

# WAIKATO LAW REVIEW

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The Editor  
Waikato Law Review  
Te Piringa – Faculty of Law  
Waikato University  
Private Bag 3105  
Hamilton 3240  
New Zealand

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## **EDITOR IN CHIEF'S INTRODUCTION**

I would like to welcome you to the 2012 edition of the Waikato Law Review. In this year's edition, I am pleased to present a wonderful diversity of articles and submissions that truly reflect the Māori title of the Review, Taumauri, meaning "to think with care and caution, to deliberate on matters constructively and analytically". This title both encapsulates and symbolises the values and goals of the Review.

The esteemed Harkness Henry Lecture is, as ever, the lead article in the Review. This year's lecture was given by Judge Sir David Carruthers, Chair of the Independent Police Conduct Authority. Sir David gave a wonderful lecture entitled "Restorative Justice: Lessons from the Past, Pointers for the Future", which was full of humour and poignancy, and gave much food for thought. The Review would like to extend its gratitude to Harkness Henry for their continued support of Te Piringa and the Review in the sponsorship and organisation of this prestigious annual event.

Other papers within this year's edition represent work from national and international academics and practitioners, as well as emerging scholars, and their submissions add much to legal debates by critically exploring the law in theory and in context. The Review would like to thank all the authors for adding such value to this edition.

This year's edition would not have been possible without the support of the editorial team, and much thanks must go to Erika Roberson as Senior Student Editor for her dedication and enthusiasm.

Juliet Chevalier-Watts  
Editor in Chief



# RESTORATIVE JUSTICE: LESSONS FROM THE PAST, POINTERS FOR THE FUTURE

BY JUDGE SIR DAVID CARRUTHERS\*

Restorative Justice has had a significant impact on the criminal justice system in New Zealand and is increasingly being applied in other contexts. This paper explores the history and development of restorative justice frameworks and practices, providing a reflective account of the lessons learned during this process and identifying opportunities for the future. It begins with a discussion of the origins in the youth justice arena, before moving to the adult criminal jurisdiction. In doing so, it explains the three phases during which restorative justice practices are applied, namely in the pre-trial (diversion), pre-sentence, and post-sentence phases. The paper highlights a range of local initiatives, pilot programmes and their evaluations, as well as international instruments and examples from other jurisdictions to provide context for the New Zealand experience. It also addresses the development of restorative practice in education. Importantly, it emphasises the value of restorative justice, which can have meaningful and positive impact when implemented properly. Finally, the paper concludes by providing pointers for the future. Specifically, it identifies the need to strengthen restorative justice as part of current justice sector reforms; explore appropriate and specialist responses to sexual cases; further develop restorative justice practice in education; identify opportunities in the context of police oversight; examine solutions-focused courts and community justice centres; and move towards an academic centre of excellence to inform and strengthen restorative justice in New Zealand and further afield. The greatest risk facing restorative justice today is the loss of momentum at a critical time. An informed public discourse on restorative justice, which has left its mark on New Zealand's unique legal landscape, is now required to ensure its continued role in the lives of offenders, victims, their families, and our communities.

## I. INTRODUCTION

There is no universal definition of the term “restorative justice”. It has been described by some as “a growing social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights.”<sup>1</sup> Restorative justice is, in some respects, a tripartite theory of justice: that is, it is a term used with reference to principles, methods and outcomes in any given context. First, the term “restorative justice” may be used to describe a body of core values or principles, such as respect, inclusiveness, responsibility and understanding. Second, it may be used to describe the processes or methods which participants will employ in a restorative justice setting. Such processes include face-to-face dialogue, group conferencing, community engagement, and support and reintegration processes. Finally, the term “restorative justice” may be used to describe the outcomes that flow from the aforementioned principles and processes.

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\* Chair, Independent Police Conduct Authority (IPCA), 2012. Appointed District Court Judge in 1985, Principal Youth Court Judge in 1995 and Chief District Court Judge in 2001. Chairperson, New Zealand Parole Board from 2005 to 2012. I would like to acknowledge and thank Ms Natalie Pierce, Legal Advisor to the Chair (IPCA), for her significant contribution to this paper.

1 Suffolk University Centre for Restorative Justice *What is Restorative Justice?* <[www.suffolk.edu](http://www.suffolk.edu)>.

Others have described restorative justice as a “philosophy that moves from punishment to reconciliation, from vengeance against offenders to healing for victims, from alienation and harshness to community and wholeness, from negativity and destructiveness to healing, forgiveness and mercy”.<sup>2</sup> In 2005, Daniel Van Ness (Director of the Centre for Justice and Reconciliation at Prison Fellowship International) described the evolution of restorative justice in the following way:<sup>3</sup>

Restorative justice is both a new and an old concept. While the modern articulation (including the name) has emerged in the past 30 years, the underlying philosophy and ethos resonate with those of ancient processes of conflict resolution. The recent rediscovery of those processes in different parts of the world has stimulated, informed and enriched the development of restorative practices.

In the criminal justice context, Professor Zehr describes restorative justice as a process which involves “to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.”<sup>4</sup> In recent decades, restorative justice has been successfully applied across a range of human endeavours and in various fora, from criminal justice and educational initiatives at the domestic level through to international truth and reconciliation commissions in post-conflict societies.

## II. HISTORY AND DEVELOPMENT IN NEW ZEALAND

### A. *Traditional Significance*

It is important to emphasise at the outset that restorative justice is a practice which sits comfortably in the New Zealand context. Its principles and methodologies find their roots in most cultures around the globe. The Jewish community is familiar with restorative justice practices and the work of Professor Howard Zehr explains its rich heritage. Professor Braithwaite, an eminent Australian criminologist, has stated that restorative justice “has been the dominant model of criminal justice throughout most of human history for all the world’s peoples.”<sup>5</sup>

In New Zealand, Māori customs and traditions are closely aligned with restorative justice, and they include values such as “reconciliation, reciprocity, and whānau involvement”.<sup>6</sup> Consedine notes that, prior to European contact, Māori had a well-developed system of custom and practice

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2 Jim Consedine *Restorative Justice Healing the Effects of Crime* (Ploughshares Publishing New Zealand, 1995) at 11, as cited in Dot Goulding, Guy Hall and Brian Steels “Restorative Prisons: Towards Radical Prison Reform” (2008) 20 *Current Issues in Criminal Justice* 231 at 233.

3 Daniel Van Ness “An Overview of Restorative Justice Around the World” (paper presented at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, 18–25 April 2005) <<http://www.icclr.law.ubc.ca>> at 1.

4 Howard Zehr *The little Book of Restorative Justice* (Good Books, Intercourse, PA, 2002) at 37, cited in Ministry of Justice *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, May 2004) at 7.

5 J Braithwaite “Restorative justice” in M Tonry (ed) *The handbook of Crime and Punishment* (Oxford University Press, Oxford, 1998) at 323.

6 Ministry of Justice *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, May 2004) at 7.



that ensured the stability of their communities,<sup>7</sup> one which had a great deal in common with the restorative philosophy:<sup>8</sup>

Essentially the system was akin to what is now referred to as restorative justice. There were a number of important elements to this. When there was a breach, community process enabled a consideration of the interests of the whānau (social group) and ensured the integrity of the social fabric. Through whānau (family) or hapu (wider family) meetings, and on occasional iwi (tribal) meetings, the voices of all parties could be heard and decisions arrived at by consensus (kotahitanga). The aim was to restore the mana (prestige/authority) of the victim, the victim's family and the family of the offender, and to ensure measures were taken to restore the future social order of the wider community. Because these concepts were given meaning in the context of the wider group, retribution against an individual offender was not seen as the primary mechanism for achieving justice. Rather, the group was accountable for the actions of the individual (manaakitanga) and that exacted compensation on behalf of the aggrieved.

In this respect, aspects of restorative justice are regarded in this country as being yet another gift of the Māori culture to be treasured accordingly.

## *B. Legislative reform*

### *1. Youth justice*

The legislative shift towards restorative justice practices came in 1989 with the enactment of the Children Young Persons and their Families Act 1989. The 1989 Act was the first legislative step towards a system of restorative justice processes. Prior to 1989 a range of factors were causing concern and led to calls for legislative change. There was public dissatisfaction with the way in which the criminal justice system dealt with young people, particularly Māori, as though they were people without obligations living in communities which equally had no obligations to them. Maxwell explains that these concerns included:<sup>9</sup>

Concern for children's rights; new approaches to effective family therapy; research demonstrating the negative impact of institutionalism on children; inadequacies in the approach taken in the 1974 legislation to young offenders; the failure of the criminal justice system to take account of issues for victims; experimentation with new models of service provision and approaches to youth offending in the courts; and concerns raised by Māori about the injustices that had been involved in the removal of children from their families.

As Watt explains the economic, social and political climate in the 1980s "was one of flux".<sup>10</sup> The Labour government of 1984 established a departmental working party to examine justice

7 Consedine *Restorative Justice: Healing the effects of crime* (Ploughshares Publishing New Zealand, 1999) at ch 6. See also NZ Māori Council "Restorative Justice: A Māori Perspective" in Helen Bowen and Jim Consedine (eds) *Restorative Justice: Contemporary Themes and Practice* (Lyttleton, Ploughshares, 1999).

8 At 87.

9 G Maxwell "The Youth Justice System in New Zealand: Restorative Justice Delivered Through the Family Group Conference in Restorative Justice and Practices in New Zealand" in G Maxwell and JH Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Institute of Policy Studies, Wellington, 2007) at 46.

10 Emily Watt "A History of Youth Justice in New Zealand" (paper commissioned by Judge Andrew Becroft, 2003) at 17.

issues,<sup>11</sup> which led to the 1986 Children and Young Persons Bill. The Select Committee subsequently travelled the country to receive and consider submissions on how the Bill could be improved. In 1987, a second working party was established to consider how it could be “recast to make it simpler, more flexible, more culturally relevant, and more directed to providing resources for services rather than for infrastructure”.<sup>12</sup> The second working party explained in its 1987 report that:<sup>13</sup>

[i]n the course of its development the Bill has become the focus for frequently incompatible views concerning, among other things, state intervention versus family autonomy, the application of welfare versus justice models for dealing with young offenders, the priorities given to prevention versus intervention, and the role of “professionals” versus that of “lay” members of the community in dealing with matters affecting children and young persons.

While the Select Committee was considering the working party report, a 1988 report by Mike Doolan of the Department of Social Welfare proved to be highly influential. It recommended a separate court for young persons as a division of the District Court, as well as the use of family/whānau conferences to involve the offender, victims, and families. With respect to the potential for these proposals to resonate with Māori communities, the Doolan report marked a shift away from the 1986 Bill which had been criticised by some for its “ambivalent and confused approach to the problem of juvenile offending” which would “do little either to promote the use of diversionary strategies or to advance due process considerations.”<sup>14</sup> When the Bill was reintroduced to the House of Representatives for its second reading, the changes reflected a process of constructive review and refinement and the Act entered into force on 1 November 1989.

Prior to the 1988 Doolan report, the Youth Court had, in fact, launched its own initiatives which, although then not formally designed as restorative justice programmes, were consistent with the principles of this approach. They were inclusive of victims, family and the community and drew their inspiration from early experiments in family decision making. I became involved in these initiatives through the first Principal Youth Court Judge M Brown, who encouraged me to undertake a pilot in the mid-1980s in Porirua. The pilot was an early example of the family group conference system, which was subsequently embedded in the Children, Young Persons and their Families Act 1989. Judge Brown’s efforts at this time were critical to the success of this initiative. He emphasised the importance of identifying community leaders and thinking about how we could engage and enable them to become a central part of this process. He said to me “Who is ‘the community’? Who are its strengths? How can they be involved in helping young people?”. He regularly met with community groups to share his knowledge and enthusiasm for what he saw as an invaluable opportunity in this field.

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11 At 17–18, citing M P Doolan “Youth Justice – Legislation and Practice” in Brown and McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) at 20–21.

12 Michael Doolan “Youth Justice Reform in New Zealand” in Julia Vernon and Sandra McKillop (eds) *Preventing Juvenile Crime* (Australian Institute of Criminology, Canberra, 1992) at 123.

13 Department of Social Welfare *Review of the Children and Young Persons Bill: Report of the Working Party on the Children and Young Persons Bill* (Department of Social Welfare, Wellington, 1987) at 6, cited in Watt, above n 9, at 21–22.

14 A Morris and W Young *Juvenile Justice in New Zealand: Policy and Practice* (Study Series 1, Institute of Criminology, Wellington, 1987) at 41, cited in Watt, above n 9, at 20.

The innovative changes brought about by the 1989 Act introduced a philosophical sea change in the youth justice system. The Act introduced a number of core principles governing youth justice processes, which focus on:

- (a) alternatives to criminal proceedings;<sup>15</sup>
- (b) measures which are designed to strengthen families and foster their ability to develop their own means of dealing with offending by their children and young people;<sup>16</sup>
- (c) keeping child or youth offenders in the community, so far as that is practicable and consonant with the need to ensure public safety;<sup>17</sup>
- (d) the relevance of age as a mitigating factor in determining whether to impose sanctions and the nature of those sanctions;<sup>18</sup>
- (e) the need for sanctions to take the form most likely to maintain and promote the development of the individual within his or her family and take the least restrictive outcome appropriate in the circumstances;<sup>19</sup>
- (f) the need for measures to address, so far as practicable, the causes underlying an individual's offending;<sup>20</sup>
- (g) the need to consider, when determining the appropriate measure(s), the interests and views of any victims of offending and the need for measures to have proper regard for the interests of victims and the impact of the offending on them;<sup>21</sup> and, finally:
- (h) the fact that the vulnerability of children and young persons entitles them to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.<sup>22</sup>

The Act introduced detailed provisions relating to the treatment of children and young persons at all stages of the criminal justice process, from investigations to arrest, interview, detention, and final disposition in the Youth Court and the orders available in this regard.<sup>23</sup> The family group conference process lies at the heart of the youth justice framework under the 1989 Act. It is important to note that the conferences are mandatory for virtually all youth offender cases and the conference itself, not the court, determines the manner in which the offending should be addressed. Full decision making power is therefore devolved to the community in which the offending took place. As explained by His Honour Judge F McElrea, the family group conference procedure is as follows:<sup>24</sup>

A typical restorative justice conference involves the prior admission of responsibility by the offender, the voluntary attendance of all participants, the assistance of a neutral person as facilitator,

15 Children and Young Persons and their Families Act 1989, s 208(a) and (b).

16 Section 208(c)(i) and (ii).

17 Section 208(d).

18 Section 208(e).

19 Section 208(f)(i) and (ii).

20 Section 208(fa).

21 Section 208(g)(i) and (ii).

22 Section 208(h).

23 Sections 209–340 and 351–360.

24 Judge FWM McElrea “Customary Values, Restorative Justice and the Role of Prosecutors: A New Zealand Perspective” (paper prepared for the Restorative Justice and Community Prosecution Conference, Cape Town, South Africa, 21–23 February 2007) <www.parliament.nz> at 2.

the opportunity for explanations to be given, questions answered, and apologies given, the drawing up of a plan to address the wrong done, and an agreement as to how that plan will be implemented and monitored. The court is usually but not necessarily involved.

In the Youth Justice sphere, about one-third of conferences are not directed by the court but are diversionary conferences, initiated – and attended – by the police. (However New Zealand does not subscribe to the practice in some parts of Australia, Canada and the United Kingdom of having the police run the conferences. There is always an independent facilitator in charge). If agreement can be reached as to an outcome that does not involve the laying of charges, then no charges are laid – so long as the outcome is implemented.

Although the family group conference process which found its way into the 1989 legislation is consistent with the restorative justice paradigm, it was not until the early 1990s that the concept of restorative justice, as described in Howard Zehr's seminal book entitled *Changing Lenses*, started to have a more formal impact on New Zealand's justice processes.

## 2. Adult courts

Following the development in the field of youth justice, the next step in New Zealand's restorative justice journey was the development of restorative processes in the adult courts. This process was led by his Honour Judge F McElrea who, in 1994 at a conference of District Court judges, presented a paper proposing the use of the restorative aspects of the family group conference model in the adult setting.<sup>25</sup> At that time, no centralised funding was available for new restorative justice initiatives, although from 1995 adult courts began to accept restorative justice conference recommendations on an ad hoc basis. In the mid 1990s conferences were delivered through community groups with the support of the local judiciary, without the need for substantive legislative amendment.

In 1995, three pilot schemes in Timaru, West Auckland and Rotorua were funded by the Crime Prevention Unit in collaboration with the Police and local Safer Community Councils to divert adult offenders appearing before the District Court and began operating in 1996 and 1999 respectively. An evaluation of the pilots concluded, inter alia,<sup>26</sup> that the programmes were "effective in preventing reoffending and result in financial savings to the justice system".<sup>27</sup>

The emerging practices of the mid 1990s were also recognised by courts. In *R v Clotworthy*,<sup>28</sup> for example, the Crown appealed the sentence of an offender who was found guilty of wounding with intent to cause grievous bodily harm. The offender had undergone a pre-sentence restorative justice process and had agreed to pay reparation to the victim. The District Court had imposed a suspended two year sentence with substantial reparation and community work. Despite taking a different approach to that of the District Court to a range of issues (including the starting point,

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25 Judge FWM McElrea "20 years of restorative justice in New Zealand – Reflections of a Judicial Participant" [2011] JCLL 44 at 49.

26 Gabrielle Maxwell, Allison Morris and Tracey Anderson *Community Panel Adult Pre-Trial Diversion: Supplementary Evaluation* (Crime Prevention Unit, Victoria University of Wellington Institute of Criminology, May 1999) at 6. The report also made a range of recommendations for improvement, including: the clarification of services being provided; development of criteria for the selection, training and practice of panellists; methods to ensure accountability and performance; exploring possibilities of integrating panel outcomes into the diversion and reparation processes in the District Court; and the development for further alternative models which incorporate restorative practices.

27 At 6.

28 *R v Clotworthy* (1998) 15 CRNZ 651 (CA).

the outcome of the guilty plea and reparation order, the offender's offer of compensation and the issue of suspended sentence),<sup>29</sup> the Court acknowledged the role of restorative justice in criminal cases. It concluded:<sup>30</sup>

We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss 11 and 12 of the Criminal Justice Act 1985). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s 5, dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome in that way.

The success of the pilots and the recognition of restorative justice in the jurisprudence led to the extension of funding beyond the pilot courts. In 1997, following a government request, the Ministry of Justice prepared a document entitled "Sentencing Policy and Guidance" which addressed a number of sentencing issues.<sup>31</sup> In the words of the then Secretary for Justice, "[i]n examining these issues, the starting point [was] the desirability of fairness and consistency, and of ensuring the state exercises its coercive powers in a humane manner in accordance with international obligations."<sup>32</sup> Before work arising as a result of that discussion document could be completed, however, a citizen's initiated referendum was held on the day of the 1999 general election. The referendum question asked:<sup>33</sup>

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

Clearly the question itself, in requiring the voter to respond in a singular manner to three separate issues, was problematic. Nevertheless, 92 per cent of voters responded in the affirmative.<sup>34</sup> The new Labour Government committed itself to reform of sentencing practice and policy, which culminated in the enactment of the Sentencing Act 2002 and Victims Rights Act 2002.<sup>35</sup> Fortunately, the community infrastructure and practices were already becoming embedded in criminal justice practice and the new legislative provisions were consistent with these initiatives. The Parole Act 2002 and, later, the Corrections Act 2004 completed the circle of these wide-ranging legislative improvements. Currently, restorative justice in the adult system is now available at three key stages:

1. as part of the police adult diversion process;
2. following a guilty plea and prior to sentencing; and

29 At 659–660.

30 At 661.

31 Ministry of Justice, *Sentencing Policy and Guidance – A Discussion Paper* (Ministry of Justice, Wellington, November 1997) <[www.justice.govt.nz](http://www.justice.govt.nz)>. Topics included, for example: the rationales and goals of sentencing to aggravating and mitigating factors; persistent and dangerous offenders; multiple offenders; the role of victims; a Māori view on sentencing; forms of guidance; and responsibility for sentencing policy and guidance.

32 At Foreword.

33 *Elections New Zealand Elections: Referenda* <[www.elections.org.nz](http://www.elections.org.nz)>.

34 At 1.

35 Judge FWM McElrea, above n 25, at 51.

3. following sentence, as part of the parole of offenders and as part of reintegration back into the community.

The provisions of these statutes recognise and support a restorative justice approach. They are undoubtedly well known by members of the legal profession and of the judiciary, but some of them are repeated here to underscore the impact they have had, and will continue to have, on criminal justice processes in New Zealand. I will also reflect on the practices and developments in these areas.

### C. *Current Framework*

#### 1. *Police diversion*

For many years, New Zealand police have used a “diversion” scheme which redirects adult offenders who accept responsibility for offending away from the court but requires them to make amends for the harm caused through community work, reparation where appropriate and apologising to their victims. This diversionary process saves considerable judicial time and saves offenders, in appropriate cases, from the adverse consequences of a conviction. Importantly, a process for alternative resolutions to criminal justice issues is also in keeping with international expectations. In addition to instruments such as the International Covenant on Civil and Political Rights, non-binding instruments such as the 1986 United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), adopted by the UN General Assembly on 14 December 1990,<sup>36</sup> call upon states to “develop non-custodial measures within their legal systems to provide other options” and “to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.”<sup>37</sup> The Rules also advocate discharges in the pre-trial or pre-charge environment, where appropriate and where provided for in domestic legislation.<sup>38</sup>

New Zealand is making significant developments in this area. I recently had the pleasure of listening to a fascinating presentation delivered by Justice Mark O’Reagan at the 2012 International Criminal Law Congress, entitled “Criminal Justice Issues in Times of Change”. His presentation addressed, in addition to traversing the Criminal Procedure Simplification Project, the detailed reforms being made to the justice sector “pipeline”, as well as the Criminal Procedure Act 2011, the Policing Excellence programme and diversion.

The practice of police diversion is well known and has been in place, in one form or another, for some time in this country.<sup>39</sup> Policing Excellence was launched in 2009 and aims to reduce recorded crime by 13 per cent and Police (non-traffic) apprehensions resolved by prosecution by 19 per cent by the 2014/15 financial year. The programme focuses on improvements across a

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36 *United Nations Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules), GA Res 45/110 annex UN Doc A/45/49 (1990).

37 At [1.5].

38 At [5.1].

39 New Zealand Police *Adult Diversion Scheme Policy (Version 17.0)* <[www.police.govt.nz](http://www.police.govt.nz)> at 4. Success in these two areas will contribute to a 4% increase in Police’s prevention output: See New Zealand Police *Policing Excellence Update* (7 September 2012) <[www.police.govt.nz](http://www.police.govt.nz)>.

range of police operations, one of which is “alternative resolutions”.<sup>40</sup> The related Police Prevention First Strategy also states that one of its initiatives in the area of policing leadership will be to maximise the use of police discretion and alternative resolutions in appropriate circumstances, including when dealing with young people.<sup>41</sup> There have long been calls from the judiciary, the Law Commission, and others to develop better alternatives for offenders in certain cases.<sup>42</sup> The Commissioner of Police has described the strategy as “balanced approach which uses intelligence, enforcement and alternative ways of resolving cases enabling us to better understand and respond to the drivers of crime.”<sup>43</sup>

Diversionary action can take place at one of three stages: the pre-arrest, pre-charge, or the post-charge stage in place of a conviction.<sup>44</sup> Thus far, the pre-charge warning initiative reviewed by Police has been positive, recording a nine per cent reduction in charges proceeding to court in the Auckland region.<sup>45</sup> The pre-charge warning scheme was rolled out nationally in September 2010 and has been able to resolve 10 per cent of since implementation, with a 12 per cent reduction in the 2011/12 financial year. In a separate but related initiative, the Police Youth Services Group has also undertaken a review of the research on police warnings and alternative action with children and young people, which includes consideration of international police youth diversion in countries such as Australia, Northern Ireland, England and Wales, Canada and the United States (Florida specifically).<sup>46</sup>

Part of the alternative resolutions initiatives is the trial of a Community Justice Panel in Christchurch. The trial is “an initiative where offenders are held accountable for their offending by a panel of vetted and trained community representatives.”<sup>47</sup> The Ministry of Justice, in its *Addressing Drivers of Crime June 2011 Report Back*, explained that the panels have been in operation since January 2011 and form part of a wider cluster of initiatives.<sup>48</sup> The other initiatives mentioned in the July 2011 Report Back, which form part of the cluster of projects of which the Community Justice Panel is a part, include the judicially led Rangatahi Youth Courts, and the judicially led initiative at Kaikohe District Court to include a Nga Puhī service provider in

40 New Zealand Police *Policing Excellence Update*, at 2–3. The other operational areas covered in the programme include: deployment practice; a victim focus framework; the development of a Centre for Continuous Improvement; performance management frameworks; case management centres; mobile technologies; the Crime Reporting Line; cost recovery; the use of Authorised Officers; and support services to frontline.

41 New Zealand Police *Prevention First: National Operating Strategy 2011 – 2015* <www.police.govt.nz> at 5 and 7.

42 New Zealand Police *New Zealand Police Pre-Charge Warnings Alternative Resolutions: Evaluation Report* (New Zealand Police, 2010) <www.police.govt.nz> at 18. The Evaluation Report makes reference to: Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005); Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, 2005); and Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).

43 New Zealand Police *Prevention First: National Operating Strategy 2011–2015*, above n 41, Foreword.

44 New Zealand Police *New Zealand Police Pre-Charge Warnings Alternative Resolutions: Evaluation Report* (New Zealand Police, 2010), above n 42, at 9.

45 At 10–13. Other benefits have been identified, including improved quality of decision making, reduction in prosecutions being withdrawn, reduced paperwork and some positive responses from victims and offenders.

46 New Zealand Police *Alternative Actions that Work: A Review of the Research on Police Warnings and Alternative Action* (New Zealand Police, 2011) <www.police.govt.nz>.

47 New Zealand Police *Policing Excellence Update* (7 September 2012), above n 39, at 3.

48 Ministry of Justice *Addressing the Drivers of Crime: July 2011 Report Back* (Ministry of Justice, July 2011) <www.justice.govt.nz> at [40].

engaging with offenders to address the causes of offending though tikanga Māori. Separate to the Christchurch pilot, Community Justice Panels have been in place around New Zealand for some time in various forms, often supported by local police. Recent media reporting of the Christchurch panel indicates that more than 100 offenders have appeared before panel, with 89 per cent complying with the order set by the panel. Only 55 of cases are reported to have been returned to the District Court system for disposition.<sup>49</sup>

Community Justice Panels are also used in the United Kingdom.<sup>50</sup> In Sheffield, Somerset and Manchester, volunteer-based panels have been identified as an effective model for dealing with certain types of crime. The evaluation considered international examples of similar panels, including the Victim Offender Reconciliation Programme which has been in operation in Canada and the United States since 1977;<sup>51</sup> Pennsylvania's Youth Aid/Community Justice Panels, which have been in place since the 1960s;<sup>52</sup> Vermont's Community Justice Panels since 1994 and the Community Justice Centre from 1998;<sup>53</sup> and Victoria Community Justice Panels in Australia since 1991.<sup>54</sup> The evaluation provided strategic and operational recommendations, including recommendations concerning strategic management, coordination, reviews, targets and measures, communications strategies, impact and implementation management, evaluation, and training.<sup>55</sup> In Australia, "circle sentencing" for aboriginal offenders involves a magistrate, a prosecutor, the circle sentencing project officer, the offender and their legal representative, the victim and their support people, and four elders. Technical legal language is avoided and instead aboriginal English is used.<sup>56</sup> The process is established under the New South Wales Criminal Procedure Act 1986 and is available for most summary offences, while part 6 of the Criminal Procedure Regulation 2010 sets out eligibility requirements.<sup>57</sup> This is a process which has obvious relevance and transferrable value to New Zealand's social and cultural framework.

With respect to the police diversion scheme and the work being undertaken by Police to enhance practice in this area, an issue that ought to be considered is the development of an appropriate mechanism for the monitoring and oversight of the scheme. Monitoring and oversight, both internal and external, is essential to ensure best practice consistency across New Zealand's twelve Police Districts. With respect to the Community Justice Panel pilot, a considered evaluation will be the logical next step in determining whether the initiative can achieve its desired outcomes, whilst ensuring transparency, accountability, due process, and well-managed restorative justice practices.

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49 Jo McKenzie-McLean "New Justice scheme given a thumbs-up" (20 August 2012) <stuff.co.nz>.

50 Linda Meadows, Kerry Clamp, Alex Culshaw et al *Evaluation of Sheffield Council's Community Justice Panel's Project* (Hallam Centre for Community Justice, Sheffield Hallam University, March 2010) <[www.restorativejustice.org.uk](http://www.restorativejustice.org.uk)>.

51 At 44.

52 At 45.

53 At 47–48.

54 At 46.

55 At 5–6.

56 Michelle Lam "Understanding, but no soft options in the circle" (2012) 50(8) *Law Society Journal* 27 at 29.

57 At 27.



## 2. *Pre-sentence restorative justice*

### (a) The Sentencing Act 2002 and Victims' Rights Act 2002

The Sentencing Act 2002 contains comprehensive provisions for restorative justice processes. Section 7 provides the purposes for which the court may sentence or otherwise deal with an offender, many of which overlap with the purpose and outcomes of restorative justice, including: accountability for harm caused;<sup>58</sup> promoting a sense of responsibility for, and acknowledgement of that harm;<sup>59</sup> providing for the victim's interests;<sup>60</sup> reparation for the harm done by the offending;<sup>61</sup> and assisting the offender's rehabilitation and reintegration.<sup>62</sup> The court must take into account, *inter alia*, any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.<sup>63</sup>

In addition to aggravating and mitigating factors provided in s 9, s 10 provides that the Court must take into account matters such as offers to make amends;<sup>64</sup> an agreement to remedy the wrong, loss, or damage caused;<sup>65</sup> and the response of the offender or the offender's family, whānau, or family group to the offending and measures committed to in response, or remedial action.<sup>66</sup> Consideration of these matters is facilitated by the provisions concerning adjournments,<sup>67</sup> pre-sentence reports,<sup>68</sup> consideration of the offender's cultural background,<sup>69</sup> reparation,<sup>70</sup> orders to come up for sentence if called upon and orders for restitution or compensation.<sup>71</sup> These provisions are central to the fair and just disposition of sentencing matters. Both individually and collectively, they provide a platform for restorative justice processes and accord them the weight they deserve in the criminal justice system. It is axiomatic that the outcome of restorative justice processes must be carefully and reasonably considered by the sentencing judge to ensure that the weight given to restorative justice outcomes is appropriate in every case.

In addition to sentencing, the Victims' Rights Act 2002 is designed to improve provisions for the treatment and rights of victims of offences,<sup>72</sup> and supports restorative practices. It provides clarity around the appropriate role of victims and the standards which those involved in discharging functions in this system should strive to uphold. While the principles guiding the

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58 Sentencing Act 2002, s 7(1)(a).

59 Section 7(1)(b).

60 Section 7(1)(c).

61 Section 7(1)(d).

62 Section 7(1)(h).

63 Section 8(j).

64 Section 10(1)(a).

65 Section 10(1)(b).

66 Sections 10(1)(c), 10(1)(d)(i) to (iii), and 10(1)(e).

67 Section 25, particularly s 25(b) and (c).

68 Sections 26 and 62 respectively.

69 Section 27.

70 Section 32.

71 Section 110, particularly 110(1), 110(3)(a) and (b)(i) to (iii), and s 111.

72 Victims' Rights Act 2002, s 3.

treatment of victims as articulated in the Act do not confer any enforceable legal right,<sup>73</sup> the principle that judicial officers, lawyers, court staff, police, and others should treat the victim with courtesy and compassion and respect his or her dignity and privacy, and that appropriate services are provided, is important.<sup>74</sup> The Act addresses the provision of information,<sup>75</sup> the protection of privacy,<sup>76</sup> victim impact statements and name suppression,<sup>77</sup> and processes regarding an offender's release from prison or release to or from home detention.<sup>78</sup>

With specific reference to restorative justice, section 9 provides that if a person is available to arrange and facilitate a meeting between a victim and offender to resolve issues relating to the offence, a judicial officer, lawyer for an offender, member of court staff, probation officer or prosecutor should encourage a meeting.<sup>79</sup> Such a meeting should be encouraged if the victim and offender agree, the resources are available, and it is otherwise practicable and is in all the circumstances appropriate.<sup>80</sup>

The provisions of both Acts enable the court protect the fairness and due process rights of the offender on one hand, and the interests and needs of the victim on the other. I will return to the role of victims in restorative justice when I consider the lessons learned from New Zealand's restorative justice experience and identify some of the opportunities and pathways available for ongoing development.

#### (b) Pre-sentence restorative justice developments – international

The legislative developments in New Zealand in the early 2000s did not occur in a vacuum. At this time, momentum was gathering at the international level in the field of restorative justice. In April 2000, the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*.<sup>81</sup> As part of the Declaration, the United Nations member states made a number of commitments to the development of criminal justice frameworks. Of particular relevance to restorative justice are paragraphs 27 and 28, which identify the need to support victims of crime and to develop restorative justice policies, procedures and programmes by 2002.<sup>82</sup> The following year the Council of the European Union issued a framework which encourages the use of mediation between victims and offenders in cases where mediation is appropriate, and calls for European Union member states to ensure that agreements concluded as a result are taken into consideration in criminal proceedings.<sup>83</sup> In 2002, the United Nations

73 Section 10.

74 Sections 7(a) and (b) and 8.

75 Sections 11–14.

76 Sections 15–16A.

77 Sections 17–28.

78 Section 48.

79 Section 9(1).

80 Section 9(1)(a)–(c).

81 *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century* 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10–17 April 2000, UN Doc A/CONF187/4/Rev 3.

82 At [27] and [28].

83 Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) <<http://europa.eu>>.

Economic and Social Council adopted a resolution entitled *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, which encouraged the adoption of restorative justice practices that are consistent with international norms and standards.<sup>84</sup> Finally, in 2005, the Declaration of the Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders urged member states to continue developing their restorative justice policies, procedures and programmes, including alternatives to prosecution.<sup>85</sup> Restorative justice practices can now be seen in a number of countries around the world, from Brazil to Belgium, from France to Finland and from the USA to Scotland. I have discovered these international examples in practice during my tenure as Chairman of the Parole Board. Whilst the models are framed differently, they are nevertheless universally adaptable.

(c) Pre-sentence restorative justice developments – domestic

In New Zealand, following the legislative reforms and practice development, the Ministry of Justice initiated a continuous development framework for restorative justice. The first major development in this regard was the development of the 2004 *Principles of Best Practice for Restorative Justice* and the *Statement of Restorative Justice Values and Processes*, which pulled together the statutory and policy standards. The 2004 Principles and Statement acknowledged the Canadian Department of Justice's set of principles and guidelines for restorative justice, as well as the similar work that was then being undertaken by the United Kingdom's Home Office.<sup>86</sup> The Principles were developed following consultations with practitioners in 2003, while the Statement was prepared by restorative justice providers in the same year through the Restorative Justice Network.<sup>87</sup> The Principles emphasise the importance of voluntariness, full and effective participation, accountability, flexibility and responsiveness, the paramount importance of emotional and physical safety, effective service delivery, and the need to ensure restorative justice is only undertaken in appropriate cases.<sup>88</sup> The core restorative justice values articulated are participation, respect, honesty, humility, interconnectedness, accountability, empowerment and hope.<sup>89</sup>

Whilst the principles and values inherently make sense *in abstracto*, they can sometimes belie the complexity of restorative justice and of the need for those involved in the delivery of conferences to ensure that they adhere to these standards in practice. What is required is an ongoing and meaningful examination of what works and what does not, of successes and missed opportunities, and of possibilities for the future.

In 2001 the court-referred restorative justice pilot was launched in the Auckland, Waitakere, Hamilton and Dunedin District Courts. The Ministry of Justice evaluated 192 conferences for

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84 *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* UN Doc E/2000/INF/2/Add 2.

85 *Bangkok Declaration: Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice* 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18–25 April 2005. The Declaration was subsequently approved by the Economic and Social Council in its resolution 2005/15 of 22 July 2005.

86 Ministry of Justice *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, Wellington, May 2004) at 6.

87 At 1.

88 At 11–19.

89 At 24–25.

moderately serious offending between February 2002 and 2003.<sup>90</sup> It found increased resolution of the effects of crime for victims, with 92 per cent indicating they were pleased they took part. It also observed that the reoffending rate for conference offenders was 4 per cent lower within 12 months, concluding that conferences have the potential to meet the needs of victims and offenders and in some cases to contribute to lower reoffending rates. An evaluation of the Wanganui Community Managed Restorative Justice Project and the Rotorua Second Chance Community Managed Restorative Justice Programme (a programme using tikanga-based practices)<sup>91</sup> were found to be positive in many respects.<sup>92</sup>

Daly (2000) has foreshadowed a time when restorative justice processes become conventional, rather than currently in “oppositional contrast” to the conventional options. Our hope is that the evaluation findings presented in this report will inform the Rotorua programme providers, and contribute to the ongoing development of New Zealand’s Crime Reduction Strategy and to international debates about restorative justice.

Last year, the Ministry of Justice undertook research into the re-offending rates in 2008 and 2009 and into victim satisfaction with restorative justice. With respect to reoffending, the study found that offenders who participated in restorative justice had a 20 per cent reduced rate of re-offending than that of a similar group of offenders who did not undertake restorative justice processes.<sup>93</sup> The frequency of reoffending was also 23 per cent lower.<sup>94</sup> With respect to victim satisfaction with restorative justice,<sup>95</sup> 82 per cent were satisfied with the conference and for many being able to engage with an offender face to face was the best feature of the conference.<sup>96</sup>

Similar positive results have been observed in the United Kingdom. The New Zealand Ministry of Justice has observed that research undertaken by Professor Joanna Shapland at the University of Sheffield, which was released in the United Kingdom in 2008, found that reconvictions were reduced by 27 per cent in the two years following a restorative justice process and 85 per cent of victims have responded positively.<sup>97</sup> Increased use of restorative justice processes was later recommended in the United Kingdom government’s green paper entitled

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90 Ministry of Justice *A Summary of: New Zealand Court-Referred Restorative Justice Pilot: Evaluation* (Ministry of Justice “Just Published”, June 2005, Number 39) at 1–2. The two year evaluation of this project, including the Technical Report, is available on the Ministry of Justice website: <www.justice.govt.nz>.

91 Ministry of Justice *The Wanganui Community-Managed Restorative Justice Programme: An Evaluation* (Ministry of Justice, January 2005); and Ministry of Justice *The Rotorua Second Chance Community-Managed Restorative Justice Programme: An Evaluation* (Ministry of Justice, January 2005) at Foreword.

92 Ministry of Justice *The Wanganui Community-Managed Restorative Justice Programme: An Evaluation* (Ministry of Justice, January 2005) at 66.

93 Ministry of Justice, *Reoffending Analysis for Restorative Justice Cases: 2008 and 2009* (Ministry of Justice, June 2011) at 18.

94 At 21.

95 Ministry of Justice *Victim satisfaction with restorative justice: A summary of findings* (Ministry of Justice, September 2011).

96 At 5.

97 Ministry of Justice *Restorative Justice in New Zealand* (Ministry of Justice, December 2010) at 6. The United Kingdom research was published in both a book and four reports published by the United Kingdom Home Office and Ministry of Justice: J Shapland, G Robinson, and A Sorsby *Restorative Justice in Practice* (Routledge, London, 2011). The four separate reports, dated 2004, 2006, 2007 and 2008 are available at: <www.homeoffice.gov.uk>.

*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*.<sup>98</sup> Hennessey Hayes and Kathleen Daly, following an examination of a number of evaluation studies, observe that a “challenge for future research will be to elucidate the links between offender characteristics, conference experiences and re-offending”.<sup>99</sup> They state that “[t]here is a need to develop innovative measures of how offenders understand the conference event, as well as measures that tap the social contexts within and surrounding the conference.”<sup>100</sup>

It is important to emphasise when engaging with material of this kind that statistics can only capture elements or “snapshots” of an individual’s restorative justice experience. Statistics take us a certain way along a path of critical evaluation but it is ultimately up to us to ask “why?” and “what can we do better?” Clearly there is room for improvement and it is important that meaningful analysis, of both quantitative and qualitative information, which also includes a range of voices, is undertaken both now and on a regular basis in the future to ensure that restorative justice processes continue to achieve what they are set out to achieve in a manner that better meets the needs of victims and offenders alike.

As demonstrated in these studies, the Ministry of Justice has been active in evaluating a range of restorative initiatives in the early to mid-2000s, and continues to develop restorative justice service delivery today. Current pieces of work include contributing to the Minister of Justice’s *Review of Victims’ Rights*, the interagency *Addressing the Drivers of Crime Initiative*, and developing services following a two million dollar funding increase over the next two financial years.<sup>101</sup> Beginning in July 2011, funding for restorative justice conferences for low-level offenders will be increased by 50 per cent over the next three years – that equates to \$500,000 in 2011/12 and 2012/13, and \$1,000,000 per year thereafter.<sup>102</sup> The Ministry has contracted 26 local community-based providers to provide restorative justice services.<sup>103</sup> It has developed a training accreditation (and re-accreditation) programme for facilitators, as well as induction training.<sup>104</sup>

### 3. Restorative justice post-sentence

The third phase in which restorative justice is applied is, as identified previously, at the post-sentence phase. I have had the benefit of observing and experiencing this process in my previous role as Chairman of the New Zealand Parole Board from 2005 to 2012. It was a uniquely challenging and enriching experience, and it was an experience which reinforced the importance of critically evaluating what we have done well and what we can do better – for offenders, victims, their families and our communities.

Section 7 of the Parole Act 2002 provides that when making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is

98 Ministry of Justice (UK) *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Ministry of Justice (UK), December 2010) <[www.restorativejustice.org.uk](http://www.restorativejustice.org.uk)>.

99 H Hayes and K Daly “Conferencing and Re-offending in Queensland” (2004) 37 ANZJ Crim 167 at 187.

100 At 187.

101 Ministry of Justice *Restorative Justice at the Ministry* (Ministry of Justice, 2012) <[www.justice.govt.nz](http://www.justice.govt.nz)>.

102 Ministry of Justice *Addressing the Drivers of Crime: July 2011 Report Back* (Ministry of Justice, July 2011), above n 48, at [39].

103 Ministry of Justice “Restorative Justice providers contracted by the Ministry of Justice” (2012) <[www.justice.govt.nz](http://www.justice.govt.nz)>.

104 Ministry of Justice *Restorative Justice Facilitator Accreditation* (Ministry of Justice, 2011).

the safety of the community.<sup>105</sup> Included in the other principles that must guide the Board's decision is the principle that the rights of victims are upheld, and submissions by victims (as defined in s 4 of the Victims' Rights Act)<sup>106</sup> and any restorative justice outcomes are given due weight.<sup>107</sup> When an offender is due to be released at his or her statutory release date, or to be considered by the Board for parole, the Department of Corrections must provide the Board with any reports arising from restorative justice processes, if the offender has engaged in them.<sup>108</sup> The Corrections Act 2004 recognises as a guiding principle that offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process designed to promote restorative justice between offenders and victims.<sup>109</sup> The outcome of these post-sentence processes is not definitive, nor should it ever be. The aim of restorative justice in this context, however, is to repair (or contribute towards the ongoing repair) of the harm caused. To achieve this, the focus shifts away from the state and the courts towards the victims, the offender and their families and communities. A healing process is sought for both victims and offenders.

Referrals for restorative justice processes may come from the Parole Board itself, but they can also be initiated by victims, offenders, case officers, probation officers, social workers, prison chaplains, and support services. To date, a great deal of work has been undertaken in earnest by community organisations, most notably Prison Fellowship New Zealand. This work has been constructive, positive and enormously satisfying to be involved in. Prison Fellowship has been active in providing a range of services and programmes to prisoners and their families.<sup>110</sup> For some time in New Zealand a "disconnect" existed between organisations providing restorative justice programmes. They are now connected under the umbrella of Restorative Justice Aotearoa,<sup>111</sup> which should be regarded as a significant step forward for restorative justice service provision and community engagement.

An agreement now exists between the New Zealand Parole Board and the Department of Corrections, which provides for Department of Corrections funding in cases where the Parole Board recommends a restorative justice conference. The May 2002 "Guidelines for Restorative Justice Processes in Prisons" provides that the purpose of the process is to reduce the impact of crime on victims, hold prisoners accountable for the harm caused to victims, increase prisoners' involvement in dealing with their offending, and to reach an outcome agreement through consensus by all parties.<sup>112</sup> Importantly, the Guidelines highlight that participation is voluntary, the process must be fair and safe, participants need to be well prepared and expectations should be realistic.<sup>113</sup> The 2004 Ministry of Justice Principles of Best Practice are emphasised,<sup>114</sup> and guidelines relating to eligibility, suitability to participate, exceptions, informed consent,

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105 Parole Act 2002, s 7(1).

