PUBLIC INTEREST LAW JOURNAL OF NEW ZEALAND

PUBLISHED WITH THE ASSISTANCE OF THE NEW ZEALAND LAW FOUNDATION

CONTENTS

No Learner Left Behind: Is New Zealand Meeting its Obligations under Article 24 of the United Nations Convention on the Rights of Persons with Disabilities?
Philippa Moran…… 1

High Hopes, Disappointing Reality: Implementing the Convention on the Rights of Persons with Disabilities when the Going gets Tough
Erin Gough…….. 43

Is a Judicial Discretion needed to Soften the "All or Nothing" Nature of the Doctrine of Frustration?
Blake Carey……. 69

No Soul to Damn? Revisiting the Case for Corporate Manslaughter in New Zealand
Mitchell Spence……... 91

Rape Myths and Invisible Crime: The Use of Actuarial Tools to Predict Sexual Recidivism
Anna Chalton…… 112

Privacy Law in the Abortion Context
Sarah Alawi……151

Reconciling the Clash: A Comparison of the Australian and Canadian Legal Approaches to Burdening Indigenous Hunting Rights
Alice Sowry…… 168

Exploring Constitutional Legitimacy
Aishwarya S Bagchi……...180

No Learner Left Behind: Is New Zealand Meeting its Obligations under Article 24 of the United Nations Convention on the Rights of Persons with Disabilities?

Philippa Moran*

New Zealand's Education Act 1877 prevented children considered "deaf and dumb" from attending school, which was free and compulsory to all others.[1] Thereafter, government policy denied persons with disabilities the capacity to enjoy education on an equal basis with other members of the community. Throughout most of the twentieth century education policies ensured "special" schools remained separate from the mainstream. While the modern era espouses inclusive education for all, persons with disabilities remain disadvantaged in accessing quality education. In 2008 the New Zealand Government ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The Convention's obligations under art 24 recognise a right to enjoy education on an equal basis with others. While the equal right for persons with special educational needs to enrol and receive education in any state school is enshrined in s 8 of New Zealand's Education Act 1989, this has not been translated into practice. The current legal framework imposes statutory limitations on an equal right to education, while the Courts have denied a substantive and enforceable right.

Significant legislative reform is needed to the Education Act and Human Rights Act 1993 to ensure that a legal right to education for persons with disabilities no longer remains aspirational. The Government must also ratify the Optional Protocol to the CRPD to allow persons with disabilities to vindicate breaches of this right if domestic remedies continue to fail. This paper provides a broad and in-depth analysis of the current state of the right to education for persons with disabilities in New Zealand, through the lens of Katarina Tomaševski's Four A's Framework. Recommendations are proposed which are necessary to achieve available, accessible, acceptable and adaptable education. These changes are vital to New Zealand fulfilling its art 24 obligations, thus allowing equal access to education for all people.

> A person who is severely impaired never knows his hidden sources of strength until he is treated like a normal human being and encouraged to shape his own life.[2]
>
> – Helen Keller

Helen Keller recognised a fundamental principle: persons with disabilities have an intrinsic right to access education on an equal basis with other members of the

---

* BA/LLB(Hons) student at University of Canterbury. The author would like to thank Senior Lecturer Natalie Baird and my family for their advice and support.

[1] Education Act 1877, s 90(2); K Morris Matthews and R Matthews "Paradigms of Family, Welfare and Schooling in New Zealand" in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Longman, Auckland, 1998) at 71.

[2] Helen Keller *Teacher: Anne Sullivan Macy* (Greenwood Press, Westport (CT), 1955) at 170.

community. This paper will examine whether New Zealand is meeting its obligations to implement the right to education under art 24 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Part I will define the term disability, discuss the right to education, art 24 obligations and Katarina Tomaševski's *Four As Framework,* and set the scope and methodology for this paper. Part II will analyse whether early childhood education (ECE) and school is available, accessible, acceptable and adaptable for persons with disabilities. Provision of art 24 obligations will be examined in the New Zealand context. It will be submitted that New Zealand is failing to provide a substantive and legally enforceable right to education for persons with disabilities. Part III will suggest remedies under the current legislative framework, followed by Part IV which will propose key changes essential to New Zealand better fulfilling its art 24 obligations. Conclusions will be presented in Part V.

I Definitions, Scope and Methodology

A Definitions

1 Disability

The term "disability" must be defined to set the scope of this paper. Rather than describing a homogeneous group, disability is an "umbrella term" identifying persons who experience a diverse range of needs.[3] Earlier welfare and medical models of disability were deficit-focused. The CRPD adopts a social model definition, "includ[ing] those with long-term physical, mental, intellectual or sensory impairments," which create physical and attitudinal barriers to full and effective societal participation.[4] The CRPD's all-encompassing definition of disability will be used throughout this paper.

2 The right to education

In its World Declaration on Education for All, The United Nations Educational, Scientific and Cultural Organisation (UNESCO) stated that, at a minimum, individuals should receive the benefit of educational opportunities which meet their basic learning needs.[5] UNESCO defines basic learning needs as comprising essential learning tools and the basic learning content which are:[6]

---

[3] World Health Organisation "Health Topics – Disabilities" (2014) <http://www.who.int/en/>.
[4] Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 1 (CPRD). The CRPD does not define "long-term," however Statistics New Zealand has classified "long-term" as six months or more. Statistics New Zealand "Disability Survey: 2013" (17 June 2014) <http://www.stats.govt.nz>.
[5] UNESCO "World Declaration on Education for All: Meeting Basic Learning Needs" (1990) <http://www.unesco.org/education/nfsunesco/pdf/JOMTIE_E.PDF>, art 1.
[6] Article 1.

> … required by humans to be able to survive, develop their full capacities, to live and work in dignity, to participate fully in development to improve the quality of their lives, to make informed decisions and to continue learning.

Education is both a human right in itself, and an "indispensible means of realising other rights."[7] It is the pathway for disadvantaged persons to improve their economic and social outcomes for full societal participation.

The right to education was first recognised in the Universal Declaration of Human Rights (UDHR) in 1948.[8] The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognised the right in 1966,[9] followed by the United Nations Convention on the Rights of the Child (CRC) in 1989,[10] both of which have been ratified by New Zealand. The right to education under art 24 of the CRPD frames education as an economic, social and cultural right,[11] recognising four minimum core obligations for States; non-discriminatory access, free choice, enjoyment of free compulsory primary education, and the right to be educated in official languages of one's own choice.[12] Former Special Rapporteur on the right to education Vernor Muños stated that while persons with disabilities possess this right, it is irrefutable that these persons "suffer from a pervasive and disproportionate denial of this right."[13] Article 24 of the CRPD provides a protective and empowering framework to remedy the denial of the right to education for persons with disabilities.

B Article 24

New Zealand ratified the CRPD on 26 September 2008. The Convention did not create new rights for persons with disabilities, except insofar as special provisions are made for additional supports to foster enjoyment of rights on an equal basis with others.[14] State parties must promote, protect and implement CRPD provisions, so that persons with disabilities enjoy all of the same human rights and fundamental freedoms as persons without disabilities. Article 24 declares:

---

[7] Jill Chrisp, "The Right to Education, He Tapapa Mātauranga" in Margaret Bedgood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 156 at 156.
[8] *Universal Declaration on Human Rights* GA Res 217A, III (1948), art 26.
[9] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 13 and 14. See also Convention Against Discrimination in Education 429 UNTS 93 (adopted 14 December 1960, entered into force 22 May 1962).
[10] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 28-29.
[11] Adam McBeth, Justine Nolan and Simon Rice *The International Law of Human Rights* (Oxford University Press, Melbourne, 2011) at 148.
[12] F Coomans "Education and Work" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, (eds) *International Human Rights Law* (2nd ed, Oxford University Press, Oxford, 2014) 238 at 243-246.
[13] Vernor Muños "Report of the Special Rapporteur on the right to education – the right to education of persons with disabilities" IV A/HRC/4/29/Add.1 (2007) at [17].
[14] Theo van Boven "Categories of Rights" in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds) *International Human Rights Law* (2nd ed, Oxford University Press, Oxford, 2014) 143 at 155.

1. States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

a. the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
b. the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
c. enabling persons with disabilities to participate effectively in a free society.

2. In realising this right, States Parties shall ensure that:

a. persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
b. persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
c. reasonable accommodation of the individual's requirements is provided;
d. persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
e. effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

a. facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer-support and mentoring;
b. facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
c. ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realisation of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

New Zealand's Government is bound under art 4 of the CRPD to adopt appropriate "legislative, administrative, and other measures" to give effect to art 24 rights, refrain

from engaging in any act or practice inconsistent with those rights, and take all appropriate measures to eliminate discrimination both by public authorities and by private enterprises.[15] As education is considered an economic, social and cultural right, New Zealand has agreed to undertake progressive realisation of its obligations to the maximum of its available resources. Due to many countries' resource and knowledge constraints, progressive realisation requires states to take steps within their means both immediately and in the future which constantly progress towards full realisation of economic, social and cultural rights.[16] New Zealand must submit reports to the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) on its progress in implementing the Convention.[17]

The Government has not ratified the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (CRPD OP). This means that persons with disabilities who are denied their art 24 rights have no effective means of redress against the New Zealand Government at the international level.

C The Four As Framwork

Katarina Tomaševski developed the *Four As Framework* in 2001 when working as the first Special Rapporteur on the right to education. Tomaševski's framework deconstructs educational rights into two aspects: firstly the right to education encompasses availability and accessibility; and secondly rights in education encompass acceptability and adaptability.[18] Each aspect describes interrelated but different governmental obligations. Tomaševski's framework is universally acclaimed as the conceptual yardstick against which to measure whether a state is substantively fulfilling its obligations to implement the right to education. David Karlsson and Jonas Grimheden credited Tomaševski's "acute sense of methodology and pedagogics" with allowing her to develop a practical tool that "neatly captures the full aspects of the right."[19] This framework will be applied to the New Zealand context to assess whether education for persons with disabilities is available, accessible, acceptable and adaptable.

---

[15] Huhana Hickey and Kris Gledhill "Economic, Social and Cultural Rights of Persons with Disabilities" in Margaret Bedggood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 242 at 251.
[16] International Network of Economic, Social and Cultural Rights "Progressive Realisation and non-regression" (2012) <https://www.escr-net.org/docs/i/401627>.
[17] A State's first report is required two years after ratification, and thereafter every four years. CRPD, above n 4, arts 35-36.
[18] Katarina Tomaševski "Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" Right to Education Primers No 3 (Novum Grafiska AB, Gothenbur, 2001) <http://www.right-to-education.org> at 12.
[19] David Karlsson and Jonas Grimheden "Tomaševski's 4-A on Java: Measuring the Right to Reproductive Health" Raoul Wallenburg Institute of Human Rights and Humanitarian Law (Accessed 8 December 2014) <http://rwi.lu.se/app/uploads/2012/04/Tomasevskis-4A-on-Java-Karlsson-Grimheden.pdf> at 1.

D Scope

The scope of this paper is limited to discussion of education for persons with disabilities in New Zealand schools and ECE institutions. The international age bracket for compulsory education is from 6 to 16 years, provided through primary, intermediate and secondary schooling.[20] The author has limited the scope of this paper to ECE and schooling because the compulsory age bracket recognises the fundamentality of school education to meet individuals' basic learning needs. Similarly, quality ECE in the formative years fosters children's future development. Tertiary education, vocational training and adult learning are excluded due to constraints in length. Persons with disabilities accessing higher education are often aware of their rights.[21] By contrast, parents and students accessing ECE and schooling are being exposed to the education system for the first time and are thus in greater need of human rights protection, as afforded by art 24 of the CRPD.

E Methodology

This paper involved both doctrinal and socio-legal research. Doctrinal research covers New Zealand case law, legislation, statistics and policies relating to education of persons with disabilities, measured against art 24 obligations and Tomaševski's *Four As Framework*. The University of Canterbury's Human Ethics Committee granted approval to interview eight people with wide-ranging experience in both the disability and education sectors, to gather socio-legal material.[22] Interviewees included Disability Rights Commissioner Paul Gibson, together with several school principals, policy makers, a lawyer and a residential support-worker, some of whom have personal experience of disability. Seven of the interviewees chose to remain anonymous when referred to in this paper. These interviewees were selected because their positions reflect expertise in the field. Interviewees were asked their perceptions about whether persons with disabilities have equitable access to education, and where they believe there is room for improvement. Persons in these positions could draw on not only personal experiences, but also the experiences of many persons with disabilities whom they have supported. All interviewees agreed that despite a legal right to education, the Government should do more to fulfil its art 24 obligations. While eight interviewees provided a very limited sample, their commentary was invaluable in informing the development of this paper. The interviewees' observations will be referred to throughout; however the author is responsible for the views expressed in this article.

---

[20] Jill Chrisp, above n 7, at 160.
[21] Interview with Paul Gibson, Disability Rights Commissioner (the author, 23 October 2014).
[22] University of Canterbury Human Ethics Committee, reference HEC 2014/75, 13 August 2014.

II Is New Zealand Fulfilling its Art 24 Obligations?

A The New Zealand Context

In 2001 the New Zealand Government developed the Disability Strategy, signalling a paradigm shift toward recognising persons with disabilities as possessors of rights. The Office for Disability Issues (ODI), established in 2002, oversees implementation of the Strategy and CRPD. The Ministerial Committee on Disability Issues sets policy direction and adopts Disability Action Plans, most recently covering 2014-2018. An Independent Monitoring Mechanism (IMM), comprising a three-way partnership between the Human Rights Commission (HRC), the Office of the Ombudsman, and the Convention Coalition of Disabled Peoples' Organisations (DPOs), provides checks on government compliance with the CRPD through their annual *Making Disability Rights Real* reports.

The Ministry of Education (MOE) administers the early childhood, primary, and secondary education systems. Special Education is a branch of the MOE that focuses on improving educational outcomes for persons with special education needs and disabilities. Special Education funds the main additional supports many persons with disabilities require to be able to access education on an equal basis with others. New Zealand's National Education Goals aspire to achieving "equality of educational opportunity for all," through removal of barriers to achievement, by ensuring that persons with special education needs are identified and receive appropriate support.[23] The National Administration Guidelines (NAGs) require Boards of Trustees (BOTs) to implement "teaching and learning strategies" to address identified students' special education needs.[24]

The Education Act 1964 (EA64) adopted a social definition of special education as education for children who "because of physical or mental handicap or some educational difficulty" require additional educational treatment to that normally obtained in an ordinary school classroom.[25] This definition was not repealed by the Education Act 1989 (EA89). Disconcertingly, the later statute adopted a narrower, purely procedural definition, as help from a "special school, class, clinic or service."[26] The EA64 definition is more aligned to the CRPD. The following sections will outline Tomaševski's explanation of States' responsibility and correlative art 24 obligations, examine the New Zealand position, and assesses whether New Zealand is meeting Tomaševski's standards.

---

[23] Ministry of Education (MOE) "National Education Goals" (23 January 2009)<http://www.minedu.govt.nz>, Goals 1, 2 and 7.
[24] Ministry of Education "National Administration Guidelines" (24 October 2013) <http://www.minedu.govt.nz>, Guidelines 1 and 5.
[25] Education Act 1964 (EA64), s 2.
[26] Education Act 1989 (EA89), s 2.

B Availability

Availability covers the establishment and funding of educational institutions. Tomaševski believes that the availability obligation requires States to fund inclusive, quality and free education for all children in state schools within the compulsory age bracket.[27] Availability also involves the employment of sufficient teachers qualified to support learners with disabilities. New Zealand fails to meet its availability obligations under art 24 in two key ways: through inadequate provision of a fully inclusive education system; and by insufficient funding for learners requiring additional educational support.

1 Inclusive education

New Zealand has not yet fulfilled its art 24 obligation to provide schooling "consistent with the goal of full inclusion" within the "general education system." The CRPD Committee takes an inclusive and participatory approach in believing the best outcomes are achieved when children progress through school with peers from their local community, as this fosters a culture that accepts diversity.[28] The United States Supreme Court's landmark decision in *Brown v Board of Education,*[29] that "separate educational facilities are inherently unequal," sparked an international move towards mainstreaming minority groups.

Inclusive education has been preferred but not yet realised in New Zealand since the enactment of the EA89. Objective 3.1 of the Disability Strategy aims for the best education to be available for all learners in their "local, regular educational centres," should these be their parents' first choice. In 2010 the MOE developed the *Success for All: Every School, Every Child* policy, [30] which sets a target of 100 per cent of schools demonstrating inclusive practices by the end of 2014.[31] *Success for All* plans to implement inclusion under four broad themes: building educators' knowledge and skills, providing increased services and funding, working closely with persons with disabilities, and reviewing progress. This inclusive policy also extends to ECE providers under *Te Whāriki* curriculum.[32] While these policies are well intentioned, the MOE has unwittingly made decisions without consulting the disabled community

---

[27] Tomaševski, above n 18, at 10.
[28] Ron McCallum and Hannah Martin "Comment: the CRPD and Children with Disabilities" (2013) 20 Aust ILJ 17 at 27; See also United Nations Educational, Scientific and Cultural Organisation "The Salamanca Statement and Framework for Action on Special Needs Education" (adopted by the World Conference on Special Needs Education: Access and Quality, 7-10 June 1994) <http://www.unesco.org> at [3].
[29] *Brown v Board of Education* 347 US 483 (1954) at 495.
[30] Ministry of Education "Success for All: Every School, Every Child – Planned Actions 2010 – 2014" (2010) <http://www.minedu.govt.nz>.
[31] New Zealand Government *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* XVIII A/HRC/WG.6/18/NZL/1 (2013) at [19].
[32] Ministry of Education "Te Whāriki, He Whāriki Mātauranga mō ngā Mokopuna o Aotearoa" (1996) <http://www.educate.ece.govt.nz> at 11.

and before organising the practical supports required for implementation.[33] Despite consistent ideology in domestic policy, assessment by the Education Review Office (ERO) and the IMM also indicates that further work is needed at the grassroots level to meet international standards of inclusion.

In 2014, New Zealand's delegation to the CRPD Committee asserted that all persons with disabilities had the same access to their local schools as other children.[34] However inclusive practices require substantially more than merely allowing persons with disabilities to enrol in mainstream institutions. The European Disability Forum noted the important distinction between integration and inclusion.[35] Integration involves persons with disabilities adapting to a mainstream teaching and learning environment. Conversely, inclusion requires the system to adapt constantly to reduce the barriers to individual learning, benefiting all students, including those with disabilities.

Dr Jude MacArthur measures effective inclusion through three elements: presence, curricular and extra-curricular participation, and achievement.[36] ERO's 2010 review of 229 mainstream primary, secondary and composite schools indicated low participation and achievement rates of high needs students. [37] Only approximately 50 per cent of the schools examined demonstrated mostly inclusive practices.[38] Similarly, in 2011 ERO found that only 44 per cent of ECE providers with persons with disabilities enrolled were very inclusive.[39] This clearly falls short of MacArthur's expectations. ERO found that low rates of inclusion were predominantly attributable to poor attitudes of school leaders. Furthermore, participants in the 2011 *Youth Monitoring Report* stated that educational mainstreaming did not equate to social mainstreaming; students were frequently excluded from extra-curricular activities and the presence of teacher aides disrupted students from interacting with teachers and classmates.[40] Schools should be required not only to adapt their curriculum, but to also encourage peer support and social interaction beyond the academic environment.

---

[33] Interviewee Two (the author, 21 August 2014).
[34] Office of the United Nations High Commissioner for Human Rights "Committee on the Rights of Persons with Disabilities considers initial report of New Zealand" (16 September 2014) <http://www.ohchr.org>.
[35] European Disability Forum "Inclusive Education: Moving from Words to Deeds" in Deborah A Ziegler (ed) *Inclusion for All: The UN Convention on the Rights of Persons with Disabilities* (International Debate Education Association, New York, 2010) 209 at 211.
[36] Jude MacArthur *Learning Better Together: Working Towards Inclusive Education in New Zealand Schools* (IHC, Wellington, 2009) at 14-15.
[37] "High needs students" refers to students classified in the top three per cent of significant sensory, physical, neurological, psychiatric, behavioural or intellectual impairment. Education Review Office (ERO) "Including Children with High Needs" (30 June 2010) <http://ero.govt.nz> at 3.
[38] ERO (2010), above n 37, at 11, 23 and 26.
[39] ERO "Inclusion of Children with Special Needs in Early Childhood Services" (11 December 2012) <http://ero.govt.nz> at 2.
[40] Convention Coalition Monitoring Group "Disability Rights in Aotearoa New Zealand 2013: Youth" (December 2013) Disabled People's Assembly New Zealand <http://www.dpa.org.nz> at 13-15.

In 2011 ERO conducted a nationwide questionnaire on the inclusion of students with special needs. The questionnaire was completed by 253 schools and revealed an alarming lack of self-awareness by school leaders. A significant 88 per cent of schools believed they engaged in adequate inclusive practices, while only one per cent considered they had no inclusiveness.[41] Discrepancies between ERO's 2010 evaluation and the survey one year later patently exposed the need to instruct schools further about their obligations of inclusive best practice for persons with disabilities. When reporting, schools simply focused on their strategies, rather than providing achievement information reflecting the effectiveness of the strategies. Follow-up reviews of 81 primary schools in 2012 indicated little change in inclusive practice.[42] With this record, the MOE is not on track to achieve their 2014 target of 100 per cent of schools demonstrating inclusive practices. Schools must provide achievement data so that BOTs, ERO and the IMM can credibly assess the efficacy of inclusive measures. It is submitted that minimum standards of inclusive education should be mandated to ensure quality education and social outcomes from the outset, and at all levels of education. In line with the recommendations of Muños and the Office of the High Commissioner on Human Rights, it is imperative that the MOE develops a transition strategy to transform the education system from partially segregated to fully inclusive.[43] Following a transitional phase, best practice can be embedded.

Aligned with ERO's findings, Gibson notes that inclusion relies in a practical sense on "ethical leadership," which is highly variable across schools.[44] Inclusive practices, underpinning both art 24 obligations and Special Education policies, are not mentioned in the EA89. It is vital that the EA89 be amended to secure a right to inclusive education for persons with disabilities.

2 Funding

Funding idiosyncrasies obstruct the availability of education for persons with disabilities. In addition to a general funding subsidy, the MOE provides further financial support to eligible ECE providers which draw a high number of persons with disabilities, or which provide services in languages other than English, including New Zealand Sign Language (NZSL).[45] In a 2012-2013 review, ERO found that 71 per cent of providers who received this targeted equity funding used it to promote

---

[41] Note that the 2011 review covered the inclusion of students with moderate to high needs; whereas the 2010 survey was only concerned with inclusion of high needs students. ERO "Including Students with Special Needs: School Questionnaire Responses" (April 2012) <http://ero.govt.nz> at 1.
[42] Education Review Office "Including Students with High Needs: Primary Schools" (July 2013) <http://ero.govt.nz> at 1.
[43] Muños, above n 13, at [28]-[30]; Office of the United Nations High Commissioner on Human Rights *Thematic Study on the Right of Persons with Disabilities to Education* A/HRC/25/29 (2013) at [71].
[44] Gibson, above n 21.
[45] New Zealand Government *Replies of New Zealand in relation to List of Issues* XII CRPD/C/NZL/Q/1/Add.1 (2014) at [129].

inclusive practices and increase affordability for low-income families.[46] However funding was often not distributed for disability-specific initiatives. Minimum standards for inclusive best practice should be implemented to enhance effective use of equity funding.

Funding for school-aged students is failing to meet the MOE's goal of targeting resources to address disparity in achievement.[47] School-aged students with high or multiple needs are covered by the Ongoing Resourcing Scheme (ORS). The criteria for accessing ORS funding are inflexible, permitting only one to three per cent eligibility across all students.[48] Students ineligible for ORS funding may receive lower level specialist supports, including the School High Needs Health Fund (SHNHF), Communication Services, and Severe Behaviour Services. Schools may also access Resource Teachers specialising in Learning and Behaviour (RTLBs), Vision, and Deaf education who fund interventions, working alongside staff and students. All schools receive an annual Special Education Grant (SEG) to assist moderate needs students. SEGs are paid proportionally according to a school's decile rating.[49] EJ Ryan observes that while two equivalent decile schools might receive the same grant, one school may persistently discourage enrolment of persons with disabilities and so have few or no supported learners, while another may be a "magnet" school attracting a high number of students with disabilities.[50] *Success for All* does not account for the uneven distribution of students with disabilities, meaning the resources of "magnet" schools are too thinly spread.

Inadequate access to funding also limits the availability of quality education for persons with disabilities. As a group, persons with disabilities are commonly from lower socio-economic backgrounds, and this inherent challenge is exacerbated by additional financial burdens that having a disability entails.[51] Gibson stated that parents commonly have to paint the "biggest tragedy" and "battle to get the basics" for their children.[52] In *Success for All* the MOE acknowledged the need to reduce bureaucracy, in order to expedite access to supports. Gibson believes that the ORS policy is discriminatory because eligibility criteria focus on the "deficit" of children's impairments rather than their potential to achieve educational outcomes equivalent to their non-disabled peers. It is degrading to implicitly impose desperation as a

---

[46] Education Review Office "Use of Equity Funding: in Early Childhood Services" (October 2013) <http://ero.govt.nz> at 11.
[47] Ministry of Education "Statement of Intention 2014 – 2018" (August 2014) <http://www.minedu.govt.nz> at 14.
[48] *Daniels v Attorney-General (No 1)* HC Auckland M1616-SW99, 3 April 2002 at [29].
[49] Deciles are rated on a scale of 1-10 regarding socio-economic status of the community from which they draw students, 1 being the lowest and 10 being the highest. Schools with a decile 10 rating receive a significantly lower SEG than schools with decile 1 rating.
[50] EJ Ryan "Failing the System? Enforcing the Right to Education in New Zealand" (2004) 35 VUWLR 735 at 742.
[51] Office for Disability Issues (ODI) "New Zealand Disability Strategy: Making a World of Difference" (April 2001) <http://www.odi.govt.nz> at 13.
[52] Gibson, above n 21.

prerequisite for persons with disabilities and their families applying for basic funding. This is inconsistent with the CRPD's purpose of respecting the inherent dignity of all persons.

The Government fails to take account of human rights standards when making funding decisions. Evidence provided to the New Zealand Society for the Intellectually Handicapped (IHC) indicates that the MOE has exercised deliberate under-spending to meet targets below the notional ORS cap of one to three per cent.[53] It is acknowledged that the government must have discretion about how it spends limited taxpayer money; however budget considerations should not necessarily take priority over the best interests of individual students in allocating resources effectively.[54] A lack of transparency and consistency in decision-making related to ORS suggests that individuals are not accurately assessed for eligibility on a case-by-case basis. A proportionally higher number of applicants from low socio-economic areas fail, along with those from areas with high Māori and Pasifika populations,[55] indicating that the success of an application may depend more on the quality of the written application rather than an assessment of applicants' needs. In some cases, parents of children who are not granted funding have paid for teacher aides themselves.[56]

3 Teachers

Additionally, New Zealand has insufficient teachers who are skilled and qualified to adapt the curriculum in order to meet the needs of learners with disabilities. Annual Education Staffing Orders restrict the allocation and subsidy of special education staff.[57] Many students are confronted with "an expectation of low achievement."[58]Teachers' training institutions are "quite appalling" in preparing graduates to work with persons with disabilities.[59] Special education training is not mandatory, and the rate at which teachers and schools take up professional development opportunities is variable. Concurrent to addressing key availability issues, changes should be made to the current legal framework to allow equal access to a quality education for persons with disabilities.

---

[53] New Zealand Society for the Intellectually Handicapped (IHC) "Complaint to the Human Rights Commission under Part 1A of the Human Rights Act 1993" (31 July 2008) <http://www.ihc.org.nz> at [46].
[54] CRPD, above n 4, art 7.
[55] Ryan, above n 50, at 743.
[56] ERO (2010), above n 37, at 23.
[57] Education (2014 School Staffing) Order 2013, cls 16, 19, 30-31, 34, 65, 76 and 82-83.
[58] Independent Monitoring Mechanism of the CRPD (IMM) "Making Disability Rights Real-Annual Report of the Independent Monitoring Mechanism of the CRPD 1 July 2011-30 June 2012" (December 2012) <http://www.hrc.co.nz> at 19.
[59] Interviewee One (the author, 20 August 2014).

C Accessibility

Under Tomaševski's framework accessible education encompasses the elimination of legal, administrative, financial and physical barriers which prevent persons with disabilities from receiving equivalent education.[60] Article 24 imposes obligations on State parties to ensure persons with disabilities access education on an equal basis with others and without discrimination. This section will outline the key challenges in terms of New Zealand meeting its art 24 obligations to ensure accessible education.

1 Legal right to education

The EA89 does not recognise a clearly enforceable, substantive right to quality education. While persons with disabilities are currently afforded the same "presumptive right" to attend any school on an equal basis with non-disabled students, this does not translate into equitable access. Under s 3 of the EA89, every New Zealand citizen is entitled to free education at any state or partnership kura hourua school from the ages of five to 19. Section 8 affirms the equal procedural rights of persons with special educational needs to enrol and receive education at state schools. The terms "enrol" and "receive" imply that both rights *to* education and rights *in* education should be provided equally, in terms of Tomaševski's framework. Mainstream schools are prima facie expected to cater for all students, regardless of disability, in their local area.

The EA89 does provide a narrow procedural right for persons with disabilities to access special education support. Sections 3 and 8 are qualified, because Parliament recognised that these rights would be hollow if some students were simply treated the same as others.[61] Section 9 allows the Secretary of Education to reach an agreement with, or direct parents, to enrol their child in a particular state school, or special school, class, clinic, or service until the age of 21. In the controversial leading case of *Daniels v Attorney-General*, Keith J held that these agreements are only necessary for a restricted class of persons with disabilities seeking ORS funding or enrolment in special schools.[62] The EA89's narrow definition allowed the Court of Appeal to limit the applicability of s 9.[63] Appeals may be made against s 9 decisions to the Secretary, an arbitrator and finally the courts.[64] Complaints can alternatively be directed to the MOE, Ombudsman, Privacy Commissioner or the Health and Disability Commissioner, who have restricted powers to make non-binding recommendations.[65]

---

[60] Tomaševski, above n 18, at 14; Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 13 – The Right to Education* XXI E/C.12/1999/10 (1999) at [6(b)].
[61] Ryan, above n 50, at 739.
[62] *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at [57].
[63] As discussed above under Part II(A): "The New Zealand Context."
[64] EA89, s10.
[65] See New Zealand Code of Health and Disability Services Consumers' Rights 1996.

The contrasting interpretations of the right to education taken by the High Court and Court of Appeal in *Daniels* reflect the need for a statutory amendment to create a substantively enforceable right under the EA89. *Daniels* involved judicial review, as parents believed their children's right to education under ss 3 and 8 was compromised by the now-redundant Special Education 2000 policy. Both courts accepted the existence of a procedural right to education, though differed in the interpretation of the content and enforceability of that right.

At first instance, Baragwanath J took the preferred approach in recognising a substantive right to education. The Judge accepted the courts' responsibility to ensure minimum standards were met, comprising a right for all students to receive education which is systematic, regular and "not clearly unsuitable (and in the specific sense of it, suitable) for the pupil."[66] In Baragwanath J's opinion, diversity of needs necessitates individual appraisal and monitoring of learning requirements; assistance should be allocated proportionately to the extent of the child's particular disability.

However on appeal the Court of Appeal overruled Baragwanath J's substantive right. The Court of Appeal believed an enforceable right could only encapsulate the "regular and systematic" elements of Baragwanath J's minimum standards, considering the "not clearly unsuitable" aspect was too "opaque" to be sustained.[67] Hence the right to education would be satisfied through procedural requirements that schools be open for minimum hours and days, employ registered teachers, and comply with the national curriculum. Keith J stated that there is no "freestanding general right" for persons with disabilities to receive equal access to education under the EA89. However States must do more than merely secure a procedural right to education. Baragwanath J's substantive right is clearly favourable. Gibson observes the Court of Appeal's interpretation does not allow persons with disabilities a direct legal means of enforcing their substantive right to access education.[68]

The Court of Appeal's decision has received substantial criticism from the IMM, HRC and commentators. Disapproval of Baragwanath J's "not unsuitable" requirement as "opaque" is especially troubling, as this requirement is relatively specific in the context of an individual's educational needs. Baragwanath J recognised that reviewing MOE decisions required ascertaining student's entitlements under the substantive content of the right to education. The Judge recognised that so as to not overstep the constraints of judicial review, involving "scrutiny of the form and procedure of an action as opposed to a substantive evaluation of it,"[69] a declaration that the Minister of Education breached students' EA89 rights was the appropriate

[66] *Daniels,* above n 48, at [137].
[67] *Daniels*, above n 62, at [82].
[68] Gibson, above n 21.
[69] Ryan, above n 50, at 761.

remedy.[70] It was left to the Crown to determine the substantive means by which the breach should be resolved. The Court of Appeal did not disagree with Baragwanath J's conclusions as to the appropriate relief. However while partly correct in remaining aware of the limitations of the judicial review process, the Court of Appeal limited justiciability to such an extent that enforceability of the substantive right to education was itself undermined.

2 Right to be free from discrimination in accessing education

In order to promote more consistency with art 24 obligations, amendments are also needed to strengthen legal protections against discrimination. Section 21 of the Human Rights Act prohibits direct or indirect discrimination by public and private bodies on the grounds of disability.[71] Section 19 of the New Zealand Bill of Rights Act 1990 establishes the right to be free from discrimination in relation to acts or omissions by the government, or a person or body performing a public function conferred by law;[72] including the MOE and state schools acting pursuant to the EA89.[73]

It is an anomaly that discrimination is not defined under the HRA or NZBORA. As these statutes were enacted to comply with United Nations Covenants and Conventions,[74] the courts should interpret discrimination consistently with the CRPD to fulfil art 24 obligations.[75] *Child Poverty Action Group (CPAG) v Attorney-General* remains the leading authority on the definition of discrimination, in which the Human Rights Review Tribunal (HRRT),[76] later affirmed by the Court of Appeal,[77] stated that discrimination could be established if there was different treatment of two comparable groups, to the disadvantage of the disfavoured group, which could not be justified as a reasonable limit on the right to be free from discrimination under s 5 of the NZBORA. Persons with disabilities must prove disadvantage in accessing education arising from different treatment to non-disabled persons in comparable circumstances.

---

[70] *Daniels* (HC), above n 48, at [7] and [155]; *Daniels* (CA), above n 62, at [113]-[115]. The matter was remitted to the High Court where Baragwanath J upheld his earlier determination (*Daniels v Attorney-General* HC Auckland M1616-SW99, 27 August 2003 at [5(a)]).
[71] Human Rights Act 1993, ss 21(h) and 65 (HRA).
[72] New Zealand Bill of Rights Act 1990, ss 3 and 19(1) (NZBORA) and HRA, s 21A (introduced via Human Rights Amendment Act 2001, s 7).
[73] EA89 confers powers relating to enrolment (ss 11A-12B), discipline (ss 13-19), the management of state schools (Part 7) and the functions of the New Zealand Qualifications Authority (Part 20) and school BOTs (Schedule 6).
[74] HRA, long title; NZBORA, long title, which particularly affirms New Zealand's commitment to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976).
[75] CRPD, above n 4, art 2.
[76] *Child Poverty Action Group Inc v Attorney-General*, Decision No 31/2008, HRRT41/05, 16 December 2008 at [126].
[77] *Child Poverty Action Group Inc v Attorney-General* [2012] NZCA 319 at [46]-[47] and [66].

3 *Reasonable accommodation*

Reasonable accommodation provisions are designed to ensure that schools provide education in environments and formats which are accessible for persons with disabilities. Educational establishments may provide elevators and ramps, additional and specialised teaching and technological assistance, and deliver the curriculum in appropriate formats. Article 24 confers a clear, positive entitlement to reasonable accommodation by educational providers, defined as "necessary and appropriate modification and adjustments," not imposing a disproportionate or undue burden.[78] Conversely, the HRA sets a default rule that accommodation need not be provided unless it would be reasonable to do so.

HRA provisions allow an educational establishment to refuse admittance, admit on less favourable terms, deny or restrict access to benefits of services, or exclude a person with disabilities,[79] if "special services or facilities" were required which the educational establishment cannot reasonably be expected to provide, or if admittance poses a unreasonable risk of harm.[80] A restrictive judicial approach to reasonable accommodation reflects the negative wording of the HRA provisions. In *Ta'ase v Victoria University of Wellington,* it was held that a complainant must establish that a defendant took positive and direct actions to deny or restrict access in their failure to accommodate.[81] This connotes a high threshold that must be met for a claim of unlawful discrimination to succeed. In *Proceedings Commissioner v Kissell,* an ECE centre, which agreed to admit a child with developmental disabilities only if he attended for restricted hours compared with other children and was accompanied by a teacher aide, was held to have breached these provisions.[82]

A further difficulty is determining what the "reasonable" requirement means when accommodating learners with disabilities, and how this relates to the prohibition on discrimination. In the leading case of *Smith v Air New Zealand,* the Court of Appeal broadly stated that reasonableness involves an "analysis of the proportionality of the [education] provider's response…taking into account the overall benefits in comparison with the costs." [83] This exception leaves ample latitude for interpretation, potentially resulting in denial of persons with disabilities' right to education due to

---

[78] CRPD, above n 4, art 2.
[79] HRA, s 57.
[80] HRA, s 60; Sylvia Bell (ed) *Brookers Human Rights Law* (online looseleaf ed, Brookers) at [HR57.02] and [HR60.01].
[81] *Ta'ase v Victoria University of Wellington* (1999) 5 HRNZ 573 (HC) at 575.
[82] *Proceedings Commissioner v Kissell* [2001] NZCRT 22 at [27]-[28]. Note however that a similar outcome might not be reached today as this case was decided before amendments were made to the HRA, s 60 under the Human Rights Amendment Act 2008, s 9(a), meaning that the ECE provider could not rely on the reasonable accommodation exception in relation to admission on less favourable terms or restriction of access to benefits, as were the issues in this case.
[83] *Smith v Air New Zealand Ltd* [2011] NZCA 20 at [61].

generous interpretations of the cost-benefit analysis from the provider's standpoint.[84] Reasonable accommodation must be defined to clarify that, unlike other forms of discrimination, "equal treatment" in ignoring individual disabilities will exacerbate rather than eliminate discrimination.[85] Different treatment, including the provision of reasonable accommodation, is lawful, provided it fosters the equal realisation of persons with disabilities' rights. This approach was however rejected by Baragwanath J in *Daniels,* who held that failure to accommodate the needs of individuals with disabilities did not constitute a breach of anti-discrimination law, but only of s 8 of the EA89.[86] Education providers and rights-holders need clearer direction about their corresponding obligations and entitlements through the development of minimum standards of inclusive education, which could increase substantive access to education.

4 Substantive access

Statistics reveal that persons with disabilities are not able to realise their right to education in practice. The 2013 Disability Survey show that persons with disabilities have proportionately lower formal educational qualifications than the general population. Only 64 per cent of adults with disabilities aged 15+ had educational qualifications, compared with 85 per cent of non-disabled adults.[87] Whilst high rates of persons with disabilities enrol in ECE and schooling, they experience limitations to the enjoyment of their rights.

(a) Early childhood education

ECE providers are inequitably limiting access for persons with disabilities post-enrolment. Although the 2006 Household Disability Survey showed that 73 per cent of children with disabilities aged zero to four were enrolled in ECE, nonetheless providers only allowed partial attendance through reduced hours, and the needs of 71 per cent of these children were never professionally assessed.[88] Early assessment is vital so that quality support can be provided from the outset. If the Government's 2016 target of 98 per cent of all children accessing ECE is to be met, an enforceable substantive right to education and a clear reasonable accommodation obligation must be established.

(b) Schools

---

[84] Douglas Hodgson "The Educational Rights of Persons with Disabilities: International Human Rights Law and Australian Law Perspectives" (2013) 12 IJDL 184 at 210.
[85] *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62, (2003) 217 CLR 92 per McHugh and Kirby JJ (in the minority) at [86].
[86] *Daniels* (HC), above n 48, at [97].
[87] Statistics New Zealand "Social and economic outcomes for disabled people: Findings from the 2013 Disability Survey" (7 October 2014) <http://www.stats.govt.nz> at 10.
[88] Statistics New Zealand "Disability and Education in New Zealand in 2006" (November 2008) <http://www.stats.govt.nz>, at 7.

School-aged students also face inequitable access to educational supports. Only 25 per cent of persons with disabilities enrolled in education aged zero to 14 received specialised support, and 58 per cent aged five to 14 were never professionally assessed.[89] Enrolled students aged five to 14 experienced substantial disruptions due to their disability, including (as percentages): change of school (20), interruption of education for long periods (15), beginning school later than others (eight) and delivery by correspondence or home-schooling (eight).[90] Alison Kearney stressed the importance of translating rights rhetoric into reality, by ensuring the right to education is legally "recognised, maintained and enforced."[91] Providing persons with disabilities and their families with a clearly justiciable right to education should compel schools to remedy the limitations faced by students with disabilities.

The majority of statistics were sourced from the 2006 Disability Survey, before New Zealand ratified the CRPD. It would be beneficial to monitor changes to the position of persons with disabilities post-ratification, although it is acknowledged that no causal conclusions can be determinative. Once access *to* education has been improved, New Zealand must remedy shortfalls in persons with disabilities' rights *in* education.

D Acceptability

According to Tomaševski, acceptability is the first of two "rights in education" which all learners are entitled to exercise. Acceptability equates to the quality of education. This includes minimum standards, respect for diversity, and recognition of learners as possessors of rights.[92] This section will consider issues of quality, bullying, and the inequitable experience of Māori and Pasifika persons with disabilities.

1 Quality

Many students with disabilities are deprived of their right to an acceptable education, as highlighted in complaints to the HRC. From 2008-2012, the HRC received between 500 and 800 complaints annually concerning unlawful discrimination on the grounds of disability.[93] The largest proportion (34 per cent) concerned education for persons with disabilities.

The HRC's *Disabled Children's Right to Education* report noted significant complaints concerned a disproportionate number of children being disciplined due to

---

[89] At 9, 11 and 35.
[90] At 45-46.
[91] Alison Kearney "Exclusion from and within School: Issues and Solutions," in Roger Slee *Studies in Inclusive Education* (Sense Publishers, Rotterdam, 2011) vol 14 at 106.
[92] Tomaševski, above n 18, at 12-14.
[93] IMM (2012), above n 58, at 36.

disability.[94] The *Youth Monitoring Report* found teachers commonly mistake disability-related issues for bad behaviour.[95] Persons with disabilities presenting severe behavioural difficulties may have a propensity to engage in gross misconduct or continual disobedience which sets a dangerous example, or to seriously harm themselves or others, meeting the threshold to justify serious disciplinary action.[96] In *A v Wheeler,* Harrison J held that students' misconduct need not be wilful to justify stand-down.[97] The Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999 (SSEE Rules) do not require a student's disability to be considered when making disciplinary decisions.[98] Unfair punishment creates further barriers to learning, adversely affecting acceptable educational outcomes for persons with disabilities.

A v Hutchinson pertinently illustrates this problem.[99] A, a student with severe intellectual disabilities manifesting in aggressive behaviour, was excluded from school. When judicially reviewing the decision, Faire J held that both the principal and BOT had failed to be primarily cognisant of A's unique position. Their decisions were set-aside on the basis that a comprehensive investigation before exclusion may have instead resulted in a restoration of A's recently withdrawn behavioural supports.[100] This case illustrates the urgency of amending the SSEE Rules to ensure that school governance takes adequate account of disability-related behaviours in disciplinary decisions. Likewise, further action is needed to address the unacceptable rate of disability-related bullying.

2 Bullying

Persons with disabilities are often vulnerable to bullying, rendering them isolated and devoid of a safe physical and emotional environment.[101] The effectiveness of prevention and response to bullying varies widely, and is reliant on a proactive stance of school leadership. National guidelines, such as the MOE's *Positive Behaviour for Learning (PB4L)* strategy, provide direction to address this problem.[102] In some instances, bullying because of disability, or an inadequate school response to a disability-related bullying complaint can be progressed as an unlawful discrimination

---

[94] Human Rights Commission "Disabled Children's Right to Education" (2009) <http://www.hrc.co.nz>, at [15].
[95] Convention Coalition Monitoring Group, above n 40, at 17.
[96] EA89, ss14(1), 15(1)(c), 17(1)(c) and 20; Interviewee Five (the author, 2 October 2014).
[97] *A v Wheeler* HC Hamilton CIV-2007-419-1187, 15 November 2007 at [41].
[98] See only Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999, r17, requiring BOTs to "have due regard to each circumstance relevant to suspension."
[99] *A v Hutchinson* [2014] NZHC 253.
[100] At [75].
[101] See also CRPD, above n 4, art 16 (right to be free from exploitation, violence and abuse).
[102] See also Bullying Prevention Advisory Group "Bullying Prevention and Response: A Guide for Schools" (April 2014) Te Kete Ipurangi (TKI) <www.tki.org.nz/> at 16.

complaint under the HRA.[103] It would be beneficial for greater focus to be placed on measuring the type and extent of bullying experienced by persons with disabilities. Once gaps in the current framework are identified, the MOE and DPOs can plan measures to foster an inclusive environment, promoting tolerance towards acceptance of diversity.

3 Māori and Pasifika

"Acceptable" education must guarantee additional supports for whānau hauā (Māori persons with disabilities) and Pasifika persons with disabilities, who may face intersectional forms of discrimination, being both disabled and of indigenous or minority culture. The CRPD protects those subjected to multiple or aggravated forms of discrimination based on race, colour, ethnicity, or indigenous origin.[104] The New Zealand Government endorsed the non-binding United Nations Declaration on the Rights of Indigenous Persons in 2010, which recognises the rights to non-discrimination in accessing education and delivery in native languages.[105] The MOE's Special Education Principles similarly acknowledge that learners' language and culture are a "vital context for learning and development."[106] Furthermore, Objectives 11 and 12 of the Disability Strategy set the goal of providing culturally appropriate services and equitable distribution of resources for whānau hauā and Pasifika persons with disabilities.[107]

Māori and Pasifika persons with disabilities access support services at a lower rate than others. The 2006 Household Disability Survey revealed only 16 per cent of whānau hauā and 20 per cent of Pasifika persons with disabilities aged five to 14 had an Individual Education Plan (IEP), compared with 25 per cent of their Pākehā counterparts.[108] IEPs outline teaching strategies, supports and monitoring required to achieve specific educational outcomes. Given the lack of trilingual interpreters, Māori and Pasifika who are deaf are particularly disadvantaged.

It is suggested that the New Zealand Government addresses partnership responsibilities with Māori, embodied in Te Tiriti o Waitangi, akin to its art 24 obligations. The MOE has developed *Getting it Right for Māori* under the *PB4L* strategy, since Māori make up 40 per cent of referrals to the Severe Behaviour Service.[109] This programme, together with *Te Hikoitanga*, seeks to provide cultural

---

[103] See Part II(c)(2) above "Right to be Free from Discrimination in Accessing Education." Human Rights Commission "School Violence, Bullying and Abuse: a Human Rights Analysis" <www.hrc.govt.nz> at [2].
[104] CRPD, above n 4, Preamble paragraph (p).
[105] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, LXI A?RES/61/295 (2007), arts 14, 15 and 21.
[106] New Zealand Government *First Report to the United Nations Committee on the Rights of Persons with Disabilities* CRPD/C/NZL/1 (2013) at [160].
[107] ODI "Disability Strategy", above n 51, at 29.
[108] Statistics New Zealand "Disability and Education", above n 88, at 12.
[109] Ministry of Education "Special Education" (6 November 2014) <http://www.minedu.govt.nz>.

responsiveness for whānau hauā.[110] Despite these initiatives, Māori persons with disabilities remain underprivileged in accessing acceptable education.

Action is further needed to remedy the unacceptable provision of education for Pasifika persons with disabilities and to increase awareness of support services. New migrant groups commonly believe that caring for persons with disabilities is a family responsibility.[111] The MOE's *Pasifika Education Plan 2013-2017* seeks to increase the percentage of Pasifika children with disabilities aged under five accessing early intervention services from nine per cent in 2013 to 13 per cent in 2016.[112] This figure remains unacceptably low. New Zealand's fulfilment of Tomaševski's final "adaptability" criteria will now be examined.

E Adaptability

Tomaševski notes that the adaptation obligation flows from the "best interests of the child" doctrine; children are no longer expected to fit the school or be excluded, rather education must mould to fit the child.[113] Inadequate provision of additional supports, alternative modes of communication, and modified physical environments are the greatest shortfalls in fulfilling this obligation.

1 Additional supports

New Zealand is not fulfilling its art 24 adaptability obligation of providing "effective individualised support measures" to meet the learning and developmental needs of individuals, as envisaged under the MOE's Special Education Principles.[114] The HRC asserts this failure results in disproportionately lower achievement rates for persons with disabilities.[115]

There are significant discrepancies between the adaptive measures required and those provided. The 2006 Household Disability Survey identified that only an estimated 21 per cent of children aged 0 to 14 received their IEP entitlement.[116] High rates of supports were also lacking (as percentages); children with an identified need could not access computers (34), followed by specialist teachers and therapy (32), reader/writer assistance (25), and teacher aides (23). This shortfall reflects the need

---

[110] See Ministry of Education "Te Hikoitanga/Māori Cultural Responsivity" (6 March 2012) <http://www.minedu.govt.nz>.
[111] Office for Disability Issues "New Zealand Disability Strategy Implementation Review 2001-2007" (Litmus, 2007) <http://www.odi.govt.nz> at 49-50.
[112] Ministry of Education "Pasifika Education Plan 2013-2017" (2013) <http://www.minedu.govt.nz> at 9.
[113] Tomaševski, above n 18, at 14.
[114] New Zealand Government *First Report,* above n 106, at [160].
[115] HRC "Disabled Children's Right to Education", above n 94, at [18].
[116] Statistics New Zealand "Disability and Education", above n 88, at 12.

for minimum standards to require provision of supports, enforceable through a substantive right to education and a clear obligation to accommodate reasonably.

The New Zealand Qualifications Authority (NZQA) has recognised inequity in the provision of special assessment conditions (SACs) for students undertaking national curriculum assessment. Education providers may annually apply for their students to have assistance including reader/writers and assistive technologies.[117] A 2014 review revealed that students in decile 10 schools were seven times more likely to apply for SAC entitlements compared with students in decile one schools; 35 per cent of schools did not access SACs at all.[118] This is inconsistent with the expected pattern of greater need in low decile schools. Barriers to accessing SAC entitlements were attributable to the complexity of the application process, deprioritisation in low decile schools with broader student achievement goals, and the high level of resources required for professional assessment and provision of supports. Until assistive technologies supplant the need for SACs, NZQA must ensure all eligible students access these conditions.

2 Communication

Educators are not delivering the curriculum in the most suitable format for individual learners. Article 24 asserts the right of students to learn in Braille, NZSL and other modes of communication.[119] Poor literacy is common among students requiring Braille or NZSL, indicating deficiency in providing greater technological and human aid as envisaged under Objective 3.2 of the Disability Strategy.[120]

Deaf students suffer particularly from no enforceable right to education in the appropriate medium. The New Zealand Sign Language Act 2006 (NZSL Act) declared NZSL an official national language, however s 8 states that this recognition creates no legally enforceable rights. Outside the two specialised Deaf Education Centres, the insufficient number of trained educators hinder deaf learners' art 24 rights.[121] Although the MOE offers annual scholarships for NZSL interpreters, courses are constantly undersubscribed and have high failure rates.[122] Furthermore, NZSL interpreters are not included in the list of specialists approved for allocation of ORS funding.[123]

---

[117] Interviewees Three and Four (the author, 5 September 2014).
[118] Ministry of Education and the New Zealand Qualifications Authority "Review of Special Assessment Conditions for National Certificate of Educational Achievement" (7 March 2014) <www.minedu.govt.nz> at 2.
[119] See also CRPD, above n 4, art 21 (right to access information in accessible formats and technologies).
[120] ODI "Disability Strategy", above n 51, at 20.
[121] Interviewee Eight (the author, 12 December 2014).
[122] Minister for Disability Issues "Review to New Zealand Sign Language Act" (September 2011) <http://www.odi.govt.nz> at [79].
[123] Human Rights Commission "A New Era in the Right to Sign: Report of the New Zealand Sign Language Inquiry" (September 2013) <www.hrc.govt.nz> at 44.

3 *Physical adaptability*

The physical environments of educational establishments require adaptation in order for persons with disabilities to exercise their right to inclusive education.[124] The HRA's access provisions negatively frame obligations, stating that persons are not required to provide special services and facilities to enable disability access where such provision would be unreasonable.[125] This further emphasises the need to positively frame a default rule that accommodation should be provided where reasonable.

The Building Act 2004 and New Zealand Building Code 1992 contain inadequate accessibility requirements. Building consent for construction or alteration of educational institutions is conditional on reasonable and adequate provision of access for persons with disabilities.[126] New buildings must either follow minimum standards for access under the New Zealand Standard Specification 4121 (2001), or design alternative solutions which satisfy Specification standards.[127] Buildings may however be exempted from meeting Code accessibility requirements where owners' sacrifices, such as cost, are considered to outweigh potential advantages to persons with disabilities.[128] The only way to compel existing buildings to become accessible is if educators seek alterations.[129] Parliament should not pass the Building (Earthquake-prone Buildings) Amendment Bill 2013, which would allow territorial authorities to grant building consent for strengthening work without requiring owners to upgrade access and facilities for persons with disabilities to meet Code accessibility standards.[130]

Having assessed New Zealand's position against Tomaševski's framework, it is clear that obligations to provide available, accessible, acceptable and adaptable education to persons with disabilities are not being met. Key recommendations to enable New Zealand to fulfil its art 24 obligations will be discussed.

III Solutions under the Current Framework

Part III will outline possible solutions for New Zealand to better fulfil its art 24 obligations within the current legislative and policy framework. Alternative solutions that are currently available must first be exhausted before changes can be justifiably

---

[124] See also CRPD, above n 4, arts 9 (accessibility) and 18 (liberty of movement).
[125] HRA, ss 42-43.
[126] Building Act 2004, ss 17, 112(2) and118.
[127] Sections 19, 23 and 119; Malatest International "Consultation Report: Access to Buildings for People with Disabilities" (Office for Disability Issues and Ministry for Business Innovation and Employment, June 2014) <http://www.dbh.govt.nz> at [3.3]-[3.4].
[128] Building Act, ss 67 and 69; New Zealand Government *Replies to List of Issues,* above n 45, at [53].
[129] Interviewee Two, above n 33.
[130] Building (Earthquake-prone Buildings) Amendment Act (182-2) 2013, cl 133AX.

implemented. Proposed remedies under each of Tomaševski's *Four A's* will be addressed in turn.

A Availability

Current inclusive education practices, funding and teacher training fall short of meeting Tomaševski's availability obligation under art 24. Availability of education for persons with disabilities could be improved under the current framework through more effective mainstreaming practices, awareness training for teachers and streamlined funding.

Mainstreaming students with disabilities in non-specialised schools fosters progress towards more inclusive educational practices. Mainstreaming is however a highly contentious issue. For some students with disabilities, the current mainstream schooling system is both unsuitable and impractical.[131] The HRC found that under the current system students with disabilities are ghettoised in specials schools and classrooms as well as in mainstream classrooms, as they are the object of special measures and specialist teacher support.[132] Between one and three per cent of the student population have such severe disabilities they are unable to participate in the national curriculum.[133] Article 24 acknowledges complexities in needs, by stating learners should be educated in environments individually matched to their development. While MacArthur asserts that true inclusion can never occur in an education system that condones segregation under a separate Special Education framework,[134] true inclusion requires a more nuanced approach than uplifting all children from special schools and placing them in mainstream classrooms.

More effective and less inhibitive supports should be developed to help the majority of students with disabilities integrate effectively. The MOE could also fulfil its goal of "rais[ing] teaching quality and leadership,"[135] by implementing mandatory disability awareness programmes for trainees and practising teachers, to encourage an attitudinal shift towards inclusive education. A limited number of special schools should however also be retained to accommodate very high needs learners.[136] These non-mainstream schools could accommodate students unable to participate in the national curriculum and offer their expertise by providing outreach services to mainstream schools. The dual systems of mainstream education and Special Education should however be dismantled and managed under a single MOE framework. This would ensure that a single entity oversees placement of children in the type of school best suited to their individual needs, facilitates greater policy co-

[131] Human Rights Commission "Disabled Children's Right to Education" above n 94, at [39].
[132] At [39]
[133] At [42].
[134] MacArthur, above n 36, at 18.
[135] MOE "Statement of Intention", above n 47, at 14.
[136] Interviewee Five, above n 96; Interviewee Six (the author, 8 October 2014).

ordination in the implementation of inclusive practices and enables cohesive regulation of minimum standards.

While government resources are finite, the MOE could be more astute in their allocation of funds. To better fulfil art 24 obligations, it is recommended that individual funding schemes be overhauled into one system, and SEG allocations be made proportional to the number of supported learners in each school. Remedies currently available under the legislative framework will now be explained in the context of accessibility.

B Accessibility

Alternative remedies to enforce persons with disabilities' right to access education on an equal basis with others will be outlined in the context of the EA89, a tortious negligence claim, and under the HRA.

1 Enforcement under the Education Act 1989

Daniels was decided before New Zealand ratified the CRPD. Should a similar case arise today, the courts would be required to apply the presumption of consistency, preferring interpretations of the EA89 consistent with international obligations such as art 24. Furthermore, when interpreting legislation the courts have an obligation to prefer a reading consistent with the NZBORA.[137] This may mean that ss 3 and 8 of the EA89 could be read in a non-discriminatory light to allow persons with disabilities to access a substantive right to education. However the NZBORA allows reasonable limitations to rights where they can be "demonstrably justified in a free and democratic society."[138] Relying on the uncertainties of future judicial interpretation to protect persons with disabilities' right to education is insufficient. It is therefore desirable that Parliament amend the EA89 to recognise an explicit, substantive and enforceable right to education. Beyond this, the Government must ratify the CRPD OP to allow redress for aggrieved persons in an international forum.

