



NZ Centre for Human Rights Law, Policy and Practice

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The first several months have been extraordinarily busy. A stream of public lectures examining cutting edge issues have been hosted, including Widney Brown, Legal Counsel to Amnesty International addressing the prospects for an arms control treaty and Esther Brimmer, President Obama’s Assistant Secretary of State for International Organizations, discussing the US engagement in human rights issues in the Pacific.

The Centre was also at the forefront of the creation of the New Zealand Human Rights Lawyers Association (HRLA – see www.hrla.org.nz). The HRLA was launched in June 2012 with a lecture by HH Judge Jonathan Moses on the importance of being a lawyer active in human rights, to which Grant Illingworth QC provided some supplemental comments. Amongst other things, the HRLA hope to pursue critical human rights cases to the UN Human Rights Committee. It is already working on its first case; intervening in domestic cases will also be considered. The HRLA and the Centre, together with the Human Rights Foundation, were involved in presenting a seminar on the practicalities of taking a case to the UN’s Human Rights Committee.

As a university body, engagement in research is a central function of the Centre, though it is hoped that this can be research that can be used by the legal profession and others. The main methodology used to generate research is the establishment of the Human Rights Working Paper Series. The series is organized into more than 30 thematic and geographic series and edited by academics and assisted by student associates. The Working Paper Series aims to publish short papers addressing theoretical and empirical human rights issues, providing a forum for the publication, discussion and debate of these issues. Submission guidelines are on the Centre’s “Research” homepage. Papers from practitioners are welcomed.

Introduction to the Centre

Oxford University’s Vinerian Professor of English Law, Andrew Ashworth, launched The New Zealand Centre for Human Rights Law, Policy and Practice with a public lecture in March 2012 at Old Government House in Auckland, attended by judges, senior practitioners, academics and students. Located at the University of Auckland’s Faculty of Law, the Centre has been established to examine human rights in a changing world. It aims to support discussion between academia, civil society, the legal profession and policy makers on human rights topics, domestically and internationally.

Introduction to the Centre

The Working Paper Series also seeks to provide a repository of human rights documentation and so should provide a starting point for research on a particular issue. Each series has a number of pages attached, presenting cutting edge podcasts, video lectures, newspaper commentary, reports by NGOs, international organisations, and governments relating to the particular human right in question, as well as relevant journals and links to other centres and institutions.

Many of the academic editors of the Working Paper Series are from the University of Auckland, some from the Law School but many from other departments, as the Centre has been keen to ensure that it builds the possibility for cross-disciplinary approaches to human rights standards. The Centre has a significant number of such academic members from other universities in New Zealand and elsewhere.

In due course, a programme for visiting scholars will be established. The Centre has recently appointed its first Research Fellow. Rosslyn Noonan, best known as the Chief Commissioner for Human Rights for a decade, will be associated with the Centre in a research capacity: naturally, her talents will also be used in other ways.

There is also a forum for speedier and less academic debate. Also attached to the Working Paper Series is the New Zealand Human Rights Blog, providing for timely comment on contemporary and other human rights issues. This student-led initiative will be supplemented by case summaries of leading human rights cases, both arising under the New Zealand Bill of Rights Act and from other jurisdictions: the hope is that this will build into a ready reference point for important cases.

Also planned for students is a human rights careers hub. This will have profiles of New Zealand graduates who have gone to work in human rights fields, and the aim will be to alert students to the possibilities and to provide them with contacts who can offer peer support and guidance.

The Centre also hopes to develop a range of additional human rights related courses that can be offered to students, including a version of the clinical legal education programmes that have become a central feature of the law school experience of students in the USA. The plan here is to place students within civil society organisations to help them participate in the UN human rights monitoring process by the provision of reports to the relevant UN body, or to participate in making submissions on legislation passing through Parliament. There are opportunities for practicing lawyers to get involved in this to offer mentoring support.

In terms of events on the drawing board for next year, these include a conference on the theme of access to justice and another as part of the Constitutional Review on the questions of the way that human rights standards are part of the constitutional framework in New Zealand (and the way they should be). Guest speakers will include Professor Michael O'Flaherty who, amongst other appointments, is the Vice-Chair of the Human Rights Committee of the United Nations and the Chief Human Rights Commissioner for Northern Ireland.

The Zealand Centre for Human Rights Law, Policy and Practice aims to build on New Zealand's past position as a leader in human rights by placing human rights, again, at the centre of public discussion. New Zealand played a significant role in the formulation of the Universal Declaration of Human Rights, has been an early adopter of many human rights standards, but occasionally lags behind. The Centre is off to a healthy start in its task of returning discourse on human rights to a central position.

Kris Gledhill | Director NZCHR

Our People



Kris Gledhill

Kris Gledhill is the Director of the New Zealand Centre for Human Rights Law, Policy and Practice. Kris developed an appellate criminal and public law practice as a barrister in England, which included numerous appearances in precedent setting cases in the European Court of Human Rights, the House of Lords and the Court of Appeal; he also sat as a Tribunal Judge on mental health cases. Kris taught extensively on continuing professional education courses in the UK; he had in the past been engaged as a tutor at SOAS, UCL and University College Oxford and as a part-time lecturer at the London School of Law and had been involved in an online mental health law course with the New York Law School.

Kris came to New Zealand in 2006, initially to pursue a PhD; he accepted a lectureship at Auckland University Law School from the start of 2007. Kris has already published extensively on Mental Health and Human Rights. He has been the driving force behind the Centre's functions, particularly the development of key conferences on 'Access to Justice' and 'Refugee Rights', the creation of the New Zealand Human Rights Lawyers Association, the establishment of links with other academics, universities and the legal profession, and the evolution of Centre research initiatives (the Working Paper Series and the Human Rights Blog).



Chris Mahony

Chris Mahony is the Centre's Deputy Director. Chris has been involved in human rights since 2003, when he took a year off from his undergraduate degrees in Commerce and Law, to work on human rights in West Africa. That year, Chris worked on access to justice and corruption issues. He drafted the governance recommendations for Sierra Leone's Truth and Reconciliation Commission.

Chris returned home to finish his undergraduate degrees and practice law at Meredith Connell, appearing for the Crown in 2006 on criminal and refugee matters. He began a Masters in African Studies at Oxford University, where he is currently undertaking a Doctorate in Politics.

Chris' thesis examines case selection at the International Criminal Court, the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda.

In 2008 Chris was employed by the UN backed Special Court for Sierra Leone to direct the design of a witness protection program for Sierra Leone's criminal justice system, informed by research in South Africa, Kenya, Uganda and at the United Nations Office on Drugs and Crime in Vienna.

He has since advised the US State Department, USAID, the British Foreign and Commonwealth Office, the Open Society Initiative, the International Centre for Transitional Justice, The International Criminal Court and the Government of Nepal on issues relating to the ICC, transitional justice and criminal justice reform.

Our People



Stéphanie Bürgenmeier

Stephanie completed her Master of Criminology and Criminal Justice from Kings College London, UK in February 2012. She also holds a Master of International Relations, Security and Development from the Autonomous University of Barcelona, Spain, and a Bachelor of Arts in Political Economics and History from the University of Geneva, Switzerland. She dedicated her BA dissertation to the disappeared people of Argentina and her MA dissertation to human rights violations occurring at the intersection of business and government and obtained Distinction for both works. She gained practical experience during her internships at the International State Crime Initiative in London and at the Office of Promotion of Peace and Human Rights of the Catalan Government in Barcelona. In 2011 she worked for the Association for the Prevention of Torture in Geneva and was in charge of the organisation of the “APT Global Forum on the OPCAT: Preventing Torture, Upholding Dignity. From Pledges to Action.” She is now the Working Paper Series Editorial Convenor and a researcher at the New Zealand Centre for Human Rights Law, Policy and Practice. She is also undertaking research on ICC case selection in Uganda for Chris Mahony, Deputy Director of the Centre, and on the teaching of theoretical criminology to postgraduate students for James Oleson, Senior Lecturer in Criminology at the University of Auckland.



Lee Lon Wong

Lee Lon Wong is a recent graduate from the law faculty of the University of Auckland. Currently he works with a number of criminal defence barristers alongside his work with the New Zealand Centre for Human Rights, Law, Policy and Practice. At the Centre, a significant amount of work goes into maintaining the pages of each respective Working Paper Series. The individual sections of each series – podcasts, media clippings, reports, organisations and legislation – all require constant updates with the most recent material compiled by the research associates. Lee Lon’s role is to manage the research associates and moderate the content of the website. Lee Lon’s work is very much informed by his experience living in Saudi Arabia. In New Zealand, rights are largely taken for granted. In Saudi Arabia, as in many places elsewhere, the beauty of the country masks the ugliness of repressive elements below the surface. There, it is not difficult to see that a life without rights is barely a life at all. Thus, for Lee-Lon working with the Centre in ways that help progress human rights is both a privilege and an honour.



Geraldine Burnett

Geraldine is the editor of the NZCHR Bulletin and student page manager for the China and North America series. She is currently completing her law degree at the University of Auckland and she also holds a Bachelor of Commerce majoring in Economics and Management. She has a strong interest in Human Rights Law and Policy and in addition to her role with the Centre she works for Amnesty International New Zealand. She strongly believes in the importance of social sustainability and the role that human rights law, policy and practice have to play in this.

Centre Initiatives

The New Zealand Human Rights Blog

The New Zealand Human Rights Blog (<http://nzhumanrightsblog.com/>) is an exciting new online initiative, launched in partnership with the Centre. The Blog – entirely student-edited and administered – features case notes and commentary from students, academics and practitioners

A selection of highlights:

University of Auckland student [Shelley Deng's analysis of the recent tort case, C v Holland](#). Deng provides an excellent overview of the development of the tort of privacy in New Zealand, and an erudite commentary on its likely future course.

University of Auckland lecturer [Danielle Kelly's Analysis of human rights in the Pacific Region](#). Kelly advocates for greater prominence of cultural values in Pacific law, including the interpretation of Pacific constitutions. She concludes that this approach allows for the affirmation of particular identity, rather than causing conflict between legal and cultural values.

The Human Rights Lawyers Association, Aotearoa New Zealand

The Aotearoa New Zealand Human Rights Lawyers Association is a growing network of approximately 60 lawyers with an interest in human rights. A group of young lawyers, working closely with Kris Gledhill and Chris Mahoney of the New Zealand Centre for Human Rights Law launched the Association in Auckland with a public lecture by Judge Jonathan Moses about the importance of lawyers being active for human rights. Since then, the board has prepared a detailed strategic plan, co-hosted a seminar on taking events to the UN Human Rights Committee with the Centre, and hosted an information evening in Wellington with a view to expanding nationwide. The Association is also developing a referral network of lawyers who are willing to take on cases with human rights implications, and has already fielded several

University of Auckland student [Oliver Sutton's analysis of the Copyright \(Infringing File Sharing\) Amendment Act 2011](#). Sutton concludes that the law fails to achieve either efficacy or compliance with the New Zealand Bill of Rights Act, and is in need of revisiting.

Readers are encouraged to contribute to the blog. For more information, please contact blog editors Sam Bookman and Gretta Schumacher at editors@nzhumanrightsblog.com.



**NEW ZEALAND
HUMAN RIGHTS
BLOG**

requests from legal assistance from members of the public.