106 Victims' Rights Act 2002, s 4.

107 Parole Act 2002, s7(2)(d).

108 Section 43(1)(b).

109 Corrections Act 2004, s 6(1)(d).

110 Prison Fellowship New Zealand <[www.pfnz.org.nz](http://www.pfnz.org.nz)>.

111 Restorative Justice Aotearoa <[www.restorativejusticeaotearoa.org.nz](http://www.restorativejusticeaotearoa.org.nz)>.

112 Department of Corrections "Guidelines for Restorative Justice Processes in Prisons" (May 2011) at 1.

113 At 1.

114 At 3.

facilitator requirements, victim contact, and involvement of Whānau Liaison Officers, Kaiwhakamana, Kaiwhakahaere, and Fautua Pasefika (amongst other things) are addressed. Importantly, the Guidelines provide that individual prisons will meet costs where possible.<sup>115</sup> They also establish a detailed restorative justice referral process,<sup>116</sup> and set out the quality assurance requirements for conference facilitators, including additional requirements for facilitators in conferences relating to sensitive cases (that is, cases of family violence, sexual or other serious violence, and cases where the victim is under 18 years of age).<sup>117</sup>

It should be emphasised that the work of restorative justice conferencing – at all stages of the criminal justice process – is highly professional work and no place for well-meaning but untrained enthusiasts. The risks associated with proceeding in cases where restorative justice may be inappropriate need to be taken seriously (for example, in cases where an offender denies involvement, blames others, or is affected by mental health issues affecting his or her capacity to engage in a meaningful way; or in cases where a victim is unable or unwilling to engage with the offender). Ultimately the process requires – and deserves – specialist input and experience.

I also acknowledge in this context the power of work being undertaken by community-based groups on prisoner reintegration and the proliferation of faith based communities, both here in New Zealand and further afield. These circles of support and accountability provided by members of religious congregations welcome and integrate returned prisoners. They have their origins in the Mennonite communities of Canada and are now appearing in New Zealand through the pioneering work being done by Jim Van Rensberg (principal psychologist for the Te Piriti Special Treatment Unit which deals with sexual offenders, who is from the Reformed Presbyterian Church of Bucklands Beach). Other organisations also undertake important work in this field, including Prison Care Ministries in Hamilton, the PILLARS network in Christchurch and South Auckland. Prison Fellowship New Zealand offers faith based through-care, operates a 60 bed faith unit at Rimutaka Prison, as well as reintegration, re-entry, aftercare and maintenance support.<sup>118</sup>

Many of the preventive detainees indefinitely imprisoned in New Zealand are recidivist sexual offenders. They have been a very difficult group to release on parole from prison because of the lack of adequate support. The formation of circles of support as described above provides a community network to support people and is a useful initiative now widely adopted throughout the United Kingdom and elsewhere overseas. In Hawai'i, for example, the Huikahi Restorative Circle is a process that draws upon public health learning principles and applied learning techniques to increase restorative justice outcomes, enabling individuals to become their own "change agents" as they plan their re-entry into the community following imprisonment.<sup>119</sup> The process was envisioned in 2004, introduced in 2005 at Waiawa Correctional Facility, trialled for 16 months with 21 circles, 21 incarcerated men and 123 total participants before being introduced fully in 2006.<sup>120</sup>

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115 At 3–5.

116 At 10.

117 At 8–9.

118 "Faith Based Throughcare" Prison Fellowship New Zealand <[www.pfnz.org.nz](http://www.pfnz.org.nz)>.

119 Loren Walker "Huikahi Restorative Circles: Group Process for Self-Directed Reentry and Family Healing" (2010) 2(2) *European Journal of Probation* 76 at 76.

120 At 78–79.

The value of faith based, or non-faith based support structures that focus on reintegration is clear. Christopher Marshall, in his book entitled *Compassionate Justice*,<sup>121</sup> provides an interesting account of offender reintegration. At one point Marshall draws on the work of legal scholar Thomas Shaffer who uses the parable of the Prodigal Son to commend what he calls a “jurisprudence of forgiveness”.<sup>122</sup> He explains that the story “has not only furnished the subject matter of great literature, art, music, and theological reflection through the generations but has also surfaced frequently in discussions of crime and punishment.”<sup>123</sup> He proceeds to explain, amongst other things, Richard Bell’s observations that “contemporary philosophical discussions on the topic of justice have become stuck” in a circular discourse about the law and its applicable principles.<sup>124</sup> Marshall states that:<sup>125</sup>

[o]ne benefit of returning to a more textured view of justice is its capacity to hold justice and mercy together in the domain of corrective or criminal justice. Justice and mercy are often viewed there as contrasting concepts, with mercy serving to forestall or moderate or bypass the delivery of just deserts. But in a thicker conception of justice, mercy is not a substitute for justice, or merely some exterior check to prevent retribution from becoming excessive. It is an integral part of the meaning of justice itself ...

#### 4. Restorative justice in education

Thus far this paper has examined the experience of restorative justice in the criminal justice sector. The value of restorative justice as a theory of justice has a much wider application. It can be harnessed in a range of settings where conflict resolution, in one form or another, can be achieved through facilitated interpersonal engagement. The influence of restorative justice principles and practice is readily identifiable in workplace disputes and even in the area of resource management.

Importantly, it has had a major impact in this country in the field of education which, like the criminal justice system, has traditionally been focused on tariff-based deterrence and has imposed punitive responses to alternative, and at times destructive, behaviour. The importance of establishing a responsive framework that tackles issues facing individuals at the formative stages of their lives, particularly at a time when they are developing their views on society and their place in it, cannot be understated. Margaret Thorsborne, who has done a great deal of work in New Zealand, Australia and elsewhere in the field of restorative justice in education, explains that:<sup>126</sup>

[r]estorative justice has much to offer those of us who are concerned with the development of well-rounded, socially and emotionally competent young people who are accountable for their behaviour and understand that there is nothing they do (or don’t do) which doesn’t impact on others in some way. ... Restorative justice requires a paradigm shift in thinking ... and indeed delivers

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121 Christopher D Marshall *Compassionate Justice: An Interdisciplinary Dialogue with Two Gospel Parables on Law, Crime and Restorative Justice* (Cascade Books, Oregon, 2012).

122 At 191.

123 At 1.

124 At 218.

125 At 1.

126 Margaret Thorsborne and David Vinegrad *Restorative Justice Practice in Classrooms: Rethinking Behaviour Management* (Inyahead Press, Queensland, 2004) <[www.thorsborne.com.au/manuals.htm](http://www.thorsborne.com.au/manuals.htm)> at 8.



outcomes that include high rates of school achievement, low rates of offending behaviour, a sense of belonging in a community and emotional literacy and competence.

Restorative justice conferencing was formally introduced into schools in New Zealand in the late 1990s as part of a Ministry of Education Suspension Reduction Initiative. The University of Waikato Restorative Practices Development Team was contracted to provide conference processes in five schools initially, with 24 schools subsequently enrolling their staff for training.<sup>127</sup> The group drew on the family group conference model and school suspensions fell.<sup>128</sup> It is appropriate in light of the University of Waikato's support of the annual Harkness Henry lecture to acknowledge the pioneering work undertaken by the University in this respect. This pilot was instrumental in contributing to the mainstreaming of restorative justice practice in the educational setting. In 2005 Sean Buckley and Gabriele Maxwell conducted an examination of the experiences of 15 schools that were making use of restorative justice practices.<sup>129</sup> They reported that five common restorative practices were being employed:

- (a) the restorative chat (one on one conversations between staff and student);
- (b) the restorative classroom (open dialogue in the classroom on specific conflicts);
- (c) the restorative thinking room (a room set aside for students involved in a conflict situation who need time to think and speak with a staff member);
- (d) a restorative mini conference (held for more serious conflict situations, involving the offender, the victim, a staff member and sometimes another individual); and
- (e) the full restorative conference (which is loosely based on the youth justice family group conference model. Participants may include victims, offenders, staff, family/whānau, and other support persons. Planning is critical and some conferences may take several hours.

The evaluation identified that schools were consistent in their acceptance of a core set of restorative values, namely respect, inclusion, achievement, and celebration of diversity, although all schools identified different ways of making these values a reality in their unique educational context.<sup>130</sup> Schools, in a manner not dissimilar to the diversion processes practiced in the criminal justice system, are using conferences as an alternative or first response to offending behaviour before a disciplinary investigation is considered and the conferences often focus on the establishment of a suitable sentence, punishment, or plan of action.<sup>131</sup>

Since the early 1990s, in a quiet and relatively unpublicised way compared to the criminal justice sector developments, the expansion of restorative justice in schools has been remarkable. At present, there are 325 secondary schools in New Zealand. Approximately 160 secondary schools have invested significantly in restorative practice and indicate that restorative practice is a priority. The Ministry of Education, with its Positive Behaviour for Learning work, is recruiting

127 Margaret Thorsborne and David Vinegrad *Restorative Justice Practice in Schools: Rethinking Behaviour Management* (Inyahead Press, Queensland, 2002) <[www.thorsborne.com.au/manuals.htm](http://www.thorsborne.com.au/manuals.htm)> at 7.

128 Wendy Drewry "Restorative Practice in Schools: Far-Reaching Implications" in Gabrielle Maxwell and James Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Institute of Policy Studies, Victoria University of Wellington, September 2007) at ch 10.

129 Sean Buckley and Gabrielle Maxwell *Respectful Schools: Restorative Practices in Education: A Summary Report* (Office of the Children's Commissioner and the Institute of Policy Studies, Victoria University of Wellington, January 2007).

130 At 18–19.

131 DJ Carruthers "New Zealand's Restorative Journey from Criminal Justice to Education" *Resolution: News from the Restorative Justice Consortium* (Restorative Justice Consortium UK, Spring 2010) at 9.

24 secondary schools to pilot a new restorative practices model. The aim of the refined model is to ensure that, instead of relying upon restorative practices in response to conflict in a limited number of cases, efforts are made to ensure that relationships are placed at the heart of the learning experience. The Ministry will provide training, coaching, implementation support, and evaluation tools. The Ministry's paper, entitled *Restorative Practices in NZ: The Seven Restorative Practices*, introduces a "relational focus", whereby all members of the school community engage in restorative practice in their day-to-day engagement, in a "whole-of-school" preventive manner.<sup>132</sup> The system identifies three "tiers", from school-wide expectations and practices (tier one) to early intervention problem solving (tier two) and intensive interventions (tier three).<sup>133</sup> An evidence base, drawing on local and international material, has been produced to inform the development of a restorative practice model.<sup>134</sup> These developments, which will be implemented over a three- to five-year period, will involve school principals, managers and board members, school implementation leaders, and restorative practice coaches and trainers.

Similar work is being done overseas. In the United Kingdom in 2004 an evaluation was undertaken of nine local youth offending teams in 26 schools (20 secondary schools and six primary schools).<sup>135</sup> While there was no discernible effect on exclusions, as they were used by some schools to reintegrate students following an exclusion, 92 per cent resulted in successful party agreements and 89 per cent of pupils were satisfied with the conferences. Only 4 per cent of agreements had been broken after three months.<sup>136</sup> The evaluation concluded that "[r]estorative justice is not a panacea for the problems in schools but, if implemented correctly, it may be a useful resource that improves the school environment and enhances the learning and development of young people."<sup>137</sup> Work has also been done in the UK on restorative justice approaches in young people's residential units,<sup>138</sup> as well as by a group of experts at the University of Cambridge Institute of Criminology.<sup>139</sup>

New Zealand is one of the world leaders in this area. The successes are enormous and the commitment is considerable. The leadership must be able, strong and focused and the support and training for teachers and others who take part in the process has to be clever, professional and focused. The results are there to be seized as we move ever closer to a final and full vision of restorative processes in schools and as we foster fully restorative and therapeutic learning communities.

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132 Ministry of Education *Restorative Practices in NZ: The Seven Restorative Practices* (Ministry of Education, April 2012) <[www.vln.school.nz](http://www.vln.school.nz)> at 4.

133 At 3.

134 Ministry of Education *Restorative Practices in NZ: The Evidence Base* (Ministry of Education, February 2012) <<http://www.vln.school.nz>> at 5.

135 Youth Justice Board for England and Wales *National Evaluation of the Restorative Justice in Schools Programme* (Youth Justice Board for England and Wales, 2004) <[www.restorativejustice.org.uk](http://www.restorativejustice.org.uk)>.

136 At 65.

137 At 65.

138 Brian Littlechild and Helen Sender *The Introduction of restorative justice approaches in young people's residential units: A critical evaluation* (Centre for Community Research, University of Hertfordshire, February 2010) <[www.restorativejustice.org.uk](http://www.restorativejustice.org.uk)>.

139 The Institute of Criminology, University of Cambridge (UK) <[www.crim.cam.ac.uk](http://www.crim.cam.ac.uk)>.

### III. LESSONS LEARNED AND POINTERS FOR THE FUTURE

#### A. *The Value of Restorative Justice*

Notwithstanding the complexity of this area of work, there is overwhelming evidence of the value that it can yield when appropriately implemented, resourced and managed. It is also important to emphasise that restorative justice conferencing often forms part of a longer process of development for both victim and offender, as they come to terms with their conduct or experiences and identify avenues that will enable them to rebuild their lives and, hopefully, to move forward. Barbara Toews and Jackie Katounas explain that prisoners have particular needs, including opportunities to:<sup>140</sup>

- express their remorse, sorrow and regret for the harms done and offer apologies to the victim;
- have others, ideally including victims, accept their remorse as genuine, no matter how inadequately expressed;
- tell their story – without justifying or excusing their offending;
- gain greater insight into the effects of their offending;
- have others, including victims, realise that they, offenders, may have come from a world in which they may have themselves been victims of violence, abuse, neglect, etc;
- receive acknowledgement of their experiences with victimisation and attention to their needs as crime victims;
- experience personal growth and transformation and be able to demonstrate their new lives; and
- have opportunities to make things right and build relationships with their families and the broader community.

Prosecution and punishment, as Zehr explains, can sometimes have a disproportionately negative effect and, as such, criminal justice policies need to respond in ways that will best achieve its multilayered objectives.<sup>141</sup>

If it is true ... that shame and the desire to remove it motivates much crime, then our prescription of crime is bizarre: we impose more shame, stigmatizing offenders in ways that begin to define their identities and encourages them to join other “outsiders” in delinquent subcultures. Guilt and shame become a self-perpetuating cycle, feeding one another. In fact, psychiatrist Gillian argues that punishment decreases the sense of guilt while at the same time accentuating shame, the very motor which drives offending behaviour.

The distinction between shame in the traditional criminal justice system and in restorative justice is that the former is “stigmatic shaming”, while the latter is “re-integrative”: “Put simply, the re-integrative shaming process attempts to shame the action rather than the actor and encourage mutual understanding, healing and forgiveness amongst all parties involved.”<sup>142</sup> It is important to

140 Barb Toews and Jackie Katounas “Have Offender Needs and Perspectives Been Adequately Incorporated into Restorative Justice?” in Howard Zehr and Barb Toews (eds) *Critical Issues in Restorative Justice* (Monsey, New York and Cullompton, Devon, UK: Criminal Justice Press and Willan Publishing, 2004) at 109.

141 Howard Zehr “Journey to Belonging” in Elmar Weitekamp and Hans-Juergen Kerner (eds) *Restorative Justice: Theoretical Foundations* (Cullompton, Willan, 2002) at 27, cited in Christopher D Marshall *Compassionate Justice*, above n 121, at 230.

142 Dot Goulding, Guy Hall and Brian Steels “Restorative Prisons: Towards Radical Prison Reform”, above n 2, at 233.

emphasise when considering the deeper legal and philosophical questions that we do not pit the goals of justice against each other, but seek to identify ways of harmonising them to maximise outcomes for our communities. The process of restoration, rehabilitation and reintegration is not always easy. The reality of reintegration as a personal (and often difficult) journey, was provided by Professor Shadd Maruna, Reader in Criminology at Queen's University Belfast. In his presentation to the 2007 Prison Fellowship Conference in Wellington entitled "When the Prisoner Comes Home – A Community Response to Prisoner Reintegration",<sup>143</sup> Professor Maruna said:<sup>144</sup>

There is something wonderful about the verb "re-integration". The State can be said to be in the business of "rehabilitating" or "reforming" offenders. The State, however, cannot be said to be in the business of "re-integrating" individuals. Professionals cannot re-integrate anyone no matter how much training they have. Ex-offenders can re-integrate themselves and communities can re-integrate ex-offenders. But the most that the State can do is to help or hinder this process . . . . Re-integration happens "out there", when the professionals go home.

Professor Maruna referred to the excellent work of Professor John Braithwaite in Australia, in particular Professor Braithwaite's 1989 book entitled *Crime, Shame and Reintegration*.<sup>145</sup> Braithwaite refers to reintegration as not just physical resettlement but also as containing a symbolic element of moral inclusion. Maruna refers to this as being "restorative terrain" involving, as it does, forgiveness, acceptance, redemption and reconciliation. Whilst the journey is difficult, as explained by Professor Maruna, restorative justice can act as an important catalyst for change in an offender's road to reintegration.

Victims also tread their own path within the "restorative terrain".<sup>146</sup> In recent times, there has been growing disenchantment on the part of victims of crimes, and defendants, with the criminal justice system itself. Members of the judiciary and academics have suggested in the public arena that the traditional criminal court processes should not overly accommodate victims, focusing instead on the dispassionate and fair delivery of justice. The two objectives are not, nor do they need to be, mutually exclusive. At times the potential complexities of the administration of the system are seen as a reason not to pursue these otherwise valuable solutions. The law in New Zealand has, as explained earlier, expressly provided for victim involvement to varying degrees and at a number of stages in the criminal justice process. Restorative justice, when implemented properly, can be a useful tool in the legal toolbox for augmenting the support structures for victims and ensuring that the justice system, through a range of appropriately defined mechanisms, responds to all who come into contact with it. To disregard restorative justice, out of principal or due to practical concerns, or to fail to recognise its inherent value in New Zealand would be a grave loss indeed.

The work and guidance of Professor Howard Zehr, who is renowned in this field and who spent time in New Zealand with Parole Board members, is worth repeating. Professor Zehr emphasises the concept of restorative justice as a victim's right and considers that there may be

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143 Prison Fellowship New Zealand "When the Prisoner Comes Home – A Community Response to Prisoner Reintegration" (Conference, Wellington, 11–13 May 2007) <[www.pfnz.org.nz/conference\\_2007.htm](http://www.pfnz.org.nz/conference_2007.htm)>.

144 S Maruna "Who Owns Resettlement? Towards Restorative Re-Integration" (2006) 4(2) *British Journal of Community Justice* 23 at 26.

145 John Braithwaite *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989).

146 S Maruna, above n 144, at 31.

occasions in which the only real progress made at a restorative justice conference may not necessarily be reformation or rehabilitation but the satisfaction of the legitimate needs of victims. In many cases, of course, both will benefit and for that reason establishing robust systems that support restorative practice in its various forms should be encouraged. As Marshall proposes:<sup>147</sup>

[p]erhaps the profoundest insight of restorative justice theory, and the secret to the power of its simple mechanism of bringing victims and offenders together to talk about what has happened, is its recognition that offenders and victims are on parallel journeys of dealing with the crushing impact of shame – for one, the shame of *doing* harm, for the other, the shame of *being* harmed – and that each party, paradoxically, holds the key to the other’s healing.

## *B. Pointers for the Future*

Whilst we have come a long way since the mid-1970s and the systems that were at that time failing to respond to or relieve emerging justice issues, there is undoubtedly a long way to go still. The risk, particularly at a time when global financial pressures have forced us to cut programmes across a range of sectors and when “sentencing populism” is gathering apace, is to forget where we were 30 years ago. To forget the paradigm shift that the 1989 Act and the subsequent legislative amendments made to our national legal landscape, and to think that we can achieve the same (or better) results with pared down processes or black-and-white responses to complex legal and social issues would only unravel what has been a string of real success stories in our communities. Restorative justice is in its adolescence. New Zealand, a small and closely connected country with the potential to harness the benefits of its size and structure, is hopefully looking to a future where the full potential of restorative justice in its maturity will be realised. There are a number of pointers for the future which will now be outlined for further consideration. Development opportunities for existing systems will be addressed first, followed by other areas in which we can identify untapped potential for restorative justice principles and practice.

### *1. Justice Sector Reform*

First, in terms of existing frameworks, restorative justice should be viewed as not simply complementing the “traditional” criminal justice system, but forming an integral and mutually reinforcing part of it. In this respect, restorative justice should be enabled to move away from the periphery and take its place with other central and valued processes in our criminal justice system. It should not be left to individual enthusiasm and ad hoc decision making. To realise its full potential, it needs to be centrally positioned, adequately resourced and professionally managed.

A number of significant reforms are underway at present with respect to the role of victims in our criminal justice system and, as such, now is the time to engage in a dialogue, both public and professional, about where RJ fits in this system. The Victims of Crime Reform Bill, an “omnibus bill, which proposes to amend the Victims’ Rights Act 2002; the Children, Young Persons and their Families Act 1989; the Parole Act 2002; and the Sentencing Act 2002, to implement the Government’s reform package for victims of crime”,<sup>148</sup> will undoubtedly go some way to addressing the issues victims still experience despite the legislative and policy reforms in recent

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147 Christopher D Marshall *Compassionate Justice*, above n 121, at 231.

148 Victims of Crime Reform Bill (319-2) (select committee report) at 1.

years. Thought should be invested into whether, or how, restorative justice processes can form a more centralised part of our criminal justice processes. As mentioned earlier, we have heard from judges and academics about the role of victims in the criminal justice system. In her 2009 Shirley Smith address, the Chief Justice, the Rt Hon Dame Sian Elias stated that “[c]ool, impartial justice is not getting a very good press these days.”<sup>149</sup> In this context, “cool” means considered and calm. Her Honour went on to say that:<sup>150</sup>

[t]here is no question of going back to the days where victims were largely irrelevant ... [b]ut we need to consider how much further we can go without undermining basic values and whether indeed we may have gone too far in this respect already. ... Perhaps direct assistance to victims may be of more help than a sense of ownership of the criminal justice processes. I do not know whether this is right. But I would like to see some serious assessment of whether the emotional and financial cost of keeping victims in thrall to the criminal justice processes (through trial, sentencing and on to parole hearings) does help their recovery from the damage they have suffered or whether they are re-victimised through these processes.

Professor Warren Brookbanks of the University of Auckland, in his recent address at the 2012 International Criminal Law Congress, proposed that “[v]ictims’ laws in New Zealand have grown rapidly, at a pace which raises questions as to whether they bear any relation to the lived experience of being a victim. As more prescriptive laws and regulations are proposed and enacted in favour of victims, ... this is occurring without regard to the measurable benefits to victims themselves.”<sup>151</sup> Professor Brookbanks called for a moratorium on further victims’ legislation, pending an evaluation of existing laws and assessment of future needs.

It is important to emphasise that no system of justice should allow processes which re-traumatise victims and their families, or hold them in the thrall of the criminal justice system. Fundamentally, the “do no harm” principle must be paramount. It should be placed at the apex of any engagement framework. There is clearly a need for fair disposition of criminal proceedings and the traditional systems of justice have a long history of principled application of processes that serve to protect due process rights. The law, as explained earlier in this paper, such as the need to take into account the views of victims and the impact of offending on them at various stages of the criminal justice process, were designed to bring the victim in to what is otherwise a process primarily focused on the state and the offender. Nevertheless, there is no reason why victims should not have a voice in this process, nor why we should avoid exploring mechanisms (including, but not limited to restorative justice) to meet their needs. Victim involvement need not be viewed as something which destabilises the court or leads to inconsistencies: the appropriate decision-making authority is vested in an impartial judiciary. Judges are ultimately able to balance all relevant factors in determining an appropriate sentence.

Any process needs to be well managed and supported by experts. Some needs may not be able to be met through criminal justice processes, either traditional or restorative. How to better support victims once the criminal process ends is another critical question, and one that is beyond the scope of this paper. It is important to emphasise, however, that goals such as denunciation and deterrence and of rehabilitation and healing need not be seen as two-track system, moving

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149 The Rt Hon Dame Sian Elias, Chief Justice of New Zealand “Blameless Babes” (2009) 40 VUWLR 581 at [10].

150 At [11].

151 2012 International Criminal Law Congress, Queenstown, 12–17 September 2012 (Speakers’ Abstracts) <[www.crimlaw2012.com](http://www.crimlaw2012.com)>.

ever further away from each other, or as the two sides of a Janus-faced justice process. The closer they become, and the greater effort we invest in their harmonisation through smarter and more effective justice processes, the better our system will be for all concerned.

## 2. A specialist response

Second, further work is required in the area of meeting the needs of victims of sexual offences. Dr Susan Blackwell, a well-respected clinical psychologist and Honorary Research Fellow in Criminology at the University of Auckland, in her recent paper presented at the 2012 International Criminal Law Congress entitled *Juries, Justice and Therapeutic Jurisprudence: Or Why We Might Well be Concerned about Wrongful Acquittals in Child Sexual Offence Trials*,<sup>152</sup> examined current issues in this field of criminal law. Dr Blackwell reiterated the observation that “in no other crime is the victim subject to so much scrutiny during an investigation or at trial; nor is the potential for victims to be re-traumatised during these processes as high in any other crime.”<sup>153</sup> She observed that, according to Ashworth and Redmayne, “the purposes of the criminal process are accurate determinations and fair procedures at all times”. Dr Blackwell indicated that, from her observations and research, “in relation to charges of sexual offending against children, our current system is not routinely providing accurate determinations.”<sup>154</sup> In addition, “anecdotal clinical reports about sexual abuse victims who have been complainants in criminal trials indicate that most would be unwilling to give evidence in court again, and this is especially the case where there has been, in their perception, a wrongful acquittal. This also means that they may be unlikely to report subsequent sexual victimisation to others, including police.”<sup>155</sup>

These issues are also being considered elsewhere. The New Zealand Law Commission has been asked to undertake a high-level review of pre-trial and trial processes in criminal cases, with particular reference to sexual offences. In February of this year, President of the Commission Sir Grant Hammond stated that “[a] specialist court would be able to respond to the offending in a more flexible way than at present – for example, by developing programmes to require offenders to take responsibility for and address the causes of their offending before the final sentence was determined.”<sup>156</sup> The Commission’s Issues Paper on this subject states:<sup>157</sup>

Due to the shortcomings of the current system for many cases involving sexual offending, there is a strong case for making an alternative process available for those who choose to use it. This alternative process could deliver a tailored response which better meets the needs of victims, outside of the traditional investigation and trial process offered by the criminal justice system. It would be necessary for any alternative process to keep a balance between the safety of the community and the rights of the accused.

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152 Susan Blackwell “Juries, Justice and Therapeutic Jurisprudence: Or Why We Might Well be Concerned about Wrongful Acquittals in Child Sexual Offence Trials” (paper presented at the 2012 International Criminal Law Congress, Queenstown, 12–17 September 2012).

153 At [29].

154 At [50].

155 At [58].

156 New Zealand Law Commission “Law Commission considers alternative trial processes” (press release, 14 February 2012).

157 Law Commission “Alternative Pre-Trial and Trial Processes: Possible Reforms” (NZLC IP30, 2012) at 51.

With respect to the merits of a system that utilises therapeutic jurisprudence and restorative justice, Dr Blackwell noted the increase in specialist courts in New Zealand and Australia, and made the following comments, which should resonate with us as we consider next steps for restorative justice in New Zealand:<sup>158</sup>

Restorative justice and therapeutic jurisprudence stress the need to address underlying issues to completely resolve legal problems. They provide a contrast to the current adversarial trial system which supports a win-lose situation and in cases of alleged sexual offending by family members, exacerbates conflict between the complainants and accused by pitting them against each other in the court arena.

There are many aspects of restorative justice that would need fine tuning for use in sexual assault cases, and it may only be appropriate in a very limited number of cases. There are issues of voluntary participation, power imbalance and a myriad of other factors to consider, and more research is needed about this. However ... this is a useful path to consider especially with youthful sexual offenders and “first offenders” ... . What we know is that many of these victims might not want their family members to be incarcerated, and may well be prepared to be part of a restorative justice process. Such an approach would not be a substitute for criminal justice processes, but could operate within that arena.

Dr Blackwell’s observations, which are informed by her clinical and research experience, are consistent with the observations of others in this field – I too have come across victims who express the desire for a better way of dealing with offending. Ultimately, they provide us with something to seriously consider as we move towards a more responsive system of justice.

### *3. Restorative justice in education*

Third, in relation to restorative justice in education, it is clear that a great deal has been done to develop a range of systems to not only respond to conflict but to work with a preventive focus, developing children and young people’s ability to engage with each other in a constructive manner. As observed in the criminal justice setting, there is much to be gained from developing and implementing a corpus of national best practice principles, standards, and measures for restorative justice in New Zealand schools, including a definition of what restorative justice or restorative practices means in this context. A thorough process of consultation, planning, implementation and evaluation would undoubtedly assist in ensuring that any child, from Invercargill to Northland and regardless of their school’s decile rating, could reap the benefits of restorative practices on an equal basis during the most formative years of their lives. Clear, national guidelines are therefore an obvious next step. An inclusive and consultative work programme similar to that which was undertaken by the University of Waikato’s Restorative Practices Development Team, which included workshops, training and informative publications, needs to be continued.

### *4. Policing oversight*

Fourth, I consider there to be at least three areas where restorative justice development could have a marked positive impact on conflict resolution methods. The first is in the area of policing oversight, something with which I am now engaged as Chair of the Independent Police Conduct Authority. In certain cases, particularly where conciliation is recommended, restorative justice processes may assist in achieving a relatively seamless resolution of the issue(s), whilst also

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158 Blackwell, above n 152, at [88].



contributing to longer term goals of fostering trust and confidence in police. Consideration of the efficacy of these processes has already been undertaken in the United Kingdom. The Independent Police Complaints Commission provides complainants with information on the local resolution process, which is provided by police. Understandably, a review conducted in 2007 observed that “[f]or the police complaints system to be seen as an effective and transparent process the needs of both types of complaint [informal issues not requiring a formal record and those that do require a formal record] must be acknowledged and accommodated. If this issue is neglected there is a danger that in some forces ... some complaints will be swept under the carpet, whilst in others complaints will be cajoled into a bureaucratic process which is driven by targets rather than complainant satisfaction.”<sup>159</sup>

Clearly there are issues with any process which is managed by the agency about which a complaint is being made and careful thought needs to be given to be best model for the specific country context. But this is an area where New Zealand could make some real change by evaluating and improving meaningful resolution of complaints. Sir Charles Pollard, Chief Constable of Thames Valley Police (the largest non-metropolitan police force in the UK) from 1991 to 2001, has gained international recognition as a pioneer of restorative justice and has engaged with leading specialists in North America and Australia. He has collaborated with leading criminologists in Australia and North America and has also spent time in New Zealand. The benefits of restorative justice practices are, therefore, there to be seized.

##### 5. *Solutions-focused courts and community justice centres*

We can identify the benefits of therapeutic jurisprudence, restorative principles, and inter-agency collaboration in New Zealand’s emerging specialist courts, such as the Rangitahi Youth Courts, Drug Courts, Family Violence Courts, and the New Beginnings (homelessness) court. These innovative responses to complex justice issues were initially led by judges and have now achieved some government support. They have a range of benefits which can be usefully developed to meet New Zealand’s justice needs.

A natural extension of the concept of restorative or therapeutic practices is community restorative practice, whereby communities address conflicts and other issues *before* intervention by the courts becomes necessary. The United States is making use of a similar model to fix local problems such as drug use and conflict within the community. Programmes include faith based services, educational and training initiatives, support structures, and youth initiatives. In New Zealand, Judge McElrea has identified the potential value of community justice centres, which could assist with community and family disputes and related issues outside a courtroom environment.<sup>160</sup> In a conference address on restorative justice for juveniles he has expressed his vision in the following way:<sup>161</sup>

The ideal arrangement that I foresee for New Zealand is a system of Community Justice Centres operating throughout the country alongside the courts and providing services in both the civil and

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159 Independent Police Complaints Commission *From Informal to Local Resolution: Assessing Changes to the Handling of Low-Level Police Complaints* (IPCC and the Institute for Criminal Policy, King’s College London, 2007) at 40.

160 Judge FWM McElrea “Roles of the Community and Government” (paper presented at Second International Conference on Restorative Justice for Juveniles Fort Lauderdale, Florida, 7–9 November 1998).

161 At 6.

criminal areas. Ultimately they could be taken over by local body or other elected local groups but at least initially they would be established and run by or under contract . . . .

The ideal location for such centres would be the places where you might now find a Citizens Advice Bureau, but eventually they might be purpose built so as to house the Community Justice Centre, Victim Support, Citizen's Advice Bureau, local Community Constable (if the area has one) and possibly other services such as health, child care, budgeting and recreation.

In areas with a strong Māori population the Community Justice Centre could be operated by the local Iwi (tribal) Social Services, either for its members only or perhaps for the public generally. . . .

As with any process of this kind, appropriate support frameworks would need to be in place to ensure that the practices are a help and not a hindrance to safe and effective resolutions. . . .

Some State funding of programs would be essential, but the objective would be to maximize the local community's sense of ownership and participation in this whole process. . . . The community would be much more involved in the ownership and resolution of conflict. Restorative justice processes would become the primary means of dealing with disputes and enhancing peace in the community.

While there will necessarily be a great deal of debate as to the best model for implementing such a proposal, it certainly warrants further consideration and meaningful debate. Like any preventive, collaborative system that engages a community at the grass-roots level, issues such as funding, ownership, management and quality assurance will be issues to consider, but as this paper demonstrates with respect to New Zealand's restorative justice history, a great number of people in our communities have the capacity and to turn this idea into a reality.

#### *6. Academic centre of excellence*

The final pointer for the future of restorative justice in New Zealand concerns the need to ground restorative justice practices in multi-disciplinary research and evaluation in an academic centre of excellence or Chair within an independent centre of research. Such a centre would enable New Zealand to harness existing capabilities through expert training to inform domestic and international best practice. Academic centres of excellence around the globe are undertaking cutting edge, progressive research into key legal, political, criminological, and sociological issues. We only need to look to the United Kingdom, Canada, Australia and the United States to see good examples of what works in this regard. New Zealand, despite being a world leader through the concerted efforts in practice, has so far failed to provide the academic underpinning for promoting and implementing restorative justice. Preliminary work is underway to establish a Chair in Restorative Justice within an independent centre of research, education and training for restorative processes in New Zealand and throughout the wider international community. If successful, this initiative would, with appropriate support and the right experts, add breadth and depth to our jurisprudence and enable us to reap the benefits of a fully functional and mature restorative justice system.

## IV. CONCLUSION

The road to New Zealand's current system of restorative justice has been an extraordinary process of reform, refinement, and reflection. The road has not been without its twists and turns, divergent views from proponents and critics, or hurdles – both financial and political. Remarkably, what characterises this journey is the resilience of those who have worked tirelessly to turn the concept into a reality: those who, on a daily basis, bring people together in restorative

justice conferences, as well as those who commit to participating in them, sometimes following the most difficult and life changing experiences.

In 2012, as we consider the role that restorative justice may play in the future of New Zealand's social, cultural and legal frameworks, we must never forget how much we have achieved in the last three decades. In that time, we have become a world leader in transforming people's experiences of justice and the criminal justice system, of testing new approaches and evaluating our experiences, and in championing a practical and principled response to complex issues. Unsurprisingly, and in a typically New Zealand fashion, we have achieved much of this through the dedicated work of volunteers, advocates, and committed professionals who clearly recognise the value of restorative justice – both in theory and in practice.

The greatest risk facing restorative justice today is the loss of momentum at a critical time of legislative review and of social and political development. We need to ensure that public discourse is informed and measured, based on knowledge, reason and an unwavering commitment to do better. We need to ensure that our political and ideological differences work for us and not against us and that we contribute to an important national conversation on fundamental legal questions: what does justice mean to us as individuals, communities, and as a country? What does good law "look like"? Who does it serve and what principles does it uphold? What is relevant to our challenges today? These questions are not new and the answers are not always clear. At times, the answers may seem out of reach. The realities we face in our criminal justice, in education, and in other areas, however, demand that we engage in an honest discussion. Restorative justice has a great deal to offer and has left its mark on our unique legal landscape. It is now up to us to learn the lessons from the past and identify new pathways for the future.

# SUSTAINABLE DEVELOPMENT AND SOCIAL JUSTICE: A NEED FOR COHERENCE WITH INTERNATIONAL LAW

BY PROFESSOR DOMINIC ROUX AND PROFESSOR MARIE-CLAUDE DESJARDINS\*

Since 1992 sustainable development has become a unifying theme mobilising the political forces and public opinion all over the world. Nevertheless, its implementation into law appears particularly difficult for States, although some effort has been done to integrate the concept as a principle in new laws<sup>1</sup> or to use it in the law-making process. As it is used now, sustainable development serves to conciliate social, environmental and economic considerations when adopting or implementing law, but few States have been using the concept in order to shed new light on the pre-existing legal instruments pursuing common objectives. In other words, very few have made use of the sustainable development concept to conciliate social, environmental and economic legal obligations.

In our view, sustainable development should be considered as a hinge between the various fields of law. However, we have to admit that in reality they remain highly partitioned,<sup>2</sup> especially at an international level. Some efforts have been made by inter-State organisations, such as the International Labour Organization (ILO), in order to make connections between social and environmental legal principles, but not much has been done in order to conciliate economic law with the two other spheres of law. Indeed, economic law, more often than not, prevails over environmental and social law.

Sustainable development should be considered not only as a tool, as it is mainly used now, to create new law conciliating economy, environment and social development, but also as a new way to interpret existing legislation. Putting forward sustainable development in a legal context does not mean to deny legislation existing before its creation. Contrariwise, it underlines the necessity for States to stop considering each law field as if existing in a vacuum. They have to be considered as a whole, in a holistic perspective. It seems totally logical to do so because States

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\* Dominic Roux is a professor at Laval University's Faculty of Law (Dominic.Roux@fd.ulaval.ca), co-researcher at the Interuniversity Research Centre on Globalization and Work (CRIMT), associate Member of the Quebec Institute of International Studies (IQHEI) and one of the founding Member of Jurists for Coherence (<[www.juristespourlacoherence.com/fr/index.php](http://www.juristespourlacoherence.com/fr/index.php)>).

Marie-Claude Desjardins is a Professor at Sherbrooke University's Faculty of Law (Marie-Claude.Desjardins4@usherbrooke.ca), member of the COMPTRASEC (Centre de droit comparé du Travail et de la Sécurité Sociale/Université Montesquieu Bordeaux IV) and of the Interuniversity Research Centre on Globalization and Work (CRIMT).

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- 1 For example, Sustainable Development Act, LRQ 2006, c D-8.1.1; Federal Sustainable Development Act, LRC 2008, c 33.
- 2 Sandrine Rousseau "Dimensions humaine et sociale du développement durable : une problématique séparée du volet environnemental?" (6 November 2004) Développement durable & territoires <<http://developpementdurable.revues.org/1214>>.

taking economic decisions at the World Trade Organization (WTO)<sup>3</sup> are generally the same States that engage themselves to pursue social objectives at the ILO<sup>4</sup> and to protect the environment under the aegis of United Nations Environment Program (UNEP).<sup>5</sup> In that sense, sustainable development could be used as a way to bring more *coherence* into the international arena.<sup>6</sup> Following this logic, pre-existing recognised legal principles, such as social justice, should be considered as part of the sustainable development three spheres' content. We can even go further and assert that any interpretation of sustainable development that does not include these legal principles goes against the obligations imposed by international law to States and intergovernmental organisations.

The example of social justice, as a legal principle, is particularly striking in this regard. Even if sustainable development has been designed to give a role as important to the social dimension as the ones given to the economy and the environment, and although it has its roots in international legal instruments, we have to admit that it is often neglected by States when implementing the concept. Moreover, social justice seems to be the "poor cousin" of sustainable development, at least judging by the amount of literature devoted to it. In the light of this, questions should be addressed: Is it possible to conceive sustainable development without taking account of social justice principle? Most importantly, is it possible to do so without violating international law? These questions form the basis of this paper, which continues a discussion already begun in a recent study. In the latter we showed that sustainable development and decent work, which involves respect for fundamental human and labour rights, are interdependent concepts, both legally and functionally.<sup>7</sup>

This paper is divided into two parts. In part I we will address the following questions: What is social justice? What does it mean in international law? In part II we will identify links between social justice and sustainable development. In other words, we will ask the following questions: In terms of international law, what is the current function of social justice in sustainable development? What should States do to take into account social justice when they enact bills or measures in order to achieve sustainable development? Our approach is based on human rights, and that is why we will give the example of the eight "core" ILO conventions, widely ratified by the ILO member States, and the International Covenant on Economic, Social and Cultural Rights (the Covenant), a treaty ratified by 160 countries .

## I. SOCIAL JUSTICE AS PRE-EMINENT LEGAL PRINCIPLE

Tracing the historical origins of the concept of social justice is a perilous adventure far beyond the objectives of this study. We therefore limit ourselves to present a few examples.

3 World Trade Organization "Members and Observers" <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

4 International Labour Organization "Alphabetical list of ILO member countries" <[www.ilo.org/public/english/standards/relm/country.htm](http://www.ilo.org/public/english/standards/relm/country.htm)>.

5 United Nations Environment Programme "About UNEP: The Organization" <[www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43](http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43)>.

6 Johanne Brodeur and others *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights* (Yvon Blais Bruxelles Bruylant, Cowansville, 2010).

7 Marie-Claude Desjardins and Dominic Roux "Développement durable et travail décent: à la recherche d'une interface en droit international" (2009) 5 McGill International Journal of Sustainable Development Law and Policy 199 at 209.

Origins of the social justice principle can be traced back to antiquity. It has been developed throughout history, particularly in the philosophical literature, but also in political action. In Book 5 of *Nicomachean Ethics*, Aristotle devised the concept of “proportional reciprocity”, which is a sort of forerunner for social justice, and he justified his rationale: “For it is by proportionate requital that the city holds together.”<sup>8</sup> In the 16th century, we find the early writings on the need to provide work for the poor, especially a law adopted by Parliament of Paris in February 1515.<sup>9</sup> In France, the French Revolution put an end to the corporate system in 1791. A law was adopted to enable all citizens to exercise the profession of their choice so they could meet their needs and those of their families.<sup>10</sup> The same year, another law called “Loi Le Chapelier” stated in its preamble that “it is to the Nation and Public officers to provide work to those who need it for their existence and provide assistance to disabled person”. The French have explicitly reiterated this “right to work” in the Constitution of 1793, adding that “public assistance is a sacred debt”, because “the society must give subsistence to poor citizens” (art 21).<sup>11</sup> The idea of social justice also appeared in *Rerum Novarum*, the encyclical issued by Pope Leo XIII in 1891 and entitled “Rights and Duties of Capital and Labour”. This influential text is the official Catholic social teaching. Besides the rights and obligations of employers and employees described therein (which among others aim to provide respectable working conditions for workers), we find this:<sup>12</sup>

Whoever has received from the divine bounty a large share of temporal blessings, has received them for the purpose of using them for the perfecting of his own nature, and, at the same time, that he may employ them, as the steward of God’s providence, for the benefit of others.

Eighty years later, in his book *A Theory of Justice* published in 1971, John Rawls speaks of social justice as a principle whose goal is to provide a way to determine the rights and duties in society and define the appropriate distribution of benefits and burdens of social cooperation.<sup>13</sup> This principle can be achieved, according to Rawls, if the most disadvantaged people get their fair share and actually see their situation improve. In short, there must be a *reduction of*

8 Alain Supiot *L’esprit de Philadelphie – La justice sociale face au marché total* (Seuil, Paris, 2010) at 43.

9 Also, in 1525, the Spanish Juan Luis Vives published what could be considered the first book devoted to public assistance (*De Subventionem pauperum – Assistance to the poor*). Organisation of work by government was then, in his view, the main measure against poverty: Juan Luis Vivès *De subventionem pauperum (1525)* (Nouvelle édition, Bruxelles, De Valero & Fils, 1943) at 203, quoted by Pierre Rosanvallon *La nouvelle question sociale* (Seuil, Paris, 1995) at 138.

10 Thierry Revet “La liberté du travail” in R Cabrillac and others (eds) *Droits et libertés fondamentaux* (Daloz, Paris, 1996) at 435.

11 Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 79.

See also Dominic Roux “Le droit au travail” in Lucie Lamarche and Louis Bosset (eds) *Donner droit de cité aux droits économiques, sociaux et culturels – La Charte des droits et libertés du Québec en chantier* (Éditions Yvon Blais, Cowansville, 2011) 161.

12 The full text of *Rerum Novarum* is available on the Vatican’s official website: <[www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html)>.

