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NZ CENTRE FOR HUMAN RIGHTS LAW, POLICY and PRACTICE

THE UNIVERSITY OF AUCKLAND FACULTY OF LAW

Human Rights Agenda e-Bulletin

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Contents

Centre News

Centre launches Event Podcasts, Videocasts and Media page

The Centre now has a page that is hosts links to podcasts and youtube clips of the events the Centre has hosted. Most recently, they include the presentations by academics and practitioners on human rights in the constitution as well as other lectures and media appearances or articles by guests and academic members.

Chris Mahony on "Why There's Disagreement on Syria at the G8" in the *Atlantic* and the *New Zealand Herald*

19 June 2013

Chris Mahony considers the possibilities for peace in Syria, as world leaders gather for the G8 summit. *"It is the division, primarily between Russia and the United States that drives both countries to inflate the conflict, rather than drive political reconciliation."*

"Tirohia Mai / Look At Us Now" exhibition is showing in Wellington until the 25th November, curated by Rosslyn Noonan

19 June 2013

New Zealand women won the vote 120 years ago. Tirohia Mai looks at where women stand now, how they got here, and how they see themselves in 2013. This exhibition celebrates the rich diversity of women and their contributions to the past, present and future of New Zealand. The exhibition will run until the 25th of November at the National Library in Wellington. >>

Centre News

The Centre's Deputy Director presents on "Witness Sensitive Practices in International Fact-Finding" in Florence

28 May 2013

On 20 May, Chris Mahony presented a paper on witness sensitive practices in international fact-finding at the European University Institute in Florence, Italy. Mahony's paper examined the efficacy of pursuing fact-finding in disparate political, economic and security situations, a podcast of Mahony's remarks may be found on the Centre's event podcasts and videocasts webpage. >>

Centre co-hosts the Annual Human Rights Conference with Amnesty International

13 May 2013

The Centre co-hosted the Annual Human Rights Conference with Amnesty International NZ. Chaired by Centre Director Kris Gledhill, the day was an inspiring gathering of like-minded people who had the privilege to listen to some distinguished speakers and participate in lively discussion. >>

Christchurch Earthquake Universal Periodic Review Stakeholder Submission

18 April 2013

A group of law students at the University of Canterbury under the supervision of Senior Lecturer Natalie Baird are coordinating and writing a joint stakeholder submission for New Zealand's Universal Periodic Review, which is taking place in early 2014. Their submission will focus on the human rights issues that have arisen as a consequence of the 2010 and 2011 Canterbury earthquakes.

A short online presentation about their project can be viewed at http://prezi.com/5j0mbz1evj_n/untitled-prezi/>>

FORTHCOMING AND RECENT EVENTS

The Annual Human Rights and Criminal Law Seminar 24 July 2013

On Wednesday 24 July 2013, the New Zealand Centre for Human Rights Law, Policy and Practice held its inaugural Annual Human Rights and Criminal Law Seminar. Colin Wells, a Barrister of 25 Bedford Row, London, outlined recent important cases from the European Court of Human Rights that will impact on the work of criminal barristers in England and Wales. Simon Mount, a Barrister of Bankside Chambers, addressed "The Bill of Rights and Sentencing in New Zealand".

Practitioners in criminal law will be aware that arguments under the New Zealand Bill of Rights Act may often be relevant. It is therefore important to be kept informed as to recent developments. It is hoped that an annual seminar on the interplay between human rights law and criminal law can be organised to assist practicing lawyers, the judiciary and academics that work in the field of criminal law. A social gathering kindly sponsored by the Criminal Bar Association followed the seminar.

"Suing Government for Discriminatory Legislation and Policy: the Family Caregivers Case and the law and practice of Part 1A of the Human Rights Act 1993" 9 July 2013

On Tuesday 9 July 2013, kindly sponsored by Chapman Tripp, Centre co-Director, Professor Paul Rishworth, chaired presentations by Dr Jim Farmer QC and Frances Joychild QC, followed by questions and discussion. The seminar examined "Part 1A" jurisdiction under the Human Rights Act 1993, under which both legislation and government policy can be challenged for inconsistency with rights against discrimination as set out in the New Zealand Bill of Rights.

The speakers looked closely at the Court of Appeal decision in *Ministry of Health v Atkinson* [2012] 3 NZLR 456, which ruled unlawful the government's policy of not paying parents to care for their adult disabled children (in circumstances where it would have paid for care by non-related caregivers). The Government did not appeal but undertook consultation. Its ultimate response was legislation enacted under urgency on 20 May – the New Zealand Public Health and Disability Amendment Act 2013.

This Act authorised new policies in the field, which may still be discriminatory, with ouster clauses seeking to preclude further possible legal challenges. The ability for the *Atkinson* plaintiffs to pursue their remedies was preserved, and there was a special limited saving for one other pending case, that of Mrs Margaret Spencer. Frances Joychild QC is counsel for the plaintiffs in *Atkinson*; Dr Jim Farmer QC is counsel for Mrs Spencer. They spoke to their cases and discussed the phenomenon of suing government for unlawful discrimination.

The Centre had a full events calendar for May and June. Our events included film screenings on the war in Sri Lanka, public lectures on various topics, debates about the New Zealand Constitution and hosting visiting international guests such as Justice Teresa Doherty who was appointed by the UN as a Judge on the Special Court of Sierra Leone. The Centre also co-hosted the inaugural Human Rights Conference with Amnesty International NZ. If you would like to stay informed of any upcoming events please check our website at http://www.humanrights.auckland.ac.nz/uoa/home/nzchrlpp-happenings/events

Screening of 'No Fire Zone' – a cutting edge documentary on the civil war in Sri Lanka. 22 June 2013

Amnesty International, The New Zealand Centre for Law, Policy and Practice and Auckland University were proud to host a screening of 'No Fire Zone,' a documentary on the last few months of the civil war in Sri Lanka. It is a meticulous and chilling expose of some of the worst war crimes and crimes against humanity of recent times - told through the extraordinary personal stories of those who were present and also through some of the most dramatic and disturbing video evidence ever recorded.

Callum Macrae, the documentary's director, visited New Zealand especially for screenings of No Fire Zone and was available for a question and answer session after the event.

If you missed the screening you can read more on 'No Fire Zone' and view the trailer here

Symposium: What place for Human Rights in our Constitution?

On June 7th at University of Auckland Law School the Centre hosted a symposium on the place for Human Rights in our Constitution. Questions debated were: Are human rights sufficiently protected by our current constitutional practice? Are there rights that we should recognise in our constitutional documents but don't? Or have we got it about right?

The government has initiated a wide-ranging review of New Zealand's constitution. As part of this review, the Centre wishes to facilitate reflection on the place of human rights in our constitution, and to explore ways in which this can be improved if that is necessary or desirable.

The primary goal of this symposium was to bring together policy makers, lawyers, academics and civil society groups to discuss these important questions. The outcome of this reflection will be presented to the Constitutional Advisory Panel.

Speakers included Dr Ranginui Walker, the Hon Dr Wayne Mapp, and representatives from the Human Rights Commission.