David Tong Co-Chair | Human Rights Lawyers Association Aotearoa New Zealand



**THE HUMAN RIGHTS
LAWYERS
ASSOCIATION
AOTEAROA NEW ZEALAND**

News & Developments in Brief

Recent New Zealand Bill of Rights Cases: Court of Appeal Decisions

The Right to Foreign Counsel

Barrie v R [2012] NZCA 485 - The right to counsel under s 23(1)(b) of the NZBORA does not include the right to advise foreign counsel. A detainee who seeks to consult an overseas lawyer must first demonstrate reasonable grounds exist to believe that they can obtain relevant legal advice from that source.

Covert Police Surveillance of a public space - a search?

Lorigan v R [2012] NZCA 264 - In this case, the police action involved video surveillance of the end of a driveway from a neighbouring property in order to record the vehicles and persons entering and leaving the driveway. The information obtained was then cross-referenced with the police databases for known drug leads. No view of the private residence was taken and at one stage the police also employed night-time filming equipment to continue surveillance at night.

The test to be applied in these cases is whether the surveillance by the police involves state intrusion into reasonable expectations of privacy. In this case, the filming of a public space without trespass did not constitute a search. However, the surveillance capturing images not usually visible to the naked eye (e.g. night time, infrared) did involve a breach of reasonable expectations of privacy, and thus did amount to a search.

The Right to Choose Legal Aid Counsel

Clark v Registrar of the Manukau District Court [2012] NZCA 193 - Canvassing overseas authorities and international law, this decision clarified that the right to legal representation does not include the right to choose specific counsel when the accused is receiving state-funded legal assistance.

Funding Family Caregivers to the Disabled

Ministry of Health v Atkinson [2012] NZCA 184 - The Court of Appeal upheld the High Court's finding that a Ministry policy to stop payments to family carers of disabled children whilst nevertheless continuing them for contractor-provided services was discriminatory to the family caregivers by reason of their status as family. This was a prima facie breach of s19 of the NZBORA. There is an extended discussion of the meaning of "discrimination". Analysing the High Court's evaluation of whether the policy was a justified limit, the Court of Appeal decided that the Ministry of Health had not proven any error of law in the High Court's reason and upheld its decision.

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Recent New Zealand Bill of Rights Cases: High Court Decisions

The “Cat Lady”, s 14 Freedom of Expression

Thompson v Police [2012] NZHC 2234 - The High Court decided that the “Cat Lady”, a lady who wheeled a trolley full of cat food around Grey Lynn calling very loudly to cats, engaged in disorderly behaviour and was not engaged in protest protected by s 14 of the NZBORA. The High Court analysed the Supreme Court decision of *Brooker v Police* and proposed a test for disorderly behaviour. It also analysed the freedom of expression and its limits. Priestley J decided that as there was no information or opinion imparted by her calling to the cats, the appellant’s actions did not engage the freedom of expression, and so there was no NZBORA issue.

Automated Google Search Prompts, Defamation?

A v Google New Zealand CIV-2011-404-2780, 12 September 2012 - This was a preliminary application to strike out which considered whether a search engine could be held to be a publisher for the purposes of a defamation proceeding simply through automatically producing URLs or potential search results when the search engine was used. Google argued that this extension of the tort of defamation would be an unreasonable limit on its s 14 freedom of expression. Being an application for strike out, there was no firm decision on the issue, but the Court suggested that it may be possible for Google to be so considered a publisher, although with the potential defence of innocent dissemination.

A New Tort of Intrusion into Seclusion

C v Holland [2012] NZHC 2155, [2012] 3 NZLR 672 - This case involved the surreptitious filming of the plaintiff on a number of occasions by the defendant while she was in the shower. The High Court thoroughly canvassed the American, Australian, United Kingdom, Canadian and New Zealand law on privacy and decided for the first time that a tort of intrusion upon seclusion should be recognised as part of New Zealand law. Its elements follow the equivalent North American equivalent closely, and are a) an intentional and unauthorised intrusion; b) into seclusion; c) involving infringement of a reasonable expectation of privacy; and d) that is highly offensive to a reasonable person.

Bill of Rights and Extradition Hearings

United States of America v Dotcom [2012] NZHC 2076 – Kim Dotcom was being held for extradition having been charged with offences in the US for his activity in relation to his website, Megaupload. In the District Court, the applicants had been ordered to disclose their evidence to the respondents. The applicants appealed, arguing that the NZBORA does not apply to extradition hearings and that the disclosure ordered was too wide.

The High Court had to decide its approach to the construction of the Extradition Act and the relevant application of the NZBORA to extradition hearings. Winkelmann J decided that extradition hearings were essentially criminal hearings and did amount to being charged with an offence in New Zealand, and so ss 24, 25 and 27 of the NZBORA applied. In departing from previous authority, the disclosure ordered by the District Court was upheld as correct.

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Obama's visit to Myanmar

Myanmar, politically and economically isolated from the rest of the world before military rule ended last year, received its first visit by a sitting United States President, which also happened to be the first overseas visit of the re-elected President Obama.¹

President Obama arrived in Yangon where he met with President Thein Sein and opposition leader Daw Aung San Suu Kyi. Mr Thein Sein, a general and junta member who has led Myanmar's opening, released some 50 political prisoners in anticipation of President Obama's arrival. Ms Aung Sun and other opposition members were recently freed and able to run for seats in Parliament.

By visiting Myanmar, Mr Obama rewards the country and the government for its achievements and democratic reforms. However, the United States emphasised that it remains concerned about the ongoing situation, citing remaining political prisoners and ethnic conflict. The Rohingya, the Muslim population of Myanmar is one of the most persecuted minorities in the world, being deprived of their citizenship since passage of a 1982 citizenship law. The latest riots took place in October 2012. Intolerance and instability between the ethnic groups are ongoing.

Ms Aung Sun and other human rights activists have deemed the visit premature and pointed to the ongoing tensions that they believe the government has done too little to stop. The visit is seen as a validation of the move from military rule and an attempt to further US interests in an increasingly important region. Mr Obama emphasized that it is not an endorsement of the current government and that the journey is not complete, even though the country is moving in a better direction. "During our discussions, we also reached agreement for the development of democracy in Burma and for promotion of human rights to be aligned with international standards," Obama stated, after talks with Mr Thein Sein.

Ms Aung Sun thanked Mr Obama for supporting the political reform process. However, she warned that the process would be difficult.

No justice foreseeable for human rights violators in Syria²

In Syria an estimated 30,000 people have lost their lives in a civil conflict that appears to be worsening. China and Russia have vetoed three Western-backed U.N. draft resolutions condemning Assad's government in Syria.

The Russian position is based on opposition to regime change, particularly if led by Western military intervention, as in Libya. For Russia, the fall of the Assad regime would significantly diminish its influence in the Middle Eastern region. Russia believes the West has geopolitical motivations in achieving regime change in Syria, accusing Saudi Arabia and Qatar of arming the rebels with diplomat support from the US and heightening the humanitarian devastation of the conflict.

China also has interests in preventing another Western-led invasion in the region, although they have urged the Syrian government to start a dialogue with the opposition and take steps to meet demands for political change. A new proposal to end the conflict in Syria was presented by China in November 2012, aimed at building international consensus and supporting Lakhdar Brahimi's

1 Peter Baker "Obama to Visit Myanmar as Part of First Postelection Overseas Trip to Asia" The New York Times (online ed, United States, 8 November 2012).

2 Michelle Nichols "International Peace Envoy to Meet With Syrian Leader" Reuters (online ed, United States, 14 September 2012).

News & Developments in Brief

mediation efforts. Western powers accuse Russia of supporting a regime that is slaughtering its people. France and the United Kingdom have recognized a coalition of external opponents of Assad as the sole representative government of Syria.

Developments in perception and law of same-sex marriage

U.S. citizens were asked to cast their vote on numerous ballots as well as the presidential election. One of the subjects they voted on was the definition of marriage.³

In Maine, Maryland and Washington, marriage was redefined by popular vote and the idea of marriage existing of a bond between one man and one woman only was abolished.

In Minnesota, citizens rejected a constitutional amendment that sought to enshrine the traditional understanding of marriage as the union of a man and a woman. However, earlier in the year, in May, residents of North Carolina approved a constitutional amendment limiting marriage to traditional one man-one woman marriages, so the redefinition of marriage is not yet a general trend.

In New Zealand, Parliament is currently considering a bill that will permit same-sex marriage. It has passed its first reading and was sent to the Government Administration Select Committee for further consideration and input. Public submissions for the bill were accepted until 26 October 2012 and the committee is due to report back to the House by the end of next February.

In Russia, the courts have dismissed the lawsuit against Madonna for allegedly breaking the St Petersburg "Anti gay" law, which is vague in content, criminalises "public action aimed at propagandising sodomy, lesbianism, bisexuality, and transgenderism among minors." St Petersburg is the fourth Russian city to impose such a law. Soviet-era laws that criminalised homosexuality were repealed in 1993, but, as this lawsuit illustrates, anti-homosexual sentiments remain strong in Russia.

⁴

Election of new members to the Human Rights Council⁵

On 12 November, the General Assembly elected 18 countries to serve on the Human Rights Council who will start their three-year term in January 2013. According to the United Nations, the 47-member council is the forum where "all victims of human rights abuses should be able to look to... as a springboard for action."

Amnesty international remarked that the Human Rights Council would be most effective when Council members are states that have demonstrated commitment in promoting and protecting human rights. Other human rights action groups, such as Human Rights Watch, have expressed their concern about whether the Council will be able to fulfil its aim after the past election, stating that the newly elected members include States with poor records for protecting human rights, explicitly mentioning Pakistan, the UAE and Venezuela for their human rights abuses.

The seats in the Council are divided over five regional groups. Only four groups put enough candidates forward to fill the vacant seats and the only competitive vote took place in the 'Western

³ Lizzy Davies "Gay marriage approved in two states on a good night for US liberals" The Guardian (online ed, United Kingdom, 7 November 2012).

⁴ Miriam Elder "Russian court rejects complaint over Madonna gay rights comments" The Guardian (online ed, United Kingdom, 22 November 2012).

⁵ Michael Astor "US re-elected to UN Human Rights Council seat" Associated Press (online ed, United States, 12 November 2012).

News & Developments in Brief

and Others' group. Where Ireland, Germany and the United States were the preference ahead of Greece and Sweden and won the contested election to take a seat in the Council. The African seats will be filled by Ivory Coast, Ethiopia, Gabon, Kenya and Sierra Leone. The Asia-Pacific seats go to Japan, Kazakhstan, South Korea, Pakistan and the United Arab Emirates. The Eastern European regional group elected Estonia and Montenegro. Argentina, Brazil and Venezuela will fill the five vacant seats of 'Latin American and Caribbean' states.

Afghanistan confirms execution of 14 prisoners

Afghan President Hamid Karzai approved the executions of 14 prisoners on the 20th November. This is the first use of the death penalty in Afghanistan since June 2011. The death penalties could be seen as troubling given the seriously flawed Afghan Justice system. Grant Bayldon, Executive Director of Amnesty International NZ, comments that "detainees are frequently tortured into confessions then relied upon by a judiciary that has little to no independence. Meanwhile serious human rights violations go unpunished. There is simply no guarantee of a fair trial." Amnesty International speculates that this rush to execute so many could be an attempt by President Karzai to demonstrate he can maintain the rule of law in Afghanistan and is therefore not motivated by justice, but rather, politics.⁶

6 Amnesty International Media Release "Afghanistan: 14 prisoners executed in two days" (21 November 2012) Amnesty International NZ <www.amnesty.org.nz>.

