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IMBALANCE IN EXTRADITION: THE BACKING OF WARRANTS PROCEDURE WITH AUSTRALIA UNDER PART 4 OF THE EXTRADITION ACT 1999

RYNAE BUTLER*

I. INTRODUCTION

The little known backed-warrant procedure, set out under pt 4 of the Extradition Act 1999, is a simplified extradition procedure that stems from its use between colonies dating back to imperial times.¹ Today, the backed-warrant procedure accounts for approximately half of all extradition requests to New Zealand, a trend that is unlikely to change in the future.² The procedure relies heavily on the concept of comity. Yet, despite its importance and frequent usage by the judiciary in context of the pt 4 backed-warrant procedure, the term “comity”³ is not explicitly mentioned in the 1999 Act or in its predecessors.

In a major review of the current Extradition Act, which began in 2013, the Law Commission proposed a new Act that will achieve the Commission’s objective to “strike the necessary and appropriate balance between protecting the rights of those whose extradition is sought and providing an efficient mechanism for extradition”.⁴ Under the proposed Act, further simplification of the backed-warrant procedure is recommended. The Commission stated that this would make extradition hearings more efficacious and less complex, particularly in regard to Australia.⁵ It is noteworthy that despite the Court of Appeal’s emphasis placed on comity being the reason for a fast-track procedure with Australia,⁶ the Commission makes little, if any, mention of it. Rather, the Commission refers to ingredients that are often equated with the foundations for comity with Australia, such as trust, close links and the underlying presumption of legal and procedural similarity.

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¹ M Cherif Bassiouni *International Extradition: United States Law and Practice* (5th ed, Oxford University Press, New York, 2014) at 21; and Clive Nicholls and others *The Law of Extradition and Mutual Assistance* (3rd ed, Oxford University Press, Oxford, 2013).

² Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) (Issues Paper) at [2.27].

³ More modern usage of the term comity, includes “judicial comity” and “legal comity” with connotations of deference and respect for the courts in another jurisdiction. It is also said to complement the principles of stare decisis. See for example *Hilton v Guyot* 159 US 113 (1895) at 163–64; and *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 396. Applied in *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) [Tsebe] at [126].

⁴ Issues Paper, above n 2, at [1.8]–[1.9].

⁵ Law Commission *Modernising New Zealand’s Extradition and Mutual Assistance Laws* (NZLC R137, 2016) (Report) at 5. See draft Extradition Bill, cl 7(1)(a).

⁶ See *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [18].

Comity is broadly defined in the non-legal sense as “courtesy and considerate behaviour towards others”.⁷ Its legal roots have been traced to private international law where it acted as a balancing principle that assisted the judiciary and executive to accommodate the doctrine of sovereignty with serving justice to private litigants.⁸ In the context of extradition, the purpose of comity was to allow states to deviate from the principle of sovereignty in order to fulfil the goal of international cooperation in transnational crime.⁹ This notion that comity enables international cooperation does not fit comfortably with the Commission’s reference to comity as interchangeable with international cooperation.¹⁰

Comity in the extradition context is often referred to as “comity of nations” which is defined in the Shorter Oxford Dictionary as being “the courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests.”¹¹ In *Morguard Investments Ltd v De Savoye*, the following definition of comity of nations was approved by La Forest J in the Supreme Court of Canada:¹²

‘Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...

Comity in the context of the backed-warrant procedure may be differentiated from that used in the standard procedure in terms of the level of comity involved. The pt 4, backed-warrant procedure attracts a higher level of comity with Australia as a result of close geographical and historical links, and shared political and economic ideals. It involves mutual respect and trust for the quality and impartiality of their legal system. It is also underpinned by the presumption of legal and procedural

⁷ See *Shorter Oxford Dictionary* <www.dictionaries.com>; and HW Fowler and FG Fowler *The Concise Oxford Dictionary* (Clarendon Press, Oxford, 1929) at 224.

⁸ Thomas Shultz and Jason Mitchenson “Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts” (2016) 12 *Journal of Private International Law* 344 at 348.

⁹ Alexander James Johnston *The New Zealand Justice of the Peace: A Treatise on the Powers, Duties and Liabilities of Magistrates, Coroners & Peace Officers in the Colony: With a Digest of the Law of Evidence and an Appendix of Acts and Forms* (M’Kenzie & Muir, Wellington, 1864) at 288-292. See further Alpheus Todd *Parliamentary Government in the British Colonies* (2nd ed, Longmans, London, 1894).

¹⁰ See Issues Paper, above n 2, at [6.42].

¹¹ See *Shorter Oxford Dictionary* above n 7 and *The Concise Oxford Dictionary*, above n 7 at 224. The usage of “comity of nations” was referred to in context of determining extradition under simplified schemes in *Tsebe*, above n 3, at [126]. See for example *Hilton v Guyot*, above n 3, at 163-64; and *CSR Ltd v Cigna Insurance Australia Ltd*, above n 3, at 396.

¹² *Morguard Investments Ltd v Savoye* [1990] 3 SCR 1077 at 256.

similarity that excuses the requirement to establish a prima facie case.¹³ There is, however, nothing currently to indicate a commonality in the fundamental rights of the requested person, such as the type of treatment to which the person will be subject in the prisons of Australia. Unlike New Zealand, Australia does not have an enforceable Bill of Rights. Whether the concept of comity with Australia ought to be reconceptualised so as to include a human rights component is beyond the scope of this article. Instead, its focus is on two proposals by the Law Commission affecting the pt 4, backed-warrant procedure.

First, the Law Commission proposes the simplification of the backed-warrant procedure, with Australia nominated as a special case.¹⁴ Of particular interest, is a proposed less onerous test for Australia in meeting the criteria for an extradition offence. The Commission's intention is to remove the requirement for double criminality, based upon factors underpinning comity with Australia, namely, close ties, trust and a presumption of similarity.¹⁵

The second proposal arises from the Commission's recommendation to shift extradition from an executive to a judicial process.¹⁶ This entails giving more emphasis to the role of the judiciary and less to the Minister in considering all of the grounds for refusing surrender¹⁷ as well as increasing the breadth of grounds on which the judiciary may consider refusing surrender.¹⁸ To this end, a new "unjust or oppressive" provision is proposed based mainly upon the equivalent ground in the Canadian Extradition Act.¹⁹ The Commission considers that the unjust limb of the provision is directed primarily at the risk of prejudice to the requested person in the conduct of the trial itself and oppression limb is directed to the hardship imposed upon the requested person resulting from their personal circumstances.²⁰ The effect of this proposed two-limbed provision is that if established to the requisite high standard, namely, that the injustice or oppression must shock the conscience of the court, the court must, rather than may, refuse to surrender the requested person.²¹

This article examines how these proposed changes will impact on the backed-warrant procedure. It argues that because of unchallenged assumptions about

¹³ See Issues Paper, above n 2, at [6.43]; Paul O'Higgins "Extradition within the Commonwealth" (1960) 9 ICLQ 486 at 487; and *Bates v McDonald* (1985) 2 NSWLR 89 [*Bates*] at 98 per Samuels JA.

¹⁴ See Issues Paper, above n 2, at [6.21]; and Report, above n 5, at [7.17].

¹⁵ Issues Paper, above n 2, at [6.23]; and Report, above n 5, at [7.25].

¹⁶ Report, above n 5, at 6.

¹⁷ At [5.11]-[5.17]; and [13](b)(i)-(ii).

¹⁸ Report, above n 5. See draft Bill, cl 20(e).

¹⁹ Report, above n 5, at [5.6(e)].

²⁰ At [5.6(e)].

²¹ At [5.6(e)]. This is the requisite standard in Canada. See *United States v Burns* 2001 SCC 7, [2001] 1 SCR 283 at [60]; *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at [35] and [63]; and *Canada v Schmidt* [1987] 1 SCR 500 at 522 cited in Report, above n 5, at 37.

comity, namely the degree of mutual respect and trust shown as well as the degree of similarity that exists, there are good reasons for re-examining what the Commission proposes under further simplification of the backed-warrant procedure, a question neglected in extant literature.²² At the same time, the article concludes that the need for further simplification of the backed-warrant procedure is arguable and in any event likely to be thwarted by the proposed new “unjust or oppressive” provision, which paradoxically suggests that the Commission has revised its earlier assumptions about comity with Australia and instead introduced a much stronger human rights provision. It is argued that the Commission’s new scepticism is warranted and accords with Australia’s own emphasis on protecting the interests of the person in the context of the backed-warrant procedure.

II. HISTORICAL ORIGINS OF THE BACKED-WARRANT PROCEDURE

A *Definition*

The backed-warrant procedure, or backing-of-arrest warrants, is the name given to the procedure in which a state is asked to “back”, or endorse, the warrant for arrest of a person.²³ It differs from normal extradition procedures in that it is a less formal, simplified procedure without the requirement to establish a prima facie case before an extradition court in the requested state.²⁴

B *Origins of the Backing-of-warrants Procedure in New Zealand*

The origins of New Zealand’s practice of using backed arrest warrants between colonies dates back to 1843 when the Imperial Parliament enacted the first statute, the Apprehension of Offenders Act 1843 (the 1843 Act), providing for the surrender of fugitives between British possessions.²⁵ New Zealand’s Foreign Offenders Apprehension Act 1863²⁶ (the 1863 Act) was enacted for the sole purpose of providing for surrender (referred to as “deportation”) of the requested person facing alleged felonies as well as indictable misdemeanours²⁷ in the Australasian Colonies

²² The Law Commission’s recommendations for simplification of the backed-warrant procedure were not mentioned in Paul Comrie-Thomson and Kate Salmond “Modernising New Zealand’s Extradition and Mutual Assistance Laws” [2016] NZLJ 81.

²³ It has been suggested that the term “backing of warrants” was first used in the Indictable Offences Act 1848 (UK) 11 & 12 Vict c 42. See EP Aughterson *Extradition Australian Law and Procedure* (Law Book Co Ltd, NSW, 1995) at 236.

²⁴ *Laws of New Zealand* Extradition at [5]. See *Kurtz v Aicken* (1891) 9 NZLR 673 (SC).

²⁵ Apprehension of Offenders Act 1843 (UK) 6 & 7 Vict c 34. Bassiouni, above n 1, at 21; Nicholls and others, above n 1, at 21.

²⁶ Foreign Offenders Apprehension Act 1863 27 Vict c 22. See further Solicitor-General “New Zealand Foreign Offenders Apprehension Act, 1863; (Papers relating to the case of Frederick Gleich)” Untitled, [1880] AJHR A6.

²⁷ Foreign Offenders Apprehension Act 1863 27 Vict c 22, pt III.

(New Zealand, New South Wales, Tasmania, Victoria, South Australia, Western Australia and Queensland and their respective Dependencies).²⁸ It was designed to build on the 1843 Act in order to deal with an influx of criminals escaping from Australia, particularly to the Otago goldfields.²⁹ Although assented to by the Crown, the 1863 Act was held to be ultra vires and repugnant to imperial legislation because it contained no provision that expressly allowed for the Governor-General to keep lawful detention of the surrendered person on the high seas, a passage that was unavoidable in surrendering persons between the Australasian colonies.³⁰ This difficulty was remedied by the enactment of the Fugitive Offenders Act 1881 (UK) which repealed the 1843 Act and applied to New Zealand.³¹ It contained provisions designed to improve the efficacy of extradition governing the return of defendants within the Empire. Part II, of this Act was specifically applied to groups of "British possessions", based upon their contiguity, and designated by Order in Council.³² Until it was repealed by the current Act, the 1881 Act marked the continuation of Commonwealth cooperation through the provision of simplified arrangements and accompanying safeguards with Australia.³³

C London Scheme and Extradition within the Commonwealth

When many former colonies attained independence,³⁴ "A Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth" was adopted in 1966 at a Meeting of Commonwealth Law Ministers in London. Amendment of the 'London Scheme' followed in 1990 and 2002.³⁵ At the 1966 meeting, it was agreed that the Scheme was not a treaty, but informal and similar in character to a multilateral convention,³⁶ creating the basis for Commonwealth countries to enact reciprocating and substantially uniform legislation.³⁷ Importantly, the Scheme did not preclude

²⁸ This Act was intended to broaden the scope of offences provided for in the Apprehension of Offenders Act 1843 (UK) 6 & 7 Vict c 34.

²⁹ John E Martin "Refusal of Assent – A Hidden Element of Constitutional History in New Zealand" (2010) 41 VUWLR 51 at 68.

³⁰ A point previously highlighted by Johnston, above n 9, at 288-292. See also Martin, above n 29.

³¹ Fugitive Offenders Act 1881 (UK) 44 & 45 Vict c 69. *Re Ashman* [1985] 2 NZLR 224 (SC) at 226; and Robert E Clute "Law and Practice in Commonwealth Extradition" (1959) 8 American Journal of Comparative Law 15 at 20. See Fugitive Offenders Act 1881 (UK) (preamble).

³² Section 12. See Clute, above n 31, at 21; and the Fugitive Offenders Amendment Bill 1976 (30-1) (explanatory note).

³³ *In re Tressider* (1905) 25 NZLR 289 (SC) at 290; *R v Hartley* [1978] 2 NZLR 199 (CA) at 214.

³⁴ Nicholls and others, above n 1, at 6.

³⁵ Great Britain Home Office *A Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth* (Cm 3008, 1966). Anthony Aust "The Theory and Practice of Informal International Instruments" (1986) 35 ICLQ 787.

³⁶ Geoff Gilbert *Transnational Fugitive Offenders in International Law : Extradition and Other Mechanisms* (Kluwer Law International, The Hague, 1998) at 42.

³⁷ Ivan A Shearer *Extradition in International Law* (Manchester University Press, UK, 1971) at 55.

special arrangements between Commonwealth countries, enabling Australia and New Zealand to preserve existing simplified procedures (set up in the 1881 Act).³⁸

D Nature of Backing-of-warrants

The continuation of simplified arrangements between Australia and New Zealand under the 1999 Act has been regarded as symbolic of their close links in terms of geographical proximity, shared economic and political ideals and mutual respect and trust for the quality and impartiality of their legal systems.³⁹ Simplified schemes exist where other states are closely linked legally, historically, economically, politically and geographically, such as through the European Arrest Warrant, the Nordic Arrest Warrant and in Southern Africa.⁴⁰

III. CONCEPTUALISING COMITY BETWEEN AUSTRALIA AND NEW ZEALAND

The importance of “comity” between Australia and New Zealand is expressly mentioned in cases decided under the simplified procedure of extradition, beginning with the case of *Police v Thomas*.⁴¹ Comity’s importance has also been emphasised under the backed-warrant procedure of the 1999 Act in *Mailley v District Court at North Shore*⁴² [*Mailley* (CA 2013)] and recently in the *Commonwealth of Australia v B* [*Mercer* (HC 2016)] .⁴³

Nevertheless, judicial views of what comity means have not always been clear, except that in the context of backed warrants, comity is obviously bound up with the perceived similarity of the legal system and procedural safeguards between New Zealand and the requesting country, especially, Australia.⁴⁴ For example, in *Radhi v Manukau District Court* [*Radhi*], Woolford J in the High Court determined that no restrictions to surrender under pt 4 applied to the appellant in light of there being a “high level of commonality between New Zealand and Australia’s legal systems, and thus Australia could be trusted to safeguard Mr Radhi’s rights at trial.”⁴⁵ That judicial

³⁸ R Burnett *The Australia & New Zealand Nexus Annotated Documents* (Australian National University, Australia.1980) at [701.1] and [703.1].

³⁹ See Issues Paper, above n 2, at [6.42]-[6.46]; Paul O’Higgins “Extradition within the Commonwealth” (1960) 9 ICLQ 486 at 487; and *Bates v McDonald* (1985) 2 NSWLR 89 at 98.

⁴⁰ For example extradition in South Africa is governed by the Extradition Act 67 of 1962, and contains a simplified procedure in respect of extradition requests from associated states (see s 12).

⁴¹ See *Police v Thomas* (1989) 4 CRNZ 454 (HC) at 458; and *Bieleski v Police* HC Auckland AP286/86, 28 November 1986.

⁴² *Mailley v District Court at North Shore* [2013] NZCA 266 [*Mailley* (CA 2013)] at [7].

⁴³ *Commonwealth of Australia v B* [2016] NZHC 302 [*Mercer* (HC 2016)] at [20]-[21]; and *Commonwealth of Australia v Mercer* [2016] NZCA 503 [*Mercer* (CA 2016)] at [17]-[18].

⁴⁴ *Mercer* (HC 2016), above n 43, at [20].

⁴⁵ *Radhi v Manukau District Court* [2015] NZHC 3347 [*Radhi*] at [44]. See *Mercer* (HC 2016), above n 43, at 8.

fuzziness on comity is really an assumption of familiarity is well illustrated in *Mercer* (HC 2016) when Nation J said:⁴⁶

The Judge did not expressly refer to the particular comity that existed as between Australia and New Zealand. He did not need to. The issue which he had to consider was the only issue because there was such comity.⁸

In describing the pt 4 procedure, the Court of Appeal in *Mailley* (CA 2013) simply added: “[i]t reflects the high degree of comity between New Zealand and Australia.”⁴⁷

Without a precise definition of comity being agreed upon, it is difficult to know how the judiciary or executive conceptualises or weighs comity when considering grounds for refusing surrender. All that can be gleaned from cases such as *Radhi*, is that because of comity, the grounds for refusing surrender entail a high bar, it being core to the assumption that despite delay the requested person will receive a fair trial.⁴⁸

IV. BACKING-OF-WARRANTS UNDER PT 4 OF THE 1999 ACT

A *Nature*

The backed-warrant procedure in pt 4 of the 1999 Act⁴⁹ sets out a process in which New Zealand is asked to back the overseas warrant for arrest and it applies to extradition requests from Australia and any country designated by Order in Council on the recommendation of the Minister of Justice.⁵⁰ The Minister must be satisfied as to the circumstances in which a person may be arrested in the issuing country, which include similarities to the process in New Zealand, its ability to extradite to New Zealand (reciprocity), its speciality rules (the rule that “once extradited, a person cannot be detained and tried in the requesting country for an offence that is different to the one to which the extradition request related”⁵¹) and rules about surrender to a third country.⁵²

⁴⁶ *Mercer* (HC 2016), above n 43, at [20]. In *Mercer* (CA 2016), above n 43, the Court of Appeal did not mention Nation J’s interpretation of comity but referred to its own undefined usage of the term in *Mailley* (CA 2013), above n 42 at [17]-[18]. In the second appeal, there was no mention of comity at all. See *Mailley v District Court at North Shore* [2016] NZCA 83 [*Mailley* (CA 2016)].

⁴⁷ *Mailley* (CA 2013), above n 42, at [7] per French J.

⁴⁸ *Police v Thomas*, above n 41, at 457; and *Mercer* (CA 2016), above n 43, at [18].

⁴⁹ For a summary of the statutory scheme, see *Mailley v Police* [2011] 3 NZLR 223 (HC) at [21]-[38] per Ellis J.

⁵⁰ Currently only the United Kingdom and the Pitcairn islands have been designated. Extradition Act 1999, ss 39 and 40. See Issues Paper, above n 2, at [2.15].

⁵¹ Extradition Act 1999, s 30(5)(d). See Issues Paper, above n 2, at [2.12].

⁵² Extradition Act 1999, s 40(3)(c)-(d). See Report, above n 5, at [7.15].

B Conditions

(i) Extraditability

(a) “Extraditable person”

Under s 3 of the 1999 Act, a person is an “extraditable person” in relation to an extradition country if:

- (a) the person is accused of having committed an extradition offence against the law of that country; or
- (b) the person has been convicted of an extradition offence against the law of that country and—
 - (i) there is an intention to impose a sentence on the person as a consequence of the conviction; or
 - (ii) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served.

(b) “Extradition country”

Australia and all designated countries are defined as “extradition countries” for the purposes of the relevant part of the Act.⁵³

(c) “Extradition offence”

An “extradition offence” is defined in s 4 of the 1999 Act.