Centre co-hosts the Annual Human Rights Conference with Amnesty International

13 May 2013

The Centre was delighted to co-host the Annual Human Rights Conference with Amnesty International NZ this year. It was an informative and at times inspiring day.

The itinerary included Gordon Weiss, the former UN Spokesperson in Sri Lanka and current expert consultant with the International Criminal Evidence Project, who spoke about the situation in Sri Lanka and Graham Leung, the Former Fiji Human Rights Commissioner and now specialist, consultant and trainer at the Secretariat of the Pacific Community who discussed Human Rights and Wrongs in the Pacific. There

was a lively question and answer session with current and former MPs Jan Logie, Hon 'Aussie' Malcolm and Keith Locke. To close the day, Centre Director Kris Gledhill had the pleasure of presenting the Human Rights Defenders Award to Marilyn Waring, Member of the New Zealand Order of Merit, for her tireless work in Human Rights.

Guest Lecture by Justice Teresa Doherty on "Assessing the Legacy of the Special Court for Sierra Leone: Jurisprudential Advances, Reconciliation and Confrontation of Impunity"

09 May 2013

The Centre had the honour of hosting Justice Teresa Doherty of the Special Court for Sierra Leone in May. Justice Doherty spoke about the legacy the Special Court (the International War Crimes Tribunal for Sierra Leone) and candidly discussed the challenges the court faced during that time. She commented specifically on the jurisprudential advances on gender issues and provided particularly frank and nuanced comments on the extent to which the court was able to confront the impunity of those who committed horrific crimes during the civil war in Sierra Leone.

Watch the Lecture on youtube:
http://www.youtube.com/watch?v=HL72vzO8uks

Listen to the podcast

"Hegemonic stability in transitional justice: Lessons from Sierra Leone" a public lecture by Deputy Director Chris Mahony.

09 May 2013

Centre Deputy Director Chris Mahony gave a public lecture on the trajectory of international justice and the extent to which a shifting global economic order may be causing a decline in the independence of prosecutions at international criminal courts and tribunals. Chris considered the Special Court for Sierra Leone and then the International Criminal Tribunal for Rwanda and the International Criminal Court.

The lecture podcast and youtube clip are available on the Event podcasts and videocasts webpage
Watch the lecture on youtube: http://www.youtube.com/edit?video_id=EiSVSR31So0&ns=1

PUBLICATIONS BY ACADEMIC MEMBERS

The Centre is pleased to highlight just a snippet of the human rights oriented publications of our distinguished members. A list of these publications may be found on the 'Publications' page of our website.

Tracey McIntosh has published a co-edited edition on '*Pacific Identities and Well-being: Cross-cultural Perspectives*' with Routledge that attempts, using a multi disciplinary and cross-cultural approach, to bridge mental health related research and practice within the indigenous communities of the South Pacific.

David Williams has published *"Ko Aotearoa Tenei: Law and Policy Affecting Maori Culture and Identity"* in the International Journal of Cultural Property - an article that carefully considers the impact of regulatory frameworks on Maori cultural practices and identity.

Treasa Dunworth has published a particularly insightful consideration of *'International Humanitarian Law and International Criminal Law'* in the New Zealand Yearbook of International Law (2011) 308-315.

James Oleson has published research with R Chappell in the Journal of Family Violence called "*SelfReported Violent Offending Among Subjects with Genius-Level IQ Scores*". The research looks specifically at eight different types of violent crimes and the relationships that appear to exist between the incident of these crimes and the offenders IQ levels.

Kate Diesdelf, along with G Mellsop, published *"Service availability, compulsion and compulsory hospitalization"* in the Shanghai Archives of Psychiatry that explores China's draft Mental Health Act that aimed to improve patient services in China. Juliet Chevalier-Watts has published "*Charitable Trusts and Advancement of Religion: On a Whim and Prayer?"* in the Victoria University of Wellington Law Review which explores this controversial topic, and sides with a conservative interpretation of the advancement of religion based on established case law.

Sharyn Graham Davies has published her intimate exploration into Indonesia's bureaucratic system with *"Understanding Indonesia's Complex Bureaucracy."*

Carmel Williams has published *"Using a rights-based approach to avoid harming health systems: a case study from Papua New Guinea"*, with Brian G, in the Journal of Human Rights Practice which assess proposed health programmes in Papua New Guinea and highlights issues that would have arisen if the proposed programmes had gone ahead.

Anna Hood has published *"The Security Council's Legislative Phase and the Rise of Emergency International Law-Making"* in K Rubenstein and H Nasu's book Security Institutions and International and Public Law in which she explores the parallels between Security Council Legislation and legislation that is produced by domestic governments during emergencies.

Thomas Gregory has published an article in the International Feminist Journal of Politics that draws on the work of Judith Butler to argue the rhetoric of humanitarianism operates to preclude Afghan civilians from appearing as recognizable human beings, contributing to the expendability of their lives.

Luke Fenwick, through The New Economic School of Moscow, has published *"Child Safety on the Internet: International Experience and Challenges for Russia"*, an exhaustive exploration of global legislative approaches to strengthening children's safety online, providing comparative analysis of recently introduced legislation in Russia.

Grant Huscroft's chapter *"From Natural Justice to Fairness - Thresholds, Content, and the Role of Judicial Review"*, in the second edition of the popular Canadian casebook Administrative Law in Context, considers the Duty of Fairness. The chapter outlines the threshold test for when fairness is required, the limitations on the application of the Duty of Fairness and judicial review of the Duty of Fairness.

Mark Busse's co-edited edition Protection of Intellectual Biological and Cultural Property in Papua New Guinea, recently re-released as an eBook, considers, over a diverse range of chapters, the concept of property and property rights in intangible things from a unique Papua New Guinean perspective.

Klaus Bossleman is a co-editor of *Environmental Law for a Sustainable Society*, published as part of the New Zealand Centre for Environmental Law's Monograph Series, which examines current trends in environmental law and how New Zealand environmental law meets the challenge of sustainable development.

Petra Butler's forthcoming chapter *"Critical Perspectives on Human Rights and Disability Law"* examines whether, considering the constitutional framework, policy developments and practical measures, New Zealand is meeting its commitment to combat disability discrimination, especially in regard to the Convention on the Rights of Persons with Disabilities.

In her book *Hard Interests, Soft Illusions: Southeast Asia and American Power,* Natasha Hamilton-Hart contends that South East Asian countries disproportionately support the United States and, in their perception of the United States as a relatively benign external power, tacitly accept United States hegemony in the South East Asian region.

Biblical scholar Caroline Blyth considers the parallels of the experiences of people living with HIV and AIDS in sub-Saharan Africa and Psalm 88 in her article *"I am alone with my sickness"* in the Australian and New Zealand Theological Review.

Hanna Wilberg has published a case note on the Supreme Court's decision in *Right to Life New Zealand Inc v The Abortion Supervisory Committee* that elucidates the bases on which a majority of the bench found that while the Abortion Supervisory Committee can conduct generalised reviews, it has no authority to review individual diagnostic decisions under the Conception, Sterilisation, and Abortion Act 1977.

Mark Henaghan – together with Bill Atkin – has published a fourth edition of *Family Law Policy in New Zealand*. The book incorporates policy developments from the past five years in its exploration of legal definitions relating to families, Māori conceptions of family, family property and finances, reproduction, and family dissolution.