2 Negligence

The law of negligence may be an alternative way to ensure accessibility under the current legislative framework. The New Zealand courts are yet to rule definitively on whether a tortious negligence claim could be upheld where the right to education has been breached to the extent that a duty of care could be imposed on education providers.[139] In *Phelps v Hillingdon London Borough Council,* an educational psychologist who failed to detect and treat the plaintiff's dyslexia was held to have assumed a direct duty of care to the child, by virtue of the parents' and school's

---

[137] NZBORA, s6.
[138] Section 5.
[139] See *Anderson v Attorney-General* HC Auckland CIV-2004-404-2511, 6 June 2007 at [73].

reliance on the psychologist's advice.[140] As such, the House of Lords held that the educational authority employing the psychologist was vicariously liable for the breach of professional duty. Lord Slynn awarded damages for past and future loss of earnings and the cost of tuition on the basis that had the plaintiff's dyslexia been diagnosed early, adverse consequences to literacy and employment could have been significantly mitigated.[141] Their Lordships unanimously distinguished earlier authority,[142] holding that a breach of statutory duty did not preclude the existence of a civil action.[143] The question of direct liability against an educational authority was left open.

Negligence claims are however an unsuitable means of enforcing art 24 rights. In *Daniels,* Baragwanath J applied *Phelps* in recognising a substantive right to education under the EA89. The Court of Appeal distinguished *Phelps* on the basis that it involved an individual claim rather than a group action. Professor Stephen Todd has nonetheless criticised the House of Lord's decision on their application of private "common law concepts of negligence" rather than "public law concepts of irrationality" in reviewing the exercise of statutory duties.[144] The courts must be careful not to impose an undue burden on or usurp the role of public bodies in the legitimate exercise of their discretion. Tortious liability is concerned not with enforceability but with compensation for damage. Enforcement of rights under a statutory framework, as encapsulated under the HRA and NZBORA, generally overrides common law approaches.[145] From a policy perspective, refraining from seeking redress until substantial detriment occurs would cause irrevocable harm to the social and academic development of learners with disabilities. Therefore, Parliament should establish an enforceable right to education.

3 Enforcement under the Human Rights Act 1993

Claims of unlawful discrimination against state schools acting under the EA89, including failure to provide reasonable accommodation, may be brought to the HRC under Part 1A of the HRA. Acts or omissions by state schools amount to a breach of Part 1A if they are held to unjustifiably limit the right to be free from unlawful discrimination under s 19 of the NZBORA.[146] Unlawful discrimination by private entities – independent schools and ECE services – constitutes a breach of Part 2 of the HRA. Breaches of ss 57 and 60 of the HRA, which specifically deal with reasonable

---

[140] *Phelps v Hillingdon London Borough Council* [2000] UKHL 47, [2001] 2 AC 619 at 654 per Lord Slynn.
[141] At 656-657.
[142] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 735-738.
[143] *Phelps,* above n 140, at 653, applying *Barrett v Enfield London Borough Council* [1999] UKHL 25, [2001] 2 AC 550 at 570 and 572 per Lord Slynn.
[144] Stephen Todd "Negligence: Particular Categories of Duty" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 269 at 337.
[145] See Cheryl Saunders "Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study" (2002) 33 VUWLR 507 at 512-513 and 516-518.
[146] HRA, s20I-J; *Morrison v Housing New Zealand Corporation* Decision No 45/06, HRRT14/06, 8 December 2006 at [35]-[36].

accommodation in educational establishments, will be predominantly enforceable against private entities under Part 2. Reasonable refusal to accommodate in state schools should theoretically pass the test of a justified limitation on the right to be free from discrimination in the application of s 5 of the NZBORA.[147]

While the presumption of consistency with international obligations likewise relates to the courts' interpretation of the HRA, the statute would benefit from an amendment which defines discrimination, applicable to all prohibited grounds and contexts. It is imperative that anti-discrimination legislation provides explicit guidelines detailing how the courts can consistently ascertain whether or not discriminatory conduct has occurred.

High proportions of complaints regarding a failure to provide reasonable accommodation show that this obligation must also be clarified under the HRA. The highest number of Part 1A education complaints received by the HRC in 2011-2012 (40 per cent), concerned the failure of educational institutions to provide reasonable accommodation.[148] Examples of these include inadequate provision of supports for autistic children, a school's exclusion of a child due to failure to reasonably accommodate his behavioural disorders, and a teacher's criticism of a child, whose disability affects his ability to take instruction, as "lazy."[149] Implementing a clearly enforceable, positive obligation to provide reasonable accommodation under the HRA will broaden understanding of expected minimum standards and should increase substantive access to education for persons with disabilities.

C Acceptability

There are insufficient measures within the current framework to adequately improve the acceptability of education for persons with disabilities. Substantial changes are needed for New Zealand to better fulfil its acceptability obligation under art 24. Amendments to the SSEE rules are necessary, which require educators to take account of disability when making disciplinary decisions. More robust investigation of disability-related bullying could provide meaningful solutions and identify gaps in current bullying management policies. New Zealand's failure to meet Tomaševski's acceptability requirement highlights the need for the Government to collate more comprehensive data of persons with disabilities' educational experiences, including Māori and Pasifika. This would inform government strategies thereby effectively remedying identified shortfalls in art 24 obligations.

---

[147] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [17.19.4].
[148] IMM (2012), above n 58, at 20-21.
[149] Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, "Second Report – Making Disability Rights Real July 2012-December 2013" (7 August 2014) <http://www.hrc.co.nz> at 22.

D Adaptability

Educators must be more proactive in using adaptive technologies and languages and building adapted environments to fulfil New Zealand's art 24 obligations in line with Tomaševski's standards.

NZQA offers many solutions which schools should utilise. Variability of access to assistive technologies show that many schools must make greater efforts to apply for supports, including SACs, on behalf of their students with disabilities.[150] Furthermore NZSL was introduced as a subject under the National Certificate of Educational Achievement in 2015. This must be promoted to prospective students as an opportunity to create greater awareness, acceptability, and communication between deaf and hearing students. NZSL interpreters should urgently be classified as approved ORS specialists to allow more students to access their supports. While these solutions indicate progress, the NZSL Act should ultimately be amended to recognise a right to education in NZSL.

Adapted buildings are essential to allowing an equal right to education for persons with disabilities. The IMM has recommended that universal design concepts be incorporated into the Building Act and Code on a mandatory basis.[151] Representatives from the disabled community should be consulted in the building consent process so that new buildings are made accessible, and persons with disabilities do not have to fight for the right to access later. The MOE is now prepared to make reasonable modifications to every school which makes a property modification request.[152] The MOE's planned $1.137 billion investment into development of modern learning environments over the next decade should include upgrading all educational institutions to meet universal design concepts under minimum standards of inclusive education, irrespective of modification requests.[153] A proactive stance is needed to build accessible facilities which benefit all learners; "if we change our environment so that everyone can [have] access…then we open the doors to everyone."[154]

Having discussed possible solutions it is clear that the current framework does not adequately fulfil New Zealand's art 24 obligations. Key changes, imperative to improving the right to education for persons with disability, will now be outlined.

---

[150] MOE and the NZQA, above n 118, at 2.
[151] IMM (2014), above n 149, at 56.
[152] Interviewee One, above n 59.
[153] Ministry of Education "Annual Report 2014" (October 2014) <www.minedu.govt.nz> at 37-38.
[154] Interviewee Two, above n 33.

IV Recommended Changes

A human rights approach in government decision-making is essential to provide greater accountability in the provision of education to persons with disabilities under art 24. The proposed changes are widespread and necessitate co-operation between Parliament, the MOE, IMM, the courts, teaching professionals, DPOs as disabled community representatives, and the public. Article 4 of the CRPD requires States to ensure better realisation of rights is developed "by and not on behalf of oppressed people." [155] As rights-holders, persons with disabilities are best placed to inform legislation and policy changes.

Part IV will outline pivotal changes required to the EA89, HRA, NZSL Act, SSEE Rules, and NAGs to ensure an equal right to education for persons with disabilities in New Zealand no longer remains aspirational. Article 24 will be used as a framework for reform to develop proposed 'Minimum Standards of Inclusive Education,' collect quantitative and qualitative data, establish an Education Tribunal and ratify the CRPD OP.

A Amendments to the Education Act 1989

The right to education under the EA89 lacks detail concerning its substantive content. Following ratification of the CRPD, Parliament made no amendments to provisions which encapsulate the right to education for persons with disabilities.[156] New Zealand operates under a dualist system of international law; international treaty provisions must be incorporated into domestic legislation to be legally enforceable. It is submitted that Parliament should create a clearly enforceable substantive right under the EA89, thereby giving domestic recognition to the rights conferred in art 24. This will benefit all learners, not only those with disabilities. Cognisant of *Daniels,* a positively-framed, explicitly worded right would provide the necessary reliability for persons with disabilities and a clear direction for judicial enforcement. The NZBORA would also benefit from an amendment recognising a right to education, although including economic, social and cultural rights in this statute is less likely and would require significant constitutional overhaul.

Pursuant to the preference for inclusion and mainstream recognition of disability rights, amendments should be made to the EA89, rather than passing separate legislation dealing exclusively with persons with disabilities' rights. All education

---

[155] Roger Slee "Clauses of Conditionality: the 'Reasonable' Accommodation of Language" in Len Barton (ed) *Disability and Society: Emerging Issues and Insights* (Longman, New York, 1996) 83 at 118.

[156] No amendments were made to EA89, ss 3, 8 and 9 under the Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008, s 4.

providers will have to recognise and provide an equal right to education for persons with disabilities. The EA89 should be amended to read:[157]

2 Interpretation

"Additional educational supports" means the provision of resources, assistive technologies, facilities, specialised teachers and peer-supports, and/or the delivery of the curriculum in appropriate languages and modes of communication aimed to accommodate each person's individual educational needs to facilitate their effective education.

"High level of additional educational supports" means the provision of additional educational supports to supported learners classified as "high needs" under ORS.

"Inclusive education" means the provision of education for all students, including supported learners, within the general state school system.

"Satellite classroom, unit or service" means a classroom, unit or service, within a state school, designed specifically to provide education for supported learners who cannot be accommodated within inclusive education.

"Separate school" means a day or residential school designed specifically to provide education for supported learners who cannot be accommodated within inclusive education.

"Supported learners" means students requiring additional educational supports.

8 Equal rights to <u>inclusive</u> primary and secondary education

(1) Except as provided for in this Part, <u>supported learners</u> have the same right to enrol and receive <u>inclusive education</u> at state schools on the <u>basis of equal opportunity</u> with those who do not.

(2) Supported learners have a <u>right to receive additional educational supports</u> required, within state or <u>separate</u> schools or <u>satellite</u> classrooms, units or services, to <u>facilitate their effective education within a suitable environment.</u>[158]

9 <u>Separate</u> education and <u>additional educational supports</u>

(1) If satisfied that it is in <u>the best interests</u> of a person under 21 to receive a <u>high level of additional educational supports</u>, the Secretary shall –

(a) agree with the person's parents that the person should be enrolled, or direct them to enrol the person, in a particular state school, <u>separate</u> school, or <u>satellite</u> classroom, unit or service; and/or

[157] Note that the new wording of existing sections is underlined.

[158] EA89, s8(2) would move down to become s 8(3) and should remain unchanged as the right for schools to maintain enrolment schemes and discipline problematic students cannot practically be compromised, although see amendments to SSEE Rules at Part IV(E) below.

> (b) agree with the person's parents that the person should receive, or direct them to ensure that the person receives, a high level of additional educational supports.

The words "special school, special class, or special clinic" and "special education service" under s 9(2) and (4) should be respectively substituted for the words "separate school, or satellite classroom, unit or service" and "additional educational supports."[159]

These amendments incorporate the wording of art 24, and explicitly recognise a substantive right to inclusive education. The amendments to s 2 are consistent with the broader definition of special education under the EA64 and incorporate inclusive terminology. The disabled community no longer appreciate the patronising phraseology of "special," as it hampers inclusion through implying a lack of ability.[160] The alternative proposed phrases are practical descriptions of the services provided. The terms "supported learners" and "additional educational supports" recognise that some students are entitled to supports beyond those required by the majority of learners. The word "separate" acknowledges that some schools, which are distinct from the mainstream, are specifically designed to cater for persons with disabilities, while "satellite" adopts the current terminology used by the MOE.

The proposed amendments to s 8 explicitly recognise that persons with disabilities who are denied enrolment in mainstream schools have a legally enforceable right to education. The addition of s 8(2) clarifies the debate between the High Court and the Court of Appeal in *Daniels,* recognising not only a procedural but also a substantive right to receive additional educational supports within the best suited environment. This aligns with Kishore Singh's statement that establishing justiciability is crucial through clear legislative wording which outlines specific entitlements available and allows individuals to seek redress for non-fulfilment of international obligations.[161]

Amendments to s 9 predominantly incorporate wording appropriate to the new philosophy. The "best interests of the child" determines the Secretary's primary considerations in reaching a decision, recognising this CRPD principle. A s 9 agreement should only be required for the narrow class of persons with disabilities requiring a "high level" of additional supports, in line with Keith J's assertion in *Daniels*.[162] The addition of this requirement ensures children experiencing the entire spectrum of disabilities are guaranteed individualised "best interests" appraisal of their educational needs, occurring concurrent to an overhaul of the various funding

---

[159] EA89, ss 9(3) and (5) should remain unchanged.
[160] Hickey and Gledhill, above n 15, at 243.
[161] Kishore Singh *Report of the Special Rapporteur on the right to education – Justiciability of the right to education* XXIII A/HRC/23/35 (2013) at [27].
[162] See Part II(C)(1): "Legal Right to Education" above.

schemes.[163] Pragmatically, the Secretary retains the ability to make directions where agreement cannot be reached, although this decision should be well informed through substantial consultation with professionals familiar with the child's needs. The recognition of a substantive right to supports which facilitate best educational outcomes should encourage decisions which satisfy all parties. The right of appeal against the Secretary's decisions under s 10 should remain unchanged. If parents are dissatisfied, the enforceable right to substantive education in an inclusive system should encourage the courts to take a stronger approach to judicial review. These EA89 amendments should be strengthened through correlative amendments to anti-discrimination law.

B Amendments to the Human Rights Act 1993

A discrimination definition and a clear obligation to provide reasonable accommodation would enhance the HRA. These amendments will fulfil New Zealand's obligation to enact legislative measures giving effect to art 24. Parliament must ensure that legislation explicates the denial of reasonable accommodation as tantamount to an act of unlawful discrimination. This will indicate to the judiciary that legislation should be interpreted in accordance with both the letter and spirit of the CRPD.[164] ECE providers and schools will be able to recognise their responsibilities more readily to reasonably accommodate learners with disabilities.

United Nations (UN) Enable identified three options for States: to enact either a specific disability anti-discrimination law,[165] an equality law, or ensure the CRPD's understanding of disability and discrimination is explicitly referenced and "fully reflected in a general anti-discrimination law."[166] Given the scope of this paper, it would be inappropriate to assume that all rights for persons with disabilities would be better recognised in disability-specific legislation. UN Enable has acknowledged that provisions relating to persons with disabilities are often better placed within general thematic legislation, such as the EA89 and the HRA, consistent with international mainstreaming of disability rights.

HRA amendments should read:

2 Interpretation

---

[163] See Part IV(D): Minimum Standards for Inclusive Education below.
[164] Committee on the Rights of Persons with Disabilities *Concluding Observations on the initial report of New Zealand* XII CRPD/C/NZL/CO/1 (2014) at [50].
[165] For example s 23 of the Australian Disability Discrimination Act 1992 (Cth) and the United Kingdom Disability Discrimination Act 1995, Part IV.
[166] Department of Economic and Social Affairs (UN-DESA), the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Inter-Parliamentary Union (IPU) "UN Enable Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities" (No.14, 2007) United Nations <http://www.un.org> at Ch 5.

> **Discrimination** means treating two comparable groups differently by reason of one of the prohibited grounds of discrimination, thus creating disadvantage for the disfavoured group.
> **Reasonable Accommodation** means necessary and appropriate modification not imposing a disproportionate or undue burden, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms contained in the NZBORA or any other enactment.

Section 57 should have a further subsection inserted to read that it is unlawful for an educational establishment:

> …(e) to fail to provide a person with reasonable accommodation that prevents their enrolment or limits the exercise of their right to quality education provided by the educational establishment.
> by reason of any of the prohibited grounds of discrimination.

Finally, s60(1) should be amended to read:

> (1) Section 57 applies <u>except where</u> the provision of <u>reasonable accommodation</u>, which would enable a person with a disability to participate in an educational programme or derive substantial benefits from that programme, would impose a disproportionate or undue burden on educational establishments.

These amendments would increase educational providers' awareness of a clear obligation to reasonably accommodate learners with disabilities. Amendments to ss 2 and 57 incorporate CRPD definitions, specifically referring to substantive equality which, remarkably, is not currently mentioned in the HRA or the NZBORA. The current definition of disability under s 21(h) is consistent with the broad CRPD definition and can be read in conjunction with the newly inserted definition of discrimination to ascertain whether discrimination has occurred against persons with disabilities. The discrimination definition specifically incorporates international obligations because it is necessary under New Zealand's dualist system. This definition also provides legislative legitimacy to the leading *CPAG* decision, and ensures consistency in judicial application.[167]

The addition of s 57(1)(e) and amendment of s 60(1) elucidate a positive obligation, asserting that the provision of reasonable accommodation should be the default position. In *Eaton v Brant County Board of Education*, the Canadian Supreme Court acknowledged the complex tension between reasonable accommodation and segregation of some students into special schools, as separate education can be "both

[167] See Part II(C)(2): "Right to be Free from Discrimination in Accessing Education" above.

protective of…and violative of equality."[168] The Ministry of Justice is currently creating reasonable accommodation guidelines for rights-holders, which could be read in conjunction with amended obligations to 'reasonably accommodate,' further clarifying the rights of persons with disabilities and the responsibilities of education providers.

C Amendments to the New Zealand Sign Language Act 2006

The NZSL Act should also be amended to incorporate the wording of art 24 and include an enforceable right to education in NZSL,[169] further fulfilling New Zealand's obligation to adopt legislative measures which implement CRPD provisions.[170] Schools would be compelled to provide inclusive and adaptable education for students with hearing impairments. The current s 7 of the NZSL Act should be relabelled s 7A, following a new s 7, which should read:

> **7 Right to use NZSL in education**
> (1) Persons whose first or preferred language is NZSL have the right to:
> (a) Learn NZSL in early childhood and school education; and
> (b) Have the New Zealand Curriculum delivered in NZSL.

Section 8, which holds that no legally enforceable rights are created in recognising NZSL as an official language, should necessarily be amended to read:

> **8 Effect of recognition**
> (1) <u>Aside from sections 7 and 7A</u>, section 6 does not create any legally enforceable rights.

The right to NZSL in ECE and schooling stresses the importance for deaf students to learn NZSL at as young an age as practical, as this forms the basis of their ability to communicate in all aspects of their lives.[171] The new s 7 recognises that, as with English and Te Reo Māori, students should have an enforceable right to communicate in NZSL. The right to use NZSL in education should precede the right to use NZSL in legal proceedings; NZSL cannot be used elsewhere if it has not first been taught. These substantial legislative amendments to the ERA89, HRA and NZSL Act should be reinforced through the implementation of several policy changes, discussed forthwith.

---

[168] *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at [67].
[169] Minister for Disability Issues, above n 122, at [103]-[104].
[170] CRPD, above n 4, art 1(a).
[171] Interviewee Eight, above n 121.

D Minimum Standards of Inclusive Education

The MOE, in consultation with DPOs, should develop a comprehensive list of 'Minimum Standards of Inclusive Education' under a nationwide transition strategy to give credence to an amended substantive right to education under the EA89. The Minimum Standards should require ECE providers and schools to:[172]

(a) mandatorily require pre-service and in-service staff training on inclusive practices;
(b) facilitate early identification of individual learners' needs;
(c) fund support for all entitled students;
(d) be physically accessible to all students, including the provision of adequate transport services;
(e) develop a curriculum accessible to all learners;
(f) provide accessible communication for all students, including NZSL and Braille; and
(g) ensure social accessibility to peers.

Transition to full inclusion should occur on a manageable timeline. Thereafter, all educational establishments should be required to maintain their facilities and services at the appropriate level.

The numerous separate and inflexible funding schemes should be disestablished and pooled into ORS.[173] A ranking system within the one scheme will acknowledge that students require different levels and types of support based on individually assessed needs. Students ranked as high needs will require s 9 agreements or directions.[174] Criteria will focus not on impairment but on supports needed to reach learning potential. Moreover, allocation of the SEG should be overhauled and granted proportionally to the number of supported learners in each school, not according to decile rating. More targeted funding would ensure greater efficacy and co-ordination in investments and better educational outcomes for students.

E Amendments to the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999

It is recommended that further amendments be made to the SSEE Rules to avoid unfair punishment, as occurred in *A v Hutchinson*. Principle 7, which outlines processes, practices and procedures, should include an additional consideration under

---

[172] IMM (2012), above n 58, at 117. See also Tony Booth and Mel Ainscow *Index for Inclusion: Developing Learning and Participation in Schools* (3rd ed, Centre for Studies on Inclusive Education, Bristol, 2011) at [A.1]-[C.2].
[173] The schemes include ORS, SHNHF, Communication Service, and Severe Behaviour Services, discussed above at Part II(B)(2): "Funding."
[174] See Part IV(A): "Amendments to the EA89" above.

subclause (d) which would require school governance to recognise the unique position of persons with disabilities when making decisions on serious disciplinary matters. This amendment is consistent with the recognition of other minority groups, such as Māori, who are proportionately over represented in negative discipline figures. IEPs should be consulted for alternative means of de-escalating disability-related behaviour. With the best interests of learners with disabilities in mind, serious disciplinary measures should only be used as a last resort.

F Gathering Data

As a precursor to data collection, the IMM has recommended that a universal definition of disability be adopted across all government departments to ensure that statistics are comparable. The Government should adopt the social model definition outlined under art 2 of the CRPD.[175] This will provide the most effective measure of the extent to which art 24 rights have been met.

The MOE, Statistics New Zealand, ERO and DPOs must routinely collect and report relevant data on the experience of persons with disabilities in accessing education, to inform the direction of future legislation and policy, and facilitate effective IMM monitoring. MacArthur states that collection of valuable data is the "lifeblood of continuous improvement."[176] While Statistics New Zealand collects data for national disability surveys alongside its five-yearly census, there are no plans for 2013 data to be disaggregated into a report on disability and education, as followed the 2006 Survey. There are no comprehensive statistics on the relationship between disability and education post-ratification of the CRPD. A lack of meaningful recent data was a challenge for obtaining evidence to support findings expressed in this paper.

Quantitative and qualitative data is needed to establish the extent of inclusive education, achievement rates, effectiveness of supports, the rate of bullying and the experience of whānau hauā and Pasifika persons with disabilities. Data should compare learning outcomes of persons with disabilities with all other equivalent groups.[177] Unlike ERO's 2011 self-review questionnaire, schools should be held accountable for the number of students actually participating and accessing supports. Data should correlate with the extent to which the 'Minimum Standards of Inclusive Education' are being met, and can be used to determine the action each school and ECE centre must take to implement fully inclusive, culturally responsive education, promoting widespread tolerance.

---

[175] CRPD, above n 4, art 2.
[176] MacArthur, above n 36, at 24.
[177] Including comparisons between all persons with disabilities and non-disabled persons, and between between whānau hauā and Pasifika persons with disabilities and both non-disabled Māori and Pasifika, and non-Māori and Pasifika persons with disabilities.

G Amendment to the National Administration Guidelines

The UN Committee on Economic, Social and Cultural Rights (CESCR),[178] New Zealand Law Commission,[179] IMM, and Ombudsman,[180] have recommended that all schools be required to implement anti-bullying programmes. This mandatory obligation would remove current reliance on ethical leadership within each school. The NAGs should extend beyond the current requirement of BOTs to provide a "safe physical and emotional environment for students."[181] A new Guideline 5A should be inserted which requires each BOT to implement a school-wide safety and anti-bullying programme and complaints process, and gather information on the rate and types of bullying experienced by students, identifying vulnerable groups such as persons with disabilities, Māori and Pasifika. Undertaking this requirement will expose deficits in prevention and response methods, increasing awareness and informing more effective remedial measures.

H Education Tribunal

Accompanying these changes, Parliament should consider establishing an independent quasi-judicial body, similar to the Employment Relations Authority, specialising in educational complaints. This body should be established under the EA89 and sit above the MOE complaints services, but below the courts to expedite decisions and provide a more affordable accountability mechanism. A Special Education Needs and Disability Tribunal (SENDT) has been established in the United Kingdom.[182] Complaints to the SENDT cover issues including discrimination in education, parents' disagreement with their local authority's decision regarding their child's educational needs assessment or the development of their child's Education, Health and Care Plan.[183]

To justify the considerable expense involved in establishing an additional body, the Education Tribunal should consider all education complaints and appeals arising from MOE decisions, not only those concerning persons with disabilities. The Tribunal's jurisdiction should include enrolment and s 9 decisions, provision of additional educational supports, barriers to participation, and unfair disciplinary action. The disadvantaged position of persons with disabilities outlined in this paper indicates that

---

[178] Committee on Economic, Social and Cultural Rights *Concluding Observations of the CESCR: New Zealand* XLVII E/C.12/NZL/CO/3 (2012) at [19]
[179] New Zealand Law Commission *Ministerial Briefing Paper: Harmful Digital Communications: The adequacy of the current sanctions and remedies* (Wellington, August 2012) at 6.83.
[180] IMM (2012), above n 58, at 123-124; Office of the United Nations High Commissioner for Human Rights *Summary of Stakeholder's Information on New Zealand* XVIII A/HRC/WG.6/18/NZL/3 (2013) at [77].
[181] Ministry of Education "National Administration Guidelines", above n 24, Guideline 5(a).
[182] Chrisp, above n 7, at 164-5; See also United Kingdom Disability Discrimination Act 1995, above n 165, ss 28H-M.
[183] United Kingdom Government, "Appeal to the Special Educational Needs and Disability Tribunal" (10 August 2015) <https://www.gov.uk/special-educational-needs-disability-tribunal/overview>.

the current system is not working effectively, thereby giving validity to the establishment of an independent and dedicated authority. Having discussed necessary changes to the domestic framework, international enforceability options will be examined.

I International Enforcement

While this study has focussed on domestic remedies, there is also merit in exploring an effective international mechanism for persons with disabilities to enforce their right to education under art 24. Tomaševski and many others have stressed that no right can exist without an effective remedy. International enforcement mechanisms are valuable in determining whether or not domestic remedies are valid. This section will discuss the international enforcement mechanisms available, and assess which Optional Protocol the Government should ratify.

1 Optional Protocol to the CRPD

New Zealand's failure to ratify the CRPD OP means that persons with disabilities are unable to access the individual communications measures, and the CRPD Committee cannot conduct an inquiry into New Zealand's fulfilment of art 24. Following recommendations from the CRPD Committee,[184] New Zealand is intending to accede to the CRPD OP as soon as practical.[185]

The CRPD OP allows persons who believe that their art 24 rights have been violated to make a complaint, called a "communication," to the CRPD Committee.[186] Individual communications act as a last resort when domestic remedies have been exhausted. Should the CRPD Committee decide that the complaint is admissible and substantively meritorious, they may formulate recommendations for the State concerned.[187] The Committee's final decision is published, promoting State accountability in the international arena.

The inquiry procedure allows the CRPD Committee to conduct its own investigations based on reliable evidence of grave or systematic rights violations.[188] The Committee may require States to comment, and designate Special Rapporteurs to inquire urgently. Findings will be transmitted to the concerned State for response, then a summary published and reported to the UN General Assembly. In ratifying the OP, States may "opt out" of the inquiry process, but not the communications process. This

---

[184] Committee on the Rights of Persons with Disabilities *List of issues in relation to the initial report of New Zealand* XII CRPD/C/NZL/Q/1 (2014) at [1].
[185] New Zealand Government *Replies to List of Issues,* above n 45, at [1].
[186] Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (CRPD OP) Doc.A/61/611 (opened for signature 20 March 2007, entered into force 3 May 2008) arts 1-55.
[187] UN-DESA, OCHR, IUP "UN Enable Handbook", above n 166, at Ch 3.
[188] CRPD OP, above n 186, arts 6-7.

recognises the fundamental right of aggrieved persons to access an international mechanism to vindicate their rights.

The CRPD Committee currently has some ability to hold the New Zealand Government to account under the periodic reporting mechanisms. The CRPD Committee provides a List of Issues requiring government response, then reports its Concluding Observations.[189] Following New Zealand's first report, the CRPD Committee recommended that the Government increase the provision of reasonable accommodation in schools, implement anti-bullying programmes and establish an enforceable right to inclusive education.[190] These observations express a commitment by the CRPD Committee to ensuring that New Zealand is complying with its art 24 obligations.

2 Other international mechanisms

New Zealand has ratified neither the Optional Protocol to the International Covenant on Civil and Political Rights (ICESCR OP) nor the Third Optional Protocol to the United National Convention on the Rights of the Child on a Communications Procedure (CRC OP3). Should New Zealand ratify either of these Optional Protocols, they would provide an alternative international enforcement mechanism of the right to education for persons with disabilities. Each of these Optional Protocols establish a complaints and inquiry process similar to the CRPD OP.[191]

Article 13 of the ICESCR recognises a general right to education but does not specifically mention persons with disabilities. The CESCR emphasised the invidious nature of discrimination on the grounds of disability in accessing education and implored States to be proactive in providing equitable educational opportunities for persons with disabilities. [192] The CESCR is, however, not the best body to address violations of this right. It is disappointing that the CESCR has commended New Zealand for developing a curriculum "which is more responsive to the diversified student population," given the Committee fell short of specifically discussing access to education for persons with disabilities.[193] The CESCR focuses on general rights, whereas the CRPD Committee has a greater appreciation of additional protections afforded to persons with disabilities in affirming their right to education.

---

[189] CRPD, above n 4, arts 35 and 36.
[190] CRPD Committee, *Concluding Observations,* above n 164, at [50].
[191] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Doc.A/63/435 (open for signature 24 September 2009, entered into force 5 May 2013) arts 1-12; Third Optional Protocol to the United Nations Convention on the Rights of the Child on a Communications Procedure A/RES/66/138 (opened for signature 28 February 2012, entered into force 14 April 2014), Parts II and III.
[192] Committee on Economic, Social and Cultural Rights*, General Comment No.5 – Persons with Disabilities* XI E/1995/22 (1994) at [5].
[193] Committee on Economic, Social and Cultural Rights*,* above n 178, at [5].

The CRC OP3 is the best alternative to the CRPD OP for children with disabilities seeking to enforce their right to education, given the close alignment of the two treaties.[194] Similar to the CRPD, Article 3 of the CRC introduced the "best interests of the child" doctrine. Article 23 of the CRC recognises general rights of children with disabilities, including accessing education to achieve their "fullest possible social integration and individual development." Articles 28 and 29 enshrine all children's equal right to receive education. Both treaties demand that children with disabilities have the right to be involved in decisions affecting them.[195] As with the CRPD Committee, the CRC Committee recommends that the Government invest in inclusive, quality education for all disadvantaged children.[196]

However the CRC does not give recognition for any rights that are not better addressed by art 24 of the CRPD, and protects only the rights of children under 18 years of age. Despite being beyond the scope of this paper, art 24 rights extend to adults pursuing "life long learning."[197] The broader application and, most importantly, specific disability experience of the CRPD Committee mean the CRPD OP is the best international mechanism for enforcing the right to education for persons with disabilities. The Government's priority must be to ratify the CRPD OP urgently. Ratification of the CRPD OP will allow individuals to seek redress where they feel their art 24 rights have been violated. The CRPD Committee will be able to assess the sufficiency of New Zealand's domestic remedies to address this issue. Having recommended changes at both the domestic and international levels necessary to New Zealand fulfilling its art 24 obligations, a summation of concluding observations follows.

V Conclusion

New Zealand is not meeting its obligations under art 24 of the CRPD. Part II of this paper measured doctrinal research of New Zealand's current framework for protecting persons with disabilities' right to education against Tomaševski's *Four A's Framework.* Her highly acclaimed standards of availability, accessibility, acceptability and adaptability proved an effective conceptual yardstick against which to gauge New Zealand's compliance with art 24. Eight individuals with experience in the disability and education sectors were interviewed to inform the author's research for this paper. This doctrinal and socio-legal research revealed that the current domestic framework lacks a substantive and enforceable right to inclusive education, an equitable funding scheme, a clear obligation for educators to provide reasonable

[194] Committee on the Rights of the Child *General Comment No 9 – The Rights of Children with Disabilities* XLIII CRC/C/GC/9 (2007) at [62]-[63].
[195] CRC, above n 10, arts 5 and 14(2); CRPD, above n 4, art 3(h).
[196] Committee on the Rights of the Child *Concluding Observations: New Zealand* LVI CRC/C/NZL/CO/3-4 (2011) at [45]; See also Office of the United Nations High Commissioner for Human Rights *Compilation of United Nations Information on New Zealand* XVIII A/HRC/WG.6/18/NZL/2 (2013) at [60].
[197] CRPD, above n 4, art 24(5).

accommodation, and a right to learn and use NZSL. All evidence points to finding that persons with disabilities lack sufficient educational supports to ensure learners achieve their best educational outcomes.

Available solutions were explored under the current legislative and policy framework in Part III of this paper, however these proved inadequate when measured against Tomaševski's framework. A more nuanced approach to mainstreaming students with disabilities and funding additional supports is required for the goal of an available and fully inclusive education system to be achieved. Enforcement of a substantive right to access education under the EA89 remains subject to judicial uncertainty, while a claim in negligence is undesirable and unlikely to succeed. While the HRA provides an effective anti-discrimination framework, a positive, explicit obligation to provide reasonable accommodation is needed. Increased acceptability in education requires educators to take account of disability-related behaviour when making disciplinary decisions. Further data collection is needed to identify gaps in current anti-bullying measures, as persons with disabilities are proportionately over-represented as victims. Educators must also be proactive in using adaptive technologies and languages in the classroom and creating adapted environments in order for New Zealand to better fulfil its art 24 obligation.

Part IV proposed recommendations required to ensure that New Zealand fulfils its art 24 obligations. These recommendations included:

(a) amendments to the EA89 to recognise a substantive right to education for persons with disabilities;
(b) amendments to the HRA to recognise a clear obligation to provide reasonable accommodation for persons with disabilities in education;
(c) amendments to the NZSL Act to recognise deaf learners' right to learn and use NZSL in ECE and schools;
(d) an additional requirement to consider the unique position of persons with disabilities in the SSEE Rules;
(e) the development of 'Minimum Standards of Inclusive Education' under a transition strategy;
(f) collection of quantitative and qualitative data on inclusive practices, and the correlation between disability, bullying, and minority cultures;
(g) a national requirement that BOTs implement an anti-bullying strategy under the NAGs;
(h) establishment of an Education Tribunal; and
(i) urgent ratification of the CRPD OP.

The recent comment of Tom Parsons, Secondary Principals' Association President, that students with disabilities should not be identified within the school setting, let alone provided with additional supports, poignantly illustrates the need for recommended changes as leverage for greater public awareness and an attitudinal

shift.[198] As Helen Keller observed, persons with disabilities must be given an equal opportunity to exercise their right to education which maximises social and academic potential. It is fundamental that New Zealand fulfils its art 24 obligation to provide an equal education for persons with disabilities. This recognises inherent dignity of persons with disabilities and ensures no learner is left behind.

[198] Jo Moir and Cate Broughton "Endless Disorders a 'Nightmare' for Schools" *The Weekend Press* (Christchurch, 22-23 November 2014) at A1.

High Hopes, Disappointing Reality: Implementing the Convention on the Rights of Persons with Disabilities when the Going gets Tough

Erin Gough*

This article explores the challenges of implementing the Convention on the Rights of Persons with Disabilities (CRPD) in the context of the Christchurch earthquake rebuild. General United Nations treaty implementation mechanisms and their challenges are discussed, as well as challenges specific to the CRPD. In the context of Christchurch, it is argued that the earthquake rebuild is a prime opportunity to make Christchurch more accessible and inclusive for everyone however, this opportunity is not being seized upon due to inadequate mandatory building standards and a belief that making buildings accessible costs more and only benefits disabled people. The article identifies two government-funded social change initiatives attempting to change this belief and concludes that a significant shift in New Zealand's human rights culture is necessary for the CRPD to be adequately implemented.

I The CRPD

A Background to the CRPD and New Zealand's Involvement

The idea of a Convention aimed at promoting and protecting the rights and dignity of persons with disabilities first came about in 2001 when the United Nations General Assembly established an Ad Hoc Committee to consider the issue.[1] After meeting for the first time in 2002, the Committee, which included New Zealand Permanent Representative to the United Nations (UN), Don Mackay, set up a Working Group to prepare a draft Convention text.[2] The Group successfully drafted a Convention text within a year of its creation.[3] This text subsequently served as a basis for negotiation, following which a final text was agreed upon in August 2006 – the quickest any human rights treaty had ever been negotiated.[4]

After over five years of negotiations, the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 13

---

* BA/LLB student at the University of Canterbury, now working for the Human Rights Commission in Wellington. The author would like to thank Senior Lecturer Natalie Baird for her belief in and assistance with this article.

[1] Don Mackay "Convention on the Rights of Persons with Disabilities" (13 December 2001) Audiovisual Library of International Law <http://legal.un.org/>.

[2] United Nations Enable "Report of the Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities" (16-27 June 2003) < http://www.un.org>.

[3] Don Mackay, above n 1, at "Procedural History".

[4] United Nations Enable "Convention on the Rights of Persons with Disabilities" <http://www.un.org>.

December, 2006.[5] On 30 March, 2007, it opened for signature, and many states (the most for any treaty in fact) signed it immediately on the opening day.[6] Thus, the twenty-state ratification requirement was quickly reached, and it, along with the Optional Protocol, entered into force on 3 May 2008.[7]

New Zealand sent a delegation of both government and non-government representatives to all negotiation meetings,[8] demonstrating its apparent commitment, or at least enthusiasm, towards a disability convention. As one of the few countries with an established national strategy focused on disability – the New Zealand Disability Strategy 2001 − prior to the drafting of the Convention,[9] New Zealand was, at that time, considered world-leading in its promotion of disabled people's rights. In fact, its efforts in developing and implementing the Disability Strategy and shaping and negotiating the CRPD were internationally recognised when it was awarded the Franklin D Roosevelt International Disability Award in 2007.[10] While this was a noteworthy achievement for which New Zealand should be commended, it has seemingly not built on its success to the extent that it could. Rather than gaining strength in the years since, the rights of disabled people have arguably been undermined, particularly after the Canterbury earthquakes of 2010-2011.

B Contents of the CRPD

According to art 1, the purpose of the Convention is "to promote, protect, and ensure the full and equal enjoyment of all human rights by persons with disabilities, and to promote respect for their inherent dignity".[11]

A further article of note is the definition article, in art 2, which does not define disability despite it being the concept around which the Convention is centred. Rather, art 1 broadly describes what "people with disabilities" includes in terms of "long-term physical, mental, intellectual, and sensory impairments, which in interaction with various barriers, may hinder their full and effective participation…"[12]

Article 3 outlines the Convention's general principles, while art 4 details states' general obligations. Further, art 4(2) recognises that civil and political rights are to have immediate effect and states are expected to progressively realise social, economic and cultural rights utilising the maximum of its available resources. Finally, art 4(3) obliges states to actively consult with and involve disabled people through

---

[5] United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [CRPD].
[6] United Nations "Convention on the Rights of Persons with Disabilities" <http://www.un.org>.
[7] CRPD, above n 5.
[8] See ODI "History of the Strategy" <http://www.odi.govt.nz>.
[9] ODI, above n 8.
[10] Ruth Dyson "NZ wins Roosevelt International Disability Award" (press release, 3 December 2007).
[11] CRPD, above n 5.
[12] CRPD, above n 5.

disabled person's organisations (DPOs) in the development of legislation and policies to implement the Convention.[13]

The UN states that the Convention simply expresses existing rights in a way that addresses the needs of persons with disabilities as opposed to creating new rights.[14] However, some authors argue that it does create "new rights" in that the CRPD is specific to persons with disabilities.[15] It either respect, it is clear that the Convention is considered a uniquely drafted treaty which has the potential to make a great difference to the lives of disabled people. In fact, due to the unique challenges disabled people face, it appears the CRPD has been drafted in a way which reshapes and overcomes the dichotomies traditionally present in international human rights law and challenges the international legal system in general.

Traditionally, international human rights law has been made up of a number of dichotomies which "reinforce human rights core assumptions".[16] According to Frederic Megret, there are four distinctions which have been used to construct international human rights norms and which are therefore present in human rights treaties. Such distinctions are between the types of rights (positive vs negative; civil/political vs economic/social/cultural); the rights' main actors (the state vs the individual); the intensity of rights (progressive realisation vs immediate implementation); and the best way to implement them (enacting laws as opposed to enacting policies).[17]

Such dichotomies are entrenched in human rights treaties in that the provisions either emphasise one or the other.[18] However, because disabled people face challenges particular to them, the CRPD seems to combine the approaches across these four distinctions. For example, rather than wording rights negatively or positively, the Convention tends to use both, and in doing so, systemically highlights both the negative and positive dimensions of all relevant rights.[19] Similarly, while traditionally international human rights law views states, as opposed to individuals, as owing human rights obligations, the Convention Preamble explicitly states that individuals

---

[13] The Convention contains a further 26 substantive provisions in arts 5-30. These include political, civil, economic, social, and cultural rights identical to those contained in the Universal Declaration of Human Rights and its two covenants, but also include unique rights such as the right to Accessibility (art 9), Living Independently and Being Included in the Community (art 19), Personal Mobility (art 21), and Habilitation and Rehabilitation (art 26).
[14] UN Enable "Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities" <http://www.un.org>.
[15] Aart Hendricks "Selected Legislation and Jurisprudence: UN Convention on the Rights of Persons with Disabilities" (2007) 14 EJHL 273 at 277; and Rosemary Kayess and Philip French "Out of Darkness, Into Light? Introducing the Convention on Rights of Persons with Disabilities" (2008) 8 HRLR 1 at 32.
[16] Freddie Megret "The Disabilities Convention: Towards a Holistic Concept of Rights (2008) 12 Int J of Human Rights 261 at 262.
[17] At 264.
[18] At 262.
[19] At 265.

have a duty to both other individuals and their communities to strive for the promotion of the rights recognised in the International Bill of Rights.[20] This recognises that disabled people need assistance and protection from both the State and individuals in their everyday lives.[21] The fact that the CRPD transcends these distinctions means it produces a unique, considerably more holistic view of human rights and, as Megret argues, provides a unique opportunity to rethink how we conceive human rights as a whole, beyond the dichotomies that have beset it.[22] The practical reality of implementing the obligations in the Convention remains to be seen, as no matter how holistic the drafting, it is only useful if its provisions are actually implemented.

To this end, the Government has recently created a new Disability Action Plan 2014-2018 which sets out strategic priorities focused on increasing participation of disabled people in society, intended to advance the implementation of both the CRPD and the New Zealand Disability Strategy.[23] The Plan takes a collaborative approach, emphasising action between government agencies, DPOs and other entities, and recognises that such an approach is necessary because many of the barriers disabled people face cut across agencies.[24] The Government has put a significant amount of effort into working with seven national DPOs to develop the plan, recognising the value they have to offer as representatives of disabled people.[25] This signifies an encouraging shift as historically the Government has generally only engaged with DPOs sporadically. Currently, the groups are working together to develop governance and implementation arrangements, which are obviously key to the Plan's execution. It will be interesting to see how the Plan develops, how government agencies and DPOs work together to implement the Plan over the next four years, and any effects this has on advancing the implementation of the Convention and the rights it codifies.

C General Implementation Mechanisms and their Challenges

Implementing the CRPD raises a number of challenges; those general to the implementation of any international treaty and those specific to the CRPD. The Convention does contain a number of obligations in relation to monitoring and implementation, which commentators argue is the most comprehensive national monitoring/implementation provision of any treaty.[26] Specifically, art 33 imposes several requirements on states in regards to implementation and monitoring. The New Zealand Government has fulfilled these requirements by maintaining the Office for Disability Issues, established in 2002 under the Disability Strategy and by

---

[20] At 267.
[21] At 267.
[22] At 274.
[23] ODI "Disability Action Plan 2014-2018" (May 2014) <http://www.odi.govt.nz>.
[24] ODI "Disability Action Plan 2014-2018" (May 2014) <http://www.odi.govt.nz> at "Introduction".
[25] At <http://www.odi.govt.nz>.
[26] Michael Stein and Janet Lord "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential" (2010) 32 Hum Rts Q 689 at 692-694.

establishing the Ministerial Committee on Disability Issues, which acts as a coordination mechanism.[27] In addition, an Independent Monitoring Mechanism (IMM) was established in 2011, made up of the Ombudsman, the New Zealand Human Rights Commission, and the Convention Coalition (a group of DPOs which monitor and advocate for the rights of disabled people).[28]

Each party has different roles. The Human Rights Commission's focus is on identifying "areas where disabled people are vulnerable to abuse and denial of their rights and advocating for solutions", using the Convention as a framework.[29] The Ombudsman, on the other hand, has a more confined role in aspects of protection and monitoring, its main function being to "monitor the performance of the wider State sector" in implementing the Convention (making recommendations and publishing reports where necessary).[30] Finally, the Convention Coalition provides the civil society component, its main role being to monitor disabled people's rights through regular consultation from which it produces monitoring reports, both on disability rights in general and on specific topics, such as media and youth.[31]

Thus far, the IMM has published two joint reports detailing the state of disability rights in New Zealand, reporting on the progress made since the last report, and making key recommendations.[32] Their latest report, entitled "Making Disability Rights Real" was published earlier this year and identified five overarching areas that require attention to "promote greater realisation of the rights set out" in the CRPD.[33] These five key areas are: data, accessibility, building a people driven system, violence and abuse, and education.[34] The IMM's recommendations orientate the government's main focuses in relation to implementing the CRPD over the coming years. [35]

It is also worth mentioning the Government's first periodic report which detailed New Zealand's compliance with the Convention thus far, presented to the Convention Committee in September 2014.[36] States are obliged, by virtue of art 35, to submit reports detailing the measures they have taken to implement the rights enshrined in the Convention, initially within two years of ratifying the Convention and thereafter every four years. Meeting at the United Nations headquarters in Geneva, the State

---

[27] ODI "What We Do" <http://www.odi.govt.nz>.
[28] ODI "Framework to promote, protect and monitor implementation" <http://www.odi.govt.nz>.
[29] ODI, above n 28.
[30] ODI, above n 28.
[31] ODI, above n 28.
[32] ODI, above n 28.
[33] Independent Monitoring Mechanism "Making Disability Rights Real" (Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, June 2014) at 6.
[34] At 6.
[35] At 13.
[36] The Committee, established under art 34 of the Convention, is a body of independent experts which monitors the implementation of the Convention by states; essentially its function is that of the IMM, but on an international level; UN OHCHR "Committee on the Rights of Persons with Disabilities" (2014) <http://www.ohchr.org>.

delegation, made up of both government officials and DPO representatives in New Zealand's most recent visit, presents its report to the Committee.[37] The Committee then examines the report with the obligations set out in the Convention in mind, and, drawing on information provided by community groups through shadow reports, makes recommendations for improvement.[38] These recommendations are subsequently forwarded to the state in question.[39]

While the recommendations made by the Committee are no doubt intended to address breaches and, in some cases, are very detailed, one of the major challenges is that these recommendations are non-binding and, as such, states are not compelled to comply with them.[40] In turn, this means that states can, and do, in some cases, ignore the Committee's recommendations even though they may be breaching their obligations. In other words, human rights treaties, including the CRPD, are not directly enforceable as they do not have any means of compelling the state to improve their behaviour through sanctions or otherwise. As such, the state reporting mechanism is not considered to be particularly effective.[41]

This problem of rights without effective remedy is widely recognised as one of the key challenges besetting the UN system, "threatening the integrity of the international human rights legal regime".[42] It is compounded by a lack of resources on the part of the treaty bodies, as well as a general reluctance to become involved in the "sensitive world of monitoring and implementation".[43] The result of this general ineffectiveness, Bayefsky argues, is that ratification has become an end in itself, with many states of the view that it does not carry serious consequences.[44] In fact, Bayefsky states that the dysfunction of the international system, coupled with a lack of national democratic institutions, has made the "likelihood of national consequences comfortably remote" and is precisely what has caused so many states to ratify treaties.[45]

The other mechanism for enforcement is the Optional Protocol, which New Zealand has not yet ratified (but it has indicated it intends to do so in its most recent state report).[46] As a side-agreement to the CRPD, the Optional Protocol establishes an individual complaints mechanism for the Convention.[47] In accordance with art 1,

---

[37] At "Committee on the Rights of Persons with Disabilities" <http://www.ohchr.org>.
[38] CRPD, above n 5, art 36(1).
[39] Article 36(1).
[40] Anne Bayefsky "The UN Human Rights Treaties: Facing the Implementation Crisis" (1996) 15 Windsor YB Access Just 189 at 192.
[41] At 197.
[42] Anne Bayefsky *The UN Human Rights Treaty System: Universality at the Cross Roads* (Kluwer Law International, The Hague, 2001) at i.
[43] At 7.
[44] At 7.
[45] At 8.
[46] New Zealand Government "Initial Report of New Zealand Submitted under Article 35 of the Convention" United Nations <http://tbinternet.ohchr.org>.
[47] Optional Protocol to the Convention on the Rights of Persons with Disabilities A/61/611 (opened for signatures 30 March 2007, entered into force 3 May 2008), art 1.

states who have signed the Optional Protocol agree to recognise the Convention Committee's ability to receive and consider communications from or on behalf of individuals or groups who claim to be victims of a violation of the rights protected under the Convention. Once a communication has been received, the Committee examines it and issues "views" as to the admissibility of the communication and whether the state in question has failed to fulfil its obligations under the Convention.[48] If the communication is found to be admissible and the state is found to be in violation of its Convention obligations, the Committee can make recommendations as to what the state should do to remedy the breach(es).[49] In accordance with art 5 of the Optional Protocol, the state is then required, within six months, to submit a written response acknowledging these recommendations and detailing any action taken in response to such.

Although it may be thought that unlike the reporting mechanism, the Optional Protocol mechanism may enable a more thorough analysis and address breaches by states more effectively, it has been argued that the results thus far are disappointing.[50] According to Bayefsky this is because, firstly, many states who ratify a treaty do not allow individual complaints.[51] In the case of the CRPD, 56 per cent of state parties (including New Zealand) do not currently allow complaints.[52] Secondly, even if such complaints are allowed, the process remains largely inaccessible.[53] This is partly due to the fact that many people are ignorant of the possibility or are reluctant to bring a complaint, and also because all domestic remedies, including court processes, must have been exhausted before a complaint can be made.[54] Given the costs and time involved in taking a matter through the domestic court system, this can be an extremely difficult requirement to fulfil, particularly for disabled people and other vulnerable groups who generally lack resources and have difficulty accessing justice. Finally, the ability of the Committee to enforce its views is also an issue.

While a treaty body's views are not considered formally binding, a number of authors argue that, in effect, they are. Scheinen, for example, argues that the fact the obligations of a treaty are themselves legally binding, and the "international expert body established by the treaty is the most authoritative interpreter of the treaty in question", means that a finding of a violation by a human rights treaty body is an indication that the state party is under a legal obligation to remedy the situation.[55] Unfortunately, this is only theoretical; a recent report which sets out information

---

[48] Articles 2 and 5.
[49] Article 5.
[50] Bayefsky, above n 40, at 197.
[51] Bayefsky, above n 42, at 5.
[52] See list of signatories/ratifications to the Optional Protocol at UN Enable "Convention and Optional Protocol Signatures and Ratifications" <http://www.un.org>.
[53] Bayefsky, above n 40, at 198.
[54] Optional Protocol to the CPRD, above n 47, art 2(d).
[55] M Scheinen "International Mechanisms and Procedures for Implementation" in Hanski Raija & Markku Suksi (eds) *An Introduction to the International Protection of Human Rights: A Textbook* (Turku, Finland University, 1997) 429 at 444.

received by the Special Rapporteur for Follow-Up to Views regarding the CRPD Committee graded Sweden's response to its views in a communication as a C, meaning no action has been taken to implement the Committee's recommendations.[56] Another example concerns a complaint made against Hungary, wherein in its reply to the Committee's views, Hungary stated that it would improve accessibility as recommended but did not provide an answer as to when and how it would do so.[57] In light of this, it seems that irrespective of whether the Committee's views are considered "legally binding", it is very difficult to compel states to comply, and is arguably an ineffective mechanism.

It is clear that the system of implementation through state reporting, and the individual complaints mechanism is, as Bayefsky states "riddled with major deficiencies".[58] In order for the current mechanisms to be used as a successful implementation tool, Bayefsky recommends a number of changes to the treaty body system. Her main recommendation is that treaty bodies need to be consolidated, particularly as there is "substantive overlap of treaty rights and freedoms and inevitable overlap of reporting and dialogue".[59] Rather than having separate treaty bodies which each oversee a different treaty and impose different reporting obligations on states, Bayefsky suggests there be two consolidated treaty bodies – one for state reports and one for communications – made up of independent, full-time treaty body members with appropriate qualifications.[60] Consolidating treaty bodies, she argues, would "conform to the overall goal of modern UN reform which seeks to adopt a global approach to the needs of each country" making the process more integrated and coherent and the application of rights more concrete.[61]

However, she does warn that consolidation is not a panacea in that the international human rights system will remain "impoverished and irrelevant" to those who need it if UN states refuse to accept the importance of such monitoring bodies comprised of independent experts, and if they remain under-resourced.[62] Ultimately, as Bayefsky argues, the international implementation mechanisms need to be entirely reorganised and partnerships with actors at the national level strengthened for lasting change to occur.[63] This argument is echoed by international lawyer Philip Alston, who in his final report as a UN independent expert on the functioning of treaty bodies, stated that

---

[56] Committee on the Rights of Persons with Disabilities "Interim follow-up report under Article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted by the Committee on the Rights of Persons with Disabilities at its eleventh session (31 March–11 April 2014)" <http://tbinternet.ohchr.org> at 2.
[57] At 5.
[58] Bayefsky, above n 40, at 197.
[59] Bayefsky, above n 42, at ii.
[60] At 145.
[61] At ii.
[62] At 8.
[63] At 8.

"the present [treaty body] system is unsustainable and significant reforms will be required if the overall regime is to achieve its objectives".[64]

Recently some measures have been taken to address the challenges plaguing the treaty body system. In April 2014, following a process of consultation and a further two-year long intergovernmental process, the General Assembly adopted a resolution which recognised the need to provide more adequate funding to the treaty bodies,[65] requested that the Secretary General and OHCHR offer more technical assistance to states,[66] and encouraged the treaty bodies to harmonise their working methods.[67] This is a move in the right direction, although there is more work to be done. Ultimately, even an entire revamp of the treaty body system, while making compliance more likely, would not guarantee that human rights obligations are complied with to their fullest extent. In the words of Professor Beth Simmons, "[t]reaties alter politics; they do not cause miracles."[68] With this in mind, neither the CRPD nor its Optional Protocol can alone compel the Government to fully comply with its obligations.

D Challenges Specific to the CRPD

Additionally, there are implementation challenges specific to the CRPD.

The first relates to the content of the Convention itself. The Convention's monitoring system has been called "especially innovative".[69] Furthermore, the Convention enables the Convention Committee to receive collective complaints,[70] to use the expertise of DPOs and specialised agencies and organs in the UN,[71] and to use procedures to better manage reporting deadlines.[72]

However, like other human rights treaties, the CRPD uses "lofty statements of broad principle" which are often difficult to translate into meaningful action.[73] The same could be said for New Zealand's Disability Strategy and the Government's new Disability Action Plan. Both are centred on creating a fully accessible, inclusive society with objectives such as "ensuring rights for disabled people"[74] and "promoting

---

[64] Philip Alston *Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system* E/CN.4/1997/74 (1997) at [10].
[65] *Strengthening and enhancing the effective functioning of the UN treaty body system* GA Res 68/268, LXVIII A/Res/68/268 (2014) at 2.
[66] At 2.
[67] At 3.
[68] Beth Simmons *Mobilising for Human Rights: International Law in Domestic Politics* (Cambridge University Press, Cambridge, 2009) at 16.
[69] Stein and Lord, above n 26, at 696.
[70] CRPD Optional Protocol, above n 47, art 1(1).
[71] Arts 4(3) and 38(a).
[72] Article 36(2).
[73] Lucia Silecchia "The Convention on the Rights of Persons with Disabilities: Reflections on Four Flaws which Tarnish its Promise" (2013) 30 J Contemp Health L & Poly 96 at 108.
[74] New Zealand Disability Strategy "Objective 2: Ensuring Rights for Disabled People" Office for Disability Issues <http://www.odi.govt.nz>.

access in the community".[75] While these are perfectly valid objectives, they are difficult to implement on a practical level due to the fact that they are so general.
To the Government's credit, it requires the Minister for Disability Issues to report to Parliament annually on the implementation of the Strategy and the Action Plan. The most recent report on the Disability Strategy highlights specific initiatives that demonstrate that these objectives are being met. For example, the 2013 report details three initiatives focusing on disabled people in rebuilding Christchurch. To some extent this reporting scheme brings the lofty statements down to a more practical level than that of the CRPD.