13 In fact, for Rawls, there are two fundamental principles of justice: the first is a sort of “right of each person ... to have an equal right to liberties”; the second principle, which he calls the “difference principle”, aims at reducing the social and economic inequalities. Those will be acceptable only insofar as they provide the greatest benefit to the most disadvantaged members of society. See John Rawls *A Theory of Justice* (The Belknap Press of Harvard University Press, Cambridge (MA), 1971).

*inequality*, and this can only be achieved if the basic needs of the poor are met and if the wealth is distributed more evenly. Rawls' theory was criticised in particular by Amartya Sen, recipient of the Nobel Prize in Economics Sciences (1998). Through his many writings, Sen proposed to define social justice in terms of "capabilities", which are the concrete and real opportunities available to each individual to achieve freely (the "freedom") the things that are important to him.<sup>14</sup> The factors that hinder the "capabilities" come from personal considerations, such as physical disabilities, but they may also result from poverty – broadly understood, not only deprivation of resources – such as decent work.<sup>15</sup> For Sen, the government has the obligation and responsibility to help those in need: it must take ethical decisions guided by the ideal of justice, that is to say improve the "capabilities" of each individual.<sup>16</sup> Sen's writings have had a great influence on the policies of international development assistance. His work is also one of the founders of the Human Development Index adopted in 1990 by the United Nations Development Program (UNDP), an index that takes into account three criteria: life expectancy at birth (depending on access to adequate food, drinking water, adequate housing and adequate health care); education level; and living standards (measured on the basis of economic indicators).<sup>17</sup>

These few non-exhaustive examples give a good idea of the origin and the content of social justice in a general context. This concept has not only interested philosophers but it has also been integrated into international law. Indeed, social justice is an established "legal principle" that expresses itself through concrete international obligations binding on States, either because of their membership in international organisations such as the ILO or United Nations (UN), or because these States have ratified or acceded to international treaties that aim to respect, protect and promote human rights.

The formal consecration of social justice as a legal principle in international law occurred in 1919 when the ILO was founded<sup>18</sup> at the end of World War I. Although almost a century has passed since then and although the international context has changed, the objectives pursued by its founders remain highly relevant in the current era of economic globalisation and domination of neo-liberal and free-market ideologies. Some of them are explicitly mentioned in the ILO Constitution's preamble. The first sentence of this founding treaty of the ILO, which binds all member States, is revealing in this regard: "Whereas universal and lasting peace can be established only if it is based upon social justice."<sup>19</sup> For the ILO and its 185 current members,

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14 Amartya Sen *L'idée de justice* (Flammarion, Paris, 2009) at 283; Amartya Sen *Development as Freedom* (Oxford University Press, Oxford and New York, 1999). See also Renée-Claude Drouin "Capacitas and Capabilities in International Labour Law" in Simon Deakin and Alain Supiot (eds) *Revisiting the Legal Notion of Capacity* (Hart Publishing, Oxford, 2009) 141.

15 Sen *L'idée de justice*, above n 14, at 309.

16 At 292.

17 United Nations Development Programme "Human Development Index – 2011" Human Development Reports <<http://hdr.undp.org/en/>>. These criteria correspond essentially to the social dimension of sustainable development which will be described in the second section of this text.

18 It should be noted that, since 1946, the ILO is a specialised agency of the United Nations. It meets annually at the International Labour Conference (ILC). Each of the 185 member States is represented by four delegates: two for government and one delegate for each of the most representative organisations of employers and employees present in the country.

19 ILO Constitution, preamble <[www.ilo.org/dyn/normlex/en/f?p=1000:62:2503588611032723::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO#A1](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:2503588611032723::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A1)>.

there is no possible doubt: the world peace is impossible without social justice. That is what the second statement of the ILO Constitution's preamble asserts:

Whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required.

Finally, social justice cannot be achieved without strong cooperation between States and, mainly, without international standards in order to ensure fair international trade. In other words, social justice requires that ILO norms protect States, and therefore workers, against "a race to the bottom".<sup>20</sup> That is what the third statement of the ILO Constitution's preamble stipulates:

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.

In 1944 the ILO and its member States took a step further in the legal recognition of social justice principle by adopting a text we can consider as the precursor of the universal recognition of human rights by the UN a few years later. This is the Declaration of Philadelphia, which was annexed to the ILO Constitution and therefore binds the organisation and all the member States. In this powerful text the ILO "reaffirms" the structural principles which founded the creation of the ILO, including the fact that "Labor is not a commodity", that "poverty anywhere constitutes a danger to prosperity everywhere", and that "the war against want requires to be carried on with unrelenting vigour within each nation".<sup>21</sup> Although adopted nearly 50 years before, these principles are very close to the one proposed by the international community in 1992 through the sustainable development concept "war against want and poverty".<sup>22</sup>

That being said, one of the most striking provisions of the Declaration of Philadelphia is the one stating the prerequisite for the realisation of the social justice principle.<sup>23</sup>

All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

This fundamental right, which in itself expresses social justice and furthermore implies equality for all people, should be, according to the text of the Declaration, the *main objective of all national and international policies*. Indeed, economic and social aspects cannot be separated, and it is clear that the ILO and its member States have a formal obligation to put social justice at the heart of their international and national decisions. These two excerpts of the Declaration confirm that idea.<sup>24</sup>

20 Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at ch1; RJ Flanagan "Labor Standards and International Competitive Advantage" in RJ Flanagan and others (eds) *International Labor Standards: Globalization, trade and public policy* (Stanford Law and Politics, Stanford, 2003) 17; Sarah H Cleveland "Why International Labor Standards?" in RJ Flanagan and WB Gould IV (eds) *International Labor Standards: Globalization, trade and public policy* (Stanford Law and Politics, Stanford, 2003) 129.

21 Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), art I.

22 We will come back in part II on that issue.

23 Declaration of Philadelphia, art II(a).

24 Declaration of Philadelphia, art II(b)(c).



the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy; ...

all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective

In other words, the economy is not an end in itself but should rather be at the service of human beings! For the ILO, acting for social justice has always meant adopting international legal standards in order to establish working conditions that respect the dignity of workers, protect their health – their physical safety and their mental health, especially for women and children – and restore fairness in international trade relations. These are the common structural bases that have always guided the normative and institutional activity of the ILO. In short, the 189 conventions and 202 recommendations adopted so far by the ILO *implement social justice principle*.<sup>25</sup>

To a lesser extent, the same conclusions can be made from the two major declarations recently adopted by the ILO. In 2008 the ILO adopted a text which is not a treaty and has not been incorporated into the Constitution, unlike the Declaration of Philadelphia. It is a mere instrument of “soft law”.<sup>26</sup> However, the title of this instrument, and the fact that it was adopted unanimously by 183 countries, deserves some attention here.<sup>27</sup> This is the ILO Declaration on Social Justice for a Fair Globalization.<sup>28</sup> The long preamble recognizes that “achieving an improved and fair outcome for all has become even more necessary in these circumstances to meet the universal aspiration for social justice”. In this text the ILO and its member States undertake “to place full and productive employment and decent work at the centre of economic and social policies”. In order to do this, these policies “should be based on the four equally important strategic objectives of the ILO” which have to be considered as “inseparable, interrelated and mutually supportive”. Those objectives appear in art I-A: promoting employment by creating a sustainable institutional and economic environment; developing and enhancing measures of social protection (social security and labour protection); promoting social dialogue and tripartism; and respecting, promoting and realising the fundamental principles and rights at work.

Several jurists have expressed scepticism about this “soft” statement, written in a highly technical style, and devoid of any binding monitoring mechanism.<sup>29</sup> Admittedly, it is stipulated in art II-B that member States:

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25 These ILO conventions and recommendations are all available at <[www.ilo.org/dyn/normlex/en/f?p=1000:12000:4402457742319280::NO::>](http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:4402457742319280::NO::>).

26 Isabelle Duplessis “Le vertige et la *soft law*. Réactions doctrinales en droit international” (2007) (Hors-série) Revue québécoise de droit international 245; Isabelle Duplessis “Soft international labour law: The preferred method of regulation in a decentralized society”, in International Institute for Labour Studies *Governance, International Law & Corporate Social Responsibility*, (Research Series 116, Geneva, 2008) 7 <[www.ilo.org/public/english/bureau/inst/download/116.pdf](http://www.ilo.org/public/english/bureau/inst/download/116.pdf)>.

27 F Maupain “New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation” (2009) 20 EJIL 823.

28 ILO Declaration on Social Justice for a Fair Globalization <[www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms\\_099766.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms_099766.pdf)>.

29 Renée-Claude Drouin and Isabelle Duplessis “La régulation internationale du travail de 1998 à 2008: un Eldorado normatif ou un désert interprétatif?” (2009) 14 Lex Electronica 1.

have a key responsibility to contribute, through their social and economic policy, to the realization of a global and integrated strategy for the implementation of the strategic [and decent work] objectives

Critics were quite right. The debates preceding its adoption confirm the extreme difficulty of reaching consensus, except for this: the new instrument should not impose any new international obligation that goes beyond those already existing under the relevant ILO conventions. In short, it was clear that the member States, and therefore the vast majority of the delegates attending the International Labour Conference (ILC), did not want any binding instrument whose violation could be legally punished.<sup>30</sup>

However, we have previously hypothesised that the 2008 Declaration could eventually broaden the “core” fundamental labour rights recognised as such by the international community.<sup>31</sup> We must recall that the ILO only acknowledged four of these in the 1998 ILO Declaration on Fundamental Principles and Rights at Work,<sup>32</sup> a text which was a response to the failure of the attempt to include a social clause in the binding WTO agreements. The 1998 Declaration recalled that “economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions”; also, it stated that:<sup>33</sup>

in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.

This 1998 Declaration is of course strictly promotional – it is not a treaty – but it devotes the mandatory status of fundamental rights for all member States simply because of their membership in the ILO. These four rights are: freedom of association and effective recognition of right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour; and elimination of discrimination at work.<sup>34</sup> This Declaration reflects the international consensus that already exists with regard to these principles, but the exclusion of health and safety and minimum wage is difficult to justify,<sup>35</sup> considering that the first laws

30 International Labour Conference “Provisional Record 13 A/B” (International Labour Conference, 97th Session, Geneva, 2008); International Labour Office “Strengthening the ILO’s capacity to assist its Members’ efforts to reach its objectives in the context of globalization: Continuation of the discussion on strengthening the ILO’s capacity and possible consideration of an authoritative document, possibly in the form of a Declaration or any other suitable instrument, together with any appropriate follow-up, and the form they may take” (International Labour Conference, Report VI, 97th session, Geneva, 2008).

31 Marie-Claude Desjardins and Dominic Roux “Développement durable et travail décent: à la recherche d’une interface en droit international” (2009) 5 McGill International Journal of Sustainable Development Law and Policy 199 at 209.

32 International Labour Organization “Declaration on Fundamental Principles and Rights at Work and its Follow-up” (International Labour Conference, Eighty-sixth Session, Geneva, 18 June 1998).

33 ILO Declaration on Fundamental Principles and Rights at Work, preamble.

34 Claire La Hovary *Les droits fondamentaux au travail: Origines, statut et impact en droit international* (PUF, Paris, 2009).

35 Alan Hyde “The International Labor Organization in the Stag Hunt for Global Labor Rights” (2009) 3 Law & Ethics of Human Rights 154.

adopted by the industrialised states in the late 19th and early 20th centuries were in this area.<sup>36</sup> Although the Declaration was the subject of much criticism,<sup>37</sup> it has a positive impact.<sup>38</sup> First, several regional or bilateral trade agreements explicitly refer to it,<sup>39</sup> as do many transnational corporations in their codes of conduct.<sup>40</sup> Second, ratifications of the eight core conventions increased significantly.<sup>41</sup> To make it clear, the average rate of ratification for these eight conventions is more than 91 per cent (167 out of 185 member States, on average), which is clearly excellent. This is a very important fact, because ratification or accession to a treaty indicates if an international standard is “healthy” or not. Indeed, in monist countries a ratified treaty is automatically integrated into national law, which means it can be invoked directly in court. In dualistic countries a specific legislation is required to achieve the same result. In several dualistic countries, such as Canada, legislation to ensure compliance of domestic law under the obligations provided by the treaty will be adopted prior to ratification; in any case, the ratification will occur only if the government considers that its domestic law *already* complies with the treaty.<sup>42</sup> Obviously, in any system, the State should take various legislative, financial, governmental and administrative measures to ensure the full implementation of the obligations imposed by the treaty.<sup>43</sup> Ultimately, ratification guarantees neither compliance with international standard nor its effectiveness. The main problem, especially in developing countries, is that existing legislation is not, in fact, implemented by the authorities, and that there are still serious labour rights violations, committed both by States and private actors. The following reasons are

- 36 Fernand Morin and others *Le droit de l'emploi au Québec* (4th ed, Wilson & Lafleur, Montréal, 2010) at 109; Bob Hepple *The Making of Labor Law in Europe – A Comparative Study of Nine Countries up to 1945* (Mansell Publishing Limited, London, 1986).
- 37 Philip Alston and James Heenan “Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?” (2004) 36 *Journal of International Law and Politics* 221; Philip Alston “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime” (2004) 15 *EJIL* 457; Philip Alston “Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda” (2005) 16 *EJIL* 467.
- 38 Francis Maupain “Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights” (2005) 16 *EJIL* 439.
- 39 Cleopatra Doumbia-Henry and Éric Gravel “Free trade agreements and labour rights: Recent developments” (2006) 145 *Intl Lab Rev* 185; Pierre Verge “Les accords de coopération dans le domaine du travail liant le Canada” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 261.
- 40 Renée-Claude Drouin “Responsabiliser l’entreprise transnationale: portrait d’une normativité du travail en évolution” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 283.
- 41 The eight core labour conventions are: C87 - Freedom of Association and Protection of the Right to Organise Convention, 1948; C98 - Right to Organise and Collective Bargaining Convention, 1949; C29 - Forced Labour Convention, 1930; C105 - Abolition of Forced Labour Convention, 1957; C138 - Minimum Age Convention, 1973; C182 - Worst Forms of Child Labour Convention, 1999; C100 - Equal Remuneration Convention, 1951; and C111 - Discrimination (Employment and Occupation) Convention, 1958.
- 42 Government of Canada “Policy on Tabling of Treaties in Parliament” (26 June 2011) Canada Treaty Information <[www.treaty-accord.gc.ca/procedures.aspx](http://www.treaty-accord.gc.ca/procedures.aspx)>; Charles-Emmanuel Côté “La réception du droit international en droit canadien” (2010) 52 *SCLR* (2d) 483; Pierre Verge and Dominic Roux “L’affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien : deux solitudes?” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 446.
- 43 ILO Constitution, art 19(5)(d); Committee on Economic, Social and Cultural Rights *General Comment 3, The nature of States parties’ obligations* E/1991/23 (1991).

mentioned by the ILO and some experts to explain this situation: lack or insufficiency of the labour inspectorate and effective sanctions; legal system lacking financial resources and expertise; non-compliance with the principle of the rule of law; incompetence of the judiciary; and predominance of the informal economy.<sup>44</sup>

That being said, social justice cannot be separated from another structuring principle recognised by the international legal order since 1945: *respect for human dignity*. In the preamble of the Charter of the United Nations, member States resolved to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person” and to “*promote social progress and better standards of life in larger freedom*” (emphasis added). This commitment was reiterated in 1948 in the preamble of the Universal Declaration of Human Rights. Fundamental human rights, which find their legal basis in the social justice principle and its mirror, human dignity, are enshrined not only in the Universal Declaration but in a considerable number of UN treaties opened for ratification. In fact, once again, these treaties are widely ratified (90 per cent)<sup>45</sup> except for one of them (the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), ratified by only 46 countries):

- International Convention on the Elimination of All Forms of Racial Discrimination (1965) (175 countries).
- International Covenant on Civil and Political Rights (1966) (167 countries).
- International Covenant on Economic, Social and Cultural Rights (1966) (160 countries).
- Convention on the Elimination of All Forms of Discrimination against Women (1979) (187 countries).
- Convention on the Rights of the Child (1989) (193 countries).
- Convention on the Rights of Persons with Disabilities (2006) (126 countries).

Do all these instruments of international law adopted under the aegis of the ILO and the UN agree on the rule that the economy must serve social justice and not vice versa? For us, a detailed analysis of their content certainly supports this conclusion. Then it should mean that the whole organisation of economic life is subject to compliance with the social justice principle. Yet, even if the States engaged themselves to commit to this rule when ratifying these social and human rights conventions, it seems often forgotten and even reversed when these same States meet at the WTO’s lounge. As noted recently by Professor Alain Supiot, the economy (quantifiable gains for people and corporations) has become the primary purpose of international law developed by the WTO, while free trade is the means to achieve it. If social justice is formally absent from WTO agreements, the welfare of human beings, Supiot said,<sup>46</sup> appears only indirectly in the Preamble of the agreement establishing the WTO in 1994:<sup>47</sup>

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44 See for example Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at 39.

45 One hundred and ninety-three countries are members of the UN. For detailed analysis of these treaties, see: Dominic Roux “Le ‘droit à un travail décent’ affirmé dans les normes internationales de l’ONU et l’OÉA. Ou la longue marche d’un vieux couple: le droit du travail et les droits de la personne” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 147.

46 Alain Supiot “A legal perspective on the economic crisis of 2008” (2010) 149 *Intl Lab Rev* 151 at 154.

47 Agreement Establishing the World Trade Organization (1994) 1867 UNTS 3 <[www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf)>.

[The WTO members recognise] that their relations in the field of trade and economic endeavour should be conducted with a view to *raising standards of living, ensuring full employment* and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and service ... (emphasis added)

Moreover, it seems that negotiations which currently take place under the aegis of the WTO almost exclusively focus on the second objective, namely “increased production and trade”. Sometimes, there even seems to be only one objective for some countries: expanding trade.<sup>48</sup>

This problem becomes even more significant if we remind ourselves that the WTO system has a mechanism for resolving disputes which aims to ensure full implementation of the legal obligations created and even allows the proportional suspension of trade benefits in case of non-compliance of WTO decisions.<sup>49</sup> However, there is no similar mechanism for protecting human rights in international law. This situation seems to place the ILO and UN systems in an inferior position compared to the WTO system, especially as the WTO system gives a marginal place to legitimate non-trade factors. These factors are *exceptions* to free trade regulations, even if States can ultimately temporarily set aside their application without penalty for breach of agreements. Exceptions adopted by WTO member States based on these non-trade factors (such as protecting workers’ rights, local agriculture and the environment) are eligible only if they are (1) “necessary to protect public morals” or “necessary to protect human, animal or plant life or health”, and (2) “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.<sup>50</sup> These exemptions allowed by the WTO agreements raise several questions still left unanswered. For example, would a restrictive measure adopted by a State (for example banning the import of carpets made by children in Bangladesh) be considered as really necessary to protect the “morality” on its territory? Might there be other less restrictive measures to achieve the same result, such as temporary restriction or labelling? When they are adopted for protecting health and safety, what should we target? People living on the territory of the exporting country that violates the rights of workers, or people located in the importing country that adopts the restrictive measure? And are these measures necessary? Do they effectively contribute to reduce risks to people’s health and lives? Are other effective options available?<sup>51</sup> Ultimately, as Professor Hepple said:<sup>52</sup>

the general exceptions and safeguards provisions of GATT do not appear to be apt to allow trade measure for breach of labour standards. An explicit amendment to the GATT would be required, but there is no political consensus to bring this about.

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48 Johanne Brodeur and others *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights* (Yvon Blais Bruylant Cowansville, 2010) at 12–20 and 34–35.

49 Dispute Settlement Understanding 1869 UNTS 401, arts 22–23.

50 General Agreement on Tariffs and Trade (GATT), art XX.

51 WTO *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998); WTO *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* WT/DS135/R (2001). Those issues have been addressed largely by lawyers and academics. We shall only quote two texts: Adelle Blackett “Commerce international et travail: définir le rôle réglementaire de l’État dans la nouvelle économie” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville 2010) 227; Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at ch 6.

52 Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at 130.

In the light of this, it seems that there is an obvious inconsistency in law. States should (or even *must*) show a minimum of (or more) coherence with respect to the various obligations they have undertaken internationally:<sup>53</sup>

- First, as we already saw, the 1944 Declaration of Philadelphia, which binds every ILO member State, imposes to “accept” all national and international economic and financial policies and measures “only if they respect and not restrain or hinder the achievement” of the “fundamental objective” of the ILO, which is social justice (which means the right of each human being to pursue his material well-being and his spiritual development with freedom, dignity and economic security).
- Second, art 1 of the UN Charter provides that one of the most important goals of this organisation is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. But what is really interesting is reading art 103 of the same Charter which provides: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail.*” (emphasis added)
- Third, it can be argued that the fundamental rights related to social justice, as discussed above, should benefit a pre-eminent status in international law. Some of them, such as prohibition of forced or compulsory labour and prohibition of racial discrimination,<sup>54</sup> or discrimination in employment and occupation,<sup>55</sup> may even be peremptory norms of general international law (*jus cogens*). Therefore, no express or implied derogation of those rights, provided in a free trade treaty (multilateral, plurilateral or bilateral), would be allowed. In fact, “a treaty is void if, at the time of its conclusion, it conflicts with this norm”.<sup>56</sup> Also, because their legal recognition is based on common values to all States and on a general concern for their compliance, these fundamental rights could impose *erga omnes* obligations. So, when a State violates these obligations, all States, without exception, have a legal interest to claim the termination of this wrongful act.<sup>57</sup> In other words, obligations *erga omnes* are universal rules that specify the obligations of any State to the international community.

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53 Johanne Brodeur and others *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights* (Yvon Blais Bruxelles Bruylant, Cowansville, 2010).

54 *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (second phase) (1970) CIJ Rec 1970 at [34].

55 Inter-American Court Of Human Rights “Advisory Opinion OC-18, Legal Status and Rights of Undocumented Workers” (17 September 2003) <[www.cidh.oas.org/Migrantes/migrantes.caselaw.htm](http://www.cidh.oas.org/Migrantes/migrantes.caselaw.htm)> at [101].

56 *Vienna Convention on the Law of Treaties of 1969* (1980) 1155 RTNU 331, art 53.

57 *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (second phase) (1970) CIJ Rec 1970 at [33]–[34]. See also *East Timor* (Portugal v Australia)(1995) CIJ Rec 1995 at 102[29]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro)(1996) CIJ Rec 1996 at [31]–[32]; Institute of International Law “Obligations and rights erga omnes in international law” (2005) Institute of International Law Yearbook 1.

Obviously, this question of human rights and hierarchy of norms in international law is definitely not settled yet and many authors have already studied it.<sup>58</sup> Only time will tell what will happen. In view of the foregoing, it is difficult to argue that social justice is a utopia, or is merely a philosophical or moral principle. It is clearly a principle which explicitly belongs to international legal order. It is necessarily recognised in international law not only because it is explicitly “affirmed”, but also because it is implemented by rules contained in treaties or customary law.<sup>59</sup>

Indeed, as we have shown in this first part of the paper, each of those widely ratified treaties adopted by member States of the ILO or the UN – which are roughly the same countries – implement the social justice principle.

Moreover, their legal content corresponds to the essence of the concept of sustainable development, as we will demonstrate in the second part of this paper.

## II. IMPLEMENTATION OF SOCIAL JUSTICE THROUGH SUSTAINABLE DEVELOPMENT: A MATTER OF HUMAN RIGHTS

What connections can be made between social justice and sustainable development, as it is currently formulated, defined and implemented by the international community?

We begin with a brief reminder of what sustainable development is. Although it is difficult to ascertain the exact origin of this ancient concept,<sup>60</sup> we might first note the consensus that already existed in 1972 between UN members when they adopted, at Stockholm, the Declaration of the United Nations Conference on the Human Environment:

Principle 1 - Man has the fundamental right to freedom, equality and *adequate conditions of life*, in an environment of a quality that *permits a life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Principle 8 - Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. (emphasis added)

Fifteen years later, the Brundtland Report adopted in 1987 by the World Commission on Environment and Development exposed and clarified the idea of sustainable development with

58 Christian Tomuschat and Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers, Leiden/Boston, 2006); Koji Teraya “Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights” (2001) 12 EJIL 917; Hon Rosalie Silberman Abella “International Law and Human Rights: The power and the Pity” (2010) 55 McGill LJ 871; Alix Toubanc “L’article 103 et la valeur juridique de la Charte des Nations Unies” (2004) 108 RGDIP 439; Robert Kolb “Observation sur l’évolution du concept de jus cogens” (2009) 113 RGDIP 837; Véronique Marleau “Réflexion sur l’idée d’un droit international coutumier du travail” in Jean-Claude Javillier and Bernard Gernigon (eds) *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos* (BIT, Genève, 2004) 363.

59 See Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 69; Georges Ripert *Les forces créatrices du droit* (LGDJ, Paris 1955) at 325; Charles Perelman *Logique juridique – Nouvelle rhétorique* (2nd ed, Dalloz, Paris, 1979) at 105; Ronald Dworkin *Prendre les droits au sérieux* (PUF, Paris, 1995); Ronald Dworkin *L’empire du droit* (PUF, Paris, 1994) at 56; Neil MacCormick *Raisonnement juridique et théorie du droit* (PUF, Paris, 1996) at chs VII and IX.

60 Kristin Bartenstein “Les origines du concept de développement durable” (2005) 3 *Revue juridique de l’environnement* 289.

this well-known definition, at least one that seems to reach a broad consensus among authors and within the international community:<sup>61</sup>

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of “needs”, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.

A modelling made from this definition resulted in a widely recognised three interconnecting spheres (economic growth, social development and environmental protection) diagram. These three spheres were designed to be of equal importance, but the environmental dimension has received much more attention.<sup>62</sup> However, in spite of this lack of interest in the social dimension of sustainable development, it makes no doubt that it has been considered as important as the other spheres. The Rio Declaration, adopted in 1992 by 182 States attending the UN Conference on Environment and Development, is clear on this point:<sup>63</sup>

All States and all people shall cooperate in the essential task of *eradicating poverty as an indispensable requirement* for sustainable development, in order to decrease the disparities in *standards of living and better meet the needs* of the majority of the people of the world. (emphasis added)

If we do not find any specific reference to the expression “social justice”, we have to recognise that the principle is clearly present in the instruments and texts adopted by States at the Rio Summit. Action 21, a guide to implementation of sustainable development for the 21st century, adopted at the 1992 Earth Summit as a complement to the Rio Declaration, gives us plenty of good examples in this respect. The idea of social justice is clearly expressed in this excerpt from art 3.4 of Action 21:

The long-term objective of enabling all people to achieve sustainable livelihoods should provide an integrating factor that allows policies to address issues of development, sustainable resource management and poverty eradication simultaneously.

The principle of social justice could also be found in ch 29 of Action 21, which is entirely dedicated to the role of workers and unions in the implementation of sustainable development. Several provisions of this chapter clearly show that decent work, which is an important element of social justice, has to be part of sustainable development. For example, art 29.2 states that “the overall objective is poverty alleviation and full and sustainable employment, which contribute to safe, clean and healthy environments – the working environment, the community and the physical environment”. Other provisions specifying the social objectives that States should seek to achieve by year 2000 also speak for themselves: “ratification of ILO conventions of subject and the enactment of legislation in support of those agreements”; “increasing the number of environmental collective agreements aimed at achieving sustainable development”; “reducing

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61 *Report of the World Commission on Environment and Development: Our Common Future* GA Res 42/187, A/RES/42/187 (1987) at pt 1, ch 2.

62 Marie-Claude Desjardins and Dominic Roux “Développement durable et travail décent: à la recherche d’une interface en droit international” (2009) 5 McGill International Journal of Sustainable Development Law and Policy 199; Jérôme Ballet, Jean-Luc Dubois and François-Régis Mahieu “A la recherche du développement socialement durable: concepts fondamentaux et principes de base” (2004) Développement durable & territoires 3.

63 *Rio Declaration on Environment and Development* (1992) at principle 5.



occupational accidents, injuries and diseases according to recognized statistical reporting procedures”; and “increasing the provision of workers’ education, training and retraining, particularly in the area of occupational health and safety and environment” (article 29.3). Also, workers, unions and the promotion of rights at work have a role to play in facilitating the implementation of sustainable development (art 29.4 and ff).

Ten years later in 2002, 100 Heads of States attending the World Summit on Sustainable Development in Johannesburg reiterated, even more clearly, their willingness to integrate the issue of social justice into sustainable development. Indeed, one of the main commitments of the Summit is the following:<sup>64</sup>

[W]e assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels.

In the same Declaration, the States declared that the elimination of poverty is a primary objective and a precondition of sustainable development (at [11]):

We recognize that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development are overarching objectives of, and essential requirements for sustainable development.

Achieving social justice through sustainable development implies, in particular, according to the Declaration, “provid[ing] assistance to increase income generating employment opportunities, taking into account the International Labour Organization (ILO) Declaration of Fundamental Principles and Rights at Work” (at [28]).

Speaking of the ILO, we have to mention that efforts have not only been deployed to link sustainable development to social justice in international instruments specifically dedicated to sustainable development, but also in other international forums such as the ILC. Indeed, at the 2007 ILC, the ILO made clear connections between its flagship objective, “Decent Work”, and sustainable development. Let us recall that Decent Work is this unifying concept that embodies, since 1999, the fundamental purpose of the ILO to “promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.<sup>65</sup> The aspiration to put Decent Work as an essential component of sustainable development has been vigorously defended not only by the Director-General of the ILO but also by several States and representatives of workers and employers attending the 2007 ILC.<sup>66</sup> The title of the Director-General’s report is eloquent on that matter: *Decent work for sustainable development*. The report states that the ILO “needs to anchor the vision of sustainable development as the overriding policy paradigm within which the Decent Work Agenda can make its key contribution to development”.<sup>67</sup>

If this session of the ILC is the first attempt of the ILO to integrate Decent Work as a corollary to the achievement of sustainable development, it must be admitted that a

64 World Summit on Sustainable Development *Johannesburg Declaration on Sustainable Development* A/CONF 199/L6/Rev2 (2002) at [5].

65 ILO “Decent Work” (Report of the Director-General to the International Labour Conference, International Labour Conference, 87th Session, International Labour Office, Geneva, 1999).

66 ILO “Provisional Record 24” (International Labour Conference, 96th session, Geneva, 2007).

67 ILO “Director-General’s introduction to the International Labour Conference Decent work for sustainable development” (ILC 96-2007/Report I (A), Geneva, June 2007).

rapprochement between the two concepts had been already made by the organisation in 1998. The preamble of the ILO Declaration on Fundamental Principles and Rights at Work confirms this:

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Ten years later, the preamble of the ILO Declaration on Social Justice for a Fair Globalization also proves that social justice should be seen as an integral part of the concept of sustainable development:<sup>68</sup>

in a world of growing interdependence and complexity and the internationalization of production, the fundamental values of freedom, human dignity, social justice, security and non-discrimination are essential for sustainable economic and social development and efficiency.

Connections may also be made between the principle of social justice as developed in international human rights law treaties and sustainable development.

The International Covenant on Economic, Social and Cultural Rights (with, as a backdrop, the eight core ILO conventions) is a good example. This is one of the two major treaties adopted by the UN in the field of human rights. It was adopted in 1966 and has been in force since 1976. The preamble recalls that:<sup>69</sup>

the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

It is true that, for historical, political and ideological reasons,<sup>70</sup> the two covenants were split. Without reopening the old recurring and semantics debate on “justiciability” of first and second generation human rights,<sup>71</sup> it may be useful to recall one of the essential premises of international law, declared in 1968 and repeated in 1993 at two World Conferences on Human Rights held respectively in Tehran<sup>72</sup> and Vienna:<sup>73</sup>

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68 ILO Declaration on Social Justice for a Fair Globalization <[www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms\\_099766.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms_099766.pdf)>.

69 International Covenant on Economic, Social and Cultural Rights <[www2.ohchr.org/english/law/cescr.htm](http://www2.ohchr.org/english/law/cescr.htm)>.

70 Lucie Lamarche *Perspectives occidentales du droit international des droits économiques de la personne* (Bruylant, Bruxelles, 1995) at 59; Daniel J Whelan *Indivisible Human Rights: A History* (University of Pennsylvania Press, Philadelphia, 2010).

71 In this regard, read the debates of 2004 and 2005 published in Human Rights Quarterly, launched by Kenneth Roth “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organisation” (2004) 26 HRQ 63. See also Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 131; Philip Harvey “Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously” (2002) 33 Colum Hum Rts L Rev 363.

72 International Conference of Human Rights *Proclamation of Teheran, Final Act of the International Conference on Human Rights A/CONF/32/41* (1968) at 3.

73 World Conference on Human Rights *Vienna Declaration and Programme of Action A/CONF/157/23* (1993) at [5].

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

There is an inexorable logic in this premise.<sup>74</sup> The death of a person who has been tortured by State agents is dramatic, but is it worse than the death of a person who did not receive adequate care because of a lack of resources or who died because he or she had not enough to eat? In all these cases we should consider that there are internationally recognised human rights violations. Besides, what does the right to life or to liberty effectively mean without the right to health, the right to education or the right to an adequate standard of living? What does freedom of expression and the right to vote really mean without a good education?<sup>75</sup>

Even if there is no explicit reference to the Covenant in the Rio Declaration or in Action 21, many of the economic, social and cultural rights they enshrine are clearly essential components of a sustainable development. The main element that interconnects them is their common objective of poverty eradication. Indeed, it is considered to be an indispensable requirement for sustainable development and also a major component of the social justice principle, as “it is now widely accepted that ... poverty should not be seen only as a lack of income, but also as a deprivation of human rights”.<sup>76</sup>

The first right mentioned in the Covenant, the *right to work* (art 6), is a good example of a right pursuing this poverty elimination objective. Gainful employment is in fact often the first step for an individual to get out of poverty. Moreover, as the Brundtland Report says: “The most basic of all needs is for a livelihood: that is, employment.” What does this right include concretely? Labour must be free, which means that everyone can earn a living and have a job freely chosen and accepted, without being discriminated.<sup>77</sup> It also implies the right not to be unfairly deprived of employment.<sup>78</sup> The right to work minimally presupposes the abolition of forced labour and slavery,<sup>79</sup> but also the obligation for all States to take measures aiming at achieving full employment.<sup>80</sup> This right is related to a host of “core” ILO conventions and other UN treaties,<sup>81</sup> and its normative components are guaranteed in those instruments. The right to

74 Dominic Roux “Le ‘droit à un travail décent’ affirmé dans les normes internationales de l’ONU et l’OÉA. Ou la longue marche d’un vieux couple: le droit du travail et les droits de la personne” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 155.

75 Manisuli Ssenyonjo *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford and Portland (Oregon), 2009) at 13.

76 The Office Of High Commissioner For Human Rights “Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water, A Background Paper” (World Summit on Sustainable Development, Johannesburg, 26 August 2002 – 4 September 2002) at 2.

77 Discrimination (Employment and Occupation) Convention 1958, C111.

78 Committee on Economic, Social and Cultural Rights *General Comment 18 – The right to work* E/C/12/GC/18 (2006) at pts 1 and 4.

79 Forced Labour Convention 1930, C29; Abolition of Forced Labour Convention 1957, C105; Minimum Age Convention 1973, C138; Worst Forms of Child Labour Convention 1999, C182.

80 Employment Policy Convention 1964, C122.

81 International Convention on the Elimination of All Forms of Racial Discrimination (1965), art 5; International Covenant on Civil and Political Rights (1966), arts 8 and 26; Convention on the Elimination of All Forms of Discrimination against Women (1979), art 11; Convention on the Rights of the Child (1989), arts 32–34; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); Convention on the Rights of Persons with Disabilities (2006), arts 2, 5 and 27.

work implies a “Decent Work”, and that is why it is also related to art 7 of the Covenant: it is the *right of everyone to the enjoyment of just and favourable conditions of work* which ensure, in particular, remuneration that provides all workers, as a minimum, with a decent living for themselves and their families, and which also ensure safe and healthy working conditions, rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>82</sup>

In connection with those rights, the Covenant enshrines other labour rights: trade union rights (art 8), which are also recognised in two ILO “core” conventions;<sup>83</sup> the right to strike (art 8); the right to social security (art 9); and the right to family protection, especially for mothers and children, particularly with regard to working conditions (art 10). Once again, this last right is part of other UN treaties<sup>84</sup> and many ILO conventions.<sup>85</sup>

Besides labour-related rights, the Covenant also includes other important rights that States must seek to fill through the lens of sustainable development: the right of everyone to an adequate standard of living for himself and his family, which includes the right to adequate food (since the States recognise the “fundamental right of everyone to be free from hunger”);<sup>86</sup> the right to have enough clothes and the right to live in adequate housing (art 11) (this right might also include right to water);<sup>87</sup> the right to health, that is to say the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (art 12);<sup>88</sup> and the right to education, which particularly means that “primary education shall be compulsory and available free to all” (arts 13 and 14).<sup>89</sup> The Brundtland Report mentions several of them, such as rights to food, housing, drinking water, sanitation, health care and energy. Action 21, adopted at the Rio Summit in 1992, also explicitly mentions the eradication of poverty, civil society participation in decision-making on social and environmental issues, and the improvement of living conditions and health protection as issues of high importance with regard to the implementation of sustainable development. The Plan of Implementation<sup>90</sup> adopted in 2002 at the World Summit on Sustainable Development in Johannesburg is even clearer on this point.

82 Stephanie Bernstein “Le droit à des conditions de travail justes et favorables: un retour aux fondements de la ‘décence’ au travail” in Lucie Lamarche and Pierre Bosset (eds) *Donner droit de cité aux droits économiques, sociaux et culturels – La Charte des droits et libertés du Québec en chantier* (Éditions Yvon Blais, Cowansville, 2011) 93.

83 Freedom of Association and Protection of the Right to Organise Convention 1948, C87; Right to Organise and Collective Bargaining Convention 1949, C98.

84 Convention on the Elimination of All Forms of Discrimination against Women (1979), art 11; Convention on the Rights of the Child (1989), arts 32–34.

85 Minimum Age Convention 1973, C138; Worst Forms of Child Labour Convention 1999, C182. See also Maternity Protection Convention 2000, C183.

86 Committee on Economic, Social and Cultural Rights *General Comment 12 – Right to adequate food* E/C 12/1999/5 (1999).

87 Committee on Economic, Social and Cultural Rights *General Comment 15, The right to water* E/C 12/2002/11 (2002).

88 Committee on Economic, Social and Cultural Rights *General Comment 14, The right to the highest attainable standard of health* E/C.12/2000/4 (2000).

89 Committee On Economic, Social And Cultural Rights *General Comment 13, The right to education* E/C12/1999/10 (1999).

90 World Summit On Sustainable Development “Plan of Implementation of the World Summit on Sustainable Development” (Johannesburg, 2002).

Chapter II of this Plan, entitled “Poverty Eradication”, qualified as “the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries”, provides a range of needs for every human being and correlative measures that have to be taken by States and international organisations. It includes: health services for all and reducing environmental health threats; real access to primary schooling and all levels of education for every children; access to agricultural resources for people living in poverty, including the transfer of basic sustainable agricultural techniques and knowledge; food availability and affordability; access to sanitation to improve human health and reduce infant and child mortality; and prioritising water and sanitation. In the light of this comparison, we can assert that economic and social rights and sustainable development clearly pursue the same objective: the satisfaction of all “basic needs” of human beings.

What should we conclude from all of the above? First, it provides us with two main ideas that characterise sustainable development and are related to the social justice principle as developed in international law:

- (1) States and the intergovernmental organisations they belong to *must absolutely put priority* on meeting the basic needs of the poorest people.
- (2) The *respect of equity* is a primarily condition for achieving sustainable development:<sup>91</sup> intragenerational equity, on the one hand, since it is necessary to *share* the wealth between the richest and poorest people of the world; intergenerational equity, on the other hand, since the planet’s resources are not unlimited and their use must be controlled so that future generations can enjoy them, too, when the time comes.<sup>92</sup>

Sustainable development therefore accords perfectly with the social justice principle in international law. Both concepts share a common and central basis, which is *welfare of human beings*. That means respect for human dignity through satisfaction of basic needs and collective wealth sharing. In the words of the Brundtland Report: “Sustainable development requires a change in the content of growth, to make it less material- and energy-intensive and more equitable in its impact.”<sup>93</sup>

Even if the ILO conventions, the international human rights treaties and the concept of sustainable development share the common objective of social justice, it has to be underlined that they do not have the same legal effects. Indeed, the concept of sustainable development (which was taken by many actors and sometimes used in a way remote from its original design) has its own areas of ambiguity. In other words, even though several national and international instruments expressly refer to sustainable development, it is very difficult at present to say that this notion corresponds to a formally and universally accepted definition in international law, or that it is a well established general principle or customary law binding all States.<sup>94</sup> In the light of this, international human rights treaties and ILO conventions, which have been widely ratified by

91 Jean-Guy Vaillancourt “Penser et concrétiser le développement durable” (1995) 15 *Écodécision* 24 at 28–29.

92 Edith Brown Weiss *In Fairness to Future Generations* (Transnational Publishers, Dobbs Ferry (NY), 1989); Axel Gosseries “Theories of intergenerational justice: a synopsis” (2008) 1 *SAPIENS*.

93 *Report of the World Commission on Environment and Development: Our Common Future* A/42/a/27 4 August (1987) at pt 1, ch 2.

94 Jean-Maurice Arbour, Sophie Lavallée and Hélène Trudeau *Droit international de l’environnement* (Éditions Yvon Blais, Cowansville, 2012) 98; Patricia W Birnie and Alan E Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 85 and 95.

States and thus constitute legally binding instruments for the majority of the countries, should not only be used as a guidance for States on how to implement the social dimension of sustainable development – because they are much more explicit about social justice content – but also as a way to give sustainable development more legal force.

The Covenant, for example, already provides explicit and specific legal obligations to State parties. Indeed, art 2 of the Covenant sets out the legal obligations of State parties. Obviously, there is a general obligation of progressive realisation of all rights guaranteed in that treaty. For the Committee on Economic, Social and Cultural Rights, a body composed of 18 independent experts which is responsible for ensuring compliance with the obligations of State parties, the Covenant's provisions include three basic duties for States: (1) the obligation to respect the enjoyment of rights guaranteed in the Covenant, which requires them not to obstruct, by their acts or omissions, the enjoyment of those rights; (2) the obligation to protect, which requires preventing violations that may be committed by third parties, including companies, in the territory under their jurisdiction; and (3) the obligation to fulfil or provide the full realisation of rights, which involves taking the necessary legislative, administrative, budgetary and judicial measures. Although this Committee is not a supranational court like the Inter-American Court of Human Rights, the European Court of Human Rights or the International Criminal Court, its general conclusions and decisions are recognised as authorities when there are violations of rights committed by the State parties.

Moreover, art 2 of the Covenant recognises the constraints due to limited available resources. The fact remains that States must guarantee that all these rights will be exercised without discrimination of any kind. States have a fundamental duty to act immediately in order to ensure the full enjoyment of all those rights, regardless of their national resources or level of economic and social development. The expression “maximum of its available resources” in this case cannot excuse a State that is unable to achieve the implementation of guaranteed rights.<sup>95</sup> This means first and foremost, the adoption of legislative measures necessary to prohibit and eliminate discrimination, forced labour and child labour, for example. Moreover, many of the rights enshrined in the Covenant have to be implemented “immediately” by State parties: prohibition of discrimination; equality between men and women; the right to fair wages and equal pay for equal work without discrimination based on sex; trade union rights; the right of children to be protected against exploitation and work harmful to their development; and the right to free and accessible primary education.<sup>96</sup> Therefore, according to the interpretation of the Committee, art 2 entails the fundamental obligation of the State parties to ensure, whatever their level of economic or social situation, the rights of all to a minimum level of subsistence and, especially, protect adequately the poor and vulnerable people.<sup>97</sup>

It is not mundane to recall that no fewer than 160 countries are bound by its provisions. This is the vast majority of 185 ILO member countries and WTO members (which counts 157). Of these, over 110 countries bound by that instrument are neither European nor North American

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95 Committee on Economic, Social and Cultural Rights *General Comment 3, The nature of States parties' obligations* E/1991/23 (1991).

96 Committee on Economic, Social and Cultural Rights *General Comment 3, The nature of States parties' obligations* E/1991/23 (1991) at [5]; Committee On Economic, Social And Cultural Rights *General Comment 9, The domestic application of the Covenant* E/C12/1998/24 (1998) at [8] and [10].

97 Committee On Economic, Social And Cultural Rights *General Comment 3, The nature of States parties' obligations* E/1991/23 (1991) at [12].

States but developing countries or countries largely underdeveloped. Therefore the Covenant is a crucial vector for social justice and sustainable development, as well as the ILO conventions. In other words, ratifying the Covenant is equivalent to legally endorsing social targets of sustainable development.