Amrita Kapur has published the article *'A decade in the life of the ICC: Assessing its impact on crimes of sexual violence'*, which provides a frank evaluation of the ICC's commitment to eradicating sexual and gender-based violence.

Alice Mills has published *'Researching the mental health needs of women in prison: problems and pitfalls'*, a co-authored chapter that challenges the usefulness of gendered interventions within a penal setting.

Stephen Winter's chapter on *'Climate Change, Complicity and Compensation' challenges the supposed ethical superiority of the Alaska's Permanent Fund Dividend by connecting residents'* receipt of funds to moral complicity in rights violations of the oil industry.

Susanna Trnka has introduced the concept of sensory citizenship in her co-edited book *Senses and Citizenships: Embodying Political Life*. Essays explore how sensory phenomena can give rise to national and supra-national forms of belonging due to the political effects of our senses.

Warren Brookbanks has published a book chapter *"The New Face of Preventive Detention in New Zealand: Public Protection Orders"* in Preventive Detention: Asking the Fundamental Questions, a review of preventative detention in New Zealand and an analysis of the Public Safety (Public Protection Orders) Bill 2012.

In a most useful tool for diplomacy and statecraft: *Neutrality and Europe in the 'long' nineteenth century 1815 - 1914*, Maartje Abbenhuis considers the key role neutrality played in the development of international law in nineteenth century Europe.

Jay Marlowe has published *'Going Slowly Slowly: An Ethnographic Engagement with the South Sudanese Community'*. In this chapter, the "slowly slowly" reintegration of a group of displaced South Sudanese men in Australia is used to show the need to maintain reflexivity, build interpersonal relationships, and incorporate reciprocity in considering trauma, resettlement, and recovery.

Malcolm Campbell has published a co-edited chapter *'The Reunion of Irish Convicts and their Families in Australia, 1788–1852'* in *Australian Historical Studies,* a review of the complex and previously untold story of Irish convicts reunited with their families in Australia between 1788 and 1852.

In *Indigenous human rights and knowledge in archives, museums, and libraries: Some international perspectives with specific reference to New Zealand and Canada* Bradford Morse looks at recent changes in international law on the rights of Indigenous peoples, the impact of this on the legal status of traditional knowledge and culture, and the resulting key legal and practical challenges faced by archivists and related professionals.

Mike Asplet has published *"Kenya's Face-Off with the ICC"* in Infocus Revue des Affaires Internationales de Sciences Po, a comment on the implications of Kenya's potential withdrawal from the ICC following the Court's announcement it would investigate the post-election violence of 2007-2008.

Building partnerships in Uganda and the Democratic Republic of Congo: A recent alumni's experience

Stephen Windsor holds a BA/LLB (Honours) from the University of Auckland. Since 2009 he's been working in Uganda and the Democratic Republic of the Congo (DRC).

In Kampala, Uganda, he is director of education at an NGO called Xavier Project. Xavier promotes access to quality education for refugee children in urban areas. That includes: a sponsorship programme; an English Course; and a mobile library and reading recovery programme at four primary schools.

By 2015 Xavier plans to start an early childhood education centre and primary school which will offer refugee children an education that takes into account the diverse futures they may have (ranging from local integration, repatriation to third country resettlement). Xavier is also considering how to develop a teaching methodology that encourages creative and analytical thinking in contexts where there are few ordinary resources and a high student-teacher ratio.

Stephen helped start a network of nine small mostly refugee-run NGOs working with refugees in Kampala. They meet regularly, sharing ideas and coordinating activities. They hope to build each other's capacities such that refugees will no longer be seen merely as a burden by the Ugandan government and the UN Refugee Agency, but rather, as potential partners.

In DRC Stephen is working with an NGO that runs an orphanage in Southern Masisi in the east of the country. We are developing it into a community centre that offers vocational training, a library and sports, while finding and assisting foster families for orphans, and supporting this through agricultural activities.

Together with some Congolese journalists, Stephen has started an organisation called 'News and Logistics for Peace and Development'. Local journalists often help out foreign journalists, researchers and NGOs when they visit dangerous places. By bringing local journalists together they hope to be paid better, increase their professionalism, make dangerous places more accessible and encourage a higher standard of journalism about the DRC.

Stephen is also a trustee, project manager and field officer for the Imani Children's Trust. Imani is a New Zealand registered charity that Stephen started with some other kiwis (some of whom are former refugees from DRC). Imani aims to promote access to education in the Great Lakes Region of Africa.

Same-sex adoption and discrimination in New Zealand

Susan O'Conner (Law Student, University of Auckland)

The rights of lesbian, gay, bisexual and transgender New Zealanders have been the centre of considerable attention in recent months. The Marriage (Definition of Marriage) Amendment Bill (39-2) (Marriage Equality Bill) passed its third reading, 77 votes to 44, on 17 April 2013. This vote was delivered to a packed gallery which erupted into a spontaneous rendition of Pōkarekare ana. Two days later the Marriage (Definition of Marriage) Amendment Act 2013 (Marriage Equality Act) received the royal assent. With the road to enactment successfully navigated, the Marriage Equality Act will come into force on 19 August 2013. New Zealand has become the 13th country in the world to legalise same-sex marriage. Despite the outpouring of jubilation and pride following the third reading, the Marriage Equality Act has been met with consistent and considerable opposition since the Marriage Equality Bill was first introduced on 26 July 2012. Although the primary focus of the Marriage Equality Act, as set out in s 5, is to redefine marriage as "the union of two people, regardless of their sex, sexual orientation, or gender identity", it will, as a consequence, amend a number of statutes. Among these is the Adoption Act 1955. Read a selection of public submissions on the Marriage Equality Bill and it quickly becomes clear many opponents were concerned that the redefinition of marriage will allow same-sex couples to adopt jointly.

Same-sex adoption has recently been the focus of the European Court of Human Rights. In *X v Austria*,[1] the applicants alleged that allowing unmarried heterosexual couples to adopt while denying same-sex couples the same right amounted to discrimination. The first and third applicants were two women in a stable relationship; the second applicant was the son of the third applicant who had lived with his mother and her partner for around 13 years (at the time of the judgment). The first applicant wanted to adopt the second applicant in order to create a legal relationship between them, without severing the legal relationship between the boy and his mother.[2]

Under the Austrian Civil Code this was not possible and their application to adopt was dismissed in the domestic courts. The *Code* provides only individuals or married couples may adopt (art 179). This rule is not absolute. Article 182(2) allows for second-parent adoption by heterosexual couples, but not by same-sex couples. Based on this exception the applicants applied to the European Court of Human Rights for relief. They argued, with reference to arts 8 (the right to family life) and 14 (the prohibition on discrimination) of the European Convention on Human Rights (ECHR), that art 182 (2) presents an unjustified distinction between same- and different-sex couples.[3]

In reaching its decision, the Court confirmed that differential treatment under art 14 of the ECHR is lawful if that treatment has a legitimate aim and is reasonably justifiable.[4] The Austrian Government argued, and the domestic courts agreed, that protecting the traditional biological family unit is a legitimate legislative aim and so denying same-sex couples the ability to adopt is reasonably justifiable.[5] However, the Court pointed out that as the ECHR is a living instrument, the rights it protects develop alongside societal changes. The Court criticised the Austrian adoption law position, stating the "legislation lacks coherence" as same-sex partners may adopt as individuals but not as a family.[6] By finding that 'family life' is no longer limited to the traditional biological family unit,[7] the Court held the discrimination found in art 182 (2) "is incompatible with the Convention."[8] The Austrian Civil Code, in allowing a heterosexual unmarried individual to adopt their partner's child, but not allowing an individual in a same-sex relationship to do the

1 *X v Austria* (19010/07) Grand Chamber, ECHR 19 February 2013.
2 At [10]-[11].
3 At [16].
4 At [98].
5 At [137].
6 At [144].
7 At [139].
8 At [151].

same, breaches art 14 and art 8.