A specific issue to the CRPD is the broad definition given to disability. While this correctly reflects the fact a wide range of disabilities exist, it also makes the practical application of the CRPD more difficult. This is because, as Lucia Silecchia states, "the needs of people vary a great deal and the efficacy of rights protection varies."[76] Silecchia acknowledges that this may have been intentional to keep the focus away from the individual and onto society, as in the opinion of some scholars: [77]

> To include a definition would undermine the Convention's commitment to the social model of disability that places responsibility for eradicating unequal treatment of people with disabilities on society, not on the person with the disability.

That said, the CRPD may be easier to implement if it is recognised that relying on this social model exclusively may not benefit some disabled people as much as others.[78] For example, it may work well for those with physical impairments advocating for rights of access because it is easy to see how the environment disables someone in that context, but for people with less visible impairments (such as mental health issues advocating for a more abstract right) the social model may not be as useful. It would be helpful for the Convention Committee to provide some guidance on how to apply the social model to different impairment groups.

Another challenge affecting effective implementation of the CRPD relates to the complexities involved when undertaking law reform domestically, which is particularly complex because of the multifaceted, fragmented nature of disability legislation.[79] While in theory New Zealand ensures that its legislation is in line with a treaty before it ratifies it, the legislation and standards guaranteeing the rights set out in the Convention are certainly fragmented. There are the Bill of Rights Act and Human Rights Act guaranteeing civil and political rights and protecting citizens from

---

[75] ODI, above n 23, at 11.
[76] Silecchia, above n 73, at 115.
[77] Arlene S Kanter "The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law" (2009) 25 GA St U L Rev 527 at 551.
[78] Silecchia, above n 73, at 115.
[79] Michael Stein and Janet Lord "The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities" (2008) 83 WLR 449 at 471.

discrimination, which also apply to disabled people. Then there are disability-specific statutes, such as the Health and Disability Commissioner Act 1994. There are also general pieces of legislation with sections alluding to CRPD rights. Section 155(4) of the Electoral Act 1993, for example, states that a certain proportion of polling booths must be accessible to disabled voters and ss 112 and 118 of the Building Act which set out the compulsory accessibility standard for buildings and facilities through the Building Regulations 1992. However, there is also an optional accessibility standard, known as "4121" (separate from the Building Act) which denotes a much higher level of accessibility. Having disability-related legal standards in so many different pieces of legislation plainly complicates matters and makes the CRPD more difficult to implement generally and in specific cases.

II Case Study: The Christchurch Earthquakes

A The Christchurch Earthquake

Christchurch's "earthquake journey" started at 4.35am on 4 September 2010, when a 7.1 magnitude earthquake struck near Darfield, 40km west of Christchurch city. This caused widespread damage to buildings and serious injuries to two residents, but did not result in any deaths.[80] Hundreds of aftershocks followed in the subsequent weeks and months, the biggest and most damaging of which occurred at 12.51pm on 22 February 2011.[81]

The earthquake, centred closer to the city than the September event and shallower in depth, caused widespread damage across Christchurch, particularly in the central city and eastern suburbs. This resulted in severe damage to infrastructure across the city and the collapse of a number of buildings, some of which had been weakened by the first earthquake.[82] Furthermore, in contrast to the first earthquake, many people were killed: 185 in total.[83] While the total rebuild cost was originally estimated to be NZ$15 billion this ballooned to an estimated $40 billion, the equivalent of 20 per cent of New Zealand's GDP, making it New Zealand's costliest natural disaster and one of the costliest earthquakes in history worldwide.[84]

Touted as "forever one of New Zealand's darkest days" by Prime Minister Rt Hon John Key,[85] the earthquake and the destruction it caused to people's homes, livelihoods, and lives, continues to have a huge impact on many residents four years

---

[80] Christchurch City Libraries "Christchurch and Canterbury earthquakes" <http://christchurchcitylibraries.com>.
[81] At <http://christchurchcitylibraries.com/society/disasters/canterbury-earthquakes/>.
[82] Eileen McSaveney "The 2011 Christchurch earthquake and other recent earthquakes" (14 October 2014) Te Ara Encyclopedia <www.teara.govt.nz/>.
[83] At "The 2011 earthquake and other recent earthquakes" <www.teara.govt.nz>.
[84] Alan Wood "February Quake Third Most Expensive" (30 March 2012) Stuff < http://www.stuff.co.nz>.
[85] 3 News "Key: New Zealand's Darkest Day" (22 February 2012) 3 News <www.3news.co.nz>.

on. People continue to grieve for perished loved ones, to live in damaged homes, stress and anxiety levels continue to increase (prompting targeted mental health campaigns such as the "all right" campaign)[86] and the continuation of extra helplines targeted at those living in Canterbury.[87] The city and the eastern suburbs remain largely destroyed despite rebuild efforts; dotted with more damaged buildings and empty lots than with intact buildings with functioning facilities. It is clear that the earthquakes were tragic events which have had wide-ranging, long-lasting consequences that will continue for years to come.

On the other hand, the earthquakes have been perceived by some as an opportunity to rebuild Christchurch to be better than before; more environmentally friendly, easier to get around, and with bigger and better public facilities. No group could benefit more from this opportunity than disabled people. Make Christchurch accessible for disabled people and it is accessible for everyone, including the young, parents with pushchairs, and the elderly. The benefits of doing so include increased tourism, an increase in spending which in turn will contribute positively to the economy, and more opportunity to utilise the skills and talents of traditionally marginalised groups.[88] But, with such a massive task ahead and time, financial constraints, and differing needs of the disability community to take into account, whether it is practical to expect this to happen, and the extent to which this is or is not happening, remains to be seen.

B The Rebuild Process

According to a 2011 report by the Canterbury Employment and Skill Board, the rebuild is estimated to take at least 15 years and require an additional 23,900 additional trades workers as well as a further 12,000 employees to back up the rebuild requirements, including lawyers, accountants and hospitality workers.[89] At the time of the report, more than 10,000 homes required rebuilding, while a further 105,000 required repairing.[90] Unsurprisingly, according to 2013 census data, the need for trade workers has caused construction to become the largest industry in greater Christchurch.[91]

---

[86] Canterbury District Healthboard & Mental Health Foundation of New Zealand "All right Campaign" all right? <http://www.allright.co.nz>.
[87] Ministry of Social Development "Christchurch earthquake support and assistance: Canterbury Support LTine" <https://www.msd.govt.nz>.
[88] For example Be. Institute "Christchurch Stands to Reap Massive Economic Benefit From Rebuilding Accessible City with an Eye to Tourism" (press release, 13 May 2014); and Philip Matthews "Building Accessibility Lags Despite Rebuild Opportunity" (20 June 2014) Stuff.co.nz <http://www.stuff.co.nz>; and Wallace Chapman "Rebuilding Christchurch as an Accessible City" (18 May 2014) Radio Live <http://podcast.radionz.co.nz>.
[89] Canterbury Employment & Skills Board "Employment Opportunities in Canterbury" (2011) <http://www.dol.govt.nz> at 34.
[90] At 34.
[91] Statistics New Zealand "2013 QuickStats about Greater Christchurch" (2013) <http://www.stats.govt.nz>.

In terms of the rebuild process, a number of different units focusing on different areas of the rebuild with different plans are involved. The biggest and most notorious of these is the Central City Development Unit (CCDU), which, along with the Canterbury Earthquake Recovery Authority (CERA), and the Christchurch City Council (CCC), developed the Central City Recovery Plan, outlining the future development of central Christchurch.[92] The Plan contains 16 "anchor projects" mainly relating to the development of transport, retail, health and justice, sports, and cultural facilities, and is based on five key themes.[93] One of these is "accessibility" in relation to facilities, public spaces, and transport networks.[94] The Plan alludes to the concept of accessibility in a disability context in that it states that the accessibility standards in the Building Act 2004 will be considered the minimum as buildings and infrastructure are replaced.[95] However, in the Plan itself and a subsequent "Accessible City" chapter, it appears to focus on "accessibility" in relation to transport, providing for more transport options, a cycle-friendly city, more bus networks and improved facilities for pedestrians.[96] It is intended that improving transport will make the city more "accessible" in terms of being easier to get around. While obviously disabled people can and hopefully will benefit from being able to get in, out and around the city more easily, it is disappointing that CCDU's plans to rebuild in accordance with the accessibility standards in the Building Code are not discussed in more depth, particularly as not all of the standards it contains are compulsory.

C Relevant Law and Standards

The compulsory accessibility standard is contained in the Building Act and expanded upon in the Building Code, and provides that when a building is being constructed or modified, "reasonable and adequate provision" in terms of access, parking, and sanitary facilities must be made for persons with disabilities.[97] It has been held that "reasonable and adequate access" must be assessed against the performance requirements set out in Clause D1 of the Code.[98] This requires at least one entrance to have features that enable a person in a wheelchair to negotiate it unaided (i.e. a ramp or flat entrance), and to have access to and within those spaces where they may be expected to work, visit or carry out "normal activities and processes".[99] Such guidelines are broad and open to interpretation, which means that while a building may technically comply with the standards, it may not be accessible on a practical level. For example, the ramp may be too steep or it may not have a handrail, which

---

[92] CCDU "Christchurch Central Recovery Plan" (2012) <https://ccdu.govt.nz>.
[93] CCDU "Aspirations" (2012) <https://ccdu.govt.nz>.
[94] At <https://ccdu.govt.nz/plan/aspirations>.
[95] CCDU, CERA, CCC "Christchurch Central Recovery Plan: Executive Summary" (2012) <https://ccdu.govt.nz>.
[96] CCDU, CERA, CCC "An Accessible City" (2013) <https://ccdu.govt.nz>.
[97] Building Act 2004, s 118(1).
[98] Ministry of Business, Innovation and Employment (MBIE), "Determination 2013/039 (15 July 2013) Department of Building and Housing" <http://www.dbh.govt.nz> at [6.5].
[99] Department of Building and Housing "Compliance Document for the New Zealand Building Code: Clause D1: Access Routes, Second Edition" (2011) <http://www.dbh.govt.nz> at 13.

means although it may be useable to someone using a wheelchair, it is difficult for people using other mobility aids; there may be a slight step at the entrance which, while able to be negotiated in a manual wheelchair is impossible to get over in a powered one; or the supposedly "accessible" entrance may be at the back of the building, which is often difficult to get to.

In contrast, the optional design standard: NZ 4121 sets out much more detailed guidelines in relation to the necessary dimensions needed to ensure that the structure and layout of both public and private accommodation and other features and facilities are accessible to and useable by disabled people.[100] Unlike s 118 of the Building Act, the standard provides guidance on how to adequately provide access to those with visual and hearing, as well as mobility, impairments in a wide range of areas. These include signage, car parks, footpaths and ramps, entranceways and corridors, stairs and lifts, toilet and shower facilities, public accommodation and places of entertainment and recreation.[101] As such, the standard denotes a much higher level of accessibility and makes it much more likely (at least on paper) that facilities will actually be useable to people with a range of impairments.

Having said this, it is important to note that often people with different impairments have different needs and that accommodating the needs of different disability groups who each have their own idea of the ideal is a real challenge. For example, visually impaired people may require tactile markings on the ground but wheelchair users may find this uneven surface difficult to navigate. Therefore, one of the most important tasks architects and planners have is to recognise this diversity and strike a balance which addresses as many different needs as possible.

This issue aside, the 4121 standard complies much more fully with the accessibility obligations detailed in art 9 of the Convention, which provides that states should identify and eliminate barriers to accessibility in relation to buildings, roads, transportation and other indoor and outdoor facilities, and information and communication services.[102] The issue is that the 4121 standard is optional and while the city plan states that compliance with it is "encouraged" in the construction of new and modification to existing facilities, developers are not legally obliged to comply with it.[103] This means that while the rebuild is a prime opportunity to make Christchurch more accessible to disabled people, in practice this may not eventuate. This is particularly because there is a common perception that making provisions for accessibility costs more,[104] and money is obviously of the essence. There is also the pressure of time as, understandably, developers want to rebuild as quickly as possible.

---

[100] Standards New Zealand "NZS 4121: 2001 Design for Access and Mobility – Buildings and Associated Facilities" <http://www.standards.co.nz>.
[101] At 1-2.
[102] CRPD, above n 5, art 9(1).
[103] CCDU, CERA, CCC, above n 96, at 5.
[104] Edward Steinfield "Education for All: The Cost of Accessibility" (August 2005) World Bank <http://siteresources.worldbank.org> at 5.

The problem is that this often puts other considerations, such as accessibility, at risk of being an afterthought rather than a primary consideration.

Because of this earthquake-related advocacy groups and DPOs have petitioned Parliament, through Green Party MP and disability issues portfolio holder Mojo Mathers, urging the Government to ensure full access to public and commercial buildings constructed during the rebuild by making design standard 4121 mandatory.[105] While this change has not yet occurred, the petition has thus far attracted over 6,000 signatures and prompted the Ministry of Business, Innovation and Employment (MBIE) and the Office for Disability Issues (ODI) to undertake a joint review of access for people with disabilities under the current Building Code in consultation with a number of stakeholders, including building owners, designers and users, advocacy and interest groups, and DPOs.[106] After the consultation process is complete, recommendations will be made to senior officials who will then brief Ministers on these.[107]

As part of this process Malatest International, a consultation firm, consulted with members of a range of DPOs, regulators, and building designers.[108] The report has been provided to MBIE and ODI who will use the report to generate conclusions about next steps and make recommendations to senior officials.[109] According to the Ministry of Building website, MBIE, ODI and a steering group made up of people across the disability sector, are "working together to create a long term plan on accessibility" which will be presented to Ministers in "a few months' time".[110] While MBIE should be commended for its willingness to jointly undertake a review in response to the petition, and for their involvement of disabled people in the consultation process for the review, it would be helpful to know the content and extent of the recommendations made and whether, having received these recommendations, the Minister(s) responsible plan to propose any legislative changes. This would enable advocacy and interest groups to advocate further and the sooner any legislative changes are proposed, the sooner they could actually be implemented, and the more the rebuild will be positively affected.

D Rebuild Progress

In terms of the rebuild so far, progress varies considerably depending on the area of focus. In the rebuild of the central city, for example, the majority of anchor projects are reportedly either under construction or due to start construction by the end of

---

[105] Earthquake Disability Leadership Group "Petition to the House of Representatives" (October 2013) Change.org <https://www.change.org>.
[106] MBIE "Joint review of access for people with disabilities under the Building Code" (2014) Department of Building and Housing <http://www.dbh.govt.nz>.
[107] At <http://www.dbh.govt.nz/disability-access-review-terms-of-reference#steps>.
[108] At < http://www.building.govt.nz/access-to-buildings-for-people-with-disabilities>.
[109] At <http://www.building.govt.nz/disability-access-review>.
[110] At <http://www.building.govt.nz/disability-access-review>.

2014.[111] However because of the scale of work involved, many of the projects are expected to take several years to complete; the overall target date for the completion of the public sector rebuild (which includes all anchor projects) being the end of 2020.[112] There is no official information indicating the level of accessibility of the overall rebuild, but promisingly, CCDU have made a commitment to work with the Barrier Free Trust, an accessibility audit programme, to ensure the accessibility of some of the anchor projects.[113] On the other hand, as 4121 remains optional, it is safe to assume that at least some of the new buildings outside of the anchor projects, while compliant with accessibility requirements set out in the Building Act, do not meet the higher 4121 standard and therefore are not as accessible as they could be. This also means that while New Zealand is most likely not breaching any of their obligations in the Convention, it is also not complying with them to their fullest extent. Hence, change is clearly needed to ensure that the remaining 90 per cent of the rebuild is completed with accessibility as a primary consideration.

E Building (Earthquake-prone Buildings) Amendment Bill

One area in the rebuild where New Zealand is almost breaching its Convention obligations relates to a section of the Building (Earthquake-prone Buildings) Amendment Bill 2013 currently progressing through Parliament. The legislation amends the Building Act 2004 and introduces more stringent earthquake-strengthening requirements, purportedly striking a balance between protecting people from harm in an earthquake and managing the costs of strengthening and removing buildings by providing for a significantly greater role for central government.[114] One of the changes the Bill purports to introduce enables local Councils to issue building consents for work on earthquake-prone buildings without requiring upgrades to access, facilities, and fire escape routes for people with disabilities where ensuring the building is earthquake-proof outweighs any detriment that is likely to arise as a result of the building not complying with the access provisions in the Building Code.[115] The rationale behind this change was to address the concerns of building owners who argued that having to further earthquake strengthen and make buildings access-compliant would take time and incur excessive cost.[116]

The amendment is contrary to current requirements, which denote that when an existing, currently non-compliant building is being altered, the building must be upgraded to be as accessible as reasonably practicable, before a building consent can be issued.[117] The rationale is to make buildings built prior to the introduction of the

---

[111] CCDU "Anchor Projects Review" (2014) <https://ccdu.govt.nz>.
[112] CERA "Public Sector Rebuild: Programme of Works" (August 2014) <http://cera.govt.nz>.
[113] CERA, above n 113.
[114] Building (Earthquake-prone) Amendment Bill 2013 (182-1, Explanatory Note).
[115] Building (Earthquake-prone) Amendment Bill, cl 133AX.
[116] Canterbury Earthquake Royal Commission "Final Report, Volume Four: Earthquake Prone Buildings" (2012) <http://canterbury.royalcommission.govt.nz>.
[117] Building Act, s 112.

accessibility requirements in 1991 disability-friendly. This proposed amendment, however, means that all existing inaccessible buildings could legally remain so as building consents can be granted without access and escape route upgrades for people with disabilities being upgraded where reasonably practicable.[118] Such a law change has not only been highlighted as being a major step backwards in terms of access rights but also a potential breach of art 9 of the CRPD which, as discussed, provides that states have a positive obligation to take measures to progressively identify and eliminate barriers to accessibility.[119] The proposed exemption would, as a submission undertaken jointly by a number of DPOs states, "weaken the government's current measures to ensure this obligation."[120]

Unfortunately, this is yet another example of the challenges in implementing the provisions of the Convention in situations where spending the least amount of money and taking the least amount of time are considered more important than making as many spaces as possible accessible. It is also important to note that the current provisions already enable building authorities to exercise discretion in applying access and fire requirements to building upgrades, because access is only required to be provided where "reasonably practicable".[121] Thus introducing this amendment not only weakens New Zealand's compliance with its obligations under the CRPD, but also complicates and confuses existing guidelines. Therefore, rather than a law change, arguably what is needed is more guidance for local authorities in applying their existing discretion.

Furthermore, even if building owners are unable to use this existing discretion and therefore would currently be required to upgrade their access, their concerns may be based on a misconception that making buildings accessible only benefits disabled people. This is shown by the fact that the Canterbury Earthquake Royal Commission and MBIE referred to s 112 as "the disabled access rule".[122] Further, some submissions received as part of the consultation process which led to the drafting of the Bill framed access solely as a disability issue and argued that their buildings may never need wheelchair access, making it an extra cost with potentially no benefit.[123] However, as stated by the CERA itself, access benefits a much wider group than those

---

[118] See Building (Earthquake-prone) Amendment Bill, cl 133AX .
[119] CRPD, above n 5, at art 9(1).
[120] Disabled Persons Assembly "Joint Submission to the Local Government and Environment Select Committee on the Building (Earthquake-prone Buildings) Amendment Bill" (16 April 2014) <http://www.dpa.org.nz> at 13.
[121] See Building Act, s 112(1)(a).
[122] Canterbury Earthquake Royal Commission "Final Report, Volume Four: Earthquake Prone Buildings" (2012) <http://canterbury.royalcommission.govt.nz> at [97]; and MBIE "Improving the System for Earthquake-prone buildings" (2013) < http://www.dbh.govt.nz> at 22.
[123] See, for example, the submission from Chorus: MBIE "Proposals to improve New Zealand's earthquake-prone building system: Full report on the Consultation Process" (July 2013) < http://www.dbh.govt.nz> at 91.

who identify as disabled, including parents with young children, those over 65, many of which have impairment to some degree, and those with temporary injuries.[124]

Further to this, research indicates that improving access has significantly positive effects on the economy, and irrespective of this, that the cost of improving accessibility is often exaggerated and based on inaccurate estimates of the cost of construction.[125] This was demonstrated in some submissions which provided examples of high access costs to justify the exemption.[126] These generally referred to the costs of installing lifts, but failed to take into account that under current law, lifts are only required when the building footprint area is greater than 400m^2 and even then, it must be "reasonable and practicable" to install them.[127] Furthermore, aside from the submissions obtained during the consultation process which informed the drafting of the Bill, an Official Information Act request done by DPA showed that MBIE did not have any evidence that access requirements are likely to pose a significant financial barrier to building upgrades.[128] It would seem that the rationale behind the introduction of this amendment is weak at best. It would be more beneficial for building owners to view access requirements as an investment opportunity wherein the potential benefits outweigh any extra cost, particularly as almost a quarter of the New Zealand population (24 per cent) now identifies as disabled;[129] a percentage which is bound to continue to increase as the population ages.

The fact is, however, that the Bill has passed its first reading and given the support from building owners during the consultation process, is likely to be enacted.[130] Therefore, it can only be hoped that its impact on the overall rebuild will be minimal which, given that it only applies to existing buildings and that the current access requirements in the Building Act provide for discretion,[131] is likely. Even so, the change would further complicate guidelines and lead to more confusion amongst building authorities. The fact that it weakens New Zealand's compliance with the CRPD means that it will at the very least negatively affect New Zealand's international reputation. Such change should be strongly discouraged.

---

[124] CERA, above n 113, at 5.
[125] Steinfield, above n 105.
[126] See, for example, the submission from the Gisborne District Council: MBIE, above n 124, at 89.
[127] John Hare "Heritage earthquake prone building strengthening cost study: Technical Report" (2009) Christchurch City Council <http://canterbury.royalcommission.govt.nz>.
[128] DPA, above n 125, at 24.
[129] Statistics New Zealand "Disability Survey: 2013" (17 June 2014) < http://www.stats.govt.nz>.
[130] This was the progress of the Bill at the time of writing. The Bill since has been considered by the Local Government and Environment Committee. As a result, the section has been reworded and a new clause inserted which states that a building consent for an alteration must not be granted unless the authority is satisfied that following the alteration, the building will comply "as nearly as reasonably practicable" with the provisions of the Building Code which relate to access. The fact such a safeguard has been introduced is very encouraging and shows the value of the public consultation process. <http://www.legislation.govt.nz/bill/government/2013/0182/latest/DLM5616125.html>.
[131] Building Act 2004, s 112.

There are clearly a number of challenges in implementing the CRPD to its fullest extent in post-earthquake Christchurch. For a treaty which purported to free disabled people of discriminatory practices and prevailing negative attitudes, these barriers appear to reflect the disappointing reality of implementing the CRPD "on the ground" where despite legislation, government policies, and the efforts of disabled people and their allies to address such barriers, discriminatory practices and misconceptions about disability remain.

III Implementing the CRPD in Post-earthquake Christchurch

There is no simple solution to the challenges discussed above, as is the case with all human rights treaties. As discussed, it is very difficult to compel states to comply with their obligations to the fullest extent given that, beyond the state reporting requirement and the power of the Convention Committee to give its views through the individual complaints mechanism in the Optional Protocol, there is no enforcement mechanism.

It is important to re-iterate that while New Zealand ratifying the Optional Protocol would provide the option to complain at an international level, complainants would first have to exhaust all domestic remedies in order for such a communication to be admissible.[132] Rebuilding Christchurch accessibly is a city-wide policy, which, while potentially able to challenged domestically under Part 1A of the Human Rights Act, would be difficult to challenge at the international level. Even if this domestic remedy was exhausted and the subsequent communication was deemed admissible, the Committee's views are not legally binding on the state, and even where a state takes action, are often too vague to really address the issue. Therefore even when New Zealand does adopt the Optional Protocol, this is not likely to adequately address the challenges experienced in post-earthquake Christchurch.

Rather, for any real change to occur, a significant cultural shift towards a strong human rights culture is required. This includes an attitudinal shift towards valuing disabled people and seeing accessibility as a benefit rather than a burden. While New Zealand was built on egalitarian principles and "giving everyone a fair go" has become a deep-rooted mantra of New Zealand society,[133] New Zealand seemingly does not have a strong rights culture, based on its constitutional arrangements. Unlike the vast majority of countries, it does not have a codified constitution.[134] Instead, citizens' rights are set out in a number of documents, which in New Zealand includes the Constitution Act 1986, a number of statutes, the Treaty of Waitangi, Orders in

---

[132] UN Optional Protocol to the CRPD, above n 47, art 2(d).
[133] ODI "Introducing a Disability Perspective: A Toolkit for Government Officials" <http://www.odi.govt.nzl>.
[134] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1.

Council, court decisions, letters patent and unwritten constitutional conventions.[135] Furthermore, while it does have a Bill of Rights Act which sets out a number of civil and political rights of New Zealanders, the Act is not entrenched and does not hold any supremacy over other legislation unlike Bills of Rights in other common law jurisdictions, including Britain, Australia, and Canada. [136]

In fact, s 4 of the Act specifically states that any law, whether passed before or after the Bill of Rights Act came into effect, cannot be overridden by it, and that, providing that such limits can be "demonstrably justified", the right with which the legislation conflicts can be limited.[137] The principle reflects the doctrine of parliamentary sovereignty.[138] This means that Parliament can, and sometimes does, pass laws which are inconsistent with the Bill of Rights Act, even when such laws have been declared inconsistent by the Attorney-General pursuant to s 7. An example of this in a disability context is the New Zealand Public Health and Disability Amendment Bill (No 2) of 2013 which, despite being declared as inconsistent with the Bill of Rights Act,[139] is now law.[140] Given the lack of protections, it is not surprising that Parliament seemingly perceives giving effect to some human rights as a cost as opposed to an investment.

A Be. Accessible

Despite these challenges, there are a growing number of government-funded initiatives targeted at changing negative perceptions and as part of this, emphasising the importance of making Christchurch accessible. These appear to be having a positive impact. One of these is "Be. Accessible", a social change initiative and holistic framework for accessibility managed by the Be. Institute. Founded in 2011 in anticipation of the Rugby World Cup, Be.'s mission is to "create a truly accessible country for us all".[141] It does so through what it terms the "Be. Lens" – a philosophy which rather than focusing on disability and associated limitations, focuses on accessibility and the opportunities it brings, not only for disabled people, but for society as a whole.[142] Hence, the language used is different too, with phrases like "access customer" and "access economy" being used in place of disabled people and disability.[143] Underpinning the philosophy is a "three pillar system" wherein it is believed that in order to create a fully accessible society, the physical, social and

---

[135] At 1.
[136] Susan Glazebrook "The New Zealand Bill of Rights Act: Its Operation and Effectiveness" (paper presented to the South Australian State Legal Convention, 22-23 July 2004) at [1].
[137] New Zealand Bill of Rights Act 1990, s 5.
[138] New Zealand Parliament "How Parliament Works" (21 March 2014) <http://www.parliament.nz >.
[139] New Zealand Parliament "Bills Digests No 2049" (17 May 2013) <www.parliament.nz> at "New Zealand Bill of Rights Act 1990".
[140] New Zealand Public Health and Disability Amendment Act 2013.
[141] Be. Accessible "The Movement" <http://www.beaccessible.org.nz>.
[142] Be. Accessible "About Be. Accessible" < http://www.beaccessible.org.nz>.
[143] At <http://www.beaccessible.org.nz/the-movement/about-be-accessible>.

personal must all be addressed together.[144] This means making the physical environment and information accessible, challenging people to think differently about access and see it as an investment opportunity rather than a cost, and building leadership capacity among disabled people to help champion the change through a year-long leadership programme.[145] Be. addresses these areas through a number of different initiatives, which thanks to $4 million of government funding allocated until the end of 2015,[146] have been able to grow substantially.

One such initiative is the Be. Welcome programme, which is focused on improving the physical accessibility of businesses by way of an accessibility audit carried out by trained "accessibility coaches".[147] The audit assesses the accessibility across impairment types in terms of getting to and from the organisation and getting around within the site, which includes physical features such as ramps, lifts, and accessible toilets, and also information, such as signs, menus, and brochures, and the quality of the customer service.[148] The evacuation procedure is also assessed and particularly important in the context of Christchurch. To help ensure consistency, all businesses are assessed against a standard checklist by assessors who have undergone a standard training and accreditation procedure. While the checklist used by assessors is not available publicly, a version which allows businesses to self-assess their accessibility is available, and this appears to be based around the 4121 design standard.[149]

Once assessed, the organisation is given a rating ranging from "Just Starting" to "Gold", which they are encouraged to display by placing a sticker indicating their rating on the front door.[150] In addition, the organisation is given a detailed report which provides a break-down of current accessibility features and provides suggestions on how to improve, to encourage the business to work towards achieving a higher rating.[151] As of November 2014, 448 organisations have been assessed nationwide, the majority being in Auckland, while in Christchurch, seven organisations have been officially assessed, and a further six have undertaken a self-assessment available on the Be. Accessible website.[152] While not yet a significant number, the response of businesses that have been assessed, including some of Christchurch's biggest, such as the airport, has been positive.[153] Furthermore, this initiative has the potential to grow, and it is great to see that although Be. is based in

---

[144] At <http://www.beaccessible.org.nz/the-movement/about-be-accessible>.
[145] At <http://www.beaccessible.org.nz/the-movement/about-be-accessible>.
[146] Be. Accessible "Inspiring and Enabling a 100% Accessible Society for Us All" (press release, 16 May 2011).
[147] Be. Accessible "Be. Welcome" <http://www.beaccessible.org.nz>.
[148] Be. Accessible "CQ Hotels Wellington Accessibility Report" < http://www.beaccessible.org.nz>.
[149] Be. Accessible "Be. Welcome Lite Self Assessment" <http://www.beaccessible.org.nz>.
[150] Be. Accessible "Assessment Ratings" <http://www.beaccessible.org.nz>.
[151] All Be. Welcome assessed businesses with their reports are available in a directory on their website. See Be. Accessible "Find" <http://www.beaccessible.org.nz>.
[152] Be. Accessible "Find Accessible Places: Christchurch" <http://www.beaccessible.org.nz>.
[153] Be. Institute "Christchurch: New Zealand's greatest accessibility opportunity" (14 May 2014) YouTube <http://www.youtube.com>.

Auckland, it is putting a significant amount of energy into engaging with business owners and decision-makers in Christchurch, which it describes as "New Zealand's greatest accessibility opportunity".[154]

It is this framing of accessibility as an opportunity which makes the Be. Welcome programme and Be. Accessible so innovative and appealing. Rather than being framed as an obligation which only benefits disabled people, Be. Welcome, in line with the rest of the Be. Accessible framework, is framed as a way to add value to one's business, "by tapping into the growing access customer market", thereby bringing positive economic benefits.[155] In fact, Be. has coined the term "yellow dollar" as a measure of the economic benefits accessibility brings, stating that if customers are able to access a business easily, they will spend easily, businesses will earn more and this will lead to a stronger economy and a more thriving society.[156]
In this way, Be.'s philosophy attempts to persuade businesses to become more accessible, not by stating that they have national and international obligations to do so, but by appealing to their ultimate goal of increasing their profit. This approach is refreshing, innovative, and most of all, necessary. With Be.'s leadership programme soon commencing its sixth year, over 500 businesses assessed on their accessibility nationwide, and a new employment programme seeking to get disabled people into work by changing perceptions around disability, Be. has clearly created some positive change already. Further, providing it continues to garner more support from business owners who see the opportunities accessibility can bring, Be. also has the potential to lead to institutional change in the long term which will make a huge difference to the disability community.

B Think Differently

Another social change initiative which is worthy of recognition is the "Think Differently" campaign funded by and administered through the Ministry of Social Development (MSD) in partnership with ODI. The campaign aims to "encourage and support a fundamental shift in attitudes and behaviour towards disabled people" and to increase people's knowledge and understanding about disability and the benefits of inclusive communities by working with DPOs and connecting with educators, employers, businesses, and families.[157] To accomplish this mission, it has established two main funding channels: the "Making a Difference" fund which funds community initiatives focused on attitude change, and funding to national organisations.[158] Additionally, the Think Differently programme also aligns with the Government's

---

[154] Be. Accessible "Christchurch Stands to Reap Massive Economic Opportunity From Building Accessible City with an Eye to Tourism" (press release, 13 May 2014).
[155] Be. Accessible "Be. Welcome" <http://www.beaccessible.org.nz>.
[156] Be. Accessible "Useful Terms" <http://www.beaccessible.org.nz> at "Yellow Dollar".
[157] Think Differently "Welcome" <http://www.thinkdifferently.org.nz/>.
[158] Think Differently "About Think Differently" <http://www.thinkdifferently.org.nz>.

Disability Action Plan,[159] which, as discussed, denotes a number of priorities to be implemented over the next four years.

Since its inception in 2010, the campaign has funded an increasing number of national and community projects. Last year, it funded eight national partnerships with DPOs centred around supporting New Zealand Sign Language week and increasing the visibility of disabled people on television.[160] Relevant to the Christchurch earthquakes, a national partnership was formed between the Earthquake Disability Leadership Group (EDLG) – a collective of disabled people, allies, and DPOs advocating for an accessible earthquake recovery and rebuild – and decision-makers including the City Council, CERA, and property owners and developers, ensuring the presence of a strong disability voice in the rebuild.[161] Established in 2011, the EDLG has made a number of submissions advocating for the city to be rebuilt accessibly, including starting the petition discussed earlier, has engaged with CERA on a number of occasions, and has been quoted in several media articles.[162] It is clear the group plays an important role in increasing the disability voice in the rebuild, and it is encouraging to see that the Government sees value in supporting it.

Also of note is the "Making a Difference" fund, which funded 23 community-led projects ($800,000 worth) last year. These ranged in focus from improving accessibility, to promoting disability arts and culture.[163] In addition to funding, project leaders were given support to help them manage their projects through an online "social change toolkit" consisting of templates for project plans, surveys and evaluations, and links to external sources.[164] Two of the 2013 projects were related to the earthquake and subsequent rebuild: the Catapult Employment Services Trust encouraged businesses to employ intellectually disabled people in the rebuild by meeting with rebuild-related businesses and developing and distributing a booklet which profiled a number of disabled people in paid employment as well as a number of employers. Additionally, the Christchurch City Council Disability Advisory Group

---

[159] At "About Think Differently" <http://www.thinkdifferently.org.nz>.
[160] Think Differently "Year in Review 2013: National Partnerships" <http://www.thinkdifferently.org.nz>.
[161] Think Differently "Year in Review 2013: National Partnerships Continued" <http://www.thinkdifferently.org.nz> at "Kanohi ki te Kanohi – influencing the Christchurch Rebuild".
[162] See Earthquake Disability Leadership Group, above n 106; Philip Matthews "Building Accessibility Lags Despite Rebuild Opportunity" (20 June 2014) Stuff.co.nz <http://www.stuff.co.nz>; Glenn Conway "Disabled People Locked Out of Rebuild" (4 December 2013) Stuff.co.nz <http://www.stuff.co.nz >; Walt Dickson "Hard Fought Access May be Flouted" (5 December 2013) Stuff.co.nz <http://www.stuff.co.nz>; and Glenn Conway "Petition Urges Access for All" (22 October 2013) Stuff.co.nz <http://www.stuff.co.nz>.
[163] Think Differently "Year in Review 2013: Thinking differently in the Community" <http://www.thinkdifferently.org.nz>.
[164] Think Differently "Social Change Toolkit" Social Change Toolkit <http://www.socialchangetoolkit.org.nz>.

held a leadership workshop on how disabled people could contribute to their post-earthquake community.[165]

While small in scale compared to the national projects and to Be. Accessible's work, these community-led projects have been found to lead to a number of positive changes at community level.[166] This includes increased knowledge, awareness and positive attitudes, increased empowerment and leadership among disabled people, and improved accessibility and a more welcoming environment.[167] It has also been found that the use of funding at a community level has been effective and has the potential to support the long-term changes for which the campaign is aiming.[168] The further $6 million dedicated to the campaign over the next two years in the 2013 budget,[169] helping to fund 41 projects this year, and another four next year,[170] will no doubt help to support long-term change. This increase in funding demonstrates the Government's continued commitment to the campaign and should be commended. Changing perceptions in regards to the potential of disabled people to contribute and bring value to society is what will help to ensure that Christchurch is as accessible and inclusive as possible.

It is clear that while there is no easy way to overcome the challenges in implementing the CRPD, however, the Be. Welcome and Think Differently initiatives demonstrate a large amount of work is being done at a grassroots level to make life better for disabled people. Providing that funding channels remain available, more long-lasting change looks likely. It is up to disabled people to continue to advocate for social change initiatives as it is community initiatives, not Government policy documents, which will ultimately lead to institutional change.

IV Conclusion

It is clear the CRPD has unprecedented potential to change the lives of disabled people for the better. It is not only a Convention that codifies a wide range of rights, some of which are unique to the disability community, but one which aspires to eliminate discrimination, environmental and attitudinal barriers, and the notion that disabled people are less valuable. It does so in a holistic way not seen in any other treaty, subtly transcending traditional dichotomies and challenging people to rethink the conception of human rights as a whole. Furthermore, the Convention's monitoring mechanisms are seen by scholars as comprehensive and progressive in terms of

---

[165] Think Differently "Community Projects, continued" <http://www.thinkdifferently.org.nz> at "Rebuilding Canterbury Differently"; and Think Differently "Community projects, continued". <http://www.thinkdifferently.org.nz> at "Canterbury Celebrates the Contribution of Disabled People".
[166] Think Differently "Tracking our Progress" <http://www.thinkdifferently.org.nz>.
[167] At "Tracking our Progress" <http://www.thinkdifferently.org.nz>.
[168] Think Differently "Evaluation of the Fund" <http://www.thinkdifferently.org.nz>.
[169] Think Differently "Year in Review 2013" <http://www.thinkdifferently.org.nz>.
[170] Think Differently "Round 4 Projects" <http://www.thinkdifferently.org.nz>; "Round 5 Projects" <http://www.thinkdifferently.org.nz>.

enabling the Convention Committee to receive collective complaints, its utilisation of the expertise of DPOs, and its use of state meetings to help facilitate interpretation.
New Zealand played a key role in the negotiations and drafting of the Convention and, as one of the few countries to send disabled representatives with the Government delegation to negotiations, demonstrated its commitment to the creation of a Convention, not only for, but also with, the input of disabled people. Despite the lofty promises the Convention makes and New Zealand's involvement in its creation, the practical reality of implementing it has meant that in spite of high hopes that the Convention would result in a major shift in the way disabled people around the globe are treated, the reality has been somewhat disappointing. Despite its progressive monitoring provisions, the enforcement mechanisms underlying the Convention, namely the state reporting mechanism and the individual complaints mechanism, remain weak making the Convention difficult to implement. The Convention Committee lacks the resources to compel compliance which means that while states are required to report on their progress every four years, they are effectively able to ignore the Committee's observations. It is a similar situation in regards to the Optional Protocol which, while giving individuals an avenue to complain about a violation of their rights beyond their national jurisdiction, is difficult to enforce on a practical level. As New Zealand is yet to sign the Optional Protocol, state reporting remains the only mechanism by which New Zealand can be encouraged to comply with its obligations under the Convention.

In addition to the ineffectiveness of the United Nations system itself, there are challenges specific to the CRPD. These challenges include providing for the different needs of disabled people with various impairment types, and the multi-faceted nature of disability legislation, some of which impose different standards of accessibility.
These challenges of implementation, both general and CRPD-specific, are particularly obvious in the context of the Christchurch earthquake where outdated building legislation, building standards with differing levels of accessibility, and a misguided legislative amendment exempting building authorities from considering accessibility when earthquake strengthening buildings, has undermined New Zealand's compliance with the CRPD. This in turn means that Christchurch is not being rebuilt as accessibly and inclusively as it could be. Much of this is based on a perception that rebuilding accessibly is an extra cost both in terms of time and money, which only benefits disabled people. However, making places accessible needs to be perceived as more of an investment that benefits a much wider group of people, including parents with small children and the elderly, and brings opportunities for economic growth.
Only a significant shift in human rights culture will redress the fate of the CPRD. Encouragingly, there are a number of government-funded initiatives, including Be. Accessible and the Think Differently campaign, which are at least attempting to change perceptions towards disability and are emphasising the importance of rebuilding Christchurch accessibly. There is also the 2014-18 Action Plan, intended to engage DPOs and government agencies jointly.

It is fair to say that while there are a number of challenges in implementing the CRPD which have been highlighted in post-earthquake Christchurch, all hope is not lost. Be. Accessible and Think Differently appear to be having a positive effect. As long as disabled people and their allies continue to raise awareness of the value that accessibility brings and engage with decision-makers, Christchurch could yet become the world's most accessible city.

The adoption of the CRPD may not have yet resulted in the changes that its supporters hoped for and implementing it may be more of a challenge than anticipated. The Christchurch earthquake experience makes it clear, however, that while this is somewhat of a disappointing reality, high hopes can be met with small concrete steps, which in turn can inspire positive change – even when the going gets tough.

Is a Judicial Discretion needed to Soften the "All or Nothing" Nature of the Doctrine of Frustration?

Blake Carey*

An unforeseen event can seriously affect the obligations arising under commercial contracts. Typically, contracts which become radically different after a said event will be discharged under the doctrine of frustration. However, there are an increasing number of contracts that become onerous but remain on foot, as they do not meet the high bar for frustration. In light of this, this paper examines whether judges should have discretion to alter parties' obligation if the contractual obligations become onerous. Such discretion would allow judges to allocate the loss caused by unforeseen events in a more equitable fashion, as well as keeping the contractual relationship on foot. Nonetheless, this paper contends that keeping the doctrine is necessary to preserve much-needed commercial certainty found in the "all or nothing" nature of frustration. Further, judicial discretion would nullify the entire doctrine of frustration, rendering decades of case law unusable. Judicial meddling is particularly undesirable, especially in commercially significant long-term contracts, given that the whole purpose of many agreements is to allocate risk. The benefits of implementing a judicial discretion in cases of onerous contracts are therefore outweighed by the uncertainties it would create.

Frustration of contract has resurged in academic discussion in the last decade. The doctrine was invoked in the 2008 financial crisis and again after the 2010-2011 Christchurch earthquakes created difficulties in many commercial agreements. Much of the discussion both internationally and nationally has been concerned with the particular difficulties of the consequences of the application of frustration of contract in the context of commercial contracts.[1] Many consider that the law is still in an unsatisfactory state and is particularly unsuited for commercial reality.[2] Questions have been raised as to when a judicial discretion is warranted in frustration cases in order to soften the "all or nothing" nature of the doctrine of frustration.[3] Both the High Court and Supreme Court of New Zealand have released judgments attempting to clarify the doctrine.[4] However, both judgments declined to address either the application of a judicial discretion to lessen the harshness and "all or nothing" nature of frustration, or considerations relating to commercial contracts. The law as it stands in New Zealand and the United Kingdom is that the frustrated contract is terminated

---

* The author wrote this paper in his fourth year at the University of Canterbury, while studying a BA/LLB (Hons). The author would like to thank Dr Christian Riffel of the University of Canterbury for his valuable supervision and discussions during the preparation of this paper.

[1] Simon Whittaker and Reinhard Zimmerman (eds) *Good Faith in European Contract Law* (Cambridge University Press, Cambridge, 2000) at 557-577.

[2] John Burrows, Jeremy Finn and Stephen Todd (eds) *The Law of Contracts in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 815-816. See also Andrew Rogers "Foreward" in Ewan McKendrick (ed) *Force Majeure and Frustration of Contract* (2nd ed, Lloyd's of London Press, London, 1995).

[3] Burrows, above n 2, at 815-817.

[4] *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149; *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2012] NZHC 2954, (2012) 17 ANZ Insurance Cases 61-957.

with no chance to adjust the parties' obligations.[5] However, the most significant injustices lie with contracts that turn onerous, yet do not reach the threshold for frustration. There is an increasing school of thought that a duty of good faith should be imposed on commercial parties whose contract turns onerous. Numerous cases exist which display the injustices caused by forcing one party to bear the full loss for a contract that is onerous but does not reach the threshold. This essay focuses on whether a judicial discretion is warranted in cases of onerous contracts that do not meet the threshold for frustration; it will not consider the merit of any judicial discretion to supplement the Frustrated Contracts Act 1944 (a statute which deals with the consequences that arise when a finding of frustration is made out).

I The Doctrine of Frustration

The doctrine of frustration is the common law response to contracts affected by an unforeseen event, and therefore provides the starting point for this research. Frustration can occur between parties to a contract when supervening circumstances prevent the agreement from being fulfilled. Should a contract be found frustrated, the Court will intervene and discharge the parties from their obligations.

The rule of absolute contracts (*pacta sunt servanda*) was dispelled in *Taylor v Caldwell*.[6] In *Taylor*, Lord Blackburn found that the doctrine of absolute contracts could not be invoked where there is an express or implied condition that was essential to the agreement and this condition was, due to the supervening event, no longer achievable. While the implied term test is now essentially outdated,[7] the doctrine of absolute contracts remains subject to the frustration exception.

Frustration in United Kingdom and New Zealand law "kill[s] the contract and discharge[s] the parties from further liability under it."[8] The common law of England, New Zealand and Australia gives the judge no discretion to alter a contract once it has been deemed frustrated; the contract is completely ended, therefore alteration obviously cannot take place. Likewise, contracts that turn onerous but do not reach the threshold of frustration will remain on foot and unchanged by the judge. This is the "all or nothing" nature of the doctrine.

The Courts are wary of eroding certainty of contract, and as such the bar for reaching frustration has been set high. In *The Sea Angel*, Rix LJ identified that frustration could only be invoked if the supervening event resulted in "radically different"

---

[5] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).
[6] *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309 (KB).
[7] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL).
[8] *Lauritzen AS v Wijsmuller B V* [1990] 1 Lloyd's Rep 1 (CA) *[The Super Servant Two]* at 8. This reasoning was affirmed by Elias CJ in *Planet Kids Ltd v Auckland Council* above n 4, at [9].

circumstances than what the parties originally contemplated.[9] Furthermore the threshold needs to be high given that total discharge is such a drastic consequence to the agreement. Frustration is not a remedy but occurs automatically regardless of the intention of the parties.

Lord Simon of Glaisdale summarised the rationale for the doctrine in *National Carriers v Panalpina*:[10]

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

Pacta sunt servanda is normally overridden due to the changed circumstances that heavily burden the debtor.[11] Therefore frustration's ultimate rationale is to prevent holding parties to a contract in circumstances that make adhering to the literal obligations unjust. Clearly the doctrine also aims at preserving some certainty as well, hence the high threshold needed to establish frustration.

The injustice that frustration aims to remedy was displayed in a recent New Zealand case. In *Ridgecrest NZ Ltd v IAG New Zealand Ltd* a finding of frustration was made out.[12] This case was one of many cases relating to the 2010-2011 Christchurch earthquakes. There were four earthquakes relevant to this case. The issue was whether the insurer should be liable for the costs of repairs after the third and fourth earthquakes rendered the building in question irreparable. By the third earthquake, the insurer had paid $125,000. His liability was capped at $1.984 million. Dobson J found that the obligation of the insurer to meet the full extent of his liability contained in the contract was frustrated; the insurer was only liable to pay for the repairs needed as a result of the first two earthquakes. The use of frustration here prevented the plaintiff from receiving a windfall.[13]

In light of this discussion, it is clear that frustration has the following attributes: it operates automatically, it uses an "all or nothing" approach, and it uses a high "radical difference" threshold. A judicial discretion to vary the contract that has become

---

[9] *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517 *[The Sea Angel]* at [111].
[10] *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 7, at 700.
[11] Knut Rodhe "Adjustment of Contracts on Account of Changed Conditions" (1959) 2 Scan St in Law 153 at 154.
[12] *Ridgecrest NZ Ltd v IAG New Zealand Ltd*, above n 4.
[13] John Goddard "Earthquake Cases" [2013] NZLJ 229 at 230.

onerous due to an unforeseen event but has not met the threshold for frustration would alter all three of these facets.[14]

A The Nature of Contract Law and Frustration

The nature of contract law is that it involves risk taking. The exception to the rigid adherence to contractual sanctity is the doctrine of frustration, which serves to completely discharge the contract. Therefore frustration conflicts with *pacta sunt servanda* (promises must be kept). Complete termination of contractual obligations is a "drastic solution."[15] The rationale for absolute contracts is that it should be for the parties to the agreement to allocate risk.[16] Parties to an agreement cannot use frustration simply to escape a bad bargain.[17] Both scholars and business people continue to contend that the entire purpose of having a contractual relationship is to distribute risk.

The lack of discussion on the effects of frustration is what Treitel terms "surprising."[18] He identifies that in the United Kingdom there is generally considered to be no middle ground between a contract being totally discharged or totally bound.[19] Judicial expressions of frustration such as that in *The Super Servant Two*[20] affirm this.

II The Mischief

A finding of frustration completely discharges all parties to the contract. There is no middle ground. Cases where the contract becomes onerous but not radically different will therefore remain on foot. In these cases a severe change of circumstance means that contract becomes unduly burdensome for one party, but because of the high bar, that party is still fully bound to the contract. Here, often sharing the loss would be more equitable than placing it on one party.[21] Having one party to bear the full loss risks the other party receiving a windfall. Additionally, this effect would irreparably harm the business relationship between the parties. A party forced to complete work that has become significantly more expensive due to an onerous event would undoubtedly become disgruntled. Whether these problems are best addressed through a restricted judicial discretion or through other means is the focus of this essay.

---

[14] For extended discussion see Part III(A) of this essay.
[15] Law Commission *Contract Statutes Review* (NZLC Rn 25, 1993) at 277.
[16] *Planet Kids Ltd v Auckland Council*, above n 4, at [47] per Glazebrook J.
[17] Edwin Peel (ed) *The Law of Contracts* (13th ed, Sweet & Maxwell, London, 2011) at [19-005].
[18] Guenter Treitel (ed) *Frustration and Force Majeure* (Sweet & Maxwell, London, 1994) at [15-009].
[19] At [15-009].
[20] *Super Servant Two*, above n 8.
[21] Law Commission, above n 15, at 286.

A Cases Where the Contract Became Onerous and Where the Results were Harsh

The following cases show the high threshold of frustration has led to injustice. Frustration was pleaded in *Leiston Gas Company v Leiston-Cum-Sizewell Urban District Council*.[22] In this case, the defendants contracted with the plaintiffs who were to provide gas standards and lamps and to supply gas and to maintain the lamps on an ongoing basis. The defendants were required to pay quarterly instalments to pay for the gas. Part way through the contract's performance, the military prohibited further lighting of the streetlamps. The plaintiffs sued for the remaining three quarterly payments, and the defendants rejected this contention on the basis that the contract was rendered impossible.

The Appeal Court held that the military order did not make the contract fully impossible; therefore the defendants had to pay. This is an example of the bluntness of frustration. In this case, the defendants had to pay full cost for a service they were not receiving. Professor Burrows identifies that a judicial discretionary power here could reduce the payments of the defendants until the plaintiffs could resume performing their full obligations.[23]

The classic case displaying the harshness of the doctrine of frustration's "all or nothing" nature is *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*.[24] This case concerned the supply of water pursuant to a 1929 agreement. The agreement was to continue in perpetuity. Lord Denning MR's minority view was that the contract should be adjusted to take into account the drastic inflation. The inflation in this case meant that the payments for the water were 19 times below market value. Professor Burrows identifies that in this case "no one could seriously contend that it is fair and reasonable to enforce the contract to the letter."[25] Nonetheless, the majority held that the contract did not reach the high threshold to be found frustrated.

Another case criticised for its harsh result is *The Super Servant Two*.[26] In this case the defendants had agreed to transport the plaintiff's oil rig from Japan to Rotterdam. The parties agreed to use the Super Servant Two ship for the delivery. The Super Servant Two sank in 1981. The Court held that the defendants must bear the costs of transporting the oil rig. This decision has been described as particularly harsh and "open to criticism."[27] The harsh result of this case could be solved by lowering the

---

[22] *Leiston Gas Company v Leiston-Cum-Sizewell Urban District Council* [1916] 2 KB 428 (CA).
[23] Law Commission, above n 15, at 290.
[24] *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 (CA).
[25] Law Commission, above n 15, at 294.
[26] *Super Seven Two,* above n 8.
[27] Guiditta Cordero-Moss (ed) *Boilerplate Clauses, International Commercial Contracts and International Law* (Cambridge University Press, Cambridge, 2011) at 176.

threshold for frustration, or alternately empowering a judge with discretion to make payments more equitable and in line with proper dealings in good faith.

The United States case of *Eastern Air Lines Inc v Gulf Oil Corp* also shows a harsh result.[28] Here, the Court could not find frustration in a case where the OPEC crisis caused dramatically increased oil costs; it found that Gulf Oil had to bear the burden. In these cases, there is little incentive for the party that does not receive the service but receives payment for it to bother negotiating or accepting a compromise. This would probably harm the previously amicable business relationship of the parties engaged in the agreement.

III Arguments for the Restricted Judicial Discretion for Onerous Contracts

Much has been written about the merits of giving the judiciary discretion to vary the contract where it becomes onerous due to an unforeseen event. Contractual modification is well equipped for distinct individual circumstances given its potential for flexibility.[29] There has been little judicial comment on any discretion Courts have in cases of frustration. However, in *British Movietonews Ltd v London & District Cinemas Ltd*, Denning LJ suggested the Courts could act with flexibility:[30]

> In these frustration cases … the Court really exercises a qualifying power – a power to qualify the absolute, literal or wide terms of the contract – in order to do what is just and reasonable in the new situation.

Lord Denning propounded a similar view in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*.[31] His view was rejected by the New Zealand Court of Appeal in *The Power Co Ltd v Gore District Council*.[32] Here, inflation increased by a factor of 30.9 times from the creation of the agreement in 1927 until the establishment of the proceedings in 1997. However, there was less scope for injustice here than there was in *Staffordshire*. The Company gained great value from being the sole supplier of power to the Council.[33] The rationale for the Courts not allowing steep increases in price as grounds for frustration is they do not want to reallocate contractual risks in a way that gives one party a windfall.[34] An important rationale for this case (and all cases where frustration is argued) is likely to be

---

[28] *Eastern Air Lines Inc v Gulf Oil Corp* 415 F Supp 429 (SD Fla 1975).
[29] Theo Rauh "Legal Consequences of Force Majeure Under German, Swiss, English and United States' Law" (1996-1997) 25 Denv J Int'l L & Pol'y 151-153.
[30] *British Movietonews Ld v London & District Cinemas Ld* [1951] 1 KB 190 (CA).
[31] *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*, above n 24.
[32] *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).
[33] Burrows, above n 2, at 761.
[34] Jack Beatson "Increased Expense and Frustration" in Francis Rose (ed) *Consensus ad Idem: Essays on the Law of Contract in Honour of Guenter Treitel* (3rd ed, Sweet & Maxwell, London, 1996) at 133.

preserving contractual certainty. Additionally, increases or decreases in market value can be predicted by the parties.[35]

Lord Denning's rationale has received fervent criticism. Burrows identifies that potentially millions of contracts are within the scope of the principle such as long-term (over 99 year) leases with fixed rents.[36] On the other hand, there has never been any notable risk of excessive litigation; both common law and American Courts have been consistently reluctant to take such a liberal standing. For example, the United States doctrine of impracticability (which allows for a judicial discretion where an unforeseen event has altered the essential nature of the contract[37]) is rarely invoked. Therefore there is an argument that the criticism overemphasises the issue.

It is submitted that a judicial discretion would need to remedy the injustice while ensuring that the principle cannot be invoked too easily (the "floodgates"[38] argument). While a judicial discretion determining the justice on a case-by-case basis might be workable in these cases, Courts would need to be extremely aware of eroding contractual certainty. They would also need to recognise that any decision would have to be extremely well thought through given the commercial precedent it would set. Because of these risks it is possible that judges would so rarely alter the contract that a judicial discretion would not make a practical difference to this area of the law. This seems to be the case in the United States, discussed below at Part V(C).

