into error, Harrison J wrote:²⁶

In our judgment Cooper J erred primarily in his analogous application of the factors relevant to the s 30 balancing exercise. ... [T]he s 30 test for determining whether exclusion is proportionate to the breach of [s 21 of the NZBORA] is tailored to a criminal proceeding. ...

Adherence to process has much greater significance for criminal than civil proceedings. The liberty of an individual is at issue and the state is required to comply with basic requirements to ensure a fair trial, as affirmed by ss 23-25 of the NZBORA.

Noting that many of the s 30 factors “directly relevant” to criminal proceedings are “inapt for a discretionary inquiry in civil proceedings”, the Court observed that one particular factor — the “nature of the impropriety and ... whether it was deliberate, reckless or done in bad faith” (s 30(2)(b)) — “may be relevant in a civil [case]”.²⁷ According to Harrison J:²⁸

A finding that the police acted with that degree of consciousness or deliberation is likely to be decisive for exclusion in both the criminal and civil jurisdiction. In a criminal proceeding exclusion on this ground may lead to a discharge; in a civil proceeding proof of bad faith may constitute an abuse of process, sufficient to justify a stay or an analogous remedy. ...

Asserting that the breach of s 21 of the NZBORA in this case “was solely one of process in applying for a search warrant without adequate inquiry”, the Court observed that “the accuracy of the information originally received by the police was proved by the discovery of the cannabis cultivation operation at Mr Marwood’s home”.²⁹ It was likewise significant that Marwood had already been “discharged from criminal liability ... despite highly probative evidence of his guilt”.³⁰ Indeed, by contrast with Cooper J’s approach, Harrison J stated:³¹

Exclusion is the appropriate vindication of a breach of a NZBORA right. Mr Marwood has already enjoyed that vindication. Exclusion of the evidence in the criminal proceeding, with the inevitable consequence of a discharge, has returned him to the position he would have enjoyed but for the unreasonable search. ...

...

The CPRA regime is designed to ensure that a person is not enriched by criminal activities. A forfeiture order would simply return Mr Marwood to the same financially neutral position he would have been in but for his participation in significant criminal activity. ... It would be contrary to public policy to allow Mr Marwood to retain the financial fruits of his crime where the evidence,

²⁵ At [45].

²⁶ At [51]-[52].

²⁷ At [52]-[53].

²⁸ At [53].

²⁹ At [58].

³⁰ At [58].

³¹ At [57] and [60] (citations omitted).

even though improperly obtained, is nevertheless highly probative, not only of his participation in significant criminal activity but also of his receipt of an unlawful benefit.

Accordingly, the Court of Appeal concluded that, even if the discretion to exclude improperly obtained evidence did exist in civil proceedings, Cooper J “erred in principle” in the exercise of that discretion.³² This meant that the evidence found in Marwood’s home could be admitted in the CPRA case.

III. THE SUPREME COURT DECISION

Marwood appealed the Court of Appeal’s decision to the Supreme Court. As with the lower court rulings in the case, the appeal raised two issues: (a) whether there was jurisdiction in civil CPRA proceedings to exclude evidence improperly obtained by the police; and if so, (b) whether exclusion was appropriate in the Commissioner’s CPRA case against Marwood?

Regarding the first matter, the Supreme Court held unanimously that judges do have the jurisdiction in civil trials to exclude evidence obtained by the police in violation of the NZBORA. This was despite the fact that the exclusionary rule codified in s 30 of the Evidence Act applied only to “a *criminal* proceeding” (s 30(1)).³³ According to William Young J — who wrote for a four Justice majority including Glazebrook, Arnold and O’Regan JJ — such limitation provided no bar to the exclusion of improperly obtained evidence in a civil case:³⁴

Prior to enactment of the [Evidence] Act, we think that in proceedings akin to the present (that is, by way of law enforcement and with a public officer as a plaintiff) it would have been open to a judge to exclude evidence which has been obtained in breach of the [NZBORA]. Such evidence would have been by way of remedy for the breach. To use the expression which now appears in s 7(1)(b) of the Act, evidence so excluded could be said to have been “excluded under ... [the New Zealand Bill of Rights] Act”. For this reason it seems to us that exclusion of evidence as a remedy in this case would not be in breach of the s 7(1) “fundamental principle” that relevant evidence is admissible.

...

In company ... with Cooper J, we see s 11 [of the Evidence Act] as providing support for this approach; this is on the basis that the powers of a court to provide remedies for both abuse of process and breach of the [NZBORA] are within the “inherent and implied powers of a court” [s 11(1)]. We agree with the Chief Justice that the obligations of the courts imposed by s 3 of the [NZBORA] are important considerations in relation to breaches of that Act.

Accordingly, we find that there was jurisdiction to exclude the evidence.

Concurring in the reasoning above, Elias CJ wrote separately to add the following:³⁵

The Court of Appeal conclusion that there is no power to exclude improperly obtained evidence in civil proceedings following enactment of the Evidence Act turns on the view that such jurisdiction is impliedly removed by s 30 of the Evidence Act. It depends on accepting that the

³² At [61].

³³ Emphasis added.

³⁴ *Marwood SC*, above n 2, at [35] and [37]–[38] (citations omitted).

³⁵ At [58]–[61] (citations omitted).

provision of a statutory requirement to exclude improperly obtained evidence in criminal proceedings where exclusion is “proportionate to the impropriety”, without making distinct provision for the position in civil proceedings, entailed necessary and deliberate exclusion of the former common law inherent jurisdiction to exclude such evidence in civil proceedings. ...

Section 30 does not on its face purport to be exclusive of the circumstances in which improperly obtained evidence may be excluded. Nor is such result a necessary consequence of the enactment of s 30.

I am of the view that the Court of Appeal’s approach is inconsistent with s 11 of the Evidence Act. Section 11 makes it clear that “[t]he inherent and implied powers of the court are not affected by the Act, except to the extent that this Act provides otherwise”. ... I am unable to agree that s 30 “provides otherwise”. Section 30 captures and partly modifies the then-current common law principles governing the circumstances in which the power to exclude evidence was formerly exercised in criminal proceedings ... The inclusion of s 30 and the structure it enacts for determining questions of exclusion in criminal proceedings does not explicitly or directly oust the powers of the court to exclude in civil proceedings evidence improperly obtained.

The only modification of the inherent and implied powers preserved by s 11 is that they must be exercised to “have regard to the purposes and principles set out in ss 6, 7 and 8” of the Evidence Act [s 11(2)]. ... Section 6 provides that one of the purposes of the Act is that rules of evidence are to “recognise the importance of the rights affirmed by the [NZBORA]” [s 6(b)]. The courts, which are bound by s 3 of the [NZBORA] to give effect to it, are not precluded from excluding evidence for breach of the [NZBORA], if that course is appropriate to meet the impropriety.

Having determined that jurisdiction to exclude improperly obtained evidence existed in the CPRA proceeding, the Court nonetheless determined that the evidence should have been admitted in the case. In this regard, and by contrast with the language of the Court of Appeal, William Young J noted that the decision to exclude was “not discretionary in nature”.³⁶ Instead, it involved “an evaluative assessment — necessarily open-textured ... — as to the appropriateness of the remedy proposed”.³⁷ Adopting the proportionality-balancing approach set out in s 30, his Honour stated that “[t]he real question is whether relief by way of exclusion of evidence is proportionate to the breach of rights”.³⁸ On this point, the Court observed:³⁹

Despite the dismissal of the charges against him, it would have been open to Mr Marwood ... to have sought compensation for the unlawful search. ... The relief obtainable would be confined to a vindication of the rights which were breached and non-economic loss, such as, for instance, loss of privacy and distress. ... We accept that it may be that such a claim would fail on the basis that the judgment of [the District Court Judge] and the dismissal of the charges were a sufficient vindication of the breach of rights which had occurred. This may suggest that any further vindication in the form of exclusion of evidence in the CPRA proceedings would not be warranted. ...

To our way of thinking ..., what is critically important is that CPRA proceedings involve only a claim for money and, in particular, to the proceeds of criminal conduct. Mr Marwood ... [is] not at risk of conviction and imprisonment. ...

In company with the Chief Justice, and for the reasons she gives, we do not regard the conduct of the police as a serious breach. There was information warranting inquiry. ... Also significant is

³⁶ At [46]. See the text at n 25 above.

³⁷ At [46].

³⁸ At [50].

³⁹ At [48]–[52] (citations omitted).

the acknowledgement of breach [by the District Court Judge] and the dismissal of the criminal proceedings, as well as the policy of the CPRA ... Forfeiture is not dependent upon conviction. It follows that considerations which preclude conviction ... do not necessarily exclude forfeiture. ...

[The High Court] implied that the vindication of the breach of s 21 [of the NZBORA] represented by [the District Court Judge's] ruling is entirely irrelevant, a proposition which we do not accept. To take that vindication into account when determining whether further relief is appropriate ... does not mean s 21 of the [NZBORA] ceases "to have effect". This is not to say that evidence of the kind in issue on this appeal ... will always be admissible under the CPRA. ... [I]f ... the police have acted in bad faith, a judge may well conclude that further vindication of exclusion of evidence in a CPRA proceeding is required. ...

For the reasons just given, we are of the view that relief in the form of exclusion of evidence would not be proportionate to the breach.

While concurring in the result, Elias CJ adopted a different perspective on both the proportionality-balancing test and the relevant considerations involved in such weighing. According to her Honour:⁴⁰

The proper assessment to be made was whether the breach of the [NZBORA] necessitated exclusion of the evidence, even though it was "highly probative". ... It turns, principally, on assessment of the seriousness of the breach ... and the extent to which it is proper for the court to be co-opted into countenancing it. ...

The public interest in observance of the [NZBORA] and proper and lawful police conduct means that the question of admission must be considered on a principled basis. Stripping "unlawful benefit" is no more sufficient justification for admission of unlawfully obtained evidence than convicting the guilty. ...

I do not accept [the majority's view] that the ... "acknowledgement of breach [by the District Court Judge] and the dismissal of the criminal proceedings" absolves the Court from considering the question of exclusion on a principled basis. ... It cannot be principled to treat exclusion of evidence in one proceeding as sufficient observance of fundamental rights.

It seems to me that in every case where evidence is challenged it is necessary to consider the application on its merits, without any preconception derived from the outcome in earlier proceedings. Nor is it appropriate to take the view that the different nature of forfeiture justifies less concern about observance of the human rights contained in the [NZBORA]. ... It is, in my view, the sort of reasoning which is likely to prove slippery.

...

The correct approach is to focus on the breach of s 21 in the circumstances of the current application. In that consideration, I do not rely on the fact that Mr Marwood may have a claim for compensation [for a police breach of the NZBORA] ... Even if such a remedy is available in principle, such possibility does not preclude exclusion of evidence as the immediate response here sought. ...

Notwithstanding the observations above, Elias CJ agreed with the other members of the Court that exclusion of the improperly obtained evidence was not warranted in the CPRA case. According to her Honour:⁴¹

⁴⁰ At [64]–[67] and [69] (citations omitted).

⁴¹ At [70]–[74].

[The search of Marwood's home] was not baseless. ... The application [for the search warrant] ... passed the judicial officer who issued the warrant. The ensuing search conformed with the authorisation provided by the warrant on its face. The error made by the police was in a judgment as to sufficiency of information, rather than any conscious evasion of the statutory criterion. ...

[H]ere the error arose from sloppy policing, and the sloppiness was not of a high level of seriousness. ...

In considering the question of admission, it is relevant too that the important information obtained was real evidence. ...

It is true that the warrant was executed at a home, but there was no suggestion of any incursion of privacy beyond that circumstance. It is relevant, too, in the assessment of whether exclusion of relevant evidence is an appropriate response to impropriety, that the proceeding in which it is sought is not one in which Mr Marwood is in jeopardy of a criminal conviction.

I would therefore dismiss the appeal. ...

IV. DISCUSSION

How sound are the conclusions reached by the Supreme Court in *Marwood* and what are the implications of the decision going forward? As set out and discussed below, the case raises a number of different issues suitable for analysis and critique.

A. Exclusion of improperly obtained evidence in civil cases at common law

In both the majority and concurring decisions, the Justices asserted that an inherent, common law jurisdiction existed in civil proceedings to exclude evidence obtained by police in violation of the NZBORA or otherwise improperly. However, the assertions are just that, unsupported by any relevant authority or real argument. To the contrary, as William Young J candidly admitted in his review of the common law position:⁴²

Although the courts ... recognised a power to exclude illegally obtained evidence in criminal cases, there was no corresponding development in relation to civil cases in the sense that there are *no reported cases* in which such a power has been exercised. ...

Indeed, not only was the power *not* recognised at common law, the settled position was just the opposite. This is made clear by the review of UK cases undertaken in *Marwood* by the Court of Appeal.⁴³ Nor does the scant New Zealand authority on the matter alter that view.

In the 1994 decision of *Queen Street Backpackers Ltd v Commerce Commission*, the Commission instituted penalty proceedings against the owners of backpacker hostels for price fixing in violation of s 27 of the Commerce Act 1986.⁴⁴ While acknowledging that the proceeding was civil in nature, the Court accepted the Commission's concession "that there was sufficient analogy with criminal proceedings to enable the

⁴² At [22] (emphasis added).

⁴³ *Marwood* CA, above n 3, at [38]–[44].

⁴⁴ *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94 (CA).

Court to exclude improperly obtained evidence”.⁴⁵ However, as the Court of Appeal judgment in *Marwood* pointed out:⁴⁶

Implicit in this observation is an acceptance of the *inclusionary* rule applying in *civil* proceedings. By contrast with *Queen Street Backpackers*, the Commissioner’s claim is a civil proceeding, as s 10(1) of the CPRA confirms.

In her Honour’s concurring judgment in *Marwood*, Elias CJ cited *Queen Street Backpackers* to support the existence of the “common law inherent jurisdiction to exclude [improperly obtained] evidence in civil proceedings”.⁴⁷ Yet, in limiting its holding to quasi-criminal actions brought by state officials to impose punishment in the form of a penalty, *Queen Street Backpackers* supports exactly the contrary result. Indeed, this was recognised in a 2006 decision of the High Court not cited by any of the Justices in *Marwood*. In *NJG Holdings Ltd v Oliphant*— a proceeding seeking relief against forfeiture of a lease for non-payment of rent — Allan J cited *Queen Street Backpackers* and stated directly:⁴⁸

[T]here is no statutory or common law bar to the admission in a civil case of illegally obtained evidence. ...

[E]ven if certain of [the plaintiff’s] business records were unfairly or illegally obtained [by the defendant], they are not thereby rendered inadmissible in civil proceedings. *Queen Street Backpackers Ltd v Commerce Commission* (1996) 2 HRNZ 94 at 97 (CA).

Accordingly, and by contrast with the assertions of the Justices in *Marwood*, the position prior to enactment of the Evidence Act was clear. As the Court of Appeal observed, the “settled common law principle” was that “no jurisdiction” existed in civil proceedings “to exclude evidence ... on the ground that it would be unfair to admit it because it was unlawfully obtained”.⁴⁹ The Supreme Court therefore erred in holding otherwise.

B. Exclusion under the Evidence Act

Following on from the discussion above, the Court’s erroneous claim of inherent jurisdiction to exclude improperly obtained evidence in civil proceedings was relevant to its key argument perpetuating that alleged prerogative under the Evidence Act.

⁴⁵ At 96–97.

⁴⁶ *Marwood* CA, above n 3, at [41] (emphasis added). See also *Marwood* SC, above n 2, at [14]. In relevant part, s 10(1) of the CPRA states: “(1) Proceedings related to any of the following are civil proceedings: ... (d) a profit forfeiture order ...”.

⁴⁷ *Marwood* SC, above n 2, at [58].

⁴⁸ *NJG Holdings Ltd v Oliphant* HC Auckland CIV-2006-404-4749, 1 December 2006 at [27]–[28].

⁴⁹ *Marwood* CA, above n 3, at [44]. The Court of Appeal did observe, however, that there was “a recognised [common law] exception to the inclusionary rule in civil proceedings. A stay or related remedy may be justified where evidence has been obtained through violence, deception or bad faith amounting to contempt or abuse of process. ... The discretion, which has the effect of excluding evidence obtained by means of deliberate misconduct, is based on public interest grounds of policy” (at [39]) (citations omitted). However, as the Court pointed out, none of the police behaviour in *Marwood* fit that description or rose to the level of such wrongdoing (at [40]).

According to both William Young J and Elias CJ, s 11 of the Act supported the continued exercise of such jurisdiction in civil trials. However, as previously noted, s 11 states that “[t]he inherent and implied powers of a court are not affected by the Act, *except to the extent that the Act provides otherwise*” (emphasis added). The exception clause in s 11 was ignored by the majority, who asserted simply that “the powers of a court to provide remedies for both an abuse of process and breach of the [NZBORA] are within the ‘inherent and implied powers of the Court’”.⁵⁰ While this is undoubtedly correct, it begs the real question posed by the *Marwood* appeal. That is, whether the Evidence Act *ousts* that jurisdiction with respect to a *particular* remedy: the exclusion of improperly obtained evidence in a *civil* case.

In this regard, the majority made no effort to explain why the plain language of s 30(1) — “This section applies to a *criminal* proceeding ...” (emphasis added) — does not reflect Parliament’s clear and settled intention to confine the Act’s exclusionary rule to *criminal* trials. Indeed, it would seem to be a rather obvious point for judicial discussion.

Elias CJ, at least, attempted to deal with the matter in her Honour’s concurring judgment. As previously noted, Elias CJ asserted that:⁵¹

[t]he inclusion of s 30 and the structure that it enacts for determining questions of exclusion in criminal proceedings does not *explicitly or directly* oust the powers of the court to exclude in civil proceedings evidence improperly obtained.

However, what could be more explicit or direct than Parliament *expressly* constraining the application of a statutorily-based evidence rule with clear language of limitation? Indeed, there are many instances in the Act that self-consciously confine a particular tenet of evidence law to either civil or criminal trials.⁵² Conversely, there are numerous examples of rules applying to every “proceeding” — itself defined broadly in s 4(1)(a) as a “proceeding conducted by a court” — or which clearly refer to, and distinguish between, the applicability of a particular provision in either a civil or criminal case.⁵³

To the extent that the Act says anything about the inadmissibility of improperly obtained evidence in civil trials, it does so only in the narrow fashion provided for in ss 53(4) and 90(1).⁵⁴ Among other limitations, s 90(1) prohibits parties in civil or criminal proceedings from questioning a witness with a document excluded under s 30. Nor can any witness consult such a document when giving evidence (s 90(2)). In any proceeding, s 53(4) gives the judge a broad discretion to prevent an unauthorised person from disclosing acquired information that is otherwise privileged under the Act. However, apart from those rules, as Mahoney and others point out, “[t]he Act does

⁵⁰ *Marwood* SC, above n 2, at [37].

⁵¹ At [60] (emphasis added).

⁵² See, eg, Evidence Act 2006, s 22 (“Notice of hearsay in criminal proceedings”) and s 26 (“Conduct of expert in civil proceedings”).

⁵³ See, eg, Evidence Act 2006, s 7 (“Fundamental principle that relevant evidence admissible”; 8 (“General exclusion”); s 40(2) (“Propensity rule”) and s 50 (“Civil judgment as evidence in civil or criminal proceedings”).

⁵⁴ Mahoney and others *Act & Analysis*, above n 1, at [EV30.02].

not specifically control the admissibility of improperly obtained evidence in civil [cases] ...”⁵⁵

The broad point, of course, is that the entirety of the Evidence Act reflects Parliament’s concrete decision making about which rules of evidence apply in civil proceedings, criminal proceedings, or both. Accordingly, there is no reason to treat the limited scope of s 30 as reflecting anything other than Parliament’s actual purpose and aim. Indeed, the Law Commission apparently intended the same. Commenting on the original version of s 30 in its 1999 report on the nascent Act — which limited the exclusionary rule to criminal proceedings using the same language now codified in s 30(1) — the Commission stated: “Improperly obtained evidence is *admissible* in civil proceedings, subject to relevance and the general exclusion in s 8”.⁵⁶ However, that report is nowhere cited in the *Marwood* case.

In sum, the Supreme Court wrongly concluded that various provisions of the Evidence Act either support, or do not rule out, a judge’s jurisdiction to exclude in civil cases evidence improperly obtained by the police. To the contrary, and as its drafters apparently intended, the Act accomplishes precisely the opposite.

As discussed at Part IV(A) above, the exclusion of improperly obtained evidence in civil proceedings was never contemplated at common law as being within the “inherent and implied powers of a court” (s 11(1)). Even if it were, the Act “provides otherwise” (s 11(1)).

A similar argument eliminates any reliance on s 12 (“Evidential matters not provided for”) — which permits a judge to fill lacunas in the Act with admissibility decisions based on ss 6, 7 and 8 (and, in some circumstances, the common law). Section 12 applies only “[i]f there is *no provision* in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with the question only *in part* ...” (emphasis added). However, as the analysis above should make clear, the Evidence Act *does* regulate the admission of improperly obtained evidence in a distinct and self-conscious fashion. Nor can one argue logically that, in plainly limiting the exclusion of improperly obtained evidence to criminal cases, Parliament has only dealt with the issue *in part*. In other words, as regards the admissibility of improperly obtained evidence in civil proceedings, there is simply no statutory hole in the Act to be filled. Any attempt to create one both misrepresents legislative intent and, in the words of the Law Commission, does not reflect “the type of gap at which s 12 is targeted”.⁵⁷

Section 7 likewise offers no assistance to the Court’s argument in *Marwood*. Again, just the opposite. Section 7(1)(a) states that *all* relevant evidence is admissible in a civil or criminal proceeding — such as the drug selling evidence in the CPRA case

⁵⁵ At EV30.02.

⁵⁶ Law Commission *Evidence: Volume 2 — Evidence Code and Commentary* (NZLC R55, 1999) at 87 (emphasis added).

⁵⁷ Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [2.49]. See also Mahoney and others *Act & Analysis*, above n 1, at [EV10.01].

against Marwood — unless it is “inadmissible under this Act or any other Act”. But no provision of the Evidence Act makes improperly obtained evidence inadmissible in a civil trial. Nor, pursuant to s 7(1)(b), is improperly obtained evidence “excluded *under* this Act or any other Act” (emphasis added). As the Court of Appeal correctly pointed out in its *Marwood* judgment, evidence obtained in breach of the NZBORA is not excluded *under* the NZBORA — which itself contains no remedy or exclusion clause.⁵⁸ Instead, the police breach of s 21 of the NZBORA in Marwood’s case simply rendered the recovered evidence “improperly obtained” pursuant to s 30(5)(a) of the Evidence Act. This would make such proof eligible for exclusion under the s 30 proportionality-balancing test — provided that s 30 applied. However, as previously discussed, s 30 does not apply to a civil CPRA proceeding, or to any other civil case.

C. Exercise of the Jurisdiction to Exclude

In the second part of its *Marwood* ruling — and as set out more fully at Part III above — the Supreme Court considered whether the asserted jurisdiction to exclude improperly obtained evidence in civil proceedings should have been exercised in the CPRA case.

Unsurprisingly, the Court adopted the proportionality-balancing methodology of s 30 to determine “whether relief by way of exclusion of evidence is proportionate to the breach of rights”.⁵⁹ In this regard, the s 30-linked factors relied on by the majority, together with their balancing, evinced a rather mainstream judicial approach towards the decision to exclude.

William Young J noted that the police breach of rights was “not ... serious” (s 30(3)(a))⁶⁰ and that police did not act in bad faith (s 30(3)(b)).⁶¹ Moreover, as an “alternative [remedy] to ... exclusion ... which can adequately provide redress ...” (s 30(3)(f)), Marwood could pursue a civil claim against the police seeking “compensation for the unlawful search” of his home.⁶² The Court also found it relevant that the policy behind the CPRA is not to make forfeiture “dependent upon conviction”,⁶³ and that Marwood was facing only “a claim for ... the proceeds of criminal conduct” rather than “conviction and imprisonment” for a criminal offence.⁶⁴ Finally, and by comparison with the High Court decision of Cooper J, the majority took into account that Marwood had already enjoyed a large measure of rights vindication — including the exclusion of improperly obtained evidence and the “dismissal of ... criminal proceedings” against him — in the original District Court trial.⁶⁵ Absent police bad faith, which might suggest that “further [rights] vindication [by] exclusion of evidence in a CPRA proceeding is

⁵⁸ See the text at n 20 above.

⁵⁹ *Marwood* SC, above n 2, at [50].

⁶⁰ At [50].

⁶¹ At [50] and [51].

⁶² At [48].

⁶³ At [50].

⁶⁴ At [49].

⁶⁵ At [50].

required”, a judge could rely on the previous decision to exclude as a factor supporting the admission of improperly obtained evidence in a subsequent civil forfeiture case.⁶⁶

Concurring in the result, Elias CJ likewise relied upon s 30’s approach and cited various factors set out under s 30(3). Her Honour observed that the “real evidence”⁶⁷ at issue in the CPRA proceeding was “highly probative” (s 30(3)(c)),⁶⁸ and that the search of Marwood’s home in breach of s 21 of the NZBORA resulted only from “sloppy policing” that “was not of a high level of seriousness” (s 30(3)(a) & (b)).⁶⁹ In line with the majority, Elias CJ likewise found it relevant that the CPRA proceeding in which the admission of improperly obtained was sought was not one where Marwood faced any “jeopardy ... [of] criminal conviction”.⁷⁰

Nonetheless, as regards the concrete proportionality-balancing in the *Marwood* case, her Honour’s key points of difference with the majority related to the perceived significance of: (a) the exclusion of the drug dealing evidence in Marwood’s underlying criminal trial; (b) the different nature of civil forfeiture proceedings from criminal prosecutions; and (c) the possibility that Marwood might himself mount a civil claim against the Crown for a police breach of s 21 of the NZBORA.