New Zealand adoption laws are similar to those in Austria and date from 1995. Parliament has failed to update the legislation, despite calls for reform from many quarters.[9] Section 3 of the Adoption Act 1955 (the Act) provides for adoption by one person or by "2 spouses jointly". 'Spouse' is not defined by the Act, but it is traditionally understood to mean 'husband' or 'wife'. However, in *Re application of AMM and KJO to adopt a child* (*Re AMM and KJO*), the New Zealand courts extended 'spouse' to include de facto heterosexual couples.[10] This extension was possible through the New Zealand Bill of Rights Act 1990 (NZBORA). Although Parliament may limit rights and freedoms under s 4, a legislative interpretation that is consistent with NZBORA is to be preferred.[11] Interpreting 'spouse' as including de facto partners is more consistent with the right to freedom from discrimination (s 21 of the Human Rights Act 1993 (HRA)) than the traditional view.[12] It is also consistent with the intent and purpose of the Act (as required by s 5(1) of the Interpretation Act 1999). The judgment points out that, in this case, the Attorney-General had taken the unusual step of agreeing that the Act discriminates against de facto couples "without logic or justification",[13] but did not comment on the Act's discriminatory effect on same-sex couples.[14]

Justices Wild and Simon France acknowledged that although *Re AMM and KJO* did not concern itself with whether same-sex or civil union couples could adopt, this decision could "open the door for those in other forms of relationship to apply."[15] However, obiter dicta in R*e AMM and KJO* notes that there are formidable barriers to a successful adoption application by a civil union couple. In 2005 Parliament rejected an amendment to the Act under the Relationships (Statutory References) Act 2005 which would have allowed civil union partners to adopt; additionally, heterosexual de facto partners in a stable relationship are directly comparable to a traditional married couple,[16] whereas same-sex and civil union partnerships are not. Notably, the obiter acknowledges that *Re AMM and KJO* eliminates only one instance of discrimination in the Act.[17]

The discriminatory nature of the Act becomes even more apparent when considering it in light of the *Austria* decision. Although New Zealand cannot be party to the ECHR, the government has ratified the International Covenant on Political and Civil Rights (ICCPR).[18] Articles 17 and 2(1) provide rights parallel to those stated in arts 8 and 14 of the ECHR. Language differences do exist between the two human rights documents but the substantive rights remain the same. However, the ICCPR goes a step further than the ECHR in prohibiting discrimination. Articles 2(1) of the ICCPR and 14 of the ECHR state that the rights contained within both documents must be applied without discrimination. Article 26 of the ICCPR makes non-discrimination a right. This requires domestic law to provide effective protection against discrimination based, amongst other things, on status. Given the parallels between the Austrian and the New Zealand laws on same-sex adoption as well as between ECHR and ICCPR rights, the Government faces potential human rights complaints on the basis of unjustified discrimination.

Victoria University of Wellington Professor Bill Atkins writes that "same-sex parenting has become a fact of life".[19] Atkins points out that the obiter regarding same-sex adoption in *Re AMM and KJO* is anomalous. It is a matter of logic to extend 'spouse' to include civil union partnerships, regardless of sex. Presumably

9 See, for example, Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* NZLC R65, 2000.

10 *Re application of AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [73] [*Re AMM and KJO*].

11 New Zealand Bill of Rights Act 1990, s 6.

12 *Re AMM and KJO*, above n 9, at [50].

13 At [10].

14 At [39].

15 At [11].

16 At [35].

17 At [49].

18 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) was ratified by New Zealand on 28 December 1978.

19 Bill Atkins "Adoption law: The Courts outflanking Parliament" (2012) 7 NZFLJ 119 at 119.

the level of commitment and stability present when entering a civil union is the same when entering a marriage or de facto relationship.[20] Surely, he argues, a civil union, regardless of sexual construction, is akin to a marriage or de facto relationship and falls within the traditional family unit concept. As the European Court of Human Rights pointed out in *Austria,* the notion of a biologically traditional family unit does not justify treating a same-sex couple differently in light of modern societal developments.[21]

Louisa Wall, author of the Marriage Equality Act, points out that the reality of same-sex parenting is here to stay.[22] In New Zealand, as in Austria, a homosexual person may adopt a child as a single parent.[23] The Government Administration Committee (the Committee) took this point into consideration when examining the Marriage Equality Bill. The Committee comments that the anomaly that allows homosexual or transgender persons to adopt alone, but not as part of a couple, presents a legal position that is "absurd."[24] The law in New Zealand, as in Austria, lacks coherence.

Acting Principal Family Court Judge von Dadelszen calls it as he sees it: "The Adoption Act is outdated and it has become unjustly discriminatory."[25] When the Act was enacted, homosexuality was a crime under s 158 of the Crimes Act 1908; society has moved on from this but the adoption laws have not.[26] The Act breaches NZBORA, HRA and the United Nations Convention on the Rights of the Child in eleven ways,[27] including the prohibition of discrimination on the grounds of both sexual orientation (HRA, s 21(m)) and marital status (HRA, s21b). The *Austria* decision adds the ICCPR to this list of legislation.

Acting Principal Judge von Dadelszen goes on to comment that the Act has been developed judicially over the years. The paramount consideration in adoption applications is now whether the adoption is in the best interests of the child.[28] This welfare principle is present in other legislation (see, for example, the Care of Children Act 2004, s 4(1)), but is not provided for in the outdated Act. The principle focuses on whether the parents can provide a loving and stable environment for a child; were it not for the requirements of the Act, it is unlikely the sexuality of the parents would factor into this analysis.[29]

The Committee felt that allowing same-sex couples to marry will provide "appropriate legal right[s] to families who are already raising children."[30] Although the Marriage Equality Act constitutes an important step towards removing some of the discrimination felt by same-sex couples, the Act's deficiencies have not been entirely corrected. In reality, the Marriage Equality Act will grant same-sex couples legal protections in regards to their children if they choose to marry. The position of de facto and civil union same-sex couples remains unchanged. R*e KMM and KJO* applies. These couples continue to be barred from being legally recognised as the parents of the children they are raising and from adopting jointly.

On 14 October 2012 Green MP Kevin Hague revealed a private member's bill which proposes an indirect overhaul of the Act.[31] The Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill seeks to make a number of changes to adoption laws. These amendments include removing "automatic ineligibility on grounds of … sexuality … and relationship status".[32] Same-sex de facto and civil union couples will be

20 At 120.

21 *X v Austria*, above n 1, at [139].