The Centre in the Media

[Chris Mahony Recently Spoke at a seminar at the Hoover Institute at Stanford University](#)

Chris Mahony recently spoke at a prestigious seminar at the Hoover Institute at Stanford University. Other Speakers include the former United States Secretary of State, George Schultz and Former Prosecutor of the United Nations International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, Richard Goldstone.

[Details of the seminar](#)

[Boris Dittricht radio interview](#)

20 November 2012

Boris Dittricht - Visiting public lecturer on Lesbian, Gay, Bisexual and Transgender Rights gave an interview on BFM.

[Details](#)

[Maria Armoudian Radio NZ interview](#)

18 November 2012

The Mediawatch program on 18 November for Radio NZ National contains an interesting interview with Maria Armoudian, the visiting American scholar and broadcaster on media as a force for bad and good.

[Listen](#)

[Research Working Papers recently published](#)

17 November 2012

The Working Paper Series is off to a good start with papers in eight themes. >>

[Changing the World: Kris Gledhill - Thomson Reuters article](#)

22 October 2012

An Article written by Susan Dugdale for the Online Insider, Thomson Reuters NZ giving background to Kris Gledhill and the NZCHRLPP. >>

[Teaser to the up-coming launch of the Working Paper Series - Human Rights, China and Taiwan - by Professor Steve Hoadley](#)

17 October 2012

In the past quarter century the Republic of China on Taiwan (ROC) has evolved from authoritarianism to democracy. Motivated by the need to ease diplomatic isolation, ROC leaders recently set about ratifying international human rights treaties. >>

[Chris Mahony speaks at 2012 Connecting Young Leaders Conference](#)

16 October 2012

Chris discussed the challenges advocating for protecting human rights at a time of hyper-commercialization and socio-economic change. >>

[Chris Mahony publishes on the Charles Taylor case in BBC's Focus on Africa Magazine](#)

6 August 2012

Chris Mahony takes the 'no' position on the debate: Has International Justice been served by the verdict? On page 23 of the current edition (July - September) of BBC's Focus on Africa Magazine. >>

[NZ Herald article](#)

19 July 2012

Chris Mahony comments on the Greek election in the New Zealand Herald. >>

[Chris Mahony comments on international criminal justice on Los Angeles radio show, Scholar's Circle.](#)

26 June 2012

On Sunday (LA time) Chris Mahony participated in a debate about international criminal justice on the Los Angeles based KPFK radio show, Scholar's Circle. >>

[Warlord Charles Taylors Conviction](#)

1 May 2012

Chris Mahony's article in 'The Atlantic' on Victor's Justice: What's Wrong With Warlord Charles Taylor's Conviction. >>

The centre recently hosted two highly successful lectures at The University of Auckland Law School. A special thanks to Boris Dittrich and Maria Armoudian for helping us create such a successful day. NZCHR has hosted ten or so speaker events this year. It is hoping to engage with bodies such as Human Rights Watch both by providing a forum for visiting speakers from respected human rights organisations. Events are open to the public.

Kill the Messenger: The Media's Role in the Fate of the World

21 November 2012, 6pm



Maria Armoudian speaking at the University of Auckland Law Faculty with Dr Gavin Ellis

Maria Armoudian is the author of *Kill the Messenger: The Media's role in the Fate of the World*, and a fellow at the University of Southern California's Centre for International Studies. She also serves on the board of the Los Angeles League of Conservation Voters and is a host and producer of the Pacifica Radio programs, the Scholars' Circle and the Insighters. On 21 November 2012 she delivered an evening lecture at the University of Auckland that delved into the main concepts of her 2011 book, investigating the media's ability to both help and harm our society.

Armoudian first outlined how the media interacts with psychological and cultural forces to impact our perceptions; how they are capable of enhancing cultural fears and encouraging and reinforcing peer-pressure and "groupthink" through the way that they frame issues. To illustrate her argument, Armoudian cited some thought provoking examples of real life studies such as the "Rattlers v Eagles" experiment and the "Stanford Prison Experiment." These studies emphasised just how readily humans can be influenced to go along with the pack, even within a controlled environment.

From this framework of theory, Armoudian then posed the question to the audience of whether the Media can be used as a force for good? She proposed that the media environment in Nazi Germany and Bosnia can be seen as heavily influencing the atrocities that occurred in those countries at that time. She argued that these examples from our history illustrate the media's sheer power to harm our society through its ability to dehumanize and villainize victims and create an environment of "group think" according to the agenda of whomever has power over the media.

But what of the force for good? Armoudian outlined a particularly salient illustration of the media's effects with her discussion of the "twin" nations, Rwanda and Burundi, where the different approaches of the media correlated to either a tragic genocide, or the gradual healing of a country. While Rwanda's media followed the same homogenous pattern of places like Nazi Germany; Burundi had no 'one voice' in the media. Instead of inciting hatred and violence, the Burundian media created constructive rules; such as one Tutsi and one Hutu reporter having to collaborate on every story, and the creation of a forum where people could discuss their roles as bystanders in the war. Armoudian proposed that this example, among others, illustrates that when the media frames the issues a certain way, it can play a large part in helping our society. Instead of playing on a society's fears of "us" and "them" the media has the power to help society see that there is only, "us."

Dr Gavin Ellis (Freedom of Expression Working Paper Series Editor, Lecturer in Politics at The University of Auckland and former editor of The New Zealand Herald) placed Armoudian's comments in a New Zealand context. He warned us of our role to be mindful of the media, to speak out where

Events: Recent

we see injustices and polarization of the media, even though we may feel like such atrocities could never happen here. Armoudian added that even though we may feel like “it can’t happen here,” so too was the feeling in places like Bosnia and Chile. Ellis emphasised that we must always pay heed if a “spiral of silence” begins, where those who feel they are not in the majority often will not speak up. He commented that even if you feel as though you are in the minority you must speak to defend the freedom and objectivity of our media.



Audience members meet and greet over pre-event nibbles.

There followed a lively discussion during question time, where audience members asked questions around the role of the media in current society, especially touching on the failings of some of New Zealand’s major publications. Armoudian delivered some thought provoking answers, theorizing that once goals are defined about what it means to be a “successful” member of society then that sets the agenda for people’s behaviour. Armoudian proposed that If the ideal of what it means to be a successful journalist is to toe the line and be moderate then that is hugely influential; journalists are people too and often careerism trumps morality, especially in the profit model structure of most of today’s media corporations.

Geraldine Burnett | Editor, New Zealand Centre for Human Rights, Law Policy and Practice Bulletin

Public Lecture by Boris Dittrich: Lesbian, Gay, Bisexual, and Transgender Rights

21 November 2012, 1pm



Boris Dittrich speaks at the University of Auckland.

Boris Dittrich, a former judge in his native Netherlands and currently the Advocacy Director for LGBT Rights with Human Rights Watch in New York, spoke in favour of Louisa Wall’s bill to define marriage so as to include same sex couples. Addressing some 60 people at a lunch-time meeting on 21 November 2012, Dittrich spoke of his own “coming out” and his decision in the mid-1980s to focus his skills on calling for equality based on sexuality. At that time, he commented, whilst a few Scandinavian countries had started to introduce civil unions, the Netherlands had not. He determined that the “separate but equal” status of civil unions was not adequate. It is worth recalling that this was an argument used to justify racial segregation in the USA, namely that the separate provision made for African-Americans was just as good as that available to the majority white community and so there was no need for a single provision to which all groups had access.

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Dittrich's campaign was for the Netherlands to take the lead and introduce legislation to permit marriage without reference to sexuality. By this time, he had moved from a judicial position and had become a politician. He soon achieved majority support in the Dutch legislature, and gained the support of the Prime Minister after making the legalisation of gay marriage a bargaining factor for the formation of the coalition government. The legislation passed in the Netherlands and several other countries soon followed, including South Africa, where the reaction to past institutional discrimination created an atmosphere to support the proposal. Various northern European countries have followed, as well as several countries with strong Catholic churches, including Spain, Portugal and Argentina. He noted that Canada and several states in the USA also had similar laws, the latter often the result of majority support at referenda. Dittrich was glad to see that New Zealand had the opportunity to be a relatively early adopter of legislation that was rooted in the obligation not to discriminate.



A/P Jo Manning, Dean Andrew Stockley, Louisa Wall MP and Jan Logie MP were in attendance.

Dittrich also had a warning for the audience that the campaign against prejudice is far from won. He noted that it is still a criminal offence to engage in homosexual conduct in 76 of the 193 members of the United Nations, and recalled that there were numerous instances he had come across during his work for Human Rights Watch where persecution had been meted out to homosexual individuals, even without any finding of proscribed conduct. There was also, he noted, a movement led by Russia that, under the cover of calling for respect for so-called traditional values, was being used actively to seek to entrench bigotry. Worryingly, noted Dittrich, this has gained support at the UN Human Rights Council, the body designed to be at the forefront of promoting the application of human rights standards.

But on the positive side, he also spoke about the Yogyakarta Principles, in which he had a key role, and the support they were gaining. These principles restate existing fundamental rights and explain what they mean in the context of equality for LGBT members of society. Secretary-General Ban Ki-Moon had been staunch in his advocacy for equality on grounds of sexuality (in contrast to his predecessor in the role). The principle advocated by the Secretary-General is that traditional values have their place, but must give way to human rights standards. New Zealand, he noted, had been supportive of these positive moves.

Dittrich also recounted how the Holy See came to issue a statement in support of the decriminalisation of homosexual behaviour: it was asked to do so, and its ambassador to the UN explained that it had not issued such a statement before because no-one had requested!

The event, expertly introduced and chaired by Sir Ted Thomas, was one of the ten or so speaker events hosted this year by the New Zealand Centre for Human Rights Law, Policy and Practice. It is hoping to engage with bodies such as Human Rights Watch both by providing a forum for visiting speakers from respected human rights NGOs but also by constructing links to allow New Zealand students to benefit from internship opportunities.

Kris Gledhill | Director, New Zealand Centre for Human Rights Law, Policy and Practice

Working Paper Series

The New Zealand Centre for Human Rights Law, Policy and Practice 'Working Paper Series' provides an online forum where scholars and practitioners can disseminate their research and practical experiences regarding human rights. The Working Paper Series is administered by the Centre based at the University of Auckland. Below are summaries and abstracts of our recent working papers, please follow the hyperlinks to read the full papers.

South China Sea Region

Democracy, International Human Rights, and Diplomacy in Taiwan, by Stephen Hoadley

ABSTRACT: In the past quarter century the Republic of China on Taiwan (ROC) has evolved from authoritarianism to democracy. Motivated by the need to ease diplomatic isolation, ROC leaders recently set about ratifying international human rights treaties including the ICCPR, ICESCR, and CEDAW. The ROC submission of the articles of ratification was rejected by the UN Secretary General but its leaders have persisted with human rights reforms, believing that Taiwan's power of example will project soft power and raise its international profile.

