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From: "Graeme Axford"
To:
CC:
Date: 20/05/2013 9:28 a.m.
Subject: Constitution era/error anti-democratic Human Rights breaching law making and breaking Government of New Zealand
Attachments: Axford Legal Opinion Right to Protest.pdf; Axford Legal Opinion RMA Right to Protest.pdf; I think National just broke our constitution by Andrew Geddis.pdf; Select Committee public participation & Democracy.pdf

His Excellency Lieutenant General the Right Honourable Sir Jerry Mateparae

Governor-General of New Zealand

Government House

Wellington Mail Centre

20 May 2013

Dear Governor General,(and others)

Before I start I need to point out I have a disability that affects my literacy skills which is why I have taken what you might see as an unusual approach in writing to you. I have a severe case of dyslexia therefore require some reasonable accommodation in that regard.

I am going to outline my concerns which I will back-up with other people's opinions who are more qualified, experienced and better educated and skilled than I owing to my disability. What I have provided (attached) best encapsulates the issues as I see them for your consideration. So I don't want you to think I am being lazy in my method by using other people's works rather than putting it all into my own words. Nor do I want you to think by sending this to you I am in any way trying to insult your intelligence as I am well aware you would be far more advanced than I could ever be in understanding these matters. I had to find information that could bridge the gap between how I understand them and then what could best explain the issues in more technical terms for you in a more coherent manner than I can do because of my disability which also affects my streams of consciousness.

I am writing to you on a number of issues but with the common theme and that's how Parliament seems to be taking away our Freedoms and Rights and being indifferent to the New Zealand Bill of Rights Act 1990 (NZBORA) in doing so. Once I have outlined my case I am hoping you will consider not giving certain Bills Royal assent and withdrawing Hon Christopher Finlayson the Attorney-General's warrant if you are able to under your powers. Given the Attorney-General is meant to be the Protector of the NZBORA I think he has done a lousy job of this as I will go on and explain.

As you will note I have copied this to the Attorney-General should he wish to comment himself but will not hold my breath on that one. Regardless of what he might or not say I believe what I outline will prove he should not hold that position. Given he is a lawyer himself I think he should be thrown out of Parliament in disgrace never to return because of what he has played a part in lately and should know better. I mean I am uneducated, got a disability and no law degree and can still see the problems, what's his

excuse?

While we have a Human Rights Commission and Attorney-General I think I can now make the case they are of little use in reality by way of any real tangible results in the matters I outline. By that I mean our Freedoms and Rights have been slowly but surely eroded away rather than maintained or better still strengthened over time.

My history and expense to date:

I have been an advocate since 1989 and patriot in whom I acknowledge I have both Rights and Responsibilities. In all my protesting I have acted "within the law" never been arrested or as yet detained by the police because of this or anything. So I and not a radical activist nor an anarchist and never taken part in the occupy movement as yet as I have been unsure of their legality. If in doubt about my protesting or methods I will withdraw and double check things to play it safe.

Now for me there is the problem "within the law" that goal post seems to be changing as I have had to battle both the Police and the Greymouth District Council (GDC) about what is or not within the law within the powers given to them by Parliament. I have attached two very good Legal opinions we paid for by Evgeny Orlov to the Greymouth Police and the other written from me by Graeme Edgeler overseen by Tony Ellis about the Resource Management Act 1991 issues and protesting. Both the Police and GDC tried to limit my Right to protest. My point is I seem to have little redress as the NZBOR is toothless and we do not have a constitution.

I can no longer afford to protest because of the hounding and amount of money it cost to defend what used to be a right. If I can get a lawyer on pro bono I still have to guarantee "Security of costs" deposit. So these two things exclude me from justice. The Freedoms cost these days but in earlier times they didn't used to and I hope you would have issues with that on principle.

I raise this concern on some blogs over many years in which I claimed the Government would escalate things and take bolder steps as time went on and they got away with subtly taking away our Rights as my case highlights. I have seen this come to pass with what looks like a move against Greenpeace to limit their protests in favour of the mineral/oil exploration/exploitation.

This National led Coalition Government seems to treat New Zealand like some virtual SIMS city Game where they can make rules up or change them at will. They seem to live in some alternate reality from the rest of us and the winder world given what they have done in the past few months.

I have not changed the way I protest over the past 24 years but what's different is how authorities think they can limit me using the laws as passed by Parliament and the lack of protection afforded to us under the NZBORA. While you might be thinking I should take that up with them given I have been there done that is why I am asking you to interject now.

I have less confidence in the Parliamentary process than ever before I do not believe that Parliament itself is setting a fine example by using urgency and truncated processes and Supplementary Order Papers (SOP) to ram things through the house and at their whim. This should not be allowed to happen in my review.

Even if something makes it to a Select Committee that process itself can be

manipulated as I can show given the attached document titled "Select Committee Public participation & Democracy" that I hope highlights this clearly.

There are three points of view in that document which are under the headings:

"Committees need opposition chairperson" by TREVOR MALLARD

"Select committees must be more autonomous" SUE KEDGLEY

"Lack of public participation damages Parliamentary democracy" by the Human Rights Commission. It should be obvious from these three points of views all is not well and how the parties that form the Government can stack the deck in their favour at every point. While I realise as Governor General you could say there could be other sides to that debate the fact credible people and organisations are finally talking like that is a worry. Especially when it's all so anti-democratic and this bureaucracy is what's killing our democracy.

I should add I have been through the Select Committee process three times now and left somewhat disappointed by the results given the amount of effort it took and for research purposes they are as listed Petitions:

Reference number 2008/121 Date presented 16 March 2011 (Got a hearing).

Reference number 2011/33 Date presented 25 July 2012 written submissions accepted, denied a hearing in person to spite asking and pointing out my disability.

Reference number 2011/52 Date presented 1 March 2013 (being considered)

It will be interesting to see where and how my latest Petition is treated what they accept, rejected or if I get to appear before them in person third time lucky.

To say the average person can approach Parliament and get a fair hearing is a bad joke and I am not laughing third time around as little has changed about the issues I raised and been fighting for justice over the past 13 years now. My webpage will explain more <http://www.graemea.snap.net.nz/> should you want to know.

While I am aware there is a current constitutional conversation <<http://www.ourconstitution.org.nz/>> <http://www.ourconstitution.org.nz/> debate going on I doubt it will be retrospective should anything come of it. I also distrust the fact the Government get to cherry-pick what it likes if anything from that consultation processes. They might not follow through on the recommendations should they come up with the right ones.

But the time it gets up and running it might well be far too late as all the damage seems to be happening now like with the "Anadarko Amendment" which is a limit on protests like never attempted before.

If I get the gist of what has happened with other amendments under the "Public Health and Disability Amendment Bill (No 2): People are now limited from making claims to the Human Rights Commission under section 70E (2). I believe that is an unprecedented move for which I hope you will not sign off on.

Let alone the fact they blanked out parts of the "Regulatory Impact Statement" which again I think is a first and shameful act by this Government.

The standards of Parliament has got so bad that this Government had to introduce the "Crown Minerals Amendment Bill (No 2)" to fix problems that arose as a result of issues with the original amendment passed in April 2013 that had not even come into effect yet. So in a first they had to Amend and Amendment before it came into being. That's because they avoided proper scrutiny via public submissions and Select Committee processes to rush it through.

I assume you as the Governor General gave that Royal assent, without checking it?

It also looks like this second attempt at a patch-up job will also create issues because of the problems around the fact it might be outside of our jurisdiction (continental shelf) as this snippet shows:

Ministry for the Environment: "In areas where the continental shelf extends beyond 200NM from the baselines, the water itself above the continental shelf is not within New Zealand's jurisdiction and is part of the high seas." Source: <<http://www.mfe.govt.nz/issues/oceans/jurisdictional.html>>
<http://www.mfe.govt.nz/issues/oceans/jurisdictional.html>

This could also put us in breach of our international treaties and conventions besides these issues. It also worries me if they get away with this any future Government someday might use all the aforementioned tactics to ban protesting much closer to home. However in the wider global context if other countries took this new approach like China with the whaling or nuclear testing and we wanted to protest against that in the high seas this would be a bit hypocritical I would think if we now complained.

After all Norman Kirk sent two navy frigates, HMNZS Canterbury and Otago, into the nuclear test area as a protest years ago as is our proud heritage being taken from us now.

New Zealand often led the way with world firsts for the betterment of us all, but now sadly we seem to be heading in the opposite direction and in the face of our proud heritage. Given Simon Bridges is meant to be a lawyer I am surprised he made these very basic errors. This has wasted and cost enough time and money with more to come it could seem.

I have included an opinion from Professor Andrew Geddis from the faculty of Law at Otago university published on his Blog about the issues I have

outlined to you under the title "I think National just broke our constitution" as he says it best. I should add I have used this without permission because of time restraints (signing of Royal assent) it's his Blog is not copyrighted therefore also sent what I have done here to him out of respect (hopefully he will see it that way).

This all brings me back to my original reason for writing to you given our lack of a constitution and fact the protector of the NZBOR being the Attorney-General is not looking after her majesty servants that only seems to leave you. So as the Governor General will you please consider refusing royal assent to both the "Public Health and Disability Amendment Bill (No 2):" and "Crown Minerals Amendment Bill (No 2)" as well as removing the Attorney-General Christopher Finlayson warrant if he has one and that how the system works..

While I know they expect you to rubberstamp the Bills, I hope you will be brave enough to reconsider doing that. I hope you will have strong words with this Government and if it continues consider dissolving Parliament if you think the matters are serious enough to warrant that, as I do.

All I want is to go back to the days when we had clearer Rights and Freedoms for all to protest in the full knowledge of everyone's Rights and Responsibilities including the Governments and its agents towards its citizens. The Right to protest was the only form of civil disobedience we could lawfully undertake to make a point. No one should ever lose the right to protest or even appeal either by law or because of truncated processes or financial restraints/burdens as evidenced by the examples I have given you of late. Who is or will uphold the rights for us all when Parliament fails.

I have sent this to Transparency International after hearing a National Party member saying they found us to be one of the least corrupt countries and when you see what's taken place lately have to question that claim. Mind you it might be just incompetence rather than corruption I guess it's a fine line?

While the Governor-General might not like some of my views when this Government treats the public with such disrespect in regard to not doing its job properly and taking for granted its people, I think they deserve a little flack for that.

I also have to question the damage this will do to our international reputation as far as the United Nations and New Zealand wanting a seat on the Security Council. By stealth we are becoming more like China as this Government becomes more oppressive.

Graeme Oxford

Email

Webpage <<http://www.graemea.snap.net.nz/>> <http://www.graemea.snap.net.nz/>

Documents attached:

Axford Legal Opinion Right to Protest - Evgeny Orlov Barrister

Axford Legal Opinion RMA Right to Protest - Graeme Edgeler and Tony Ellis Barrister

I think National just broke our constitution -Andrew Geddis (from public Blog)

Select Committee public participation & Democracy (joint snippets) -Trevor Mallard, Sue Kedgley and the Human Rights Commission.

Warning:

The views expressed in this document are solely that of Graeme Axford and might not represent those who works I have attached or use being unaware of this.

Copied to:

The Human Rights Commission

Christopher Finlayson, Attorney-General

The Constitutional Conversation Panel

Greenpeace New Zealand

Professor Andrew Geddi, faculty of Law Otago

Transparency International secretariat

Simon Bridges MP

Labour Party

Green Party

The United Nations



By way of post

Greymouth Police Station

Greymouth

Auckland

Dear Sir/Madam,

Tr

Enc

RE: Graeme Axford – Issues in regard to having a right to protest

We act for the above named client.

We have been advised by our client that he has been recently issued a warning by the police to desist protesting outside of Child, Youth and Family ("CYF") offices. For the past 4 to 5 years, he has been protesting outside of CYF offices about an important public issue that is the breaches of CYF as agent of the New Zealand Government concerning article 23 of the International Covenant on Civil and Political Rights ("ICCPR").

He has also organised numerous petitions which were made available to the public during the protest action and also on his website and produced documents to start a debate about CYF issues on his own website, http://graemea.s_nap.net.nz/.

To attempt to arrest or limit our client's right to freedom of protest in any manner would directly undermine his right to freedom of expression under s 14, freedom of peaceful assembly under s 16, and freedom of association under s 17 of the New Zealand Bill of Rights Act and would also undermine his rights under the ICCPR which New Zealand is a party to.

By this letter, we warn the department and any government agency that our client's right to exercise his freedom of expression and his freedom of protest will be vigorously protected. Indeed, any attempts to limit our client's rights under the Bill of Rights would be an act of political oppression which would entitle our client both to remedies available under New Zealand law, as well as access to the UN Convention on Human Rights.

Right to Protest in New Zealand

In New Zealand, right to protest is protected by various rights in the New Zealand Bill of Rights Act 1990, namely, freedom of expression (s 14), freedom of peaceful assembly (s 16), freedom of association (s 17) and which is one of the cornerstones of a free and democratic society. No restrictions may be placed on the exercise of these rights unless the action is not in conformity with the law.

Section 14 of the New Zealand Bill of Rights Act 1990 provides:

Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

Everyone can hold their views or express them publicly provided that it does not upset the societal status quo and exceed the bounds of legitimate protest. As McCarthy J stated in *Melser v Police* [1967] NZLR 437 (CA), the right to freedom of opinion is an accepted "fundamental human right in any modern society which deserves to be called democratic".

In terms of s 5 of the Act, the right to freedom of expression may be subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

One of the common restrictions placed on the protestors in exercising their right to protest is when the behaviour involved in conducting the protest action is considered disorderly and offensive under sections 3 and 4(1) of the Summary Offences Act 1981.

The leading protest case in New Zealand is *Brooker v Police* [2007] 3 NZLR 91 (SC) which accepted the existence of right to protest and dealt with disorderly or offensive behaviour in a protest action. The majority of the Supreme Court in this case reformulated the test for disorderly behaviour offence, which requires that for the behaviour to be disorderly, it has to have the tendency to disturb or violate the public order. It is clear from the majority's approach taken in *Brooker* that the conduct has to be sufficiently seriously disruptive of public order to warrant the intervention of the criminal law. Similarly the test for offensive behaviour was whether the behaviour was such as to cause substantial offence to reasonable persons in the particular circumstances, taking into account the reactions of the person actually subjected to it. Although disorderly behaviour and offensive behaviour are not synonymous, the same high level of threshold applies to both tests.

Where the rights under the Bill of Rights are at stake, a balancing exercise must be carried out between the competing interest of those exercising their right to freedom of expression and their freedom to protest, against the legitimate interest and expectations of the people who are affected by the protest action. Time, place and circumstance remain important considerations, but as *Brooker* suggests, very strong countervailing factors would need to exist before the right to freedom of expressing genuine political views might be counterbalanced.

We note that our client has staged numerous protest actions with a group of people, on the footpath and/or on the side of the road outside the CYF offices throughout New Zealand. Our client and other protestors were holding pickets, displaying placards and using the megaphone at times to get their opinions across to CYF and also the public. During the protest action, our client also organised petitions in which members of the public could take part in.

It is our submission that our client was only expressing his views and opinions about how CYF office dealt with CYF issues. Every New Zealand citizen is entitled to a right to discuss, debate and comment on matters of public interest, and we consider that our client was legitimately exercising his rights under section 14 of the New Zealand Bill of Rights Act 1990.

Surely exercising the right to freedom of expression is likely to influence the level of anxiety and disturbance which a reasonable member of the public should be expected to bear. The purpose of a protest is to make someone listen to something they do not want to hear.

Public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour. The techniques in which our client employed (holding pickets, displaying placards, using loudspeaker to speak, having petitions) to exercise his rights, no doubt were common enough incidents of protest action targeting the CYF offices and other government bodies or organisations involved with CYFS.

In addition, there is no suggestion that any of the messages our client attempted to convey during the protest were in themselves objectively alarming or threatening. They were expressed without abuse or bad language.

It is doubtful whether our client's behaviour or conduct involved in the protest action disturbed public order or influenced the level of anxiety and disturbance which a reasonable citizen should be expected to bear. We consider that the conduct involved was not sufficiently seriously disruptive of public order to warrant the police to intervene our client's right to freedom of expression and freedom to protest.

We submit that our client's protest action involved a genuine exercise of the right to freedom of expression and freedom of protest. His conduct, viewed objectively, did not in all circumstances cause anxiety or disturbance at a level beyond that which a reasonable person in CYF shoes should be expected to bear. We consider that our client exercised his rights in a manner that was reasonable justifiable in a free and democratic society.

We therefore believe that the police do not have any grounds to interfere with our client from legitimately exercising his rights to freedom of expression and freedom of protest under the Act.

Other issues – harassment and noise level

We also note that CYF and the Police believe that our client's protest actions are in a form of harassment affecting the CYF staff. Section 3 of the Harassment Act 1997 defines harassment as follows:

a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

Section 4 defines "specified act" as watching, loitering near, or preventing or hindering access to or from a person's place of residence, entering their property, or acting in any other way that reasonably causes the person to fear for their safety. The purpose of the Harassment Act 1997 is to afford individuals who fear for their safety a remedy in either civil or criminal law.

We submit that the target of our client's protest has never been towards any specific CYFS staff member, but towards the organization of CYF as a whole. Our client has never identified any individual in his protests nor has there been any action fitting the definition of harassment under the Act. It is highly doubtful that the techniques of protest that he employed are capable of causing any staff member to fear for his or her safety.

In regards to the issue of noise caused by the protests, s 327 of the Resource Management Act 1991 provides that it is the local authority, in this instance, the Grey District Council that can employ noise control officers to determine if the noise level from the protests is deemed "excessive". Our client's megaphone is incapable of breaching normal acceptable noise levels. If it is found to be "excessive" according to the local bylaws, the appropriate course of action would be to direct our client to reduce noise levels to a reasonable level. If the Police attempt to mute our client before ascertaining a breach in noise levels, it would amount to a further violation of his right to freedom of expression.

We therefore respectfully submit that the Police have no legitimate reason to prevent our client from engaging in a lawful exercise of his rights. Any attempts to limit our client's ability to protest would be a breach of his rights under New Zealand Bill of Rights Act and various other international legislations to which New Zealand is a party.

Yours faithfully,
EQUITY LAW CHAMBERS

Evgeny Orlov
Barrister

TONY ELLIS

BARRISTER
LL.B., LL.M., M.PHIL., FCIS

Wellington

Email

17 December 2012

Graeme Axford
by email

Dear Mr Axford

Grey District Council – Abatement Notice

1. Thank you for enquiries about your dealings with Grey District Council (GDC). You have expressed concern about the Council's use of abatement notices in respect of a protest you have frequently engaged in, particularly outside the Office of CYFS. You note in particular that the GDC "want the megaphone turned down so low that it becomes ineffectual."
2. This is obviously concerning. The starting point is that the GDC (and its employees and contractors when exercising the powers of the council) are bound to give effect to the New Zealand Bill of Rights Act 1990:

3 Application

This Bill of Rights applies only to acts done—

(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

3. This includes the right to freedom of expression, guaranteed under section 14:

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

4. In exercising its powers, whether those powers are specific to the GDC, apply to all councils generally, or apply to wider public, the GDC is prohibited from infringing upon your rights, in a way that unjustifiably limits your rights. It is clear that the Council can act in a way that diminishes the strength of your protest, but it is required to be particular careful to ensure that it does not overstep its powers in a way that unjustifiably limits your rights. The question . The council itself notes:

What is excessive noise?

Excessive noise is any noise that is under human control and of such a nature as to unreasonably interfere with the peace, comfort and convenience of any person.

Examples of excessive noise may include a loud party, stereo, band practices, audible alarm or machinery.

Note:

- There is no one set level for noise that is acceptable.
 - The level of noise that is acceptable varies according to the location of your neighbours, time of day, zone you live/work in, presence of sound barriers and the type of noise.
 - The same noise levels during the day may not be acceptable at night.
5. This is nothing inaccurate about the information stated here, but it misses an important point. The assessment of whether noise “unreasonably interferes with the peace, comfort and convenience of any person” recognises that New Zealanders value freedom of expression and the right to protest, and are more willing to tolerate, for example, noisy protests than they are noisy machinery.
6. You quote a letter from the GDC CEO as saying:

“Our focus is on determining whether or not noise levels are excessive. We have upon repeated complaints found that it wasn’t and, in the case that we

found you to exceed acceptable levels, two separate staff members made the assessment per the Act.”

7. There are a number of decisions of New Zealand Courts that are helpful in explaining the limits of public power over protest, and in explaining what reasonable people are prepared to put up with because of their appreciation of freedom of expression.
8. The High Court decision in *Police v Beggs*¹ (upheld some years later in the Court of Appeal²) is helpful in assessing the approach those who exercise public power must take when exercising those powers in respect of protest. In that case, the Speaker was exercising his powers under the Trespass Act in respect of student protesters who were congregated in the area in front of Parliament. The Speaker had ordered them off the grounds, exercising general powers that “occupiers” of land possess. Although the existence of the power was undoubted (and could be exercised by ordinary occupiers for any reason whatsoever – or no reason at all), the Court determined that the Speaker had to take account of the right to freedom of expression before exercising his powers under the law. The High Court decision, made by a full Court, observed:

The Speaker may limit public access to certain places including Parliament grounds itself, but if people are permitted entry to this public place, as a privilege which is not absolute but relative, their use must be exercised consonant with the general comfort and convenience of others including the Speaker, and with peace and good order. ***But it should not, under the guise of regulation, be abridged or denied unless there are reasonable grounds for doing so.***

[*Emphasis added*]

9. The use of general powers – even those that do not ordinarily involve freedom of expression or freedom of assembly – by people or bodies exercising public powers, may not unreasonably limit rights and freedoms contained in the New Zealand Bill of Rights Act 1990. The application to your

¹ [1999] 3 NZLR 615.

² [2002] NZAR 917.

situation is clear. To the extent that the Council itself makes decisions in setting noise limits and making bylaws or plans, and the way in which the Council's Noise Control Officers exercise their powers, they are forbidden from doing so in a way that unreasonably limits the free speech rights of protesters.

10. The general point having been made, the question that remains is, of course, whether the actions of the Grey District Council in issuing you abatement notices, and in making the particular rules in respect of which those powers have been exercised against you, have *unreasonably* limited your freedom of expression.
11. There appear to be no major cases looking directly at the use of noise control powers to limit protests, but two decisions of the New Zealand Supreme Court are helpful in assessing what reasonable and unreasonable limitation on freedom of expression. The first, *Brooker v The Police*,³ involved a charge of disorderly behaviour, relating to a protest directed at an individual police officer at home.
12. Mr Brooker, upset over the actions of a particular police officer, had gone to her house on a weekday morning where she was asleep after coming off night duty. He knocked on her door for about three minutes, waking her up, and after she answered his knock on the door (and told him to leave), he had stood in the street outside her house playing his guitar and chanting a protest ("relatively loudly") about the constable's role in obtaining search warrants relating to his property some time previously. He was arrested when he refused to desist by other officers. The chanting lasted about 15 minutes before the arrest ended it.
13. By majority, the Court concluded that, taking into account Mr Brooker's right to freedom of expression guaranteed by s 14 of the New Zealand Bill of

³ [2007] NZSC 30 (4 May 2007).

Rights Act 1990, his behaviour had not in these circumstances been disruptive of public order and was therefore not criminal. In short, it was the type of protest that the law could not reasonably limit.

14. The case contains much about the importance of freedom of expression, but particularly helpful is the observation of Justice Tipping, at paragraph 92 of the judgment:

Where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case. This may be necessary to prevent an unjustified limitation of the freedom and is consistent with the purpose of s 6 of the Bill of Rights.

15. This observation is apposite to your situation. The reasonable member of the public is more prepared to put up with loud protest than other loud noises.
16. The other case, *Morse v The Police*,⁴ involved a charge of offensive behaviour. Ms Morse was involved in a protest conducted at the Wellington ANZAC Dawn Service. She was part of a group that unfurled banners, blew loudly into toy trumpets, and chanted against New Zealand's involvement in ongoing wars. The timing of the peak of the protest was intended to disrupt the ANZAC Address by a former New Zealand Secretary for Defence. Ms Morse's particular role as part of the protest included burning the New Zealand Flag. It is noteworthy that some of the protest was amplified, which distinguishes it from *Brooker*. Principally, the decision focuses on the meaning of offensive behaviour, but the importance of freedom of expression and the right to protest are also expanded upon. In particular, Justice McGrath at paragraph 108:

Protest against government policies is an aspect of freedom of speech which is of particular importance in our society, as is the right to protest in an effective way. **It is legitimate for those wishing to protest to make**

⁴ [2011] NZSC 45 (6 May 2011).

choices based on time, place and circumstance as to the most effective manner of doing so.

[Emphasis added]

17. This final statement is an important one to be considered by the Council. It is not enough that the Council can argue that you can still protest, as long you don't use a loudhailer. The right to protest in an effective manner is as important as the right to protest itself.
18. These cases provide a strong basis for the general proposition that New Zealand law (and New Zealanders) recognise the importance of protest and of freedom of expression, even when it causes a level of annoyance or discomfort, and even when they may strongly disagree with the views expressed. The Courts recognise that reasonable people may disagree strongly with a protest, with its message and means, its place and timing. But New Zealanders are willing to accept this because we recognise the importance of freedom of speech – even to the extent that it may impinge on our sleep, or the solemnity of an ANZAC Dawn Service.
19. There are still limits on freedom of expression. But these limits must be reasonable, and the assessment of whether those limits are reasonable is founded upon an acceptance of the profound importance of freedom of expression. A protest can be “too loud” to be a reasonable, and thus fall foul of the law, but what “too loud” means, takes into account public acceptance of the right to protest (and *effective* protest) just as the interpretation of “disorderly” and “offensive” do.
20. An assessment of whether some noise is “too loud” must take into account not only a quasi-scientific assessment of noise level, but also take account of the fact that some loud noises are considered more worthy of greater protection and tolerated to a greater extent by reasonable people. This will be the case with your protest, and use of a loud hailer. You can still step over the line, but it is harder for you to do, and the Noise Control Officers need to

Tony Ellis

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be aware that the line is different when freedom of expression and the right to protest are in play.

21. If you have any other queries, please contact me.

Yours faithfully

Graeme Edgeler
Barrister

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From: "Graeme Axford"
To:
CC:
Date: 22/05/2013 12:55 a.m.
Subject: FW: Correspondence, Constitution era/error anti-democratic Human Rights breaching law making and breaking Government of New Zealand No2
Attachments: Limiting the Right to Protest within the Exclusive Economic Zone Unlawful New Zealand.pdf

His Excellency Lieutenant General the Right Honourable Sir Jerry Mateparae

Governor-General of New Zealand

Government House

Wellington Mail Centre

Wednesday, 22 May 2013

Hi Niels Thank-you for the reply. While I understand what you are saying I note at the end of the day the Governor-General can ultimately refuse to give royal assent if they wish to do so, is that in theory correct?

While I am unaware of this ever happening in New Zealand's history there can always be a first and I hope this is it.. So the way I read your email it's unlikely to happen but that does not rule it out entirely, is that also correct?

Or put another way the Prime Minister is hardly likely to bring a Bill before the Governor -General that he would not expect him to rubber stamp essentially? I mean it would be pointless to knowingly do that which means if the Governor -General refused Royal assent that would be a very major decision and not taken lightly. I can understand why normally the Governor-General would not want to be in that position but sadly I think it has come.

While I realise from what you wrote the Governor -General does carefully study the Bill's the bad practices and law-making seems to be escalating.

The NZPA did an Editorial that I think help highlights this as reads:
"Disability bill demonstrates contempt for due process"

". This is not the first time that it has nullified the role of the judiciary, both in interpreting and applying the law and as an avenue of public recourse. Legislation governing the response to the Canterbury earthquakes dictated that the decisions of individual government ministers

could not be challenged in court. Similarly, the decisions of an authority set up to fast-track applications for facilities for the Rugby World Cup could not be reviewed by the High Court, except on points of law. In the latter case, at least, the legislation went through a select committee. In this instance, even that has been deemed superfluous.

It could be argued the World Cup and the Canterbury earthquakes were events out of the ordinary that demanded such an urgent response setting aside constitutional nuance. But that can hardly be said to be the case in terms of improving the support of disabled people and their families. The Government's unseemly focus on reducing litigation risk has triggered a shabby piece of legislation and a deplorable flouting of parliamentary process"

Dated 5:30 AM Tuesday May 21, 2013

Source: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10884930>
&objectid=10884930

While I am aware this is an Editorial and the Governor -General needs to base his decision on something more substantial my point is the fact this is being talked about in mainstream media shows a level of contempt for the way the Public is being treated by this Government.

With the greatest of respect, while I get your point about the giving of loyal assent: "the Governor-General does so on the advice of the Prime Minister, who has the support of the democratically-elected House of Representatives (Parliament)"

I don't think that should give the law makers the right to become themselves the law breakers like they are now doing. They are elected by the people for the people one would hope and when things seem to be going wrong in essence the Governor-General is our Constitution in place of a proper one for example like the USA has. That's if my understanding is correct? If I am wrong I would like to hear why please.

I also think it would be a very bad precedent to suggest just because they got the numbers to form a Coalition Government after an election that gives them the right to trample over our Human Rights at will. In other words our only democratic right comes about every election and beyond that we have no say until the next election, surely you are not suggesting that?

Here is another issue I am confused about in your response "If a bill is passed by the House of Representatives, the Prime Minister advises the Governor-General to sign the bill while the Attorney-General certifies that there are no legal reasons not to give assent"

Given the current Attorney-General acknowledged how they seem to have breached the New Zealand Bill of Rights Act 1990 (NZBORA) by limiting people's ability to go to the Human Rights Commission or Court I see that as a legal reason not to give royal assent to those particular Bills passed, I

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hope?

In the words of the Chief Human Rights Commissioner, David Rutherford, "This sends a chilling message to anyone seeing litigation as a road to solving issues relating to the protection of their economic and social rights."

Source:

<http://www.hrc.co.nz/2013/commission-concerned-new-family-carer-legislation-will-compromise-disability-rights>

So I see good legal reason for the Governor-General to refuse Royal assent to the "The New Zealand Public Health and Disability Amendment Bill (No 2)"

So it seems the Human Rights Commission does not like what's going on but unlike the Governor-General can't do anything about it?

As quoted by Greenpeace "Peter Williams QC said, "The power of protest is at the heart of democracy". Peter is himself a veteran of the 1995 flotilla protest to Moruroa against French testing"

Source:

<http://www.greenpeace.org/new-zealand/en/blog/the-power-of-protest-is-at-the-heart-of-democ/blog/44869/>

So when you say "In these circumstances - where a bill has been passed by a democratically elected House of Representatives and the Governor-General has been advised by the Prime Minister to sign - it is not open to the Governor-General to refuse to give Royal assent"

That for me seems at odds with my understanding and interpretation of what you previously suggested. While it might be the rule I think there might be some exceptions to it, do you concur that could be the case?

So really what you are saying is when the Prime Minister gives the Governor-General a Bill and the Attorney-General doesn't alert them to any legal issues about it you are expected to automatically give it Royal assent. I assume your officials' double check that at some point rather than just take the Prime Minister and Attorney-General word for it, is that correct?

The fact the Prime Minister and Attorney-General are in the same Government and worse same political Party implies to me they are hardly likely to work against each other. I would think their loyalties would be more likely to the Government they are in over the public interest. Is that not what we are seeing now?

In your response you state "As a matter of constitutional convention and democratic principle, the Governor-General accepts the Prime Minister's advice and gives Royal assent."

I agree that should normally be the case but these are extraordinary circumstances and times wherein the "democratic principle," have been flouted.

As I said in my original email, we have had truncated processes; some select Committees have been high-jacked and some "regulatory impact statements" blanked out. Let alone the use of urgency and use of Supplementary Order Papers to ram things through the house. That does not seem to be the "democratic principle" at work in my book.

I don't see that just because this or any other coalition Government wins the election by way of being able to get enough numbers for a majority to form a working Government means that gives them the right to do anything anyway they want. That seems to be what you are saying to me if my understanding is correct in which you sort of suggested are totally unable to ever intervene?

Put another way if this Government put a Bill through tomorrow under urgency turning New Zealand in to a republic overnight and that got presented to you by the Prime Minister and the Attorney-General does not see or point out any legal issues to you this must be given royal assent. You would have to sign your position and role away and out of a job. Would this scenario I have given to you be correct?