22 Louisa Wall "Louisa Wall: The facts on my marriage bill" *The New Zealand Herald* (online ed, Auckland, 22 March 2013).

23 The Adoption Act 1995, s 3(1).

24 Marriage (Definition of Marriage) Amendment Bill (39–2) (select committee report) at 5 [Select Committee].

25 Acting Principal Family Court Judge von Dadelszen "A new Adoption Act for the new Millienium" (Families in Transition Seminar, Roy McKenzie Centre, Wellington, 17 August 2009) at 2.

26 At 7.

27 At 2-3.

28 At 5.

29 At 9.

30 Select Committee, above n 24, at 6.

31 Green Party of Aotearoa New Zealand "Comprehensive modernisation of adoption law to enter ballot" (press release, 14 October 2009).

32 Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill, at 2.

able to make adoption applications. However the ultimate decision will be made in light of the welfare principle, with the child's best interests remaining a primary consideration.[33] If drawn from the ballot and enacted, Hague's private member's bill will alleviate the discrimination currently found in the Act. However there is no telling when, or even if, this will happen.

There can be no doubt that the enactment of the Marriage Equality Act was an important and historic step towards recognising the rights of lesbian, gay, bisexual and transgender New Zealanders. But the battle for equality before the law is far from over. Marriage has been redefined as a non-discriminatory institution but the adoption laws have failed to keep up. Despite its divisive nature, the Marriage Equality Act has highlighted (once again) that society is an evolving institution, and the Government must react to these developments or fail in both its domestic and international human rights obligations. The 1950s nuclear family is not the family of 2013. It is time for the Adoption Act 1955 to be updated.

Housing New Zealand and Indirect Discrimination: The Case of *Winther*

Kathryn Gaskell (Law Student, University of Victoria, Wellington)

I INTRODUCTION

The primary function of Housing New Zealand (HNZ) is to provide rental housing, principally for those who need it the most.[34] Access to housing is a fundamental human right.[35] HNZ is therefore, fulfilling the Government's responsibility of housing New Zealanders, who otherwise could not afford adequate accommodation.

HNZ has an obligation to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates.[36] This implies that HNZ has a duty to avert its tenants from unreasonably interfering with neighbouring properties. HNZ encounters significant difficulties when it attempts to uphold this social duty whilst still fulfilling its obligation to provide housing to vulnerable New Zealanders.

In recent times, HNZ has used the procedure of issuing a 90 day notice as a means of terminating the tenancy of a disruptive tenant.[37] However, although HNZ is not required to provide any reason when issuing these notices, their use is not without contention.

HNZ is also bound by the Bill of Rights Act 1990 (BORA). When HNZ decides to issue a 90 day notice it is exercising a public function and thus cannot lawfully do so in breach of the BORA.[38] This was agreed by parties in *Winther v Housing New Zealand Corporation (Winther)*.[39]

The challenge of HNZ to uphold its obligations to house vulnerable New Zealanders, as well as to exhibit a sense of social responsibility whilst abiding by the BORA has become very topical recently. *Winther* highlights this issue.

33 At 3.

34 Housing Corporation Act 1974, s 18(2)(a).

35 Universal Declaration of Human Rights 217 A (III) (adopted by General Assembly 10 December 1948), art 25(1); International Covenant on Economic, Social and Cultural Right 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 11(1).

36 Housing Corporation Act, 3B(a)(i).

37 Residential Tenancy Act 1986, s 51(1)(d); and *Winther v Housing New Zealand Corporation* [2011] NZHRRT 18 at [21].

38 New Zealand Bill of Rights Act 1990, s 3b

39 *Winther*, above n 4, at [14].

II WINTHER

A Factual Background

The plaintiffs in *Winther*, Ms Winther, Ms Taylor and Ms Tamaka, were tenants of three HNZ properties in Pomare, Lower Hutt. On February 1st 2009, three Mongrel Mob members, each of whom was a partner to one of the mentioned plaintiffs, intimidated another HNZ tenant. The men threatened her with a shotgun and asked her to get out of their 'fucken hood'. The identified men then also ransacked her home.[40]

The individual plaintiffs were each holding tenancies to the separate HNZ properties at which HNZ believed the relevant men were living.[41] In an attempt to prevent any future anti-social behaviour by these men in the Pomare community, HNZ decided to issue 90-day notices to the plaintiffs, terminating each of their tenancies.

Ms Winther, Ms Taylor and Ms Tamaka appealed HNZ's decision to the Human Rights Review Tribunal (HRRT). The plaintiffs argued that the issuing of these notices was a breach of their right to freedom from discrimination.[42] The HRRT rejected this claim. HRRT's reasoning will be examined throughout this paper.

B HRRT Decision

The right to be free from discrimination is protected under s 19 of the BORA. Section 19 states that the discriminatory act must be based on a prohibited ground, specified in the Human Rights Act 1993 (HRA).[43] The plaintiffs argued that HNZ discriminated against them on the ground of family status.[44] The current paper will examine whether the termination of the tenancies was discriminatory on the argued ground of family status, as well as on the prohibited ground of ethnic origin.

Firstly however, the method used by the HRRT to determine discrimination will be outlined. The Tribunal based their decision on approaches taken in R v Gov. Body of JFS and Air New Zealand v McAlister.[45] This method involved asking "whether the prohibited ground relied on was a material ingredient in HNZ's decision to issue the plaintiffs with 90 day notices".[46]

The Tribunal decided that it was not because of the relevant men's' familial association with the plaintiffs that HNZ choose to terminate the tenancies. Rather, the HRRT maintained that the defendants acted because of their belief that these men who were involved in criminal behaviour, were living at the properties.[47] The Tribunal thus concluded that the decision to issue the notices was for non-prohibited reasons.

The key critique of the decision is that the HRRT only considered whether there was direct and not indirect discrimination. The concept of indirect discrimination will be discussed in the following paragraphs.

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40 *Winther,* above n 4, at [26].

41 At [30].

42 At [47].

43 Bill of Rights Act, s 19.

44 *Winther*, above n 4, at [1].

45 *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153; R *(on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15, 2 AC 728 (SC).

46 *Winther*, above n 4, at [59].

47 At [62].

III DIRECT vs. INDIRECT DISCRIMINATION

Direct discrimination involves a policy which uses a prohibited ground as the basis upon which to differentiate between people.[48] The HRRT found that HNZ differentiated between the plaintiffs due to the individuals who were living with them. [49] This is not a prohibited ground under the HRA and therefore it is agreed that there was no direct discrimination.

Indirect discrimination, however, occurs where as an effect of a law or decision there is an adverse impact on a particular individual or group of people.[50] *Northern Regional Health Authority v Human Rights Commission (NRHA)* confirmed that indirect discrimination is prohibited under New Zealand law.[51]

It is maintained that the HRRT neglected to consider whether HNZ was indirectly discriminatory. The Tribunal decided the case by merely determining whether family status was a material ingredient in HNZ's decision. The Tribunal did not address whether the particular action may have had the effect of differentiating against the plaintiffs on a prohibited ground.