For Elias CJ, none of these considerations assumed any real relevance for the instant decision to exclude.⁷¹ In sum, and stemming from a “contextual assessment in the circumstances of the particular case”,⁷² her Honour’s approach requires a court to: (a) consider an application “on its merits, without any preconception derived from the outcome in earlier proceedings”;⁷³ and (b) “confront directly the question whether exclusion of evidence is warranted by the impropriety”.⁷⁴ In *Marwood*, this determination turned “on [an] assessment of the seriousness of the breach of the [NZBORA] and the extent to which it is proper for the court to be co-opted into countenancing it”.⁷⁵ The “critical” enquiry was therefore whether the CPRA case was *itself* based on “evidence that it is proper to admit” — a question Elias CJ answered in the affirmative (as did the majority) after balancing the various factors involved.⁷⁶

⁶⁶ At [51]. The same majority of the Supreme Court took a comparable approach with respect to the use of improperly obtained excluded in an earlier criminal proceeding that police subsequently seek to rely upon when applying for a search warrant in a new investigation. See *R v Alsford* [2017] NZSC 42, 1 NZLR 710 at [87] (citing *Marwood* SC, above n 2, at [50]–[52]). See similarly *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ 214 at [26]; *R v Hsu* [2008] NZCA 468 at [32]. As discussed in the text at n 88 below, Elias CJ adopted a contrary view in the *Alsford* appeal (at [125]) just as she did in the *Marwood* case (at [66]–[67]).

⁶⁷ At [72].

⁶⁸ At [64].

⁶⁹ At [71].

⁷⁰ At [73].

⁷¹ See the text at n 40 above.

⁷² *Marwood* SC, above n 2, at [62].

⁷³ At [67].

⁷⁴ At [69].

⁷⁵ At [64].

⁷⁶ At [63].

For persons familiar with the large body of case law utilising the s 30 proportionality-balancing test to admit improperly obtained evidence in criminal proceedings, the overall thrust of *Marwood* — with respect to both reasoning and result — will come as no particular surprise.⁷⁷ Indeed, assuming that the potential for exclusion applies (a matter queried at Part IV(B) above), the *Marwood* decision presents relatively standard s 30 fare (although as applied to a civil forfeiture trial). Nonetheless, several points of critique can be made.

The first involves the majority's rather disingenuous view that: (a) *Marwood* might seek money damages for the unlawful police search of his home breaching s 21 of the NZBORA; and (b) if awarded, such damages could provide some alternative measure of rights vindication supporting the inclusion of the improperly obtained evidence in the CPRA case.

The availability of "alternative remedies to exclusion of evidence which can adequately provide redress to the defendant" is a stated consideration for proportionality-balancing set out at s 30(3)(f). However, largely dismissed by the Supreme Court as a meaningful s 30 factor in *criminal* proceedings,⁷⁸ there is little reason to conclude that, as a practical matter, *Marwood* could successfully mount an action against the Crown of any real significance. This would be true even if, as William Young suggested, such claim might "be brought and heard at the same time as the [CPRA proceeding]".⁷⁹ Likewise, as a policy matter, Elias CJ correctly observed that "[e]ven if such a remedy is available in principle, ... [m]onetary relief is not an obvious response".⁸⁰ Indeed, as Tipping J previously acknowledged in *Hamed v R*, the leading Supreme Court decision dealing with s 30 in the penal context, financial compensation has "the appearance of the Crown buying the right to admit the evidence" — albeit here within the confines of a civil CPRA case.⁸¹

The second issue worth scrutinising involves the majority's notion that the original decision to exclude evidence in the District Court criminal case — and the resulting dismissal of the drug dealing charges against *Marwood* — was a significantly relevant factor supporting the denial of additional relief in the CPRA trial. Indeed William Young J made it clear that, absent police bad faith or some equally blameworthy official misconduct, the District Court result made it unlikely that "further vindication" of rights through the "exclusion of evidence in a CPRA proceeding [would be] required".⁸²

⁷⁷ See generally Simon France (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Thomson Reuters) [*Adams on Criminal Law*] at [EV30.11]–[EV30.12]; Mahoney and others *Act & Analysis*, above n 1, at [EV30.11]–[EV30.12].

⁷⁸ See *Hamed v R*, above n 15, at [70] per Elias CJ, [202] per Blanchard J, [275] per McGrath J and [247] per Tipping J. See also *Adams on Criminal Law*, above n 77, at [EV30.12(7)]; Mahoney and others *Act & Analysis*, above n 1, at [EV30.12(7)].

⁷⁹ *Marwood* SC, above n 2, at [48].

⁸⁰ At [69] (citing *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [256] per Blanchard J).

⁸¹ *Hamed v R*, above n 15, at [247] per Tipping J.

⁸² *Marwood* SC, above n 2, at [51].

The inevitable result of such reasoning is that Marwood's successful s 30 challenge to the admission of the improperly obtained evidence at his criminal trial actually counted *against* (if not effectively eliminated) his ability to argue for exclusion in the Crown's subsequent CPRA case. While really only a remote possibility, and as noted above, William Young suggested that the same might be true regarding any civil claim brought *by* Marwood seeking compensation for a police breach of his rights.⁸³ Somewhat inconsistently, his Honour drew this conclusion despite also highlighting Marwood's ability to sue as an alternative remedy *supporting* the admission of the improperly obtained evidence in the CPRA action. Completing the circle, William Young J likewise observed that the potential failure of such a lawsuit could itself "suggest that any further vindication in the form of exclusion of evidence in the CPRA proceedings would not be warranted".⁸⁴

How can we best depict the majority's perspective? If one were to summarise it, the overall message seems clear: Marwood obtained all of the rights vindication he was entitled to when the improperly obtained evidence was excluded from his District Court trial and criminal charges were dismissed. Any additional remedial action — whether in the form of financial compensation for a breach of rights or exclusion of the improperly obtained evidence in the CPRA proceeding — would result in an unwarranted windfall to Marwood disproportionate to the unlawful police conduct in the case and antithetical to the aims of a civil forfeiture regime.

What are we to make of that view? As previously discussed, it is certainly possible to conclude that, pursuant to the methodology of s 30, the evidence improperly obtained by police from Marwood's home should have been admitted at his CPRA trial.⁸⁵ Indeed, for any given case, this is precisely what the evaluative, proportionality-balancing exercise would permit. As well, the actual (and unanimous) decision of the Supreme Court allowing the use of the evidence in *Marwood* is both explicable and defensible. Admitting real proof of significant unlawful activity in the face of less than serious police impropriety is, in fact, consistent with many judgments rendered — although in criminal proceedings — under the s 30 proportionality-balancing test.⁸⁶

However, what does seem misguided about the majority's thinking — as regards successive cases stemming from the same set of circumstances — is to suggest that the exclusion of evidence in a prior criminal trial should negatively impact a defendant's ability to argue for exclusion in a subsequent civil one. To the contrary, the various elements relevant to the proportionality-balancing exercise in Marwood's earlier penal proceeding — such as the concrete details of police misbehaviour, the seriousness of the offending, and the probative value of the challenged proof — do not change their character when applied to the second and related CPRA action. Nor are those considerations somehow transformed by: (a) conceptual differences between civil forfeiture applications and criminal prosecutions; or (b) a defendant's ability (however notional) to seek monetary compensation for a police breach of his

⁸³ At [48]. See the text at n 39 above.

⁸⁴ At [48].

⁸⁵ See the text at n 76 above.

⁸⁶ See the various decisions noted in *Adams on Criminal Law*, above n 77, at [EV30.12].

or her rights. Indeed, between one kind of proceeding involving Marwood's unlawful behaviour and another, nothing changes the *facts* pertinent to the proportionality-balancing exercise — they always remain the same.

Understanding this point, Elias CJ correctly observed — by contrast with the majority — that approaching exclusion on a “principled basis” means engaging with the issue afresh for each individual case.⁸⁷ In fact, allowing the outcome at one trial to impact the results at another undermines the *actual* evaluative exercise at the core of the proportionality-balancing test. That assessment, as the Chief Justice noted in a later decision involving s 30, *R v Alsford*, should not take into account that an individual arguing for exclusion in a new and distinct action “received a remedy” in ... earlier proceedings”.⁸⁸ Instead, and in the concrete language of s 30(2)(b), the evaluation requires a judge to “give appropriate weight to the impropriety and also take proper account of the need for an effective and credible system of justice” (s 30(2)(b)). As her Honour stated in *Marwood*, this is not “an exclusively remedial perspective” concentrating only on the individual whose legal rights have been breached.⁸⁹ Rather, the focus must be on the “public interest [at] both ends”.⁹⁰ Applied to *Marwood*, this meant the public interest in “[s]tripping ‘unlawful benefit’” from persons who have engaged in significant criminal behaviour, but also ensuring “observance of the [NZBORA] and proper and lawful police conduct”.⁹¹ Thus, the ultimate issue, succinctly put by Elias CJ, is whether the improper means used by the police to secure evidence from Marwood's home “should be countenanced”⁹² — and hence whether the CPRA proceeding, like the criminal case underlying it, can be based on evidence “that it is proper to admit”.⁹³

The judicial answer to that question, and the reasons underlying it, may vary — just as it did between the High Court, Court of Appeal and Supreme Court in the *Marwood* litigation. Indeed, the very nature of proportionality-balancing means that, for any given case, diverse judges might evaluate relevant factors differently, and likewise reach different conclusions as to the correct result. The Supreme Court, of course, gets the last word. Nonetheless, and as recognised in *Alsford* by the same majority as in *Marwood*, judges must always be satisfied that allowing police to rely on improperly obtained evidence at trial would not erode “public confidence” in the processes of justice.⁹⁴ Accordingly, and in any proceeding where the matter is raised, a *systemic* orientation towards the exclusion of improperly obtained proof is the correct approach. This is, in fact, the focus embodied in s 30 — which centers neither on vindicating the individual rights of criminal suspects, deterring particular acts of police misconduct, nor on providing personalised remedies for police transgressions of law.

⁸⁷ *Marwood* SC, above n 2, at [66].

⁸⁸ *Alsford*, above n 66, at [125] (citing Arnold J at [97]).

⁸⁹ *Marwood* SC, above n 2, at [69].

⁹⁰ At [65].

⁹¹ At [65].

⁹² At [65].

⁹³ At [63].

⁹⁴ *Alsford*, above n 66, at [98].

The upshot of this discussion is to suggest that, while it reached a defensible proportionality-balancing *result*, the majority's *reasoning* in *Marwood* took several wrong turns. Neither the chance of Marwood suing to redress financially a police breach of his rights, nor the fact that evidence was excluded (and proceedings dismissed) in his original criminal trial, should have impacted the Supreme Court's decision to admit the improperly obtained evidence in the CPRA case. While defensibly concurring in the actual outcome of the appeal, the Chief Justice was right to emphasise the errors of the *Marwood* majority in each regard.

Finally, and following on from the points just made, both the majority and Elias CJ found it relevant to the proportionality-balancing exercise that Marwood was not "at risk of conviction and imprisonment" in the CPRA proceeding — which involved "only a claim for money" alleged to be the proceeds of significant criminal acts.⁹⁵ Somewhat contradictorily, the Chief Justice took that view despite concluding, as noted above, that "the different nature of forfeiture" does not justify "less concern about observance of the human rights contained in the [NZBORA]".⁹⁶

Regardless, and whether employed as a pertinent factor by the majority or Elias CJ, it does not seem obvious why the *consequences* to Marwood of a criminal versus civil proceeding should impact the exclusion calculus in the latter action. Indeed, since a defendant can *only* be penalised financially in a civil forfeiture trial, there is scant logic to comparing it with the potential outcome of a criminal case. To do so takes the mere *description* of a CPRA application and transforms it into a proportionality-balancing *factor* always favouring the admission of improperly obtained proof. Such reasoning shifts the focus away from genuinely relevant public interest matters attending any judicial decision to countenance police impropriety or not — considerations that, despite differences in available outcomes, remain present for both CPRA proceedings and penal actions.

Simply put, if the exclusionary rule is to apply in CPRA cases, it should not be a factor favouring the admission of improperly obtained evidence that "only ... money" is at stake.⁹⁷ The Supreme Court wrongly concluded otherwise in the *Marwood* appeal.

V. CONCLUSION

What are the lessons of *Marwood* going forward? Several points might be made.

Marwood evinces the Supreme Court's insistent approach to the exercise of inherent jurisdiction in the remedies field. Despite common law precedent and provisions of the Evidence Act to the contrary, the Court was keen to assert its authority to exclude improperly obtained evidence in civil proceedings, just as it can in criminal ones.

What drives such result? The impulse to make such rulings may stem simply from the Court's desire not to have its remedial jurisdiction hemmed in by statute. Or it may

⁹⁵ *Marwood* SC, above n 2, at [49], Elias CJ agreeing at [73].

⁹⁶ At [67]. See also the text at n 40 above and following n 70 above.

⁹⁷ At [49].

derive from a more noble impulse, where considered necessary, to ensure the systemic integrity of trial justice in *all* types of civil or criminal cases — particularly those, such as CPRA actions, involving the conduct of police or other agents of the State. In that regard, and notwithstanding the critique of *Marwood* developed in this article, one can both understand and empathise with the Court's ostensible goal. Indeed, as the analysis in this paper should suggest, policy concerns underlying the admission or exclusion of improperly obtained evidence in criminal trials — such as the vindication of rights, the deterrence of police misconduct and the protection of court processes — may be no less extant in the CPRA realm. While the legal position in the United States is varying, such rationales are precisely why, for example, some American courts have applied that country's exclusionary rule to civil forfeiture trials.⁹⁸

Nonetheless, if the statutory analysis in this article is correct, the extension of the s 30 proportionality-balancing test to civil proceedings — whether only to those involving state actors (such as CPRA cases) or more broadly — is really a question for Parliament requiring amendment to the Evidence Act. Pursuant to s 202, it is, in fact, a matter that will soon be taken up by the Law Commission in its second and upcoming statutory review of current evidence law.⁹⁹

The pros and cons of any such change is beyond the scope of the instant discussion. Nonetheless, if *Marwood* is any guide — and the notional availability of exclusion notwithstanding — defendants will find it difficult, if not impossible, to convince courts to rule out improperly obtained evidence in civil forfeiture trials. Absent bad faith or particularly egregious police misconduct, *Marwood* is a clear signal that the exclusion of such proof in criminal proceedings is all the relief an applicant is likely to obtain. CPRA actions growing out of the same set of facts, even if relying on the same tainted evidence, will thus cause courts little concern. Moreover, *Marwood* points to such outcome notwithstanding any particular orientation toward either the goals of proportionality-balancing or the policies underlying the exclusionary rule. Indeed, whether nodding towards the vindication of rights, the deterrence of police misconduct or the systemic integrity of justice processes, *Marwood* demonstrates the Court's broad willingness to accept the use of improperly obtained evidence in the civil forfeiture sphere.

Accordingly, and as the title to this article suggests, the real message of *Marwood* may be that every silver lining has a cloud. Criminal defence lawyers no doubt cheered the decision at first instance — grateful that, in CPRA applications, a judicially created extension of s 30 could allow for the exclusion of the same improperly obtained evidence previously rejected in a criminal trial. Advocates probably also assumed that, in those civil forfeiture proceedings, the same proportionality-balancing assessment might apply. Ironically, however, the very success of defence efforts to exclude tainted evidence in criminal cases likely assures the opposite result in a subsequent and connected CPRA action. Nor did defence lawyers count on the fact that, in the view of

⁹⁸ See Daniel Kaminski "Conclude to Exclude: The Exclusionary Rule's Role in Civil Forfeiture Proceedings" (2010) 6 Seventh Circuit Review 268.

⁹⁹ Law Commission "Second Review of the Evidence Act 2006" (20 February 2017) <<http://www.lawcom.govt.nz/our-projects/second-review-evidence-act-2006>>.

the Supreme Court at least, proportionality-balancing inevitably favours the Crown when only a defendant's money — particularly in the form of unlawfully gained profits — is at stake. There is also an underlying sense in *Marwood* that lawbreakers should not push a judge's willingness to reject improperly obtained evidence too far. Indeed, in all but the most extreme cases of police misconduct, the spectre of an individual avoiding both criminal punishment *and* financial penance for illegal behaviour seems like simply too much for the Court to bear.

One final point: if *Marwood* allowed criminal defendants a second chance at excluding improperly obtained evidence in CPRA proceedings, it afforded police an even more winning opportunity to secure the opposite result. However, as United States commentators have pointed out— and particularly in drug selling cases like *Marwood* — “law enforcement agencies [now] use civil remedies to achieve criminal justice goals”.¹⁰⁰ Indeed, civil forfeiture proceedings may be “easier to use, more efficient, and less costly than criminal prosecutions”.¹⁰¹ If that turns out to be true of law enforcement practices in New Zealand, whether now or in future, *Marwood's* legacy may be to create a classic ‘moral hazard’ for the police. That is, investigators might be tempted to cut corners in the lawful obtaining of evidence for criminal prosecution, realising that the consequences of such improper behaviour will not ultimately be borne in expected CPRA trials.

The most cogent judicial response to the problem of moral hazard in civil forfeiture cases is, of course, the exclusion of improperly obtained evidence in such proceedings. However, *Marwood* suggests that courts should do so only when police misbehaviour is particularly blameworthy — and judges will undoubtedly hesitate to find such level of fault. If that assessment is correct, then in drug investigations — and other types of criminal activity amenable to CPRA actions — *Marwood* may encourage police to focus their investigative priorities where obedience to law presents less of an obstacle to enforcement success. Attractive to some in the short term, one should always bear in mind the long term consequences to justice where police are incentivised to combat illicit activity by themselves breaking legal rules.

¹⁰⁰ Kaminski, above n 98, at 299–300.

¹⁰¹ At 300 (citing Mary M Cheh “Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) 42 Hastings LJ 1325 at 1345.

CASE NOTE: *N v R* [2017] NZCA 170

WARREN BROOKBANKS*

I. INTRODUCTION

The ongoing discourse around unfitness to stand trial still has the capacity to surprise. Occasionally, new decisions of the courts challenge the accepted orthodoxy of earlier jurisprudence in ways that foreshadow significant change — both in the way in which legal ideas are conceptualised and in the practical workings of a particular legal doctrine. *N v R* is such a case.¹ Of particular interest is the adoption by the Court of Appeal of the notion of “effective participation” as the hallmark of a criminal defendant’s capacity to undertake a trial.

“Effective participation” acknowledges a differentiation between the capacities required for participation in proceedings of differing degrees of complexity. It moves beyond the evaluation of trial competence as a monolithic, abstract, once-only evaluation to a more nuanced assessment that evaluates an offender’s ability to process information in real time (and in respect of quite specific trial decisions). As the Court observed, the need to inquire into an offender’s capacity to participate *effectively* in a trial arises in cases where there is a superficial appearance of participation but in reality the offender is no more than a bystander (for example, because of the impact of intellectual disability). Such cases offend against fundamental principles underpinning the fitness to plead rules.

A. The Facts

The appellant appealed his conviction for aggravated robbery following a jury trial. The question on appeal was whether, at the time of his trial, Mr N was ‘unfit to stand trial’ within the meaning of s 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, which would have rendered his conviction a miscarriage of justice.

The appellant, together with three other men and two women, embarked on a plan to lure an unsuspecting male to a secluded location — ostensibly for sexual purposes — and there to rob him of his money. The 53-year old victim had driven to a location in suburban Auckland looking for women available for sexual services. The two women were in the area waiting and approached the victim when he stopped, asking him if he wanted to use their services. He agreed and proceeded to drive the women to the secluded location where the three other men were waiting. When the women got out of the car, having requested and received \$100 from the victim, the men rushed the car and began to assault the victim. As a result of the assault he suffered a broken eye socket, lacerations to his lip and left ear, head abrasions and a black eye. The offenders left the scene in the victim’s car, together with his wallet containing about \$900 in cash and many credit cards. They were located by Police near Napier airport the next morning.

* Professor of Criminal Law and Justice Studies, AUT Law School

¹ *N v R* [2017] NZCA 170 at [26] (*N*).

At the Police interview held at the Napier Police Station the following afternoon, Mr N answered questions in a simplistic manner, often laughing or nodding. His answers were difficult to comprehend and he showed signs of confusion. In his interview he appeared to have told Police that he had drunk some alcohol that evening and had heard some arguing and noise. Soon afterwards a friend drove up in a car and asked him to get in. He and the other occupants drove until they were stopped by police. Mr N was charged with aggravated robbery. At his trial, the two women co-accused pleaded guilty and gave evidence. It was alleged that Mr N, who did not give evidence, physically participated in the attack on the victim. However, through his counsel, Mr N claimed that he had joined the co-offenders after the victim had been assaulted. He was, nonetheless, convicted with another co-accused of aggravated robbery.

A pre-sentence report revealed that the appellant suffered comprehension difficulties, possibly due to head injuries suffered as a child. The report writer suggested that the Court request a neuro-psychological assessment to confirm whether Mr N had any brain dysfunction.

At the sentencing hearing the Judge sentenced the principal offender to 3½ years imprisonment and indicated his intention to sentence the appellant to 3 years' imprisonment. However, the Judge adjourned sentencing to obtain a report on the appellant's cognitive abilities.

B. Psychologist's Report

Pursuant to s 38(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act), a report was submitted by a clinical psychologist to assist the Court in determining whether the appellant was unfit to stand trial. This revealed that Mr N had left school at the age of 14 and could neither read nor write. A mini mental-status examination and executive functioning tests revealed that the appellant had serious cognitive problems. He could not follow correctly a three-step command and did not have a good grasp of left and right. In addition, he was unable to read the words "close your eyes" and could not print a sentence. The Wechsler Adult Intelligence Scale Test administered by the clinical psychologist revealed Mr N's full IQ score to be 62, placing him in the extremely low range of intellectual functioning. Other tests administered revealed that Mr N satisfied two of the three criteria in the definition of "intellectual disability" in s 7(1) of the Intellectual Disability (Compulsory Care & Rehabilitation) Act 2003 (the IDCCR Act) — his history indicating that he was also likely to meet the third criterion.² It was considered that Mr N may not have been fit to stand trial. The significance of this assessment was that if the appellant had been unfit to stand trial because of an intellectual disability, in all likelihood he would have

² 'Intellectual disability' is defined in s 7 of the IDCCR Act. It requires "permanent impairment" in three nominated domains, namely:

- (a) significantly sub-average general intelligence;
- (b) significant deficits in adaptive function in at least two statutorily listed skills (eg communication, self-care, home living, social skills, use of community services and others); and
- (c) became apparent during the person's developmental period.

The judgment does not indicate which criteria were satisfied or which was likely to be met.

become a care recipient under the IDCCR Act, and may have no longer been subject to the criminal justice system.

On receipt of the report the trial judge recognised there were real issues concerning the appellant's fitness to stand trial, but was prevented from making any finding at that stage of the proceedings that the appellant was unfit to stand trial because of the operation of s 7(1) of the CPMIP Act.³ The Court of Appeal found that the language of s 7 was clear, and prevented the trial judge from undertaking an assessment of the appellant's fitness to stand trial following the conclusion of all the evidence. Sentencing was then adjourned pending an appeal to the Court of Appeal to determine whether: (a) the conviction should be quashed; and (b) hearings should be conducted under ss 9 and 14 of the CPMIP Act to determine if the appellant was fit to stand another trial.

Reports from two forensic psychiatrists were then obtained under s 38(1)(a) of the CPMIP Act, which assessed the appellant's mental state and fitness to stand trial. These reports determined that the appellant had a poor understanding of the consequences of pleas of guilty and not guilty and of the legal significance of the charge. They also noted that his cognitive difficulties would have rendered it difficult for him to follow in general terms the course of proceedings before the court.

The reports concluded that it was likely the appellant fulfilled the statutory criteria for being unfit to stand trial. In particular, one of the psychiatrists gave evidence that the appellant's intellectual impairment meant that he was unlikely to have participated effectively in his trial, although what this meant in context was not elaborated upon in the Court's judgment.

C. Legal Principles

The Court then considered the legal principles applicable in determining whether there may have been a miscarriage of justice in terms of s 385(1)(c) of the Crimes Act 1961 (under which the appeal was brought).⁴ It found that the appellant's trial would have been a miscarriage if he was unfit to stand trial, because it is a "fundamental feature of the criminal justice system that only those who passed the threshold of being fit to stand trial are subjected to all that is entailed in responding to criminal charges".⁵

The Court briefly outlined the origins of the new regime for determining fitness to stand trial in New Zealand. It noted, in particular, the legislature's decision to broaden the qualifying criteria by abandoning the "mental disorder" threshold applied in the test previously contained in s 108 Criminal Justice Act 1985 and substituting a threshold test of "mental impairment". This reflected Parliament's intention to ensure

³ Section 7 says:

"(1) A Court may make a finding under this subpart that a defendant is unfit to stand trial at any stage after the commencement of the proceedings and until all the evidence is concluded."

⁴ Section 385 of the Crimes Act 1961 was repealed by s 6 of the Crimes Amendment Act (No 4) 2011 and replaced by s 232 of the Criminal Procedure Act 2011 (Criminal Procedure Act).