I have as yet to write to the Prime Minister about Christopher Finlayson, Attorney-General because my first concern is the Royal assent I have copied the same first email you received to the Attorney-General but given how long it takes them to respond should they even bother I did not want to wait. However I think it is highly unlikely that the Prime Minister would want to sack the Attorney-General as that could destabilise his Government and result in or cause a snap election if he resign from the Party in protest. While that is all hypothetical I see more reason for the Prime Minister to support the Attorney-General then not. I would assume their hold on power means more to them then the public good as their actions of late seem to highlight. While you might beg to differ or be unable to comment on that one I think it's rather obvious. I mean please feel free to offer your view if you are able to on that.

So I will write to the Prime Minister as you suggested but I would ask you again to consider not giving royal assent to the Bills that breach the NZBORA and consider removing, the Attorney-General warrant..

Let alone the issues around what Greenpeace call the "Anadarko Amendment" surrounding continental shelf as I mentioned to you before:

Ministry for the Environment: "In areas where the continental shelf extends

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beyond 200NM from the baselines, the water itself above the continental shelf is not within New Zealand's jurisdiction and is part of the high seas." Source: <<http://www.mfe.govt.nz/issues/oceans/jurisdictional.html>>
<http://www.mfe.govt.nz/issues/oceans/jurisdictional.html>

You might be signing something that's not even legally possible and risking us being in breach of other treaties and conventions and setting a very bad legal precedent.

I would also hope you might take issues with signing something into law for which we have no real legal right over its jurisdiction like the continental shelf.

I would also like to draw your attention to other voices of concerns via this:

"Gareth Hughes: Are the Rt Hon Sir Geoffrey Palmer, Peter Williams QC, New Zealander of the Year Anne Salmond, and over 36,000 New Zealanders who have signed a petition in the last few days all unreasonable to be asking for public consultation on this amendment?"

Source: Sitting date: 16 April 2013. Volume:689;Page:9356

http://www.parliament.nz/en-NZ/PB/Business/QOA/5/b/e/50HansQ_20130416_00000012-12-Oil-Gas-and-Minerals-Prospecting-and.htm

These people that Gareth mentions along with Professor Andrew Geddis from the faculty of Law at Otago University are no slugs so while I am a no one they surely aren't. They are creditable people with experiences and expertise in their fields to whom I hope you would take note of.

So would you please be kind enough to clarify the issues I raised with you given the confusion I have around them in your latest response..

I would hate to think that New Zealand has become a dictatorship because on one hand you talk about you have to follow "democratic principle" and if the Government doesn't then that's our tough luck. There is little if any point telling me to go to the Prime Minister when he is the one allowing this to happen and getting the most benefit from it. I doubt the Prime Minister is going to put himself in a weaker position by following the "democratic principle".

I mean when the Government breaches the New Zealand Bill of Rights Act 1990 on quite a few occasions, uses truncated processes, Supplementary Order Papers and urgency to bypass proper public submissions and scrutiny I would hope you would have a problem with that. What about our Rights to natural justice they walked over in doing all this.

While this is going to sound unkind I need to ask this way, is the Governor-General there more for the Government or the public of New Zealand. I assumed the Governor-General was there as a safety net to protect her majesty subjects. Have I got that totally wrong? I had hoped you had some

real power and authority rather than just a figurehead.

I hope you will consider all the documentation I have sent you in the previous email please and give me some hope this is not a lost cause.

I have also attached another document called "Limiting the Right to Protest within the Exclusive Economic Zone Unlawful New Zealand" which highlights other issues around the Bills the Governor-General will be asked to give Royal assent to. If you look at all the documents I sent you they have a common theme and case to consider I believe.

I hope you don't mind but I copied this to a number of people because its and issues I intent on not giving up on so easily...

Graeme Axford

Email

Webpage <http://www.graemea.snap.net.nz/>

From: Niels Holm
Sent: Tuesday, 21 May 2013 1:46 p.m.
To:
Subject: Correspondence

Mr Graeme Axford

Dear Mr Axford

On behalf of His Excellency, Lt Gen The Rt Hon Sir Jerry Mateparae, Governor-General of New Zealand I acknowledge receipt of your email which was received by Government House on 20 May 2013. You have asked that the

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Governor-General not give Royal Assent to the Public Health and Disability Amendment Bill (No 2) and the Crown Minerals Amendment Bill (No 2).

The Governor-General has various legal powers, including the power, under section 16 of the Constitution Act, to give royal assent to Bills. Although the Governor-General is free to exercise these powers as a matter of law, as a matter of constitutional convention, the Governor-General does so on the advice of the Prime Minister, who has the support of the democratically-elected House of Representatives (Parliament).

If a bill is passed by the House of Representatives, the Prime Minister advises the Governor-General to sign the bill while the Attorney-General certifies that there are no legal reasons not to give assent. In these circumstances - where a bill has been passed by a democratically elected House of Representatives and the Governor-General has been advised by the Prime Minister to sign - it is not open to the Governor-General to refuse to give Royal assent. As a matter of constitutional convention and democratic principle, the Governor-General accepts the Prime Minister's advice and gives Royal assent.

I can assure you that the Governor-General studies fully and carefully all documents put to him for his signature including Bills presented to him for the granting of Royal Assent, and that he is well informed on issues of public importance.

You also ask in your email for the Governor-General to remove the ministerial warrant of the Attorney-General, Hon Christopher Finlayson. By convention, the Governor-General appoints or dismisses Cabinet Ministers on the advice of the Prime Minister. If you have concerns about the performance of an individual minister, your concerns should be directed to the Prime Minister.

Yours sincerely

Niels Holm

Official Secretary

Government House

<<http://www.facebook.com/GovernorGeneralNewZealand>>
www.facebook.com/GovernorGeneralNewZealand

<<http://www.twitter.com/GovGeneralNZ>> www.twitter.com/GovGeneralNZ

<<http://www.gg.govt.nz/>> www.gg.govt.nz

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Limiting the Right to Protest within the Exclusive Economic Zone

April 15th, 2013 | Posted by Tracey Turner LLB (Hons)

Once upon a time, the New Zealand Government played a key role in protesting things it thought inappropriate. In the 1970s, this extended to sending two navy frigates into the middle of a nuclear test area to express concerns against French nuclear testing in the Pacific. Those days are a distant memory, with the Minister of Resources and Energy, Simon Bridges, recently introducing a Supplementary Order Paper (SOP) to amend the Crown Minerals (Permitting and Crown Land) Bill 2013. The amendment will create two new offences and corresponding penalties for people protesting against oil and gas exploration in the Exclusive Economic Zone (EEZ). The proposals are contentious, with the likes of Sir Geoffrey Palmer, Peter Williams QC and Dame Anne Salmond issuing a joint statement that describes the amendment as "a sledgehammer designed to attack peaceful protest". Although the Government is defending the amendment – citing both economic and safety concerns – the proposals have been heavily criticised as inconsistent with international law. The proposed offences create disproportionate penalties that impinge directly upon an individual's right to freedom of expression and freedom of peaceful assembly, both affirmed under the New Zealand Bill of Rights Act 1990 ss 14 and 16 (NZBORA).

This post briefly addresses some of the procedural and substantive concerns raised by the proposals.

Background: the Elvis Teddy incident

It is no coincidence that the amendment follows a recent incident in which a protestor was arrested for "interfering" with an oil exploration vessel off the East Cape. The ensuing case deserves a mention as it provides some insight into the Government's enthusiasm for the proposed amendment.

As part of a protest against a *Petrobras* (Brazilian oil company) vessel undertaking seismic surveys in the Raukumara Basin, Mr Teddy positioned his boat in front of the vessel and proceeded to deploy buoys and fishing lines on the basis that he was exercising customary fishing rights. His boat was within an "exclusion zone" that the Police had set up to prevent protestors from interfering with the surveys and after asking him to move on multiple occasions, the Police boarded Mr Teddy's boat and arrested him. Mr Teddy was charged with operating a vessel in a manner that caused "unnecessary risk" contrary to s 65(1)(a) of the Maritime Transport Act 1994 (MTA).

(b) The District Court decision

It is perhaps too easy to imagine the Government's shock when Judge Treston, sitting in Tauranga District Court, found that s 65(1)(a) of the MTA did not apply to activities in the EEZ because it lacked the "specific, explicit and express provision" necessary to confer extraterritorial effect (*R v Teddy* DC Tauranga CRI-2011-070-002669, 26 July 2011 at [41]). Consequently, Judge Treston ruled that the charges were "nullities" and Mr Teddy was "free to go" (at [49]).

The Police filed an appeal on the basis that the District Court made an error of law in finding that s 65 of the MTA did not confer extraterritorial jurisdiction.

(b) The High Court decision

For the sake of brevity, it is sufficient to say that the High Court found the MTA applied "by necessary implication" to New Zealand flagged ships located beyond the territorial sea. The matter was sent back to the District Court for redetermination.

Both the District Court and High Court judgments are noteworthy because they provide insight into the motivation behind the proposed amendment. The Government must have felt vulnerable when they realised they had not expressly legislated for such circumstances. Arguably, the amendment is a direct response to this incident; it signals a move by the Government to assert power over activities going on in the EEZ and removes any doubt as to whether or not authorities will have the jurisdiction to arrest protestors should the need arise in the future.

The question is: does the amendment go too far in limiting New Zealander's rights to freedom of expression and peaceful assembly?

The substantive effect of the amendments

(a) It will be an offence to "damage or interfere with" a mining structure or vessel

The SOP – at clause 101B(1) – proposes to make it an offence for any person (or organisation) to "intentionally engage in conduct that results in *damage* to or *interference* with" a mining structure or vessel. A person found guilty of such conduct may face up to one year in prison or a fine of \$50,000 (cl 101B(4)(a)). If an organisation is involved, they face a fine of up to \$100,000 (cl 101B(4)(b)).

A major concern with this amendment is that an ambiguous word such as "interference" may give rise to a criminal offence. It is not clear what conduct will amount to an "interference" as the amendment does not define it. Consequently, the discretion that it gives authorities is alarming. They may decide that the mere presence of protestors is an "interference" with mining activities. The provision therefore needs rewording or risks disproportionately encroaching on a person's right to freedom of expression and peaceful assembly, affirmed under the **NZBORA**.

Although the offence requires a protestor to *intend* to damage or interfere with a mining structure or vessel, this means little when we consider that a protestor is, rather obviously, likely to *intend* to protest, not knowing that this may be deemed an "interference" by authorities.

It is perhaps even more concerning when this provision is considered in conjunction with the second proposed offence (discussed below), which makes it illegal for a protestor to enter a "non-interference zone". The amendment states that such a zone may be established up to 500m away from a mining structure or vessel (cl 101B(7)(c)). Assuming that a "non-interference zone" is established, this means that a person may be found to have "interfered" with a mining structure or vessel without even getting near it. Such a finding would very likely be found as a disproportionate impingement upon a person's rights under the **NZBORA**.

Arguably, the word "interfere" was included within the first offence to enable authorities to protect mining vessels or structures where no "non-interference zones" have been established. However, the mere potential for a person to be convicted for "interfering" with mining activities, even though they were not near the activities,

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raises significant concern. It may mean that a protestor can be charged with two offences, one for "interfering" per se, and one for entering a "non-interference zone". Given the ambiguity of the word "interference" this may be deemed justifiable under the legislation even though they are peacefully protesting, by (for example) merely sitting in their boats.

(b) It will be an offence to breach a "non-interference zone"

As already alluded to, the SOP makes it an offence for any person to breach "non-interference zones" (cl 101B(2)). Should a protestor get too close and personal with a mining vessel or structure, they may face a fine of up to \$10,000 (cl 101B(5)). Although the Government is at pains to point out that the offence contains a "reasonable excuse clause" it is essentially one of strict liability – cl 101B(3) means it is unnecessary to prove that the person intended to commit an offence. The nature of the provision is of significant concern and overlooks the context in which deep-sea drilling occurs (the middle of the ocean).

There are multiple pragmatic difficulties that make it nearly impossible for protestors to comply with this provision. Notwithstanding the fact that the mining activities at issue occur in the middle of the EEZ, anywhere from 12nm to 200nm offshore, and that sea conditions are likely to be rough, most protestors take part in small vessels. The stark reality is that most of these vessels do not have GPS technology, and the Government knows this. Consequently, the fact that a protestor chooses to participate in a boat without GPS technology and accidentally drives through a "non-interference" zone is unlikely to satisfy the "reasonable excuse" category.

Further, the provision does not provide that it will be mandatory for authorities to mark the "non-interference zone" with buoys or similar apparatus. If the Government were not trying to punish protestors for expressing their opinion, then such a provision would surely have been included.

The fact that a protestor may be convicted for merely driving or positioning themselves within a "non-interference" zone, which may extend up to 500m from a mining vessel or structure, appears to be a very heavy-handed way of deterring dangerous behaviour at sea. Although I may be sounding like a broken record, the creation of such an offence and penalty goes directly toward impinging upon a person's right to freedom of expression and peaceful assembly.

Concerns relating to process

The most alarming feature of the amendment is how it has been introduced. It is unlikely that the proposals were the result of a last-minute epiphany by Simon Bridges, especially when one considers that the Elvis Teddy saga began in 2011. Yet the amendment was only recently introduced in the form of a SOP, and was not included within the original Crown Minerals (Permitting and Crown Land) Bill, which was introduced on 20 September 2012.

The consequences are significant. **The amendment will not be heard by a Select Committee and the public will not have an opportunity to express their opinion on the changes in any effective manner. Perhaps worst of all, the proposed changes will not be vetted for**

compliance with the NZBORA. This is despite the fact that the amendment impinges directly (and arguably unjustifiably) on New Zealander's rights to freedom of expression and peaceful assembly.

As lawyer Duncan Currie identifies, the approach of the Government is contrary to Cabinet Guidelines which note that "sufficient time" must be accounted for within the proposal process "for adequate consideration of Bill of Rights issues by officials, the Attorney-General and other Ministers where appropriate".

The Government appears to be side-stepping their obligation to ensure that the new amendment will not breach New Zealanders' rights. Worryingly, it appears to be doing so intentionally. Although it is conceded that the Government can create laws that are inconsistent with a person's rights, if they must do this, they should at least do so openly so that the public can hold them accountable. As Currie and many others have recommended, the Government should proceed to allow the Attorney-General to consider the consistency of the proposed offences with the NZBORA, as clearly provided for by s 7 of the NZBORA.

Concluding remarks

The Government's proposed amendment to the Crown Minerals (Permitting and Crown Land) Bill directly impinges upon New Zealanders' rights to freedom of expression and peaceful assembly. These rights are affirmed in the NZBORA and should not be treated so lightly. The offences and penalties proposed by the amendment are disproportionate and unjustifiable. Yet given the way that the Government has introduced the amendment, the changes will not be closely scrutinised to determine their compliance with the NZBORA. Should the proposed changes go ahead, it is likely we will have to wait for the courts to assess whether the legislation is contrary to the NZBORA or not. Such a declaration would perhaps provide the momentum necessary for the public to hold the Government to account and to push for the necessary changes.

Tracey is an LLB (Hons) student at the University of Auckland.

Source: <http://nzhumanrightsblog.com/policy/limiting-the-right-to-protest-within-the-exclusive-economic-zone/#more-323>

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From: "Graeme Axford"
To:
CC:
Date: 31/05/2013 11:37 a.m.
Subject: The New Zealand Public Health and Disability Amendment Bill (No 2) NZLS take case to UN. Beaching the NZ Bill of Rights GG's Royal assent.
Attachments: Legal_opinion_proposed_crown_minerals_act_amdts.pdf; Statement on Crown Minerals Bill Amendment 2013.pdf

Governor General Lt Gen The Rt Hon Sir Jerry Mateparae

Government House

Private Bag 39995

Wellington Mail Centre

Lower Hutt 5045

Dear Sir Jerry, if ever there was a reason not to give "The New Zealand Public Health and Disability Amendment Bill (No 2)" Royal assent you now have it. Given the New Zealand Law Society (NZLS) has not only written to the Prime Minister John Key about their concerns but they are also taking them to the United Nations as you can read here from the announcement made on their webpage
<http://www.lawsociety.org.nz/home/for-the-public/for-the-media/latest-news/news/september2/nzls-urges-government-to-support-un-burma-human-rights-inquiry>

I would hope you would shear their concerns and that of many other high profile and prominent people as evidenced by what I have already sent you in support of my call for you to refuse Royal assent. I also still believe you should not give what become known as the "Anadarko Amendment" officially "the Minerals Bill Amendment 2013" Royal assent either, especially given what Labour uncovered under the Official Information Act (OIA) that "Shell provided a paper to Mr Joyce expressing concern that there was 'insufficient legal authority' to clamp down on offshore protests and that the Government 'has no teeth beyond 12 nautical miles to protect legitimate commercial activity'," Labour's energy spokeswoman Moana Mackey said

Source:
<http://www.3news.co.nz/Govt-did-backroom-deal-with-Shell---Labour/tabid/1607/articleID/299763/Default.aspx>

While I realise that the Governor General does not base his decision on Media reports and opposition Parties this could make an interesting line of questioning before or if you decide to give Royal Assent on that Bill as well. Let alone the fact we have no legal right over the water above the continental shelf to start with, if my understanding is correct.

Our Rights and Freedoms should not be for sale and our Country/Sovereignty is being taken over by Rich Companies. This is a war over resources Freedoms and Rights for all New Zealanders which will affect future generations. That is something I hope the Governor General sees and takes into account in all of this.

I would hope being a former Army man you wanted to serve Queen and Country and now is you one big opportunity to make a stand to defend both here and

now, while in your role as Governor General.

If all you are ever going to do is rubber stamp everything for the Government without question and not hold them to account then your position is pointless. Are you there to serve the Queen and look after her people's/subjects interests or solely the Governments. If you give Royal assent to "The New Zealand Public Health and Disability Amendment Bill (No 2)" that will define you legacy in a not very good way in my view. While these are testing matters for you, I hope and pray you come out on the Right side of them for all our sakes.

My hope is as well as not giving the two Bills I talk about Royal Assent you might also consider warning this or any Government your office will not stand for New Zealanders Rights and Freedoms to be so easily trampled upon. I am not asking you to make a political stand as it should be a warning to all future Coalition Governments. I am asking you to make a stand on behalf of all New Zealand citizens and Her Majesty subjects, please.

Graeme Axford

Email:

Home

Mobile

Webpage <https://www.facebook.com/talk2graeme>

Copied to:

The Human Rights Commission

The Constitutional Conversation Panel

Greenpeace New Zealand

Professor Andrew Geddi, faculty of Law Otago

Transparency International secretariat

Labour Party

Green Party

The United Nations

Amnesty International

The New Zealand Law Society (NZLS)

Andrew Little labour Justice spokesperson

Moana Mackey

Also attached two other documents to update you:

Legal Option..

Statement on Crown..

Proposed Amendments to Crown Minerals (Permitting and Crown Land) Bill Under International Law

Executive Summary

The Government has proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill, including proposed new offences applicable in the exclusive economic zone. This opinion finds that the proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill would breach international law in a number of respects.

1. They would wrongly interfere with the freedom of navigation in that they would apply a 500 metre exclusion zone around vessels, whereas UNCLOS only provides for such zones around installations, and expressly preserves rights of navigation.
2. In providing for criminal penalties for mere interference, including in structure and operations, without requiring violence, acts of violence, damage endangering safe navigation of a ship, or serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship, they go much further than the SUA Convention provides.
3. They would breach international human rights, in purporting to prohibit legitimate and peaceful forms of demonstration, protest, or confrontation, which has expressly been recognized by the International Maritime Organization (IMO), and breach the rights to freedom of expression, peaceful assembly and free association, enshrined in the International Covenant on Civil and Political Rights.
4. A consequence of this finding is that the Attorney-General should examine the Bill and indicate to the House when it appears to him that it is inconsistent with the NZ Bill of Rights Act 1990, according to s7 of the Act. According to the Cabinet Guidelines, "[s]ufficient time needs to be built into the government bill preparation process for adequate consideration of Bill of Rights issues by officials, the Attorney-General, and other Ministers where appropriate."

*Opinion on Proposed Amendments to the
Crown Minerals (Permitting and Crown Land) Bill*

Proposed Amendments to Crown Minerals (Permitting and Crown Land) Bill Under International Law

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Introduction

The Government has proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill. The proposals follow the Select Committee consideration of the Bill so it is envisaged that they will not be considered by a Select Committee. This opinion does not address the procedural aspects of this proposed amendment, but focuses on its consistency or otherwise with applicable international law.

According to the Supplementary Order Paper No. 205 (9 April 2013), two new offences are proposed:

"101B Interfering with structure or operation in offshore area

- "(1) A person commits an offence if the person intentionally engages in conduct that results in—
 - "(a) damage to, or interference with, any structure or ship that is in an offshore area and that is, or is to be, used in mining operations or for the processing, storing, preparing for transporting, or transporting of minerals; or
 - "(b) damage to, or interference with, any equipment on, or attached to, such a structure or ship; or
 - "(c) interference with any operations or activities being carried out, or any works being executed, on, by means of, or in connection with such a structure or ship.
- "(2) A person commits an offence if—
 - "(a) the person is the master of a ship that, without reasonable excuse, enters a specified non-interference zone for a permitted prospecting, exploration, or mining activity; or
 - "(b) the person leaves a ship and, without reasonable excuse, enters a specified non-interference zone for a permitted prospecting, exploration, or mining activity.
- "(3) In prosecuting an offence against subsection (2), it is not necessary for the prosecution to prove that the person intended to commit the offence.
- "(4) A person who commits an offence against subsection (1) is liable on summary conviction,—
 - "(a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$50,000;

*Opinion on Proposed Amendments to the
Crown Minerals (Permitting and Crown Land) Bill*

"(b) in the case of a body corporate, to a fine not exceeding \$100,000.

- "(5) A person who commits an offence against subsection (2) is liable on summary conviction to a fine not exceeding \$10,000.
- "(6) For the purposes of subsection (2), the chief executive may specify a non-interference zone by notice published in a fortnightly edition of the *New Zealand Notices to Mariners* (under Part 25 of the Maritime Rules).
- "(7) A notice must specify—
- "(a) the permitted prospecting, mining, or exploration activity to which the non-interference zone relates; and
 - "(b) the locality of the activity; and
 - "(c) the area of the non-interference zone to which the activity relates (which may be up to 500 metres from any point on the outer edge of the structure or ship to which the activity relates or, if there is any equipment attached to the structure or ship, 500 metres from any point on the outer edge of the equipment); and
 - "(d) the period (which may be up to 3 months) for which the notice has effect.
- "(8) The chief executive, when determining the area of a non-interference zone for the purposes of a notice, must take into account the nature of the activity, including the size of any structure or ship to which the activity relates and any equipment attached to the structure or ship necessary for the carrying out of the activity.
- "(9) No proceedings for an offence against this section may be brought in a New Zealand court in respect of a contravention of this section on board, or by a person leaving, a foreign ship without the consent of the Attorney-General.

New Zealand's Rights Over the Continental Shelf and in the Exclusive Economic Zone

Under the 1982 United Nations Convention on the Law of the Sea,¹ to which New Zealand is party,² New Zealand has sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.³ New Zealand also has jurisdiction⁴ as provided for in the relevant provisions of the Convention with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.

Article 78.2 provides that in exercising its rights and performing its duties under this Convention in the exclusive economic zone (EEZ), New Zealand as the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.⁵ In addition, crucially, the exercise of the rights of New Zealand as the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in the Convention.

¹ United Nations Convention on the Law of the Sea. Signed at Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994 ("UNCLOS"). At http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

² UNCLOS entered into force on 16 November 1994. New Zealand ratified UNCLOS on 19 July 1996. See status at http://www.un.org/Depts/los/reference_files/status2010.pdf.

³ UNCLOS article 77.1.

⁴ UNCLOS article 56.1(b).

⁵ UNCLOS article 56.2.

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Installations and Structures in the EEZ and Safety Zones

Article 60 addresses artificial islands, installations and structures in the EEZ.⁶ It grants, in the EEZ, to New Zealand as the coastal State the exclusive right to construct and to authorize and regulate the construction, operation and use of installations and structures for the purposes provided for in article 56 and other economic purposes. New Zealand, as the coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.⁷

The breadth of the safety zones shall be determined by New Zealand as the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.⁸ All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.⁹ Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.¹⁰

Rights in the EEZ

In the EEZ, all States enjoy, subject to the relevant provisions of the Convention, the freedoms (referred to in article 87) of navigation and overflight, and other internationally lawful uses of the sea related to these freedoms, and compatible with the other provisions of the Convention.¹¹

Under article 58.2, articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with Part V (relating to the EEZ). These include rights of navigation.¹²

In exercising their rights and performing their duties under the Convention in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with this Part.¹³

⁶ UNCLOS article 60.

⁷ UNCLOS article 60.4.

⁸ UNCLOS article 60.5.

⁹ UNCLOS article 60.6.

¹⁰ UNCLOS article 60.7.

¹¹ UNCLOS article 58.1.

¹² UNCLOS article 90.

¹³ UNCLOS article 58.2.

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Conflicts in the EEZ

Article 59 provides the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone (EEZ). It provides that "[i]n cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

Implications for this Bill

The comparable Australian legislation, the Offshore Petroleum and Greenhouse Gas Storage Act 2006, provides in section 616 for a 500 metre petroleum safety zone for the purpose of protecting a petroleum well, a structure, or any equipment, in an offshore area. There is no provision for a safety zone around a vessel.

This is important. UNCLOS, as has been seen, provides for a 500 metre safety zone around an installation such as an oil rig. It does not provide for such a safety zone around a ship. Such a safety zone would constitute an interference with navigation, which is specifically preserved in article 58.1. There is a good reason that UNCLOS does not allow safety zones around vessels. In contrast to installations such as oil rigs, which are subject to the exclusive jurisdiction of the coastal State, ships are principally subject to their flag State laws while sailing in the EEZ or on the high seas. Safety zones around vessels would create confusing zones of coastal state jurisdiction around foreign flagged vessels - a very confusing state of affairs which is not contemplated by UNCLOS or the law of the sea.

Other Relevant International Legal Provisions

There are already numerous international instruments in place to address the safety of navigation of vessels. The 1972 Collision Regulations¹⁴ are aimed at avoiding collisions at sea, and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the "SUA Convention")¹⁵ and its related protocols are aimed at preventing violent acts against vessels and installations.

Some years after the September 2001 World Trade Centre bombing, member States of the International Maritime Organization, including New Zealand, agreed amendments to the 1988 SUA Convention. That Convention specifically provided that nothing in the SUA Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the UN Charter and international human rights law.¹⁶ That is important, as it shows that Parties when negotiating the SUA Convention specifically had in

¹⁴ Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs). Adopted on 20 October 1972; entered into force 15 July 1977. Copy at <http://www.collisionregs.com/MSN1781.pdf>.

¹⁵ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, concluded at Rome on 10 March 1988, and Protocol for the Suppression of unlawful acts against the safety of fixed platforms located on the continental shelf. Concluded at Rome on 10 March 1988. At <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf/>

Protocol adopted in London, UK on 14 October 2005, entered into force 28 July 2010. At <https://www.unodc.org/tldb/pdf/Convention&Protocol%20Maritime%20Navigation%20EN.pdf>.

¹⁶ SUA Convention article 2bis.

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mind the balance between protecting human rights and protection against acts of terrorism. Article 3 of the SUA Convention provides for various offences, including that:

"1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or*
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or*
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or*
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or*
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or*
- (f) communicates information which that person knows to be false, thereby endangering the safe navigation of a ship."*

In other word, article 3 requires elements of acts of violence, damage endangering safe navigation of a ship, and serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship. This is clearly a much higher threshold than 'interference' with a structure, a ship, or even operations or activities, as proposed in the SOP. The SUA Convention, after much negotiation, struck a balance between protection of vessels from violent acts and human rights.

Even more recently, New Zealand supported rights of protest in opposing attempts by Japan at the IMO to adopt an international 'Code of Conduct during Demonstrations/Campaigns against Ships at High Seas'¹⁷ on the grounds that existing international laws strike the right balance.

Freedom of Expression and Protest at Sea

The New Zealand Bill of Rights enshrines in section 14 "the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form," and provides in section 16 for the freedom of peaceful assembly and in section 17 for the right to freedom of association. These sections reflect similar provisions in the International Covenant on Civil and Political Rights,¹⁸ which provides for freedom of expression,¹⁹ freedom of peaceful assembly²⁰ and freedom of association.²¹

There is no doubt that international law supports the right of legitimate and peaceful demonstration, protest and confrontation at sea. The IMO has expressly recognised the right of protest at sea, in a

¹⁷ IMO document NAV 54-10-1, (15 April 2008). At <http://www.sjofartsverket.se/pag/es/14913/54-10-1.pdf>. See Greenpeace comments on the Japanese proposal in NAV 54/10/2 (9 May 2008) at <http://www.sjofartsverket.se/pag/es/14913/54-10-2.pdf>.

¹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171,

¹⁹ ICCPR article 19.

²⁰ ICCPR article 21.

²¹ ICCPR article 22. See also similar provisions in the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, articles 19 and 20.

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resolution "[a]ffirming the rights and obligations relating to legitimate and peaceful forms of demonstration, protest or confrontation and noting that there are international instruments that may be relevant to these rights and obligations."²²

The International Whaling Commission has repeatedly in resolutions expressly upheld the right to legitimate and peaceful forms of protest and demonstration at sea.²³ The writer was present at the meetings, where New Zealand took an important and active role in preserving the right to peaceful protest in the resolutions. It is worth noting that many important environmental protection initiatives arose from protests at sea, including the moratorium on commercial whaling, the ban on the dumping of nuclear waste at sea and the ban on the use of driftnets. Perhaps most importantly to New Zealanders, a cessation of atmospheric nuclear tests came after the New Zealand government itself sent two naval vessels protest - HMNZS *Canterbury* and HMNZS *Otago* - to protest at Moruroa in 1973, and again in 1995 to protest underground nuclear testing.²⁴ Australia also participated in the 1973 waterborne protest, sending the HMAS *Supply*.

Case Law

The European Court of Human Rights has upheld a waterborne protest, finding in *Women on Waves v Portugal*²⁵ that forbidding a protest vessel to enter Portuguese territorial waters prevented the plaintiffs from conveying their information and holding meetings and manifestations – that were scheduled to take place on board – in a way they deemed most effective.

The European Court of Human Rights in *Steel and others v United Kingdom*,²⁶ observed that "[i]t is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the Court considers nonetheless that they constituted expressions of opinion within the meaning of Article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression." The Court has stated that: "... any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance."²⁷ National courts have interpreted this

²² IMO Resolution MSC.303(87), at <http://www.maritimenz.govt.nz/AdyGil/IMO-resolution.pdf>.

²³ IWC Resolution 2006/2, Resolution on the Safety of Vessels Engaged in Whaling and Whale Research-Related Activities (at <http://archive.iwcoffice.org/meetings/resolutions/resolution2006.htm#2>) ("Whereas the Commission and Contracting Governments support the right to legitimate and peaceful forms of protest and demonstration") and IWC Resolution 2007/2 Resolution on Safety at Sea and Protection of the Environment (same wording). At <http://archive.iwcoffice.org/meetings/resolutions/resolution2007.htm#res2>.

²⁴ See Hansard at <http://www.vdig.net/hansard/archive.jsp?v=1995&m=07&d=18&o=27&p=41>. See account of the voyage at <http://mururoavet8k.com/Rumours.htm>.

²⁵ *Women on Waves v Portugal* Requête no 31276/05 (ECHR 2009). At <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:%22women on waves%22,%22documentcollectionid%22:%22COMMITTEE%22,%22DECISIONS%22,%22COMMUNICATEDCASES%22,%22CLIN%22,%22ADVISORYOPINIONS%22,%22REPORTS%22,%22RESOLUTIONS%22,%22itemid%22:%22001-91046%22}}>.

²⁶ *Steel and others v United Kingdom* 67/1997/851/1058 (ECHR 1998). At <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx?i=001-58240#{%22itemid%22:%22001-58240%22}}>. Para. 92.

²⁷ See, for example, *Sergey Kuznetsov v. Russia*, 23 October 2008, Application no. 10877/04, §44.

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to mean that direct action that obstructs business needs to be tolerated if it raises a matter of general importance and requirements of proportionality, subsidiarity and safety are met.²⁸

In Australia, the District Court of New South Wales has held that "[t]he right to protest and the right to express publicly one's political views, albeit by direct action, is one which is to be valued and protected in the context of a modern democracy."²⁹

Conclusion

The proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill would breach international law in a number of respects.