A The Impact on the Doctrine of Frustration

Introducing a restricted judicial discretion to soften the "all or nothing" nature of frustration would be a remarkably bold move. It would mean the doctrine of frustration as we know it could no longer exist. Total discharge would still exist, but it would no longer be automatic in nature; the judge would use his or her discretion to determine if total discharge is warranted *or* if a variation is all that is required. While on the face of it this does not seem like a big change, it would affect decades of legal precedent. Furthermore, a judicial discretion would alter the "all or nothing" nature of the doctrine, since it would act as a middle ground between letting the agreement stand and imposing total discharge. Discretion to remedy the injustice caused by contracts turned onerous would also be effectively lowering the threshold as to when contract can be interfered with. The reformist literature surveyed by the author often did not recognise the fundamental doctrinal change that would result from modifying the application of frustration. This being said, New Zealand is a young and independent country that has not been afraid to challenge the laws of its colonial

---

[35] *The Power Co Ltd v Gore District Council*, above n 32, at 554. See also Beatson, above n 34, at 133-134.
[36] Burrows, above n 2, at 794.
[37] American Law Institute *Restatement of the Law of Contracts* (2nd ed, Washington, District of Columbia, 1979), § 261.
[38] Beatson, above n 34, at 133.

power. Additionally, all of the three primary aspects of the doctrine have been consistently criticised, particularly the pointlessness of the doctrine's automatic nature in the context of long-term contracts where the parties wish for the agreement to continue.[39]

B Standard Business Practice

A judicial discretion would alter the nature of the doctrine of frustration. However, the nature of the doctrine could use reform; it is particularly ill-suited to both standard business practice and long-term contracts. Most business people would take issue with the rigidity of the common law rules.[40] Often compromise is more fiscally sensible than an absolute discharge of obligations.[41] Furthermore, business people to large contracts are usually concerned with maintaining cordial business relations rather than adhering to the rigid common law.[42] This being said, commercial fairness is arguably lost since the parties who volunteered to the agreement will no longer have control over it.[43] However, it seems likely that to most business people judicial termination of the agreement is less preferable than (for example) altering the agreement to account for an increase of price, delay in delivery, or curtailment of supply.[44] In certain industries the expectation of equitable adjustment is so common that parties rely on it (for example, the petroleum industry).[45] Finally, in the United States, there are a "vast number" of transactions carried out based on "letters of intent" which by their nature demand flexible dealing.[46]

C Long-term Commercial Contracts

This research was unable to find any conclusive definition of what encompasses a "long-term contract." This is undoubtedly because the definition involves use of a continuum.[47]

It has been argued in the past that contract law has historically ignored agreements that establish on-going relationships, and instead focused on single transactions such

---

[39] Ewan McKendrick "Long-Term Contracts in English Law" in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (3rd ed, Clarendon Press, Oxford, 1995) at 322.
[40] Law Commission, above n 15, at 286.
[41] Peel, above n 17, at 923.
[42] Michael Aubrey "Frustration Reconsidered - Some Comparative Aspects" (1963) 12 ICLQ 1165 at 1169.
[43] Andrew Kull "Mistake, Frustration, and the Windfall Principle of Contract Remedies" (1991-1992) 43 Hastings LJ 1 at 55.
[44] Leon Trakman "Frustrated Contracts and Legal Fictions" (1983) 46 MLR 39 at 41.
[45] Larry DiMatteo "Equity's Modification of Contract: an Analysis of the Twentieth Century's Equitable Reformation of Contract Law" (1999) 33 New Eng L Rev 267 at 310.
[46] PHN Opas "What Happens When the Contract Becomes Unprofitable?" (1973) 1 Aust Bus L Rev 59 at 63-64.
[47] Michael Zundel "Equitable Reformation of Long-Term Contracts - The "New Spirit" of ALCOA" (1982) 4 Utah L Rev 985 at 991.

as the sale of goods.[48] This is clearly not the case today; the majority of the cases referred to in this paper deal with long-term, continuous relationships. The nature of long-term contracts leaves them more vulnerable to unforeseen events that are outside of the parties' contemplation. The length of the contract increases the risk of the agreement being subject to an unforeseen event, and also increases the risk of continuing loss from said event.

Business people engaged in a long-term contract usually have a greater interest in its continuation than its dissolution.[49] The complexity of long-term contracts has led to the perspective that they should be subject to the duty of good faith.[50] It is much more difficult for long-term transactions to be found subject to frustration;[51] therefore they are more at risk of the harsh results that lead to onerousness (but not frustration), as described in the case examples above. As one commentator stipulates:[52]

> The longer the expected duration and the greater the uncertainty of a contract, the more difficult it is for the parties to expressly agree upon contingencies and excuses. It is increasingly left to the courts to imply such conditions and excuses into the contract.

There is a strong case that the Courts should adapt to assisting parties to complex long-term transactions beyond the bare extent needed for the contract to be feasible. Other developments in contract law support this need. For example, interpretation of contracts is now based on a purposive model instead of the historic literal approach. This model favours "smooth working of long-term relational contracts."[53] Furthermore, one commentator has observed that "relational contracts, by necessity, are incomplete and dependent on good faith adjustments after the time of formation."[54] Under the "all or nothing" approach, a party to an onerous long-term agreement stands to make a windfall at the expense of the prejudiced party. There is generally more money at stake in complex long-term transactions, which increases the windfall risk.

D Consistency with the New Zealand Contract Statute Landscape

Amending the Frustrated Contracts Act 1944 to allow for a restricted judicial discretion for contracts that become onerous would assist in fostering consistency

---

[48] John Burrows "Update on Contract" (paper presented to New Zealand Law Society, October 2003) at 41.
[49] Rauh, above n 29, at 154.
[50] Burrows, above n 48, at 42. For extended discussion on the merits of the good faith solution, see Parts V(B) and VI of this essay.
[51] *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 10, at 691 per Lord Hailsham.
[52] DiMatteo, above n 45, at 314.
[53] Burrows, above n 48, at 42.
[54] Richard Speidel "Afterword: the Shifting Domain of Contract" (1995-1996) 90 Nw U L Rev 254 at 264.

between New Zealand's contract statutes.[55] Additionally New Zealand's contract statute landscape shows that restricted judicial discretion in order to deal with "hard cases" (cases that follow proper legal application but lead to a harsh result)[56] is the direction in which the law is heading; the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contracts (Privity) Act 1982, and the Contractual Remedies Act 1979 all bestow the Court with wide discretionary powers to either vary the contract or grant damages.[57] The rationales of each Act also bear noticeable similarities.[58] However, uniformity in statutes is not always a great rationale for legislative change. For example, the statutes modelled on the United Kingdom Frustrated Contracts Act have all received similar criticisms.[59]

If a case with the same facts as *Krell v Henry* were decided in New Zealand, and the contract was entered into after cancellation, then the plaintiff would be able to access relief under contractual mistake. To Professor Burrows, it would be "logical to match the tests for, and the legislation regulating, frustration and mistake."[60] In that case, a finding of frustration was made out where a room was booked for the sole purpose of seeing the royal procession. The procession was subsequently cancelled which was found by the Courts to render the agreement changed so drastically that it was frustrated.

1 Extending principles contained in the Contractual Mistakes Act 1977

The Contractual Mistakes Act provides the Court with wide-ranging powers of relief in cases where contracts are entered into under mistake.[61] It allows the Court under s 7(3)(a)-(d) to make any order it deems just, including (but not limited to) declaring the contract valid, whole or in part; cancelling the contract; granting relief by way of variation to the contract; and granting relief by way of restitution or compensation. Interestingly, the relief sections in the Contractual Mistakes Act were intended to foster consistency with the Illegal Contracts Act 1970 and the Frustrated Contracts Act 1944.[62] Therefore the argument that implementing a judicial discretion would foster much-needed consistency in the NZ contract statutes landscape has gained some strength in recent years.

---

[55] Thomas Gibbons "A Contracts (Consolidation) Act for New Zealand" (2003) 11 Waikato L Rev 13 at 33.
[56] Desmond Fagan "Uncertainty and Judicial Discretion in Commercial Law" (1990) Policy Magazine 9 at 11.
[57] Illegal Contracts Act 1970, s 7; Contractual Mistakes Act 1977, ss 6-7; Contracts (Privity) Act 1982, s 7; Contractual Remedies Act 1979, ss 6 and 9. For general discussion on this point see Gibbons, above n 55, at 33.
[58] Gibbons, above n 55, at 33.
[59] John Burrows, Jeremy Finn and Stephen Todd "Discharge of Contract" in Cynthia Hawes (ed) *Introduction to Commercial Law* (3rd ed, LexisNexis, Wellington, 2010) at [8.1.6].
[60] Law Commission, above n 15, at 290.
[61] Contractual Mistakes Act, s 7.
[62] Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at [CM7.03].

On the other hand, the Courts have been reluctant to grant relief under s 7. There is uncertainty in what principles should guide the wide-ranging powers of relief.[63] Gault posits that over time, the Courts will fashion a "landscape" around s 7, which will be guided by the following principles; to ensure that a party does not take advantage of the mistake to escape the agreement which is still capable of performance; and "[i]f the agreement is no longer capable of performance and they are not willing to substitute another agreement, the contract should be cancelled and the discretion employed to return the parties to the position they were in before the contract was entered."[64] If a judicial discretion similar to s 7 was implemented to deal with onerous contracts, then ideally a "landscape" of case law would be developed to provide certainty to the law. Whether this would actually happen is doubtful given the rarity of supervening events which turn the contract onerous.

2 Extending principles contained in the Contractual Remedies Act 1979

Again, like the Contractual Mistakes Act, under the Contractual Remedies Act the Court has wide-ranging power of relief. The discretion is contained in s 9(1)-(4). The Court can vest in any party the whole or part of any real or personal property that was subject to the contract; direct any party to pay the other such sums as the Court deems just; and injunctive relief. The considerations the Court shall have regard to includes the expenditure incurred by one party in or for the purpose of the performance of the contract (s 9(4)(c)); the value of any work or services performed pursuant to contractual obligation (s 9(4)(d)); any benefit or advantage obtained by a party by reason of anything done by another party pursuant to contractual obligations (s 9(4)(e)); and such other matters as the Court thinks proper (s 9(4)(f)).

Professor Burrows suggested that before implementing a judicial discretion to soften frustration's "all or nothing" nature, it may be wise to "wait a little" until the other contract statutes which grant discretion have had time to be judicially interpreted.[65] Professor Burrows said this in the context of the law in 1982; it is now 32 years later, and there has been some case law on this point in the context of the Contractual Remedies Act. There is no evidence that the wide discretion has impacted commercial certainty. It has been noted that the "remarkably broad"[66] discretion under the Act provides a new opportunity to review the nature and traditional hierarchy of damages in contract law.[67] The broad discretion was boldly used in *Herbert v Catley*, where the judge reopened a cancelled contract.[68]

---

[63] Law Commission, above n 15, at 354.
[64] Gault, above n 62, at [CM7.03].
[65] Law Commission, above n 15, at 303.
[66] Burrows, above n 2, at 896.
[67] This was the approach of Fisher J in *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC).
[68] *Herbert v Catley* HC Rotorua A 42/81, 11 July 1983.

Therefore there is an argument that onerous cases that do not meet the threshold for frustration should be subject to a judicial discretion in a way that is consistent with New Zealand's other contract legislation. Perhaps a stronger argument is that the contract statutes are specific to their area of law, and do not extend to liberalise contractual principles in general. It is submitted that the latter interpretation is more consistent with the development of the law, which develops incrementally and over time. This being said, the other contract statutes provide an indication as to what considerations are needed to suitably restrict a judicial discretion generally.

IV Arguments against a Restricted Judicial Discretion

A Sanctity of Contract

The risk of eroding *pacta sunt servanda* presents what is probably the strongest challenge to implementing a restricted judicial discretion. The rationale for absolute contracts is that it is up to the parties to allocate contractual risk.[69] However, sanctity of contract is more at risk if the Court alters the parties' obligations than if the Court merely discharges both parties.[70] If the obligations are altered, the parties' contractual relationship remains intact. Admittedly, frustration does provide certainty in its straightforward "all or nothing" modus operandi. The nature of contract as a risk allocation device is deeply ingrained into common law societies. Frustration challenges this already, and any further changes would not be taken kindly to by traditionalists. Nonetheless the contention that adjustment preserves certainty to a greater extent than total discharge is logically a compelling one.

B Insurance and Other Safety Clauses

Commercial parties to an agreement are not infallible. The mischief identified above could be avoided if the parties (or more likely, their lawyers) had thought to include an insurance provision or a more specific provision for certain circumstances that turn the contract onerous. The reality is that these are not always present, and it is submitted that not having these elements through personal negligence (or more likely through the negligence of a solicitor) is not enough to warrant the mischief identified above causing unnecessary hardship. However, an early New Zealand case opposes this view. In *Hawke's Bay Electric-Power Board v Thomas Borthwick*,[71] premises were damaged in the Napier Earthquake. Blair J held that the contract was not frustrated for two reasons: earthquakes occur frequently in New Zealand, and that most businessmen of large companies either insure or let the business absorb the risk. It is submitted that Blair J's rationale is particularly harsh and best limited to its facts.

---

[69] *Planet Kids Ltd v Auckland Council*, above n 4, at [47] per Glazebrook J.
[70] Treitel, above n 18, at [15-035]. This view is shared by Rauh, above n 29, at 153.
[71] *Hawke's Bay Electric-Power Board v Thomas Borthwick And Sons (Australasia) Ltd* [1933] NZLR 873 (SC).

It is impossible to predict everything in complex long-term agreements. Additionally lawyers rather than business people are often tasked with drafting the contractual machinery.

C Commercial Uncertainty

If a judicial discretion was implemented, there may be uncertainty with what direction the Courts would take. This is undesirable in commercially significant long-term contracts. Goff and Jones have written that:[72]

> In commercial law, it is undesirable that these questions should rest on the uncertain exercise of judicial discretion.

The Law Commission of British Columbia agreed with this contention, commenting that people should know with clarity what their obligations and liabilities are.[73]
There may also be an increased risk of litigation. This would be present where one party argues the contract is onerous and therefore warranting use of judicial discretion, while the other argues frustration and therefore total discharge. However, it is submitted that this risk would be small, given that the litigation on whether a contract is frustrated is already little in number. This is due to frustrating or onerous events being inherently rare.

Professor Burrows notes that if the Courts could grant variation (a lesser form of relief) instead of total discharge, they may be more willing to hold that onerous (as opposed to "radically different") events negate strict adherence to the agreement.[74] If this were true, it would decrease commercial certainty. However, the overseas comparison beginning at Part V of this essay has found that Courts of overseas jurisdictions who use the adjustment principle remain highly reluctant to alter the parties' agreements. New Zealand cases such as *Thomas Borthwick* show reluctance by the judiciary to sympathise with parties to contracts that become onerous.[75]

D Judge as Accountant or Economist

It goes without saying that if judges have to act as business people and accountants "injustices are bound to occur."[76] Judges lack the requisite knowledge to determine when to adjust the contract.[77] Furthermore judges trained in the law would lack

---

[72] British Columbia Law Reform *Commission Report on the Need for Frustrated Contracts Legislation in British Columbia (Project No 8)* (LRC 3, 1971) at 37-38.
[73] At 38.
[74] Law Commission, above n 15, at 277.
[75] *Hawke's Bay Electric-Power Board v Thomas Borthwick And Sons (Australasia) Ltd*, above n 71.
[76] Basil Markesinis, Hannes Unberath, Angus Johnston (ed) *The German Law of Contract: a Comparative Treatise* (2nd ed, Hart Publishing Oregan, 2006) at 346.
[77] Robert Hillman "Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law" (1987) 1 Duke LJ 1 at 2.

proficiency to deal with complex long-term commercial agreements,[78] particularly so in New Zealand where the Court system only has specialist judges in the Youth, Environment, and Family divisions. Hillman argues that introducing a judicial discretion in cases of commercially impracticable contracts would increase costs of contracting parties, as they would need to plan the contract around the judge's discretion.[79] With respect, his contention is doubtful. Unforeseen events that render the contract onerous occur so rarely that it is unlikely the contracting parties would waste expense drafting a contract that directly addresses judicial discretion.

The Courts are ill-equipped for dealing with a country's economic policy. Commentators have contended that problems of economic policy are best to be addressed by the legislature.[80] Questions of economic character "can seldom be isolated but must be planned as part of a more complex whole."[81] Moreover, taking capital from one class of person and distributing it to another is arguably political in nature and best kept away from the Courts.[82] In New Zealand, the Court of Appeal has identified that long-term contracts between public agencies that are affected by unexpected events are better dealt with by the "obvious means" of exercising legislative powers, rather than invoking the doctrine of frustration.[83] On the other hand, there is an argument that applying the above contentions to New Zealand would be artificial. New Zealand already has discretionary relief available for breach of contract, contractual mistake, and contracts that are made oppressive or onerous on their creation.[84] Therefore turning away from the consistent direction New Zealand contract statutes have taken would upset the predictability of the law.

Regardless, it is likely that there will be certain cases that are too economically complex for a judge to be useful. Judges' training as lawyers is not appropriate in these cases. However, as Zundel identifies, less economically complex cases where the parties intended to share the risk may be assisted by equitable adjustment.[85] Given both the above discussion and the growing prevalence of long-term contracts, it is submitted that it would be very risky to give the judge, trained in law rather than economics, broad discretionary powers.

---

[78] At 3.
[79] At 3.
[80] Rodhe, above n 11, at 157.
[81] At 157.
[82] At 157.
[83] *The Power Co Ltd v Gore District Council*, above n 32, at 555.
[84] See Part III(D) of this essay. Courts can reopen contracts that are onerous at their creation (as opposed to becoming onerous after an unforeseen event) under the Credit Contract and Consumer Finance Act 2003, ss 120 and 127.
[85] Zundel, above n 47, at 1002.

E Deterring Planning

Some commentators have identified that if the Court has broad discretionary powers, the parties could be deterred from planning a commercially sensible agreement.[86] Unrealistic long-term contracts could be made on the assumption that the judge will alter the terms if the contract becomes onerous.[87] It is submitted that as long as the discretion is appropriately restricted, there will be very little incentive to poorly plan a contract. Arguments that consider frustration are already rarely invoked in New Zealand, and any judicial discretion would probably also be invoked in rare circumstances. In particular, the United States, which uses the principle of judicial adjustment of contracts, rarely invokes it.[88]

V Jurisdictional Comparisons

A Germany

German Courts allow for a restricted judicial discretion in cases where the contract becomes onerous. German Courts have discretion to alter the contract under the doctrine of *Wegfall der Geschäftsgrundlage* where the foundation of the contract has been lost. Unlike the French and English doctrines, which are based on unforeseeability, the German model is based on good faith.[89] The Court will interfere with the sanctity of absolute contracts when it deems it unreasonable for the obligor to perform the contract.[90] If the parties' relationship falls through, the Court will consider modifying the contract first.[91]

Geschäftsgrundlage was used in *Sp Co v F Co*.[92] This case involved a clause in a lease to require steam for industrial use. Due to inflation, performance of the contract became radically different from that which was originally intended. The disgruntled party propounded that the Court should adjust the contract, and that adjustment powers were logical given that the Court already had the power to terminate the agreement.[93] The Court made the following findings in regard to altering the contract: both parties want the contract to be modified instead of discharged; there was an exceptional and unforeseeable change in situation; and that full modification was necessary so that the loss was not confined completely to one party.[94]

---

[86] Hillman, above n 77, at 2.
[87] Aubrey, above n 42, at 1180.
[88] See Part V(C) of this essay for a jurisdictional comparison with US law.
[89] Aubrey, above n 42, at 1180.
[90] Rauh, above n 29, at 153.
[91] At 153.
[92] *Sp Co v F Co* Reichsgericht 100 ERG (Z) 129, 21 September 1920 .
[93] Aubrey, above n 42, at 1179.
[94] At 1179.

Geschäftsgrundlage has faced criticism for its favouring vague equitable principles over the correct dispensation of contractual risk.[95]

B France

French Courts have essentially the same discretion under its doctrine of *imprévision*.[96] The doctrine is restricted to the administrative Courts and applies in situations where a reasonable person could not have foreseen the altered circumstances.[97] Imprévision was first applied in *Compagnie Générale d'Eclairage de Brodeaux c Ville de Bordeaux*.[98] This case concerned a company's attempt to have its price for gas increased due to severe post-World War I inflation. The Conseil d'Etat recognised that inflation should be anticipated, yet granted relief in the form of adjustment of contractual terms. This discretion was utilised as it was in the public interest that the town be provided with gas.[99] In these cases, if the parties cannot reach agreement, the Court will secure an indemnity, and presumably the contract would continue.[100]

C United States

In the United States there is support for reforming the contract after it has been found to be frustrated. Courts in the United States have a discretion to "protect the parties' reliance interests" if it is necessary to avoid injustice.[101] Friedmann identifies that in Anglo-American law, freedom of contract is only strictly adhered to regarding formation of contract, distinct from contractual remedies.[102]

The American Courts favour commercial reasonability over rules of automatic applicability. In *Transatlantic Financing Corp v United States* the Court held in the context of adjustment of contracts at the time of formation:[103]

> The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.

---

[95] Rogers, above n 2, at 373.
[96] Treitel, above n 18, at [15-034].
[97] Law Commission, above n 15, at 289.
[98] *Compagnie Générale d'Eclairage de Brodeaux c Ville de Bordeaux* Conseil d'Etat (1916) III D 25, (1916) III S 17.
[99] At 1176.
[100] Whittaker, above n 1, at 562.
[101] Guenter Treitel "Some Comparative Notes on English and American Contract Law" (2002) 55 SMU L Rev 357 at 361, citing American Law Institute *Restatement of the Law of Contracts* (2nd ed, Washington, District of Columbia, 1979), § 261.
[102] Daniel Friedmann "Good Faith and Remedies for Breach of Contract" in Jack Beatson, Friedmann, Daniel (ed) *Good Faith and Fault in Contract Law* (3rd ed, Clarendon Press, Oxford, 1995) at 401.
[103] *Transatlantic Financing Corp v United States* 363 F 2d 312 (DC Cir 1966) at 315.

This reasoning has been extended to contracts after formation. For example, in the *ALCOA* case a large cost increase was held to be impracticable.[104] The Court did not discharge the parties; instead it used its own method to fix the costs so that they were commensurate with the changed circumstances. The American Courts can therefore alter a contract whose terms were actually agreed to by the parties without mistake.[105] *ALCOA* is one of the rare cases of commercial impracticability where the Court has modified contractual obligations instead of ordering specific performance against the supplier.[106]

ALCOA has received large amounts of academic discussion. The Court's modus operandi was one of equitable reformation, which is used to prevent unjust enrichment from occurring in the future.[107] This contrasts to equitable restitution, which is concerned with correcting unjust enrichment that has already resulted. Equitable reformation has received some judicial support post-*ALCOA*.[108]

D Scandinavia

Scandinavian law has adopted the principle of adjustment of contracts.[109] In Sweden, the Courts have occasionally contended that intervening in the private contractual arrangement is necessary to prevent one of the parties from becoming unjustly enriched.[110] The Supreme Court applied this principle to cases involving an unreasonable rent increase owing to increased heating costs.[111]

VI Options for Reforming the Application of the Doctrine

The solutions propounded focus on assisting parties to smoothly work through unforeseen events that render the contract onerous while retaining business cordiality and attempting to preserve contractual certainty.

A Arbitration

A helpful precondition to other forms of relief would be to impose mandatory negotiations between the parties to the frustrated contract.[112] This would be consistent with commercial methods of operation. A statutory duty to negotiate could only ever be a precondition to other forms of relief because if the negotiation fails then the

---

[104] *Aluminum Corp of America v Essex Group Inc* 499 F Supp 53 (WD Pa 1980) *[ALCOA]*.
[105] For comparison with other jurisdictions, see Treitel, above n 18, at [15-033].
[106] Hillman, above n 77, at 2.
[107] Zundel, above n 47, at 1001.
[108] *National Presto Industries Inc v United States* 338 F 2d 99 (Ct Cl 1964). *Parev Products Co v Rokeach & Sons* 124 F 2d 147 (2d Cir 1941).
[109] Promissory Notes Act 1936 (Sweden), s 8.
[110] Rodhe, above n 11, at 168.
[111] At 184.
[112] Burrows, above n 15, at 291-292.

mischief identified in Part II of this essay will still be present. Arbitration is a typical route taken by business people wanting to preserve amicable dealings. By way of overseas example, arbitration is expected in Japan, and, additionally, many commercial contracts in France provide for arbitrators to act as *amiables compositeurs* (arbitrators with the power of equitable correction to depart from rigid legal standards).[113] Arbitrators in the International Chamber of Commerce have the power to declare that a substantial circumstantial change causing hardship has occurred, and if the declaration is made out, the power to alter the contract.[114] A judicial discretion to refer matters to arbitration would be a worthwhile reform to assist in ensuring business relationships are maintained and the problems of unforeseen circumstantial changes are quickly and efficiently remedied.

This would only be relevant if the parties to an agreement had neglected to insert an arbitration clause, which would come into effect if the agreement is stricken by substantial change in circumstances that leaves one party in severe hardship if bound by the literal terms of the agreement.

B Good Faith

Good faith was discussed by Thomas J in *Bobux Marketing Ltd v Raynor Marketing Ltd*.[115] The judge perceived the term as loyalty to a promise. He also accepted that good faith was "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[116] Importantly, the judge recognised that good faith does not correlate to abandonment of self-interest. However, implying a term of good faith in onerous contracts could be problematic. Good faith is "beset by agonising inquiries" into what the term actually means.[117] Nonetheless, Thomas J's essential reasoning was that a term of good faith would assist parties in efficient dealing and overcoming unforeseen situations.[118]

Section 242 of the German Civil Code[119] requires good faith in contracts and allows disgruntled parties possible access to relief without terminating the contract. Moreover, the duty is also present in international trade and in the United States.[120] Thomas J identified that there was no evidence to suggest the use of good faith has

---

[113] *Compagnie Générale d'Eclairage de Brodeaux c Ville de Bordeaux*, above n 98, at 1177.
[114] Opas, above n 46, at 62.
[115] *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 (CA).
[116] At [41].
[117] At [41].
[118] Burrows, above n 48, at 42.
[119] For the legal text, see Federal Ministry of Justice and Consumer Protection "German Civil Code" (2014) <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html>.
[120] The relevant United States law is American Law Institute *Restatement of the Law of Contracts* (2nd ed, Washington, District of Columbia, 1979), § 261. For international trade, the good faith requirement is found in UNIDROITT *Principles of International Commercial Contracts* (1994), art 1.7.

made transactions unworkable or uncertain.[121] Agreements must also be performed subject to good faith in France[122] and Switzerland.[123]

Practically, if the unprejudiced party does not consider the prejudiced party's offer to reasonably adjust the contract, the first party may be deemed to be acting in bad faith. This could then leave the Court to equitably adjust the contract.[124] Here, any adjustment would be restricted to deal with the presence of bad faith. It is submitted that giving the Court discretion to award damages for bad faith dealing may be preferable to granting the Court powers to adjust the agreement. This is because an award of damages would not alter the nature of frustration as an adjustment power would. The doctrine of frustration would remain intact, thus preserving both commercial certainty and the large body of case law. Additionally, the body of New Zealand contract statutes discussed above already give the judiciary liberal powers to grant damages. This would assist with fostering legislative consistency. Awarding damages would serve a similar function to adjustment in that it would provide a more equitable way to distribute loss, but without the ramifications to the nature doctrine of frustration.

It may be too soon to introduce good faith into New Zealand, given the strong fears about possible wide-ranging implications to commercial certainty. This being said, good faith appears to be more in line with the actual business expectations of the contracting parties, particularly in long-term relational contracts. It could ultimately assist in preserving both amicable business relations and contractual relations. It would also encourage parties to sort out matters themselves rather than moving to litigation. It goes without saying that before good faith can be introduced to onerous contracts, the term would require more certainty. A good starting point would be for the non-prejudiced party to the contract to have to reasonably consider the prejudiced party's offer to adjust the agreement. "Reasonably consider" is distinct from "accept the offer" for this would seriously interfere with commercial autonomy and be overly detrimental to the unprejudiced party.

While good faith is an uncertain term, defined restrictions like the starting point mentioned above would assist in increasing certainty. Furthermore, the exercise of one party's rights which inconveniences the other party is not generally contrary to good faith.[125] Defined lines are necessary, for it is unjust to hold a party in bad faith for not doing an act that they were not obliged to do.[126] A further (albeit less certain) line that could be drawn is that good faith would require "faithfulness to an agreed common purpose" and "consistency with the justified expectations of the other

---

[121] *Bobux Marketing Ltd v Raynor Marketing Ltd*, above n 115, at [39].
[122] *Code Civil* (France), art 1134.
[123] *Zivilgesetzbuch* (Switzerland), art 2.
[124] DiMatteo, above n 45, at 310.
[125] Friedmann, above n 102, at 401.
[126] McKendrick, above n 39, at 316.

party."[127] Certainty here may be increased with reference to common commercial standards in the particular industry the agreement relates to. This is already used in Credit Contract and Consumer Finance Act 2003 (CCCFA 2003) cases. In these cases, expert evidence is brought in to ascertain the reasonable (and measurable) commercial standards of the industry to which the agreement relates. Additionally, if parties knew that they had to follow a duty of good faith they would be more inclined to negotiate and resolve their disputes on their own, which would ideally prevent matters from coming to the Court. This method also means that the parties retain control of their arrangement.

C Extending the Oppressiveness Provisions in the CCCFA 2003

Extending the principles in the CCCFA could be a simple yet convenient way to impose a restricted judicial discretion. Professor Burrows, in propounding this novel solution,[128] notes that the CCCFA already has provisions to reopen a contract that was oppressive at the date of creation.[129] He submits that this principle could be applied to contracts that become onerous later on in their lifespan. This solution would assist in fostering consistency between New Zealand's contract statutes that Gibbons has observed is missing.[130] As this solution requires a judicial discretion, the arguments detailed above about the place of *pacta sunt servanda* apply.

D Softening the Threshold

Softening the threshold required for an agreement to be frustrated is unlikely to sufficiently remedy the identified mischief. There is an argument that the law in NZ is moving towards a lower threshold. *Steele v Serepisos* provides support for this.[131] The facts of that case concerned a Council rule that sewage and drainage be connected to the appellant's property. The appellants expected the neighbours to grant an easement for this purpose. The neighbours denied this, forcing the appellants to the only other option; place the pipes through separate adjoining land which would disrupt both visual appearance and cost ten times more. While not directly on point with frustration, Tipping J provides useful dicta. He found that the denial of consent "come[s] close to [the] permitted escape of frustration." However, the majority of the case law does not indicate that the bar should be lowered.[132] Additionally, it is unlikely that in light of the jurisdictional comparisons a lowering of the bar would

---

[127] Robert Summers "The General Duty of Good Faith - Its Recognition and Conceptualization" (1982) 67 Cornell L Rev 810 at 821.
[128] Law Commission, above n 15, at 290-291.
[129] Credit Contract and Consumer Finance Act 2003, s 120.
[130] See Gibbons, above n 55.
[131] *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 (SC).
[132] See eg *The Power Co Ltd v Gore District Council*, above n 32. See also Tim Clarke "Termination of Contracts" (2008) <http://www.bellgully.co.nz/resources/pdfs/termination_of_contracts08.pdf> who argues that the line of cases does not favour lowering the threshold.

return a practical difference in the way Courts treat onerous contracts. Both the German Courts and the Courts in the United States appear reluctant to interfere with contracts that are onerous, evidenced by the rarity of cases where the judicial discretion is invoked.

E Formulating a Workable Restricted Discretion

If a judicial discretion were to become part of New Zealand law, the author's view is that the following restrictions would render it more viable:

The Court should have discretion to refer the matter to arbitration first. As Speidel identifies, "the appropriate response for a Court is to press aggressively for an *agreed modification* or to impose an adjustment as a condition to equitable relief." [133]

Professor Burrows suggests the following restrictions for discretionary relief of the Frustrated Contracts Act 1944: the judge must take into account the expense incurred by one party; the amount of unjust enrichment; and the degree to which the supervening event devalued the enrichment.[134] The first suggestion would be a direct adoption of s 9(4)(c) of the Contractual Remedies Act 1979. This would render the judicial discretion consistent with other contractual legislation. While Burrows mandated these changes be made in the context of the Frustrated Contracts Act 1944, it is equally applicable to onerous contracts which are a direct result of frustration's "all or nothing" nature. The Court also could have a discretion specifically related to contracts turned onerous due to massive inflation or other financial crisis by imposing a clause that deals fairly with price inflation.[135]

Finally, adjustment would be rare given that bad faith would need to be present before any discretion is invoked. Should a judicial discretion to adjust the contract be deemed too uncertain, there could be discretion to award damages for breach of good faith. This would assist in removing one party receiving a windfall. It would need to be given similar restrictions to those needed for a workable (i.e. restricted) judicial discretion.

VI Conclusion

The harsh results following onerous contracts that do not reach the threshold of frustration are well known. The tough consequences of the cases under analysis are a

---

[133] Richard Speidel "Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management" (1980) 32 SCL Rev 241 at 279 [emphasis added].
[134] Law Commission, above n 15, at 302.
[135] This kind of power would provide a more equitable form of relief to inflation cases like *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*, above n 24. Professor Burrows suggests that a price fluctuation clause might be appropriate for the Courts to import in these situations: Law Commission, above n 15, at 294.

direct result of frustration's "all or nothing" nature. In the cases under analysis, a more equitable approach that distributed the loss between the parties would have remedied the identified injustices. However, this is easier said than done. The practical cost of implementing a restricted judicial discretion is high enough to counter most proposals, at least at this stage in New Zealand's judicial history. Having a restricted judicial discretion for the onerous contract cases would undermine the well-established nature of the doctrine of frustration. Moreover, overseas Courts have shown a strong trend against modifying the contract in onerous cases. Clearly, in common law and continental jurisdictions, the core purpose of the contract is to allocate risk. Additionally, judges are not qualified to deal with these particular questions of equitable distribution; particularly in complex long-term commercial contracts, specialist training in accountancy and economics would be requisite. Theoretically a judicial discretion would successfully soften the doctrine's "all or nothing" nature, but practically its benefits would be outweighed by the uncertainties it creates.

A Future Developments to Consider

This being said, the law is clearly in an unsatisfactory state and therefore requires some form of alteration. The "all or nothing" nature of frustration remains distant from the expectations of commercial parties engaged in complex transactions. In particular, long-term commercial contracts by their nature demand flexibility. Business people are often more concerned with maintaining cordial business relations than with the painstaking exactitude of the common law rules. The law should endeavour to reflect this reality. Any alteration to the law must also reflect the ever-present need for certainty of dealing. It is submitted that a judicial discretion to refer matters to arbitration is a useful starting point. This would keep the contract away from judicial interference while encouraging the parties to maintain their relationship. Arbitration is not a complete solution since the parties may fail to reach consensus. The other adjustment to the law which is necessary is to impose an obligation of good faith on parties to contracts that turn onerous after their creation. With clear guidelines, an obligation of good faith could potentially solve a great many onerous cases in a more equitable manner, while only invoking discretion rarely or perhaps only for damages, as damages do not involve modifying the contract. This would leave the doctrine of frustration unchanged. Given the reluctance of New Zealand Courts to use good faith in other areas of contract law, using it in the rare onerous contract cases may be a good starting point to test its efficacy for other forms of commercial dealing in the New Zealand context.

No Soul to Damn? Revisiting the Case for Corporate Manslaughter in New Zealand

Mitchell Spence*

Currently a corporation cannot be convicted of manslaughter in New Zealand. Increasingly, both in light of legislation passed in cognate jurisdictions and several recent industrial disasters, the distinction demarcated between individuals and corporations seems out of touch.

Taking as its focus the Report of the Independent Taskforce on Workplace Health and Safety (2013), this article considers the above issues, concluding that the offence's alignment with fundamental criminal law principles makes a strong case for its introduction in New Zealand. Additionally, following a review of cognate jurisdictions and the findings of the Taskforce, it concludes that a more comprehensive set of recommendations, particularly consideration of the 'corporate culture' model of liability developed abroad, was absent in the Taskforce's conclusions and necessary in any future discussions of reform.

Recent high profile events have revealed an abject failure in the operation of New Zealand's legal regime for workplace health and safety. In addition to the well-publicised mining disaster at Pike River in 2010,[1] the collapse of the Christchurch Television building (CTV) during the February 2011 earthquake and a recurring spate of fatalities within the forestry industry has brought the issue of deaths in industry and employment sharply into the public consciousness. Concurrently, a discourse has emerged calling for an increased focus on higher penalties for what is a perceived culture of negligence among numerous New Zealand corporations.

Central in much of the commentary around this issue have been calls for the introduction of an offence of corporate manslaughter, a charge that remains curiously absent from our law. Organisations such as the New Zealand Council of Trade Unions have argued vehemently for the enactment of such charges, in order to more appropriately lay blame for deaths that occur in an industrial or corporate context.[2] Such a development would bring New Zealand to par with several other commonwealth jurisdictions that have embraced the concept of criminal liability for deaths at the hands of corporations. The most significant recent development in this

---

* BA/LLB(Hons) student at Victoria University of Wellington. He would like to thank Professor ATH Smith for his invaluable advice and supervision in writing this article.

[1] See generally Rebecca Macfie *Tragedy at Pike River Mine – how and why 29 men died* (Awa Press, Wellington, 2013).

[2] New Zealand Council of Trade Unions "Submission to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2014" at [S.93]. See also Sarah-Lee Stead and Nura Taefi "Should New Zealand Introduce Corporate Manslaughter?" *ISN Magazine* (New Zealand, July 2012) at 22.

respect was in the United Kingdom, where the Corporate Manslaughter and Corporate Homicide Act (CMCHA) was enacted in 2007.[3]

Against this background, the Independent Taskforce on Workplace Health and Safety was convened and published a report in 2013 assessing the efficacy and suitability of our current legal mechanisms in this area.[4] In the course of the widespread review it conducted regarding industrial health and safety, it sought in part to track the development of offences of corporate manslaughter in other jurisdictions and assess the potentiality of replicating these laws in New Zealand. The Taskforce's key recommendations for addressing offending were the strengthening of occupational health and safety laws and the extension of the existing law of manslaughter to corporations.[5] Whilst the first of these objectives is on the path to being addressed through the Health and Safety Reform Bill 2014,[6] recent remarks by the Prime Minister appear to have put the issue of corporate manslaughter to rest once again.[7]

The aims of this article are twofold. Following a review of the current state of the law in Part I, Part II aims to consider afresh the case for corporate manslaughter in contemporary New Zealand. The author concludes that the offence's consistency with the principles of deterrence and denunciation in the criminal law and the persistence of industrial related harms warrants criminal sanction in the form of a manslaughter charge.

This article will then examine the Taskforce's report, as well as set forth the author's own view of the most appropriate aspects of any potential reform. In Part III, this article analyses and critiques the recommendations advanced by the Taskforce, arguing principally that they fail to engage with the inherent complexity of holding corporations accountable through criminal law mechanisms. Part IV discusses an emergent 'corporate culture' approach to attribution of corporate liability, concluding that, with sufficiently clear legislative indicia, this ostensibly nebulous concept may provide an effective method of attribution.

I Corporate Criminal Liability

A The 'Identification' Doctrine

Historically, the common law was hesitant to recognise the notion of a corporate body having a conscience sufficiently autonomous to warrant criminal punishment. The

---

[3] Corporate Manslaughter and Corporate Homicide Act 2007 (UK).
[4] "The Report of the Independent Taskforce on Workplace Health and Safety" (April 2013) Independent Taskforce on Workplace Health and Safety <hstaskforce.govt.nz>.
[5] Independent Taskforce on Workplace Health and Safety, above n 4, at [386].
[6] Health and Safety Reform Bill 2014 (192–1).
[7] Patrice Dougan "PM: Corporate manslaughter law 'unlikely'" *The New Zealand Herald* (Auckland, 3 December 2013).

traditional thinking, which has been attributed to Baron Edward Thurlow, was that such bodies had "no soul to be damned, and no body to be kicked."[8] However, there now exists a rebuttable presumption that criminal offences apply directly, not vicariously, to corporate bodies, unless the language of the relevant offence suggests otherwise.[9]

The settled norm in the imputation of criminal liability to corporations is the 'identification' doctrine, which requires that a single individual, acting as a 'directing mind and will', as distinct from the 'hands' of the company in the wider workforce, is identified as having performed the requisite elements of the offence.[10] The House of Lords in *Tesco Supermarkets Ltd v Nattrass*, the authoritative case on this issue, articulated the following central principle:[11]

> [T]he person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the *persona* of the company, within his appropriate sphere, and his mind is the mind of the company.

This individual must have personally committed the crime in question in order for liability to be attributed to the company.[12]

It has long been considered that the identification process yields unsatisfactory results, with Celia Wells writing that the model's "concentration on the misdeeds of managerial officers ignores the reality of corporate decision making."[13] Indeed, in all but the smallest of companies, layers of authority serve to divorce the senior management from the day-to-day workings of the organisation, rendering the task of identifying such an individual virtually impossible. Arising out of these concerns, a model of 'aggregation' has been suggested to remedy the shortfalls of this focus on the location of a culpable individual officer. Such a system would introduce liability where two or more officers perform acts or omissions that, if carried out by one of them, would ordinarily lead to the personal liability of that officer. The conduct of this totality of individuals is aggregated to attach to the corporate body itself. However, common law courts have given strong indication that they do not consider it appropriate to alter the basis of liability in this way, such as in *Attorney General's*

---

[8] Richard Card *Card Cross and Jones Criminal Law* (20th ed, Oxford University Press, Oxford, 2012) at [18.19].
[9] AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 220.
[10] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) at 713.
[11] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL) at 170.
[12] At 170.
[13] Celia Wells *Corporations and Criminal Responsibility* (Oxford, Clarendon Press, 1993) at 132.

Reference (No 2 of 1999) where the identification doctrine was affirmed as the established and correct principle.[14]

Notably, the judgment of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* put forward a substantially more *ad hoc* method of attribution, grounded in statutory interpretation. Lord Hoffmann was of the view that:[15]

> [T]he Court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

While this approach found favour with the New Zealand Court of Appeal in *Linework Ltd v Department of Labour*, [16] it is clear that the orthodox identification doctrine maintains a strong hold in spite of Lord Hoffmann's seemingly transformative ruling.[17] While Lord Hoffmann's test might appear to be at odds with identification principles, scholars are of the view that the *Meridian* approach does not purport to overturn the traditional doctrine, but supplements it with a "principle of allegiance to the purpose of the statute" where the circumstances require.[18] The default rules continue to be based on the location of a "directing mind and will."[19]

In seeking to provide a principled basis for attributing blame to the corporate body, Andrew Ashworth writes that the trend in the development of corporate liability rules "has been to attempt to fit corporate liability into the existing structure rather than to consider its implications afresh."[20] Although the criminal law was engineered overwhelmingly to ascertain the liability of individuals, a *de novo*, first principles approach to the implications of corporate liability has not taken place. It is this confused basis on which the principles of corporate liability lie that informs much of the debate as to its future.

---

[14] *Attorney-General's Reference (No 2 of 1999)* [2000] 2 Cr App R 207 (CA) at 218 per Rose LJ.
[15] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 12–13.
[16] *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA) at [12].
[17] *St Regis Paper Company Ltd v R* [2011] EWCA Crim 2527 at [12].
[18] Simester and Brookbanks, above n 9, at 228.
[19] At 228.
[20] Andrew Ashworth and Jeremy Hodder *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013) at 147.

B Corporate Manslaughter: the Current Position

1 United Kingdom

Prior to the introduction of its present statute, the common law of the United Kingdom had warmed to the idea of extending the application of the offence of manslaughter to corporate bodies. Although accounts differ as to the exact genesis of the principle, the unreported 1965 case of *R v Northern Strip Mining Construction Co Ltd* is often touted as the earliest indication of an assent to prosecuting corporate manslaughter at common law.[21] In any event, by 1969 scholars accepted that "it now seems clear that corporations may be liable for manslaughter."[22] However, conviction for the common law offence of manslaughter by gross negligence was still dependent on attributing liability under the identification doctrine, a hurdle that resulted in a very limited number of successful prosecutions.[23] One salient example, the capsizing of the Herald of Free Enterprises ferry in 1987, caused the death of nearly 200 passengers resulting from the failure of members of three employees of mixed seniority to close and check the ship's bow doors.[24] A Judicial Inquiry into the disaster led the wreck commissioner, Mr Justice Sheen, to reach the damning verdict that "from top to bottom the body corporate was infected with the disease of sloppiness."[25] However, Bingham LJ, reiterating the identification doctrine, ruled that manslaughter could not be proved.[26] The resulting legislation, the CMCHA, was intended as a corrective to the dire state of affairs in which instances such as the above went without punishment.

The product of repeated calls for reform dating back to 1996,[27] the CMCHA served to introduce an offence of manslaughter distinct from the existing common law offence, grounded primarily in the law of negligence. The new offence provides that an organisation will be guilty if it causes a person's death in circumstances of a gross breach of a duty of care to which the defendant company owed to the victim.[28] Additionally, the way in which the company's activities are managed or organised by its senior management must form a *substantial element* of the breach.[29] Such has been termed a "managerial fault" model, the purpose of which being that "liability for the

---

[21] *R v Northern Strip Mining Construction Co Ltd The Times* (United Kingdom, 2, 4 and 5 February 1965) as cited in Gary Slapper "Corporate Manslaughter: An Examination of the Determinants of Prosecutorial Policy" (1993) 2 Social and Legal Studies 423 at 424.
[22] LH Leigh *The Criminal Liability of Corporations in English Law* (Widenfield and Nicolson, London, 1969) at 59.
[23] Andrea Oates *Tolley's Corporate Manslaughter and Homicide: A guide to compliance* (LexisNexis, London, 2008) at 7.
[24] Amanda Pinto and Martin Evans *Corporate Criminal Liability* (3rd ed, Sweet and Maxwell, London, 2003) at 220.
[25] Justice Sheen "MV Herald of Free Enterprise report of Court no 8074 Formal Investigation" (Department of Transport (UK), London, 1987) at 14.
[26] *R v P&O Ferries (Dover) Ltd* [1991] 93 Cr App R 72; [1991] Crim LR 695 (CA) at 84.
[27] See generally Law Commission (UK) "Legislating the Criminal Code: Involuntary Manslaughter" (5 March 1996) <www.gov.uk>.
[28] Corporate Manslaughter and Corporate Homicide Act, s 1.
[29] Section 1(3).

new offence depends on a finding of gross negligence in the way in which the activities of the organization are run."[30] A finding of these elements creates prima facie liability under the Act to an unlimited fine, a remedial order and/or a publicity order, provided that the defendant cannot establish one of the Act's many exceptions.[31] This development was welcomed among legal academics, and the "managerial fault" approach to liability has been heralded as "breaking new conceptual ground."[32] The question of whether this legislation has truly been apt in prosecuting divergent behaviour will be considered in Part III of this article.

2 New Zealand

A corporation may not be convicted of manslaughter in New Zealand. Whilst a *person* is designated in the Crimes Act as referring to both natural and legal persons,[33] the language of s 158 limits the ambit of a potential charge of homicide to the "killing of a *human being* by another."[34] The verdict reached in *R v Murray Wright Ltd* unequivocally confirmed that the "human being" requirement prevents a company from being liable, as a principal, for homicide.[35] At a minimum, this element of s 158 would require amendment to the term *person* in order for a manslaughter charge to be brought against a corporation. However, this does not deny the ability of a corporate body to be liable as a secondary party to a homicide committed by an individual.[36] The relevant Crimes Act provision governing the ambit of secondary participation, s 66, does not contain the same language of a "human being".[37]

II The Case for Corporate Manslaughter

A Principles and Policies of the Criminal Law

Many of the fundamental principles of the criminal law would arguably be well served by the introduction of a charge of corporate manslaughter. Principally, conviction for an offence of manslaughter, as opposed to a prosecution under health and safety legislation, would more adequately reflect community outrage. Such is evident in the burgeoning calls for stricter penalties for corporate offending. Widespread dissatisfaction with the outcome of attempts to hold companies and the

---

[30] Ministry of Justice "A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007, Explanatory Notes" (2007) at [14].
[31] Corporate Manslaughter and Corporate Homicide Act, ss 3(1)-7(1). Exceptions to the CMCHA include public policy decisions and instances in relation to military activities, the police and emergency services.
[32] AP Simester and GR Sullivan *Criminal Law Theory and Doctrine* (4th ed, Hart Publishing, Oxford 2010) at 282.
[33] Crimes Act 1961, s 2.
[34] Section 158 (emphasis added).
[35] *R v Murray Wright Ltd* [1970] NZLR 476 (CA) at 480.
[36] Simester and Brookbanks, above n 9, at 221.
[37] Crimes Act 1961, s 66.

individuals within them to account, including the decision not to prosecute Pike River manager Peter Whittall,[38] has only served to exacerbate this sense of disillusionment with the potency of our current legal armoury. Such public disquiet provides cause for considering the "fair labelling" principle of the criminal law, which holds that offences should be "subdivided and labelled so as to represent fairly the nature and magnitude of law-breaking."[39] This principle does not exist merely to satiate public outrage, but is based on the value that "where people reasonably regard two types of conduct as different, the law should try to reflect that difference."[40]

The criminal stature of a manslaughter charge arguably becomes more desirable in the context of our current regime for the correction of health and safety malfeasance, the Health and Safety in Employment Act 1992.[41] Breaches of this legislation are considered 'regulatory offences' which, although carrying penalty, fall victim to a perceived "'real' crime–'quasi' crime distinction."[42] Manslaughter, a real criminal offence of serious gravity, would provide a greater avenue for expressing public censure and condemnation. Whether or not such a distinction is valid, there is something to be said for classifying corporate behaviour causing death as manslaughter in order to more adequately reflect its seriousness, rather than falling under the 'regulatory' sphere of the criminal law.

Intuitively, the 'stigma' attaching to a manslaughter charge, in conjunction with higher penalties, would work to satisfy the deterrence aims of the criminal law. However, one compelling argument weighing against this appearance of harmony with fundamental principles is a concern that a corporate manslaughter charge might merely create a semblance of stricter penalties whilst the bulk of deterrence is realised by the health and safety compliance regime. In effect, it would be tantamount to a hollow attempt at "penal populism."[43] Should the Health and Safety Reform Bill currently before Parliament succeed in establishing a more effective compliance and penalty regime, the further introduction of a corporate manslaughter charge in New Zealand would likely face similar charges of futility

It is the author's view that the justification for corporate manslaughter remains in spite of this development. The new offences contained in the Bill before the House will not penalise deaths but merely exposure to the *risk* of death.[44] While there would

---

[38] Ministry of Business, Innovation and Employment "Charges against Peter Whittall not proceeding" (press release, 12 December 2013). See also Rebecca Macfie, above n 1, at 248.
[39] Ashworth, above n 19, at 77.
[40] At 77.
[41] Health and Safety in Employment Act 1992, ss 49-56.
[42] Wells, above n 12, at 8.
[43] See generally John Pratt and Marie Clark "Penal Populism in New Zealand" (2005) 7 Punishment and Society 303.
[44] Proposed offences under the Health and Safety Reform Bill include reckless conduct in respect of health and safety duty (cl 42), failing to comply with a health and safety duty that exposes and individual to the risk of death or serious injury or illness (cl 43) and failing to comply with a health and safety duty (cl 44).

undoubtedly be a degree of overlap between the behaviour examined under both categories of offences, the focus remains on different harms and outcomes. The justification for a corporate manslaughter indictment, if only for symbolic reasons, remains intact.

Submissions made during the legislative passage of the Health and Safety Bill also indicate a view in some quarters that the introduction of corporate manslaughter is still necessary, with the Council of Trade Unions criticising the Bill for not going far enough in its punishment of negligent organisations.[45] The lack of sanction currently available to address the dangerous behaviour found in recent years reflects how patent the need for an offence of this nature is.

B New Zealand: a Commonwealth Anomaly

New Zealand's lack of an offence of corporate manslaughter puts it at odds with developments in many of the jurisdictions to which our legal system is attentive, particularly in light of the CMCHA. In addition, New Zealand remains firmly grounded in the common law doctrine of identification, where many other commonwealth jurisdictions have sought statutory reform of these rules, whether pertaining to a specific manslaughter offence or rules of general application in the criminal law. Notably, Canada amended its corporate liability rules in 2003, and, although not equipped with a charge of corporate manslaughter, it has attempted to make prosecutions against corporations easier by introducing an offence of causing death by criminal negligence.[46] Australia similarly sought to change the generic rules of corporate liability at a federal level, albeit in a different manner.[47] Although other states have not yet followed its lead, the Australian Capital Territory (ACT) enacted an offence of Industrial Manslaughter in 2003 where an employer or senior officer causes the death of a worker in the course of employment.[48]

Notwithstanding the question of whether or not these offences are in fact effective, New Zealand appears comparatively immobile in its treatment of industrial and workplace related fatalities.

---

[45] New Zealand Council of Trade Unions, above n 2. See also Radio New Zealand "Safety Reforms don't go Far Enough, MPs Told" (2014) <www.radionz.co.nz>.
[46] Criminal Code RSC 1985 c C–46, ss 22.1–22.2. See Part III for a fuller discussion of Canada's corporate liability rules.
[47] Criminal Code Act 1995 (Cth), Part 2.5. See Part IV for fuller discussion.
[48] Crimes Act 1900 (ACT), ss 49D–49E.

III The Report of the Independent Taskforce on Workplace Health and Safety

The Taskforce was established in June 2012, on the occasion of the 20 year anniversary of the Health and Safety in Employment Act 1982. It was established with a view to undertaking a "strategic review of whether the New Zealand workplace health and safety system remains fit for purpose".[49] The report of the Royal Commission on the Pike River Coal Mine Tragedy, released that September, had already taken the view that consideration should be given, among a full spectrum of health and safety reform proposals, to the introduction of an offence of corporate manslaughter, a call of which the Taskforce took heed.[50] The resultant report undertook to examine the current state of the law internationally as regards corporate manslaughter, as well as setting out their view of the approach New Zealand should take. It provides perhaps the most holistic and comprehensive survey of issues pertaining to health and safety law in New Zealand. Accordingly, the recommendations made by the Taskforce would likely be salient to any concrete proposals for reform, should they arise in the future. Scrutiny of the Taskforce's findings in respect of corporate manslaughter is thus valid and important.

The principal argument made within the report was that changes in the common law rules of the attribution of corporate criminal liability, applicable to all offences, was of primary importance for New Zealand and that, from these changes, the extension of the general law of manslaughter to corporations would become feasible. Changes to the rules of attribution were seen as requiring the implementation of two key measures: (a) allowing the attribution of criminal liability to a corporation as a result of the acts and omissions of a greater range of officers and employees; and (b) the introduction of a system of aggregated criminal liability for the acts and omissions of two or more officers.[51]

This article argues that the above recommendations fail to give adequate consideration to the full extent of the models developed in cognate jurisdictions. This is particularly evident in the total lack of engagement with the concept of 'corporate culture' as an emergent basis for the attribution of liability to corporations that has developed abroad.[52] As a result, the Taskforce's proposal should be treated as a conservative statement of the reform options available. However, the author acknowledges that this perceived lack of depth may be due to time constraints, as the

---

[49] Independent Taskforce on Workplace Health and Safety "Terms of Reference for the Independent Taskforce undertaking the Strategic Review of the Workplace Health and Safety System" (2012) <http://hstaskforce.govt.nz>.
[50] Royal Commission on the Pike River Coal Mine Tragedy *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (2012) vol 2 at 310.
[51] Independent Taskforce on Workplace Health and Safety, above n 4, at [382].
[52] 'Corporate culture' will be examined in Part IV.

corporate manslaughter section formed only a small part of the Taskforce's report, totalling only three to four pages.

A Liability for the Acts and Omissions of a Greater Range of Officers

The Taskforce directed strong criticism at the identification doctrine of attribution, particularly in its requirement that the offending individual be a "directing mind and will" of the corporate body. This was cited as the predominant reason why criminal prosecutions against corporations, in New Zealand and beyond, were seen as unlikely to succeed. In order to remedy this shortcoming, the Taskforce considered that, provided the individuals concerned were acting within the scope of their authority, corporate criminal liability should extend to the acts and omissions of a "greater range of officers."[53]

It is, of course, hard to determine what degree of extension was meant by the phrase "greater range of officers" as the Taskforce did not see it necessary to expand on their conclusions. However, the Taskforce did refer with apparent approval to the terminology adopted in the Canadian Criminal Code as one way to structure corporate liability rules so as to relax the stringent requirements of the identification doctrine.[54] As a result of their familiar dissatisfaction with the workings of the existing rules of attribution, statutory reform took place in Canada through an amendment to the Code in 2003. Of note within such reforms was the use of the term "senior officer". Such officers play a central role in the attribution of liability to corporations for offences of negligence and are defined within the Code as a: [55]

> …representative who plays an important role in the establishment of an organisation's policies or is responsible for managing an important aspect of the organisation's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

Although these officers would appear to refer to the similar narrow class of individuals considered a "directing mind and will" under the previous doctrine, explanations of the Bill by the Canadian Department of Justice maintain that the Code's focus is "on the function of the individual, not any particular title."[56]

Although the case law concerning these adaptions to the Code is limited, the recent judgment in *R v Metron Construction Corp* gives promising signals that the Courts have interpreted the concept of a "senior officer" as widening the basis of attributing liability beyond a small cache of upper–level management.[57] In that case, three

---

[53] Independent Taskforce on Workplace Health and Safety, above n 4, at [382].
[54] At [381].
[55] Criminal Code 1985 (Canada), above n 46, s 2.
[56] Department of Justice (Canada) "Criminal Liability of Organizations – a Plain Language Guide to Bill C–45" (2003) <www.justice.gc.ca> at 5.
[57] *R v Metron Construction Corp* 2012 ONCJ 6568.

employees of the defendant construction company fell to their deaths from a swing stage platform while working to restore a high-rise building. The platform was not properly constructed and collapsed under the weight of six men in gross excess of the platform's weight capacity. The site supervisor, Mr Fazilov, permitted this overabundance of workers on the platform, with the additional knowledge that they were under the influence of drugs at the time. At trial, Bigelow J saw no reason why Fazilov could not be classed as a senior officer and expressed that "these changes in the criminal law… clearly extends the attribution of… corporate criminal liability to the actions of midlevel managers."[58]

Section 22.1 of the Code, which establishes the Canadian approach to liability for crimes of negligence, also differs critically from the identification doctrine in that these senior officers need not have personally committed the offence, but must exhibit a *marked* departure from the standard of care that, in the circumstances, could reasonably be expected to prevent any *representative* of the organisation from being a party to the offence.[59] In essence, senior officers owe a duty not to allow other representatives to commit the unlawful acts or omissions due to their own want of care. Colvin writes that the "focus on senior personnel has moved away from their own conduct and onto the quality of their supervision of other persons."[60] Where the traditional identification doctrine would require the officer to be found personally guilty, the Code would allow liability where any representative or representatives[61] commit the offence, provided they were unsupervised to a marked degree by a relevant senior officer.

It can be gleaned from the amendments made to the Code that the location of a senior officer was to be based on authority in real terms, rather than a limitation to a specific class of officers with titles of formal seniority.[62] It may well be that this facet of the Code imports some of the problems that were levelled at the approach taken by Lord Hoffmann in *Meridian*. Such an approach requires the judge to make an assessment of whether the offending actor was intended, due to the policy and language of the offence, as a relevant directing mind for attribution of liability to the company. Seemingly, this avoids a fixed determination that only a certain class of management is attributable to the company. Indeed, one of the pertinent considerations when assessing liability on the basis of the *Meridian* approach is whether the individual concerned had practical or effective authority.[63] Similarly, s 22.1 merely requires that the senior officer play a significant role in policy and/or management, rather than a fixed determination based on the title the offending individual holds.