The current paper will therefore discuss whether the issuing of the 90-day notices in fact amounted to indirect discrimination. Prior to deciding this however, the appropriate approach to defining prima facie indirect discrimination must be determined.

IV DEFINING DISCRIMINATION

A Defining Direct Discrimination

Ministry of Health v Atkinson (Atkinson) confirmed that a neutral method is the correct approach to defining direct discrimination.[52]. The decision held that any differential treatment which gives rise to a material disadvantage is sufficient to find prima facie direct discrimination.[53]

B Defining Indirect Discrimination

The law is still unclear as to whether a neutral or more purposive approach should be taken when defining indirect discrimination. This paper advocates for a neutral conception. A neutral paper is consistent with the *Atkinson* method of determining direct discrimination. It is argued that any policy causing differential treatment should amount to indirect discrimination. Therefore, deliberations of possible justifications for the conduct must be left to the s 5 stage of analysis. An s 5 analysis contrasts a purposive approach in that justifications are also considered when determining prima facie indirect discrimination.

Rishworth argued that if a neutral conception of the right is adopted, virtually any policy could be an infringement of the right on the basis of coincidence.[54] However, it is contended that this conclusion is not inevitable. It is acknowledged that if a more neutral conception were taken, a large number of practices will consequently be prima facie, indirectly discriminatory. However these practices will not necessarily result in a breach of BORA, as the policy may be reasonably justified under s 5.[55]

48 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act*: A Commentary (LexisNexis, Wellington, 2005) at [17.11.1].

49 *Winther*, above n 4, at [62].

50 Butler and Butler, above n 14, at [17.11.1].

51 *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) 236.

52 *Ministry of Health v Atkinson* [2012] NZCA184 at [109].

53 At [109].

54 Paul Rishworth and others The New Zealand Bill of Rights (Oxford University Press, Victoria, 2003) at 388.

55 Selene Mize "Indirect Discrimination Reconsidered" [2007] NZ L Rev 27, at 68.

The placement of the burden of proof is a significant reason for following a more neutral approach.[56] The onus to establish discrimination under s 19 is on the claimant. It would be a heavy burden for the citizen to carry if they had to take into account justifications in order to prove prima facie indirect discrimination. It is argued that it is more appropriate for the alleged discriminator, the state, to have the heavier burden. Government or state action should be challenged.[57] It is desirable, given the enormous power the Government has at its disposal, that the state continually justify any policy that treats people differently on a prohibited ground.

This paper, therefore, maintains that a neutral conception of indirect discrimination should be followed.

V PRIMA FACIE INDIRECT DISCRIMINATION

On the basis of the neutral approach, for the conduct of HNZ to amount to prima facie indirect discrimination, the termination of the tenancies must merely have the effect of differentiating on a prohibited ground between people. Prior to answering this question, however, an appropriate comparator group needs to be determined.

A Comparator Group

The comparator group is an issue which underlines most discrimination cases. To make a finding of indirect discrimination there must be adverse consequences imposed on one individual or group, which are not felt by another in comparable circumstances.

In NRHA, Cartwright J held that, when determining an appropriate comparator, "the core of each group must be the very basis on which the discrimination is asserted".[58] This paper will attempt to define comparator groups for the prohibited grounds of family status and ethnicity, on the basis of Cartwright J's approach.

B Family Status

The claimants in *Winther*, were arguing discrimination on the ground of family status. NRHA held that the correct comparator group is individuals, who are identical to the claimant group, minus the alleged ground of discrimination. The comparator group should therefore be individuals who are not in a de facto relationship, who however are still disruptive. It is argued that, it would be difficult to establish that, as an effect of HNZ actions, members of this comparator group, would be treated differently to, the claimants in this case. In other words, as an effect of HNZ's policy, it is likely that a member of the comparator group would still have their tenancy terminated. Thus there would be no indirect discrimination on the ground of family status. Nevertheless this paper maintains that there may have been indirect discrimination on another prohibited ground.

C National or Ethnic Origin

The current paper maintains that HNZ's actions are indirectly discriminatory on the prohibited ground of ethnic origin.[59] This argument is based on the assumption that gang association and criminal activity go hand in hand.[60] Therefore, it is immaterial whether the reason HNZ decided to evict the plaintiffs was due to the relevant men being associated with the Mongrel Mob or due to their criminal activity.

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56 *Mize*, above n 21, at 69.

57 At 69.

58 *Northern Regional Health Authority*, above n 17, at [241].

59 Human Rights Act 1993, s 21(1)(g).

60 Richard Carleton "Mob Rule: NZ's Mongrels" (29 August 1999) Sixty Minutes <sixtyminutes.ninemsn.com.au>; Rory Callinan "Tribal Trouble" (5 July 2007) Time Magazine World <www.time.com>; and "Organised crime in New Zealand" New Zealand Police <www.police.govt.nz>.

It is argued that the comparator group should be defined according to gang association. The comparison should be to women who have identical circumstances to the claimant's, except that their de facto partner is not associated with gangs. This is despite gang membership not being a prohibited ground of discrimination.

Individual's, who are members of or have some association with gangs in New Zealand, are predominately of Māori decent.[61] Both the Mongrel Mob and Black Power have a majority of Māori members.[62] It is reasoned therefore, that if HNZ's termination of the plaintiff's tenancies has the effect of differentiating between individuals, by reason of their de facto relationship with a gang member, it will consequently have a disproportionate impact on people of Māori decent.

This paper maintains, that a result of issuing 90 day notices to the plaintiffs on the grounds that a person who is associated with gangs usually lives with them, members of the claimants group, individuals who are in a de facto relationship with a gang associate, will be treated differently to the comparator group.

If an individual lives with someone, they are far more likely to have a de facto relationship with them. The group represented by the plaintiffs are therefore more likely to be evicted from their homes than individuals whose de facto partner is not a gang member. Due to the strong connection between gang membership and Māori ethnicity, HNZ's actions will consequently have a disproportionate impact on individuals of Māori decent. In other words, the issuing of the 90 day notices has the effect of differential treatment towards the plaintiffs on the grounds of national origin.

Further, Māori make up a huge proportion of HNZ's tenants. They are the second largest occupant group and the largest group of applicants.[63] This is despite Māori making up only 15% of the total New Zealand population.[64] Therefore, the effect of differential treatment towards Māori by HNZ will be amplified as a consequence of Māori's high use of HNZ properties.

D Material Disadvantage

The final requirement of a finding of prima facie indirect discrimination is that there needs to be some kind of material disadvantage.[65] The eviction of individuals from their houses is a clear material disadvantage and therefore, this element is easily fulfilled.

VI SECTION 5 ANALYSIS

Although it has been found that the conduct of HNZ was prima facie indirectly discriminatory, this does not necessarily mean that HNZ breached the BORA. In order for the indirect discrimination to be unlawful, it must be an unreasonable limitation to the right.