1. They would wrongly interfere with the freedom of navigation in that they would apply a 500 metre exclusion zone around vessels, whereas UNCLOS only provides for such zones around installations, and expressly preserves rights of navigation.
2. In providing for criminal penalties for mere interference, including in structure and operations, without requiring violence, acts of violence, damage endangering safe navigation of a ship, or serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship, they go much further than the SUA Convention provides.
3. They would breach international human rights, in purporting to prohibit legitimate and peaceful forms of demonstration, protest, or confrontation, which has expressly been recognized by the IMO, and breach the rights to freedom of expression, peaceful assembly and free association, enshrined in the International Covenant on Civil and Political Rights.
4. The Attorney-General should examine the Bill and indicate to the House when it appears to him that it is inconsistent with the NZ Bill of Rights Act 1990,³⁰ according to s7 of that Act.³¹

²⁸ See *Shell Nederland Verkoopmaatschappij B.V. and others v. Stichting Greenpeace Nederland and Stichting Greenpeace Council (Greenpeace International)* District Court of Amsterdam, 5 October 2010, LJN BX9310.

Translation available at <http://www.greenpeace.org/international/Global/international/publications/climate/2012/Arctic/finaltranslation%20of%20judgment.pdf>. See also <http://www.greenpeace.org/international/en/press/releases/Dutch-court-grants-Greenpeace-right-to-stage-peaceful-protests-against-Shell/>.

²⁹ *R. v Kirkwood* NSW District Court 15 May 2002, DCZ 2293 EF-C (unpublished).

³⁰ 262 New Zealand Bill of Rights

"(1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney-General must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.

(2) An indication by the Attorney-General to the House concerning the New Zealand Bill of Rights Act 1990 is made by the presentation of a paper,—

(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.

(3) Where the House has accorded urgency to the introduction of a bill, the Attorney-General may, on the bill's introduction, present a paper under this Standing Order in the House.

(4) A paper presented under this Standing Order is published under the authority of the House."

At <http://www.parliament.nz/en-NZ/PB/Rules/StOrders/b/a/e/00HOHPBReferenceStOrders3-Standing-Orders-of-the-House-of-Representatives.htm>. Standing Order 262 at <http://www.parliament.nz/en->

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According to the Cabinet Guidelines, "Sufficient time needs to be built into the government bill preparation process for adequate consideration of Bill of Rights issues by officials, the Attorney-General, and other Ministers where appropriate."³² As was observed by the 2011 Report of the Standing Orders Committee,³³ "Cabinet guidelines require officials to report on Bill of Rights and other constitutional matters in the documentation supporting proposals for bills, although this analysis is not always reflected in explanatory notes or regulatory impact statements when bills are introduced. We consider that this material should be included and given prominence in regulatory impact statements to assist submitters and committees in their consideration of these issues in bills. The Government should also amend Cabinet guidelines to require Bill of Rights reporting on substantive Supplementary Order Papers."³⁴



Duncan E.J. Currie

5 April 2013

[NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter 5CGeneral1-General-provisions.htm#SO262](http://www.parliament.nz/en-NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter5CGeneral1-General-provisions.htm#SO262)

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At <http://www.parliament.nz/en-NZ/PB/Rules/StOrders/b/a/e/00HOHPBReferenceStOrders3-Standing-Orders-of-the-House-of-Representatives.htm>. Standing Order 262 at [http://www.parliament.nz/en-NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter 5CGeneral1-General-provisions.htm#SO262](http://www.parliament.nz/en-NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter5CGeneral1-General-provisions.htm#SO262).

³² See Cabinet Guidelines, Checking human rights issues, at <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/checking-human-rights-issues>.

³³ Review of Standing Orders: Report of the Standing Orders Committee. September 2011. At http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/4/a/8/49DBSCH_SCR5302_1-Review-of-the-Standing-Orders-I-18B.htm, page 37.

³⁴ See Cabinet Guidelines, Checking human rights issues, at <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/checking-human-rights-issues>.

Join Statement on Crown Minerals Bill Amendment 2013.

In defence of the right to peaceful protest at sea

This proposed new law is an assault on the honourable Kiwi values of having a say and being able to stand up for our country.

Simon Bridges' new law is a sledgehammer designed to attack peaceful protest at sea. It is being bundled through Parliament without proper scrutiny despite its significant constitutional, democratic and human rights implications.

New Zealanders have a rich history of protesting at sea. It is a part of who we are. The boats that set sail to stop French nuclear testing led to a proud legacy that defines us, and our country.

The proposed amendments breach international law, and attack our democratic freedoms.

That's why we, the below signed, strongly oppose Simon Bridges' proposed amendment to the Crown Minerals Bill.

Greenpeace
George Armstrong, Founder Peace Squadron
Rt. Hon. Geoffrey Palmer QC
Peter Williams QC
Rikirangi Gage, Te Whānau-ā-Apanui
Sir Ngatata Love
Dame Anne Salmond
Jeanette Fitzsimons
Bryan Gould, Former Chancellor of Waikato University
WWF-New Zealand
Forest and Bird,
ECO
Coal Action Network Aotearoa
Coromandel Watchdog
Peace Movement Aotearoa,
NZ Council of Trade Unions, Helen Kelly
Sustainability Council, Simon Terry
Amnesty International NZ
350.Aotearoa

Context to the statement on the Crown Minerals Bill Amendment 2013.

"Your mission is an honourable one – to be silent witnesses with the power to bring alive the conscience of the world."

– Prime Minister Norm Kirk to the crew of HMNZS Otago on their voyage to oppose French Nuclear testing at Moruroa in 1973.

On Easter Sunday 31 March 2013 the Minister of Energy and Resources Simon Bridges publicly announced proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill, including new offences applicable in the exclusive economic zone.

The penalties are harsh, up to \$50,000 for an individual, up to 12 months imprisonment and up to 100,000 for a body corporate. It enables the Navy or a police officer to nominate assistants who can stop and detain a ship entering an exclusion zone, remove a person from an exclusion zone and all these parties carry next to no criminal or civil liabilities for anything that happens as a result.

There was no prior public warning of these new laws and they are to be passed within days of their announcement without select committee scrutiny and without any other public consultation or process.

They have substantial implications for the right to peaceful protest in the waters of New Zealand's exclusive economic zone (200 miles), including risks to principles enshrined in international human rights and the New Zealand Bill of Rights. They breach international law and rights of navigation, as well as free speech, that New Zealand has signed up to.

There is no need for these laws. There are existing domestic and international laws that covers unlawful and unsafe activities at sea which nevertheless do not hinder the beneficial tradition and right to seaborne protest such as has characterised public campaigns to make New Zealand nuclear free and oppose commercial whaling.

Prime Minister Jim Bolger (National Government) supported the virtue of these rights in 1995 when he was considering sending the Navy boat 'Tui' in support of a protest flotilla against French nuclear testing.

"It is not going there to ram anyone. We are not declaring war. It will be there to provide support to individual New Zealanders who want to express their abhorrence at the thought of a return to nuclear testing in the Pacific by sailing their yachts and taking themselves and friends or whomever with them."

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From: "Graeme Axford"
To:
CC:
Date: 4/06/2013 3:22 p.m.
Subject: New Zealand Government, breaches Bill of Rights, our Constitution & Democracy
Attachments: I think National just broke our constitution by Andrew Geddis.pdf; Legal_opinion_proposed_crown_minerals_act_amdts.pdf; regulatory-impact-statement-government-response-family-carers-case.pdf; Select Committee public participation & Democracy.pdf; SOP sinks mining protesters Lawtalk Mag New Zealand.pdf; StatementonCrownMineralsBillAmendment2013.pdf; Criminal Bar Association v AG.pdf

The Commonwealth

Marlborough House, Pall Mall,
London SW1Y 5HX, UK

Secretary-General, Mr Kamalesh Sharma

Dear Mr Kamalesh, I believe "The Commonwealth" groups aim is to support shared democracy for its member countries of which New Zealand is one of them.

I hope you will be kind enough to overlook my literacy issues as I have a severe case of dyslexia and look to the heart of the matters as I do my best to try and explain them to you as I see them.

I have attached some more highly technical information to support my claims from experts in their fields and very reputable people that support my claims that this current New Zealand Government is being anything but democratic of late with some of its practices.

This National coalition Government has openly breached the NZ Bill of Rights Act (1990) (BORA) as the Attorney-General Christopher Finlayson alerted Parliament to as he should, then ironically himself voted for the legislation that did this.

This Government because of its majority is using truncated processes, Supplementary Order Papers (SOP) and urgency to bypass public scrutiny and Select Committee processes to ram things through Parliament. They have also blanked out Regulatory impact statements (attached), so that their fellow Members of Parliament and opposition parties can't even see what they say let alone the Public. This is all very anti-democratic and more like a dictatorship in my view.

So worrying is this trend that The New Zealand Law Society (NZLS) is taking one of the many cases to the United Nations as you can read here <http://www.lawsociety.org.nz/home/for-the-public/for-the-media/latest-news/news/september2/nzls-urges-government-to-support-un-burma-human-rights-inquiry>

I have written to His Excellency Lieutenant General the Right Honourable Sir Jerry Mateparae who is the Governor-General of New Zealand and he does not seem that bothered by what's going on and judging by his official responses it sounds like give Royal assent when asked to by the Government of the day. I will write to the Queen about her personal representative but I bet an official or bureaucrat will simply answer on her behalf and she left none the wiser. These very bureaucratic systems are designed to be anti-democratic in my view more so when you have a disability like mine and they more hinder then help you.

The New Zealand Government has taken away people's Right to complaint to the Human Rights Commission and to seek a judicial review. They have also in essence banned protesting out at sea all of which clearly breaches the BORA.

In the words of the Chief Human Rights Commissioner, David Rutherford, "This sends a chilling message to anyone seeing litigation as a road to solving issues relating to the protection of their economic and social rights."

Source:

<http://www.hrc.co.nz/2013/commission-concerned-new-family-carer-legislation-will-compromise-disability-rights> .

It seems Mr Kamalesh we have a lot of groups that are meant to support Human Rights and Democracy but when it counts fail to deliver a message to the New Zealand Government what they are doing is totally unacceptable. This Government is becoming more like communist China or Russia by stealth under the guise of so called democracy. At least China and Russia don't pretend to be democratic.

This Government has changed employment laws for Warner Brothers,(see here <http://www.nbr.co.nz/article/warner-bros-sought-job-law-change-film-the-hobbit-nz-135087>) now doing a deal with SkyCity which will involve another Law change to allow more pokies (Source:

http://www.nzherald.co.nz/business/news/article.cfm?c_id=3
<http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=1088348
1> &objectid=10883481)

Then we find out the Government meet with the Shell Oil and suddenly we end up with what Greenpeace calls the "Anadarko Amendment" to ban deep sea protests

Source

<http://www.3news.co.nz/Govt-did-backroom-deal-with-Shell---Labour/tabid/1607/articleID/299763/Default.aspx>

Ironically we have no legal right over the sea above the plates as you can read here

The Ministry for the Environment: "In areas where the continental shelf extends beyond 200NM from the baselines, the water itself above the continental shelf is not within New Zealand's jurisdiction and is part of

the high seas." Source:

<<http://www.mfe.govt.nz/issues/oceans/jurisdictional.html>>

<http://www.mfe.govt.nz/issues/oceans/jurisdictional.html>

So I hope you can see a worrying trend and the problem is with any possible election being 18month away this Government can go for it and do whatever they like given their majority if our Governor General lets them. I have written to the Governor General and his officials have interacted he will upon request give Royal assent to the two Bills in question being "the Crown Minerals Amendment Act" and "The New Zealand Public Health and Disability Amendment Bill (No 2)"

Besides all of this the Government as part of its new tactic to help deny justice has allowed the security of costs (which is a deposit paid to a Court before a case can be heard) to rise so only the rich can afford Justice if you want to take action against them.

Governments over the years have slowly but surely tightened up the Legal Aid criteria to ensure not even the middle class qualify to gain the money towards getting justice, let alone the poor. Let us not forget in many cases legal Aid is a loan that has to be paid back. In fact The Criminal Bar Association challenged the Attorney-General in Court to prove what the Government did was illegal (judgement attached). What would have happened if this Government outlawed being able to take a judicial review on the Legal Aid decision like happened for carers of people with disabilities. Given this new legal precedent that could one day happen!

When is anyone going to make a stand on behalf of the most vulnerable because it's the Right thing to do rather than for their own vested interests?

The Criminal Bar Association is in my view only looking after their own interests as they should have said something way before now about the problems accessing Legal Aid for clients.

Our Human Rights Commission, Governor General and Attorney-General have proven their worth and use in all of this. We need international sanctions and there is no way New Zealand should get a seat on the United Nations Security Council given the current state of affairs. They are likely to use that as a bargaining tool to the highest bidder given their current form. I mean if they can't look after most of the New Zealand's population interests now I would not trust them with even more power in a global context.

All these checkS/cheque\$ and balances are run by/buy the elite who have the most to gain by keeping the status quo. Examples the Governor or Attorney Generals are hardly likely to oppose this Government and Prime Minister in favour of the commoners as all the aforementioned as outlined throughout this and the attached documents proves. New Zealand is on a slippery-slope and without international pressure it will continue or even get worse in my view.

Regards

Graeme Axford

Email

Home

Mobile

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Documents attached:

Select Committee public participation & Democracy (joint snippets) by Trevor Mallard MP, Sue Kedgley former MP and the Human Rights Commission (HRC)

I think National just broke our constitution -by Professor Andrew Geddis
Faculty of Law

SOP sinks mining protesters BY NIKKI PENDER AND PAM MCMILLAN

Proposed Amendments to Crown Minerals (Permitting and Crown Land) Bill Under
International Law by Duncan E.J. Currie

Regulatory Impact Statement

Statement on Crown Minerals Bill

Criminal Bar Association v AG

I do invite the people I copied this to for comment if they so wish..

The Governor General of New Zealand

Transparency International

The United Nations

Professor Andrew Geddi, faculty of Law Otago

Amnesty International

Labour party justice Spokesperson

Green party Justice Spokesperson

Greenpeace

Constitutional Review Panel NZ

New Zealand Government

Attorney-General Christopher Finlayson

Prime Minister John Key

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"(b) in the case of a body corporate, to a fine not exceeding \$100,000.

"(5) A person who commits an offence against subsection (2) is liable on summary conviction to a fine not exceeding \$10,000.

"(6) For the purposes of subsection (2), the chief executive may specify a non-interference zone by notice published in a fortnightly edition of the *New Zealand Notices to Mariners* (under Part 25 of the Maritime Rules).

"(7) A notice must specify—

"(a) the permitted prospecting, mining, or exploration activity to which the non-interference zone relates; and

"(b) the locality of the activity; and

"(c) the area of the non-interference zone to which the activity relates (which may be up to 500 metres from any point on the outer edge of the structure or ship to which the activity relates or, if there is any equipment attached to the structure or ship, 500 metres from any point on the outer edge of the equipment); and

"(d) the period (which may be up to 3 months) for which the notice has effect.

"(8) The chief executive, when determining the area of a non-interference zone for the purposes of a notice, must take into account the nature of the activity, including the size of any structure or ship to which the activity relates and any equipment attached to the structure or ship necessary for the carrying out of the activity.

"(9) No proceedings for an offence against this section may be brought in a New Zealand court in respect of a contravention of this section on board, or by a person leaving, a foreign ship without the consent of the Attorney-General.

New Zealand's Rights Over the Continental Shelf and in the Exclusive Economic Zone

Under the 1982 United Nations Convention on the Law of the Sea,¹ to which New Zealand is party,² New Zealand has sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.³ New Zealand also has jurisdiction⁴ as provided for in the relevant provisions of the Convention with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.

Article 78.2 provides that in exercising its rights and performing its duties under this Convention in the exclusive economic zone (EEZ), New Zealand as the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.⁵ In addition, crucially, the exercise of the rights of New Zealand as the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in the Convention.

¹ United Nations Convention on the Law of the Sea. Signed at Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994 ("UNCLOS"). At http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

² UNCLOS entered into force on 16 November 1994. New Zealand ratified UNCLOS on 19 July 1996. See status at http://www.un.org/Depts/los/reference_files/status2010.pdf.

³ UNCLOS article 77.1.

⁴ UNCLOS article 56.1(b).

⁵ UNCLOS article 56.2.

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Installations and Structures in the EEZ and Safety Zones

Article 60 addresses artificial islands, installations and structures in the EEZ.⁶ It grants, in the EEZ, to New Zealand as the coastal State the exclusive right to construct and to authorize and regulate the construction, operation and use of installations and structures for the purposes provided for in article 56 and other economic purposes. New Zealand, as the coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.⁷

The breadth of the safety zones shall be determined by New Zealand as the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.⁸ All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.⁹ Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.¹⁰

Rights in the EEZ

In the EEZ, all States enjoy, subject to the relevant provisions of the Convention, the freedoms (referred to in article 87) of navigation and overflight, and other internationally lawful uses of the sea related to these freedoms, and compatible with the other provisions of the Convention.¹¹

Under article 58.2, articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with Part V (relating to the EEZ). These include rights of navigation.¹²

In exercising their rights and performing their duties under the Convention in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with this Part.¹³

⁶UNCLOS article 60.

⁷UNCLOS article 60.4.

⁸UNCLOS article 60.5.

⁹UNCLOS article 60.6.

¹⁰UNCLOS article 60.7.

¹¹UNCLOS article 58.1.

¹²UNCLOS article 90.

¹³UNCLOS article 58.2

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Conflicts in the EEZ

Article 59 provides the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone (EEZ). It provides that "[i]n cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

Implications for this Bill

The comparable Australian legislation, the Offshore Petroleum and Greenhouse Gas Storage Act 2006, provides in section 616 for a 500 metre petroleum safety zone for the purpose of protecting a petroleum well, a structure, or any equipment, in an offshore area. There is no provision for a safety zone around a vessel.

This is important. UNCLOS, as has been seen, provides for a 500 metre safety zone around an installation such as an oil rig. It does not provide for such a safety zone around a ship. Such a safety zone would constitute an interference with navigation, which is specifically preserved in article 58.1. There is a good reason that UNCLOS does not allow safety zones around vessels. In contrast to installations such as oil rigs, which are subject to the exclusive jurisdiction of the coastal State, ships are principally subject to their flag State laws while sailing in the EEZ or on the high seas. Safety zones around vessels would create confusing zones of coastal state jurisdiction around foreign flagged vessels - a very confusing state of affairs which is not contemplated by UNCLOS or the law of the sea.

Other Relevant International Legal Provisions

There are already numerous international instruments in place to address the safety of navigation of vessels. The 1972 Collision Regulations¹⁴ are aimed at avoiding collisions at sea, and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the "SUA Convention")¹⁵ and its related protocols are aimed at preventing violent acts against vessels and installations.

Some years after the September 2001 World Trade Centre bombing, member States of the International Maritime Organization, including New Zealand, agreed amendments to the 1988 SUA Convention. That Convention specifically provided that nothing in the SUA Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the UN Charter and international human rights law.¹⁶ That is important, as it shows that Parties when negotiating the SUA Convention specifically had in

¹⁴ Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs). Adopted on 20 October 1972; entered into force 15 July 1977. Copy at <http://www.collisionregs.com/MSN1781.pdf>.

¹⁵ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, concluded at Rome on 10 March 1988, and Protocol for the Suppression of unlawful acts against the safety of fixed platforms located on the continental shelf. Concluded at Rome on 10 March 1988. At <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>

Protocol adopted in London, UK on 14 October 2005, entered into force 28 July 2010. At <https://www.unodc.org/tldb/pdf/Convention&Protocol%20Maritime%20Navigation%20EN.pdf>.

¹⁶ SUA Convention article 2bis.

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mind the balance between protecting human rights and protection against acts of terrorism. Article 3 of the SUA Convention provides for various offences, including that:

"1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or*
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or*
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or*
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or*
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or*
- (f) communicates information which that person knows to be false, thereby endangering the safe navigation of a ship."*

In other word, article 3 requires elements of acts of violence, damage endangering safe navigation of a ship, and serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship. This is clearly a much higher threshold than 'interference' with a structure, a ship, or even operations or activities, as proposed in the SOP. The SUA Convention, after much negotiation, struck a balance between protection of vessels from violent acts and human rights.

Even more recently, New Zealand supported rights of protest in opposing attempts by Japan at the IMO to adopt an international 'Code of Conduct during Demonstrations/Campaigns against Ships at High Seas'¹⁷ on the grounds that existing international laws strike the right balance.

Freedom of Expression and Protest at Sea

The New Zealand Bill of Rights enshrines in section 14 "the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form," and provides in section 16 for the freedom of peaceful assembly and in section 17 for the right to freedom of association. These sections reflect similar provisions in the International Covenant on Civil and Political Rights,¹⁸ which provides for freedom of expression,¹⁹ freedom of peaceful assembly²⁰ and freedom of association.²¹

There is no doubt that international law supports the right of legitimate and peaceful demonstration, protest and confrontation at sea. The IMO has expressly recognised the right of protest at sea, in a

¹⁷ IMO document NAV 54-10-1, (15 April 2008). At <http://www.sjofartsverket.se/pages/14913/54-10-1.pdf>. See Greenpeace comments on the Japanese proposal in NAV 54/10/2 (9 May 2008) at <http://www.sjofartsverket.se/pages/14913/54-10-2.pdf>.

¹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171,

¹⁹ ICCPR article 19.

²⁰ ICCPR article 21.

²¹ ICCPR article 22. See also similar provisions in the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, articles 19 and 20.

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resolution "[a]ffirming the rights and obligations relating to legitimate and peaceful forms of demonstration, protest or confrontation and noting that there are international instruments that may be relevant to these rights and obligations."²²

The International Whaling Commission has repeatedly in resolutions expressly upheld the right to legitimate and peaceful forms of protest and demonstration at sea.²³ The writer was present at the meetings, where New Zealand took an important and active role in preserving the right to peaceful protest in the resolutions. It is worth noting that many important environmental protection initiatives arose from protests at sea, including the moratorium on commercial whaling, the ban on the dumping of nuclear waste at sea and the ban on the use of driftnets. Perhaps most importantly to New Zealanders, a cessation of atmospheric nuclear tests came after the New Zealand government itself sent two naval vessels protest - HMNZS *Canterbury* and HMNZS *Otago* - to protest at Moruroa in 1973, and again in 1995 to protest underground nuclear testing.²⁴ Australia also participated in the 1973 waterborne protest, sending the HMAS *Supply*.

Case Law

The European Court of Human Rights has upheld a waterborne protest, finding in *Women on Waves v Portugal*²⁵ that forbidding a protest vessel to enter Portuguese territorial waters prevented the plaintiffs from conveying their information and holding meetings and manifestations – that were scheduled to take place on board – in a way they deemed most effective.

The European Court of Human Rights in *Steel and others v United Kingdom*,²⁶ observed that "[i]t is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the Court considers nonetheless that they constituted expressions of opinion within the meaning of Article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression." The Court has stated that: "... any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance."²⁷ National courts have interpreted this

²² IMO Resolution MSC.303(87), at <http://www.maritimenz.govt.nz/AdyGil/IMO-resolution.pdf>,

²³ IWC Resolution 2006/2, Resolution on the Safety of Vessels Engaged in Whaling and Whale Research-Related Activities (at <http://archive.iwcoffice.org/meetings/resolutions/resolution2006.htm#2>) ("Whereas the Commission and Contracting Governments support the right to legitimate and peaceful forms of protest and demonstration") and IWC Resolution 2007/2 Resolution on Safety at Sea and Protection of the Environment (same wording). At <http://archive.iwcoffice.org/meetings/resolutions/resolution2007.htm#res2>.

²⁴ See Hansard at <http://www.vdig.net/hansard/archive.jsp?v=1995&m=07&d=18&o=27&p=41>. See account of the voyage at <http://munuroavet8k.com/Rumours.htm>.

²⁵ *Women on Waves v Portugal* Requête no 31276/05 (ECHR 2009). At [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{\"fulltext\":\[\"women on waves\"\],\"documentcollectionid\":\[\"COMMITTEE\",\"DECISIONS\",\"COMMUNICATEDCASES\",\"CLIN\",\"ADVISORYOPINIONS\",\"REPORTS\",\"RESOLUTIONS\"\],\"itemid\":\[\"001-91046\"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{\).

²⁶ *Steel and others v United Kingdom* 67/1997/851/1058 (ECHR 1998). At [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58240#{\"itemid\":\[\"001-58240\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58240#{\). Para. 92.

²⁷ See, for example, *Sergey Kuznetsov v. Russia*, 23 October 2008, Application no. 10877/04, §44.

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to mean that direct action that obstructs business needs to be tolerated if it raises a matter of general importance and requirements of proportionality, subsidiarity and safety are met.²⁸

In Australia, the District Court of New South Wales has held that "[t]he right to protest and the right to express publicly one's political views, albeit by direct action, is one which is to be valued and protected in the context of a modern democracy."²⁹

Conclusion

The proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill would breach international law in a number of respects.

1. They would wrongly interfere with the freedom of navigation in that they would apply a 500 metre exclusion zone around vessels, whereas UNCLOS only provides for such zones around installations, and expressly preserves rights of navigation.
2. In providing for criminal penalties for mere interference, including in structure and operations, without requiring violence, acts of violence, damage endangering safe navigation of a ship, or serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship, they go much further than the SUA Convention provides.
3. They would breach international human rights, in purporting to prohibit legitimate and peaceful forms of demonstration, protest, or confrontation, which has expressly been recognized by the IMO, and breach the rights to freedom of expression, peaceful assembly and free association, enshrined in the International Covenant on Civil and Political Rights.
4. The Attorney-General should examine the Bill and indicate to the House when it appears to him that it is inconsistent with the NZ Bill of Rights Act 1990,³⁰ according to s7 of that Act.³¹

²⁸ See *Shell Nederland Verkoopmaatschappij B.V. and others v. Stichting Greenpeace Nederland and Stichting Greenpeace Council (Greenpeace International)* District Court of Amsterdam, 5 October 2010, LJN BX9310.

Translation available at

<http://www.greenpeace.org/international/Global/international/publications/climate/2012/Arctic/finaltranslation%20of%20judgment.pdf>. See also <http://www.greenpeace.org/international/en/press/releases/Dutch-court-grants-Greenpeace-right-to-stage-peaceful-protests-against-Shell/>.

²⁹ *R. v Kirkwood* NSW District Court 15 May 2002, DCZ 2293 EF-C (unpublished).

³⁰ 262 New Zealand Bill of Rights

"(1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney-General must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.

(2) An indication by the Attorney-General to the House concerning the New Zealand Bill of Rights Act 1990 is made by the presentation of a paper,—

(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.

(3) Where the House has accorded urgency to the introduction of a bill, the Attorney-General may, on the bill's introduction, present a paper under this Standing Order in the House.

(4) A paper presented under this Standing Order is published under the authority of the House."

At <http://www.parliament.nz/en-NZ/PB/Rules/StOrders/b/a/e/00HOHPBReferenceStOrders3-Standing-Orders-of-the-House-of-Representatives.htm>. Standing Order 262 at <http://www.parliament.nz/en->

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According to the Cabinet Guidelines, "Sufficient time needs to be built into the government bill preparation process for adequate consideration of Bill of Rights issues by officials, the Attorney-General, and other Ministers where appropriate."³² As was observed by the 2011 Report of the Standing Orders Committee,³³ "Cabinet guidelines require officials to report on Bill of Rights and other constitutional matters in the documentation supporting proposals for bills, although this analysis is not always reflected in explanatory notes or regulatory impact statements when bills are introduced. We consider that this material should be included and given prominence in regulatory impact statements to assist submitters and committees in their consideration of these issues in bills. The Government should also amend Cabinet guidelines to require Bill of Rights reporting on substantive Supplementary Order Papers."³⁴



Duncan E.J. Currie

5 April 2013

[NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter 5CGeneral1-General-provisions.htm#SO262](http://www.parliament.nz/en-NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter5CGeneral1-General-provisions.htm#SO262)

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³² See Cabinet Guidelines, Checking human rights issues, at <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/checking-human-rights-issues>.

³³ Review of Standing Orders: Report of the Standing Orders Committee. September 2011. At http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/4/a/8/49DBSCH_SCR5302_1-Review-of-the-Standing-Orders-I-18B.htm, page 37.

³⁴ See Cabinet Guidelines, Checking human rights issues, at <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/checking-human-rights-issues>.

Regulatory Impact Statement

Government Response to the Family Carers Case

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Health (the Ministry).

It provides an analysis of options to respond to the Courts' decisions on the Family Carers case and options for managing risks associated with the Government's preferred response.

The Courts found that the Ministry's current policy of not paying family carers (parents, spouses and resident family members) to provide disability support services to disabled family members does not comply with the New Zealand Bill of Rights Act 1990 because it is unjustifiable discrimination on the basis of family status (*Ministry of Health v Peter Atkinson (on behalf of the Estate of Susan Atkinson) & Others* (O'Regan P, Glazebrook, France, Harrison and White JJ), 14 May 2012, [2012] NZCA 184). The Government needs to agree on and implement a response to the Tribunal's declaration before the Order suspending its effect is lifted, which could be as early as May 2013.

The Government has decided that the immediate focus of its response will be on the issues that directly arise from the Courts' decisions, which is the discrimination that arises within Ministry of Health funded home and community support services (HCSS) through not paying parents and resident family members to provide these services to their adult disabled family members. Although the Courts said that the policy as a whole was discriminatory, the Family Carers case specifically addressed the existing policy's prohibition on parents providing HCSS to their adult sons and daughters. This means that the Government can be certain that it needs to change its policy to address these circumstances.

This Statement includes analysis of policy options for addressing this discrimination. A key constraint in the analysis was the poor information available to estimate the number of family carers who would be eligible for payment under each of the options and the proportion of eligible family carers in each option who would choose to be paid. The cost analysis therefore used two approaches, each of which has its own uncertainties, to estimate costs and to provide a measure of the accuracy of the estimation.

The Government has decided on a preferred response to the Courts' decisions but recognises that there are a number of significant risks and issues, including legal risks, associated with this response. This Statement therefore includes advantages and disadvantages of proceeding to implement the preferred response and options for reducing the associated risks, including legislative options.

Don Gray
Deputy Director-General
Policy Business Unit

15.03.13

Status quo and problem definition

1. For over 20 years, the Ministry of Health (the Ministry) and its predecessors have operated a blanket policy of not paying family carers (parents, spouses and resident family members) for the support that they provide to disabled family members receiving disability support services (DSS)¹ funded through the Vote Health National Disability Support Services appropriation. In January 2010, the Human Rights Review Tribunal (the Tribunal) declared that this policy resulted in unjustified discrimination that is inconsistent with Section 19 of the New Zealand Bill of Rights Act 1990 (NZBORA) (see: *Atkinson & others v Ministry of Health* [2010] NZHRRT 1). Following the declaration that this policy was discriminatory, the Tribunal, by consent, made an Order suspending the effect of the declaration until further order of the Tribunal. The period of suspension the Ministry sought was 12 months from the date of determination of all appeals.
2. The Crown subsequently appealed the Tribunal's decision to the High Court and the Court of Appeal. Both Courts, however, upheld the declaration (see: *Ministry of Health v Peter Atkinson (on behalf of the Estate of Susan Atkinson) & Others* (O'Regan P, Glazebrook, France, Harrison and White JJ), 14 May 2012, [2012] NZCA 184). The Government elected to not appeal to the Supreme Court, which means that the Tribunal's declaration stands and the Ministry must now either change its blanket policy of not allowing family carers to be paid for providing disability support, or it must enshrine the policy in legislation (or both). The date by which the Ministry's policy must be changed is determined by the date that the Suspension Order is lifted. This means that the policy needs to change with some urgency. The plaintiffs agreed that they would not initiate action to lift the Suspension Order before May 2013, but even in the absence of the plaintiffs taking this step, if an extension beyond 12 months is required, the Crown should seek such an extension.
3. The Family Carers case specifically addressed the existing policy's prohibition on parents providing HCSS² to their adult sons and daughters. This means that the Government can be certain that it needs to change its policy to address these circumstances. In the absence of compelling policy reasons to do otherwise, the Government is adopting a conservative approach to addressing the broader implications of its policy.