[Read full paper](#)

Children's Rights

Ending the Involvement of Children in Armed Conflict in the Democratic Republic of the Congo, by Manasi Kogekar

ABSTRACT: This essay assessed the measures taken by the Democratic Republic of the Congo (DRC) to protect children from involvement in armed conflict using a model of human rights reform. Inadequate judicial systems, policies, and legislation were diagnosed as hindering the DRC's protection measures. This essay recommended that NGOs and other states work with the DRC to end the recruitment of child soldiers by increasing the DRC's capacity to protect children's rights.

[Read full paper](#)

Commercial Actors and Human Rights

The WTO and Human Rights Obligations: Harmonizing Trade Liberalization with Core Labour Standards, by Aaron Paquette

ABSTRACT: The WTO rules do not supersede the responsibility of States to abide by their other treaty obligations with respect to human rights. An improved coordination between the ILO, the UN human rights committees and the WTO would vastly improve the ability of individual governments to utilize human rights instruments in their attempts to adjust their trade of goods and services that are determined to have violated the fundamental human rights and core labour standards of the workers.

[Read full paper](#)

Freedom from Discrimination

New Zealand and CEDAW: An international mechanism advancing women's rights domestically, by Nathan Crombie

ABSTRACT: A remarkable process with implications for the rights of New Zealand women recently took place at United Nations (UN) Headquarters in New York City. On 18 July 2012, New Zealand presented its seventh periodic report under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The presentation was no pro forma process. 23 women's rights experts from different countries, forming the Committee on the Elimination of Discrimination against Women (Committee), posed challenging questions to New Zealand's representatives, calling upon them to explain deficiencies in domestic women's rights protections.

New Zealand's presentation before the Committee has three significant implications for the advancement of women's rights in New Zealand. First, the presentation process allows the Committee to monitor domestic laws and policies that are contrary to CEDAW. Second, the process incentivises States Parties to CEDAW to take stock of their record on women's rights, and be prepared to justify any failings before the Committee. New Zealand invested considerable time and resources to prepare for the presentation, despite the Committee's conclusions lacking legally binding authority. Finally, the presentation process provides a key focal point for the advocacy activities of do-

Working Paper Series

mestic women's rights non-government organisations (NGOs). When NGOs invoke the Committee's concluding observations, the Committee influences domestic debates on women's rights issues.

[Read full paper](#)

Searching for Dignity: Human Dignity in a Post-Apartheid South African Context, by Julia Classens

ABSTRACT: South Africa has seen more than its share of human rights violations. And unfortunately this threat to the dignity of men, women and children did not end overnight with the end of Apartheid. One only has to read the newspapers to be persuaded of the continuing acts of injustice and violence that still mar a post-apartheid South Africa.

[Read full paper](#)

Part 1A and reasonable limits prescribed by law, by Lisa Fong

ABSTRACT: *IDEA Services Inc v Attorney-General* challenges the assumption that broad statutory, regulatory or common law authority will satisfy the requirement in s 5 of the NZBORA that any reasonable limits on rights be "prescribed by law". The finding, made under Part 1A of the HRA, has significant implications for s 3 decision makers, policy process, and the NZBORA, and warrants further consideration.

[Read full paper](#)

Right to a Fair Trial

Inter Arma Enim Silent Leges, or, It's the American Way: Hearsay in United States Military Commissions, by Jordan Carr Peterson

ABSTRACT: The United States government and military have operated systems of military justice for the trial of enemy combatants for over a century, and such a system has been developed and is employed in the conflicts in Afghanistan and Iraq. The minimalist evidentiary rules governing the introduction of hearsay evidence before proceedings at these tribunals seriously jeopardize the rights of defendants to fairness and justice.

[Read full paper](#)

Economic, Social and Cultural Rights

Not in New Zealand's waters, surely? Labour and human rights abuses aboard foreign fishing vessels, by Christina Stringer, Glenn Simmons and Daren Coulston

ABSTRACT: In August 2010, Oyang 70, a South Korean fishing vessel fishing in New Zealand's exclusive economic zone (EEZ), capsized with the loss of six lives. Beyond the tragedy of the loss of lives, information obtained from the surviving crew detailed labour and other abuses aboard the Oyang 70. This is not the first allegation of abuse aboard foreign charter vessels (FCV) fishing in New Zealand's EEZ. New Zealand government policy supports the use of high quality FCVs to complement the local fishing fleet, provided FCVs do not provide a competitive advantage due to lower labour costs and foreign crew receive protection from exploitation. Using the global value chain and global production network analyses, this research examines which institutions are responsible for the working conditions of an important but largely invisible and vulnerable workforce on FCVs in New Zealand waters. Semi-structured interviews were undertaken with key individuals in the fisheries industry and with foreign crew. We found within the fisheries value chain there is an institutional void pertaining to labour standards on board FCVs and in some cases disturbing levels of inhumane conditions and practices have become institutionalized.

[Read full paper](#)

THE UNITED NATIONS' GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

On 16 June 2011, the UN Human Rights Council endorsed the UN's Guiding Principles on Business and Human Rights (Guiding Principles). The Guiding Principles are the product of Professor John Ruggie's six-year mandate as the UN Secretary-General's Special Representative for Business and Human Rights. In his words, they mark "the end of the beginning". The project has now moved into its key phase: implementation.

The 'Protect, Respect, and Remedy' framework

Harvard University's Professor Ruggie was appointed as Special Representative on Business and Human Rights in 2005. After three years of research and extensive consultations, he made only one recommendation to the Human Rights Council: it should adopt a three-part 'Protect, Respect, and Remedy' framework consisting of:

- the primary obligation of states to protect their populations from violations of human rights by any third parties, including companies;
- the responsibility of companies to respect human rights by acting with due diligence to avoid infringing upon them and through addressing any adverse impacts of their business activities; and
- the necessity of a remedy for individuals whose rights have been violated.

The recommendation was motivated by Professor Ruggie's realisation that there was no authoritative focal point around which public and private sector initiatives to address business and human rights issues could converge. This meant that existing initiatives were fragmented and could not affect large-scale change.

In June 2008, the Council unanimously adopted Professor Ruggie's recommendation and extended his mandate for a further three years.

The Guiding Principles

The Council asked Professor Ruggie to develop a list of simple and clear principles to implement his 'Protect, Respect and Remedy' framework. The result was a list of 31 principles organised around the 'Protect, Respect, and Remedy' framework.

These Guiding Principles are informed by extensive consultations with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities affected by business activities in different parts of the world, and civil society groups. Unlike previous initiatives, they do not impose 'top-down' legal obligations, but focus instead on sector-specific implementation tailored to the size and circumstances of individual companies. The Guiding Principles draw out the implications for States and companies of the 'Protect, Respect, and Remedy' framework. Perhaps their most valuable contribution is in identifying governance gaps in the way States and companies address (or do not address) the impact business enterprises have on human rights.

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In June 2011, the Council unanimously endorsed the Guiding Principles. This was the first time the Council had endorsed a normative text that was not negotiated between States. The Council also set up a Working Group on Business and Human Rights to promote the effective dissemination and implementation of the Guiding Principles.

The heavy-lifting ahead

Principles are great but the heavy-lifting remains to be done. Professor Ruggie recognised this when he described the Council's endorsement as "the end of the beginning".

Implementing the Guiding Principles will be both time- and resource-intensive. Specialist advice is likely to be required, as the Guiding Principles themselves recognise. In light of the difficult economic times, it could reasonably have been expected that the Guiding Principles would be consigned to the scrap-heap occupied by other well-intentioned but resource-intensive initiatives.

This has not (yet) happened. Much of the credit should go to Professor Ruggie for his focus on involving all stakeholder groups in the consultation process. International organisations, States, private sector groups, and individual companies are pushing ahead with efforts to implement the Guiding Principles and align their existing CSR policies with them. Some examples of efforts currently underway, include:

- The UN is looking at ways in which it can assist with dissemination and implementation of the Guiding Principles. UN Secretary-General has suggested that the UN: (i) establish a global database for keeping track of the implementation of the Guiding Principles, and (ii) examine the feasibility of establishing a global fund to support efforts to implement the Guiding Principles. The UN Working Group on Human Rights is seeking to actively engage with interested parties to assist with dissemination and implementation of the Guiding Principles. It recently completed its first country visit (to Mongolia) and a report is to be issued next year.
- The EU has announced that it will develop sector-specific guidance for the oil & gas, information technology, and employment sectors. The EU is also working with Member States to develop national plans for implementing the Guiding Principles. A number of EU Member States have already taken steps to implement the Guiding Principles, including the United Kingdom which has made a 'Business and Human Rights Toolkit' available for British companies operating overseas.
- Inter-governmental organisations are working to align existing policies with the Guiding Principles. They have been incorporated into the OECD Guidelines for Multinational Enterprises and the new social responsibility standard adopted by the International Organization for Standardization (ISO 26000). The International Finance Corporation - the private sector arm of the World Bank - has updated its policy and performance standards to explicitly recognise the responsibility of companies to respect human rights.;
- Business enterprises are working to develop sector specific guidelines based on the Guiding Principles. For example, the Thun group of banks (including Barclays, Credit Suisse, UBS and UniCredit) has announced it is developing a practical application guide for the banking sector based on the Guiding Principles.

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On 4-5 December 2012, international officials, Government representatives, multi-national corporations and civil society groups converged on Geneva, Switzerland for the UN Working Group's first annual Forum on Business and Human Rights. The Forum provided an opportunity for stakeholders to evaluate the steps taken thus far and to coordinate on the steps that need to be taken. The Working Group is shortly to publish a report on the forum that will allow an assessment of efforts made to date, but the early signs are encouraging.

Robert Kirkness | Member of the Consultative Committee of the New Zealand Centre for Human Rights Law, Policy and Practice.

Bill of Rights in Australia

The absence of statutory or constitutional Bills of Rights in Australia has meant that Australia has had less influence on the development of human rights jurisprudence. However, the relatively recent enactment of statutory Bills of Rights in Victoria and the Australian Capital Territory mean that New Zealand human rights lawyers are likely to find Australian case law increasingly useful. That is particularly so because, in the Victorian equivalent to New Zealand's *R v Hansen*, the Australian High Court has expressed a preference for New Zealand Bill of Rights jurisprudence over the European influenced United Kingdom jurisprudence.

Momcilovic v The Queen (2011) 280 ALR 221.

In New Zealand, the United Kingdom, Canada and Hong Kong, reverse onus provisions in drug offences have produced some of the most significant jurisprudence on the interpretation and operation of the relevant human rights instruments. In Victoria, such a provision has resulted in a lengthy decision from the High Court of Australia, with six separate judgments. Its length may well discourage even the most committed human rights lawyer from reading the entire judgment. However, despite its size, New Zealand lawyers may want to think twice before relegating their copy of *Momcilovic v The Queen* to a door stop. While preferring the New Zealand Supreme Court's conservative approach to the interpretative rule in s 6 of the New Zealand Bill of Rights to the more radical approach taken in the United Kingdom, the High Court of Australia still managed to give a restrictive interpretation to the reverse onus provision in question.