Hansen sets out the leading authority for determining whether a limitation on a right is reasonably justified under s 5.[66] Firstly, the limiting measure must serve a purpose sufficiently important to justify curtailing the right. Secondly, the means used by the alleged discriminator must be reasonably and demonstrably justified. There are three requirements coming under this heading. The limiting measure must be rationally connected with the purpose, the infringing policy must also not impair the right more than is reasonably necessary for sufficient achievement of its purpose, and finally, the limit must be in due proportion to the importance of the objective. The *Hansen* approach will now be applied to the facts of *Winther*.

61 Rory Callinan, above n 26; and "Organised crime in New Zealand", above n 26.

62 Rory Callinan, above n 26.

63 *Māori Housing Trends 2008* (Housing, New Zealand, June 2008) at [1.3].

64 At [1.4].

65 *Atkinson*, above n 18, at [109]; and Butler and Butler, above n 14, at [17.9.37] and [17.13].

66 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at 104.

HNZ has a statutory obligation, to protect the interests of the community.[67] The purpose of HNZ issuing the 90-day notices was in order to fulfil its social duty by removing the gang related behaviour stemming from the properties. The issuing of the notices was thus of great importance and therefore necessarily significant to justify curtailing the right to be free from indirect discrimination.

The limiting measure of terminating the tenancies is sufficiently linked to the purpose. By ending the plaintiff's tenancies, HNZ will drive the anti-social behaviour of the relevant men out of the neighbourhood.

It is argued that issuing of the 90 day notices infringed the right more than was reasonably necessary. There was another preferable method which HNZ could have followed in order to fulfil its purpose of exhibiting a sense of social responsibility. The area of Pomare has a high concentration of HNZ properties, occupied by a large proportion of individuals who are involved in the Mongrel Mob.[68] Gangs have been found to strengthen in neighbourhoods with high levels of crime and economic disadvantage.[69] The area of Pomare has poor statistics in terms of crime, employment and education.[70] It is maintained that if HNZ had integrated the families into a variety of neighbourhoods instead of placing these families of similar backgrounds in the same neighbourhood, the anti social behaviour would not have been so problematic. HNZ does not have a responsibility to thoroughly investigate tenants' possible associations with gang members prior to housing them. However, given HNZ's obligation to house vulnerable New Zealanders and the substantial correlation between Maori, gang membership and economically disadvantaged neighbourhoods, it is argued that HNZ did, and remains to have, a responsibility to integrate families of these similar backgrounds into a range of areas.[71] It was grouping all these families together in the one region, which already had high rates of crime and unemployment, which enabled the Mongrel Mob to gain a level of de facto control over Pomare. [72] The current paper therefore maintains that the 90-day notice procedure did infringe the right to be free from indirect discrimination, on the grounds of ethnic origin, more than is reasonably necessary.

It is argued that the final *Hansen* requirement, that the limiting measure is in due proportion to the purpose, is satisfied. The anti-social behaviour the relevant men were involved in in this case was serious. The Mongrel Mob members threatened a HNZ tenant with a shotgun and ransacked her home.[73] The objective of removing these men from the neighbourhood to ensure the community's safety was thus in due proportion to the infringement of the plaintiff's right to freedom from indirect discrimination. However, as HNZ infringed the right more than is reasonably necessary, the Hansen test is not fulfilled.

This paper consequently, contends that HNZ's conduct indirectly discriminated against the claimants on the grounds of ethnic origin, and that this was not reasonably justified under s 5 of the BORA. Hence, the issuing of the 90 day notices by HNZ was unlawful.

VII CONCLUSION

The challenges faced by HNZ in addressing its often conflicting obligations are addressed in this paper. A function of HNZ is to provide rental housing, principally for those who need it the most. HNZ is also required to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates. Furthermore, the organisation is bound by the BORA.

67 Housing Corporation Act, 3B(a)(i).

68 *Winther*, above n 4, at [23].

69 *Juvenile Justice Bulletin* (U.S Department of Justice, Office of Justice Programs, Office of Juvenile and Delinquency Prevention, December 2010) at 8.

70 *Winther*, above n 4, at [23].

71 Richard Carleton "Mob Rule: NZ's Mongrels" (29 August 1999) Sixty Minutes <sixtyminutes.ninemsn.com.au>; Rory Callinan "Tribal Trouble" (5 July 2007) Time Magazine World <www.time.com>; and "Organised crime in New Zealand" New Zealand Police <www.police.govt.nz>.

72 *Winther*, above n 4, at [23].

73 At [26].

Winther involved a claim by HNZ tenants that HNZ's termination of their tenancies was an infringement of their right to be free from discrimination. The HRRT rejected this claim, finding that there was no prima facie discrimination. This paper argues, however, that the HRRT only considered whether there was direct and not indirect discrimination.

This paper supports a neutral conception of the right to freedom from indirect discrimination. It is argued that an act or policy will amount to indirect discrimination where it has the effect of causing differential treatment to an individual or group of people, which results in a material disadvantage.

It is maintained that there is no indirect discrimination on the basis of family status. It is doubtful that as an effect of HNZ's actions, members of the comparator group, individuals who are not in a de facto relationship who however are still disruptive, would be less likely to be issued a 90-day notice.

However, it is argued that HNZ indirectly discriminated on the ground of ethnic origin. The issuing of 90-day notices on the basis that a gang member usually lives at a property, is going to have a disproportionate impact on individuals who are in a de facto relationship with a gang member than individuals whose de facto partners are not involved in gangs. Due to the high proportion of Māori gang membership, this will therefore have an effect of imposing differential treatment, on individuals of Māori decent. Thus, HNZ's policy is prima facie indirectly discriminatory.

It is contended that the conduct of HNZ was not reasonably justified under s 5. HNZ has a duty to exhibit a sense of social responsibility. However, it was not necessary that HNZ issued the 90 day notices to the three claimants. It is argued that HNZ should have instead, placed the families in separate neighbourhoods in order to mitigate the Mongrel Mob's control of Pomare and thus reduce the criminal behaviour in the neighbourhood. It is predicted that the issues involving the plaintiffs' partners in *Winther* would have been avoided if HNZ had not placed the great amount of families with affiliation to the Mongrel Mob in the region.

This paper therefore maintains that the HRRT's finding in *Winther* is incorrect. It is argued that HNZ's issuing of the 90 day notices was indirectly discriminatory on the grounds of ethnic origin. Further the infringement of the right was not reasonably justified and was thus unlawful.

Case Note: *Tye v R* [2012] NZCA 382 – Police Powers and Individual Privacy

Nilson Gieger (Law and Associates)

The Court of Appeal case *Tye v R*[74] considered the District Court's decision which arose in the context of an application by the Crown under s 344A of the Crimes Act 1961 as to the admissibility video footage as evidence.

The Facts

Mr Tye and a co-accused were charged with 21 offences relating to serious drug offending or to the possession of firearms and ammunition. The specific charges against Mr Tye include manufacturing the Class A controlled drug, methamphetamine; supply of methamphetamine; and possession of methamphetamine for the purpose of supply or offering to supply. Included in the evidence against Mr Tye is video surveillance footage which the police acquired after two motion-activated cameras were installed on Mr Tye's property. The search warrant that was obtained by the police officer under s 198 of the Summary Proceedings Act 1957 on 5 May 2009 only authorised entry, search and seizure. The warrant

74 *R v Tye CA*109/2012, 27 August 2012.

did not make any mention of allowing the Police to record any activity. Mr Tye challenged the Disctrict Court's analysis of s 30 of the Evidence Act 2006, in light of the Supreme Court's decision in *Hamed v R*.[75]

The Law

The central issue for the Court of Appeal was whether, taking *Hamed* into consideration, evidence of serious drug offending obtained in breach of s 21 of the New Zealand Bill of Rights Act (1990) (NZBORA), was still admissible under s 30 of the Evidence Act 2006.