Ultimately it is our point of view that, legally speaking, the concept of sustainable development put forward in 1987 and universally recognised at the 1992 Rio Summit and reiterated at the 2002 Johannesburg Summit brings nothing new in terms of content regarding the notion of social justice. Things were quite different regarding the protection of the environment.<sup>98</sup> Nevertheless, we have to admit that sustainable development has been useful to clearly remind States, international organisations and private actors (such as transnational corporations) that conditions and limits *must legally be* imposed to economic development: these are respect of human rights, in the name of social justice.

As a legal principle, social justice means (*purpose*) that all human beings should be treated with dignity and equality, and that all human beings have the right to meet their basic needs without discrimination. This social justice principle implies three conditions (*means*) so that it can be achieved: a sharing of wealth; respect of basic human rights; and an economy that serves human beings. At least, this is what asserts the Declaration of Philadelphia of 1944, a text that binds the 185 ILO member States. Therefore, in a concrete way and as a legal principle, social justice is the foundation of many legal rules derived from international treaties or international custom. It should then control the interpretation and application of international law linked with them or the creation of a new rule in case of silence or obscurity of the existing ones.<sup>99</sup> This sense of social justice binds all to whom it is addressed, that is to say, the States and intergovernmental organisations.

Given the above, we think it is through international law that social justice could likely go from utopia to reality. And it is through international law that sustainable development will not be reduced to the mere status of “popular slogan”. However, in order to do so, we need common political will. It is clear that social justice, even as a pre-eminent legal principle, and the concept of sustainable development in itself, will not acquire more legal binding significance until the time they get, both politically and economically, sufficient interest from the international community. If, for now, social justice is only “promoted” in international law – that is to say, that violations of ILO conventions and UN human rights treaties cannot be sanctioned as are violations of multilateral or bilateral free trade agreements – it is for a specific reason: the States have decided so. Actually, States still do not want to adopt truly binding mechanisms for the ILO or UN. After watching the excellent (but still shocking) documentary by Charles Ferguson, *Inside Job*, we would say that it is also the will of powerful bankers on Wall Street.

However, ultimately all this discussion has been a good opportunity to recall what *should* or even *must* be the place of social justice and fundamental human rights in the international legal order: at the top of the hierarchy of norms. It remains now for lawyers and legal scholars to scientifically prove this hierarchical superiority and pre-eminence. This will make it easier to convince governments and the courts to act in this same direction.

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98 Sophie Lavallée “Sustainable Development ... without ‘Ecological’ Justice?” in Marie-Ange Moreau and Antoine Duval (eds) *Towards Social Environmental Justice?* (workshop held in Firenze (Italia) organised by the European University Institute, 26 November 2010) 37 <<http://cadmus.eui.eu/handle/1814/20018>>.

99 Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 71.

# APOLOGY IN NEW ZEALAND'S MENTAL HEALTH LAW CONTEXT: AN ENIGMATIC JUXTAPOSITION?

BY ASSOCIATE PROFESSOR KATE DIESFELD\*

*Apology has particular significance for historic psychiatric abuses in New Zealand. In 2001 the New Zealand Government announced that personal apologies had been expressed for mistreatment of children and adolescents at Lake Alice Hospital during the 1970s. Additionally, the Government offered a financial settlement to some survivors and responded to victims' needs by establishing a Confidential Forum and later a Confidential Listening and Assistance Service. The latter has been depicted as a constructive, reconciliatory response to historic incidents that deeply affected people at the time of confinement and that still impact upon their present lives.*

*Yet people who participate in the service may also make a claim for damages through litigation. This is a potentially peculiar juxtaposition because aggrieved people may pursue conventional, adversarial litigation while simultaneously expressing their distress to an independent panel "in the journey to a place of internal peace, resolution and calmness".<sup>1</sup> This chapter examines New Zealand's apology and reconciliatory process through Marrus' definition of "complete apology",<sup>2</sup> aiming to understand New Zealand's effort to achieve closure.*

## I. INTRODUCTION

The New Zealand Government offered a range of responses to the revelation of historic abuses against psychiatric patients. The following analysis explains the findings within Sir Rodney Gallen's report on Lake Alice Hospital (the Gallen Report),<sup>3</sup> the announcement of the Government's apology, and the genesis of the Confidential Listening and Assistance Service (the Service). The conciliation process is contrasted with a recent lawsuit by a person who was detained in Porirua Hospital under similar conditions. The focus is New Zealand's combination of apology, reconciliation and litigation for historic wrongs.

The international backdrop of this phenomenon has been described as "apology mania",<sup>4</sup> and a vast spectrum of scholarship explores its many permutations. According to Professor Marrus:<sup>5</sup>

We are ... awash in apologies, both trivial and highly consequential. Reaching backwards and forwards, hard and soft, macro and micro, and extending across cultures, apologies have become a

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\* Associate Professor, Faculty of Health and Environmental Sciences, AUT University, Auckland.

1 Department of Internal Affairs "Confidential Listening and Assistance Service" (2009) Confidential Listening and Assistance Service <[www.listening.govt.nz](http://www.listening.govt.nz)>.

2 M Marrus "Official apologies and the quest for historical justice" (2007) 6 *Journal of Human Rights* 75.

3 Sir Rodney Gallen "Report on the Lake Alice Incidents" (2001) (Obtained under Official Information Act 1986 Request to the Ministry of Health).

4 B Amiel "Saying sorry is fine, but only to a point" *MacLean's* (Canada, 25 May 1998) at 11.

5 Marrus, above n 2, at 75.



familiar part of our relational landscape. In particular, apologies have emerged as an instrument for promoting justice for historic wrongs.

Drawing upon select scholarship on apology, this analysis inquires whether New Zealand's apology, and subsequent responses, achieve the outcomes of a complete apology.

To date, information about historic injustices within New Zealand's institutions has received intermittent, sporadic and fragmented publicity and analysis. Yet Thompson asserts that meaningful reconciliation and a genuine political apology requires more concerted official action.<sup>6</sup>

The government should take steps to demonstrate that the injustice and the sufferings of the victims have become embedded in the official history of the nation and this historical account should be something that the victims can endorse.

The following analysis attempts to contribute to that reckoning.

## II. OVERVIEW OF EVENTS

The series of official responses to institutional abuse in New Zealand may be viewed as part of an international trend for states to be held accountable.<sup>7</sup> In New Zealand, abusive practices within mental health services generated a range of official responses. The genesis began when serious concerns regarding patient care were reported from the inception of the Lake Alice Hospital Child and Adolescent Unit in 1972.<sup>8</sup> Within six years the unit was closed, and the entire hospital was eventually closed in 1999. Amongst the young patients, "many [were] from troubled backgrounds" with few social supports;<sup>9</sup> most did not have medical conditions and were not admitted under mental health legislation.

Abuse allegations focused on the administration of electric shocks and injections as behaviour modification or punishment. A Commission of Inquiry in 1976 and 1977 did *not* find that electric shocks were used as punishment. However, the Ombudsman Inquiry in 1977 determined that the use of electro-convulsive therapy (ECT) should play little part in the treatment of children and only be used as a last resort where other treatments have been exhaustively tried. The Ombudsman found that the use of ECT without anaesthetic or muscle relaxant was not justified in most circumstances.<sup>10</sup>

In May 2001 the Government established a process to respond to the allegations. In July, Sir Rodney Gallen commenced his report on events and conditions at the Child and Adolescent Unit. Sir Rodney summarised the evidence he heard, determined who might have a valid claim and

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6 J Thompson "Apology, justice and respect: A critical defence of political apology" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 31 at 41.

7 JM Coicaud and J Jonsson "Elements of a road map for a politics of apology" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 77.

8 Annette King "Crown settles with 95 former Lake Alice patients" (press release, 8 October 2001) <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

9 King, above n 8.

10 King, above n 8.

decided how the government fund would be apportioned.<sup>11</sup> On 8 October 2001 the Prime Minister and the Health Minister announced that, for the 95 patients who were in the Unit between 1972 and 1977, the Government had offered a written apology and reached a settlement of \$6.5 million.<sup>12</sup> On the same day, the Government urged any claimants who had not already come forward to do so. During the second resolution and settlement process, additional funds were distributed for a total disbursement of \$10.1 million.<sup>13</sup> A Confidential Forum was established and later the Confidential Listening and Assistance Service. However, the issue was not resolved.

In terms of civil litigation, by February 2010 there were 527 claims before the High Court according to the Attorney General's office.<sup>14</sup> Also, the Legal Services Agency reported that over 900 people applied for state-funded legal aid to sue for damages. Although \$11 million in legal aid was paid or approved to pursue the claims, few have been heard despite some being filed over 10 years ago. However, up to 1,000 victims could be offered "wellness payments" by the Government to settle their claims, according to the Crown Health Finance Agency.<sup>15</sup>

In terms of criminal proceedings, in late March 2010 the police dismissed claims by 40 people who wanted criminal charges laid against a former psychiatrist who now resides in Australia, Selwyn Leeks, and others.<sup>16</sup> In April 2010 a complaint to the United Nations Committee Against Torture inquired how the Government was ensuring that allegations were investigated, perpetrators prosecuted and victims compensated.<sup>17</sup>

Clearly, many victims who suffered the destructive effects of institutionalisation still want to register their dissatisfaction. What was the nature of New Zealand's apology and reconciliatory strategy? A closer examination of New Zealand's response informs that analysis.

### A. *The Gallen Report*

According to the former judge Sir Rodney Gallen in 2001, the children within the Unit were between eight years and 16 years of age. He reported:<sup>18</sup>

Some had been subjected to severe physical and sexual abuse before their admission (and) others had suffered some kind of trauma which affected their ability to integrate into the community of which they were a part ... All were in need of understanding, love and compassionate care. That is not what they received at Lake Alice.

The dominant approach was aversive therapy, involving "imposition of rigid discipline and the application of punishment [for] what was seen as unacceptable behaviour".<sup>19</sup> Also, ECT "was in constant use on children", and although it was justified as therapy, "that is not the way it was

11 Gallen, above n 3; L Hood "Reliable evidence and due process" (28 October 2005) NZLawyer 5.

12 King, above n 8.

13 G Cameron "Reliable research and due thought?" (27 January 2006) NZLawyer 8.

14 "Govt looks to settle historic abuse cases" *The New Zealand Herald* (online ed, Auckland, 25 February 2010).

15 *The New Zealand Herald*, above n 14.

16 "'Justice remains to be done' over Lake Alice" *The Dominion Post* (online ed, Wellington, 6 April 2010).

17 *The New Zealand Herald*, above n 14.

18 Gallen, above n 3, at [3]–[4].

19 At [6].

constantly used at Lake Alice".<sup>20</sup> Complainants and medical records verified that the administration of ECT without muscle relaxants or anaesthetics "was not only common but routine".<sup>21</sup> According to Sir Rodney:<sup>22</sup>

Claimant after claimant emphasised that the accumulation of unsatisfactory grades during the week meant the likelihood of the administration of ECT at the end of the week in an unmodified form ... Quite apart from occasions when ECT was administered to them, they were required to assist by bringing it into the room where it was used, and on some occasions actually watched its use on other patients ... [It] was brought into the dining room and placed in a prominent position in order to encourage children to eat their meals if they were reluctant to do so ... There can be no doubt at all that the children saw the administration of ECT, at least in an unmodified form, as being a punishment and intended to dissuade them from certain forms of conduct.

As a deterrent for attempts to escape, it was applied to children's legs. As punishment for unacceptable sexual behaviour, it was used on their genitals.<sup>23</sup>

The ECT was plainly delivered as a means of inflicting pain in order to coerce behaviour. ECT delivered in circumstances such as those I have described could not possibly be referred to as therapy, and when administered to defenceless children can only be described as outrageous in the extreme.

Paraldehyde was "a peculiarly unpleasant sedative" used as punishment and injection was "extremely painful".<sup>24</sup> It is no longer in use. During solitary confinement, children were entirely naked. The room had a bucket for a toilet and a bed.

Although Lake Alice was an institution for "criminally insane" adults, children were both threatened with, and were placed amongst, adult inmates or in maximum security as punishment. Sir Rodney established that the allegations of serious sexual abuse by staff and other inmates did occur:<sup>25</sup>

Perhaps the most appalling story contained in all the materials placed before me was of a 15 year old boy who claims that he was locked in a wooden cage with a seriously deranged adult who was kept locked in that cage and who was known to all the people at Lake Alice as being totally insane. He describes a situation where, for a considerable period, he was crouched in the corner being pawed by the particular inmate, screaming to be released, and unable to get out or to get away from the contact to which he had been exposed.

Sir Rodney concluded:<sup>26</sup>

The best summary which I can make of the large number of statements I have made and the interviews I have conducted is that the children concerned lived in a state of extreme fear and hopelessness. Statement after statement indicates that the child concerned lived in a state of terror during the period they spent at Lake Alice ... *Almost every complainant asks that some system be put in place which would prevent any such situation developing again.*

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20 At [8].

21 At [11].

22 At [11]–[12].

23 At [16].

24 At [17].

25 At [19].

26 At [22]–[23] (emphasis added).

These findings laid the foundation for New Zealand's later strategies.

### *B. The announcement of the Government's apology*

The Prime Minister issued a personal apology to all claimants with whom settlements were reached. That apology is not available. However, the Government's press release from Prime Minister Helen Clark and Health Minister Annette King on 8 October 2001 stated:<sup>27</sup>

The government came into office determined to resolve the grievance of this group of former patients and we have kept our word. The people involved were young—some of them children—and many from troubled backgrounds, including wards of the state. Some were sent to the Child and Adolescent Unit primarily because there was nowhere else for them to go ...

Whatever the legal rights and wrongs of the matter, and whatever the state of medical practice at the time, our government considers that what occurred to these young people was unacceptable by any standard, in particular the inappropriate use of electric shocks and injections. The government has now achieved a settlement with the majority of former patients who had brought claims, but there are others who may have been subject to similarly unacceptable events and who have not been part of the settlement. Their concerns will be considered as they come forward.

This official response was supplemented with additional, novel victims' programmes.

### *C. The Confidential Forum*

Subsequently, the Government created a complementary approach for aggrieved former patients. In 2004 the Government established the Confidential Forum (the Forum) for former in-patients of psychiatric hospitals, their families and staff members to formally speak about their experiences of psychiatric institutions in the period prior to November 1992.<sup>28</sup> The initiative aimed to create an accessible, informal and confidential environment for the hearings that were held by a panel of (usually) three members. Between 2005 and 2007, 493 people attended interviews and were provided with customised information about local and national support services and networks. A broad overview of the Forum process and patients' perspectives was published as the Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals.<sup>29</sup>

The Forum was described by Attorney-General Michael Cullen as a new reconciliation initiative. Therapeutic terms were used to describe the Forum at an event hosted by Women's Health Action in 2007:<sup>30</sup>

[The Forum] is a journey towards truth in the belief that being heard and believed is fundamental; towards reconciliation in the hope that making peace with the past helps in the journey to a place of internal peace, resolution and calmness.

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27 King, above n 8, at 1.

28 Department of Internal Affairs "Te Aitonga: Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals" (2007) Confidential Forum <[www.confidentialforum.govt.nz](http://www.confidentialforum.govt.nz)>.

29 At 1.

30 Women's Health Action Trust "Truth and reconciliation in the twilight zone" (invitational flyer, 2007). (Copy on file with author.)

People participated because “they wanted to make sense of their experiences, wanted the Government to know of their experiences and the effects upon them and *hoped that others might benefit* from the Forum”.<sup>31</sup> Importantly, participants wished that their revelations would have preventive effects:<sup>32</sup>

Many participants said that they wanted the Government to know what had happened to them and to others. They hoped that the cumulative effect of the confidential narratives told at the Forum might *affect changes in mental health services* in New Zealand.

Participants were invited to express their views on their experiences *prior* to November 1992. This cut-off date was selected because “it reflects the time by which these sectors had modernised their standards and improved mechanisms to manage complaints”.<sup>33</sup> On 1 November 1992 the Mental Health (Compulsory Assessment and Treatment) Act 1992 came into force, which applies to involuntary patients and explicitly lists patients’ rights. The Act includes a complaints procedure and access to the District Inspector, who has the power of investigation and who may make recommendations to the Director of Area Mental Health Services. Dissatisfied complainants may be referred to the Mental Health Review Tribunal for further investigation. Also, further protections were established under the Health and Disability Commissioner Act 1994 and within the Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996.<sup>34</sup>

Although the interviews related to events prior to 1992, the participants wanted assurances that improvements and safeguards in current mental health services would be implemented. Although this priority on prevention was repeatedly expressed, it is unclear whether the confidential systems that New Zealand subsequently developed are able to achieve this objective, without further evaluation.

#### *D. The Confidential Listening and Assistance Service*

In 2009 the Government created a similar but broader Confidential Listening and Assistance Service (the Service) with an intended duration of five years. According to the Service facilitator, by February 2010 approximately only 20 per cent of the participants were former psychiatric patients; this may indicate that many former patients participated in, and were satisfied with, the original Forum.<sup>35</sup>

The Service’s scope widened to include people who lived in health camps, child welfare facilities and special education homes.<sup>36</sup> According to the invitation pamphlet, this highly private project:

- Provides an opportunity to talk.

31 Department of Internal Affairs, above n 28, at 2 (emphasis added).

32 Department of Internal Affairs, above n 28, at 3 (emphasis added).

33 Confidential Listening and Assistance Service: Frequently Asked Questions <[www.listening.govt.nz](http://www.listening.govt.nz)>.

34 Health and Disability Commissioner “The Act and Code” (2010) <[www.hdc.org.nz](http://www.hdc.org.nz)>.

35 Phone communication with Claire Booth, Confidential Listening and Assistance Service facilitator (Kate Diesfeld, 8 February 2010). (Communication on file with author.)

36 Confidential Listening and Assistance Service “Confidential Listening and Assistance Service” (pamphlet, 2010); and see <[www.listening.govt.nz](http://www.listening.govt.nz)>. (Copy on file with author.)

- Helps participants to identify needs and obtain assistance (for example contact details for the Health and Disability Commissioner, Accident Compensation Corporation, counselling and related services).
- Enables participants to access information held about them by the State.
- Assists participants to come to terms with their experience as far as is reasonable.

The Service does not supplant other legal remedies; a civil claim for damages may be pursued. In describing what the Service is, the website also defines what the Service is not. The Service is not a commission of inquiry to test or evaluate evidence. Legal representatives are not allowed to accompany participants to interviews. The Service will not produce findings or recommendations.<sup>37</sup>

[It] is not intended to determine liability or make judgements about the truth of participants' experiences or stories, nor recommend the payment of compensation ... but [it] is designed to assist people with their present practical and emotional needs arising from their experiences in State care.

As demonstrated by the informational material, the Service is designed to offer a safe and free means to express dissatisfaction with past mistreatment. But the project's boundaries raise questions. First, the Service applies to events that occurred before 1992. What is the evidence that conditions in state residential facilities satisfactorily improved after 1992? Second, the service is confidential. Are *participants* free to disclose the nature of the interviews and whether the process was satisfactory? Third, the revelations from the interviews are not intended to be analysed, published or assessed. How could participants' anonymous information be utilised to establish future safeguards for vulnerable individuals living in conditions of dependence? Fourth, the juxtaposition of the Service's formal reconciliation process with New Zealand's adversarial legal system poses a philosophical conundrum. How does New Zealand reconcile the adversarial litigation process with the Service's benevolent intent to heal and achieve "internal peace"?

Despite the Government's range of reconciliation efforts, grievances continue as evidenced by some former patients' efforts to pursue criminal prosecutions and the submissions to the United Nations High Commissioner for Human Rights. In response, the Government may issue "wellness payments" to 1,000 individuals to settle their claims.<sup>38</sup> How might the acts of apology and reconciliation achieve closure in New Zealand?

### III. THE APPLICATION OF MARRUS' CONCEPT OF "COMPLETE APOLOGY"

Professor Marrus examined official apologies for historic abuses and offers an analytic foundation for exploring New Zealand's approach.<sup>39</sup> The application of clear, defined criteria may assist governments to produce more meaningful apologies, which in turn may increase the

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37 .Confidential Listening and Assistance Service, above n 33.

38 *The New Zealand Herald*, above n 14.

39 Marrus, above n 2.

long-term prospects of final reconciliation.<sup>40</sup> According to Marrus, with minor variations complete apologies include the following four features:<sup>41</sup>

- An acknowledgement of a wrong committed, including the harm it caused.
- An acceptance of responsibility for having committed the wrong.
- An expression of regret or remorse both for the harm and for having committed the wrong.
- A commitment, explicit or implicit, to reparation and, when appropriate, to non-repetition of the wrong.

The first stage of analysis focuses on the Prime Minister's press release. This public announcement may be distinguished from the personal (unpublished) written apology. Arguably the announcement was less effective than it might have been because it lacked transparency and did not reveal the explicit content of the personal apology to the 95 patients.

However, the press release may be conceptualised as a form of Marrus' official apology, whereby a communication is sent by representatives of one group to another, "from the Many to the Many".<sup>42</sup> From this vantage, the Government effectively made an official communication both to the wider community and to the former patients. However, it was not a complete apology because it did not attribute responsibility to the Government. In avoiding the word "apology", the announcement did not explicitly express regret or remorse for the harm and having caused it. There is an implication that the activities at Lake Alice may have been legally justified ("whatever the legal rights and wrongs of the matter"). An explanation of the hundreds of recent lawsuits may be the perception that the official statement was an inadequate apology and a justification; some victims may respond to justifications with anger and litigation.<sup>43</sup> Another critique is that the phrases within the public apology had a distancing effect because the apologists attribute the statement to "our government".

New Zealand's announcement of private apologies may be contrasted with other official apologies which Marrus views as "complete" and, presumably, more effective. New Zealand's announcement may be compared with President Clinton's apology in May 1996, sixty years after the syphilis experimentation upon black sharecroppers in Tuskegee, Alabama.<sup>44</sup> Both the New Zealand and the United States medical injustices were followed by formal investigations, out-of-court settlements and (in some instances) litigation. However, the United States apology had distinctive features. According to Marrus, the President "spoke generously, and sought, through his apology, to document the wrong, to make a broader admission, and to extend a commitment to doing better in the future".<sup>45</sup>

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40 M James "Wrestling with the past: Apologies, quasi-apologies, and non-apologies in Canada" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 137.

41 Marrus, above n 2, at 79.

42 N Tavuchis *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, Stanford California, 1991) at 45.

43 B White "Saving face: Benefits of not saying I'm sorry" (2009) 72 LCP 261.

44 Marrus, above n 2, at 84.

45 At 84.

Marrus considered the President's apology a "model of the genre" and referred to the following excerpt:<sup>46</sup>

The eight men who are the survivors of the syphilis study at Tuskegee are a living link to a time not so very long ago that many Americans would prefer not to remember, but we dare not forget. It was a time when our nation failed to live up to its ideals, when our nation broke the trust with our people that are the very foundation of our democracy. It is not only in remembering that shameful past that we can make amends and repair our nation, but [it] is in remembering that past that we can build a better present and a better future ... So today America does remember the hundreds of men used in research without their knowledge and consent. We remember them and their family members. Men who were poor and African American, without resources and with few alternatives, they believed they had found hope when they were offered free medical care by the United States Public Health Service. They were betrayed ... No power on earth can give you back the lives lost, the pain suffered, the years of internal torment and anguish. What was done cannot be undone. But we can end the silence. We can stop turning our heads away. We can look you in the eye and finally say on behalf of the American people, what the United States government did was shameful, and I am sorry.

Any comparison must take account of variations in the political context, the cultural norms of official announcements, and the personalities of the apologists. As Renteln<sup>47</sup> noted, apology may not have the same meaning in all societies. Another confounding factor is that the New Zealand and United States pronouncements were addressed to different audiences for different forms of abuse. However, dimensions that are present in the Tuskegee apology and central to Marrus' "complete apology" are: explicit expression of the wrong and the consequent harm; acceptance of responsibility; and remorse.

To achieve closure, a fulsome apology is particularly necessary in the health care context because the nature of the relationship "necessitates a high degree of trust and intimacy".<sup>48</sup> More broadly, apology may be viewed as the "centrepiece in a moral dialectic between error and forgiveness".<sup>49</sup> The effectiveness of New Zealand's announcement may be examined from Taft's perspective:<sup>50</sup>

Its purpose is to give voice to repentance through expression of sorrow and admission of wrongdoing ... the absence of either renders the apology incomplete and interrupts its moral dimension.

Also, Marrus observed another justification for revealing the complete content of the apology in the public record: the apology has current relevance. Marrus asserted that official apologies are issued for historic wrongs because the "persistent grievances" are "damaging to present-day institutional credibility and civic responsibility".<sup>51</sup> In New Zealand, although legislative reforms

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46 At 85, citing Bill Clinton "Remarks by the President in Apology for Study Done in Tuskegee" (16 May 1997) White House <<http://clinton4.nara.gov/>>.

47 AD Renteln "Apologies: A cross-cultural analysis" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 61.

48 J Robbennolt "What we know and don't know about the role of apologies in resolving health care disputes" (2005) 21 Ga St U L Rev 1009 at 1009.

49 L Taft "Apology and medical mistakes: Opportunity or foil?" (2005) 14 Annals Health L 55.

50 At 71.

51 Marrus, above n 2, at 84.



may have occurred, there were significant opportunities to learn preventive lessons for improvement of mental health services and to enhance the credibility of the current government. Another critique is that while Marrus' notion of reparation is achieved through New Zealand's early payments, the announcement made no claims that the past wrongs would not be repeated. These assurances are central to a full and effective apology.<sup>52</sup> To this extent, the Government's public statement does not have the hallmarks of a complete apology.

The Forum and Service could be viewed as supplemental reparative strategies. Although both invited participants to "tell the government what happened", the outcome of the Service will not be reported or analysed due to its highly confidential nature. Neither initiative was designed to address prevention through systemic review and reform. Yet a key element of preventing future adverse outcomes is gathering information about the events that have occurred.<sup>53</sup> In fact, neither panel heard (or hears) complaints that relate to events after November 1992, based on the assertion that the legislation and services have been adequately reformed in the interim.

#### IV. IN DEFENCE OF NEW ZEALAND'S APPROACH

Admittedly, not all strategies will satisfy everyone and in many ways the strategies can never be complete. However, New Zealand employed a range of novel, pro-therapeutic techniques to apologise, address victims' desires to be heard and (in some instances) compensate. This combination could certainly be viewed as an "indicator of sincerity"<sup>54</sup> and a strenuous effort to "make trustworthy institutions trusted".<sup>55</sup>

Action is an essential feature of effective apology, to achieve reparation that addresses the victims' tangible needs.<sup>56</sup> On an international scale of official apologies for historic injustice, New Zealand could be highly rated for its relevant, responsive engagement with victims. The Government went beyond mere pronouncements to provide concrete, safe and non-adversarial arenas for victims to voice their experiences, with referrals to appropriate services.

Also, there may be several explanations for the Government's confidential, personal apology. Due to multiple constraints, governments may choose to not publish apologies, thereby averting accusations that victims are being used for political purposes or that the apology is used as a means to avoid accountability.<sup>57</sup> Private apologies may be appropriate when some victims want to avoid publicity. Thus New Zealand's efforts may be viewed as a complex balancing process; the Government may have prioritised some patients' preferences for a private apology while addressing the public's interest in transparent processes.

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52 Thompson, above n 6; J Kleefeld "Thinking like a human: British Columbia's *Apology Act*" (2007) 40 UBC Law Rev 769.

53 JR Cohen "Toward candor after medical error: The first apology law" (2004) 5 Harvard Health Policy Review 21.

54 A Allan "Apology in civil law: A psycho-legal perspective" (2007) 14 Psychiatry, Psychology and Law 5.

55 P De Greiff "The role of apologies in national reconciliation processes: On making trustworthy institutions trusted" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 120.

56 D Slocum, A Allan and MM Allan "The relationship between apology, sorrow and forgiving: The findings of a qualitative and quantitative study" (paper presented at the Third International Conference on Therapeutic Jurisprudence, Perth, Western Australia, June 2006).

57 Coicaud and Jonsson, above n 7.

Arguably, New Zealand struck the appropriate balance in choosing how it announced its apology, taking account of: the severity of the injustice; the extent to which the abuse was publicly known and “ingrained in the public psyche”;<sup>58</sup> and the importance of the underlying value of public trust in official bodies and services for dependent individuals.

Of relevance to New Zealand, some governments that apologise for wrongs committed by previous regimes are criticised regarding the authenticity of the apology.<sup>59</sup> The difficulty is that the giver of the apology and those responsible for the injustices are separated by time. Hopefully, the specific conditions and regimes that tolerated or ignored abuse have been eliminated. Marrus helpfully explained how officials may overcome the authenticity challenge. They may “relay credibly a message of historic responsibility” by establishing the truth about violations, acknowledging the state’s responsibility, and expressing the continuity of the state and rule of law.<sup>60</sup> To that extent, New Zealand’s multiple strategies effectively communicated its aspirations symbolically and offered concrete services.

Regarding New Zealand’s failure to promise reform, it could be argued that a promise to reform is easy to give and difficult to implement. The 1992 time limit was due to a change in medico-legal policy and practice, and the Government has expressed its belief that the same misconduct could not be repeated. While there is an argument that no government can guarantee perfect practice, governments do have an obligation to establish accessible and effective processes to address substandard practice. Further research with mental health consumers on standards within services would indicate whether the Government’s beliefs are well-founded and whether its protections are robust.

## V. A PECULIAR JUXTAPOSITION?

New Zealand’s Service is portrayed as a therapeutic effort towards reconciliation. But aggrieved persons may also pursue a civil claim through the adversarial legal process. To understand the tensions that arise, the benevolent aims of the Service described above will be contrasted with the unsuccessful civil lawsuit by plaintiff J. In a neutral tone, the High Court decision reported the evidence offered by J and her witnesses regarding their harrowing institutionalisation at Porirua Hospital, under conditions similar to those at Lake Alice. Simultaneously, the Government sponsored a non-legal, benevolent listening Service for former victims of psychiatric abuse. Although the Service was functioning during the course of J’s lawsuit, the Government’s reconciliatory intent was not expressed in the decision; nor were the Gallen Report or the Government’s reconciliation services referenced.

### A. *J v Crown Health Financing Agency*

The following New Zealand case portrays a standard legal process within the court system and is representative of its kind. The High Court decision in *J v Crown Health Financing Agency*<sup>61</sup> addressed J’s admission at age 18 in 1954 to Porirua Hospital and events that allegedly had

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58 BT White “Say you’re sorry: Court-ordered apologies as a civil rights remedy” (2005-2006) 91 Cornell L Rev 1261 at 1309.

59 Marrus, above n 2; Thompson, above n 6.

60 Marrus, above n 2, at 82.

61 *J v Crown Health Financing Agency* HC Wellington CIV-2000-485-876, 8 February 2008.

occurred between 1956 and 1960. The claim was based on assault and battery and negligence. J did not bring the claim earlier because she believed she could not sue. She claimed general damages of \$650,000, exemplary damages of \$45,000, and special damages for pecuniary loss of \$250,000.

The 100-page decision related to J's claim that she was subject to cruel treatment, crossing the line into deliberate emotional and physical harm, while hospitalised by the State. She alleged that nurses assaulted her on a regular basis. A non-exhaustive list of alleged abuses included: dragging J by her hair; dragging J by the collar or with her arm twisted up her back to seclusion for punishment; striking J when she was stripped of her clothes; slapping J across the face and body; punching and pinching J; and being forced to the ground by a nurse while being sat on in the small of her back and struck around her head and ears. Also, J reported that she was routinely assaulted by other patients.<sup>62</sup>

The Court identified that the essential legal issues were:

1. whether J proved that she was subjected to indecent and physical assaults by nursing staff, was punished or threatened to be punished through use of electro-convulsive therapy (ECT), insulin therapy and seclusion, and/or suffered harm through breaches of duties of care;
2. whether Crown Health Financing Agency was vicariously liable for damages; and
3. whether the proper measure of compensatory and/ or exemplary damages in event liability was established.

The Court held that for therapies to have been administered for reasons of punishment, there had to have been improper and unethical behaviour fuelled by vindictive motives. However, J had not proved on the balance of probabilities that ECT, insulin therapy or seclusion were administered or threatened for punishment. Despite J's perception that the treatment was a threat of punishment, the Court was satisfied that justification for the treatments existed.

The Court held that the nature and inadequacy of J's evidence did not meet the evidentiary burden for the majority of allegations. However, the cause of action in assault and battery through physical assaults by junior nurses or nurse aides was established. Yet the claims were barred because J's failure to make the present claim earlier was not because of her disability. But for the Limitations Act 1950, J would have been entitled to a modest award of damages for distress and suffering at the time of the incidents. Exemplary damages were not appropriate. J's claim was dismissed.

### *B. Lessons from the J case*

Although J's case did not succeed, it established in the public record that State officials were aware of substandard conditions in psychiatric institutions for decades. For example, in 1954 the District Inspector reported that there was the equivalent of 2.5 full-time doctors, "which is quite inadequate to properly supervise and care for some 1600 patients".<sup>63</sup>

Likewise, in 1957 the Official Visitor (who had 40 years' experience in this capacity) complained:<sup>64</sup>

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62 At [124].

63 At [111].

64 At [115].

The institution has become a ward of the Wellington Public Hospital. When an old patient there becomes too troublesome to be looked after, this patient is removed to Porirua Hospital and in many cases is dead in under a month. Such patients should never be sent to this institution but unfortunately there is no other home provided for them ... In this land of plenty, the conditions at present existing are somewhat astounding.

Also, the case revealed the social conditions of adolescents who were institutionalised. The vulnerability of eight witnesses who were hospitalised at the relevant period is indisputable. Most were adolescents when admitted (although at the time of the hearing, their ages ranged from 60 to 76). Ms ZLC was 14 years old and from a family of 16. Ms JH was 15 and from a family of 11. Ms BMY was 15 and hospitalised after experiencing childhood sexual abuse. When Ms CS was 13, her father was imprisoned for sexual abuse on a family member; she was institutionalised two years later and reported that she was raped by another patient in his 30s at Porirua Hospital. The Court responded:<sup>65</sup>

Given the layout of the grounds, and what is known to have occurred in other mental institutions as to sexual acts, or contact, between patients (with or without consent) this event probably occurred.

The Court's rendering of the legal issue seems to avoid acknowledging the destructive effects upon the victim. Yet the expression of compassion is essential to peaceful co-existence in society and an appropriate response to the perception of unjustified suffering, including in the context of civil litigation.<sup>66</sup> Proponents of therapeutic jurisprudence would inquire whether the legal process itself could better acknowledge victims' and witnesses' mental and physical distress, both during the initial incidents and during the process of litigation.<sup>67</sup> Offering a patient's perspective, Stevens eloquently documented the impact of anti-therapeutic legal proceedings surrounding her hospitalisation.<sup>68</sup> Also, she expressed the potential of therapeutic jurisprudence for both recovery and closure.

Many of the witnesses in the J case had a common purpose: advocacy for others. Ms DNJ claimed: "All I'm doing is trying to stick up for some people who were treated badly."<sup>69</sup> Likewise, Ms BMY harboured "no ill will towards those at Porirua Hospital" but wished to "tell her own story so as to be able to help others".<sup>70</sup> A recurring and urgent goal expressed by witnesses, litigants and Forum participants<sup>71</sup> is that their histories are documented in the public record to assist others.

Evidently this Court did not adopt the healing ethos of the Government's other services for aggrieved psychiatric victims. The question remains whether that ethos could be brought to bear

65 At [187].

66 NR Feigenson "Merciful damages: Some remarks on forgiveness, mercy and tort law" (1999) 27 *Fordham Urb L J* 1633.

67 D Wexler and B Winick *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, Durham, 1996); K Diesfeld and I Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot, 2003).

68 S Stevens "Where is the asylum?" in K Diesfeld and I Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot, 2003) 95.

69 *J v Crown Health Financing Agency*, above n 61.

70 At [199].

71 Department of Internal Affairs, above n 1.

on legal processes for survivors of historic injustice. In the interim, what additional recourse have victims sought?

## VI. AN INTERNATIONAL SOLUTION?

A New Zealand lawyer who represents former patients of Lake Alice and other hospitals has described the institutional practices as inhuman, degrading treatment or punishment. Sonja Cooper made submissions to the Committee Against Torture at the Office of the United Nations High Commissioner for Human Rights in 2009.<sup>72</sup> Citing the Forum's reports to the Government, Cooper reported that "many participants hoped for a public acknowledgement or apology".<sup>73</sup> Most of the clients did not make a police complaint because the police are reluctant to investigate historic abuse allegations. Importantly, due to the damage from mistreatment most clients were not "emotionally robust enough to deal with the trauma of giving evidence about the abuse they suffered in a criminal investigation".<sup>74</sup>

For over five years Cooper's firm advocated for a non-adversarial, out-of-court resolution.<sup>75 76</sup>

New Zealand is lagging behind other Commonwealth countries in investigating and addressing abuses of children in State care and of former psychiatric patients. In recent years, there have been formal Government Inquiries in Australia, Canada, Ireland and England into the treatment of children in residential institutions. These Inquiries have found patterns of widespread and systemic abuse extending over many years. Mechanisms have been created outside of the court system for recognising the harm done and providing redress to victims. New Zealand also has its own precedents for undertaking such investigations and resolving claims out of court.

The complainants to the United Nations in 2009 reported that the Government has: "contested almost all claims vigorously; relied heavily on technical defences ... ; denied the existence of any systemic problem or culture of abuse; refused to conduct an official inquiry ... ; and refused to implement out-of-court settlement".<sup>77</sup> Finally, the Government failed to promptly and impartially examine the cases, which is in breach of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>78</sup> Article 13 states:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

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72 S Cooper *Information for the Consideration of the Fifth Periodic Report of the Government of New Zealand* (2009) Committee Against Torture: Forty Second Session (2009) <www2.ohchr.org>.

73 At 2.

74 At 2.

75 At 2.

76 For discussion of New Zealand's Treaty of Waitangi settlement activity, see M Gibbs "Apology and reconciliation in New Zealand's Treaty of Waitangi settlement process" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 154.

77 Cooper, above n 72, at 3.

78 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

The six-year delays of litigation caused considerable distress to Cooper's clients, "who ask how a moral and just State, which has obligations to protect them, can allow this to happen without providing any redress".<sup>79</sup> She predicts that it would take approximately 150 years for the currently filed claims to progress through the courts.

More recently, New Zealand's response has come to the attention of the international human rights community. In May 2012 the United Nations Committee Against Torture requested an explanation from the New Zealand Government. The Committee raised concerns over the decision by the police to end its investigation in 2009 without prosecuting any staff. Felice Gaer, Committee representative, asked if the Government "intends to carry out an impartial investigation into the nearly 200 allegations of torture and ill treatment against minors at Lake Alice". While the Ministry of Justice reported that the Government will respond, the Ministry did not indicate the nature of its eventual response.<sup>80</sup>

## VII. REFLECTIONS UPON LITIGATION: THE CHALLENGES A GOVERNMENT FACES

New Zealand, like other jurisdictions, faces difficulties in delivering a fully satisfactory response to historic abuses. First, further financial settlement with complainants could have far-reaching effects. For example, settlement by the Government signals it was responsible for historic abuses. This acknowledgement of responsibility through a settlement could be the basis for the Government's liability in existing and future proceedings. Also, a settlement may encourage others to pursue litigation and their claims would not be barred by the settlement. The financial impact could be enormous, particularly for New Zealand, a country with a population of 4.43 million people<sup>81</sup> which is absorbing the impact of the Pike River Mine disaster, recent Christchurch earthquakes and the Tauranga oil spill.

Second, there are legal barriers to litigation, as demonstrated in the above case. They include limitation periods, the inadequacy of proof, and the death of relevant witnesses and defendants. Third, arguably the legal and professional standards of 2012 must not be applied to the conduct of mental health workers from four decades ago; justice requires acknowledgement of the historical context, resources and scientific knowledge of the previous era.

Given these factors, New Zealand is contemplating how to demonstrate its continuing commitment to former, existing and future mental health service consumers. The Government has expressed its dedication to upholding patients' rights and monitoring health providers' conduct from the 1990s. For example, it has enacted a range of domestic legislation, including the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Human Rights Act 1993, the Health and Disability Commissioner Act 1994 and the Health Practitioners Competence Assurance Act 2003. Importantly, in 2008 New Zealand ratified the United Nations Convention on the Rights of Persons with Disabilities.<sup>82</sup> Given this stated commitment to

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79 Cooper, above n 72, at 3.

80 Martin Johnston "UN asks Govt to re-open hospital abuse probe" *The New Zealand Herald* (Auckland, 23 May 2012).

81 Statistics New Zealand "National Population Estimates: March 2012 quarter" (14 May 2012) <www.stats.govt.nz>.

82 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

protection of mental health consumers, New Zealand grapples with how to remedy the past injustices.

New Zealand is poised to respond to these competing demands. It has provided a range of strategies that have been accepted by some former patients. However, litigation is under way and the United Nations has been alerted. New Zealand's future response may be instructive for other jurisdictions that face similar historic abuses.

### VIII. WHAT DOES THE NEW ZEALAND APPROACH TELL US ABOUT JUSTICE SEEKING IN OUR TIME?

New Zealand offered a non-legal strategy for victims of historic psychiatric abuse through its public announcement and personal apology, settlement for some, reconciliatory programmes and the (potential) wellness payment. New Zealand has not blocked access to civil litigation. Yet grievances still exist. How satisfied are survivors with the Government's incremental and complex response?

Victims' recent efforts to pursue civil litigation, criminal prosecutions and the complaint to the United Nations are evidence that many victims were not satisfied with New Zealand's reconciliation techniques and apology. As Allan observed, "victims may have a much more complex understanding of apology" than others appreciate.<sup>83</sup> Equally, the New Zealand Government may have been unaware of this complexity. What might be required for resolution?

Perhaps there is a need for a new, official, public acknowledgement of the destruction caused by the past abuses. According to White, "[w]hen governments apologise for past injustices, they acknowledge these evolving norms and establish a new social contract".<sup>84</sup> It would appear that a new social contract would be beneficial at this impasse and a renewed apology, with additional commitments, may be a partial solution.

To reflect the Government's reconciliatory intents, this apology might more clearly resemble an "authentic expression of sorrow meant to facilitate healing".<sup>85</sup> The nature of the official, political apology is very significant. According to Thompson:<sup>86</sup>

The ceremony that surrounds the apology, who performs the role of apologising and the other roles that the ceremony demands—should be endorsed by victims and their representatives.

This renewed apology could include collaboration with, and an explicit commitment from, the Health and Disability Commissioner and other relevant officials who safeguard the legal rights of dependent individuals. Ideally, the communication would be an explicit assurance by the Government that victims' and service users' views will meaningfully inform future improvements to relevant services.

An essential, imperative priority for New Zealand is prevention, which is also a core element of Marrus' complete apology. Typically, official apologies provide assurances that the events will not recur. Likewise, Taft asserted that official recognition of wrongdoing includes the

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83 Allan, above n 54, at 8.

84 White, above n 58, at 1282.

85 L Jesson and P Knapp "My lawyer told me to say I'm sorry: lawyers, doctors and medical apologies" (2008–2009) 35 *Wm Mitchell L Rev* 1410 at 1444.

86 Thompson, above n 6, at 41.

expectation that “a culture of honesty and openness will disrupt those cultures of silence that tend to hide systemic problems”.<sup>87</sup> Clearly, prevention is a priority for New Zealand survivors because repeatedly and in diverse fora they have revealed their abuse in hopes of averting similar injustices. The recurring call for prevention indicates that problematic practices continued after 1992. Logically, patients’ priorities would guide the platform of assessment, monitoring and safeguards. Regarding the process of litigation, perhaps legal decisions could better acknowledge the trauma that claimants and their witnesses express (regardless of whether the claimants are ultimately awarded damages). While New Zealand established laudable strategies for reconciliation with victims of historic abuse, the final analysis of its success may depend on how it integrates victims’ priorities in the next stage of resolution.

### IX. ACKNOWLEDGEMENT

This chapter is dedicated to the former Lake Alice resident who revealed her experiences to me as encouragement to pursue this research. Also I thank PWD. The recommendations of Professor Giselle Byrne, Professor Margaret Wilson and the external reviewers are greatly appreciated, although I am responsible for the resulting analysis. Claire Booth provided insight on the Confidential Listening and Assistance Service. The University of Waikato’s interdisciplinary symposium “Apology, remorse and reconciliation” in 2010 was a source of great inspiration. Sabbatical support was generously provided by AUT University and Te Piringa Faculty of Law.

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87 Taft, above n 49, at 87.