Background

Ms Momcilovic owned and occupied an apartment where drugs were found. She was charged with trafficking in a drug of dependence against s 71AC of the Drugs, Poisons and Controlled Substances Act 1981 (the Drugs Act) on the basis that she had methylamphetamine in her "possession for sale" pursuant to the definition of traffick in s 70(1) of the Drugs Act. Her partner shared the apartment with her and was convicted of trafficking in a separate trial. Although he gave evidence at Ms Momcilovic's trial stating that she had no knowledge of the drugs, she was convicted. At trial, the prosecution relied on s 5 of the Drugs Act. Section 5 provides for the meaning of "possession" and shifts the burden of proof to the accused, deeming an occupier of the premises where drugs are found to be in possession of the drugs unless he or she proves on the balance of probabilities that they were unaware of their presence. Section 5 places a legal burden of proof on the accused, rather than an evidential burden that would only require a person to introduce evidence capable of negating possession. Section 5 is a separate provision and potentially applies to a range of offences where possession is an element. The appellant contended that s 5 should be 'read down' to only impose an evidentiary burden of proof in accordance with the interpretive rule in s 32(1) of the Charter.

Section 32 provides that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. The provision is differently worded but is modelled on the United Kingdom Human Rights Act and s 6 of the New Zealand Bill of Rights Act. Notwithstanding the similarities in wording between the New Zealand and United Kingdom provisions, they have been interpreted quite differently, with stark differences in outcomes. While the House of Lords has used the interpretative rule to read down reverse onus provisions, the New Zealand Supreme Court has not: see *R v Hansen* and *R v Lambert*. Not surprisingly, much of the argument in the High Court of Australia centred around those two approaches

Decision

The Australian High Court has expressed a clear preference for the New Zealand approach, and rejected the argument that the provision could be read as imposing an evidential onus only. However, applying the common law principle of legality and reinforced by the interpretative provision in s 32 of the Charter, the High Court found that the presumption in respect of possession in s 5 of the Drugs Act did not apply to the offence of possession for supply at all.

Implications for New Zealand jurisprudence

In using Victorian or ACT jurisprudence, New Zealand lawyers should be aware of important similarities and differences, including:

The strength of the interpretative rules is very similar. For a helpful, and succinct, summary of the effect of *Momcilovicsee Slaveski v Smith* [2012] VSCA 25 at [24] per Nettle JA.

While New Zealand has now resolved its '4-5-6' conundrum, with a majority of the Supreme Court finding that the question of consistency in s 6 has regard to the general limits provision in s 5, the question is unresolved in Victoria. While the High Court clearly adopted a similar approach to the strength of the interpretative rule, it has not adopted the stepped approach of the Supreme Court in *Hansen*. Further, the High Court was split 4:3 on the role of the general limits provision in s 7(2). A majority (Gummow, Hayne, Heydon and Bell JJ) considered that the question of compatibility must have regard to whether limits are reasonable and justified under s 7(2), but there are difficulties relying upon Heydon J's judgment. As a consequence, the Victorian Court of Appeal is currently split on the issue: see *Noone v Operation Smile* at [142] per Nettle JA and at [30]-[31] per Warren CJ and Cavanough AJA.

The Victorian Charter and the ACT Human Rights Act each have express obligations upon public authorities: to act compatibly with human rights; and to give proper consideration to relevant human rights. It may well be that the same obligations can be found in the New Zealand Bill of Rights Act, either directly through the application to the executive branch of government and to persons and bodies performing public functions, or indirectly through the operation of the interpretative rule (see *Drew v Attorney-General* [2002] 1 NZLR 58).

While an obligation to 'give proper consideration' to relevant human rights is not apparent from the text of the NZBORA, the recent Canadian case of *Doré v. Barreau du Québec* [2012] 1 S.C.R. 395 raises the possibility of an indirect obligation arising by operation of administrative law principles.

Joanna Davidson | Special Counsel, Victorian Government Solicitor's Office.

The US Supreme Court Confirms Healthcare Law

National Federation of Independent Business v Sebelius 567 US (2012)

This case was brought as a challenge to the constitutionality of the Patient Protection and Affordable Care Act ("ACA"), part of a package of healthcare legislation passed by the Obama administration that represents one of the largest reforms of the United States' healthcare system in decades.

Two elements of the law faced scrutiny. The first was the requirement that all individuals not covered by an employer sponsored insurance plan, Medicaid or Medicare or other public insurance programs purchase a private insurance plan or face a penalty – the "individual mandate".

The second element was the proposed expansion of the government-run health insurance program for low-income families ("the Medicaid expansion"). This element gave the states a choice of either accepting the expansion (and 10 per cent of its costs) or risk losing federal funding for its existing Medicaid programmes.

The Individual Mandate

The key question was whether the United States Federal Government ("the federal government,") had the power to compel people to buy health insurance.

The key argument submitted for the government was that the individual mandate was a necessary and proper exercise of Congress' power to regulate interstate commerce, under art 1, s8, cl 3 of the United States Constitution.

The opposing argument to this was that the mandate imposed a penalty on Americans who chose not to buy health insurance, in effect penalising economic inactivity, an action that lay outside Congress' constitutional powers.

Justices Ginsburg, Breyer, Sotomayor and Kagan viewed the individual mandate as within Congress' powers to regulate interstate commerce. Justices Scalia, Kennedy, Alito and Thomas took the opposing view.

In siding with the majority, Chief Justice Roberts agreed with the minority that the individual mandate was not a proper exercise of Congress' power to regulate interstate commerce. However, his Honour took the view that the individual mandate could be construed as a tax upon individuals with a certain amount of income who choose to forego health insurance. Thus, it derived legitimacy from Congress' power to "lay and collect taxes" under art 1, §8, cl 1 of the US Constitution. Hence, by a 5-4 ruling, the Supreme Court held that the individual mandate was constitutional.

The Medicaid Expansion

The issue here was whether, in threatening to withhold Medicaid funds wholesale, the federal government's provision was unconstitutionally coercive towards states who did not wish to expand their Medicaid programmes.

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Justices Ginsburg and Sotomayor held that the expansion was constitutional in its entirety, whilst Justices Scalia, Kennedy, Thomas and Alito viewed it as unconstitutional.

Chief Justice Roberts, and justices Breyer and Kagan ruled that the Medicaid expansion was legitimate, but that states had to be given the option to opt out without losing their pre-existing Medicaid funding.

Consequently, the coercive element of the Medicaid expansion was struck out as unconstitutional.

Lee Long Wong | New Zealand Centre for Human Rights Law, Policy and Practice

Confirmation of a structured and reasoned approach to discrimination in New Zealand

Ministry of Health v Atkinson [2012] NZCA 184.

Not all differential treatment will be discriminatory. Distinctions must be drawn between individuals and groups in appropriate circumstances. What then marks the line between permissible and impermissible differentiation?

Finding prima facie discrimination involves two steps. The first step is to ask whether there is differential treatment as between persons or groups in analogous situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

The absence of a legislative definition of discrimination, nor any clear guidance from New Zealand's top courts, has resulted in a 'significant conceptual enquiry' over what is required at the second stage - is discrimination little more than differential treatment, or does it entail an element of invidiousness?

A number of recent decisions from the High Court and Court of Appeal, most notably the Court of Appeal's five judge, single-judgment decision in May 2012 in the so called 'parents as caregivers' case (*Ministry of Health v Atkinson & Ors* [2012] 3 NZLR 456), have provided some much needed clarity in this area.

A common theme of Crown submissions in Part 1A cases (*Atkinson, Child Poverty Action Group v Attorney-General* (High Court, Wellington, CIV 2009-404-273, 25 October 2011, Dobson J, Member Grant MNZM, Member Inneson QSM), *IDEA Services v Attorney-General* [2011] NZHRRT 11) has been the argument that the Court should adopt the approach taken in Canada, namely to be discriminatory the law or policy creating the differential treatment must be based on prejudice or stereotyping, perpetuate historical disadvantage, or have particularly severe negative effects.

Claimants have argued for a neutral definition - any differential treatment that meets the first step will be prima facie discriminatory if it is a distinction which, viewed in context, gives rise to a real disadvantage or more than de minimis. Similarly, the Human Rights Commission,

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as intervener in *Atkinson*, submitted that any distinction giving rise to a disadvantage is discriminatory.

The claimants' position found favour with the High Court in *Atkinson* (2010) 9 HRNZ 47 at [77; 122] which appeared to suggest that any degree of disadvantage triggered section 19. The High Court in *CPAG* required a slightly higher threshold; requiring disadvantage of a "real" or "more than trivial" nature [81-84].

The Court of Appeal in *Atkinson* considered that differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a material [considered a better descriptor than "real" or "more than trivial"] disadvantage on the person or group differentiated against. The Court of Appeal identified several reasons supporting that conclusion, including:

- a) Its consistency with the statutory scheme and purpose [111-117];
- b) Its relative ease of application "in the field" by policy advisors and others who have to work with discrimination law on a daily basis [131];
- c) Notable differences between the New Zealand and Canadian provisions meaning that the Canadian approach might not resonate in New Zealand. Those difference include:
 - i) An ability for Canadian court's to strike down legislation; and
 - ii) The fact that the Canadian Charter contains an open ended list of prohibited grounds of discrimination (which suggests a more cautious approach is required to discrimination) [118-122]; and
- d) Policy considerations including the appropriate interplay between sections 19 and 5 of the Bill of Rights Act. The Court of Appeal, concerned about potentially conflating issues of discrimination and their justification (so called "justification creep,") considered that matters of justification are best dealt with at the section 5, reasonable limits, stage of the Part 1A analysis [123-134].

The Crown has decided not to seek leave to appeal *Atkinson* to the Supreme Court, so the Court of Appeal's structured approach to discrimination is the law for the time being.

Oliver Gascoigne | Senior Solicitor Russell McVeagh

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Discrimination and Disability

Smith v Air New Zealand Ltd [2011] NZCA 20.

Summary

The Court of Appeal has restored the finding of prima facie discrimination under s 44 of the Human Rights Act 1993 by Air New Zealand against a passenger, Valerie Smith, who suffers from a respiratory disorder. The disorder means Ms Smith requires additional oxygen when travelling by air. However, the Court found that the discrimination was not unlawful because it fell within s 52 of the Human Rights Act 1993.

Facts

The appellant, Ms Smith, required extra oxygen when she flew. Air New Zealand required that she supply her own extra oxygen on domestic flights from a nominated provider and pay a fee to have Oxygen supplied by Air New Zealand on international flights.

Background

In 2002 Ms Smith complained to the Human Rights Commission that the extra charge for her supplementary oxygen needs was discriminatory and amounted to treating her less favourably in the provision of services contrary to s 44 of the Human Rights Act 1993. She was represented by the Director of Human Rights Proceedings at the Human Rights Review Tribunal, which found that there was a prima facie breach of s 44.

However, the Tribunal found that the breach fell within the Human Rights Act exception (s 52) that a service may be provided on more onerous terms (in this case the extra charge) where the provider "cannot reasonably be expected" to provide the service "without requiring more onerous terms". On appeal the High Court found that Air New Zealand had not discriminated against Ms Smith under s 44. Ms Smith was granted leave to appeal to The Court of Appeal.