---

[58] At [15].
[59] Criminal Code 1985 (Canada), above n 46, s 22.1. A "representative" is defined in s 2 of the Code as a "director, partner, employee, member, agent or contractor of the organization".
[60] Eric Colvin and Sanjeev Anand *Principles of Criminal Law* (3rd ed, Thomson, Toronto 2007) at 126.
[61] The Code also allows for a system of aggregated liability. See ss 22.1(a)(ii).
[62] Department of Justice (Canada), above n 56, at 5.
[63] *Linework Ltd v Department of Labour,* above n 15*,* at [12].

Criticism of the approach taken by Lord Hoffmann has been forthcoming by academic writers, mostly for reasons of the apparent inconsistencies such an approach might result in, with the "greater uncertainty regarding who will be deemed the relevant person within the corporate hierarchy… likely to lead to difficulties."[64] This is particularly true for corporations, which require clarity from judicial rulings in order to create policies that can provide a meaningful method to ensure compliance with the law.

By way of comparison, the CMCHA's "senior management" test could be said to mirror the language of "senior officer" present in the Canadian Code.[65] In a similar vein to the interpretation of "senior officer" in the Code, the group deemed to be "senior management" is defined within the Act as the persons who play a significant role in:[66]

> (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or;
> (ii) the actual managing or organising of the whole or a substantial part of those activities.

The inclusion of persons tasked with *actual* management or organisation might reflect the Canadian interpretation of persons wielding actual authority, potentially giving scope for the courts to look below a director and executive level in interpreting "senior management" to officers more aligned with the "hands" of the corporation. But, as will be made clear in Part IV of this article, a body of case law has not developed in the United Kingdom concerning this offence so as to test this hypothesis.

The CMCHA could comparatively be said to suffer from a lack of clarity as to the conduct that will be required to bring a corporation's senior management, however interpreted, within the purview of the Act. Section 22.1 of the Code establishes that, at a minimum, senior officers must have been grossly negligent in failing to prevent other representatives from committing the offence. By contrast, the CMCHA states only that the way in which these persons manage the organisation's activities should play a substantial role in the breach of the duty owed.

Additionally, it is currently unclear what a *substantial* role might even entail. Early perceptions of the legislation were of the view that substantial was to mean "more than trivial", and in so doing meant that senior managers would not have to be solely responsible for the breach of duty.[67] It is submitted that, with respect, this is a strained

---

[64] Meaghan Wilkinson "Corporate Criminal Liability. The Move Towards Recognising Genuine Corporate Fault" (2003) 9 Canta LR 142 at 151.
[65] Corporate Manslaughter and Corporate Homicide Act, s 1(3).
[66] Section 1(4)(c).
[67] Oates, above n 27, at 142.

interpretation of the provision, as any plain reading of the language of a *substantial* element would suggest that a high threshold of conduct is required.

Perhaps symptomatic of the lack of time in which coherent legal principles have been able to develop, the law appears to be at a loss as to an effective way to capture corporate liability in terms of the true nature of the bodies' activities. The emphasis on officers at a senior level of management likely reflects the justified apprehension that, in fixing the threshold of officers too low, bottom-rung employees, who by and large do not perform meaningful work and are not influential enough to truly embody the company, will be treated as suitable to pin serious criminal liability to their employer. However, in so doing, these models may replicate the same focus on individuals that were the immediate cause of their reform.

B Aggregation

The Taskforce was of the view that changes in the general rules of corporate liability must provide for the ability to attribute where "two or more individuals of the required seniority… engaged in conduct that, if it had been the conduct of only one of them, would have made them personally liable."[68] It is beyond doubt that this would require statutory enactment, as the common law has not felt able to so radically alter the basis of liability.[69]

Changing the basis of corporate liability in this way would harmonise New Zealand practice with a vast swathe of academic commentary in support of aggregation. Celia Wells writes that it would be advantageous to move away from the "idea, implicit in both the vicarious and *alter ego* principles, that a corporation can only be liable through the unlawful activities of one particular officer or worker."[70] Perhaps influenced by this academic appraisal, the concept of aggregation has also formed an integral role in cognate corporate liability laws. Section 22.1 of the Canadian Code provides that an organisation is party to an offence of negligence if: [71]

> Two or more of its representatives engaged in conduct… such that, if it had been the conduct of only one representative, that representative would have been a party to the offence.

Additionally, the CMCHA would appear to provide for aggregation in that the 'senior management' who must play a substantial role in the breach refers to the *persons* who play significant managerial roles, rather than the location of a singular officer.[72]

---

[68] Independent Taskforce on Workplace Health and Safety, above n 4, at [382].
[69] *Attorney General's Reference No. 2 of 1999*, above n 13, at 218 per Rose LJ.
[70] Wells, above n 12, at 132.
[71] Criminal Code (Canada), above n 46, s 22.1.
[72] Corporate Manslaughter and Corporate Homicide Act, s 1(3).

The pronouncements made by the Taskforce, although in support of the principle of aggregation, contain key differences to the approaches taken internationally. While the Taskforce's reasoning would aggregate liability where two officers *of the required seniority* commit the required acts, the Canadian Code stipulates that two or more *representatives* (rather than the analogous "senior officers") can be aggregated to constitute a liable organisation. The Taskforce's reasoning thus appears to still be grounded in concerns with a limited upper class of management, rather than taking an expansive view of corporate culpability as capable of stemming from a variety of levels of the corporate structure. Arguably, it is the "hands" of the corporation that are most likely to commit the acts catalysing a homicide.

In spite of the growing attention given to models of aggregation, the theoretical underpinnings of the concept are not unanimously championed among academics. Some consider it "not possible to artificially construct the *mens rea* in this way", being of the view that "two semi innocent states of mind cannot be added together to produce a guilty state of mind."[73]

A common justification for a system of aggregation is that the model captures instances of a "widespread pattern of negligence by its individual representatives [that] may amount to a more serious breach of its own duty of care."[74] However, the author is of the view that it would be wrong to presuppose that an aggregated system will deal wholly with *widespread* patterns among a large number of employees. The model, by its very description, would draw liability from the conduct of as few as two employees. While aggregation would adequately catch cases of widespread malfeasance where it can be said that all layers of the organization played a role in the offences committed, it may also impose liability in the situation where two wayward employees, subject to a lack of supervision, commit the relevant offence. It is doubtful whether this is conduct that we would instinctively liken to an organisation plagued by the "disease of sloppiness."[75]

It is submitted that, for these reasons, aggregation should not provide the fulcrum of any method of attributing criminal liability to a corporation. While a useful tool, it should be coupled with an assessment of the corporate body as a whole, so as to mitigate the risk of apportioning blame at companies when only a small number of representatives are privy to the offence.

C No Separate Offence of Corporate Manslaughter

Going against the grain of the reforms enacted in the United Kingdom and other commonwealth jurisdictions, the view of the Taskforce was that reform should come

---

[73] David Ormerod *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, New York, 2011) at [10.1.2.5].
[74] Colvin and Anand, above n 60, at 127.
[75] Justice Sheen, above n 29.

via the extension of the general law of manslaughter to corporations. Thus, while they were enthusiastic about a charge of some nature becoming part of our law, the Taskforce did not support the introduction of a separate statutory offence of corporate manslaughter, as has been the recent trend. This was justified primarily on the basis of the Taskforce's characterisation of the comparative offences in the United Kingdom and Canada as being of limited efficacy. The Taskforce concluded that the low rate of successful prosecutions of corporations for manslaughter was indicative of the hold of existing corporate liability rules, which "make it very difficult to convict a corporation for core Crimes Act offences."[76]

Further justification against an isolated change to the law of manslaughter is evident in the potential legal anomaly that would arise where the particular offence of corporate manslaughter would be adrift from the orthodox principles informing the general criminal liability of corporations. If recourse was made to a separate offence, framed to relieve the difficulties of establishing liability using the identification doctrine, the Taskforce rightly indicates that it "would end up making it easier to convict a corporation of manslaughter than of some other offence against a person".[77] In principle, the means of attributing corporate liability should apply consistently to any offence that a corporation could conceivably commit. The specific harm of killing does not of itself warrant a distinct lower threshold of liability, and offences such as "injuring by unlawful act" should also be relieved from the strictness of the identification doctrine.[78] The Taskforce's view was that changes at a general level to the rules of attribution were preferable for the coherent development of the law.

1 Is the CMCHA 2007 an effective means of attributing liability?

The Taskforce placed strong emphasis on what it considered to be a failure in the operation of the 2007 legislation. Indicative of this failure was, in the Taskforce's view, a low rate of prosecutions brought under the Act, all of which were "against small companies."[79] As a result, they were of the opinion that a model such as that developed in the United Kingdom should not be followed.[80] The emergent case law surrounding the offence, or lack thereof, supports this conclusion to some extent. The first successful indictment brought under the s 1 offence, *R v Costswold Geotechnical Holdings Ltd*, concerned the death of a geologist resulting from the collapse of an unsupported pit. The defendant was a small company in which the sole director, Mr Eaton, was easily classifiable as senior management.[81] There was, as a result, no question that Eaton had played a substantial role in the company's breach of duty and it seems likely that the director would have been identified as a directing mind.

---

[76] Independent Taskforce on Workplace Health and Safety, above n 4, at [379].
[77] At [380].
[78] Crimes Act 1961, s 190.
[79] Independent Taskforce on Workplace Health and Safety, above n 4, at [374].
[80] At [376].
[81] *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337, [2012] 1 Cr App R (S) 26 at [3].

Further charges were instigated against JMW Farm Ltd and Lion Steel Ltd, the latter of which was a company of larger size. However both pleaded guilty, thus avoiding the need to proceed to trial.[82] While the Taskforce's analysis of these cases as few and far between served to mischaracterise the operation of the Act as a failure, it is instead merely the case that a body of law surrounding the offence has not yet flourished.[83] This does not necessarily mean that the offence is ineffective.

Of critical importance to, and currently absent from, any analysis of the CMCHA is an exposition of how the mechanics of the offence will work in the courts. Issues such as how the judge will summarise a 'gross' breach in the context of corporate, rather than individual offending, and how the senior management test will unfold are the characteristics that make the offence unique and thus will provide the salient points in any discussion of whether we should adopt it.

In the author's view the Taskforce was premature in reaching its conclusion that the statutory approach of the United Kingdom is wholly inappropriate as a method of reform. As New Zealand has the benefit of time, with no proposals for corporate manslaughter at any substantive stage in the legislative process, we would do well to assess the continuing prosecutions under the Act as they come to light.

IV Alternative Reform Options

A Prosecuting Errant 'Corporate Culture'

Rather than a conclusion that the CMCHA 2007 is ineffective as a method of structuring a charge of corporate manslaughter, this article will argue that elements of the United Kingdom's offence have merit and warrant adoption, or, at the very least, consideration should New Zealand ever resolve to legislate for corporate manslaughter. Of particular note is its scope to evaluate "the way the organisation's activities were managed or carried out."[84] This element of the offence speaks to a concern with prosecuting a 'corporate culture' where, rather than assessing a corporation in terms of the acts of the individuals within it, the focus would turn to the corporation aggregate, inviting an assessment of the internal policies and processes of the company, as well as internal views about the importance of such structures. The virtues, or otherwise, of this model of liability were not canvassed in the Taskforce's report.

Support for attributing liability on this basis abounds in academic literature. A leading voice on this matter, Celia Wells, argues that "responsibility… can be found in the

---

[82] Jonathon Grimes "Corporate Manslaughter" *The Law Society Gazette* (London, 29 August 2012) <www.lawgazette.co.uk>.
[83] As at September 2015 there have been sixteen convictions for corporate manslaughter.
[84] Corporate Manslaughter and Corporate Homicide Act, s 1(3).

corporations structures themselves."[85] In a similar fashion, LH Leigh was of the view that the imputation of corporate liability "should depend not upon the status of the actor performing it, but on whether the crime represents a policy decision on the part of those in control of the corporation."[86] This concentration of matters of policy and process has led some to conclude that a culture–based approach to attribution might provide one method by which we can calibrate a corporate body's *intent*. They submit that these components of culture would give "evidence of corporate aims, intentions and knowledge of individuals within the corporation"; and such would be authoritative "because they have emerged from the decision making process recognised as authoritative within the corporate culture."[87]

A first principles assessment has led the author to the view that Sheen J struck at the heart of the harms that a corporate manslaughter charge should address when he lambasted the P&O Ferries Corporation for their affliction with the "disease of sloppiness."[88] Arguably, a culture-based model of liability is best placed to identify a truly blameworthy corporation in line with this fundamental notion.

This argument speaks to a wider discord articulated by Colvin between "nominalist" and "realist" theories of the corporate body. Where nominalist theories "view organizations as nothing more than collectivities of individuals" realist theories "assert that organizations have an existence that is, to some extent, independent of the existences of their members."[89] The Taskforce's recommendations, particularly aggregation, in truth fall prey to a *nominalist* conception of organisational personality that do not differ in any practical respect from the current identification doctrine. The extension of liability to a greater range of officers, while aimed to capture the entirety of activity within the corporation, would only give a realistic picture in the circumstance of officers from a range of levels within the corporation being at fault. Short of an affirmation of a corporate culture model, this would not prevent the same focus on the acts of individuals.

Parallel jurisdictions have embraced corporate culture as a doctrine of attribution. The Australian Criminal Code, in providing for corporate culture as a means of proving fault, defines the term as an "attitude, policy, rule, course of conduct or practice existing within the body corporate."[90] However, as the major criminal offences lie within the legislative territory of states, the potential benefits of such an amendment have not borne fruit. The Australian Capital Territory (ACT) was compelled to adopt this more holistic approach to corporate liability, although other states have not followed suit. The Territory adopted a corporate manslaughter offence, termed

---

[85] Wells, above n 12, at 130.
[86] Leigh, above n 26, at 126.
[87] Stewart Field and Nico Jorg "Corporate Manslaughter and Liability: Should we be Going Dutch?" (1991) Crim LR 156 at 159.
[88] Justice Sheen, above n 29.
[89] Colvin and Anand, above n 60, at 123.
[90] Criminal Code Act 1995 (Cth), s 12.3(6).

"Industrial Manslaughter", to be found in sections 49A–49E of the Crimes Act 1900 (ACT). [91] This is the only example of an offence of this nature within Australia and provides that an employer or senior officer of an employer (this may be an individual or a company) is guilty of an offence where its reckless or negligent conduct results in the death of an employee. More significantly, the general principles of corporate liability espoused in the Territory's Criminal Code 2002 allow for the attribution of fault if the corporation is found to have *authorized or permitted* the commission of the offence. Such can be established by: [92]

> (c) proving that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to noncompliance with the contravened law; or
>
> (d) proving that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law.

However, the Territory's small size and largely bureaucratic workforce means that judicial application of this 'corporate culture' model is extremely unlikely.[93] Without substantial business and industrial sectors, the potential reach of the territory's model remains unclear and untested. Furthermore, the evidential difficulties of pinpointing a corporation's culture has been a point of criticism and debate among scholars, as is the question of whether the corporation aggregate, or merely one offending section of the company, must have an errant culture in order to warrant criminal sanction.[94]

While the term 'corporate culture' might appear malleable and prone to ambiguity, it is submitted that this is not a foregone conclusion and that a workable legislative design of a corporate culture provision is possible. Firstly, as evidenced under the commonwealth code, the traditional links to the upper levels of a corporation's management persist. Questions of whether "authority" to perform the proscribed acts had been given, or was believed on reasonable grounds to have been given, by a senior manager are "relevant considerations" in determining whether or not such a culture exists.[95]

The author suggests that such considerations could be extended to a set of statutory indicators of a malfeasant corporate culture, whether for optional or mandatory consideration. These indicia could include the internal policies and processes of the firm, or lack thereof, as well as evidence of previous health and safety incidents or

---

[91] Crimes Act (ACT), ss 49A–E. Note that the ACT offence relates only to deaths that occur within the workplace.
[92] Criminal Code 2002 (ACT), s 51(2)(c)–(d).
[93] Des Taylor and Geraldine McKenzie "Staying Focused on the Big Picture: should Australia Legislate for Corporate Manslaughter Based on the UK Model?" (2013) 37 CLJ 99 at 11.
[94] Allens Arthur Robinson "'Corporate Culture' as a basis for the criminal liability of corporations" (prepared for the United Nations Representative of the Secretary-General on Human and Business, February 2008) at 17.
[95] Criminal Code (ACT), s 51(4).

investigations conducted by WorkSafe New Zealand.[96]

Lessons from the industrial disasters in New Zealand that have been the catalyst for this debate seem to suggest that the health and safety culture of the companies in question was highly relevant to the eventual tragedies. Inquiries into the Pike River disaster identified that the 'organisational culture' of the company put production before safety, and a criticism levelled at the senior management of the organisation was that they "pressed ahead when health and safety systems and risk assessment processes were inadequate."[97] This was characterised as a systemic shortfall and a 'cultural influence' of management, which permeated the organisation as a whole.[98] This would seem to confirm that there is a valid need to amend the organisational culture of companies so as to improve our health and safety record, and supports the case that it is the acts of the overarching entity, rather than one or a combination of individuals within it, that should principally be at issue in the context of a corporate manslaughter offence.

B Collateral Individual Liability

Section 1 of the CMCHA makes clear that only an *organisation*[99] can be liable for corporate manslaughter.[100] An individual cannot be liable for the offence, nor can they be tried as a secondary party.[101] Academics have voiced concern around this measure, arguing that, if they are sufficiently culpable, individual directors should also be made accountable on a separate basis for the outcome of the corporation's failings.[102] This is pertinent if reforms move the basis of corporate manslaughter away from the identification doctrine, where the locus of liability will no longer be an individually culpable "directing mind." Advice to the Taskforce regarding reform of our health and safety laws indicates that this issue would not arise. The creation of positive directors duties to mitigate Health and Safety risks in the current Bill were mooted in as "not mutually exclusive" to a corporate manslaughter enactment, and able to be enforced in conjunction with one another.[103] This parallel prosecution would ensure that all culpable parties are punished, while reflecting that these two notions of liability are, and should be, grounded on categorically distinct principles.

---

[96] The Crown Entity charged with the monitoring and enforcement of Health and Safety Legislation. See generally < http://www.business.govt.nz/worksafe>.
[97] Royal Commission on the Pike River Coal Mine Tragedy, above n 50, at 56.
[98] At 175.
[99] Organisations for the purposes of the CMCHA include Corporations (s 1(2)(a)), Government departments or other public bodies (s 1(2)(b)), a Police Force (s 1(2)(c)), and a partnership, trade union or employers' association that is an employer (s 1(2)(d)).
[100] Corporate Manslaughter and Corporate Homicide Act, s 1.
[101] Section 18.
[102] Taylor and McKenzie, above n 93, at 114.
[103] Ministry of Business, Innovation and Employment "Supporting Material for MBIE's presentation to the Independent Taskforce on Workplace Health and Safety" (27 November 2012) at 22 (Obtained under an Official Information Act 1982 Request to the Minister of Labour).

C Constructive Liability

One of the options under consideration when the Law Commission reported on corporate manslaughter in the United Kingdom was a form of constructive liability, whereby guilt for manslaughter would arise wherever a death occurred as a result of a breach of a health and safety offence. Such an approach was rejected, although committing a health and safety offence was imported as a relevant jury consideration regarding whether a "gross breach" of the duty under the Act occurred.[104] This model is closely analogous to the conventional 'unlawful act' permutation of the general law of manslaughter in New Zealand.[105]

There is an arguable case for this approach to liability. The Health and Safety in Employment Act imposes wider duties on employers "to ensure that no action or inaction of any employee while at work harms any other person",[106] making the scope of the duties owed under it applicable to any eventuation of a homicide at the hands of a corporation. The UK's hesitance to accommodate constructive manslaughter perhaps stems from the Law Commission's publication of disapproval with this type of liability throughout the general criminal law.[107] The same concerns do not appear to be present in New Zealand, so in the absence of any apparent advantages to one variation over another, consideration might also be lent to an enactment of this kind.

V Conclusion

It is clear that, aside from the continued prevalence of great harms at the hands of corporations in our society, the development of criminal sanctions on the part of many of our most comparable foreign jurisdictions warrants serious consideration of the need for an offence of corporate manslaughter. Given that the Taskforce additionally recognised the offence as desirable for New Zealand, this divergence from the commonwealth norm cannot, in the long term, be maintained.

The final recommendations reached by the Taskforce, namely that widespread general change to the common law rules of attribution was required, concurs with the weight of commonwealth thinking both in academic and legislative circles and was undoubtedly the correct conclusion. However, because the law in this area internationally is still in a state of infancy, it would be premature to take the Taskforce's recommendations as an exhaustive statement of the options available in New Zealand. Indeed, their report was not intended to be so.

If our elected representatives deem it appropriate for corporate manslaughter to be introduced into our legal system, the author is of the view that consideration should be

---

[104] Ormerod, above n 74, at [15.4.2.2].
[105] Crimes Act 1961, s 160(2)(a).
[106] Health and Safety of Employment Act 1992, s 15.
[107] Law Commission (UK), above n 35, at [5.14].

given to a fuller range of options for law reform. Any eventual reforms should not take a patchwork quilt approach, but consider afresh the underlying principles of corporate criminal liability. This will only come as a result of a longer conversation, not by enacting a stand-alone law of corporate manslaughter while leaving the bulk of our criminal law subject to its historical underpinnings of individual liability. Reform of corporate criminal liability principles should only come from the acceptance of a realist view that an organisation can have an existence, indeed 'soul', independent of the individuals within it.

Rape Myths and Invisible Crime: The Use of Actuarial Tools to Predict Sexual Recidivism

Anna Chalton*

This paper aims to show that the statistical tools currently used to predict risk in convicted sex offenders are based on a biased sample that renders them unreliable. It examines the profile of rape, including looking at rape that drops out of the criminal justice system before conviction. It then examines studies of the profile of rape in the general population. It looks at New Zealand sentencing and parole law. It examines the structure of the actuarial tools used by Corrections New Zealand to assess recidivism risk in sex offenders. It then compares the profile of reported rape, and the profile of offending established by studies of unreported rapists, to the risk factors identified in those actuarial tools. The analysis suggests that the actuarial tools are likely to further entrench the same factors that already wrongfully diminish the probability of conviction in many rape cases, because cases exhibiting those factors are more likely to be perceived as "low risk".

Finally, it suggests that with more research, actuarial tools could be used to counteract some of the factors associated with low reporting, prosecution and conviction rates. It argues that most of the issues with the actuarial tools currently in use are due to the use of offenders as a sample for establishing the tool. As an alternative, it suggests research on the population at large, which could be used to establish a more accurate risk scale. When combined with sufficient individualised information, such as psychologist interviews, this approach could present a reliable statistical profile, and when combined with individual assessment, could be a more useful predictive tool. That tool could then be used to focus the attention of the system on the subset of crime which is under-reported and under-prosecuted, but which still has a high reoffending rate. In this way, the tool could be used to compensate for bias in the criminal justice process.

Sexual crimes are difficult to investigate and prosecute. They are underreported, and subject to attrition throughout the criminal justice process.[1] Victims often decline to give evidence, or withdraw from the process.[2] It is difficult to prove beyond reasonable doubt the absence of reasonable belief in consent, because social factors

* The author would like to thank Fiona Ross-Taylor, for her proof-reading and support. Roger Marshall, for his help with the statistical aspects of this paper. Rachel Dunning, for checking my references. And Khylee Quince, for her excellent supervision.

[1] Bronwyn Morrison and others "The New Zealand Crime and Safety Survey: 2009 Main Findings Report" (Ministry of Justice, December 2010) at 46; Statistics New Zealand "Charges prosecuted by offence type" (2013) NZ.Stat <http://nzdotstat.stats.govt.nz>; Statistics New Zealand "Annual recorded offences for the latest calendar years (ANZSOC)" (2013) NZ.Stat <http://nzdotstat.stats.govt.nz>; Kathleen Daly and Brigitte Bouhours "Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries" (2010) 39 Crime & Just 565; Sue Triggs and others "Responding to sexual violence: attrition in the New Zealand criminal justice system" (Crime and Justice Research Centre, September 2009); Her Majesty's Crown Prosecution Services Inspectorate and Her Majesty's Inspectorate of Constabulary "Without Consent: A report on the joint review of the investigation and prosecution of rape offences" (HMIC, January 2007) at 34–37.

[2] Triggs and others, above n 1, at 47, 62 and 84; one in five cases charged did not proceed due to victim withdrawal.

combine to create widespread assumptions that rapists fit a certain profile: that some victims bring rape upon themselves; that only stranger rape is truly unavoidable; that lack of physical resistance or injury implies consent; or that "innocent" men often rape accidentally in party, date or relationship contexts. These myths influence police and juries despite directions to disregard them.[3]

Despite worldwide attempts at legislative reform, false distinctions between "real" and "other" rape also endure in some official publications and policies. For example, until 2013 the FBI kept full statistics for "forcible rape" as a subset of violent crime, but only arrest data for other kinds of rape, implying that other rape is less significant, or nonviolent.[4] The Conflict Tactics Scale, used to determine the prevalence of abuse in relationships, considers some types of sexual coercion "minor" and others "major".[5] This categorisation correlates with rape myths: for example, rape by coercion is "minor" while if physical force is applied it is "major".[6] These distinctions ignore the fact that much sexual offending occurs between people who know each other, drawing on existing relationships and power dynamics; and the fact that sexual violation is an inherently violent crime because it always involves violation of the victim's bodily autonomy. The victim may even see "non-violent" rape committed using coercion, threats, or stupefying substances as a greater violation, because it involves the destruction of trust in a person, a sense of safety in a location, or in the case of substances, the victim's control over his or her own mind.

Even when these stereotypes are addressed, they are often replaced with a legal approach incompatible with sexual violence prevention. The underpinnings of criminal and sentencing law serve a different paradigm of violence, one where crimes are relatively reliably reported, and reporting does not carry serious social consequences for most victims. The mixed objectives of the criminal law (punishment, treatment, and prevention) are contradictory; a problem that is particularly acute regarding sexual violence, as punishment of "more severe" sexual crime may push crime with an equal or greater prevalence or likelihood of reoffending to the lower end of the scale. Additionally, accurate evaluation of some factors taken into account in sentencing requires a representative sample of offenders for comparison. Sexual crime has a very low reporting rate, and a non-representative sample is reported, making accurate comparisons of certain factors difficult. An important example is the assessment of recidivism rates, which is critical at both sentencing and parole, often relying on actuarial tools formulated using samples

---

[3] Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299; Triggs and others, above n 1, at 80–84.
[4] FBI Criminal Justice Information Services Division "Crime in the United States 2012: Forcible Rape" <www.fbi.gov>.
[5] Murray A Straus and others "The Revised Conflict Tactics Scale (CTS2): Development and Preliminary Psychometric Data" (1996) 17 Journal of Family Issues 283.
[6] At 309.

composed of convicted offenders. There is, however, research available on unreported and unconvicted crime that could compensate for the biased sample.

Due to the difficulty and scarcity of empirical research into sexual crime, and the individualised nature of sentencing, I take a qualitative rather than quantitative approach. I focus on male perpetration of rape against female victims because that is statistically the most common iteration of rape, and the most widely researched. However, many of my conclusions will apply to other types of rape, such as rape against male victims and, to a lesser extent, rape of minors.[7] In terms of research, I rely on only a few studies, but they have been selected for their comprehensive, representative nature, and incorporation of previous research. I use the term "invisible crime" to refer to crime that is systematically under-reported, under-prosecuted, and under-convicted. Invisible crime is ignored in official risk calculation; invisible crime that never reaches trial is also ignored in crime statistics and even policy.

I Sentencing for Sexual Crime

A Sentencing Guidance for Sexual Violation

New Zealand distinguishes between different types of sexual violation in name, although theoretically not in substance. Sexual violation by rape is unlawful sexual connection effected by the penetration of the victim's genitalia by the offender's penis.[8] Other unlawful sexual insertions or mouth-to-genital contact are sexual violation by unlawful sexual connection.[9] The same sections of the Crimes Act govern both types of sexual violation, and the statutory language is a mirror image so that the consent requirements are the same for both.[10] Both have the same maximum penalty of 20 years' imprisonment.[11] Theoretically, each type of sexual violation should be taken as seriously as the other.

The tariff case *R v AM (CA27/2009)* guides sentencing for sexual violation.[12] All sentencing is based on the particular circumstances of the offending, including the

---

[7] References to sexual assault, rape, or sexual violation should be read as referring to the offences covered by section 128 of the Crimes Act 1961. Terms will be used interchangeably. Victims should be assumed to be women aged 16 or older. While the principles the paper explores can be extrapolated to apply to bail, it will not be specifically addressed. Discussions of sentencing focus on bands 1 and 2 of the four bands promulgated by *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750, because bands 3 and 4 involve either significant additional violence, or sexual crime over a long period of time. This kind of severe, extended offending is substantively different to single instances of rape (or multiple instances of rape against different victims). Accordingly it will present different issues.
[8] Crimes Act 1961, s 128(2).
[9] Section 2.
[10] See s 128; see also s 128A, which applies to both types of sexual violation and clarifies that acquiescence does not amount to consent in some circumstances, such as where it is induced by threats, and that unconscious people are incapable of consent.
[11] Sections 128-129.
[12] *R v AM*, above n 7.

culpability of the offender and the impact of the offending on the victim.[13] In sentencing for sexual violation, the violence of the offending is relevant to the offender's culpability and the harm done to the victim. Despite noting that neither is "worse" than the other, *R v AM* prescribes different sentencing bands for sexual violation by rape and other forms of sexual violation, because sexual violation other than rape was seen to comprise a wider range of activity in terms of severity and culpability.[14] One set of bands ("the rape bands") deals with lead offences of rape, penile penetration of the mouth or anus, or violation using objects. Objects are included because their potential to cause physical injury makes them more analogous to rape than to other forms of unlawful sexual connection.[15] These bands range from 6-20 years.[16] The other set ("the USC bands") deals with lead offences of sexual violation by unlawful sexual connection other than those covered under the rape bands. Sentences range from 2-18 years.[17] The combination of factors was critical, so in sentencing, judges should not focus on the mode of penetration. Non-rape sexual violations could be more serious than rape, if they had the potential to inflict greater injury.[18] Serious digital penetration or forced oral sex could approach the sentences imposed for penile penetration or penetration with an object, though ultimately the lower effective maximum sentence indicates that the most serious rapes will be considered worse than the most serious unlawful sexual connection.[19]

Factors indicating increased culpability for both kinds of sexual violation include planning and premeditation; violence, detention and home invasion; vulnerability of the victim; harm to the victim; the presence of multiple offenders; the scale of offending (for example, multiple instances of offending, long-term victimisation or cruelty); multiple victims; breach of trust; and degree of violation.[20] Factors indicating decreased culpability include a mistaken and unreasonable belief in consent which is not grossly negligent (in contrast with cases where the offender knows there is no belief in consent), and the presence of consensual sexual activity immediately before the offending (depending on the timing and similarity of the prior activity, as well as other circumstances indicating culpability).[21] A prior relationship between the offender and the victim is not a mitigating factor.[22] The victim's wishes, which in practice usually involve calls for leniency, may be taken into account to some extent, although bearing in mind that rape is a public wrong, and considering always the risk that those wishes might reflect illegitimate social pressure. This concession was seen

---

[13] Sentencing Act 2002, s 8.
[14] *R v AM*, above n 7, at [36] and [65]–[75].
[15] At [65].
[16] At [90].
[17] At [113].
[18] At [70] and [73].
[19] At [76].
[20] At [37]–[52].
[21] At [53]–[54]; see also *R v Hill* CA94/02, 21 October 2002.
[22] At [61].

as reducing the risk that victims might fail to complain for fear of the imposition of a harsh sentence.[23]

B An Illustration of Rape Myths

R v AM takes into account the culpability of the individual offender and the harm to the individual victim, to the extent these can be discerned from the crime and surrounding circumstances. The court attempted to avoid entrenching rape myths, but some are still latent within the factors it listed. Certain aspects of the offence are treated as more important than others; arguably, those are based on generalisations about the nature of the crime. Perhaps more importantly, other elements said to be relevant to sentencing cater to legal orthodoxy at the expense of empirical justification.

Consistency and proportionality are privileged over public safety. For example, s 8 of the Sentencing Act 2002 designates consistency a principle of sentencing.[24] Prevention of reoffending is not a principle of sentencing, although previous convictions must be taken into account if they are numerous, similar, serious, recent, or relevant enough to be considered aggravating factors in respect of the conduct for which the offender is being sentenced.[25] The effect of this prioritisation of principles over practicalities, coupled with the difficulties of applying other preventive measures to sexual crime, is counterproductive from a public safety point of view. I contend that it is difficult, if not impossible, to adequately address the purposes or principles of sentencing if our understanding of rape is based on an account which omits invisible crime: although actuarial tools are not widely used at sentencing, the same misunderstandings which underpin them also undermine the robust application of the principles of sentencing.

R v AM was alert to the existence of rape myths. It avoided overtly blaming victims and reinforcing stereotypes of which "type" of rape was most serious. However, aspects of the guidelines nonetheless play into existing inequities and misconceptions. Such myths are problematic because they affect the criminal justice system's attitude to rape, reducing the chance that a victim to whom the myths apply will report a crime against her. Once a crime is reported, the myths may also affect the sentence initially given, which can have flow-on effects at parole. For example, a sentence of two years or less will lead to automatic release after half the sentence has been served, so a sentence of home detention may be considered.[26] An offender serving a longer sentence must undergo a hearing, and will not receive home detention, which is only available where the effective sentence imposed is to be less than 12 months.[27]

---

[23] At [62]-[64].
[24] Sentencing Act, s 8(e).
[25] Section 9(1)(j).
[26] Parole Act 2002, ss 21 and 28.
[27] Section 86; Sentencing Act, s 80A.

Additionally, throughout the criminal justice process, the system's mistaken adherence to rape myths can make victims feel dismissed. Sentencing and parole occur after conviction, so victim mistreatment at those stages cannot cause attrition to the same extent as it might at other stages of the criminal justice process, but it can discourage victims - and those who witness their difficulties - from reporting sexual crime in the future.

Perhaps the most serious rape myth evident in *R v AM*, and a factor that the Court of Appeal recognised might be misapplied, was the inclusion of a mistaken and unreasonable belief in consent as a factor reducing culpability. The judgment notes that belief in consent is not a mitigating factor, and a grossly negligent belief in consent will not reduce culpability, but this seems a fine distinction that may be seized upon by the defence, especially in relationship rape cases.

Similarly, the availability of prior consensual sexual activity as a factor reducing culpability is potentially problematic. The Court phrased this factor carefully, specifying that it did not apply to relationships generally, only where the preceding activity was genuinely similar and close enough in time to reduce culpability.[28] Its inclusion nonetheless seems to play into the idea that sex within a relationship is a special case as regards consent, or that consent may, in some circumstances, be assumed rather than established for each sexual act. It is difficult to see how this factor could be used except to establish genuine but unreasonable belief in consent, which is not a defence. Moreover, despite the Court's expectation that it would have little effect on sentencing, it seems that the presence of this factor, when officially recognised, could distract from harm to the victim.[29] The difference in this context may be evident to legal professionals, but the low prosecution-to-conviction ratio where the rapist is the victim's partner or boyfriend suggests that juries may conflate this narrow exception with a broader, pre-existing assumption that rape within a relationship is rare.[30] This is especially worrying because relationship rape is the type most likely to drop out of the court system, and is strongly correlated with other forms of domestic violence.[31]

Other factors listed in the guidelines present subtler concerns. For example, force is an aggravating factor. This implies that the other common method of rape, victim intoxication, is less serious, at least where the rapist is not responsible for the stupefaction. While research on the subject is limited, it suggests that this is usually untrue. Force is used in a slight majority of reported cases, but usually results in non-serious injuries.[32] Moreover, rape by force appears more likely to be reported, meaning that "non-violent" rape may actually form the majority of all rapes. Rape by

---

[28] *R v AM*, above n 7, at [54]–[60].
[29] At [60].
[30] Triggs and others, above n 1, at 64.
[31] At 21 and 30.
[32] At 27–28.

intoxication is as common or almost as common, less commonly reported, and when reported is often subject to evidential difficulty. On the other hand, forcible rape and rape which causes injury are less subject to attrition, and indeed injuries can be useful as evidence.[33] Including force as an aggravating factor will tend to lead to heavier sentences for the type of rape which is already more likely to be reported and properly addressed by the system.

It may also be problematic to take account of the victim's preferences as to sentencing, although this is intended to counter difficulties inherent in reporting and prosecuting sexual crime. The Court was cognisant that victims might face social pressure to withdraw from the criminal justice process if they and the offender shared a social group. It reminded judges that sexual crime is a public wrong. However, it considered that ignoring victims' wishes could be patronising, and it could potentially discourage victims from coming forward if their requests for leniency were not respected.[34] Attrition is a valid concern. On the other hand, it must be asked how significantly sentencing will affect victims' decisions to follow through with prosecutions. Rape and sexual violation are serious crimes, and offenders are usually sentenced to imprisonment.[35] In effect, then, the victim's say will often affect only the length of the term, not the choice of penalty. Would a reduction really have much effect, considering that any term of imprisonment carries a heavy social stigma? Research suggests this is unlikely.[36] Additionally, given that victims do not have their own representation in a trial between the Crown and the offender, they are unlikely even to know how sexual sentencing operates.[37] The more fundamental problem, however, is that this may represent a superficial view of social pressure as regards relationship and acquaintance rape. While victims are often pressured to drop charges, and that pressure is a serious concern, arguably the more pressing issue in relation to rape prosecutions is the view that rape, especially acquaintance or relationship rape, is not a real crime worth prosecuting. Participants in the Crime and Safety Survey commonly cited this belief as a reason they did not report, either because they thought that what had happened to them was not criminal, or because they thought that others would not perceive it as such.[38] The issues with *R v AM* should not be seen as specific to sentencing, but as symptomatic of the system's understanding of rape as a whole.

---

[33] At 81–84.
[34] *R v AM*, above n 7, at [62]–[64].
[35] Statistics New Zealand "Adults convicted in court by offence type – all offence types" (2013) NZ.Stat <http://nzdotstat.stats.govt.nz>.
[36] Ministry of Women's Affairs "Restoring Soul: Effective interventions for adult victims/survivors of sexual violence" (October 2009) at 68-69.
[37] A woman who has been victimised multiple times may understand the sentencing process, but this reinforces the idea that the system should prosecute rape as a public crime, in an impartial, evidence-based manner. Research suggests such women may not report because of trauma at the hands of authorities and during the court process; sentence length is less significant. See Ministry of Women's Affairs, above n 36, at 37–41 and 68–69.
[38] Morrison and others, above n 1, at 39, 48 and 139.

C The Issue

The criminal justice system's failure to account for unconvicted sexual crime causes principled and practical problems at the sentencing and parole stages. At sentencing, it perpetuates rape myths, and minimises the prevalence of rape in the community. This leads to victim dissatisfaction and attrition, exacerbating low conviction rates.[39] Although difficult to confirm, it is likely that the perception of rape as a rare crime which occurs only in certain ways dissuades victims of "atypical" rape from reporting it. At a more general level, minimisation of the prevalence of rape and misunderstanding of the nature of the crime impedes progress in legislative and policy measures intended to combat it.

Unconvicted crime is arguably more important to decision-making at parole than at sentencing. While sentencing decisions are based largely on the culpability of the individual offender, and require adherence to procedural requirements such as consistency and proportionality, the paramount consideration in parole proceedings is the safety of the community.[40] As a result, the risk of reoffending is a key factor. This risk, however, is usually formulated as *reconviction* risk, ignoring those crimes that never come to the attention of the courts. With actuarial tools now being used at sentencing and parole to "empirically" predict offenders' risk of reoffending, rape myths may become reified: falsely understood as proven to predict risk, when in fact they may predict only the system's response to certain cases.

Rape that is seen as "atypical" is more likely to escape conviction. I argue that the invisibility of this type of crime means that when a conviction does occur, an offender is likely to receive a short sentence relative to offenders whose crimes fit the profile that the system expects. Furthermore, the effective sentence served is likely to be further reduced when parole is taken into account, because differential conviction rates show that atypical offenders have lower reconviction risk. This may result in earlier release and relatively lower scrutiny at parole. An accurate understanding of an individual's crime is required in order to accurately assess many of the purposes and principles of sentencing. That necessarily involves an understanding of the nature and prevalence of the crime in society, to contextualise the offending. Failure to account for unconvicted crime has significant implications for community safety and rehabilitation, which are key principles in the Parole Act and Sentencing Act respectively.[41] The question, then, is how the criminal justice system might adapt the tools already at its disposal in order to properly contextualise convicted sexual crime – and, perhaps, to begin counteracting some of the factors which lead to high prevalence and low conviction rates.

---

[39] Ministry of Women's Affairs, above n 36, at 37–41 and 68–69.
[40] Parole Act, s 8; Sentencing Act, ss 7–8.
[41] Parole Act, s 7; Sentencing Act, ss 7, 8.

II Rape Perpetration: Prevalence and Patterns

A Invisible Crime

The term "invisible crime" refers to types of crime which are committed, but which, due to systemic or societal issues, are unlikely to be convicted. The lack of conviction may be due to under-reporting; to Police decisions not to investigate or prosecute once crime is reported; or to low conviction rates at trial.

In the context of sexual violation, rape using intoxication rather than force, rape by people other than strangers and family members, and rape by men with no previous criminal record is less likely to be convicted. These factors have a cumulative effect, so that if a woman is sexually violated by a man who is a stranger, uses force, inflicts injury, *and* has a previous criminal record, he is many times more likely to be convicted than he would be if he were her current boyfriend, used intoxication or implicit fear, did not inflict physical injury, and had no criminal record.[42] Not coincidentally, the categories which contribute to invisibility correlate with those where rape has historically been understood either as impossible, or as partially or entirely the victim's fault: the idea that rape is committed by monstrous, violent criminals, not by unexceptional people; the idea that women who become intoxicated put themselves at risk and so are partly or wholly to blame for their own victimisation; the idea that women who are not physically injured must not have fought back, and so must have consented; and the idea that it is impossible to rape one's wife, or by logical extension, one's partner or girlfriend. Although these ideas are now discredited, they have a long history, and still hold moral sway in many sections of society.[43]

It is clear that these factors lower the odds of prosecution and conviction, and they likely also affect the chance a victim will report a crime to the police. Many women who do not report sexual violation state the reason as being that they considered the matter private, or felt ashamed.[44] Shame implies the victim felt partly at fault, and both these reasons suggest that rape is not perceived as a public wrong in the same way as other violent crime. It is also suggested that even in a survey context, there may be many victims who denied being affected.[45] Low reporting rates make it impossible to accurately estimate how many sexual violations occur in the population. Consequently, it is extremely difficult to target remedial measures against the impact of rape myths. It is therefore crucial to use research on offenders to fill the gap and better target available resources.

---

[42] Triggs and others, above n 1, at 48.
[43] See Daly and Bouhours, above n 1, at 565–567; Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (Routledge, London, 2005) at 18–50.
[44] Morrison and others, above n 1, at 48.
[45] At 24.

B A Profile of Reported Rape

It is necessary to analyse the research on sexual violation to address the justice system's response to the crime. Ideally, as well as offender culpability and victim impact, prosecution and sentencing decisions would consider best practice for rehabilitation with regard to the particular offending.[46] In reality, however, this approach is complicated. Critically, low reporting rates and a dearth of reliable research make it difficult to evaluate prevalence, typology, or indeed, the success of rehabilitation.

Reporting rates for sexual violation are difficult to measure and vary by country, but estimates are usually well below 25 per cent.[47] In New Zealand, the 2009 Crime and Safety Survey estimated the rate at seven per cent, and a 2009 Ministry of Women's Affairs report at nine per cent.[48] In contrast, reporting rates for crime in general hover around one-third, while reporting rates for serious crime are higher, as are rates for property crime (because a police report is often a precondition for making an insurance claim).[49] The 2009 Crime and Safety Survey estimated the reporting rate for assault at 32 per cent.[50] The Survey's definition of assault included minor incidents, which are relatively unlikely to be reported, and unlike Police statistics, counted each instance of domestic violence separately.[51] This will have depressed the apparent reporting rate shown by the Survey. The fact that the serious crime of sexual violation displays a significantly lower reporting rate is concerning.

Statistics indicate that the sexual offender usually knows the victim, a trend also borne out internationally.[52] In New Zealand, Triggs and others conducted a comprehensive study of 1,955 file notes on sexual crime reported to Police.[53] These file notes represented all offences Police had recorded as sexual violation against an adult female between 1 July 2005 and 31 December 2007.[54] Sexual crime against minors (aged under 16) was not included in the sample; nor was minor or non-contact sexual crime such as flashing.[55] Of the 1,955 cases reported to police, 251 ended in a conviction. This represented 42 per cent of cases charged, 13 per cent of cases

---

[46] Sentencing Act, s 7.
[47] See for example HMCPSI and HMIC, above n 1, at 34–37; Jennifer Truman, Lynn Langton and Michael Planty "Criminal Victimization, 2012" (October 2013) Bureau of Justice Statistics <www.bjs.gov> at 4; Marcus Berzofsky and others "Victimizations Not Reported to the Police, 2006-2010" (August 2012) Bureau of Justice Statistics <www.bjs.gov>.
[48] Morrison and others, above n 1, at 45; Ministry of Women's Affairs, above n 36.
[49] At 35.
[50] At 35.
[51] At 35 and 165.
[52] Michele C Black and others "The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report" (Centers for Disease Control and Prevention, November 2011) at 21–22; HMCPSI/HMIC, above n 1, at 21; Triggs, above n 1, at 16–18.
[53] At 16–18.
[54] At 1.
[55] Full list at 85. All crimes surveyed were actual or attempted sexual connection against adult victims; the study included such offences even when labelled differently (e.g. as incest).

reported, and using the reporting rates discussed above, roughly one per cent of all cases of the crime.[56]

Relationship data was available for 73 per cent of the cases. In just over two-thirds of these, the victim had a previous relationship with the offender. In roughly one-third, that previous relationship was a romantic one.[57] Stranger assaults accounted for only 15 per cent of cases; people the victim had met within the last day accounted for 16 per cent.

The Triggs study also collected data on a number of other variables relating both to victims and offenders. Most notable was the information on age, alcohol consumption, and the use of violence. The highest rates of reported sexual crime were observed for victims aged under 20; after this point there was a sharp drop. Over half of all victims were younger than 25.[58] Data on alcohol use was collected in about half of all cases. In 79 per cent of these, the offender had consumed alcohol or other drugs, and in 75 per cent, the victim had too. These figures correspond to a minimum of 39 per cent and 30 per cent of total cases, respectively.[59] In 13–16 per cent of all cases, the victim was unsure whether she had been violated; almost all of those victims had consumed alcohol or other drugs.[60] There were only a few instances where the victim alleged her drink had been spiked (62, or three per cent of the total).[61] The file notes did not reliably track victims' level of intoxication, nor whether they had been pressured or encouraged by the offender into consuming alcohol or other drugs.[62] Male victims made up only a small proportion of the sample: about five per cent.[63]

In almost all cases, one offence was committed against one victim, by one offender. The victim was threatened in 9–16 per cent of cases, and force was used in 28–64 per cent of cases. The figure is uncertain because of inconsistent reporting in the file notes, but researchers' cross-tabulation suggested that use of force was likely to have occurred towards the top of this range (41–64 per cent of cases). The victim was injured in 27–30 per cent of cases. Injuries were usually superficial, such as bruising or grazes, but in 18 per cent of cases where injuries occurred, they were serious. 33 cases or roughly 1.5 per cent of the total required a hospital visit.[64] Although these figures are broad ranges, they appear to represent a reduction from the proportion of cases where the use of force was reported in past studies.[65] 60 per cent of offenders

---

[56] At 57; the one per cent estimate comes from multiplying these percentages with the estimated reporting rate above.
[57] At 17.
[58] At 16 and 30.
[59] At 28.
[60] At 28.
[61] At 28–29.
[62] At 28–29.
[63] At 16.
[64] At 27–28. Estimates have a margin of error because Police did not consistently record these factors.
[65] Also compare M Stace "Rape complaints and the police" (Department of Justice, Rape Study: research reports, volume 2, 1983) as cited in Triggs and others, above n 1, at 27–28 and 92.

had a prior criminal history, but only 11 per cent had a prior conviction for a sexual offence. A further 26 per cent had a previous conviction for violence; the other 23 per cent had only non-violent convictions.[66]

Taking the Triggs data as a whole, the typical victim was a woman aged around 23, who may have been drinking. She was assaulted by an offender she knew, who used some force or threat of force, but who inflicted no significant physical injury. The offender may have had some criminal history, but probably no history of violent or sexual crime. Such a victim's case involves many factors that trigger the myth that date rape or acquaintance rape is not "real rape", and which may hinder the prospects of reporting the crime, having it successfully investigated by the Police, and obtaining a conviction.

The authors of the Triggs study hypothesise that the overrepresentation of young women in reported rape statistics may be because older women are often raped by intimate partners, and are therefore less likely to report that crime. They note that the proportion of reported rapes committed by strangers has fallen as reporting of acquaintance and partner rape has increased,[67] but that victims still disproportionately withdraw their complaints for offences involving current or ex-partners before and during the court process.[68] Once charged, offences involving strangers and family were least likely to be withdrawn.[69] If these attrition trends hold true at the reporting stage, one would expect that a greater proportion of unreported rapes involved substances rather than violence, and offenders known to the victim. Consequently, the difference between the profiles of rape committed compared to rape actually dealt with by the criminal justice system would be more pronounced than the available statistics indicate.

C A Profile of Undetected Offenders

Reliable data on offender characteristics is difficult to obtain, because offenders are convicted in only a small minority of rapes. As a result, the sample set of any study dealing exclusively with convicted offenders is very small, and probably distorted. The Triggs study dealt with alleged, rather than convicted, offenders, which broadened its scope, and it gathered some data on offender characteristics. However, because the reporting rate is low and likely biased towards violent offences committed by strangers, the study still featured a self-selecting and probably non-representative sample.

---

[66] Triggs and others, above n 1, at 31.
[67] In New Zealand and internationally; particularly compared to the Stace study, above n 65, cited in Triggs and others, above n 1, at 16 and 19. Berzokfsky and others, above n 47, at 4 also suggest a relationship with the offender could deter reporting (e.g. for fear of causing trouble).
[68] At 49–50 and 64.
[69] At 64–65.

Studies dealing with victimisation, such as the Crime and Safety Survey, may present a more accurate picture of total offending, but are nonetheless likely to be distorted by the reluctance of certain victims to label their experiences as crimes. That is borne out by the high proportion of victims interviewed in the survey who considered sexual crime "wrong, but not a crime" or "just something that happens".[70] Additionally, studies of victims cannot reliably link each instance of rape to a perpetrator. While interviewing victims can provide a longitudinal sample of victims, identification and reporting issues make them inappropriate for tracking recidivism among offenders. Nor can they explain offenders' motivations, or track the proportions of offenders who recognise that their actions were criminal. These limitations translate to other areas of criminal law and criminology, where they are reasonably well recognised. For example, studies of undetected drug users are common. For reasons that are unclear, however, only a few studies have addressed undetected perpetrators of sexual crime.

Lisak and Miller's 2002 study of "undetected" rapists was one of the rare exceptions. The study attempted to surmount the obstacles associated with victim reporting, and drew some revealing conclusions.[71] Lisak and Miller defined "undetected" rapists as men in the community who admitted during a survey to behaviours that legally amounted to sexual assault.[72] Although limited to male students at a university in the United States, this study had a relatively large sample size and, where verifiable, its conclusions are consistent with similar studies, including a recent study of United States Naval recruits by McWhorter and others.[73] It is one of only a few such studies, so its conclusions are useful despite the sampling limitations. Participants were told they were answering a survey on "childhood experiences and adult functioning", and asked a series of questions including two which described, without labelling as such, forcible rape and rape of a victim incapacitated by substances.[74]

Unlike the Triggs study, the question on intoxication *did* specify a high level of incapacitation: the wording used asked whether the victim had been "too intoxicated (on alcohol or drugs) to resist [the rapist's] sexual advances (e.g., removing their clothes)".[75] This denotes quite a high level of intoxication, and might exclude situations where the victim was too intoxicated to consent, meaning that the sexual contact was non-consensual, but retained enough coordination that the men surveyed would not consider this description met.

---

[70] Morrison and others, above n 1, at 39.
[71] David Lisak and Paul M Miller "Repeat rape and multiple offending among undetected rapists" (2002) 17 Violence and Victims 73.
[72] At 76–77.
[73] Stephanie K McWhorter and others "Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel" (2009) 24 Violence and Victims 204. Studies of convicted sex offenders where amnesty has been offered for honest accounts of past behaviour also reveal high rates of unreported recidivism. For examples see at 205; Lisak and Miller, above n 71, at 74.
[74] Lisak and Miller, above n 71 at 77.
[75] At 77.

The questions also included the Abuse-Perception Inventory, which measures interpersonal violence committed by the subject.[76] The Inventory was used to cross-reference rape with acts of nonsexual interpersonal violence.[77] The questionnaire was followed by a corroborating interview, which found that no participant who admitted to rape had done so mistakenly.[78] 6.4 per cent of the participants admitted to rape. Of those, approximately 60 per cent had committed multiple rapes.[79] The mean number of rapes committed by a multiple rapist was 5.8, and the median was three.[80] 14 per cent of the repeat rapists, or just under 10 per cent of all the rapists, had committed more than eight rapes, indicating a high degree of recidivism. The age range was similar to the sample used in developing the Automated Sexual Recidivism Scale, discussed below.

The majority of the rapists (80.8 per cent) reported raping incapacitated women.[81] A smaller proportion admitted to using threats or overt force to coerce sexual intercourse or oral sex, or in attempted rape. These groups overlapped to some extent, but each rapist was given one categorisation for the purposes of analysis.[82] While rapists who used overt force reported committing more rapes than those who used intoxication, the difference was not statistically significant.[83] The implication is that the use of force as opposed to intoxication does not predict future sexual violence.

Rapists were responsible for a disproportionate amount of nonsexual violence. From a sample of 1,882 men, the researchers documented 3,698 violent acts. Each non-rapist was responsible for a mean of 1.41 of these, while the single-act rapists were each responsible for 3.98 and the repeat rapists for 13.75.[84] Despite representing less than five per cent of the sample, the repeat rapists were responsible for 28 per cent of the violence.[85] The single-act rapists, representing less than 2.5 per cent of the sample, were responsible for almost five per cent of the violence. Whether a rapist used overt force or intoxication appeared irrelevant to the amount of nonsexual violence they committed; there was no statistically significant difference between intoxication and overt-force rapists, only between single-act and repeat rapists.[86] In this respect, too, then, the Lisak and Miller study indicated that the use of overt force was no more of a risk factor than the use of intoxication, although they also suggested that this might be partly due to the small sample size, and that more research was necessary.[87]

---

[76] At 77.
[77] At 78.
[78] At 76-77.
[79] 63.3 per cent. At 78.
[80] At 78.
[81] At 78.
[82] At 78.
[83] At 80.
[84] At 78.
[85] At 80.
[86] At 80.
[87] At 81.

The 2009 study conducted by McWhorter and others of 2,925 naval recruits found similar results. The recruits were surveyed in June 1996 and June 1997, using a behavioural questionnaire similar to that of Lisak and Miller. This sample was non-representative because naval recruits are screened for mental and physical health, education and criminal records before recruitment, so participants would be expected to be healthier and perhaps better adjusted than the general population.[88] 13 per cent of the participants admitted to perpetrating at least one attempted or completed rape. Among those, 63 per cent had perpetrated more than one, with a mean of 6.36 incidents per perpetrator.[89] 29 per cent of rapists had perpetrated rape in the year before they took the survey, in their first year of military service, and for 14 per cent, that perpetration was not their first. This translated to nine per cent of men who perpetrated rape before they entered military service, two per cent who perpetrated rape during the first year of service, and two per cent who perpetrated rape both before and during the first year of service.[90] Repeat rapists had committed 95 per cent of the total reported incidents of attempted or completed rape.[91] Interestingly, there was no relationship between any demographic variable and the number or violence of reported rapes, only between the number of reported rapes and their severity.[92] Also, considering the effects of attrition during the course of the study, the researchers suggested that their estimates of perpetration rates were probably conservative.[93]

Most men who admitted perpetrating rape had used drugs or alcohol rather than force. Only 23 per cent of all the rapists used force alone.[94] Most rapists (77 per cent) had raped someone they knew, a variable that the Lisak and Miller study did not track, but which accords with the Triggs study from New Zealand.[95] Most men reported a single victim type and a single method of perpetration, but among those men who targeted strangers, most targeted strangers *and* acquaintances; only seven per cent of all the rapists targeted strangers alone.[96] 51 per cent of rapists perpetrated rape against acquaintances using substances only; this figure excludes rapists who raped both acquaintances and strangers, and those who used both force and intoxication.[97]

Interestingly, in the McWhorter study, all men who attacked using force alone attacked acquaintances, and all who attacked strangers using force also used intoxication. The study did not find a single instance of stranger rape where force alone was used.[98] This strongly suggests that while the image of forceful stranger rape

---

[88] McWhorter, above n 73, at 213.
[89] At 209 and 212.
[90] At 217-218.
[91] At 214.
[92] At 214-125.
[93] At 219.
[94] At 209-210 and 216.
[95] At 209-210 and 218.
[96] At 215 and 216.
[97] At 216.
[98] At 212 and 215–218.

is the dominant image of "real" rape, that stereotype elides the existence of much more common, and by extension more socially harmful, types of rape. While the McWhorter and Lisak and Miller studies are the most recent and the most detailed, their conclusions that most rape is committed by multiple rapists, against acquaintances rather than strangers, and using intoxication rather than force are supported by other research.[99]

So whether or not a rapist used force or intoxication, he was likely to be a recidivist, and to be disproportionately violent compared to the rest of the population. Bearing in mind that the majority of participants in the Lisak and Miller study were in their twenties, and rapists continue to commit crime for longer than other violent criminals, this tends to point to a conclusion that a majority of rapists commit a large number of rapes throughout their lifetimes.[100] Extrapolating from that conclusion, it appears that imprisonment or effective rehabilitation could have a major impact on the overall number of rapes committed, even if (for imprisonment) that effect is only achieved by isolating rapists from potential victims. Heavier or more effective sentencing could be achieved either at the sentencing stage, based on the original calculation of the sentence or non-parole period, or at the parole stage, by using more accurate recidivism risk calculations to determine the time actually served.