⁵ *N*, above n 1, at [24].

that persons with intellectual disabilities, personality and neurological disorders and 'other conditions' were not forced to stand trial where that would offend the principles underlying the fitness to stand trial requirements of the CPMIP Act. These were identified as:⁶

- (1) Fairness to the defendant by protecting his or her rights to a fair trial and to present a defence;
- (2) Promoting integrity and legitimacy of the criminal justice system by only holding defendants accountable if they understand the reasons why they have been prosecuted, convicted and punished;
- (3) Enhancing society's interest in having a reliable criminal justice system by not placing on trial defendants who, through lack of fitness, are unable to advance an available defence.

This list represents an amalgam of grounding principles drawn from established case law and commentary from leading theorists on criminal law and procedure.⁷

The Court then reviewed the criteria for unfitness set out in s 4 of the CPMIP Act. It noted that the criteria, first articulated in *R v Pritchard*,⁸ have evolved, and that — within the New Zealand jurisdiction — are now supplemented by the "more discriminating"⁹ list of trial functions outlined in *R v Presser*¹⁰ and adopted by the High Court in *P v Police*.¹¹ Nevertheless, it is worth noting that the *Presser* criteria contain no qualifying language which might indicate the level or quality of understanding required, so that the application of the criteria still suggest a relatively low level of understanding permitting an accused person to be brought to trial. Nevertheless, these additional criteria were considered by the psychiatrists when assessing the appellant.

The Court then made the following observation — which directly introduced the concept of "effective participation" and the explanation of this term:¹²

An inquiry into a defendant's fitness to stand trial, however, involves more than an assessment of whether or not the defendant can participate in his or her trial by simply performing relevant trial functions. A defendant must also have the capacity to participate effectively in his or her trial. This involves an assessment of the defendant's intellectual capacity to carry out relevant trial functions. The reason for the need to inquire into the defendant's capacity to participate effectively in his or her trial is that the principles we have explained above are not honoured in cases where, for example, a defendant superficially appears to participate in his or her trial but in reality is, because of intellectual disability, nothing more than a bystander.

⁶ At [26].

⁷ See *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [13]; *R v Presser* [1958] VR 45 (SC) at 48; (*Presser*); RA Duff *Trials and Punishments* (Cambridge University Press, Cambridge, 1986) at 119; Richard Bonnie, "The Competence of Criminal Defendants: A Theoretical Reformulation" (1992) 10 Behav Sci and Law 291 at 295.

⁸ *R v Pritchard* (1836) 7 Car & P 303, (1836) 173 ER 135 (KB) at 135.

⁹ *N*, above n 1, at [28].

¹¹ *Presser*, above n 7, at 48; *P v Police* [2007] 2 NZLR 528 (HC) at [43].

¹² *N*, above n 1, at [29].

The helpful nature of the psychiatric evidence was acknowledged by the court in helping to explain how an assessment of the appellant's fitness to stand trial involved an inquiry into his capacity for effective participation in the trial. Four different types of intellectual capacity were identified as relevant to the inquiry:¹³

- (1) Understanding: including capacity to "understand relevant information, including the elements of the charge, the trial process, the role of participants in the trial, evidence, and the purpose and possible outcomes of the trial".
- (2) Evaluation: including the appellant's "capacity to process information, particularly evidence and directions, and to evaluate the impact of that information on the defence".
- (3) Decision-making: including the "capacity to make decisions normally required of a defendant during the course of the trial" (which encompasses how to plead and to give evidence putting forward a particular defence).
- (4) Communication: including capacity to communicate instructions to his lawyer and to give evidence if the appellant elected to do so.

The Court noted that these functions needed to be carried out "rationally by Mr [N] and in real time".¹⁴ However, the Court did not go so far as to suggest that the requirement for rationality implied that the defendant must be capable of acting in his best interests.¹⁵ In an extensive footnote the Court explained that the concept of "rationality", while vague and not universally understood, is a requirement "well ingrained" in other jurisdictions.¹⁶ In particular, the Court noted that in the United States rationality was interpreted to mean, at least in relation to capital sentences, that a defendant's understanding "should not be adversely affected by delusional thoughts".¹⁷

The Court did not attempt to offer an explanation of what that might mean in New Zealand, other than to suggest that the decision in *R v Cumming*¹⁸ meant that rational understanding was also an important ingredient in unfitness to stand trial requirements and thus "an established feature of our law".¹⁹ In *Cumming* the Court of Appeal held that an accused must rationally be able to understand the proceedings and functionally be able to defend it through participation in the trial process.²⁰ What this might mean in practice has yet to be fully determined by the courts. What it apparently does not mean is that a defendant must be capable of making trial decisions which are in his or her best interests. Giving it an affirmative meaning is more challenging, because it is not possible to determine in advance the multitude of

¹³ At [30].

¹⁴ At [30].

¹⁵ This issue was extensively surveyed by the Court of Appeal in *Solicitor-General v Dougherty* [2012] NZCA 405 at [31]–[40]. There the Court concluded that the law was settled, and that there was no indication that Parliament intended to change the settled law to include an inquiry into whether the accused will act in his or her best interests. The Court reaffirmed its commitment to the underlying principle of giving "preeminence" to personal autonomy (at [55]).

¹⁶ *N*, above n 1, at [30], n 15. See also *Youtsey v United States* 97 F 937 (6th Cir 1899); *Dusky v United States* 362 US 402 (1960).

¹⁷ *N*, above n 1, at [30], fn 15. See also *Panetti v Quarterman* 551 US 930 (2007).

¹⁸ *R v Cumming* [2006] 2 NZLR 579 (CA) at [38] (*Cumming*).

¹⁹ *N*, above n 1, at [30], fn 15.

²⁰ *Cumming*, above n 18, at [38], citing Warren Brookbanks "Judicial Determination of Fitness to Plead" (1992) 7 Otago LR 520 at 521 (cited by the Court in support of the rationality requirement).

circumstances where a defendant's thinking must be reasonable for justice to be done. This must be assessed on a case by case basis in light of the principles undergirding the fitness rules, namely, dignity, reliability and autonomy.

The Court of Appeal also noted that the effective participation test originated in decisions of the European Court of Human Rights (ECtHR) in relation to minimum fair trial rights (as to which see art 6(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950²¹) and is the test for fitness to stand trial recently endorsed by the Law Commission of England and Wales.²² It is also the test applied in international criminal tribunals.²³

Of particular interest is the decision in *SC v United Kingdom*²⁴ where the ECtHR gave a detailed account of what was meant by effective participation. It said it:²⁵

presupposes that the accused has a broad understanding of the nature of the trial process and what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence ...

Concerning the application of the effective participation construct in the New Zealand context, the Court of Appeal noted that it is a contextual enquiry. This recognises that a defendant who may have the capacity to participate effectively in a simple criminal proceeding — for example, by pleading guilty to shoplifting — may lack the capacity to participate effectively in more complex proceedings (particularly those requiring an ability to process information in real time and to communicate effectively in order to be able to advance a defence). This meant, the Court concluded, that in the present appeal the enquiry should be whether the appellant could participate meaningfully in his trial.

D. Analysis

The Court rejected Crown counsel's submission that the trial did not require a significant level of executive functioning on the part of the appellant, implying that he was fit to stand trial. On the contrary, it found that the appellant's circumstances called into question his ability to perform all the intellectual capabilities outlined earlier in the

²¹ Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6.3.

²² See Law Commission of England and Wales *Unfitness to Plead Volume 1: Report* (LAW COM No 364, 2016) at [3.32].

²³ See Ian Freckelton and Magda Karagiannakis "Unfitness to Stand Trial under International Criminal Law: The Influential Decision of the International Criminal Tribunal of the Former Yugoslavia in Relation to Pavle Strugar and its Ramifications" (2014) 21 *Psychiatry, Psychology and Law* 611. See also Criminal Justice and Licensing (Scotland) Act 2010, s 170.

²⁴ *SC v United Kingdom* (2005) 40 EHRR 10 (ECHR).

²⁵ At [29], cited in Kris Gledhill "Ability to Participate in Criminal Proceedings" in Colin Wells (ed) *Abuse of Process* (3rd ed, Oxford University Press, Oxford, 2017) at [10.21].

judgment, such that he was unable to effectively participate in his trial. The Court noted, for example, the psychiatric testimony that the appellant had little understanding of “charge”, “aggravated” or “robbery”, and that his cognitive impairments meant that he would have struggled to follow the proceedings. Notably, the appellant would have struggled to understand the evidence as it was presented, and to process the evidence and understand how it applied to him “in a rational manner”.²⁶

In allowing the appeal against conviction and ordering a retrial, the Court concluded that the appellant lacked the capacity to make the decisions normally required of a defendant, or to communicate instructions effectively with his counsel. Furthermore, he lacked the ability to give evidence in order to properly advance his defence and would have been unable to understand questions put to him in cross-examination (and would likely have simply given affirmative answers in response to questions).

The Court found that the combined effect of the expert psychiatric testimony was that the appellant lacked the ability to participate effectively in his trial and that his cognitive disabilities were such that he met the criteria for unfitness to stand trial in s 4 of the CPMIP Act. This meant that he should have been assessed under the Act before facing trial and that requiring the appellant to stand trial when he was unfit to do so was unfair and gave rise to a miscarriage of justice.

The appeal against conviction was allowed. The conviction was quashed and a retrial ordered. The Court concluded that “[i]f the Crown wishes to proceed against Mr [N] then a full evaluation of his fitness to stand trial will need to be undertaken pursuant to ss 9 and 14 of the CPMIP Act”.²⁷ The decision is subject to a publication prohibition pending final disposition of the retrial.

II. DISCUSSION

The *N* case illustrates the increasing complexity and sophistication of the legal questions involved in determining unfitness to stand trial. What was once a tolerably simple determination as to whether an offender had the cognitive ability, at a fairly basic level, to understand the proceedings and instruct counsel as to a defence, has now become a more demanding and nuanced inquiry. It asks whether a defendant can perform those tasks *effectively* so that the offender’s participation in the trial can be said to be *meaningful*. By its nature, effective participation appears to privilege active engagement in, and shaping of, the trial process, and speaks of a defendant having a positive experience of voice and judicial engagement.²⁸ This would seem to be a significantly different form of curial engagement than the merely passive ability

²⁶ *N*, above n 1, at [35].

²⁷ At [38].

²⁸ See Amy Kirby, Jessica Jacobson and Gillian Hunter “Effective participation or passive acceptance: How can defendants participate more effectively in the court process?” in The Howard League for Penal Reform *What is Justice? Reimagining Penal Policy* (Working Papers 9/2014) at 11.

to “adequately” understand proceedings and communicate with counsel — even if that does represent the current statutory test in New Zealand.²⁹

The reality, it would seem, is that while the statutory test is the law “and must always remain the ultimate question”,³⁰ it may be necessary for the test to be “reinterpreted by the courts to make it more appropriate for the trial process”.³¹ What this will mean in practical terms remains to be seen. However, if meaningful participation is now a significant measure of trial capacity, it would seem that, at a minimum, the court should have regard to what the particular legal process will involve and the demands it will make on the particular defendant. The degree of complexity of different legal proceedings may vary significantly, but typically the court will have to consider the nature and complexity of the issues in the particular proceedings, the likely duration of those proceedings and the number of parties. It is not a question of whether the defendant lacks capacity to participate in some theoretical or abstract proceedings. The question will always be “does the defendant have the capacity to participate in the proceedings which he faces”.³²

²⁹ See the definition of “unfit to stand trial” in the CPMIP Act, s 4.

³⁰ *Solicitor-General v Dougherty*, above n 15, at [57].

³¹ *R v Marcantonio* [2016] EWCA Crim 14 at [4].

³² *N*, above n 1 at [17].

CASE NOTE: *CAMERON V R* [2017] NZSC 89 – CONTROLLED DRUG ANALOGUES, INDETERMINACY AND MENS REA UNDER THE MISUSE OF DRUGS ACT 1975

NICK CHISNALL*

I. INTRODUCTION

In *Cameron v The Queen*,¹ the Supreme Court addressed the mens rea element in offences under the Misuse of Drugs Act 1975 (the MDA) involving controlled drug analogues. The Court also considered whether it falls to the jury to decide, as a question of fact, whether a substance is “substantially similar” to a controlled drug and thus a “controlled drug analogue” or, alternatively, if this is a question of law to be decided by the trial Judge. The Court identified two further statutory interpretation issues that required resolution. First, whether the indeterminacy of the definition of controlled drug analogue necessitated the appellants’ proceedings to be stayed and, second, whether the active ingredient in the drugs that the appellants were manufacturing and distributing are caught by the drug analogue regime.

The Court heard the appeal over two days in November 2016, but reconvened in April 2017 to allow the parties the opportunity to address whether the mens rea standard should encompass recklessness, despite the fact this was not how the Crown advanced its case in the High Court.

II. THE FACTS

The four appellants were found guilty in the High Court on numerous charges of importing, selling and possessing, for the purpose of sale, the Class C controlled drug 4-methylethcathinone, which goes by the name “4-MEC”.²

At the centre of the case was a business called “London Underground”, which marketed and distributed “legal highs”, but also sold products on “the after-market”. This arm of the business manufactured and sold pills with 4-MEC as the active ingredient. The pills were intended to mimic the effects of MDMA (“Ecstasy”), which is a Class B controlled drug. The after-market was a lucrative operation, as the street value of the pills manufactured and sold during the period covered by the charges – June 2010 to November 2011 – was \$36 million.

Three of the four appellants were part of London Underground’s operation – its co-founder (Mr C), his second in command (Mr Good) and a technical advisor who received commission on each pill sold (Dr L). The fourth appellant (Mr Cameron) was the business’s liaison with gangs involved in the after-market activities; described in the judgment as a major customer of London Underground as an on-seller of pills.

*Barrister, Auckland.

¹ *Cameron v R* [2017] NZSC 89 (*Cameron*).

² A fifth appellant abandoned his appeal before the decision was delivered.

London Underground had two faces. Whereas the legal highs operation was operated in an “above-board” way, the after-market arm was:³

... clandestine in nature, in that, for instance, imported materials were mislabelled, codes were used, cash was the medium of exchange, tax was not accounted for and proceeds were laundered. All of this was capable of supporting an inference that the appellants realised that their activities were illegal.

While the Court did not consider it a material mistake, for most of the timeframe covered by the charges the appellants believed the active ingredient of the pills was 4-methylmethcathinone, or 4-MMC, rather than 4-MEC.

III. THE DRUG ANALOGUE REGIME

Section 6 of the MDA prohibits dealing with its three categories - Class A, Class B and Class C - of controlled drugs. The drugs contained in each class are specified in schs 1, 2 and 3. A “controlled drug analogue” is a Class C controlled drug under the MDA, which is mirrored in the definition of Class C controlled drug, which means “the controlled drugs specified or described in Schedule 3; and includes any controlled drug analogue”.⁴

A “controlled drug analogue” is defined as:⁵

[Any] substance, such as the substances specified or described in Part 7 of Schedule 3, that has a structure substantially similar to that of any controlled drug; but does not include—

(a) any substance specified or described in Schedule 1 or Schedule 2 or Parts 1 to 6 of Schedule 3; or

(b) any pharmacy-only medicine or prescription medicine or restricted medicine within the meaning of the Medicines Act 1981.

The Court held that s 29 rendered inconsequential the appellants’ mistake that they thought they were dealing with 4-MMC instead of 4-MEC. It provides:⁶

29. Mistake as to nature of controlled drug or precursor substance

Where, in any proceedings for an offence against ... section 6 ... it is necessary, if the defendant is to be convicted of the offence charged, for the prosecution to prove that some substance ... involved in the alleged offence was the controlled drug ... which the prosecution alleges it to have been, and it is proved that the substance ... was that controlled drug ... , the defendant shall not be acquitted of the offence charged by reason only of the fact that he did not know or may not have known that the substance ... in question was the particular controlled drug ... alleged.

³ *Cameron*, above n 1, at [5].

⁴ Misuse of Drugs Act, s 2(1), definition of “Class C drug” [MDA].

⁵ MDA, s 2(1), definition of “controlled drug analogue”. The definition has changed to include “an approved product within the meaning of the Psychoactive Substances Act 2013”, but the Supreme Court dealt with the definition as it stood prior to 18 July 2013.

⁶ MDA, s 29.

The Court described the broader context of the controlled drug analogue regime introduced in 1987.⁷ The underlying policy was to bring “designer drugs” within the scope of the MDA. The Health Select Committee, which reported back on the Bill,⁸ said that “[i]dentification of all kinds of analogues of controlled drugs, by name or specific description, would be impossible”,⁹ which explains why the “substantially similar” approach was enacted.

A. The definition of controlled drug analogue is indeterminate

The Court accepted that the definition is indeterminate and said, “It follows that there will necessarily be scope for argument about its application in marginal cases.”¹⁰ However, it rejected an argument that the courts’ response to the issue should be, in every case, to “disapply the legislation” and stay or dismiss any controlled drug analogue prosecution.¹¹ It described the indeterminacy complaint as abstract, as, “Whatever uncertainty might exist in respect of the categorisation of other drugs, there is no uncertainty about the drugs in issue in this case. This is because 4-MMC and 4-MEC are undoubtedly both analogues of methcathinone.”¹² Also, the Court observed that indeterminacy is not uncommon in the criminal law.¹³

IV. THE HIGH COURT’S APPROACH TO MENS REA

The Crown case was that both 4-MEC and 4-MMC have chemical structures substantially similar to that of the Class B drug methcathinone, which means that both are controlled drug analogues, and thus Class C controlled drugs.

It was not in dispute that the appellants, apart from Mr Cameron, had turned their minds to the question whether 4-MMC is a controlled drug analogue, and knew that its structure is similar to methcathinone which, they also knew, is a Class B controlled drug. At trial, the appellants claimed that they had been operating under the mistaken belief that, to be a drug analogue, the substance concerned had to be substantially similar to one of six families of drugs specified in pt 7 of sch 3 of the MDA.¹⁴ This misapprehension therefore had equal application to 4-MMC, and was brought about because of erroneous legal advice about the operation of the MDA.

The trial Judge, Woodhouse J, considered that the issue of substantial similarity was a question of fact for the jury. Also, his Honour ruled that the Crown had to prove that

⁷ The Court also discussed its international counterparts, the most similar of which is the Canadian Controlled Drugs and Substances Act SC 1996 c 19, although there are also “generally similar” regimes in the Australian states.

⁸ Misuse of Drugs Amendment Bill 1987 (154–1).

⁹ (24 November 1987) 484 NZPD 1248.

¹⁰ *Cameron*, above n 1, at [21].

¹¹ At [21].

¹² At [22].

¹³ At [22] and [42], using indecency as an example.

¹⁴ MDA, sch 3, pt 7, describing analogues of six controlled drugs specified in schs 1 and 2, thus creates six drug families, the members of which are all controlled drugs in their own right.

the appellants either knew the identity of the substance, or that it was a controlled drug, and directed the jury that knowledge would be established if the prosecution proved either:¹⁵

- The appellant knew, or believed, that the substance he was dealing with was a particular drug, such as knowledge of the type of drug or of its name (identity knowledge); or
- The appellant knew or believed that the substance he was dealing with was illegal – that it was a controlled drug – even though the defendant may not have known the particular type of drug involved (illegality knowledge).

Under the first alternative, the Judge made it clear that identity knowledge would comprise guilty knowledge even if the appellant did not know the substance was a controlled drug. It was at this point that Woodhouse J explained that ignorance of the law is not a defence – thus, if the jury was sure that an appellant had identity knowledge, then the fact he believed the drug was not a controlled drug analogue – whether that belief was the result of an honest mistake or not – provided no defence.

V. THE COURT OF APPEAL'S JUDGMENT¹⁶

The Court of Appeal endorsed the approach taken by the trial Judge and held that the question whether a substance is compositionally substantially similar to a controlled drug is an issue of fact for the jury.

The Court grappled with the issue whether anything about drug analogue offences justifies departure from the presumption that mens rea attaches. It identified the purpose of the legislation – to respond to “the proliferation of designer drugs that mimic the effect of scheduled controlled drugs but differ in chemical structure” and recognised “obvious difficulties in scheduling these substances in advance”, which is why the legislature chose to address these concerns through the concept of substantial similarity.¹⁷

The Court was concerned that full mens rea, “even recognising that it would include the concepts of subjective recklessness and wilful blindness”, would risk negating the effectiveness of the legislation because those alleged offenders removed from the immediate design and manufacture of the drug (distributors) may only know its effects; not its chemical constitution. It relied upon the exception to proof of mens rea described in *Millar v Ministry of Transport*¹⁸ that arises in cases where that interpretation is justified by the regulatory nature of the legislation. While it recognised that the instant case involved serious crime rather than offending of a regulatory nature, the Court held that “there is good reason to impose a high standard of care in this area of risk-taking activities”, as those involved in the trade of drugs that mimic

¹⁵ The Crown opened on the basis that it was required to prove that the defendants knew that 4-MMC was a controlled drug or were wilfully blind. However, it changed direction towards the end of the trial and successfully persuaded the Judge that knowledge of the name of the drug, identity knowledge, would suffice.

¹⁶ *Cameron v R* [2016] NZCA 48, (2016) 27 CRNZ 700.

¹⁷ At [93].

¹⁸ *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).

the effects of a controlled substance “know the conduct is close to the line”.¹⁹ It saw negligible risk that the net would be cast too widely and ensnare those engaged in innocent activity. However, it declined to treat absolute liability as appropriate sans express statutory authority.²⁰

The Court of Appeal concluded that the balance was struck by requiring the Crown to prove either identity or illegality knowledge, but with an available defence of total absence of fault, which enables a defendant to prove that “notwithstanding knowledge of the identity of the drug they were not at fault in dealing with a controlled drug (its status once a jury has determined the substantially similar issue)”.²¹

The trial Judge had not left total absence of fault to the jury as a defence, but the Court held this had not caused a miscarriage of justice.

VI. THE SUPREME COURT’S REVIEW OF MENS REA IN CONTROLLED DRUG CASES

The Supreme Court undertook its review of the authorities under the heading “The mens rea problem in respect of possession and supply of illicit material”. It observed that full knowledge of the illicit character of the material concerned – complete knowledge and honest belief it is innocent – innocent belief – fall at opposite ends of the continuum.²²

The central conclusion reached by the Supreme Court is that courts have tended either to equate lack of complete knowledge with innocent belief or to hold that complete knowledge is required for criminal liability. It described this as inconsistent with the general principles of criminal law as to recklessness. It endorsed the thrust of the Court of Appeal’s approach by agreeing that the approach to date is not consistent with the policy underpinning the controlled drug analogue regime.²³

The Court foresaw several possible responses to the policy concern. The approach taken in the High Court and Court of Appeal was to treat identity knowledge as sufficient. The Court observed that in most drug cases this will suffice,²⁴ but this approach does not work “so well” in the case of controlled drug analogues if the issue of substantial similarity is one of fact and not law because, if mens rea must encompass awareness as to substantial structural similarity, “there is an indeterminacy problem”. The options it described were:²⁵

- Awareness that 4-MMC has a structure that is similar to that of methcathinone constitutes mens rea; or

¹⁹ *Cameron v R*, above n 18, at [95].

²⁰ At [95].

²¹ At [96].

²² *Cameron*, above n 1, at [37].

²³ At [39].

²⁴ At [40]–[41]. It used the example of cannabis where a person who sells material knowing it to be cannabis will have full mens rea even if not aware cannabis is a controlled drug.

²⁵ At [41].

- Awareness that the degree of similarity is substantial (or might or would be so regarded by a jury).

The Court was concerned that the bar would be set too low and have an over-criminalising effect, if “awareness of similarity suffices for mens rea”, as it would make no allowance for the person who has taken reasonable steps to address the question whether the similarity is substantial.²⁶

The gravamen of the Court’s decision is its conclusion that a strict identity knowledge approach would have the potential to catch those who had no idea that the drug in question was or might be controlled. Thus:²⁷

Treating recklessness as sufficient to constitute mens rea avoids the over-criminalising risk just adverted to while, at the same time, providing a workable and just solution to the indeterminacy problem which we have just discussed.

The Court broke its analysis down into five topics,²⁸ but it is helpful to pick the thread up where it discussed total absence of fault as a defence, and its subsequent consideration of recklessness. It observed that the general understanding amongst criminal practitioners that existed until the mid-1970s, in its most simplistic form, was that there were three categories of offences: (a) full mens rea offences; (b) *Strawbridge* offences;²⁹ and (c) absolute liability offences. A fourth category – strict liability offences for which a total absence of fault is a defence – was later added.³⁰ It places the onus of proof on the defendant, although the Court recorded that this may require reconsideration in a future case, as the leading authorities establishing the rule pre-date the enactment of the New Zealand Bill of Rights Act 1990.³¹

The Court explained that many offences, instead of specifying the particular state of mind required to prove the charge, are defined by reference to either or both of (a) the circumstances in which an offender acts; and (b) the results that the offender brings about. It said, “the general position is that recklessness suffices as mens rea in respect of either circumstances or results”.³² This “sufficient but minimum degree of fault” is consistent with the authorities from England and Wales, and Australia, too.

²⁶ At [43].

²⁷ At [44].

²⁸ At [45] which it described as “The *Ewart – Matuarika* lines of cases”, “*R v Martin and Soles v R*”, “total absence of fault as a defence”, “recklessness” and “mistake of law and mens rea”.

²⁹ *R v Strawbridge* [1970] NZLR 909 (CA), which provided that, upon the actus reus of the offence being proved, guilty knowledge is presumed unless there is evidence that the defendant honestly believed on reasonable grounds that the act was innocent, in which case the Crown bears the onus to establish beyond reasonable doubt that should not be accepted. The Court observed that a shift occurred in 1982 when New Zealand dispensed with the reasonableness requirement of a postulated innocent belief: obiter comment in *R v Wood* [1982] 2 NZLR 233 (CA), but affirmed in *R v Metuariki* [1986] 1 NZLR 488 (CA).