Decision

The Judgement of the court was delivered by Allen France J who began by considering the approach to s 44, then considered how any comparison should be made between Ms Smith's position and Air New Zealand's other passengers, and finally discussed the test established by s 52.

s 44(1) of the Human Rights Act provides as follows:

//

1) It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public ... (b) to treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case, by reason of any of the prohibited grounds of discrimination."

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Disability, as defined in s 21 of the Act, is a prohibited ground of discrimination. Section 52 of the act provides an exception to s 44 in relation to disability and reads as follows.

//

...It shall not be a breach of s 44 of the Act for a person who supplies facilities or services if...
(b) to provide those facilities or services to any person on terms that are more onerous than those on which they are made available to other persons, if —
(i) that person's disability requires those facilities or services to be provided in a special manner; and
(ii) the person who supplies the facilities or services cannot reasonably be expected to provide them without requiring more onerous terms."

The Court held that the effect of the statutory scheme is that ss 44 and 52 should be read together, that service providers to whom the act applies will have to treat a person with a disability no less favourably in connection with the provision of those services, subject to a reasonableness requirement.

When considering whether the extra charges were covered under the reasonableness requirement the Court agreed with the Tribunals finding that Air New Zealand's charge of US\$75 per sector for extra oxygen represented only about 20% of the actual cost, a figure also recommended by the ICAO. The Tribunal held that industry practices were relevant in that Air New Zealand would be at a significant competitive disadvantage if it could not charge for the service of supplementary oxygen supply. The Court therefore held that Air New Zealand could not reasonably be expected to provide supplementary oxygen without the imposition of the charge.

The court agreed that there was, however, a prima facie breach of s 44 but that it was not unlawful because it fell within s 52. The finding of the prima facie breach was based on the fact that the supply of oxygen during a flight is a basic part of an airline's service, provided to all passengers equally, even if the cost to the airline is greater for some than others. Therefore, passengers who have to pay for a part of their own oxygen due to a disability are treated less favourably than those who don't have to pay.

This case is a clear example of the court's interpretation of The Human Rights Act 1993 and the importance it has placed on the use of the word "reasonable" when interpreting the statute.

Geraldine Burnett | Editor, New Zealand Centre for Human Rights, Law Policy and Practice Bulletin

Scope of Commerce Commission's powers under s100 of the Commerce Act 1986 *Commerce Commission v Air New Zealand Ltd*[2011] NZCA 64, [2011] 2 NZLR 194 (CA).

Background:

This decision concerned the scope of the Commerce Commission's powers under s 100 of the Commerce Act 1986 ("the Act"). The powers allow the Commission to prohibit an interviewed witness from disclosing or discussing any details of the interview or any information involved in the interview with any other party.

In 2007 during an investigation by the Commerce Commission ("the Commission") into alleged anti-competitive conduct in the air cargo industry, the Commission served notices on a number of Air New Zealand ("ANZ") employees requiring them to be interviewed. These interviews were recorded and a transcript produced and provided to each employee through their counsel. After a number of interviews had taken place, the Commission issued an order under s 100 of the Act prohibiting the interviewees from discussing the contents of their interview. Orally however, the Commission told the interviewees that they were not prohibited from discussing with others underlying facts or documents.

In 2008 the Commission commenced proceedings ("the air cargo proceedings") against ANZ and a number of its current and former employees for anti-competitive conduct. Shortly after, ANZ requested discharge of the s 100 orders. The Commission responded that it would be willing to vary the s 100 orders so as to permit disclosure of the interviews to certain named solicitors and counsel and to ANZ's in-house legal counsel. This led ANZ to apply to the High Court for a stay of the air cargo proceedings until the s 100 orders were discharged, and also for judicial review of the s 100 orders.

In the High Court:

Andrews J made three key findings. First, she held that the Commission was entitled under s 100 to prohibit disclosure of the contents of the interviews in such broad terms. Second, she found that only the information, documents, and answers given by an interviewee could be restricted by s 100 orders. Questions asked within the interviews could not. Finally, Andrews J considered that s 100 orders were terminated on the filing of proceedings in the High Court. Each finding was challenged on appeal.

Issues:

There were three issues for the Court of Appeal to decide, namely:

- 1) do orders under s 100 cover only confidential information provided to the Commission?
- 2) if so, can s 100 orders cover questions posed and other material put to a witness?
- 3) can s 100 orders survive the issuing of proceedings?

Does s 100 only cover confidential information provided to the Commission?

ANZ argued that s 100's purpose is to protect confidential information primarily for the benefit of the holders of that information. Furthermore, an interpretation of s 100 allowing orders in such

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broad terms contravened the right to freedom of expression enshrined under s 14 of the New Zealand Bill of Rights Act (“the NZBORA”). The Commission submitted that the general terms of the legislation allowed orders to be made in very broad terms, and that a narrow construction would destroy s 100’s intended utility.

Siding with the Commission, the Court of Appeal agreed that the section’s general language prevented the reading in of any limitations or qualifications. However, in practical terms the Commissioner’s discretion was not unfettered. As an order under s 100 is a serious step, the Commission was obliged to satisfy itself that such an order was necessary. Consequently, any orders made, and their scope and duration, should be kept under review. This, the Court of Appeal held, the Commission had not done. Moreover, a less restrictive modification to the order should have been confirmed in writing rather than orally to the individual witnesses.

As to the NZBORA question, the Court accepted that the power to impose suppression orders under s 100 was a *prima facie* breach of the NZBORA. Applying the *Hansen* test, it held that the goal of protecting the integrity of an investigation, particularly in the context of cartels, was sufficiently important to justify any resulting restriction of free expression.

This goal was rationally connected to the making of s 100 orders, a limiting measure that impaired the freedom of expression no more than reasonably necessary and was duly proportionate to the importance of its objective. Broadly termed orders under s 100 were thus a demonstrably justified limitation to ANZ’s s 14 right.

Do s 100 orders cover questions posed by the Commission?

The Court noted that such questions are essential to understanding the answers given, and that questions become part of evidence if accepted or adopted by the interviewee. The Commission also submitted, and the Court accepted, that questions can involve putting evidence obtained from one person to another. As such, the questions posed during the interviews also count as “evidence” restricted by the s 100 orders.

Can s 100 orders survive the filing of proceedings?

Section 100 empowers the Commission to make orders “in the course of carrying out any investigation”. ANZ submitted that the filing of proceedings placed the matter within the High Court’s jurisdiction and outside the Commission’s, and that the Commission’s evidence did not demonstrate that its investigation continued after proceedings were commenced.

Rejecting this submission, the Court of Appeal held that investigations may be continuing once proceedings are issued, but any exercise of the s 100 powers must still be for proper investigative purposes, rather than for any advantage in litigation. Furthermore, litigation amounts to a major change of circumstances requiring the Commission to reconsider any existing s 100 orders. Such orders would also be subject to the supervisory jurisdiction of the Court, and could be discharged or altered to the extent required for the fair conduct of those proceedings.

Discussion

The s 100 powers are broad and effectively override legal privilege, denying parties like ANZ the ability to discuss interview contents with counsel and thereby hampering its defence. One need look no further than the Rules of Conduct and Client Care to see that open communication is

vital to a lawyer exercising his or her professional duty. This is exacerbated by the fact that such orders can and sometimes will continue even after litigation has commenced. This decision raises a significant question as to whether a lawyer can properly advocate for their client in a situation like this when he or she is not in receipt of all the necessary information.

Whilst the Commission must keep the effect of such orders “under review,” this will be cold comfort to a party when the Commission finds itself operating under a mistake of law or fact. It is difficult to reconcile this with the fact that the power and the gatekeeper are one and the same. It is unsurprising that Andrews J described the effect of these orders as “chilling”.

For parties like ANZ, the Court in its supervisory role is the only real check on the Commission’s discretion, a fact that will impose greater time and expense on defendants. Given the clear statutory language of s 100 this is probably the best outcome that could be hoped for. However, the Court’s comment at [114] concerning s 27(3) of the NZBORA should be noted:

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...fulfilment of this objective [contained in s 27(3) of the NZBORA] does not require that a State litigant is to refrain from exercising its statutory powers related to s 100 once proceedings have been issued..”

That a party can be denied the ability to frankly and comprehensively discuss key aspects of its defence with its legal counsel by the state should be more than disquieting, and lead us to wonder how seriously the New Zealand Parliament takes the right to natural justice.

Lee Long Wong | New Zealand Centre for Human Rights Law, Policy and Practice

Freedom of Expression, whether bylaw ultra vires and disproportionate restriction on the right to freedom of expression

Schubert v Wanganui District Council [2011] NZAR 233.

Summary

This High Court case from March 2011 found that a bylaw passed by the Wanganui District Council to restrict the display of gang insignia in specified places was unlawful on two counts. The bylaw’s substantive effect was to prohibit the display of gang insignia in all public places. However, the Wanganui District Council Act 2009 only provides the Council powers to regulate, a total prohibition was therefore ultra vires. The bylaw was further held to be invalid because the council did not consider the effect of the bylaw on the right to freedom of expression as protected by the NZBORA.

Facts

The Wanganui District Council made a bylaw under the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 that specified which public places in the district persons may not display gang insignia at any time. This case was an application for judicial review to quash the bylaw. The applicant (a member of the Hells Angels gang) submitted that, contrary to

s 5(6) of the Wanganui Act, the bylaw in effect specified all public places in the district as places where gang insignia was prohibited. The applicant additionally submitted that the bylaw was a disproportionate restriction on the right to freedom of expression and therefore in breach of s 5 of the New Zealand Bill of Rights Act 1990.

Decision

The key basis of Clifford J's decision turned on whether the bylaw was in breach of s 5(6) of the Wanganui Act and whether the bylaw was a disproportionate restriction on the right to freedom of expression and thus in breach of the NZBORA. Due consideration was given as to whether the bylaw was nevertheless *intra vires* the Act and therefore saved by s 4 of NZBORA.

Section 5(6) of the Wanganui Act stipulates that:

“(6) A bylaw must not be made under subsection (1) (a) if the effect of the bylaw, either by itself or in conjunction with other bylaws made under subsection (1)(a), would be that all the public places in the district are specified places.”

Clifford J's interpretation viewed s 5(6) as only added pursuant to the recommendation made by The Law and Order Select Committee in 2008. The Select Committee recommended the addition of s 5(6) to make clear the well established principle that the power to regulate an activity does not amount to a power to totally prohibit it. The Wanganui District Council, therefore, was not given the power to make all public places specified places.

Clifford J held that a power to prohibit in specified places implies no power to prohibit generally. By examining the purposive and substantive effect of the specified areas he held that the bylaw was *ultra vires* because although the bylaw did not literally ban gang insignia in all areas of the Wanganui district, its substantive effect was to do so.

Clifford J found further that this case related to the important right to freedom of expression. Whilst banning gang insignia in all public places could arguably help achieve the purpose of the Act and in doing so may very well have imposed a justified and lawful limit to the right to freedom of expression; the Council still needed to consider the significance of that right when making the bylaw, and it failed to do so.

The Council was held to have erred in law in believing that it did not have to consider the bylaw's significance relative to the NZBORA, specifically its infringement on the right to freedom of expression. On the basis of this mistaken belief that the NZBORA issues were no longer relevant to their decision (as evidenced by the minutes of their 31 August meeting) the council did not properly consider whether the geographic extent of the bylaw as determined by them was “reasonably necessary” in terms of the NZBORA. The bylaw was held to be invalid for this reason also.