In this regard, Section 30(2)(b) of the Evidence Act provides that the Judge must decide:

whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but but also takes proper account of the need for an effective and credible system of justice.

Section 30(3) provides a list of factors that the Judge may consider when going through the balancing process. Section 30(4) states that the Judge must exclude any improperly obtained evidence if the Judge determines that its exclusion is proportionate to the impropriety.

The District Court's Decision

Judge Tompkins found that the evidence, while obtained in breach of s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA), was nevertheless admissible under s 30 of the Evidence Act 2006 (the Act).

In reaching this conclusion Judge Tompkins took into account the following considerations: [76]

- The expectation of privacy in relation to the shed at the centre of the surveillance;
- The location of the shed on the property;
- The rugged nature of the landscape;
- The presence of bush; and
- The camouflaged nature of the shed.

The Judge did not accept "that the expectation of privacy in relation to the shed and its environs can properly be described as 'high'".[77] The Judge found that there was no evidential basis for bad faith on the part of the police and that, apart from installing the video equipment, there was no other unreasonable behaviour by the police whilst on the property. Judge Tompkins concluded that the exclusion of the evidence would be disproportionate to what he found was a "slight to moderate breach"[78] of the NZBORA.

The Court of Appeal's Decision

Mr Tye appealed on the grounds that the evidence was inadmissible under section 30 of the Act and that the District Court Judge failed to take into account the principles established in *Hamed*.

In order to determine the admissibility of the challenged evidence the Court of Appeal considered three main issues: the expectation of privacy, the nature of the impropriety and the nature and quality of the improperly obtained evidence.

Section 21 of the NZBORA states that everyone has the right to be secure against unreasonable search or

75 [2011] NZSC 101; A decision by the Supreme Court which ruled on the admissibility of video surveillance. The ruling held that evidence collected using criminal trespass on private land to conduct covert surveillance under a warrant is only admissible for serious crimes.

76 *R v Tye*, above n 1, at [14].

77 At [14].

78 At [17].

seizure. The test for what constitutes a search under s 21 is whether the surveillance by the police involves state intrusion into reasonable expectations of privacy.[79] The Court therefore had to asses the expectation of privacy Mr Tye had in relation to the shed in order to evaluate the seriousness of the breach. The Court acknowledged that since Mr Tye was the proprietor of the land he had an "undeniable expectation of privacy".[80]

However, various factors indicated that the reasonable expectation of privacy in relation to the shed was not as high as that of the dwelling house. This is because the shed was (1) a considerable distance from the dwelling house, (2) was towards the rear of the property, and (3) was used for storage rather than for residential purposes. The Court referred to *R v Williams*[81] which stated that a "lesser expectation of privacy"[82] is a relative term as an intrusion of a person's garden will still be serious, just not as serious as invading their bedroom. In this case, the shed, the central focus of the surveillance, was towards the rear of a very large rural property. Therefore, the Court concluded that Mr Tye's expectation of privacy was not on the same level as it was for the dwelling house.

The Court held that an expectation of privacy may be unreasonable where the person complaining of the s 21 breach does not subjectively hold a strong expectation of privacy. In this case, the Court concluded that Mr Tye could not have had a strong expectation of privacy because he camouflaged the shed and set tripwire around it. These measures were indicative of the fact that the Mr Tye expected that outsiders might visit the shed or observe it. The Court did accept, rather inconspicuously,[83] that camouflaging and setting tripwire around the shed could suggest Mr Tye was trying to hide the area and thereby had a heightened expectation of privacy. However, the Court concluded that Mr Tye did not go as far as putting a fence around the shed or setting up signs such as "keep out" or "private", which would have clearly indicated his heightened expectation of privacy.

The Court analysed whether the impropriety was deliberate, reckless or done in bad faith. Counsel for Mr Tye pointed to the fact that the application for the first warrant stated that the police desired to conduct covert surveillance. However, the warrant only authorised entry, search and seizure, and did not authorise the police to conduct covert surveillance. The Court concluded that the act of covert surveillance was the only unlawful step taken by the police. The act itself does not raise the police officers' liability for improper conduct beyond recklessness.

S 30(3)(c) states that the Court may consider, as part of the balancing process in s 30(2), the nature and quality of the improperly obtained evidence. The Court acknowledged the approach of Blanchard and McGrath JJ in Hamed which stated that the centrality of the evidence to the prosecution case is a relevant factor to take into account in the s 30 analysis.[84] The Court concluded that the obtained footage of the criminal activity provides key evidence against Mr Tye and is therefore vital to the criminal proceedings against Mr Tye.

The Court further considered the approach taken in *Hamed*, which proposed that unlawfully obtained video evidence would always be inadmissible. The Court took the view that this approach would be unsuited for the s 30 balancing exercise. The Court therefore decided that the "exclusion of the evidence would be an outcome disproportionate to the impropriety involved".[85] The s 21 NZBORA breach was reasonable in these circumstances because the Police entered the property in accordance with the search warrant. Accordingly, the appeal was dismissed.

79 *Lorigan v R* [2012] NZCA 264 at [22].

80 *R v Tye*, above n 1, at [24].

81 *R v Williams* [2007] NZCA 52.

82 At [113].

83 *R v Tye*, above n 1, footnote 24.

84 At [36].

85 At [41].

Discussion

The decision in *Hamed* prompted the government into a knee-jerk reaction which brought about the Search and Surveillance Act 2012 (SSA). The SSA gives the police the widest possible powers to make intrusions into the private business of New Zealand citizens in the name of ensuring the public's safety. The SSA was passed by a bare majority in the House. The opposition commented that the SSA effectively made New Zealand a "police state".[86] The SSA attempts to balance the two primary objectives of law enforcement and proteciton of the right to privacy.[87] In *Tye*, the Court of Appeal did not consider the SSA, but it undertook a similar balancing exercise. The Court gave s 21 of the NZBORA a substantial amount of consideration by acknowledging that Mr Tye had a reasonable expectation of privacy since he was the proprietor of the land. However, in the end, the prerequisite to uphold an effective and credible system of justice[88] and ensuring the public's safety outweighed the individual's right to privacy. In effect, the decision in *Tye* justifies the wide powers the SSA gives to the police. Whilst citizens can take some comfort in the notion that the police and government are taking measures to ensure the public's safety, there is perhaps a greater concern that this comes at the cost of their right to privacy.

86 Danya Levy, *Search and Surveillance Bill passes*, 23 March 2012, available at: <http://www.stuff.co.nz/national/politics/6625136/Search-and-Surveillance-Bill-passes>.

87 Search and Surveillance Act 2012, s 5 states: "The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values".

88 Evidence Act 2006, s 30 (2)(b).