Double criminality

The principle of double criminality is preserved in s 4(2). The principle requires that an alleged crime for which extradition is sought be punishable in both the requested and requesting states.⁵⁴ The purpose of double criminality is to safeguard the liberty interests of the requested person by ensuring their surrender will not be followed by prosecution in another country for conduct that would not constitute a criminal offence in the requested country.⁵⁵

Conduct rule

In determining whether the statutory definition of an “extradition offence” is met, the expression “conduct constituting an offence” under s 5 means that the focus is on the conduct of the requested person rather than the crime alleged to have been committed.⁵⁶ Sections 4 and 5 of the 1999 Act reflect a modern approach in requiring that the conduct in question be, either in total or part, punishable under the laws of both the requesting and requested state (the conduct rule).⁵⁷ This

⁵³ Extradition Act 1999, s 2(1).

⁵⁴ Issues Paper, above n 2, at [5.13]; see also Aughterson, above n 23, at 59-60; Shearer, above n 37, at 137-138; Bassiouni, above n 1, at 494; and Anne Warner La Forest *La Forest's Extradition to and from Canada* (3rd ed, Canada Law Book, Ontario, 1991) at 52-53.

⁵⁵ *MM v United States of America* 2015 SCC 62, [2015] 3 SCR 973 at [174].

⁵⁶ *Plakas v Police* HC Auckland, CIV-2008-404-2412, 11 June 2008 at [23].

⁵⁷ *Plakas v Police*, above n 56; and Issues Paper, above n 2, at [5.15].

contrasts with the more restrictive approach that required substantial correspondence between the offences in each country.⁵⁸ The broader view accords with the London Scheme and the United Nations Model Treaty on Extradition.⁵⁹

Penalty threshold

Under s 4 an "extradition offence" contains a seriousness threshold of a minimum of twelve months' imprisonment punishable under the law of an extradition country in relation to both incoming and outgoing requests for extradition (s 4(1)(a)-(b)). This threshold accords with Australia and the United Kingdom and is within the parameters set by art 2(2) of the United Nations Model Treaty, however it is half that used by Canada⁶⁰ and the London Scheme.⁶¹ It means that a requested person may be subject to extradition under the standard and backed-warrant procedure on the basis of a relatively minor offence.⁶² In the case of the backed-warrant procedure this problem is said to be obviated because of the high level of trust that is accorded Australia and other designated countries.⁶³ Further, the trivial nature of the offence is currently one of the grounds by which the court may refuse surrender.⁶⁴

Speciality

The principle of speciality is also preserved under the backed-warrant procedure by virtue of the Minister's discretion to refuse surrender.⁶⁵

Standard of evidence

The usual requirement for extradition in Commonwealth countries, namely prima facie evidence of the requested person's guilt, has been removed under the pt 4 procedure and replaced with a requirement that the requesting state produce an arrest warrant.⁶⁶ Removal of the prima facie case standard is a result of comity.⁶⁷ This is the main point of difference between the backed-warrant procedure and the standard procedure of extradition under pt 3 of the 1999 Act.

⁵⁸ Issues Paper, above n 2, at [5.15]; and Aughterson, above n 23, at 61. See also Gavan Griffith and Claire Harris "Recent Developments in the Law of Extradition" (2005) 6 Melbourne Journal of International Law 33 at 38–41, citing *Cabal v United Mexican States* (No 3) [2000] FCA 1204, (2000) 186 ALR 188; and *Dutton v O'Shane* [2003] FCAFC 195, (2003) 132 FCR 352.

⁵⁹ London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), cl 2; and Model Treaty on Extradition GA Res 45/116, A/Res/45/116 (1990), art 2(2)(b). See Issues Paper, above n 2, at [5.16].

⁶⁰ Extradition Act SC 1999 c 18, s 3.

⁶¹ London Scheme, above n 59, cl 2(2); see Issues Paper, above n 2, at [5.27].

⁶² For example, unlawful assembly, attracts a maximum 12 months' imprisonment, under the Crimes Act 1961, s 86.

⁶³ Issues Paper, above n 2, at [5.29]-[5.32].

⁶⁴ At [5.24]. See Extradition Act 1999, s 8(1).

⁶⁵ Section 40(3)(d).

⁶⁶ Section 45(5).

⁶⁷ Issues Paper, above n 2, at [6.8]-[6.10].

C Procedure

Part 4 of the 1999 Act prescribes a procedure for considering requests for surrender. It differs from standard extradition by narrowing the procedural requirements, again on the basis of comity and the underpinning presumption of similarity of legal and procedural systems with Australia and other designated countries. Consequently, there are fewer procedural safeguards and formalities in place than are found in standard extradition.

(i) Pre-Arrest

The process of securing extradition to Australia or a designated country under pt 4 of the Act involves several important steps. The procedure commences when the appropriate authority in the requesting country (usually the Australia Federal Police, in the case of Australia) makes a request for an arrest warrant to the appropriate authority in New Zealand.⁶⁸ In essence, the initial process of securing surrender under pt 4 involves police-to-police cooperation although the 1999 Act is silent on who is responsible for the receipt and vetting of backed-warrant requests as well as the decision to initiate proceedings.⁶⁹ In practice, preparation of documents, affidavits, and the application for surrender to a District Court Judge (DCJ) is made by the New Zealand Police, on behalf of the requesting state.⁷⁰ This exemplifies the simplification of the process compared to the standard procedure which involves the diplomatic channel and the Minister of Justice in its initial stages.⁷¹

(ii) Endorsement of overseas warrant (s 41)

The DCJ may endorse a warrant for arrest under s 41 if, based on affidavit evidence (authenticated in compliance with s 78 of the 1991 Act), it is satisfied of such matters as: the identity of the requested person; the person being in New Zealand or is on his or her way here (s 41(1)(a)); and the warrant for arrest being issued, including the lawful authority it is issued under (s 41(1)). There must also be reasonable grounds to believe that the person is an "extraditable person" in relation to an "extradition country" and "extradition offence" (s 41(1)(b)). The "prescribed form" of endorsement, Form EA6, is found in the Extradition Regulations.

⁶⁸ In practice, Interpol's national bureau in New Zealand receives and vets the documents and original overseas warrant before passing detailed instructions to district or business group staff.

⁶⁹ *Mailley* (CA 2013), above n 42, at [8]; and Issues Paper, above n 2, at [4.18]-[4.19].

⁷⁰ Extradition Act 1999, s 41. See *Mailley v Police*, above n 49, at [21]-[38]; and Issues Paper, above n 2, at [4.18]-[4.19]. In *Mailley* (CA 2013), above n 42, at [43] the Court of Appeal held that the appropriate applicant is the requesting country rather than the New Zealand Police but that error in the naming of the applicant was a technicality which could be overcome and did not lead to prejudice.

⁷¹ See Extradition Act 1999, s 18. See also Issues Paper, above n 2, at [2.24].

(iii) Provisional warrant (s 42)

Assuming endorsement of the overseas warrant, Interpol are notified so an "arrest border alert" can be entered to prevent the requested person from fleeing.⁷² Where there is urgency, s 42 allows for the issue of a provisional arrest warrant.

(iv) Powers of the Court (s 43)

In contrast to the sui generis standard procedure, the backed-warrant procedure is aligned to the Criminal Procedure Act 2011. The Criminal Procedure Act's summary proceeding for what it terms Category 2 offences is applied to the backed-warrant process.⁷³ Trial for Category 2 offences involve District Court Judge alone proceedings unless an order is made on application by either side to the High Court.⁷⁴ A District Court has all the usual powers such as issuing of summons to witnesses, remand of the defendant, adjournment and stay of proceedings.⁷⁵

(v) Procedure following arrest

Whether the person is arrested on a warrant endorsed under s 41 or a provisional warrant under s 42, the person must "unless sooner discharged, be brought before a court as soon as possible" (s 44(1)). Section 44(2) sets out terms by which bail may be granted following arrest under the Bail Act 2000 (s 44(3)). Section 44(4) deals with time-frames when the person is under a provisional arrest warrant. If a reasonable time has elapsed for the endorsement of the warrant under s 41, "...the court may, and must if a reasonable time has elapsed for the endorsement of the warrant, order that the person be discharged."⁷⁶ Once a warrant has been endorsed and the Police have arrested the person sought, usually the matter is transferred to the relevant Crown Solicitors who initiate and oversee the court proceedings.⁷⁷

(vi) Eligibility for surrender hearing (s 45)

Section 45 provides for the determination by the DCJ of the eligibility of the requested person for surrender in relation to the offences for which surrender is sought. Before ordering surrender of the requested person is possible, pursuant to s 45(2) the court must be satisfied:

⁷² New Zealand Police "Extradition to Part 4 Countries" (Obtained under Official Information Act 1982 Request to the New Zealand Police).

⁷³ Extradition Act 1999, s 43(1)(a).

⁷⁴ Criminal Procedure Act 2011, s 70.

⁷⁵ District Court Rules 2014; and District Court Act 2016.

⁷⁶ Extradition Act 1999, s 44(4)(b).

⁷⁷ *Mailley v Police*, above n 49, at [34]. Extradition Act 1999, ss 44-45. These provisions stipulate the procedure following arrest.

- A warrant for the arrest of the defendant is produced to the court and has been endorsed under s 41(1);
- That the defendant is an “extraditable person” (as defined in s 3), in relation to the extradition country;
- There is an “extradition offence” (as defined in s 4) in relation to the “extradition country” (pursuant to s 39); and
- There are no mandatory or discretionary restrictions under ss 7 and 8, respectively (s 45(3)(a)-(b)).

In determining whether the requested person is an “extraditable person”, defects in the original warrant will not necessarily render the endorsed warrant invalid particularly if the defect is without substance and can be overcome by the existence of supporting documentation.⁷⁸

(vii) Post eligibility hearing (s 46)

(a) Detention

Assuming that the court is satisfied that the person is eligible for surrender, the court must: issue a warrant for the requested person’s detention pending their surrender (s 46(1)(a)); inform the person of time frames relating to their surrender, during which time the person may lodge an appeal or apply for a writ of habeas corpus (s 46(1)(b)).

(b) Bail

The court may grant or refuse bail (s 46(2)) which is the exercise of a judicial discretion governed by a mixture of the provisions of both the Bail Act 2000 and the Extradition Act 1999 (s 46(3)). Flight risk has been found to be highly relevant in the Court’s assessment of there being a just cause to deny bail.⁷⁹

Assuming that the court grants bail to the requested person, pursuant to s 46(3) of the 1999 Act the court may impose any conditions of bail that it thinks fit in addition to any conditions that it may impose under section 30(1), (2), and (4) of the Bail Act 2000 (s 46(3)) including conditions for estreatment of bail bond.⁸⁰ In the event that the requested person is not found eligible for surrender, s 46(4) provides for their discharge subject to s 70(1).

(viii) Surrender Order (s 47)

Assuming a warrant for the detention of the requested person is issued under s 46(1)(a), s 47 obliges the court to immediately make a surrender order unless it refers

⁷⁸ *Smith v Police* [2014] NZHC 2676 at [6]; and *Smith v Police* [2014] NZHC 1577.

⁷⁹ *Archer v Police* HC Tauranga CRI-2007-463-143, 22 November 2007 at [4] and [10].

⁸⁰ *R v Morgan* HC Wellington CRI-2004-485-110, 17 March 2009 at [13]. For example *Fifita v New Zealand Police* HC Auckland CRI-2006-404-145, 12 May 2006; and *R v PGD* HC Wellington CRI-2005-085-5692, 28 April 2006.

the person's case to the Minister under ss 48(1) or 48(4). Section 47(2) deals with time restrictions and the appellant's right to appeal or apply for habeas corpus before a surrender order takes effect.

(ix) Referral of case to Minister (s 48)

Once the criteria for eligibility for surrender are met the court may refer the case to the Minister either because it considers that the exceptions in ss 7 or 8 may apply (s 48(4)(a)(i)) or "because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period" (s 48(4)(a)(ii)).

The word "or", creates two distinct statutory tests, either of which needs to be established before the DCJ may refer a case to the Minister.⁸¹ It should be noted that unless the statutory tests are met, the DCJ is not required to consider the purpose of the Minister's role, including the wider discretion available to the Minister and his power to seek undertakings from Australia.⁸²

In the rare case of a referral by the court to the Minister under s 48(4) the Minister must determine whether the person is to be surrendered, having regard to the matters contained in s 30.⁸³ The Minister has a comparatively broader discretion at the end of the process in deciding whether an order for surrender should be issued (s 30(3)(d)-(e)).⁸⁴ Section 48(4)(a)(ii) also allows the Minister to merely defer extradition where because of present circumstances, "it would be unjust or oppressive to surrender the person before the expiration of a particular period."

The Court is also required to refer the case to the Minister if the requested person is a New Zealand citizen, unless the requesting country is Australia or the requesting country is a designated country in terms of the legislation.⁸⁵ There are four other circumstances in which the court must refer the case to the Minister irrespective of whether the requesting country is Australia. They arise where if the person were to be surrendered it appears to the court that the requested person would be in danger of: (i) being subject to torture,⁸⁶ or (ii) the death penalty;⁸⁷ or (iii) double-

⁸¹ *Radhi*, above n 45, at [31].

⁸² At [30].

⁸³ See *Mailley* (CA 2013), above n 42; *Mailley* (CA 2016), above n 46; *McGrath v Minister of Justice* [2014] NZHC 3279 at [6]; and *Radhi*, above n 45.

⁸⁴ See *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA) at [49]; *Mercer* (CA 2016), above n 46; *Mailley* (CA 2013), above n 42; and *Radhi*, above n 45, at [2].

⁸⁵ Extradition Act 1999, s 48(3)(a)-(b).

⁸⁶ Section 48(1)(b)(i).

⁸⁷ Section 48(1)(b)(ii).

jeopardy;⁸⁸ or (iv) where it appears to the court that another request has been made under the 1999 Act for the person's surrender and a final decision on the surrender of the person in relation to that request has not been made.⁸⁹

(x) Appeal (s 68)

Section 68 of the Extradition Act 1999 applies to both the standard and backed warrant procedure under ss 24 and 45 respectively.⁹⁰ Parties have a right of appeal, by way of case-stated and/or judicial review, in relation to decisions on eligibility for surrender.⁹¹ Arrest warrants may be challenged by habeas corpus applications where the Crown is required to justify the detention of a prisoner. Assuming the Court or the Minister orders surrender, there is a 15-day window in which to apply for habeas corpus or lodge an appeal.⁹²

(xi) Ministerial Determination

Where the case has been referred to the Minister, s 49 obliges the Minister to make a surrender determination and enables the Minister to seek any undertakings by the extradition country (s 49(2)). If the Minister determines in favour of surrender, ss 50 and 51 cover provisions for the making, varying or cancelling of a surrender order, time restrictions, right to appeal, and application for a writ of habeas corpus.

(xii) Outgoing requests from New Zealand

Extradition from Australia to New Zealand is represented by pt 3 (ss 28-39) of the Australia's Extradition Act 1988 (Cth) (1988 (Cth) Act), a backed-warrant procedure analogous to extradition within Australia requiring only an endorsed warrant.⁹³ There is no requirement: (a) to make a formal request for extradition; (b) to produce supporting documents characteristic of the standard process; (c) meet the double criminality requirement; or (d) meet a particular threshold of seriousness for any offence.⁹⁴ Nor is there a requirement to provide prima facie evidence of guilt.⁹⁵ There are however, judicial restrictions on surrender under s 34(2) of the 1988 (Cth) Act. Unlike New Zealand's backed-warrant procedure, there is no habeas corpus

⁸⁸ Section 48(1)(c)(iii).

⁸⁹ Section 48(1)(d).

⁹⁰ Section 68(1).

⁹¹ *Mercer* (HC 2016), above n 43, at [2];.

⁹² Extradition Act 1999, ss 47(2) and 50(2). See *Mercer* (CA 2016), above n 46.

⁹³ *New Zealand v Moloney* [2006] FCAFC 143, (2006) 154 FCR 250 [*Moloney* (FC)]; *New Zealand v Johnston* [2011] FCAFC 2 at [10]. The current process of securing extradition within Australia is governed by Pt 5 of the Service and Execution of Process Act 1992 (Cth).

⁹⁴ *Moloney* (FC), above n 93, at [28].

⁹⁵ At [28].

provision in Australia's extradition legislation. Another difference is that s 34(5) allows for a review of the magistrate's decision based upon a de novo hearing.

D Restrictions

(i) Judicial discretionary restrictions on surrender

Under s 45(4) of the Extradition Act 1999 courts have a discretion to determine that a person who might otherwise be eligible for surrender is not eligible because discretionary restrictions in s 8 apply. These restrictions safeguard the interests of the requested person facing prosecution and punishment for crimes alleged to have occurred in the requesting country and ensure that the court's process is not abused.⁹⁶ However, unlike standard extradition under pt 3, comity plays a more definitive role in determining surrender under pt 4, as illustrated in some of the cases discussed below. Its impact on these restrictions is not clear. The question whether comity should be determinative, requires some balancing of the competing interests between the growing importance of human rights and New Zealand's commitment to Australia to make surrender as swift as possible.

(ii) Section 8(1) "unjust or oppressive" provision

Under s 8(1) a discretionary restriction may exist on the basis of one or more of three statutory grounds:

- The trivial nature of the case; or
- If the person is accused of an offence, the fact that the accusation against the person was not made in good faith in the interests of justice; or
- The amount of time that has passed since the offence is alleged to have been committed or was committed, and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

The onus is on the accused to prove to the court on the balance of probabilities that circumstances exist to warrant the intervention of a judicial discretion to be exercised in favour of the accused.⁹⁷

In similar fashion to cases determined under the 1881 Act, "the amount of time passed" (delay) under s 8(1)(c) has continued to be the category most often considered by the courts. While delay is relevant, it is not determinative. In order for delay (or whatever statutory ground is relied upon) to be found oppressive or unjust, the courts require a clear nexus between the ground relied upon and the

⁹⁶ See Report, above n 5, at [5.6(e)].

⁹⁷ *Wolf*, above n 84; and *Mercer* (CA 2016), above n 46, at [13].

“circumstances of the case”.⁹⁸ While the personal circumstances of the person (such as health issues⁹⁹ and settling into a new life¹⁰⁰) can come within the statutory phrase “circumstances of the case”, it is well established that the personal circumstances of the person are generally outside the scope of a s 8 inquiry because of the nexus required between those personal circumstances and the issues of delay.¹⁰¹

In regard to the nexus required, the Court of Appeal in *Mailley* (CA 2013), determined that health issues alone would not have achieved an outcome in favour of the appellant under s 8.¹⁰² However, it thought that the appellant was on stronger ground if he raised his health issues under s 48(4)(a)(ii) as a basis for referral to the Minister.¹⁰³ In *Smith v Police*, Smith was refused leave to appeal because the requisite nexus between the delay and the psychological stress was absent, and even if there had been such a nexus, the psychological stress was of insufficient degree to satisfy the test under s 8(1)(c).¹⁰⁴ In that case there had been a significant and unexplained delay of four years between the initial decision to prosecute the accused for sexual offences against children, and the obtaining of a warrant for his arrest in the United Kingdom and the request for his extradition from New Zealand to the United Kingdom.¹⁰⁵ The court did not consider the issue of responsibility for the delay¹⁰⁶ or whether delay is unexplained¹⁰⁷ determinative; the relevant question was the consequence of the delay and whether it made it unjust or oppressive to order surrender of the requested person.¹⁰⁸

As far as the meaning ascribed to the term “unjust or oppressive” is concerned, Lord Diplock’s definition given in the decision *Kakis v Government of Cyprus* [*Kakis*] continues to be relied on in the New Zealand Court of Appeal, albeit somewhat

⁹⁸ *Wolf*, above n 84, at [60] per French J; and endorsed in *Mercer* (CA 2016), above n 46, at [35]; *Mailley* (CA 2013), above n 42, at [48]; *Smith v Police* [2014] NZHC 2676 at [9]; and *Smith v Police* [2014] NZHC 1577 at [39]-[45].