D A Profile of Successfully Prosecuted Rape

Taking these studies together, and bearing in mind the inherent difficulties with data gathering which mean that any conclusion must be tentative, about half of rapes seem to involve violence other than that inherent in the crime, and probably more than half of rapes involve some degree of intoxication (whether the victim chose to become intoxicated or not). The Lisak and Miller study suggests that, from a recidivism and therefore public safety standpoint, "violent" and "other" rape are equally serious, and should be treated as such by the justice system. That is supported by the fact that, in most cases where violence occurs, the physical consequences for the victim are in the nature of scrapes, cuts and bruises, rather than more serious injuries such as vaginal or anal bleeding, or broken bones. That is, they seem to be the kind of injuries that might be incidental to the use of threats or to the act of rape itself, rather than representing a particular intention to physically injure the victim. Looking at the McWhorter study in particular, crimes fitting the traditional view of violent stranger rape seem vanishingly rare.

The studies point to a series of common conclusions. Whether a rape is accomplished by force or incapacitation appears largely irrelevant to the risk of rape reperpetration.

---

[99] See list of studies in McWhorter, above n 73, at 204–206; see also Samuel A Rubenzahl and Kevin J Corcoran "The Prevalence and Characteristics of Male Perpetrators of Acquaintance Rape: New Research Methodology Reveals New Findings" (1998) 4 Violence Against Women 713.
[100] Department of Corrections "Reconviction Rates of Sex Offenders: Five year follow-up study" (16 August 2011) <www.corrections.govt.nz>.

Rapists tend to have high rates of recidivism. Imposition of heavier sentences upon those more likely to reoffend will prevent reoffending at least for the duration of the sentence, and seems a good starting place. Full rehabilitation should be the eventual goal, but increased conviction and sentencing of rape would significantly reduce the prevalence of sexual violation in the community, and would expose more offenders to Corrections rehabilitation programmes.

However, the profile of rape that is convicted appears to be quite different from the profile of rape reported, which itself is different from the profile of rape at large in the community. This will have significant implications at sentencing. Cases involving current or ex-partners or boyfriends had high prosecution rates, but very low conviction rates: eight per cent of recorded cases for current partners or boyfriends, and 13 per cent for ex-partners or boyfriends. The eight per cent conviction rate for current partners was the lowest of any offender group, and also involved by far the lowest conviction-to-prosecution ratio of any offender group. 46 per cent of recorded cases were prosecuted, the highest rate, but only 16 per cent of cases prosecuted resulted in convictions. The next-lowest figure was for people the victim had just met, where 34 per cent of prosecutions resulted in a conviction. This demonstrates either some specific evidentiary difficulty, or, perhaps more likely, a jury assumption that men do not rape their current partners, leading them to require more proof than they otherwise would. Cases involving friends, dates, or other acquaintances, and people the victim had just met, had low prosecution rates and correspondingly low conviction rates (12 per cent and nine per cent respectively). When cases were prosecuted, they had a reasonable chance of leading to a conviction.[101]

Stranger rapes had a high conviction rate as a proportion of total recorded cases (20 per cent). That is despite the fact that a relatively low proportion of cases are prosecuted, due to the difficulty of identifying the offender. 68 per cent of cases prosecuted led to a conviction, the highest prosecution-to-conviction rate in the study, in contrast to the 16 per cent rate for current partners. Only family rapes had a higher conviction rate; like stranger rapes, 68 per cent of cases prosecuted led to a conviction. However, since it was easier to identify family members than strangers who committed rape, this corresponded to an overall report-to-conviction rate of 30 per cent, the highest in the study.[102]

Where an offender had a criminal record, prosecution and conviction rates were both affected. The presence of a criminal record had a significant effect on the probability of both prosecution and conviction. Interestingly, however, where the previous criminal record was sexual, there was only a slight increase in the conviction rate compared to where the record was nonsexual but violent. 32 per cent of alleged offenders with no criminal record were prosecuted, while 53 per cent of those with a

[101] Triggs and others, above n 1, at 82.
[102] At 82.

violent record and 54 per cent of those with a sexual record were prosecuted. 35 per cent, 50 per cent, and 45 per cent of those prosecutions, respectively, led to convictions. This corresponded to overall conviction rates of 11 per cent, 27 per cent, and 24 per cent respectively.[103] The effect of a record of violent offending is particularly interesting given Lisak and Miller's findings on the rates of general violence among recidivist rapists. This may be an additional point in favour of their recommendation of targeting rapists' other violence as a method of reducing risk. [104]

The use of force, threat or injury, and the severity of injury, was associated with increased prosecution. The use of force, threat or injury was associated with convictions in 20 per cent of recorded cases, as opposed to seven per cent where these factors were not present. Particularly where the injury was moderate to severe, the presence of force, threat or injury raised the prosecution rate, and consequently the conviction rate. The conviction rate for cases with no injury was nine per cent; for mild injury it was 16 per cent and for moderate to severe injury, 29 per cent. Where only cases actually prosecuted were considered, the conviction rates for mild injury and no injury were similar: 38 per cent and 40 per cent, respectively. However, the presence of a moderate or severe injury raised the conviction rate significantly, to 57 per cent of cases prosecuted.[105] These figures are unsurprising as they accord with popular understandings of rape. It is perhaps encouraging that conviction rates are similar whether or not the victim has been physically injured, but this may equally be due to the Police's role in selecting for prosecution only cases likely to end in conviction.

Due partly to inconsistent record keeping by the Police, the Triggs study did not track the impact of victim intoxication as an independent factor, only as a factor associated with their other areas of focus. However, they did establish that around 10 per cent of victims were intoxicated at the time of the alleged rape and 39 per cent had consumed some amount of alcohol or other drugs, but some of the victims within the latter category were not specifically noted as being intoxicated.[106] Analysis of police files suggested that where the victim was intoxicated, cases were less likely to be prosecuted.[107] Where victims were intoxicated, Police often expressed doubts about the accuracy of their accounts of the event.[108] Additionally, since intoxication often led to memory loss, in such cases the offender was often not identified.[109] The idea that an intoxicated victim is untrustworthy is particularly worrying given that significant intoxication will render people unable to legally consent. The researchers identified at least 10 cases where the file note suggested that the victim had been

---

[103] At 82.
[104] Lisak and Miller, above n 71, at 81; both comorbid physical violence and battering and historical sexual violence.
[105] Triggs and others, above n 1, at 82.
[106] At 28–29.
[107] At 77.
[108] At 48.
[109] At 42.

legally unable to consent, but which had been classified by Police as "no offence".[110] Other factors not specifically tracked, but associated with rape myths and low prosecution rates, included delayed reporting, victim mental illness or intellectual disability, previous complaints by the victim, and attempts by victims to conceal some aspect of their own behaviour, such as drinking or drug taking.[111]

The effects of these variables are almost exactly as an observer schooled in rape myths might expect, and they help explain why the profile of convicted rape is so different to the profile exposed by studies of undetected rapists. Violent stranger rape is much more likely to be prosecuted and convicted than relationship or acquaintance rape not involving violence. The presence of a previous sexual or violent conviction increases the probability of a successful prosecution. Given the research explained above, and the fact that rapists in general tend to be abnormally violent, the effect of a previous violent conviction may be helpful to victims of all kinds of rape. However, previous *sexual* convictions are likely to result from the kind of behaviour which is most successfully prosecuted and convicted; that is, the kind of behaviour that conforms to traditional dialogues about rape. So while previous convictions are helpful to some victims, they may also reinforce the same trends in sexual crime prosecution, to the relative detriment of victims of intoxication-based or acquaintance-perpetrated sexual violence.

III The Use of Actuarial Tools in Criminal Justice

A Principled Issues and Sentencing

Actuarial tools are, by their nature, general. They can predict outcomes across a group, but cannot accurately predict whether any given individual will reoffend. Harris and others compare this to giving a cancer prognosis, where doctors can predict survival rates for patients of a certain age, with given risk factors, treatments, and a particular type of cancer, but cannot predict which individuals will die.[112]

This can lead to arbitrary outcomes for individual offenders. Traditionally, criminal and sentencing law focused on the deeds, circumstances, and culpability of an individual offender in one situation.[113] It was backward-looking in the sense that it emphasised holding the individual offender accountable for the crime already committed.[114] To respond to individual crime in a just manner, the law developed principles of sentencing: penalties should be knowable in advance, consistent as

---

[110] At 45.
[111] At 48.
[112] Grant T Harris and others "A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders" (2003) 15 Psychological Assessment 413 at 421.
[113] See Geoff Hall *Sentencing Law and Practice* (LexisNexis, Wellington, 2004), at [1.3], [2] and [3]; AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2012) at [1.1] and [1.3].
[114] Hall, above n 113, at [1.3], [SA7] and [SA8].

between offenders who committed similar crimes, and proportional to the seriousness of the offending.[115]

Other aspects of the system harmonised with this understanding of the role of the criminal law. For example, crime was formulated as a matter between the state and the offender, because it was seen as a public wrong, not a matter that injured only the victim.[116] This formulation contributed to consistency and proportionality because decisions to prosecute and to convict were made by impartial authorities, rather than depending on victims' wishes.[117] Underlying these principles is natural justice: the right to be penalised only according to evidence properly tested under the law.[118] These principles endure in New Zealand in the principles and purposes of sentencing.[119]

With the improvement of technology, and the rise of rehabilitation, the emphasis of the criminal law began to shift. In addition to personal accountability, ideas of prevention became powerful.[120] The scope of the criminal law broadened to include property offences (traditionally the domain of tort law), as well as inchoate offences and offences of omission.[121] Thus, it now punished offences where no harm had actually occurred, and where offenders had not actually performed a misdeed, but had simply omitted to perform a duty. This was the context in which recidivism risk became a factor in sentencing, and in which both individual assessments and statistical assessment tools began to be used.[122]

The Sentencing Act sets out the purposes of sentencing in New Zealand. They are to hold the offender accountable; to promote responsibility for harm done; to provide for the victim's interests; reparation; denunciation; deterrence; protection of the community; rehabilitation and reintegration.[123] Some objectives are offender-focused, promoting internal change. They require a genuine understanding of the wrong committed and the reasons it has been punished. Others are focused on protecting the victim and the community. They reflect the modern approach to sentencing, and require mitigation of the potential to reoffend. For serious violent crime, or repeat offending, this often involves removal from the community via custodial sentences. Rehabilitation spans both categories; by reforming the offender, it protects the

---

[115] See Andrew Ashworth *Sentencing and Criminal Justice* (5th ed, Cambridge University Press, Cambridge, 2010), at 96–100; Hall, above n 113, at [1.3] and [8.1]–[8.5].
[116] At 75.
[117] At 75.
[118] At 75 and 96.
[119] Sentencing Act, ss 7 and 8.
[120] See David Brown "Recurring themes in contemporary criminal justice developments and debates" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 7 at 16-20; Andew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at 47-50 and 119-144.
[121] Ashworth and Zedner, above n 120, at 27 and 95–102.
[122] At 47–50; Brown, above n 120, at 16–20.
[123] Sentencing Act, s 7.

community after the formal sentence ends, but rehabilitation programmes are usually administered in custodial settings, and successful rehabilitation will require offenders to understand the reality of their actions.

An understanding of how the crime is committed is necessary to target sentences, in order to achieve the purposes of sentencing. For example, it will be difficult to make an offender understand the gravity of his crime if it is treated as a first-time opportunistic offence when it is actually one of a string of premeditated offences. Likewise, the focus in rehabilitation will be different for a first-time opportunistic offence as opposed to a recidivist offender who uses premeditation. Therefore, to fulfil the purposes of sentencing, it is important to base decisions on an accurate picture of offending, including, but not limited to, recidivism risk.

Recidivism risk is generally considered at sentencing, although it may not be specifically named as a factor. In *R v AM*, for example, the court specifically addressed Corrections' assessment of AM's recidivism risk.[124] If the traditional approach, rather than the actuarial approach, is taken, then instead of directly addressing risk the judge may use proxies such as regret and understanding of the crime, which are focused on the individual but which are popularly understood as measures of ongoing criminality.[125] Additionally, the history of offending is a mandatory factor to be considered at sentencing, and is significant in analysis of recidivism risk.[126] In sexual violation sentencing, the presence of multiple victims, or prolonged victimisation of the same individual, is an aggravating factor.[127]

The traditional approach is not risk-focused, so its ability to mitigate offending risk is naturally limited. However, even where the actuarial approach is applied, it is only one factor among many. Most principles of sentencing relate to the individual offender and the circumstances of the crime, rather than the feelings of the victim or public safety. This reflects the function of criminal law in holding offenders to account, and the legal reality that criminal cases are not proceedings between the victim and the offender, but between the state and the offender.

An assessment of recidivism risk is inherently forward-looking, and therefore diverges from the traditional backward-looking focus of the criminal law. Scholars have argued that statistical tools are necessarily impersonal, and examine the profile of the offender rather than the offender's past actions.[128] They see this as a breach of due process: the offender is effectively punished for belonging to a group, not for his actions, and that punishment is rationalised using specialist evidence which can be

---

[124] *R v AM*, above n 7, at [143].
[125] Sentencing Act, ss 7–10.
[126] Section 9(1)(j).
[127] *R v AM*, above n 7, at [47]–[48].
[128] See for example Ashworth and Zedner, above n 120, at 125–130.

difficult to challenge in a court context even if there are confounding factors which make its accuracy regarding the particular offender uncertain.[129]

Advocates of actuarial tools answer these criticisms by pointing out that tools are validated by empirical research, and are more effective than traditional assessment methods. It is true that the observed accuracy of actuarial tools is often as good as, or better than, traditional psychological assessment or risk scoring measures.[130] It can be argued, however, that they are qualitatively different to such measures. Even if traditional tools are less accurate, they at least focus on characteristics personal to the offender, which is important both from a due process perspective and in the context of a criminal justice system suffering from entrenched systemic discrimination. Actuarial tools, by contrast, assess risk on a population level and are capable, at most, of showing that a given offender belongs to a group which tends to reoffend more than other groups. All those involved in the criminal justice process should therefore be wary of confusing correlation with causation, and labelling any offender a high-risk individual based solely or mainly on an actuarial analysis.

Unsurprisingly, *R v AM* did not address the effect of unreported rape on its profiles of serious crime. Neither did it establish guidelines for the use of risk assessment tools at sentencing for sexual crime. However, AM himself was assessed before trial using the Automated Sexual Recidivism Scale and the Stable-2007, two of Corrections' primary risk assessment tools for sexual offenders.[131] The assessment was not criticised, and the court considered it when deciding whether to impose a minimum period of imprisonment under s 86 of the Sentencing Act.[132] This indicates that the court thought there was a place for such assessments at the sentencing stage. They are helpful at least in determining non-parole periods, even if their omission from the discussion of sentencing principles suggests they might not be a significant factor in determining the overall sentence.

I do not argue that actuarial analysis of reoffending risk is necessarily bad, nor contrary to the fundamentals of the criminal law. Indeed, extra measures used properly should be helpful. Objective evidence, carefully collected and properly analysed, could aid crime prevention and possibly also encourage equal treatment, counteracting discrimination among individuals involved in the criminal justice system. However, certain baseline requirements must be met. The assessment must be focused on the individual, based on robust research, and cross-checked constantly to ensure changing circumstances are addressed. The tool should be reliable, and should only be one of many methods of evaluating risk. Even if the measure is proven to be

---

[129] At 125–143.
[130] See for example Mairead Dolan and Michael Doyle "Violence risk prediction: Clinical and actuarial measures and the role of the Psychopathy Checklist" (2000) 177 British Journal of Psychiatry 303 at 303–307.
[131] *R v AM*, above n 7, at [143].
[132] At [147]–[160].

equally effective across a given population as traditional assessment, it should be targeted and supplemented by other, individualised tools which look at the offender as an individual, so that the individual's particular circumstances are addressed. Criminal cases are not a matter of the state in opposition to offenders as a population. Rather, they are individual instances of the state in opposition to a single offender. If a given offender is disadvantaged by the process used to determine his sentence, the Crown cannot answer the disadvantage by stating that another offender was better off due to the same process. It must prove the efficacy of the process used *for each offender*.

If actuarial assessments are flawed, or are used as the main tools to assess an offender's personal circumstances and risk level, they are likely to produce situations where the principles of sentencing are breached.[133] An assessment that presents an aggregate risk for a given crime type, and applies it to individuals without further refinement, addresses neither the particular circumstances of the individual offender nor the crime. As a result, it is likely to breach several principles of sentencing. For example, it cannot be demonstrably proportional. It is unlikely to effectively hold the offender accountable for harm done,[134] since it is not based specifically on that offender's behaviour. Nor is it likely to promote in the offender a sense of responsibility for the harm; on the contrary, it may contribute to the perception that the system is blind to offenders' circumstances and needs.[135] It can only denounce and deter criminal conduct on a general level, rather than denouncing and deterring the specific deeds of the specific offender.[136] Even well-researched and robust risk assessment tools must be combined with other methods, such as psychiatric assessments and personal interviews, in order to adequately address the offender's particular situation.

If the research behind the tools is flawed, however, these potential problems will be exacerbated. The validity of the assessment may be called into question even if it is combined with other assessment methods. Where an actuarial assessment is developed based on a biased or otherwise non-representative sample, there is a danger that it will be aimed at a hypothetical version of the crime that has a different profile to crime actually committed. The conclusions are likely to be inapplicable to many offenders. For example, if a tool associates stranger rape with higher rates of recidivism than acquaintance rape, but in fact the difference can be explained by higher reporting and conviction rates for stranger rape, then the tool will give a falsely high assessment of risk for stranger rapists, and a falsely low assessment of risk for acquaintance rapists. Even where other assessment tools are used to cross-check and individualise the actuarial tool, that assessment of risk will nonetheless have an effect, because the tool is still considered important in itself, and because the risk level

[133] Sentencing Act, s 7.
[134] Section 7(1)(a).
[135] Section 7(1)(b).
[136] Section 7(1)(e)-(f).

calculated by the tool may prime staff conducting interviews and other assessments to perceive stranger rapists as high-risk offenders. Consequently, the objectives of sentencing will be affected. Even if the understanding of due process applicable to the case allows the use of actuarial tools, that specific tool may not withstand close scrutiny.

B Parole

Invisible crime is arguably more important at parole than at sentencing. Whereas sentencing deals with the culpability of the individual offender, and the principles of sentencing are crucial, at parole the emphasis is on the safety of the community. This makes it easier to apply risk assessment tools, but means that an unreliable tool may have a correspondingly large impact. A tool that misses a certain type of crime is likely to present an artificially low estimate of risk for the offenders who commit that kind of crime, and may mean that they are released prematurely or after insufficient rehabilitation. However, a well-calibrated tool, which uses a representative sample of crime to draw conclusions about the behaviour of offenders in general, could conceivably be used to mitigate the effects of bias in the criminal justice system. Corrections staff (at parole), and perhaps even Police (at investigation) could focus additional scrutiny on those types of crime which have low conviction rates but not correspondingly low prevalence in the population.

The Parole Act applies to all sentences of imprisonment.[137] For sentences of imprisonment of two years or less, offenders are automatically released half way through the sentence.[138] For sentences longer than two years, an offender becomes eligible for parole after he or she has served one third of the sentence, unless a longer non-parole period is imposed.[139] At that point a hearing is held to determine whether an offender should be released, released with conditions, transferred to a different type of sentence, or held in prison.[140]

In all parole proceedings, the paramount consideration is the safety of the community.[141] The Parole Board must also consider the offender's right to the least restrictive detention and/or release conditions that are consistent with the safety of the community; the offender's right to be provided with relevant information so as to be able to mount a case; the principle that all available relevant information should be considered; and the victim's submissions.[142]

---

[137] Parole Act, ss 6, 9 and 18.
[138] Section 86.
[139] Section 84.
[140] Sections 21, 28 and 29.
[141] Section 7(1).
[142] Section 7(2).

In terms of enabling the use of actuarial tools, the Parole Act has a simple framework. Parole Board decisions involve balancing the safety of the community against the offender's right to freedom.[143] The safety of the community supersedes the offender's rights.[144] "Undue risk" and, by extension, the Board's assessment of community safety, depends upon both the likelihood of reoffending, and its likely nature and seriousness.[145] Section 117 allows the Board to accept any evidence it wishes, even if the evidence would not be admissible in a court of law, and s 7(2)(c) provides that decisions *must* be made on the basis of all the relevant information available to the Board at the time. These sections, taken together, make it clear that data on risk is critical, whether that is the risk posed by the individual offender or actuarial data on the generic risks posed by that type of offender.

As a result, it might be thought that the principles of sentencing are irrelevant. However, the Act requires that community safety be balanced against the offender's right to be detained only as long, and released subject to conditions only as onerous, as is necessary for the protection of the community.[146] This amounts to a protection, albeit an expressly weakened one, of the offender's rights to freedom of movement and freedom of association under the Bill of Rights Act 1990.[147] The Parole Board must have regard to the Bill of Rights Act when interpreting the Parole Act, and in exercising its discretion under that Act, although the Parole Act will take priority over the Bill of Rights Act.[148] This means that the balancing exercise required by s 7 will be informed to some extent by Bill of Rights jurisprudence. It is suggested that, with regard to statistical tools, this should occur under ss 7(a) and (c): the balancing of the offender's right to freedom against public safety, and the obligation on the Board to make decisions based on all available information. Section 7(c) appears to require that, where high-quality applicable actuarial data is available, it *must* be considered, but as with sentencing, there is controversy over the extent to which individual assessments, rather than epidemiological data, should be emphasised.

In a challenge, the likely effect will be that the Board must show that there is sufficient data suggesting that the particular offender will pose a danger to the community in order to justify continued imprisonment, or the imposition of release conditions. The tools used in New Zealand have been validated and shown to achieve a level of predictive accuracy similar to individual assessments across a population of inmates. However, it is suggested that the Board should be able to show that the tool fulfils the requirements set out above, as well as substantive analysis of that prisoner's individual circumstances, in order to prove that the assessment is valid as a predictor of that individual's behaviour, not just of the group he belongs to, so that the use of

---

[143] Section 7.
[144] Section 7(1).
[145] Section 7(3).
[146] Section 7(2)(a).
[147] New Zealand Bill of Rights Act 1990, ss 17 and 18.
[148] *Miller v Parole Board* HC Wellington CRI-2004-485-37, 11 May 2004 at [44]–[46].

the tool is justified with reference to that particular individual. Even if the tool used is accurate and well targeted to the specific crime and offender type, the use of traditional means of assessment such as individual psychological analysis by a qualified clinical psychologist or psychiatrist can only improve the analysis, because they may identify unexpected variables that a generalised analysis might miss. If the tool is not so well targeted, for example if it targets a group of crimes (such as sexual crimes) rather than one specific crime (such as rape), or if it is based on a small or otherwise unreliable sample, then a cross-check against traditional predictive measures may help to identify points of inaccuracy or ineffective targeting with respect to that offender, where the structure of the statistical tool may produce a misleading result.

C Practical Issues

Statistical tools often suffer from issues with sampling and bias, which may affect the validity of their conclusions. Some of these issues are linked to the fact that New Zealand, as a small jurisdiction, bases many tools on those developed overseas. In countries like the United States there is a larger population of offenders, so an adequate sample size can be obtained from offenders released in one year, while in New Zealand an adequate sample might only be obtained after tracking offenders released across multiple years.[149] Consequently, many of the tools available to New Zealand authorities come from large overseas jurisdictions, with varying amounts of local input. The tool used for sexual crime in New Zealand was developed overseas, cross-checked internationally, and modified slightly for the New Zealand context.[150]

Tools based on overseas populations necessarily use samples with different sociocultural profiles to New Zealand offenders. They are therefore likely to be insensitive to cultural and social differences between New Zealand and the places where they were developed. The most notable difference is the special status of Māori in New Zealand. Māori are not necessarily comparable to overseas minority groups (for example, African-Americans); nor do factors that affect majority-white populations necessarily affect Māori in the same way. Robert Webb, for example, postulates that a substantial proportion of Māori offending is attributable partly or wholly to the interaction between Māori culture, particularly its collective nature, and a particular history of dispossession, cultural imperialism and erasure.[151] Because these factors, as well as enduring social deprivation and inequality, interact uniquely

---

[149] See for example Alexander Skelton and others "Assessing risk for sexual offenders in New Zealand: Development and validation of a computer-scored risk measure" (2006) 12 Journal of Sexual Aggression 277 at 280.
[150] At 280.
[151] Robert Webb "Risk Factors, Criminogenic Needs and Māori (paper presented to the Sociological Association of Aotearoa conference: Knowledge, Capitalism, Critique, Auckland University of Technology, December 2003). For further analysis, see the notable works of Juan Tauri and Moana Jackson; regrettably, I am unable in this paper to adequately analyse the factors possibly contributing to overrepresentation of Māori in the prison population.

with Māori culture, the Māori experience is not transferable to other minorities who have faced different issues and have different cultural backgrounds. The concern about Māori-specific influences is particularly significant because Māori make up more than 50 per cent of the prison population, and so are disproportionately affected by criminal justice measures.[152]

Additionally, the offender's past criminal activity is an important factor in most or all actuarial analyses of risk. When it comes to past convictions, offenders' individual circumstances may be taken into account. Some tools also use court appearances to fine-tune risk calculations.[153] However, offending which has been tested and convicted in a court of law is the only offending for which data is reliably available, and is decisive in actuarial tools used for offender management.[154] This data is used as a proxy for the offender's predisposition to commit crime, but in contrast with a clinical setting where the practitioner in charge of treatment could use the patient's admitted behaviour, the behaviour must be reported, prosecuted, and convicted to reach Corrections assessors reliably. With sexual violence, factors unrelated to the seriousness of the crime often determine whether a given offence is prosecuted. These include many personal to the victim, rather than the offender, which may not measure predisposition to offend, but rather predisposition to offend against victims with the personal and social capital to have the offence successfully prosecuted. Conversely, looking at the absence of social capital, there is evidence that minority groups are discriminated against at sentencing and parole. They are more likely to have custodial sentences imposed, are sentenced to longer terms on average, and are less likely to apply for and receive parole.[155] Since almost all actuarial tools measure conviction, most measure imprisonment, and many also look at sentence length, these variables will affect their risk assessments.

One response to this might be to include court appearances in the risk calculation. This could mitigate issues associated with juries' perceptions of offenders, although it would do little to address differences in reporting by victims and prosecution by the police. It might be possible to go even further and consider reported but unprosecuted crime, as well as offenders' own admissions of either previous sexual offending or offending with high comorbidity with sexual violence. The obvious objection is on natural justice grounds: that offending not legally proven should not determine a person's sentence. But currently Corrections uses court appearances occasionally, offenders' own admissions occasionally, and the general controversies over whether

---

[152] Statistics New Zealand "NZ Official Yearbook 2012: New Zealand's Prison Population" (4 July 2012) <www.stats.govt.nz>.
[153] For example, the STATIC-99 has a conversion chart for charges to convictions; see Andrew Harris and others "STATIC-99 Coding Rules" (2003) STATIC-99 Clearinghouse <www.static-99.org> at 35.
[154] Response to questions regarding use of actuarial tools for sexual crime, 14 August 2014 (Obtained under Official Information Act 1982 Request to the Department of Corrections) at 1–2.
[155] Bronwyn Morrison "Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research" (Ministry of Justice, November 2009) at 53–56.

actuarial tools are an affront to due process are still in play.[156] Rendering a tool more accurate will go some way to addressing the general issues. More importantly, however, if Corrections uses this kind of data for any offenders, it implicitly asserts that it is reliable enough to usefully contribute to an assessment, and thus it should be used for all offenders. Yet it appears that such data is used on an ad hoc basis.[157] For the sake of proportionality and consistency as between offenders, there should be a set test of reliability, and once that test is passed, this information should be used to assess all offenders to whom it applies.

Additionally, there are serious general issues of sampling and bias that arise when crime has a low reporting and conviction rate. The primary risk associated with these issues is that the low conviction rate will lead to a biased sample of imprisoned offenders. The imprisonment of a non-representative population of offenders might, in turn, lead to a skewed assessment of recidivism risk which reflects the biases of the criminal justice system more than the actual risk a certain offender poses.

The principal diagnostic tools used for sexual crime in New Zealand are based on studies of United States prison inmates, modified by studies of New Zealand inmates over a long period of time.[158] All the general attendant selection bias problems with the United States information, including its treatment of race, apply to sexual offences. But with regard to sexual offences, all the tools suffer from a more fundamental problem: they are based on a sample of roughly one per cent of all offending.[159] Academic studies, too, often focus on re-arrest or reconviction.[160] Moreover, the profile of convicted sex offenders is not representative. "Forcible rape" is much more likely to be treated seriously by the criminal justice system, from arrest to conviction.[161] The Department of Corrections reports that rapists have a comparatively low recidivism rate, and correspondingly few rapists have previous sexual crime convictions; those identified as recidivists by Corrections (as opposed to "first-timers") significantly increase the average rate.[162] When these facts are combined with the other factors relevant to sentencing, especially the emphasis on past convictions and on the violence of the crime, they may result in a very distorted picture of recidivism risk.

---

[156] Response to questions regarding use of actuarial tools for sexual crime, above n 154, at 3.
[157] At 3.
[158] At 1–2; see also Skelton and others, above n 149.
[159] Extrapolating from reporting, charge and conviction rates. Triggs and others, above n 1, at 82; Morrison and others, above n 1, at 35 and 45; Statistics NZ "Charges prosecuted against adults by offence type", above n 1; Statistics New Zealand "Annual recorded offences for the latest calendar years (ANZSOC)", above n 1.
[160] See for example Patrick A Langan, Erica L Schmitt and Matthew R DuRose "Recidivism of Sex Offenders Released from Prison in 1994" (November 2003) Bureau of Justice Statistics <www.bjs.gov>. This is probably because funding and data are available for studies of convictions, via national corrections services.
[161] See for example Shane Muldoon, Caroline S Taylor and Caroline Norma "Patterned characteristics of continued and discontinued sexual assault complaints in the criminal justice process" (2013) 24 CICJ 395 at 411–414; Daly and Bouhours, above n 1.
[162] Department of Corrections, above n 100.

The use of actuarial tools assumes that statistical analysis of convicted offenders can accurately protect an individual offender's future risk. There are significant criticisms of this premise in general, on both principled and practical grounds. Even where tools are shown to be as accurate as individual assessments across a given population, it is possible that the tool unfairly disadvantages (or advantages) certain individuals compared to an individual assessment. On a practical level, criticisms often centre on the non-representative nature of the offenders sampled; the assumptions often made in smaller jurisdictions that tools developed elsewhere will be transferable to different cultural and social environments; the question of whether the data collected is specific enough to predict reoffending for specific crimes, or whether it operates based only on broad categories; and on the possibility that certain tools, or tools as a whole, conflate correlation with causation.

IV Sexual Crime Prediction in New Zealand

A Sampling and Distortion: Issues with Predicting Behaviour

Actuarial tools rely on reliable reporting and conviction. All tools require crime to be reported before it is taken into account; most only take into account conviction data. Therefore, they rely on two major assumptions. First, a significant and representative sample of moderate to serious crime must be both reported and convicted. Second, since actuarial tools attempt to categorise recidivism risk, we must be confident that if a given person re-offends after their first release, that re-offence will lead to a report and probably a conviction. Additionally, there must be a reasonably high reporting rate overall. Otherwise, the model risks presenting a warped picture of offending, implying that offenders who commit crimes that are less likely to lead to conviction are less dangerous, rather than simply more evasive.

For many types of crime, it is appropriate to assume that enough serious offences will be reported and convicted to render the statistical model viable. For example, although not all thefts will be reported, the more serious a theft is, the more likely a victim will report it. We can be relatively certain that the most serious thefts will be reported. Owners take theft of high-value items seriously because of the harm caused by that particular theft, and police and owners are alert to the possibility that whoever took the item might steal again. There is no real stigma to reporting theft, even if the owner failed to take precautions to reduce risk, such as installing a car alarm. Similarly, although not all assaults are reported, the most serious assaults generally will be (with the possible exception of domestic assault, which also suffers from a particular stigma and a related low reporting rate, and to which much of this paper will also be applicable). Either the harm done will be serious enough that the victim is sent to hospital, in which case the process may be set in motion automatically, or the victim or a witness will decide to contact the police. Moreover, the victim knows that

they can do so, because physical injury is taken seriously by the criminal justice system and victims are rarely blamed for not avoiding physical assault. Once prosecuted, the most serious thefts and assaults will receive the most severe sentences. Given a range of thefts or assaults, it is relatively easy to judge which are the most serious. A higher reporting rate would mean that a greater proportion of crime was reported, and consequently there would be reduced potential for distortion of recidivism risk. The reporting rates for almost all crime are higher than those for sexual crime. But even where rates are low, a reliable reporting *pattern* tends to allow a profile of high-risk crime to be formulated, and that in turn will allow recidivism risk to be calculated relatively accurately at sentencing and parole.

Excluding extreme cases, where victims experience physical harm amounting to serious assault as well as sexual violence, we cannot be confident that sexual crime will come to the authorities' attention. With a reporting rate of around 10 per cent, and around one-third of those offences actually charged, sexual violation is one of the least-reported crimes.[163] Combining reporting and attrition data with conviction data leads to a conclusion that only around one per cent of rapes result in a conviction.[164] As a comparison, approximately 15 per cent of assaults lead to a conviction.[165] Not only is the reporting rate low, but as discussed above, the crimes that are reported are not necessarily the most serious. Often, they are simply those for which it would be most difficult to blame the victim, or for which physical evidence is most easily gathered. And in addition to the sexual-crime-specific confounding factors, which distort the selection of crimes used to inform the tools, there are also general biases inherent in the criminal justice system as a whole that tend to warp the sample of offenders targeted.

The Department of Corrections uses actuarial tools in sexual crime sentencing to assess the static factors that contribute to an offender's recidivism risk. The primary tool is the Automated Sexual Recidivism Scale (ASRS).[166] It is based on a similar tool developed overseas and validated internationally, the STATIC-99.[167] Corrections psychologists also conduct interviews, and use non-actuarial checklist-type tools designed to assess dynamic and acute factors that might affect recidivism risk. These

---

[163] Morrison and others, above n 1, at 43–46.
[164] Extrapolating from reporting, charge and conviction rates.
[165] These figures are approximate, but they demonstrate the trend, especially as assault is also under-reported (see Morrison and others, above n 1, at 32–35). This data was obtained by extrapolating from reporting, charge and conviction rates; see Morrison and others, above n 1, at 35 and 45; Statistics NZ "Charges prosecuted by offence type", above n 1; Statistics New Zealand "Annual recorded offences for the latest calendar years (ANZSOC)", above n 1. This trend holds true overseas; see Truman and others, above n 47, at 4.
[166] Response to questions regarding use of actuarial tools for sexual crime, above n 154, at 1–2; see also Andrew Harris and others "Static-99/Static-99R Overview" STATIC-99 Clearinghouse <www.static99.org>.
[167] At 1–2; see also Andrew Harris and others "Static-99/Static-99R Overview" STATIC-99 Clearinghouse <www.static99.org>.

include the STABLE-2007, ACUTE-2007 and the Violence Risk Scale-Sexual Offender Version.[168]

The ASRS is administered via a computer program that mines data from the Corrections computer system and assigns a risk score, which can then be analysed by Corrections psychologists.[169] It measures the following factors, which elevate the risk score: number of unique prior sentencing dates for sexual offences; total number of unique prior sentencing dates; convictions for non-contact sexual offences; prior sentences for non-sexual violence; index non-sexual violence; any convictions for male sexual victims; and youth. This list omits three STATIC-99 factors, not because they were considered prognostically irrelevant, but because Corrections had not reliably collected data on them.[170] The missing factors are cohabitation or an intimate relationship, stranger victims, and unrelated victims. Additionally, whereas the STATIC-99 can include charges that did not lead to convictions in the analysis, and even includes a conversion table for the relative risk scores of charges as opposed to convictions, the ASRS deals only in convictions.[171]

The omission of three factors rendered the ASRS a substantively different instrument from the STATIC-99. The only question without which the STATIC-99 can be validly administered is whether the offender has lived with an intimate partner for two years or more.[172] Accordingly, Corrections needed to verify whether the ASRS effectively predicted reconviction. Rather than applying the ASRS to a new cohort of offenders, and waiting to see whether they were reconvicted, the researchers took a retrospective approach. They used as their sample 1,064 sex offenders released from prison in 1987, 1992, and 1997.[173] These groups comprised the five-, ten- and fifteen-year follow-up samples, respectively. They spanned the range of sexual offences from non-contact exhibitionist offences to sexual violation; sentences ranged from two months' imprisonment to preventive detention.[174] Sexual offences against children were also included in the sample.[175] 50 per cent of the offenders were New Zealand European/Pakeha, 40 per cent Māori, and 10 per cent Polynesian: an over-representation of Māori compared to the general population.[176] We can also infer from prosecution rates that intoxication and acquaintance rape were almost certainly underrepresented in this sample, as compared to their prevalence in the population.

---

[168] Response to questions regarding use of actuarial tools for sexual crime, above n 154, at 1–2.
[169] At 2; see also Skelton and others, above n 149, at 280–281 and 284–285.
[170] Skelton and others, above n 149, at 280–281.
[171] At 280–281; Andrew Harris and others, above n 153, at 11.
[172] Andrew Harris and others, above n 153, at 25.
[173] Skelton and others, above n 149, at 280.
[174] At 280.
[175] At 280.
[176] At 280.

B Further Limitations

1 Development of the ASRS: statistical issues with predicting reconviction

The STATIC-99 was designed to assess the recidivism risk posed by adult male sexual offenders, and is used internationally.[177] Recidivism is defined as reconviction for a new sexual offence.[178] Offenders are scored on 10 variables; most are yes-or-no questions, where a "yes" adds one point to the total score. However, some variables, such as previous sexual offences, are scaled.[179] The total numerical score assigned to an offender is then placed into a risk category.

The STATIC-99's own coding rules identify two disadvantages:[180]

> The weaknesses of the STATIC-99 are that it demonstrates only moderate predictive accuracy (ROC = .71) and that it does not include all the factors that might be included in a wide-ranging risk assessment.

Other studies have shown an ROC (receiving operating characteristic) as low as 0.59 for rapists' sexual recidivism.[181] An ROC curve maps the correspondence of true positives and true negatives against false positives and false negatives in such a way that a score of 0.5 indicates a prediction no more effective than chance. The maximum score is one; a score of one would indicate that the tool predicts every outcome perfectly.[182] While actuarial tools can improve on clinical predictions, this seems highly context-dependent and the difference is smaller than might be expected.[183] This should be borne in mind also in the assessment of the ASRS.

The use of historic offender data is concerning from a statistical point of view. Testing appears to have been conducted as impartially as possible under the circumstances: rather than using the profiles of convicted offenders to develop the tool, the researchers developed the tool first, then measured its conclusions against the actual recidivism rates observed from their selected sample. The researchers identified the postdictive approach as a limitation, and this arrangement does test the validity of the tool's conclusions.[184] However, it is still subject to the possibility of confounding variables, such as the effect of legal or social changes during the period, or of changes to Corrections practice.[185] Crucially, the retrospective approach also limits

---

[177] Andrew Harris and others, above n 153, at 11.
[178] At 4.
[179] At 35.
[180] At 3.
[181] Grant T Harris and others, above n 112, at 420; the tool more accurately predicted child molesters' recidivism, increasing its overall ROC.
[182] Dolan and Doyle, above n 130, at 304–305.
[183] At 303–306.
[184] Skelton and others, above n 149, at 284.
[185] Such changes did occur; this paper is too short to examine them. This issue might also affect predictive studies but can more easily be notified and compensated for.

researchers' ability to tailor the tool. The ASRS omitted three factors that the STATIC-99 tested because Corrections had not, up to that point, collected that information. If it had been designed and then tested using a prospective validation study, those factors could have been included, because Corrections could have begun collecting the data from the point when the tool was developed. Additionally, the researchers could have collected information on factors which were not assessed on the STATIC-99, but which were thought to be potentially useful. A study of total population prevalence of rape might provide insight into exactly which factors should be considered, as will be seen later.

The authors also noted the 2006 study had not examined the impact of victim characteristics, some offender characteristics (for example age, ethnicity and degree of psychopathy), or the effect of treatment.[186] The reference to victim characteristics is particularly important; while the authors may have been thinking of the "victim characteristics" assessed by the STATIC-99 (whether the victims are strangers, and whether they are related to the offender), it is suggested that further research could perhaps go further by incorporating the effect of other victim characteristics on conviction rates, in order to obtain a more accurate picture of offending. One issue the study does not adequately address, however, is the extent of the bias created by using a sample comprised entirely of imprisoned offenders. The authors note that the true recidivism rate may be higher than that detected by their analysis.[187] However, they do not address the possibility that their sample may have distorted the relative recidivism rates of different types of crime. As we have seen above, the profile of the victim has a significant effect on whether her case will proceed to trial and whether any trial will lead to a conviction, and thus affects the likelihood of a conviction.

To test the conclusions of the 2006 study, a further study was conducted in 2010 by two of the original authors. It found that the recidivism rates predicted by the ASRS and those actually observed were "quite similar".[188] The verification study involved 2,435 sexual offenders of all types, including 868 who had offended only against adults at the point when they were released and 402 who had offended against both children and adults.[189] The ROC area for adult-victim offenders was 0.64, and for offenders with both adult and child victims it was 0.69.[190] The 0.64 figure, in particular, is not a particularly high correspondence even ignoring the serious selection issues outlined above.

---

[186] At 284.
[187] At 284.
[188] James Vess and Alex Skelton "Sexual and violent recidivism by offender type and actuarial risk: reoffending rates for rapists, child molesters and mixed-victim offenders" (2010) 16 Psychology, Crime and Law 541 at 541.
[189] At 545.
[190] At 550.

2 *Implications for particular groups*

The omission of stranger victims seems to be an improvement on the STATIC-99, as discussed above, because the McWhorter and Lisak and Miller research suggests that those who attack strangers are not necessarily more prolific offenders than those who attack people they know, and the Triggs study suggests that the apparent difference in recidivism rates might be fully explained by the fact that stranger rapes are more likely to be reported, convicted, and prosecuted. Therefore treating stranger rape as a risk factor, and by extension treating acquaintance rape as a non-risk factor, could give an inaccurate picture of the actual likelihood of offending.

The other omitted factors, however, are associated with research that *does* suggest that they predict risk. The question whether an offender has had any unrelated victims may be associated with unreliable prosecution, in the sense that incest rapes have a high conviction rate, but unlike stranger rapes, it seems likely that the difference in typology is sufficient to lend this factor higher predictive accuracy. There is also significant research that suggests that functional long-term relationships are protective factors regarding crime in general and sexual crime in particular.[191] It is also important that Corrections ascertain that such a relationship is not physically (or sexually) abusive. Not all relationships are created equal; abusive relationships do not confer the same protective benefits, and many rapes occur within relationships.[192]
One potential issue with the STATIC-99 and ASRS is that offenders with male victims are considered higher-risk than those with female victims only. The 2010 validation study of the ASRS found male child victims were associated with higher recidivism rates compared to female child victims, but did not mention male adult victims as compared to female adult victims.[193] It cited a 2003 study that examined a sample of almost 400 offenders who had attacked a child, an adult female, or both.[194] The focus was not on adult-male-victim offenders; indeed, since female-victim rape is much more common than male-victim rape, one might wonder how many offenders in the sample had any adult male victims. The Triggs study found higher conviction rates for male victims based on a small sample, and cited a Victoria study that found the same.[195] Though the data is far from reliable, it suggests that the apparent recidivism risk associated with male victims may be partly because such attacks are more likely to lead to conviction than attacks on women. It is also possible that studies involving both child and adult victims have shown that attacking male child

---

[191] See for example R Karl Hanson and Kelly Morton-Bourgon "Predictors of Sexual Recidivism: An Updated Meta-Analysis" (Public Safety and Emergency Preparedness Canada, February 2004) at 31; Ruth E Mann, R Karl Hanson and David Thornton "Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors" (2010) 22 Sex Abuse 191 at 199 and 201–202.
[192] Hanson and Morton-Brougon, above n 191, at 31; Mann, Hanson and Thornton, above n 191, at 199 and 201–202.
[193] Vess and Skelton, above n 188, at 546–548.
[194] Grant T Harris and others, above n 112, at 415.
[195] Triggs and others, above n 1, at 78; Office of Women's Policy "Study of Reported Rapes in Victoria 2000–2003: summary research report" (Department for Victorian Communities, July 2006) at 20–25.

victims is associated with reoffending, and because those studies involved offenders who attacked both adults and children, this conclusion was applied to all rapists.[196] The ASRS was developed in the context of parole law reform for sexual offending against children.[197] Although some offenders offend against both children and adults, it is generally accepted that the two are qualitatively different offences. The ASRS study notes the difference in typology, yet it developed a single tool.[198] It may therefore be less sensitive to factors specific to adult-victim offending than it should be, and factors specific to child-victim offending may be misapplied to adult-victim offending for which reliable actuarial data is lacking.

The initial studies and subsequent reviews of the ASRS raise serious concerns about the methods used. The validation study indicates that the ASRS correlates as closely with actual reconviction as traditional prediction methods, on average.[199] It is accepted that the ASRS may accurately predict reconviction or reimprisonment across a population. But *why* does the correlation exist? Is it because the scale predicts offending? Does the tool track factors associated with, but not causative of, offending? Or does it simply predict the response of the system that created it? In the second case, the tool will be of limited use, and in the third, it is unlikely to add anything useful to the systemic response to crime.

Considering the formulation of the tool, and the statistics on unreported and unconvicted perpetration, the second and third scenarios seem more likely. The authors recognised that the ASRS should only be used as a population measure, not for individual assessment, and that it would be "less than accurate" when predicting the behaviour of any individual.[200] They also realised the tool would not catch all sexual violence, but they seem not to have accounted for the qualitative differences between sexual crime that is commonly reported and sexual crime that is typically not.[201] The ASRS dispensed with the most obviously problematic aspect of the STATIC-99, namely the assumption that apparent recidivism rates for stranger rape could be attributed to the crime itself, and not to the responses of victims or agents of the criminal justice system. However, that was not the result of any reasoned analysis, but of the fact that data was not available from the Corrections computer system. For the same reason, the ASRS dropped two other factors, which may have been helpful, and could not include additional potentially useful factors in the assessment.

Corrections data also shows that reconviction rates for sexual criminals are relatively low. When they are reconvicted, it is usually not for sexual crime. Correspondingly

---

[196] Vess and Skelton, above n 188, at 543 and 546–549.
[197] Skelton and others, above n 149, at 280 and 282.
[198] At 282 and 285.
[199] Vess and Skelton, above n 188, at 551–553.
[200] Skelton and others, above n 149, at 285.
[201] At 285.

few people convicted for sexual crime have prior sexual crime convictions.[202] 35 per cent of rapists released from prison are re-imprisoned within two years. This is lower than the overall re-imprisonment rate; the only crimes with a lower reconviction rate are drink driving, homicide, and child sex offences. Most reconvictions are for non-sexual crimes, to the point that Corrections attributes the low reconviction rates of child sex offenders to the fact that child sexual offending is less closely linked to general violence than adult sexual offending.[203] Only eight per cent of convicted rapists – less than a quarter of those reconvicted – are re-imprisoned for further sexual violence. The trend of low reconviction rates holds true after five years, although the absolute numbers increase.[204] The Lisak and Miller and McWhorter studies suggest that the proportionally low rates of reconviction for sexual crimes are likely not because those individuals become dramatically less sexually violent, but rather because of the strong correlation between sexual and non-sexual violence, and the fact that there is a much higher reporting rate for non-sexual violence. That is, when a sexual offender is released, and commits both sexual and violent crimes, the violent crime is much more likely to be reported, prosecuted, and lead to a conviction. The comorbid non-sexual violence identified by Lisak and Miller appears to be responsible for most reconvictions.[205] Non-sexual violence is also a major determinant of an offender's overall recidivism risk level as assessed by the ASRS.[206]

In one sense, this means the parole system is working. Lisak and Miller specifically recommended the use of physical violence as a proxy for sexual violence. Reconviction of sex offenders for non-sexual violence mirrors this recommendation, and tends to remove non-reformed sexual offenders from the community. To some extent this meets the Parole Act's guiding principle, protection of the community from further harm. But this is only one of the purposes of the Sentencing Act, and even in the narrow context of protection by removal of the offender from the community, it is likely to be insufficient. Since sexual violation is a very serious crime, sentences for other crimes will often be shorter. Sentences and rehabilitation will be focused on non-sexual violent offending, which will impede the ability to correct that behaviour, and will often give a false impression that the behaviour is less serious than it truly is. It is likely (though not certain, especially where there is domestic violence) that the victim of physical violence will not be the same person as the victim of sexual violence; this will thwart the victim-focused purposes of sentencing. Promoting in the offender a sense of responsibility for the harm they caused seems particularly important for sexual offences, given the blame shifting common in society at large, let alone among offenders. Reconviction for other crime

---

[202] Triggs and others, above n 1, at 24.
[203] Department of Corrections "Re-imprisonment rates by original offence type" (15 September 2008) <www.corrections.govt.nz>.
[204] Department of Corrections, above n 100.
[205] Department of Corrections, above n 203.
[206] Skelton and others, above n 149.

cannot promote a sense of responsibility for unreported, unprosecuted or unconvicted sexual crime. It cannot adequately address this problem.

V The Potential of Actuarial Tools

The problem is twofold. First, how to sentence based on actual harm and culpability, rather than on received wisdom or social pressure. Second, how to incorporate public protection into sentencing and parole, given that low reporting rates pose such a serious obstacle to the reliability of the traditional and actuarial approaches. The most important change that must occur in solving these problems is an increase in the reporting rate. That aspect is too complex to address in a paper of this length, but studies of attrition in the criminal justice system, and of rape typology, suggest that there may be other ways to achieve improvement. How effective those methods will be is unclear; I do not argue that it is certain that the suggestions I give below will have a significant effect, nor that actuarial tools are necessarily the way forward. However, it is my contention that basing actuarial analysis on robust research is more effective and responsible than making do with what is available. So long as actuarial tools are being used, they should be made as robust as possible, used in a way that is supported by data, and if possible, paired with education that may help address the underlying issues behind the reporting rate. For those purposes, the key to improvement is research.

Actuarial tools are used in criminal justice to quickly assess the likely risk presented by an offender. For most crimes, this is useful at sentencing and parole, but not particularly relevant to the decision to prosecute: it is relatively easy to tell what is a serious assault, or a serious theft, and the most serious crimes are reliably convicted. For some crimes, however, that is not so. With rape in particular, perceived risk differs significantly from real risk. As a result, rapists who are perceived as higher-risk because they attack strangers and use violence, among other features, are more likely to be reported, prosecuted and convicted. Meanwhile, rapists who are perceived to be low-risk are even less likely to be reported and convicted than the low overall reporting and conviction rates would suggest. Consequently, the prison population is composed disproportionately of offenders whose perceived risk is high, regardless of their actual risk, and actuarial tools based on that population are likely to perpetuate the distortion.

However, if substantial research were undertaken which showed the *actual* prevalence of rape in the community, the tools might be able to achieve their original aim of ensuring that crime and justice policy is based on verifiable data and not on assumptions about criminality. The most obvious place where such data could be incorporated is at sentencing, to counteract rape myths such as those latent within *R v AM*. The use of actuarial tools at this stage remains controversial. Additionally, while recidivism risk can be treated as an aggravating factor, it is only one among many,

and is often addressed through proxies such as regret and previous criminal record, rather than directly.

Regardless of whether a tool is used, however, the research behind it will be valuable in providing an accurate understanding of typology, which is necessary at each stage of the criminal justice process, even under the traditional approach, to contextualise and understand criminal behaviour. At trial and sentencing, behaviour must be placed in the proper cultural context. Sexual violence is often misunderstood by juries, and sometimes also by judges. Like domestic violence, it is prevalent in the population, often recurs, and should be understood as a special type of crime if it is to be tried properly and sentenced in accordance with the Sentencing Act. That includes educating judges and juries about prevalence, methods, typical victim reactions, and reasons victims might react in unexpected ways. In terms of the purposes of sentencing, this will apply not only to rehabilitation and protection of the community, but also to holding the offender accountable, promoting a sense of responsibility for harm, and deterring the commission of similar offences.[207] Whether the research is used within a tool, or merely to place the offending in context, it can be valuable at this stage.

Parole will likely be a more appropriate place to incorporate any actuarial tool derived from this research. The Parole Act allows the Board to consult any information it thinks fit and requires decisions to be made on the basis of all relevant information,[208] which means that issues of admissibility do not arise so long as the tool is well-formulated. In fact, if it provides new information, the Board may be required to consider it. The paramountcy of safety makes it easier to justify the use of risk assessment, and if statistical assessment is more effective than individual assessment, or if they function best in tandem, it is easy to argue that the use of actuarial data is justified. It does not seem a stretch to suggest that the Parole Board should consider public safety in a broad sense, focusing on actual harm rather than confining it to the likelihood of further convictions. Objections on the basis of due process might have force at sentencing, but at parole they are unlikely to succeed. The use of population studies will likely ameliorate due process issues associated with the current use of actuarial tools, by rendering the tools more accurate and therefore diminishing the impact of confounding factors such as race and victim characteristics, among others. An understanding of how the offence occurred will also be critical to Corrections' ability to track potential reoffending. Research into typology may assist Corrections in tailoring rehabilitation and prevention programmes to cast a wide net. It might reveal a strong correlation between certain types of physical violence and sexual offending, for example, enabling rehabilitation targeted at the comorbid physical violence to incorporate a sexual violence prevention element. This could help

[207] Sentencing Act, s 7(1)(a), (b) and (f).
[208] Parole Act, ss 7(2)(c) and 117.

rehabilitate offenders imprisoned for physical violence but whose sexual offending is undetected.

The area where most rape falls out of the system, however, and where the greatest change is needed, occurs long before sentencing and parole. This paper has addressed and proposed solutions for the fact that only one per cent of offending is included in the samples currently used for actuarial tools, because only one per cent of offending is convicted. The obvious drawback is that if the improved tools are limited to sentencing and parole, they will only apply to one per cent of crime in the future. Discussions about the low rape conviction rate tend to focus on the low reporting rate, which is a legitimate response; as seen above, low reporting is the biggest contributor to low conviction. However, low reporting is a perennial issue that has never been resolved, despite years of research and effort internationally.

Research on rape prevalence cannot directly counteract low reporting rates, but perhaps it could be used by Police to double-check decisions whether to investigate or prosecute. It might be possible to use a variant of an actuarial tool to see how common certain types of cases are, and perhaps counteract some of the misconceptions that lead to such low prosecution rates for relationship and intoxication rape. A simple set-format tool might be more accessible for Police than extensive qualitative research into rape typology. If such a tool had a significant impact on prosecution rates, that effect might even become evident in a change of attitudes to victims, which could in turn reduce attrition during the criminal justice process.

Low reporting is a continuing problem, and solving it will require years of work and a culture change in wider society as well as in the criminal justice system. Even if the only effect of additional research is to slightly improve the accuracy of the predictive tools already in use, that seems a worthy objective. But it may be that there are additional benefits: actuarial tools may be able to function as a stopgap, helping to compensate for some of the defects in the system as it currently exists, and perhaps eventually helping to facilitate the ultimate goals of reliable rape reporting and prosecution. Surely it is worth improving upon the tools that are already available, to see what effect a reliable statistical approach might have.

Privacy Law in the Abortion Context

Sarah Alawi*

The law on abortion is currently out of touch with reality. Accessibility is treated as a medical problem, and protection against anti-abortion protests is reached vicariously through property law concepts. In both instances, the law is using the wrong mechanism to properly confront what it is seeking to protect. This paper suggests that privacy law presents a more honest response to the issues that are at play. This is possible since, in recent years, privacy law has secured status as a right in New Zealand.

The topic of abortion is a hugely divisive and sensitive subject matter; "it engenders in the community every sort of response."[1] For this reason, Parliament has maintained a neutral standpoint. The Supreme Court, in the decision of *Right to Life New Zealand Inc v Abortion Supervisory Committee*, has also distanced itself from the topic.[2]

Unfortunately, one of the consequences of remaining distanced from the topic has meant that the legal framework for the availability of abortions in New Zealand is not an honest one. The problem is three-fold. First, lawful abortions exist as an exception within the criminal law context. Secondly, the availability of abortions is "centrally focused" on the beliefs of the medical practitioners (whose decisions are non-reviewable). Thirdly, the decision to abort is categorised as a medical problem. This ignores the reality that most women wishing to abort do so as a result of decisional autonomy rather than issues with mental health. This point has been addressed by the Abortion Law Reform Association, saying "[m]ore than 98% of all abortions in New Zealand are approved under the so-called mental health ground, showing how dishonest the current law is".[3]

This paper will suggest that privacy law presents a workable framework. In the first section, I argue that a woman's decision to abort is more honestly categorised as a private decision rather than a medical one. I turn to similar approaches taken by overseas jurisdictions to support this view. The second section focuses on anti-abortion protests and the lack of protection which exists for women entering clinics in this context. Again, I consider privacy law to present a more workable framework than existing measures of protection.

---

* The author was a BA/LLB(Hons) student at the University of Auckland. She is grateful to her then supervisor, Stephen Penk.