APPROACH TO THE ISSUES IN THIS DOCUMENT

4. This document outlines the key policy issues, summarises the analysis of options, and makes recommendations to Government on how to respond to the Court findings in the Family Carers case. These are laid out in the following order:

- **Objectives**

- Immediate objectives
- Cabinet's preferred response

- **Regulatory Impact Analysis**

- Payment options and analysis
- Targeting options and analysis
- Financial costs of combined options
- Recommended option
- Significant legal issues and risks with the preferred response
- Legal risks arising from other agencies' policies
- Potential fiscal risks of broadening the scope and introducing similar allocation rates
- Options for managing the risks of implementing the preferred response
- Advice on whether to implement the preferred response
- Options for dealing with the broader implications

¹ The Ministry funds a range of disability support services including home and community support services for people who meet DSS eligibility criteria. Other examples include residential services, carer relief and respite services, and supported living services.

² HCSS provide assistance with personal cares (such as showering and dressing) and household tasks.

- **Consultation**
 - Approach and outcomes
- **Conclusion and recommendations**
- **Implementation**
 - Legislative options
 - Dealing with existing and future claims
- **Monitoring, evaluation and review**

Objectives

RESPONDING TO ISSUES ARISING FROM COURT DECISIONS

5. The overall objective is to develop a response to the implications of the Courts' decisions. These implications arise across the range of family relationships and services where there is a significant risk that discrimination may arise. These relationships and services include:
 - parents and other resident family members of disabled adults
 - other family relationships, particularly spouses and parents of young disabled children
 - disability support services funded by the Ministry
 - support services funded by District Health Boards (DHBs)
6. Due to the short time frame available to agree on and implement a new policy, the Government has decided to focus its immediate response on the issues most directly arising from the Courts' decisions, which is the discrimination arising from not allowing parents and resident family members to be paid for providing Ministry-funded HCSS to adult disabled family members.
7. Specific objectives include that the policy:
 - supports positive outcomes for family carers and disabled people
 - is legally defensible (does not unjustifiably discriminate under the NZBORA or the Human Rights Act)
 - can be implemented by the time that the Suspension Order is lifted, or soon after
 - is affordable (Vote: Health costs met within Vote Health baselines and its operating allocation for 2013)
 - supports Government's strategic directions (those for disability support and broader policy objectives).³

CABINET DECISION ON PREFERRED RESPONSE

8. On 12 December 2012, Cabinet Social Policy Committee agreed, subject to further advice, that the Ministry's policy be changed to allow adult disabled people (18 years or over) to employ their parents, or other adult family members (other than spouses) who reside with them, to provide them with HCSS. This policy change would not allow the spouses of disabled adults or parents (or other resident family members) of disabled children, to be paid to provide HCSS.
9. The preferred response allows eligible family carers in the following situations to be paid for providing up to forty hours⁴ of HCSS per week:
 - very high need situations (e.g. where the family situation is at risk of breakdown, jeopardising the disabled person's ability to remain living in their family home)

³ Strategic directions for disability support include promoting disabled people's choice, control and flexibility over the support they receive to achieve their goals.

⁴ The 40 hour cap is on HCSS provided by paid family carers. Disabled people assessed as needing more than 40 hours of HCSS per week will be able to access additional HCSS through contracted providers.

- high need situations (e.g. where the family carer's caring responsibilities are so significant that they are unable to work in another job outside the home)
 - in other exceptional circumstances where there is a very good case for paying a family carer (e.g. where no other suitable carer is available).
10. The mechanism for paying eligible family carers under the preferred approach is through a Section 88 Notice issued under the New Zealand Public Health and Disability Act 2000 (NZPHDA) at a payment rate that is based on the minimum wage plus associated employment costs (about \$16 per hour). Consultation findings informed Cabinet's preliminary decision to include the following additional elements in the implementation of the future policy:
- independent support for the disabled person who is considering employing family carers
 - independent monitoring of disabled people's quality of life when family carers are paid
 - strengthening the current principles-based approach used by Needs Assessment and Service Coordination organisations (NASCs)⁵, to improve consistency and transparency in how the level of unpaid support that family carers are able to provide is determined.

Regulatory impact analysis

Key choices - how to pay and approach to targeting

11. With Cabinet approval, the Ministry carried out a seven-week public consultation process between September and November 2012 to help inform the development of the future policy that will apply to Ministry funded HCSS. The key questions that informed the consultation and the main themes that emerged from an independent review of the findings are included in the consultation section of this paper (refer p24).⁶ These findings and further analysis by officials clarified that the key choices affecting the Government's response were how family carers should be paid and the approach to targeting.

HOW TO PAY

12. The consultation document outlined two main options for how family carers could be paid - as employees or by an allowance. It also included an alternative approach of a family carer's payment administered through the welfare system. Further analysis led to this option being discounted because: it would not recognise the specific work family carers do; it would involve significant costs and delayed implementation (as substantial changes would be needed to government agencies' systems); and, it was the option least favoured by the public (only one in four submitters supported this approach).
13. After the consultation process, officials identified an additional option that involved elements of employment and payment by an allowance. The three broad options analysed by officials were therefore:
- Option One: Family carers paid as employees
 - Option Two: Family carers paid an allowance
 - Option Three: Family carers paid as employees through an alternative payment mechanism under Section 88 of the NZPHDA.⁷
14. The existing policy of not paying family carers of disabled people to provide disability support was used as the 'base case' against which the various options were assessed. The criteria used to assess each option included: impact on family carers and disabled people; legal defensibility; feasibility to

⁵ NASCs are contracted by the Ministry to: assess disabled people's eligibility for DSS; assess what supports they need to help achieve their goals; and to allocate Ministry-funded supports and facilitate access to other support.

⁶ The consultation document and the independent review of submissions are available on the Ministry's website: <http://www.health.govt.nz>

⁷ Under Section 88 of the NZPHDA, the Crown or a district health board (DHB) gives notice of the terms and conditions on which it will make a payment. Acceptance by the person of the payment constitutes their acceptance of the terms and conditions, which may be enforced by the Crown or DHB.

implement within the time available; affordability; and, consistency with Government's strategic directions. The following section briefly describes and summarises the analysis of each option. The analysis is also presented in Tables One and Two below.

Option One – Allow family carers to be employed

15. This option would remove the restriction on parents and resident family members of adult disabled people allocated Ministry-funded HCSS being employed to provide HCSS that are above the level they are willing to provide unpaid. The family carer would be employed through the Ministry's existing systems (contracted provider or individualised funding (IF)).⁸ The hourly rate they would receive would depend on their method of employment.⁹ Analysis of the consultation findings showed that just over one in three submitters supported payment through employment as a means of giving carers greater status and ensuring that family carers were treated equitably in comparison with non-family carers.
16. Paying family carers as employees recognises their contribution by giving them status as an employee. It also gives them the opportunity to acquire a formal work record. For disabled people, this option supports choice and flexibility in the support they receive as it gives them the ability to employ a family carer under IF. It also incorporates mechanisms for assuring service quality and safety (e.g. meeting providers' training requirements or quality monitoring by IF host providers). Some family carers and disabled people may, however, be discouraged from taking up this option due to concern either about having to meet employment obligations¹⁰ or about employment undermining their family relationships. Paying family carers as employees complies with the NZBORA and general employment law and would require relatively minor changes to Ministry systems. Though the costs of setting up this option are expected to be relatively low, the Government would have significantly less control over costs than under the other options because it would have to ensure that the hourly rate paid to contracted providers and under IF is sufficient to ensure that at least the minimum hourly rate can be paid to family carers, once overheads are deducted. It could be feasible to implement this option by May 2013 if policy decisions were made quickly.

Option Two – Pay family carers an allowance

17. Under this option, parents and resident family members of adult disabled people allocated Ministry-funded HCSS would be able to be paid an allowance to provide HCSS that are above the level they are willing to provide unpaid. The allowance could be set at a similar level to the hourly rate that support workers typically receive and the Government would not incur the overheads that are incurred by contracted providers (e.g. training, administration, monitoring). Analysis of the consultation findings showed that more submitters (almost one in two) preferred payment through an allowance than employment as it was considered to be flexible and easy to administer.
18. Advantages of this option for family carers and disabled people are that it is: relatively easy for carers to access (as they would not have to meet employers' criteria); likely to have less adverse impact on family relationships than employment; and likely to provide more flexibility to respond to individual families' situations than employment under contracted providers. Disabled people, however, would not have the option of being the employer under this approach, potentially giving them less control over the support provided. The lower administrative burden of this approach could lead to high uptake and increased demand putting pressure on available funding. This option also presents considerable design and system challenges such as creating assessment, payment and quality monitoring systems but, once established, would be relatively easy to administer. Legislation would be needed to be clear that an employment relationship does not exist. The system and legal implications mean that it would not be possible to implement this option by May 2013.

⁸ IF is a mechanism for funding HCSS which enables disabled people to directly employ carers and have more choice and control over the support they receive. People using IF are supported with setting up and administering these arrangements by IF host providers.


⁹ Rates vary under different employment arrangements.

¹⁰ This was a particular concern raised by some older carers in the consultation process.

Option Three - Employ family carers through a Section 88 Notice

19. This option involves paying adult disabled people allocated Ministry-funded HCSS an allowance under Section 88 of the New Zealand Public Health and Disability Act 2000 (NZPHDA) and allowing them to use this funding to employ family carers. A Section 88 Notice would allow the Minister of Health to specify the terms and conditions that apply when people accept payments made in accordance with the Notice. As under Option Two, the allocation could be set at the same rate as the rate most carers employed through contracted providers or under IF receive, although paying the higher rate would have significant fiscal implications (discussed later).
20. This option may have similar impacts on family relationships to the first option, but offers families more flexibility than simply removing the restriction on people being employed. As employer, the disabled person would have more say over the support provided than under the allowance option. A Section 88 Notice would enable the Government to exercise considerable control over the parameters of paid family care as family carers and disabled people would have to agree to the specific terms and conditions that apply. This is likely to aid budget management and monitoring of the quality of services provided. Some system development would be required, but less than would be the case for an allowance, as the Ministry already uses Section 88 Notices. Although it is unlikely to be possible to implement this option by May 2013, there is a reasonable likelihood that it could be implemented later in 2013.

| TABLE ONE: ANALYSIS OF OPTIONS FOR HOW FAMILY CARERS ARE PAID TO PROVIDE HCSS | | | | | |
|---|--|--|--|--|--|
| Option | Impact on family carers and disabled people | [Contents of this column legally privileged] | Feasibility to implement in time available | Affordability – costs able to be met within Vote Health allocation (refer Table Three for estimated costs) | Consistency with Government directions |
| Employment | <ul style="list-style-type: none"> Gives carers status and opportunity to acquire a formal work record Supports disabled people's choice and flexibility of support provided as will be able to employ family carers under IF Employment obligations and concern about effects on family relationships may deter some from taking up this option Provides level of assurance of service quality and safety through contracted HCSS/IF host provider monitoring | | Could be feasible to implement by May 2013 if policy decisions were made quickly (relatively minor changes needed to existing Ministry systems) | <ul style="list-style-type: none"> Highest cost option on a per person basis as allocation includes overheads for contracted providers and disabled people using IF Government will have significantly less control over costs than under the other options because it will have to ensure that the hourly rate allocated is sufficient to ensure that employees receive at least the minimum wage once overheads are deducted | Consistent with Government's strategic directions for disability support – can operate under IF framework |
| Allowance | <ul style="list-style-type: none"> Relatively easy for family carers to access as would not have to meet employment criteria Avoids risks to family relationships associated with employment Likely to provide more flexibility to respond to individual families' situations than employment under contracted providers Potentially gives disabled people less choice and control over support provided as not the employer under this approach Offers less assurance of quality and safety of support than provided through formal mechanisms under other options | | Not feasible to implement by May 2013 - longer lead-in time required to implement than under the employment option (requires new assessment, payment and quality monitoring systems) | <ul style="list-style-type: none"> Less costly for Government on a per person basis than employment option as allocation does not need to include overheads, but would involve significant initial set-up costs (new administrative and payment system within the Ministry) Ease of access and lack of formal employment obligations likely to result in higher uptake and associated cost pressures | Choice and flexibility consistent with Government's strategic directions but, as the disabled person is not the employer under this option, offers disabled people less control over the support they receive than the other options provide |

| | | | | | |
|---------------------------------|--|---|--|--|---|
| <p>Section 88 Notice</p> | <ul style="list-style-type: none"> • Easier for family carers to access than employment through a contracted provider • Carers will receive a pay rate similar to that received by most other carers employed through contracted providers • A form of employment, therefore can expect similar impacts on family relationships to the first option • Offers more flexibility to respond to individual situations than employment through a contracted provider but less than under the allowance option (as bound by terms and conditions in the Notice) • Provides level of assurance of service quality and safety as the terms of Notice can specify monitoring and accountability requirements |  | <p>Not feasible to implement by May 2013 but reasonable likelihood that could be implemented later in the year</p> | <ul style="list-style-type: none"> • Similar per person cost to allowance option but initial set-up costs (to amend assessment, contracting and payment systems) would be significantly less than under the allowance option • Allows Government to have more control over on-going costs than under employment | <p>Allows Government to build in terms and conditions that support its strategic directions</p> |
|---------------------------------|--|---|--|--|---|

HOW TO TARGET

21. The Government has indicated that the cost of paying family carers of people receiving Health funded supports will need to be met from within Vote Health's existing funding,¹¹ which means that difficult trade-offs will need to be made. The consultation document outlined a range of different targeting options. Analysis of the consultation findings showed that there were divided views on whether targeting should apply. However, if targeting were to be implemented, there was support for targeting situations where family carers are caring for: disabled people with high and complex needs and/or where there are significant risks to safety and wellbeing (two in three submitters); those living in remote locations where there is limited access to carers (one in two submitters); and, where a person has specific cultural or religious needs that cannot be met by a non-family carer (four in ten submitters).
22. After more detailed analysis of submissions and further work on costings, officials identified three possible targeting options. These included:
- Option A: Tight targeting to very high need situations
 - Option B: Medium targeting to high and very high need situations
 - Option C: No targeting.

The following section briefly describes and summarises the analysis of each of these options. It also addresses how exceptional circumstances under any targeted approach could be treated.

Tight targeting - Pay family carers supporting disabled people in very high need situations

23. This would involve targeting payment to families where the disabled person's ability to remain living at home is under threat because their family situation is at risk of breakdown, often because of multiple factors, including the extent of the family carer's caring responsibilities. The Ministry estimates that there are approximately 1,100 people in this situation.¹²
24. Targeting this group would support families potentially most at risk (in very high needs situations) and is likely to be affordable as there are very limited numbers in scope. The disabled person and the family carer would be likely to experience improved well-being, have support to maintain the stability of the family unit, have a reduced risk of abuse (where family stress exacerbates this risk), and be able to continue to live in their community of choice. There is some risk that targeting based on need may give rise to an indirect claim of discrimination based on treating different kinds or severity of disability differently. But, as targeting to those with high needs is supportable both for fiscal reasons and because of the greater impacts on family carers of those disabled people with higher needs, any differential treatment based on need is likely to be justifiable. Disadvantages of this approach include creating an incentive for some families to present as vulnerable and potentially applying a 'short-term fix' to situations where more fundamental intervention is needed. There would be operational challenges in developing the criteria for this target group and in designing and implementing a process for identifying and working with these families. Implementation may also require cross-agency data sharing.

Medium targeting - Pay family carers supporting disabled people in high and very high needs situations

25. This would involve targeting payment to the group outlined above and also to family carers supporting disabled people with such high support needs that meeting those needs means that a

¹¹ Vote Health funding is the total funding allocated by government for Ministry and DHB funded services.

¹² Estimates of the number of people are based on data from Statistics New Zealand's 2006 Disability Survey on the number of people receiving personal care from informal carers and Ministry of Health data on a known population of people it already supports receiving high and very high support packages. The estimates include adjustment for population growth since 2006, with the Ministry data used to determine the proportion of carers who receive high and very high support packages.

family carer who wishes to work in a job outside the home is unable to do so. The Ministry estimates that there are approximately 1,600 disabled people in this situation.¹³

26. Targeting this group would support family carers and disabled people in high and very high need situations, is likely to be affordable (as the scope of the eligible group is relatively narrow), and would be consistent with feedback from consultation on the minimum scope of the future policy. As with tight targeting, there is some risk that this approach may give rise to an indirect claim of discrimination based on treating different kinds or severity of disability differently but any differential treatment based on need is likely to be justifiable. A disadvantage of this approach is that family carers who largely meet these criteria but are able to work very limited hours may not be eligible to be paid, resulting in some family carers exiting other employment to enable them to be paid as a family carer. The Ministry plans to do further policy work to identify whether the new policy should allow family carers who are able to work only very limited hours outside the home to be employed as paid family carers. Another disadvantage of this approach is that some people's eligibility or payment rate for the Domestic Purposes Benefit – Care of Sick or Infirm (DPB-CSI) will be affected.¹⁴
27. Operationally, developing guidelines on how to determine that a family carer is unable to work due to caring responsibilities (as opposed to other factors) is feasible but will be challenging.

No targeting – Pay all family carers

28. If no targeting were applied, any family carer of a DSS eligible person allocated HCSS would be able to be paid to provide these services to adult disabled family members. The Ministry estimates that there are approximately 5,400 disabled people in this situation.
29. Such universal eligibility to be paid (subject to meeting employment or allowance criteria) would address the discrimination found by the Courts and therefore significantly reduce the risk to the Government of further litigation. This approach would be considerably less complex to implement than a targeted approach but would be significantly more costly, as people who currently do not approach DSS NASCs for assessment because their family carers cannot be paid, might now do so and access funded support. Higher numbers accessing paid family care would also result in a lower rate of payment to family carers. An associated shift from contracted non-family carers to family carers could also affect the viability of some providers, especially smaller providers in low population areas, reducing choice for some disabled people.

Exceptional circumstances

30. If a targeted approach is adopted, there are likely to be some particular circumstances arising where people's situations fall outside the targeting criteria but there is a very good case for family carers to be paid to provide care. An example would be where a disabled person is living in a remote rural area and there is no alternative non-family carer available to provide support. An explicit exceptional circumstances provision could be developed but this could lead to an unintended broadening of the range of family carers paid over time because of the considerable uncertainty about what constitutes 'exceptional circumstances'. An alternative would be to allow a degree of flexibility in operational policy to provide for these types of situations.

¹³ This number includes the estimated 1,100 people in very high need situations included in the 'tight targeting' estimate.

¹⁴ This would not affect eligibility for, or the level of, New Zealand Superannuation older family carers receive.

| TABLE TWO: ANALYSIS OF TARGETING OPTIONS | | | | | |
|--|---|--|---|---|--|
| Option | Impact on family carers and disabled people | [Contents of this column legally privileged] | Feasibility to implement in time available | Affordability – costs able to be met within Vote Health allocation (refer Table Three for estimated costs) | Consistency with Government directions (and broader implications for Government) |
| Tight targeting – pay in situations where the disabled person's ability to remain living in the home is under threat because their family situation is at risk of breakdown | <ul style="list-style-type: none"> • Supports families/whānau most at risk • For disabled people, families, whānau in very high need situations: <ul style="list-style-type: none"> - Improved well-being - support to maintain family unit - less risk of abuse - able to continue to remain living in their community of choice • No benefit for those who are not in very high need situations but whose life choices are significantly constrained by the extent of their caregiving responsibilities | | Feasible but will be operational challenges in developing the criteria for this target group and designing and implementing a process for identifying and working with these families | Likely to be affordable as very limited numbers in scope (est. 1,100 people) | <ul style="list-style-type: none"> • Paying family carers in these situations may improve family circumstances in the short-term but risk masking more fundamental underlying issues that are contributing to family stress • Potential implications for cross-agency data sharing |
| Medium targeting – pay in both the above situations and also in situations where family carers are supporting disabled people with such high support needs that they are unable to work in another job outside the home | <ul style="list-style-type: none"> • Supports families most at risk and also those whose life choices are significantly constrained by the extent of their caregiving responsibilities • Benefits as above for these groups • No benefit for those in medium to low need situations | | Feasible but will be operational challenges in developing guidelines on how to determine that a family carer is unable to work due to caring responsibilities (as opposed to other factors) | Likely to be affordable as relatively low numbers in scope (est. 1,600 people) | Consistent with public expectations, expressed through consultation process, of minimum acceptable scope of a targeted policy |
| No targeting – any family carer of a DSS eligible person allocated HCSS can be paid | <ul style="list-style-type: none"> • All family carers providing, and disabled people receiving, Ministry-funded HCSS have the choice of paid family care irrespective of their circumstances • Higher numbers accessing paid family care would result in a lower rate of payment to family carers • Reprioritisation of funding could have a significant impact on DSS levels | | Easiest of options to implement | Significantly more expensive than other options as more people would be attracted into the DSS system (those who prefer family as carers - est. 5,400 people) | Shift from contracted non-family carers to family carers could affect the viability of some smaller HCSS providers potentially leading to reduced access to home and community support |

FINANCIAL COSTS OF COMBINED OPTIONS

31. Nine options arise from combining the payment and targeting options. The fiscal costs assume a cap of 40 hours per week paid family care - generally equivalent to a full working week. This cap is intended to help ensure that the future policy is affordable and that the paid care arrangements are sustainable and in family carers' and disabled people's best interests.

32. The costs of each option are summarised in Table Three below.¹⁵ These estimates include the direct cost to Vote Health and assume that any savings from reduced welfare benefit payments will be used to offset costs to Vote Health. The expected increase in income tax revenues from paying family carers is not reflected in these estimates.

TABLE THREE: ESTIMATED COSTS TO VOTE HEALTH (NET OF REDUCTION IN BENEFIT PAYMENTS) OF OPTIONS FOR RESPONDING TO THE FAMILY CARERS CASE

| Targeting approach | Payment Options (estimated per year) | | |
|--|--|--|--|
| | Option 1: Allow family carers to be employed | Option 2: Pay family carers an allowance | Option 3: Employ family carers through a Section 88 Notice |
| Option A: Tight targeting: pay family carers in very high needs situations | Option 1A Mid-point \$26 M Range: \$22-30 M | Option 2A Mid-point \$15 M Range: \$11-20 M | Option 3A Mid-point \$15 M Range: \$11-20 M |
| | Family carers of 1,100 disabled people are paid | | |
| | Option 1B Mid-point \$40 M Range: \$35-46 M | Option 2B Mid-point \$23 M Range: \$17-30 M | Option 3B Mid-point \$23 M Range: \$17-30 M |
| Option B: Medium targeting: pay family carers in high and very high needs situations | Family carers of 1,600 disabled people are paid | | |
| | Option 1C Mid-point \$65 M Range: \$56-75 M | Option 2C Mid-point \$40 M Range: \$35-46 M | Option 3C Mid-point \$40 M Range: \$35-46 M |
| | Family carers of 5,400 disabled people are paid | | |
| Option C: No targeting: pay all family carers providing Ministry HCSS | | | |
| | | | |
| | | | |

RECOMMENDED OPTION – EMPLOYMENT THROUGH SECTION 88 NOTICE AND MEDIUM TARGETING

33. Option 3B in the table above appears to achieve the most appropriate balance when assessed against the criteria of: impact on family carers and disabled people; legal defensibility; feasibility to implement in the time available; affordability; and consistency with Government directions. This option involves paying adult disabled people eligible for Ministry funded HCSS, who have high and very high needs, an allowance under Section 88 of the NZPHDA to employ family carers.

34. This is the preferred option because:

- disabled people as employers will have more control and influence over the support they receive than if family carers were paid directly, and flexibility within the terms and conditions of the Notice
- family carers are able to gain the benefits of employment (a work record, employment status) and to be paid an hourly rate that is similar to that received by most carers employed through contracted providers

¹⁵ There are limitations to these estimates. There is a greater than usual degree of uncertainty around them as: they rely on drawing inferences from existing data sets that were gathered for different purposes; in some cases they rely on self-reporting; and, it is very difficult to estimate the extent to which family carers may elect to become paid under any of these options. The welfare benefit impacts are also difficult to estimate because of uncertainty about the number of eligible carers.

- this arrangement will be relatively easy to administer for all parties once the initial assessment has been completed and contractual arrangements are in place
- targeting people in high and very high needs situations is consistent with carer and disability communities' views (expressed through the consultation) that targeting should recognise those most in need and be based on complexity of care
- it reduces legal risks as it responds directly to the Courts' finding that family carers were discriminated against in employment and does not target on any grounds that could be considered unjustifiable discrimination under the NZBORA
- it is feasible to implement close to the date from which the Suspension Order could be lifted
- the costs of implementing this approach (mid-point estimated cost of \$23 million per year after tax) are likely to be able to be sustained from within the overall Vote Health allocation
- it supports the Government's management of quality and safety of publicly funded care and budget management through specifying the terms and conditions within the Notice
- it is consistent with Government's strategic directions for disability support.

REASONS FOR DISCOUNTING OTHER OPTIONS

Payment options

35. The option of payment through employment was discarded because it would result in significantly higher costs than the other options. The mid-point estimated cost of paying family carers through employment in high and very high need situations is \$40 million per year (compared with \$26 million per year under tight targeting, or, \$65 million per year under the 'no targeting' option). This compares with a mid-point estimated cost under payment by an allowance or under a Section 88 Notice of \$23 million per year (compared with \$15 million per year under tight targeting, or, \$40 million per year if no targeting is applied).
36. The option of payment by an allowance, though involving operational costs similar to those under the Section 88 option, was also discarded. This is because it would involve significant initial set-up costs (developing new assessment and payment systems) and ease of access would be likely to result in higher uptake and considerable cost pressures. It would also not be feasible to implement payment through an allowance by the time the Suspension Order is lifted or soon after.

Targeting options

37. The option of only paying family carers in very high needs situations ('tight targeting') was discounted because the access threshold was considered to be too high - family carers with such significant caring responsibilities that they are unable to work in another job outside the home would not have the opportunity to be paid. The 'no targeting' option was discounted on the basis that it would be significantly more expensive (\$40 - \$65 million per year depending on the payment option chosen).

SIGNIFICANT LEGAL ISSUES AND RISKS ARISING FROM THE PREFERRED RESPONSE

[Paragraphs 38-42 legally privileged]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

| TABLE FOUR: IMPLICATIONS OF INCLUDING OR EXCLUDING FAMILY CARERS OF PEOPLE RECEIVING DHB-FUNDED HCSS | | | | | |
|--|---|--|--|--|---|
| Option | Impact on family carers and disabled people | [Contents of this column legally privileged] | Feasibility to implement in time available | Affordability – costs able to be met within Vote Health allocation | Consistency with Government directions |
| Include | <ul style="list-style-type: none"> Adults receiving DHB funded HCSS have access to paid family care Enables family carers in these situations to earn an income through providing care, receive better recognition for their caring role and potentially come off welfare benefits | | Not feasible in timeframe available – requires further consultation and policy development | The mid-point of estimated costs is \$41 million per annum ¹⁷ | Might help support strategic direction to support older people to live in their own homes for longer (further policy work needed to determine this) |
| Exclude | <ul style="list-style-type: none"> People with similar impairments and support needs to those receiving Ministry-funded supports are treated differently Constrains the level of choice and control people receiving DHB-funded HCSS have over the support they receive Precludes family carers of people receiving DHB-funded HCSS from being able to earn an income through providing care, receive better recognition for their caring role and potentially come off welfare benefits | | Feasible | No impact on operating costs but potentially significant costs associated with defending Court cases. | No particular impact on strategic directions for these groups |
| Exclude in short term with option to include following further policy work | <ul style="list-style-type: none"> No immediate benefit or certainty but does not preclude these groups from being paid in future, if further policy work indicates this is appropriate and affordable | | Feasible | <ul style="list-style-type: none"> No immediate impact on operating costs Additional costs in medium-term if policy work results in decision to allow paid family care for these groups (included in estimate for first option) - further work required to separate out specific costs | Dependent on whether further policy work leads to inclusion of these groups |

¹⁷ Does not include spouses or parents of children needing support.

DHB and Ministry policies of not paying spouses, as well as parents and other family carers of children, to provide HCSS

43. Spouses of adult disabled people, parents and other resident family members do not have the option of being paid family carers despite many having extensive caring responsibilities. The views expressed through the consultation process indicate that, if Government excludes these groups from payment, it is highly likely that it will be faced with claims of unjustified discrimination under the NZBORA.


[Paragraphs 44-46 legally privileged]

[Redacted text block]

47. The mid-point estimate of the cost of extending the preferred policy to pay spouses and parents of children for providing HCSS to disabled family members (receiving Ministry or DHB funded support) is \$46 million a year. (Refer Table Five below for further analysis).

[Redacted text block]

| TABLE FIVE: IMPLICATIONS OF INCLUDING/EXCLUDING SPOUSES AND PARENTS OF DISABLED CHILDREN PROVIDING VOTE HEALTH SERVICES | | | | | |
|---|--|--|--|---|---|
| Option | Impact on family carers and disabled people | [Contents of this column legally privileged] | Feasibility to implement in time available | Affordability – costs able to be met within Vote Health allocation | Consistency with Government directions |
| Include | <ul style="list-style-type: none"> Adult disabled people who prefer to have their partner providing support have access to paid family care Disabled children who prefer to have their parent providing support (e.g. for trust or privacy reasons) have access to paid family care Responds to Māori and Pacific communities' cultural norms Enables family carers in these situations to earn an income through providing care, receive better recognition for their caring role and potentially come off welfare benefits Risks a spouse or parent feeling obliged to become a full-time carer when this might not otherwise be their preference Risks spouses or parents continuing to support a disabled person because they are paid, even though it is not in the disabled person's best interests Risks relationships between spouses and between parents and children being undermined through placing too strong an emphasis on the role of the carer | | Not feasible in timeframe available - requires further consultation and policy development | The mid-point of estimated costs of allowing spouses and parents of disabled children, supporting Ministry or DHB funded clients, is \$46 million per annum | <ul style="list-style-type: none"> Consistent with strategic directions for disability support of increasing disabled people's choice and flexibility in the support they receive Inconsistent with strategic directions of building up natural support (unpaid) networks |
| Exclude | <ul style="list-style-type: none"> Limits choice for adult disabled people who may prefer to have their partner providing paid support Limits choice for disabled children who may prefer to have their parent providing paid support Precludes family carers in these situations from being able to earn an income through providing care, receiving better recognition for their caring role and potentially coming off welfare benefits | | Feasible | No impact on operating costs but additional costs associated with defending Court cases | <ul style="list-style-type: none"> Inconsistent with focus on increasing disabled people's choice and flexibility in support they receive Consistent with emphasis on building up natural support networks |

| | | | | | |
|--|---|---|----------|---|---|
| Exclude in short-term with option to include later (following further policy work) | No immediate benefit or certainty for family carers or disabled people but does not preclude these groups from being paid in future, if further work indicates this is appropriate and affordable |  | Feasible | <ul style="list-style-type: none">• No immediate impact on operating costs• Additional costs in medium-term (if policy work results in decisions to allow these groups to be paid (included in estimate for first option) - further work required to separate out specific costs | Dependent on whether further policy work leads to inclusion of these groups |
|--|---|---|----------|---|---|

Preferred policy of not paying family carers to provide any services other than HCSS

48.

| TABLE FIVE: IMPLICATIONS OF INCLUDING / EXCLUDING FAMILY CARERS PROVIDING OTHER MINISTRY DSS | | | | | |
|--|--|--|---|---|---|
| Option | Impact on family carers and disabled people | [Contents of this column legally privileged] | Feasibility to implement in time available | Affordability – costs able to be met within Vote Health allocation | Consistency with Government directions |
| Include | <ul style="list-style-type: none"> Increases choice for all disabled people receiving Ministry funded DSS and their family carers Increases risk of some disabled people and some family carers becoming 'trapped' in caring relationships For some disabled people, would create barriers to acquiring the skills to live independently in the community | | Not feasible in timeframe available - requires further policy work to confirm implications and develop appropriate policy | Maybe minimal costs arising from changing the policy and allowing family carers to be paid for providing some services | <ul style="list-style-type: none"> Where not contrary to specific service objectives, consistent with focus on increasing disabled people's choice and flexibility in the support they receive Inconsistent with emphasis on building up natural support networks |
| Exclude | Limits choice for some disabled people and family carers | | Feasible | <ul style="list-style-type: none"> No impact on operating costs May be costs associated with defending Court cases (though expected to be less claims relating to this exclusion than to relationship exclusions) | <ul style="list-style-type: none"> Inconsistent with focus on increasing disabled people's choice and flexibility in the support they receive Consistent with emphasis on building up natural support networks |
| Exclude in short term with option to include some services after further policy work | No immediate benefit or certainty for those seeking payment but does not preclude payment to family carers providing those services in future, if further policy work indicates appropriate and affordable | | Feasible | No immediate impact on operating costs, but additional costs in medium term if policy work results in allowing paid family care for other services (included in estimate for first option) - further work needed to separate out specific costs | Dependent on whether further policy work leads to inclusion of additional services |

49.