⁹⁹ *Mailley* CA 2013, above n 42.

¹⁰⁰ *Smith v New Zealand Police* [2014] NZHC 1577; and *Smith v New Zealand Police* [2014] NZHC 2676.

¹⁰¹ *Mailley* (CA 2016), above n 46, at [39]; and *Wolf*, above n 84, at [58]. See also *Smith v New Zealand Police* [2014] NZHC 2676 at [8].

¹⁰² At [48].

¹⁰³ *Mailley* (CA 2013), above n 42 at [49].

¹⁰⁴ *Smith v Police* [2014] NZHC 2676 at [8].

¹⁰⁵ At [9].

¹⁰⁶ At [31].

¹⁰⁷ At [9].

¹⁰⁸ At [9].

inconsistently.¹⁰⁹ Lord Diplock defined “unjust” and “oppressive” in the context of s 8(3) of the Fugitive Offenders Act 1967 (UK) as follows:¹¹⁰

Unjust I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, ‘oppressive’ as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; that there is no room for overlapping, and between them they would cover all cases where to return him would be fair.

The passage has been cited with approval in both Australian¹¹¹ and New Zealand¹¹² courts.

The recent case of *Commonwealth of Australia v Mercer* [*Mercer*]¹¹³ illustrates the indeterminate impact of good neighbourliness on these restrictions. The Court of Appeal allowed an appeal against the decision of the High Court that upheld the District Court decision to refuse Mercer’s surrender to Australia. Mercer was sought for extradition to Australia in relation to charges of indecent treatment of a boy under 17 years.¹¹⁴ The crimes were alleged to have occurred between 1985 and 1986 in Queensland and Mercer was subject to an Australian arrest warrant issued on 31 October 2013. The Court of Appeal determined that on “the balance of possibilities” (equated with likelihood), Mercer failed to meet the unjust limb of s 8(1)(c).¹¹⁵ In reaching its conclusion that surrender of Mercer would not be unjust, the Court emphasised what it perceived to be similarity in the legal and procedural system between New Zealand and Australia and the lack of evidence produced by Mercer that met the high threshold required to meet the s 8(1)(c) unjust limb.¹¹⁶

In regards to the oppressive limb of s 8(1)(c), the Court stressed the importance of oppression linking to the prospect of surrender.¹¹⁷ While it accepted that delay may in some cases be relevant to whether there is oppression,¹¹⁸ it viewed this as a

¹⁰⁹ *Mercer* CA 2016, above n 46, at [33]. See also *Kim v Prison Manager, Mt Eden Corrections Facility* [2015] NZCA 2.

¹¹⁰ *Kakis v Government of Cyprus* [1978] 1 WLR 779 (HL) at 782-783 per Diplock J.

¹¹¹ For example, *Perry v Lean* (1985) 39 SASR 515 at 520; *Ingram v Attorney-General (Cth)* [1980] 1 NSLWR 1990 at 206; in *Moloney* (FC), above n 93. See also Aughterson, above n 23, at 159.

¹¹² As articulated in *Perry v McLean* (1986) 63 ALR 407, the passage was relied upon in *Bieleski v Police* HC Auckland AP286/86, 28 November 1986. See *R v Governor of Brixton Prison ex parte Singh* [1962] 1 QB 211; *Coronno v Police* HC Wellington 130/86, 4 February 1987; and *Re Gorman* [1963] NZLR 17 (SC).

¹¹³ The *Commonwealth of Australia v B* [2015] NZDC 22153; and *Mercer* (CA 2016), above n 46, at [1].

¹¹⁴ *Mercer* (CA 2016), above n 46. See also *The Commonwealth of Australia v B* [2015] NZDC 22153.

¹¹⁵ *Mercer* (CA 2016), above n 46, at [44].

¹¹⁶ At [45].

¹¹⁷ At [52].

¹¹⁸ At [53]. Referring to *Kakis* where Lord Edmund-Davis used the term “inexcusably dilatory” in context of delay by the requesting state. See *Kakis*, above n 110.

matter best dealt with by the requesting state.¹¹⁹ Only in borderline cases was the Court prepared to consider that prosecutorial delay may tip the balance in favour of a finding of oppression.¹²⁰ Given there was limited evidence as to the cause of delay, the Court rejected the matter of delay as a factor relevant to oppression. The Court rejected all other matters viewed by the High Court as relevant to oppression. The Court determined there was no evidence of a significant change in circumstances linked with the delay, previous convictions and deportation to justify a finding of oppression in surrendering Mercer to Australia.¹²¹ It allowed the appeal and on request of Mercer's counsel remitted the case to the District Court to consider a possible referral to the Minister under s 48.

The *Mercer* litigation suggests that differences exist between the approaches of the lower court and that of the Court of Appeal. The Court of Appeal displays a more restrictive reading of what qualifies as "oppression". In the absence of any treaty between New Zealand and Australia that would impose an obligation to read such provisions restrictively, it is reasonable to infer that comity is operating as a justification for this restrictive reading. Why else would the Court of Appeal not read liberally in favour of liberty?

E Summary

The authorities discussed above illustrate the importance of comity between New Zealand and Australia and the role it plays in the judiciary's determination that circumstances exist to warrant their intervention in the surrender process under pt 4.¹²² This restrictive role appears to be based upon a presumption of similarity, it being core to the assumption that the person will receive a fair trial downstream in Australia.¹²³ Interestingly, the New Zealand Court of Appeal considers it to be "a justified expectation that the respondent's human rights (including right to a fair trial) will be met by Australia". Comity, however, does not extend the scope of similarity between New Zealand and Australia to the full gamut of human rights.¹²⁴ Comity in this context is without a human rights dimension. Because comity rests on a presumption of similarity, it is used as an excuse for leaving the issue of human rights of the requested person for the trial court. It allows the New Zealand courts to presume that fundamental human rights will be observed by Australia, thus avoiding any inquiry employing a New Zealand Bill of Rights Act 1990 (NZBORA) standard as

¹¹⁹ *Mercer* (CA 2016), above n 46, at [59].

¹²⁰ At [53].

¹²¹ At [2]-[16] and [65].

¹²² *Mercer* (HC 2016), above n 46, at [14] and [21].

¹²³ *Police v Thomas*, above n 41, at 457; and *Mercer* (HC 2016), above n 46, at [14]; and *Mercer* (CA 2016), above n 46, at [18].

¹²⁴ *Mercer* (CA 2016), above n 46, at [18].

to what kind of protection of fundamental rights they are likely to receive in Australia. Importantly, Australia does not have a Bill of Rights or any similar provisions reflected in the Australian Constitution. Other than what is provided by international human rights instruments and the few procedural safeguards in place to protect the rights of the person sought, the current backed-warrant procedure may be rightly accused of imposing an obligation of "blind trust". A similar proposition was made in relation to the principle of mutual recognition and problems identified with fundamental rights in context of European Union law.¹²⁵ The Law Commission appears, however, to be having second thoughts.

V. A CRITIQUE OF THE LAW COMMISSION'S PROPOSALS

A *Proposed New "Unjust or Oppressive" Provision*

In its Issues Paper, the Commission suggested removal of some or all of the grounds for refusing surrender, placing great emphasis on the importance of comity and reciprocity with Australia.¹²⁶ However, in its Report, tabled in February 2016, the Commission decided against this option, now being more concerned with the importance of human rights. The Commission also struggled to delineate the standard from the backed-warrant procedure. For instance, in the Issues Paper, the Commission suggested expanding the number and nature of grounds to be considered for refusal under the 1999 Act. Its rationale was a proposed shift towards placing the extradition process in the hands of the judiciary rather than the executive¹²⁷ to reflect modern international and domestic expectations.¹²⁸ While acknowledging that such changes meant that a hearing may become more complex and costly,¹²⁹ the Commission decided that greater emphasis on the interests of the person being sought was justified. In support of that proposition, the Commission highlighted the merits that such a proposal has for considering the evidence of the person's offending,¹³⁰ a consideration that is irrelevant to the backed-warrant procedure. The Commission's failure to consider risks of impediment to the backed-warrant procedure is further exemplified through the proposed new "unjust or oppressive" provision, in that it makes s 8(1) subject to a broader discretionary power of the court rather than confined to three grounds. In suggesting a new

¹²⁵ See Koen Lenaerts "The Principle of Mutual Recognition in the Area of Freedom, Security and Justice" (paper presented to The Fourth Annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, January 2015) at [4].

¹²⁶ Issues Paper, above n 2 at [6.22]-[6.23].

¹²⁷ At [8.18] and [8.32].

¹²⁸ At [8.16].

¹²⁹ At [8.33].

¹³⁰ At [8.35].

“unjust or oppressive” provision the Commission believed it would capture a wider range of circumstances where extradition would be unjust or oppressive.¹³¹

Initially, the Commission considered that a general ground could be added, namely “any other sufficient cause”, wording that is found in the London Scheme, and the equivalent of “for any other reason” under pt 3, s 34(2) of the 1988 Australian Act.¹³² The Commission believed that such an expanded ground would be able to encapsulate the broader discretion conferred on the Minister, namely “compelling or extraordinary personal circumstances”¹³³ and “any other reason”.¹³⁴ Described as the “corner-stone of our reform” the final result is reflected in cl 20 of the Bill that reads (emphasis added):¹³⁵

- (e) that the extradition of the respondent would be unjust or oppressive *for reasons including (but not limited to)* –
- (i) the likelihood of a flagrant denial of a fair trial in the requesting country; or
 - (ii) exceptional circumstances of a humanitarian nature;

This option conflicts with the Commission’s recommendation to further simplify the backed-warrant procedure. By its own admission, the Commission anticipates that expanding the number of grounds for refusal may result in more complexity and cost to the extradition hearing.¹³⁶ This concern is exacerbated by the fact that under the proposed new Act the judiciary will no longer exercise discretion in refusing surrender but will be compelled to refuse surrender if grounds are established.¹³⁷

The problems associated with broadening the injustice or oppression ground of refusal may be ameliorated by the emphasis on the high threshold required to satisfy the court that the circumstances warranting refusal are unjust or oppressive.¹³⁸ The “unjust” limb is intended to allow “the Courts to refuse an extradition request if it has grave concerns about how the person will be treated by the foreign authorities upon return” whereas the “oppressive” limb addresses the impact of extradition in light of their personal circumstances.¹³⁹ Instead of looking to English cases, such as *Kakis*, as a guide to determining the boundaries of such a

¹³¹ At [8.78].

¹³² At [8.78]. The words “for any other reason” were introduced in the Extradition (Commonwealth Countries) Amendment Act 1985 (Cth); see *Narain v Director of Public Prosecutions* (1987) 15 FCR 411 [*Narain*]. See Extradition Act 1999, s 8(1); the London Scheme, above n 59, cl 15(2)(b); Extradition Act 1988 (Cth) s 34(2); Extradition Act 2003 (UK), ss 14, 25, 82 and 91; and Extradition Act SC 1999 c 18, s 44(1)(a).

¹³³ Extradition Act 1999, s 48(4)(ii).

¹³⁴ Section 30(3)(d).

¹³⁵ Report, above n 5, at 196

¹³⁶ Issues Paper, above n 2, at [8.33].

¹³⁷ Report, above n 5, at [5.1].

¹³⁸ Issues Paper, above n 2, at [8.79]-[8.84].

¹³⁹ Report, above n 5, at 196.

broad term, the Commission has chosen the Canadian threshold.¹⁴⁰ The Canadian threshold for standard extradition requires the circumstances to “shock the conscience”¹⁴¹ or be “fundamentally unacceptable to our notions of fair practice and justice.”¹⁴²

Irrespective of the high threshold required for any of the grounds under this new provision to succeed, the broad nature of the wording is likely to result in more rather than fewer appeals being filed by the person requested. Procedurally, the Commission anticipates that the delays caused by the unsuccessful raising of grounds for refusal will be circumvented by having these grounds considered by the Court at the extradition hearing, after having been raised by the respondent at another of the Commission’s innovations - the Issues Conference.¹⁴³ In the context of the backed-warrant procedure, the impact of the Issues Conference on the new unjust and oppressive provision, depends on the accuracy of the suggestion made by the Commission that it is “unlikely that grounds for refusal arguments would succeed in the case of an approved country, due to the nature and values of that country’s criminal justice system.”¹⁴⁴ The backed-warrant procedure under pt 4 already suffers lengthy delays arising from protracted litigation. For example, the Mailley litigation dates back to 2005 when the original warrant was “backed” by Judge Morris in the District Court, North Shore. Mailley was arrested in 2008 for the purposes of extradition to Australia to face trial for fraud charges. Numerous appeals followed and did not reach their final conclusion until his last ditch effort to resist extradition was dismissed by the Supreme Court in 2016.¹⁴⁵

Notwithstanding the risks of frustrating the fast-track nature of pt 4, the new provision does attempt to give more emphasis to the importance of human rights. For the purposes of clarity, the Bill illustrates the high threshold required with two examples: (e)(i) reflecting fair trial concerns, covering abuse of process and delay measured according to international minimum standards as opposed to the

¹⁴⁰ It is notable that the Commission’s preferred interpretation of the “unjust or oppressive” limb, conflicts with that of the Court of Appeal which refers to the definition expressed in *Kakis*. See *Mercer* (CA 2016), above n 46, at [33]-[34] and [53]-[55]. But see also *Mailley* (CA 2016), above n 46 where the same Court (but different Judges) considered *Kakis* less useful than its own earlier analysis of the “unjust or oppressive” limb in *Wolf*.

¹⁴¹ Report, above 5, at 196; citing *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCR 3.

¹⁴² At 196.

¹⁴³ Report, above n 5, at 5.

¹⁴⁴ Issues Paper, above n 2 at [8.137]–[8.138]; and Report, above n 5, at [7.30].

¹⁴⁵ *Mailley v District Court at North Shore* [2016] NZSC 73. Compare *Bujak v District Court at Christchurch* [2009] NZSC 96 and *Bujak v Minister of Justice* [2010] NZSC 8 (see earlier extradition hearings). The Commission highlighted the six years it took to process an extradition request under the standard procedure. See Issues Paper, above n 2, at [1.7] and [9.63].

NZBORA;¹⁴⁶ and (e)(ii) the “compelling or extraordinary personal circumstances” ground in s 30(3)(d) of the 1999 Act.

The language in the latter provision has been imported from s 207 of the Immigration Act 2009, tailored to reflect a modernised concept of human rights issues.¹⁴⁷ What the Commission has not considered, are the decisions that distinguish deportation from extradition in considering grounds for refusing surrender.¹⁴⁸ Furthermore, it is questionable whether reference to the language of the Immigration Act 2009, assists with the furtherance of human rights. Lord Mance in *Norris v Government of the United States of America (No 2)* identified a trap that the courts have fallen into when by focussing on:¹⁴⁹

...some quite exceptionally compelling feature [they tend to] divert attention from consideration of the potential impact of extradition on the particular persons involved ... towards a search for factors (particularly *external* factors) which can be regarded as out of the run of the mill.

In a case that dealt with the issue of the rights of the child in context of the European Arrest Warrant (a simplified-procedure of extradition), Lady Hale in *HH v Deputy Prosecutor of the Italian Republic, Genoa* emphasised “some potentially grave consequences are not out of the run of the mill at all”¹⁵⁰ and exceptionality is not a test but a prediction about whether the gravity of harm to the right at stake is justified by the public interest pursued.¹⁵¹

To a degree, the “unjust and oppressive” provision conflicts with the Commission’s recommendation to simplify the backed-warrant procedure, because it risks lengthy delays by emphasising the interests of the person. Despite the weaknesses identified with this proposal, it is argued that the potential for enhancing the human rights interests of the person sought, provides a strong principled case for its application to the backed-warrant procedure. It will appear that unlike New Zealand, the Australian judiciary has a less restrictive application of comity, suggesting that Australia places more emphasis on the interests of the person.

¹⁴⁶ At 196. *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR) is cited as the source of wording “flagrant denial of a fair trial”.

¹⁴⁷ Issues Paper, above n 2 at 196.

¹⁴⁸ *Radhi*, above n 45; and *Mercer* (CA 2016), above n 46.

¹⁴⁹ *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; [2010] 2 AC 487 at [109].

¹⁵⁰ *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at [32].

¹⁵¹ At [32] per Lady Hale.

B Comity: The More Sceptical Australian Perspective

Initially, the Commission considered that the case for removal of some or all of the grounds for refusing surrender is strongest in relation to Australia whose extradition legislation already accommodates New Zealand in this way under the 1988 (Cth) Act. The Commission makes the point that the only statutory bar to extradition to New Zealand is found in s 34(2):¹⁵²

Further, instead of the usual “extradition objections” applying, the only bar to extradition is for reasons of: triviality, bad faith, delay or any other reason it would be “unjust, oppressive, or too severe a punishment to surrender the person to New Zealand”.

The Commission fails to recognise that by virtue of the words in s 34(2), “for any other reason”, there is potential for the requested person to raise broad grounds for refusing surrender in Australia. There is, however, a further test to satisfy the court under the “unjust or oppressive” limb. Section 34(2) of the 1988 (Cth) Act provides “that if a magistrate is satisfied by a person arrested on an endorsed New Zealand warrant that for one of the reasons specified, or “for any other reason” it would be “unjust, oppressive or too severe a punishment to surrender the person to New Zealand” the magistrate shall order that the person be released.”¹⁵³

The historical background of s 34(2) needs mentioning as it highlights the Commission’s misconception that there is only a single statutory bar to surrender in Australian law. The historical origins of s 34(2) are linked to the Australian Parliament’s intention to bring the backed-warrant procedure with New Zealand into line with interstate extradition under the Services and Execution of Process Act 1901 (Cth) (SEPA 1901)¹⁵⁴ by widening the scope for a refusal to surrender.¹⁵⁵ This was achieved by amendment in 1985 to the Extradition (Commonwealth Countries) Act 1966 (the 1966 Act) which had been carried forward into the 1988 (Cth) Act.¹⁵⁶ As a result, the Commission is misled in its appraisal of the reciprocal nature of the statutory scheme in Australia as far as surrender to New Zealand is concerned, or in the words of the Commission: “How Australia treats New Zealand”.¹⁵⁷ Aside from the enduring rhetoric about the particular comity that is said to exist under pt 4, there is

¹⁵² Report, above n 5, at [7.21].

¹⁵³ *Moloney* (FC), above n 93, at [143].

¹⁵⁴ The SEPA 1901 was amended under the Service and Execution of Process Amendment Act 1991 (Cth), then replaced by the SEPA 1992 following a report of the Law Reform Commission on service and execution of process.

¹⁵⁵ *Kenneally v New Zealand* (1999) 166 ALR 625 at [46]-[47]. For example *Bannister v New Zealand* [1999] FCA 362, (1999) 86 FCR 417 [*Bannister*].

¹⁵⁶ Extradition (Commonwealth Countries) Amendment Act 1985 (Cth).

¹⁵⁷ Report, above n 5, at [7.20].

an unchallenged assumption that recognition of comity is a two-way street as far as Australia is concerned.

To illustrate, in interpreting “unjust” and “oppressive” in the context of s 34(2), in *Binge v Bennett*¹⁵⁸ (decided under the SEPA 1901) Mahoney JA said:

The words ‘unjust and oppressive’ given their ordinary meaning have a broad connotation. I do not think that, so understood, they exclude matters going to, for example, the nature and incidents of the justice system to which the person in question is to be returned or to the circumstances or mode of his treatment pending trial in that system.

This shows the influence of SEPA 1901 in providing a basis for the Australian courts to inquire into the human rights of the person further along the backed-warrant procedure. There is nothing comparable to the SEPA 1901 in New Zealand. Under the SEPA 1901 matters considered by the courts include amongst others, the likelihood of conviction and prison conditions in the requesting state. These matters are downstream in the backed-warrant procedure and are simply not considered by New Zealand courts because of the unchallenged assumption of comity and its underpinning principle of similarity and trustworthiness.