³⁰ *Cameron*, above n 1, at [62].

³¹ *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA); *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) (*Millar*).

³² *Cameron*, above n 1, at [64] (emphasis omitted).

Jumping ahead, the Court described a 1988 article by Simon France as a “useful overview of the law in New Zealand as to recklessness and the policy issues involved”.³³ The author observed that the Court of Appeal had touched upon the role of mens rea in three decisions of (then) recent vintage – *Strawbridge*, *Metuariki* and *Millar*; “yet in all of them recklessness has hardly featured ... the absence of talk concerning recklessness is significant”.³⁴

The Court, in a statement that the Crown in future will no doubt argue should be treated as applicable to other offences in the criminal calendar, held that:³⁵

In cases such as the present in which the offence is not defined in terms which require actual knowledge or intention and nothing less, we consider that recklessness as explained in *G*³⁶ will (at least usually and perhaps always) be sufficient to satisfy mens rea requirements as to circumstance and result. For these purposes, recklessness is established if:

- (a) The defendant recognised that there was a real possibility that:
 - i. his or her actions would bring about the proscribed result; and/or
 - ii. That the proscribed circumstances existed; and
- (b) Having regard to that risk those actions were unreasonable.

In terms of limb (b), the Court said that there has been limited judicial and academic discussion about unreasonableness. It described a continuum – at one end are those actions of an offender that have no social utility (using the example of personal violence with the risk of serious injury or death), where the running of the appreciated risk is necessarily unreasonable. At the other end of the spectrum (using the surgeon who performs risky but potentially life-saving surgery as an example) are those actions with high social utility. Thus, in those cases where there is some social utility, a more nuanced approach that asks whether a reasonable and prudent person would have taken the risk is required. The Court said this may require consideration of the level of the risk involved, counterbalanced by the utility of the actions of the defendant.³⁷

The Court described a grey area between recklessness and intention, which tends to result in their conflation, but said “we think it best to treat intention and recklessness as distinct concepts; this for clarity of thinking and discussion”.³⁸ It addressed wilful blindness, and said that the principle does not equate recklessness with knowledge; rather it provides a method by which knowledge may be inferred. It considered the line of authority culminating in *R v Martin*³⁹ (*Martin*) and *Soles v R*⁴⁰ (*Soles*), which held that the offence requires proof of knowledge, and wilful blindness offered a

³³ Simon France “A reckless approach to liability” (1988) 18 VUWLR 141; *Cameron*, above n 1, at [71].

³⁴ France, above n 33, at 144.

³⁵ *Cameron*, above n 1, at [73].

³⁶ *R v G* [2003] UKHL 50, [2004] 1 AC 1034, which was discussed by the Court in *Cameron*, above n 1, at [69]. The Court recognised that the approach to recklessness adopted in *G* mirrored that earlier taken by the Court of Appeal in *R v Harney* [1987] 2 NZLR 576.

³⁷ *Cameron*, above n 1, at [74].

³⁸ At [75].

mechanism by which knowledge could be inferred.⁴¹ It concluded that *Martin* and *Soles* could have been dealt with “more easily” on the basis that recklessness sufficed for mens rea purposes, and where actual knowledge is not an element of the offence, there “should be no need to resort to wilful blindness”.⁴²

The Court rounded out its discussion on mens rea by saying that the language employed in s 29 of the MDA assumes that knowledge is, or may be, an element of the Act’s offences. Despite that, it concluded that “the conditionality of the language of the section” leaves it to the courts to determine if knowledge is an element of any particular offence under the MDA; thus, if the Court concluded that recklessness suffices for mens rea, then the only work to be done by s 29 is to provide that “the required recklessness need extend only to the controlled nature of the drug and not its specific identity”.⁴³

The Court reasoned that, having regard to the New Zealand authorities, as well as the position adopted in other jurisdictions, it was entitled to adopt the view that the relevant mens rea encompasses recklessness.⁴⁴ It regarded it to be “not practicable” for the law to continue to apply the “complete knowledge/innocent belief dichotomy”, and held that:⁴⁵

[I]n the unique context of drug analogues, the policy of the statute would be defeated if the courts apply a concept of mens rea which involves complete knowledge which in many and perhaps most cases, will not be able to be established given the indeterminacy of the definition of controlled drug analogue.

I interpolate that it is probable that the Crown in future will seek to argue that the reasoning in *Cameron* justifies the adoption of recklessness as the mens rea element in other offences outside the MDA. However, I suggest that such an application should be challenged on the basis that the Court’s reasoning was directed at the specific policy considerations behind the MDA’s analogue regime. Any application to apply the reasoning in *Cameron* to another offence will require careful judicial consideration of the wording and purpose of the statute in question.

A. The Court’s proposed mens rea direction

Having concluded that the Court of Appeal in *Millar* identified four, not three, categories of offences, the Court saw the instant offence as falling within the “*Strawbridge* principle”.⁴⁶ As such, the Court said that a trial judge should, in a way missing in this case, direct the jury that the Crown has no obligation to establish the state of mind of the defendant in respect to the status (controlled or otherwise) of the

⁴¹ See *Cameron*, above n 1, at [57]–[60].

⁴² At [77].

⁴³ At [86].

⁴⁴ At [87].

⁴⁵ At [91].

⁴⁶ At [83]–[84].

substance. Thus, the direction proceeds on the basis that, in the absence of evidence to the contrary, mens rea is assumed.

If the Judge is "of the view" there is such an evidential basis, then he or she should direct the jury that:⁴⁷

- (a) A defendant should be found not guilty unless the Crown has proved, beyond reasonable doubt, that the defendant has a guilty state of mind.
- (b) A defendant will have a guilty state of mind if:
 - i. He or she knew or believed that the drug in question was a controlled drug. This would be established if the defendant knew that 4-MMC (for example) is an analogue of methcathinone (that is, their structures are substantially similar) but could be established if the defendant simply understood in general terms that the drug is a controlled drug. (The knowledge limb.)
 - ii. The defendant was aware that the drug may be a controlled drug and that, given his or her assessment of the possibility that this was so, his or her actions in dealing in the drug were unreasonable. The question whether the defendant's actions were unreasonable comes down to whether he or she has acted as a reasonable and prudent person – that is, as a law-abiding person doing their best to comply with the law would have done (The recklessness limb.)

B. The interplay between a mistake of law and mens rea

The Court concluded that the fact that the appellants had relied upon incorrect legal advice did not provide them with a defence. It held that they had been operating under a mistake of law regarding the operation of the MDA's drug analogue regime, which engaged s 25 of the Crimes Act 1961.⁴⁸ It observed that, notwithstanding the wording of s 25, the section and its international equivalents have been applied robustly to exclude defences based on mistake as well as ignorance of the law and observed, "[i]n particular we are not aware of cases where a mistake as to the existence or application of the criminal law in respect to the defendant's conduct has been held to be a defence."⁴⁹

C. The court's conclusions regarding the appeals

The Court found there to be no issue with the illegality limb of the trial Judge's directions, but concluded that the direction regarding identity knowledge was problematic, as the question whether 4-MMC and 4-MEC are controlled turned on the jury's assessment of substantial similarity. The Court identified an intermediary step between identity knowledge and a knowledge of all the facts that result in the drug being controlled – thus, knowledge of the identity of a drug that is later found to be a drug analogue does not necessarily equate to knowledge that the drug is

⁴⁷ At [97].

⁴⁸ "Ignorance of law: The fact that an offender is ignorant of the law is not an excuse for any offence committed by him or her".

⁴⁹ *Cameron*, above n 1, at [78].

controlled.⁵⁰ However, the Court said that identity knowledge “is likely to be very significant”, as a defendant who knows the true identity of a controlled drug analogue has a very specific knowledge – more specific than that held by most drug dealing offenders.⁵¹ Using 4-MMC to illustrate the point, the Court said that “a defendant who believed he was dealing in [that drug] had a very particular belief and its corollary might be thought to have been recognition of the probability that its structure was similar to that of methcathinone”.⁵² As such, someone who knows that 4-MMC has a structure substantially similar to that of methcathinone knows all the facts that are necessary to comprise knowledge that 4-MMC is a controlled drug. In contrast, the common name(s) of the drug analogue involved may provide no link to its associated controlled drug. Accordingly, identity knowledge is not automatically indicative of a guilty mind.⁵³

The Court’s conclusion there had been an error in the trial Judge’s direction on identity knowledge meant that it was required to allow the appeal unless satisfied that the appellants were guilty of the offences on which they were found guilty.⁵⁴ The Court said that it was only entitled to dismiss an appeal if satisfied, on the evidence adduced at trial, either that an appellant was aware that 4-MMC is a controlled drug analogue, or that he appreciated that 4-MMC is a controlled drug analogue and his actions in dealing with the drug were, in light of that appreciation, unreasonable. The absolute right to a fair trial required the Court to be satisfied that an appellant was not prejudiced by the course taken at trial – in particular, by the trial Judge’s incorrect directions.⁵⁵

The Court dismissed three out of the four appeals in reliance on the proviso. It described a “striking feature” of the case to be that none of the appellants with a close association with London Underground (Messrs C and Good and Dr L) denied the substantial similarity of 4-MMC and methcathinone.⁵⁶ While the Court accepted that the appellants were not indifferent to the issue of legality, they were attempting to exploit a perceived loophole in the law created by pt 7, sch 3 of the MDA, and the clandestine nature of the operation was designed to avoid inviting official scrutiny and the potential inclusion of 4-MMC into an MDA schedule. This meant that they acted unreasonably, as the appellants’ conduct was not that “of a law-abiding citizen intending to do his or her best to comply with the obligations or duties imposed”.⁵⁷ Thus, both the knowledge and recklessness alternatives of the test proposed by the Court were met.

⁵⁰ At [93], the Court described the situation where a defendant either knew the drug by the name it appears in the MDA or “most cases in which the drug was known by reference to its slang name”.

⁵¹ At [95].

⁵² At [95].

⁵³ At [95].

⁵⁴ The proviso in s 385(1)(c) of the Crimes Act 1961, which applied to the appellants’ trial.

⁵⁵ *Cameron*, above n 1, at [100].

⁵⁶ At [118].

⁵⁷ At [120], quoting Casey J in *Millar*, above n 31.

It allowed Mr Cameron's appeal on the basis that his position could be distinguished. While it concluded that it was open to inference that Mr Cameron knew that the chemical composition of 4-MMC was substantially similar to that of a controlled drug, and "even more strongly open to inference that he was at least reckless in that regard"⁵⁸, "[t]here was no occasion for him to engage as closely as Mr C, Mr Good and Dr L with the way in which the controlled drug analogue regime worked"⁵⁹. This meant that, if the Crown had advanced a case premised on recklessness, "it is not inconceivable that he would have been able to present a narrative which might have persuaded the jury to acquit him".⁶⁰ As such, his fair trial entitlements precluded application of the proviso.⁶¹

⁵⁸ At [139].

⁵⁹ At [140].

⁶⁰ At [140].

⁶¹ At [140].

LEGISLATION NOTE: THE CHILD PROTECTION (CHILD SEX OFFENDER GOVERNMENT REGISTRATION) ACT 2016

KRIS GLEDHILL*

The Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act) commenced on 14 October 2016;¹ it had to be modified under urgency by the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 to ensure its retrospective application. This retrospectivity was one of the reasons why the proposed legislation was found by the Attorney-General to be in breach of the New Zealand Bill of Rights Act 1990 in his report to Parliament under s 7 of that Act.² This article describes the background to and content of the Act as passed, and analyses issues to which it gives rise, including the potential human rights issues.

In the first part of the article, the basics of the scheme are described, including who is registered (some 1750 people at the outset and around 3000 after 5 years), the detailed information they have to provide and update for between 8 years and the rest of their life, the limited opportunities to be removed from the register, the offences for non-compliance, and the regime for accessing the register. The second part sets out the international comparators in the USA and the UK, and notes case law in the UK that led to the requirement to have review processes; it is also noted that the regime is not considered to involve a criminal penalty (and hence not be problematic on retrospectivity grounds). The third part sets out the policy statements behind the regime as introduced, including that policy makers do not expect it will prevent many offences (between 4 and 34 over a 10-year period is the estimate, though grounds are given for suggesting that there will be more, given the underreporting of such offences) but estimate that it will cost over \$146 million to run over that period; the absence of any rationale for limiting the scheme to child sex offenders is noted. Finally, the fourth part of the article analyses the regime for compliance with the New Zealand Bill of Rights Act and international human rights standards, assesses whether the offences created are strict liability, considers the impact of registration on the quantum of the sentence otherwise imposed and examines the interplay between being a registrable offender and being given notice of that fact; several drafting points are also raised, such as the effect of home detention on whether an offender is covered.

I. THE REGIME DESCRIBED

Section 3 of the Act sets out that its purpose is the establishment of a Child Sex Offender Register, which, it is asserted, will “reduce sexual reoffending against child

* Professor, AUT Law School. I would like to thank Steven Zindel, Barrister and Solicitor of Zindels, Nelson, for some useful comments on an initial draft, and those involved in the editorial and reviewing for their helpful input, which led to further amendments.

¹ Section 2 of the Act provided for commencement 30 days after Royal Assent, which was on 14 September 2016. One wonders why, given that it is viewed as so necessary for protective purposes that it is retrospective in effect, that it did not come into effect on the day of Royal Assent.

² Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill* (6 May 2015).

victims, and the risk posed by serious child sex offenders". The legislature has indicated that this will flow from the fact that the Register will provide:

- (a) ... government agencies with the information needed to monitor child sex offenders in the community, including after the completion of the sentence; and
- (b) ... up-to-date information that assists the Police to more rapidly resolve cases of child sexual offending.

A. The Register

Section 10 of the Act requires the Commissioner of Police to establish the Child Sex Offender Register; "significant operational decisions" about the administration of the Register must involve consultation with Corrections (s 11(2)). The Act regulates who is included on the Register and for how long, what information about them is recorded and needs to be updated, and who can access the information.

B. The Registrable Offender

As to who is covered, s 7 defines a "registrable offender" as someone imprisoned for a qualifying offence (ie they are automatically covered) or someone made subject to a registration order if a non-custodial sentence is made (ie there is a level of discretion). Also covered are "corresponding registrable offenders", defined in s 8 as those resident in New Zealand (or entering with a view to residence)³ and who have been sentenced to imprisonment abroad following conviction for a "corresponding offence" (defined in s 4 as relating to "the same or substantially similar conduct") or required to register in that jurisdiction under a similar scheme following their conviction.

As to what is a "qualifying offence", s 4 has a convoluted approach: it defines a "qualifying offence" as a "class 1 offence, a class 2 offence, a class 3 offence, or an equivalent repealed offence", and then goes on to further define those terms by reference to sch 2 of the Act. The latter lists various offences against the Crimes Act 1961 and three offences against the Films, Videos, and Publications Classification Act 1993; in all cases, the victim must be under 16. The place of the offence in the different categories is relevant to the length of the reporting obligation, discussed below: in brief, class 3 offences involve sexual connection, class 2 offences are instances of indecency and assaults, and class 1 offences are those involving more preparatory conduct (though including abduction offences contrary to s 208 of the Crimes Act that carry up to 14 years' imprisonment).

The classification of people as registrable offenders is designed to be retrospective. Whilst general principles of interpretation might allow an argument against retrospectivity, s 5 brings into effect transitional provisions in sch 1 to the Act which make express that it is retrospective. It covers those who, as of 14 October 2016, are

³ This will cover people deported to New Zealand from overseas, most notably Australia: see Kris Gledhill "Legislation Note: The Returning Offenders (Management and Information) Act 2015" [2016] NZCLR 19.

in custody,⁴ on parole or otherwise subject to release conditions, or subject to an Extended Supervision Order (ESO) or Public Protection Order (PPO) in relation to a qualifying offence (clause 1(1) of sch 1); sentenced on or after 14 October 2016 in relation to a conviction before that date (clause 1(2) of sch 1); or subject to an overseas sentence or registration requirement on or after 14 October 2016. Since the ESO and PPO could relate to a conviction that was more than a decade old, clearly there is significant retrospectivity. The only caveat is that if the person was under 18 at the time of the offence, they are outside the regime: this is set out in s 7(3).

There is a different approach for those who are not imprisoned. If a non-custodial sentence is imposed, registrability depends on the making of a registration order under s 9 of the Act. This is expressly retrospective by reason of s 9(1A), which makes the date of the offence irrelevant. The order is classed as a sentence and so is appealable: this is by reason of s 9(4). It is also classed, under s 9(5), as a means of dealing with an offender and so gives rise to the judicial duty to give reasons for a sentence or other order, set out in s 31 of the Sentencing Act 2002. The making of an order turns on the court being "satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally": s 9(2). The court can take into account anything it thinks relevant, but has to consider various factors, such as the seriousness of the offence, the time since it was committed and any risk assessment evidence: s 9(3). For those who received a non-custodial sentence during the period after commencement and before 13 March 2017, the Commissioner was able to seek a registration order unless the court had already rejected it at the time of sentencing: clause 4 of sch 1.

The Regulatory Impact Statement relating to the legislation, which is discussed further below, suggests that there are around 210 child sex offenders released from prison into the community each year and 115 placed on community based sentences.⁵ Clearly, given the significant retrospectivity in the legislation, it will cover a significant number of people. Indeed, a government press release at the time the Act was passed suggested that 1750 people would be on the register at the outset, rising to 3000 after five years.⁶

⁴ This includes someone transferred to a psychiatric hospital under sections 45 and 46 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or section 34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003: see the definition of "custody" in Child Protection (Child Sex Offender Register) Act 2016, s 4.

⁵ New Zealand Police *Regulatory Impact Statement: Child Protection Offender Register and Risk Management Framework* (6 June 2014) at [28]. The Attorney General indicated that it was understood that 472 people would be caught by the retrospective element of the regime: Christopher Finlayson, above n 2, at [29].

⁶ Hon Anne Tolley MP "Legislation passed to establish first child sex offender register" (8 September 2016) [Beehive.govt.nz <https://www.beehive.govt.nz/release/legislation-passed-establish-first-child-sex-offender-register>](https://www.beehive.govt.nz/release/legislation-passed-establish-first-child-sex-offender-register).

C. The Information to be Reported and the Time-scale for Reporting

A person who is registrable by virtue of the sentence received or registration order (or their position overseas) has to provide an initial report and then various periodic reports. This relates to “relevant personal information”, and is extensive, some might say Orwellian, set out in s 16(1)(a)-(q): it covers not just the usual identifying details of name, date of birth and address, but details of children in the same household, details of work, details of user names for social media accounts, details of modems and routers, details of cars owned or driven, and details of tattoos and scars. Any changes to this information must be reported by reason of s 20. In addition, an annual periodic report must be made whilst the registration requirement remains in place: ss 18 and 19.⁷ As Ellis J has commented, the obligations arising under the Act are “onerous”.⁸

Time limits exist for this reporting. Under s 17, the initial report has to be made within 72 hours of release from custody, the making of a registration order if a non-custodial sentence is imposed, or entering New Zealand as a citizen or resident or applying for a residency visa after entering New Zealand. Any changes to the personal information, such as a new tattoo or modem or a new social media name, must be advised within 72 hours; but any address change must be advised at least 48 hours prior. These requirements are set out in s 20(1). In addition, under s 21, 48 hours’ notice has to be given of travel plans that involve being away from home for more than 48 hours (though there is an exception if “exceptional circumstances” make this “impracticable” – s 21(4)). Changes in plans have to be reported, as does return to New Zealand if the travel is overseas: ss 22 and 23. One specific point to note is that a Registrable Offender cannot change their name without advance permission of the Commissioner (which can be refused if it might adversely affect such matters as rehabilitation, facilitate criminality or be offensive to a victim or the family of a deceased victim): see ss 52-54. Under s 53(3), breach of this by making an application under the Births, Deaths, Marriages, and Relationships Registration Act 1995 without a reasonable excuse carries up to two years’ imprisonment.

Much of the reporting by the offender has to be in person; this includes initial and periodic reports, changes of address, and changes to tattoos (s 25(1)). It is possible for other matters to be reported by other means, such as by e-mail, if the police agree. The Commissioner can direct a specific place for reporting or otherwise designate approved places (s 24), and privacy has to be guaranteed for the reporting (s 26). Some things, including initial and periodic reports and reports as to travel outside New Zealand, have to be reported to a constable; other things can be reported to an authorised police or Corrections employee (ss 25(3), 11(3) and 4). Under ss 28 to 32, the police can require proof of identify at the time of the reporting, and can take and store fingerprints and photographs.

In addition to the information supplied by the offender, s 10(2) indicates that the Register has to contain information about the offending and such matters as the

⁷ Special provision is made by s 33 for reporting by those in witness protection programmes.

⁸ *Bird v New Zealand Police* [2017] NZHC 1296 at [17].

sentencing notes of the judge. This in turn means that the creation of a record on the Register about the offender is not limited to situations in which people comply with their obligations as to the initial report. In other words, people will be placed on the Register by virtue of the conviction and sentence: for example, those in custody in relation to a relevant offence will be registered even though their obligation to report will not commence until they are released. However, much of the information will be that supplied by the offender.

The commencement of the time limits as set out in s 17 marks the start of the reporting obligation by reason of s 34. Section 35 then controls how long the reporting obligation continues: for life for a class 3 offence where there is imprisonment; 15 years for a class 2 offence where there is imprisonment; and eight years for a class 1 offence where there is imprisonment or for an offence of any class in relation to which a non-custodial sentence is imposed and registration order made.⁹

There are provisions under s 36 for suspending the requirements in two different sets of circumstances. Firstly, in short-term circumstances of the person being in custody or out of New Zealand. Secondly, the Commissioner has the power to suspend reporting on the basis that it is no longer necessary. This arises under s 36(2) and requires that the Commissioner be:

... satisfied, on reasonable grounds,—

- (a) that the offender does not pose a risk to the lives or sexual safety of 1 or more children, or of children generally; and
- (b) that the offender has a terminal illness or a significant cognitive or physical impairment that makes it difficult or impossible for the offender to fulfil his or her reporting obligations.

If either of these criteria cease to exist (ie, the risk reappears or the illness or impairment no longer applies), the suspension may be revoked by reason of s 37.

An alternative course for seeking a suspension of the reporting requirements exists under s 38 by way of application to the District Court, but in restricted circumstances. Only those subject to lifelong restriction can apply and only after 15 years and if they are not then on any form of parole or ESO or PPO; the test is that the offender satisfies the court that “he or she does not pose a risk to the lives or sexual safety of 1 or more children, or of children generally”. The court is required to take into account similar features as the Police in relation to s 36, and the Police and Corrections are parties to the application. An application can be made only every five years.

Although the provisions of ss 17 and 34, setting the time limits for the initial and ongoing reporting obligations, turn on the person being a registrable offender and certain events occurring (release from custody, the making of an order or the arrival into New Zealand or making of a residence application), there are duties as to notification. Sections 12-15 of the Act require notice of the registration requirement to be given by the sentencing judge and the court registrar in relation to a person

⁹ There are detailed provisions in s 35(2)–(3) for corresponding registrable offenders, which take the period back to the date of release from custody or the date of conviction if there was no imprisonment.

being sentenced, Corrections in relation to a person in custody for 14 days or more,¹⁰ and the Police in relation to someone who has entered New Zealand. In addition, the Police may give notice of the obligation and the penalties to anyone if the Commissioner “suspects that a registrable offender may not have received notice, or may otherwise be unaware, of the offender’s reporting obligations”: s 14. This latter power could no doubt cover someone who makes a residence application (in relation to whom there is no statutory notification obligation).

In relation to those covered by the retrospectivity provisions in sch 1, notice of their obligations has to be given by the Department of Corrections or the Commissioner of Police. By reason of cl 3 of the Schedule, their reporting obligation is to provide an initial report within 72 hours of receipt of the notice (or any longer time set out in the notice) and s 34 is expressly replaced by a provision to the effect that the reporting obligation begins on the receipt of the notice (which will affect the dates of annual reports), and the length of the reporting period (which will matter if it is not for life) is calculated to be from the date of sentence or the date of release from custody for the offence, whichever is later.

It is an offence, contrary to s 39, to fail to comply with reporting obligations without a reasonable excuse: this carries up to a year in prison; providing what is known to be false or misleading information carries up to two years, and is contrary to s 40.

The registrable offender may ask to be provided with the information held about them on the Register and for the correction of any errors: s 48. In addition, a person can challenge whether they are properly placed in the Register and the correct length for their placement. This involves an application to the Commissioner for a review of the placement (except if it follows from the making of a registration order in relation to a non-custodial sentence, which is subject to an appeal): this can be done within 28 days of notice being given under ss 12-15 (noted above). The Commissioner must make a decision after giving the person a chance to state their case. If the decision as to placement is upheld, it may be appealed to the District Court under s 50. No further appeal is possible, by reason of s 50(4).

D. Access to the Information

Under s 41(2) of the Act, the Commissioner of Police is required to issue guidelines as to access which restrict it “to the greatest extent that is possible without interfering with the purpose of this Act”, and allow access for the purposes of “preventing, detecting investigating and prosecuting qualifying offences; monitoring registrable offenders in the community”; and for information sharing among the government agencies specified in s 43(2), namely Police, Corrections, the Ministry of Social Development, Housing New Zealand, Internal Affairs and Customs. Section 43(2)(g) allows the Minister of Police to add other public sector bodies, after consultation with the Privacy Commissioner: this was used to allow the Ministry of Vulnerable Children to be

¹⁰ Section 4 defines custody as including police custody or psychiatric hospital detention: however, the notice has to come from Corrections.

added.¹¹ This information sharing must be for one of several purposes specified in s 43(1), namely monitoring the offender's whereabouts, verifying his or her personal information, managing the risk of further child sex offences or any risk or threat to public safety.