Level of proposed payment, resulting in a differential treatment under the preferred response from allocating about \$16 an hour²¹ to pay family carers rather than the \$25 an hour that providers are allocated to pay non-family carers

50.

51. Non-family carers can be employed through contracted providers or directly by disabled people under IF arrangements. Employers in these situations face overheads. This means that they cannot pay non-family carers providing personal care the full \$25 an hour. (Providers are expected to cover business overheads and people using IF have a portion of their allocated funding 'top-sliced' to pay IF host providers).²⁴ They are, however, able to pay more than the minimum wage (currently \$13.50 an hour, but rising to \$13.75 an hour on 1 April 2013) that the approximately \$16 an hour allocation is based on. The approximately \$16 an hour allocation does not include the cost of making independent support available to disabled people considering, or receiving, paid family care.

52. Changing the rate paid to the different groups would be problematic. Reducing the amount of funding allocated for HCSS provided by non-family carers to about \$16 per hour would be contrary to current contracts and mean that providers and disabled people using IF would not be able to cover their full costs. The alternative of increasing the amount allocated to parents and other resident family members to \$25 per hour would increase the estimated cost of the response for Ministry funded HCSS by about \$13 million a year, from \$23 to \$36 million a year. If this increase was also applied across all Vote Health funded support, the mid-point of estimated costs would increase by a further \$49 million a year (with total costs across Vote Health increasing from \$110 to \$172 million a year). This means that the risk arising from the differential payments to family carers can only be effectively addressed through legislation or additional funding.

RISKS ARISING FROM OTHER AGENCIES' POLICIES [PARAGRAPHS 53-54 LEGALLY PRIVILEGED]

53.

54.

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•

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²¹ The estimated cost will change as a result of changes to the minimum wage.

²²

²³

²⁴ IF host providers support disabled people with set-up and on-going administration of IF.

POTENTIAL FISCAL RISKS ASSOCIATED WITH THESE RISKS

55. The uncertainty about how the Courts would decide in any particular case creates significant potential financial risks for the Government. Table Eight below sets out the level of financial risk - up to \$172 million per year for Vote Health funded services [REDACTED]. These cost estimates are based on paying family carers who provide HCSS to people with high and very high needs and an allocation rate of \$16 an hour.

TABLE EIGHT: ESTIMATED FISCAL RISKS ASSOCIATED WITH THE FAMILY CARERS CASE

| Groups of carers | Mid-point estimated costs (\$ million a year) | | |
|---|--|------------|------------|
| | Ministry of Health | DHBs | Combined |
| Cost of implementing the preferred response across family carers and funders i.e. allocating disabled adults with high and very high needs \$16 an hour employ family carers | | | |
| • Parents of disabled adult sons and daughters • Other family members of disabled adults | 23* | 41 | 64 |
| • Parents of disabled children • Spouses • Other family members of disabled children | 21 | 25 | 46 |
| Sub-total: cost of extending preferred policy | 44 | 66 | 110 |
| Additional cost of increasing family carer allocations from \$16 to \$25 an hour for people with high and very high needs | | | |
| • Parents of disabled adult sons and daughters • Other family members of disabled adults | 13 | 23 | 36 |
| • Parents of disabled children • Spouses • Other family members of disabled children | 12 | 14 | 26 |
| Sub-total: cost of increasing allocations | 25 | 37 | 62 |
| Potential fiscal cost for Vote Health | 69 | 103 | 172 |
| [REDACTED] | | | |
| Total potential fiscal cost for the Crown | | | 175 |

*The preferred response for Ministry funded HCSS

Note: Costs would be significantly higher if funds are allocated to pay family carers when disabled people do not have high or very high needs.

OPTIONS FOR MANAGING THE RISKS ASSOCIATED WITH IMPLEMENTING THE PREFERRED RESPONSE

56. A fundamental tenet of Government funded social support is that, in general terms, families have primary responsibility for the wellbeing of their members. Care and support provided by family members to each other is part of this responsibility and the expectation is that it will be provided out of love and affection rather than for money. Consistent with this expectation, Government's primary role is to support families in their role, but not to pay them to undertake it. Funding for care and support is therefore appropriately targeted to meet needs families are not able to meet. There are, and will be in the future, circumstances where Government considers there are social benefits and other advantages to family members being paid to provide care and support to each other, but these circumstances are the exception rather than the rule.

Implementing a cross-government policy of paying family carers

57. Responding to the Tribunal's declaration by adopting a policy of paying all family carers would have the effect of changing this fundamental tenet. There is a risk that paying family carers will have adverse impacts on some disabled people's and family carers' lives. Considerable further work, including public consultation, would be required to inform advice to Ministers on the most appropriate way of paying family carers who are not covered by the preferred response for Ministry funded HCSS. While implementing this approach would eliminate any legal risk of the policy not complying with the NZBORA, the potential fiscal costs of implementing such a policy could be up to \$175 million a year.

'Do nothing' option

58. Similarly, retaining the status quo is not acceptable as it would mean that the Government did not comply with the law. It would lead to the possibility of a very large number of claims for unjustified discrimination on the basis of family status across health services and disability support that are funded through the Ministry, DHBs [REDACTED]. Responding to each of these claims would take a considerable amount of time and effort and create considerable fiscal costs that are very hard to estimate.

Legislative option - recommended approach

59. Having discounted these options on the basis of legal and fiscal risk, the only feasible way of managing these risks is through legislation that allows the Government to continue to restrict paying family carers to provide disability support services. Legislation would reduce the risks and uncertainties inherent in the status quo, and significantly reduce the on-going litigation risks, while allowing the Government to implement policies of paying family carers where that is fiscally sustainable and there are good policy reasons to do so.

DECISION WHETHER TO IMPLEMENT THE PREFERRED RESPONSE

60. If the Government decides to legislate to reduce risks associated with the status quo, the first issue it needs to address is whether to confirm its preferred response for Ministry-funded HCSS. Confirming that response would mean that, from October 2013, the Ministry would allocate about \$16 an hour to adult disabled family members in high and very high need situations for paying parents and resident family members (other than spouses) to provide care that is over and above the support it is reasonable to expect the family carers to provide unpaid. This approach would include allowing for payment in exceptional circumstances where the target group criteria are not met but where paying a family carer is the only practical option (such as in remote rural areas when there is no suitable carer available).
61. Implementing the preferred response directly addresses the Courts' decisions and is a proportionate response to the issues raised in the Family Carers case. It is also affordable and can feasibly be implemented within the time frame available. However, the tight targeting and the lower level of funding allocated to family carers (about \$16 an hour) compared with about \$25 an hour for non-family providers may lead to adverse reactions from some people.

OPTIONS FOR DEALING WITH BROADER IMPLICATIONS

62. The preferred response does not address the broader implications for other relationships (such as spouses of disabled people, and parents and other family carers of disabled children), other Ministry-funded DSS, or family carers of people receiving DHB [REDACTED]. This means that the Government needs to decide how to respond to these issues. The document that formed the basis for the consultation process noted the potential broader implications of the Courts' decisions and indicated that the policy development and consultation process would establish a framework for considering the implications of policy options for these. Officials also indicated in public meetings that policy work on these broader implications would be undertaken once decisions were made on the immediate response.

63. There are two broad options available to the Government. These are:

- Option One: announce an intention to carry out further work on these issues when the Government has sufficient funding to pay for any policy responses
- Option two: not carry out any further work on these issues.

64. Option One would provide some level of confidence to disability and carer communities that the issues will be addressed at a time when the Government has a better understanding of them. It would also enable the Government to make decisions based on better quality information as specific consultation and further analysis of the implications could be undertaken over a longer period. (Limited work has been done to date on these broader implications as officials' focus has been on options for responding to the Courts' decisions). Taking this approach would, however, result in ongoing debate and create a strong expectation that the approach taken in the preferred policy will be a precedent that is extended to these other groups.

65. If this approach were to be adopted, the estimated fiscal costs that would result at the conclusion of the further work would be the following:

- \$46 million a year for paying spouses and parents of children who are supported through the Ministry and DHBs, and
- \$41 million a year for paying parents and other family members to provide HCSS to adults receiving DHB funded support.

66. Option Two would provide certainty but is likely to generate an adverse public reaction and negative media coverage, at least in the short-term. Feedback through the consultation process indicated that developing a policy that applied only to a narrow group would result in considerable adverse reactions from disability and carer communities.

67. Whether or not Cabinet decides to carry out further work on the broader issues, there are likely to be some support services funded by the Ministry where allowing family carers to be paid will involve minimal fiscal risk that can be managed within baseline funding and may allow improved quality of services. The Ministry will consider whether this is the case for other services that it funds – such as residential care – as part of the Ministry's regular review of these services.

Consultation

Sector consultation

68. Consultation with the disability and carers communities and the wider public took place in the first phase of the policy process that led to Cabinet decisions on the preferred response.

TECHNICAL ADVISORY GROUP

69. A Technical Advisory Group provided advice on consultation processes and contributed to the development of the initial options in the consultation document. This group consisted of people with expertise in or lived experience of disability, caring, the disability support system, and managing funds for disability support.

EXPERT ADVISORY GROUP

70. The Ministry was also assisted by an Expert Advisory Group with technical expertise and experience relevant to the case. This group reviewed and discussed the Ministry's analytical work on the benefits, costs and fiscal implications of policy options.

PUBLIC CONSULTATION

71. The Ministry consulted with disability and carers communities, and the wider public, on options for responding to the Family Carers case between 19 September and 6 November 2012. A consultation

document was posted on the Ministry's website and distributed to key stakeholders by email and post.

72. The consultation process included:

- twelve regional workshops with interested people, most of whom were carers
- two hui with people from Māori carer and disability communities
- a fono with people from Pacific carer and disability communities
- a separate meeting with the plaintiffs in the Family Carers case.

73. 632 people made submissions. 82% made their submissions via an online survey, 16% made written submissions and 2% attended public meetings. Two thirds of those making submissions were family carers of a disabled person aged 18 years or over.

74. The consultation covered six key areas:

1. How can we ensure good outcomes for disabled people and their families?
2. Should eligibility for payment be targeted?
3. How should family carers be paid?
4. What should family carers be paid for?
5. Should a family carers payment be established through the welfare system?
6. Possible trade-offs within disability support services to fund paying family carers.

75. Some of the key themes that emerged from an independent review of the submissions included the following:

- good outcomes should be supported by: carrying out regular external audits (1/2 submitters); providing independent support to disabled people to plan and build support networks (1/3 submitters); adopting a modified developmental evaluation tool (1/4 submitters)
- there were polarised views on whether targeting should apply
- if targeting was implemented, submitters supported targeting family carers supporting: people with high and complex needs and/or where there are significant risks to safety and wellbeing (2/3 submitters); in remote locations where the disabled person has limited access to carers (1/2); disabled people with specific cultural or religious needs that could be met by a non-family carer (4/10)
- a preference for payment through an allowance (1/2 submitters) - considered to be flexible and easy to administer, particularly for older carers
- those supporting employment (1/3 submitters) considered that it would give carers greater status and treat family carers equitably in relation to contracted support workers
- split views on whether family should determine how much unpaid support families should provide or whether NASC organisations should make this judgement; if NASCs have this role, there was a preference for a principles-based approach over a generic (set number of unpaid hours) approach
- little support for a requirement for family carers to provide a specified level of unpaid support before they could become eligible to be paid
- limited support for a payment administered through the welfare system (1/4 submitters); a preference for family members being paid through employment or allowance (1/2)
- little support for trade-offs within DSS to fund paying family carers; this role is important and additional funding should be found
- widespread rejection of reducing the level of disability support funding allocated across all disabled people to free up funding to pay family carers
- ensure the policy supports strategic directions for disability supports – increases disabled people's choice, flexibility and control and supports better outcomes for disabled people.

Government agency consultation

76. A Senior Officials Group comprised of officials from key government agencies reviewed and helped refine policy options and provided advice on implementation considerations.
77. The Ministry of Health consulted with the Treasury, the Ministry of Social Development, the Inland Revenue Department, the Ministry of Business, Innovation and Employment, the Ministry of Justice, the Ministry of Pacific Island Affairs, the State Services Commission, Te Puni Kōkiri, Crown Law Office, the Office for Disability Issues, Veterans' Affairs New Zealand, the Ministry of Women's Affairs and ACC on the Regulatory Impact Statement.

Conclusions and recommendations

78. The recommended option resulting from analysis of how the Government could respond to immediate issues arising from the Courts' decisions in the Family Carers' case is to allocate adult disabled people with high and very high needs, who are eligible for Ministry-funded HCSS, an allowance under Section 88 of the NZPHDA to employ family carers.
79. This is the preferred option because:
- family carers gain the benefits of employment and are paid an hourly rate that is equivalent to that received by most other carers
 - allocating funding for paying family carers to disabled people gives those receiving care greater control over their supports and flexibility, consistent with the Government's strategic directions
 - this arrangement is relatively easy to administer once established
 - targeting people in high and very high needs situations supports those for whom the option of paid family care is most important (based on consultation findings)
 - it responds directly to the Courts' finding of discrimination in employment and does not involve targeting on grounds that could be considered discriminatory under the NZBORA
 - it is feasible to implement this approach within the time available
 - the costs are likely to be affordable within the overall Vote Health allocation.
80. Other options were discounted because implementing them would be too expensive, would not be feasible within the time frame available, or, would exclude family carers of disabled people with high needs.

[Paragraphs 81-83 legally privileged]

[Redacted text block]

82. [Redacted text block]

83. [Redacted text block]



Implementation

Implementing the preferred response

84. If the Government decides to confirm its preferred response, the Ministry will implement the new policy through changing policies and procedures for funding and contracting disability support. Ministry officials will work with their existing network of carer and disability community representatives, and contracted organisations affected by the policy changes (such as NASCs), to design and implement operational policies and processes. Officials will also work with other relevant government agencies, such as the Ministry of Social Development and the Ministry of Business, Innovation and Employment, to identify and work through broader implications of the new policy, such as benefit and employment implications.

Legislative options [Legally privileged]



85. 

86. 



87. 





88. 

- [REDACTED]
89. [REDACTED]
- [REDACTED]
 - [REDACTED]
 - [REDACTED]
90. [REDACTED]
- [REDACTED]
 - [REDACTED]
 - [REDACTED]
- [REDACTED]
91. [REDACTED]
- [REDACTED]
92. [REDACTED]
93. [REDACTED]
- [REDACTED]
94. [REDACTED]
95. [REDACTED]
96. [REDACTED]

[REDACTED]

97. [REDACTED]

[REDACTED]

98. [REDACTED]

[REDACTED]

99. [REDACTED]

[REDACTED]

100. [REDACTED]

[REDACTED]

101. [REDACTED]

Monitoring, evaluation and review

102. The Ministry will monitor quality and safety of services provided by paid family carers using its existing mechanisms such as complaints processes, developmental evaluations and/or audits.

103. The Ministry will also closely monitor actual expenditure on HCSS provided by family carers through monthly reporting. This will require minor changes to the Ministry's administrative systems to differentiate HCSS provided by paid family carers from HCSS provided by carers employed by contracted providers or by disabled people under IF. This monitoring will enable the Ministry to both ensure that expenditure on paid family care remains within its allocated budget and to identify any savings that might indicate scope for broadening the application of the policy.

Lack of public participation damages parliamentary democracy

The lack of public participation in fundamental legal reforms is damaging parliamentary democracy, says the Human Rights Commission.

In the past five years fundamental human rights issues such as the lack of public participation in submission processes, diminishing collective deliberation about fundamental changes, rushed legislation, the by-passing of select committees, and what appears to be less respect for submitters in select committee proceedings have been of concern, says Commissioner Dr Judy McGregor.

In a submission to the Standing Orders Review, the Commission says that each of these on its own is a cause for concern but the aggregated effect warrants serious scrutiny so that parliamentary processes are not further weakened.

The Commission has released a discussion paper called *Strengthening Parliamentary Democracy* which also refers to the unrealised potential of the Attorney-General's vetting role under section 7 of the New Zealand Bill of Rights Act.

"We believe there needs urgently to be a constructive and legitimate debate about how parliamentary democracy can be strengthened in New Zealand", says Dr McGregor.

The Commission is keen to receive feedback on the paper and the recommendations for further action that it proposes. These are:

A minimum period of 12 weeks allowed for the public to make submissions to Select Committees.

A review of Parliamentary sitting time that takes account of scheduling, has regard for the scope of the legislative programme across the election cycle, and supports the family-friendly responsibilities of Members of Parliament.

The establishment of a dedicated Human Rights Select Committee.

The tabling in Parliament and referral to Select Committee of recommendations made by international treaty bodies and New Zealand's reports on its compliance with human rights treaty standards.

The Standing Orders of Parliament should specifically refer to the fact that no new major legislative provision is to be introduced by Supplementary Order Paper.

Continued use of innovative forms of e-governance and other approaches to ensure the business of Parliament is effectively notified and that public participation is enhanced.

Induction and professional development for Select Committee chairs and deputy chairs aimed at strengthening the effectiveness of Select Committees, the dignity of hearings and respect for submitters, and thereby the legitimacy of Parliament.

An amendment to Standing Order 246 to ensure dissenting views of members are included in reports.

Source: <http://www.hrc.co.nz/2011/lack-of-public-participation-damages-parliamentary-democracy>

Discussion Paper link: <http://www.hrc.co.nz/wp-content/uploads/2011/05/Strengthening-Parliamentary-Democracy-final-17June11.pdf> " **STRENGTHENING PARLIAMENTARY DEMOCRACY** "

Join Statement on Crown Minerals Bill Amendment 2013.

In defence of the right to peaceful protest at sea

This proposed new law is an assault on the honourable Kiwi values of having a say and being able to stand up for our country.

Simon Bridges' new law is a sledgehammer designed to attack peaceful protest at sea. It is being bundled through Parliament without proper scrutiny despite its significant constitutional, democratic and human rights implications.

New Zealanders have a rich history of protesting at sea. It is a part of who we are. The boats that set sail to stop French nuclear testing led to a proud legacy that defines us, and our country.

The proposed amendments breach international law, and attack our democratic freedoms.

That's why we, the below signed, strongly oppose Simon Bridges' proposed amendment to the Crown Minerals Bill.

Greenpeace
George Armstrong, Founder Peace Squadron
Rt. Hon. Geoffrey Palmer QC
Peter Williams QC
Rikirangi Gage, Te Whānau-ā-Apanui
Sir Ngatata Love
Dame Anne Salmond
Jeanette Fitzsimons
Bryan Gould, Former Chancellor of Waikato University
WWF-New Zealand
Forest and Bird,
ECO
Coal Action Network Aotearoa
Coromandel Watchdog
Peace Movement Aotearoa,
NZ Council of Trade Unions, Helen Kelly
Sustainability Council, Simon Terry
Amnesty International NZ
350.Aotearoa

Context to the statement on the Crown Minerals Bill Amendment 2013.

"Your mission is an honourable one – to be silent witnesses with the power to bring alive the conscience of the world."

– Prime Minister Norm Kirk to the crew of HMNZS Otago on their voyage to oppose French Nuclear testing at Moruroa in 1973.

On Easter Sunday 31 March 2013 the Minister of Energy and Resources Simon Bridges publicly announced proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill, including new offences applicable in the exclusive economic zone.

The penalties are harsh, up to \$50,000 for an individual, up to 12 months imprisonment and up to 100,000 for a body corporate. It enables the Navy or a police officer to nominate assistants who can stop and detain a ship entering an exclusion zone, remove a person from an exclusion zone and all these parties carry next to no criminal or civil liabilities for anything that happens as a result.

There was no prior public warning of these new laws and they are to be passed within days of their announcement without select committee scrutiny and without any other public consultation or process.

They have substantial implications for the right to peaceful protest in the waters of New Zealand's exclusive economic zone (200 miles), including risks to principles enshrined in international human rights and the New Zealand Bill of Rights. They breach international law and rights of navigation, as well as free speech, that New Zealand has signed up to.

There is no need for these laws. There are existing domestic and international laws that covers unlawful and unsafe activities at sea which nevertheless do not hinder the beneficial tradition and right to seaborne protest such as has characterised public campaigns to make New Zealand nuclear free and oppose commercial whaling.

Prime Minister Jim Bolger (National Government) supported the virtue of these rights in 1995 when he was considering sending the Navy boat 'Tui' in support of a protest flotilla against French nuclear testing.

"It is not going there to ram anyone. We are not declaring war. It will be there to provide support to individual New Zealanders who want to express their abhorrence at the thought of a return to nuclear testing in the Pacific by sailing their yachts and taking themselves and friends or whomever with them."

IN THE COURT OF APPEAL OF NEW ZEALAND

CA606/2012
[2013] NZCA 176

| | |
|---------|--|
| BETWEEN | THE CRIMINAL BAR ASSOCIATION OF NEW ZEALAND INCORPORATED Appellant |
| AND | THE ATTORNEY-GENERAL First Respondent |
| AND | STUART WHITE Second Respondent |

Hearing: 25 October 2012

Court: Randerson, Stevens and Wild JJ

Counsel: R E Harrison QC, G M Illingworth QC and K H Cook for Appellant
C R Gwyn, T J Warburton and D Perkins for Respondents

Judgment: 24 May 2013 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed, to the extent that we hold :

- (a) The Secretary for Justice acted unlawfully in implementing the Criminal Fixed Fee and Complex Cases Policy, in that it is inconsistent with the Legal Services Commissioner's independent functions under the Legal Services Act 2011.**
- (b) The Criminal Fixed Fee and Complex Cases Policy and Procedures is also unlawful, in that it unreasonably fetters the discretions imposed in the Legal Services Commissioner by ss 16, 23 and 28 of the Legal Services Act 2011.**

B We make declaration s accordingly.

- C Any decision on further relief is reserved, for application by way of memorandum if sought.
- D The appeal is otherwise dismissed.
- E The costs of the appeal are reserved.

REASONS OF THE COURT

(Given by Wild J)

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Introduction

[1] In March 2012, the Government introduced a new framework for criminal legal aid. It comprises fixed fees with an ability to seek amendment of those fees for complex cases. The new fees cut the remuneration of lawyers providing criminal legal aid services by an average 10 per cent.

[2] The appellant, the Criminal Bar Association, represents lawyers practising criminal law in New Zealand. Most of its members are involved in criminal legal aid work. The appellant is understandably concerned at the cut in remuneration, particularly as remuneration rates for criminal legal aid work have been increased only once since 1996. That was in 2008, an 8.5 per cent increase.

[3] The appellant applied to the High Court for judicial review of several of the key decisions involved in the new fees framework. First, it challenged the delegation of powers by the Secretary for Justice (the Secretary) to the second respondent, Mr Stuart White. The new fixed fees 'regime' was developed and implemented by Mr White, exercising those delegated powers. Second, it challenged Mr White's decision, also exercising those delegated powers, to introduce the fixed fees 'regime'. Third, it challenged the 'regime' itself. Fourth, it challenged the policy applying to complex cases – the policy for amendment of the fixed fee. The 'regime' and 'policy' are incorporated in the Criminal Fixed Fee and Complex Cases Policy and Procedures, promulgated with amendments in June 2012. In this judgment, we will refer to this as the Fixed Fee Policy, or simply the Policy.

[4] The appellant's judicial review application was heard by Simon France J. In a judgment he delivered on 31 August 2012, the Judge dismissed all of the appellant's challenges.¹

[5] The appellant appeals against the whole of Simon France J's judgment, pursuing on appeal all but one of the challenges the Judge dismissed.²

[6] In [38] below we set out the seven questions which this appeal requires us to answer. They are best understood if we first provide some background.

Background

Concern over the rising cost of legal aid

[7] In March 2007 Government decisions expanding the eligibility for legal aid were implemented. The resulting increase in legal aid expenditure was greater than anticipated. For the year ended March 2010 it was \$172 million, a 55 per cent increase on the \$111 million cost for the March 2007 year. Criminal legal aid accounted for 45 per cent of the expenditure — \$78 million in the March 2010 year.³

¹ *Criminal Bar Association of New Zealand Incorporated v The Attorney-General* [2012] NZHC 1572 [High Court judgment].

² The challenge not pursued related to inadequate consultation.

³ These figures are given in: Affidavit of Stuart Douglas White in opposition to the interlocutory

Government initiates a fundamental review of legal aid

[8] Government considered that it could not sustain that rising level of expenditure. In March 2009 Cabinet agreed with the recommendation of the Minister of Justice that a fundamental review of the legal aid system be undertaken. Cabinet agreed also with the terms of reference recommended by the Minister. These included:⁴

1. The purpose of this review is to take a first principles approach to reviewing New Zealand's legal aid system to ensure it:
 - delivers legal services to those who need them most
 - manages costs effectively and is sustainable
 - complements efforts to maintain and improve the effective operation of the justice system, especially the court system
 - is consistent with principles of natural justice and New Zealand's international obligations
 - is based on objectives of fairness, efficiency, effectiveness, and quality
 - provides value for money
 - is simple and low cost to administer.
2. The review must align with Government priorities and take into account the projected fiscal environment of future years. In this respect, a key focus is on developing alternative approaches to manage or reduce costs. Existing models of public and private service provision (including other forms of social assistance) should be considered.

Bazley Report

[9] Dame Margaret Bazley was appointed to chair the review. She submitted her final report and recommendations in November 2009. The report is entitled "Transforming the Legal Aid System" (the Bazley Report).⁵

application for interim relief (2 March 2012) at [50]. Further detail about the increase in legal aid costs is included in the Minister's paper from which we have quoted in [16]–[20] below.

⁴ Cabinet Domestic Policy Committee Minute "Fundamental Review of Legal Aid System" (25 March 2009) DOM Min (09) 4/1 at Appendix.

⁵ Margaret Bazley, Chairperson of Legal Aid Review *Transforming the Legal Aid System: Final Report and Recommendations* (Ministry of Justice, Wellington, November 2009) [Bazley

[10] Amongst the failings of the then current legal aid system identified in the Bazley Report were the inflexible procurement provisions in the Legal Services Act 2000 (the 2000 Act) which prevented the Legal Services Agency (the LSA) procuring services in the most efficient way possible.⁶

[11] The Bazley Report expressed the view that the existing funding on a "fee for service" basis did not encourage lawyers to be efficient or innovative, including by resolving a case in the most effective way, was open to abuse, and carried significant administration costs.⁷

[12] The recommendations in the Bazley Report included:⁸

- (a) a mix of publicly and privately provided services; and
- (b) greater flexibility in the procurement of legal services: the funding model that ensured best value for taxpayers' money should be used.

[13] The section of the Bazley Report headed 'Procurement of Legal Aid Services' included this paragraph:⁹

In general, I consider that fee for service should be avoided, in favour of other funding models such as bulk funding or fixed fee. Where work volumes permit, I see advantages in bulk funding law firms or groupings of lawyers to provide specified legal services.

Cabinet decisions following the Bazley Report

[14] On 14 December 2009 Cabinet invited the Minister for Justice to report to Budget ministers by 30 November 2010:¹⁰

... with options (including reprioritisation options) to establish a sustainable and affordable baseline for legal aid and community law centres, for consideration in Budget 2011.

Report].

⁶ At [56].

⁷ At [414]–[416].

⁸ Recommendations 68 and 73.

⁹ At [418].

¹⁰ Cabinet Minute "Budget 2010: Allocation of the Operating Allowance" (14 December 2009) CAB Min (09) 44/28 at [27].

[15] On 17 December 2009 Cabinet considered the recommendations in the Bazley Report, and made some initial decisions. These included the main decisions to alter the legal aid framework, for example disestablishing the LSA and the Legal Aid Review Panel; transferring responsibility for the administration of the legal aid scheme to the Chief Executive of the Ministry of Justice, and establishing the office of Legal Services Commissioner, with three specified independent functions. The Cabinet Minute includes:¹¹

Financial implications

- 34 [Cabinet] invited the Minister of Justice to report to DOM [Cabinet Domestic Policy Committee] by 31 March 2010 on the cost of the proposed changes, with the view to managing the costs from within existing baselines.

[16] In response to Cabinet's 14 December 2009 invitation ([14] above), the Minister reported to Cabinet on 8 December 2010.¹² The Executive Summary in this report included:

2. Expenditure on legal aid has grown substantially in the past decade, and the rate of growth has accelerated since 2007/08. On 22 December 2009, Cabinet agreed that I would develop a sustainable and affordable baseline for legal aid, in consultation with Budget Ministers [CAB Min (09) 44/28].¹³
- ...
5. These proposals will reduce forecast legal aid expenditure by \$138 million from 2013/14 onwards. They provide an important first step in better managing legal aid expenditure by working within the current design and scope of legal aid. However, there will still be a gap totalling \$264 million between forecast expenditure and available baselines (over five years, including 2010/11).
6. Meeting the remaining funding gap requires more extensive changes, which need to be assessed in light of a closer examination of the purpose of legal aid and its relationship to other parts of the justice system. ...

[17] The Minister's paper also includes this section:

¹¹ Cabinet Minute "Legal Aid Review: Findings and Recommendations" (17 December 2009) CAB Min (09) 45/6B.

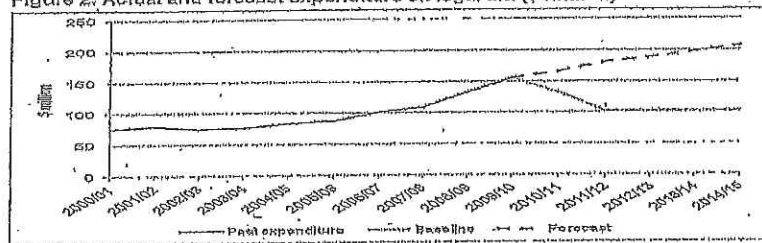
¹² Minister of Justice to Cabinet Domestic Policy Committee "Managing the cost of legal assistance in the justice sector" (8 December 2010) [Minister's Paper].

¹³ The date of the relevant Cabinet Minute is 14, not 22, December 2009 – it is correctly given in [14] above.

Legal aid budget

12. Figure 2 sets out expenditure on legal aid since 1998/99 (excluding administration costs). Spending was stable at around \$80 million until 2004/05, but rose steadily from then. In particular, expenditure rose from \$101 million in 2006/07 to \$152 million in 2009/10.
13. The expenditure increase was primarily due to policy decisions to increase eligibility and provide remuneration. However, roughly a third of the growth is due to non-policy factors (e.g. pressure on the Legal Services Agency to use its discretion more generously, increases in the amounts claimed by legal aid providers, and increases in the number and length of court cases).

Figure 2. Actual and forecast expenditure on legal aid (\$ million)



14. Legal aid funding was demand-driven until Budget 2010 when a decision was made to manage within a fixed limit (equal to 2007/08 expenditure). The gap between the baseline for legal aid and forecast expenditure is rising (set out in Table 3). In response, on 22 December 2009 Cabinet agreed that I would report to Budget Ministers on a sustainable and affordable baseline for legal aid [CAB Min (09) 44/28].

Table 3: Forecast and baseline legal aid expenditure (\$ million)

| | 2009/10 | 2010/11 | 2011/12 | 2012/13 | 2013/14 | 2014/15 |
|--------------------|---------|---------|---------|---------|---------|---------|
| Legal aid forecast | | 166 | 180 | 189 | 198 | 207 |
| Baseline | 156 | 132 | 102 | 101 | 101 | 101 |
| Difference | | 34 | 78 | 87 | 97 | 106 |

[18] Under the heading 'Price per grant', the Minister outlined his proposal for fixed fees for "high-volume activities", primarily criminal summary cases, and agreeing a price for services in advance for high cost cases. The paper then contains these paragraphs:

52. I propose that the new rates be set to manage the price per grant so that it has a lower overall cost than 2010/11. Legal aid providers commonly assert that 20-30% of their time is spent in administrative tasks associated with the legal aid system, primarily relating to

claiming and invoicing for fee for service grants. These costs will reduce under a fixed fee regime, because set rates will be paid and the level of work required in administering claims will reduce substantially.

53. Further, the increase in the price per grant over the past decade is in large part due to an increase in the number of hours worked, and it is expected a reduction could be achieved whilst still providing high quality legal advice.