Schubert v Wanganui District Council underlines the court's expectation that regulatory authorities give due consideration to the NZBORA when making bylaws.

Geraldine Burnett | Editor, New Zealand Centre for Human Rights, Law Policy and Practice Bulletin

Part 1A and reasonable limits prescribed by law

Recent judgments addressing discrimination claims under Part 1A of the Human Rights Act 1993 (HRA) emphasise the courts' developing expectation of evidence-based policy decisions by bodies falling within s 3 of the New Zealand Bill of Rights Act 1990 (NZBORA), as demonstrated in *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) and *Child Poverty Action Group Inc v Attorney-General/HC WNTN*, CIV-2009-404-273, 25 October 2011. What may pose more of a conundrum for s 3 decision makers, however, is the requirement that reasonable limits on the freedom from discrimination be "prescribed by law" under s 5 of the NZBORA. The point was conceded by the plaintiffs in *Atkinson* before the High Court and not in issue in *Child Poverty Action Group*. It was, however, relevant to the deliberations in *IDEA Services Ltd v Attorney-General* [2011] NZHRRT 11, a case which illustrates the consequences of a strict reading of "prescribed by law." This decision is currently the subject of appeal on this point and others.

IDEA Services concerned a decision to cease funding for a group of intellectually disabled people to access day services after their retirement. The Human Rights Review Tribunal (the Tribunal) held that the decision was discriminatory and failed the *Hansen v R* [2007] 3 NZLR 1 (SC) justification test. In tackling s 5 the Tribunal observed that the question whether an act or omission is justified is separate from the question of whether or not a limit on the freedom from discrimination has been prescribed by law. It found that the requirement that reasonable limits be prescribed by law was not met. The decision suggests that s 5 could have been determined on the "prescribed by law" requirement alone, rather than engaging in the justification analysis.

The case has significant implications for policy decisions. The judgment takes as its starting point the interpretation of "prescribed by law" in *Hansen*, where McGrath J refers to it as sufficiently precise legislative, regulatory or common law authority. However, the Tribunal's interpretation excludes legislative discretion as a source of authority. In doing so, it acknowledges that failure to recognise policy created under broad statutory power as "prescribed by law" could create significant practical difficulties for government (not to mention other s 3 bodies).

This is because even non-contentious decisions that prima facie discriminate must be able to demonstrate reasonable limits prescribed by law: *Atkinson*, at [110] and [125], relying on *Air New Zealand v McAlister* [2010] 1 NZLR 153 at [39] and [55] (SC) per Tipping J. Requiring specific legislative, regulatory or common law authority imposes an upward ratchet to legislate or regulate out of existing policy made under broad empowering provisions or otherwise lawful policy discretion.

IDEA Services provides an example of this effect. The decision to end the funding and associated contract for day services was made under the same broad statutory powers by which it was authorised (incidentally the same provisions of the New Zealand Public Health and Disability Act 2000 relied on in *Atkinson*). The original policy was no more prescribed by law than the decision to cease it. Nonetheless, the Tribunal required an extra boost for the Ministry to exit the policy.

The decision also has implications beyond Part 1A of the HRA. The Tribunal effectively imposes a more stringent test for lawfulness than that applied in judicial review. Its interpretation of "prescribed by law" leaves little, if any, breathing room between lawful activity (no prima facie breach), which need not be specifically legislated or regulated, and justified activity (prima facie breach), which must. In effect, prima facie breach cannot be justified unless legislation expressly permits the specific activity; s 5 justification has no role at all in cases of broad delegation.

It is not clear what this approach is intended to achieve. Even if legislated, unjustified discrimination under Part 1A will not be saved by s 5, by virtue of s 20L(3) and s 92J of the HRA. If the Tribunal's approach came to be applied in the general NZBORA context, it may alter the strength of s 5 relative to s 6 and s 4. Requiring unambiguous legislative authority under s 5 could limit the scope for s 6 analysis and increase reliance on the s 4 savings provision. Alternatively, failing to recognise broad statutory or regulatory provisions as a source of authority for reasonable limitations under s 5 may pre-empt analysis under s 6 and narrow the circumstances in which s 4 will apply.

Given the implications for s 3 decision makers, policy process, and the NZBORA, these issues warrant further consideration in the *IDEA Services* appeal, or when "prescribed by law" next comes to be addressed in the context of Part 1A jurisprudence.

Lisa Fong | Crown Counsel at Crown Law – the views expressed here are her own.

SEARCH AND SURVEILLANCE ACT 2012

The Search and Surveillance Act 2012 (Act) implements most of the Law Commission's recommendations to fundamentally overhaul the legal framework for search, surveillance, and seizure.¹ This note considers one aspect of this legislation that was particularly controversial² when introduced – the extension of trespassory surveillance powers to regulatory agencies – and looks at how Parliament sought to resolve that controversy.³

Legislative purposes

The initial policy decision to extend trespassory surveillance powers to regulatory agencies was driven by two high-level objectives.

First, Parliament sought to enact a comprehensive framework for the powers of certain regulatory agencies to replace the pre-existing patchwork of agency-specific statutes.⁴ In broad terms, agencies with search warrant powers are now governed by the Act (subject to certain exceptions, such as the Serious Fraud Office). This reflects the Law Commission's objective of bringing "order, certainty, clarity and consistency to the sprawling mass of statutory powers of search and surveillance scattered throughout the statute book."⁵

Second, Parliament sought to provide a warrant regime for certain types of surveillance – defined by duration and intrusiveness⁶ – which did not involve trespass (such surveillance then being unregulated except to the extent that such surveillance was controlled by section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA)).⁷

¹ Law Commission, Search and Surveillance Powers (NZLC R97).

² Final Report of the Justice and Electoral Select Committee on the Search and Surveillance Bill, page 3.

³ For a summary of other concerns raised by submitters, refer to the joint report of the Ministry of Justice (Crime Prevention and Criminal Justice Group) and the Law Commission (August 2010) released by the Justice and Electoral Select Committee on 6 August 2010.

⁴ However, statutes specific to each regulatory agency continue to provide for other statutory information-gathering powers (e.g. powers to compel the production of documents and the answering of questions under oath).

⁵ Law Commission, Search and Surveillance Powers (NZLC R97), page 15.

⁶ See cl 42 of the Search and Surveillance Bill 2009 (as introduced) and s 46 of the Search and Surveillance Act 2012.

⁷ See, e.g. Law Commission, Search and Surveillance Powers (NZLC R97), paragraph 11.9: "Other than the general prohibition on unreasonable search and seizure in section 21 of the Bill of Rights Act, New Zealand statute law has not sought to deal with the field on any comprehensive basis. In particular, there is virtually no statutory regulation of visual or video surveillance or other non-auditory forms of surveillance".

The reforms in respect of non-trespassory surveillance clarified and limited agencies' surveillance powers. However, as introduced, the legislation also proposed that agencies which had the power to apply for search warrants would have the power to apply for surveillance warrants for trespassory surveillance.⁸ The principal rationale for that extension was that trespassory surveillance was not intrinsically more intrusive than search warrants and should therefore be available on the same basis.⁹

The concerns raised and the compromise adopted

A number of submitters, including several law firms and the Law Society,¹⁰ were troubled that regulatory surveillance powers were being expanded despite the absence of any demonstrated need for the conferral of such powers on all of the affected agencies.¹¹

They contended that the extension of such powers on an as-required basis would be preferable to a blanket extension of powers, while properly balancing the public interest in detecting regulatory contraventions against legitimate privacy interests.

After two rounds of submissions, the Select Committee acknowledged that the bill would unduly extend surveillance powers.¹² Ultimately, Parliament sought to accommodate these concerns by implementing the following "double trigger" for the availability of surveillance warrant powers for trespassory surveillance:

- (a) First, the agency must be specifically approved for such powers;¹³ and
- (b) Second, the offence being investigated must be punishable by at least seven years' imprisonment (or certain offences under the Arms Act 1983).¹⁴

In the regulatory context, this limits the use of such warrants to serious white collar offences. If the Commerce Commission received approval, it would also include the new cartel offence proposed by the Commerce (Cartels and Other Matters) Amendment Bill 2011).

These requirements should ensure that trespassory surveillance powers are confined to agencies with the appropriate capabilities and used for the purposes of investigations which justify such intrusion. As such, these changes accord with the Act's stated objectives of ensuring that investigative tools are effective and adequate for law enforcement needs while also recognising the importance of the rights affirmed in NZBORA.¹⁵

Jesse Wilson | Bell Gully

⁸ This power was subject to the requirements of satisfying the issuing judge that there were reasonable grounds to suspect offending for which the applicant could apply for a search warrant; and believe that the proposed surveillance would obtain evidential material.

⁹ See, e.g., Law Commission, Search and Surveillance Powers (NZLC R97), paragraph 11.79.

¹⁰ See, e.g., the submissions made to the Justice and Electoral Committee by Bell Gully, Chapman Tripp, Russell McVeagh, and the New Zealand Law Society.

¹¹ See, e.g., the joint submission made in response to the Interim Report of the Justice and Electoral Committee by Bell Gully, Chapman Tripp, and Russell McVeagh.

¹² Final Report of the Justice and Electoral Select Committee on the Search and Surveillance Bill, page 3.

¹³ Search and Surveillance Act 2012, s 50. The Governor General may approve an agency by Order in Council, on the recommendation of the Minister of Justice, following consultation with the Minister of Police.

¹⁴ Search and Surveillance Act 2012, s 45.

¹⁵ Search and Surveillance Act 2012, s 5.

TAX INVESTIGATIONS AND THE BILL OF RIGHTS IN TAUBER

The Court of Appeal recently confirmed in *Tauber v Commissioner of Inland Revenue* that the Commissioner's information-gathering powers under the Tax Administration Act 1994 ("TAA") are subject to the orthodox constraints on unreasonable search and seizure set out in section 21 of the New Zealand Bill of Rights Act 1990 ("NZBORA").

The issues before the Court of Appeal

Tauber involved a judicial review challenge to the issue and execution of a series of search warrants under the TAA. The Commissioner had been investigating companies with which Mr Tauber and his fellow appellants were associated for income suppression and tax avoidance.

When his requests to provide information under section 17 of the TAA yielded unsatisfactory results, the Commissioner sought and obtained warrants under sections 16(4) and 16C of the TAA to enter a number of private dwellings and to remove and retain documents found there for inspection. Following an unsuccessful application for judicial review in the High Court, the matter went on appeal.

The importance of NZBORA protections reaffirmed

The Court of Appeal dismissed the appeal, concluding (by a narrow margin, in the case of one particular access warrant) that the search warrants were correctly issued on the evidence supplied to the issuing judge. More important than the result, however, was the Court's reasoning.

On appeal, the Commissioner initially argued that a warrant to access a private dwelling could be lawfully issued under section 16(4) wherever a search of that dwelling would further the Commissioner's investigations in some non-negligible way. The Court rejected that interpretation as NZBORA-inconsistent. Rather, to comply with the right in section 21 NZBORA to be secure against unreasonable search and seizure, the Court held that the Commissioner must demonstrate to the issuing judge that a search of the private dwelling is reasonably required in the circumstances. In turn, that test requires a multifactorial assessment of such matters as the nature of the Commissioner's investigation, the steps already taken by the Commissioner, the proposed search locations, the nature of any information likely to be found and the urgency of the search. The Court of Appeal went on to confirm that a similar circumstantial reasonableness test also applies to the judicial power to issue document removal and retention warrants under section 16C of the TAA.