In practice, s 34(2) of the 1988 (Cth) Act has led the Australian courts to breach the comity doctrine, creating significant delays in processing extradition requests to New Zealand. This raises the question of whether the backed-warrant procedure under the Law Commission’s proposed new Act, will follow the same trend as Australia. If it does, the new Act is likely to give less weight to the principle of comity in favour of the interests of the person. This would be a better approach to protecting the human rights of the person sought for surrender. The Commission feels that the “broadly framed ground builds necessary flexibility into the Bill to ensure that the New Zealand authorities can refuse to extradite in appropriate cases.”¹⁵⁹ But the Commission is unlikely to have intended it to be interpreted so broadly as to enable the ability of Australia’s legal system to guarantee a fair trial to be called into question.

The contrasting approach to comity between Australia and New Zealand is illustrated by how the Australian Federal Court decision *Moloney v New Zealand* [*Moloney* (FC)]¹⁶⁰ impacted on the New Zealand High Court bail decision in *R v PGD*¹⁶¹ where the appellant had been surrendered from Australia to face charges in New Zealand.¹⁶² The two accused were subject to a request for surrender to New Zealand

¹⁵⁸ *Binge v Bennett* (1988) 13 NSWLR 578 at 596 cited in *Moloney* (FC), above 93, at [68].

¹⁵⁹ Report, above n 5, at 194.

¹⁶⁰ *Moloney v New Zealand* [2006] FCA 438 [*Moloney* (FCA)] at 62.

¹⁶¹ *R v PGD* HC Wellington CRI-2005-085-5692 24, 28 April 2006.

¹⁶² At [14]-[15].

to face trial on an allegation of historic sex abuse. The accused succeeded on appeal against the magistrate's finding that there were no grounds established that made it unjust or oppressive to surrender the accused. The quality of the trial that the accused might face formed part of the Court's assessment in determining pursuant to s 34(2) that 'for any other reason' it would be unjust or oppressive to surrender the accused to New Zealand. In the view of Madgwick J, a fair trial was not possible because on account of delay, it would be unjust to surrender the accused. The nub of the decision, turned on what Madgwick J perceived was a disparity between New Zealand and Australia in the mandatory requirement of a Judge to warn a jury of the difficulties an accused faces in defending historic sexual assault allegations. The requirement Madgwick J was referring to, was based upon the approach in *Longman v R*, known as the "Longman warning".¹⁶³ This mandatory requirement was said to contrast with the New Zealand position that does not accept the directions required by the *Longman* warning.¹⁶⁴ Madgwick J also considered differences in "cross-admissibility" between Australia and New Zealand because, unlike in New Zealand, in Australia any trial for sexual offences involving multiple complainants would most likely be severed unless the evidence of each complainant was admissible as part of the case in relation to the other complainants.¹⁶⁵

After examining the decision of the primary judge in *Moloney* (FC), Ronald Young J in *R v PGD* accepted the submission that the chance of a second request for surrender succeeding was low because of differences perceived by the Australian judiciary in the way New Zealand law governs warning juries in the context of historic sex abuse cases.¹⁶⁶ Although Ronald Young J challenged the soundness of that reasoning,¹⁶⁷ it is important to note that for the purposes of questioning the trustworthiness assumed to exist between New Zealand and Australia, that the perceived lack of parity in the legal system between Australia and New Zealand significantly influenced the outcome of the bail decision for the applicant.¹⁶⁸

Ronald Young J did not have the advantage of being able to make reference to the decision in October 2006 of *Moloney* (FC) which held that it was not established that it would be unjust to return the respondents to New Zealand.¹⁶⁹ Accordingly, the magistrate's decision to order release of the accused was quashed and instead, their

¹⁶³ *Longman v R* (1989) 168 CLR 79.

¹⁶⁴ At [11]. See *Moloney* (FC), above n 93; and *Moloney* (FCA), above n 160.

¹⁶⁵ *Moloney* (FC), above n 93, at [11].

¹⁶⁶ At [11]-[12].

¹⁶⁷ *R v PGD*, above n 161, at [13].

¹⁶⁸ At [11].

¹⁶⁹ *Moloney* (FC), above n 93, at [231] and [233]-[235].

surrender to New Zealand was ordered and costs awarded against them.¹⁷⁰ The Full Court was also not persuaded that disparity between *Longman* warning requirement in Australia and the flexible approach towards warning the jury in New Zealand was as significant as the accused (respondents) contended.¹⁷¹ Particular emphasis was given to the recognition that New Zealand courts share a mutual objective in ensuring a fair trial, which is supported by provisions of the NZBORA.¹⁷² The Full Court took the view that Madgwick J had erred in law by giving too much weight to the need for a *Longman* warning to be given in assessing whether the accused could receive a fair trial in New Zealand.¹⁷³ The assumption that any trial in New Zealand will be fair was reinforced in the following passages:¹⁷⁴

[36] As has been seen, New Zealand has long been equated, for extradition purposes, with the Australian States and Territories. The fact that the backing of warrants, without more, is regarded as sufficient, itself demonstrates confidence in the integrity of the New Zealand criminal justice system.

[37] Even apart from the special arrangements that govern extradition from Australia to New Zealand, the close relationship between our two countries, and the respect and high regard with which New Zealand courts are held in Australia, would support an assumption of fairness. Section 34(2) must be understood in the light of that assumption.

However, the reality that in practice Australian courts find that there are exceptions to the assumption of there being a fair trial in New Zealand, limits the impact of the Full Court's attempt to rescue the trustworthiness doctrine. In *Bannister v New Zealand*¹⁷⁵ the Court refused to surrender the accused to New Zealand based upon procedural disparity between New Zealand and Australia in relation to sexual offending charges. Because New Zealand sought the extradition of the accused to face trial on representative charges, a situation the Australian High Court considered had previously given rise to a risk of miscarriage of justice, the Court concluded "that it would be unjust, within the meaning of s 34(2), to surrender the respondent to New Zealand to face trial on such charges."¹⁷⁶ *Bannister* was influential in the *Moloney* litigation¹⁷⁷ and although, the Full Court determined that Madgwick J failed

¹⁷⁰ Subsequent to the Full Court decision, the Federal Court in *New Zealand v Moloney* [2006] FCA 1363, dismissed the accused's application to stay the orders of the Full Court.

¹⁷¹ At [219].

¹⁷² Citing *R v MCA187/95*, 13 November 1995.

¹⁷³ *Moloney* (FC), above n 93, at [222] and [226].

¹⁷⁴ *Moloney* (FC), above n 93. These passages have been cited favourably in subsequent decisions. For instance *Newman v New Zealand* [2011] QSC 257 at [9]. See also *MM v United States of America* [2015] SCC 62, 2015 SCR 973 at [119]-[120].

¹⁷⁵ *Bannister*, above n 155.

¹⁷⁶ At [13].

¹⁷⁷ At [129].

to apply the ratio in *Bannister* correctly to the facts of the case,¹⁷⁸ the Full Court rejected New Zealand's contention that *Bannister* should be overruled.¹⁷⁹

To the extent that it found the judge of first instance erred in applying *Bannister* and *Longman*, the Full Court, at least in part, re-settled the trustworthiness doctrine. Four years later, the issue of comity was revisited in *New Zealand v Johnston*.¹⁸⁰ In that case the Full Court overruled the primary judge in refusing to surrender the accused to New Zealand on the basis that surrender would be unjust. What this indicates is a tendency for the lower courts of Australia to adopt a less restrictive view of comity as a determining factor in surrender than Australia's higher courts consider appropriate.

C. The Hidden Evidential Threshold in Australia under the "Interests of Justice" Limb

Another infringement of comity by Australia relates to qualification of the prohibition against consideration of the strength of the case against the person sought.¹⁸¹ This exception is also triggered under s 34(2) of the 1988 (Cth) Act but, here, it is based upon the "unjust or oppressive" limb of the test. If, for instance, the requested person can show that there is no evidence to support the charge, or that there are other reasons why the prosecution cannot succeed, the court is likely to conclude that the accusation was not made in good faith or in the interests of justice, within the meaning of s 34(2)(b) and that the surrender of the person would be unjust or oppressive.¹⁸² This exception was considered by the Full Court in *Moloney* to be "... the sole qualification to the rule that courts of the requested state are not concerned with the strength of the case against the accused...".¹⁸³ The origins of this exception have been traced to the SEPA 1901 as explained above.¹⁸⁴

¹⁷⁸ *Moloney* (FC), above n 96, at [202]-[204].

¹⁷⁹ At [132] and [139].

¹⁸⁰ *New Zealand v Johnston* [2011] FCAFC 2 [*Johnston* (FC)]; and *New Zealand v Johnston* [2010] FCA 958 [*Johnston* (FCA)].

¹⁸¹ Extradition Act 1988 (Cth), s 34(4). This provision corresponds to s 45(5) of the 1991 Act (NZ). See *Moloney* (FC), above n 93, at [33].

¹⁸² At [28]. Referring to the Magistrate's decision. See *Bates v McDonald* [1985] 2 NSWLR 89 at [102]; and *Binge v Bennett* (1988) 13 NSWLR 578 at 585.

¹⁸³ *Moloney* (FC), above n 93, at [52]-[59], [64]. The test for the prima facie exception was developed in cases that applied to extradition within Australia, under the SEPA 1901 and applied to extradition requests from New Zealand under s 27 of the Extradition (Commonwealth Countries) Act 1966 (Cth). See further *Ex parte Klumper* (1967) 1 NSWLR 161.

¹⁸⁴ The Australian courts consider that the "unjust, oppressive or too severe a punishment" limb under s 34(2) of the 1988 (Cth) Act should be construed in accordance with various cases determined under the SEPA 1901. See the cases considered in *Kenneally v New Zealand* [1999] FCA 1320 (1999) 91 FCR 292, at [50]-[51].

In *Kenneally*, the Full Court said:¹⁸⁵

The introduction into the Act of the expression 'for any other reason' it would be unjust, oppressive or too severe a punishment' avoids the necessity to construe s 34(2)(b) in such a way as to cover the situation where there is a hopeless case, but no evidence of any collateral purpose or lack of bona fides.

The effect of this approach may be seen in numerous cases dealing with surrender from Australia to New Zealand.¹⁸⁶ They reflect the willingness of the Australian judiciary to address a submission of injustice or oppression based upon the proposition that there is little likelihood of the requesting State ultimately securing a conviction for the offence, or that the allegations against the accused were "wholly misconceived", that they "could not be possibly right" and that it was "demonstrably clear that the proceedings could have no foundation at all",¹⁸⁷ expressions first used in *Willoughby v Eland* [*Willoughby*] and *Bates v McDonald* [*Bates*].¹⁸⁸

Although a finding of injustice or oppression under this exception is not treated lightly,¹⁸⁹ the preparedness of the judiciary to pay consideration to the standard of evidence against the requested person, places Australia in direct conflict with the concept of comity as described by the Commission:¹⁹⁰

The interest in comity leads to extradition proceedings that show respect for the criminal proceedings of the requesting state. This can be achieved, for instance, through an approach that removes or reduces the requested country's inquiry into the case against the person by making the extradition hearing more akin to a preliminary hearing than a full trial, or by relaxing admissibility of evidence standards for foreign evidence in extradition hearings.

Bates was an appeal against a magistrate's order for surrender from Australia to New Zealand under the 1966 Act, before the 1985 amendment to s 27 of the 1966 Act took effect. In that case, the requested person had absconded to Australia from New Zealand while on bail in relation to trial proceedings for drug offences. The New South Wales Court of Appeal held that under s 27(b) of the 1966 Act, the only issue was whether the accusation against the appellant was "wholly misconceived" or "could not possibly be right".¹⁹¹ Despite the fact that there was no obligation on New Zealand to establish a prima facie case, the Court held that it may examine the

¹⁸⁵ At [46]-[47].

¹⁸⁶ *Bates*, above n 182, at 95,100 and 102.

¹⁸⁷ At 95. Considered in *Moloney* (FC), above n 93, at [59].

¹⁸⁸ *Willoughby v Eland* (1985) 79 FLR 130 [*Willoughby*] at 134; and *Bates*, above n 182, at 95.

¹⁸⁹ *Moloney* (FC), above n 93, at [35]. See also *Kenneally*, above n 184, at [55].

¹⁹⁰ Report, above n 5, at [7.41].

¹⁹¹ *Bates*, above n 182. See dicta of Kirby P at 95; Samuels JA at 100; and McHugh JA at 104. Cited in *Moloney* (FC), above n 93, at [60].

depositions of criminal proceedings in New Zealand, albeit for the purpose of ensuring that a request for surrender was not made for an improper purpose, particularly in regard to s 27(b), and not for the purpose of adjudicating disputed questions of fact or law.¹⁹² After examining the depositions and evidence produced before the Court, the appellant failed to establish under s 27(b) of the 1966 Act that the accusation was not made in good faith or in the interests of justice.¹⁹³ Kirby P narrowed the issue of injustice or oppression to where “there was no scintilla of evidence”.¹⁹⁴ In this sense, a sufficiency of evidence is potentially applicable in Australia’s backed-warrant procedure, albeit at an extremely low threshold.

The practice in Australia in this regard is not, admittedly, always consistent. Notwithstanding his concern about the evidence relating to the charge against the accused sought for extradition to New Zealand, Yelham J in *Daemar v Parker* [*Daemar*]¹⁹⁵ believed that the s 27(b) “interests of justice” exception did not permit a magistrate to refuse surrender in a case in which it appeared that the prosecution must fail.¹⁹⁶ However, Hope JA in *Willoughby* expressed a contrary view.¹⁹⁷ Yelham J’s conclusion in *Daemar* was largely based upon his examination of the SEPA 1901 (repealed) relating to interstate extradition, considered analogous to the backed-warrant procedure in New Zealand. In particular, s 18(6)(c) of the SEPA 1901’s exception that “for any other reason, it would be oppressive to return the person” allowed for an extensive evaluation of the evidence in order to prove an abuse of process for the purpose of establishing whether the accusation was “not...made in good faith or in the interests of justice” in terms of s 18(6)(b).¹⁹⁸ Finding that there was a corresponding provision under pt II but not pt III of the 1966 Act, Yelham J felt that there was a need for legislative change to bring pt III into line with s 18(6)(b) of the SEPA 1901.¹⁹⁹ In *Narain*, Wilcox and Jackson JJ considered that the insertion in s 27, by the 1985 amendment, of a reference to “or for any other reason” reconciled these two sections.²⁰⁰ Consequently, the expression “or for any other reason” has been construed in accord with a long line of authority dealing with an application under the SEPA 1901.²⁰¹ In *Narain*, a Full Court of the Federal Court noted that a court is justified in refusing extradition “where it positively finds that

¹⁹² *Bates*, above n 182, at 100. See *Willoughby*, above n 188 at 151-152. But see *Daemar v Parker* (1975) 45 FLR 405 [*Daemar*] at 409.

¹⁹³ *Bates*, above n 182.

¹⁹⁴ *Bates*, above n 182.

¹⁹⁵ *Daemar*, above n 192.

¹⁹⁶ At 409. See *Narain v Director of Public Prosecutions* (1987) 15 FCR 411 [*Narain*].

¹⁹⁷ See *Willoughby*, above n 188, at 134-135. Followed in *Bates*, above n 182.

¹⁹⁸ *Daemar*, above n 192, at 407.

¹⁹⁹ At 411.

²⁰⁰ *Narain*, above n 196.

²⁰¹ *Kenneally*, above n 184, at [47].

the offence was not committed".²⁰² In a statement of some significance to the exception of no evidential threshold, it held:²⁰³

...if the material before the magistrate had positively demonstrated, in relation to either charge, that the offence had not been committed, it would have been correct to hold that it would be unjust and oppressive to surrender the appellant on that charge. But this was not the case.

The same evidential threshold approach has been employed successfully under the 1988 (Cth) Act in *Kenneally v New Zealand*, on the grounds that it was unjust to surrender the accused. A magistrate had ordered Kenneally's surrender from Australia to New Zealand in relation to drug offences. He appealed to the Supreme Court of New South Wales. The primary judge had allowed evidence (affidavit evidence and transcripts of intercepted conversations) from the respondent (New Zealand) to be adduced in support of its application for Kenneally's surrender. The primary grounds of appeal concerned the contention that the respondent's (New Zealand) accusations against him were not made in the "interests of justice".²⁰⁴ The primary judge dismissed the application for review on two grounds. First, that it was not for an Australian magistrate, or judge on review to decide which version of the transcript of the intercepted conversation was the more accurate.²⁰⁵ Secondly, it could not be assumed that there was no other evidence available to support the charges.

Kenneally then appealed to the Full Court of Federal Court of Australia,²⁰⁶ which held that the evidence relied upon by the New Zealand authorities, fell substantially below the prima facie standard. The Full Court said:²⁰⁷

...where the Court is satisfied, upon all of the evidence before it, that the evidence taken as its highest for the prosecution fails to disclose a prima facie case, and it is clear that it has available to it no other evidence of any significance, the words of s 34(2) suggest that extradition should be refused.

In finding that the primary judge had erred in not assuming that there was no evidence apart from the taped conversation, the Full Court reasoned that the standard of proof which must be met, is the civil standard. Although it has been described as an unusual case,²⁰⁸ *Kenneally* remains current authority for there being

²⁰² At [424]. Cited in *Moloney* (FC), above n 93, at [61].

²⁰³ *Narain*, above n 196, at 8.

²⁰⁴ *Kenneally*, above n 184, at [24].

²⁰⁵ At [38].

²⁰⁶ *Kenneally*, above n 184.

²⁰⁷ At [56].

²⁰⁸ At [79].

an exception to the no evidence requirement.²⁰⁹ Following the test enunciated in *Bates*, a Full Court determined that it would be “unjust” for the appellant to be surrendered to New Zealand.²¹⁰

The Full Court in *New Zealand v Johnston* exhibited some reluctance at being dragged into an ever deeper inquiry into the criminal justice process in New Zealand. When determining that the primary judge had erred in concluding that delay had rendered the accused’s trial unfair, it noted the reasons how the delay might prejudice the accused’s trial were speculative.²¹¹ It also responded negatively to counsel’s invitation that the Full Court assess the strength of the prosecution’s case, and, having done so, should conclude that it is hopeless or so weak that it would be unjust to surrender the respondent to New Zealand:²¹²

This Court is not permitted to make this kind of assessment of the prosecution case. It has not been put that the case has some fatal flaw or that it is clearly bound to fail. What was put by the first respondent’s advocate was that, having regard to the matters referred to at [133] above, the case would not succeed. That conclusion is based upon an assessment of the facts which is an assessment for the New Zealand courts to make, not this Court.

Yet, despite the emphasis by the Full Court in *Moloney* that judicial intervention in extradition cases relating to evidence and strength of prosecution case should only occur in the most exceptional of circumstances,²¹³ the lower court decision in *Johnston* (FC) more accurately exemplifies Australian courts’ attitude to the concept of comity.

In summary, the scope of s 34(2) under the 1988 (Cth) Act allows the Australian judiciary to engage in a wide-ranging consideration of the merits of the New Zealand criminal justice system.²¹⁴ It might be argued that the evidential threshold approach would not succeed in the New Zealand courts because of comparatively stricter adherence to comity. However, it could be invoked under the “unjust or oppressive” limb of s 8(1) of New Zealand’s Extradition Act 1999 in context of either a judicial discretion under s 45(4) or referral to the minister under s (48)(4)(a)(ii). Support for this proposition is found in the recent Court of Appeal decision in *Mercer* (CA 2016) *appeal* where the Court considered *Moloney* (FC).²¹⁵ Moreover, in the context of the

²⁰⁹ *Kenneally*, above n 184.

²¹⁰ In *Moloney* (FC), above n 93, at [79].

²¹¹ *Johnston* (FC), above n 180, at [120]; and *Johnston* (FCA), above n 180, at [54] and [58].

²¹² At [133]-[134].

²¹³ *Moloney* (FC), above n 93.

²¹⁴ *Moloney* (FC), above n 93.