[19] The paper included tables demonstrating how and when the savings necessary to contain legal aid expenditure within the agreed base line would be achieved. An example is the following table (we have included only the two lines in this table which are relevant to this appeal):

Table 7: Savings from proposals to reduce the price per grant (\$ millions, negatives indicate a cost)

| | Operating | | | | | Capital |
|-----------------|-----------|---------|---------|---------|-------|---------|
| | 2011/12 | 2012/13 | 2013/14 | 2014/15 | Total | Total |
| Fixed fee | 3.0 | 11.0 | 11.8 | 11.1 | 37.0 | (0.7) |
| High cost cases | 2.3 | 4.1 | 4.7 | 4.6 | 15.6 | (0.3) |

The operating and capital costings were explained in paragraph 56 of the paper thus:

56. The costings include implementation costs of \$1.7 million (operating) and \$4.3 million (capital). These costs are associated with the establishment of the Public Defence Service, the analysis required to price fixed fee, and the system changes necessary to introduce the new purchase regime. The capital costs are indicative because of the reform process already underway and the implementation of a new IT system.

[20] The Minister recommended that Cabinet agree to:¹⁴

... a two stage process to establish a sustainable and affordable baseline with:

- 2.1 changes to the current legal aid system to save \$138 million over four years; and
- 2.2 further work by November 2011 to address the remaining funding gap by reviewing the purpose of legal aid and associated cost drivers, predominantly in the Family Court.

...

¹⁴ Minister's Paper, above n 12, at [129].

... establish a new purchase approach that will:

- 13.1 establish fixed fees for cases that have more standard cost structures, with prices set to reduce the cost per grant;
- 13.2 establish high cost case management for the most expensive cases, with prices set to reduce the cost per grant;
- 13.3 reduce fee-for-service payments for remaining cases, so that payments are comparable with rates in the new purchase regime.

Cabinet approves the fixed fee regime and high cost case management

[21] On 7 February 2011 Cabinet approved the recommendations the Minister had made in his December 2010 paper.¹⁵ In particular, Cabinet:

- (a) approved the expansion of the Public Defence Service so that it dealt with 50 per cent of criminal cases in the centres where it was to operate;¹⁶ and
- (b) agreed to establish a new purchase approach that will:¹⁷
 - 14.1 establish fixed fees for cases that have more standard cost structures, with prices set to reduce the cost per grant;
 - 14.2 establish high cost case management for the most expensive cases, with prices set to reduce the cost per grant;
 - 14.3 reduce fee-for-service payments for remaining cases, so that payments are comparable with rates in the new purchase regime.

[22] The 7 February 2011 Cabinet Minute also records Cabinet agreeing, as part of the Budget 2011 process, to fund the \$34.13 million shortfall in legal aid funding in 2010/11.¹⁸ Cabinet noted that the changes it had approved produce a reduction

¹⁵ Cabinet Minute "Managing the Cost of Legal Assistance in the Justice Sector" (7 February 2011) CAB Min (11) 3/6.

¹⁶ At [11]–[12].

¹⁷ At [14].

¹⁸ At [23]–[24].

totalling \$129.4 million in forecast operating expenditure on legal aid for the three years 2012/13–2014/15.¹⁹

Development and implementation of the Fixed Fee Policy

[23] Soon after Cabinet's approval in February 2011, a team comprising LSA and Ministry of Justice staff and a private consultancy was set up to develop a fixed fee regime for criminal legal aid. This team was headed by Mr White who, at the time, was General Manager of the LSA. On 21 June 2011 the Secretary delegated to Mr White his statutory functions under the Legal Services Act 2011 (the 2011 Act). That Act had been introduced on 4 August 2010, enacted on 6 April 2011 and was to come into force on 1 July 2011. On 24 June 2011, Mr White was appointed as the first Legal Services Commissioner (the Commissioner) – the new position established by s 70 of the 2011 Act.

[24] From the time the 2011 Act came into force Mr White's involvement in developing the fixed fees regime was in his capacity as the Acting Deputy Secretary Legal Services of the Ministry of Justice. That was the capacity in which Mr White consulted on the proposed fixed fee regime during September, October and November 2011, including with the appellant. Mr White deposed:²⁰

... In December 2011, the final framework of the fixed fees policy was decided by me, as Acting Deputy Secretary under the authority delegated by the Secretary for Justice.

Mr White also deposed that he had not made any decisions relating to grants of legal aid in his capacity as the Commissioner since the introduction of the Policy.²¹

[25] Mr White also stated that, as Acting Deputy Secretary, he was responsible for the implementation of the fixed fees framework.²²

¹⁹ At [26].

²⁰ Affidavit of Stuart Douglas White in Opposition to Application for Judicial Review (2 May 2012) at [14].

²¹ At [17] of the same affidavit.

²² Respondents' Answers to Interrogatories (signed by Mr White on 5 April 2012), answer to Question 3.4.

[26] From the outset, the development work on the fixed fee framework was based on two “givens”:

- (a) it would be a fixed fee system; and
- (b) it would need to achieve a 10 per cent saving in the average cost per grant.

[27] The proposed framework was put out for consultation on 22 July 2011. The fixed fee model and overall savings of 10 per cent were non-negotiables. The consultation focused on the appropriateness of the fixed fees allocated to various steps and types of legal proceeding/application. The submissions resulted in adjustments, though the upward adjustments needed to be offset to achieve the required overall savings of 10 per cent.

[28] The new Fixed Fee Policy came into effect on 5 March 2012. We have set out, in [69]–[75] below, those parts of the Policy relevant to this appeal.

[29] The evidence before Simon France J established these points about the working of the new framework:

- (a) Pursuant to regulations made under the 2011 Act, approximately the same number of lawyers as under the previous scheme have been approved for each category of criminal legal aid work.
- (b) As at 18 May 2012, of the 10,025 applications for criminal legal aid approved under the new scheme, 7,523 had been allocated to private lawyers, 7,455 as fixed fee cases. The balance had been allocated to the Public Defence Service.

The 2011 Act

[30] As we have mentioned, the 2011 Act came into force on 1 July 2011.

[31] The 2011 Act:

- (a) repealed the Legal Services Act 2000;
- (b) disestablished the LSA, transferring the administration of publicly funded legal services to the Ministry of Justice and providing that the Secretary would be responsible for establishing and delivering those services;
- (c) established the office of the Legal Services Commissioner to be responsible for the granting of legal aid;
- (d) did not dictate a particular legal aid model;
- (e) introduced a new quality assurance and performance management system for those providing publicly funded legal services; and
- (f) made administrative changes.

[32] The functions of the Secretary and the Commissioner respectively are set out in Part 3 of the 2011 Act in these important sections:

Part 3 — Administration of legal services system

Subpart 1 — Functions of Secretary for Justice and Legal Services Commissioner

Secretary for Justice

68 Functions of Secretary for Justice

- (1) The functions of the Secretary under this Act are—
 - (a) to establish, maintain, and purchase high-quality legal services in accordance with this Act;
 - (b) to perform any functions that are conferred or imposed on the Secretary by or under this Act;
 - (c) to perform any other functions relating to legal services that are conferred or imposed on the Secretary by or under any other Act.
- (2) For the purposes of performing his or her functions, the Secretary may—

- (a) assess and determine the need for legal services by people with insufficient means; and
- (b) specify legal services to which subpart 2 applies; and
- (c) determine the method or methods for the delivery of legal services; and
- (d) determine the allocation of legal services—
 - (i) on the basis of the method or methods of delivery that the Secretary considers appropriate for the type of legal service to be provided; or
 - (ii) in any other manner that the Secretary considers appropriate; and
- (e) subject to this Act, disestablish any legal services established under this Act; and
- (f) deliver any legal services established under this Act; and
- (g) undertake or fund law-related research and education; and
- (h) exercise any other power conferred on the Secretary by this Act or any other enactment.

69 Methods of delivery of legal services

Without limiting section 68(2)(c), the methods of delivery of legal services may include—

- (a) making arrangements, subject to the Lawyers and Conveyancers Act 2006, for the services of non-lawyers to be made available;
- (b) entering into agreements with individual lawyers, groups of lawyers, or law firms for the provision of legal services;
- (c) employing salaried lawyers to provide legal services;
- (d) entering into contracts with community law centres to provide community legal services.

Legal Services Commissioner

70 Legal Services Commissioner

- (1) A person must be appointed under the State Sector Act 1988 to hold office as Legal Services Commissioner.
- (2) The person to be appointed Commissioner must be an existing employee of the Ministry or be appointed an employee of the Ministry when appointed Commissioner.
- (3) The Commissioner must, except to the extent that section 71(2) applies, act under the direction of the Minister and the Secretary.

71 Functions of Commissioner

- (1) The Commissioner has the following functions:
- (a) to grant legal aid in accordance with this Act and the regulations;
 - (b) to determine legal aid repayments where legal aid is granted;
 - (c) to assign a provider of legal aid services or specified legal services to an aided person;
 - (d) in relation to salaried lawyers,—
 - (i) to decide the allocation of cases among salaried lawyers;
 - (ii) to oversee the conduct of legal proceedings conducted by salaried lawyers;
 - (iii) to manage the performance of salaried lawyers;
 - (e) to carry out any other function conferred on the Commissioner by the Minister, by the Secretary, or by or under this Act or any other enactment.
- (2) The Commissioner must act independently when performing any function stated in subsection (1)(a) to (d).

[33] Section 72 enables the Commissioner to delegate his functions under the 2011 Act. It is pursuant to such delegation that grants officers make decisions on applications for criminal legal aid.

[34] The main functions conferred or imposed on the Secretary by the 2011 Act can be summarised thus:

- ss 74–79 – establishment and operation of a quality assurance system for providers of legal aid services;
- ss 91–92 – audit of providers of legal aid services;
- ss 94–96 – contracting with community law centres for the purchase of community legal services;

■ ss 97–100 – receiving and paying claims for payment for legal aid services, once those claims are approved by the Commissioner; and

■ ss 101–103 – enforcement – dealing with payments to a provider being investigated by the performance review committee, and taking action after considering the committee’s advice, including by modifying or cancelling a provider’s approval.

[35] The Commissioner’s independent functions under the Act all relate to the granting of legal aid, including managing the performance of the (salaried) Public Defence Service lawyers who are employed by the Secretary. Although those are independent statutory functions, Mr White described them as “[sitting] within the broader framework in which the Secretary for Justice determines the method of delivery of legal services”.²³

[36] With respect to criminal legal aid, the Commissioner’s independent functions under the 2011 Act can be grouped as follows:

■ ss 8 and 14–23 – all aspects of granting, or declining to grant, legal aid for criminal matters;

■ ss 25, 26, 28–29, 31–32 – dealing with legal aid after it is granted, including amendment to or withdrawal of the grant;

■ ss 33–44 – enforcing conditions of the grant of legal aid. This encompasses recovering payments due, enforcing charges over property, charging interest on unpaid legal aid debts and writing off amounts payable;

■ ss 51–59 – dealing with applications for reconsideration of the Commissioner’s decision, providing information to the Legal Aid Tribunal if review of the Commissioner’s reconsideration is sought, reconsidering if

²³ Affidavit of Stuart Douglas White in Opposition to the Interlocutory Application for Interim Relief (2 March 2012) at [22].

directed by the Tribunal, and appealing to the High Court if the Commissioner considers the Tribunal's determination is wrong in law;

- ss 89–90 – examining claims made by providers of legal aid services if they appear excessive, and examining a claim if requested by an aided person; and
- s 99 – approving, deferring or declining claims for payment made by a provider.

These powers, particularly those in ss 8 and 14–23, are consistent with the Commissioner's s 71(1)(a) function "to grant legal aid in accordance with this Act and the Regulations". That function is to be performed by the Commissioner acting independently: s 71(2).

[37] The Commissioner also has some functions under the Miscellaneous and Transitional Provisions in the 2011 Act eg s 108 Disclosure of information.

The questions on appeal

[38] We consider the appeal can best be determined by answering seven questions. These questions do not correspond to the four issues Simon France J addressed in his judgment. The seven questions result from our separating some of the arguments the appellant put to us. We consider they capture the appellant's arguments on appeal in the most orderly way. The seven questions are:

- Question 1: Is the purpose of cost-cutting which supported the introduction of the 2011 Act a proper purpose of that Act?
- Question 2: Is the Fixed Fee Policy consistent with the 2011 Act, in particular the Commissioner's independent functions under the Act?
- Question 3: Does the Fixed Fee Policy unreasonably fetter the Commissioner's discretion under the 2011 Act?

■ Question 4: Was the delegation of the Secretary's powers under the 2011 Act to Mr White when he was also the Commissioner a valid exercise of the Secretary's powers of delegation?

■ Question 5: Is the Fixed Fee Policy unreasonable?

■ Question 6: Is the Fixed Fee Policy unlawful, in that the Secretary when developing the Policy failed to take into account rights under the New Zealand Bill of Rights Act 1990 (BORA)?

■ Question 7: Was the Secretary's decision to implement the Fixed Fee Policy unlawful, in that it gave effect to the 10 per cent reduction in fees directed by Cabinet?

Question 1: Is the purpose of cost-cutting which supported the introduction of the 2011 Act a proper purpose of that Act?

Relevant provisions

[39] This argument hinges on two provisions in the 2011 Act. First, s 3 which provides:

3 Purpose of Act

The purpose of this Act is to promote access to justice by establishing a system that—

- (a) provides legal services to people of insufficient means; and
- (b) delivers those services in the most effective and efficient manner.

Secondly, s 68(1)(a) which provides:

68 Functions of Secretary for Justice

(1) The functions of the Secretary under this Act are—

- (a) to establish, maintain, and purchase high-quality legal services in accordance with this Act:

...

The Judge's view

[40] Simon France J expressed himself to be in general agreement with the respondents, that it is permissible under s 3 to have regard to the overall cost of the scheme. To have as a purpose the reduction of the existing overall cost is not necessarily inconsistent with a statutory purpose of high-quality legal services. There is nothing to say conceptually that one cannot achieve the same or a better outcome for the same or less money.²⁴

[41] The Judge also considered that efficiency properly incorporates considerations of cost. He explained:²⁵

... Part of the rationale for transferring legal aid back to a government department was to assist with control of costs, and it would be very unlikely that a law would be passed that then makes it an irrelevant consideration. One only needs to state the proposition to immediately doubt its correctness. In her report Dame Margaret Bazley spoke of the need to have regard to "responsible expenditure of public monies". Whilst it is true the Report was interested in the quality of services, it also had things to say about cost.

(Footnote omitted.)

Appellant's argument

[42] For the appellant, Mr Harrison QC first points out that there is no mention in either s 3 or s 68(1)(a) of the expense of providing the "high-quality legal services", let alone any reference to cutting the cost of those services. The appellant then argues that Simon France J was wrong to infer a statutory purpose of cost-cutting from s 3(b), because "efficient" is not synonymous with "economical". It contends that the legislature, had it intended the 2011 Act to be a vehicle for cost-cutting, would have said so. Mr Harrison stresses that in s 3(b) it is the delivery of legal services – not their funding – which is to be achieved in the most effective and efficient manner. He draws attention to s 88 which empowers the Ministry to carry out quality assurance checks on providers of legal aid services "to ensure that the services are delivered in an effective and efficient manner".

²⁴ High Court judgment, above n 1, at [79].

²⁵ At [80].

[43] The appellant seeks support for this argument by contrasting the 2011 Act with the repealed 2000 Act. Under the latter, one of the functions of the LSA was “to *administer* schemes in as consistent, accountable, *inexpensive* and efficient a manner *as is consistent with* the purpose of this Act” (appellant’s emphasis).²⁶ Section 68(1)(a) is the comparable provision in the 2011 Act. It is one of the Secretary’s functions.

[44] The appellant argues that cost-cutting is thus not a purpose of the 2011 Act. Indeed, insofar as it detracts from, or is pursued without regard to, the provision of “high-quality legal services”, it runs contrary to the purpose of the 2011 Act and the first of the Secretary’s statutory functions. The appellant also contends that the purpose of cost-cutting has compromised, and overwhelmed, the Secretary’s s 68(1)(a) function.

Respondents’ response

[45] The respondents essentially rely on the reasoning of Simon France J. They submit that the 2011 Act has its genesis in the recommendations in the Bazley Report, and argue that procuring high-quality legal services and cost-cutting are not alternatives. The 2011 Act confers on the Secretary broadly expressed powers to determine the methods of delivery of legal services. The respondents point particularly to the s 3 purpose of promoting access to justice through the legal services to be provided under the Act.

[46] The respondents draw attention to the provisions in the 2011 Act which contemplate, or at least do not proscribe, fixed fees or a payment system other than the previous fee for service based on an hourly rate. The concept of a maximum grant is first referred to in s 16(2)(c), in the context of the Commissioner’s powers on a grant of legal aid. The relevant part of s 16 provides:

16 Decision on application for legal aid

- (1) On an application for legal aid, the Commissioner may, in respect of the whole or any part of the proceedings or appeal,—

²⁶ Legal Services Act 2000, s 92(a).

- (a) grant legal aid to the applicant; or
 - (b) grant legal aid on an interim basis until a decision is made under paragraph (a) or (d); or
 - (c) request further information from the applicant or the proposed lead provider, or both; or
 - (d) decline the application.
- (2) When granting legal aid under subsection (1)(a) or (b), the Commissioner —
- (a) must specify the conditions, as described in section 18, attaching to the grant; and
 - (b) must identify the lead provider; and
 - (c) may specify a maximum grant.

...

[47] The next relevant provision is s 23 which provides:

23 Maximum grant

- (1) A grant of legal aid may specify a maximum grant, which is the amount of legal aid that is authorised under the grant.
- (2) A maximum grant may be expressed in any way. For example, it may refer to a total dollar amount, or a maximum number of hours, or a period within which the aid must be provided, or any combination of these or any other specifications.

...

[48] Then there is s 28. The pertinent parts are:

28 Application for amendment to grant of legal aid

- (1) An application for an amendment to a grant of legal aid—
 - (a) must be made by either the aided person or the provider; and
 - (b) must be made in the prescribed manner to the Commissioner; and

...

...

- (3) Following an application for amendment to a grant of legal aid, the Commissioner may confirm the grant or amend it in a manner consistent with this Act and any regulations.

...

[49] A further provision is s 99 which is in that subpart of the 2011 Act dealing with payment for legal aid work. Section 99(3) enables the Commissioner to defer payment of a claim which appears excessive “in light of the Secretary’s standard rates for payment ...”.

[50] Finally, the respondents rely on that part of the judgment where Simon France J expressed the view that the appellant had overstated the differences between the old and new systems. These were the Judge’s main points:

- (a) Both systems had/have caps on expenditure that could not be exceeded without approval. Thus, under the old system, “there was a type of fixed fee, namely the [applicable] hourly rate x the guideline hours”.²⁷
- (b) The current fixed fees “represent the average claim over the last year for all legal aid grants for that type of proceeding”, less 10 per cent.²⁸
- (c) The ability to seek a review remains under the present system, albeit restricted to specific situations.²⁹

Our views and decision

[51] This argument is essentially an improper purpose argument: cost-cutting is not a proper purpose of the 2011 Act. Insofar as the Fixed Fee Policy purports to be made under the 2011 Act, the appellant contends it has been made for improper purposes.

[52] Somewhat obviously, we agree with both parties that the purpose of the 2011 Act is that stated in s 3. The parties differ as to what is encompassed by the wording of s 3, or as to what those words mean. The interpretation task is succinctly

²⁷ High Court judgment, above n 1, at [34].

²⁸ At [35].

²⁹ At [36].

summarised in this Court's recent judgment in *SMW Consortium (Golden Bay) Ltd v The Chief Executive of the Ministry of Fisheries*:³⁰

... in interpreting the relevant provisions of the Act, we ascertain their meaning from their text and in light of their purpose.³¹ In determining purpose we have regard to both the immediate and general legislative context, as well as the social, commercial and other objectives of the Act.³² We also recognise that the legislation should be interpreted in a realistic and practical way in order to make it work.³³

[53] The leading authority in this country on the improper purposes doctrine is the Supreme Court's decision in *Unison Networks Limited*.³⁴ Delivering the Court's judgment, McGrath J said:³⁵

A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act".³⁶ A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.³⁷

[54] In citing that passage, we have not overlooked the subsequent criticism of this Court's decision in *Attorney-General v Ireland*³⁸ by Professor Joseph of Canterbury University. In an article on constitutional law, when dealing with the doctrine of improper purpose, the Professor offered these views:³⁹

Ireland represents a wrong turn in the law, and should be overruled.

...

³⁰ *SMW Consortium (Golden Bay) Ltd v The Chief Executive of the Ministry of Fisheries* [2013] NZCA 95 at [23].

³¹ Interpretation Act 1999, s 5.

³² *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

³³ *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA); and JF Burrows and R Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 205.

³⁴ *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

³⁵ At [53].

³⁶ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030 per Lord Reid.

³⁷ *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA) at [42]–[43] and *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) at 393–394.

³⁸ *Attorney-General v Ireland*, above n 37.

³⁹ Philip A Joseph "Constitutional Law" (2012) 3 NZ L Rev 515 at 533, 536–537.

The *Ireland* ruling subverts Dicey's first meaning of the rule of law, "government according to law". Had Parliament wanted DOC to use the reserve as a regional administration centre, it would have said so in the Reserves Act 1977. But it had not done so.

...

The rulings in *Ireland* were excessive and unnecessary. The improper purpose doctrine has sufficient inbuilt flexibility, without the unprincipled latitude that *Ireland* accords.

...

The latitude which the *Ireland* ruling condones compromises the improper purposes doctrine. No public power can be exercised legitimately for an unauthorised purpose. *Ireland* held that public powers can be exercised for *any* purpose, as long as the ulterior purpose does not (a) thwart the attainment of the authorised purpose, or (b) frustrate the policy or objects of the Act. The objection this raises is fundamental: in *Ireland* Parliament had not authorised what the Court of Appeal upheld as a valid exercise of power. In *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53], the Supreme Court affirmed *Ireland* but in a pro forma ruling that did not address the implications. The Court should feel no reluctance to revisit *Ireland* and look at the matter afresh.

[55] Although the Supreme Court's affirmation of *Ireland* may have been "pro forma", affirm the decision it did. Any revisiting must accordingly be by the Supreme Court.

[56] Simon France J noted the respondents' reliance on the last two sentences of [53] in *Unison Networks*, and thus on *Ireland*.⁴⁰ There was not the same reliance in the arguments the respondents put to us. Further, for the reasons we are about to explain, we do not consider that the respondents need to rely on *Ireland* here. Accordingly – even if it were appropriate for us to do so – we need not express a view about the correctness of *Ireland*, in the light of Professor Joseph's criticisms of it.

[57] Our view is that "the most effective and efficient" delivery of legal services encompasses cost effectiveness and cost efficiency. In her report Dame Margaret Bazley wrote:⁴¹

⁴⁰ High Court judgment, above n 1, at [74].

⁴¹ Bazley Report, above n 5, at [130].

At the same time, it should be open to the government to determine the level of legal services it can afford to provide its citizens, and establish policies and mechanisms to manage this expenditure. The government has a key stake in devising a legal aid system under which decisions about resources, priorities, and targeting produce the most desirable outcomes in a principled, transparent, and accountable way. *Public expenditure principles of equity, efficiency, and effectiveness* should guide the nature and extent of the public legal services on offer.

(Our emphasis.)

[58] We agree with the words in that passage we have emphasised. That is, we agree that “efficiency and effectiveness” are principles when it comes to the expenditure of public monies. In short, the cost of legal services is an inseparable part of the effectiveness and efficiency of their delivery.

[59] Conversely, we reject the proposition that a system which delivers legal services without regard to their cost could do so in “the most effective and efficient” manner. While we accept the appellant’s point that the effectiveness and efficiency of delivery is concerned with the quality of the services, it is also concerned with their cost. As we note in [11] above, one of the concerns expressed in the Bazley Report was that the existing “fee for service” basis of payment did not encourage lawyers to be efficient and effective.

[60] We agree with the respondents that ss 23(2) and 99(3), particularly the first of those, reinforce that conclusion.

[61] Further, the fact that s 68(1)(a) empowers the Secretary to “*purchase* high-quality legal services” (our emphasis) supports the view that Parliament was concerned with the cost of those services.

[62] There is a further point. The appellant submits that the cost of legal aid services is demand driven. They cost the Government what they cost. We reject that argument. The evidence before the Judge established that taxpayer monies available to fund legal aid services are limited. As the appellant accepts, the primary purpose of the 2011 Act is to promote access to justice by providing legal services to people of insufficient means. That purpose cannot be achieved unless the costs of legal services are kept within the available funds. The fixed fee framework was intended

to achieve that, and in that way it is commensurate with the primary purpose of the Act.

[63] For the reasons we have explained, we do not accept that cost-cutting was not a proper purpose of the 2011 Act. Accordingly, we answer Question 1: 'Yes, cost-cutting is a proper purpose of the 2011 Act'.

Question 2: Is the Fixed Fee Policy consistent with the 2011 Act, in particular the Commissioner's independent functions under the Act?

The Fixed Fee Policy

[64] This question focuses on how, and by whom, the Policy was implemented. The nub of the appellant's argument on this question is that the Policy is inconsistent with the Commissioner's independent function of granting legal aid, and with his discretion, when doing so, to specify a maximum grant. That function and discretion are in ss 16(1)(a) and (2)(c) and 23(1).⁴²

[65] A description of the Policy is therefore a necessary precursor to consideration of this second question. Section 14 of the 2011 Act provides for an application for a grant of legal aid. In terms of s 71(1)(a), it is a function of the Commissioner to grant legal aid in accordance with the Act, and therefore to determine applications. In doing so, the Commissioner must act independently: s 71(2).

[66] Under the Policy, if legal aid is granted, a lawyer is allocated and the proceeding is divided into one of four proceedings categories (PCs):

- (a) PC1, being judge alone cases;
- (b) PC2, being jury trials where the highest maximum penalty is 10 years;
- (c) PC3, being jury trials where there is a finite maximum penalty greater than 10 years; and

⁴² Both set out in [46]–[47] above.

- (d) PC4, being jury trials where the maximum penalty is life imprisonment, or the Crown has indicated it will seek preventive detention.

[67] Appointment of a lawyer for PC 1 and 2 cases is on the rotational basis unsuccessfully challenged in *Clark v The Registrar of the Manukau District Court*.⁴³ A lawyer of choice is available for PC 3 and 4 cases.

[68] Remuneration is initially by way of fixed fee, save for cases being managed under the High Cost Case framework. That encompasses a small group of serious offences. It is not in issue on this appeal. A fixed fee case involves the payment of a base fixed fee which covers taking instructions, preparation for the case and conduct of the case. An additional fixed fee is available for specified application eg opposed applications for bail and name suppression.

[69] It is sufficient to set out the schedule of fixed fees applicable to category 1 – judge alone – cases. Which of the three different levels of fee (A, B and C) applies depends on the highest maximum penalty attaching to any of the charges. This schedule is included at the end of this judgment.

[70] The rules dealing with an application to amend a grant of legal aid are set out in different parts of the Policy. The Rules restrict amendment to a small percentage of cases, and only where the case is “particularly complex”. The first reference is in the Background section, where there is this description:

2.3 What are complex cases?

Particularly complex cases, where the fixed fees payable are shown to be completely inadequate for a particular activity, may be managed as complex cases. Complex cases involve payment outside of the fixed fee schedules. Complex cases are expected to comprise approximately 4.5% of all criminal cases.

A case will be managed as a complex case when an amendment is approved. The amendment must meet specific criteria and, if approved, the applicable fixed fee will be replaced by a new maximum grant.

⁴³ *Clark v The Registrar of the Manukau District Court* [2012] NZCA 193, (2012) 9 HRNZ 498.

[71] Section 6 of the Policy deals with 'Amendment to grant (complex cases)'.

The section starts with this introductory paragraph:

In situations where a criminal case is unusually complex, either overall or in some particular aspect, an amendment to the fixed fee grant may be sought. An approved amendment on a fixed fee case results in the case being managed as a 'complex' case and may prompt consideration of transfer for management under the high cost case framework.

[72] After describing the process for requesting an amendment to a fixed fee or complex case, the Policy states that an amendment may relate to:

- a base fixed fee
- an additional fixed fee
- any disbursement that requires prior approval, or
- an estimate.

[73] The Policy then elaborates on the first of these four items in these terms:

A new maximum grant will be set where a provider demonstrates that the case is particularly complex and that the base fixed fee is completely inadequate in reflecting the work involved in completing activities covered by the base fixed fee. If an amendment request relating to activities covered by the base fixed fee is approved, the base fixed fee will not be paid. Instead, the maximum grant will be administered on the basis of the provider's hourly rate.

For a summary proceeding ... the maximum grant may be amended if the case is characterised by two or more of the following:

- disclosure index more than three pages long and more than 100 full pages of disclosure;
- more than 60 pages of disclosure and more than half of this text transcription, photocopied hand-written material, or interviews on DVD;
- more than five charges to be defended, especially where these are serious and there are complexities such as some warrants not issued locally;
- significant new points of law to be researched;
- co-accused defendants;
- five or more witnesses, regardless of whether they are to appear or be read;

- three or more prosecution interviews with the defendant or with a witness;
- defended hearing set down for more than a full day.

[74] The criteria for an indictable proceeding (a similar set) and for appeal and parole proceedings are then set out, followed by these paragraphs:⁴⁴

For all cases the following situations may result in an amendment to the maximum grant being approved:

- highly vulnerable defendant or complainants, such as children;
- defendant subject to treatment orders (serious mental health problems or a serious intellectual disability);
- defendant with significant barriers to communication throughout preparation, including those that require an interpreter/translator (eg, significant sensory impairment or English as a second language requiring an interpreter/translator).

For all types of proceedings, the presence of these factors may result in additional work having to be carried out on the case, such that the base fixed fee is rendered completely inadequate and payment on an hourly basis is warranted.

[75] There follows a paragraph dealing with additional fixed fees. This also requires the provider to demonstrate why “the activity is particularly complex and that the fixed fee amount is completely inadequate in reflecting the work involved in completing the activity”. The Policy then contains this note:

Note: a request to amend the maximum grant may also be approved where a provider can demonstrate that certain activities are necessary to the conduct of a matter, but that these are not adequately covered by any of the available fixed fees.

The Judge’s reasoning

[76] Simon France J did not accept that the Policy is inconsistent with ss 16(2)(c) and 23 of the 2011 Act. In particular, he saw no reason to read down s 23(2), as requiring only time based systems. As we have noted,⁴⁵ the Judge pointed out that

⁴⁴ The wording we quote is from the June 2012 version of the Policy. In June 2012, in response to issues identified by providers and Ministry staff, the Policy wording was amended slightly.

⁴⁵ At [50] above.

there was, under the previous system, “a type of fixed fee, namely the hourly rate times the guideline hours”.⁴⁶ So, although there were three different hourly rates depending on the lawyer’s classification, it was still a capped payment. Because the fixed fees were based on the average claim over the last year for all legal aid grants for that type of proceeding, the Judge considered that the differences between the previous and current schemes “are not as significant as being claimed”.⁴⁷ While accepting that the review provision (s 90) could not apply where there was a fixed fee, Simon France J pointed out that it did apply to refusals to amend and to claims in complex and high cost cases.

[77] Simon France J then turned to “the more difficult issue”, whether it was/is the Secretary or the Commissioner who should set the payment rates. The Judge accepted that the appellant’s argument had merit, in particular because it is the Commissioner who is to determine a maximum grant (s 23). However, for four reasons, the Judge considered that the 2011 Act permitted the Policy to be determined by the Secretary.

[78] First, although the reality is that for the bulk of cases the fixed fee is fixed by default, the point remains that the Commissioner “has the capacity to fix a different maximum grant if circumstances warrant”.⁴⁸

[79] Second, the text of the 2011 Act is not entirely consistent on this point. Section 90 (giving an aided person the right to request the Commissioner to review the cost of services) can be contrasted with s 99 (which provides that the Commissioner may defer payment of a claim if it “appears ... to be excessive in light of the Secretary’s standard rates for payment ...”).⁴⁹ There is no reason to read the emphasised words as not including fixed fees.⁵⁰

⁴⁶ High Court judgment, above n 1, at [34].

⁴⁷ At [35].

⁴⁸ At [38].

⁴⁹ Legal Services Act 2011, s 99(3)(a). Simon France J’s emphasis.

⁵⁰ At [39]–[40].