# IMPROVING NEW ZEALAND'S PROSECUTION SYSTEM: A PRACTICAL REFORM PROPOSAL TO AVOID MISCARRIAGES OF JUSTICE

BY NIGEL STONE<sup>\*</sup>

## I. INTRODUCTION

This paper discusses a practical reform proposal to prevent miscarriages of justice arising from prosecutorial (or police) misconduct, namely to allow only Crown solicitors the power to lay charges relating to certain crimes. Crown solicitors would perform an analysis of the evidence obtained at an early stage of the police investigation, and make a decision whether new lines of enquiry should be followed, or existing ones built upon, prior to determining whether charges should be brought by the Crown. This would increase the quality of decision-making at the early stages of a case, reducing the potential for intervention at the appellate level on the basis of a miscarriage of justice. As we shall see, not only is this reform in keeping with sweeping policies recently adopted in England and Wales, and longer-standing policies in Canada and Australia; it also provides direct and indirect cost savings throughout the system.

Any commentary on the law concerning miscarriages of justice in New Zealand is necessarily indebted to the work of Sir Thomas Thorp<sup>1</sup> and his 2005 paper "Miscarriages of Justice".<sup>2</sup> In that paper, Sir Thomas comprehensively argues for a specialised and fully independent New Zealand authority to identify miscarriages of justice beyond the existing appellate arrangements, similar to those authorities employed in England, Wales and Scotland. This paper supports Sir Thomas' conclusions and builds upon the so-called "front end" reform he refers to by aiming to prevent miscarriages of justice from occurring in the first place.<sup>3</sup>

### A. *Definition of Miscarriage of Justice*

The term "miscarriage of justice" has a diffuse meaning. At its widest, it popularly means false attribution of guilt,<sup>4</sup> and may encompass very minor matters. The judiciary, legal profession,

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\* Nigel Stone, postgraduate student, University of Cambridge; LLM (Hons), Auckland University, 2011; BA History, LLB Victoria University of Wellington, 2003; former Crown prosecutor; admitted as a barrister and solicitor of the High Court of New Zealand, 2004.

1 Former High Court Judge, Chairperson of the Parole Board and Crown Prosecutor.

2 Thomas Thorp "Miscarriages of Justice" (Legal Research Foundation, Auckland. 2005).

3 At 79: "The identifications in overseas studies of common sources of error indicate areas likely to repay study. However, the conclusion of such indications into practical reform proposals, appropriate to New Zealand conditions, calls for detailed consideration by persons and agencies sufficiently skilled and resourced for that purpose."

4 William Young "The Role of the Courts in Correcting Miscarriages of Justice" (paper presented to Legal Research Foundation's Miscarriages of Justice Symposium, Auckland, August 2010) at 3

legislators and the media<sup>5</sup> usually define the term as wrongful convictions in serious criminal matters,<sup>6</sup> and this paper will adopt that narrower definition. It is worth noting that prosecutors may fall foul of other types of misconduct not amounting to a miscarriage of justice that go beyond the scope of this paper.<sup>7</sup>

“Miscarriage of justice” is not defined in New Zealand legislation, even in Acts that could be expected to address the concept, such as the Crimes Act,<sup>8</sup> the Evidence Act<sup>9</sup> or even the Supreme Court Act.<sup>10</sup> The central protection against miscarriages of justice is set out in s 385 of the Crimes Act (specifically mentioning “miscarriage of justice”), and courts have expended considerable effort to define the term as it appears within the context of s 385.<sup>11</sup>

## II. PROPOSED REFORM – PROFESSIONALISATION OF CHARGING IN CASES OF SERIOUS CRIME IN NEW ZEALAND TO PREVENT MISCARRIAGES OF JUSTICE

### A. Introduction

The New Zealand criminal justice system should be reformed in respect of charging decisions in serious cases. The charges laid and enquiries followed at the early stages of a case have a significant impact at any subsequent trial, and in a way which is very difficult to undo as the trial progresses. Oversight by Crown solicitors at these early stages would ensure higher quality decision-making with improved outcomes for the criminal justice system overall. While Crown prosecutors review cases from a variety of government departments (if and when those matters enter the indictable jurisdiction), this paper concentrates solely on the practices of the police. This is primarily as a result of the generally more significant penalties associated with charges that may be laid by the police, and the seriousness of the crimes police investigate. This paper proposes the adoption of a schedule of offences that may only be laid by Crown solicitors, starting with homicide, and with the intention of expanding the list of crimes included in that schedule over time.

This paper will focus only on the indictable jurisdiction, which encompasses all serious criminal prosecutions in New Zealand. Implementing the reforms proposed in this paper in the

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5 The history of the Court of Appeal in England and Wales (and New Zealand) is inextricably linked with the media. For a discussion on this topic see Richard Nobles and David Schiff *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford University Press, Oxford, 2000) at 48.

6 At 16.

7 These include conduct such as participating in an abuse of the Court’s processes. See *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) or *Fox v Attorney General* [2002] 3 NZLR 62.

8 Crimes Act 1961.

9 Evidence Act 2006.

10 Supreme Court Act 2003.

11 See for example *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 and *Petryszick v R* [2010] NZSC 105, [2011] 1 NZLR 153.

summary jurisdiction, in addition to the indictable jurisdiction, would be too costly when compared to the benefit to the criminal justice system overall.<sup>12</sup>

### B. *History of Charging Practices in England, Wales and New Zealand*

It is worth examining why police in England and Wales (and by extension New Zealand) were and still are permitted to lay charges in courts at all. Historically in England, criminal prosecutions were brought by the King's subjects exercising their public duty to prosecute crime.<sup>13</sup> Even after the "King's peace" eventually covered the whole of the realm of England (precluding the need to petition any number of feudal lords or rural communities for justice),<sup>14</sup> the system still relied on the King's subjects to petition him to enforce justice in most cases.<sup>15</sup> In more recent centuries, English citizens were assisted by justices of the peace (members of the local gentry), who served as what we would term "amateur detectives" and pre-trial committal officers.<sup>16</sup>

Throughout the late 17th and early 18th centuries, an expanding number of government departments in England began to employ "institutional solicitors", who were tasked with investigating and prosecuting criminal cases in their respective areas of oversight. The entities these solicitors represented included the Treasury, the Mint, the Bank of England and the East India Trading Company.<sup>17</sup> This practice continues to this day, and having been adopted in New Zealand, it is commonplace to see lawyers from government departments appearing in the summary jurisdiction of District Courts throughout the country, bringing charges following their investigations, and in some cases making submissions or eliciting evidence.

After the English Parliament enacted the Metropolitan Police Improvement Bill in 1829,<sup>18</sup> a modern, united and disciplined police force emerged in the London metropolis,<sup>19</sup> and later throughout England.<sup>20</sup> During this period there was a decline in influence of the justices of the peace, especially as it became harder to find men of high social position to fulfil the role in metropolitan London and surrounding Middlesex.<sup>21</sup> For this reason (as well as others) private prosecution standards declined at this time.<sup>22</sup> It would not be until the establishment of a Director of Public Prosecutions (DPP) in 1879 that the English system of public prosecutions began to

12 Arguments for limiting the role of police officers in the summary courts have been made for some time. See Sean McGonigle "Public Accountability for Police Prosecutions" (1996) 8 Auckland U L Rev 163 and Stephanie Beck "Under Investigation: A Review of Police Prosecutions in New Zealand's Summary Jurisdiction" (2006) 12 Auckland U L Rev 150. While these papers were published before the introduction of the nominally independent Police Prosecutions regime, many of the arguments made are still relevant.

13 AH Manchester *A Modern Legal History of England and Wales 1750–1950* (Butterworths, London, 1980) at 226.

14 Philip Stenning *The Modern Prosecution Process in New Zealand* (Victoria University Press, Wellington, 2008) at 27.

15 John Langbein, Renée Lerner and Bruce Smith *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen Publishers, New York, 2009) at 31–32.

16 At 666.

17 John Langbein *The Origins of Adversary Criminal Trial* (Oxford University Press, Oxford, 2003) at 113–119.

18 Manchester, above n 13, at 221.

19 Langbein *History of the Common Law*, above n 15, at 673.

20 Law Commission *Criminal Prosecution* (NZLC PP28, 1997) at [44].

21 Langbein *History of the Common Law*, above n 15, at 666.

22 Law Commission, above n 20, at [44].

consolidate, and even then the DPP did not assume more modern duties until 1908.<sup>23</sup> As there was no other obvious entity to lay charges on behalf of the police in England in the mid to late 19th century, they were simply treated in the same way as the institutional solicitors. By the beginning of the 20th century, the role of the police as both an investigative *and* charging prosecutorial agency had become entrenched.

Colonial New Zealand provided comparatively less work for Antipodean lawyers than their English counterparts in the early years after nationhood.<sup>24</sup> New Zealand history during this era has examples of part-time Crown prosecutors for whom the title of prosecutor seems to have been but another feather in their cap. This is why we see very early New Zealand lawyers such as Sir Richard Hanson holding various roles, including Crown Prosecutor,<sup>25</sup> Land Purchase Officer to the New Zealand Company<sup>26</sup> and founding member of the Wellington Council of the Colonists.<sup>27</sup> Furthermore, parts of the English legal system were not feasible in Victorian New Zealand because of the limited numbers of settlers in the colony. As an example, grand juries were not used in New Zealand in certain cases that would have otherwise called for them, had they occurred in England or Wales;<sup>28</sup> and under this system, prosecutors themselves could present cases for trial.<sup>29</sup> Perhaps most significantly of all, the New Zealand legal profession was fused from its inception; all lawyers could practice as both barristers and solicitors.<sup>30</sup> This would play an important role in the nature of the work for Crown prosecutors as both barristers in court *and* solicitors able to receive briefs. Thus, this central part of New Zealand's legal framework arose from a lack of human resources and the need to truncate English practices that were otherwise unfeasible.

When criminal justice reform eventually did take place in England with the establishment of a DPP in 1879 (and refinement of the office in 1908), lawmakers in New Zealand did not see fit to alter the status quo, and retained the Crown solicitor model of prosecutions. Police in New Zealand appear to have always had a role in bringing those they arrest before judicial officers, and by 1864 were also expected to act as prosecutor in the summary jurisdiction. Crown solicitors have always had jurisdiction over indictable matters following the committal.<sup>31</sup>

An important factor preventing reform in England and Wales, but not in New Zealand, has been pressure from the English Bar (which wields considerable political power)<sup>32</sup> to limit the role

23 Manchester, above n 13, at 228.

24 David Collins "The Independence of the Prosecution" (paper presented to New Zealand Legal Method Conference, Auckland, 23 October 2009) at [11].

25 This was a different role from "Crown solicitor", which did not come into existence until 1864. See *Crown Law Office Prosecution Guidelines* (1 January 2010) <[www.crownlaw.govt.nz](http://www.crownlaw.govt.nz)> at 2.

26 Robin Cooke (ed) *Portrait of a Profession* (AH & AW Reed, Wellington, 1969) at 24.

27 NA Foden "Wellington's First Crown Prosecutor" (1936) 12 NZLJ 256.

28 Stenning, above n 14, at 72–73.

29 Law Commission, above n 20, at [51].

30 Supreme Court Ordinance 1841 and 1844. Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History: Second Edition* (Brookers, Wellington, 2001) at 250. Strictly speaking, "New Zealand developed a profession that was theoretically made up of distinctive branches but allowed for the combined practice of its members": at 251.

31 Law Commission, above n 20, at [50].

32 Kenneth MacDonald QC, former Director of Public Prosecutions in England and Wales "Independent Prosecutors and Democratic Accountability" (4 March 2012) London School of Economics <<http://www.youtube.com>> at approximately 8:20 minutes.

of the DPP. In England, serious prosecutions are handed to a barrister for trial and barristers have an economic incentive to keep participation of the DPP throughout the system to a minimum. For a century this model was maintained until reforms strengthened the function of the DPP in the early years of the 21st century (see II D 1 below).

We may conclude, therefore, that police participation in charging and court proceedings in New Zealand is primarily the result of apathy on the part of English government and its legal establishment in the 19th century and centuries before that time. Political pressure in England kept reforms necessary to strengthen the system from occurring until relatively recently. In modern New Zealand, actions that many would conclude as rightfully the role of the Crown are performed by police labouring under this “ad hoc” 19th century arrangement. The New Zealand Crown solicitor system functions like a hybrid of the English DPP and independent bar, and the “DPP function” of Crown solicitors has remained relatively weak. This is not the case in other comparable jurisdictions referred to below. New Zealand should adopt the reforms set out below which have taken place in England and elsewhere, modifying them to suit the New Zealand model of prosecutions, and empower Crown solicitors with greater oversight at the early stages of a case.

### C. Common Causes of Miscarriages of Justice

This paper does not focus on the causes of miscarriages of justice themselves, as this topic has been comprehensively examined elsewhere.<sup>33</sup> What is most significant to grasp about this area is that judicial opinion and scholarship in this subject recognises there are in fact relatively few causes of miscarriages of justice. The same mistakes appear to be repeatedly made and will continue to be made, unless changes are instigated.

General categories under which miscarriages of justice fall include:

1. “Tunnel vision”, where suspects or lines of enquiry are ignored because they do not fit a pre-existing theory of the case, to the detriment of the overall investigation.<sup>34</sup>
2. Visual misidentification, as this kind of evidence is associated with a number of wrongful convictions.<sup>35</sup>
3. Inadequate disclosure (usually on the part of police) resulting in unfairness to an accused.<sup>36</sup>
4. Unreliable or distorted scientific evidence presented to juries by prosecutors.
5. Improper use of in-custody informants, who are referred to in “almost every review of miscarriages of justice”.<sup>37</sup>

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33 See generally Thorp, above n 2, at 79–84; or Bruce MacFarlane “Causes of Wrongful Convictions, and How to Avoid Them” in “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31 Manitoba L J 403 at 435–483; and Federal/Provincial/Territorial Heads of Prosecution Committee Working Group (Canada) “Report on the Prevention of Miscarriages of Justice” (September 2004) Department of Justice Canada <www.justice.gc.ca>.

34 *R v Dougherty* [1996] 3 NZLR 257, (1996) 14 CRNZ 145 (CA) is an example of this phenomenon. *R v Sophonow* [1984] 2 SCR 524 (SCC) is a well known Canadian example. See also Grant Hammond “The New Miscarriages of Justice” (2006) 14 Wai L Rev 1 at 2.

35 Judges in New Zealand are required to warn juries of the “special need for caution” before convicting defendants based on identification evidence for this reason: Law Commission *Evidence. Volume 2: Evidence Code and Commentary* (NZLC R55, 1999) at [398]; and Evidence Act 2006, s 126.

36 The Criminal Disclosure Act 2008 sets out a new regime in New Zealand for disclosure in an attempt to reduce the possibility of this occurring.

6. “Noble cause corruption”, where prosecutors or police decide the end justifies the means of securing a conviction and conduct themselves accordingly to secure a guilty verdict.<sup>38</sup>
7. Flawed or false confessions and flawed interrogations.
8. Improper conduct by prosecutors during a trial; playing upon the jury’s sympathy or prejudice.<sup>39</sup>

#### D. *The Current Regime and Proposed Changes*

At the present time, Crown solicitors do not, as a rule, make the initial decisions about what charges should be laid in criminal cases; and they cannot discontinue proceedings except generally in open court, by either withdrawing charges or by not entering evidence.<sup>40</sup> In most cases, Crown prosecutors first become involved after there has been a committal for trial,<sup>41</sup> and must file an indictment within 42 days of that committal.<sup>42</sup> Trial commences at some point in time after that, depending upon court resources. In practical terms, it is likely Crown prosecutors preparing for trial will first set eyes upon a case scheduled for trial some months (and in some cases years) after the initial police investigation and the laying of the original charge or charges. At this point the trial may be only weeks away.

In certain cases, Crown prosecutors will provide advice to police at the investigatory stage, for example about the legality of a search or seizure, or whether the delay from the time an offence is alleged to have taken place to the date of investigation can be justified.<sup>43</sup> This is often as a result of the growing importance placed on human rights and bills of rights.<sup>44</sup> Nevertheless, comprehensive advice from Crown prosecutors to police officers about the investigation proper, during the investigation itself, remains the exception.

Crown prosecutors examine the case and will often communicate with the officer in charge of the police investigation requesting additional evidence. This additional evidence will be necessary to argue the case as it stands so that the counts (charges) in the indictment may be proved beyond a reasonable doubt. This process is made more difficult firstly because of the lapse of time between the initial investigation, and secondly because the trial date may be only a short time away. Moreover, this system tends to create new evidence, which must be disclosed to the defence shortly before trial. These significant defects have been understood for some time. The Law Commission’s 1997 preliminary paper on the subject, *Criminal Prosecution*, identified the problem in the following way:<sup>45</sup>

37 Thorp, above n 2, at 80. See generally the Honourable Fred Kaufman, CM QC “The Commission on Proceedings Involving Guy Paul Morin” (1998) Ontario Ministry of the Attorney General <[www.attorneygeneral.jus.gov.on.ca](http://www.attorneygeneral.jus.gov.on.ca)>; and *R v Morin* [1992] 1 SCR 771 (SCC).

38 New Zealand’s most famous example of this is the Arthur Allan Thomas case. See generally RL Taylor *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (PD Hasselberg, Government Printer, Wellington, 1980).

39 *R v Stewart* [2009] 3 NZLR 425 (SC) is a recent example, which cites *R v Roulston* [1976] 2 NZLR 644 (CA).

40 Crimes Act 1961, s 347.

41 Summary Proceedings Act 1957, ss 145–185.

42 Crimes Act 1961, s 345A.

43 Collins, above n 24, at [45].

44 At [45].

45 Law Commission, above n 20, at 99.

Crown solicitors often come into a case at too late a stage. This point was made by many Crown solicitors and by the Crown Law Office. The police and departments are free to consult the Crown solicitor at any time, but most indictable cases come to the Crown solicitor's knowledge only after a committal for trial. As a result they have no opportunity to influence the initiation of proceedings, the choice of summary or indictable procedures, the choice of charges ... [b]y the time Crown solicitors received the papers it is often difficult to bring a case to an end, or to alter its character radically (eg, by proceeding with a different charge or taking a summary, rather than an indictable path).

The criminal justice system is also flawed in that it lacks a mechanism to stop a police case that has proceeded against one particular suspect and to begin an investigation against a different suspect. Such an about turn in the investigation would be no small issue. High-profile cases are routinely accompanied by intense public pressure and media interest to have charges brought against a suspect.<sup>46</sup> Crown solicitors would need to resist this pressure and, if necessary, delay an investigation, possibly for months in the most extreme cases. This delay must be balanced against the consequences that can follow from a determination that there has been a miscarriage of justice.

### 1. *Police Prosecutions in New Zealand*

or

#### *Quis Custodiet Ipsos Custodes?*

New Zealand currently operates a police prosecutions arrangement that was put into place following the Law Commission's report in 2000.<sup>47</sup> Either police officers in the traditional sense, or a small number of lawyers employed by the police (both with nominal independence) appear on behalf of the police in court to prosecute cases at the summary level.<sup>48</sup> This includes matters that will enter the indictable jurisdiction. The Law Commission recommended the adoption of this system for reasons of "efficiency and economy".<sup>49</sup> This system fails to adequately address the fundamental issues of transparency, legitimacy and independence that are necessary in a modern criminal justice system. In contrast to the Police Prosecutions Office, Crown prosecutors are "institutionally, financially and culturally separate from and independent of [the police]".<sup>50</sup> Any prosecution by police officers (either "sworn" or "unsworn") cannot be truly objective, as police camaraderie and cohesion preclude this. Furthermore, a police prosecutions organisation can never be seen to be objective, as Professor Stenning notes:<sup>51</sup>

There has been considerable discussion about Police Prosecutors in recent years, in which questions have been raised about both competency and possible conflicts of interest in the role. Suggestions have been made that no amount of "Chinese walls" between Police Prosecutors and their other police colleagues can be adequate to ensure the necessary impartiality and objectivity required to make good prosecutorial decisions, and that by reason of their lack of legal training, Police Prosecutors are anyway inadequately equipped for prosecutorial responsibilities. Those who make

46 Recent cases of this kind in New Zealand include *R v Kahui* HC Auckland CRI-2007-092-14990, 20 October 2007.

47 Law Commission *Criminal Prosecution* (NZLC R66, 2000) at [109].

48 "Police prosecutors do not report through the District Command structure, but directly to the National Police Service Office through the District Coordinators and Regional Managers": Stenning, above n 14, at 108.

49 Law Commission *Criminal Prosecution* (1997), above n 20, at [19].

50 Lord Justice Auld "Review of the Criminal Courts of England and Wales" (September 2001) The National Archives <<http://webarchive.nationalarchives.gov.uk>> at ch 10, [40].

51 Stenning, above n 14, at 109.

such arguments commonly point to jurisdictions such as Canada and more recently England where it has been concluded that police and prosecutorial roles are fundamentally incompatible and must be separated.

Crown solicitors need to act as a check and balance on police discretion in serious cases; echoing the sentiments of “astute and cerebral jurist”<sup>52</sup> Lord Justice Auld, who was tasked with reviewing the criminal courts of England and Wales along with the Crown Prosecution Service (CPS) in 2001.<sup>53</sup> In that report he concluded the CPS needed the power to determine the initial charge, taking control of cases in a more forthright manner as occurs with the “more highly regarded Procurator Fiscal” in Scotland (see II E below). This would allow the prosecution to take control of cases from the period charges were laid (or earlier) and “fix on the right charges from the start and keep to them”.<sup>54</sup> Lord Justice Auld was critical of the way in which the CPS did not provide advice to the police from an early stage, noting that its role is “almost wholly reactive” and that “[t]he Service is normally only brought into the picture for advice and review when the charge has been preferred or the summons issued, *and the potential for damage created*” (emphasis added).<sup>55</sup>

In a recent speech, former Director of Public Prosecutions for England and Wales (head of the CPS) Sir Kenneth MacDonald QC commented on the “broader and deeper role in criminal justice” being given to prosecutors in England and Wales over the last two years.<sup>56</sup> In his speech Sir Kenneth remarked:<sup>57</sup>

By the early 1980s a consensus had at last been reached ... that it wasn’t appropriate for the police to both investigate and prosecute crime. There needed to be separation. It began to be understood that the responsibility of the police for both – for investigation, and in effect decisions to prosecute had resulted in a series of miscarriages of justice.

In the same speech, Sir Kenneth noted the “extremely hostile” stance police in England and Wales took to the new arrangement, noting “[t]hey didn’t want to lose power. They certainly didn’t want to be supervised”.<sup>58</sup>

A politically contentious issue remains as to what extent police should retain control of these charging decisions in England and Wales. In mid-2010 the British Conservative Party was able to form a coalition government following national elections.<sup>59</sup> The Conservative Party campaigned on a platform of austerity following the global recession, and newly appointed Home Secretary Teresa May announced in June 2010 that police would be permitted to charge in a greater number of investigations than had been the case.<sup>60</sup> However, beneath any political rhetoric is a

52 MacDonald, above n 32, at approximately 12:54 minutes.

53 Auld, above n 50.

54 At ch 10, [12].

55 At ch 10, [37]–[38].

56 MacDonald, above n 32, at approximately 4:00 minutes.

57 At approximately 6:00 minutes.

58 At approximately 8:00 minutes.

59 United Kingdom Electoral Commission – UK General Election 2010 <<http://www.electoralcommission.org.uk>>; and see “Election 2010” (12 August 2010) BBC <<http://news.bbc.co.uk>>.

60 Keir Starmer QC “Director’s letter to the Attorney General” in *Crown Prosecutor Service Annual Report 2009–2010* <[www.cps.gov.uk](http://www.cps.gov.uk)>.



message that “statutory charging”<sup>61</sup> in serious cases is now a permanent feature of the criminal justice system in England and Wales. The United Kingdom House of Commons Justice Committee had earlier noted that the CPS should take a “bold and robust approach” to their role with police, challenging the police “to do better” and noting “the CPS is not a minor partner in the criminal justice system”.<sup>62</sup> The Committee heard “strong support on grounds of principle for the charging decision to rest with the prosecutor”.<sup>63</sup> This new era of “statutory charging” in England and Wales echoed certain Australian and Canadian reforms already in place (see II E below).

These reforms, and those elsewhere in the Commonwealth, do not coincide with the recommendation in the New Zealand Law Commission’s 2000 report on the subject,<sup>64</sup> which stated that the Commission did not recommend that Crown solicitors take the initial charging decision. The Law Commission made its recommendations for the following reasons:

1. Efficiency and practicality and the need for immediate arrest and charge in certain cases.
2. That in accordance with the submission of the Crown Law Office, police and Crown solicitors should be distanced from initial decisions in order to maintain the necessary level of independence. In its report, the Law Commission recommended “prosecution should be separated from investigation” on the basis that separation of these two functions provides checks and balances to protect individuals.<sup>65</sup> The Commission noted:<sup>66</sup>

A separate evaluation of a case by someone who is independent, and seen to be independent, of the investigation process:

- helps to ensure the prosecution decision is not prompted by bias or prejudice;
- lessens the chance of corruption or improper motives; and
- brings greater independent judgment to bear.

3. That Crown solicitors do occasionally suggest appropriate charges when requested by police.
4. That development of charging standards for police and prosecuting agencies will assist in obtaining quality and consistency in the original investigative decision to charge.<sup>67</sup>

With respect to the Law Commission, none of these recommendations are sustainable. The reasons this paper disagrees with the Commission’s recommendation are outlined below:

1. The term “efficiency” in this context is a reference to the additional cost of employing lawyers for longer periods of time throughout the life of a case to scrutinise the charges laid. Notwithstanding this, “professionalisation” of charging decisions adds to the robustness of the criminal justice system. This is an important part of government, and additional costs may well be appropriate if it significantly enhances the quality of the system. Moreover,

61 See generally the Criminal Justice Act 2003 (UK), pt 4.

62 “United Kingdom House of Commons Justice Committee: The Crown Prosecution Service: Gatekeeper of the Criminal Justice System: Government Response to the Committee’s Ninth Report of Session 2008-09, Second Special Report of Session 2009-10” (12 January 2010) <[www.publications.parliament.uk](http://www.publications.parliament.uk)> at 6.

63 At 7.

64 Law Commission *Criminal Prosecution* (2000), above n 47, at 38.

65 See generally Law Commission *Criminal Prosecution* (1997), above n 20.

66 Law Commission *Criminal Prosecution* (2000), above n 47, at [4].

67 At 38.

professionalisation of charging decisions will result in greater efficiencies both directly and indirectly. Indirectly, as the number of miscarriages of justice should reduce as higher quality decisions with greater objectivity are made at an earlier stage of prosecutions. Direct cost savings will be made across the justice system because of the reduced likelihood of improper charging (either overcharging or undercharging).<sup>68</sup>

Following the introduction of “statutory charging” throughout England and Wales, there has been an increase in guilty pleas by 30 per cent, a reduction in the rate of discontinuance by the early identification of “non-viable” cases by 69 per cent, and a reduction in the rate of attrition by 23 per cent (the difference between the numbers charged and the numbers convicted).<sup>69</sup> These statistics are either remarkable or the result of prosecutors “cherry-picking” cases that are likely to result in conviction, depending on the point of view adopted. The truth may lie somewhere in-between. Care should certainly be taken with these figures, as research in this area from Harvard University suggests these numbers can be misleading; a prosecutor’s high conviction rate may not be as a result of “being tough on crime” or doing their job well, but rather the result of “taking easy cases and letting too many criminals go without prosecuting them”.<sup>70</sup>

If “statutory charging” is only partially successful in New Zealand, however, there is likely to be not only a significant reduction in the number of criminal cases, but a reduction in the average length of time cases are within the system, along with a corresponding reduction in costs. This reduction in costs will, of course, be offset by any additional time prosecutors spend analysing cases.

The CPS now operates a “24/7” service as part of its “Modernising and Charging Programme”<sup>71</sup> to give police officers in the United Kingdom the ability to obtain instructions as to the appropriate charge or charges to lay at any time. This service overcomes the practicality issue raised by the Law Commission where charges must be laid immediately, perhaps after the apprehension of a fleeing suspect. To overcome this issue, if the reforms proposed in this paper are put into place, the Crown Solicitor or a senior Crown prosecutor should be on call at all times for all districts to provide advice as to the correct charges to lay in homicide cases (see II F below). Providing advice to police whenever it is needed for homicide cases is largely in keeping with current practice. As further crimes are added to the schedule of crimes requiring prosecutorial consent, more comprehensive systems could be implemented.

Moreover, laying a holding charge until a Crown prosecutor can be located (assault for example in the case of an alleged murder) would be a suitable alternative, on those rare

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68 At 99.

69 Yvonne Moreno and Paul Hughes *Effective Prosecution: Working in Partnership with the CPS* (Oxford University Press, Oxford, 2008) at 31.

70 J Mark Ramseyer, Eric Rasmusen and Manu Raghav “Convictions Versus Conviction Rates: The Prosecutor’s Choice” (Harvard Law School: Discussion Paper 611, Cambridge, MA, 2008) at 27.

71 United Kingdom House of Commons Justice Committee, above n 62, at 4.

occasions when it was necessary.<sup>72</sup> This is unlikely to infringe on an accused's rights under the New Zealand Bill of Rights Act,<sup>73</sup> as the charges that will likely follow are of such greater seriousness.

2. With respect to both the Law Commission and the Crown Law Office, the greater threat to the system is from a lack of objectivity on the part of the police and an inability for Crown prosecutors to adequately supervise the investigation, rather than the possibility that Crown solicitors' independence will be compromised. Crucially, policy-makers need to realise that the all-important framework of a case is largely set by the initial charging decisions and investigation, *irrespective of whether the Crown may later change them*. It is far more important for the system to have a check and balance on police discretion early in the development of serious cases as the experience in England, Wales, Canada and Australia shows (see II E below). The system must be able to rely on the professional accountability of Crown solicitors to maintain an adequate level of independence from the police.
3. The fact that Crown solicitors provide advice from time to time to police officers in certain cases is all the more reason to expand this part of their role, and a formalised process would provide greater transparency and accountability. If this reform were undertaken, criminal cases would have a record of the decisions made at the earliest stages of a case and guidelines could be developed to assist Crown prosecutors in advising the police. As the English experience shows, greater participation at this stage of an inquiry improves the quality of the evidence presented to the court at trial.
4. While the development of charging standards no doubt assists in improving the quality of decision-making, the task of laying charges in serious cases is one far better suited to Crown prosecutors.

### 2. *The Crown Solicitor System Compared to the Crown Prosecution Service*

Despite the reforms proposed, at the present time the system of Crown solicitors employed throughout New Zealand is preferable to the adoption of a Crown Prosecution Service model in use elsewhere in the world.<sup>74</sup> It goes beyond the scope of this paper to provide a comprehensive analysis of the benefits and drawbacks of the two systems, or to analyse whether the two systems might be able to co-exist. However, it is worth noting that the Crown solicitor system in New Zealand provides a number of advantages over a CPS model. These include decision-making with an arguably lower degree of political interference than in other jurisdictions,<sup>75</sup> an ability to attract and retain highly skilled advocates at all levels of practice, and a lesser degree of

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72 Hon Robert McClelland MP "Prosecution Policy of the Commonwealth" (November 2008) Commonwealth Director of Public Prosecutions <[www.cdpp.gov.au](http://www.cdpp.gov.au)> at [1.3]: the Australian Director of Public Prosecutions requires that prosecutors make a decision whether the prosecution is to continue in cases commenced by arrest and charge; or Auld, above n 50, at 45: "The Crown Prosecution Service should determine the charge in all but minor, routine offences or where, because of the circumstances, there is a need for a holding charge before seeking the advice of the Service."

73 New Zealand Bill of Rights Act 1990, ss 23 and 24.

74 The Law Commission in 2002 again questioned whether the current arrangements were satisfactory and "whether a stand alone, independent Crown prosecution service is required": Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, 2002) at 105.

75 Collins, above n 24, at [31]. The level of independence may be contrasted against the systems in place in England, Australia, Canada and the United States of America in Bruce A MacFarlane QC "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency" (December 2000) <[www.canadiancriminallaw.com](http://www.canadiancriminallaw.com)> at 12.

bureaucracy. Bureaucracy in prosecution work can manifest itself in various ways, from greater administration costs<sup>76</sup> to implementation of concepts such as “key performance indicators”, which compel prosecutors to reach certain conviction targets for example, to the detriment of overall justice.

A succinct means of contrasting the two systems can be seen from the following. The United Kingdom House of Commons Justice Committee in 2010, concerning the Crown Prosecutions Service in England and Wales, recently commented:<sup>77</sup>

We do not dismiss the anecdotal concerns raised from a number of quarters about the quality of CPS advocates and the systems for their deployment, such as allegations that complex cases are dumped on self-employed barristers at short notice, but regard this as evidence of a need for better case management by the CPS, rather than providing a general argument against CPS advocacy ...

This may be contrasted with the New Zealand position, as described by Dame Margaret Bazley, in her report on the legal aid system in New Zealand. Dame Margaret notes the benefit of junior lawyers working together with senior lawyers on cases, performing ever more complex tasks in the trial and noting: “The Crown Solicitors still follow this kind of process, and it seems to result in a steady and sustained flow of high-quality lawyers being available to the Crown.”<sup>78</sup>

Nevertheless, the New Zealand system does not adequately utilise the ability of Crown prosecutors to help prevent miscarriages of justice. Unlike with the CPS employed in New South Wales or England for example, New Zealand’s Crown solicitors’ offices employ numerous lawyers with the highest level of experience and ability. Delegating charging decisions to Crown solicitors combines the best of both systems, namely the oversight provided by a modern CPS and the ability to draw upon very experienced advocates to determine what evidence is necessary and how the case will unfold at trial.

### *E. Prosecutorial Functions in Various Jurisdictions*

The relationship between prosecutors and police in comparable jurisdictions to New Zealand varies. While this paper primarily concentrates on the developments in England and Wales (as the most dynamic changes are occurring in that jurisdiction), it is appropriate to briefly examine the systems in other countries:

#### *1. Scotland*

Before analysing the criminal justice system in Scotland, we must recognise that it differs from the common law in significant ways and any comparison with it must be tempered accordingly. For example, concepts such as corroboration play an important part of Scottish law, much more so than they do in New Zealand.<sup>79</sup> Nevertheless, in Scotland the police carry out the preliminary investigation and submit a report to the local “Procurator Fiscal”.<sup>80</sup> The Procurator Fiscal

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76 Collins, above n 24, at [30].

77 United Kingdom House of Commons Justice Committee, above n 62, at 11.

78 Margaret Bazley *Transforming the Legal Aid System: Final Report and Recommendations* (November 2009) Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)> at [305] and [306].

79 Thorp, above n 2, at 97.

80 David Walker *The Scottish Legal System: An Introduction to the Study of Scots Law* (8th ed, W Green/Sweet & Maxwell, Edinburgh, 2001) at 385.

considers this report and decides whether any action should be taken, and if so to what extent.<sup>81</sup> The Procurator Fiscal, along with the Crown Office in Scotland (jointly known as the COPFS) work closely with Scottish police. Specifically, the Procurator Fiscal can give directions and instructions to the police in connection with their investigation, especially where the case is serious.<sup>82</sup> Arguments for the adoption of aspects of the Scottish system have been made in New Zealand before.<sup>83</sup>

The Scottish system has a number of advantages over the system employed in New Zealand. First, the police concentrate on their core investigative role, rather than on the appropriate charge or charges to lay. Secondly, the evidence suggests miscarriages of justice occurring as a result of alleged police or prosecutorial conduct (including non-discovery) occur approximately 13 per cent less in Scottish cases as compared to those occurring in New Zealand, and approximately 30 per cent less than in England.<sup>84</sup>

## 2. Australia

At the Australian federal level, the enactment of the Director of Public Prosecutions Act 1983 (Cth)<sup>85</sup> established the Office of the Director of Public Prosecutions for the Commonwealth of Australia. The Director is to make prosecution decisions independently of those who were responsible for the investigation, separating the investigative and prosecutorial functions within the justice system.<sup>86</sup> The Australian Federal Police (or other government agency) may lay charges if the situation requires it, but ordinarily the Director of Public Prosecutions lays charges after being provided with a brief of evidence by the investigative agency in question. Investigators may be questioned by prosecutors, with prosecutors having discretion whether any charges should be laid. This system is particularly appropriate in the New Zealand context and should be considered by New Zealand policy-makers.

## 3. Canada

Prosecutors in Canada are not usually responsible for the initial decision to lay charges. However there are a number of exceptions to this rule and certain offences at the federal level require the consent of a provincial attorney-general to be put before the Court. Moreover, British Columbia, Quebec and New Brunswick require all charges be screened by prosecutors before they are laid in Court.<sup>87</sup> In British Columbia, for example, police must submit a written report to Crown counsel called an "RCC", which includes evidence and any recommended charges for the Crown to consider.<sup>88</sup> Most Canadian jurisdictions employ legally qualified Crown Attorneys, who are independent of the police, rather than employ police as prosecutors.<sup>89</sup>

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81 "How does the prosecution system work?" Crown Office and Procurator Fiscal Service <[www.copfs.gov.uk](http://www.copfs.gov.uk)>.

82 "Relationship with the Police" Crown Office and Procurator Fiscal Service <[www.copfs.gov.uk](http://www.copfs.gov.uk)>.

83 Thorp, above n 2, at 96.

84 At 97.

85 Commonwealth Consolidated Acts <[www.austlii.edu.au](http://www.austlii.edu.au)>.

86 "Prosecution Policy of the Commonwealth", above n 72, at [1.3] and [3.2]–[3.7]; and see Director of Public Prosecutions Act 1983 (Cth), s 9.

87 Robert Frater *Prosecutorial Misconduct* (Canada Law Book, Aurora Ontario, 2009) at 18. The process in British Columbia, Quebec and New Brunswick is discussed in *R v Regan* [2002] 1 SCR 297 (SCC).

88 "BC's Prosecution Service: Frequently Asked Questions" (2 April 2009) British Columbia: Ministry of Justice <[www.ag.gov.bc.ca](http://www.ag.gov.bc.ca)>.

89 Stenning, above n 14, at 109.

#### 4. *The United States of America*

Comparisons between the role of prosecutors in New Zealand and those in the United States of America are problematic because of the large number of jurisdictions within the United States. These jurisdictions can differ considerably from one another. However, in broad terms, prosecutors work closely with investigators prior to charge in many situations at the county,<sup>90</sup> state<sup>91</sup> and federal<sup>92</sup> jurisdictions, and are frequently responsible for laying charges either before a trial court or before a grand jury. The American Bar Association publishes standards for criminal justice, setting out the functions of the prosecution. Those standards state that a prosecutor “ordinarily relies on police or other investigative agencies” for investigation work, but that prosecutors have “an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies”.<sup>93</sup> At the federal level, United States Attorneys are “authorized to request the appropriate federal investigative agency to investigate alleged or suspected violations of federal law”.<sup>94</sup>

We may conclude, therefore, that many jurisdictions within the United States employ a system of greater cooperation between prosecutors and investigators than currently occurs in New Zealand between Crown solicitors’ offices and the police.

#### F. *Crown Solicitors to Determine Charges and Direct Prosecutions in Serious Cases*

Enabling legislation should be enacted to permit only Crown solicitors the ability to lay certain charges. These would be set out in a schedule, and at first would include only homicide.<sup>95</sup> In time, other crimes could be added to the schedule in the incremental fashion that characterises New Zealand’s prosecutorial history. The counts (charges) laid by the Crown would appear in an indictment filed by the Crown, presented to the accused shortly after arrest, and subsequently to the Court.

Homicides in New Zealand often involve a degree of consultation between police officers and Crown prosecutors. Purists may argue that this practice is improper as it does not separate Crown prosecutors’ roles as advocates in court from police officers’ roles as investigators. The opposite is in fact correct; the police should be kept out of charging in serious cases, focusing on their core

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90 Examples of websites for District (sometimes referred to as County) Attorneys’ offices at the county level explaining their role with investigators include: New York County District Attorney Office <<http://manhattanda.org/investigation-division>>; and City and County of San Francisco: District Attorney <<http://da.lacounty.gov/bofi.htm>>.

91 For the relationship between the California Attorney General and law enforcement, see generally “Services and Information” State of California Department of Justice: Office of the Attorney General <[www.ag.ca.gov/cbi](http://www.ag.ca.gov/cbi)>.

92 Examples of websites for United States Attorneys’ offices at the federal level explaining their role with investigators include: “Law Enforcement Coordinating Committee” The United States Attorney’s Office: District of Massachusetts <[www.justice.gov](http://www.justice.gov)>; and “Criminal Division” The United States Attorney’s Office: Central District of California <<http://www.justice.gov>>.

93 “ABA Standards for Criminal Justice: The Prosecution Function” (1992) ABA House of Delegates <<http://npac.state.nv.us>> at Part III, 3–3.1.

94 “United States Attorneys’ Manual” (July 2011) Offices of the United States Attorneys <[www.justice.gov](http://www.justice.gov)> at 9-2.010.

95 Approximately 50–70 murders occur each year in New Zealand, meaning whatever additional resources are deployed of the kind proposed in this paper in any resulting criminal case will be insignificant to the costs incurred by the system overall. See “Fiscal Year Crime Statistics” (1 October 2010) New Zealand Police <[www.police.govt.nz](http://www.police.govt.nz)>.

role of investigation and collection of evidence. Furthermore, police will know their actions will be subject to scrutiny at an early stage, when they must submit their case to a Crown prosecutor for analysis. Should problems with the investigation arise, they can be remedied more easily as the investigation is still relatively new, and while fresh lines of enquiry are most likely to yield additional useful evidence.

### *1. Powers*

Crown solicitors would be given the complete police file and a summary prepared by the officer in charge of the police case, detailing the identity of the person or persons the police propose to charge and the reason why it is appropriate to charge these persons and no others, in a broadly similar way to the system in place at the federal level in Australia. One alternative possibility would be to have an Independent Police Conduct Authority member participate in the hearing, providing a high level of practical experience in the decision-making process. This would incur greater expense, but would be a more robust system, similar to the Scottish system (and certain systems employed in the United States of America) referred to above. A hearing would be held at the offices of the appropriate Crown Solicitor. The Crown Solicitor (or a senior Crown prosecutor) would have the power to question the officer in charge and, in rare circumstances, any other appropriate person. Following the hearing, the Crown prosecutor could direct that certain evidence be obtained, and in the most extreme cases direct that another suspect be investigated, or that the investigation should end. Subsequent meetings could take place, if necessary. Police officers presenting the case to the Crown in one-off meetings at the early stages of an investigation provides some level of practical separation between police and prosecutor, helping to prevent prosecutors from becoming police "team members". As the case progressed, contact between the Crown and police would increase as it does at present.

The enabling legislation required to implement this oversight would list a number of factors relevant in making these decisions about police investigations, or, alternatively, the Solicitor-General could list factors to be taken into account in either the Solicitor-General's Prosecution Guidelines or in a new document. In either situation, reasons for the decision to stop the prosecution, gather further evidence or to investigate another suspect would need to be recorded in writing and incorporated into the case file.

### *2. Funding*

Funding for this work would be provided to Crown solicitors through the Crown Law Office, to help maintain independence from the police. Crown prosecutors are routinely asked to assist with homicide investigations; and unlike with other crimes, preparation for cases based on indictments for murder are based on "the time actually spent" in preparation for trial, rather than a proscribed maximum numbers of hours.<sup>96</sup> These reforms would formalise the status quo to a certain extent.

### *3. Authority*

The Crown Solicitor would be answerable to the Solicitor-General for charging decisions, and the Solicitor-General would have the power to override the decision made by the Crown Solicitor in question. The police would be able to require reasons from the Solicitor-General as to why the Solicitor-General upheld the decision of the particular Crown Solicitor. Judicial review of the decision to prosecute would be prohibited by legislation. This is an important means of

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<sup>96</sup> Crown Solicitors Regulations 1994, reg 20(2)(b).

preventing undue delays within the system, as the proper place to challenge the Crown case is at trial.

#### 4. Legislation

The enabling legislation necessary to give Crown solicitors these powers should be similar in many ways to the Independent Police Conduct Authority Act<sup>97</sup> (IPCA Act). Crown solicitors would have the power to require any person who was able to give information relating to the investigation to appear before them, although this power should be used sparingly.<sup>98</sup>

Section 33 of the IPCA Act holds that Police Complaints Authority proceedings are privileged. This appears to be because of the extra-judicial nature of the Police Complaints Authority's work. Crown solicitors, by contrast, would be making determinations about an ongoing investigation. As such it is appropriate that their conclusions could be later raised in court, perhaps at the subsequent trial. An appropriate safeguard, however, would be for the legislation to make clear that *the fact an issue was raised* by a Crown solicitor (or Crown prosecutor or Police Complaints Authority member) would be privileged, and that regardless of which documents were disclosed, this privilege could only be waived expressly and in writing.

Defence counsel would therefore be able to cross-examine witnesses on whether certain lines of enquiry were followed or not, but would not be able to unduly bolster that cross-examination by referring to the identity of the person making these directions to police. To allow this would have the potential to unduly influence the jury by asking them to attach more weight to certain evidence than they should. For example, simply because the Crown Solicitor required certain evidence to be obtained, and it was not (for whatever reason), is not a material fact in a trial.