[1] *R v Woolnough* [1977] 2 NZLR 508 (HC) at 519.

[2] *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762.

[3] Abortion Law Reform Association of New Zealand "Did You Know?" < http://www.alranz.org>.

I The Legality of Abortions in New Zealand

Abortion procedures in New Zealand are governed by the Contraception, Sterilisation, and Abortion Act 1977 (the CSA Act) and certain provisions in the Crimes Act 1961. The CSA Act defines in s 2 "abortion law" as ss 10 to 46 of the CSA Act and ss 182 to 187A of the Crimes Act. The starting point is s 182 of the Crimes Act, which provides:

> **182 Killing unborn child —**
>
> Every one is liable to imprisonment for a term not exceeding 14 years who causes the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being.
>
> No one is guilty of any crime who before or during the birth of any child causes its death by means employed in good faith for the preservation of the life of the mother.

Section 186 says that it is a crime to unlawfully supply or procure the means of an abortion.

The meaning of what is "unlawful", for the purposes of s 186, is contained in s 187A. In summary, the section provides that an abortion within the 20 weeks' gestation period is not unlawful if the person doing the act believes that:

(a) the continuance of the pregnancy would result in serious danger to physical or mental health;[4]

(b) there is a substantial risk that the child, if born, would be seriously handicapped, physically or mentally;[5]

(c) the pregnancy is the result of incest or unlawful sex with a guardian;[6] or

(d) the woman or girl is severely abnormal within the meaning of s 138(2).[7]

Section 187A(2) states that extreme age or sexual violation are not grounds for a lawful abortion, but these matters can be taken into account in determining whether

---

[4] Crimes Act 1961, s 187A(a).
[5] Section 187A(aa).
[6] Section 187A(b).
[7] Section 187A(d).

the continuance of pregnancy would result in serious danger to life or physical or mental health.

The "person doing the act" must, under s 187A(4), be a medical practitioner. If the woman's own doctor proposes to perform the abortion, and the doctor is not a certifying consultant, the doctor must refer the case to two certifying consultants for a determination under s 33. One of the certifying consultants must be a practising obstetrician or gynaecologist. If the woman's own doctor proposes to perform the abortion, and the doctor is a certifying consultant, he or she may certify an abortion in conjunction with another certifying consultant. An abortion that meets these requirements is lawful not only under s 186 but also under s 182 of the Crimes Act.

II Privacy Law and Abortion

A Privacy law as the Doctrinal Underpinning of Abortion Law

The United States Supreme Court decision of *Roe v Wade* found that a statute that made criminal all abortions – except "by medical advice for the purpose of saving the life of the mother" – violated the right of privacy which, the Court said, is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[8]

The Court focused on the negative effects of a forced pregnancy:[9]

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

The focus on the "detriment" that a pregnant woman would suffer if the State were to deny the choice altogether is an unusual link to privacy law since the focus is not on the woman's entitlement to exercise her privacy rights per se, such as a right to autonomy or personal development, but on what may flow if those privacy rights were withheld. The analysis, in this regard, is therefore a clinical and paternalistic one.

In *Bowers v Hardwick*, Blackmun J made a more nuanced and definitionally correct reference to privacy law concepts. The Judge held:[10]

---

[8] *Roe v Wade* 410 US 113 (1973) at 153.
[9] At 727.

> We protect those rights... because they form so central a part of an individual's life. The concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole... we protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition.

More recently, protection against "interference with privacy" in art 17 of the International Covenant on Civil and Political Rights and respect for "private and family life" in art 8 of the European Convention on Human Rights have also been said to include the decision to have or not to have a child.[11] The cases that flow from these jurisdictions are important because they demonstrate a growing consensus in the international arena that restricting access to abortion for women may amount to a violation of the right to privacy (including the right to personal autonomy, and to physical and psychological integrity). However, in *A B and C v Ireland*, the Grand Chamber of the European Court of Human Rights made the observation that "[t]he woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child".[12]

B The Suitability of Privacy Law as the Applicable Body of Law

In *C v Holland*, Whata J said that "it is now too late to cogently argue that Judges in New Zealand are unable to adjudicate on the content and boundaries of a privacy right…"[13] This decision was delivered in 2012, suggesting that privacy law is a modern area of the law. This means that the position taken by the CSA Act, which is more than 35 years old, is out of date with the current legal trend.

From a definitional approach, privacy law is a suitable framework to guide the legality of abortions in New Zealand. The best-known[14] definition of privacy is "the right to be let alone".[15] The "inviolate personality", a term captured by this definition, refers to dignitary interests and bodily integrity. In the abortion context, the right to be let alone would refer to the State censoring itself from a woman's decision to not remain pregnant. *Roe v Wade* is a good example.

The right to privacy also encapsulates a form of retreat from the conformist pressures of social norms. Under this view, "social retreat is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness... formulate unique ideas,

---

[10] *Bowers v Hardwick* 478 US 186 (1986) at 204.
[11] See, for example, *KL v Peru* CCPR/C/85/D/1153/2003, 22 November 2005; *LMR v Argentina* CPR/C/101/D/1608/2007, 28 April 2011; and *A, B and C v Ireland* (2011) 53 EHRR 13 (ECHR).
[12] *A, B and C v Ireland*, above n 11, at [213].
[13] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [74].
[14] Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) at 3.
[15] Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harvard L Rev 193.

opinions, beliefs and ways-of-living..."[16] This definition of privacy appeals to the abortion context because it entitles pregnant women wishing to abort with the ability to retreat from the abortion debate and withdraw from societal pressures on the subject matter.

DeCew refers to privacy as a form of "control" over one's ability to make important decisions about family and lifestyle.[17] The idea of control is closely connected to Warren and Brandeis' definition of privacy in that it appeals to the inviolate personality. However, DeCew's definition focuses more on the power of the individual to remain autonomous, rather than focusing on the State's duty of non-interference. Under this view, parenthood is obviously an important decision relating to family and lifestyle. It is therefore up to the pregnant woman, herself, to control (within the gestation limit) whether to choose that lifestyle for herself.[18]

Reiman views privacy as fundamentally connected to personhood. He defines privacy as:[19]

> The right to privacy protects my capacity to enter into intimate relations, not because it protects my reserve of generally withheld information, but because it enables me to make the commitment that underlies caring as *my* commitment uniquely conveyed by *my* thoughts and witnessed by *my* actions.

This definition is helpful as it focuses on the right of the woman to choose when to make the commitment to be a mother. This definitional approach is interesting in that it looks beyond the relationship between the individual and the State. It focuses on the ability of the individual to choose whether to form intimate relationships with others (in this context, the 'other' – the unborn child – is "contingent"[20]).

C Privacy Law and Abortion in New Zealand cases

In *Harris v McRae*, the United States Supreme Court confined the stated position in *Roe v Wade* to a purely negative right.[21] In that case, the question for the Court was whether the *Roe v Wade* decision included an entitlement to public funding for abortions that are not medically necessary. It was held that the answer is no. The Court took the view that "although government may not place obstacles in the path of

---

[16] John DR Craig "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill LJ 355 at 361.
[17] Judith Wagner DeCew *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press, New York, 1997) at 77.
[18] I acknowledge that this definition can lead to complicated inquiries, as it can trigger further privacy claims – for example, father's rights.
[19] Jeffrey Reiman *Moral Liberalism: Theory and Practice* (Rowman & Littlefield Publishers, United States of America, 1997) at 37.
[20] Tipping J in *Wilcox v Police* [1994] 1 NZLR 243 (HC) at 253 uses the term "contingent" to explain the interests of the unborn child.
[21] *Harris v McRae* 448 US 297 (1980).

a woman's exercise of her freedom of choice, it need not remove those not of its own creation." Indigency, it was held, "falls in the latter category." The Court added:[22]

> The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

This decision was criticised for confining the right to privacy to a right without access. As Mackinnon puts it, "[t]he women in *Harris*... needed something to make their privacy effective." Solinger adds:[23]

> [T]he abstract freedom to choose is of meagre value without meaningful options from which to choose and the ability to effectuate one's choice. The traditional concept of privacy makes the false presumption that the right to choose is contained entirely within the individual and not circumscribed by the material conditions of the individual's life...

The *Harris* decision is not explicitly pertinent to a New Zealand context. In New Zealand, women can be eligible to have their procedures publicly funded depending on the licenced institution.[24]

However, the conceptual difficulties in the *Harris* decision emerge in a related context. The law places the ultimate decision to abort "on the shoulders of the medical profession".[25] As Tipping J in *Wilcox v Police* put it, the availability of an

---

[22] At 317.

[23] Rickkie Solinger *Abortion Wars: A Half Century of Struggle, 1950-2000* (University of California Press, California, 1998) at 147.

[24] The Health and Disability Services Eligibility Direction 2011 sets out the eligibility criteria for publicly funded health and disability services in New Zealand. Generally, an abortion is free for New Zealand permanent residents or citizens.

[25] The determination of an abortion case is mandated by ss 32 and 33 of the CSA Act. Outlined briefly, the process is as follows:

1. The woman must first consult a medical practitioner who is referred to as the "woman's own doctor".
2. If the woman's own doctor considers that the case is one to which s 187A(1) or (3) applies, the doctor must, if not proposing to perform the abortion, refer the case to another medical practitioner (the "operating surgeon") who may be willing to perform it (if authorised by the CSA Act).
3. If the woman's own doctor proposes to perform the abortion, and the doctor is not a certifying consultant, the doctor must refer the case to two certifying consultants for a determination under s 33. One of the certifying consultants must be a practising obstetrician or gynaecologist.
4. If the woman's own doctor proposes to perform the abortion, and the doctor is a certifying consultant, he or she may certify an abortion in conjunction with another certifying consultant.
5. Each certifying consultant must consider the case as soon as practicable.
6. The case is determined under s 33. If the certifying consultants are of the opinion that the case is one to which any of paragraphs (a) to (d) of subs (1) or subs (3) of s 187A apply, they shall issue a certificate in the prescribed form authorising the performance of an abortion.
7. If they are of the contrary opinion, they must refuse to authorise the performance of an abortion.

abortion is "centrally focused" on the belief of the medical practitioners.[26] For this reason, the New Zealand position may be criticised for going further than the outcome in *Harris*. Financial status is, at least, objectively ascertainable and closer to being controlled by the agent's own affair. The judgement of a medical practitioner, on the other hand, is completely subjective in nature and thus indeterminable. Crucially, there is no right of review either by the Committee or anyone else, including the pregnant patient. This means that she can do little to secure her own affairs.

The Supreme Court decision of *Right to Life New Zealand Inc v Abortion Supervisory Committee* is the most recent authority on the issue of reviewability in the abortion context. The majority confirmed the position taken in *Wall v Livingston*, and took the view that the Committee cannot, even after the fact, make any inquiry or investigation into a medical practitioner's decision-making in an individual case where that would tend to question a decision actually made in a particular case.

In *Wall v Livingston*, the Court of Appeal observed that the Committee has a responsibility for the "general" oversight of the work of certifying consultants throughout New Zealand but that the Committee has no control, authority or oversight in respect of the individual decisions of consultants.[27] The Court explained:[28]

> That deliberate absence of any review process inside the Act itself is probably founded upon three considerations. First, special attention has been given in the Act to the preservation of anonymity of the woman patient. Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented in any particular case by the certifying consultants a responsibility to make decisions which will depend so very much upon a medical assessment pure and simple. And thirdly, there are the adverse medical implications which could arise from the passage of time should such a determination be easily open to review. Thus it can be said that the Act itself has put aside the dangers and anxieties and frustrations together with moral as well as medical argumentation that might develop by permitting the substitution of one set of medical opinions for others as the result of some generally available process of review or appeal.

In the Supreme Court decision of *Right to Life New Zealand Inc*, the majority drew a distinction between "caseload" and "individual cases", stating:

> [42] What the Committee is at liberty to seek from consultants is information about how they have generally approached their caseload. It could also seek

---

8. If the certifying consultants hold differing opinions, there is a provision to refer the case to another certifying consultant for their opinion.
9. If an abortion is authorised, the prescribed form is forwarded to the holder of a licence in respect of the licenced institution in which the abortion is to be performed.

[26] *Wilcox v Police,* above n 20, at 253.
[27] *Wall v Livingston* [1982] 1 NZLR 734 (CA).
[28] At 738.

> background information of statistical significance such as anonymised information of a socio-demographic kind not germane to the... decision in any case.

The approach taken by the courts is an appropriate one given the circumstances in which these cases arose. In *Wall v Livingston*, the facts involved an application for judicial review by a doctor of the decision of two certifying consultants who had authorised an abortion for a teenage girl. The doctor formed the view that there was no ground under the CSA to justify the carrying out of the abortion. In the Supreme Court, Right to Life New Zealand Inc (RTL) brought judicial review proceedings claiming that many abortions were wrongfully certified, and this has led to abortion "on demand". In both circumstances, the finding against reviewability protected the woman's choice not to remain pregnant.

However, the same reasoning applies to a reverse set of facts. In obiter, the Court of Appeal noted there is no right of review even if the woman herself may wish to review a decision determining that the case for authorising the performance of an abortion had not been made out.[29] Here, the Court aligns itself with the stated position in *Harris*. The *Harris* decision exempted the State from a positive obligation to ensure the resources necessary for autonomous decision-making. Similarly, in removing the potential margin for review, the *Right to Life* decision removed any positive obligation owed by the State to ensure that the woman's choice to abort is protected.

The bad faith exception is currently the only potential for which the right to choose may overcome unfavourable medical judgement. However, this does little to preserve a woman's privacy interests since bad faith is very difficult to detect and will require intervention only in a "clear case".[30]

The other side of the coin is that non-reviewability protects the patient's informational privacy.[31] The reasoning behind patient confidentiality is obvious. Information relating to abortion generates the most sensitive sort of personal information. It reveals private information that is both backward-looking (sexually active, pregnant) and forward-looking (seeking to end pregnancy).

Informational privacy is crucial in this context because it "assures these people space in which they are free of public scrutiny, judgement, and accountability". It also

---

[29] *Abortion Supervisory Committee v Right to Life New Zealand Inc* [2011] NZCA 246, [2012] 1 NZLR 176 at [32].
[30] *Right to Life New Zealand Inc v Abortion Supervisory Committee*, above n 2, at [108].
[31] Noting, however, that privacy law exists separately to the action for breach of confidence. Tipping J, in the majority decision of *Hosking v Runting* [2005] 1 NZLR 1 (CA) was "in general agreement" with the judgment delivered by Gault P (for the majority) but wrote a separate judgment starting at [223] of that decision.

gives individuals the freedom "to choose not to reveal about themselves facts which are acutely sensitive".[32]

DeCew prefers a different line of reasoning. She argues there is a need for informational privacy because there is a real possibility of "exploiting, aggregating, or misusing the information" about individuals. DeCew adds this is particularly relevant in today's electronic medical records: "[w]hile paper records and copying machines have never been particularly secure, computerized records introduce new risks and new opportunities for abuse."[33] Nissenbaum takes a similar approach: "[t]he power of computers and networks to gather and synthesize information exposes individuals to the scrutiny of others in unprecedented ways."[34] This largely refers to the way in which access to most of these databases is virtually unlimited. A related concern is the centralisation of such sensitive information, which "places too much power in a single public agency."[35]

The Court of Appeal in *Right to Life* relied on two lines of reasoning which belong to privacy law jurisprudence. First, reviewability would impinge on the privacy of both the woman and the relevant medical practitioner or provider, and, secondly, any disclosure of records would only tell part of the story. It may be critical for other relevant information to be obtained from the woman patient and/or her medical practitioner,[36] thereby creating the potential for privacy interests to be interfered with to an uncertain or unlimited degree.

In his Honour's dissent, Arnold J preferred to reverse the priority of these competing claims. The Judge would have allowed reviewability of the medical practitioner's decision. He took the view that Parliament has already made a policy trade-off by deciding that abortion is not a matter to be left simply to the affected woman and her doctor. For example:[37]

> [I]t has taken as more circumscribed approach, specifying criteria for abortions, establishing processes for the consideration of applications and for the performance of abortions and constituting a supervisory committee to administer those processes and keep them under review. In other words, Parliament has chosen to interfere with the privacy interests of women seeking abortions and with their professional relationships with their medical advisers.

---

[32] Helen Nissenbaum "Toward an Approach to Privacy in Public: Challenges of Information Technology" (2010) 7 Ethics & Behaviour 207 at 209.
[33] Judith Wagner DeCew "The Priority of Privacy for Medical Information" (2000) 17 Social Philosophy and Policy 213 at 215.
[34] Nissenbaum, Above n 32, at 218.
[35] At 219.
[36] *Abortion Supervisory Committee v Right to Life New Zealand Inc*, above n 29, at [103].
[37] At [178].

It is clear that the CSA Act protects informational privacy. The Act requires that all records and reports made to the Committee keep the patient's name and address anonymous.[38] The purpose is to report only on "the operation of the abortion law" and "its activities during the preceding 12 months."[39]

D Concluding Remarks

This section has suggested that privacy law is able to present a workable framework in governing the legality of abortions in New Zealand. The courts and the legislature have, albeit to a limited degree, acknowledged a privacy right which exists within the abortion context (insofar as the protection of informational privacy is concerned). But, in my assessment, privacy law can apply in a more meaningful way, namely, by holding that the decision to abort is a private one.

However, privacy law is bound up with competing claims. It is not the aim of this paper to specify in any detail the competing claims that lie in the abortion context although I agree with the Grand Chamber's comment that the decision to abort must be weighed against other competing rights and freedoms invoked, including those of the unborn child. What is clear, at this stage, is that the availability of abortions is not suitably placed as an exception within the criminal law and that privacy law, as an alternative, is able to offer a more honest response to the reality in which many abortions are procured.

III Anti-Abortion Protests

Anti-abortion protests are not uncommon in a New Zealand context. The courts have looked at circumstances where anti-abortion protesters "with very strong views about abortions" use extra-legal deterrence techniques such as shaming, harassment, and obstruction in an effort to "help [women] point out what [they are] doing".[40]

In *White v Police*, the appellant sang songs about women entering the premises at the time.[41] The appellant positioned himself at the entranceway of the clinic so that any woman approaching the clinic on foot had to pass very close to him at the time when he was making a protest. In *Wilcox v Police*, ten protesters blocked the front and rear entrances in order to prevent the entry of women who were intending to have abortions that day. A more recent example refers to a group of protesters that have

---

[38] Contraception, Sterilisation, and Abortion Act 1977, s 36. See specifically, s 36(2).
[39] Sections 14(1)(k) and 39.
[40] See Alice Clapman "Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts To Protect Abortion Patients and Staff" (2002) 112 Yale LJ 1545 at 1550-1553.
[41] *White v Police* HC Christchurch CRI 2004-409-000064, 12 May 2004.

picketed outside Thames Hospital every Friday for the last 18 months and have attracted media attention for causing upset to pregnant women entering the premise.[42]

It is clear to see that anti-abortion protests located on or around abortion clinics pose a quandary for the courts. As Fogarty J put it, these women are likely to have "mixed views about their own conduct" and are "likely to be emotionally on edge, if not already upset anyway".[43] Unsurprisingly, abortion doctors are also often targets. This is more common in overseas jurisdictions. In New Zealand, this has not been tested before the courts though our Supreme Court has decided on analogous confrontations, such as that in *Brooker v Police*.[44]

A The Current Legal Framework

The Trespass Act 1980 is the only means of protection against anti-abortion protesters. The Act provides:[45]

> **3 Trespass after warning to leave**
>
> (1) Every person commits an offence against this Act who trespasses on any place and, after being warned to leave that place by an occupier of that place, neglects or refuses to do so.
>
> (2) It shall be a defence to a charge under subsection (1) if the defendant proves that it was necessary for him to remain in or on the place concerned for his own protection or the protection of some other person, or because of some emergency involving his property or the property of some other person.

In the abortion context, the courts have tended to apply the Act in favour of the owners or occupiers of the clinic. As a starting point, anti-abortion protesters are likely to be deemed trespassers within the meaning of s 3(1) from the start. They will usually require only one warning to leave because it is unlikely that they would have express or implied authority to go onto the premises of the hospital or clinic to begin with. Once they are warned to leave but refuse to do so, their only defence is the enactment of the common law doctrine of necessity under s 3(2).

Following *Wilcox v Police*, s 3(2) poses an obstacle for protesters in the abortion context. The subsection refers to the phrase "some other person" ("for his own protection or the protection of some other person"). Tipping J took the view that

---

[42] "Anti-abortion protesters upsetting, says Waikato DHB" *Stuff.co.nz* (online ed, Waikato, 14 May 2014).
[43] *White v Polic*e, above n 41, at [12].
[44] *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.
[45] Trespass Act 1980, s 3.

when Parliament used the word "person" in s 3(2), "there was in the background no settled common law principle that an unborn child was relatively a person."[46]

The protection afforded in trespass cases is, in any event, very limited. Protection is only triggered once it is proved that the person charged (i) was trespassing on the premise; (ii) was warned to leave the premise by an occupier; and (iii) had refused to do so. This is problematic in two ways. First, not all protests involve setting foot on the premise. For example, in *Brooker v Police*, Mr Brooker's conduct did not constitute an offence under the Trespass Act because his protest was situated on the grass verge on the road outside the constable's house.[47] Secondly, the trespasser must be warned to leave by an occupier. To come within the meaning of an "occupier", a person must have a sufficient degree of control over premises.[48] This means that a woman entering the clinic cannot herself put forward a claim.

Trespass laws are intended to protect property, not persons. In the abortion context, the reverse is true. Thus the conclusion is that trespass laws do not accurately encompass what the courts are actually seeking to protect.

It is worth noting that the Harassment Act 1977 is not a preferred body of law in the circumstances because, as defined by s 3 of the Act, a person "harasses" another person if he or she engages in a pattern of behavior directed against that person (being a pattern of behaviour that includes doing any of the specified acts on at least two separate occasions within a period of 12 months). Whether the same woman would enter the clinic on two separate occasions will vary depending on the circumstances and, in any event, it is unlikely that the same person or group of people would pester her on both occasions.

It is proposed that privacy law is the applicable body of law for protection against anti-abortion protests through two causes of action. Below is an overview.

1 The intrusion tort

In order to satisfy the elements of the tort, Whata J in *C v Holland* confirmed that the plaintiff must show:[49]

(a) an intentional and unauthorised intrusion;

(b) into seclusion (namely intimate personal activity, space or affairs);

---

[46] *Wilcox v Police*, above n 20, at 252.
[47] *Brooker v Police*, above n 44, at [10].
[48] See *Wheat v E Lacon & Co Ltd* [1996] AC 552 (HL).
[49] *C v Holland,* above n 13, at [95].

(c) involving infringement of a reasonable expectation of privacy; and

(d) that is highly offensive to a reasonable person.

The intrusion tort is suited to this context because it allows the courts to focus directly on the personal rights of these women, rather than on the property rights of abortion clinics. Importantly, this form of privacy does not depend upon any publicity given to the person whose interest is invaded or to his or her affairs.

In my view, the abovementioned elements are sufficiently broad so as to enable protection against anti-abortion protests. The elements can be set out in the following way:

"an intentional and unauthorised intrusion"

- There must be an affirmative act, not an unwitting or simply careless intrusion. The meaning of "unauthorised" excludes consensual and/or lawfully authorised intrusions.[50]
- This requirement is likely to be easily met. The overarching purpose of anti-abortion protests is to intrude, in the hope of pleading with women entering the clinic.

"into seclusion"

- This will be a question of fact, according to social conventions and expectations.
- It is socially accepted that abortion procedures are an intimate personal affair.

"involves a reasonable expectation of privacy"

- This is a two-prong test. There must be a subjective expectation of privacy which is objectively reasonable. The classic marker of this is the public/private divide.
- This limb will pose the greatest difficulty for potential claimants (see below).

"which is highly offensive"

- Various factors, including the degree of intrusion, context, conduct and circumstances of the intrusion, the motive and objectives of the intruder and the expectations of those whose privacy is invaded, are all relevant to whether or not the intrusion is "highly offensive".
- This requirement is unlikely to pose any real difficulties. Regard will probably be had to the courts' position taken in trespass cases. For example, in *White v Police*, Fogarty J accepted that the woman was likely to be

[50] At [95].

> "emotionally on an edge if not already upset", such that the appellant's "unpleasant confrontation" could not be justified.[51]

2 The reasonable expectation of privacy

Since abortions take place in public buildings, the case does not easily fit within the conception of a reasonable expectation of privacy.

In *Hamed v R*, the Supreme Court considered whether the use of surveillance in a public space breaches the reasonable expectations of privacy.[52] The Court was split on this issue. In the majority, Blanchard J took the view that "[p]eople in the community do not expect to be free from the observation of others... in open public... nor would any such expectation be objectively reasonable."[53]

This view is aligned with the seminal article written by Dean Prosser.[54] Prosser stated:[55]

> On the public street, or in any other public space, the plaintiff has no right to be alone, and it is no intrusion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any on present would be free to see.

In the minority, Elias CJ took the view that there can be a reasonable expectation of privacy in public spaces. The Chief Justice held:[56]

> [P]eople may have reasonable expectations that they will be let alone... even in public spaces in their private conversations and conduct. There is public interest in maintaining a human right space for privacy in such settings.

The Chief Justice's view appeals to a notion of "public privacy".[57] The idea is that people do not think of themselves as entirely accessible to the public at large simply because they happen to be outside their homes. This is a high-level approach to privacy which requires looking beyond physical solitude. Most modern definitions of privacy offered by scholars prefer this view.

---

[51] *White v Police*, above n 41, at [12].
[52] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. The law on this point is fitting in this context since the purpose of anti-abortion protests is to "observe" the women entering the hospital or clinic.
[53] At [167].
[54] American Law Institute *Restatement of the Law of Torts* (2nd ed, Washington, District of Columbia, 1977), § 652B also incorporates this view.
[55] William L Prosser "Privacy" (1960) 48 Cal L Rev 383 at 391.
[56] *Hamed v R*, above n 52, at [12].
[57] See Andrew Jay McClurg "Bringing Privacy Law Out of the Closet: A tort theory of liability for intrusion in public places" (1995) 73 NCL Rev 899.

A preferred view is one taken by Allen. She argues that we need privacy because it "makes it possible for a person to use public places for their intended governmental, commercial, and recreational purposes."[58] The suggestion is, therefore, given the intimate circumstances involved, the operation of an abortion clinic depends on the presupposition of privacy norms. This has little to do with spatial privacy.

3 Public disclosure of private facts

It is possible that the protesters' technique could involve public disclosure, such as posting videos on the Internet of women entering into the premise. Such public disclosure of private facts would put the case in the more traditional tort of the invasion of privacy.

Hosking v Runting is the leading authority on this point. The leading judgment of the Court held that this tort has two elements:[59]

> (a) the existence of facts in respect of which there is a reasonable expectation of privacy; and
>
> (b) publicity given to those private facts would be considered highly offensive to an objective reasonable person.

In that case, the plaintiffs sought to prevent publications of photos taken of their children while they were on a shopping trip in one of New Zealand's busiest retail precincts. It was held that the plaintiffs' concerns were "overstated" because there was no reasonable expectation of privacy in the context of a photograph being taken in a public space:[60]

> The photographs taken by the first respondent do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day.

Under this view, it can be said that a pregnant woman entering the clinic or hospital would have no reasonable expectation of privacy since she "could have been observed by any member of the public" in or around the premise that day. The case, therefore, would fail to meet the first stage of the inquiry.

On the other hand, it is possible to distinguish the facts in *Hosking* from the abortion context. Shopping vicinities attract all sorts of people. The same cannot be said in the

---

[58] Anita Allen *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, United States of America, 1988) at 125.
[59] *Hosking v* Runting, above n 31, at [117].
[60] At [164].

abortion context: those entering and exiting the abortion clinic are likely to be of a very small class of women all undergoing an extremely personal experience or are the support person linked to someone who is. Those seeing the publication on print, however, are likely to be part of a wider class, detached from the intimate experience. Viewed in this way, the image is not merely being disseminated to a larger public audience, but an altogether *different* audience than those present on that particular day.

In a separate judgment, Tipping J concurred with Gault P and Blanchard J. However, his Honour took the view that, in most cases, there can be no reasonable expectation of privacy unless publication would cause a high degree of offence to a reasonable person. This combines the two elements set out by the majority as one overall inquiry.

On the facts, the Judge held:[61]

> They were taken in a public space. There is no evidence which satisfies me that publication would be harmful to the children, either physically or emotionally. There is, in my view, no greater risk to the safety of the children than would apply to a photograph of any member of society taken and published in a similar way.

Tipping J's approach probably allows for an easier threshold to be met. Under his Honour's test, there is a reasonable expectation of privacy because publication would cause a high degree of offence to a reasonable person. In *Hosking*, the children were simply shopping with their parents. This is a mundane activity that reveals nothing about the individuals' private lives. In the abortion context, however, the setting captures everything: that the woman is pregnant and that she wishes to abort. Both facts are extremely sensitive, and disclosure of such facts is likely to be emotionally harmful. The courts have already acknowledged this setting in trespass cases.[62]

D Bubble-zone Legislation: a Proposal

Privacy law competes notoriously with the right of freedom of expression. This is especially true in the context of protests. This, unsurprisingly, poses a quandary for the courts because Judges have to decide which interest is worth protecting in the context of competing claims.

It is possible that a balancing approach may be reached. In the United States and Canada, some states and provinces have passed legislation generally known as "buffer-zone" or "bubble zone" legislation. These legislations create a "bubble"

---

[61] At [260].

[62] See *White v Police*, above n 41 at [12]. Fogarty J acknolwedged that the woman was likely to be "emotionally on an edge if not already upset" prior to the defendant's confrontation.

around abortion-providing clinics within which protesters' speech and actions are restricted. Outside the bubble-zone, the protesters' freedom of speech is maintained.

For example:

(a) Under United States federal law, s 636 of the Freedom of Access to Clinic Entrances Act 1994 prohibits physically obstructing access to clinics, damaging clinical property, injuring or intimidating clients or staff.[63]

(b) In Canada, the Access to Abortion Services Act 1995 was passed. The purpose of the Act is "to ensure that women who choose to use abortion services will have unimpeded access to those services. It will also ensure that those who provide these services can do so safely and without harassment."[64]

This model provides a guiding framework for New Zealand. The bubble-zone is a balance of competing claims because the purpose is not to restrict the freedom expression but to protect people from the potentially harmful consequences of such expression occurring in a particular place, time and manner.

Bubble-zone legislation is especially appropriate when we consider the purpose of anti-abortion protests. Protesters perceive protests as a kind of "wake-up call" for these women, in the hope that she or they would be sufficiently deterred from undergoing the procedure minutes before the scheduled appointment. The reality is, by that point, the decision has already been made. Parliament's medicalised approach to abortion laws has meant that these women have to pass many hurdles of medical judgement to get to accessibility.

IV Conclusion

The current law on abortion is in need of review though an ultimate solution, given its context, may be impossible to reach. This paper has concluded that privacy law presents an honest framework. I accept, however, it is not necessarily a flawless one. There are competing claims which exist within privacy law and the inner workings of them will need to be explored in more detail – a task which is for another day. The aim of this paper has been to look into workable alternatives or, at the very least, open up a constructive reform debate.

---

[63] Freedom of Access to Clinic Entrance Act 18 USC § 248.
[64] Access to Abortion Services Act RSBC 1995, c 1.

Reconciling the Clash: A Comparison of the Australian and Canadian Legal Approaches to Burdening Indigenous Hunting Rights

Alice Sowry*

In the context of rising support for strong legislative protections of animal welfare, the continued practice of Indigenous hunting rights may be perceived as inconsistent with the provisions aimed at preventing cruelty to animals. This article will deal with the question of how the protection of hunting rights granted by the common law doctrine of Native title may continue if new animal welfare standards are to be accommodated for. Three possible solutions are analysed in the context of both Australian and Canadian law. First, modifications to traditional hunting methods could minimise cruelty while allowing hunting to continue. Second, Indigenous hunting rights could be extinguished altogether by animal welfare standards. Third, animal welfare standards could include exemptions for the continued exercise of Indigenous hunting. The analysis of these possible resolutions to the conflict confirms the importance of consultation with Indigenous communities, in order to be inclusive of the Indigenous perspective on animal welfare.

Rising public support for legislative protection of animal welfare has raised difficult questions about the compatibility of these standards with particular traditional hunting practices. This article will examine the nature of the Indigenous hunting rights at stake in comparison with the varied justifications for animal welfare protection. This issue is most pertinent to Australia, where tougher legislative protections for animal welfare were introduced in Queensland in 2012 after public outrage at "cruel" Indigenous hunting methods.[1] The various approaches in Australian states are compared with each other as well as alongside the Canadian legal approach. Although Australia and Canada have a common settler history and similar legal systems operating at both the federal and state/provincial levels, there are significant differences in legal approaches taken to overriding Indigenous hunting rights in order to promote the public interest. Many traditional Indigenous hunting methods are viewed as illegally inflicting cruelty upon animals in Australia, although this depends on the particular animal welfare legislation in each Australian state. In contrast, animal cruelty offences in Canada are part of the federal Criminal Code, and these provisions do not apply to the types of animals usually hunted. Separate regulations pertaining to hunting operate on the provincial level in Canada, and burden Indigenous hunting rights where they can be justified.[2] These regulations are generally environmental, and animal welfare concerns are not yet a burden on hunting

---

* BA(Hons)/DipLang/LLB student at the University of Otago. The author studies Politics and French in addition to Law. This article was written in her third year of study. The author wishes to thank Associate Professor Jacinta Ruru for her insightful feedback and encouragement throughout the writing process.

[1] Sarah Dingle and Lesley Robinson "Cruelty Exposed" (9 March 2012) ABC Radio Australia <www.radioaustralia.net.au>.

[2] *R v Sparrow* [1990] 1 SCR 1075 at 1077I-J.

rights in Canada as they are in some Australian states. This article will address the existing statutory regimes in both countries, and, given the lack of case law on this particular issue, will offer an analysis of three possible resolutions to the conflict between Indigenous hunting rights and animal welfare standards.

I The Nature of Indigenous Hunting Rights

A Australia

The rights of Aboriginal peoples and Torres Strait Islanders to hunt is expressly provided for in the Native Title Act 1993[3] and has been confirmed in subsequent case law.[4]

The traditional practices of hunting, fishing and foraging[5] hold great importance in many Indigenous Australian communities for various reasons. Some communities rely on hunting wildlife as a source of food.[6] However, the spiritual dimension of hunting is one of the principal reasons that Indigenous communities still practise it today as:[7]

> …hunting [allows Indigenous peoples] to express profound environmental knowledge stretching back over many generations, and continually reinforces their beliefs in the spiritual value of such knowledge; it is also an important medium of education, whereby both spiritual and ecological knowledge is handed on to succeeding generations.

Traditional hunting in Australia involves the killing of many different native species, and it has been estimated that 1,600 dugongs, 200,000 mutton-birds and 20,000 salt and freshwater turtles die each year as a result.[8] However, the remoteness of many Indigenous communities means that extensive data is not available.

B Canada

The Canadian courts have generally recognised various sources as granting the Aboriginal right to hunt and fish, including treaties made between the Crown and different Indigenous groups. These rights are not necessarily required to form part of

---

[3] Native Title Act 1993 (Cth), s 223.
[4] *Yanner v Eaton* [1999] HCA 53, (1999) 201 CLR 351.
[5] In this article, the term "hunting" will be used to collectively refer to all of these practices.
[6] Marcus Barber and others "The Persistence of Subsistence: Qualitative Social-ecological Modelling of Indigenous Aquatic Hunting and Gathering in Tropical Australia" (2015) 20 Ecology and Society 60 at 60.
[7] Elspeth Young *Caring for Country: Aborigines and Land Management* (Australian National Parks and Wildlife Service, Canberra, 1991) at 111.
[8] Dominique Thiriet "Out of the "Too Hard Basket" – Traditional Hunting and Animal Welfare" (2007) 24 EPLJ 59 at 59.

an Aboriginal title to land,[9] meaning that the traditional hunting rights in Canada "arise from an Aboriginal title and can exist independently of a territorial aboriginal claim."[10] The Constitution Act 1982 strengthens recognition of what it terms "existing rights", which includes these hunting rights granted as part of Aboriginal title.[11]

The exercise of Aboriginal hunting rights varies across Canada, depending on the Indigenous group in question. Inuit have a well-known history of hunting whales for subsistence.[12] Other tribes, such as the Mikmaq and the Innu, hunt wildlife including caribou and moose.[13] In a similar way, to Indigenous groups in Australia, hunting is considered an important right not only for subsistence but also for serving the cultural and spiritual needs of the community.[14]

II Animal Welfare Legislation as it Applies to Traditional Hunting

The purpose of animal protection laws is to safeguard animals from harm caused to them by humans.[15] However, there is a difference between the approaches of 'animal welfare' and 'animal rights': [16]

> Animal welfare refers to the objective of improving the living conditions of non-human animals insofar as this is possible without fundamentally altering the framework of interactions between humans and other animals… [it] is often contrasted to the concept of animal rights, which rejects the imposition of any suffering and thereby challenges virtually all existing human practices utilizing animals.

The 'animal welfare' approach is reflected in the legal status of animals in Australia and Canada, as detailed below. This approach generally aims to outlaw animal cruelty, defined as causing 'unnecessary' pain to an animal. The fact that the animal welfare perspective is preferred over the animal rights perspective reflects the position that animals are still viewed as lesser to humans, as their fundamental interests do not enjoy the protection of a rights-based framework. The two positions are often conflated as anti-cruelty laws create the impression that animals have a 'right' to be

---

[9] Desmond Sweeney "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 UNSWLJ 97 at 107.
[10] Paul McHugh "Maori Fishing Rights and the North American Indian" (1985) 6 OLR 62 at 74.
[11] Constitution Act 1982, being schedule B to the Canada Act 1982 (UK) 1982.
[12] Nancy Doubleday "Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law" (1989) 17 Denv J Int'l L & Pol'y 373 at 379.
[13] Russel Barsh and James Henderson "Biodiversity and Canada's Aboriginal Peoples" in Svein Jentoft, Henry Minde and Ragnar Nilsen (eds) *Indigenous Peoples: Resource Management and Global Rights* (Eburon, Delft, 2003) 45 at 46.
[14] At 45.
[15] Peter Sankoff "The Protection Paradigm: Making the World a Better Place for Animals?" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia* (2nd ed, The Federation Press, Sydney, 2013) 1 at 4.
[16] Andrew Brighten "Aboriginal Peoples and the Welfare of Animal Persons: Dissolving the Bill C-10B Conflict" (2011) 10 Indigenous LJ 39 at 42.

free from suffering. Anti-cruelty laws would conflict with traditional hunting practices if the particular methods used are determined to be cruel by the relevant legislative definitions. However, the adoption of animal welfare means there is flexibility in what is defined as cruelty – there is generally a distinction made between 'necessary' (that which is legally permitted) and 'unnecessary' suffering. This means that traditional Indigenous hunting would be restricted on the basis that it causes 'unnecessary' suffering to animals, rather than the right of animals to be free from being hunted altogether.

A Australia

In Australia, each state has its own statutory regime to protect animal welfare. For the purposes of this article the most relevant provisions in each piece of legislation are those which could affect traditional hunting.

The Acts governing animal welfare standards in the Northern Territory[17] and Queensland[18] are of interest because they both contain specific provisions relating to the relationship between animal welfare and traditional hunting. The use of culture, religion or traditional practices is expressly excluded as a defence to animal cruelty in the Northern Territory.[19] In Queensland, up until 2012, the legislation provided exemptions for acts that would otherwise be defined as animal cruelty if they were performed under either Aboriginal tradition or Torres Strait Islander custom.[20] The Act was amended in 2012, following an investigation into perceived cruelty to dugongs and sea turtles by Indigenous hunters, prompted by political pressure from animal rights activists.[21] The current legislation in Queensland now provides that an act committed in the exercise of native title rights is no exemption to being considered an act of animal cruelty.[22] However, this does not extinguish traditional hunting rights altogether – another new provision was enacted to allow for an offence exemption when an animal is killed in the exercise of native title rights "if the [killing] act is done in a way that causes the animal as little pain as is reasonable."[23] This new provision creates uncertainty over whether certain traditional hunting methods may legally continue or must be modified to meet the new standards, which demonstrates the difficulty in reconciling the conflict of rights where the law is unclear. This particular situation in Queensland will be analysed in greater depth in the Part II of this article.

---

[17] Animal Welfare Act 1999 (NT), s 79.
[18] Animal Care and Protection Act 2001 (Qld), s 8.
[19] Animal Welfare Act (NT), s 79(2).
[20] Animal Care and Protection and Other Legislation Amendment Bill 2012 (Qld) (explanatory note) at 1.
[21] Dingle and Robinson, above n 1.
[22] Animal Care and Protection Act (Qld), s 8.
[23] Section 41A(2).

The Animal Welfare statutes in other Australian states do not specifically refer to traditional hunting. It is likely in these states that traditional hunting will be treated similarly to recreational hunting, meaning that the cruelty provisions apply unless there is a specific defence – in New South Wales, Tasmania, Victoria and Western Australia, the statutes all provide that hunting in a way that minimises cruelty (defined in various ways depending on the specific state legislation) may provide an exception to prosecution for cruelty.[24]

B Canada

On the federal level, the Canadian Criminal Code deals with cruelty to animals.[25] The key distinction from the Australian position is that animal cruelty provisions in Canada do not apply to wildlife, and so have little effect on the animals usually hunted by Indigenous groups.[26] This is because animal cruelty is conceptualised as a property offence in Canada, rather than an offence against the animal itself. A failed proposal to change the law (Bill C-10B) so that the Criminal Code would apply to wildlife occurred in 2003.[27] The debate over Bill C-10B in Canada will be analysed in greater depth in the third section of this article as it is similar to the situation in Queensland in 2012 where the proposed resolution to the conflict of rights failed to acknowledge the Indigenous perspective.

Although the present Criminal Code does not apply to hunting, there are many examples of regulations (generally at the provincial level) which limit hunting rights. Indeed, there are many cases in Canada to demonstrate that the Aboriginal right to hunt may be qualified. The most important of these is *R v Sparrow*. This case held that regulations could limit Aboriginal hunting rights granted under s 35 of the Constitution Act 1982 if the infringement was justifiable.[28] The test essentially allows the government to regulate hunting rights if those regulations have a valid objective and the actions taken to implement the regulations are consistent with the "special trust" relationship between the Crown and Canada's aboriginal peoples.[29] Most of the limitations placed on traditional hunting rights are to satisfy particular environmental objectives, and are not concerned with animal welfare. However, it is important to note that "there is a distinction between the extinguishment of an aboriginal title and regulation of incidents in that title."[30] This means that any regulations which could go as far as to end the exercise of traditional hunting rights would be invalid under the Constitution Act 1982, as it is the supreme law of Canada.[31] It remains unclear what

[24] Prevention of Cruelty to Animals Act 1979 (NSW), s 24(1)(b); Animal Welfare Act 1993 (Tas) s 4(1); Prevention of Cruelty to Animals Act 1986 (Vic) s 6(1)(b); Animal Welfare Act 2002 (WA) s 22(b).
[25] Criminal Code RSC 1985 c C-46, ss 444-471.
[26] Brighten, above n 16, at 43.
[27] At 40.
[28] *R v Sparrow*, above n 2, at 1077I-J.
[29] At 1079D.
[30] McHugh, above n 10, at 73.
[31] Constitution Act 1982, being schedule B to the Canada Act 1982 (UK) 1982 c11.

would happen if provisions similar to those in Queensland were introduced in Canada, which allow for hunting if pain to the animal is minimised.[32] Such regulations would surely require modification to traditional hunting methods in many situations, which may conflict with the existence of the right itself.

III Three Possible Resolutions

The law in both Australia and Canada appears uncertain as to whether Indigenous hunting rights, in their current form, may co-exist with animal welfare standards. This section is concerned with the analysis of three possible scenarios in which the law could be clarified. The first, that traditional hunting methods could be modified, will be analysed in the greatest depth as it purports to reconcile Indigenous hunting with the promotion of animal welfare in the most balanced way. The second scenario will examine what might occur if Indigenous groups were unhappy with the idea of modifying their traditional practices. The third scenario deals with the current position in Canada, and will analyse the potential discriminatory impact upon Indigenous peoples.

A Would Modifications to Traditional Hunting Methods be an Acceptable Solution?

The current legislation in Queensland specifically allows for the continued exercise of Indigenous hunting rights if methods used are performed in a way "so as to cause the animal as little pain as is reasonable".[33] The Act gives examples of acts and omissions that will not satisfy the standard for an exemption, which include methods such as injuring the animal to prevent its escape[34] and causing the animal to die from starvation or dehydration.[35] The amendments made in 2012 followed the release of a video showing the use of the controversial hunting methods against a turtle, and so the specificity of Section 41A(3) appears to target those methods.[36] If Indigenous groups were to modify their hunting methods so as to be permitted by Section 41A(2), this could perhaps be a balanced compromise between the continuity of traditional hunting rights and the promotion of animal welfare.

Dominque Thiriet provides a detailed analysis of the desirability of modifying the traditional methods of hunting and concludes that:[37]

---

[32] Animal Care and Protection Act (Qld), s 41A.
[33] Section 41A(2).
[34] Section 41A(3)(a).
[35] Section 41A(3)(d).
[36] Dominique Thiriet "Out of Eden: Wild Animals and the Law" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia* (2nd ed, The Federation Press, Sydney, 2013) 226 at 239.
[37] Dominique Thiriet "Tradition and Change – Avenues for Improving Animal Welfare in Indigenous Hunting" (2004) 11 JCULR 159 at 172.

> … in most cases where the purpose of the hunt is traditional but the killing methods have no inherent cultural value, modifying the methods will not detract from the tradition. In such cases, it would be unnecessary, unjustifiable and unreasonable to continue using methods which inflict or are likely to inflict pain on animals in preference to humane alternative methods.

The argument here is that if hunting is only valuable because it serves a cultural purpose, then the ability to modify the method would apply to situations such as hunting for subsistence. It could be difficult to determine how the method of hunting ought to be changed. This is where the issue of uncertainty in the law becomes pertinent, as it would be necessary to determine which alternative methods of killing animals are permitted by the law, which is difficult as the legislation only gives a non-exhaustive list of what is *not* permitted.[38] Even if there is a possibility of changing hunting methods in order to make them more humane, the challenge lies in ensuring communities embrace these changes. This could be a problem, particularly in the context of public outrage and targeting of Indigenous practices in Queensland in 2012. The rushed nature of the amendments did not allow for adequate consultation with affected Indigenous communities, and so this may have had an impact upon their willingness to adapt to the new law.[39] The failure of legislators to ascertain the response of Indigenous communities to the requirements of new legislation affecting their way of life is serious, as some may be willing to suggest and lead changes themselves as has been done in the past in relation to sustainability issues,[40] where others may not share the same understanding of animal welfare laws.[41] It must be understood that there are likely to be significant differences within and between different Indigenous groups, which necessitates consultation with many communities.

In order to determine whether modifying the methods of traditional hunting is the best way to resolve the conflict with animal welfare, more information about the nature of Indigenous hunting is needed. The extent to which the method of hunting has cultural value will vary between communities and over time. The difficulty of fully appreciating the various Indigenous perspectives on hunting means that such an examination is beyond the scope of this article. Thiriet argues that "the significant changes to hunting practices [outlined in her article]… do not affect the legitimacy of the relevant traditions."[42] However, it seems premature to conclude that this will apply in the same way to the variety of Indigenous groups that could be forced to change their hunting practices under the new Queensland scheme, especially when that conclusion does not appear to be founded on extensive consultation with affected communities. Although there is some evidence that many Aboriginal and Torres Strait

---

[38] Animal Care and Protection Act (Qld), s 41A(3).
[39] Agriculture, Resources and Environment Committee, Parliament of Queensland *Animal Care and Protection and Other Legislation Amendment Bill 2012: Report No 5* (July 2012) at 6.
[40] Fernando Ponte, Helene Marsh and Richard Jackson "Indigenous Hunting Rights – Ecological Sustainability and the Reconciliation Process in Queensland" (1994) 29 Search 258 at 261.
[41] *Perceptions of Animal Welfare among Indigenous communities* (Department of Agriculture, Fisheries and Forestry, September 2006).
[42] Thiriet, above n 37, at 171.

Islander people supported the measures taken in Queensland,[43] it remains uncertain whether affected communities have formed a consensus. This is vital as to whether modifying traditional hunting methods should be treated in the most balanced way to reconcile the clash with animal welfare standards, and the lack of evidence of the Indigenous perspective means that this resolution should not be treated as the ideal solution to the matter.

In Canada, Indigenous groups may be required to modify their hunting practices if similar animal welfare legislation were to apply to hunted wildlife in Canada as in Australia. The ability to regulate Indigenous hunting was established in *Sparrow* and it is likely that the prevention of cruelty to animals would be considered similarly to conservation aims, in that it would constitute a 'justifiable' infringement on aboriginal rights.[44] It is already established in Canada that hunting may be modified in order to comply with safety and conservation regulations,[45] which prescribe the necessary changes. In contrast, modifications required by the Queensland legislation are not prescribed and therefore it is unclear what is expected of affected Indigenous groups. The difficulty in drawing the analogy between existing regulations and animal welfare is the fact that animal welfare standards require a much greater degree of interference with the right to hunt, and compliance is made all the more difficult by the lack of prescription. The following sub-paragraph will analyse whether animal welfare in particular could be an acceptable justification for interfering with Indigenous rights.

1 A critique of the animal welfare justification for interference with traditional hunting rights

The question of whether it is acceptable to require Indigenous groups to modify their hunting methods in the name of promoting animal welfare requires a deeper examination of the strength of 'animal welfare' as a justification for doing so. As mentioned in section II of this article, animal welfare is distinct from animal rights.[46] Protection for animal welfare requires distinctions to be made between 'necessary' and 'unnecessary' suffering.[47] 'Necessary' suffering is determined as such in relation to human activities that are viewed as important enough to override concern for any harm it does to animals. The production and consumption of animal products is so ingrained within many human cultures that any attempt to outlaw it altogether would probably fail. Although there are examples of campaigns against commercial farming practices in order to force them to modify their methods, it could be argued that Indigenous groups' practices are significantly more likely to be the target of law reform. This is because a non-Indigenous person may take the view that traditional

[43] (19 June 2012) 412 QLDPD 744.
[44] *R v Sparrow*, above n 2, at 1077J.
[45] See *R v Morris* 2006 SCC 59, [2006] SCR 915.
[46] Brighten, above n 16.
[47] Wendy Adams "Human Subjects and Animal Objects: Animals as "Other" in Law" (2009) 3 J Animal L & Ethics 29 at 34.

methods of hunting are 'unnecessary' where alternative humane methods exist, as it is difficult to comprehend the importance of cultural traditions from an external perspective. Moreover, it is easier for an outsider to find justifications for the necessity of other potentially cruel practices (such as the economic benefits of factory farming) as they are likely to participate in or benefit from those practices in contrast to traditional hunting. The justification of animal welfare allows for some animal suffering in relation to human activities, yet the activities defined as 'necessary' perhaps depend upon one's cultural perspective, meaning the law could operate to disadvantage Indigenous peoples because their perspective is not shared by the majority.

B Indigenous Hunting Rights are Restricted by Animal Welfare Standards

Where the traditional method of hunting itself has cultural significance, it is more difficult to resolve the situation unless animal welfare was determined to take precedence over Indigenous hunting rights.[48] The current legislation in Queensland prioritises animal welfare, as certain traditional methods of hunting dugongs[49] and sea turtles[50] would be prohibited by the Act.[51] Change is therefore imposed on certain Indigenous communities, which restricts their ability to exercise their rights under native title if the change in hunting method would undermine the cultural significance of the hunt. Moreover, it may be that Indigenous communities are unwilling to change their traditional hunting methods even if alternative humane methods are available in the circumstances. Where modification to traditional hunting methods is not possible, Indigenous peoples who practise cruel hunting methods would be liable under the various Australian animal welfare statutes. This could create problems in relations between Indigenous peoples and the State, as the prohibition of traditional practices is likely to be viewed as unwarranted by groups who have a different conception of the relations between humans and animals than the one which justifies state legislation for animal welfare.[52]

In reality, it remains unlikely that the legislative regimes will have such a far-reaching impact upon Indigenous groups who hunt. This is because most traditional hunting, particularly in Australia, takes place in remote areas which are difficult to monitor, and therefore animal welfare law enforcement is impractical and not a priority for the relevant authorities.[53] Thus far it is unclear how the Indigenous hunting practices in Queensland which received significant attention in 2012 have been impacted by

---

[48] Brighten, above n 16, at 173.
[49] RE Johannes and JW MacFarlane *Traditional Fishing in the Torres Strait Islands* (CSIRO Publishing, Clayton, 1991) at 25.
[50] At 63.
[51] Animal Care and Protection Act (Qld), s 41A(3).
[52] DH Bennett, "Some Aspects of Aboriginal and Non Aboriginal Notions of Responsibility to Non-human Animals" (1983) 2 Australian Aboriginal Studies 19 at 67.
[53] Steven White "Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?" 35 FL Rev 347 at 359.

potential liability to cruelty. The introduction of the amendment was accompanied by a 12-month 'grace period' for Indigenous hunters, meaning those who would otherwise be subject to prosecution received a warning instead during this period.[54]

In contrast to Australia, the unlikelihood of practical interference with traditional hunting rights in Canada is due to the perceived sensitive nature of the conflict. The trajectory of the failed Bill C-10B in Canada in 2003 illustrates why cultural sensitivity creates a sense of reluctance towards interfering with the traditions of Indigenous peoples. The fear that Bill C-10B would have exposed Indigenous groups to prosecution for their hunting activities led the Canadian Senate to propose an exemption for Aboriginal peoples alongside Bill C-10B.[55] This exemption was envisaged as operating in a similar manner to the law in Queensland at the time.[56] The exemption was worded so as to make explicit the protection of the right of Indigenous groups to hunt using their traditional methods.[57] Although it is accepted in many Canadian provinces that Indigenous hunting rights may be burdened by conservation and safety regulations,[58] those same regulations equally apply to non-Indigenous hunters. The Bill C-10B proposal would have had a disproportionate impact on Indigenous hunters by targeting the traditional methods used, and so the fact that the exception amendment was proposed alongside it reflects a general concern for respecting traditional Indigenous hunting practices in Canada.

C Indigenous Hunting Rights Remain an Exception to Animal Welfare Standards

The final potential resolution is that Indigenous peoples' traditional hunting rights are specifically exempted from animal welfare legislation. This is essentially the position in Canada and was the position in Queensland up until 2012. As previously discussed, this position no longer seems possible in Australia. The situation in Canada is interesting as the current animal welfare standards as they relate to cruelty are contained within the Criminal Code.[59] As previously noted, the Code does not apply to wildlife and thus traditional hunting is not affected. However, this position remains subject to change, as demonstrated by the Bill C-10B proposal as well as many related proposals to strengthen protection of animals against cruelty.[60] This article's previous discussion of Bill C-10B showed that an exemption for Indigenous peoples exercising their hunting rights formed part of the debate. The idea of this exemption in law is worth analysing as a possible resolution to the conflict with animal welfare.

---

[54] "Cruel indigenous hunters to face penalties" (13 September 2012) Sydney Morning Herald <http://www.smh.com.au/environment/conservation/cruel-indigenous-hunters-to-face-penalties-20120913-25u6t.html>.
[55] Brighten, above n 16, at 41.
[56] At 48.
[57] At 49.
[58] *R v Sparrow*, above n 2, at 1079D.
[59] Criminal Code RSC 1985 c C-46, ss 444-471.
[60] Brighten, above n 16, at 41.

First, the rationale for exempting Indigenous hunting from animal welfare standards is connected with the broader rationale for recognising aboriginal rights and native title generally. The recognition of native title in Australia is based on the need to eliminate the previous discriminatory law that denied Indigenous peoples the right to occupy their traditional land and practice their traditional laws and customs.[61] In Canada, the recognition of Aboriginal rights is based on the existence of activities that are integral to the distinctive Indigenous culture.[62] Clearly in both countries the recognition of native title rights allowed Indigenous peoples the right to continue cultural traditions such as hunting. The recognition of Native title and Aboriginal rights can justify the exemptions from laws such as animal welfare standards because those laws encroach upon the practice of traditional activities.

Second, the benefits of such an exemption were noted by Canadian politicians during the Bill C-10B debates in 2003, as they emphasised that traditional hunting practices ought to be considered "reasonable and generally accepted" despite the harsher standards for animal cruelty.[63] Section 35 of the Constitution Act 1982 was relevant as the House of Commons claimed it would ensure the protection of traditional hunting rights.[64] An exemption for Indigenous peoples would have been consistent with the generous and liberal interpretation of aboriginal rights that was made necessary under the *Sparrow* framework.[65]

Although an explicit exemption is not yet required in Canada due to the failure of Bill C-10B, it remains a possibility for resolving any conflict with animal welfare should the issue be raised again. This is in contrast to Australia, where exemptions for traditional hunting have been all but eliminated. Although the Australian position seems to have originated from a concern for animal welfare above all else,[66] exemptions for traditional practices can still be critiqued from an Indigenous rights perspective. Brighten argues that the proposal of an exemption in Canada would have implicitly associated Indigenous peoples with animal cruelty, as it could be inferred that their hunting practices were inherently cruel.[67] According to this view, there could be severe political implications for Indigenous peoples where non-Indigenous peoples may backlash against the perceived entitlement of Indigenous groups to be cruel. However, this would not appear to harm Indigenous peoples in the Canadian context as the protection afforded to their rights is broad according to current interpretations of s 35 of the Constitution Act 1982.[68] Harms to the way Indigenous peoples are perceived generally in the public discourse are more difficult to define. Comparing Canada to Australia could give us a guide to the effect of exemptions,

---

[61] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.
[62] *R v Van der Peet* [1996] 2 SCR 507 at [46].
[63] Brighten, above n 16, at 49.
[64] At 49.
[65] *R v Sparrow*, above n 2, at 1077E.
[66] See discussion of the impetus for legal reform in Queensland in Part II of this article.
[67] Brighten, above n 16, at 51.
[68] *R v Sparrow*, above n 2, at 1077E.

where outrage in Queensland in 2012 was directed at Indigenous groups who were viewed negatively for cruel hunting that did not attract legal consequences. However, it is important to note that the Australian cultural context and the place of Indigenous peoples within it is vastly different to Canada. Australia did not recognise native title rights until 1992,[69] and unlike Canada, Indigenous peoples in Australia do not enjoy recognition within the constitutional framework of their country.[70] Therefore it could be argued that the possibility of exemptions for Indigenous hunting in Canada (if animal welfare laws were to apply to wildlife in future) may not engender the same harmful discourse around Indigenous practices as was the case in Australia. This may depend on whether animal welfare protections for wildlife are strengthened, but the failure of Bill C-10B indicates this is not a priority in Canada.