²¹⁵ *Mercer* (CA 2016), above n 46, at [50].

backed-warrant procedure under the 1881 Act, Justice Salmond, in *Re Murray Ross*, conceded that it was conceivable to find cases in which: ²¹⁶

... the innocence of the accused is so clearly demonstrated as to show that his return is not being asked for in good faith and in the interests of justice; in such a case the power of discharge under s 19 may be properly exercised in accordance with the terms of that section. But the present is not a case of that description.

The Australian cases do illustrate that there is a tendency to apply more substantive conditions to the backing-of-warrants in Australia when considering grounds for refusal than would be suggested by rigid adherence to comity. It is possible that under the Law Commission's introduction of a broader "unjust or oppressive" provision, the New Zealand courts may be willing to follow this practice, particularly on the basis of reciprocity. Ultimately, however, the approach of Australia's lower courts tends to undermine the comity/trustworthiness doctrine relied on by the Law Commission for its further simplification of the backed-warrant procedure.

D Further simplification of the backed-warrant procedure

As part of the aim to further simplify the backed-warrant procedure, the Commission suggested treating Australia even more "favourably" by placing it in a category of its own under the new Act.²¹⁷ In deciding whether differentiation from other categories of countries is necessary, the Law Commissioner considered: ²¹⁸

- that most extradition traffic is with Australia;
- Australia is a country with a similar legal system to New Zealand;
- a high degree of trust held by New Zealand in Australia's legal system; and
- New Zealand is singled out as being a special category under the Extradition Act 1988 (Cth).

For these reasons, the Commission has recommended the removal of the requirement of double criminality in regard to requests from Australia.²¹⁹ The recommendation reflects the high degree of comity that underpins the pt 4, backed-warrant procedure with Australia.

The case of *Radhi v New Zealand Police* [*Radhi*] was highlighted by the Commission as an illustration of the difficulties encountered in trying to meet the double criminality requirement.²²⁰ Radhi appealed against the decision in the District Court that he was eligible for surrender to Australia in relation to an alleged people-

²¹⁶ *Re Murray Ross* [1921] NZLR 292 (SC) at 292.

²¹⁷ Issues Paper, above n 2, at [6.21].

²¹⁸ Report, above n 5, at 51; and Issues Paper, above n 2, at [6.22]–[6.24] and Q 13.

²¹⁹ Report, above n 5, at 47, Recommendation 15. See draft Bill cl 7(1)(a) which omits the requirement of double criminality.

²²⁰ *Radhi v New Zealand Police* [2013] NZHC 163 [*Radhi*]; and Issues Paper, above n 2, at [5.19].

smuggling offence. His grounds were that the offence upon which extradition was based was not an offence in New Zealand under s 142(fa) of the Immigration Act 1987, when in October 2001 the offence was alleged to have occurred. The High Court determined that the relevant New Zealand offence at the time of the offending required the arrival in New Zealand of the persons being smuggled to flow from the accused's conduct of wilfully assisting and aiding.²²¹ It is relevant that the offence under s 232A of the Migration Act for which Radhi was sought, did not require arrival into Australia of illegal immigrants, and that was not alleged by the Australian Federal Police.²²² Accordingly, the High Court found in favour of Radhi, that at the relevant time, the conduct attributed to him did not constitute an offence in New Zealand and the requisite double criminality standard was not met. In 2014, the Court of Appeal, overturned the decision of the High Court on this point, finding instead, that Radhi's conduct can be construed to fall within the relevant offence.²²³ In anticipation of further cases like *Radhi*, which it viewed as creating unnecessary impediment to extradition through the difficulties identified with an interpretation of s 5, the Commission has contemplated further widening the conduct rule in assessing double criminality.²²⁴ But for Australia, as noted, it contemplates removal.

It is doubtful whether there is a sound basis for removing the requirement for Australia to establish double criminality.²²⁵ For example, while Australia criminalises cartels to regulate cartel conduct currently and somewhat controversially, New Zealand does not.²²⁶ Someone arrested for such conduct in New Zealand on a backed Australian warrant would be unable to use the current unjust or oppressive provision on the grounds the matter was trivial, because the Australian cartel offence carries a maximum 10-year penalty.²²⁷ The oppressive limb of the provision may be of greater assistance, but the court would need to be persuaded that the civil rather than criminal nature of the offence in New Zealand would meet the high threshold standard associated with this provision. Even then this ground for refusal could not be invoked until the extradition request had proceeded through most of

²²¹ *Police v Radhi* [2014] NZCA 327 at [15].

²²² At [15].

²²³ At [15]-[27].

²²⁴ Issues Paper, above n 2, at [5.21].

²²⁵ Report, above n 5, at [7.24]-[7.27].

²²⁶ See Commerce Act 1986 and Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2). See also Anna Kingsbury "Cartel Regulation in New Zealand: Undermining the per se Rule?" (2016) 37ECLR 282; and Jesse Tizard "Get Out of Jail Free: A Wrong Turn in New Zealand Cartel Regulation" (2016) 22 NZBLQ 46 at 49.

²²⁷ Competition and Consumer Act 2010 (Cth), pt VI, s 79.

the procedure, something hardly compatible with a fast-track system of extradition.²²⁸

My principal criticism of the Commission's rationale for relaxing these restrictions, however, relates to Australia's purported trustworthiness.²²⁹ In the view of the Commission, a country's trustworthiness is measured according to there being: reciprocity; a human rights record; membership of international schemes such as the London Scheme; assurances as to there being safeguards in place to guard against breaches of fundamental restrictions on extradition; and whether the wider criminal investigation and prosecution systems include adequate checks and balances.²³⁰ These factors are said to assist in establishing the criteria by which countries may fall into a more simplified backed-warrant category. The Commission also regards this trust as reflected in the secure Trans-Tasman relationship, evidenced in the Trans-Tasman Proceedings Act 2010. Specifically, the Commission cited the formal acknowledgement given of "each Party's confidence in the judicial and regulatory institutions of the other Party."²³¹ However, that statement is given in the context of private international law and has a civil rather than criminal underpinning.²³²

The Commission's unchallenged assumption about Australia's trustworthiness neglects to consider cases such as *Samson v McInnes*.²³³ In this case, a New Zealand citizen was arrested, interviewed twice, and remanded in custody by South Australian Police simply on the basis of the original arrest warrant issued by a DCJ in New Zealand. The failure to have the warrant properly endorsed before execution was explained by erroneous advice being given to the arresting South Australian Police Officer.²³⁴ Moreover, Australia's recent track record on human rights is poor and does not seem to be improving.²³⁵ Finally, Australia's own practice in regard to New Zealand extradition cases belies this trust. The Australian backed-warrant

²²⁸ See Issues Paper, above n 2, at [5.22]. It is uncertain how effective a mechanism such as an Issues Conference will reduce delay.

²²⁹ Issues Paper, above n 2, at [7.9].

²³⁰ Report, above n 5, at [6.41]-[6.46].

²³¹ At [7.19]. See Agreement between the Government of New Zealand and the Government of Australia on the Trans-Tasman Court Proceedings and Regulatory Enforcement [2013] ATS 32 (signed 24 July 2008, entered into force 11 October 2013)(preamble).

²³² See further John Turner "Enforcing Foreign Judgments at Common Law in New Zealand: Is the Concept of Comity Still Relevant" (2013) NZ L Rev 653; and Thomas Shultz and Jason Mitchenson "Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts" (2016) 12 Journal of Private International Law 344.

²³³ *Samson v McInnes* (1998) 89 FCR 52 [*Samson*]. See also *R v Hartley* [1978] 2 NZLR 199 (CA) at 214 per Woodhouse J.

²³⁴ *Samson*, above n 233, at 53.

²³⁵ Ben Doherty, "Offshore detention may hurt Australia's bid for UN Human Rights Council seat" *The Guardian* (online ed, UK, 7 April 2017). See also UN News Centre "Australia's Aboriginal children 'essentially being punished for being poor' – UN rights expert" *UN News Centre* (online ed, UN, 4 April 2017).

procedure may give the appearance of strong adherence to the principle of comity, but as the above analysis of case law dealing with s 34(2) under the 1988 (Cth) Act reveals, there are even tighter safeguards in place to protect the interests of the person than would seem proportionate to the importance of comity. In other words, the Commission's representation of the comparatively more 'matey' extradition process to New Zealand is a fiction, because it is based upon unchallenged assumptions about Australia's adherence to comity.

VI. CONCLUSION

Extradition is meant to be expeditious and efficient. At the same time, the process must provide adequate protection to the rights of the person sought for extradition. These principles underlie the Law Commission's rationale for the proposals examined above. It is, however, argued that in proposing a new Act, the Commission has shown limited consideration for the impact of its proposals on the backed-warrant procedure and how, by extension, these two principles are affected.

First, this article has sought to show how the Commission's failure to delineate between the standard and backed-warrant procedure in proposing a new Act, impacts negatively on its proposals for the backed-warrant procedure. At the root of the problem is a lack of consideration of any case law relevant to the backed-warrant procedure, which might have otherwise compelled the Commission to reconsider its position in making across-the board proposals, such as the proposed "unjust or oppressive" provision. Instead, the Commission simply drew a parallel with Australia's extradition legislation,²³⁶ without giving adequate consideration to the implications relevant case law concerning s 34(2) of Australia's 1988 (Cth) Act, has for the backed-warrant procedure. Arguably, this proposed new unjust or oppressive provision will breach comity and impede rather than enhance the expediency of that pt 4 procedure. Notwithstanding that the backed-warrant procedure relies heavily on comity, the Commission clearly has reservations about this practice, indicated by its inconsistent application of comity. Another more subtle example of the Commission's failure to delineate between the standard and backed-warrant procedure, relates to how comity is understood and applied by the decision-maker, which may vary according to whether extradition involves a standard or simplified procedure. How each country is categorised gives rise to further definitional differences. Arguably, comity under pt 4 in relation to Australia is qualitatively different from comity in relation to the United Kingdom, as a function of geographic proximity and economic importance for instance.²³⁷

²³⁶ Extradition Act 1988 (Cth), s 34(2).

²³⁷ Issues Paper, above n 2, at [6.23].

Secondly, this article has demonstrated how the Commission's emphasis on comity, has been inconsistently applied. In the first instance, the Commission placed too much importance on comity by proposing removal of some or all grounds for refusing surrender in the case of Australia. Then, the comity rationale was abandoned altogether, when the Commission changed tack and recommended leaving the grounds for surrender under the backed-warrant procedure intact. The Commission's final position is consistent with a blanket approach, and one that limits rather than enhances the importance of comity. I argue, that such an approach, insofar as the backed-warrant procedure is concerned, does not, in the words of the Commission, "strike the necessary and appropriate balance between protecting the rights of those whose extradition is sought and providing an efficient mechanism for extradition". Consequently, there is a lack of coherency in the Commission's proposals and underlying rationale. These particular proposals are hard to reconcile with other proposals to simplify procedures that are built upon the importance of trustworthiness and comity in regard to Australia. This leaves open the question whether the Commission has as much faith in comity with Australia as it appears to profess.

Thirdly, this article has demonstrated that the Commission has based its proposals on unchallenged assumptions about comity in regard to Australia. The impact of this tendency is most relevant to the proposal to further simplify the backed-warrant procedure. Analysis of Australian case law shows that the Australian judiciary flouts comity as far as the required standard of evidence is concerned. There are appreciable differences in how comity and liberty interests are weighed in context of the 1988 (Cth) Act compared to the 1991 Act. It may be the result of a partitioning between the influence of a broad latitude given to the judiciary by virtue of s 34(2) "for any other reason" and what the Australian judiciary regard as firmly established authority for considering an exception to the prima facie requirement and the role of the SEPA 1901, in assessing the grounds for refusing to surrender a requested person to New Zealand. It is difficult to reconcile these findings with the assumption of there being mutual trust and comity between New Zealand and Australia.

It follows therefore, that the Commission's proposal for further simplification of the backed-warrant procedure, in regard to Australia, places too much emphasis on comity and trustworthiness. The overestimation of similarity between New Zealand and Australia weakens the case for the proposed removal of the double criminality requirement. Further simplification of the backed-warrant procedure is unjustified and would be, in principle, an unnecessary sacrifice of the person's human rights in favour of comity. In any event, the need for any further simplification of the backed-warrant procedure is arguable and likely to be thwarted by the proposed new "unjust or oppressive" provision.

As a result of all of the issues identified above, it is uncertain what policy the Commission has or should have towards the backed-warrant procedure. It remains to be seen whether the effect of the new “unjust and oppressive” provision, if implemented, will frustrate the backed-warrant procedure and suffer the same judicial fascination with fair trial issues as evidenced in Australian case law, or whether the problem can be avoided by the newly proposed Issues Conference. Perhaps a solution would be to amend these proposals in a way that delineates the standard from the backed-warrant procedure completely. Ultimately, it should be determined whether the current backed-warrant procedure actually discourages surrender requests and suffers the same delays associated with the standard procedure²³⁸ before tampering with the current balance.

In recommending removal of some or all of the grounds for refusing surrender,²³⁹ it is contended that the emphasis placed on comity is based upon unchallenged assumptions about New Zealand’s relationship with Australia. At the same time, it is argued that under the new proposed “unjust and oppressive” provision, akin to that of Australia,²⁴⁰ the Commission’s change of heart, in leaving intact the grounds for refusing surrender, suggests that we follow the lead of the Australian judiciary and exercise a more cautionary approach.²⁴¹

²³⁸ Issues Paper, above n 2, at [9.63].

²³⁹ Issues Paper, above n 2, at [6.22]-[6.23].

²⁴⁰ Extradition Act 1988 (Cth), s 34(2).

²⁴¹ Report, above n 5, at 37. See draft Bill, cl 20(e).

SENTENCE INDICATIONS – SOME PRACTICAL CHALLENGES

TIM CONDER*

Sentence indications have formed part of the practice of criminal law in New Zealand for a number of years.¹ However, appellate courts have at times drawn the practice into question and have called such indications “troublesome” and “problematical”.² They have also been the frequent target of Solicitor-General’s appeals, which seek to respond to lenient sentences which have been seized upon by those defendants fortunate enough to receive them.³ Sentence indications have also been identified as carrying similar risks as plea bargaining, with the potential to encourage even innocent defendants to plead guilty.⁴

Despite these concerns, the practice has received legislative sanction in the form of the Criminal Procedure Act 2011 (the CPA) which introduced a detailed procedure to deal with such applications.

The procedure imposed by the CPA, which drew heavily on the procedure that had been developed by the District Court, is intensely practical. As with the informal regime which preceded it,⁵ it is based on principles of clarity and predictability⁶ and is designed to ensure that a defendant is not penalised for seeking an indication.⁷ In this way it has built upon the existing law that had developed around the former regime and improved on it.

However, despite this improvement a number of challenges remain. Many of those which were identified in the early years of the practice – including the concerns around plea bargaining and questions about how to deal with sentence indications on appeal – have not been resolved. New challenges have also developed – particularly in relation to the popular interest in certain cases.⁸ This paper seeks to identify these challenges, to review how the courts have responded to them to date, and to consider whether further improvements could create a more robust system in the future.

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¹ *R v Gemmell* [2000] 1 NZLR 695 (CA).

² *R v Edwards* [2006] 3 NZLR 180 (CA) [*Sipa*] at [53] and [46]. This case was heard together with *R v Sipa*.

³ *R v Smail* [2008] NZCA 6, [2008] 2 NZLR 448; *Sipa*, above n 2; *R v Gemmell*, above n 1.

⁴ *R v Smail*, above n 3, at [39].

⁵ As evidenced in the provisions of the District Court Bench Book, reproduced in full in *Sipa*, above n 2, at [41].

⁶ Criminal Procedure Act 2011, ss 61-62 and 64.

⁷ Sections 63 and 65.

⁸ The case of *Police v Filippo* [2016] NZHC 2573 is a recent and striking example of this, which is discussed in more detail below.

I. SENTENCE INDICATIONS: HISTORY AND PROCEDURE

Sentence indications are not a new feature of criminal procedure in New Zealand, but the CPA represents the first time that they have been given a clear legislative basis. However, the present practice owes more to the District Court bench, who developed the original scheme through experimentation and discussions with the profession, rather than a deliberate legislative design.

II. SENTENCE INDICATIONS PRE-CPA

Sentence indications have existed for many years with greater or lesser degrees of formality attached to the practice. In the decade or so prior to the passage of the CPA, courts both in New Zealand and abroad began to develop a more systematic approach to sentence indications which, in New Zealand and elsewhere, has now been codified.⁹ However, these early developments also reveal the issues which continue to threaten the validity of the practice.

Sentence indications appear to have arisen as a response to the inherent difficulties in predicting sentencing outcomes in different cases. The broad sentencing ranges available to judges create significant uncertainty about sentencing, and comparisons between cases provide limited assistance due to the uniqueness of particular facts.¹⁰ The existence of regional differences and individual differences between judges add to this complexity.¹¹

In response to this uncertainty, certain judges began the practice of indicating what sentence they might impose if a defendant was to plead guilty. This practice was not legislated or developed from a central authority, but rather began organically as individual judges saw fit. However, the appellate decisions in this area indicate a high degree of scepticism around the practice. In 1995, the Court of Appeal described the giving of a sentence indication as "very unusual" and went on to state that:¹²

[this practice] is one that we strongly deprecate in the absence of any settled guidelines covering plea bargaining involving a Judge. There is obvious scope for manipulation and

⁹ See, for example, Criminal Procedure Act 2009 (Vic), s 60; but compare the approach in the United Kingdom, where the relevant provisions are found in *R v Goodyear* [2005] EWCA Crim 888, [2005] 1 WLR 2532 and further expanded in the Criminal Practice Directions [2013] EWCA Crim 1631.

¹⁰ During the 1950s the Court of Appeal even commented that comparisons between cases were unlikely to prove helpful: *R v Brooks* [1950] NZLR 658 (CA) at 659; *R v Radich* [1954] NZLR 86 (CA).

¹¹ P Spier *An Examination of Regional Differences in the Use of Custodial Sentences in the District Courts* (Policy and Research Division Department of Justice, Unpublished Paper, Wellington, 1989) at 49; Sean J Mallett "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just?" (2015) 46 VUWLR 533 at 542-543.

¹² *R v Reece* CA74/95, 22 May 1995 at 3-4.

erosion of public confidence in the administration of justice if this is seen to be done in the course of informal and unstructured discussions between counsel and the trial Judge.

Nevertheless, by the late 1990s the practice had become well established, at least in the District Court.¹³ The Guidelines set out in the District Court Bench Book give an indication of how the process operated. These guidelines established certain principles that remain the core of sentence indications even under the CPA scheme. Sentence indications must be requested by the defendant; they are not to be referred to in subsequent proceedings if the matter goes to trial. Giving a sentence indication is discretionary and should only be offered if the judge has sufficient information to give an appropriate sentence. The views of the police and victims must also be considered.¹⁴ While the guidelines operated only in the summary jurisdiction, a similar process was followed in the indictable jurisdiction as well.¹⁵

Despite the guidelines that were developed, a number of issues arose with sentence indications. In many cases, defendants would rely upon statements made by judges about the likely sentence that would be imposed,¹⁶ however, the informality of many of these indications made it difficult to differentiate between a simple offhanded remark and a sentence indication which could later be relied upon. For example, the Court of Appeal refused an appeal in *R v Mohi* where the purported "sentence indication" consisted of a comment by a judge at a bail hearing that if the trial was not held before Christmas, the defendant may be on remand longer than the eventual sentence he could expect to receive.¹⁷ Equally problematic, in some cases sentence indications were given, in the absence of a defendant who later sought to rely upon it.¹⁸ Despite clear directions, some judges also continued to give sentence indications unilaterally, without a request from the defendant.¹⁹

Informational challenges were also common. Without clear processes existing for obtaining victim impact statements and pre-sentence reports in advance of a sentence indication, these reports were generally missing.²⁰ As a result, sentence

¹³ *R v Gemmell*, above n 1, at [15]-[16]; Law Commission *Reforming Criminal Pre-Trial Processes* (NZLC PP55, 2004) at 218.