### III. CONCLUSION

Miscarriages of justice resulting in wrongful convictions represent a conflagration of failures for the criminal justice system. The most insidious of these cases result in an innocent party imprisoned, a guilty party remaining free and the credibility of the system itself impugned in the public mind. A century of media reporting means many New Zealanders regard these cases as representative of the entire justice system. A criminal justice system which acknowledges its shortcomings is more robust and better able to retain the confidence of the public.

An examination into the history of charging practices in England, Wales and New Zealand reveals that the system of prosecutions now in existence in New Zealand was not the result of careful planning, and remains rooted in its origins from centuries past. One of the legacies of this history is that members of the police continue to appear in New Zealand courts. This arrangement cannot provide New Zealanders with a modern, transparent and accountable criminal justice system, and prosecutorial reform is necessary for cases of serious crime.

This paper proposes permitting only Crown solicitors to lay charges in most serious cases, with legislation enacted to establish this power. The legislation would refer to a schedule of offences that may only be laid by a Crown solicitor. The first offence within the schedule would be homicide, and further crimes could be added to this list from time to time. This arrangement would stand in contrast to the present regime where the police lay charges for all crimes and a Crown solicitor may either continue with the same charges, lay different charges or, in rare

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97 Independent Police Conduct Authority Act 1988 (IPCA Act).

98 IPCA Act, s 24.



instances, may decide not to prosecute. "Professionalisation" of charging is very important because the original charging decisions frame the prosecution, regardless of whether the Crown may alter the charges at a later time.

Other comparable jurisdictions around the world have criminal justice systems that operate in this way. In England and Wales, "statutory charging" has been put in place as a means of limiting the possibility of miscarriages of justice by requiring Crown Prosecution Service lawyers to lay charges in most cases. Both Australia and to a lesser extent Canada at the federal level have guidelines in place to ensure that prosecutors are able to review investigations at an earlier stage than in New Zealand, and prosecutors are often expected to lay the original charges. The New Zealand Law Commission examined this model of prosecutions in two reports and concluded that police in New Zealand should retain the ability to lay the original charges. This was because Crown solicitors had the ability to relay charges in the indictable jurisdiction, and for reasons of practicality and efficiency. These arguments are flawed, and the recent debate in England is confirmation that the New Zealand system is in need of reform.

The practical means by which this reform should be carried out involves weighing up various principles. The level of contact between investigator and prosecutor is a vexed one. The method best able to prevent miscarriages of justice, while at the same time avoiding undue costs, is similar to the way in which federal Australian investigators and prosecutors work together. As noted above, investigators there prepare a brief of the evidence collected and may be questioned by prosecutors, who have discretion whether any charges should be laid. This system results in contact between investigator and prosecutor, but sufficient separation to allow independence from one another.

New Zealand's criminal justice system was brought about by a system of "incrementalism", as this paper demonstrates. Adding to the system in the ways described above furthers this approach and provides the robustness, openness and transparency required of a system for the new century.

# FURTHER SUPREME COURT STATISTICS

BY PROFESSOR MARGARET WILSON\*

Waikato Law Faculty is developing a database to research the work of the Supreme Court in terms of the number, nature and types of appeals to the Supreme Court. The purpose of this database is to track the work of the Court over a period of time. This summary is an update for 2011 and next year it is intended to provide an analysis of the work of the Supreme Court since it was established. The analysis this year will include data on the number of judgments in each case. There is an argument that a final court of appeal should provide a clear statement on the state of the law to provide certainty in future cases. While this analysis does not engage substantively in this debate, it was one of the arguments to establish a final court of appeal so it has been decided to include an analysis of the cases where one judgment as the judgment of the court is written and those cases where more than one judgment is written by the majority. There is also an analysis of the judgments in the cases where the appeal was not allowed.

## I. CASES HEARD BY THE SUPREME COURT

In 2011 the Supreme Court heard a total of 126 applications for leave of which 106 (84 per cent) were declined and 20 (16 per cent) were granted leave. The Court also delivered a total of 25 written judgments, of which 8 (32 per cent) were allowed, one allowed in part and 16 (64 per cent) were dismissed. This made a total of 151 cases dealt with by the Court. In terms of the final judgments, the cases may have been heard the previous year. A further analysis of the time taken between the hearing and the final decision needs to be undertaken and will be included in future data.

### A. *Applications for leave*

Consistent with the applications for leave to appeal in previous years, criminal matters dominate the applications for leave to appeal comprising 50.7 per cent of the applications. Administrative law comprised 12 per cent and if the categories of company, contract and insurance are combined into a general category of commercial cases then they also comprise 12 per cent of the applications for leave. The other applications represent a spread of different areas of the law.

In terms of successful applications, only 12 per cent of the successful applications were criminal cases, while criminal cases represented 28 per cent of the unsuccessful applications.

A better assessment of the success of criminal cases application for leave can be gained from noting only 9.3 per cent of the criminal applications were successful. The success rate for administrative law cases is slightly better with over 13.3 per cent being successful. There was however a better success rate for commercial cases, in particular company law cases, with a 54 per cent success rate. There were two tax cases seeking leave to appeal with one being successful and the other unsuccessful and of the five tort cases, four were unsuccessful. Given that the

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\* Professor, Te Piringa – Faculty of Law, The University of Waikato

number of cases were quite small under many of the categories it is impossible to draw any general conclusion from the data for 2011.

### *B. Decisions of the Court 2011*

As noted the Supreme Court gave 25 written decisions in 2011 and of those decisions 8 were successful (36 per cent), 16 (64 per cent) unsuccessful and one appeal was allowed in part. There has been an argument that it is the experience across jurisdictions that one third of appeals are successful and two thirds unsuccessful. This data would support that assertion but it will be interesting to see if the assertion holds across a longer time period.

The Supreme Court as the final court of appeal is the precedent setting court in New Zealand and therefore there is an argument that clarity of the statement of law is best delivered through a unanimous decision expressed in one judgment. A review of the cases reveals that for the 25 decisions, 43 written judgments were delivered by the judges.

In successful appeals the unanimous decision of the court was expressed in one judgment in 5 cases. In the other 3 successful cases 11 judgments were written by different judges. In the one decision only partially allowed, 5 commentaries were forthcoming.

## II. APPELLANT IN PERSON

It would appear that the number of cases in which the appellant appears in person has not increased and is confined to a small number of individuals.

# TEACHING INSECURITIES LAW: A VIEW FROM 2012

BY THOMAS GIBBONS\*

## I. INTRODUCTION

The title of this article is not a misprint. It is about teaching in the field of securities law. Securities law, also known as securities regulation, is a well-known field of study. The phrase “insecurities law” is less well-known, but this article seeks both to coin a phrase and justify its appropriateness. As this article will show, “insecurities law” is an entirely apposite description of the subject matter.

The article begins with a discussion of legal pedagogy and the teaching of securities law within New Zealand. It then shifts to various considerations which have informed both course design and legal pedagogy in the course in securities law I co-taught in 2012. After setting out these contexts, it moves to the express contexts of this course, including the global financial crisis, finance company collapses, and other considerations. A number of examples then illustrate why “insecurities law” is a useful description of the subject, including losses to investors (who found their deposits were not “secure”); the uncertainty of the law, with important cases being decided while I was teaching; the new term “financial product”, which to some extent supplants the notion of a “security” under proposed new legislation; and the changing nature of the subject through law reform. The article concludes by glimpsing into 2013 and beyond.

This article, then, is about “teaching in securities law”, and “teaching insecurities law”. It is also both about an area of law, and about a university subject. In something of a nod to the Socratic Method,<sup>1</sup> I end this introduction with a question: “Are they the same thing?” Readers will have the length of the article to consider their answer.

## II. THE WAIKATO TRADITION OF LEGAL PEDAGOGY

I have argued elsewhere that Waikato Law School (now called Te Piringa – Faculty of Law) was forged in debates about the role, ideals and purpose of legal education, and that this has led to continuing attention from Waikato faculty members as to the nature and practice of legal education:<sup>2</sup> in other words, there is an extensive body of Waikato legal pedagogy. The Faculty

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\* Director, McCaw Lewis Hamilton. I would like to thank Brendan Cullen, who co-taught the course with me in 2012, and Professor Nan Seuffert, who taught the course in 2011 and in many other years, and whose structure provided much of the basis for the course. All references to the Financial Markets Conduct Bill 2011 relate to the Bill in place as at the time I co-taught the course (342-1): the Bill has since been revised by the Commerce Committee.

1 See for example PE Areeda “The Socratic Method” (1996) 109 Harv L Rev 911. For a recent examination of the Socratic method within in a New Zealand context, see L Taylor et al *Improving the effectiveness of large class teaching in law schools* (Christchurch, Ako Aotearoa, 2012) <<http://ako.aotearoa.ac.nz>> at 16–17, especially the references.

2 Thomas Gibbons “Waikato Law Review: The First Ten Years” (2002) 10 Wai L Rev 39.

has recently celebrated 20 years since its creation, and the scholarship on the Faculty goes back even further than this.<sup>3</sup>

Broadly speaking, the legal pedagogy scholarship has been of three kinds. There have been publications on the law school itself, considering its origins, mission, and brief history.<sup>4</sup> There have been articles on the methods and practice (and sometimes, purpose) of legal education generally.<sup>5</sup> And there have been articles on specific legal subjects, including Professional Responsibility and the sadly-defunct Law and Societies (subject to a merger, or perhaps an acquisition).<sup>6</sup> At times, there has been considerable overlap between these areas: articles about specific subjects have often – perhaps inherently – considered practices in legal pedagogy, and general articles about the law school have examined the purpose of legal education, which has then inevitably turned attention to the faculty’s methods. So these categories cannot be considered entirely discrete. They do, however, provide a useful framework.

Within this framework, I seek to further this rich Waikato literature on law school pedagogy through a consideration of a particular subject, a course formally entitled “Corporate Securities & Finance Law” – LAWS423A in numerical terms – a course more colloquially called “Corporate Securities”, or “Securities Law”.

### III. TEACHING SECURITIES LAW (OR SECURITIES REGULATION?) IN NEW ZEALAND

The subject “Securities Law” has been irregularly taught in New Zealand,<sup>7</sup> but has a longer lineage overseas. In the United States, for example, the Securities Act 1933 and Securities Exchange Act 1934, enacted in the wake of the stock market crash of 1929 and the ensuing Great Depression, led to the establishment of a discrete area of regulatory law. Louis Loss has been described as the “intellectual father” of securities law in the US, publishing a key text on the subject in 1951, and being credited with developing the term “securities regulation”, and giving “a name and a shape to a field”.<sup>8</sup>

An area of law need not have its own statute to be a university subject – contracts, torts, and property law are all examples of this – but it can help. In fact, modern examples abound,

3 Margaret A Wilson “Waikato Law School: A New Beginning” (1990) 14 NZULR 103.

4 Margaret Wilson “The Making of a New Legal Education in New Zealand: Waikato Law School” (1993) 1 Wai L Rev 1; John H Farrar “Living with the Waikato Foundation Principles, 20 Years On” (2010) 18 Wai L Rev 83; Margaret Wilson “Challenges to Legal Education: The Waikato Law School Experience” (2010) 18 Wai L Rev 15.

5 See for example Ken Mackinnon “The ‘Best Qualified’ – for what? The place of affirmative action in a mission-focused New Zealand law school admissions policy” (2000) 4 Yearbook NZ Juris 71; Peter Spiller “Aligning course objectives, assessment and teaching strategy: a teleological approach to teaching law” in Dorothy Spiller (ed) *Narratives from Tertiary Teaching: Giving students a voice* (Pearson Education, Auckland, 2000); Dorothy and Peter Spiller “Teaching Law in the Context of Student Diversity” (2000) 8 Wai L Rev 106.

6 Kaye Turner “Teaching Professional Responsibility: The Waikato Experience” (1994) 2 Wai L Rev 151; Paul Havemann “‘Law in Context’ – Taking Context Seriously” (1995) 3 Wai L Rev 137; Nan Seuffert, Stephanie Milroy and Kura Boyd “Developing and Teaching an Introduction to Law in Context: Surrogacy and Baby M” (1993) 1 Wai L Rev 27.

7 See for example Victoria Stace *Securities Law in New Zealand* (LexisNexis, Wellington, 2010) vii.

8 Louis Loss *Securities Regulation* (Little Brown & Co, Boston, 1951). See also Mary Ann Glendon “A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming America” (Farrar Straus and Giroux, New York, 1994) 204; and Obituary (15 January 1998) Harvard University Gazette <<http://news.harvard.edu/gazette>>.

including Employment Law (based on the Employment Relations Act 2000 and its predecessors), Environmental Law (based on the Resource Management Act 1991), and Company Law (based on the Companies Act 1993 and its predecessors). In New Zealand, “securities law” has been based around the Securities Act 1978 and the Securities Amendment Act 1988 (later renamed the Securities Markets Act 1998), and has often been subsumed within “company law”, occasionally called “company and securities law”.<sup>9</sup> It has often been called “securities regulation”, but more recently, the phrase “securities law” has assumed prominence.<sup>10</sup>

An area of law also need not have its own textbook to be a university subject – taxation law has been taught for many years, but I like to call New Zealand’s search for a taxation law text elusive<sup>11</sup> – though again, it can help. Victoria Stace’s 2010 text noted two points: that this was the first book devoted solely to New Zealand securities law since 1983, and that its preparation was necessary because the course had not been taught for some years.<sup>12</sup> The publication of Stace’s text may well help redefine what an LLB course on securities law should cover. It also helps replace and supplant earlier publications that have used “securities regulation”. Unlike in the United States, “securities law” seems to have taken hold as the name for the subject in New Zealand.<sup>13</sup>

It was noted above that securities law has often been subsumed within “company law” or “company and securities law”, and has not been taught within all law schools in all years. This has perhaps contributed to the phenomenon that there appears to be no formal legal scholarship on teaching securities law in New Zealand. Therefore, this article is not only a contribution to Waikato legal pedagogy scholarship, but also something of a contribution to securities law legal pedagogy scholarship more generally.

#### IV. TEACHING SECURITIES LAW IN CONTEXT

It was noted above that Louis Loss helped define a field in the US over 60 years ago. More recently, global events have been described as “the best of times, [and] the worst of times” for securities law teaching and scholarship.<sup>14</sup> That is:<sup>15</sup>

As we sit here in the midst of a global financial recession, many of us seemingly are seeing—even experiencing—the worst of times, at least from a financial point of view. For many in the faculty

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9 See for example John Farrar and Susan Watson (eds) *Company & Securities Law in New Zealand* (Wellington: ThomsonBrookers, 2008).

10 Compare John Farrar and Mark Russell *Company Law and Securities Regulation in New Zealand* (Butterworths, Wellington, 1985), and Gordon Walker and Brent Fisse (eds) *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland, 1994); with Farrar, above n 9, and Stace, above n 7.

11 In 1976 *Molloy on Income Tax* was published: AP Molloy *Molloy on Income Tax* (Butterworths, Wellington, 1976). This treatise primarily referred to the Land and Income Tax Act 1954, which was replaced in the year of publication by the Income Tax Act 1976. In 1994 another text was published: J Prebble *Income Tax Law: Concepts and Cases* (Butterworths, Wellington, 1994). This text primarily referred to the Income Tax Act 1976, which was again replaced in the year of publication by the Income Tax Act 1994.

12 Stace, above n 7.

13 See above n 10.

14 Joan Macleod Heminway “The Best of Times, The Worst of Times: Securities Regulation Teaching and Scholarship in the Global Financial Crisis” (2010) 5 *Jnl of Business and Technology Law* 59.

15 At 59–61.

sector, there are lower or non-existent travel budgets, hiring freezes, no raises, and fewer dollars for adjuncts and visiting instructors. Our graduating students are having a tougher time finding employment, or if they have found desirable, private-firm jobs, they are being told not to bother to come to work on their originally scheduled start dates at the firm. Many are not being compensated for these delayed start dates. Others, less fortunate yet, are even having their employment offers rescinded. Our friends and family members are losing—or have lost—their jobs and the compensation and benefits (including health insurance) that those jobs provide. The worst of times.

Yet (and not to gloat), like a Phoenix rising from the ashes, those of us who research, write about, and teach law — especially business law — now have more salience, more status in the wake of the current economic crisis. We have the opportunity to participate in debates about what went wrong and how to fix it, and we are in the scholarly trenches and in the classroom with others doing the same. We can help relate the facts, analyze the issues and problems, and forward solutions. It is perhaps not “the best of times” for corporate and securities law professors, but it nevertheless is an exciting time to be engaging in business law scholarship and teaching.

Securities regulation is a particularly relevant area for inquiry and analysis, for obvious reasons. Securities markets around the world have been both players in and victims of the global financial crisis.

Not all of Heminway’s points are entirely congruent to New Zealand circumstances, but many are. The global financial crisis has had a terrible impact on many people’s lives, including those inside and outside the legal profession and universities. Further, Heminway continues, Socratic style, by asking a series of questions, including “Are our regulators up to the task?”, “Is effective regulation possible in a constantly evolving, innovative, entrepreneurial market?”, “Is new regulation necessary?”, and “Do we need more regulation, or can the market provide adequate checks?”<sup>16</sup> All of these questions – and many others – are relevant to securities law teaching in the US, New Zealand, and elsewhere, and highlight the sense of excitement that the current financial, economic, and regulatory contexts – including, in particular, law reform and the rapidly changing legal environment – provides for the field of securities law.

### A. *My Own Context*

I will return to this broader context. First, however, I want to provide some information on my own background, as this has informed a number of elements of the course I taught in 2012; including particular choices as to teaching style, context, and the requirements of students. To paraphrase, via a legal academic, a former Court of Appeal judge “[lecturers] are, fortunately, human”:<sup>17</sup> they are not automatons, and background matters in that it can inform teaching and pedagogy, both covertly and overtly.

Returning to matters of Waikato pedagogy, in the discipline of education studies, for example, Sue Middleton has emphasised the importance of one’s own “life-history”.<sup>18</sup> Middleton uses art from her childhood and university years, anecdotes from her own experience, as well as broader patterns of educational and social change that affect her family and those around her to emphasise how an individual’s background circumstances influence the educational process.

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<sup>16</sup> At 61–67.

<sup>17</sup> *M v Y* [1994] 1 NZLR 527, 537, per Hardie-Boys J, cited in Peter Spiller “Principles of Professionalism in Law Teaching and Judicial Practice” (2010) 18 Wai L Rev 26, 38.

<sup>18</sup> Sue Middleton *Educating Feminists: Life Histories and Pedagogy* (Teacher’s College Press, New York, 1993).

Reading her book as an undergraduate law student, among courses in jurisprudence, administrative law, and corporate entities, I found her analysis of the importance of individual, *personal* background to the education process fascinating. But perhaps I should not have been so surprised about the role of individual circumstances in shaping various phenomena: shortly before reading Middleton, I would have read about the American legal realists in jurisprudence, and some forms of realism allow individuals (judges in particular) significant influence in the development of the law.<sup>19</sup> And in teaching, perhaps, we *can* all be realists now.<sup>20</sup>

For reasons of space, I will not say as much about myself as Middleton does, but a number of these background considerations have been set out in an earlier essay, “A Realistic Professionalism: The Next Step”.<sup>21</sup> This was written for a celebratory purpose: a special edition of the *Waikato Law Review* commemorating 20 years of the law school. But it was also an invitation and opportunity to reflect on what brought me to law school, the development of my career since then, and how both my law school experience and private practice experience informed my teaching, for I was at the time co-teaching securities law for the first time. I enjoyed my time at law school, though at times found it challenging and alienating. I have also enjoyed practice as a lawyer more than I thought I would, perhaps because I did not fully comprehend the extent to which practical lawyering is really about *helping people*. This makes it an enjoyable and rewarding exercise. Being a lawyer can be a difficult job, and I felt I was not fully prepared for the challenges by either law school or the subsequent professional training. “On the job” apprentice-style training is essential to a lawyer’s development, and a university law school cannot fully prepare graduates for the exigencies of practice.

What a university law school can do, however – particularly at fourth-year level – is to seek to inculcate the importance of *professionalism*. This was the point of “A Realistic Professionalism”, which combined an outline of my own background with some points on requiring professionalism, and student experiences of law school. This analysis, of course, requires a teacher to decide what professionalism is, and how it should be inculcated. In that article, I drew on professional services author and consultant David Maister’s illustration of a professional as someone who does an outstanding job, goes the extra mile, has the client/customer in mind, and who uses his or her knowledge in a particular way.<sup>22</sup> The opposite of a professional, Maister notes, is not an amateur, but a technician.<sup>23</sup>

Drawing on my own background as a practising commercial lawyer, with some academic interests, I wanted to be up front about my philosophy of teaching and my requirements of the students. The importance of the latter was emphasised in some of the ideas in “A Realistic Professionalism” and in aspects of the course, as discussed below. The importance of the former has been reinforced to me in other contexts: as a school trustee involved in interviewing school staff for management roles, I was struck by the degree to which school teachers emphasise their

19 There are a range of sources on legal realism. See for example William Twining *Karl Llewellyn and the Realist Movement* (London, Weidenfeld and Nicolson, 1973); Neil Duxbury *Patterns of American Jurisprudence* (Clarendon Press, Oxford, 1995) at ch 2; Richard A Posner *How Judges Think* (Harvard University Press, Cambridge, 2008) at 112–114 and following.

20 See the comments of Laura Kalman *Legal Realism at Yale 1927–1960* (UNC Press, Chapel Hill, 1986) 229; but in the New Zealand context compare Jim Evans “Questioning the Dogmas of Realism” [2001] NZ L Rev 145.

21 Thomas Gibbons “A Realistic Professionalism – The Next Step?” (2010) 18 Wai L Rev 72.

22 At 75–76.

23 David H Maister *True Professionalism* (Free Press, New York, 1997).



own philosophies of teaching in those interviews. This was a common theme in those interviews. But I have also interviewed lawyers for legal jobs and we do not generally ask lawyers what their own philosophy of lawyering is. On reflection, this seems odd, as I clearly have an idea of what it means to be a good lawyer – probably all lawyers do – even if it often goes unexpressed.

So in setting out the requirements of the course in the first lecture, I emphasised to students the importance of preparing them for professional careers, even if not all would enter private practice. In doing so, I was able to refer to “A Realistic Professionalism”, as setting out my own approach to teaching and the requirements of students in completing the course. Being a practising lawyer with some academic interests did not merely lead to a strong belief that professionalism is something that should be required of law students. Being a practising lawyer also helped emphasise certain considerations in the substantive aspects of my law teaching. To take an example, the Securities Act 1978 often applies in situations where businesspeople don’t expect it to, such as attempts to raise relatively small amounts of capital from friends. New Zealand securities law generally requires an investment statement and prospectus to be prepared and available before an offer of securities is made to the public,<sup>24</sup> but there are a number of exemptions and exceptions to what constitutes “the public”.<sup>25</sup> These include relatives, close business associates, and more recently “eligible persons”. However, the nature of these exceptions and exemptions is often uncertain, and they have been criticised for being hard to understand, hard to apply, and lacking in certainty,<sup>26</sup> but why would anyone want to avoid the investment statement/prospectus regime? Well, because of compliance costs. Having a prospectus prepared is an expensive exercise, and many clients wish to avoid this expense, and so fall within an exception or an exemption – in some cases, one of the general or specific exemption notices promulgated through regulations.<sup>27</sup> These are important parts in the toolbox of a working securities lawyer, but are easily ignored unless a practical focus is taken.

There can of course be advantages and disadvantages to practical experience. I taught as a contract lecturer, perhaps – depending on definition or description – a visiting lecturer or adjunct. I continued in full-time legal practice, while co-teaching the course with a colleague. The extract from Heminway, cited above,<sup>28</sup> noted the difficulties that sometimes fall on adjunct teachers, and others have also observed this.<sup>29</sup> Being a practising lawyer means a greater knowledge of practice, but also generally a lesser knowledge of theory, a lesser knowledge of the broader literature and ideas of the subject. Diligent reading (and writing and research) can overcome this to some extent, but not entirely. On the other hand, practical matters – such as arranging course materials and examination questions – were not unduly challenging.

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24 Securities Act 1978, s 33.

25 See Securities Act 1978, ss 3 and 5, and Shelley Griffiths “Regulating Private Offers of Securities: Time for a Major Rethink” (2009) 15 NZBLQ 105.

26 Griffiths, above n 25; Thomas Gibbons “The Securities (Disclosure) Amendment Act 2009 and ‘the public’” [2009] CSLB 124.

27 See for example Securities Act (Real Property Proportionate Ownership Schemes) Exemption Notice 2002; Securities Act (Venture Capital Schemes) Exemption Notice 2008.

28 Heminway, above n 14 and accompanying text.

29 See Madeleine Schachter *The Law Professor’s Handbook* (Carolina Academic Press, Durham NC, 2004) at 29–30 (noting that adjuncts may be treated as “second-class teachers”); Rachel A Van Cleave “A Primer for Teaching Law as an Adjunct Professor” (2011) *Publications*, Paper 240 <<http://digitalcommons.law.ggu.edu/pubs/240>>.

### B. *A Note on Expectations and Assessment*

One's background cannot be avoided, but the choices that one makes can still be deliberate. Applying my practical knowledge was perhaps inevitable (and perhaps somewhat pointless if I had avoided doing so), but expressly seeking professionalism was not.

The course stipulated a 40 per cent exam, with 60 per cent internal assessment. Previously, this had meant a 10 per cent proposal, a 15 per cent presentation, and a 35 per cent research essay. I reduced the marks for the presentation and essay by 5 per cent each, and shifted these marks to a 10 per cent participation grade. This was aimed at achieving class engagement in the subject matter, allowing me to ask questions and expect answers, and also encouraging students to ask questions of each other in their presentations. It was also aimed at professionalism, as I know well that graduates can be asked tricky questions in law offices – both in client meetings and in tearooms – and need to be able to express themselves clearly, both with colleagues and with clients, in order to advance their careers. With a class of just over 30 students, I made sure there were regular exercises such as “discuss this question with your neighbour, and then we'll feed back as a group”. At times, it was necessary to prompt students with “remember, there's a grade for participation”. This often helped.<sup>30</sup>

I believe the regular opportunities to participate created a strong class culture, which manifested most obviously in the high quality of the student presentations. While others may bemoan “death by powerpoint”,<sup>31</sup> the vast bulk of presentations were clear, succinct, thoughtful, and well-researched. I believe undergraduates deserve more opportunities to “speak in front of the class”, as public speaking and clear oral communication is again part of many lawyers' careers, as well as careers in many other fields. The level of engagement between students in each other's presentations was also a highlight.

## V. TEACHING: INTRODUCTIONS AND CONTEXTS

### A. *Topicality*

I began the first lecture with some topical images: the Lombard directors, the Bridgecorp directors,<sup>32</sup> the intended sell-down of shares in state-owned enterprises, and the Facebook IPO. These allowed me to illustrate the topicality of the subject-matter.

Following the point that it is important to engage with students by learning their names,<sup>33</sup> I had students introduce themselves, and talk about what they had done over the summer: some had worked in legal or accounting firms; some had worked elsewhere; some had travelled; and some had studied. I then outlined the assessment, including the importance of active participation in class (because of the grade for participation). Highlighting the importance of professionalism,

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30 This brings to mind the “law and economics” notion of responses to incentives, but that deserves separate attention. See generally Richard A. Posner *Economic Analysis of Law* (4th ed, Little Brown & Co, Boston, 1992); Rt Hon Ivor Richardson “Law and Economics – and Why New Zealand Needs It” (2002) 8 NZBLQ 151; Cass R Sunstein (ed) *Behavioral Law & Economics* (Cambridge University Press, New York, 2000). Obviously some contributed more than others, and this was able to be reflected in their grades.

31 Farrar, above n 4, at 85.

32 See “Former Bridgecorp directors face sentencing” (18 May 2012) Newstalk ZB <[www.newstalkzb.co.nz](http://www.newstalkzb.co.nz)>.

33 Spiller and Spiller, above n 5, at 108.

I explicitly made students aware of the expectations of attendance, doing readings before class, meeting deadlines, and producing quality written work. I emphasised to them that at fourth-year level, they needed to be prepared for demanding supervisors and clients, and referred them to my article “A Realistic Professionalism” for further information.<sup>34</sup>

### *B. Concepts and Actors*

I then introduced a number of key concepts for the course, including:

- Finance company collapses
- Capital raising
- The primary market
  - “Offer of securities to the public for subscription”
- The secondary market
  - Insider trading, takeovers, substantial shareholdings
- Why we regulate securities
- Key actors and institutions
- Reform.

These were designed to provide a road-map of key ideas: again, based on experiences as a student where it could be difficult to put discrete components of a course into a complete whole. Further, to illustrate that securities law is based on a specific regulatory and economic regime, and is more than a system of rules, I also introduced a number of key actors, including:

- Financial Markets Authority
- NZX
- Financial advisors
- Sharebrokers
- **Lawyers**
- Auditors
- Company directors
- Serious Fraud Office
- Trustee companies
- Companies.

“Lawyers” was in bold because I noted – again, as part of the emphasis on “professionalism” – that I didn’t just want them to read cases to find a “rule”. Sometimes, I wanted to focus on particular facts: why issuers or investors behaved a particular way; was this a serious investment opportunity, or the efforts of a “dreamer”? I noted that in some cases, particular attention would be focused on the role of lawyers. This was, I believe, a successful aspect of the emphasis on professionalism, as examples later in this article will show.

I then outlined the main statutes we would be examining in the course, and returned to some themes in greater detail, such as finance companies (“what they did, how they raised money, what went wrong, and what were the consequences”); reform (“what and why?”); the role of

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34 That is, I made my own philosophy of teaching express.

lawyers, as noted above; and regulation (“why is securities law different?”). Following the lead of Peter Spiller, one of my own lecturers, I presented a “teleological” view of the course:<sup>35</sup> that is, the key things I wanted the students to get out of it, including an understanding of why we regulate capital markets, the primary market, the secondary market, the key areas of study within each; and when securities law does and does not apply to particular situations. This also underscored my approach to legal pedagogy.

### C. *Applied Concepts and the Global Financial Crisis*

In the second introductory lecture, I expanded on these themes, and picked up on some new ones.<sup>36</sup> Globalisation has been a theme of securities law for a number of years: it was emphasised, for example, in the Walker and Fisse text<sup>37</sup> used when I studied the course myself, though aspects of this analysis – including the importance of technology developments – were now somewhat overstated.<sup>38</sup> Perhaps more important in recent years has been the idea of harmonisation, or the extent to which New Zealand securities law should harmonise with other jurisdictions such as Australia. This in turn allowed debate over whether New Zealand should seek to harmonise (that is, be consistent) with Australia; or whether New Zealand should try to attract overseas capital by being more attractive to investment than Australia. Put another way, is it better to have the “best” laws, or the “same” laws – and what does it mean to be “best”?<sup>39</sup> Theories of regulation were also important, including “public choice” and “public interest” theories, which were able to be illustrated by reference to US Presidential debates (where, perhaps more than in any other forum, candidates promise to “get government out of peoples’ lives”: that is, deregulate). These ideas were able to be concretised by referring to the new – and expanded – powers of the Financial Markets Authority.<sup>40</sup>

Looking to theories of regulation invites us to consider why securities deserve special regulation. There are a range of considerations. It has been argued that there are special historic reasons that securities and capital markets law are specially regulated, based on Western attitudes to the morality of speculation and financial markets, as against more tangible and practical

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35 Spiller, above n 5.

36 I should note that not all of these themes were my own: some were adopted from material used by the course’s previous lecturer, Professor Nan Seuffert.

37 Walker and Fisse (eds), above n 10; see also Gordon Walker, Brent Fisse and Ian Ramsay (eds) *Securities Regulation in Australia and New Zealand* (LawBookCo, Sydney, 1998), especially ch 1-2.

38 I called this a “look, wow, the internet!” factor.

39 Compare Jane Diplock, the Chair of the New Zealand Securities Commission, who often emphasised harmonisation: “Jane Diplock, chairperson of IOSCO, says that harmonisation in securities regulation is achievable” (October 2009) *The Banking Conversation* <<http://thebankingconversation.com>>; Simon McArley “Securities Markets Regulation: Is being right more important than being accepted?” [2003] CSLB 9 at 9: “If the New Zealand capital markets are perceived by foreign investors to be less safe and fair than the Australian equivalents, we will quickly be passed over in favour of those markets .... To compete in a global market for capital we must, like any business trading in a competitive market, meet the demands of that market”; and Frank Chan “Emerging trends in the trans-Tasman financial an capital markets: harmonisation or assimilation” [2007] CSLB 61 at 67: “The danger of harmonisation ... is that it may distract everyone from what ought to be the continuing long-term focus – the attraction to the New Zealand market of issuers and their capital”.

40 See for example Securities Act 1978, ss 43C (consideration of prospectuses), 43F (prohibition of distribution of investment statements), and others introduced by the Securities Markets Amendment Act 2011.

activities.<sup>41</sup> In the recent decision in *R v Moses*, Heath J also emphasised special factors associated with securities law, such as that a purchaser of securities acquires something that is essentially intangible, and the value of the purchase/investment depends entirely on what is subsequently done by the directors of the issuer with the invested money.<sup>42</sup>

At an early stage of the course, it is good to relate concepts to students' lives. Few have invested significant amounts of money, and none will have defended finance company directors, but many will have eaten fast food. An online article from John Kay provided an excellent "teachable moment". I started with a visual, before noting that in comparing the regulation of securities to the regulation of hamburgers, Kay observes:<sup>43</sup>

Now we don't regulate the sale of hamburgers very much. The main purpose of our regulation is to ensure that poisonous hamburgers are not put on the market. The regulations which we impose are almost entirely confined to that. There is no suggestion that regulation should ensure that the hamburgers we eat are nice. We don't seek to impose regulation to ensure that people buy only hamburgers that are appropriate to their tastes and their state of hunger. We do not in any way regulate the price that people pay for their hamburgers. We would not dream of asking the question whether [people] obtained best, or even good or any advice when they make their decision to purchase a hamburger.

The visual helped(!)<sup>44</sup>



A further context, still of fundamental importance in 2012, was the global financial crisis of 2008 onwards. While there is an extensive literature on this topic, I drew primarily on a 2011 report of the US Government:<sup>45</sup> this emphasised various issues, including the phenomenon of securitisation, sub-prime mortgages, CDOs, and – interestingly – that a key aspect of the crisis

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41 See Stuart Banner *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (Cambridge University Press, Cambridge, 1998) at ch 1.

42 *R v Moses* HC Auckland, CRI 2009-004-1388, 8 July 2011, Heath J, at [35].

43 "Why Regulate Securities" (8 June 1999) John Kay <[www.johnkay.com](http://www.johnkay.com)>.

44 I have earlier argued that humour can get in the way of professionalism; while I remain of this view, I also believe that humour is a useful part of teaching, and humour and professionalism can co-exist in law classes, as long as professionalism is given an appropriate emphasis.

45 National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Reference Inquiry Report* (2011).

was “dramatic failures of corporate governance”.<sup>46</sup> Problems of governance have also been identified in New Zealand. As I have noted elsewhere:<sup>47</sup>

The Commerce Committee *Inquiry into finance company failures*, for example, has highlighted how poor governance was an importance factor in finance company failures; ... . Jane Diplock, former chair of the Securities Commission, has also suggested that a failure of corporate governance is “at the heart of the financial crisis”. ... an undue focus on governance can be problematic. There are many things that can make investment successful, and conversely, many factors that can lead to investor losses, as has happened with the finance companies. Among the reasons other than poor governance that led to finance company collapses, we might consider (in various cases) factors such as the global financial crisis, stormy seas in the international economy, individual fraud, a lack of knowledge on the part of investors, poor regulation, and poor enforcement by the regulator.

The various themes of the course were therefore able to be linked. Were the finance company problems caused by poor governance? Or by poor regulation? What is poor regulation – and what is good regulation? Is it guided by public interest theories, or public choice? Is it based on harmonisation – trying to be the same as Australia, or something else – trying to be better than Australia? Was the finance company crisis an example of poor regulation, or good regulation improperly enforced? And what about the role of individual directors, facing criminal penalties for wrongdoing (whether honest or not)? Who is responsible – an ineffective regulator, individual directors, or poor governance? Or perhaps uninformed investors? Or really, did the international stormy seas of the global financial crisis make the collapse of finance companies inevitable?<sup>48</sup>

I believe these “big questions” provided a valuable introduction to enduring themes of securities law, as well as encouraging students to “think for themselves” and help them towards their own positions on these issues. Some may become policy makers, others litigators, and others appellate judges. Fundamentally, then, we should want to encourage students how to approach policy issues, and themes as well as the “rules” of securities law.

## VI. SOME BRIEF COMMENTS ON CONTENT

I have emphasised these contextual considerations because they often receive too little attention. The most recent New Zealand text,<sup>49</sup> for example, is excellent as a treatise, but has some limitations as a teaching tool (at least for the course I taught) because it gives little space to broader themes and contextual issues of securities law. For me, these included (more generally) theories of regulation, and (more specifically and topically) the global financial crisis and finance company collapses. The substance of securities law is less relevant to this article, but I want to draw on a few teaching aspects I believe may be useful to others.

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46 At xviii.

47 Thomas Gibbons “The Enigmatic Purpose of Securities Law” [2012] CSLB 75, citing Commerce Committee of the House of Representatives, *Inquiry into finance company failures* (2011) 26, 42 (footnotes omitted); “Profile: Jane Diplock” (June 2010) International Federation of Accountants <[www.ifac.org](http://www.ifac.org)>.

48 See for example Scott Colesanti “Laws, Sausages and Bailouts: Testing the Populist View of the Causes of the Economic Crisis” (2010) 4 Brooklyn Jnl of Corporate, Financial & Commercial Law 175 for comment on various causes of economic difficulties overseas, as well as National Commission, above n 45. On the New Zealand economy more broadly, see Brian Easton *In Stormy Seas: The Post-War New Zealand Economy* (Otago University Press, Dunedin, 1997).

49 See Stace, above n 7.

Following the theme of applying concepts to students' experiences, I knew, for example, that few students would have cause to read a prospectus under the Securities Act. But most have read a prospectus of another kind: a university prospectus.<sup>50</sup> This allowed, variously:

- A consideration of what a prospectus is (essentially, some information about an investment or opportunity, but this information is heavily regulated in a prospectus under the Securities Act);
- A discussion about risk (there is risk in any investment; a statement of risks is fundamental to a prospectus;<sup>51</sup> what risks are involved in “investing” in an LLB?); and return (what return might be obtained from an LLB?);
- The consequences of a failure to obtain a return (some American law students were, at the time, suing their law school for misrepresenting employment opportunities arising from completion of a JD degree; though they were ultimately unsuccessful, and I was careful not to encourage students to do the same thing).

An investment prospectus and a university prospectus are not entirely congruent, but neither are securities law and hamburgers; comparative examples like these can help securities law be more “real” to students, particularly at the beginning of a course when they are grappling with a range of new and technical concepts.

Issues of “public choice” versus “public interest” were able to be applied through a consideration of recent reforms to the Securities Act 1978, which had expanded the powers of the key regulator – the Financial Markets Authority. These new powers included the power to review prospectuses, the ability (with some discretion – should a regulator have this discretion or not?) to consider the extent of its review, to require amendment, and to prevent investment while the prospectus is under consideration.<sup>52</sup> Having discussed key themes earlier in the course made it easier to ask the class to evaluate the appropriateness of these reforms.

Finally, I made a conscious choice to seek to teach both the “old” law (that is, the current law, as comprised in the Securities Act 1978, other legislation, and extant cases), as well as aspects of the “new” law (that is, proposals for reform contained in the Financial Markets Conduct Bill). This was part of my emphasis on “professionalism”: students should be aware of the proposed reforms, so that they can be ready to apply them if they enter employment under the new legislative regime. What use would it be to be on the job and to know the old law, but not the new? This was particularly useful in some instances, such as comparing the notion of a “close business associate” under s 3 of the Securities Act 1978 (undefined in the legislation, but defined through case law<sup>53</sup>), and the notion of a “close business associate” under cl 4(2) of sch 1 of the Financial Markets Conduct Bill.<sup>54</sup>

50 See for example University of Waikato *University of Waikato Undergraduate Prospectus 2013* <<http://cms.its.waikato.ac.nz>>.

51 Securities Regulations 2009, r 36: “A registered prospectus or an advertisement must not state or imply that investment in the securities to which it relates is safe or free from risk.”

52 Securities Act 1978, ss 43C-43D, as amended by the Financial Markets Authority Act 2011.

53 See in particular *Securities Commission v Kiwi Co-operative Dairies Ltd* [1995] 3 NZLR 26 at 32 (CA).

54 Section 4 just says “close business associate”; *Securities Commission v Kiwi Co-operative Dairies Ltd* [1995] 3 NZLR 26 (CA) refers at 32 to a requirement for “a degree of intimacy or ‘business friendship’ in the relationship, though not necessarily a friendship away from business”; while cl 4(2) of sch 1 of the Financial Markets Conduct Bill 2011 (342-1) reads as follows:

## VII. THE ROLE OF LAWYERS

As I mentioned above, as part of seeking to embed “professionalism”, I paid particular attention to the role of lawyers in securities law; not just as counsel in reported cases, but also as actors and participants in securities disputes. In this section of this article, I set out some examples of this approach.

### A. *Who should certify?*

Section 5 of the Securities Act 1978 (as amended in 2004, and then again in 2009) provides that an offer of securities may be made to an “eligible investor” without being required to provide a prospectus or investment statement. An “eligible investor” is one who meets certain requirements as to wealth, experience in investment, or experience in the industry to which the security relates. Depending on the exemption sought, certification is required from a chartered accountant or independent financial service provider.

Clause 39 of Schedule 1 of the Financial Markets Conduct Bill also provides for a definition of “eligible investor”, with certification by an authorised financial adviser, a chartered accountant or ... “a solicitor”.<sup>55</sup> A certifier must be satisfied that the investor has been sufficiently advised of the consequences of the certification, and must have no reason to believe that the certification is incorrect (or that further information or investigation is required).<sup>56</sup>

I then asked students a series of questions: “Who should provide this certification? Would you? Why a “solicitor”, rather than “a solicitor experienced in commercial law” or a similar provision? Should a sole practitioner in general practice – or a resource management lawyer, or a criminal specialist – provide this kind of certification? Should a new graduate? Does it matter who is asking? What if the client puts pressure on the lawyer (an “Uncle Sam wants you” approach)? What liabilities might arise from providing this certificate?” I believe that these kinds of questions help students to consider professional responsibility issues, and how they, as potential securities lawyers, would deal with them.

(2) A person (A) is a close business associate of the offeror if—

- (a) A is a director or senior manager of the offeror or of a related body corporate of the offeror; or
- (b) A holds or controls 5% or more of the voting products of the offeror; or
- (c) A holds or controls 20% or more of the voting products of a related body corporate of the offeror; or
- (d) A is a partner of the offeror or of a director of the offeror (under the Partnership Act 1908); or
- (e) A is a spouse, civil union partner, or de facto partner of a person who is a close business associate of the offeror under any of paragraphs (a) to (d) or subclause (3); or
- (f) A is a child, parent, brother, or sister of a person who is a close business associate of the offeror under any of paragraphs (a) to (e) or subclause (3) (whether or not by a step relationship).

(3) A person (A) is also a close business associate of the offeror, in relation to an offer of financial products, if A has a close professional or business relationship with the offeror, or a director or senior manager of the offeror, that allows A to obtain the information that will enable A to assess—

- (a) the merits of the offer; and
- (b) the adequacy of any information provided by the offeror and any other person involved in the offer.

Law reform does not always make things simpler!

<sup>55</sup> Financial Markets Conduct Bill 2011 (342-1), sch 1, cl 39(1)(c).

<sup>56</sup> Financial Markets Conduct Bill 2011 (342-1), sch 1, cl 41(1).



### B. *Lawyers as Advisers: Managing Legal Risk*

*R v Rada Corporation (No 2)*<sup>57</sup> is a case that predates the global financial crisis and the finance company collapses. It considers the responsibility of an issuer and its directors under s 58 of the Securities Act 1978. Besides the “rule” arising from this case, I used it as an opportunity to consider further issues of professional responsibility.

The law firm in this case produced a checklist of matters for the directors, and then a “draft letter certifying compliance with statutory requirements”, which was sent around the directors.<sup>58</sup>

The Court noted that:<sup>59</sup>

The letter ... was careful to point out that ... If a statement required to be included in a prospectus would be misleading if additional information were not also included, then that additional information must be given. The letter went on to point out that it is the directors who are primarily liable for the correctness of the prospectus. It was not always possible for solicitors to certify a prospectus as complying with these matters, since relevant information may be outside their knowledge.