[80] Third, the regulation-making power in s 114 contemplates limits on the Commissioner's discretion in relation to maximum grants.⁵¹ It provides that the Governor-General may make regulations:

- (b) prescribing a method or methods for calculating what maximum grant, if any, should be set under a grant of legal aid ...

[81] Fourth:⁵²

Finally, regard must be had to the economic realities. Moving legal aid to the Ministry of Justice was motivated in part by a desire to change fiscal accountability. It does that because the Secretary is subject to obligations under the State Sector Act 1988 and Public Finance Act 1989 to ensure that expenditure is lawful and within appropriation. Once one accepts that the Commissioner does not have an open cheque book, and that it is not wholly a demand driven system, then the expectation must be that the Secretary would have a role in setting the fees, otherwise he cannot discharge these fiscal responsibility duties. The statutory expression in s 99 of the "Secretary's standard rates for payment" is consistent with the fiscal responsibility obligations imposed on the Secretary.

Appellant's argument

[82] The appellant submits that the Secretary's function under the Act in relation to the delivery of legal services is a 'macro' function, intended to give scope for innovation in the delivery of legal services in response to the Bazley Report. The Policy is not open to the Secretary to implement, because it is not a "purchase" within the Secretary's s 68(1)(a) function.⁵³ The power to grant legal aid in an individual case belongs solely to the Commissioner exercising his power independently. It is for the Commissioner alone, under ss 16(2)(c) and 23(1),⁵⁴ to decide whether to specify a maximum grant for any given application for legal aid.

[83] The appellant argues that the Policy effectively removes the Commissioner's discretion both as to whether or not to specify a maximum grant and, if so, its level. Instead the Policy effectively prescribes the relevant fixed fee as the maximum grant. Thus, from the outset, the Policy is inconsistent with and contrary to the scheme of

⁵¹ At [41].

⁵² At [42].

⁵³ Section 68(1)(a) is set out in [39] above.

⁵⁴ Set out in [46]–[47] above.

the 2011 Act. That is because the Secretary's implementation of the Policy removes in a wholesale fashion the Commissioner's discretion to make a maximum grant of legal aid. Because every grant is subject to a fixed fee (with the exception of high cost and complex cases), no one currently exercises the s 16(2)(c) and/or s 23(1) discretion.

[84] Further, the Policy also abrogates the right afforded by s 28(1) to both the grantee and the assigned provider to apply for amendment to the grant of legal aid.

[85] The appellant accepted that the Secretary could have promulgated guidelines, as existed under the previous Act. But the Policy introduced what Mr Harrison, in his oral submissions, termed an "immutable fixed fee system with a very high threshold for amendment".

Respondents' response

[86] The respondents' response on this question is summarised in [45]–[50]. The respondents also relied on the reasoning of Simon France J summarised at [78]–[81].

Our views and decision

[87] We refer in [110] below to the statistics available to Simon France J. Based on those statistics, a fixed fee(s) has applied to 99.6 per cent of grants of legal aid. That fee was fixed by the Policy promulgated by the Secretary.

[88] Thus, the fixed fee in all but 0.4 per cent of grants was also effectively a maximum grant. Yet the discretion to specify a maximum grant pursuant to ss 16(2)(c) and (23)(1) of the Act resides with the Commissioner, not the Secretary. Further, and importantly, that discretion is one which the Commissioner must exercise independently: s 71(2). As Mr Harrison points out, the consequence of the Policy is that no one exercised, or even considered exercising, the ss 16(2)(c) and 23(1) powers for 99.6 per cent of the grants of legal aid.

[89] This was all but accepted by Mr White who deposed:⁵⁵

Fixed fees as 'maximum grant'

118. Under the fixed fees regime, a maximum grant for each grant of legal aid will be fixed as it is now. The maximum grant will be based on the fees set out in the applicable schedule. Which schedule is applicable is determined by the maximum penalty for the offence.
119. *The fixed fee is a form of maximum grant.* The Commissioner has the discretion to decide which of those schedules should apply as a maximum grant to a particular legal aid application.

(Our emphasis.)

[90] Effectively, the Policy involves the Secretary dictating to the Commissioner how the Commissioner should exercise his independent discretionary power in ss 16(2)(c) and 23(1) of the 2011 Act. We accept the appellant's submission that this is inconsistent with the 2011 Act. It is also contrary to the administrative law principle of dictation, the relevant aspects of which are well summarised in Matthew Smith *New Zealand Judicial Review Handbook* as follows:⁵⁶

Where a person or body has been specifically nominated to make a decision then (subject to principles of delegation ...) the nominated decision-maker must exercise the discretion they have in a real and genuine manner. This means that the discretion is not to be abdicated to another. It also means that the nominated decision-maker must not act under the dictation of anyone else. ... It is, however, important to note that these principles do not prevent nominated decision-makers from adopting a suggestion or a submission made to them, provided, that is, that their adoption of the suggestion or the submission is part of a real and a genuine exercise of their discretion, rather than some mechanical "going through the motions".

[91] As Mr Smith points out in the passage just cited, it would be permissible for the Secretary to make suggestions to the Commissioner as to the exercise of his s 16(2)(c) power, and perhaps to issue guidelines. As noted, the appellant accepted that guidelines, similar to those that existed under the 2000 Act, would be unobjectionable. But by the Policy the Secretary has stepped over the line from

⁵⁵ Affidavit of Stuart Douglas White in Opposition to the Interlocutory Application for Interim Relief (2 March 2012).

⁵⁶ Matthew Smith *New Zealand Judicial Review Handbook* (Thomson Reuters, Wellington, 2011) at 593. The classic authority is *Roncarelli v Duplessis* [1959] SCR 121 at 157. *Lavender (H) & Son Ltd v Minister of Housing and Local Government* [1970] 1 WLR 1231 (QB) is a good example of how the issues of dictation and fettering can be intertwined. New Zealand authorities include: *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC) at 762; *New Era Energy Inc v Electricity Commission* [2010] NZRMA 63 (HC) at [74]; *BNZ Investments Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,078 (HC) at [28].

permissible suggestion or guidance to impermissible dictation. In implementing the Policy the Secretary has acted unlawfully.

[92] The independence of the Commissioner in deciding on individual applications for legal aid is an important feature of the 2011 Act. The Secretary is a Government official, and as such is generally subject to the control of the Minister of Justice and, more widely, the Government of the day. The prosecution of crime is an important Crown function for which the Solicitor-General takes responsibility as an independent law officer of the Crown. A former Solicitor-General has described this as “a convention, built on the perception that it is undesirable for there to be even an appearance of political decision-making in relation to public prosecutions”.⁵⁷ It is equally important that the grant of legal aid to those accused of crime be controlled by an independent person, as the 2011 Act provides.

[93] Prior to the passing of the 2011 Act the LSA, a Crown entity, was charged with the function of administering legal aid.⁵⁸ The Cabinet Manual states:⁵⁹ “A decision to assign a government activity or function to a Crown entity indicates that the function should be carried out at “arm’s length” from the government”. Bringing the LSA’s functions within the Ministry of Justice removed the “arm’s length” element from the relationship between the Government and the legal aid system. The creation of the new statutory office of Commissioner was a response to that.

[94] We have set out above in [32]–[37] the respective statutory functions of the Secretary and the Commissioner relating to criminal legal aid. Those provisions allocate to the Commissioner the function of determining applications for legal aid, including specifying any maximum grant, and then administering the grant through to and including approval of payment to the provider. The 2011 Act requires the Commissioner to perform those functions independently.

⁵⁷ John McGrath “Principles for Sharing Law Office Power: The Role of the New Zealand Solicitor-General” (1998) 18 NZULR 197 at 207.

⁵⁸ Legal Services Act 2000, s 92. More precisely, from January 2005 until its disestablishment the LSA was a Crown agent pursuant to s 7 of the Crown Entities Act 2004. Under s 103 of the Crown Entities Act, Crown agents must give effect to Government policy when directed to by the relevant Minister. Under s 113 Ministers cannot direct a Crown entity in relation to a statutorily independent function. Any Ministerial directions under the Act can only be made after consultation with the Crown entity, and must be gazetted and tabled in the House of Representatives as soon as practicable after the direction is made (s 115).

⁵⁹ Cabinet Office *Cabinet Manual 2008* at [3.28].

[95] The importance of the Commissioner acting independently from the Secretary in relation to the grant of criminal legal aid was acknowledged by the Minister of Education, when moving the first reading of the Legal Services Bill on behalf of the Minister of Justice.⁶⁰

... The bill disestablishes the Legal Services Agency and makes the Secretary for Justice responsible for administering the legal aid system. The bill also establishes the Legal Services Commissioner as an independent statutory officer within the Ministry of Justice to ensure independent decision-making in the granting of legal aid and the managing of cases in the Public Defence Service.

[96] Nevertheless, the Justice spokesmen for opposition parties expressed concern about the scheme of the Bill, in particular the folding back into the Ministry of Justice of the functions of the LSA and the Legal Aid Review Panel (LARP).

[97] Reporting to the House, the Justice and Electoral Committee said this:⁶¹

Independence

We heard concerns expressed about bringing legal aid services under the responsibility of a Government department, and in particular that decisions could be subject to political interference, thus limiting the independence of the criminal bar. We are satisfied that the new statutory officer created by the bill, the Legal Services Commissioner, would retain the necessary degree of independence. Functions that require independence, such as granting decisions, are defined in the bill as independent decisions of the Commissioner. *It is important that while the Commissioner would be accountable to the Secretary for Justice, the Secretary should not be able to interfere in the Commissioner's performance of his or her independent functions as set out in the bill.* There are a number of instances of a similar structure having been used successfully within the public service, such as the Registrar of Companies and the Director of Public Health.

(Our emphasis.)

[98] Concerns about the independence of the legal aid system again featured in the committee stage of the consideration of the Legal Services Bill, and in its second and third readings. In moving the third reading the Minister of Justice said:⁶²

... Submitters were concerned that the transfer of the legal aid system to the Ministry of Justice may reduce the level of independence in the legal aid system. We thought about this carefully in the policy design, and I am

⁶⁰ (24 August 2010) 666 NZPD 13509.

⁶¹ Justice and Electoral Committee *Legal Services Bill* (15 December 2010) at 6–7.

⁶² (6 April 2011) 671 NZPD 17772.

pleased that the committee agreed that the position of the Legal Services Commissioner will guarantee that independence. ...

[99] Outlining his party's continued opposition to the bill on its third reading, Mr Locke MP referred to the importance of preserving.⁶³

... the necessary independence that a legal services body requires. Putting in a supposedly independent statutory officer, the Legal Services Commissioner, will not necessarily solve that problem.

He added:⁶⁴

The report back from the select committee says: "It is important that while the Commissioner would be accountable to the Secretary for Justice, the Secretary should not be able to interfere in the Commissioner's performance of his or her independent functions as set out in the bill." That is all very well, but, as we have found in other areas, when an officer is reporting to someone above them in the hierarchy their responses are a bit conditioned by the responses of the higher-up officer. That issue was raised as part of the debate on the bill that merged Archives New Zealand and the National Library and put them under the Department of Internal Affairs. Even though there is an independent Chief Archivist, the Chief Archivist has to report to the head of the Department of Internal Affairs. *A similar situation will constrain the real independence of the Legal Services Commissioner, particularly when monetary matters are involved, as they are with legal services and as they are in the case of the Chief Archivist and the Department of Internal Affairs. Budgets can be restricted and so on, so we do not think there is sufficient independence in the system.*

(Again, our emphasis.)

[100] We do not accept the respondents' proposition that the Secretary has power to set maximum grants under s 68 of the 2011 Act. First, we agree with the appellant's argument that the Secretary's function under s 68(1)(a) "to establish, maintain, and purchase high-quality legal services in accordance with the Act" is intended to be a 'macro' level function. This is reinforced by the Secretary's broad power under s 68(2)(c) to determine the method(s) of delivery of legal services. We see this as directed toward the type of arrangement described in s 69, for example providing for services to be provided by the Public Defence Service or bulk funding.⁶⁵

[101] Secondly, the Secretary's functions under s 68(1)(a) must be exercised "in accordance with this Act". That entails reading s 68 in the light of the specific power

⁶³ At 17778.

⁶⁴ At 17778.

⁶⁵ Section 69 is set above in [32].

vested in the Commissioner to fix maximum grants in individual cases under ss 16 and 23, functions which the Commissioner must exercise independently.

[102] Viewed in that light, the 2011 Act cannot sensibly be interpreted as empowering both the Secretary and the Commissioner to fix maximum grants. Rather, the Secretary's functions are to be construed as excluding the power to fix maximum grants in individual cases.

[103] We do not consider the reasons given by the Judge for his conclusion that the Secretary could fix maximum grants withstand analysis.⁶⁶ The Judge accepted the reality that for most cases the fixed fee operated by default. His view was that this was regularised by the Commissioner's "capacity to fix a different maximum grant if circumstances warrant".⁶⁷ For the reasons we have explained, we do not accept that this is consistent with the scheme of the 2011 Act. The Judge also relied on the reference in s 99 to "the Secretary's standard rates for payment ...". This oblique reference is in subpart 4 of the 2011 Act, which contains the provisions dealing with payment for legal aid work. We do not consider it can be construed as showing that Parliament intended the Secretary to have power to fix maximum grants, given the overall statutory scheme. And, if the Secretary were to have such a power, there would be no need for the Governor-General, by Order in Council, to have the power under s 114(1)(b) to make regulations :

prescribing a method or methods for calculating what maximum grant, if any, should be set under a grant of legal aid in respect of [criminal] proceedings ...⁶⁸

[104] It follows that we consider that the Secretary acted unlawfully in implementing the Fixed Fee Policy, in that it is inconsistent with the Commissioner's independent functions under the 2011 Act. By developing and implementing the Policy the Secretary has dictated to the Commissioner how he is to exercise his independent functions. Accordingly, we answer Question 2: 'No, the Fixed Fee

⁶⁶ These reasons are set out above at [78]–[81].

⁶⁷ High Court judgment, above n 1, at [38].

⁶⁸ We deliberately do not consider whether the Policy could lawfully have been promulgated in the form of Regulations pursuant to s 114(1)(b). That is because we did not hear argument on that. We merely observe that it is a nice question, given the Commissioner's independent functions under ss 14, 23 and 28 of the 2011 Act.

Policy is not consistent with the 2011 Act and is not consistent with the Commissioner's independent functions under the 2011 Act'.

Question 3: Does the Fixed Fee Policy unreasonably fetter the Commissioner's discretion under the 2011 Act?

The Judge's reasoning

[105] Simon France J began by identifying the appellant's two, overlapping challenges. First, that the fixed prices scheme is overly prescriptive in terms of what level of control may be imposed on a discretion by the fixing of predetermined rules. Second, that the high threshold set by the Secretary before a fixed fee may be departed from has improperly usurped the Commissioner's independence.

[106] Dealing with the first of those arguments, the Judge accepted the reality that, once the Commissioner has decided to grant legal aid, any case which does not obviously fall into the high cost category will be allocated to the fixed fee category. He did not find that initial allocation incompatible with s 16(2). The statement in s 16(2)(c) that the Commissioner "may specify a maximum grant", means that he need not always do so. The alternative payment methods of complex cases and high cost cases remain available, as does the Commissioner's ability to amend the size of any additional fees.

[107] Further, the Judge considered that the sheer number of legal aid applications is such that one would expect a relatively fixed set of rules. He observed:⁶⁹

It is not realistic to read the Act as mandating a case by case individualised assessment when the number of applications is at this level.

(Footnote omitted.)

[108] Simon France J then turned to consider the rules governing the approval of an application to amend a maximum grant. He set out the rules in much the same way as we have set them out in [70]–[75].

⁶⁹ At [104].

[109] Having done that, the Judge offered this summary of the Policy:

[111] ... First, identify what it is about the case that potentially means it requires a different funding method. These will be:

- (a) two or more of the characteristics identified for summary and indictable cases; or
- (b) the presence of certain characteristics about people involved in the proceedings such as vulnerability, or mental health issues.

[112] Then, show that given these features, the fee is completely inadequate. Alternatively, show that the case requires certain activities or services to be done that are not covered by the fixed fee scheme.

[110] The Judge then noted the appellant's submission as to "the impossibly onerous nature of the tests", particularly the second stage – whether the fee is "completely inadequate" – supported by the available statistics: only 0.4 per cent or 40 of the 10,000 applications had been transferred to the complex case category. Given the anticipated 4.5 per cent,⁷⁰ the appellant put it to the Judge that those numbers reinforced that the tests are too severe, that the Commissioner in reality has no discretion, and the statutory scheme is being subverted.⁷¹

[111] The Judge did not accept these arguments. In general agreement with the respondents' argument, he considered it "far too early to use the figures". He pointed out that they showed that about half the initial amendment applications were approved, but observed "the reality is that these figures mean nothing".⁷²

[112] As for the overall test for moving a case out of the fixed fee category, the Judge accepted that "completely inadequate" is a forbidding expression.⁷³ But he considered it is "only words", and how the test is applied by the Commissioner is a different matter. Again, the Judge obviously considered it was too early to make a judgment:⁷⁴

... [i]t is a matter of assessing these things, at least for a while, on an individual case basis. Perhaps at some point in the future it can be assessed

⁷⁰ The 4.5 per cent is in section 2.3 of the Fixed Fee Policy set out in [70] above: "Complex cases are expected to comprise approximately 4.5% of all criminal cases".

⁷¹ At [113]–[115].

⁷² At [115].

⁷³ At [117].

⁷⁴ At [118].

whether some pattern has emerged, but it is not for the Court to anticipate incorrect decisions by the Commissioner. ...

[113] Nor at this stage did the Judge accept that “there is insufficient flexibility such that the ... Commissioner will consider himself unable to provide what he considers the necessary level of funding”.⁷⁵

[114] Simon France J concluded this part of his decision with these suggestions for immediate improvement in the fixed fee scheme:⁷⁶

- (a) the inclusion of an exceptional circumstances discretion;
- (b) the Commissioner making clearer the criteria or factors that will make the fixed fee “completely inadequate” for the case; and
- (c) more assistance to lawyers as to how the Commissioner will approach the “completely inadequate” aspect of the test.

Appellant's argument

[115] The appellant contends that the Policy, particularly the rules governing amendment to grant (complex cases), unlawfully fetters the Commissioner's discretion. The “particularly complex” and “completely inadequate” test sets too high a threshold. The Policy removes the Commissioner's ability to make a maximum grant of his own determination, is unclear, contrary to the purpose and objects of the Act, and abrogates the unfettered right of providers to apply for an amendment to the grant.

[116] The appellant argues that Simon France J was wrong to hold that it needed to demonstrate the consequences of this harsh test by presenting individual cases and fact situations. Although the consequences are relevant to the relief to be granted, they are not relevant for the purposes of identifying a breach. And the only relief sought by the appellant is a declaration that the Policy is unlawful.

⁷⁵ At [120].

⁷⁶ At [121].

Respondents' response

[117] The respondents submit that policy constraints on discretion can be lawful. The test for considering whether a policy unlawfully constrains discretion is that the authority must always be willing to listen to anyone with something new to say.⁷⁷ While the policy might well state a strong presumption against exercising the discretion, the policy cannot deny the power which the law has conferred.⁷⁸ Though the fixed fees are to apply to the vast majority of grants of legal aid, there remains a genuine opportunity for the Commissioner to consider the unusual or exceptional cases, by amending the grant and transferring it to the high cost or complex case category. Furthermore, the Policy is no different than the guidelines under the 2000 Act. Overall, the respondents submit that the Policy allows the Commissioner sufficient flexibility to amend grants, while at the same time ensuring consistency and fairness in approach.

Our views and decision

[118] The law relating to the fettering of a statutory discretion is accurately and well summarised in Taylor's *Judicial Review: A New Zealand Perspective*.⁷⁹ When a statute confers a discretion on a particular person, it cannot be altered by means other than statutory amendment. The adoption of policy guidance might be administratively convenient for a decision maker, and can advance rule of law values such as consistency and certainty in decision making. However, a policy which guides the exercise of a discretion will inevitably fetter that discretion to some extent. If that policy guidance crosses the line between legally acceptable limits on the exercise of discretion and those which are not legally acceptable, it "feters" the discretion and is unlawful.

[119] The type of discretion fettering alleged by the appellant comes within Taylor's classification "overriding policy". As Taylor points out, addressing

⁷⁷ *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL).

⁷⁸ *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [45] and [48].

⁷⁹ GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at 770.

overriding policy,⁸⁰ reliance on policy is not unlawful, but blind following of policy is. Each case must therefore be decided on its own merits, and it should be open to the person exercising the discretion to find that the policy does not apply in a particular case. If a policy is so phrased to admit of no exceptions, it is unlawful. Any policy must be based on factors and purposes relevant to the power, and must not be unreasonable. Acting pursuant to an overriding policy can also be viewed as a failure to consider relevant factors, for example the merits of the particular case.

[120] The first element of the Policy is the fixed fee (or, to be precise, the schedules setting out various fixed fees). Given the practicalities of operating the legal aid system – the sheer number of legal aid applications – there is no reason why the Commissioner exercising his own powers independently could not establish fixed fees for categories of cases, provided there is an appropriate mechanism(s) for departing from those fixed fees. We agree with Simon France J in these respects.⁸¹

[121] The problem with the current Policy is the combination of a fixed fee for almost every grant of legal aid combined with the lack of any effective room for the Commissioner (or his delegate) to amend the grant, even where the Commissioner considers an amendment is appropriate. We are referring to what Mr Harrison termed in his submissions the “unusually complex and completely inadequate test for an amendment to the grant”. In the absence of at least two of the factors mentioned in the Policy, or a particularly vulnerable complainant, and proof that the fixed fee will be “completely inadequate in reflecting the cost of completing the activity”, the Commissioner has no discretion to move the case out of the fixed fee category. We consider that test sets a threshold so high that it constitutes an unacceptable limit on the exercise by the Commissioner of his discretion.

[122] The extreme difficulty in meeting the test is compounded by the uncertainty of its language: phrases such as “completely inadequate” and “particularly complex”. What, for example, does “completely inadequate” mean? Simon France J thought it seemed to be an expression “designed ... to emphasise that inadequacy

⁸⁰ At 775.

⁸¹ We are referring to the passage cited above at [107].

must be present by a clear margin”.⁸² But, taken literally, some level of adequacy would fail the test.

[123] Although Simon France J’s view differed from the one we have just expressed, it is significant that he included in his judgment a number of suggestions for immediate improvement to the Fixed Fee Policy, and in particular to the test for amendment to grant. We have set those out above at [114].

[124] Having accepted that “completely inadequate” is “a forbidding expression”, the Judge allayed his concerns about it by observing “it is only words; how it is applied is a matter for the Commissioner who independently must assess whether the fee is sufficient to ensure an accused person obtains appropriate legal services”.⁸³ We find it difficult to see how a test can be dismissed as “only words” when it expressly directs the exercise of a power conferred by statute.

[125] In [111] we noted Simon France J’s view that it was “far too early” to use the statistics we have summarised in [110]. While there is some force in the Judge’s view, the fact that only 0.4 per cent of 10,000 cases had been transferred to the complex case category, against the anticipated 4.5 per cent, does suggest that the threshold for transfer is extremely difficult to meet.

[126] It follows that we accept the appellant’s argument that the Policy is also unlawful in that it unreasonably fetters the Commissioner’s discretions under ss 16, 23 and 28 of the 2011 Act. Accordingly we answer Question 3: ‘Yes, the Fixed Fee Policy unreasonably fetters the Commissioner’s discretion under the 2011 Act’.

⁸² High Court judgment, above n 1, at [118].

⁸³ At [118].

Question 4: Was the delegation of the Secretary's powers under the 2011 Act to Mr White when he was also Commissioner an invalid exercise of the Secretary's powers of delegation?

Appellant's argument

[127] The appellant pointed to the careful distinction drawn in the 2011 Act between the role of the Secretary and that of the Commissioner. It referred particularly to s 71(2) which required the Commissioner to act independently when performing certain of his functions.

[128] It follows, in the appellant's submission, that Parliament must have intended that the Secretary and the Commissioner be separate decision-makers.

[129] The appellant's contention is that the requirement for independence amounts to a prohibition, restriction or condition in terms of s 41(4)(a) of the State Sector Act 1988, with the consequence that the Secretary's purported delegation in favour of Mr White was contrary to both the 2011 Act and the State Sector Act. That had the further consequence of rendering Mr White's decision (in exercise of the legal aid functions and powers delegated to him) to implement the Policy invalid.

[130] Section 41 of the State Sector Act was also the source of the Secretary's power to delegate. It provides:

41 Delegation of functions or powers

- (1) The chief executive of a department may from time to time, either generally or particularly, delegate to any other person (being a chief executive or an employee) any of the functions or powers of the chief executive under this Act or any other Act, including functions or powers delegated to the chief executive under this Act or any other Act.

...

- (4) The power of the chief executive to delegate under this section—
- (a) is subject to any prohibitions, restrictions, or conditions contained in any other Act in relation to the delegation of the chief executive's functions or powers; but

- (b) shall not limit any power of delegation conferred on the chief executive by any other Act.

...

Our views and decision

[131] We agree with Simon France J's rejection of these arguments, and for the reasons he gave. Section 70(2) and (3) of the 2011 Act require that the Commissioner be an employee of the Ministry, and that the Commissioner act under the direction of the Minister and the Secretary, except in respect of his independent functions. Thus, quite apart from the functions the Secretary delegated to him, the Act contemplates that the Commissioner will have a dual role necessitating that he both act under direction and act independently.

[132] The Judge considered that sort of dual function is not unusual in Government. He instanced the Commissioner of Police and the Solicitor-General. We agree. Thus, given that the Act contemplates the Commissioner acting under direction in discharging some of his functions, there is no logical reason why the Secretary cannot delegate some of his functions to a person (like Mr White) who had also been appointed Commissioner.

[133] We also agree with the Judge's observation that it was not to be expected, from the statutory scheme, that "the same person would both implement the scheme and take independent decisions under it".⁸⁴ But the issue is not what is desirable as a matter of sound public administration, but what is lawful.

[134] We hold that the delegation of the Secretary's powers under the Act to Mr White was not an invalid exercise of the Secretary's powers of delegation. Accordingly, we answer Question 4: 'Yes, the delegation of the Secretary's powers under the 2011 Act to Mr White was a valid exercise of the Secretary's powers of delegation'.

⁸⁴ At [93].

Consideration of the remaining questions

[135] In answering Questions 2 and 3, we have held that the Policy was unlawful, both in that it involved the Secretary dictating to the Commissioner as to the exercise of the latter's independent functions under the 2011 Act, and because it unreasonably fettered the Commissioner's discretions under ss 16, 23 and 28 of the Act. On a strict view, that renders answers to Questions 5, 6 and 7 which follow unnecessary. We have answered these questions for completeness, and in the hope that our views and decision on them may assist future reconsideration.

Question 5: Is the Fixed Fee Policy unreasonable?

Unreasonableness

[136] A Government policy will be an unreasonable one, in administrative law terms, if it is a policy no reasonable decision maker could have promulgated, or is one which is "outside the limits of reason".⁸⁵ As this Court has observed, "Clearly, the test is a stringent one".⁸⁶

The Judge's view

[137] Simon France J did not accept the argument the appellant put to him on this question, which seems to be much the same as that advanced to us on appeal. He noted that the underlying thesis of the challenge is that the Fixed Fee Policy is not capable of delivering on the Secretary's s 68(1)(a) function of establishing a system that delivers high-quality legal services. It is also contended that the Policy is premised on the erroneous basis that there will be overs, and should be set aside for irrationality.

[138] Simon France J summarised the appellant's evidence, which came in the form of affidavits from 33 criminal legal aid lawyers. He identified and commented on

⁸⁵ *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131 per Cooke P, reiterated in *Wellington City Council v Woolworths (New Zealand) Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545 per Richardson P.

⁸⁶ *Wellington City Council v Woolworths*, above n 85, at 545.

three threads running through that evidence. The first was that the new fee structure will be uneconomic, almost all the deponents indicating that they are reconsidering whether they continue to be involved in criminal legal aid work. While the Judge accepted that remuneration levels “are likely to be low”, his view was that it is too early to say if indeed they will be at a level that drives lawyers away.⁸⁷

[139] The second thread was frustration at the complexity of the scheme, in particular the complex forms required to reapply as a provider. More broadly, there was a challenge to the respondents’ proposition that there will be administrative savings.⁸⁸

[140] The third thread was the flawed reasoning of the fixed fee concept, particularly:⁸⁹

- (a) the illusory idea that cases are uniform; and
- (b) basing the fixed fees on the previous levels of claims, because those claims did not capture the true cost of the services provided, probably by a margin of 10–20 per cent.

On the evidence, Simon France J did not accept that the data used to calculate the fixed fees was flawed. He regarded the deponents’ evidence that the claims they had filed did not reflect actual time expended as not capable of response: “The claims filed are what they are ... the Ministry cannot be criticised for using the actual claims that were made”.⁹⁰

[141] The Judge commented that this part of the appellant’s case was very much underpinned by the ideas that the only goal the Secretary was permitted to have regard to was to purchase high quality legal services, and that in doing so he was basically free of fiscal constraint. The Judge then reiterated his view that the factors the Secretary may have regard to are not so narrow.⁹¹

⁸⁷ High Court judgment, above n 1, at [125].

⁸⁸ At [126].

⁸⁹ At [127].

⁹⁰ At [130].

⁹¹ At [136]–[137].

[142] Simon France J then said this:

[138] However, this is to skirt around what must be the fundamental answer to this challenge. I do not accept that it is the role of the Court on a judicial review to determine if lawyers are being paid enough for the legal aid work they do. It is not in my view a legal question. It would be a legal issue if the rates being offered meant that lawyers of the necessary quality were not available to do the work. But that is not the case; indeed at this point the opposite is true.

[139] Once it is accepted that appropriately qualified lawyers are contracting to provide these services, I accept the defendants' proposition that this then becomes a matter of policy. It is not justiciable. I can observe, as I have, that the rates certainly mean those who predominantly do this are poorly paid compared with lawyers doing other work. But it is certainly not for the Court to venture an opinion on what level of pay they should be getting.

Appellant's argument

[143] On appeal, Mr Illingworth QC again put the nub of the appellant's evidence to the forefront. He did this by drawing on the affidavits of one of the deponents who highlighted these stark facts:

- (a) from 1996 to 2008 criminal aid lawyers received no increase in remuneration;
- (b) in 2008, despite the recommendation of an independent committee that remuneration be increased by 15 per cent, the LSA increased it by only 10 per cent;
- (c) shortly after that, the increase was reduced to 8.5 per cent;
- (d) by reducing rates by 10 per cent, the remuneration under the fixed fee regime will be approximately 2.3 per cent less than the level of remuneration at 1996, disregarding the effects of inflation; and
- (e) inflation between the fourth quarter of 1996 and the fourth quarter of 2011 reduced the value of the New Zealand dollar by 40.1 per cent, so

that \$1.41 was required at the end of 2011 to achieve the same purchasing power as \$1 at the end of 1996.

[144] Mr Illingworth contends that the appellant's evidence establishes overwhelmingly an unsustainable situation for criminal legal aid lawyers. That has not been answered or met by the respondents in any way. In particular, it is not suggested that any attempt was made to assess the impact of the Fixed Fee Policy on legal aid lawyers. While the evidence indicates that the same number of practitioners had reapplied, that is a "limbo" situation. If the fixed fees remain, the level of drop-out is unknown.

[145] The appellant contends that the method of calculating the rates of payment resulted in hourly rates substantially less than those payable under the previous system, and only a fraction of the rates payable to practitioners providing similar services to private clients. The rates are also manifestly inadequate in relation to the amount of work practitioners have to do to meet their legal and ethical obligations to their clients.

[146] That leads the appellant to submit "it is therefore a *deliberately intended feature* of the Regime and the Policy that a large number of necessary legal tasks will either be under-paid or not paid for at all" (appellant's emphasis).⁹²

[147] The appellant poses the question: how could the decision-maker possibly have concluded that the statutory objective of *enhancing* the quality of legal aid services could be achieved by *reducing* the effective rates of payment? (appellant's emphasis)⁹³ It submits that there is simply no rational answer to this question. On the contrary, it is a paradigm example of irrational and unreasonable thinking.

[148] The appellant makes two further specific points. First, the fixed fees are unfair to defendants whose lawyers end up being overpaid (the so-called "overs" in the scheme), because those clients' repayment obligations (in terms of ss 18 and 21 of the 2011 Act) would be fixed at a level above what would otherwise be the

⁹² Appellant's written submissions at [119].