There is also a power to inform a parent, guardian, teacher or caregiver if "the Commissioner believes on reasonable grounds that the registrable offender poses a threat to the life, welfare, or sexual safety of a particular child or particular children": s 45. These various powers of disclosure override suppression orders (and must be accompanied by the suppression order, meaning that it is also something that should be on the Register, although it is not mentioned in s 10): see s 46. Section 47 preserves the confidentiality of the information except for the authorised disclosure scenarios, and backs this with six months' imprisonment and a fine of up to \$50,000 for a corporate body if (i) a person with access to the register discloses information other than with authority, or (ii) a person to whom information has been given passes it on without reasonable excuse.

II. BACKGROUND – OVERSEAS REGISTERS AND JURISPRUDENCE

The Register is not novel: indeed, New Zealand is a slow follower of registration schemes. The content of the Register is clearly the result of some consideration of overseas experience, particularly that in the UK. The starting point is the USA.

The US Department of Justice has an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (known by the semi-accurate acronym SMART), which was established under the Adam Walsh Child Protection and Safety Act 2006.¹² This is set out in 42 USC Chapter 151, which deals with Child Protection and Safety and has two main substantive parts, namely Sex Offender Registration and Notification and Civil Commitment of Dangerous Sex Offenders. The latter involves preventive detention, the former the requirement to register with the authorities. The website of SMART¹³ contains a potted history of the registration legislation that has developed over time, starting with the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act 1994.¹⁴ These contained requirements that states compile information on sex offenders, which have gradually extended to requirements that the information be made available to the public. SMART provides assistance to states in relation to these obligations.

¹¹ See "Child Protection (Child Sex Offender Government Agency Registration) (Specified Agency) Notice 2017," (23 March 2017) 33 *New Zealand Gazette* (online ed) <<https://gazette.govt.nz/notice/id/2017-go1384>>.

¹² Adam Walsh Child Protection and Safety Act 42 USC § 16901, and following, which opens with the recognition of numerous children who were murdered or assaulted. The various US statutes are named after victims.

¹³ See Office of Justice Programs "SMART" <https://www.smart.gov/index.htm>.

¹⁴ Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act 42 USC § 14071.

The United Kingdom (UK) followed suit, at least partially, with its Sex Offenders Act 1997, which required sex offenders to register with the authorities. The current legislation there is the Sexual Offences Act 2003 (the 2003 Act). Under s 80 of this Act, notification requirements are imposed if, in relation to certain offences, a person is convicted, found not guilty by reason of insanity, found to have committed the act after being found unfit to stand trial or accepts a caution for the offence. The offences, listed in sch 3 to the Act, are not limited to child sex offences, and those under 18 at the time of the offending are covered in relation to some offences (eg rape, sexual assault if the sentence was 12 months or more). As such, the coverage is wider than the New Zealand Register. The information to be recorded in the UK includes personal details and address, passport details; and there are ongoing requirements to give details of travel away from home for more than 3 days. The reporting obligations under the New Zealand statute are much more extensive.

The length of the reporting requirement in the UK turns on the sentence or order made, the range being two years (for a caution), five years (for a non-custodial sentence), seven years (if the sentence is six months or less or involves a hospital order), 10 years (if the sentence is more than six months but less than 30 months) or indefinite (if a sentence of 30 months or more is imposed or an order for detention in hospital with restrictions is made).¹⁵ It will be seen that the length of the reporting under the UK regime turns on the sentencing court's view of the seriousness of the offence as reflected in the sentence: in the New Zealand regime, there is only a very limited such link in that the use of a non-custodial sentence means that registration is for eight years, but the use of imprisonment means that it is the nature of the offence, not its seriousness as appears from the nature of the sentence, that is important. It will also be apparent that the reporting periods are generally longer in the New Zealand regime.

In *R (F and Thompson) v Secretary of State (R (F))*,¹⁶ the UK Supreme Court found that the indefinite restriction was a disproportionate interference with the right to privacy under art 8 of the European Convention on Human Rights¹⁷ and so granted a declaration of incompatibility under s 4 of the Human Rights Act 1998 (UK). This led to the Sexual Offences Act 2003 (Remedial) Order 2012,¹⁸ which inserted into the 2003 Act provisions allowing an offender to seek a review of the need for the ongoing application to them of the notification requirements: this can be made after 15 years in the case of someone 18 or over when placed on the Register or eight years if they were under 18; any further application can be made every 8 years. The basis for the application, found in s 91C(2), is that it is "not necessary for the purpose of protecting the public or any particular members of the public from sexual harm for the qualifying

¹⁵ Sexual Offences Act 2003 (UK), section 82. If the order made is a conditional discharge, which is roughly the same as an order to come up for sentence if called upon, under s110 of the Sentencing Act 2002, then the notification requirement lasts for the length of the conditional discharge.

¹⁶ *R (F and Thomson) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331.

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953), art 8 [European Convention on Human Rights].

¹⁸ Sexual Offences Act 2003 (Remedial) Order 2012 (SI 2012 No 1883, 30 July 2012).

relevant offender to remain subject to the indefinite notification requirements”.¹⁹ This is similar to the regime found in the New Zealand statute to apply to suspend the reporting requirements.

For the purposes of this article, it is important to understand the reasoning of the UK Supreme Court. It was accepted that privacy rights were implicated,²⁰ that it was provided for by law and that it was aimed at a legitimate object, namely preventing crime and protecting the rights of others. The key issue was proportionality in the absence of a review, which in turn involved assessing the extent of the interference with of privacy rights, the value of notification in securing the legitimate aims, and the reduced efficacy of the scheme if there was a review.²¹ The extent of the interference was found to be significant in light of the fact that the information could be conveyed to third parties (including when that was not necessary and perhaps by mistake) and involved requirements to provide information in person as to matters such as travelling plans.²²

Turning to the value of notification in preventing further offending, two areas were examined. First, there was the fact that various other powers and mechanisms existed to deal with the risk of further sexual offending, including the conditions that could be imposed as part of parole release, the making of a sexual offences protection order (under s 104 of the 2003 Act) or a foreign travel order (under s 114), and the regime that exists under the Criminal Justice Act 2003 whereby police, probation and prison authorities have to make Multi-Agency Public Protection Arrangements to manage the risk of sexual and violent offenders.²³ It was concluded that the notification requirements played an important role in helping the authorities “to keep tabs on those whom they are supervising and managing”:²⁴ but that if the other tools were no longer necessary, which would turn on the lack of risk posed by the offender, then the notification requirement would serve no purpose but instead merely be “an unnecessary and unproductive burden on the responsible authorities”.²⁵

¹⁹ The review is carried out by the police. Section 91D sets out the many factors that have to be taken into account.

²⁰ *R (F and Thomson) v Secretary of State for the Home Department*, above n 16, at [41], per Lord Phillips. Reference was made (at [30]-[31]) to established case law relating to the retention of fingerprints and DNA from those arrested but not convicted, which was found to be disproportionate in part because there was no review process: *S and Marper v UK* (2009) 48 EHRR 50. Note that there is also a human-rights based duty to protect victims: Lord Phillips referred briefly (at [24]) to the general proposition that there is a duty to deter sexual abuse, set out in *Stubbings & Others v United Kingdom* (1997) 23 EHRR 213. This extends to a more specific duty to take protective action if there is an identifiable risk (ie not merely relying on deterrence): this has arisen in relation to homicide (for example, *Paul and Audrey Edwards v UK* (2002) 35 EHRR 19, [2002] Inquest LR 27), conduct that is inhuman and degrading (eg *Dordevic v Croatia* (41526/10) Section I, ECHR 24 July 2012, [2013] MHLR 89), modern day slavery or forced labour (eg *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1), or a more simply assault and hence breach of the right to autonomy (eg *MS v Croatia* (36337/10) Section I, ECHR 25 April 2013, [2015] MHLR 226).

²¹ At [41].

²² At [42]-[44].

²³ At [45]-[50].

²⁴ At [51].

²⁵ At [51].

Secondly, however, there was the suggestion that, even if there was no particular positive risk, there was a residual risk arising from the nature of sexual offending. As the government's counsel submitted, "Either all sexual offenders had a (possibly) latent predisposition to commit further sexual offences or, if some did not, it was impossible to identify who these were".²⁶ However, the evidence before the judges, which was of a 21 year study and involved a reconviction rate of 25 per cent and hence a non-reconviction rate of 75 per cent, left them unconvinced that it was not possible to identify people whose risk of reoffending did not justify ongoing monitoring.²⁷ The lack of clear evidence that allowed firm conclusions as to this did not justify applying a precautionary approach of allowing indefinite monitoring without review.²⁸ It was also commented that other jurisdictions had review processes.²⁹

The Supreme Court referred to the fact that registration systems also exist in France, Ireland, Australia, Canada, South Africa and the United States (and invariably have review systems). The existence of these systems may also mean that there is scope for consulting case law as to the substantive points arising under the New Zealand regime.

The UK has added a non-statutory process whereby parents, guardians and carers can seek information from the police as to whether someone is a sex offender against children: the Child Sex Offender (CSO) Disclosure Scheme was established in October 2010, after a pilot.³⁰ The approach in the New Zealand process is that the Police can decide to release information: a decision on this may no doubt involve the relevant person asking the Police for the disclosure (which would raise a question as to whether there had been a breach of confidentiality).

It is also worth noting that the registration requirements in the UK have been found to be preventive risk reductions processes rather than punitive measures against those on the register. In *Ibbotson v UK*,³¹ the complaint related to the required registration under the Sex Offenders Act 1997: it applied to those convicted after it came into effect but also those serving a custodial sentence at the time and so was partly retrospective. The former European Commission on Human Rights determined that the complaint was inadmissible because the registration requirement did not amount to a penalty within the criteria adopted in case law:³² although registration followed a

²⁶ At [52].

²⁷ At [53]–[57].

²⁸ At [56].

²⁹ At [57].

³⁰ See Gov.uk "Child sex offender disclosure scheme guidance" (29 October 2010) <<https://www.gov.uk/government/publications/child-sex-offender-disclosure-scheme-guidance>>. See also Parents Protect "Keeping children safe – your right to ask" <https://www.parentsprotect.co.uk/police_disclosure_scheme.htm>, which is operated by a charitable foundation.

³¹ *Ibbotson v UK* (1999) 27 EHRR CD332. See also *Adamson v UK* (1999) 28 EHRR CD209.

³² The leading case at the time was *Welch v UK* (1995) 20 EHRR 247, in which it was determined that confiscation of the proceeds of crime was a penalty and should not be applied retrospectively in light of the prohibition of retrospective penalties in art 7 of the ECHR.

conviction (albeit that it was not a discretionary matter for the judge) and the applicant no doubt perceived it as a penalty and there was a criminal penalty for non-compliance, it was preventive in its aim, the potential criminal penalty required separate proceedings (unlike the term in default set in the regime considered in *Welch*) in which culpability could be assessed, and it was not of such severity to amount to a penalty.³³

III. THE POLICY BACKGROUND TO THE NEW ZEALAND REGISTER

The New Zealand version of the registration requirement joins the already extant preventive detention regime for those who pose a high risk of further sexual or violent offences, under the Public Safety (Public Protection Orders) Act 2014, and the ongoing supervision of released child sex offenders through Extended Supervision Orders, set out in Part 1A of the Parole Act 2002. What was then called the Child Protection (Child Sex Offender Register) Bill was introduced by the government to Parliament in 2015. The New Zealand Police provided a Departmental Disclosure Statement of 30 April 2015,³⁴ and a Regulatory Impact Statement of 6 June 2014.³⁵ The latter gives a lengthy account of the policy-making process and of the regimes abroad that were in essence copied.

The chronology of the proposal is described as having been initiated by the Minister of Corrections and Police after a 2012 visit to the UK.³⁶ It is to be hoped that this is not the first time that there was any consideration at Ministerial level of promoting the idea, given its long standing in other jurisdictions, including across the Tasman (for example, the Child Protection (Offenders Registration) Act 2000 (NSW)).³⁷ Various research statistics are quoted, though with caveats as to the lack of certainty in light of the under-reporting of sexual offending: this includes that the rate of sexual offending against children is more than 20 per cent higher than a decade previously,³⁸ and that the reconviction rates are relatively low.³⁹ Naturally, the deleterious effects of sexual offending against children are noted.⁴⁰ The problem identified is the difficulty of planning strategies to deal with recidivist offenders when there is no comprehensive

³³ The Commission specifically rejected the difficulties caused by public reaction.

³⁴ New Zealand Police *Departmental Disclosure Statement* (30 April 2015). Available at <<http://disclosure.legislation.govt.nz/bill/government/2015/16>>.

³⁵ New Zealand Police, above n 5. Available at <<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-police-cpor-aug15.pdf>>.

³⁶ At [22].

³⁷ The various other regimes are usefully summarised at [35] of and Appendix 3 to the Regulatory Impact Statement.

³⁸ New Zealand Police, above n 5, at [23]. It is not clear whether this takes into account population growth in the period.

³⁹ At [27]. The figure quoted is 8 per cent within 10 years for further offences involving children and 11 per cent if adult victims are included.

⁴⁰ At [24]–[26].

record of where they are:⁴¹ the existing measures such as Extended Supervision Orders are said to be inadequate in this regard.⁴² Accordingly, it is said:⁴³

There is an opportunity to further improve public safety and crime resolution rates through introducing a mechanism that would enable better (and better co-ordinated) monitoring of a wider range of child sex offenders in the community – during and after the end of their sentences.

The objectives are identified as (i) reducing sexual re-offending and the obvious harm it creates, (ii) improving public confidence that the authorities can monitor sex offenders, and (iii) providing up to date information that might assist the police to resolve cases more rapidly.⁴⁴ Laudable though these objectives are, there are also some clear problems. The third objective has at least a flavour of suggesting that the police should inevitably look first to past offenders to solve fresh cases, which runs the risk of prejudging an investigation, may well undermine efforts as to reintegration, and indeed suggests that the register does not reduce offending but simply provides a ready store of obvious suspects in relation to further offending. At the same time, the first two objectives raise the question of why the regime is limited to child sex offenders. When the matter passed from policy to legislative drafting, as has been noted above, the purposes set out in section 3 of the statute include the third objective and also refer to the need for monitoring (without going further as to the reason for the monitoring).

In relation to the point of why the Register is limited to child sex offenders (not a limitation in the UK), the Regulatory Impact Statement switches between sex offenders and child sex offenders with no rhyme or reason. In the summary of the options available,⁴⁵ the first rejected option is maintaining the status quo, which is unacceptable because of the information gaps about sex offenders (note, not limited to child sex offenders). The second rejected option is extending the existing protective mechanisms which are said to apply to sex offenders more generally, which is rejected because they are thought to be disproportionate to extend to lower risk offenders. The third option is of adding to the funding of NGOs that seek to manage child sex offending: it is rejected because it would not provide a single source of monitoring information for use by the police and corrections. There is no reason given for suddenly switching the concentration to child sex offending; and the conclusion is predicated on the policy aim of monitoring being the core aim. Hence, not surprisingly, the option recommended is of having a monitoring process.

It might be thought that the most sensible policy aim to deal with the problem of sexual offending is to focus on its reduction (whether against children or adults). The Regulatory Impact Statement has estimates as to the impact of the registration provisions on this. Over a 10-year period, it is suggested that between 4 and 34

⁴¹ At 30].

⁴² At [32]–[33].

⁴³ At [34].

⁴⁴ At [31].

⁴⁵ At [39].

offences will be prevented:⁴⁶ again, the reference is now to sex offences not child sex offences. The major variation between the upper and lower figures suggests that these estimates are given with very little confidence. It is added that “many additional offences are also likely to be prevented” because of the underreporting of cases and the fact that not all lead to convictions: this is necessarily speculative.⁴⁷ However, it is also recognised that there might be a perverse effect, namely an increase in the propensity for reoffending by reduced reintegration in the community.⁴⁸

The figures as to the cost of the system over the same 10-year period is given with more certainty: capital and operating costs will be \$146.054 million.⁴⁹ An inevitable question arising is whether that level of expenditure could be used in other ways that would result in a better reduction in offending. The authors of the Regulatory Impact Statement decline to reach any conclusion as to the cost-benefit analysis of the scheme,⁵⁰ and the final statement of recommendation is one that does not stress its actual benefits in reducing crime. Rather, the comment made is as follows:⁵¹

To respond to public concern about the risk of harm caused by known child sex offenders living in the community, it is recommended that a Child Protection Offender Register and offender risk management framework be established in New Zealand.

In short, this suggests a political motive of responding to public perceptions rather than of relying on proper evidence. This is all relevant because when one considers the operation of the scheme and any points of ambiguity that might call for interpretation, including on human rights grounds, evidence-based confidence in the efficacy of the measures will be a part of any proportionality assessment. This, and further matters of analysis, are set out in the next section.

IV. ANALYSIS AND COMMENTARY

A number of points will no doubt be taken in relation to the operation of the Register. What follows is an analysis of some of the obvious ones arising from a review of the statute and the materials prepared for Parliament. In addition to the Regulatory Impact Statement, to which reference has already been made, there was a Report from the Attorney-General which concluded that the Bill as introduced was problematic under the New Zealand Bill of Rights Act 1990 (NZBORA).⁵² Hence, the first is the NZBORA issues.

⁴⁶ At [73].

⁴⁷ At [84]. It is assumed that other offences, non-sexual in nature, will be deterred.

⁴⁸ At [38].

⁴⁹ At [74]. It is noted at [75]–[81] that this will require \$60.921 million of new funding, and the rest will have to be achieved through more efficient working.

⁵⁰ At [82].

⁵¹ At [91].

⁵² Christopher Finlayson, above n 2.

A. New Zealand Bill of Rights Act 1990

In the Regulatory Impact Statement, it was accepted that there were human rights and privacy concerns (and, indeed, prospects of increasing offending, as noted above). Specifically referred to are the rights to privacy, the problems of double jeopardy, the risks of vigilante attacks;⁵³ more general policy concerns are noted as well, namely continuing the perception that sexual offending is committed by strangers, whereas it is mainly perpetrated by people who know the victim, and erroneously treating sex offenders as a homogeneous group.⁵⁴ However, balancing features as to the efficacy of registers were also noted, namely the incentives for sex offenders to implement strategies to manage risk, the enhanced powers given to law enforcement agencies to resolve crimes, the deterrence effect and the enhanced abilities of communities to protect themselves.⁵⁵

The conclusion was that the human rights concerns did not prevent the legislation proceeding, and indeed it was suggested that limiting registration to those sentenced to imprisonment or made subject to a Registration Order solved any concerns.⁵⁶ The idea of allowing people to seek to come off the register was rejected on the basis that it would encourage pointless applications and should not involve police decision-making because of the risks of inconsistency and lack of scrutiny as in the case of court decisions.⁵⁷ It is worth repeating that the balancing features to which reference is made were not expected to prevent a significant number of crimes, and seem relevant only to controlling crimes by strangers rather than those known to the victims, who are accepted to be the main source of sex offending.

In any event, the government decided that there should be a form of review. The Bill that was introduced in 2015 had in cl 35 the power of the Commissioner to suspend reporting on the basis of the absence of risk and the illness that prevented the reporting (which became s 36 in the Act). Added to the Bill that emerged from the Social Services Committee was the power of the District Court to lift the lifelong reporting (which became s 38).⁵⁸ This was designed to alleviate concerns of the Attorney-General.⁵⁹

Those concerns were expressed in the Section 7 report in the following terms, the focus being on the right not to be subject to disproportionately severe treatment or punishment (s 9 of the NZBORA):⁶⁰

(i) the obligations imposed on offenders are similar to those arising under the Extended Supervision Order, which amounts to an extra penalty;⁶¹

⁵³ New Zealand Police, above n 5, at [38].

⁵⁴ At [38].

⁵⁵ At [37].

⁵⁶ At [59].

⁵⁷ At [59].

⁵⁸ Child Protection (Child Sex Offender Register) Bill 2015 (16–2), cl 36A.

⁵⁹ Child Protection (Child Sex Offender Register) Bill 2015 (16–2) (select committee report) at 4.

⁶⁰ Christopher Finlayson, above n 2, at [9]–[24].

⁶¹ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507.

- (ii) they limit freedom of movement (guaranteed by s 18 of NZBORA) and freedom of expression by compelling speech (guaranteed by s 14);
- (iii) the finding in *R (F)* that the lack of a court review for a lifelong reporting requirement was a disproportionate interference with privacy rights would sound under the NZBORA as potentially disproportionate treatment for someone for whom the restriction was no longer necessary;
- (iv) a breach of s 9 cannot be saved by an assessment of whether it is a reasonable limit for the purposes of s 5 of the NZBORA.

The introduction of the review process, replicating what happened in the UK when the human rights problem there was identified, is something that one suspects would satisfy the Attorney-General that the New Zealand regime is now rights-compliant. However, there are other concerns. In particular, there is no prospect of a review for someone whose reporting obligation is finite (ie 15 or eight years), except the police review which turns on there being both a reduced risk and severe ill-health. And yet, those who are subject to the finite term are so-subject because they have been convicted of what is viewed as a less serious offence that involves a reduced obligation to report: that surely enhances the prospect that they will be able to demonstrate the lack of a need for reporting, and yet they cannot make an application at all. Additional reasons support more extensive review provisions, both for those subject to lifelong reporting (an earlier review for them) and the others (who currently have no review): the limited material that the Register will have any significant effect on reducing offending; and the contrast with the UK regime that ties time on the register to the seriousness of the conduct as reflected in the sentence imposed. The lifelong requirement, for example, could flow from a short sentence of imprisonment for a class 3 offence, for whom a 15-year wait may be disproportionate.

The initial conclusion of the Attorney-General is predicated on the view that the Registration requirement is a penalty. This led to a second NZBORA problem for the following reasons:⁶²

- (i) Section 26 of the NZBORA prohibits a second punishment for the same offence;
- (ii) The application of the regime to those who were already serving a sentence or subject to an ESO (who were not subject to registration at the time of sentencing) was an additional punishment;
- (iii) This engaged s 26, and so it had to be assessed whether it was justified and proportionate under s 5;⁶³
- (iv) The protection of children from sexual offending is clearly an important objective; albeit that there is limited evidence of the success of registration schemes, there was a sufficient rational connection with the objective, though the focus was on "the immediate risks presented by qualifying offenders as they move into the community";⁶⁴
- (v) However, in the absence of a review that allowed those affected by the retrospective application to seek de-registration or suspension of the reporting obligation, the impairment to the right was greater than reasonably necessary and so did not meet the s 5 test.

The review process now introduced will not have solved this concern because, particularly given the context of the limited evidence of the value of registration schemes and the view expressed that their value was mainly in relation to short-term risks during a transitional period, it does not go as far as the Attorney-General

⁶² Christopher Finlayson, above n 2, at [25]–[40].

⁶³ This involves applying the approach set out in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

⁶⁴ Christopher Finlayson, above n 2, at [34].

suggested was necessary. This conclusion inevitably applies to the proportionality of the situation of those not affected by the retrospectivity provisions, and so reinforces the view noted above that the review process is not adequate.

Of course, there is the point that the equivalent process in the UK is not viewed as a penalty, which in turn means that the Attorney-General's starting point would not be replicated in the UK. For the purposes of international human rights law, a matter is criminal - such that the rights to a fair trial under art 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR), and the protection against retrospectivity in art 15, apply – if:⁶⁵ (i) the domestic classification of the matter is criminal; and (ii) if the domestic classification is not criminal but the nature of the allegation and the penalty is in substance criminal.⁶⁶ Since the NZBORA indicates in its preamble that it is designed to give effect to the obligations arising under the ICCPR, it can be seen that the domestic case law that classifies the matter as criminal is the end of the debate.

This classification of registration as a criminal penalty brings with it a further rights-based problem, namely that it is a sentence that is imposed by the legislature consequent upon the making of a custodial sentence. The right to a fair trial in relation to a criminal matter requires that criminal charges be determined by courts: see art 14(1) of the ICCPR. This has been found to be breached by mandatory death sentences because the court is deprived of assessing whether the facts merit the sentence: see *Kennedy v Trinidad and Tobago*.⁶⁷ In *R (Anderson) v Secretary of State*,⁶⁸ Lord Bingham – en route to a conclusion that the minimum term to be served under the still mandatory life sentence for murder in England and Wales had to be fixed by a judge rather than the Home Secretary – accepted that the jurisprudence arising under art 6 of the ECHR meant that the sentencing decision was part of the trial and so it was the function of the court to fix it.⁶⁹ This reflects the core principle of the separation of powers, and will apply equally to any other penalty in relation to which the judge has an administrative (ie simply announcing what Parliament has directed) rather than determinative role.

There are two possible solutions. The first is to make use of section 6 of the New Zealand Bill of Rights Act 1990, the duty to secure a rights-consistent interpretation of a statute, to read the mandatory sentence as subject to an implied condition that the order is to be made unless the courts find it inappropriate. This would retain the judicial role. By analogy, the English Divisional Court was able to read a requirement that the High Court fix minimum terms for existing life sentence prisoners “without an

⁶⁵ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 14–15.

⁶⁶ See *Janosevic v Sweden* (2004) 38 EHRR 22 and *Ezeh and Connors v UK* 39 EHRR 1, [2004] Prison LR 95, which related to the equivalent fair trial provisions under European Convention on Human Rights, above n 17, art 6.