IV Conclusion

The clash between Indigenous hunting rights and animal welfare is a difficult issue to resolve, and Australia and Canada differ on the question of whether animal welfare is a sufficient justification to burden Indigenous hunting rights. Although there is flexibility in the ability to regulate hunting rights in both jurisdictions, animal welfare standards may be considered differently as the degree of interference with the hunting rights required may undermine the very purpose of the existence of the right – which is to allow the continuation of cultural traditions.

The common thread in the analysis of all three possible resolutions to the conflict is that Indigenous perspectives on the issue are sorely lacking in the secondary literature and in the consultation required of governments before enacting restrictive legislation. In contrast, the concept of animal welfare is usually determined in accordance with the majority's understanding of what constitutes acceptable 'necessary' suffering of animals, which is not inclusive of Indigenous understandings.

This conclusion is perhaps most relevant to Australia given the recent changes in Queensland which directly affect Aboriginal peoples and Torres Strait Islanders. However, growing popular support for legal protections for animals means that this debate is likely to be re-canvassed in Canada in the future. All three possible resolutions to the conflict could be implemented there, and in that situation Canada should prioritise consultation with Indigenous communities to ascertain how they would be affected by any future animal welfare laws.

---

[69] See *Mabo v Queensland (No 2)*, above n 61.
[70] George Williams "Removing Racism from Australia's Constitutional DNA" (2012) 37 Alternative LJ 151 at 151.

Exploring Constitutional Legitimacy

Aishwarya S Bagchi*

The legitimacy of the New Zealand constitution is generally attributed to its legally continuous devolution from the original British constitution. However, legal continuity cannot be the only source of constitutional legitimacy, since it does not explain how the constitutions of newly independent nations acquire legitimacy under the doctrine of autochthony, or how post-revolutionary administrations are deemed legitimate under the doctrine of effectiveness. Further, it overlooks the fact that judicial invocation of the doctrine of necessity can sustain constitutional legitimacy during coups d'état despite breaks in continuity. This essay argues that legal continuity is merely a mask for more fundamental factors behind constitutional legitimacy, namely social consensus and judicial recognition. Revisiting the theories of Raz, Kelsen and Hart on legitimacy, the essay identifies social consensus as the "grundnorm" behind constitutions and the judicial recognition of constitutions as the source of the "rule of recognition" that the constitution is the ultimate determinant of legal validity. The essay asserts that the New Zealand constitution experiences continuous legitimacy because its democratic framework allows social consensus to guide the pragmatic evolution of the constitution. The problem of recurring revolutions and coups d'état in countries such as Fiji or Pakistan indicates that social consensus is easily lost in flawed democracies, making the use of force to overthrow governments an easier alternative to legal reform. The essay contends that the academic understanding of constitutional legitimacy should be updated so that democracy is considered a prerequisite for constitutional legitimacy across the world.

What makes a constitution legitimate? The New Zealand High Court has said that the legitimacy of our constitution lies in its legal continuity – or unbroken legal devolution – from the original British constitution.[1] However, there are several reasons to believe that legal continuity cannot be the only source of constitutional legitimacy. Firstly, legal continuity does not explain how the constitutions of new nations or new legal systems gain legitimacy. Many contemporary constitutions of largely undisputed legitimacy – including the Constitution of the United States – emerged from revolutions, where legal continuity was clearly (and sometimes deliberately) broken.[2] Secondly, a constitution does not necessarily lose legitimacy when it loses continuity. Judicial recognition may sustain its legitimacy through periods of crisis. This indicates that there are elements of social consensus and judicial recognition that work alongside legal continuity and occasionally replace it as factors determining the legitimacy of a constitution.

---

* LLM (First Class Honours) from the University of Canterbury in 2014. The author wrote this article in her fourth year of undergraduate study towards an LLB/BSc (Economics and Statistics). The author would like to thank Professor Philip Joseph for his feedback and support.

[1] *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC) at 212.

[2] F M Brookfield "The Constitution in 1985: the Search for Legitimacy" (unpublished paper, September 1985) at 10.

This article explores the legal, social and judicial requirements for constitutional legitimacy. It does so by considering a range of constitutional situations – of sound or suspect legitimacy – through the separate lenses of legal continuity, social consensus and judicial recognition. The key is to extricate from each situation the underlying elements of continuity, consensus and recognition and ask what their respective roles in the situation say about their relative importance for legitimacy.

The discussion is divided in four sections. Section I contains an overview of the existing works on constitutional legitimacy and highlights the theoretical gaps that this article will address. Section II looks at how a new constitution acquires legitimacy under the doctrine of autochthony in the context of both interrupted and uninterrupted continuity. Section III analyses how the continuity of constitutions can be interrupted by crises such as social uprisings and coups d'état, and examines how the doctrines of effectiveness and necessity may be used to address the question of legitimacy. Section IV contemplates whether democracy is an essential condition for constitutional legitimacy.

While the article draws on the experience of several countries, the central point of comparison remains the New Zealand constitution. Through these comparisons, the article attempts to create a rough formula for constitutional legitimacy. It will be shown that legal continuity is essentially a mask for social consensus and judicial recognition, which are the true determinants of constitutional legitimacy.

I Existing Theories on Constitutional Legitimacy

A Raz, Kelsen and Hart on Legitimacy

A constitution is the framework of government in a society that has a legal system. It is a framework for the interaction between the branches of government, and between the government and the people. The concept of constitution as a binding framework for limited government, now held by the majority of nations, originated with the American and French Revolutions.[3] However, the functionalist sense in which it still exists in England and New Zealand – which is effectively how government works – is older. Arguably, it existed from the time the organs of government could distinguish between executive orders and law, from the time of the Glorious Revolution of 1688.[4] While there is debate about whether the older sense is still an acceptable meaning of constitution, this discussion will assume that it is. That is because it is possible even under functionalist

[3] Kenneth Wheare *Modern Constitutions* (2nd ed, Oxford University Press, London, 1966) at 3.
[4] Elizabeth Wicks *The Evolution of a Constitution*: *Eight Key Moments in British Constitutional History* (Hart Publishing, Portland (OR), 2006) at 17-20.

constitutions to distinguish a rule that is legally valid from a rule that is not. As will be seen, that distinction is necessary for the concept of constitutional legitimacy.

What is legitimacy? According to Joseph Raz, something that is legitimate has (legally) justified claims to authority.[5] In other words, something is legitimate when it legally "ought to be". Does it also have to "be" in fact? Raz claims that legitimate political authorities, such as constitutions, must also be "effective at least to a degree."[6] This sounds sensible – a legal system that no one obeys has no authority.

Using Raz's guidelines, we can say that for a constitution to have legitimacy, the constitution's position in the legal system must be such that:

(a) It has justified claims to being obeyed (*de jure* authority); and
(b) It is in fact obeyed to a certain degree (*de facto* authority).

To understand what justifies a constitution's claim to legitimacy, it is useful to look at the theories of Hans Kelsen and HLA Hart on the foundation of the legal system. Kelsen postulated that in a legal system, a rule is legally valid (that is, has *de jure* authority) if it has been authorised by a higher norm that is itself legally valid. If we continue up the "chain of validity",[7] we will ultimately reach the original, empowering core of the system. That empowering core is called the grundnorm. It is important to note that according to Kelsen, the grundnorm is not the constitution itself, but the norm that says that the constitution must be followed. He wrote:[8]

> It is postulated that one ought to behave as the individual, or the individuals who laid down the constitution have ordained. This is the grundnorm of the legal order...

In addition, Kelsen believed that the legal system as a whole must be effective – that is, obeyed in practice – for the grundnorm to be capable of conferring legitimacy to the constitution. He observed that "efficacy is a condition of validity"[9] but added that it is only "a condition, not the reason of validity."[10] The requirement of effectiveness supplies the element of *de facto* authority to the constitution while the grundnorm's position at the core of the legal system provides the *de jure* authority to the constitution, or the reason why it is obeyed.

---

[5] Joseph Raz *The Authority of Law: Essays on Law and Morality* (Oxford University Press, New York, 1979) at 5-6.
[6] At 8.
[7] At 125.
[8] Hans Kelsen and Anders Wedberg (translator) *General Theory of Law and State* (Harvard University Press, Cambridge (Mass), 1945) at 115.
[9] At 42.
[10] At 42.

An alternative to Kelsen's explanation for constitutional legitimacy is Hart's theory of the rule of recognition.[11] A rule of recognition provides the criteria for distinguishing a valid rule from one that is invalid. According to Hart, each legal system has an ultimate rule of recognition. One reaches this rule when, like in Kelsen's theory of the grundnorm, one exhausts the ability to refer to any other rule to assess the legal validity of the rule in question. The existence of the ultimate rule can be ascertained by reference to actual practice: "the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications."[12] Judicial practice and general acquiescence also make it possible to infer an "internal point of view"[13] on the part of the courts, law-making officials and executive officials that the ultimate rule has *de jure* authority and should be obeyed.

If we apply Hart's reasoning to constitutions, we can conclude that for a legal system to have a legitimate constitution, it must have an ultimate rule of recognition that says that the constitution is the definitive guide to whether a law is valid. That is, if the judiciary and government officials of a nation refer to the constitution as the guideline for the validity of other laws and governmental systems, the legitimacy of the constitution is accepted.

Both the grundnorm and the ultimate rule operate as analytic frameworks that bring a conceptual unity to the legal system by allowing the validity of every law to be attributed to one basic or ultimate rule. However, there is a noteworthy difference in Hart and Kelsen's respective emphases on *de jure* and *de facto* authority. Hart's approach is empirical: he focuses on the "evidence" of official practice and infers from it an internal perspective that the constitution should be obeyed. Kelsen, on the other hand, is purely theoretical: he postulates that the grundnorm exists as a precondition to the legitimacy of the constitution. Whereas Hart considers habitual obedience or *de facto* authority to be integral to the question of legitimacy and regards the *de jure* authority as merely a point to be inferred, Kelsen attaches primary importance to the *de jure* authority of the grundnorm and treats *de facto* authority as a condition but not the justification. Essentially, the ultimate rule of recognition places a greater emphasis on the *de facto* component of legitimacy, while the grundnorm attaches greater importance to the *de jure* component. The discussion will accordingly use the term grundnorm when it seeks to highlight the *de jure* (normative) component of constitutional legitimacy, and use the term "ultimate rule" in connection with judicial and official practice.

---

[11] HLA Hart *The Concept of Law* (Clarendon Press, London, 1961) at 97-120.
[12] At 105.
[13] At 112.

A conceptual shortcoming of both, the grundnorm and the ultimate rule, is that the precise nature of either cannot be easily discerned. A critique of Kelsen is that he presupposes the existence of the grundnorm – his reasoning ends at the statement, "the law is valid and binding because the [grund]norm says so."[14] The question of what counts as the grundnorm is unclear. The grundnorm remains a frustratingly elusive and abstract concept to equate with observable reality. Hart leans in the opposite direction. The evidence of the ultimate rule is abundant: judicial decisions and lawmaking in accordance with established procedure are practices that add to the *de facto* authority of the constitution. However, the reason why these officials consider themselves bound is never explored. Hart simply describes the internal perspective as a "political fact"[15]. Alf Ross called it "a socio-psychological fact outside the province of legal procedure."[16]. However, describing the ultimate rule as a fact evades the question of why the ultimate rule exists in the first place. There is a dissonance between the theoretical terminology and a proper understanding of the social factors that give rise to the belief that the constitution – and the laws enacted under it – must be obeyed.

B "Real-life" Reasons for the Grundnorm and the Ultimate Rule

In New Zealand, the explanation for constitutional legitimacy is legal continuity. In *Berkett v Tauranga District Court*, Fisher J said that there is "an unbroken chain of constitutional authority for all the legislation" in New Zealand since the assumption of Imperial sovereignty in the mid-19th century.[17] The concept of legal continuity is an exercise in Kelsenian reasoning: a constitution is legitimate because a previous constitution or a higher legal authority has legitimised it. From a Hartian perspective, the current ultimate rule of a legal system exists because proper legal devolution and habitual obedience to it by the law-applying institutions have led to a practice of recognising the current constitution as the supreme authority. If the constitution were changed in a way that is unauthorised by a higher or older authority, then the absence of *de jure* authority for the change would render it incapable of being considered legitimate. Moreover, an enduring change in the framework of government that is not provided for in the constitution shows a loss of actual obedience to the constitution, which would undermine the *de facto* authority of the constitution.

History points to usurpations and revolutionary social uprisings as the main causes for breaks in continuity.[18] This suggests that for legal continuity to exist, there needs to be some sort of social (and maybe political) tolerance of the constitution precluding social

---

[14] Uta Bindreiter *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (Kluwer Law International, Hague, 2002) at 16.
[15] Hart, above n 11, at 108.
[16] Alf Ross *On Law and Justice* (Stevens & Sons, London, 1958) at 81.
[17] *Berkett v Tauranga District Court*, above n 1, at 212.
[18] Brookfield, above n 2.

uprisings and usurpations. This is the "socio-psychological fact" referred to by Ross in describing the nature of the ultimate rule.

What is the requisite social attitude? John Locke, whose theory of civil society describes the basis of many modern societies, posited that civil societies arise from a "double agreement"[19] – the first being an agreement to form a society and be bound by the majority in collective decisions; the second being a majority agreement on the form of government to have.[20] It will be argued in subsequent sections that constitutions rely on the existence of the second agreement as the grundnorm for their legitimacy.

A few points relating to Locke's terminology must be clarified. First, it is misleading to say that the majority of the people of a nation directly establish, support or change the constitution.[21] As will be seen in the upcoming sections, it is usually a few leaders who decide what the constitution's contents will be or how they will be changed. Secondly, the support of a simple majority may not be adequate for the "majority agreement" to succeed, as the "determined hostility of a substantial minority"[22] may impede the government supported by the majority. Finally, the term "majority agreement" has the connotations of the modern normative standard of democracy, which a 17th century writer such as Locke could not have meant. In view of these issues, it is better to describe Locke's second agreement as a "social consensus" in favour of the constitution. For social consensus to exist, it suffices that the large majority of people do nothing more than passively tolerate the institutions established under the constitution.[23]

Other than social consensus, there needs to be an element of governmental obedience to the constitution for the "effective" component of legitimacy to be met. For this, there needs to be a coherent working relationship between the law-making and judicial branches of government. The law-making organs must respect that the judiciary will only apply law that has been enacted in accordance with the substantive or procedural constraints of the constitution, while the judiciary must apply every law that has been enacted constitutionally. Philip Joseph calls this mutual recognition of institutional roles a "collaborative enterprise" between the political (law-making) and judicial organs. The existence of the collaborative enterprise leads to a practice of obedience to the constitution that, according to Hart, provides the evidential basis for a rule of recognition.

---

[19] Donald S Lutz *The Origins of American Constitutionalism* (Louisiana State University Press, Baton Rouge (LA), 1988) at 111.
[20] At 111.
[21] Wheare, above n 3, at 52-66.
[22] William G Andrews *Constitutions and Constitutionalism* (D Van Nostrand Company Inc, Princeton, 1963) at 10.
[23] At 10-13.

The judiciary's practice of upholding all constitutionally enacted laws adds to the *de facto* authority of the constitution.[24]

In the upcoming sections, it will be argued that whereas social consensus generates the grundnorm that accords *de jure* authority to a constitution, collaborative enterprise enables a rule of recognition to evolve around the constitution and endows it with *de facto* authority. Together, they make the constitution legitimate and render it capable of evolving in a legally continuous manner.

II Acquiring Legitimacy

Not every constitution is authorised by some older constitution. For these constitutions, legal continuity cannot exist at their conception. How do new constitutions gain legitimacy?

A Autochthony

Kenneth Wheare discussed the doctrine of autochthony[25], which, in Joseph's words, explains how "an offspring of an imperial predecessor might mature, through adolescence, into a full-fledged constitutional State."[26] Nations with constitutional autochthony are described as being "constitutionally rooted in their own native soil."[27] The reason autochthony is of interest to this discussion is because the idea of a native constitutional "root" seems to imply a different source of legitimacy than mere legal continuity. We will consider what this separate source is.

To see whether a constitution is autochthonous, Marshall suggests three criteria:[28]

(a) Whether all processes of constitutional change are locally operated within the nation;
(b) Whether there has been a break in legal continuity in the national constitutional history; and
(c) Whether the people, judges and officials regard the constitution as authoritative because of their acceptance of it.

---

[24] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 535.
[25] Kenneth Wheare *The Constitutional Structure of the Commonwealth* (Oxford University Press, London, 1960) at 89-113.
[26] Joseph, above n 24, at 478.
[27] Wheare, above n 25, at 89.
[28] Joseph, above n 24 at 480-481.

However, not all the criteria need to be satisfied to establish autochthony.[29] In the examples that will be considered under this section, the first criterion is already met. Only the second and third criteria will be of interest.

The significance attached by traditional autochthony theorists to the second criterion – that of a break in continuity – can be best understood with reference to Kelsen. Under Kelsenian theory, a break in legal continuity amounts to a legal revolution. New nations that experience a break in continuity from the colonial legal order can be said to have a new grundnorm that offers a source of constitutional legitimacy distinct from that of the parent nation. The break with the past is considered important for the distinct identity of the new nation. The fact of the break can be used as a new grundnorm, "endowing the (legally) revolutionary government with legal authority."[30]

However, it seems perplexing that a break in continuity would provide a grundnorm when, in general, it leads to the loss of the legitimate authority by disrupting the chain of validity. Marshall has said that far from providing "legal independence", a break in legal continuity does not provide "legal anything, and the only answer to questions about an alleged 'new' system's legal root would be that it had no legal root."[31]

This raises the question: if the legal root has been severed, what is the source of legitimacy for these constitutions? What leads to the formation of the new grundnorm and its binding authority?

In Ireland, the Constitution of 1937 was formed after a clear break in continuity: it was never ratified by the Dail Eireann, which was the body authorised by the British Parliament. It was instead ratified by a public referendum.[32] This was nationally recognised as generating legitimacy in its own right so as to override the need for the Constitution to be authorised by the old legal order. Why was that so?

The answer seems to be that ratification by public referendum mirrors Locke's theory of the second agreement of civil society: the majority will that is expressed in a referendum is one of the strongest possible forms of express social consensus. The result of the Irish referendum showed a majority agreement to be bound by the new constitution and supplied the new constitution with the requisite *de jure* authority because it bore the normative, almost contractual, force of mass assent. The Irish Constitution was

---

[29] At 480-481.
[30] Nelson Koala Mkwentla "The legal effect of a coup d'état on traditional constitutional concepts" (Master of Laws Thesis, Rhodes University, 2001) at 5.
[31] Joseph, above n 24, at 481.
[32] Wheare, above n 25, at 91.

autochthonously authoritative because the Irish people had strongly demonstrated their acceptance of it.

However, in most cases, the social consensus is rarely demonstrated as strongly. The existence of social consensus is often assumed due to the "representative" nature of the framers. For instance, the American Constitution was drafted and signed by the delegates at the Constitution Convention, debated in the federalist papers and then ratified by (initially) nine of the thirteen state legislatures before it came into force in June 1788.[33] The general public had no formal avenue to take part in the formation of the Constitution, albeit heated public debates in the states of Pennsylvania, Massachusetts, Virginia and New York considerably influenced the position that the delegates took at the Constitution Convention.[34]

Likewise, in India, the Constitution was ratified when the Constituent Assembly adopted it in November 1949 after breaking continuity by not seeking the assent of the Governor-General.[35] The Assembly was composed of indirectly elected delegates from state legislatures. The Indian public had no direct input in the formation of the Constitution but was given the opportunity to recommend changes to a draft constitution that was released by the Assembly in January 1948.[36] The Assembly debated the public's recommendations before finalising the Constitution.

If one looks for an agreement at the base of the legitimacy of these constitutions, it was the post-debate agreement of the delegates. The recommendations of the people, while influential, were not binding, as they would have been in a referendum. Moreover, the social reality in 18th century United States and mid-20th century India was that only the relatively privileged classes would have been capable of contributing meaningfully to the constitutional debate. A majority of the public – including women, the oppressed races and castes, the poor, and those who lived outside urban centres – were effectively disenfranchised because of illiteracy, geographical remoteness, or a lack of political clout. These categories of people would have had little voice in the formation of the constitution. Yet, both the Indian and the United States Constitutions claim in their respective preambles that they owe their legitimacy by virtue of being "enacted"[37] or "ordained"[38] by "the People".

---

[33] Steve Mount "Constitutional Topic: The Constitutional Convention" (12 March 2012) US Constitution <www.usconstitution.net>

[34] Pauline Maier *Ratification: The People Debate the Constitution, 1787-1788* (Simon & Schuster, New York, 2010).

[35] Shivprasad Swaminathan "India's benign constitutional revolution" *The Hindu* (online ed, New Delhi, 26 January 2013).

[36] Virendra Singh *A Complete Handbook on Indian Polity with Indian Constitution & Parliamentary Affairs* (Neelkanth Prakashan, New Delhi, 2015) at 16.

[38] Preamble to the Constitution of the United States, adopted 17 September 1787.

Therefore it seems that a lack of express opinion on the part of the majority of the population, and the somewhat patronising view of the framers and the privileged classes on "the best framework of government for the people", may suffice as the social consensus that gives the initial normative force to a constitution and makes it autochthonous. The problematic implications of having such a broad definition of "consensus" will be explored in Section IV when the discussion looks at normative criteria for legitimacy. The only justification for saying that "the People" authorised the Indian and the United States Constitution is that in both nations, political franchise and participation eventually expanded to encompass the categories of people who were initially excluded from the constitutional debate, and these people subsequently signalled their acceptance of the Constitution by participating within the established framework to elect new governments.

The third and final criterion of the autochthonous root for legitimacy to materialise is a governmental belief in the constitution's *de jure* authority, which prompts governments to act in compliance with the constitution, and in the process affirms the constitution's *de facto* authority. The third criterion relies on the judiciary's enforcement of the constitution. As Raz has explained, the very validity of laws depends on their recognition by the "law-applying organs", namely the courts. That is so because it is "the actions of the law-applying organs… that affect the considerations of the law's subjects."[39] In other words, by upholding the constitution, courts create a habit of constitutional obedience in the legislature and the executive, causing the normative force of social consensus to translate into the "legal" force of the constitution.

In the early days of a constitution that is derived from a break in continuity, there can be no habit of obedience to the constitution. However, if the courts uphold as valid only laws that are constitutionally authorised, what was initially only a moral commitment to obey the constitution at the official level develops into the habitual practice that is evidence of a rule of recognition. It is useful to consider the United States Supreme Court case of *Marbury v Madison*[40] as an illustration of this process. *Marbury* was the first of the constitutional cases in which the Supreme Court ruled that it had the power to judicially review statutes that breached the Constitution. The decision was a judicial signal that the validity of laws would be assessed on the basis of the Constitution agreed to in 1788. The effect of the ruling was to confirm the authority of the Constitution in the minds of the legislature and subsequent judges, prompting them to abide by the Constitution and enforce it. Had the Supreme Court in *Marbury* chosen to ignore the Constitution and declared the non-complying statute valid, the authority of the Constitution would have undoubtedly suffered and the habit of obedience would have eventually diminished.

---

[39] Raz, above n 5, at 88.
[40] *Marbury v Madison* 5 US 137 (1803).

Joseph's idea of the collaborative enterprise is founded on the judicial recognition of constitutional law-making. It settles the basis for the on-going relationship between the courts and the law-making branch: as the law-making branch legislates according to the constitution, the judiciary upholds the law. The judicial recognition of valid laws, in conjunction with the reciprocal obedience by the lawmakers to create only valid law, contributes to the body of practice that overall clarifies what the rule of recognition is – that the constitution ought to be obeyed and is in fact obeyed.

B Autochthony in Australia and New Zealand

The requirement of a break in legal continuity under the doctrine of autochthony poses a problem for new nations whose constitutions are the product of continuous legal devolution from the constitution imposed by the parent nation. Kelsenian analysis suggests that these constitutions remain part of the legal order of the parent nation, with the grundnorm for their legitimacy still embedded in the legal order of the parent nation. However, this is contrary to political and social reality, since the government and the people of such nations often believe their constitution's legitimacy to have a local rather than an imperial source. This raises the question: are there any autochthonous sources of legitimacy for the legally continuous constitutions of new nations? As Australia and New Zealand fall in this category, it is pertinent to ask if they can claim a locally contained rule of recognition behind the authority of their constitutions.

Peter Oliver's interpretation of the concept of a "sovereign" is analytically useful in this enquiry. [41] It is implicit in Oliver's analysis that sovereignty lies in the entity that is capable of "amending the amending formula".[42] In other words, the sovereign in a legal system is the body that can alter the rule of recognition authoritatively without breaking continuity. As such, the sovereign is the source of on-going legitimacy in the legal system. If the sovereign is a local body, then the nation can claim a local authority for its rule of recognition and constitutional legitimacy.

To see whether a former colony now has a local sovereign, it must be asked whether it can authoritatively provide for a change of its own rule of recognition, or whether it depends on the parent nation to do so.

In 1986, Australia revoked the last vestiges of the ability of the United Kingdom Parliament to legislate for it. But it did not do so unilaterally. Rather, it adopted a procedure of request and consent with the United Kingdom Parliament that the latter

---

[41] Peter Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, New York, 2005) at 12.
[42] At 12.

would no longer have the power to legislate for it.[43] So it would appear that it still relied on the authority of its parent nation to change its rule of recognition, and that the grundnorm still lay in the United Kingdom. However, the Australian Constitution, contained in the Commonwealth of Australia Constitution Act 1900 (Imp), was ratified by referendum by the people of the colonies and enacted by the Imperial Parliament with only very minor changes. Moreover, s 128 of the 1900 Act enables the entire Constitution to be amended by means of referendum. This suggests that ultimately, the ability to "amend the amending formula" rests with the Australian people, so that the source of constitutional legitimacy might be its validation by "popular sovereignty".[44]

To say that the sovereignty lies in the people is congruent with the idea of having a local grundnorm. It bears the same local normative force that was identified when discussing what legitimises new constitutions with a background of broken continuity.

The fact that in Australia's case the local normative force was generated within the framework provided by the Imperial Parliament does not detract from its "autochthonous" quality, as the normative force is nonetheless of Australian origin.

By this analysis, where does sovereignty lie in New Zealand? In *Berkett*, when asked to justify the validity of an Act of Parliament, Fisher J said:[45]

> If one were to start with an assumption of Imperial sovereignty dating from the mid-19th century there would be an unbroken line of constitutional authority for all the legislation that followed.

It may be argued this reasoning suggests that the alleged "sovereignty" accorded to Parliament is merely the result of the rule of recognition provided by the Imperial Parliament and therefore not locally determined. When New Zealand gained independence in 1947, it was through the request and consent procedure authorised by the authority of the Imperial Parliament.[46] If this is all that led to the internal viewpoint for the courts that the New Zealand Parliament was the ultimate law-making body, it would amount to recognising the authority of the Imperial Parliament behind Parliament's law-making powers. Speaking at a lecture in 1985, FM Brookfield acknowledged that: [47]

---

[43] Australia (Request and Consent) Act 1985 (Cth) and Australia Act 1986 (UK).
[44] Oliver, above n 41, at 328.
[45] *Berkett*, above n 1, at 212.
[46] New Zealand Constitution Amendment (Request and Consent) Act 1947 and the corresponding New Zealand Constitution Amendment Act 1947 (UK) 10 & 11 Geo VI c 46.
[47] Brookfield, above n 2.

> …the supremacy and power of [the New Zealand] Parliament rested upon legislation of the United Kingdom Parliament which has never renounced in clear terms – indeed it has never been asked to renounce – its residual power to legislate for New Zealand.

However, this changed a year later when the New Zealand Parliament enacted the Constitution Act 1986. The Act unilaterally extinguished the remnant power of the United Kingdom Parliament to make laws for New Zealand and further repealed the Statute of Westminster Act 1947, which had given the New Zealand Parliament ultimate law-making powers in the first place. The enactment of the Constitution Act 1986 amounted to an assertion by the New Zealand Parliament that it no longer needed the legal connection to the United Kingdom to justify the legitimacy of its ultimate law-making powers. The New Zealand Parliament was now sovereign not because the United Kingdom said so but because the New Zealand Parliament itself said so. From that point on, the New Zealand Parliament began to enjoy an unquestionably homegrown sovereignty.[48]

Subsequent statements by Fisher J in *Berkett* point to another source of legitimacy:[49]

> The questionable nature of some of the assumptions [justifying the original proclamations] has not detracted from the *general recognition* afforded to [the proclamations] since… It is neither necessary nor permissible for a court to delve back into history to establish the pedigree of the New Zealand parliament…for the purpose of assessing the validity of a current statute. Once Parliament passes or adopts a statute, the Courts must apply it.
>
> (Emphasis added)

Fisher J implies that the "general recognition" is an overriding factor in relation to any possibility of a breach in legal continuity. This suggests a local acceptance of the New Zealand constitution for what it now represents and not the pedigree of its initial source of authorisation.

How did the local acceptance materialise in the absence of one identifiable episode of social consensus, as in the case of India or Ireland or the United States? Joseph, quoting the New Zealand Graphic, asked rhetorically: "Has it ever occurred to you that the truest reflection of our national character and tendencies are to be found in our statute books?"[50] The democratic nature of the New Zealand constitution means that Parliament is now a reflection of the way New Zealanders provide for their own laws and constitutional

---

[48] Oliver, above n 41, at 197-201.
[49] *Berkett*, above n 1, at 213.
[50] Joseph, above n 24, at 142.

arrangements. Therefore, albeit in a more indirect way than in Australia, parliamentary sovereignty is the means by which the New Zealand public decides what their constitution will be. The source of constitutional legitimacy is thus the choices of the New Zealand public as expressed through their elected Parliament. In that sense, New Zealand also has an autochthonous source of legitimacy.

One lesson to take into the next section from the foregoing study of constitutional legitimacy in Australia and New Zealand is that legal continuity is not incompatible with evolving social consensus. Joseph notes how the major constitutional reforms in New Zealand's history have been achieved without breaking continuity and through pragmatic evolution.[51] It is suggested this is possible only because the existing constitutional framework accommodates shifting social consensus through representative government. The upcoming section considers instead those scenarios where legal continuity precludes social consensus, leading to loss of constitutional legitimacy. It will be useful to keep the New Zealand constitutional framework in mind as a point of contrast.

III Loss of Legitimacy

Occasionally, governments fail to address widespread discontent in society – often as a result of a lack of provision for representativeness and accountability in the constitution. This gives those in power the discretion to ignore social consensus. When this happens, it becomes difficult for the people to have their concerns addressed through the legal framework. This leads to a social consensus *against* the government and its framework. Locke's second contract for civil society – the agreement on the form of government – is negated by the first contract – for the government to be bound by majority decisions – as the majority is now against the government. With the loss of social consensus, the grundnorm that says that the constitution must be obeyed also ceases to exist, causing the constitution to be stripped of legitimacy.

An example of this is the American Revolution, during which the Thirteen Colonies broke away from the British constitutional arrangement and established their own constitutions, eventually uniting under one Constitution in 1788. While the pre-Revolutionary Colonies had no "constitution" in the modern sense, they did have charters that set the basis for interaction between the British Crown in Parliament and the governments of the individual Colonies.[52] During the Boston Tea Party of 1773 citizens destroyed the tea cargo of the merchant ships to disobey tax law imposed by the British. The leader of the meeting publicly defended their stance as a principled protest to defend

---

[51] At 139-142.

[52] Sydney George Fisher *Evolution of the Constitution of the United States* (The Lawbook Exchange Limited, New Jersey, 1996) at 26-69.

their "constitutional"[53] right not to be taxed without representation. Immediately after the Boston episode, there was no clear social consensus against the Imperial government, and attempts were made at recompense. However, the British Parliament continued to legislate to tax the Colonies. When the Colonies formed a Congress and made a petition to the Monarch[54] against British taxation, they were declared "traitors" under a Proclamation of Rebellion[55]. Ultimately, this led to the Revolutionary War that overthrew the existing "constitutions" and gave the Colonies independence.

In view of the fact that the Colonies had initially attempted to invoke their constitutional rights as "Englishmen" to promote their claim, it seems that had there been a legal framework in place that enabled them to satisfy their demands, the Revolution would never have happened. It was the preclusion of social consensus concerning the legal framework that led to the loss of legitimacy of the British constitutional arrangement in America.

A second example is that of the overthrow of the Egyptian Constitution of 1971 in the Egyptian Revolution of 2011.[56] When the Constitution of 1971 was in force, its human rights contents were not enforced due to the existence of Emergency Laws that ran almost incessantly before and after the passing of the 1971 Constitution. The inability to compel the then President, Hosni Mubarak, to lift the emergency rule or establish a more competitive democratic process led to large-scale protests in Egypt in January 2011. When, after failing to quash protests through moderate violence and attempts at compromise, President Mubarak resigned, the (unconstitutional) Supreme Council took over amidst public celebrations. The revolution eventually led to the removal of office of members of the order under the 1971 Constitution. A new government was elected, led by Mohamed Morsi, which signed into law a new Constitution, passed by referendum in December 2012. However, widespread dissatisfaction with the lack of religious freedom under the Morsi government led to further public unrest and the Morsi government and 2012 Constitution were overthrown in a military coup-d'état in July 2013. The leader of the coup, Abdal Fattah el-Sisi, was subsequently elected President in June 2014 in accordance with a new Constitution passed by referendum in January 2014.[57]

The Egyptian public were unable to compel President Mubarak to reform the processes of government through the legal mechanisms provided in the Constitution of 1971. The

---

[53] JK Alexander *Samuel Adams: America's Revolutionary Politician* (Rowman & Littlefield, Maryland, 2002) at 129.
[54] The Olive Branch Petition, adopted by the Second Continental Congress (8 July 1775).
[55] King George III "Proclamation of Rebellion" (23 August 1775).
[56] "Timeline: Egypt's revolution" *Aljazeera News* (online ed, Middle East, 14 February 2011); "Egypt's ruling generals to partially lift emergency law" *BBC News* (online ed, United Kingdom, 24 January 2013); "Egypt in Transition" *BBC News* (online ed, United Kingdom, 25 January 2013).
[57] "Egypt profile – Timeline" *BBC News* (online ed, United Kingdom, 2 July 2015).

Constitution had lost the consensus of the people on how they wanted the government to run. This led to its overthrow. The subsequent overthrow of the Morsi government and the 2012 Constitution is more difficult to explain solely with reference to social consensus. While there was considerable dissatisfaction with Morsi's religious policies, there was no clear consensus that the Morsi government ought to be replaced. Following the coup-d'état, hundreds of protesters who demonstrated against the el-Sisi regime were killed.[58] Morsi supporters continue to be prosecuted on political grounds in Egypt. These are indications that the apparent social consensus in favour of the el-Sisi government may not be genuine, but the result of fear of persecution and a desire to avoid further bloodshed. Time will tell how long the current social consensus will last.

What does this imply about the role of social consensus in endowing a constitution with legitimacy? The answer seems to be that social consensus is a necessary but perhaps not a sufficient condition for legitimacy. Consensus is necessary because it is not just a theoretical concept like legal continuity, but a phenomenon with very practical consequences. A loss of consensus can trigger revolutions that lead to control being taken away from the existing government, often by violence, as seen in Egypt in 2011. Even when the constitution is not overthrown outright, the existence of a social consensus against the government can lead to civil war (as in Syria) and difficulties in enforcing law and order. Thus, social consensus on the form of government is a practical requirement for on-going effective legitimacy. So it seems only superficially correct to say that constitutional legitimacy is lost due to the break in continuity. Rather, the break in continuity is the effect of the loss of legitimacy, which in turn is caused by the loss of consensus.

However, it seems that social consensus is not a sufficient condition for constitutional legitimacy because it is possible for a constitution that has *not* lost social consensus to be overthrown through coups, as seen in el-Sisi's suspension and ultimate replacement of the 2012 Constitution. In such cases, the legitimacy of the new regime is questionable unless the new regime can obtain social consensus in its favour without threats or oppressive means.

The way the judiciary chooses to respond to a revolutionary administration that succeeds the old order is often the key to determining whether the old constitution has lost its legitimacy, and whether the new order can be deemed to have successfully established its own legal system. There are two ways in which the judiciary can respond: it may recognise the revolutionary administration as legitimate and thereby implicitly overturn the old constitution, or it can regard the current regime as unconstitutional but recognise its laws as temporarily valid out of a practical need to allow governance. The former

[58] "Egypt profile – Timeline" *BBC News* (online ed, United Kingdom, 2 July 2015).

stance entails the use of the doctrine of effectiveness, whereas the latter relies on the doctrine of necessity. It will be seen in the ensuing analysis that while social consensus is insufficient in itself to retain legitimacy, there is a growing judicial tendency to incorporate social consensus in deciding whether the old constitution and legal order has ceased to be legitimate, or whether despite the gap in continuity the old constitution continues to be legitimate.

A Effectiveness

Under the common law doctrine of effectiveness, courts exercise a supra-constitutional jurisdiction to determine whether a revolution should be given legal recognition, or be deemed "effective".[59] Effectiveness relies on the same Kelsenian rationale as autochthony: that a break in legal continuity could beget its own grundnorm and legitimise a new legal order.[60] The difference between autochthony and effectiveness is that the former relates to a nation's acquisition of independence and the formation of a new state, whereas the latter applies when a revolution overthrows a constitutional government without causing a change in statehood. If successfully established, effectiveness creates a new grundnorm on which the revolutionary administration can be declared legitimate despite the legal discontinuity through which it came to power.

A criticism of the Kelsenian rationale for effectiveness is that it arguably offers undue reward for a break with continuity. Oliver calls this the "insert grundnorm and proceed"[61] approach. The Kelsenian rationale does not distinguish between revolutions with popular support and those perceived as an illegitimate usurpation. Nor does it distinguish between unstable short-lived rebel regimes and stable revolutionary governments. This is problematic because the legitimacy of a constitution over an unstable government is questionable, because it lacks the descriptively "effective" component of legitimacy.

Effectiveness has successfully been established in a handful of cases.[62] The reluctance of courts to deem a revolutionary administration effective may be evidence of an internal viewpoint that they still abide by the old rule of recognition, and feel bound to uphold the government duly established under the old constitution. When the old constitution still

---

[59] George Williams "The case that stopped a coup? The rule of law in Fiji" (transcript of the Quentin-Baxter Memorial Trust Lecture, Victoria University School of Law, Wellington, 27 November 2003) (online copy) at 11.
[60] Mkwentla, above n 30, at 5.
[61] John Hatchard and Tunde I Ogowewo *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (Commonwealth Secretariat, London, 2003) at 31.
[62] See for example *State v Dosso* [1958] PLD 533 (SC Pak); *Uganda v Commissioner of Prisons, Ex parte Matovu* [1966] EA 514 (HC Uganda); *Madzimbamuto v Lardner-Burke* [1968] 2 SA 284 (R AD); *Vallabhaji v Controller of Taxes* [1981] CLB 1249 (CA Seychelles); *Mokotso v HM King Moshoeshoe II* [1989] LRC (Const) 24 (Lesotho HC).

enjoys the allegiance of the courts, legal discontinuity means the administration is not recognised as legitimate.

In *Republic of Fiji v Prasad*, the Court of Appeal of Fiji evolved a list of criteria for effectiveness to be established:[63]

(a) The revolutionary government must be firmly established (that is, there must be no other government – including the previous government – vying for power);
(b) Its administration must be effective, in that the majority of people must be behaving "by and large, in conformity" with the administration;
(c) The conformity and obedience must be due to "popular acceptance and support" and not "tacit submission to coercion or fear of force"; and
(d) The regime must not be undemocratic or oppressive

The onus is on the new administration to prove that it is effective, rather than for complainants to prove that it is not.

The first two criteria of effectiveness highlight the importance of factual authority for the legitimisation of the new administration. They address the deficiency in Kelsen's analysis of the new grundnorm, not distinguishing between stable and unstable regimes. The Pakistan Supreme Court in *State v Dosso*[64] was said to have declared the new administration effective too quickly, as it was overthrown one day after the decision in *Dosso* was delivered.[65]

On the other hand, the third and fourth criteria for effectiveness show the relative openness of courts to be guided by social consensus in choosing whether to legitimise the new administration. Some courts have said it is their "duty as Judges"[66] to use effectiveness when the overthrow has popular support. An instance is a case in Lesotho, where the court noted in upholding the revolutionary administration that the overthrow of the old regime had been "greeted with jubilation by the people in the streets".[67] This suggests that strong public support for the new order can prompt the judiciary to undergo a voluntary shift of the internal perspective in defiance of the old constitution.

Conversely, when an overthrow of a government lacks the backing of social consensus, courts are unlikely to use effectiveness to legitimise the coup. In these situations, the

---

[63] *Republic of Fiji v Prasad* [2001] NZAR 385 (CA Fiji) at 413.
[64] *State v Dosso*, above n 62.
[65] *Jilani v Government of Punjab* [1972] PLD SC 139 (Pakistan SC) at 179.
[66] Williams, above n 59, at 14 (quoting Casey J in *Republic of Fiji v Prasad*, above n 63).
[67] *Mokotso v HM King Moshoeshow II*, above n 62, at 122.

question of the validity of the laws passed by the new administration is considered under the doctrine of necessity.

B Necessity

Section I established Raz's criteria for legitimacy as both *de jure* and *de facto* authority. That was satisfactory for the analysis throughout Section II. However, this section examines whether it is appropriate to relax the criterion of *de facto* authority to maintain constitutional legitimacy once continuity is broken.

There is a growing branch of jurisprudence on "the indestructibility of constitutions,"[68] which provides that a constitution that has not been overthrown by social rebellion, but merely by an unconstitutional coup, continues to be in force *de jure*. The break in continuity caused by coups or enemy occupations only signals a loss of *de facto* authority, but *de jure* authority (and constitutional legitimacy) remains as long as there is social consensus and judicial recognition behind the constitution.

To understand why *de jure* authority may remain, we need to consider the doctrine of necessity. Necessity is used following a break of continuity to validate laws that would lack authority because they are unconstitutional. However, unlike effectiveness, necessity does not operate to overthrow the constitution: it works as an implied exception to the constitution itself.[69] The doctrine is used under the principle *salus populi suprema lex* (the welfare of the people is the supreme law).[70]

The criteria for necessity to be established are:[71]

(a) Exceptional circumstances not provided in the constitution making it necessary to take immediate action to preserve some vital function of the State;
(b) The action does not impair the rights of citizens under the constitution;
(c) The action does not have the sole effect and intention of consolidating or strengthening the revolution or usurpation; and
(d) The action is of a temporary character limited to the duration of the exceptional circumstances.

Necessity is often used by courts during coups to gloss over the possibility of "legal vacuums".[72] The recognition that the extra-constitutional validation is "of a temporary

[68] Hatchard and Ogowewo, above n 61, at 35.
[69] Joseph, above n 24, at 719.
[70] Hatchard and Ogowewo, above n 61, at 20.
[71] *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 (CA Grenada) at 88-89.
[72] Joseph, above n 24, at 722.

character limited to the duration of the exceptional circumstances" suggests that even when the judges validate a law under necessity, they retain an internal viewpoint that the constitution is in force *de jure*.

However, Hatchard observes that necessity is often abused by the judiciary to enable a usurping regime to pass valid laws as part of an "implicit bargain"[73] to retain judicial perks and privileges. This reaches the point where "the kow-towing judges…simply grow accustomed to seeing the usurpers as legitimate."[74] This suggests that if necessity is used beyond its scope, there can be an actual shift in the ultimate rule from the previous constitutional government to the new unconstitutional government – which by Hartian analysis is fatal to the legitimacy of the constitution, both *de jure* and *de facto*.

The problem is one of drawing a line between the use and abuse of necessity. In what circumstances can it be said that the use of necessity has kept constitutional legitimacy intact, despite a period of only *de jure* legitimacy? When, instead, must it be conceded that necessity has been abused to the point that the judges have done away with even *de jure* legitimacy? With this in mind, we will examine a few examples of coups and enemy occupations and see what can be said about constitutional legitimacy in these scenarios.

In Pakistan, the military coup led by Musharraf in 2000 led to the resignation of thirteen judges, including the Chief Justice, when they refused to acknowledge the military's laws as anything but unconstitutional. They were replaced by other judges who were willing to use the necessity doctrine. The new judges validated Musharraf's provisional constitutional orders until he amended the Constitution of 1973 to become the "legitimate" President. However, when Musharraf purported to amend the 1973 Constitution without following its provisions, the same judges stepped in and held him to the required procedure. This, it can be argued, implied an unchanged internal viewpoint about the legitimacy of the 1973 Constitution.[75]

It is unclear whether the Constitution remained *de jure* legitimate throughout. It might be tempting to revert to the simpler analysis that legal continuity is the ultimate indicator of whether a constitution is legitimate. This would make Musharraf's re-invocation of the 1973 Constitution ineffective because he did not have the position to do so. But that would imply that the restoration of the 1973 Constitution in 2008 (once Musharraf resigned) was a fresh start for legitimacy, even though it was socially and judicially recognised as *de jure* legitimate throughout the eight-year interval.

---

[73] Hatchard and Ogowewo, above n 61, at 14-46.
[74] At 25.
[75] Hatchard and Ogowewo, above n 61, at 15; Lloyd de Vries "Musharraf claims victory in Pakistan" *CBS* (online ed, USA, 11 February 2009); "Pakistan Judges refuse oath demanded by Pakistan's rulers" *Waycross Journal-Herald* (online ed, 31 January 2000).

There are similar examples where *de jure* legitimacy has been used to infer the on-going legitimacy of constitutions. In Estonia, the Constitution of 1938 was purportedly overthrown by Soviet invasion and control, which lasted for 50 years. However in the end the judges held that the Constitution was *de jure* in force throughout because the "will of the people [was] enshrined" in that document.[76] It had only been suspended. In 1992 there was no longer a need for suspension of the 1938 Constitution, and the Constitution regained legitimacy.[77]

This belief appears to be consistent with the repeated attempts by Estonians to reassert their independence during the period of invasion.[78] However, to say that the constitution was legitimate but not in use for 51 years stretches the limits of whether it is possible for even the internal viewpoint to subsist that long without any actual practice. It might simply have been politically convenient rhetoric to call the 1938 Constitution *de jure* legitimate.

Nonetheless, this view does have support in more recent cases where it appears that the internal viewpoint has subsisted. In the Fijian case of *Koroi v The Commissioner of Inland Revenue*,[79] decided one year after the 1999 coup, Gates J held that "The Constitution's very indestructibility is part of its strength."[80] He continued: "Even in an extreme case, where a usurper leaves behind nothing of the past, the original Constitution remains submerged. When the usurper withdraws, it will re-emerge."[81]

In cases since, the Fijian Court of Appeal made it clear that the judiciary still regarded the Constitution of 1997 as being legitimate, and were only validating the laws of the unconstitutional government out of necessity.[82] Staunch dicta like these leave little doubt about the judicial loyalty to the suspended Constitution and arguably even contribute towards the evidence of the *de jure* authority of the Constitution, although the *de facto* authority is long gone.

It is uncertain whether the Fijian judiciary continues to regard the post-coup regimes as invalid in light of the democratic election of the Bainimarama government in 2014 and

---

[76] Hatchard and Ogowewo, above n 61, at 35.
[77] Eesti Instituut "The State Order of Estonia in its Historical Development: The Declaration of Independence and the Fourth Constitution " Estonica: Encyclopedia about Estonia <http://www.estonica.org/en>
[78] Eesti Instituut "The State Order of Estonia in its Historical Development: The Declaration of Independence and the Fourth Constitution " Estonica: Encyclopedia about Estonia <http://www.estonica.org/en>
[79] *Koroi v Commissioner of Inland Revenue* [2003] NZAR 18 (Fiji HC).
[80] At 30.
[81] At 33.
[82] Williams, above n 59, at 8-10.

the enactment of the 2013 Constitution of Fiji. It is possible that the democratic acceptance of the leader of the coup will signal to the judiciary that there is social consensus behind the new government, and that it is time to "reset" legitimacy in accordance with the 2013 Constitution. If so, the judiciary is likely to stop using necessity to validate the laws and instead implement the doctrine of effectiveness to legitimise the 2013 Constitution and every law enacted under it.

The foregoing analysis indicates that the judiciary commonly uses the doctrines of necessity and effectiveness in accordance with the level of public support in favour of the unconstitutional change in government. Where the change is socially supported, the judiciary is usually quick to eschew loyalty to the old constitution and acknowledge the new government as "effectively" legitimate, even though the new administration may only be a few days old. By contrast, where there is public opposition to the change in government, courts can cling to the old constitution for decades – recognising the usurping regime's laws as unconstitutional but temporarily valid because of necessity – until the usurping regime is either overthrown by popular support or it demonstrates that it enjoys popular support through elections.[83] These cases suggest a diminishing focus on *de facto* authority in the analysis of constitutional legitimacy. They also imply that democratic values have become a normative criterion for constitutional legitimacy in the minds of courts. Should there be normative criteria for constitutional legitimacy?

IV Normative Requirements for Constitutional Legitimacy

So far, the discussion has largely refrained from using any normative criterion for legitimacy, such as the substance of the constitution. The attitude towards social consensus or judicial recognition has not been to show that they *ought* to be the basis for constitutional legitimacy, but that objectively they are functional requirements. In this section, the approach will be more value-laden.

The growing body of international law might have opened up new ways of determining constitutional legitimacy. In his analysis of what constituted the rule of recognition, Hart hypothetically considered the effect of the British Parliament declaring that the law of Tsarist Russia was still the law of Russian territory, despite the Russian Revolution.[84] He concluded that it made no difference to the ultimate rule within Russia. However, it is possible to argue that, fifty years later, the existence of economic sanctions, the global media, the importance of maintaining political relations with other nations, and a more established international legal system mean that international pressure imposes requirements for constitutional legitimacy. Hart worked in a closed legal system that did

[83] Brookfield, above n 2.
[84] Hart, above n 11, at 116.

not consider external influences to have any bearing on the ultimate rule of recognition. In today's world, the greater reach of international law and diplomatic relations might imply that legal systems are more open to transnational influences. It can be argued that to be legitimate, the constitution of a nation must adhere to certain minimum international standards.

Of course, there is a risk that states will be guided by politics or power dynamics when deciding whether to recognise the constitutional legitimacy of another state. That is clearly not a desirable outcome. One way to create a relatively "non-arbitrary" normative standard for legitimacy would be to use widely respected instruments of international law, for instance the Universal Declaration of Human Rights, which includes the right to participate in government.

How would the incorporation of such a standard affect our judgement on whether a constitution is legitimate? Currently, the value-free definition of social consensus is dangerously broad: it would only hold that the constitution has lost legitimacy if there was a mass scale rebellion. However, even when the public no longer support government under a constitution, they might tolerate the situation out of an unwillingness to start a revolution. As William G Andrews observed, "Tyranny may be preferable to anarchy."[85] According to the value-free definition, the government would still have social consensus behind it, whereas in reality, there would be little participation in the government. Is it still necessary to conclude that the constitution is legitimate?

As was mentioned when discussing New Zealand's constitution, the mark of a successful constitution in the long run is its ability to enable social consensus to "update" the form of government within the legal framework. The examples of successful constitutional governments suggest that the model for such a framework is liberal democracy.

Democracy has a far from perfect track record in terms of ensuring legal continuity. The United States was a democracy prior to 1861, but the American Civil War broke out in response to the declaration of secession by the southern states. France, too, experienced a number of breaks in legal continuity since the enactment of the French Constitutional Laws of 1875 under the Third Republic, despite the democratic framework of government. The Weimar Republic of Germany was a constitutional republic when Adolf Hitler made his legitimate ascent and suspended the majority of constitutional rights in 1933. New Zealand itself faced a challenge to the legitimacy of the constitution from Māori during the Land Wars of 1845–1872. These examples show that democracy has experienced and continues to experience considerable challenges in channelling social consensus into decision-making and maintaining the government's effective authority.

---

[85] Andrews, above n 22, at 10.

However, as Winston Churchill famously remarked, "[D]emocracy is the worst form of government except all those other forms that have been tried from time to time."[86] Since the mid-20th century, liberal democracies have enjoyed greater empirical success in avoiding losses of continuity than illiberal or flawed democracies and dictatorships.[87] Therefore, it seems sensible to use the model of liberal democracy as a criterion for constitutional legitimacy.

There are several benefits to using liberal democracy as a criterion. It would make it easier to distinguish between those nations whose constitutions provide for democracy but in practice manipulate election outcomes. For instance, the Chief Justice of Pakistan had noted that during the reign of the constitutional government prior to Musharraf's coup:[88]

> [A] situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the Constitution, inasmuch as, the Senate and the…Assembles were closely associated with the […] Prime Minister and there was no real democracy because the country was, by and large, under one man rule.

The undermining impact of the type of practices identified by the Chief Justice on constitutional legitimacy in flawed democracies is difficult to quantify, but the implication for the overall social structure of the nation is relatively clear. It breeds what Hatchard and Owewo call a culture of "praetorianist rent-seeking"[89], whereby opposing political factions see taking over a government unconstitutionally as a more certain way of achieving desired ends than relying on flawed democracy. In the long run, this undermines not only the *de facto* component of constitutional legitimacy because of the repeated instances of breaks in continuity, but also undermines the *de jure* component, as the executive and the opposing political factions see the constitution as lacking in actual and moral authority. The nominal existence of the constitution is used to create a front of respectability to the rest of the world and conceal the real systematic issues.

Imposing the criterion of liberal democracy would at the very least take away the façade of constitutional legitimacy on the part of governments who subvert the constitutional process. To keep up a respectable front, it can be hoped that governments will be more willing to carry out the provisions of the constitution and develop a system in which

---

[86] Quoted in Walter J Raymond *Dictionary of Politics: Selected American and Foreign Political and Legal Terms* (Brunswick Publishing Corporation, Lawrenceville, 1980) at 124.
[87] William Anthony Hay "What is Democracy? Liberal Institutions and Stability in Changing Societies" (2006) 50 Orbis: A Journal of World Affairs 133.
[88] Hatchard and Ogowewo, above n 61, at 21 (quoting Irshad Hassad Khan, Chief Justice of Pakistan).
[89] At 13.

social consensus will actually resemble Locke's ideal of a majority agreement on the form of government to have.

Some may criticize this as the imposition of Eurocentric standards on the rest of the world. That is hard to deny. However, the problem with any normative criterion for constitutional legitimacy is that it will be the imposition of one set of views over another. In view of the recent empirical success of liberal democracies in maintaining legitimacy through continuity, it is arguably the most suitable normative criterion to incorporate in the definition of constitutional legitimacy.

V Conclusion

This discussion has attempted to create a descriptive formula for constitutional legitimacy that goes deeper than the usual touchstone of legal continuity. While the idea that social consensus and judicial recognition are the "real world" factors behind constitutional legitimacy is conceptually simple enough, the challenge has been to fit all of these ideas coherently within the concept of a "legal system".

Attempts to recast consensus and recognition within the framework of Kelsen and Hart's theory suggest that consensus and recognition are part of the extra-legal phenomena that create the "bindingness" of law and the legitimacy of the constitution.

In considering the autochthonous sources of legitimacy for new constitutions that are the product of broken devolution, we have seen that "social consensus" can be roughly equated to the grundnorm, while "judicial recognition" and its implications for the other organs of government can be translated into the rule of recognition. But in observing what counts as the social consensus, we find that it can range from express consensus to tacit acceptance of the decisions of representative leaders. This leads to an ethical dilemma in deciding how much "consensus" is appropriate for a constitution to gain legitimacy.

For countries like New Zealand, where constitutional legitimacy is sourced in continuity, a healthy democratic process is enough to create a local root to legitimacy in addition to the historic root, since the constitution gradually evolves through pragmatic evolution to reflect the national character. Local acceptance can be channelled through legally continuous means. Continuity in such cases is a mask for the socio-governmental acceptance of the constitution.

The conceptual uncertainties arise when considering how constitutions lose their legitimacy. While the phenomena of constitutions being overthrown due to the loss of social consensus are easy enough to explain in terms of the "conceptual building blocks"

of this discussion, the impact on constitutional legitimacy of a break in continuity through a coup d'état is a murky area. Even when suspended constitutions are ultimately restored, the assertions of the "indestructibility" of their legitimacy in the interim are dubious. This is especially so as instances where the constitution has been suspended are hard to distinguish from instances where the constitution is nominally in operation but subverted in spirit.

Ultimately, the inability to reach satisfactory answers through a value-free analysis leads us to consider normative criteria for constitutional legitimacy. It is suggested that the provably efficient model of liberal democracy should be used as an element for legitimacy. It may be that the concept of the closed legal system on which Hart and Kelsen worked is now out-dated. A more open, international legal system should be introduced where recognition by other nations also contributes towards constitutional legitimacy. That, with its challenges and rewards, might be the subject of a new enquiry altogether.