This very careful and proper letter from Bell Gully cannot in my view be elevated into approval by the law firm of any omission in the prospectus. The letter drew the directors’ attention to the need for there to be no material omissions and placed the responsibility on them.

As part of inculcating professionalism, students can be encouraged not only to read appellate decisions, but also to write “careful and proper” letters.

In the more recent *R v Moses*, Heath J observed that:<sup>60</sup>

Professionals such as solicitors ... Respond to instructions provided by a client. Clients instruct; advisers advise. The quality of any advice is only as good as the information provided to the professional.

But in *Moses*, Heath J took a particular view as to the role and involvement of all parties, with responsibility clearly placed on the directors, rather than anyone else. Lawyers rely on information provided, but “careful and proper” communications from lawyers to clients can both protect the advising lawyer, and help the client understand their responsibilities.

*Ministry of Economic Development v Stakeholder Finance Ltd*,<sup>61</sup> concerned a prosecution under s 59 of the Securities Act 1978, and is useful for its analysis of s 3(2)(a)(iii) of that Act, relating to what is generally called a “habitual investor”. It also provides useful insight into the role of solicitors in determining compliance with the exceptions to the Act. In basic terms, Mr Gale wished to invest as a “habitual investor”. In a letter from the issuer’s law firm, his application was declined, essentially on the basis that he did not have sufficient investment experience. Mr Gale – who was clearly very keen to invest, at least at this point in the chain of events – then wrote back with further information on his investment experience. The issuer’s lawyer then advised Mr Gale that he did meet the threshold for being a “habitual investor”. The

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57 *R v Rada Corporation (No 2)* [1990] 3 NZLR 453.

58 At 460.

59 At 460.

60 *R v Moses* HC Auckland, CRI 2009-004-1388, 8 July 2011, Heath J, at [100].

61 *Ministry of Economic Development v Stakeholder Finance Ltd*, DC Auckland, CRI 2007-004-28150, 9 December 2008, Judge PA Cunningham.

judgment indicates that the lawyers were instrumental in determining the scope of the “habitual investor” exception for the issuer, and in determining compliance in specific cases, with the issuer itself largely unaware of the rules being applied by the lawyers.<sup>62</sup> A case like this allows useful discussion on the practical roles securities lawyers may end up playing, at the “front end” (commercial decisions) as well as the “back end” (litigation) of investment matters. It is important that law students do not perceive everything through the prism of appellate judgments.<sup>63</sup>

## VIII. INSECURITIES LAW

### A. *Insecurity*

Thus far, this article has provided an account of teaching securities law in 2012. But let us pause to reflect on the phrase “securities law”. The *Oxford Dictionaries Online* provide three definitions of “security”:<sup>64</sup>

noun (plural securities)

1 [mass noun] the state of being free from danger or threat:

the system is designed to provide maximum security against toxic spills

job security

...

- the state of feeling safe, stable, and free from fear or anxiety: ...

2 a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the repayment of a loan, to be forfeited in case of default.

3 (often **securities**) a certificate attesting credit, the ownership of stocks or bonds, or the right to ownership connected with tradable derivatives.

Obviously, securities law focuses on the third of these, but it is worth considering the first definition as well: “the state of being free from danger or threat”. In this sense, securities law in 2012 is anything but secure, and this section of this article examines three factors which support the appropriateness of the notion of “insecurities law”.

### B. *Insecure securities – Finance Company Collapses*

First, there are the significant losses suffered by investors due to the collapses of a number of finance companies. Their funds were not “secure”, though many perhaps thought they were. As the Commerce Committee of the New Zealand Parliament noted in October 2011:<sup>65</sup>

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62 At [52] and [57].

63 See Glendon, above n 8.

64 See Oxford Dictionaries <<http://oxforddictionaries.com>>.

65 Commerce Committee, *Inquiry*, above n 47, at 7.

Since May 2006, 45 finance companies in New Zealand have failed, either being placed into receivership or entering into moratorium arrangements with debt holders. These failures have put at risk about \$6 billion of investors' deposits, much of which will not be recovered. It is estimated that between 150,000 and 200,000 deposit holders have been affected, and the losses to date have been estimated at over \$3 billion. ...

We are aware that the collapses have devastated many investors.

“Devastation” is an emotional term. But its use does not alter the reality that significant monies have been lost by investors. All investment involves some risk. But investor funds in finance companies were invested in (debt) *securities*. While the term “securities” can be a clinical and legal one, the underlying word “security” can have considerable emotion attached to it.

The consequences of investor losses were given some attention in *R v Graham*,<sup>66</sup> concerning the sentencing of the directors of Lombard Finance & Investments Ltd, where Dobson J observed:<sup>67</sup>

The very serious range of consequences for those who relied on the misleading offer documents are graphically illustrated by the 39 victim impact statements that have been completed by people who invested in Lombard between the end of December 2007 and early April 2008. The majority are retired people who were critically reliant on getting their money back, if not the interest they anticipated earning. The crushing impact of the financial losses, and the emotional stresses caused by it, should not be underestimated.

Some of these investors were described as “relatively unsophisticated”,<sup>68</sup> as a group, their investments, their “securities”, were not secure.

Dobson J also pointed to a further aspect of the insecurity created by the finance company failures:<sup>69</sup>

On a broader front, there is the harm done in an institutional sense to the New Zealand community's confidence in savings and investment. You cannot be singled out for any responsibility in that regard because loss of confidence is an industry-wide phenomenon. However ... Lombard was trusted by many small investors above other finance companies. The greater part that a sense of unjustified reliance on trusted directors plays in losses, the greater the impact in denting confidence in savings and investment generally.

Investments proved to be insecure; so too, as a result, is investor confidence. This is something the Financial Markets Conduct Bill aims to restore,<sup>70</sup> though there may be a long road forward.

66 *R v Graham* [2012] NZHC 575 per Dobson J.

67 At [9]. Although see Peter Watts “Criminal sanctions for commercial negligence” [2012] NZLJ 103 at 106 on factual uncertainty about investor losses in the *Moses* decision.

68 *R v Graham*, at [10].

69 At [13].

70 See Financial Markets Conduct Bill 2011 (342-1), cl 3: “The main purposes of this Act are to—

- (a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
- (b) promote and facilitate the development of fair, efficient, and transparent financial markets.”

### C. *Insecure law*

Second, there is the unsettled state of the law. As mentioned above, securities law is a particularly topical subject, and significant decisions were being made – significant case law was emerging – as the course was taught, including the sentencing of the directors of Lombard Finance (including two former Ministers of Justice) in *R v Graham*<sup>71</sup> and of certain directors of Bridgecorp Ltd in *R v Petricevic*.<sup>72</sup>

The *Moses* decision,<sup>73</sup> though a 2011 judgment, remained insightful through 2012 as it continued to be used and interpreted in other cases, such as the *Graham* and *Petricevic* decisions. *Moses* commented on a range of points, such as the purpose of securities law,<sup>74</sup> the characteristics of a “prudent but non-expert investor”;<sup>75</sup> the difference between governance and management;<sup>76</sup> the need for finance company directors to understand financial statements;<sup>77</sup> the importance of “impression” in interpreting a prospectus;<sup>78</sup> the role of lawyers;<sup>79</sup> and the role of other actors in securities law,<sup>80</sup> including the role of directors.<sup>81</sup> Let us consider aspects of uncertainty, or insecurity, for directors.

Roger Moses, the “Moses” in *R v Moses* (referred to above) received a sentence of imprisonment for breach of s 58 of the Securities Act 1978, relating to a misleading statement made in a prospectus.<sup>82</sup> Moses served 8½ months of his sentence, recalling in an interview his “absolute shock” at being sentenced to two years two months behind bars for gross negligence. “I thought it was very unlikely, mainly because the judge emphasised so often that there was no dishonesty involved and, in my case, no self-interest involved, so everyone thought jail was not a likely outcome”.<sup>83</sup> His wife – though not an unbiased party – emphasised that there was no dishonesty, no fraud, and that jail time was therefore inappropriate.<sup>84</sup> And other less biased commentators have said the same thing: prominent company law scholar Peter Watts, for example, has emphasised that Heath J expressed the view that he did not believe that any of the directors of Nathans Finance (the company Moses and others were involved in) had been dishonest, and that “it is generally undesirable to imprison people for negligence, even gross negligence”.<sup>85</sup> Watts makes a number of criticisms of the decision, including that while we can

71 *R v Graham* [2012] NZHC 575 per Dobson J.

72 *R v Petricevic* [2012] NZHC 665 per Venning J.

73 *R v Moses* HC Auckland, CRI 2009-004-1388, 8 July 2011, Heath J.

74 At [36]; although see Gibbons above n 47.

75 At [64]–[70].

76 At [74], [434].

77 At [80]–[84], [402].

78 At [207], [421].

79 At [100], [427].

80 At [88], [92] and [97].

81 At [74], [397], [399], [400], [434].

82 *R v Moses* HC Auckland, CRI 2009-004-1388, 2 September 2011, Heath J.

83 Rod Vaughan “Roger Moses tells of disgrace, shock and life in jail” *National Business Review*, 15 June 2012, 6 at 6.

84 At 9.

85 Watts, above n 67, at 104.

try to be careful, everyone is careless from time to time, and carelessness (unlike dishonesty) does not involve a deliberate choice.<sup>86</sup> The economic harm caused to investors could be rectified through civil remedies or sanctions other than imprisonment, and the extent of the sentence in *Moses* will, in Watts' view, leave the courts little "room for manoeuvre" for cases involving real dishonesty.<sup>87</sup> Further, Watts believes, the Court placed too much emphasis on losses to investors, when these could have been caused by a range of factors, including a failure to read the prospectus and offer documents properly. Ultimately, Watts concludes, "is it not a rather upside-down world where the law takes to terrorising the honest?"<sup>88</sup>

Watts' points have of course been considered elsewhere: there is an extensive literature suggesting that there are better remedies than imprisonment for crimes of this nature,<sup>89</sup> and increasing attention has been paid to the fact that many investors do not read offer documents properly.<sup>90</sup> But the larger point is an important one: that the law in this area is unsettled; that directors may be unexpectedly imprisoned for conduct that is negligent rather than dishonest or fraudulent; and that significant issues of sentencing and personal freedom – are in a state of uncertainty. Unintended consequences are one thing; unexpected consequences are another.

#### D. "Securities Law" or "Financial Products Law" (Or Financial Markets Law)?

Third, securities lawyers and law students will no longer be dealing with a "Securities Act". Rather, they are likely to be dealing with the "Financial Markets Conduct Act" in future.<sup>91</sup> This replaces the "cornerstone" definition of a security<sup>92</sup> with a new definition of "financial product":

##### 7 Meaning of financial product

(1) In this Act, *financial product* means—

- (a) a debt security; or
- (b) an equity security; or
- (c) a managed investment product; or
- (d) a derivative.

(2) If an interest or a right is declared by regulations not to be a security for the purposes of this Act, the interest or right is not a financial product for the purposes of this Act.

We can see that the notion of a "security" has not disappeared entirely. In particular, equity securities and debt securities will still exist, both in fact and in terminology. But the notion of a

86 At 105.

87 At 105.

88 At 106.

89 See for example Richard A Posner "Optimal Sentences for White-Collar Criminals" (1980) 17 Am Crim L Rev 409.

90 See for example Jenny Chen and Susan Watson "Investor Psychology Matters: Is a Prescribed Product Disclosure Statement a Supplement for Healthy Investor Decisions?" (2011) 17 NZBLQ 412.

91 Presently the Financial Markets Conduct Bill 2011.

92 See Peter Fitzsimons "The Investment Advisers (Disclosure) Act 1996 and the Securities Act 1978: the Cornerstone Definition of 'Security'" [1997] CSLB 67.

“participatory security” – a catch-all term in the Securities Act 1978<sup>93</sup> – will disappear, to be replaced by the notion of a “managed investment product”. Under the Securities Act 1978, a “participatory security” was defined as meaning:<sup>94</sup>

any security other than—

- (a) an equity security; or
- (b) a debt security; or
- (c) a unit in a unit trust; or
- (d) an interest in a superannuation scheme; or
- (e) a life insurance policy

Understanding the term “managed investment product” in the Financial Markets Conduct Bill, on the other hand, requires considerable analysis. The term is defined in cl 8 of the Bill as follows:

*managed investment product*—

- (a) means a right to participate in, or receive, financial benefits from a managed investment scheme, whether the right is actual, prospective, or contingent and whether it is enforceable or not; but
- (b) does not include—
  - (i) an equity security; or
  - (ii) a debt security.

This then requires us to understand the notion of “financial benefits”, which is fortunately defined briefly in cl 9(1) to mean “capital, earnings, or other financial returns”; and the notion of a “managed investment scheme”. It is here that matters become much more complicated:

### **9 Definitions of financial benefit and of managed investment scheme**

(1) In this Act,—

...

*managed investment scheme* means a scheme to which both of the following apply:

- (a) the purpose or effect of the scheme is to enable persons taking part in the scheme (*scheme participants*) to contribute money to the scheme as consideration to acquire rights to financial benefits produced principally by the efforts of another person under the scheme; and
  - (b) the scheme participants do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).
- (2) However, a *managed investment scheme* does not include—
- Scheme only involves management of direct interests in underlying property
    - (a) a scheme under which the scheme participant takes part in the scheme only by holding 1 or more interests in property if—

93 See Securities Act 1978, s 2; see also *R v Smith* [1991] 3 NZLR 740 at 748-749; *DFC Financial Services Ltd v Abel* [1991] 2 NZLR 619 at 625; *Hickman v Turn and Wave Ltd* [2011] 3 NZLR 318 at [314].

94 Securities Act 1978, s 2.

- (i) it is an interest in separately identifiable or traceable property; and
- (ii) the scheme participant either holds both the legal and beneficial interest in the property or the legal interest in the property is held on a bare trust for the scheme participant; and
- (iii) the value of the interest is not substantially dependent on contributions being made by other scheme participants or the use of other scheme participants' contributions:

Discretionary investment management services

- (b) a discretionary investment management service provided by a DIMS licensee or another person permitted to provide that service under sections 17 to 20 of the Financial Advisers Act 2008:

Insurance contracts

- (c) a scheme that would be a managed investment scheme only because it involves pure risk contracts of insurance:
  - (d) a scheme that would be a managed investment scheme only because it involves life insurance policies (within the meaning of section 2(1) of the Securities Act 1978) that were issued before this section comes into force.
- (3) In subsection (2), *pure risk contract of insurance* means a contract of insurance—
- (a) for the payment of money on the happening of a contingency, other than a contingency dependent on the continuance of human life; and
  - (b) that does not, and never will, have a value on its cancellation or surrender that is greater than the value of an unexpired premium relating to a period after the date of cancellation or surrender.

This definition is presumably not intended to be deliberately obfuscatory. However, phrases such as “purpose or effect”, “acquire rights”, and “benefits produced principally by the efforts of another person” invite further judicial enquiry. How do we determine the purpose of a scheme? What sort of rights must be acquired? Contingent rights? Beneficial rights? Absolute rights? And an adverb like “principally” invites a court to say something like “principally means substantially, but not completely”, adding other words by judicial gloss. Similarly, in the requirements for a scheme involving interests in property, phrases such as “separately identifiable or traceable property”, and “not substantially dependent” will invite further enquiry as well. It is useful to invite students into these kind of discussions.

As a subject, securities law is both concept-based – dealing with particular concepts that may well be unfamiliar to students; and analytical – breaking down phrases such as “offer of securities to the public” into individual statutory and judicial definitions of “offer”, “securities” and “public”. There will be rich analytical teaching material in a definition like “managed investment scheme”, but there may not be a lot of certainty.

## IX. CONCLUSION

In the law classroom, content matters. Context matters. And pedagogy matters. Professionalism is not just about asking students to stand and recite the facts of *Payne v Cave*:<sup>95</sup> it is much broader than that. This article has provided an account of an attempt to emphasise

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95 Or *v Moses* HC Auckland, CRI-2009-004-1388, 2 September 2011, Heath J - tempting as that is, the judgment being lengthy (and so challenging for students), providing an overview of many aspects of the primary market, and being rich in insight on a range of issues touching on securities law. On *Payne v Cave* (1789) 3 TR 148, see for example Steve Sheppard (ed) *The History of Legal Education in the United States: commentaries and primary sources* (Salem Press, Pasadena, CA, 1999) at 27-28.

professionalism in a law class and teach a subject in a unique state of transition. I have looked at both my own context, the broader context, and matters of practical content. The approach taken has emphasised professionalism in a range of ways: what is expected of students, what they can expect in practice, and the role of lawyers in securities law.

In 2013 and beyond, securities law will be both the same and different. For the next few years at least, securities law will be about “the worst of times”: finance company collapses, finance company director prosecutions, investor losses, and the impact of the global financial crisis. But it will still be about how we regulate capital markets, public offerings, and insider trading. Even in a topical subject, there is both constancy and change.

If I were to teach again in 2013, would I be “teaching in securities law” or “teaching insecurities law”? The latter seems more appropriate, as in recent times, many investments have been lost, been proved “insecure”. Directors have found themselves imprisoned for negligent (not dishonest) behaviour, and the Securities Act is likely to be repealed and replaced by the Financial Markets Conduct Bill, which favours the term “financial products” over “securities”. For those engaging with the subject, it may be “the best of times” in securities law in 2013 and beyond.



# RIGHTS TO WATER AN INDIGENOUS RIGHT?

BY VALMAINE TOKI\*

The United Nations Declaration on the Rights of Indigenous People (“the Declaration”) was adopted by the United Nations General Assembly in September 2007 with a majority of 143 states in favour.<sup>1</sup> Since then Australia, New Zealand, Canada and the United States have also signalled their support for the Declaration.

Notwithstanding this endorsement, the New Zealand Government qualified their support by holding reservations to two articles; art 26 (the right to land and resources) and art 19 (the rights of obtaining free prior and informed consent)<sup>2</sup>. The current position of the New Zealand Government is, the orthodox view, that the Declaration is soft law, aspirational in nature and not binding on domestic legislation. The New Zealand Government recently reiterated the reservations they held to certain articles and deferred to the existing legal system as overriding any international obligation.<sup>3</sup>

An Indigenous right to water is currently being debated in New Zealand. Various threads exist to support such a right. The Declaration, is but one thread that, clearly articulates these rights. Article 32 of the Declaration provides that:

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, *water* or other resources (emphasis added).

At art 25, this states how:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, *waters* and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (emphasis added).

These two articles can be read together with the key article of the Declaration asserting self-determination for Indigenous peoples:<sup>4</sup>

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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\* Valmaine Toki, Senior Lecturer in Law, Te Piringa – Faculty of Law, University of Waikato.

1 Yes: 143, No: 4, Abstentions: 11, Non-Voting: 34, Total voting membership: 192. The abstaining countries were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine; another 34 member states were absent from the vote. Colombia and Samoa have since endorsed the document. “Declaration on the Rights of Indigenous Peoples” United Nations: Permanent Forum on Indigenous Issues <<http://social.un.org>>.

2 (20 April 2010) 662 NZPD 10229; Hansard (debates) “Ministerial Statements — UN Declaration on the Rights of Indigenous Peoples – Government Support” (20 April 2010) New Zealand Parliament <[www.parliament.nz](http://www.parliament.nz)>.

3 Letter from Hon Chris Finlayson MP (Minister of Arts, Culture and Heritage; Attorney-General; Treaty of Waitangi Negotiations) to Te Hiku Forum regarding the United Nations Declaration on the Rights of Indigenous People and Treaty of Waitangi settlements (11 August 2011).

4 United Nations Declaration on the Rights of Indigenous People, art 3.

These articles collectively provide that Māori people as Indigenous peoples have the right to maintain and strengthen their distinctive relationship with their traditionally owned water, and the Government is required to consult and cooperate with Māori to obtain their free and informed consent prior to the approval of any development, utilisation, or exploitation of water.

If Māori sought recourse to the rights articulated within the Declaration, certain obstacles exist. The first obstacle is New Zealand's reservations to, or selective endorsement of, the Declaration. This is clearly a hurdle. However, holding reservations to a morally aspirational international instrument is the antithesis of what it seeks to achieve, questioning the validity of New Zealand's selective endorsement of the Declaration. Māori may be able to point to this, and also note that it is unclear whether selective endorsement is valid.

A second hurdle will be the non-binding nature of the Declaration. Case law from comparative jurisdictions provides support for the application of the Declaration in a domestic setting. For instance, notwithstanding the current status of the Declaration as soft law, Chief Justice Conteh in the Supreme Court of Belize found that:<sup>5</sup>

Given the Government's support of the Declaration on the Rights of Indigenous Peoples ... which embodies the general principles of international law relating to Indigenous peoples ... *the Government will not disregard the Declaration* (emphasis added).

Belize is a common law jurisdiction. If reliance was placed on the Declaration, in a New Zealand Court, this decision provides persuasive authority to support, for example, the current water claim for Māori.

Recognised and supported by the United Nations member states, the Declaration contains norms that are already binding in international law. So, the Declaration provides an additional international instrument for Indigenous peoples when their rights, such as the right to self-determination or a right to maintain their relationship with their traditionally owned waters, have been breached. Indigenous peoples can now argue that not only have international treaties been broken, but a breach of a right in the Declaration has occurred.<sup>6</sup>

Affirming rights derived from human rights principles such as self-determination and the right to traditionally owned waters, the Declaration does not create any new rights but is the only international instrument that views Indigenous rights through an Indigenous lens. The Declaration seeks to recognise these basic human rights for Indigenous peoples and contextualises these rights in light of their particular characteristics and circumstances.

The Declaration provides a benchmark, as an international standard, against which Indigenous peoples may measure state action. State breach of this standard provides Indigenous peoples with a means of appeal in the international arena.<sup>7</sup> In the event of a breach any redress would be uncertain; however, it would be reasonable to consider that it would provide fertile grounds for meaningful dialogue between the two parties.

On 9 August 2012, the United Nations Secretary, General Ban Ki-moon proclaimed:<sup>8</sup>

On this International Day, I pledge the full support of the UN system to cooperate with indigenous peoples, including their media, to promote the full implementation of the Declaration.

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5 *Cal v Attorney General of Belize* (2007) Claim Nos 171 and 172 of 2007 (Belize SC) at 132 per Conteh CJ.

6 Valmaine Toki "Indigenous Rights – Hollow Rights" (2011) 19 Wai L Rev 29 at 42.

7 At 42.

8 "International Day of the World's Indigenous Peoples" (9 August 2012) United Nations <<http://www.un.org>>.

In light of the current support within the international arena for the basic human rights articulated in the Declaration, it is incumbent on the New Zealand Government to meaningfully engage with Māori to respect and recognise these rights.

In addition to the Declaration's judicial enforcement of historical treaties, the common law doctrine of native title, aboriginal title, customary title and international law provide further avenues of recourse for this right to water.<sup>9</sup> Notwithstanding these various avenues of recourse – tikanga Māori, the first law of Aotearoa, New Zealand,<sup>10</sup> case law<sup>11</sup> and the Waitangi Tribunal's recommendations<sup>12</sup> provide further support for such a right. The precedents set by the 1896 Māori Land Court decision to vest Poroti Springs in six Māori owners, and the determination by the Māori Land Court that Māori owned Lake Omapere are difficult to ignore.

The commodification of this right, a right sourced from these various threads, without meaningful engagement with Māori lies contrary to these doctrines, principles and precedents. The New Zealand Government's commodification of water as a property right, through legislation,<sup>13</sup> without recognition of any original or native title right to water, is in breach of this right. Indigenous peoples are often sidelined when it comes to issues of information, consultation and development of water policies; the New Zealand Government utilising the principle of parliamentary sovereignty to justify the alienation of these rights through legislation.<sup>14</sup>

The current legislation implemented by the New Zealand Government does not include a meaningful Indigenous perspective to water. Instead, we see examples of mismanagement and over-allocation to intensive agricultural practices and extractive industries such as mining. This results in polluted waterways and ecosystems, and harm to livelihoods. Any reference to indigeneity is overridden by competing considerations.<sup>15</sup>

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- 9 Jacinta Ruru "Introducing Why it Matters: Indigenous Peoples, the Law and Water" (2010) 20 Water Law 221.
- 10 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Maori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Victoria, 2005) at 331–332.
- 11 *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA) provides that the law should recognise customary rights in accordance to Māori custom. When discussing sovereignty and absolute ownership, Tipping J notes that the "Crown's ownership is and never has been absolute in this respect. It is and always has been subject to the customary rights and usages of Maori": *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [204].
- 12 Commenting on the Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998): "The Tribunal ... made a number of recommendations to the Crown relating to the recognition of Te Ika Whenua's residual rights in the rivers, the management and control of the rivers, the vesting of certain parts of the riverbeds in the claimants, and the compensation owed to them for the loss of title resulting from the application of the *ad medium filum aquae* rule." "Te Ikawhenua Rivers Report: Report Summary" Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz>>. For another example, see Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999).
- 13 Examples include the Water and Soil Conservation Act 1967 and the Resource Management Act 1991, which allowed the Crown to assert rights over water without consultation with Māori.
- 14 Despite the ruling of *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA), the New Zealand Government passed the Foreshore and Seabed Act 2004. This vested the foreshore and seabed in the Crown, and denied Māori the right of due process. The Act has now been repealed.
- 15 For example, the Resource Management Act 1991 recognises and provides for the relationship of Māori, their culture and traditions, with their: ancestral lands, water, sites, wahi tapu, and other taonga (s 6(e)); has particular regard to kaitiakitanga (s 7(a)); and takes into account the principles of the Treaty of Waitangi (s 8). These sections, however, are but one issue to be taken into account by decision-makers when determining the purpose of the Act.

The current claim by the New Zealand Māori Council through the Waitangi Tribunal seeks to establish proprietary use rights, a lesser right, as opposed to ownership rights to traditionally owned water.

Drawing together all our threads, it would seem prudent, and long overdue, that the New Zealand Government engages with Māori to secure their free, prior and informed consent to allocate these proprietary use rights meaningfully.

# CIVIL DEATH AND PENAL POPULISM IN NEW ZEALAND

BY LIAM WILLIAMS\*

*“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage”.*<sup>1</sup>

*The ability of the governed to partake in matters of governance has long been considered the keystone of democratic legitimacy. It is a sentiment that resonates through treaties and constitutional documents throughout the world. As a specific form of political participation, the right to vote is often considered to be a fundamental democratic tenet. This is because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”<sup>2</sup> It is remarkable that there is no genuine international consensus with regard to the way in which franchise (the right to vote) should be distributed. Generally, eligibility to vote is framed in the light of the Universal Declaration of Human Rights (UDHR)<sup>3</sup> and the International Covenant on Civil and Political Rights (ICCPR),<sup>4</sup> each of which prescribes to the principles of universal suffrage. It should be noted that universal suffrage is rarely applied in a truly universal manner. Limited exceptions to universal suffrage are commonly permissible, most of which can be grouped under the category heading of mental incapacity. Mental incapacity may only be successfully used as a defence for disenfranchisement on “grounds which are established by law and which are objective and reasonable.”<sup>5</sup> It is on this principle, among others, that minors are disenfranchised.<sup>6</sup> This line of reasoning has also encouraged the widespread practice of disenfranchisement of those who suffer from cognitive impairment, though not without considerable criticism.<sup>7</sup>*

*Not all disenfranchisement operates on the basis of mental capacity, however. Many states disqualify criminals from voting as a punitive sanction. In 2010, New Zealand amended its electoral eligibility legislation to condemn incarcerated prisoners to a “civil death”<sup>8</sup> for the same duration as prescribed prison sentence length. The blanket ban brings New Zealand in line with the policies of States such as the United Kingdom, Russia and India, but puts it at odds with a growing jurisprudential opinion which is in*

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\* Current LLB student at Te Piringa – Faculty of Law, University of Waikato.

1 Universal Declaration of Human Rights (adopted 10 December 1948), art 21(3).

2 *Reynolds v Sims* 377 US 533 (1964) at 562.

3 Universal Declaration of Human Rights, above n 1.

4 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 25(b).

5 United Nations Human Rights Committee (HRC) *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, CCPR/C/21/Rev.1/Add.7 (1996) at [4].

6 Arthur Elster “Lowering the Voting Age to Sixteen: The Case for Enhancing Youth Civic Engagement” (2009) 29 CLRJ 64 at 64.

7 See generally Sally B Hurme and Paul S Appelbaum “Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters” (2007) 38 McGeorge Law Review 931.

8 Alec C Ewald “Civil Death: The Ideological Paradox of Criminal Disenfranchisement in the United States (2002) 5 Wis L Rev 1045 at 1049.

favour of granting prisoners the right to vote.<sup>9</sup> The assent of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (“the Amendment”) raises many questions about the legitimacy and necessity of the practice of prisoner disenfranchisement. Of these questions, this paper aims to answer three. Firstly, by what measure does the disenfranchisement of prisoners contribute to efforts made to manage and mitigate criminal behaviour within society? Secondly, why has New Zealand returned to the practice it first adopted in 1956<sup>10</sup> by choosing to disenfranchise all incarcerated prisoners? Thirdly, is it possible to reconcile New Zealand’s international and domestic civil rights obligations with its decision to cause the civil death of over 8,400<sup>11</sup> electors? It is surmised that there is little by way of empirical evidence or academic support to suggest that the disenfranchisement of prisoners has substantial penological merit. This finding becomes inauspicious when viewed in appreciation of New Zealand’s widely-acknowledged tendency to allow populism a long leash in the way that it influences penal policy-making.<sup>12</sup> A view is also formed which points to a series of conflicts between prisoner disenfranchisement and New Zealand’s uncodified constitution, the ICCPR and the UDHR. It is concluded that the reintroduction of a blanket prisoner disenfranchisement policy in New Zealand is an unwarranted erosion of what might be considered the most essential civil right.

## I. DISENFRANCHISEMENT – A BRIEF HISTORY

As a sanction available to the state, records of disenfranchisement date back to the advent of democracy. There is evidence to suggest that early instances of disenfranchisement took place in the Ancient Greek city of Athens. Here, it was known as a declaration of *atimia*,<sup>13</sup> which bears a resemblance to the later practice of *infami*<sup>14</sup> in Ancient Rome. *Atimia* and *infami* were mainly mechanisms used to punish those who acted in a politically detrimental manner.<sup>15</sup> This was effective because a man who did not participate in political affairs would be seen “not as a man who minds his own business, but as useless.”<sup>16</sup> The men who found themselves branded by *atimia* or *infami* would essentially become politically impotent, as they were deprived of access to the Assembly, courts and temples,<sup>17</sup> and were denied the right to obtain public office.<sup>18</sup> Similar

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9 See generally *Hila Alrai v Minister of the Interior and Yigal Amir* H.C. 2757/96 (1996), *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1, *Sauvé v Canada* (Chief Electoral Officer) 2002 3 SCR 519, *Hirst v the United Kingdom* (No 2) [2005] ECHR 681, *Frodl v Austria* [2010] ECHR 508 and *Greens and MT v United Kingdom* [2010] ECHR 1826.

10 Electoral Act 1956, s 42(1)(d).

11 Department of Corrections “Prison Facts and Statistics – December 2011” Department of Corrections <[www.corrections.govt.nz](http://www.corrections.govt.nz)>.

12 John Pratt and Marie Clark “Penal Populism in New Zealand” (2005) 7 *Punishment and Society* at 303.

13 William George Smith and Charles Anthon *A Dictionary of Greek and Roman Antiquities* (Harper, New York, 1870) at 354.

14 Christopher Francese *Ancient Rome in So Many Words* (Hippocrene Books, New York, 2007) at 181.

15 This was not always the case. Some individuals were believed to be inherently *less* than citizens, such as gladiators or slaves. See Luciana Jacobelli *Gladiators at Pompeii* (Getty Publications, Los Angeles, 2003) at 21.

16 RK Sinclair *Democracy and Participation in Athens* (Cambridge University Press, Cambridge, 1991) at xi. Note that Athenian law prescribed a political punishment for a political offence; this connection between the punishment and the nature of the offence (with regards to disenfranchisement) has recently been re-iterated by the European Court of Human Rights in *Hirst v United Kingdom* (No 2) [2005] ECHR 681.

17 Douglas MacDowell *The Law in Classical Athens* (Cornell University Press, Ithaca, 1986) at 74.

18 Christopher Francese *Ancient Rome in So Many Words* (Hippocrene Books, New York, 2007) at 181.

instances of formal political ostracism can be identified in later Germanic and Anglo-Saxon law.<sup>19</sup> Fifteenth century England saw the practice of a disenfranchisement policy which differed significantly from its historical equivalents. However, 15th century English disenfranchisement was used in a much more far-ranging capacity than its Ancient Athenian or Roman counterparts. For example, a Writ of Outlawry included the loss of legal and political rights as directed by the judiciary. A declaration of *caput gerat lupinum* (“let him bear the wolf’s head”)<sup>20</sup> stripped the legal status of the individual concerned. This was typically in response to a series of failures to appear in court for criminal charges; accordingly, this form of disenfranchisement can rightly be seen as a collateral result of a larger mechanism aimed towards increasing the strength of the criminal justice system. More than a mere loss of rights, the Writ of Outlawry actively encouraged a form of vigilante justice, where it became “the right and duty of every man to pursue [the offender], to ravage his land, to burn his house, to hunt him down like a wild beast and slay him.”<sup>21</sup> The contrast between the political-centric *atimia* and *infamia* and the crime and punishment-centric Writ of Outlawry is significant, as it denotes a shift from disenfranchisement as a tool to improve the quality of political representation towards a focus on punishment through the civil death of offenders. It is predominantly the latter approach which finds application in the modern world. This form of disenfranchisement was spread widely by rapid colonial expansion of England in the late 16th and early 17th centuries. Disenfranchisement is now usually<sup>22</sup> employed as a collateral sanction of an imprisonment sentence of a prescribed length, as is seen in the United Kingdom,<sup>23</sup> Bulgaria<sup>24</sup> and India.<sup>25</sup>

### *A. Disenfranchisement in New Zealand*

The New Zealand Constitution Act 1852 introduced prisoner disenfranchisement to New Zealand. Actions which resulted in disenfranchisement at that time were restricted to “treason, felony, or infamous offence within any part of her Majesty’s dominions.”<sup>26</sup> The subsequent one hundred and sixty years saw the application of a wide assortment of approaches in an attempt to determine the appropriate status of prisoner franchise. In 1879, the threshold was altered in order to include all offenders “within twelve months after he has undergone the sentence or punishment to which he shall be adjudged.”<sup>27</sup> A blanket ban which disenfranchised all prisoners serving a

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19 Debra Parkes “Ballot Boxes Behind Bars: Towards the Repeal of Prisoner Disenfranchisement Laws” (2003) 13 *Temp Pol & Civ Rts L Rev* 71.

20 Frederick Pollock and Frederic Maitland *The History of English Law before the time of Edward I* (Little, Brown and Company, London, 1895) at 459.

21 At 449.

22 Felon disenfranchisement is an example of an alternative disenfranchisement practice. In West Virginia, ex-felons are prohibited for voting for life unless they successfully apply for restoration from the Governor. See S David Michell “Undermining Individual and Collective Citizenship: The Impact of the Exclusion Laws on the African-American Community” (2006) 34 *Fordham Urb Law J* 831 at 834.

23 Representation of the People Act 1983 (UK), s 3.

24 Constitution of the Republic of Bulgaria, art 42(1).

25 Representation of the People Act 1951 (IN), s 62(5).

26 New Zealand Constitution Act 1852 (UK), s 8.

27 Qualification of Electors Act 1879, s 2(4).

term of a year or more was introduced in 1905.<sup>28</sup> This remained the case until the assent of the Electoral Act 1956, which disqualified all prisoners from voting.<sup>29</sup>

All prisoners were briefly granted franchise between 1975 and 1977, following the assent of the Electoral Amendment Act 1975. The amendment was greeted with moderate approval, as it was seen as a “parliamentary appreciation of the prisoners’ existence.”<sup>30</sup> Despite this, in 1977, s 42(1) of the Electoral Act 1956 was reinstated, restoring the original practice of blanket disenfranchisement.<sup>31</sup> The 1977 Amendment was passed as part of a larger attempt to remedy what the National Government perceived to be “a mess of the amendment to the electoral law”<sup>32</sup> made by Labour in 1975. Specifically, there were concerns that there were difficulties involved in determining how a prisoner’s electorate should be determined.<sup>33</sup>

From 1993 to 2010, the Electoral Act 1993 defined the extent to which disenfranchisement was applicable to prisoners in New Zealand:<sup>34</sup>

The following persons are disqualified for registration as electors:

... a person who, under—

- (i) a sentence of imprisonment for life; or
- (ii) a sentence of preventive detention; or
- (iii) a sentence of imprisonment for a term of 3 years or more,—  
is being detained in a prison.

The 1993 provisions were enacted in accordance with the views of the Royal Commission on the Electoral System, which, in 1986, stated that “punishment for a serious crime against the community may properly involve a further forfeiture of some rights such as the right to vote.”<sup>35</sup> At the time, it was thought that an offence should meet a predetermined test for seriousness in order to warrant the loss of voting rights. A sentence of three years or more was subsequently selected as the threshold for disenfranchisement. This was deemed to be appropriate, as it was the same period of time that had to lapse before a New Zealander living overseas would lose his or her right to vote in New Zealand elections.<sup>36</sup>

### B. *The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010*

The status of the franchise of prisoners remained unchanged in New Zealand until 2010, when the Electoral (Disqualification of Convicted Prisoners) Amendment Bill was introduced.<sup>37</sup> This amendment, introduced by Bernard “Paul” Quinn MP on 10 February 2010, aimed to amend the

28 Electoral Act 1905, s 29(1).

29 Electoral Act 1956, s 42(1)(d).

30 Jeremy Pope “Voting Inside” [1975] NZLJ 605.

31 Electoral Amendment Act 1977, s 5.

32 (7 April 1977) 410 NZPD 5150.

33 (7 April 1977) 410 NZPD 5150.

34 Electoral Act 1993, s 80(1)(d) (as at November 2010).

35 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral Commission: Towards a Better Democracy* (1986) at 236.

36 At 232.

37 During Select Committee, it was recommended that the name of the Electoral (Disqualification of Convicted Prisoners) Amendment Bill be changed to the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill. See Law and Order Committee *Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (2010) at 2.



Electoral Act 1993 to disenfranchise *all* incarcerated individuals. The Bill had a controversial journey through the legislative process. Most notably, it was sent to the Law and Order Committee as opposed to the Justice and Electoral Committee, which was arguably more appropriate and able to more comprehensively examine the Bill.<sup>38</sup> Over 95 per cent of the submissions made to the Committee were in opposition to the Bill.<sup>39</sup> These submissions were largely disregarded, however, and the Bill was assented on 15 December 2010. The amended legislation now reads:<sup>40</sup>

The following persons are disqualified for registration as electors: ... a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

The basis on which the previous three-year imprisonment sentence was selected as the vote-disqualification threshold formed a central theme of Quinn's argument in favour of amendment. He rightly pointed out that the amount of years was selected in order to match the similar threshold set for overseas voters.<sup>41</sup> He then asserted that the aim of this threshold-setting had a significant relationship to the severity of offences committed, which he believed was decided arbitrarily.<sup>42</sup> He would be correct if this connection was the basis on which the threshold was determined. However, there were other considerations made when the three year threshold was selected.

When the three-year threshold was chosen, it was not on the belief that it would effectively divide serious and non-serious offenders. It, like the limit placed on overseas voters, intended to ensure that voters may only cast a ballot in elections where they have a legitimate and identifiable vested interest in the political composition of the New Zealand Parliament. It was resolved that voters who have been absent from New Zealand for over three years – the parliamentary term length – are no longer sufficiently intrinsically involved in the political affairs of the State to have the right to cast a ballot.<sup>43</sup> This threshold – and the principle that underlies it – translates neatly to the context of prisoner disenfranchisement, given a certain contentious ideology which seems to imply that prisoners serving a term of three years or longer are as disassociated from the political life of their State to the extent that they should no longer have a say on the way in which it is run. There are certain problems with such an assumption. Every aspect of an incarcerated prisoner's life is ordained by the State in which he or she is held. The location in which a prisoner is held, the manner in which he or she is treated, and processes including sentencing, appeals and parole hearings are all matters that are to some extent presided over by the elected representatives of the State. Prisoners in New Zealand also have access to televisions and news publications, which allow them to stay informed of news on a daily basis.

38 The Committee received advice from officials from the Department of Corrections (as opposed to officials from the Ministry of Justice) whose previous electoral experience allegedly extended to instances where "they handed the ballot box around the clink to allow those who were eligible to vote to put their ballot in the ballot box." See (20 October 2010) 667 NZPD 14679.

39 "Electoral (Disqualification of Convicted Prisoners) Amendment Bill – Submissions" (2010) New Zealand Parliament <<http://www.parliament.nz>>.

40 Electoral Act 1993, s 80(1)(d).

41 Royal Commission on the Electoral System, above n 35, at 232.

42 "[T]he royal commission based its recommendation on the fact that in its view people were sent to prison for committing misdemeanours; the simple reality of life is that they are not." (10 November 2010) 668 NZPD 15184.

43 Royal Commission on the Electoral System, above n 35, at 233.

Prisoners continue to pay tax while incarcerated. In many ways, the State has an inherent relationship to incarcerated prisoners that is much more significant than those it has with free members of the public. The claim that prisoners are somehow separated from the State is untenable.

In this light, it seems that the three-year threshold for disenfranchisement was a result of the marriage between two incompatible assumptions. There is no rational connection between disenfranchisement as a mechanism used to ensure that people who vote in New Zealand elections live (to an extent) within its borders, and disenfranchisement as a punishment for those seen to be in violation of the social contract and therefore not worthy of a vote. The perceived need for a threshold for disenfranchisement arose on the back of a belief that only serious offenders should be prevented from voting. The threshold itself was selected on the basis of social and political involvement. The “continuous absence” rule for the disqualification of New Zealand citizens living abroad simply seems to have been used as a proxy threshold in s 80(1)(d) of the Electoral Act 1993. Quinn is correct in stating that many prisoners who serve a sentence of less than three years could quite rightly be regarded as “serious offenders”, but he is incorrect in assuming that this is a reason to support altering the threshold to affect all prisoners. Instead, the flawed reasoning of the Royal Commission on the Electoral System in 1986 gives more reason to abolish prisoner disenfranchisement altogether.

## II. THE PENOLOGICAL MERIT OF PRISONER DISENFRANCHISEMENT

Penal policy can be appraised on the basis of how well it performs with regard to the four main areas of punitive theory (or “penological principles”).<sup>44</sup> While this is not a comprehensive method of evaluating legislation, it does provide us with a useful platform for further discussion. Utilitarian punitive theory is consequentialist in nature; consequently, it is concerned with the impact punitive policy has on a societal scale. This emphasis has influenced the identification of three major principles within the field: deterrence, societal protection (or incarceration) and rehabilitation.<sup>45</sup> Retributive punitive theory provides a fourth point to be taken into consideration – retribution. The general expectation tends to be that policy makers at least consider the way in which proposed penal legislation acts to the benefit (or detriment) of these four values.<sup>46</sup> The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 does not seem to meet this expectation, as “[d]isenfranchising criminals fails to serve any of these purposes.”<sup>47</sup>

### A. Deterrence

Deterrence is frequently raised in support of prisoner disenfranchisement. During the Committee debate on the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill, Quinn asserted that disenfranchisement has a deterrent effect.<sup>48</sup> This justification rests on the notion that

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44 Susan Easton and Christine Piper *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, Oxford, 2008) at 20; Ewald, above n 8, at 1101.

45 Easton and Piper, above n 44, at 22.

46 Cyndi Banks *Criminal Justice Ethics: Theory and Practice* (2nd ed, SAGE Publishers, New York, 2008) at 115.

47 Ewald, above n 8, at 1104.

48 (10 November 2010) 668 NZPD 15184.

potential offenders will consider the threat of losing the right to vote a daunting prospect. This is a demonstrably unsound line of reasoning. Deterrence is based on the archetypal Hobbesian behavioural assumption<sup>49</sup> which identifies appetite and aversion as the sole motivators of human conduct.<sup>50</sup> This reductionist appreciation of deterrence is misleading in its simplicity, however. Crucial to the effectiveness of a deterrence-orientated punishment is the need for the potential sanction to weigh heavily on the mind of a would-be offender. This can be problematic, as there is some concern that “the threatened punishments of crime deter criminally prone individuals less ... because of their impulsive ... present-orientated natures.”<sup>51</sup> This becomes an especially salient consideration when considering the merits of prisoner disenfranchisement. Legislators must ensure that deterrence-focussed sanctions are formulated in light of the fact that they must “deter those with different personalities that predispose them to crime.”<sup>52</sup> There can be little doubt that most people find the prospect of losing the right to freedom of movement, association and liberty via incarceration to be daunting. It is unlikely that the same could be said of the prospect of losing the right to vote. Even if most would-be offenders thought about disenfranchisement when evaluating the risks involved with crime, it is probable that “this loss ... pales in comparison to the wholesale deprivations that accompany incarceration.”<sup>53</sup> If true, then the deterrent effect of prisoner disenfranchisement can only be seen as having a collateral impact which is so infinitesimal as to make it an irrelevant consideration when evaluating the penological merit of the practice. A second criticism which has been levelled at the deterrent effect of prisoner disenfranchisement is that it is unlikely to have any meaningful impact due to its relative obscurity as a sanction available to the State. The deterrence of any given policy will only be as powerful as how widely-recognised it is.<sup>54</sup> It is clear that prisoner disenfranchisement lacks any significant deterrent strength.