⁶⁷ *Kennedy v Trinidad and Tobago* (CCPR/C/74/D/845/1998 Views) Human Right Committee, 26 March 2002 at [7.3].

⁶⁸ *R (Anderson) v Secretary of State* [2002] UKHL 46, [2003] 1 AC 837.

⁶⁹ At [20]–[23], citing various ECHR decisions.

oral hearing” as subject to the implied condition “unless the judge considers that an oral hearing is necessary to secure a fair trial”: see *R (Hammond) v Secretary of State*.⁷⁰ However, it is known that the New Zealand courts have been less creative than the UK courts in using their interpretive obligations under human rights legislation,⁷¹ and might therefore find this a step too far. It is clear from the policy documents that the legislation is designed to capture all who receive a sentence of imprisonment.

The second possible solution is that courts should retain control over the total of the penalty by accepting that the Parliament’s designation of part of the punishment if a custodial sentence is imposed, namely registration, requires the courts to adjust the other punitive elements – most obviously the length of the custodial sentence – in order to maintain control over the totality of the punishment imposed. There has been consideration in early cases of the question of the impact of the registration on the length of the sentence otherwise imposed, though without this supplemental point of interpretation as to the need to avoid a breach of the separation of powers. In *Bell v R*,⁷² the Court of Appeal was addressed on the suggestion that the retrospective application of the legislation should be taken into account on an appeal against a sentence imposed before the legislation was passed. The Court declined to do this. It noted that the legislation was punitive, though its main purpose was protective, which explained its retrospectivity. The conclusion was that a Parliamentary intention to discount the custodial element of a sentence was “entirely unlikely” and would be contrary to the underlying purpose.⁷³ The broader question, however, is whether Parliament intended to remove from the courts the task of setting the punitive sentence to be imposed.⁷⁴ In the absence of any such indication, which would also involve an intention to breach the separation of powers, the courts should be able to discount the sentence to reflect the ongoing penalty of registration.

B. The Discretion to Make a Registration Order in the Event of a Non-Custodial Sentence

If a non-custodial sentence is imposed, there is a discretion to make a registration order, which turns on “a risk” being posed by the offender to the lives or sexual safety of children: s 9(2). As has been noted, anything can be taken into account, but various factors set out in s 9(3) must be considered. But what is “a risk” in this context? This is far too vague a term to appear in a criminal sentencing statute, and so will have to

⁷⁰ *R (Hammond) v Secretary of State* [2004] EWHC 2753, [2005] 4 All ER 1127, [2005] 2 Prison LR 218. The case proceeded to the House of Lords, but not on this issue.

⁷¹ A criticism of the approach of the New Zealand courts and support for the position of the UK judges can be found in Kris Gledhill “The Interpretive Obligation: the Duty to Do What is Possible” [2008] NZ L Rev 283; and Kris Gledhill “The Interpretive Obligation: The Socio-Political Context” (2013) NZJPIL 103.

⁷² *Bell v R* [2017] NZCA 90. (*Bell*).

⁷³ At [26]. See also the reference at [20] to it being “most unlikely” that an Extended Supervision Order would justify reducing a finite sentence.

⁷⁴ See also *Bird v New Zealand Police*, above n 8, at [28] per Ellis J that there had not been full argument and that Australian authority supported the view that the impact of “extra-curial punishment” could be taken into account.

be rescued by being given meaning. It can be contrasted with other risk-assessment based statutory tests: preventive detention requires that the person be “likely to commit another qualifying sexual or violent offence” if released because of a finite term (s 87(2) of the Sentencing Act 2002; an extended supervision order requires a “high risk” of a future relevant sexual offence or a “very high risk” of a relevant violent offence (s 107I(2) of the Parole Act 2002); and a public protection order requires “a very high risk of imminent serious sexual or violent offending” (s 13(1) of the Public Safety (Public Protection Orders) Act 2014). These reflect a more suitable level of precision as should be found in relation to a criminal penalty provision.

In *Bird v New Zealand Police (Bird)*,⁷⁵ Ellis J declined to make a registration order after setting aside a sentence of imprisonment and imposing home detention. However, Her Honour did not have to determine the level of risk that required an order because the Crown conceded that it was not necessary to make one.⁷⁶ She endorsed this, focussing on whether the factors in s 9(3) suggested a future risk of offending (and concluding that they did not). Subsequently, in *Johnston v New Zealand Police*,⁷⁷ Dobson J held that it was also necessary to have regard to the purpose of the Act, set in s 3 as providing protection against “serious child sex offenders”, such that the risk that was necessary for s 9(2) to apply was that the offender was a serious child sex offender.⁷⁸ This does not answer the question of “how much” of a risk is necessary. However, Dobson J, as had Ellis J, reviewed the factors, using s 9(3) as a guide, and concluded that the risk of the repetition of offending was “sufficiently modest” that the order should not be made.⁷⁹ It is suggested that it will be necessary for a court to grapple with what level of risk is unacceptable and so justifies the making of an order.

Dobson J was also of the view that even if there was a relevant risk, there was a further question relevant to the decision, which was whether it was proportionate to make an order, “balancing ... the utility of the details of a convicted person being on the register, against the impacts of this additional punishment on the defendant”.⁸⁰ This is consistent with the view expressed above that human rights must feature in the process, the proportionality assessment being typical in relation to interferences with privacy and autonomy rights (as reflected in art 17 of the ICCPR). It should be noted that His Honour’s starting point was that the “implicit assumption” behind the register was that those who commit child sex offences have “sufficiently recidivist tendencies”:⁸¹ as has been noted above, however, the policy makers behind the registration scheme did not suggest that there was a significant prospect of success as a result of registration.

⁷⁵ *Bird v New Zealand Police*, above n 8.

⁷⁶ At [30].

⁷⁷ *Johnston v New Zealand Police* [2017] NZHC 1718.

⁷⁸ At [30]–[31].

⁷⁹ At [54].

⁸⁰ At [22]. See also [55].

⁸¹ At [13]. Note also that the Court of Appeal in *Bell*, above n 72, had a view that the register was primarily protective: this is no doubt correct, but does not reflect the material discussed above that reveals the limited protective value expected to be achieved.

One additional question is the status of community detention or home detention for the registration requirements? In *Bird*, a custodial sentence was set aside and replaced by home detention: all worked on the basis that this gave rise to a discretion to make a registration order (which Ellis J declined to do for the reasons noted above). The statutory language in place is as follows. In the hierarchy of sentences in s 10A of the Sentencing Act 2002, home and community detention are clearly distinguished from imprisonment, as they are in ss 69B and 80A. At the same time, they are sentences that involve “detention”, and so do not fit easily within the idea of a “non-custodial sentence” as referred to in ss 7(1) and 9(1) of the 2016 Act. Since that would mean a significant gap in the legislative scheme, one suspects that courts will construe the legislation so as to cover these sentences, and since they are clearly not sentences of imprisonment, they will come within the definition of “non-custodial”, which will be construed as “any sentence that does not involve imprisonment”.

This does mean that if such sentences are imposed by the sentencing judge, the court will have to be reminded to consider making a registration order. This will mean that there is a further ground of disproportionality in relation to those who are excluded from home detention in particular because of grounds such as not having a suitable address.⁸² Similarly, there will be questions of what should happen if imprisonment is accompanied by leave to apply for home detention under s 80I of the Sentencing Act 2002: given that a successful application to convert the sentence means that the sentence of imprisonment is cancelled (that being the effect of s 80K), does that mean that the registration order is likewise cancelled and consideration will have to be given to whether to make a Registration Order? The answer seems to be that this is so, though the statutory language could be clearer. Section 7(4) indicates that a person ceases to be a registrable offender if the relevant conviction is quashed or “the sentence ... is reduced or altered so that he or she would not have fallen within the definition of registrable offender ... had the amended sentence been the original sentence”. This can no doubt be read together with s 9 to allow the court that substitutes the home detention sentence to go on to then make a registration order in its discretion.

At the other end of the scale, the Sentencing Act 2002 does not count all orders as sentences: in particular, fines and upwards are sentences, whereas there is also a discharge or an order to come up for sentence if called on (s 10A(2)(a) and ss 106-111). Since s 7 of the 2016 Act requires a sentence, the latter do not count and so cannot be accompanied by a registration order.

C. The Offences

There are several offences under the statute,⁸³ namely:

⁸² In *Bird v New Zealand Police*, above n 8, at [25] per Ellis J that the difference in the length of reporting requirements and the existence of the discretion in relation to a non-custodial sentence meant that the “choice between home detention and imprisonment ... assumes particular importance”.

⁸³ The first two will be charges against someone who is a sex offender: the s 40 charge will be a category 3 offence and hence involve a right to involve a jury trial. However, since it will necessarily involve revealing the defendant’s previous character as a sex offender, there will be interesting tactical questions of whether to seek a jury trial.

- Section 39(1): "A registrable offender ... fails to comply with any of his or her reporting obligations without reasonable excuse" (which carries 1 year or \$2000 or both);
- Section 40(1): "A registrable offender ... in purported compliance with this subpart, provides information that the offender knows to be false or misleading in a material particular" (which carries 2 years or \$4000 or both);
- Section 47(3): "contravenes subsection (1) or ... without reasonable excuse contravenes subsection (2)" (which carries 6 months' imprisonment or a fine of \$50,000 for a body corporate).⁸⁴

To explain further the elements of the last offence, it has been noted above that parents, guardians, teachers or carers may be given information about a Registered Offender under s 45 if there are specific risks. However, s 47(2) indicates that "A person to whom personal information about a registered offender is disclosed under this subpart must not disclose that information to any other person" unless the Commissioner of Police gives consent (which can be given generally or on particular facts and must be for the purpose of protecting a child or children generally) or the disclosure is permitted under any other statute or law. In addition, s 47(1) indicates that a person who has authorised access to the Register "must not disclose any personal information in the register" unless authorised to do so by the Commissioner of Police or under some other statute or law.

The offence contrary to s 40(1) is expressly a mens rea offence: the need for knowledge of the falsity or misleading information indicates that the registrable offender must know what their obligations are (even though it is a matter of law) and knowingly provide erroneous information. Indeed, it has to be erroneous in relation to "a material particular": this allows an argument that something that is false but has no impact on the reasons for which the information is collated (because it does not impact on the ability of the authorities to monitor the offender or to resolve cases, those being the purposes set out in section 3) is not a material particular.

The need for knowledge of the falsity or misleading nature will no doubt also produce the debate as to what level of understanding amounts to knowledge, and whether it includes a belief. In *R v Kerr*, the Court of Appeal noted that the standard approach in New Zealand case law was to equate "knowing" to "believing":⁸⁵ however, it is to be noted that Parliament is perfectly able to specify belief as a mens rea if it does not want to go as far as requiring knowledge (see, for example, s 186 of the Crimes Act). There is also the idea of "wilful blindness", in essence not seeking confirmation of what is believed because of the understanding that it would produce knowledge. See *Soles* for a discussion of this,⁸⁶ including the importance of differentiating it from recklessness, namely taking an unreasonable risk that something is false: this is clearly

⁸⁴ There is no specified fine in relation to an individual offender: but section 39(1) of the Sentencing Act 2002 will allow a fine to be imposed.

⁸⁵ *R v Kerr* [2012] NZCA 121 at [14].

⁸⁶ *R v Soles*, above n 41. The substantive holding in this case has been overturned in *Cameron v R* [2017] NZSC 89 in relation to drugs offences, but the analysis as to the difference between knowledge and recklessness remains valid.

a different standard (as, for example, is recognised by the reference to knowledge or recklessness in relation to receiving contrary to s 246 of the Crimes Act). Accordingly, someone who provides information in a situation of some uncertainty may be reckless, but that will not be sufficient.

In relation to ss 39 and 47, should a mens rea be implied? This is a statutory interpretation question, the choice essentially being between having an implied mens rea that the prosecution have to prove or an absence of fault defence that the defendant has to prove (since offences of absolute liability are uncommon and require a fairly clear legislative intention).⁸⁷ In *Stevenson v R*, the Court of Appeal noted that:⁸⁸

the presumption that proof of mens rea or a guilty mind is an element of any crime can only be displaced by clear or necessary implication if the statute creating an offence is aimed at an issue of social concern such as public safety; even then, it must be shown that imposition of strict liability will be effective to promote the statutory objectives by encouraging greater vigilance to prevent the commission of the prohibited act.

In this context, it should also be noted that since the Court of Appeal in *Millar v Ministry of Transport*⁸⁹ confirmed that New Zealand criminal law recognised that judges could construe an offence to be one of strict liability and so with a general absence of fault defence, the legislature has been able to assert its power to control this by express labelling of offences. See, for illustration, s 65F Civil Aviation Act 1990 (endangering the safety of an aircraft is labelled strict liability, which no doubt avoids any argument to the contrary arising from its maximum sentence of two years' imprisonment); ss 143 and 143A Tax Administration Act 1994 indicate what offences are absolute liability and what are "knowledge offences"; ss 13 and 30 Animal Welfare Act 1999 make clear that the offences against ss 12 and 29(a) are strict liability, and ss 54 and 55 Walking Access Act 2008 set out various strict liability offences and specify the absence of fault defences.

It is a credible argument that the ability and practice of Parliament to specify that something involves strict or absolute liability reinforces the presumption that otherwise applies (of which Parliament is taken to be aware); to this can be added the features that there will no doubt be stigma attaching to any conviction and a real prospect of custody. This will not prevent arguments that the offence is impliedly one of strict liability, and it can no doubt be argued that the matter is aimed at a matter of social concern involving public safety (albeit in the context of the limited evidence as to efficacy in this regard) and will provide a deterrence and hence perhaps encourage better compliance.

Irrespective of whether there is a no fault defence, there is in relation to s 39 a reasonable excuse defence. It is suggested that this will lead to arguments as to the

⁸⁷ *Millar v Ministry of Transport* [1986] 1 NZLR 660 at 668: Cooke P noted that the endorsement of the general applicability of the strict liability position, ie with the absence of fault defence, meant that there was "a good deal less room" for absolute liability.

⁸⁸ *Stevenson v R* [2012] NZCA 189 at [16]; the Court relied on *Gammon (Hong Kong) Ltd v Attorney-General (Hong Kong)* [1985] AC 1, and its endorsement in *Millar v Ministry of Transport*, above n 87.

⁸⁹ *Millar v Ministry of Transport*, above n 8487.

relationship with the notification requirements, and will provide an alternative way in which lack of knowledge, this time as to having the obligation to report, will be relevant. Firstly, the obligation to report turns on a matter of status, namely being a registrable offender. Secondly, however, the various obligations as to giving notice, set out in ss 12–15, are obligatory in relation to court Registrars, Corrections in relation to those in custody and the Police in relation to those entering the country; it is only in relation to the obligation of Judges that there is express provision in s 12(3) that the failure of the Judge to mention the obligation of the offender as part of the sentence is expressly noted not to affect the reporting obligations. Thirdly, there is also a discretion on the part of the Police to give notice to anyone suspected to be unaware of their reporting. Finally, it is to be noted that in relation to those who are covered by the retrospectivity provisions, their obligation to report rests on the receipt of the notice of the obligation (clause 3 of sch 1).

The obvious argument from the perspective of the prosecution is that the expressly different treatment of those to whom the retrospectivity provisions apply should be contrasted with the obligations applicable to other offenders. However, there are clear arguments the other way. In the first place, the effect of clause 3 of sch 1 is that there is no reporting obligation until the notice has been served: hence, non-service does not amount to a reasonable excuse for non-reporting, but instead means that there is no obligation. Accordingly, it cannot govern the situation of others. For those, the fact that the notification obligations are clear indicates that they should have a consequence in the case of default and one obvious way of giving this impact is to allow a reasonable excuse defence if there has been no notification.

In relation to s 47(3), if there is strict liability in relation to s 39, it is a fortiori in relation to this offence given its lower penalty and arguably stronger reasons for having strict liability (protecting those required to register from breaches of their rights, including from the risk of misplaced vigilante action against them). In addition, the information will be provided in the context of a clearly expressed obligation of confidentiality (at least one would expect so) that the duty to take care that arises under s 47(2) will be emphasised. This in turn will mean that a positive defence of taking care not to reveal the information, the consequence of it being strict liability, will be appropriate. This can be seen as particularly proportionate in light of the reasonable excuse defence, which will allow information to be passed on if that is necessary⁹⁰ for the purposes of protecting children and it is not possible to get the permission of the police in advance.

D. Drafting Points

Finally, there are a number of miscellaneous points that arise from the drafting of the legislation, which are set out in no particular order.

(i) Since a conviction is required, it appears not to cover anyone found unfit to stand trial but probably to have committed the act (under the Criminal Procedure (Mentally

⁹⁰ Objectively so, rather than on the basis of it being believed to be necessary, given that a reasonable excuse is an objective formulation.

Impaired Persons) Act 2003) or found not guilty by reason of insanity; this is unlike the situation in the UK. This is explicable by the fact that registration is not viewed as a penalty there but is here, meaning that it cannot follow from either such finding. Hence, placement on an overseas register without a conviction means that someone is outside the definition of a corresponding registrable offender (since that requires a conviction, as is express in the language of s 8 of the 2016 Act). The position of those who receive a caution as an alternative is also to be contrasted: they are registrable under the UK scheme but not the New Zealand scheme.

(ii) The Act's definition of a "corresponding offence" refers to an offence abroad that involves "the same or substantially similar conduct as a qualifying offence".⁹¹ This may give rise to an issue if the overseas offence is constructed in a way that involves no mens rea or a lesser mens rea than the equivalent offence in New Zealand. Does the reference in the definition to "conduct" encompass only the actus reus aspect of the offending?

(iii) Section 45, the power to make disclosure to parents, guardians, carers and teachers in relation to a registrable offender who "poses a threat to the life, welfare, or sexual safety of a particular child or particular children", may give rise to questions if it is not exercised and an attack occurs. This is because s 51 excludes liability in relation to good faith conduct under the Act. However, there are clear duties arising in human rights law for the police authorities to protect life and bodily integrity from the actions of third parties when they know or ought to know of a real and immediate risk to life;⁹² and failures in relation to such duties require effective redress, including compensatory remedies.⁹³ These should be translatable to remedies under the NZBORA, given its stated purpose of giving effect to international human rights standards. But if s 51 evinces an intention to breach the NZBORA and the obligations arising under international human rights law, the declaration of inconsistency jurisdiction may be exercised.

(iv) Section 50(4) provides that there is no further appeal from the District Court's decision on appeal from a decision by the Commissioner of Police when an application made to review placement on the register or the identified reporting period is rejected by the Commissioner (under s 49). Since this will invariably turn on a point of law, it would leave the matter at the level of the District Court if the matter were not reviewable by way of judicial review. However, it seems that judicial review is available. In *AH v Commissioner of Police*,⁹⁴ Faire J ruled that the amending provisions designed to add to the retrospective coverage of the regime, specifically an amendment to clause 1(1)(e) to include those subject to release conditions post

⁹¹ Section 4, definition of "corresponding offence".

⁹² For example, *Tomašić and Others v Croatia* (46598/06,) Section I, ECHR 15 January 2009, [2012] MHLR 167; *Opuz v Turkey* (2010) 50 EHRR 28. These both arise under the equivalent provisions in European Convention on Human Rights jurisprudence. See also above n 20 above as to the clearly established duty to protect victims.

⁹³ For example, *Umetaliyev v Kyrgyzstan* (CCPR/C/94/D/1275/2004 Views) Human Rights Committee, 20 November 2008 at [11]; *Agiza v Sweden* (CAT/C/34/D/233/2003 Views) Committee Against Torture, 20 May 2005.

⁹⁴ *AH v Commissioner of Police* [2017] NZHC 930.

release from a custodial sentence, did not cover AH. It was AH's action in taking a s 49 review in relation to his original placement that led to this being revoked (and to the amending legislation). This challenge was all done by way of judicial review of the placement on the order (without any review and appeal to the District Court): no point seems to have been taken that judicial review was not available. In consequence, it should be available before or after a District Court decision.

LEGISLATION NOTE: THE SUBSTANCE ADDICTION (COMPULSORY ASSESSMENT AND TREATMENT) ACT 2017

WARREN BROOKBANKS*

I. INTRODUCTION

The Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (the SA(CAT) Act) received the royal assent on 21 February 2017. The Act replaces the Alcoholism and Drug Addiction Act 1966 (the 1966 Act), which was considered outdated and inconsistent with modern approaches to compulsory treatment based on human rights.

The new Act provides for the compulsory assessment and treatment of people with severe substance addiction who lack the capacity to make treatment decisions. Writing in *New Zealand's Mental Health Act in Practice*, Warren Young and Val Sim note that legislation allowing compulsory detention and treatment of people addicted to alcohol and drugs is primarily protective in nature and depends mainly on the incapacity of such people to make decisions for themselves. Such legislation is justified:¹

because such addiction can substantially interfere with comprehension and decision-making and substantially diminish the capacity of addicts to care for themselves or make informed choices about the treatment that would be required to enable them to do so.

Compulsion in the treatment of those addicted to alcohol or drugs is thus justified for the sole purpose, and to the extent that it enables, the restoration of capacity.²

The new legislation draws substantially on the review of the 1966 Act produced by the New Zealand Law Commission in September 2011.³ In its report the Law Commission acknowledged the need for a more effective structure and coherent framework for delivering alcohol and drug treatment services.⁴ A particular concern in developing a new framework was how to manage the use of compulsion in requiring people to take treatment. The Law Commission noted that over the years various provisions in the 1966 Act had fallen into disuse and that the overall framework of the Act had not kept pace with changes in allied legislation like the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the MH(CAT) Act). Reform was therefore considered long overdue.

* Professor of Criminal Law and Justice Studies, AUT Law School

¹ Warren Young and Val Sim, "Reform of the Alcoholism and Drug Addiction Act", in John Dawson & Kris Gledhill (eds) *New Zealand's Mental Health Act in Practice* (Victoria University Press, Wellington, 2013) 376. The chapter, chapter 21 in the book, provides a valuable account of the theory behind, and the problems associated with, the compulsory treatment of alcoholics and drug addicts.

² Young and Sim, above n 1.

³ See Law Commission *Compulsory Treatment for Substance Dependence – A Review of the Alcoholism and Drug Addiction Act 1966* (NZLC R118, 2010) (Report).

⁴ At [1].

The Law Commission report identified a number of significant problems with the earlier legislation.⁵ These included the fact that while medical certification was required before committal could occur, there is no requirement that such certification be undertaken by specialist alcohol and drug practitioners. The committal process itself required an application to be made to the District Court, which often led to delay and problems for families meeting regulatory requirements for applications. In addition, the statutory two-year period of detention was considered to be far longer than was necessary for treatment purposes, and there was inadequate provision for review of the detention decision.

Important in the Law Commission's review was the question of the public interest that is served by long-term compulsory treatment. It concluded that while it was debatable whether reducing substance dependence was a sufficiently important objective to justify intervention, nevertheless in the case of people who were severely dependent on alcohol or drugs there was an important public interest to be served by intervening to protect them where they had, as a result of severe substance dependence, a substantially reduced capacity to care for themselves or to make treatment decisions and, therefore, were at risk of serious harm.⁶ In the Law Commission's view, protecting such people from immediate harm by restoring the capacity to make treatment decisions was a sufficiently important objective to justify intervention. The Commission offered the following limited justifications for compulsory treatment for alcohol and drug dependence:⁷

- a person's dependence and seriously reduced capacity to make choices about ongoing substance use and personal welfare;
- care and treatment is necessary to protect the patient from significant harm;
- no other less restrictive means are reasonably available for dealing with the person;
- a person is likely to benefit from treatment;
- a person has refused treatment.

II. ASSESSMENT AND COURT REVIEW MODEL

The SA(CAT) Act is formulated around a model of an initial committal decision being made by a specialist clinician which is then subject to review by the Family Court. In this regard it appears to follow the model of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the ID(CCR) Act) whereby an initial care and rehabilitation plan made by a care manager may, or may not, issue in the making of a compulsory care order.

Under the SA(CAT) Act a similar approach is adopted. Provided a person meets the criteria for compulsory treatment, in that they have a severe substance addiction and lack capacity to make informed decisions, they may then be subjected to a process of assessment and treatment which may issue in a compulsory treatment certificate, which takes effect as soon as it is dated and signed (s 23). This authorises a person's detention and admission to a treatment centre under the oversight of a responsible

⁵ At [4].

⁶ At [9].

⁷ At [12].

clinician (s 28). However, while detention and treatment in a detention centre is authorised upon appropriate execution of the compulsory treatment certificate, treatment must be terminated and the patient released from detention if an application for review of compulsory status has not been determined by the Court within 10 days of the date of filing the application in Court (s 31(2)).

Where a review does take place pursuant to subpart 6 of Part 2 the Court is required to determine whether, in relation to the patient, the criteria for compulsory treatment are met.⁸ If so satisfied the court may, having regard to all the circumstances of the case, continue the compulsory status by making a compulsory treatment order (s 32(2)). A compulsory treatment order remains in force until the close of the 56th day after the date of the signing of the compulsory treatment certificate, although it may, subject to certain restrictions, be extended for a once only period of a further 56 days (s 32(3)).

Where a judge is not satisfied that the criteria for compulsory treatment are met, he or she may dismiss the application and order the patient's immediate release from compulsory status.

III. DEFINING PRINCIPLES

Broadly speaking the Law Commission's recommendations align with what the new legislation now provides. Part 1 of the Act defines various preliminary matters, including the purpose of the Act (s 3), matters of interpretation (s 4), the criteria for compulsory treatment (s 7), and principles applying to the exercise of powers (s 12), including specific principles applying to the exercise of powers over children and young persons (s 13).