In general terms, the *Tauber* decision is both orthodox and predictable. In its 2010 decision in *Avowal Administrative Attorneys Ltd v District Court at North Shore*, the Court of Appeal had already held that the Commissioner's information-gathering powers in sections 16(1) and 16B of the TAA must be exercised consistently with the right in section 21 NZBORA. Further, *Avowal* and *Tauber* are simply tax-specific examples of the established general proposition that statutory discretions must be exercised in NZBORA-consistent fashion: see for example *Drew v Attorney-General* (CA) and *Cropp v Judicial Committee* (SC).

Interestingly, under *Tauber*, the Commissioner is not required to show that all other information-gathering options have been exhausted before a search of a private dwelling can be considered reasonable (and an access warrant thus lawfully issued). Observing that the TAA does not establish a strict hierarchy of investigatory options, the Court of Appeal effectively held that a search need not always be necessary in order to be reasonable under section 21 NZBORA. The Court's contrary hints in its 2002 decision in *Tranz Rail Ltd v Wellington District Court* were not explored further.

The key to reconciling these decisions may lie in the context-specific nature of the section 21 NZBORA reasonableness assessment. Much was made in both *Avowal* and *Tauber* of the distinctive civil tax-recovery scheme under the TAA and the latitude it provides the Commissioner due to the inherent complexity of tax investigations. In the tax investigation context, it appears a search may still (at least in the right circumstances) be held reasonable despite the availability of less intrusive alternatives.

Lessons for business

Tauber confirms that the issue and exercise of search warrants under the TAA will be subject to NZBORA scrutiny and may accordingly (depending on the circumstances) be vulnerable to legal challenge. The ability and willingness of the courts to examine the exercise of the Commissioner's statutory information-gathering powers from a human rights perspective provide New Zealand's business community with an important, and real, safeguard against abuse of those powers.

Chris Curran | Senior Solicitor, Russell McVeagh; Member of the Consultative Committee of the New Zealand Centre for Human Rights Law, Policy and Practice.

BUSINESS AND HUMAN RIGHTS

Corporate human rights

There has been a noticeable increase in the UK commercial and tax cases raising human rights issues. One recent study found that in the year to October 2011 the reported cases where businesses had used human rights arguments had risen 26%, and that there had been a 36% leap in human rights arguments raised against Her Majesty's Revenue & Customs in tax cases (Thomson Reuters "News Release: USE OF HUMAN RIGHTS ARGUMENTS IN COURT CASES JUMPS 5%" (9 April 2012), p1). A leading barrister said in comments on these UK trends that "When the Human Rights Act was introduced few practitioners saw it as a powerful tool for use in commercial disputes. Yet this may be the next phase of development of human rights law in the UK" (ibid, p1). So it may be here too.

Businesses embracing rights

The New Zealand Bill of Rights Act 1990 (BORA) makes very clear in s29 that except where its provisions otherwise stipulate, the BORA rights apply "so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons"; a point which Andrews J confirmed

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in *Zenith Corporation Ltd v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008 at [70]. It follows that BORA has the potential to be used by businesses in New Zealand, both offensively, as a sword, and defensively, as a shield.

The defensive use of BORA as a shield is the more common of the two business uses. Examples include litigation to prevent class actions being brought against a corporate as a breach of natural justice under s27(1) because the claimants were unidentified (*Commerce Commission v Carter Holt Harvey Ltd* [2008] 1 NZLR 387 (HC) at [41]-[42]); litigation to prevent the retention by a regulator of possibly incriminating evidence under s21 because the evidence was unlawfully or unreasonably obtained (*Tranz Rail Ltd v District Court at Wellington* [2002] 3 NZLR 780 (CA)); and litigation directed to absolving or mitigating criminal liability for breach of the s25(b) right to trial without undue delay (*Zenith Corporation Ltd*). To date it is less common for businesses to use BORA offensively, or as a sword, although there are some precedents. Two examples of this use of BORA by businesses are litigation to compel the publication of corrective statements under s14 where a business was defamed (*TV3 Network Ltd (in rec.) v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA)); and litigation to require public funding of support services under s19(1) to avoid discrimination (*Idea Services Ltd v A-G* [2011] NZHRRT 11). Claims to use BORA to protect uncompensated cancellation of contractual rights have been less successful (*Westco Lagan Ltd v A-G* [2001] 1 NZLR 40 (HC)).

Looking forward

Human rights case law in comparative jurisdictions, including the UK and Canada, shows that there are a variety of other business and human rights issues we might explore. As Cooke P recognised in *Baigent's Case*, BORA “requires development of the law when necessary” ([1994] 3 NZLR 667, 676 (CA)). That fact, when coupled with the breadth of the terms of BORA’s individual rights, means there is much potential to make BORA a powerful tool in commercial settings, as it is in non-commercial areas. As in the UK, this may well be the next phase for the development of human rights law in New Zealand.

Matthew Smith | Thorndon Chambers

Vetting Bills for Consistency with the New Zealand Bill of Rights Act 1990

The Attorney-General’s role under s 7 of the NZBORA¹⁶ was early on described as either “a very practical power or a well-intentioned nonsense”.¹⁷ Debate has since continued on the nature and scope of this important constitutional role and the extent to which it adequately serves as a stop-gap for legislative breaches of protected rights.

From the vetter’s perspective however, the solemnity of the obligation under s 7 is clear. Officials must provide frank advice to the Attorney-General on any apparent NZBORA inconsistency arising from a draft Bill. It is then for the Attorney-General to decide whether to make a report to the House under s 7. What is important, as acknowledged by the Court of Appeal in *Boscawen*, is that “the view Parliament is to be provided with under s 7 is the genuinely held view of the

¹⁶ Section 7 provides: “Where any Bill is introduced into the House of Representatives, the Attorney-General shall,— (a) in the case of a Government Bill, on the introduction of that Bill; or (b) in any other case, as soon as practicable after the introduction of the Bill,— bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.”

¹⁷ Section 7 provides: “Where any Bill is introduced into the House of Representatives, the Attorney-General shall,— (a) in the case of a Government Bill, on the introduction of that Bill; or (b) in any other case, as soon as practicable after the introduction of the Bill,— bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.”

Attorney-General, whether others consider that view to be right or wrong.”¹⁸

But how is that final view arrived at in practice? Officials charged with the onus of vetting Bills do not first receive the Bill in its final introductory form and then hurriedly provide advice on NZBORA compliance in a vacuum at this end stage of the process. Nor is the Attorney-General left uninformed of rights issues until such time as final advice is received from the Ministry of Justice or Crown Law Office.¹⁹ Such a last-minute process would perhaps resemble “a well-intentioned nonsense” and does not occur in practice, even when vetting Bills under urgency.

Consideration of the rights compliance of clauses in a new Bill begins long before those clauses have been drafted by Parliamentary Counsel. In my experience, officials involved in the development of legislation strive to present their Minister, and ultimately Parliament, with a Bill that achieves the Government’s policy objectives without transgressing the boundaries of fundamental human rights. Some Bills involving more controversial public policy, particularly in the criminal justice sphere, can present significant challenges requiring a multi-agency approach to address them. In these instances, it is not uncommon for officials responsible for NZBORA vetting at the Ministry of Justice and/or counsel from the Human Rights team at Crown Law to be consulted during the formative policy development stages of such a Bill.

This means that when the final draft Bill arrives on the vetter’s desk its objectives, provisions, and possible NZBORA implications are no surprise. Before this time, the vetter (amongst other affected agencies) will ideally have reviewed and commented on earlier Ministerial and Cabinet papers analysing the proposals and earlier versions of the draft Bill. It is therefore rare for an unanticipated NZBORA issue to arise in the final introductory version of a Bill. It is also quite probable that by this time the Attorney-General will have been briefed, particularly where a s 7 report seems likely.

Wherever possible, any apparent NZBORA inconsistency is sought to be resolved with the drafters, officials responsible for the Bill’s policy and even Ministers, prior to introduction. The Attorney-General has recently encouraged such endeavours in the NZBORA vetting process to improve legislative proposals.²⁰

Differences of opinion over the nature and extent of the inconsistency and methods to achieve resolution are however to be expected. This is particularly so in respect of finely balanced justification analyses under s 5 NZBORA. Where viable alternatives cannot be achieved in consultation with the responsible Department, the vetter’s role is to then provide independent advice to the Attorney-General on the competing issues and overall NZBORA compliance. Sometimes the Attorney-General must make a line call on whether a prima facie breach of the NZBORA is justified – but the outcome of that line call is not justiciable.²¹

18 *Boscawen v Attorney-General* [2009] NZLR 229 at [20].

19 Officials at the Ministry of Justice vet and provide advice to the Attorney-General on all Government and Private Members Bills that are not administered by the Ministry of Justice. The Crown Law Office vets Bills which are intended to be administered by the Ministry of Justice, either solely or in conjunction with another Department.

20 Attorney-General, “Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990”, 14 October 2012 at [5] - [7], <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/public-safety-public-protection-orders-bill>

21 *Boscawen, Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 (HC), 456 – 457.

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There has been much criticism of the lack of a formal supplementary vetting process following Select Committee or where late changes are proposed by Supplementary Order Paper.²² While a legitimate debate, s 7 currently does not require this.²³ That is not to say that consideration of rights issues has no place following introduction of a Bill. On occasion the Ministry of Justice and Crown Law may advise the Attorney-General on the NZBORA consistency of a Supplementary Order Paper. Vetting advice (since 2003) and the Attorney-General's s 7 reports are generally publically available on the Ministry of Justice's website²⁴ to facilitate public debate and engagement with rights issues throughout the legislative process.

It is to be expected that a s 7 report by the Attorney will be carefully considered at Select Committee and debated in the House. Similarly, a decision not to make a s 7 report in a controversial and finely balanced situation will generate post-introduction debate as part of an informed constitutional dialogue between the Executive, Parliament and the public. Such human rights awareness is to be encouraged. Section 7 of the NZBORA serves as a pivotal platform in this dialogue.

Charlotte Griffin | Crown Counsel, Human Rights Team, Crown Law Office²⁵

22 For example Geddis A "The comparative irrelevance of the NZBORA to legislative practice" (2009) 23(4) NZULR 465; Geiringer C "The dead hand of the Bill of rights? Is the New Zealand Bill of Rights Act 1990 a substantive legal constraint on Parliament's power to legislate?" (2007) 11(3) Otago Law Review 389; Hiebert J "Rights-vetting in New Zealand and Canada: similar idea, different outcomes" (2005) 3(1) NZ Journal of Public & International Law 63.

23 *Boscawen* at [46]; *Boscawen v Attorney-General* (No 2) [2008] NZAR 468 (HC) at [42].

24 <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>

25 The views expressed in this note are not necessarily reflective of any position of the Crown, the Attorney-General, Ministry of Justice or the Crown Law Office and should be construed as personal to the author alone.