¹⁴ District Court Bench Book, as recorded in *Sipa*, above n 2, at [41].

¹⁵ *Reforming Criminal Pre-Trial Processes*, above n 13; Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005) at [307].

¹⁶ *R v Smail*, above n 3, at [18]; *Sipa v R* [2006] NZSC 52, [2006] 3 NZLR 349; the same has been recognised in other jurisdictions: *R v Glass* (1994) 73 A Crim R 299.

¹⁷ *R v Mohi* [2007] NZCA 139.

¹⁸ *R v Smail*, above n 3, at [20].

¹⁹ *Criminal Pre-Trial Processes: Justice Through Efficiency*, above n 15, at [305]; *Solicitor-General v Bickerton* HC Auckland A34/01, 10 April 2004. This was directly at odds with the guidelines provided by the District Court Bench Book.

²⁰ *R v Gemmell*, above n 1, at [13]; *Criminal Pre-Trial Processes: Justice Through Efficiency*, above n 15, at [327]-[328].

indications were sometimes given on the basis that they were conditional on this information being suitable. However, there were several appeals against such “conditional” sentence indications which were later varied.²¹ As a result, the Court of Appeal established a rule that in such cases, the defendant must be offered the opportunity to vacate his or her plea before a different sentence was imposed.²² A similar rule was also developed in cases where the sentence was increased on appeal.²³ However, in *Sipa v R*, the Supreme Court suggested that this should not be automatic and actually required the appellants to file affidavits stating whether they intended to defend the charges in the District Court. Leave was refused when the defendants indicated that they had no intention of going to trial.²⁴

Even after the systematisation of the practice in the District Court, the Court of Appeal continued to describe such indications as “troublesome” and “problematical”²⁵ and repeatedly made reference to the risk that such indications would result in “plea bargaining”.²⁶ The apparent fear here was that defendants would either interpret the judge’s indication as a sign that they were likely to be found guilty, or like Mr Mohi above, conclude that the sentence would be better than continuing on remand. It also risked discouraging defendants from contesting discrete issues, such as the level of a charge or a particular sentencing fact, if the end sentence remained one the defendant could accept. The issue of guilty plea discounts also raises a particular concern, and has attracted significant attention in other jurisdictions.²⁷ The Court of Appeal of England and Wales, for example, ruled that sentence indications could not make any reference to the possibility of a plea discount, in order to avoid undue pressure on a defendant to plead.²⁸

These concerns, although frequently repeated, did not appear to discourage judges in the District Court from continuing to give such indications. Indeed, the comments of some judges, recorded by the Law Commission in their 2004 report into criminal procedure, tend to indicate that many judges saw this as beneficial, rather than detrimental to the criminal justice system.²⁹ While lawyers who were interviewed

²¹ See, for example, *R v Gemmell*, above n 1.

²² *R v Gemmell*, above n 1; *R v Edwards* (2000) 17 CRNZ 604 (CA); *Ferguson v Police* HC Auckland A99/00, 14 July 2000 at [6].

²³ *R v Smail*, above n 3, [48]-[50].

²⁴ *Sipa v R*, above n 16, at [6]-[7].

²⁵ *Sipa*, above n 2, at [53] and [46].

²⁶ *R v Smail*, above n 3, at [39]-[40], *R v Reece*, above n 12, at 3-4.

²⁷ *R v Marshall* [1981] VR 725 (FCSC) at 732; *R v Turner* [1970] 2 QB 321 (CA).

²⁸ *R v Turner*, above n 27; the evident absurdity of this rule was finally reversed after 35 years in *Goodyear v R* [2005] EWCA Crim 888, [2005] 1 WLR 2532, although that case also sought to lay down detailed guidelines, similar to the Bench Book guidelines, to prevent abuse of the practice.

²⁹ *Reforming Criminal Pre-Trial Processes*, above n 13, at [217].

tended to share this view, they also acknowledged there were risks with the practice. As one prosecutor observed:³⁰

There are times, and probably at every status hearing, you see probably one person come through and they just take the better deal ... especially if the judge has sort of said to them "look, I don't think your defence is a good defence. If you plead guilty now I am going to offer you this. If you go to defended hearing you are probably going to get this". And the defendant thinks "I may as well take this, even though I don't think I did it". That is where they are disadvantaged especially if they are unrepresented.

Ultimately, it appears that the apparent efficiency which sentence indications offered was seen as outweighing the risk that it would put undue pressure on defendants to plead guilty. Even as the Court of Appeal was critical of the practice, it continued to uphold and enforce it – including overruling the District Court when it departed from its earlier indications.³¹

III. SENTENCE INDICATIONS UNDER THE CPA

The benefits offered by sentence indications also drew considerable attention from Parliament and the Law Commission, both of which were eager supporters of the sentence indication process. While in its 2004 and 2005 reports the Law Commission identified the risk that sentence indications could lead innocent defendants to be pressured into pleading guilty, the Commission considered that this risk was easily mitigated and supported the practice as creating greater efficiency in the courts' processes.³²

Parliament's praise for the practice was even more effusive, with opposition members Charles Chauvel and Hon Lianne Dalziel expressing particularly strong support for sentence indications when the Criminal Procedure (Reform and Modernisation) Bill was being considered.³³ The objective of placing the practice on a strong legislative footing was seen as a clear benefit of the proposed reforms.³⁴ There were also repeated references to the increased efficiency provided by the practice.

The legislation largely adopted the scheme that had been developed by the District Court, and consistently applied the same principles. Sentence indications are to be given at the request of the defendant;³⁵ they are to be given only when there is

³⁰ At [235].

³¹ *R v Gemmell*, above n 1.

³² *Reforming Criminal Pre-Trial Processes*, above n 13, [235]-[236]; *Criminal Pre-Trial Processes: Justice Through Efficiency*, above n 15, at [304].

³³ (27 September 2011) 676 NZPD 21420, 21422 and 21428; (29 September 2011) 676 NZPD 21584.

³⁴ (29 September 2011) 676 NZPD 21584.

³⁵ Criminal Procedure Act 2011, s 61(1).

sufficient information for the Court to reach a positive conclusion;³⁶ and the fact that a sentence indication has been requested cannot later be used as evidence against a defendant.³⁷ As with the former District Court practice, the content of a sentence indication is to be suppressed until the conclusion of the matter.³⁸ However, contrary to the former official practice in the District Court, the Court is to be empowered not only to indicate the type of sentence that would be imposed, but also the quantum of a sentence.³⁹

As passed, the legislation also confirmed that the fact that a sentence was imposed following a sentence indication would not alter the right of either the defendant or the Solicitor-General to appeal the sentence,⁴⁰ and the ability of the appellate courts to impose a different sentence than that indicated was confirmed.⁴¹ Significantly, the legislation also explicitly altered the former practice, by removing the automatic right for a defendant to withdraw his or her plea when a more severe sentence was imposed on appeal. Now, the defendant can only withdraw the plea if the Court grants leave on the basis that it is in the interests of justice to allow the plea to be withdrawn.⁴²

In adopting the pre-existing procedures, the legislation benefited from the mechanisms that had already been developed to deal with obvious concerns with the practice – in particular the rules around suppression and when the plea could be withdrawn. However, the legislation did not seek to repair any of the difficulties which had arisen under the District Court procedure. The issues with appeals, and the considerable concerns about the risk of undue pressure on defendants to plead guilty, remain unaltered.

IV. SENTENCE INDICATIONS: UNRESOLVED ISSUES

The CPA provides clear guidance to judges who are sentencing an offender following a sentence indication in the same Court. In such cases, Judges are required to either impose the same sentence as was indicated, or must otherwise invite the defendant to withdraw his or her plea.

However, as distinct from the former practice, the CPA now makes it clear that an appellate court is not bound by a sentencing indication. The CPA provides both that

³⁶ Section 61(2).

³⁷ Section 63.

³⁸ Section 65.

³⁹ Section 60.

⁴⁰ Section 245.

⁴¹ Section 252.

⁴² Section 252.

a different sentence may be imposed on appeal, despite an earlier indication,⁴³ and also that the appellate court is not required to allow the defendant to vacate his or her plea simply because a more severe sentence is to be imposed.⁴⁴ However, the Court may allow a defendant to vacate his or her plea if it is in the interests of justice to do so.

Broadly, appeals can arise in three ways following a sentence indication. First, the defendant may consider that the sentence is manifestly excessive and appeal in the usual way. This would seem highly unusual, as the defendant is unlikely to accept the indication if this is the case, but the legislation is clear that this option remains open. Unsurprisingly, there are few examples.⁴⁵

Secondly, a defendant who received a sentence indication but was later sentenced to a different sentence without being given the opportunity to vacate his or her plea may appeal against either the conviction or the sentence imposed. While the failure to allow the defendant this opportunity is a clear error, the role of the court on appeal is somewhat less clear. In particular, the rule in s 252 of the CPA that the appellate court may impose a more severe sentence without allowing the defendant to vacate his or her plea does not directly apply.

Thirdly, a sentence indication may be unduly favourable to a defendant, in which case the Solicitor-General may appeal in the usual way. In such cases, the legislation is clear that the Court is not required to allow the defendant to vacate his or her plea, and may impose a more severe sentence, although the Court may allow a defendant to vacate his or her plea if it is in the interests of justice.

Of these three categories, the latter two are the most common and create the greater difficulty for the Court. Each raises unique challenges, and must be considered separately.

A. Departing from the Indication

When the Sentencing Court departs from an earlier indication, either because a different judge is sentencing, or because there has been a relevant change in circumstances since the indication was given, the Court is required to allow the defendant to vacate his or her plea. When this does not occur, the sentencing court commits a clear error.

This is relevant, because an appeal against sentence has been traditionally regarded an appeal against an exercise of judicial discretion. As a result, a sentence appeal is

⁴³ Section 252.

⁴⁴Section 252.

⁴⁵*Helsby-Knight v R* [2015] NZCA 315 appears exceptional in this regard.

only to be granted when the sentencing court has committed some error of principle or where the decision itself is plainly wrong.⁴⁶ An appellate court is not able to simply impose its own view in substitution of that of the lower court.⁴⁷

Section 250(2) of the CPA specifies that a sentence appeal must only be allowed if (a) there has been an error in the sentence imposed on conviction; and (b) a different sentence should be imposed. It is a conjunctive test and, in addition to being required to find an error in the lower court's decision, an appellate court must be satisfied that the sentence is wrong before it can interfere.

In a practical sense, it would be rare for a judge to find that a sentencing court made an error yet nonetheless imposed the correct sentence. A sentence imposed on wrong principle will be in error, even if it is within the available range. In this case, an appellate court is entitled to substitute its own view, even if the original sentence is defensible.⁴⁸ Similarly, a sentence which is outside the acceptable range is in error, whether some independent error of principle can be identified or not. However, in the case of a sentence imposed contrary to an earlier sentence indication, the case is not so clear. The sentencing court would clearly be in error in imposing a divergent sentence, but this does not mean that the sentence imposed is "wrong" – indeed, the appellate court may well consider that the sentence imposed is actually the correct sentence.⁴⁹

Applying the language of s 250, the appellate court should only depart from the sentence actually imposed if it is satisfied that not only was it imposed in error, but that it is also the wrong sentence. As such, the failure to impose the indicated sentence does not provide clear justification for imposing a different sentence. In particular, it does not mean that the appellate court should simply revert to the sentence which was indicated.

A number of such cases have already appeared before the courts. Because of the nature of the District Court and its workload, the vast majority of these cases have related to District Courts where there is a much higher chance (a) that a sentencing will take place before a different judge to the judge who gave a sentence indication; and (b) that the fact that a sentence indication has been given will be lost between the relevant hearings. As such, many of these appeals have been heard by the High Court.

⁴⁶ *Vae v Police* [2013] NZHC 2664 at [28].

⁴⁷ *R v Shipton* [2007] 2 NZLR 218 (CA) at [138].

⁴⁸ *R v Finau* (2003) 20 CRNZ 333 (CA) at 337; *M v Police* HC Auckland CRI-2004-404-440, 10 December 2004; however, in *Ripia v R* [2011] NZCA 101 at [15], the Court of Appeal has emphasised that in general it is the end sentence which will be of relevance on appeal.

⁴⁹ See for example *Wilson v R* [2015] NZHC 298 at [37].

The High Court has not been entirely consistent in its approach to these cases, however. In several cases the High Court has imposed a sentence in keeping with the original indication, although acknowledging that it was not required to do so.⁵⁰ By contrast, in *Wilson v R*, Wylie J dismissed an appeal where a District Court Judge imposed a sentence of imprisonment following a sentence indication of community detention, but where no address was available. While accepting that the Judge erred in failing to allow Mr Wilson to vacate his plea, his Honour noted that Mr Wilson had not indicated on appeal that he wished to vacate his plea.⁵¹ His Honour went on to observe:⁵²

[37] If I am to allow the appeal, I must also be satisfied that a different sentence should have been imposed. I must consider afresh what sentence was appropriate.

After a review of the sentence, the Judge determined that the sentence under appeal was within the available range and dismissed the appeal.

To similar effect, in *Te Namu v Police*, Courtney J allowed an appeal against a sentence which included community work, where a different judge had given an indication of a sentence not including community work, but had not allowed Mr Te Namu an opportunity to vacate his plea. In those circumstances, her Honour imposed a wholly new sentence, by increasing the term of the community detention sentence while removing the order for community work. Such a sentence was in keeping with the sentence indication, which did not address quantum, but represented a change from the sentence actually imposed.⁵³

The unifying feature in both *Wilson* and *Te Namu* appears to be that the indicated sentence proved unworkable. In *Wilson*, the indicated sentence of community detention was practically impossible. In *Te Namu*, a sentence of community detention alone, at the quantum imposed, would be insufficient under the circumstances. As such, in both cases, a different sentence was required. Conversely, in the cases where the sentence was quashed and replaced with that which had been indicated, the High Court was satisfied that the indicated sentence was within the acceptable range.

These cases can be harmonised by drawing an analogy to the standard which is commonly applied in Solicitor-General's appeals. In these cases, appellate courts will interfere with a sentence to the minimum degree necessary to bring it within the

⁵⁰ *Te Tau v Police* [2015] NZHC 1716 at [13]; *Appuhamilage v Police* [2015] NZHC 2355.

⁵¹ Compare *Sipa v R*, above n 16, where the Supreme Court refused leave on the basis that the appellants had no interest in vacating their pleas.

⁵² *Wilson v R*, above n 49, at [37].

⁵³ *Te Namu v Police* [2013] NZHC 3443 at [10].

acceptable range.⁵⁴ As a result, the defendant can expect to receive the least severe sentence which is acceptable in the circumstances.

Similarly, these cases show that where the sentence indication is in the acceptable range, the High Court has developed a practice of reinstating the sentence which had been indicated. Conversely, where this sentence is unacceptable or impossible, the Court will adjust that sentence to impose an acceptable sentence, but where possible, will do so by altering the indicated sentence to the minimum degree necessary – mirroring the approach adopted in Solicitor-General’s appeals.

B. Vacating Pleas on Appeal

This approach, however, is secondary to the Court’s preferred approach in such cases, which is to allow the defendant to vacate his or her plea. This effectively restores the defendant to the position he or she would have been in, had the District Court correctly applied s 115 of the CPA, thus reinforcing the express scheme of the legislation.

While this policy effectively undoes the error in the lower court, it is not clear whether this was the result intended by the legislation. Indeed, the CPA does not make any express provision for how breaches of s 115 should be resolved. While s 252 of the CPA provides that an appellate court is not required to allow a defendant to withdraw his or her plea when imposing a more severe sentence – this only appears to apply when the Court is considering a sentence appeal – particularly a Solicitor-General’s appeal. The situation is different when a defendant chooses to appeal against his or her conviction.

The standard on a conviction appeal is significantly different from that which applies to sentence appeals. Under s 232(2)(c) of the CPA, the appellate court must allow the appeal if a “miscarriage of justice” has occurred. Subsection (4) further defines a “miscarriage of justice” as something that causes “a real risk that the outcome of the trial was affected”.

This language draws on earlier cases discussing the meaning of a “miscarriage of justice”. In those cases, the courts held that a “real risk of an affected outcome exists when there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong.”⁵⁵ This standard means that “an appellant does not have to establish a miscarriage in the sense that

⁵⁴ *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 548-550.

⁵⁵ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 (SC) at [110] per Tipping J.

the verdict actually is unsafe” but that there is a real possibility the verdict would be unsafe.⁵⁶

Translated to the context of sentence indications, this standard could be reduced to a question of whether there is a real possibility that the defendant would not have pleaded guilty to the particular charge had it not been for the sentence indication. This may mean that the defendant would have sought an acquittal, or it may mean that the defendant would have sought to be convicted on a lesser charge. In some cases, it may not even be that the defendant would have been convicted of a lesser charge, but may have been able to disprove an aggravating fact that is contained in the summary – in short, the sentence indication may have led to the defendant accepting a state of affairs that was less favourable that could have resulted from a defended hearing.⁵⁷

This is broadly consistent to the approach which applies when a defendant appeals against his or her conviction following a guilty plea, although such cases are held to a high standard. This was confirmed by the Court of Appeal in *R v Le Page* where the Court observed:⁵⁸

It is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. These principles find expression in numerous decisions of this Court, of which *R v Stretch*⁵⁹ and *R v Ripia*⁶⁰ are examples.

In that case the Court identified three broad categories where a miscarriage of justice would occur. The first such circumstance is where the appellant pleaded by accident or did not understand the charge to which he or she pleaded. In these cases, the Court held that the plea was “vitiating by genuine misunderstanding or mistake”.⁶¹ There is a clear analogy to cases where the defendant pleads guilty based on a mistaken sentence indication. The second is where the defendant pleads guilty but on the basis of facts which could not in law justify a conviction for the charge.⁶² In most cases, such cases will also fall under the first ground. Thirdly, the defendant may vacate his or her plea where “the plea was induced by a ruling which

⁵⁶ At [110].

⁵⁷ Compare, for example *R v Smail*, above n 3; *Solicitor-General v Morunga* [2015] NZHC 1954, both discussed in more detail below.

⁵⁸ *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

⁵⁹ *R v Stretch* [1982] 1 NZLR (CA).

⁶⁰ *R v Ripia* [1985] 1 NZLR 122 (CA).

⁶¹ *R v Le Page*, above n 58, at [17].

⁶² At [18].

embodied a wrong decision on a question of law.”⁶³ Again, the analogy to an erroneous sentence indication is a simple one. Similarly, in *Merrilees v R* the Court of Appeal held that a plea which was induced by deficient legal advice could also provide a basis for a conviction appeal.⁶⁴ In that case, the Court also observed:⁶⁵

[35] It is often the case that an offender pleads guilty reluctantly, but nevertheless does so, for various reasons. They may include the securing of advantages through withdrawal of other counts in an indictment, discounts on sentencing, or because a defence is seen to be futile. Later regret over the entering of a guilty plea is not the test as to whether that plea can be impugned. If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances.

Again, this standard would appear to justify an approach that a defendant may withdraw his or her plea following a sentence indication provided there is a basis for concluding that absent the plea, the defendant may have obtained a more favourable result. This does not mean, necessarily, that the defendant must be able to prove a more favourable sentence would have been given. It will be sufficient if the defendant has waived an argument that would have led to a different and more favourable outcome in terms of the charge or the facts which are found.

It is noteworthy that this requires a different approach to that adopted by the Supreme Court in *Sipa v R*.⁶⁶ In that case, the Court refused to consider an appeal unless the appellants were intending to defend the charges at trial. With respect, this binary analysis fails to reflect the multifaceted negotiations that take place in case review. While a defendant may accept that his or her conduct fulfils the elements of a charge, the presence or absence of particular aggravating features is a point of some significance. The fact that a defendant does not intend to change his or her plea, does not mean that no injustice has been suffered as a result of the mistaken indication.