The purpose of the SA(CAT) Act as defined in s 3 is "to enable persons to receive compulsory treatment if they have a severe substance addiction and their capacity to make decisions about treatment for that addiction is severely impaired". The intended purpose of compulsory treatment is defined as being to:

- (a) protect persons from harm;
- (b) facilitate a comprehensive assessment of their addiction;
- (c) stabilise their health through the application of medical treatment (including medically managed withdrawal);
- (d) protect and enhance their mana and dignity and restore their capacity to make informed decisions about further treatment and substance abuse;
- (e) facilitate planning for their treatment and care to be continued on a voluntary basis;
- (f) give them an opportunity to engage in voluntary treatment.

These purposes in effect encompass the broad scope of the Act as expressed in the concept of compulsory treatment, the process of assessment, detention and treatment, the rights of patients, appeals and review, and the designation of approved providers.

⁸ Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 7 [SA(CAT) Act].

The question of who is likely to become subject persons under this Act is, at this point, a matter of speculation. However, three factors will be determinative, namely, the nature and degree of the addiction, the subject's actual decision-making capacity, and the principle of parsimony (least restrictive intervention). While some well-known and chronic alcoholics might seem to be early candidates for compulsion, the philosophy of the Act appears to favour engagement in voluntary treatment wherever practicable. With a growing public de-stigmatisation of all forms of disability and appeals to inclusivity, it is to be hoped that the availability of the new regime, properly supported by adequate resourcing in the public sector, will encourage those struggling with addiction to seek the help they need.

IV. ASSESSMENT AND TREATMENT

A. Application

Part 2 of the SA(CAT) Act outlines the process for assessment and treatment of persons suffering from severe substance addiction. For practitioners accustomed to the procedure for compulsory assessment and treatment under the MH(CAT) Act the regime for assessment in this legislation will seem familiar. The application requirements in s 15 are similar to those prescribed in s 8A MH(CAT) Act, as is the provision for assistance in arranging for a medical examination for the application defined in s 16. In addition to the medical certificate (again modelled on s 8B MH(CAT) Act) if attempts at examination of the subject person have been unsuccessful, an 'authorised officer' (ie a health professional designated under s 91 as a person with appropriate training and competence in dealing with persons with severe substance addictions) must outline in a memorandum attempts made to examine the person and why they were unsuccessful.

Once an application has been received by the Area Director (the equivalent to the Director of Area Mental Health Services under the MH(CAT) Act) that person must arrange for the person to be assessed by an approved specialist. The procedure specified in s 19 for making the necessary arrangements is virtually identical to the procedure in s 9(2) of the MH(CAT) Act. In defining the maximum time limits on compulsion, the SA(CAT) Act states seven events which signify when a person's compulsory status ends.⁹ However, a compulsory treatment order expires eight weeks (56 days) after the signing of the compulsory treatment certificate (s 32 (3), contrary to the Law Commission's recommendation that the period be a maximum of six weeks.¹⁰ While compulsory status begins when an 'approved specialist' has signed and dated a compulsory treatment certificate in respect of the person (see s 17) compulsory status only ends when one of the following events occur:¹¹

- (a) The responsible clinician has, by the close of the seventh day after the date on which the patient's compulsory treatment certificate was dated and signed, failed to apply under s 29(c) for a review of the patient's status;

⁹ Section 11(2).

¹⁰ Report at [22].

¹¹ SA(CAT) Act, s 11(2).

- (b) The court fails to make a compulsory treatment order within the period prescribed by section 31;
- (c) The person's compulsory treatment order expires;
- (d) The person is released from compulsory status by an order of a Judge or a responsible clinician;
- (e) The person becomes subject to an order under s 24, 25 (1)(a), or (b), or s34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003;
- (f) The person becomes subject to an inpatient order under Part 2 of the MH(CAT) ACT 1992 or becomes a special patient as defined in s2(1) of that Act;
- (g) The person is sentenced by a court to be detained in prison.

B. Expiry and Extension of a Compulsory Treatment Order

By virtue of s 32(3), a person's compulsory treatment order (CTO) expires on the close of the 56th day (eight weeks) after the date on which the patient's compulsory treatment certificate was signed, although a CTO may be extended for a further 56 days under s 47 of the Act. However, the extension power only applies in cases where the patient is suspected of suffering from alcohol or drug related brain injury.¹² A CTO may only be extended if the patient continues to meet the criteria for compulsory treatment and there are reasonable grounds to believe the patient suffers from a brain injury (s 47). There is no general power of extension. Unlike the situation under the ID(CCR) Act, there is no power to indefinitely extend a compulsory treatment order.

C. Rights of Patients

The rights of patients under the Act are defined in subpart 5 of Part 2. The statement of rights applicable to all patients is comprehensive and comparable to statements of patients' rights under the MH(CAT) Act and the ID(CCR) Act. However, rights unique to patients under this legislation include the right to nominate someone to protect the patient's interests (s 49), the obligation for the principal caregiver, welfare guardian and nominated person to be informed of events affecting patients (s 51), the right to be dealt with in accordance with the objective and principles of compulsory treatment (s 52), and additional rights of children and young persons (ss 65 and 66). A right of complaint of a breach of rights similar to that in s 75 MH(CAT) Act is also given (s 67).

It should also be noted that the rights defined in the SA(CAT) Act exist in parallel with the broad statements of rights of persons with mental disabilities which are equally applicable to persons with substance addictions. Of particular relevance are the human rights treaties to which New Zealand is a party and which are relevant to mental health and disability law, in particular the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR) and the Convention on the Rights of Persons with Disabilities 2006 (CRPD).¹³ It is enough to observe in this context that the observance of the human

¹² The qualification that the brain injury be alcohol or drug-related to warrant an extension is not expressed in the statute, but was the evident intention of the Law Commission's recommendations. See Report at [24].

¹³ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); International Covenant on Economic, Social and Cultural

rights of persons with disability is not a matter of state discretion. It is a matter of obligation. Human rights are not simply a matter between citizens and their government, but are a matter of international law enforceable against the state on behalf of persons living within or under the control of the state.¹⁴ "Governments do not possess the power to grant or deny human rights and freedoms. Persons possess rights simply because of their humanity."¹⁵

Of particular importance as this new legislation 'beds in' will be the extent to which practice under the Act gives expression to the human rights of those persons with physical, mental and intellectual disabilities who come within the Act's jurisdiction, but who are also protected by the rights enshrined in the CRPD, in particular the guarantees of equality and non-discrimination.¹⁶ As Kris Gledhill has observed, a question that will arise as the principle of non-discrimination is worked out in practice is whether the obligation of the state is essentially a negative one of "not to interfere" or requiring ostensibly neutral regulation, or whether it requires positive steps to be taken to ensure an equal outcome.¹⁷ These and other human rights issues are likely to be tested as the new legislative regime comes into effect.

V. PROCEDURE FOR CTO APPLICATION HEARING

Subpart 6 of Part 2 defines the procedure for the hearing of an application. Jurisdiction rests with the Family Court and the procedural steps are very similar to those applicable to the hearing of a CTO application under the MH(CAT) Act. Certain persons are entitled to appear and be heard (s 71) and relevant documentation served on the patient by the responsible clinician who applies for a review of the patient's compulsory status (s 72). A District Inspector has standing to appear on the patient's behalf and be heard on the application, if the patient so desires, and must communicate orally with the patient for this purpose (s 74). As with the review procedure in s18 of the MH(CAT) Act, a Judge acting pursuant to the SA(CAT) Act must interview the patient before an application for review of the compulsory status of a patient is heard (s 75). The patient is entitled to be present at the hearing, unless excused or excluded, and is entitled to legal representation. The person may call witnesses and cross-examine witnesses called by another party, and must be given an opportunity to address the court if capable of doing so (s 77(3)).

Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force January 3 1976); United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008) (CRPD). For a very thorough recent account of the relevance of these human rights treaties in the context of mental health law see Kris Gledhill, "Examining New Zealand Mental Health Law from a Human Rights Perspective" (paper presented to New Zealand Law Society "Focus on Mental Health in the Courts" Continuing Legal Education Intensive, September 2017) 1.

¹⁴ Lawrence Gostin and others *Principles of Mental Health Law and Policy* (Oxford University Press, Oxford, 2010) at 105.

¹⁵ At 105.

¹⁶ Articles 5 and 12.

¹⁷ Gledhill, above n 13, at 5.

At the hearing the Court is not bound by the rules of evidence (s 80), and may call any witnesses whose evidence may be of assistance to the Court (s 82). The Court can also dispense with a formal hearing if satisfied no one wishes to be heard on the application (s 83). Competent interpreters must be provided where the person's preferred language is a language other than English, or where the patient is unable, because of disability, to understand spoken language (s 84).

There is a right of appeal to the High Court in any case where the Family Court has refused to make an order or has dismissed an application (s 85).

A. Office Holders

Subpart 7 of the Act deals with issues of administration and public assistance and defines the roles of particular office holders, including the Director of Addiction Services (s 86), Directors of Area Addiction Services in specified areas (s 88), District Inspectors and Authorised Officers (ss 90 and 91). The powers of office holders to delegate functions, duties and powers are also spelled out here (ss 87 and 89). The subpart also defines the process for designating approved providers and their reporting duties in relation to their functions under the Act (s 93).

The rules governing the assignment of responsible clinicians and the designation of approved specialists are laid out in ss 94-96.

B. District Inspectors

Subpart 8 deals with the role of District Inspectors with regard to the visitation of treatment centres. The authority to appoint District Inspectors for this purpose is given in s 90. The Minister of Health may appoint any number of lawyers to the District Inspector role in respect of the locations specified by the Minister in the instrument of appointment. The powers given to District Inspectors are almost identical to those given to district inspectors under the MH(CAT) Act. However, it is unclear whether a person appointed as a District Inspector under this Act can also hold the same role under mental health legislation. The answer may lie by analogy with the situation pertaining to the IDCCR Act, under which the Director-General of Health has the power to designate district inspectors for the purposes of the Act.¹⁸ Under s 144(3) of the IDCCR Act the Director-General may only designate as District Inspectors "persons who are District Inspectors or Deputy District Inspectors appointed under the Mental Health (Compulsory Assessment & Treatment) Act 1992". What of the position under the SA(CAT) Act? Do District Inspectors already have to hold that role under the mental health legislation? Such an approach would at least be consistent with that taken under the ID(CCR) Act. Equally, however, in the absence of a statutory limitation identical to s 144(3) of the ID(CCR) Act, it might be argued that a purpose of the legislative scheme is to give the Minister of Health, as the designating authority, the power to appoint District Inspectors *de novo* for the distinctive purposes of the SA(CAT) Act, whether or not they have or currently hold the role under the mental health legislation.

¹⁸ See Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 144 (1).

It is of interest that neither the Act itself nor the explanatory materials preceding the passage of the legislation through Parliament addresses this question.

C. Enforcement

Subpart 9 deals with powers of enforcement under the Act. The power to seek police assistance is modelled on the same power given in s 41 MH(CAT) Act and authorises detention by a constable for the shorter of six hours or the time taken to conduct a specialist assessment (s 105(3)). The subpart also provides for the apprehension of patients who are absent without leave from a treatment centre (s 106). The jurisdictions for a Judge or Registrar to issue a warrant is defined (s 107) together with the parameters for the use of force. Under s 109 a person authorised to use force may use such force as "is reasonably necessary" in an emergency and in circumstances where a person is obliged to accept treatment or to comply with a lawful direction (s 109(3)).

D. Offences

The Act also specifies five specific offences which apply to persons involved in the management of or employment by a service operating a treatment centre. The offences track the identical offences in the MH(CAT) Act.¹⁹ The offences of neglect or ill-treatment of patients, assisting a patient to be absent from a treatment centre without leave, and obstruction of inspection defined in ss 110, 111 and 112, respectively, relate exclusively to the manager of a treatment centre, or a person employed or engaged by the manager or the service operating the treatment centre. The offence of neglect or ill-treatment under s 110 also applies to any person performing any function or exercising any power in relation to a patient under the Act.

The offences defined in ss 112-114, namely, false or misleading certificates and further offences involving false or misleading certificates, may be committed by any person and are not specifically limited to those involved in management or employment within treatment centre. The most serious of these offences, neglect or ill-treatment of patients under s 110, carries a maximum term of imprisonment not exceeding two years.

E. Legal representation

The Act is silent on the issue of the right of subject persons to free legally aided lawyers. However as with both the MH(CAT) Act and the ID(CCR) Act, the Act does provide a right to legal advice (s 57). Since the SA(CAT) Act is remedial legislation proceedings under the Act would qualify as civil proceedings for the purposes of the Legal Services Act 2011. Legal aid may be granted for civil proceedings in the Family Court or the District Court.²⁰ Eligibility for legal aid will depend on the likely cost of the

¹⁹ See Mental Health (Compulsory Assessment & Treatment) Act 1992, ss 114, 115A, 117, 118 and 119.

²⁰ Legal Services Act 2011, s 7(1)(a).

proceedings to the applicant and the applicant's ability to fund the proceedings if legal aid is not granted.²¹ Other factors, including a lack of reasonable grounds for taking or defending the proceedings and arrears in respect of repayment of a previous grant of legal aid, may also affect eligibility. However, particular rights guaranteed by the CRPD, in particular the right of effective access to justice "in order to facilitate their effective role as direct and indirect participants",²² would seem to imply a positive duty on the state to ensure that the subject person does not experience unreasonable barriers to effective participation in the proceedings, including financial barriers. However, this is an issue that will need to be conclusively determined by the courts in an appropriate case.

VI. SUBORDINATE INSTRUMENTS AND MISCELLANEOUS PROVISIONS

Part 3 of the Act is concerned with subordinate instruments and miscellaneous provisions. It provides for the Director-General of Health to issue guidelines and standard, and covers such matters as the making of regulation (s 118), matters to be disclosed in annual reports (s 119), the Ministry of Health's obligation to review the Act (s 119A) and provisions governing delegations (s 120).

The Act concludes with Schedules which govern transitional, savings and related provisions, and consequential amendments to other acts and repeals.

VII. CONCLUSION

As the Law Commission has observed, people suffering from severe substance dependence have quite distinct needs from people suffering from severe mental disorders.²³ Their needs for access to detoxification centres and ongoing access to alcohol and drug treatment programmes dictates the need for a statutory regime specifically targeting this area of social need. While the regime of the Alcoholism and Drug Addiction Act 1966 has served the interests of the community in the management and care of those with severe substance and alcohol addictions for over 50 years, the increased sophistication and complexity of a modern society's interaction with mind-altering substances requires a statutory model better suited to modern needs. It should be able to deliver care swiftly and efficiently while attuned to the rights and entitlements of addicts and substance abusers as persons with disabilities and entitled to the full protection of the law. Yet, as Young and Sim observe, law reform on its own is not enough where insufficient treatment facilities currently exist in New Zealand for both compulsory and voluntary treatment.²⁴ The lack of adequate resourcing to address treatment needs will inevitably limit the effectiveness of the legislative regime.

Nevertheless, such limitations notwithstanding, the principles and objects specified in the Act should support the fundamental public interest directive, identified by the Law

²¹ Legal Services Act 2011, s 10(2).

²² CRPD, above n 13, art 13.

²³ Law Commission, above n 3, at [6.8].

²⁴ Young and Sim, above n 1, at 388.

Commission, that people who are severely dependent on alcohol or drugs should be subject to intervention to protect them from the risk of serious harm where, as a result of severe substance dependence, they have substantially impaired capacity to care for themselves and to make treatment decisions.²⁵

²⁵ Law Commission, above n 3, at [9].

**BOOK REVIEW: ROBERT J FRATER QC *PROSECUTORIAL MISCONDUCT*
(2ND ED, THOMSON REUTERS, TORONTO, 2017).**

DON MATHIAS*

Mr Frater is a highly experienced senior Canadian prosecutor. The negativity of the title of his book is justified by the ease with which the principles of proper conduct can be stated compared with the detail necessary to discuss the case law on when those principles are breached. In any event, impropriety will inevitably be of more interest than its opposite, particularly for people who are not prosecutors. The attraction of the book is in its potential to provide relevant examples of when there may be a remedy, a relevance which comes from the similarity of the requirements of proper prosecutorial conduct among legal systems in the common law tradition. An international perspective has the advantage of revealing many more examples of misconduct than one jurisdiction could ever hope to produce. Mr Frater has achieved his stated aim of writing a book that will be useful to defence counsel, prosecutors and judges throughout the Commonwealth.

To take a snapshot: 16 of the cases most widely referred to in the book include three that have often been cited in New Zealand courts: *Boucher v R* [1955] SCR 16,¹ *R v Stinchcombe* [1991] 3 SCR 326,² and *R v O'Connor* [1995] 4 SCR 411.³ The others are not irrelevant to us. They concern topics such as: abuse of process and the duty of Crown counsel to avoid wrongful convictions and to act to rectify them when they occur, and when there may be a remedy for failure to do that;⁴ when the prosecutor has an improper relationship with other branches of government, and when outside counsel should make the decision to bring charges;⁵ the need for prosecutorial independence and objectivity and when failure of this can be an abuse of process;⁶ the nature and scope of the Crown's duties of disclosure, remedies for failure of this, and the consequences of an attack on the character of Crown counsel;⁷ the extent to which the defence has to provide a basis for greater disclosure, particularly in relation to third party records, and when a decision about that can be reviewed;⁸ when the prosecutor's conduct can be impugned at trial because of an "oblique motive" for failing to call a witness;⁹ when the Crown needs to notify the defence of the potential

*Barrister, Auckland.

¹ See *Manning v R* [2015] NZHC 936 at [5] (with mis-spelling as "Bouchier"), a recent example.

² See *R v Sullivan* (No 10) [2014] NZHC 1105 at [34]–[35] per Heath J, a recent example.

³ For example, *Attorney-General v Otahuhu District Court* [2001] 1 NZLR 737, (2000) 18 CRNZ 105 (HC Hammond and Randerson JJ).

⁴ *Hinse v Canada (Attorney General)*, [2015] 2 SCR 621, also discussing when there may be a remedy in damages against the Minister for failing to "meaningfully review" an application for the exercise of the prerogative of mercy.

⁵ *R v Carriere* 2005 SKQB 471.

⁶ *R v Cawthorne* [2016] 1 SCR 983., 2016 SCC 32.

⁷ *R v Horan* 2008 ONCA 589.

⁸ *R v Jackson* 2015 ONCA 832, (2015) 128 OR (3d) 161 (ONCA).

⁹ *R v Jolivet* [2000] 1 SCR 751. An oblique motive is an improper motive, and might be considered to affect the fairness of a trial. Robert J Frater *Prosecutorial Misconduct* (2nd ed, Thomson Reuters, Toronto, 2017) at 196.

destruction of evidence and the consequences of failure to do so;¹⁰ the extent to which a court will defer to the prosecutor's disclosure decisions in the light of the constitutional obligations of the Crown; how the court should receive evidence of counsel's reasoning, and the extent to which defence counsel must be diligent in seeking disclosure, and what remedy should be given for failure of disclosure;¹¹ when it is proper to bring a prosecution if there is evidence favourable to the defence, and to what extent does the prosecutor have to give reasons for the institution or the termination of proceedings;¹² when a stay of proceedings can be followed by an award of costs and whether the threat of costs would unduly fetter the decision to prosecute;¹³ the extent of the Crown's disclosure obligations in the sense of what is relevant when the defence seek to set aside a search warrant obtained in reliance on informer information, and what is permissible in order to protect an informer's identity;¹⁴ the extent of Crown disclosure obligations in the context of appeals;¹⁵ when failure of disclosure prior to a guilty plea may justify withdrawal of the plea on appeal, and what the remedy should be, taking account of whether a retrial for a serious offence would be an abuse of process, particularly where the defendant has served part of a sentence.¹⁶

But this is just a glimpse of the book's compass, a glimpse highlighting the prosecutor's concern with disclosure, a topic given a 50-page chapter, and the overlap of that with abuse of process, which itself has a chapter of 60 pages. Our first point of research on disclosure is the Criminal Disclosure Act 2008.¹⁷ A recent case on interpreting its s16¹⁸ cites, and is consistent with, Canadian authority.¹⁹ Much of the disclosure chapter is relevant to applying our legislation.

Overall, chapters are devoted to the role of the prosecutor, the charging decision, disclosure, abuse of process, the duties of Crown counsel at trial and on appeal, improper cross-examination, improper jury addresses, costs against the Crown, malicious prosecutions and related tort claims, and prosecutorial standards as set out

¹⁰ *R v Knox* (2006) 209 CCC (3d) 76, (2006) 80 OR (3d) 515 (ONCA).

¹¹ *R v Leduc* (2003) 176 CCC (3d) 321, (2003) 66 OR (3d) 1 (ONCA).

¹² *R v Light* (1993) 78 CCC (3d) 221 (BCCA); and *R v Anderson* [2014] 2 SCR 167.

¹³ *R v Martin* 2016 ONCA 840, (2016) 134 OR (3d) 781 (ONCA).

¹⁴ *R v McKay* 2016 BCCA 391.

¹⁵ *R v McNeil* 2009 SCC 3 (SCC), [2009] 1 SCR 66 (*McNeil*).

¹⁶ *R v Taillefer* (2003) 179 CCC (3d) 353 (SCC), [2003] SCR 307.

¹⁷ See (19 June 2008) 647 NZPD 16770, one of the purposes of this legislation was to keep pace with reforms in other common law countries: Hon Annette King (Minister of Justice). See also Law Commission *Criminal Procedure: Part One Disclosure and Committal* (NZLC R14, 1990) at [30], that pilot disclosure schemes in Canada and England had led to an increase in early guilty pleas.

¹⁸ *Ministry of Business, Innovation and Employment v Centreport Ltd* [2014] NZHC 2751 at [69].

¹⁹ *Toronto Star Newspapers Ltd v Canada* (2005) 204 CCC (3d) 397 (ONCJ) at [21] (*Toronto Star*), a case not referred to by Mr Frater, although it remains authoritative, being recently applied in *Law Society of Upper Canada v Cengarle* 2017 ONLSTH 129 (CanLII) at [49]. But the omission is insignificant as *Toronto Star* relies on *R v O'Connor* [1995] 4 SCR 411(1995), (1995) 103 CCC (3d) 1, which is another of Mr Frater's most cited decisions, and (at 94) he refers to *World Bank Group v Wallace* [2016] 1 SCR 207 at [134] in which the point is covered, citing *R v Stinchcombe* [1991] 3 SCR 326 and *McNeil*. Incidentally, he also mentions (at p 74 footnote 10) *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 at [68]–[80] per Kirby J for a review of the leading statements regarding disclosure in other countries.

in publicly available guidelines.²⁰ Each gives full treatment of its subject to an extent relevant to the role of the prosecutor. For example, the chapter on abuse of process discusses the emergence of the doctrine, its application generally, the test for abuse of process,²¹ abuse of the charging discretion, prejudicial changes in the Crown's position, and other categories of Crown misconduct (statements outside court, ignoring misconduct – past or future – by foreign authorities relevant to extradition cases, jury-related misconduct, proceeding against a person who is physically or mentally ill, reliance on perjured evidence, failure to protect the accused's rights, and condoning police misconduct).

The 370 pages of text have an average of five new - that is, excluding repeats - case citations per page, but this is not to say that extended discussion and amplification are absent. Only one New Zealand case is cited, in relation to abuse of process, and then only to give an instance of the application of a well-established point.

Where an issue has been settled by a New Zealand case there would be no need to look for overseas law. For example, on the subject of prosecutorial independence and the reviewability of decisions to, or not to, prosecute *Osborne v Worksafe New Zealand* [2017] NZCA 11 (*Osborne*) provides an answer. This was decided without reference to Canadian law,²² but cases from the House of Lords, the Privy Council, England and Wales (High Court, Court of Appeal and Queens Bench Division), and Fiji were cited. Of those foreign decisions, about 75 per cent are mentioned by Mr Frater. *Osborne* confirms the justiciability of those prosecutorial decisions, the threshold that must be met before review can be undertaken, and the use that may be made of the Prosecution Guidelines (they are not to be construed as a code, as they are aspirational and have a high discretionary content). No reference was necessary in *Osborne* to the consistent Canadian decisions: *Kvello v Miazga (sub nom Miazga v Kvello Estate)* [2009] 3 SCR 339 and *Krieger v Law Society (Alberta)* [2002] 3 SCR 372.

Some readers will feel a trifle disappointed that the discussion of counsel's duty of civility is not more detailed because they enjoy reading about instances of rudeness, at least when they themselves are not involved. However, cases are cited and it is over to the curious to look them up. The discussion of inflammatory addresses to

²⁰ Useful material in New Zealand is still to be found in "Criminal Prosecutions" (NZLC R66 (October 2000)), much of which is background for the "Solicitor-General's Prosecution Guidelines" (1 July 2013), Crown Law, <www.crownlaw.govt.nz>.

²¹ Serious conduct deliberately designed to undermine the integrity of the judicial process: *Henry v British Columbia (Attorney General)* [2015] 2 SCR 214, not cited in *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 but a similar test was used (the integrity rationale) at [60].

²² However, in the High Court reference was made to *R v Anderson* 2014 SCC 41, [2014] 2 SCR 167, a case relied on by the defendant for the proposition that abuse of process must be established before the court will review prosecutorial decisions: *Osborne v Worksafe New Zealand* [2015] NZHC 2991 at [34]. Note also the recent comment in *Taylor v R* [2017] NZCA 53 at [11], an appeal against conviction for attempted murder where there was a significant difference in charges faced by two offenders, the Court observed, "counsel for Mr Taylor recognised that this was a matter of prosecutorial discretion and not properly a ground of appeal against conviction. The concession was wisely made." Leave to appeal was refused: *Taylor v R* [2017] NZSC 105.

juries could give such readers more satisfaction, but additional illustrations could have been given of the claim that “[t]he case law is a veritable celebration of the tools of rhetorical excess”, if only to show that Mr Frater is not himself indulging in the same excess. A reader of normal sensibility – even a lawyer – could appreciate some occasional relief from the technical, and very proper, legal prose.