⁹³ Appellant's written submissions at [120].

appropriate fee (based on the Ministry's standards) for the services actually provided. Second, that legal aid clients who are funded through a fixed fee will suffer from an "inequality of arms" relative to the prosecution and to Public Defence Service resourcing.

Respondents' response

[149] The respondents counter that this challenge is not so much to the Policy, but rather to the amount of money available to fund it. The appellant is asking the Court to balance competing policy considerations, namely paying a fair price for legal aid services on the one hand, and managing taxpayer money efficiently on the other. The respondents submit that is not a justiciable issue.

[150] In any case, the respondents argue that there is no basis for the assumption that fixed fees are inherently incapable of securing high-quality legal services. Since the implementation of the Policy, there has been no drop in the number of available lawyers, nor in their seniority. There is no basis to assume those things will change in the future. The Policy is within the scope of the 2011 Act, the level of fixed fee is not arbitrary, extensive consultation was carried out, there is no evidence that the Policy will give rise to prejudice at trial, and the Policy is actively monitored and reviewed.

[151] The respondents' answer to the "inequality of arms" argument includes these points:

- (a) Crown solicitors have a different role at trial than the defence, in particular discharging the onus of proof, and they are also restricted from taking on private prosecution work;
- (b) the Bazley Report acknowledged "that not all legal aid lawyers can be compared with Crown solicitors in terms of the quality of the services they provide and the complexity of the cases they undertake";⁹⁴ and

⁹⁴ Bazley Report, above n 5, at [385].

- (c) the Public Defence Service, though funded by separate appropriation, will have to demonstrate that it is at least as cost-effective as the private bar in disposing of the cases allocated to it.

Our views and decision

[152] The appellant's argument on this question is substantially that which it put to Simon France J. These are the main points:

- (a) It was unreasonable for the Secretary to conclude that the Fixed Fee Policy, by reducing the effective rates of payment to providers, could secure the "high-quality legal services" s 68(1) of the 2011 Act required the Secretary to purchase.
- (b) There was an erroneous assumption that there would be overs as well as unders in terms of payment for legal services under the Policy.
- (c) There was a further erroneous assumption that the Policy would yield to practitioners savings through reduction in administrative tasks.
- (d) The new fixed fee structure is unsustainable for practitioners in private practice in economic terms, and thus also in terms of the ability of those practitioners to meet their legal and ethical obligations to their clients.
- (e) The reduction of legal aid fees would result in an inequality of arms that favoured the Crown and put the defence at a disadvantage.

[153] Our view on this argument substantially accords with that of Simon France J. As the Judge pointed out, the argument proceeds on the basis that the Secretary's sole concern is the purchase of high-quality legal services, and that he is free of fiscal constraints. Regrettably, he is not. Given those constraints, we are unable to view the Policy as unreasonable in administrative law terms.

[154] We also agree with the Judge that this ground of challenge invites the Court to rule on the non-justiciable question whether criminal legal aid lawyers are being paid enough for the work they do.

[155] We answer Question 5: 'No, the Fixed Fee Policy is not unreasonable'.

[156] We add one observation. In the context of this proceeding, in which the appellant sought judicial review of the overall legality of the new Policy, it is neither possible nor appropriate to reach any view as to whether the reduced fixed fees may impact negatively over time on the high-quality legal services the 2011 Act aims to deliver. Nothing we have said in this judgment should be taken as ruling out the prospect that it may be possible, in the future, to demonstrate that the quality of legal services has suffered as a consequence of the new Policy. As we have noted, that Policy affects a significant reduction in legal aid remuneration, from a base that was already set at a low level.

Question 6: Is the Fixed Fee Policy unlawful, in that the Secretary when developing the Policy failed to take into account rights under the New Zealand Bill of Rights Act 1990 (BORA)?

The Judge's view

[157] This is the third topic Simon France J considered under his Issue Two: if fixed fees are permissible, were the Secretary's reasons for adopting a fixed fee model lawful? The Judge did not accept the appellant's argument that the scheme is so poorly funded that defendants will be denied their rights under ss 24 and 25 of the BORA, in particular under s 24(f) (the right to receive legal assistance without cost where the interests of justice so require) and ss 24(d) and 25(e) (the right to adequate time and facilities to prepare a defence and to present it at trial). The Judge noted the appellant's reliance on the decision in *Legal Services Agency v Haslam*,⁹⁵ where Asher J considered that the LSA "must ... pay a practitioner for sufficient time to properly prepare the defence, whatever the nature or gravity of the charge".⁹⁶

⁹⁵ *Legal Services Agency v Haslam* (2007) 18 PRNZ 469 (HC).

⁹⁶ At [35].

[158] The Judge pointed to the difficulty – not faced by Asher J in *Haslam* – that he had no facts to consider, and no individual decisions in relation to those facts to assess. So he was left to review the scheme as a whole and determine if it is generally capable of delivering a defendant's rights under the BORA. He listed six factors which led him to the conclusion that the fixed fee scheme was capable of delivering a defendant's BORA rights, and he did not accept the appellant's proposition that the scheme does not have regard to those rights. He concluded:⁹⁷

... Inevitably there will arise individual cases where the funding is shown to be inadequate. If there are too many of course it may well indicate a systemic problem, but at this point that is not a conclusion I could reach.

The opposing arguments

[159] While the appellant accepts that the Judge had considered the relevant BORA provisions, it contends he had missed the essential point of its argument. That was and is that the Secretary (ie Mr White as his delegate) as decision-maker failed completely or adequately to consider and give effect to the relevant rights, at least as mandatory relevant considerations, when making and introducing the Policy.

[160] The respondents submit that none of the BORA rights referred to by the appellant is directly limited by the Policy, as it affects neither a defendant's eligibility for legal aid (s 24(f)), nor any of a defendant's procedural rights (s 24(c) and (d); s 25(e), (f) and (h)). The respondents submit that once a defendant receives effective representation, the ss 24 and 25 rights will usually be satisfied. The respondents rely here on observations to that end by the Privy Council in *McLean v Buchanan*,⁹⁸ though in the context of the fair trial rights under art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 of the United Kingdom. The respondents contend that the only way in which the fixed fee framework could limit these rights would be through setting remuneration rates so low that legal aid providers are unable or unwilling to comply with their professional and ethical obligations. However, the Ministry of Justice was satisfied that this would not be the case given:

⁹⁷ High Court judgment, above n 1, at [84].

⁹⁸ *McLean v Buchanan* [2001] 1 WLR 2425 (PC) at [30].

- (a) fee levels were set at the average existing grant (excluding very low-cost cases and those assumed to be complex), less 10 per cent;
- (b) the fixed fee framework was expected to save providers substantial administrative time and cost, enabling them to undertake more cases; and
- (c) complex and high cost cases would be remunerated outside the fixed fee framework.

Our views and decision

[161] As Mr Harrison made clear, this is a challenge to the Policy on the ground that the Secretary formulated it without regard to defendants' BORA rights. We do not agree with that criticism. In [16] to [20] above we refer to various parts of the Minister's 8 December 2010 paper to Cabinet, recommending the Policy. That paper refers expressly to s 24(f) of the BORA.⁹⁹ Later in the paper there is this section:

Human rights

- 118. The proposals contained in this paper appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. However, the proposals raise two issues of limits on the rights and freedoms affirmed by the Bill of Rights Act.
- 119. First, the proposals raise an issue with section 24(f) of the Bill of Rights Act that affirms the right of everyone who is charged with an offence to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance. The right to legal assistance is not relevant to family and civil cases as they do not involve someone who is charged with an offence. The proposals do not affect the jurisdiction of the court to order provision of legal aid where justice requires nor do they unreasonably limit the ability of an accused to seek a review of the decision not to grant legal aid. Parliament is also entitled to some latitude to set reasonable means thresholds.
- 120. Second, some may argue that the proposals raise an issue of discrimination under section 19(1) of the Bill of Rights Act. However, the recipients of legal aid reflect the underlying gender and racial profiles of the justice system and individual financial means. Men and Maori are over-represented in the criminal justice system. Women are over-represented in disputes at the Family Court

⁹⁹ Minister's Paper, above n 12, at [35].

and men are over-represented in the civil justice system. The disproportionate effect of the proposals on gender and racial groups flows directly from those separate groups' involvement in the justice system and not from the proposals themselves.

121. I consider that the proposals do not limit sections 19(1) or 24(f), and if there were found to be a limit, it would be justified in a free and democratic society. A final view as to whether the proposals are consistent with the Bill of Rights Act will be possible once the legislation has been drafted.
122. The alternative proposal to impose a user charge of \$200 for criminal legal aid could impose a limitation on the right to receive legal assistance affirmed in section 24(f), by depriving a person of the ability to provide an adequate defence at trial. However, the design of the user charge (e.g. by tailoring payments to an individual's ability to pay) could mitigate its impact.

[162] In the affidavit he affirmed on 2 May 2012, Mr White dealt with the ongoing review of the fixed fee framework. He stated:

64. I want to emphasise that the genuine approach we took to consultation is reflected in the adjustments to the rates where there were particular concerns. We did, within the financial constraints we had, attempt to address those areas where those who responded had particular concerns – on the basis of access to justice, equality of arms and the potential impacts on quality of legal representation. ...

[163] While Mr Harrison accepted that this was a reference to the Ministry considering BORA rights, he made the point that none of these considerations is addressed in the decision itself.¹⁰⁰

[164] So, while Mr Harrison is correct in submitting that BORA rights are not mentioned in the decision to introduce a fixed fee policy,¹⁰¹ or in the Fixed Fee Policy itself, it is clear that those who formulated the Policy were alive to the rights guaranteed in the BORA, and considered whether the Policy infringed those rights.

[165] Although Mr Harrison complains it misses the nub of this challenge, the Judge found there was no evidence that the Policy had breached any defendant's BORA rights. In *Clark v Registrar of the Manukau District Court* this Court had to decide whether legally-aided defendants in criminal proceedings are entitled to

¹⁰⁰ With the sole exception of the recording of submitters' concerns in the "Overview" section of the document "Criminal Legal Aid Fixed Fees: Summary of submissions, response and final decisions" (Ministry of Justice, Wellington, December 2011) at 6.

¹⁰¹ Cabinet's decision on 7 February 2011 to do that is set out in [21] above.

choose the counsel assigned to represent them.¹⁰² In holding that they were not, the Court observed:¹⁰³

... the state assumes a positive obligation under s 24(f) to fund legal assistance for those charged with an offence if the interests of justice so require and the person does not have sufficient means to provide for that assistance. It is for the state to determine the means by which it will meet that obligation. The courts will be reluctant to interfere with the policies adopted in the absence of clear evidence that the purpose of the right is not being fulfilled.

[166] That observation supports the Judge's "wait and see" approach.

[167] Although there appears not to have been any case in this country where the impugned Policy has led to difficulties in court, there have been in Australia. One of those cases was the ruling of Forrest J on 18 February 2013 in *MK v Victoria Legal Aid*.¹⁰⁴ The applicant was one of two people facing two counts of murder. While counsel was funded for the duration of the trial, the instructing solicitor was not.¹⁰⁵ The prosecution and co-accused had instructing solicitors funded for the whole trial. Cut-throat defences were a possibility. The Judge stated "This is a two-person case".¹⁰⁶ On the basis that there was an inequality of arms, and that he was "unable to ensure that MK will receive a fair trial in the current circumstances", Forrest J temporarily stayed the trial "until such time as those circumstances materially change".¹⁰⁷

[168] If any inadequacies in criminal legal aid are sufficiently great to lead to an unfair trial, that will need to be addressed on a case specific basis.

[169] For the reasons we have set out, we consider Simon France J was correct to hold that the Secretary did not fail to take into account BORA rights when developing the Policy. Accordingly, we answer Question 6: 'When developing the Fixed Fee Policy the Secretary did not fail to take into account rights under the BORA, so the policy is not unlawful for that reason'.

¹⁰² *Clark v Registrar of the Manukau District Court*, above n 43.

¹⁰³ At [94].

¹⁰⁴ *MK v Victoria Legal Aid* [2013] VSC 49.

¹⁰⁵ Under Victoria Legal Aid's amended guidelines an instructing solicitor would only be funded for two half days, subject to exceptions not applicable to MK's trial.

¹⁰⁶ At [46].

¹⁰⁷ At [46].

Question 7: Was the Secretary's decision to implement the Fixed Fee Policy unlawful, in that it gave effect to the 10 per cent reduction in fees directed by Cabinet?

The argument in the High Court

[170] In the High Court the appellant challenged the lawfulness of the Secretary's decision on the basis that the Secretary had treated Cabinet's decision explicitly requiring the introduction of the fixed fee framework and (arguably) implicitly requiring overall savings of 10 per cent¹⁰⁸ as binding. In the consultation on the new fixed fee framework, these 'requirements' had therefore been treated by the Secretary as non-negotiables. The consultation focused on the fixed fee amounts allocated to the various steps in a criminal proceeding. The appellant contended that the Secretary, in performing his functions under the 2011 Act, "is an independent statutory functionary and decision maker ... not subject to external direction either governmental or ministerial".¹⁰⁹ In particular, the appellant asserted that the Secretary is not obliged to implement Government policy.

The Judge's view

[171] Simon France J disagreed. He found nothing in the 2011 Act to support the proposition that the Secretary must operate independently in undertaking his functions under the 2011 Act.¹¹⁰ Those parts of the 2011 Act that do deal with independence relate to the Commissioner and are explained by the Commissioner's dual role: some parts of his functions are to be carried out independently, others under direction. Looking outside the 2011 Act, the Judge noted that ss 32 and 33 of the State Sector Act 1988 oblige the Chief Executive of a Department to implement "the policies of the Government" and stipulate the only area in which the Chief

¹⁰⁸ At [48] of the High Court judgment Simon France J noted that the paper regarding the funding of legal aid that went to Cabinet for approval showed projected savings modelled on a 10 per cent reduction in average cost per grant. However, he stated that that figure was never separately identified and the Cabinet decision never expressly refers to, nor mandates, a 10 per cent reduction. It was argued for the respondents that the paper effectively requires a 10 per cent reduction in the average cost per grant because that is the only way that the costings set out in the paper could be adhered to.

¹⁰⁹ High Court judgment, above n 1, at [55], quoting from the appellant's submissions to the High Court.

¹¹⁰ At [57].

Executive has a duty to act independently (decisions on individual employees). The Judge referred to this Court's consideration of those provisions in *Archives and Records Association of New Zealand v Blakeley*.¹¹¹ After referring to s 32 this Court stated:¹¹²

The responsibility of the chief executive to the Minister for the carrying out of the functions and duties of the department, for its general conduct, and for the efficient, effective and economical management of its activities has limits. It cannot, for instance, involve either the Minister or the chief executive interfering with powers conferred on specified officers with the purpose that those officers exercise the powers autonomously and independently.

[172] Given that what is in issue is the establishment of a legal aid system that must meet New Zealand's international and domestic obligations, but which involves annual expenditure for criminal legal aid alone of \$78 million, Simon France J observed:¹¹³

... it would be surprising if the establishment of the scheme was to be undertaken by the Secretary for Justice autonomously and independent of Government policy.

[173] The Judge noted the requirement that the Commissioner operate independently in exercising certain functions separated out from those of the Secretary. In his view, that is an obvious sign that the Secretary is not required to act independently in exercising his statutory functions.¹¹⁴ The Judge referred particularly to the function of establishing a legal aid system which delivers high-quality legal services in accordance with the Act, including the general purposes of providing legal services to people of insufficient means in the most effective and efficient manner. Whilst in doing that the Secretary must recognise the independent statutory functions of the Commissioner and allow them to be performed, "lying behind the Secretary's power is the control of the Minister and more generally of Cabinet especially as exercised through budgetary decisions".¹¹⁵

¹¹¹ *Archives and Records Association of New Zealand v Blakeley* [2000] 1 NZLR 607 (CA).

¹¹² At [22].

¹¹³ High Court judgment, above n 1, at [60].

¹¹⁴ At [63].

¹¹⁵ At [65]. The passage the Judge cited is from *Archives*, above n 111, at [31].

[174] Following from the Judge's finding that the Act does not, and did not intend to, require the Secretary to act independently of Government policy, he found that the claims of illegality based on the Cabinet decisions had to fail.¹¹⁶

Appellant's argument

[175] In this Court, the appellant's first line of argument is that the Cabinet Minute and Ministerial Paper do not direct that the introduction of fixed fees be accompanied by a 10 per cent cut in provider remuneration. The appellant submits that the Cabinet Minute does not even identify this objective.

[176] The appellant's second line of argument relates to the effect of any Cabinet decision. If Cabinet did decide certain things were to happen, the appellant questions to what extent that imposes a duty on any individual or state entity. It asserts that the Cabinet decision could only have (administratively) bound the Minister and perhaps by extension, the Ministry. It did not, and could not, bind the LSA.¹¹⁷

[177] In order to be valid, Mr White's decision to implement the Policy had to have been the outcome of a lawful exercise of the s 68(1)(a) function. The appellant submits that the High Court judgment makes no finding as to whether Mr White ever independently addressed his mind to, far less decided in accordance with, his s 68(1)(a) function. The Judge, in the appellant's contention, accepted these matters were addressed purely and simply by way of implementation of the Cabinet decision.¹¹⁸

[178] The appellant submits that it is a constitutional fundamental that where a statutory duty, function or power is conferred on an individual person or body (a conferee), the conferee must personally, and independently, perform the duty, function or exercise of power. Neither of the two exceptions to this proposition applies here: where the power has been lawfully delegated; where a power to direct

¹¹⁶ At [70].

¹¹⁷ The Cabinet Minute was two months before the enactment of the 2011 Act. Therefore, when the Minute was issued, the 2000 Act still applied and the LSA still existed.

¹¹⁸ Citing the High Court judgment, above n 1, at [50], [51], [55], [60], [67] and [70].

is expressly conferred by statute on some other person or body. Where there is no statutory power to direct, there is no inherent governmental entitlement to direct conferees. The critical point is that the s 68(1)(a) function has been conferred on the Secretary, not on Cabinet. The 2011 Act makes no allowance for the Cabinet or the Minister to direct the Secretary. The s 68(1)(a) function can be contrasted with s 70(3) in that respect. There is no legal source for the claimed power of Cabinet to direct, nor for the Secretary's purported duty to obey.

[179] The appellant's primary position is thus that Mr White erred in fact and in law in treating the Cabinet Minute as binding on him. Even if it were to be viewed as a relevant consideration, or as reflecting Government policy, acting on it without exercising independent judgment would still be impermissible. To hold otherwise, as Simon France J effectively did, is to treat the Cabinet decision as (unlawfully) abrogating s 68(1)(a).

Respondents' response

[180] The respondents contend that Mr White, in implementing the Policy, was implementing Government policy as he was constitutionally required to do. The respondents suggest the appellant confuses the political neutrality of the Public Service with its independence.

[181] The respondents support the Judge's analysis, drawing on what this Court said in *Archives*.¹¹⁹ The legal powers of executive government are exercised by those with power to act, but in practice all significant decisions or actions taken by the executive are first collectively agreed by Cabinet.¹²⁰ Once Cabinet ministers have agreed to a policy initiative, the relevant chief executives, along with their ministries or departments, are responsible to the appropriate ministers for carrying out the functions of the ministry or department "including those imposed by the Act or by the policies of the Government",¹²¹ and the efficient, effective and economical management of the activities of the department.¹²²

¹¹⁹ Above, n 111.

¹²⁰ Cabinet Office *Cabinet Manual 2008* at [5.3].

¹²¹ State Sector Act 1998, s 32(a).

¹²² State Sector Act 1988, ss 32(a) and (b), 34(2); Public Finance Act 1989, s 34.

[182] Cabinet decided to implement the package of criminal legal aid recommendations that had been put to it, including the fixed fee regime. Accordingly, Mr White was obliged to give effect to that policy decision, and there is no requirement in the 2011 Act for him to act independently of Government. As Simon France J correctly held “the normal responsibilities between Chief Executive and Minister apply”.¹²³ The Policy was determined by Mr White in furtherance of the Cabinet decision.

[183] Although the 2011 Act does not confer express power to implement a fixed fee framework (or, for that matter, any other method) for purchasing legal services, express power is not necessary. In the absence of inconsistent law there is no impediment to the formation and execution of such a policy. Accordingly, Mr White was required to implement the Government’s decision to introduce a fixed fee framework, subject to his statutory obligations under the 2011 Act. Contrary to the appellant’s assertion, Mr White satisfied himself that the Policy met those obligations. For example, referring to the 10 per cent reduction in the context of consultation with the legal profession on the proposed fixed fee framework, Mr White deposed:¹²⁴

Thus, the 10% reduction was “set in stone” but only to the extent of the consultation on the immediate proposals. If it had become clear that the policy framework could not actually deliver what the Act requires in terms of establishing, maintaining and purchasing high-quality legal services, officials would have been bound to report that back to Ministers.

[184] Further, Mr White was not prohibited from having regard to a reduction in Government funding for legal aid when deciding how to purchase legal services under the 2011 Act. Cost considerations and high-quality legal services are not mutually exclusive objectives. Finally, the Crown reiterated its submission that legal aid funding is not and cannot be “demand-driven”. Within its BORA obligations, the Government is entitled to place reasonable limits on funding.

¹²³ High Court judgment, above n 1, at [67].

¹²⁴ Affidavit of Stuart Douglas White in Opposition to Application for Judicial Review (2 May 2012) at [28].

Our views and decision

[185] We revert to the appellant's first line of argument, that in approving the fixed fee framework Cabinet did not direct Mr White that it must be accompanied by a 10 per cent cut in provider remuneration.

[186] The appellant is correct in submitting that Cabinet does not, anywhere in the process we have chronicled above in [8] to [22], expressly approve a 10 per cent cut in provider remuneration. The respondents accept this.

[187] The focus of Cabinet's decisions is the Justice votes, and in particular the need to constrain expenditure on legal aid to the existing (as at December 2009) base line. Cabinet was not so much concerned with the detail of how the Minister achieved that, although in February 2011 it did expressly agree to the Minister establishing a new purchase approach involving a fixed fee framework and case management for the most expensive cases, in all cases "with prices set to reduce the cost per grant". When doing that, Cabinet noted that the changes it was approving would produce a reduction totalling \$129.4 million in the forecast operating expenditure on legal aid for the next three years.

[188] We consider it is sufficient that Cabinet approved a new purchase system that involved reduced prices (payments would be a better word), and that Cabinet approved the reduction in legal aid expenditure that required the 10 per cent cut in provider remuneration. We do not accept the appellant's submission that Cabinet needed expressly to approve the 10 per cent cut. Accordingly, we do not accept the appellant's first line of argument.

[189] We turn to the appellant's second line of argument, its submission that Mr White erred in fact and in law in treating the Cabinet decision of 7 February 2011 as binding on him.

[190] Before we consider this, we record that we have not overlooked the appellant's point that the LSA was still in existence, and that the 2011 Act was neither enacted nor in force, at the time of that decision. The appellant's argument

was that the Cabinet decision “did not and could not on its face bind the LSA”. We do not consider that submission is correct. But, even if it is, it leads nowhere. That is because the LSA’s short involvement was in beginning work on developing a new legal aid framework. This work was still in progress when the 2011 Act came into force, disestablishing the LSA.

[191] Was Mr White bound by the Cabinet decision? More strictly, was the Secretary for Justice, whose delegated functions under the 2011 Act Mr White was exercising, bound by the Cabinet decision? The nub of this question is whether the Secretary (or Mr White as his delegate) was bound to implement the 10 per cent cut in provider remuneration.

[192] The starting point is the holding we have already made: that Cabinet did direct the 10 per cent cut, or at least it directed a reduction in expenditure that could only be achieved by making that cut.

[193] As the *Cabinet Manual* provides, “Cabinet is the central decision-making body of executive Government”.¹²⁵ Amongst the items listed in the *Cabinet Manual* for Cabinet decision-making are:¹²⁶

- (a) significant policy issues;
- (b) controversial matters [and]
- (c) proposals that affect the government’s financial position, or important financial commitments

...

[194] The significant reduction in spending on legal aid that Cabinet decided was required came within each of these three items.

[195] As Simon France J noted, s 32 of the State Sector Act charges the chief executive of a department – and thus Mr White – with responsibility to the Minister for:

¹²⁵ Cabinet Office *Cabinet Manual 2008* at [5.2].

¹²⁶ At [5.12].

- (a) the carrying out of the functions and duties of the department (including those imposed by Act or by the policies of the Government); and

...

- (d) the efficient, effective, and economical management of the activities of the department.

[196] There is also s 34 of the Public Finance Act 1989:

34 Responsibilities of departmental chief executives: financial management

The chief executive of a department —

- (a) is responsible to the responsible Minister for the financial management and financial performance of the department; and
- (b) must comply with any lawful financial actions required by the Minister or the responsible Minister.

[197] Our view is that each of those two provisions, and certainly the two in combination, obliged Mr White to implement Cabinet's decision.

[198] We agree with the Judge that this Court's decision in *Archives* supports that conclusion.¹²⁷ In that case an association representing users of the National Archives challenged a reorganisation by the Secretary for Internal Affairs. It involved the Chief Archivist reporting to a general manager rather than directly to the Secretary. The Court was required to determine the limits of the Secretary's powers, as opposed to those of the Chief Archivist. In the course of doing that, the Court referred to both s 32 of the State Sector Act and s 34 of the Public Finance Act.¹²⁸ Particularly pertinent to this appeal is this passage in the judgment in *Archives*, which was delivered by Keith J for a Court comprising Richardson P, Gault, Keith, Blanchard and Tipping JJ:¹²⁹

The legislation presents a balance: the Chief Archivist has important particular powers of a professional character, only some of which are limited by express provisions. The Secretary has related responsibilities concerning the efficient, effective and economical management of the National Archives as an aspect of the administration of the Department for the whole of which he is responsible. The related powers of the Secretary, conferred by ss 4 and

¹²⁷ *Archives*, above n 111.

¹²⁸ At the time, the equivalent of the current s 34 of the Public Finance Act was s 33.

¹²⁹ At [31].

6, must be capable, especially given the wording of s 6, of having an impact or influence on the powers and functions of the Chief Archivist. *Lying behind the Secretary's power is the control of the Minister and more generally of Cabinet especially as exercised through budgetary decisions.* But that impact or influence cannot extend to nullifying or substantially impairing the Chief Archivist's core professional functions of giving instructions about the preservation of records, appraising and requiring archives for deposit, transferring and returning them, making provision for their destruction and facilitating public access. It is against that conclusion about the relative powers of the Chief Archivist and Secretary that we now turn to consider the facts.

(Our emphasis.)

[199] We agree with Simon France J that the Cabinet decision did not cut across an exercise by Mr White of his s 68(1)(a) function:

To establish, maintain and purchase high-quality legal services in accordance with this Act.

[200] What Cabinet's decision did do was require Mr White to discharge that function within budgetary restraints. Cabinet did direct the establishment of a new purchase approach which involved "fixed fees for cases that have more standard cost structures, with prices set to reduce the cost per grant". It was Mr White (and his Ministry team) who, in developing the fixed fees framework and setting the fixed fees, applied a 10 per cent reduction in provider remuneration to achieve the budgetary constraints imposed by Cabinet.

[201] In *Archives* this Court made it clear that the responsibility of the Chief Executive to the Minister under s 32 of the State Sector Act has limits. The Court observed:¹³⁰

It cannot, for instance, involve either the Minister or the Chief Executive interfering with powers conferred on specified officers with the purpose that those officers exercise the powers autonomously and independently.

To similar effect is the penultimate sentence in [31] in *Archives* cited in [198] above.

[202] We summarise. Cabinet's decision effectively, though certainly not explicitly, required the Secretary (in other words, Mr White) when "[establishing the] fixed fees for cases that have more standard cost structures", to cut provider

¹³⁰ At [22].

remuneration by 10 per cent. That did not unlawfully impinge on the s 68(1)(a) function which the Secretary had delegated to Mr White, and was properly treated by Mr White as binding on him.

[203] Consequently, had the Secretary (Mr White) been able lawfully to implement the Policy, the fact that it gave effect to the Cabinet decision requiring the 10 per cent reduction did not render the Policy unlawful. But, of course, we have held that the Secretary's implementation of the Policy was unlawful for two reasons. We accordingly answer Question 7: 'The Secretary's decision to implement the Fixed Fee Policy was not made unlawful because it gave effect to the 10 per cent reduction in provider remuneration'.

Result

[204] We have held that the Secretary acted unlawfully in implementing the Policy, in that it is inconsistent with the Commissioner's independent functions under the 2011 Act. That is because, by the Policy, the Secretary dictates to the Commissioner how he is to exercise his independent functions.

[205] We have held that the Policy is also unlawful, in that it unreasonably fetters the discretions imposed in the Commissioner by ss 16, 23 and 28 of the 2011 Act.

[206] We make declarations accordingly.

[207] We allow the appeal to that extent, but otherwise dismiss it.

[208] The appellant did not make submissions to us on relief. Its written submissions indicated that counsel would address orally on that aspect, but counsel did not do that. Accordingly, we reserve our decision on the grant of any further relief. Either party may apply (by memorandum) if further relief is sought.

[209] As requested by counsel,¹³¹ we reserve the costs of the appeal.

¹³¹ In the case of counsel for the appellant, in their post-hearing memorandum to the Court of 5 November 2012. In the case of counsel for the respondents, in their emailed advice to the Court on 16 November.

Solicitors:
Richard Wood, Auckland for Appellant
Crown Law Office, Wellington for Respondents

| Base Fixed Fees | | | | |
|--|-------|-------|-------|---|
| Disposed at Defended Hearing [summary charge] | | | | |
| Activity | A | B | C | Tasks covered by Fixed Fee |
| All activities up to completion of Defended Hearing (including sentencing) | \$480 | \$550 | \$580 | <p>For:</p> <ul style="list-style-type: none"> ■ Taking instructions, attending the client ■ Receiving and reviewing disclosure (may include preparation of disclosure package – ie, disclosure by defendant) ■ Identifying legal and factual issues ■ Undertaking research ■ Engaging in charge resolution/negotiation ■ Attending to unopposed bail, name suppression, variation, interlocutory etc ■ Attending Registrar's/Judge's List Court/Status Hearing ■ Entering plea ■ Preparing for hearing – cross examination, briefing witnesses, submissions ■ Preparing for sentencing hearing (when matter adjourned to another day for sentence) ■ Obtaining pre-sentencing reports ■ Preparing and delivering sentencing submissions ■ Receiving verdict/sentence ■ Attending defended hearing and sentencing |

| | | | | |
|---|-----------------------|--|--|---|
| | | | | (up to and including 1.5 hours) |
| | | | | <input type="checkbox"/> Any agent fees <input type="checkbox"/> Reporting to client. |
| Defended Hearing / Sentencing Hearing – Additional Hearing Time | \$48 per half hour | | | For: <input type="checkbox"/> Where hearing time for all defended/sentencing hearing attendances exceeds 1.5 hours <input type="checkbox"/> Any agent fees. |

| Additional fixed fees | | | | |
|---|-------|---|---|---|
| Applications for Bail, Name Suppression, Media Coverage, Electronic Bail Monitoring | | | | |
| Activity | A | B | C | Tasks covered by Fixed Fee |
| Opposed application[s] for Bail, Name Suppression | \$225 | | | For: <input type="checkbox"/> Taking instructions, attending the client |
| Electronic Bail Monitoring | \$225 | | | <input type="checkbox"/> Receiving and reviewing disclosure |
| Opposed application[s] for Media Coverage | \$225 | | | <input type="checkbox"/> Identifying legal and factual issues <input type="checkbox"/> Preparing application |
| | | | | <input type="checkbox"/> Liaising with other agencies and family, whanau – for bail applications <input type="checkbox"/> Attending hearing/s <input type="checkbox"/> Receiving decision <input type="checkbox"/> Any agent fees <input type="checkbox"/> Reporting to client Note, fee covers all hearing time. |

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The submitter included the following published material which was removed for copyright reasons:

- **Pundit** – 17/5/13, *I think National just broke our constitution*', by Andrew Geddis.
- **Stuff NZ** – 10/7/13, *'Committees need opposition chairperson'*, by Trevor Mallard, and 27/7/12, *'Select committees must be more autonomous'*, by Sue Kedgeley.
- **NZ Human Rights Council** – 16/5/11, *'Lack of public participation damages parliamentary democracy'*.
- **NZ Law Society** – 26/4/13, Lawtalk, *'SOP sinks mining protestors'*.