While this approach is justified both in terms of the language of the section and by comparison with the approach which applies to conviction appeals following guilty pleas generally, the courts have applied a more generous standard to date in appeals which fall under this category. In each of the cases outlined above, the Court was willing to vacate the defendant’s plea, and only imposed a sentence when the defendant indicated that he or she did not wish to take that step. It appears that

⁶³ At [19].

⁶⁴ *Merrilees v R* [2009] NZCA 59 at [34].

⁶⁵ At [35].

⁶⁶ *Sipa v R*, above n 16.

the Court is willing to treat any breach of a sentence indication as a miscarriage of justice – although it is not immediately clear that this should be the case. However, these cases could equally be justified on the basis that in electing not to vacate their pleas, the appellants in each case confirmed that they did not consider a more favourable outcome would have been achieved by defending the charge. Alternatively, it may simply be that they do not wish to risk losing the guilty plea discount which they have received. Whether this is the case will become clearer as the courts continue to consider and determine similar appeals.

C. Solicitor-General's Appeals

The situation is somewhat different when an appeal is brought by the prosecutor on the basis that a sentence is outside the acceptable range. In such cases, the legislation is clear that the appellate court is not required to allow the defendant to vacate his or her plea – unless the court considers that it is in the interests of justice to grant leave for the plea to be withdrawn.⁶⁷

Such appeals must also contest with the principles set out in *R v Donaldson* for prosecutorial appeals, namely that:⁶⁸

- a. considerations which justify an increase in sentence must be more compelling than those which might justify a reduction;
- b. even if the Court determines that the sentence is manifestly inadequate or based upon a wrong principle, it will still be reluctant to interfere if this would cause injustice to the offender; and
- c. in particular, the court will be more disinclined to interfere where a community-based sentence has been imposed and conditions which were ordered have been complied with.

In that case the Court set out the dangers of a prosecutorial appeal in significant detail, referring to the unique harshness of imposing an increased sentence on a defendant who would otherwise consider his or her sentence to be settled. In particular, the impact of imposing a custodial sentence, in place of a community based one, was recognised by the court as being particularly crushing.⁶⁹ The Court then went on to remark:⁷⁰

... At times, certainly, any deficiency or discrepancy in the sentence under appeal may be met by the Court indicating what the appropriate term of imprisonment would have been but nevertheless declining to reverse a non-custodial sentence. We would consider such a course appropriate where the minimum custodial term which would otherwise be substituted would be 2 years' imprisonment or less ...

⁶⁷ Criminal Procedure Act 2011, s 252.

⁶⁸ *R v Donaldson*, above n 54, at 548-550.

⁶⁹ At 550.

⁷⁰ At 550.

In short, a court considering increasing a sentence on appeal must only alter the sentence to the minimum degree necessary. It must have due regard to the impact of an increased sentence and in some cases should do nothing, even where a clear error has occurred. There is no indication that these principles have been displaced by the advent of the CPA.

These principles are of equal application in cases where the defendant has pleaded guilty following a sentence indication. In such cases, the defendant's relief at receiving a particular sentence is measurable by his or her willingness to plead guilty. Where the sentence is later increased, the impact may be severe.

The potential solution to this challenge is to allow the defendant to vacate his or her plea. This avoids, in part, the crushing effect of a substituted sentence and allows the defendant to consider whether to accept the new sentence or whether to revert to the defended hearing path. However, the legislation is clear that this is not applicable in all cases where a more severe sentence is to be imposed, but only in cases where the interests of justice require it. This solution may not be perfect either, as the defendant would still be forced to decide whether to waive the guilty plea discount which would have been included in the sentence.

Given the comments of the Court of Appeal in *Donaldson*, it seems that this should be a relatively low threshold. Certainly, the impact of an increased sentence in such appeals is significant and it is not difficult to envision a case where the interests of justice would require that an opportunity be given to the defendant to vacate his or her plea. However, given the clear legislative intent to limit this outcome – in keeping with the overall purpose of the legislation being to promote efficiency in the criminal process – the court's discretion must nonetheless be somewhat constrained.

Relatively few cases have arisen under this section and there has been little judicial analysis on when the defendant should be entitled to vacate his or her plea on appeal. In some cases, it appears to simply be granted automatically.⁷¹ However, the decision of Brewer J in *Solicitor-General v Morunga* is instructive.⁷² In that case his Honour made express reference to the submission by Mr Morunga's counsel that, had the sentence indication not been given, Mr Morunga had an arguable defence which would have resulted in a reduced charge. While noting that it would have been "a roll of the forensic dice against long odds", Brewer J accepted that this was

⁷¹ For example, *Police v Filippo*, above n 8, at [85].

⁷² *Solicitor-General v Morunga*, above n 57.

nonetheless relevant in assessing (a) whether the sentence should be increased; and (b) whether the defendant should be permitted to vacate his plea.⁷³

This is broadly consistent with the approach proposed above – that a defendant should be entitled to withdraw his or her plea when it can be shown that the defendant, in accepting the sentence indication, forwent an opportunity to obtain a better outcome by defending the proceeding. Where the defendant by pleading has simply accepted the inevitable, there is little injustice to preventing them from obtaining the windfall of an overly favourable sentence indication. Conversely, where the acceptance of the indication represents a compromise on the part of the defendant, he or she should not lose the benefit of that compromise without an opportunity to revisit it. In such cases, the defendant should be able to vacate his or her plea.

There is a practical limit, however, on the benefit which the defendant can obtain by vacating his or her plea. This is because by the time a case is determined on appeal, the practical protection of the mandatory suppression under ss 63 and 65 of the CPA may well have been lost.

The CPA makes it clear that requesting a sentence indication should not prejudice a defendant if he or she elects to defend the proceeding. The fact that an indication was requested cannot be admitted as evidence, and must not be published until the defendant is sentenced. However, if the defendant ultimately withdraws his or her plea following a sentence appeal, there is no guarantee that the details of the indication will not have been published in the interim.

This risk is exemplified in the recent case of *Police v Filippo*.⁷⁴ In that case, Mr Filippo, a successful young rugby player, was granted a discharge without conviction following an incident where he assaulted several people. Following a public outcry about the case, the Solicitor-General appealed, successfully, against the decision. However, Mr Filippo had pleaded guilty following a sentence indication which had indicated that a discharge without conviction would be granted.

The Court, recognising that Mr Filippo had pleaded in reliance on the indication gave him the opportunity to vacate his plea.⁷⁵ However, in practical terms this appears to have been an empty opportunity – the publicity surrounding the case and, in particular, the fact that he had pleaded guilty would have made it very difficult for him to receive a fair trial. Perhaps unsurprisingly, he elected not to vacate the plea and was sentenced by the High Court.

⁷³ At [36].

⁷⁴ *Police v Filippo*, above n 8.

⁷⁵ At [85].

This consequence is potentially unavoidable, but demonstrates a clear tension between the suppression provisions and the appeal provisions in the CPA. While it is not realistic, or indeed appropriate, to have permanent suppression in relation to sentence indications, the protections granted by suppression may well be lost when a case is challenged on appeal. As such, this is a factor which appellate courts should take into account when determining whether it is in the interests of justice to allow the defendant to vacate his or her plea or, whether the circumstances are such that the only just outcome is to allow the defendant to enjoy the benefit of a generous sentence indication and the associated discount for guilty plea but, pursuant to *Donaldson*, to make a declaration that the sentence itself is outside the acceptable range.

D. Open Justice

In addition to the tension between the suppression and appeal provisions under the CPA, the suppression provisions also have the potential to undermine access to the Court's sentencing jurisprudence.

Consistently, regulations for the giving of sentence indications have required that they be given in open court and in the presence of the defendant.⁷⁶ In this regard, the provisions for sentence indications mirror those which apply to sentencing generally, and for the same reasons.

The CPA confirms a principle which was already widely observed in the Courts prior to the passage of that law and confers on the defendant an absolute right to be present at sentencing.⁷⁷ Unlike the trial phase, where the defendant by his or her actions may waive the right to be present, a defendant charged with an imprisonable offence has an absolute right to be present.

The reasons for this are several. On the one hand the defendant has a right to participate in the sentencing process, and the defendant's personal circumstances mean that direct involvement is highly important.⁷⁸ However, beyond this, a defendant must also hear why he or she is being sentenced and how the sentence corresponds to his conduct.⁷⁹ This is a matter of fairness, but also a matter of instruction, where the defendant's own conduct is examined for his or her benefit.

⁷⁶ District Court Bench Book, above n 5; *R v Goodyear*, above n 9, at [75]; Criminal Procedure Act 2011, s 61.

⁷⁷ Criminal Procedure Act 2011, s 118.

⁷⁸ *R v van Yzendoorn* [2002] 3 NZLR 758 (CA); *R v Tukaokao* HC Rotorua T010266, 31 May 2001; *R v Smail*, above n 3.

⁷⁹ *R v D* [2003] 1 NZLR 43 (CA) at [60].

However, sentencing does not only speak to the defendant who is being sentenced. Rather, in sentencing, a judge addresses a range of audiences, each with a vested interest in the process.

In addition to the defendant, the judge addresses the appellate courts that may later consider the sentence. The reasons for the sentence and the component parts of the sentence allow a supervisory court to properly consider whether the sentence is an appropriate one.⁸⁰

Another audience of the sentencing court is the victims of the offending. While acknowledging that no crime can be undone by the courts, the sentencing judge must demonstrate to the victims that their hurt has been properly recognised and vindicated in the courts.⁸¹

Thirdly, and relatedly, the sentencing court also addresses the public – both those who are in the courtroom and those who will later hear of its decision through the news media and other means.⁸² To this group, the court's task is to demonstrate the fairness of the courts, their reliability and justice. This is closely linked to the principle of open justice.⁸³ As observed by the Court of Appeal in *Lewis v Wilson & Horton Ltd*, the failure to give reasons for a decision would often render it "unintelligible" to those present.⁸⁴

In addition to these well recognised groups, one further audience deserves attention – the legal profession. It is on judges and lawyers that the responsibility falls to ensure that sentencing is both consistent and fair.⁸⁵ Therefore, it is judges and lawyers who must be able not only to understand the reasons for a sentence but also to adapt them and apply them to future cases. This requires more than a general explanation of the factors which go into a sentence, which are often obvious to those initiated in the sentencing process but which require a detailed and comparative approach that places a particular sentence in the wider context of offending generally.

The sentence indication provisions under the CPA attempt to preserve these interests by requiring a sentence indication to be given in the same manner as a

⁸⁰ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [80]-[81].

⁸¹ See, for example, *R v Elliot* HC Hamilton CRI-2011-219-182, 17 November 2011 at [1] and [3]; *R v Mika* [2013] NZHC 2357 at [29].

⁸² *R v Husband* (2000) 18 CRNZ 229 at [33].

⁸³ *Lewis v Wilson & Horton Ltd*, above n 80, at [76]; *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

⁸⁴ *Lewis v Wilson & Horton Ltd*, above n 80, at [77].

⁸⁵ See generally: Geoff Hall "Reducing Disparity by Judicial Self Regulation" (1991) 14 NZULR 208; Mallet, above n 11; *Practice note: Sentencing in the High and District Courts* HCPN 2014/1 at [7]-[8].

sentence. However, this can be compromised by the suppression rules which automatically apply to sentence indications.

Under ss 63 and 65 of the CPA, sentence indications are automatically suppressed. They cannot be disclosed in subsequent proceedings and it is unlawful to publish them until they are accepted. Even when they are accepted, they are not automatically published, with publishers generally cautious about publishing suppressed material even after the suppression has expired.⁸⁶

Often, when an offender is sentenced pursuant to a sentence indication, the Court does not repeat the reasons for the sentence. While not a universal rule, in some cases such sentencing decisions are brief, simply making reference to the earlier indication and imposing a final sentence. As a result, in some cases, no public record of the reasons for the decision exists.

The consequence of this is that while those present in court are able to assess the correctness of a particular sentence indication, the public and the profession are, in some cases, effectively excluded from it. Even the media do not typically provide details of the sentence indication when the final sentence is imposed, significantly undermining their role as the public's eyes and ears in the courtroom.

For the profession, the lack of access to the sentence indications is yet more crucial. Inability to access these decisions means that they cannot form part of counsel's submissions in future cases. They are effectively removed from the data which courts will have regard in sentencing in the future. Given the increasing popularity of sentence indication, this creates a clear risk that crucial precedents will be missed, or worse, misinterpreted as a result of the partial information contained in the brief sentencing decisions that are released.

The solution to this problem is a simple one – ensuring that sentence indications are published in full. This can be achieved by a simple change of policy amongst publishers, or even more easily by sentencing judges who can either repeat their indications at sentencing⁸⁷ or annex them to sentencing judgments that are given.

⁸⁶ This appears to stem from the official policy of Judicial Decisions Online (JDO), which specifically states that JDO does not publish decisions subject to suppression, including those subject to time-limited suppression (which includes many pre-trial decisions and bail decisions, as well as Sentence Indications). Whether other publishers are relying on the availability of decisions from JDO or simply applying a similar policy is difficult to assess. However, the effect of it is that sentence indications, as is the case with bail decisions, are generally not available online: *Judicial Decision Online* <www.forms.justice.govt.nz/>.

⁸⁷ Many Judges appear to have adopted this practice: *R v Maywald* [2015] NZHC 2264; *R v Dickson* [2015] NZHC 2448; *R v Sisley* [2014] NZHC 396. However, the practice is not uniform: *R v Esterhuizen* [2013] NZHC 716.

In this way the lacuna in public access to this crucial part of the sentencing process can be repaired.

V. SENTENCE INDICATIONS: DANGEROUS INCENTIVES

The most frequent objection that has been raised to the sentence indication scheme is that it bears strong similarities to plea bargaining⁸⁸ and, as with plea bargaining, it encourages innocent defendants to plead guilty.⁸⁹

Sentence indications differ from plea-bargaining in several key respects. Crucially, the judge is independent of the prosecutor, and there is no negotiation based on mutual exchanges. However, the fact remains that the defendant is given the ability to choose between a fixed sentence in return for their plea and the risk that they will face an inevitably greater sentence, having lost the plea discount, if they are convicted at trial. Some view this as placing undue pressure on defendants to plead guilty. In particular, some commentators have expressed concern about the effect of a judge explaining to a defendant that a guilty plea discount would be available if he or she pleaded guilty immediately.⁹⁰

In response to these concerns, others have observed that it is artificial to treat defendants as being unaware of the practice of giving guilty plea discounts and of the likely sentence which they may receive.⁹¹ These are all matters which defence counsel will advise on and so some argue that the impact of judicial indications is likely to have little impact other than to provide clarity around the precise level of penalties.

In fact, the role of counsel is significant in this area for several reasons. The majority of defendants who seek a sentence indication will be represented and will have counsel who can explain to them the significance of the indication and ensure that they do not misinterpret it as pressuring them to plead guilty. However, the risk remains that defendants will see the opportunity of a sentence that they can accept and take this rather than running the risk of being convicted at trial and being sentenced more harshly. Furthermore, where the sentence indicated is particularly lenient, defence counsel will generally identify this fact – potentially increasing the pressure on the accused to plead guilty.

On the other hand, courts and legislatures have developed systems that attempt to minimise the pressure placed on defendants. In particular, it is a common feature of

⁸⁸ *R v Reece* CA74/95, 22 May 1995 at 3-4; *R v Smail*, above n 3, at [39]; , "Criminal Pre-trial Processes: Justice Through Efficiency", above n 15, at [313].

⁸⁹ "Criminal Pre-trial Processes: Justice Through Efficiency", above n 15, at at [313].

⁹⁰ At [314]; *R v Turner*, above n 27, at 327.

⁹¹ "Criminal Pre-trial Processes: Justice Through Efficiency", above n 15, [315]-[316].

most sentence indication schemes that only the defendant may request an indication – this removes the sense that the defendant may misinterpret an uninvited sentence indication as a judge’s attempt to encourage a guilty plea. In particular, this was central to the Court of Appeal of England and Wales’ approach set out in *R v Goodyear*.⁹²

It is clear that these processes provide a degree of protection to defendants, and generally the appeals following sentence indications seem to confirm that defendants who plead guilty to a charge following a sentence indication do not later seek to claim innocence. However, there are shades of innocence and these appeals do show that sentence indications may encourage defendants to plead guilty to more serious crimes than they believe they have committed.

In both *R v Smail*⁹³ and *Solicitor-General v Morunga*,⁹⁴ the offenders pleaded guilty despite raising arguments which could have resulted in a reduced charge.

In the case of Mr Smail, he received a sentence indication that indicated he would receive either a determinate sentence, or a low-grade murder sentence. In reliance on that indication, he pleaded guilty to murder – waiving a possible defence of provocation.⁹⁵ On appeal, the Court of Appeal considered that he was guilty of aggravated murder and concluded that a sentence pursuant to s 104 of the Sentencing Act 2002 would have been the appropriate outcome but for the sentence indication.⁹⁶

Similarly, Mr Morunga pleaded guilty on the strength of an indication that he would receive three years’ imprisonment.⁹⁷ In entering his plea Mr Morunga waived a possible defence that would have reduced his charge to one of an accessory.⁹⁸ The Solicitor-General then appealed.

Both of these cases reveal the more pertinent risk of sentence indications. Innocent defendants are unlikely to plead guilty to a sentence indication. However, defendants may well be willing to plead guilty to a charge if the sentence they expect to receive is the same as that for the crime they believe they have actually committed. Similarly, a defendant is likely to take substantially less issue with a

⁹² *R v Goodyear*, above n 9, at [49].

⁹³ *R v Smail*, above n 3.

⁹⁴ *Solicitor-General v Morunga*, above n 57.

⁹⁵ *R v Smail*, above n 3, at [3], [21] and [28].

⁹⁶ As a result of the sentence indication, however, the Court of Appeal allowed Mr Smail to vacate his plea: at [5] and [9].

⁹⁷ He ultimately received an even more lenient sentence of 12 months’ home detention on the basis of factors disclosed by the pre-sentence report. Ultimately the High Court considered this sentence too low but in all the circumstances reverted to the indicated sentence of three years’ imprisonment.

⁹⁸ *Solicitor-General v Morunga*, above n 57, at [36].

summary of facts where the judge has already indicated that he or she will place no weight on a disputed fact.

The mischief of this is that on appeal, those issues may hold greater relevance. While a particular fact or a particular increment in a charge may not have attracted the concern of the court at first instance, on appeal these factors may lead to a more stringent sentence. However, if the defendant is unable to vacate his or her plea, then there will be no opportunity for the defendant to contest those factors. In this way, a sentence indication may potentially “short-cut” the s 24 process which applies to disputed facts.⁹⁹ Instead of contesting these issues, once the defendant is satisfied that they are irrelevant, he or she may plead guilty only to later discover the importance of these issues.

In both *Smail* and *Morunga*, the Court recognised these concerns and allowed the defendant to vacate his plea for precisely this reason. However, this risk nonetheless raises several issues for both courts and counsel to consider.

First, as outlined earlier in this article, this factor should guide the appellate court when considering whether it is in the interests of justice to allow the defendant to withdraw his or her plea. If the defendant has genuinely foregone an opportunity to achieve a different outcome, then the court should preserve this right if the indication is later altered.

Secondly, there is the evidential issue. Where a defendant is waiving a defence in pleading guilty following a sentence indication or is electing not to dispute a particular fact in the process, this needs to be clearly recorded in order to preserve that right in any future appeal. It may be useful for counsel and courts to cooperate in recording that these factors have been raised when a defendant is sentenced after a sentence indication. There is naturally a challenge in this for defence counsel who may not wish to actively draw the courts attention to what will no doubt be an aggravating factor. However, when the sentence is being imposed after the indication is accepted there should be little reason for concern. In any event, even if the indication is altered and the plea is vacated as a result, this should be preferred over the situation where the sentence is increased on appeal without an automatic right for the defendant to vacate his or her plea.