### B. Societal Protection

While it is not commonly used as a means of defending prisoner disenfranchisement, social protection is nonetheless examined here to allow for penological completeness. Imprisonment, as a mechanism for social protection, segregates offenders from society in order to prevent further harm from taking place. When the principle of social protection is applied to prisoner disenfranchisement, the equivalent segregation becomes one of a political nature. Preventing prisoners from voting then impliedly protects society from the political participation of those who are deemed detrimental to political affairs. There are immediately evident problems with such a position. Any test for whether a political view is – or is not – detrimental to the running of a state is inherently subjective. There is no need for an extensive academic analysis here in order

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49 Daniel Nagin “Deterrence” in Francis Cullen & Cheryl Jonson (eds) *Correctional Theory* (SAGE Publishers, New York, 2011) 67 at 69.

50 Thomas Hobbes, Brian Battiste (ed) and Aloysius Martinich (ed) *Leviathan Parts I and II* (Broadview Press, Peterborough, 2010) at 67.

51 Bradley Wright and others “Does the Perceived Risk of Punishment Deter Criminally Prone Individuals? Rational Choice, Self-Control, and Crime” (2004) 41 *JRCD* 180 at 182.

52 Daniel Nagin, above n 49, at 68.

53 Christopher Uggen, Angela Behrens and Jeff Manza “Criminal Disenfranchisement” (2005) 1 *Annu Rev Law Soc Sci* 307 at 331.

54 Susan Easton “Electing the Electorate: The Problem of Prisoner Disenfranchisement” (2006) 69 *The Modern Law Review* 443 at 446.

to establish that this is a justification that would be wide open to abuse. Similar arguments have defended the disenfranchisement of racial minorities, religious groups and social movements in a range of notorious instances throughout the history of democracy. Accordingly, isolation cannot form a legitimate supporting argument for the implementation of prisoner disenfranchisement.

### C. *Rehabilitation*

In New Zealand, high recidivism rates make a significant contribution to the overall crime rate. A recent Ministry of Corrections report based on research which followed released prisoners over a series of years indicated that as many as 52 per cent of all offenders will be returned to incarceration within 60 months of being released from prison.<sup>55</sup> It is widely acknowledged that states which significantly incorporate rehabilitation into penal legislation can expect to see a quantifiable reduction in recidivism.<sup>56</sup> The opposite is also true; ineffectual rehabilitation policies can often result in higher rates of recidivist offending. New Zealand has an unfortunate track record of treating the rehabilitation of offenders as a “secondary goal”,<sup>57</sup> and recent attempts to politicise the issue seem to have been stifled.<sup>58</sup> The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 seems to be another example of the on-going relegation of rehabilitation as an objective of penal legislation. No quantitative study has been undertaken in New Zealand to measure the way in which disenfranchisement affects the rehabilitation of offenders. However, comparable studies undertaken in the United States have evidenced a link between the re-enfranchisement of offenders and recidivism rates.<sup>59</sup> It is thought that disenfranchisement can “reinforce a self-fulfilling cycle of disempowerment and civic irresponsibility.”<sup>60</sup> These findings have gone some way to reinforce the belief that if a prisoner is granted franchise, then this will supplement the development of a sense of societal inclusiveness which is an essential component of a successful rehabilitative process. There are contextual dissimilarities between the United States and New Zealand which would make any direct imputation of this evidence misleading. Nevertheless, it is clear that disenfranchisement makes no positive contribution to the rehabilitation of offenders.

### D. *Retribution*

While deterrence is often explicitly raised in favour of disenfranchisement, retribution is arguably the punitive perspective largely responsible for the on-going existence of the practice in modernity. Retribution has played a significant role in law for centuries. *Lex talionis* (“an eye for an eye”) and the Law of Retaliation in the Old Testament are but two examples of the place

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55 Arul Nadesu *Reconviction Patterns of Released Prisoners: A 60-months Follow-up Analysis* (Department of Corrections, 2009) at 6.

56 Francis Cullen and Paul Gendreau “Assessing Correctional Rehabilitation: Policy, Practice, and Prospects” in U.S. Department of Justice (ed) *Policies, Processes and Decisions of the Criminal Justice System* (2000) at 110.

57 Hon Judge A J Becroft, Principal Youth Court Judge “Alternative Approaches to Sentencing” (CMJA Triennial Conference 2006, Toronto, 12 September 2006).

58 New Zealand Labour Party “Barker Asks Committee to hold Recidivism Enquiry” (press release, 15 December 2010).

59 Christopher Uggen and Jeff Manza “Voting and Subsequent Crime and Arrest: Evidence from a Community Sample” (2004) 36 *Columbia HRLR* 193.

60 Graeme Orr “Ballotless and Behind Bars: The Denial of the Franchise to Prisoners” (1998) 26 *Federal Law Review* 56 at 62.

historic societies have given to retribution in punitive policies. Retribution is founded on the concept that “[i]t is morally fitting that a person who does wrong should suffer in proportion to his guilt.”<sup>61</sup> This paper has illustrated that disenfranchisement does not inflict any measurable form of pain on offenders. Despite this, for the electorate, it can be seen as a righteous means of retributive recourse. Retribution is a widely accepted aspect of a legitimate state sanction. However, public endorsement alone does not form the entirety of the criteria required to make a punishment legitimate. Firstly, punishment should be proportional to the offence committed. This has been a fundamental element of punitive theory at least since Cicero’s *De Legibus*, “noxiae poena par esto”<sup>62</sup> or “Let the punishment be equal with the offence”. This presents a problem for proponents of prisoner disenfranchisement. Most punitive sanctions have a mechanism whereby a punishment can be scaled to appropriately meet the severity of the offence committed. Prison sentences, for example, have a length determined on the basis of offence seriousness. It could be argued that disenfranchisement, as a collateral effect of a prison sentence, is inherently proportionate as a sentenced individual is disenfranchised for an appropriate length of time (insofar as the imprisonment itself is proportionate to the offence). This is unrealistic as it overlooks the reality that elections are periodic, which gives rise to some situations which are clearly disproportionate. For example; an election might take place while a prisoner serves a minor sentence of a few months, which effectively disenfranchises the individual concerned for the duration of the subsequent parliamentary term. This seems absurd when a prisoner serving a sentence for violent offending might be released the week before an election was to begin. In the words of the Attorney-General, “The irrational effects of the Bill ... cause it to be disproportionate to its objective.”<sup>63</sup> The need for the proportionality restraint in retributive sentencing is essential, as it helps to deliver consistency and fairness for offenders. Accordingly, retribution does not offer any penological defence for the practice of prisoner disenfranchisement.

### E. Penological Analysis Conclusions

From a penological standpoint, the practice of prisoner disenfranchisement appears to be almost entirely without value. The four penological principles identified in this analysis are essential in the achievement of effective penal policy. However, it is abundantly clear that “[d]isenfranchising criminals fails to serve any of these purposes.”<sup>64</sup> This raises an important question: for what reason was the Amendment passed into law, if not to further rehabilitative, deterrent, retributive or isolative aims?

## III. PENAL POPULISM

Democracy demands that politicians bow to political imperatives of some form. Populism has long been acknowledged as an inevitable consequence of liberal democracy, as this system of governance provides incentives for politicians to endorse policy which appeals to public

61 John Rawls *Collected Papers* (Harvard University Press, Cambridge, 1999) at 21.

62 Marcus Tullius Cicero *De Legibus: Book III* at [20].

63 Chris Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (House of Representatives 2010) at 4.

64 Ewald, above n 8, at 1101.

sentiment. Populism is not in itself an undesirable thing. In a sense, it is an essential ingredient of a legitimate democracy because it allows for legislators to respond to the wishes of the electorate. This is known as reactionary populism, as it is concerned with identifying public demand and taking action to best achieve these desires.<sup>65</sup> However, it is undesirable for policy makers to anticipate public demand by legislating in such a way as to appeal to *unspoken* wishes of the electorate. This issue becomes compounded when this type of proactive populism produces policy which is dubious in terms of its legitimacy and value. It is possible that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 is largely a result of penal populism.

In many States, there is “an entrenched belief that the public is punitive.”<sup>66</sup> This provides a seemingly irresistible political imperative for legislators to endorse tough penal policy. It is thought that Sir Anthony Bottoms was the first to identify this trend as “populist punitiveness” in 1995.<sup>67</sup> Penal populism<sup>68</sup> (as it is more commonly known in modernity) is thought to play a powerful role in the formulation of law and order policy in democracies throughout the world. This is certainly no less true in New Zealand, where “politicians encourage punitive laws and sentences and thereby improve their chances of re-election by making such responses to indicators of public moods or sentiments.”<sup>69</sup> Many find this trend concerning, because “penal populists allow the electoral advantage of a policy to take precedence over its penal effectiveness.”<sup>70</sup>

### A. *The Emergence of Penal Populism in New Zealand*

In 1999, a Citizens Initiated Referendum provided a catalyst for an increase of the prevalence of penal populism in New Zealand. It asked:<sup>71</sup>

Should there be a reform of our Justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

The response was unequivocally in favour of reform; 91.78 per cent of respondents answered positively. This was seen to be a demonstration of the discontent felt by the public with regard to the way in which the criminal justice system dealt with serious violent offenders. Interestingly, this sentiment was expressed despite 1999 having the lowest overall recorded crime rate in the five years immediately preceding.<sup>72</sup> There is a wealth of research to suggest that there is a discrepancy between crime statistics and public perception of crime rates. It is postulated that the

65 Julian V Roberts and J M Hough *Understanding Public Attitudes to Criminal Justice* (McGraw-Hill International, New York, 2005) at 16.

66 Easton and Piper, above n 44, at 11.

67 Anthony Bottoms “The Philosophy and Politics of Punishment and Sentencing” in Chris Clarkson and Rod Morgan (eds) *The Politics of Sentencing Reform* (Clarendon Press, Auckland, 1995) at 40.

68 Roberts, above n 65, at 16.

69 Pratt and Marie, above n 12, at 304.

70 Roberts, above n 65, at 16.

71 New Zealand Electoral Commission “Return of Citizens Initiated Referenda Poll Votes – Reform of the Criminal Justice System” (1999) Election Results <<http://electionresults.org.nz>>.

72 New Zealand Police “National Annual Recorded Offences for the Latest Calendar Years” (2011) Statistics New Zealand <<http://www.stats.govt.nz>>.

news media plays a central role in this misconception, partly because “crime reporting is biased towards the reporting of serious violent crimes”.<sup>73</sup> International research suggests that significant portions of society rely primarily on the news media as a source of information about crime trends,<sup>74</sup> and it is likely that the same is true of the New Zealand public.<sup>75</sup> This perspective is intensified by the widespread proliferation of news media reports and press releases which sensationalise the supposed comfort within which prisoners reside.<sup>76</sup>

Unsurprisingly, in the years since the referendum, law and order has become a key policy for most of the major parties, including the National Party,<sup>77</sup> the Labour Party,<sup>78</sup> the ACT Party,<sup>79</sup> and New Zealand First.<sup>80</sup> The popularising of law and order policy continues to be a major draw-card for the larger parties on New Zealand’s political scene.<sup>81</sup> This political attitude has led to a series of legislative developments. Two pieces of legislation which were introduced in the following years are of particular significance: the Sentencing Act 2002 and the Parole Act 2002. These Acts were introduced to replace much of the Criminal Justice Act 1985. In a 2002 report on these Acts, the Ministry of Justice indicated that a key objective in the drafting of the legislation was to “[r]espond to the 1999 referendum which revealed public concern over the sentencing of serious violent offenders.”<sup>82</sup> This comprehensive reform took place less than four months after the re-election of an incumbent Labour Party-led government, following “a particularly virulent law and order campaign in 2002.”<sup>83</sup> The broad reforms which took place soon after can be perhaps seen as the beginning of a centre-stage role for penal Populism in New Zealand politics. The years since have seen the assent of several well-publicised and controversial legislative amendments which were aimed at increasing sentence severity. Of these new measures, the introduction of strict new rules for repeat offenders under the Sentencing and Parole Reform Act 2010 stood out as particularly controversial. Under the Act, the “Three Strikes Law” imposed non-discretionary maximum sentences for some types of repeat offences. It received rigorous criticism from sentencing reform lobby groups and academics, who thought that the Bill was being introduced “for purely strategic political reasons.”<sup>84</sup> It was also suggested that the “three strikes and you’re out” rule was an unnecessary impugnation on the independent discretionary ability of the judiciary.<sup>85</sup> Despite these complaints, the Sentencing and Parole Reform Act 2010 received royal assent on 31 May 2010 in order to “enhance the integrity of the

73 Ministry of Justice *Attitudes to Crime and Punishment: A New Zealand Study* (2003) at 4.

74 Julian V Roberts “Public Opinion, Crime, and Criminal Justice” (1992) 16 *Crime & Justice* 99 at 116.

75 Ministry of Justice, above n 73, at 4.

76 New Zealand National Party “Milton Hilton a Monument to Bad Management” (press release, 10 May 2007).

77 National Party “Law and Order: Victims” (2011) Policy Manifesto <<http://www.national.org.nz>>.

78 Labour Party “Labour Party Manifesto” (2011) Labour Party at 327 <<http://www.labour.org.nz>>.

79 ACT New Zealand “Law and Order” (2011) Policies <<http://www.act.org.nz>>.

80 New Zealand First “Election Manifesto” (2011) New Zealand First at 87 <<http://www.nzfirst.org.nz>>.

81 “Prisoners Feast on Venison, Crayfish” *The Press* (New Zealand, 9 April 2005).

82 Ministry of Justice, *Reforming the Criminal Justice System* (Ministry of Justice, 2002).

83 Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, Australia, 2008) at 34.

84 Audrey Young “Three Strikes Law may see Early Releases – Criminologist” *The New Zealand Herald* (New Zealand, 20 January 2010).

85 Nick Russell and James Dunne “Three Strikes and You’re Out, Version 2: The New Proposed Sentencing and Parole Reform Bill” *NZLawyer* (2 October 2010).

parole system and to protect the public from the worst repeat offenders.<sup>86</sup> There has been some muted support offered for California's similar Three Strikes Law<sup>87</sup> due to its "significant deterrent"<sup>88</sup> force. The State saw an immediate and constant decline in the overall crime rate in the years after the new law came into effect.<sup>89</sup> A similar phenomenon may be occurring in New Zealand presently; 2011 saw the lowest recorded crime rate in over fifteen years.<sup>90</sup> However, it is far too early to speculate whether the implementation of the Sentencing and Parole Reform Act 2010 has a causative link to the recent drop in recorded crime. The financial implications of the reform are not insignificant. An estimated 56 extra beds would be required in prisons within the next five years,<sup>91</sup> which was seen in a particularly unfavourable light given the expense of keeping prisoners (\$249.25 per prisoner, per day)<sup>92</sup> and a growing awareness that New Zealand prisons are on the cusp of overcrowding. The reform is predicted to cost \$356,000,000 within the next fifty years.<sup>93</sup> The Sentencing and Parole Reform Act 2010 is cumbersome and expensive, but may yield results that justify the expense. Either way, it was a policy change which rang true with retributive proponents around New Zealand.

### B. Responding to the "Not-So-Retributive" Public

There seems to be an emerging understanding among members of the New Zealand public that lowering the threshold for incarceration is both unaffordable and ineffective, especially insofar as reducing recidivism is concerned. In 1990, the overall prison population floated around 4,000. This number has more than doubled, and now sits in the vicinity of 8,433.<sup>94</sup> This bloom – and the cost associated with it – has been well publicised. It is arguable this has encouraged legislators to become more "creative" with penal policy in non-expensive ways. An example of this might be seen in the tabling of the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill introduced by Simon Powers. This Bill aimed to go one step further than the Prisoners' and Victims' Claims Act 2005 by re-directing *all* compensation awarded to prisoners to victims of crimes. Opponents to the Bill suggested that it "knocks out one of the key safeguards against prisoners being abused".<sup>95</sup> The Attorney-General found the Bill was inconsistent with the Bill of Rights Act 1990 and that this inconsistency was unjustifiable.<sup>96</sup> Powers' Bill did not pass its first reading in Parliament.

Like the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 appeared to be

86 (10 April 2009) 652 NZPD 1420.

87 Ca Pen Code § 667(e)(2)(A)(ii) and § 1170.12(c)(2)(A)(ii).

88 Franklin Zimring, Gordon Hawkins and Sam Kamin *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford University Press, Oxford, 2001) at 91.

89 At 91.

90 New Zealand Police, above n 72.

91 Judith Collins "National and ACT agree to Three-Strikes Regime" (press release, 19 January 2010).

92 Judith Collins "National and ACT agree to Three-Strikes Regime" (press release, 19 January 2010).

93 Judith Collins "National and ACT agree to Three-Strikes Regime" (press release, 19 January 2010).

94 Department of Corrections, above n 11.

95 Green Party "Prisoner Bill Knocks Out Safeguards" (press release, 18 October 2011).

96 Chris Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill* (House of Representatives 2010) at [1].



an attempt to increase the severity of sentencing in New Zealand without incurring significant financial cost. It also appeared to be politically inexpensive, as disenfranchisement is a common practice in many liberal democracies. Throughout the legislative process, Quinn was outspoken about the public demand for a stricter approach to prisoner voting rights.<sup>97</sup> His vehemence on the subject is understandable; if he could attest that there was public demand for the Bill he introduced, his actions could be seen as responsive (and therefore warranted insofar as democratic mandate is concerned). However, despite his frequent claims to the contrary, to date no evidence of this support has been produced on request. Quinn was unable to adduce proof of the “overwhelming majority”<sup>98</sup> that was purportedly in support of the introduction of the Bill because it “was provided verbally and via email (since deleted)”.<sup>99</sup> Public submissions made to the Select Committee were almost unequivocally against the disenfranchisement of prisoners; fifty submissions were against the passage of the Bill, and two were in support of it (one of which was from Quinn himself).<sup>100</sup> It was predicted that the majority of submissions made in opposition to the Bill would be from “prisoner aid-type organisations”.<sup>101</sup> Instead, submissions were received from a range of parties including community law centres, university students and the New Zealand Law Society.

### C. Penal Populism Conclusions

In the absence of evidence to the contrary, it is reasonable to assume that there was no active public demand for the blanket disenfranchisement of incarcerated offenders in New Zealand. Accordingly, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 then appears to be merely *popular*, instead of responsive. Purely popular policy-making is not a beneficial behaviour to cultivate in legislators. This is precisely what leads to situations where elected representatives place a heavy emphasis on the electoral advantage of a policy, to the detriment of its effectiveness.<sup>102</sup> This form of populism has played a role in the reduced part that penal policy experts play in the drafting of new legislation.<sup>103</sup> The perils of side-lining experts from the “criminal justice establishment”<sup>104</sup> in favour of public sentiment are fairly self-evident. Often, it results in a severely compromised level of effectiveness and, arguably, the legitimacy of new legislation.<sup>105</sup> This effect is clearly evident in the passage of the Amendment. Not only is it likely that blanket disenfranchisement will be wholly ineffective (if not counterproductive), but it may also put New Zealand in contravention with its international obligations.

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97 (17 March 2010) 661 NZPD 9610.

98 (10 November 2010) 668 NZPD 15194.

99 Email from Bernard “Paul” Quinn MP to Liam Williams regarding the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (14 October 2011).

100 “Electoral (Disqualification of Convicted Prisoners) Amendment Bill – Submissions” (2010) New Zealand Parliament <<http://www.parliament.nz>>.

101 (17 March 2010) 661 NZPD 9610.

102 Roberts et al, above n 65, at 16.

103 John Pratt *Penal Populism* (Taylor & Francis, New York, 2007) at 3.

104 John Pratt “When Penal Populism Stops: Legitimacy, Scandal and the Power to Punish in New Zealand” (2008) 41 *Aus NZJ Criminology* 364.

105 At 366.

#### IV. PRISONER DISENFRANCHISEMENT AND NEW ZEALAND CIVIL RIGHTS OBLIGATIONS

It is difficult to identify a compelling justification for the disenfranchisement of prisoners in New Zealand. Not only is the practice almost entirely devoid of penological merit, but it also seems to conflict with New Zealand's constitutional arrangements. This is unsurprising, given that the right to vote guarantees the protection of all other fundamental rights. Section 12 of the New Zealand Bill of Rights Act 1990 gives the right to vote to "[e]very New Zealand citizen who is of or over the age of 18 years", which is subject to the "justified limitations" of s 4. Christopher Finlayson, the Attorney-General of the time, provided an extensive and technical inspection of the Amendment under s 7 of the Bill of Rights Act. He raised several concerns, chief among them the "disproportionate"<sup>106</sup> way in which prisoners would be deprived of the vote. He concluded that the amendment was inconsistent with s 12 of the Bill of Rights Act, and that it was unjustifiable under s 5 of the Act.<sup>107</sup>

*Re Bennett* is the judiciary's subdued response to prisoner disenfranchisement as it sits with regard to New Zealand constitutional arrangements. Grieg J found that he could not consider the Electoral Act 1956<sup>108</sup> under ss 5 or 6 of the Bill of Rights Act 1990 as such an analysis was precluded by s 4. Instead, he opted to indicate that the practice of prisoner disenfranchisement presented a "clear conflict with the Bill of Rights".<sup>109</sup> This case is particularly relevant in modernity given that the current disenfranchisement practice is the same that was exercised on the date of this judgement. It is therefore highly likely that a similar conclusion would be reached if a similar case made its way to the High Court with regards to the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

New Zealand is a state party to the ICCPR. Article 25 of the Covenant states that "[e]very citizen shall have the right and the opportunity ... to take part in the conduct of public affairs". Reasonable restrictions are considered to be those which are made "on grounds which are established by law and which are objective and reasonable."<sup>110</sup> While there is no international jurisprudence on the matter of art 25 of the ICCPR in relation to prisoner disenfranchisement, the findings of the European Court of Human Rights (ECHR) offer some enlightening comparisons. Protocol 1, art 3 of the ECHR is very similar to its ICCPR counterpart, with the conspicuous omission of any wording that pertains to universal suffrage. Notwithstanding this absence, the ECHR has released several rulings which have consistently found that the practise of blanket prisoner disenfranchisement is incompatible with the ECHR.<sup>111</sup> These rulings make a compelling case for inconsistency between prisoner disenfranchisement in New Zealand and its obligations under the ICCPR, especially in light of the universal suffrage component found in the Covenant.

Disenfranchisement provisions have been successfully challenged by domestic courts around the world. The Israeli Supreme Court refused a request to remove the citizenship rights of Yigal

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106 Finlayson, above n 63, at 4.

107 At 4.

108 Electoral Act 1956, s 42(1)(d).

109 *Re Bennett* (1993) 2 HRNZ 358 (HC) at 361.

110 United Nations Human Rights Committee, above n 5, at [4].

111 *Hirst v the United Kingdom* (No 2) [2005] ECHR 681, *Frodl v Austria* [2010] ECHR 508 and *Greens and MT v United Kingdom* [2010] ECHR 1826.

Amir, the man imprisoned for the assassination of Prime Minister Yitzak Rabin in 1995. Had his citizenship been revoked, Mr Amir would no longer be able to exercise his right to vote. This was of concern to the Court, which held that “[w]ithout the right to vote, the infrastructure of all other fundamental rights would be damaged.”<sup>112</sup> Similarly, in 1999, the Constitutional Court of South Africa ruled against prisoner disenfranchisement, declaring that:<sup>113</sup>

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.

Similarly, in 2002 the Supreme Court of Canada judged that the “[d]enial of the right to vote to penitentiary inmates undermines the legitimacy of government, the effectiveness of government, and the rule of law”.<sup>114</sup> In 2007, the High Court of Australia found that a complete ban on prisoner voting rights went “beyond what is reasonably appropriate and adapted (or ‘proportionate’) to the maintenance of representative government”.<sup>115</sup> The Court deemed acceptable a prior policy which only disqualified prisoners serving more than three years in prison. This was purportedly because it helped to “distinguish between serious lawlessness and less serious but still reprehensible conduct”.<sup>116</sup>

## v. SUMMARY

The denial of franchise to all prisoners in New Zealand puts the State in an interesting position. As a signatory to the International Covenant on Civil and Political Rights and thus an adherent to the general principles of universal suffrage, the passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 makes New Zealand appear out of step with international jurisprudence and academic opinion. An absolute ban finds inconsistent application between offenders, is disproportionate to most offences committed, is counterproductive for the purposes of rehabilitation and derogates from the principles of universal suffrage without due cause. In the absence of any compelling argument to the contrary, it is difficult to see the reintroduction of a comprehensive prisoner disenfranchisement policy as anything other than an appeal to the conjectural “retributive public”. Such an appeal resembles what was described in 1776 by John Adams as a “democratic despotism”<sup>117</sup>, where the *perceived* popular opinion of the majority becomes a sufficient political incentive to subvert the voting rights of minority groups. It is concluded that the amendment of the Electoral Act 1993 in 2010 to disqualify prisoners from voting was unnecessary, disadvantageous and contrary to New Zealand’s civil rights obligations. This seemingly arbitrary disposal of the right to vote – a fundamental democratic right – sets a concerning precedent for the future of civil rights in New Zealand.

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112 *Hila Alrai v Minister of the Interior and Yigal Amir* HC 2757/96 (1996).

113 *August v Electoral Commission* 1999 (3) SA 1 at [17].

114 *Sauvé v Canada* (Chief Electoral Officer) 2002 3 SCR 519 at [58].

115 *Roach v Electoral Commissioner* [2007] HCA 43 at [95].

116 *Roach v Electoral Commissioner* [2007] HCA 43.

117 Marc Slonim and James H. Lowe “Judicial Review of Laws Enacted by Popular Vote” (1979) 55 Wash L Rev 175 at 185.

# BOOK REVIEW

PUBLIC LAW TOOLBOX: SOLVING PROBLEMS WITH GOVERNMENT by Mai Chen (Author), LexisNexis, 2012. 1050 pp, recommended retail price NZ\$184 (paperback).

This book has been over 15 years in the making. It represents the product of the first public law legal practice formed in the 1990s. Mai Chen, with Rt Hon Sir Geoffrey Palmer, established the first explicitly public law practice, which recognised that those giving public law advice required not only a knowledge of the law, but also an understanding of the policy and political process. Palmer had set out the case for a new approach to public law teaching and practice in a lecture to Otago law students in 1992, which was published in the Victoria University of Wellington Law Review. His view of the proper practice of public law was summed up in that article as follows:<sup>1</sup>

My contention is that no one can be an adequate public lawyer without understanding not only the laws of the constitution, but also the practice of it, how it works. If one restricts oneself to the rules recognised by the courts, one will understand very little about how we are governed, or how public power in New Zealand is distributed. From the lawyer's point of view, there is a further deficiency in the traditional approach – it teaches you little about how to produce outcomes for clients.

The formation of Chen Palmer law practice in 1993 provided the opportunity to put this new approach into practice. As I was teaching public law at the newly established Waikato Law School at the time, this approach to public law was incorporated within the curriculum in an effort to introduce students to the context within which law is made.

The focus of this approach to public law in practice was problem solving. Public law problems were best resolved through a combination of case analysis and risk assessment within the relevant political and policy context. Clients needed their legal advisors to be proactive problem solvers. It was also appropriate for the legal advisors, on behalf of their clients, to participate in the law making process through engaging with the policy and political decision makers. While today this approach to legal practice is taken for granted, at the time it was seen as radical. It also reflected a professional response to the fundamental changes that were taking place in New Zealand through the adoption of a neo-liberal approach to policy making. With the decline in the role of public institutions – such as the public service – to protect the public interest in the traditional sense, it was necessary to ensure client interests were protected through a change in the nature of the provision of legal services.

Palmer recognises in his Reviewer Comment in the introduction to the book that if the interests of New Zealanders generally are to be protected in public decision making, there must be knowledge of how those institutions work. As he notes:<sup>2</sup>

There is great value in the focus because it adds to the sense that New Zealanders govern themselves through their democratic institutions of which Parliament is the prime mover.

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1 Sir Geoffrey Palmer “The New Public Law: Its Province and Function” (1992) 22 VUWLR 1 at 7–8.  
2 Mai Chen *Public Law Toolbox* (Lexis Nexis, Wellington, 2012) at v.

Palmer characterises the approach of the book as that of the engineer who is explaining how the engine room of law making works. The book certainly sets out to explain the practice of public law in New Zealand. Chen notes in the Preface that this is not a book for theorists.<sup>3</sup> It is for practitioners, and this is reflected in the content and organisation of the book. As such it is aptly described as a toolbox. The toolbox approach is best described by Chen as:<sup>4</sup>

public law, including public accountability and transparency mechanisms, like the Official Information Act 1982, officers of Parliament, complaints bodies, institutions of government and constitutional conventions, and regulation of the private sector as problem solving tools for business and clients.

Although this practical approach is primarily aimed at clients and business, the book also makes an important contribution to explaining how the constitutional institutions operate in practice, and support democratic decision making. It is therefore essential reading for anyone who wants to know how the regulatory framework incorporating the institutions of the executive and Parliament works, or should work in practice. Knowledge of the regulatory toolbox is not sufficient, however, to protect or promote a citizen or client interest. It is the skill of knowing what is the appropriate or most effective instrument in the circumstances that is also required to get the full benefit of the tools available. This is where the book is also helpful with its use of practical examples.

At the outset of this substantial text, the author helpfully clarifies the role of the public lawyer by identifying common myths about the role. She notes first that the role of the public lawyer is not as simple as the lawyer “having access” to decision makers.<sup>5</sup> Although the lawyer may get access, that access is only effective if there is a clear understanding of the problem and options for how to it is to be resolved. That the public lawyer also must deal with all political parties in an MMP environment is sometimes forgotten. Although ideology defines political parties, in the day-to-day business of law making there is a need to find solutions to complex problems, and ideology is not often helpful in these circumstances. What is required from the public lawyer is practical advice on how to solve the problem. Also, regardless of the ideology of the government of the day, all governments are required to observe the constitutional infrastructural obligation for transparency and accountability. It is through astute use of these constitutional instruments that a client’s problem may be resolved. Finally, Chen asserts that public lawyers are not merely lobbyists. As she notes:<sup>6</sup>

the magic is in knowing, in any particular situation, which public law tools to deploy, and when and how to do that for best results.

The book is divided into five Parts that cover both institutions and processes. Although the material covered is not exhaustive, it is comprehensive. The descriptive commentary is illustrated by case studies that demonstrate the practical application of the law making process, or the various ways in which to resolve a problem. For example, Case Study 2.1<sup>7</sup> provides a narrative

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3 At xi.

4 At 3; see also Mai Chen “The Public Law Toolbox” (10 February 2012) New Zealand Lawyer Magazine Online, Issue 177 <[www.newzealandlawyer.co.nz](http://www.newzealandlawyer.co.nz)>.

5 Chen, above n 2, at 21.

6 At 21.

7 At 32.

describing the issues that have arisen recently in the settlement of parliamentary salaries and allowances, while Case Study 7.1<sup>8</sup> takes the reader through the various stages of the law reform process that resulted in the Commerce Amendment Act 2008, which amended Parts 4 and 4A of the Commerce Act. Part A of the book deals with the institutions of government decision making and the various regulatory controls on that process. The underlying theme is how to make executive decision making accountable. Material in this Part deals with the formation of governments, the implications of the electoral system and working within a MMP environment, as well as the legislative process. It also includes chapters on Treaty of Waitangi settlements, human rights protections, the impact of international law and the use of inquiries.

Part B moves onto an often neglected area, namely the Officers of Parliament, whom Chen describes as “constitutional watchdogs”.<sup>9</sup> She describes how the Offices of the Ombudsman, Auditor-General and Parliamentary Commission for the Environment can not only hold executives to account for their actions, but also provide individuals with the means to redress wrongs in public administration. This chapter is followed by an assessment of the powers and capacity of various complaints agencies to provide remedies.<sup>10</sup> The Privacy Commissioner, the Health and Disability Commissioner, the Independent Police Conduct Authority, the Regulations Review Committee, the Judicial Conduct Commissioner and the intelligence and security agencies are all examined in these chapters. The proliferation of such complaint agencies means the courts are not the primary source of the redress for wrongs experienced by clients. Knowledge of these agencies’ powers and procedures is therefore essential for the public lawyer.

Parts D and E deal with the regulators and litigation respectively. While much has been written about the central regulatory role of the Commerce Commission, less is understood of the various professional regulatory bodies. The regulatory bodies that govern health professionals, lawyers, real estate agents, financial advisors, actuaries and auditors are all analysed in the text.<sup>11</sup> Chen describes the trend towards “heavy-handed”<sup>12</sup> regulation of professions and industries as an example of a search for more accountability and transparency by clients and citizens who have suffered financial loss as a result of unprofessional conduct exposed by the financial recession. It is not surprising that a treatment of litigation comes toward the end of the book.<sup>13</sup> It is seen as a tool of last resort, given that it is “expensive, time consuming and uncertain”. It does have a place, however. Importantly, court judgments provide guidance for future cases and thus influence client behaviour. The increasing use of arbitration is therefore a concern if it undermines litigation in the courts.

The final two chapters address the issue of fraud and corruption with a focus on the Serious Fraud Office, and finally consideration is given to future constitutional change. This chapter is timely given the current constitutional review being undertaken by the government. Chen argues for the establishment of a Constitutional Commission as an independent non-partisan body to prevent constitutional changes being undertaken in a hasty ad hoc manner, without proper public education and understanding of the implications of any change. This seems like a sensible notion

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8 At 229.

9 At 675.

10 At Parts B and C generally.

11 At ch 25 generally.

12 At 925.

13 At Part E.

as a pre-requisite to any constitutional change that may emerge from the current constitutional review. The problem with the current review is that it lacks the legitimacy that comes with independence.

In conclusion, this text will be essential reading for public lawyers and those interested in understanding how public institutions work in New Zealand. Chen wrote that the purpose of the book:<sup>14</sup>

is to empower those dealing with government to be more effective and successful; and to make constitutional issues ordinary and not extraordinary. This book seeks to re-conceive the citizen/state relationship to a more level playing field. It also aims to raise consciousness about government and how it operates, and hence allows greater sophistication and quality of public debate about complex issues of law and policy and the constitution.

In terms of the text's content and clearly written style, it succeeds with these objectives. The cost of the text will limit access, however, and it is difficult to see how this could be overcome given the comprehensive nature of the text. There will also be a need for regular updating, as the law-making process is dynamic and subject to constant change. This leads to the observation that the value of the text may be increased if it can be reproduced online.

PROFESSOR MARGARET WILSON\*

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14 At 8.

\* Professor in Public Policy, Te Piringa – Faculty of Law, University of Waikato.

## BOOK REVIEW

UNDERSTANDING COMMERCIAL LAW by Philippa Gerbic and Leigh Miller (Authors), 7th ed, LexisNexis, 2010. 714 pp, recommended retail price NZ\$98 (paperback).

*Understanding Commercial Law* (published by LexisNexis) has been a popular textbook for many years since publication of the first edition in 1988. Its popularity is evidenced by the fact that it can be found in the catalogue of many New Zealand libraries, whether those in a university or those for the general public, and that it is categorised very often as “short loan” or even “not for loan”. The latest version of this book so far is its seventh edition, with the law updated to 1 October 2010. This does not mean the law stated in the book is “out of date”, as the law in most of the areas of commercial law in New Zealand has not been significantly changed since then.

There is no clear definition and scope of “commercial law”. Commercial law, however, affects all of us in our everyday lives, because as a reality all of us live in a commercial world. Modern commercial law in New Zealand stemmed from law merchant which was an integral part of English common law. Historically, doing business was treated as a privilege and merchants were regarded as a special class of people. Traders always tried to find more efficient ways to negotiate and conclude a deal. Over time, some practices became widely accepted and were often referred to by traders, and thus they became customary rules. Those customary rules were then recognised or adopted by the courts in dealing with disputes between merchants, by which the customary rules became a part of common law. Most of those common law rules relating to commercial activities were later codified. Nowadays, taking part in commercial/business activities is no longer deemed a privilege and everyone may be a merchant to some extent. For example, it is very difficult to determine whether a person buying and selling items on Trade Me is a merchant or not. Cheques (and internet banking) are now widely used by average people, not only by traders as in the 16th to 19th centuries. Governments now actively intervene for the promotion of competition and the protection of consumers. These changes mean that today commercial law affects almost all of us and it becomes more necessary or desirable for everyone, not only lawyers and merchants, to know some basic commercial law rules.

The problem, however, is that commercial law in New Zealand is complicated and not easy to understand. This is more so for those who do not have knowledge about New Zealand law or who come from a non-common law jurisdiction, and those whose first language is not English. Ideally, a person who wants to learn about commercial law should have first learned about the legal system and the law of contract in New Zealand. For a manager of a business or an average person in New Zealand, this is impractical because of the stress of time and cost. For students doing business studies, a more common situation is that they are required to do the commercial law course without completing New Zealand Legal System and Contract Law papers as a prerequisite.



*Understanding Commercial Law* would appear to provide a solution to these difficulties. The book is aimed at “non-lawyer learners and students whose first language is not English”.<sup>1</sup> The authors of this book noticed the needs of those who do not have a legal background but need to learn commercial law in New Zealand. The goal of this book is to make such a transition easier and the principles of commercial law in New Zealand “more accessible and easier to understand”.<sup>2</sup> This book does seem to cater for its target readers’ needs, and achieves its overall purpose of making commercial law more accessible and easier to understand. This goal is achieved or achievable to a large extent.

First of all, the writing style is wonderful for beginners. The book is written in simple and plain English. Legal English, with a lot of jargon and special ways of expression, is inherently difficult. This is so even for a native English speaker or a law student, let alone for a non-native English speaker or a reader without a legal background. Due to the nature of law and especially the precision and accuracy requirements of legislation, it is always a challenge to explain law in simple and plain language. *Understanding Commercial Law*, however, succeeds in this aspect to a large extent. Headings and subheadings are well numbered. Statements of the law are put into short paragraphs according to the contents. Shorter and simpler sentences and words are used wherever it is possible to do so. Expressions more often used in daily life are also preferred by the book, for example, in explaining the rules of passing of property under the Sale of Goods Act 1908, the word “ownership” is used.<sup>3</sup> Where the use of a long sentence is unavoidable, the sentence is often broken down into listed bullet points with each point in a short and simple sentence/phrase. In addition, sentences are organised following the natural flow of thinking. For example, most compound sentences in the book are written in such a way as “although a division of the District Courts, the tribunals have a different focus ...”,<sup>4</sup> “in order to..., the stronger party must rebut the presumption”,<sup>5</sup> and “if this is not so, then...”.<sup>6</sup> This reduces the degree of difficulty in reading and understanding. The book also highlights key words and concepts in the main text in bold and the meaning of most of them can be found in the glossary to the book.

Secondly, the book has its own effective way of explaining legal concepts and principles. It uses diagrams and flowcharts to illustrate legal concepts and processes. It also provides examples to illustrate the concepts and legal principles. The examples include sections of an Act, very brief case summaries and hypothetical scenarios (see all three examples at page 217 of the text). Most of the hypothetical scenarios are very simple and short, sometimes only in a few words, yet they are very helpful nonetheless. For example, in explaining the legal concept of “duress”, one of the examples given is “a threat to burn down a factory unless the contract is made”.<sup>7</sup> Another example explains rule 2 of the passing of property under s 20 of the Sale of Goods Act 1908. Immediately after describing the situation to which the rule applies, the example is given: “the parties agree that, before the buyer will pay for a car, the seller will have a broken headlight

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1 Philippa Gerbic and Leigh Miller *Understanding Commercial Law* (7th ed, LexisNexis, Wellington, 2010) at v “Preface”.

2 At v.

3 Philippa Gerbic and Leigh Miller, above n 1, at 357.

4 At 48.

5 At 205.

6 At 49.

7 At 202.

replaced”.<sup>8</sup> With the diagrams, flowcharts and examples, the book is more like a series of lecture notes well-tailored for the target readers, and provides significant assistance in understanding the elusive legal concepts and principles. The book also helps readers understand important legal principles by briefly summarising the key points of the principles, alongside the main text, in a coloured “notepad” area, which not only draws the readers’ attention to their importance but also provides an effective opportunity for the revision of those rules.

Thirdly, the book is well structured and organised. Before the main text, there is a collection of glossary terms. Glossary entries are listed in alphabetic order and each has a succinct and clear explanation. The glossary section goes beyond that of a law dictionary, because only those words or phrases that are most relevant to the topics, which are also printed in bold throughout the main text, are listed and defined in the glossary. Using this glossary rather than a general law dictionary saves readers a lot of time. The case appendix, put immediately after the main text, is also a helpful and efficient tool for readers. While it is beneficial to read the original case judgments when studying law, this is very time consuming and it may be difficult for those without a legal background or for non-native English speakers. Important cases are noted in bold in the main text and in the examples following each paragraph. They are further discussed in the case appendix. For each case noted in the case appendix, clear citations are provided and the key facts, issue(s) and decisions are listed in bullet points. Each chapter is also well structured in a convenient way. At the beginning of each chapter, there is a table of contents followed by “Key Learnings”, which outline the main learning outcomes expected. After the main text of each chapter there is a summary of the most important legal concepts and principles stated in the chapter. At the end of each chapter is a “Students’ Glossary” which lists important terms that students are expected to understand, define and describe. If a student is not sure about the meaning of those terms, he or she may go back to the main text of that chapter to scan for the words printed in bold or simply refer to the glossary.

The topics covered are also logically organised. The book, in chapters one to three, first provides readers with a general introduction to law and the New Zealand legal system, which is valuable for those without the necessary background knowledge of law and New Zealand law. Then, in chapters four and five, the book briefly introduces the most important and basic concepts and principles concerning business organisation and contracts, which are important and helpful in aiding the understanding of other areas of commercial law. Chapters seven to 12 are introductory statements of the law concerning particular areas of law, namely, the law on consumer protection, sale of goods law, law on agency, law of tort, law of property and the law of privacy. It is a pity, however, that for unknown reasons, chapter seven “Consumer Legislation” does not include some of the most important consumer legislation, for example, the Credit Contracts and Consumer Finance Act 2003 and the Motor Vehicle Sales Act 2003. Looking at the lives of New Zealanders, these types of transactions are very common and affect the daily life of almost all of us. It is conceivable that, due to the limited space available, the book does not cover other topics of commercial law, such as the laws on insurance, banking, guarantee, and insolvency etc. These topics are arguably more suitable for inclusion than the “law of employment” (chapter six) and the “law of privacy”. A possible reason for the inclusion of those topics may be the book being targeted at students of commerce rather than students of law.

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8 At 359.

Fourthly, the multi-levelled index at the end of the book, in conjunction with the logical structure, the clear table of contents, table of cases and table of statutes, allows information on a particular topic, case or legislation to be easy to find. While the main entries are listed alphabetically, contents relating to a main entry are listed together under that main entry as sub entries in alphabetical order. Each main entry and/or sub entry refers to paragraph numbers in the main text. Cross referencing of entries/sub-entries within the index is also available. Important cases (printed in bold in the main text) are also included in the index as entries, with their full citations and summaries available in the case appendix part in the book. Such a considerate arrangement significantly helps targeted readers find the particular information they need more efficiently.

Finally, we must mention the authors of the book. They are/were either teaching commercial law at New Zealand universities and/or practising commercial law in New Zealand. This equips them with an effective understanding of commercial law in New Zealand and the needs and difficulties of students studying commercial law.

All of the above, notwithstanding the minor drawbacks in topic coverage, entitles the book to worthy inclusion in the LexisNexis' *Understanding* series, with its excellent readability and accessibility to commercial law in New Zealand among its most significant features. Although it is aimed at "non-lawyer learners and students whose first language is not English",<sup>9</sup> the book can also be used as an introductory text or a stepping stone for lawyers or students whose first language is English, by providing them with a helpful overview and basic understanding as preparation for their further study or research of commercial law.

We look forward to the following edition coming soon.

DR ZHIXIONG LIAO\*

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9 Above n 1.

\* Dr Zhixiong Liao, Lecturer in Te Piringa – Faculty of Law, University of Waikato. He teaches Commercial Transactions, Contract Law and Land Law. Before joining the Faculty, he practised law in China and New Zealand, mainly in commercial law, tax law and overseas investments.