Just one niggle, and this is probably not the author’s fault: the footnotes cross-refer to each other, and any subsequent mention of a case sends the reader back to the first footnote where the full citation is given. A lot of flicking back and forth may be necessary. This is one of those dreadful decisions on style²³ that is becoming common in judgments, and even in this journal. It conforms to the Law Style Guide, as “general style”, but arguably there are times when convenience for users should be the dominant consideration. The alternative, “commercial style”, in which full citation is repeated each time a case is cited, is preferable for a book, and is of obvious advantage where only a few pages have to be photocopied.

Mr Frater QC has written a scholarly and technical, but also an accessible and practical, analysis of his subject. He achieves a balance between citation and description which gives an overview as well as pointing to areas that could, depending on the researcher’s needs, be productively explored by further investigation. While it is always necessary to check the local relevance of cases from other jurisdictions, this book is a valuable resource for anyone who needs to find examples of prosecutorial misconduct and to identify possible remedies.

²³ Some people share a dislike of unnecessary gender pronouns, such as “he or she” (used 18 times in this book, eight by the author and 10 in quoted passages). Only eight usages in 370 pages could hardly be called objectionable. But there are 45 instances of “his or her”, 22 the author’s and 23 in quoted passages. There may still be no strenuous objection, but a better style would acknowledge gender equality by dispensing with unnecessary pronouns, including the solitary “he” “him” and “his” where reference is to a person who could be of any gender (the Law Style Guide agrees on this point at [1.1.1(a)]). One example of this: in the context of improper cross-examination (p 218): Mr Frater says, “Section 14 of the Charter [which is equivalent to s 24(g) of the New Zealand Bill of Rights Act 1990] gives an accused the right to use a translator. It follows, naturally, that an attempt to cross-examine on the fact that he or she is relying on a translator will be improper.” To avoid the gender pronouns, and also the unintended possibility that the translator might also be relying on a translator, the concluding words could be rewritten as: “... an attempt to cross-examine on use of a translator will be improper.” In any event, Mr Frater’s statement needs to be treated cautiously. A challenge to the use of an interpreter (as that person is more properly called), if relevant to an issue in the proceedings, could be made pre-trial or by voir dire, on the issue of the applicability of the right, that is, whether there was an inability to understand or speak the language. But after a ruling that an interpreter could be used, further challenge would indeed be improper unless new information, calling into question the correctness of the ruling, became available. See *Daradkeh v R* [2016] NZCA 172; *Singh v R* [2014] NZCA 293.

BOOK REVIEW: GRAEME BROWN *CRIMINAL SENTENCING AS PRACTICAL WISDOM* (HART PUBLISHING, OXFORD, 2017).

WARREN BROOKBANKS*

This book is the outcome of a research project undertaken by the author to investigate the views of Scottish judges and to provide a comprehensive review of recent sentencing scholarship. The book is based on a PhD undertaken at the University of Edinburgh, in the course of which the author interviewed 17 sheriffs and eight judges of the High Court of Justiciary who offered their frank views on sentencing as practised in Scotland. The motivation for interviewing judges was to gain a direct insight into the operation of the law and to present a "human face" to the enterprise of judging and sentencing. As the author notes, while senior members of the Scottish judiciary were extremely supportive of the research, a number of judges who were approached for interviews declined. It was suggested that possible reasons for such reluctance was fear of unfairly adverse criticism, apprehension about the use of research findings by the government and beliefs about judicial independence. However, despite this reluctance amongst some of the judges, the writer was able to assert that the survey was the most extensive of Scottish sentencers undertaken in recent years.

The substantive discussion begins in chapter three with an examination of comparative judicial sentencing methodology in Canada and Australia. The traditional approach to sentencing in Canada, as expressed in cases such as *R v Willaert* (1953) 105 CCC 172 (ONCA), was that the "art" of sentencing was a wise blend of deterrence and reformation, with retribution "not entirely disregarded". Trial judges, having gained experience from the "front lines of criminal litigation" were perceived as the workhorses, while appellate review was generally non-interventionist and deferential. In particular, Canadian jurisprudence identified sentencing as a highly individualized exercise going beyond a "purely mathematical calculation". Sentencing is seen by Canadian judges as a very human process; a delicate art based on competence and expertise.

In Australia, the notion of a "delicate art" has evolved into the idea of an "instinctive synthesis" of the facts and circumstances of the offence and the offender so that sentencing is a "single, global process of reasoning". This approach, which is endorsed at the highest level of Australian sentencing jurisprudence, permits the sentencer to balance and weigh all the circumstances of a particular case and to make a judgment as to the appropriate sentence to be imposed. The focus is on the final result, rather than whether the road taken is laid out correctly. This approach has not been without controversy in Australia. Some senior Australian judges, notably Sir Michael Kirby, have been critical of the instinctive synthesis model arguing that it is inconsistent with "statutory transparency" – the trend to spell out in legislation specific considerations to be taken into account in sentencing. Kirby argues that the instinctive synthesis

* Professor of Criminal Law and Justice Studies, AUT Law School

approach discourages explanation of the “logical and rational process” leading to the sentence, to the extent that it can¹ reasonably be given (see discussion at 44)².

Within the Scottish courts, however, Brown notes that there is authority suggesting a general preference amongst appellate judges for the instinctive synthesis over the staged or two-tiered approach. Recent case law and legislation³ governing the calculation of punishment elements in discretionary life sentences, whereby courts are required to fix a period of time appropriate to satisfy the requirements of retribution and deterrence, and to be served before parole can be considered, has, according to Brown, illustrated “the problems and perceived injustices” that can arise following the imposition of a formalised and staged sentencing process.⁴ The problems relate to the difficulties in assessing sentences according to “precise arithmetical calculation” where, in a particular case, there may be a range of incommensurable and conflicting objectives in reaching the final sentence. However, such cases only comprise a small percentage of cases sentenced by Scottish courts and sentencing routinely follows practice in Canada and Australia, where an individualised process has, at its core, judicial discretion and experience.

One of the challenges to the instinctive synthesis model is the claim that it is incompatible with the rule of law. The basis of this claim is that doing *particularised* justice, as implicit in the instinctive synthesis model, is distinguished from justice as *lawfulness*, and incompatible with rule of law values. This is the subject of the discussion in chapter four, where Brown surveys academic critiques of the instinctive synthesis approach, noting that while some academics, including Andrew Ashworth, have criticised the idea as “inscrutable” and sanctioning a “free for all” approach to the purposes of punishment, others acknowledge the idiosyncratic nature and difficulty of the sentencing task. It involves self-conscious and reflective social actors making decisions and choices within certain boundaries, actively interpreting material and drawing on past experience to make decisions which are fact-specific in relation to offences and offenders which are “infinitely complicated”.⁵ The judge’s task is thus to balance often incommensurable factors and arrive at a sentence that is just in all the circumstances.⁶ Yet this does not allay the criticism of some rule of law advocates that such sentencing decisions are no more than expressions of value preference made by the individual sentencer and neither determined by, nor recognisable as, legal decisions. However, as Brown notes, this analysis may proceed from a flawed understanding of the rule of law which cannot be separated from human participation since, as in other areas of law, it is impossible to apply legal rules and principles without human reason, insight and judgment. The complexity of sentencing, on this view, demands a wide judicial discretion, albeit subject to the constraints of legal doctrine, institutional constraints, policy and strategic considerations, and the equities of individual cases.

¹ See *R v T* [2011] EWCA Crim 2345 at [18].

² *Markarian v The Queen* [2005] HCA 25 at [130].

³ See Criminal Procedure (Scotland) Act 1995, s 196 and Prisoners and Criminal Proceedings (Scotland) Act 1993.

⁴ Graeme Brown *Criminal Sentencing as Practical Wisdom* (Hard Publishing, Oxford, 2017) at 50.

⁵ At 52.

⁶ See *Elias v The Queen* [2013] HCA 31 at [27].

Nonetheless, the dispensation of individualised justice does not command universal support in the jurisdictions surveyed, and as the author notes, policy driven changes introducing statutory minimum sentencing schemes are a challenge to the requirements of proportionality, parsimony and individualised justice. They fail to take account of the circumstances of individual offences, and often result in grossly unjust outcomes. Yet, as Brown notes, statutory minimum sentencing schemes are anathema to Scottish sentencers, most of whom continue to practice equity through individually crafted sentences, in contrast to following universal rules. This also reinforces the approach that offenders are to be treated as individuals – whole people – rather than as “two dimensional crime-and-criminal-history amalgams”.⁷

In the fifth chapter, Brown develops a theme that is central to this book, namely, examining the social character of sentencing through the Aristotelian concept of *phronesis*, or practical wisdom. This is linked to the idea of value pluralism. In the context of sentencing, this means weighing and balancing potentially competing and incommensurable societal values and values particular to individuals in imposing sentence. *Phronesis* allows judicial recourse to equity in sentencing by a *phronetic* synthesis of all the relevant facts and circumstances of the case. Value pluralism is set against monism which, as a “single embracing vision” or single right way of answering any moral or political question, allows for the possibility that scientific investigation of the human world will yield a harmonious set of laws that can be formulated by experts. Whereas for the pluralist human goods are viewed as multiple, conflicting and incommensurable, the monist perspective says that all human goods are realised within a single moral and political system, which is authorised, administered and enforced by the same experts. However, in contrast to moral monism, Brown argues that value pluralism is better able to make sense of the many distinct features and dimensions of offence, offender and victim. These are implicit in the sentencing task which involves a “wise blending” of penal aims and values which are, of their nature, “irreducibly multiple and incommensurable”.

For this reason prescriptive lists of sentencing purposes such as those set out in s 142(1) of the Criminal Justice Act 2003 (UK)⁸ are sometimes viewed as a “recipe for inconsistency” and incapable of resolving the inevitable conflict between purposes that a sentencing task may give rise to. Indeed, as Brown notes, studies of matters that influence courts at sentencing have identified as many as 292 such factors. This has led to the claim that it is a reasonable assumption that consciously or subconsciously, sentencers will have set their own priorities and developed their own interpretations in sentencing particular cases.⁹ Value pluralism is expressed in the dictum from *R v Nasogatuak* where the Supreme Court of Canada said: “No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case.”¹⁰

⁷ Brown, above n 4, at 104.

⁸ Compare Sentencing Act 2002, s 7.

⁹ Brown, above n 4, at 115.

¹⁰ *R v Nasogatuak* [2010] 1 SCR 206 at [43].

Scottish law, as the author notes, does not have a list of statutorily defined purposes, although Scottish judges are guided by the same principles of punishment as are employed in other common law jurisdictions. However, while Scottish sentencers are guided by the six contemporary rationales of sentencing including deterrence, rehabilitation, incapacitation, desert, reparation and social theories (emphasising the social context of offending) together with relevant aggravating and mitigating circumstances of a case (described as the “dark mass of factors” constituting human existence), contemporary sentencing practice in England and Wales, according to Brown, is monist in approach. This is evident, he suggests, in the use of formal, prescriptive and presumptively binding sentencing guidelines from the Sentencing Council.¹¹ The problem with monist approach to sentencing, as Brown observes, is that the conflicts between the sentencing purposes (for example, retribution, deterrence) cannot be reduced to a single common measure, with any one moral claim having priority over the others. Regarding the sentencing purposes as incommensurable, as a value pluralist view would suggest, means that each has an equal claim to the attention of the sentencer, even if particular circumstances may allow the ranking of plural values to reflect the particulars of the case in hand.

Choosing amongst the incommensurables requires the application of sets of skills (virtues). Making such hard choices involves developing certain character traits which comprise generosity, (open-mindedness), realism, attentiveness and flexibility. Together these virtues allow the sentencer to properly perceive and correctly describe the particular case before them so that he or she is able to capture “the fine detail of the concrete situation” by confronting it as a “complex whole”.

Value pluralism also affirms the need for autonomy in decision-making and allows the judge to decide value-related questions concerning the type of disposal, but independent of the constraints of abstract rules. How this works is well expressed in the quote from Crowder:¹²

“Pluralists ...are obliged... to think for themselves in a strong sense...They should be able to stand back from received rules and customs, recognise the value rankings these embody, and critically assess their application in the circumstances. This may involve appeal to background values such as personal and collective conceptions of the good, but these too should be subject to revision. Pluralists ought, that is, to be capable of autonomy when they are faced with such fundamental conflicts.”

The capacity to choose autonomously, or critically, implies, for Brown, choosing well which may also mean eschewing systems “of formal, prescriptive and presumptively binding sentencing guidelines” in favour of the pluralist virtue of attentiveness to the

¹¹ Brown, above n 4, at 117.

¹² George Crowder “Value Pluralism and Liberalism – Berlin and Beyond” in George Crowder and Henry Hardy (eds) *The One and the Many – Reading Isaiah Berlin* (Prometheus Books, New York, 2007) 225.

detail of the situation (the particular offence) and the persons involved in it (offender, dependents, victims).

At the heart of Brown's analysis is the idea of practical wisdom, which allows the practical reasoner to organise choices among incommensurable goods and to avoid making decisions which would otherwise be arbitrary, incoherent and, ultimately, self-defeating. Thus practical reason, or *phronesis*, is distinguishable from the other Aristotelian concepts of *episteme* (analytical, scientific knowledge) and *techne* (technical knowledge or know how). Practical reasoning is based on practical value-rationality, and represents a reflexive analysis and discussion of values and interests. In particular, and importantly for Brown's thesis, it is about value judgment, not producing things. It represents what is ethically practical as opposed to what can be articulated in terms of theoretical axioms. But as Brown notes, not just any phase of learning will be adequate to the task of the *phronemos* as judge. In assessing the types of competencies appropriate to a sentence, Brown draws on the model of the human learning process developed by Hubert and Stuart Drefus.¹³ The Drefus-Drefus model postulates five levels of learning of all skills, from the Novice Actor through to the Expert Actor.¹⁴ Brown argues that only the final stage, the Expert Actor, is an appropriate descriptor for a judge who, as a user of intuition, assumes a special role and deals with situations that are distinct from the circumstances faced by other members of the community. Their intuition is employed "over a larger field, against a wider horizon of possible courses of action and with far greater power".¹⁵

For Brown, *phronesis* as practical wisdom allows judicial recourse to equity in sentencing, ensuring a judge gives appropriate weight to the relevant considerations of the crime, the offender and the interests of society, a factor which speaks powerfully in favour of a wide sentencing discretion. Whether sentencing is properly described as an "art" or as a "balancing exercise", for Brown the notion of the "instinctive synthesis" remains the most accurate shorthand description of the sentencing task.

Chapter six examines how the sentencing discretion is structured. In the pursuit of consistency English sentencing is said to have undergone four "phases", namely, appellate guidance, the Sentencing Advisory Panel, the Sentencing Guidelines Council and Presumptively Binding Guidelines and the Sentencing Council. According to Brown, each respective phase represents a movement towards more structured sentencing, through the issuing of "definitive guidelines" aimed at structuring, rather than eliminating proper decision-making by sentencers. Commentators cautioned, however, that given the crucial nature of predictability and consistency in any sentencing regime, there was a perceived danger that an excessive focus on guidelines risked them becoming mandatory or heavily prescriptive. However, although measures like the establishment of the Sentencing Council of England and Wales in 2009

¹³ See Hubert Drefus and Stuart Drefus, *Mind over Machine: The Power of Human Intuition and Expertise in the Era of the Computer* (New York, Free Press, 1986).

¹⁴ The five levels are: (1) the novice; (2) the advanced beginner; (3) the competent performer; (4) the proficient performer; (5) the expert.

¹⁵ Brown, above n 4, at 130.

foreshadowed a mandatory obligation to follow relevant guidelines, unless doing so would be contrary to the interests of justice, appellate courts continued to push back against any notion of “slavish adherence” to guidelines, emphasising the overriding obligation to do justice in an individual case.

Although there would appear to be some evidence that academic commentators have applauded the scheme introduced in 2009, as being exemplary for other jurisdictions contemplating structuring judicial discretion in sentencing,¹⁶ according to Brown, Scottish judges and sheriffs are less optimistic, given the uniqueness and great diversity of circumstances arising in relation to offenders coming before the courts for sentence. Other critics of the English guidelines argue that the system effectively creates an “algorithm” for sentencers to follow, making the judgment of experienced sentencers count for less and less.

By contrast Brown argues that the Scottish approach is more conducive to achieving justice in individual cases because the focus is on “the particular and situationally dependent rather than on the universal and on rules”.¹⁷ With the concrete and the practical being emphasised over the theoretical, Scottish sentencing practice is a paradigm example of *phronesis* – practical wisdom. More particularly, Brown argues that the introduction of prescriptive, presumptively binding sentencing guidelines in England and Wales has transformed normative discourse in sentencing, replacing it with a discourse that “privileges an abstract and de-personalised approach to justice”, considered the only legitimate approach.¹⁸

While experience and intuition are important in the decision-making of Scottish judges and sheriffs, they are not mere guesswork, but emerge out of practice. This requires an ability to select and focus on aspects and features of a case which are most relevant to the aim of crafting an appropriate sentence. Judicial discretion is central to this task, requiring not a detached (epistemic) observer but an expert who draws on experience, judgment and intuition. While Brown prefers to describe this approach to sentencing as a *phronetic* synthesis, rather than a conceptualisation in terms of the Australian “instinctive synthesis” model, it is noted that the last ten years in Scotland have seen the Appeal Court drawing more heavily on its statutory power to issue guideline judgments, intended to structure rather than remove judicial discretion and individualised justice. The model provides sentencers a framework in which to locate an individual case, while not depriving sentencers of the discretion to deal differently

¹⁶ See A Ashworth & JV Roberts, “Sentencing: Theory, Principle and Practice” in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (5th ed, Oxford University Press, Oxford, 2012) 892; A Ashworth & JV Roberts “The Origins and Nature of the Sentencing Guidelines in England and Wales” in A Ashworth and JV Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, Oxford, 2013) 11; JV Roberts & HH Bebbington, “Sentencing Reform in Canada: Promoting a Return to Principles and Evidence-based Policy” (2013) 17 (3) *Canadian Criminal Law Review* 327 at 337–338.

¹⁷ Brown, above n 4, at 192.

¹⁸ At 192–193.

with a case with “unusual features”. It is a “discretion underpinned by principles, rather than hemmed in by rules”.¹⁹

The penultimate chapter, chapter seven, is headed “A ‘Seedy Little Bargain with Criminals’? Judicial Discretion and the Guilty Plea Discount”. The title speaks for itself. The chapter examines the practice of plea discounting in Scotland in a way which highlights the importance of judicial discretion, equity and individualised justice. In opening this discussion the author notes the traditional antipathy of Scottish judges towards sentence discounting, referred to as an “objectionable practice”. However, sentence discounting has been provided for in legislation in Scotland since 1995.²⁰ The limited guidance about the scale or magnitude of discounts available in legislation has been met by a body of case law providing guidelines on the practice of sentence discounting. Senior Scottish judges have generally affirmed the discretionary approach to sentence discounting, while cautioning against perceptions that granting discounts is virtually automatic. In the leading Appeal Court decision in *Murray v HM Advocate* (*Murray*) the Court reiterated the existing principles, namely, that an accused is not entitled to any particular discount in return for a guilty plea, the discount will be greater the earlier the plea is entered, and that in order to maintain public confidence in the justice system and the credibility of sentences, the court’s discretion to allow a discount should be exercised sparingly and only for convincing reasons.²¹ In particular, the Court firmly rejected the view, at large amongst criminal defence lawyers, that an early plea was effectively an entitlement to a discount of one third. *Murray* and other appellate decisions reaffirmed the Scottish approach to sentencing and the use of guidelines as intuitive, holistic and interpretive consistent with the notion of *phronesis*.

The balance of the chapter outlined the results of the study as it related to discretion in discounting, noting a general scepticism of judges towards a structured, formulaic or mathematical approach to discounting and the need for discretion in setting the level of discounts. Respondents in the study saw discounting as an administrative necessity, rather than being based on indications of offender remorse or sparing victims from the ordeal of giving evidence. Nevertheless, there was also concern that sentence discounts could operate as a perverse incentive for innocent people to plead guilty, especially where a guilty plea could have the effect of eliminating the risk of a custodial sentence. There was also concern that punishment varied substantially for administrative reasons of cost and efficiency and could be viewed by the public as simply a bargain unrelated to the accused or his conduct.

The final chapter is entitled “The *Phronimos* and the Metronomic Clockwork Man”. In this chapter the author draws together the dialectic themes that have informed the substance of the book, namely, individualised justice and practical wisdom as opposed to the “one size fits all” and “box ticking” approach to sentencing implicit in Metronomic Clockwork Man model, and summarises the case in favour of the *phronetic* synthesis approach. This view of sentencing methodology incorporates both the discretionary based “instinctive synthesis” approach developed by Australian judges

¹⁹ At 193.

²⁰ See Criminal Procedure (Scotland) Act 1995, s 196(1).

²¹ *Murray v HM Advocate* [2013] HCJAC 3.

and the intuitive, holistic and interpretive form of decision-making that is involved in the Aristotelian idea of *phronesis*, or practical wisdom. The use of *phronesis* demonstrated by the judges surveyed in the study points towards a sentencing methodology that achieves individualisation by judicial recognition of the “profoundly contextualised nature of the process”.²² Brown rejects both the “staged” approach to sentencing outlined in chapter three and the use of prescriptive and presumptively binding numerical guidelines as issued by the Sentencing Council. While sentencing discretion structured using a sentencing algorithm may produce consistent and predictable outcomes, consistency is often achieved at the expense of individualised justice.

By contrast, in Scotland where judicial sentencing discretion means that sentencing outcomes are “wobbled through the prism of personality”, justice is preferred to consistency and the ability to cater for the unique circumstances of each case, a task unachievable in a guideline system.

In addressing the question of reform of the system for guilty plea discounting, Brown notes that the Australian Law Reform Commission, and appellate courts in New Zealand and Ireland have rejected legislative prescription of the quantum of a discount and the idea of a “sliding scale” approach. The latter was considered by the New Zealand Supreme Court to be too heavily structured and involved an inappropriate departure from a sentencer’s duty to evaluate the full circumstances of each individual case.²³

Suggestions for reform in this domain centre around the question of whether defendants ought to be able to benefit from reduced sentences going beyond any guilty plea discount. This may occur: for example, a defendant may benefit from fact and charge bargaining and then obtain an additional inherent discount by pleading guilty and entering into an agreed narrative with the Crown. Such factors, it is suggested, have a potentially corrosive effect by limiting a sentencer’s ability to do equity in a particular case by imposing a sentence crafted to the circumstances of the offence, the offender, the victim(s) and the community. This issue could be addressed by giving sentencers a discretion to decide whether to allow a discount, thereby restricting the amount of any discount that might be granted in cases where collateral benefits have already been achieved through negotiated pleas derived through charge and/or fact bargaining. Such an approach has already been established in Australian sentencing jurisprudence.²⁴ Recently the English Court of Appeal has, despite constraints imposed by presumptively binding, numerical guidelines, accepted that withholding of a reduction for a guilty plea in an appropriate case was not precluded by the presence of a sentencing guideline.²⁵

²² Brown, above n 4, at 229.

²³ See *Hessell v R* [2011] 1 NZLR 607 at [72].

²⁴ See eg *R v Shannon* (1979) 21 SASR 442.

²⁵ See *R v T*, above n 1, at [18].

At the present time New Zealand sentencing law is broadly consistent with the practical wisdom approach advocated by Brown. In particular the New Zealand Supreme Court has rejected the structured approach to the extent of the reduction in sentence based principally on when the plea was entered. In *Hessell v R*,²⁶ the Supreme Court held that determining the sentencing discount for a guilty plea by reference to a sliding scale which was dependent on the timing of the plea usually failed to recognise other circumstances in which the plea was made. These might include such matters as the strength of the prosecution case or the necessity of resolving disputed facts. Significantly, for the purposes of the present discussion, was the Court's view that the value to be given to a guilty plea must be assessed with regard to all the circumstances of the case, rather than by reference to a prescriptive scale of discounts depending on when the plea was entered.²⁷

This book is a tour de force in the exposition of sentencing policy and in consolidating the case for judicial discretion in sentencing. It is analytical in its approach yet is thoroughly accessible for any serious student of sentencing policy and practice. While the study at the heart of the book is focussed on judicial experiences of Scottish sentencing practice, the insights and frank expressions of opinion offered demonstrate the ethical, legal and social dilemmas that are the common lot of sentencers as practitioners of practical wisdom.

While the book does acknowledge the central role played by the principles of, for example, retribution, deterrence, rehabilitation and incapacitation in modern sentencing theory, these are not examined in systematic detail but are a point of departure for a much more intense examination of sentencing practice as a human process.

It is a book that deserves careful study for anyone interested to understand the difficult nature of the sentencing task, the ubiquitous character of judicial discretion and the complexity of the overlap between judicial practice and official policy. As such it will be of interest to students of criminal law and criminal justice, criminal lawyers, judges and policy makers.

²⁶ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

²⁷ See Simon France (ed) *Adams on Criminal Law — Sentencing* (online looseleaf ed, Brookers) at [SA9.18] for a full discussion of the principles applying in the post-*Hessell* sentencing environment in New Zealand.