Thirdly, appellate courts should also consider whether there are other alternatives that avoid requiring the defendant to vacate his or her plea. On appeal, this option is typically presented as binary – the defendant may accept an increased sentence or may return to face trial. For a defendant already several months into a prison

⁹⁹ Sentencing Act 2002, s 24.

sentence, such a prospect may be naturally unappealing. However, if the appellate court were to directly engage with the issue and conduct a s 24 hearing to resolve disputed facts,¹⁰⁰ the defendant would have an opportunity to resolve this challenge without facing the prospect of a full trial.

Such an approach is also consistent with the s 24 procedure – where a court is expected to indicate the significance which it is likely to place on a particular disputed fact.¹⁰¹ A court considering a sentence appeal could indicate to counsel the likely import of the particular fact at issue and then Crown and defence would be able to consider whether a s 24 hearing could resolve the issue on appeal without the need to revert to the first instance court for a full defended hearing.

Such an approach would recognise the reality of the calculations which a defendant is likely to engage in when presented with a sentence indication and would prevent defendants from being surprised by aggravating factors which are inherent in their plea but do not form part of their acknowledgment. It also presents a way for the courts to preserve the benefit of a sentence indication and a guilty plea without either adopting a manifestly inadequate sentence or treating a defendant unfairly. Rather, it provides a high degree of transparency to a defendant while also allowing the appellate courts to properly supervise the sentencing decisions of lower courts.

VI. CONCLUSION

The sentence indication scheme that was included in the CPA builds on more than a decade of experimental practice in the District Court and also in the High Court. It is a robust scheme which seeks to balance the systemic advantages of encouraging early pleas against the rights of defendants to be able to elect to defend proceedings and to have a degree of transparency and predictability in the sentencing process. However, even this well-designed system is unable to cure the fact that these objectives are in constant tension and as such the system requires courts, and particularly appellate courts, to trade between these principles when dealing with sentence indications.

There is as yet little data on whether the sentence indication scheme has reduced the caseload in courts around the country¹⁰² but the predominant response from the profession and from District Court Judges is that it is a good system that works well.

¹⁰⁰ The hearing could be conducted pursuant to the power of an appellate court to receive fresh evidence under s 334 of the Criminal Procedure Act 2011.

¹⁰¹ Specifically, Sentencing Act 2002, s 24(2)(a).

¹⁰² Compare the analysis of the NSW trial scheme which concluded that there were little if any systemic advantages as a result of the scheme: Don Weatherburn, Elizabeth Matka and Bronwyn Lind *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics & Research, Sydney, 1995).

However, those involved in the criminal justice system also clearly understand that it is a system that requires close supervision.

There remain a number of questions for appellate courts as how best to resolve the questions which the sentence indication scheme raises. This paper has attempted to propose solutions to some of these issues; however it will be for the courts to determine how best these questions are resolved. As with sentencing generally, the question for the court will remain how best to balance the rights of the defendant and the need to treat the defendant fairly with the importance of the broader principle of consistency in sentencing.¹⁰³

¹⁰³ Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 *Law and Contemporary Problems* 265 at 265, cited by Mallet, above n 11, at 533.

CASE NOTE: THE EXTRADITION RELATIONSHIP BETWEEN NEW ZEALAND AND CHINA: *KIM V MINISTER OF JUSTICE*

MIKE DOUGLAS*

I. INTRODUCTION

Having spent over five years in custody in New Zealand, Kyung Yup Kim was released on electronically monitored bail late last year, just a day after Minister of Justice, Amy Adams, signed off on his extradition to China for a second time.¹ The extradition of Mr Kim is sought by the People's Republic of China as he is suspected of committing the murder of a woman in Shanghai in 2009. His case has been the subject of a lengthy history of litigation, which continues following the latest decision to allow his surrender.²

The *Kim* situation puts a spotlight on the relationship between New Zealand and China in terms of extradition and mutual assistance in criminal matters. The assistance that New Zealand authorities have offered Beijing in working towards Mr Kim's surrender shows a willingness to work in a synergetic manner with China in transnational criminal matters. In the absence of an extradition treaty between New Zealand and China, a request for the surrender of a suspect like Mr Kim requires not only the establishment of jurisdiction, but relies upon cooperation between the authorities of each State. The Chinese would prefer for the relationship to be further consolidated by way of the implementation of a bilateral extradition treaty with New Zealand.³ Such a prospect would require an agreement which overcomes the human rights concerns that exist with regard to the Chinese criminal justice system. This is something that the Australian government has recently failed to overcome in attempting to have an extradition treaty with China ratified.⁴

Mr Kim's case can therefore be seen from a New Zealand perspective as a balancing act between the strengthening of diplomatic relations, and the substantive human rights and right to a fair trial of the individual. The following case note: explores the litigation history in the case of Kyung Yup Kim; discusses the laws and processes of extradition and mutual assistance in New Zealand with reference to how they have

* Deputy Registrar, Tauranga District Court.

¹ *Kim v Attorney-General* [2016] NZHC 2235.

² At [4].

³ Demelza Leslie "China Seeks Extradition Treaty with New Zealand" *Radio New Zealand* (online ed, 19 April 2016).

⁴ Colin Packham "Australia Cancels Vote on Extradition Treaty with China" *Reuters* (online ed, 28 March 2017).

operated in Mr Kim's case; and investigates the extradition relationship between New Zealand and China in this case and in the future.

II. THE FACTUAL BACKGROUND TO MR KIM'S CASE

Kyung Yup Kim, who is a citizen of the Republic of Korea, is a permanent resident of New Zealand having moved here in 1989 at the age of 14. Much of his immediate family are either permanent residents or citizens of New Zealand, and Mr Kim regards New Zealand as his home country.⁵

Mr Kim is suspected by Chinese police of killing a 20 year old woman named Pei Yun Chen when he was in Shanghai in late 2009. The evidence on which the Chinese authorities rely on in their application for the extradition of Mr Kim was reviewed in an initial District Court extradition hearing in 2013.⁶ This included blood DNA evidence found in Mr Kim's Shanghai apartment that linked him to the murder, and evidence from a former associate of Mr Kim, a Mr Park, who made a statement saying that Mr Kim had told him that he had found a prostitute and may have beaten her to death.

Mr Kim denies the allegations and ever meeting the deceased. He submitted that it would be implausible for a murder to have occurred in his apartment without the neighbours noticing, and that it would be difficult to remove a body from a fourth floor apartment unnoticed. He also claimed that his associate Mr Park must have made a statement under police pressure as part of a cover-up by Chinese authorities.

III. REQUESTING EXTRADITION FROM NEW ZEALAND AND ESTABLISHING JURISDICTION

Mr Kim's case is a textbook example of how a requesting country attempts to establish jurisdiction and how an extradition request made to New Zealand will proceed. This includes a reliance on mutual assistance between the governmental authorities of each country, and police-to-police assistance between those countries' respective police departments.

A. *Functions of Governmental Organisations in Extradition Requests*

In its Issues Paper *Extradition and Mutual Assistance in Criminal Matters*, the New Zealand Law Commission usefully sets out the roles and responsibilities of the

⁵ *Kim v Minister of Justice* [2016] NZHC 1491 (HC) at [5].

⁶ *Re Kim* DC Auckland CRI-2011-004-11056, 29 November 2013 (DC).

various branches of the New Zealand Government in handling extradition requests.⁷
To summarise:

The Ministry of Foreign Affairs and Trade acts as an initial point of contact for a requesting country, and receives requests before referring them to the Crown. The New Zealand police execute arrest warrants, facilitate the detention of the individual, and convey the surrendered person if an extradition is granted. The Crown Law office advises the Minister of Justice as to whether proceedings should be initiated and whether surrender should occur. The Crown also liaises with the requesting country and appears in Court proceedings. The Minister of Justice decides whether to allow individual extradition requests to proceed, and makes final determinations as to whether extradition should be granted. Involvement from the Courts includes the eligibility decisions made by the District Court and the involvement of the High Court when an appeal, judicial review, or writ of habeas corpus is pursued.

B. Establishing Jurisdiction

Because the alleged offending of Mr Kim took place in the city of Shanghai, there is an immediate claim of strict territorial jurisdiction available to China. The enforcement of strict territorial jurisdiction is far more straightforward than if the alleged offending had extra-territorial characteristics. States normally require that an alleged offence occurred within their territory before jurisdiction is exercised. This reflects the practicality that the place where the crime occurred is where the evidence is and where the interest in justice lies.⁸ It is then for the country which establishes jurisdiction over a crime to enforce that jurisdiction. In a case like that of Mr Kim's, this is where the difficulty lies. Although China may have established jurisdiction, they are faced with the issue of enforcing that jurisdiction in a situation where the accused has travelled to the jurisdiction of another sovereign state and attained residence status. Enforcement refers to the investigation and trying of the accused to determine whether the elements of the given charge are proved.⁹ The enforcement of such jurisdiction relies heavily on the cooperation between the police and governmental agencies of the respective countries involved. In the provisional application for Mr Kim's arrest made to the New Zealand police Interpol Office by Shanghai police, reference was made to the jurisdiction of the People's Republic of

⁷ Law Commission Extradition and Mutual Assistance in Criminal Matters (NZLC IP37, 2014) at 40.

⁸ Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 244.

⁹ At 269.

China courts to try Mr Kim, supplemented by a police summary of facts of the suspected homicide at Mr Kim's residence in Shanghai.¹⁰

C. Mutual Assistance and Police Assistance in New Zealand

The Mutual Assistance in Criminal Matters Act 1992 (MACMA) aims to assist New Zealand in providing and obtaining international assistance in criminal matters. This includes locating requested individuals and obtaining and facilitating relevant evidence.¹¹ MACMA reflects New Zealand's alignment with The Commonwealth Scheme for Mutual Assistance in Criminal Matters, or the 'Harare Scheme', which promotes the notion that countries should co-operate with each other to the widest extent possible for the purposes of criminal matters.¹² MACMA has been described as being the gateway legislation in allowing foreign countries a route through which they can access the tools New Zealand uses when investigating and conducting criminal prosecutions domestically. MACMA also acts in the role of gatekeeper in that it prescribes the requirements imposed on requesting states in seeking assistance and sets out an extensive range of grounds on which a request for assistance should be refused. The Attorney-General will scrutinise requests to New Zealand, and the involvement of the courts also offers a second line of defence in ensuring that foreign assistance is only provided in circumstances where the rights of individuals residing in New Zealand are sufficiently observed.¹³

Assistance under MACMA can be applied for only in respect of criminal matters, which includes criminal investigations and criminal proceedings.¹⁴ Part 2 of MACMA provides guidance as to how requests for mutual assistance should be requested by New Zealand to other countries, and Part 3 of MACMA sets out how requesting countries should approach New Zealand in relation to assistance in criminal investigations and proceedings. This includes assistance in locating or identifying persons,¹⁵ and assistance in obtaining evidence.¹⁶ The types of assistance available under MACMA include both administrative assistance - the locating of requested persons, serving documents, and conveying the attendance of a requested person to a foreign country - and court assistance - the taking of evidence for a criminal proceeding, obtaining and enforcing search warrants and production orders, and

¹⁰ *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZCA 471, [2012] 3 NZLR 845 at [10-11].

¹¹ Mutual Assistance in Criminal Matters Act 1992, s 4.

¹² Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth [The Harare Scheme] at [1(1)].

¹³ NZLC IP37, above n 7, at 140.

¹⁴ Mutual Assistance in Criminal Matters Act 1992.

¹⁵ Section 30.

¹⁶ Section 31.

enforcing foreign restraining and forfeiture orders relating to the recovery of proceeds of crime.¹⁷

The Crown Law Office notes that mutual assistance is complemented by police-to-police assistance between countries. Police-to-police assistance involves cooperation between police forces in such information sharing matters as providing intelligence and obtaining evidence, and is facilitated by Interpol.¹⁸ The exchange of such information can become problematic where differing organisational arrangements, protocols and cultures exist between police forces in different countries.¹⁹

Mutual assistance in Mr Kim's case involved a number of actions by the New Zealand authorities. A warrant for Mr Kim's arrest was issued in Shanghai on the 11th of March 2010 under art 50 of the Criminal Procedure Law of the People's Republic of China on the suspicion of Intentional Homicide.²⁰ This was followed in May 2012 by the issuing of an Interpol Red Notice by Chinese authorities, seeking Mr Kim's location and arrest as his extradition was sought.²¹ Shanghai police requested the New Zealand police Interpol Office to apply for the provisional arrest of Mr Kim, noting that they intended to request his surrender for the intentional homicide of Ms Chen.²² The action taken by the New Zealand police included executing Mr Kim's arrest in New Zealand at the request of Chinese authorities, and searching Mr Kim's Auckland home and car in an attempt to find his passport.²³ It is of note that the High Court held that the police had acted unlawfully in photographing and fingerprinting Mr Kim following his arrest, as s 82 of the Extradition Act 1999 (the EA) provides a constable powers for search and seizure on arrest,²⁴ but does not provide police powers to photograph and fingerprint a requested person.²⁵ Regardless, Mr Kim's case provides an example of co-operation between the police departments of both countries in order to locate a requested person so as to initiate extradition proceedings against him. Without the ability to rely on such cooperation, the successful location and extradition of a wanted individual is unimaginable.

¹⁷ NZLC IP37, above n 7 at 143-144.

¹⁸ Crown Law *Police-to-police Assistance* (2016) <www.crownlaw.govt.nz>.

¹⁹ Boister, above n 8, at 274.

²⁰ *Kim v Prison Manager, Mt Eden Corrections Facility*, above n 10, at [4].

²¹ At [5].

²² At [9].

²³ *Kim v Attorney-General* [2014] NZHC 1383 at [34].

²⁴ Extradition Act 1999, s 82.

²⁵ *Kim v Attorney-General*, above n 23 at [111].

D. The Extradition Process in New Zealand

Extradition is the most important tool of legal assistance in the pursuit of an alleged fugitive criminal because it allows the lawful acquisition of the custody of a criminal suspect so that an established jurisdiction can be exercised.²⁶ The procedure of extradition in most countries is usually initiated by a request for extradition through diplomatic channels. A lower Court will review the request, although not in deep detail, and it will then be for the executive branch of the government to make a final determination as to whether the extradition will indeed take place.²⁷ This general process for extradition requests is similar to that used in extradition requests to New Zealand.

The EA sets out the process for extradition requests in New Zealand. It provides that an extraditable person is someone suspected or convicted of committing an extradition offence.²⁸ An extradition offence is defined as one which is punishable by no less than 12 months' imprisonment in the requesting country. The offence must also have been punishable by no less than 12 months' imprisonment in New Zealand at the time of the alleged offending,²⁹ which is an example of a requirement for double or dual criminality. This means that for an extradition request to New Zealand to proceed, the conduct alleged in the requesting country must also be criminalised in New Zealand and be punishable by at least 12 months' imprisonment in each country, unless an applicable treaty stipulates otherwise.³⁰ Dual criminality exists in the case of Mr Kim as intentional homicide is punishable by life imprisonment in New Zealand,³¹ and death, life imprisonment or a fixed-term of imprisonment of not less than 10 years in China.³²

There are two sets of procedure provided by the EA for dealing with extradition requests, which are set out by Parts 3 and 4 of the EA. The procedure under Part 4 of the EA applies only to Australia and any other country designated by an Order in Council.³³ It is a more straightforward process as the extradition decision does not need to be made by the Minister of Justice; rather the decision is made by a District Court Judge.³⁴ An eligibility hearing is heard by a District Court Judge and a surrender order can subsequently be made if the Court is satisfied that an

²⁶ Boister, above n 8, at 334.

²⁷ At 335.

²⁸ Extradition Act 1999, s 3.

²⁹ Section 4.

³⁰ NZLC IP37, above n 7, at 54.

³¹ Crimes Act 1961, s 172(1).

³² Criminal Law of the People's Republic of China, art 232 .

³³ Extradition Act 1999, s 39.

³⁴ Section 41.

extraditable person is being surrendered for an extradition offence.³⁵ However, the matter should be referred to the Minister of Justice if the requested person is a New Zealand citizen, or if there is concern that the requesting country might use torture or the death penalty against that person.³⁶ Part 3 of the EA provides an extradition procedure for requests from Commonwealth countries, countries New Zealand has an extradition treaty with, and countries designated by Order in Council. If none of these apply, then individual requests from other countries can be made under s 60 of the EA, which allows the Minister of Justice to decide whether the application for surrender should be dealt with under Part 3 of the EA. Section 60 of the EA provides an opportunity for one-off extradition applications to be made by non-Commonwealth countries if there is no extradition treaty in force between New Zealand and that country or if there is a treaty in force between the two countries, but the offence is not extraditable under the treaty.³⁷ In dealing with an extradition request under s 60 of the EA, the Minister must consider any undertakings by the requesting country to return the requested person to New Zealand; the seriousness of the offence; the object of the EA which is to allow New Zealand to carry out its extradition obligations and facilitate extradition requests, and; any other matters the Minister considers relevant.³⁸ Because China is not a Commonwealth country, in the absence of an extradition treaty, their application for Mr Kim's surrender was dealt with under s 60 of the EA. When the Minister of Justice allowed the application, the matter could then be dealt with under the procedure provided by Part 3 of the EA.

Under Part 3 of the EA, a requesting country applies to New Zealand for the extradition of an individual under s 18 of the EA, which requires that the person whose surrender is requested is an extraditable person in relation to that country and is in or on their way to New Zealand, or is suspected of being so. It is also necessary for the requesting country to include a copy of an arrest warrant for the person and details of the offence that is alleged.³⁹ It is then for the Minister of Justice to either request that a District Court Judge issue a warrant for the arrest of the person whose surrender is sought, or refuse to do so if the surrender application is to be declined. If a District Court Judge is requested to do so, an arrest warrant may be issued for the person if they are either in New Zealand or suspected of being so, and there are reasonable grounds to believe that the person is extraditable to an extradition country for an extraditable offence.⁴⁰ Section 20 of the EA also allows a District Court Judge to issue a provisional arrest warrant in circumstances of

³⁵ Section 45.

³⁶ Section 48.

³⁷ Section 60.

³⁸ Section 60(3).

³⁹ Section 18.

⁴⁰ Section 19.

urgency, even if a request for surrender is yet to be made.⁴¹ Following the issue of an arrest warrant, the Minister of Justice must be notified of this by the applicant for the warrant, along with documentary evidence that was produced to the Court. The Minister may discontinue the extradition proceedings and cancel the warrant if they see fit.⁴² Following the arrest of the requested person, a bail application may be made, although the person is not bailable as of right in terms of the EA.⁴³

After the execution of an arrest warrant, a hearing to determine the requested person's eligibility for surrender occurs before a District Court Judge. Here, the Court determines whether it is satisfied that the evidence put before it would be sufficient to justify the person's trial if the alleged offending had occurred within New Zealand. This is also an opportunity for the requested person to make submissions as to whether mandatory or discretionary restrictions on surrender as set out in ss 7 and 8 of the EA apply.⁴⁴ The mandatory restrictions on surrender provided by s 7 of the EA include: where surrender is sought for a political offence, or; if the extradition appears to be sought because of discriminatory reasons against the requested person, or the requested person is likely to be discriminated against upon surrender, or; if surrender is sought for a military offence rather than one of ordinary criminal law, or; if the person has been tried already for the offence, or; if the requested person is deemed mentally unfit to stand trial.⁴⁵ Discretion may be used in restricting a person's surrender because of: the trivial nature of the case, or; the accusation was not made in the interest of justice, or; if the amount of time that has passed since the alleged offence means it would be unjust or oppressive to surrender the person.⁴⁶ If the Court determines that the person is eligible for surrender, then the matter is referred to the Minister of Justice to determine whether the requested person should indeed be surrendered.⁴⁷ The District Court's decision may be appealed to the High Court on a question of law,⁴⁸ or a writ of habeas corpus pursued.⁴⁹

Section 30 of the EA sets out what the Minister of Justice must consider in determining whether to surrender the requested person. The Minister must not surrender the person if they are satisfied that a s 7 mandatory restriction applies, if

⁴¹ Section 20.

⁴² Section 21.

⁴³ Section 23.

⁴⁴ Section 24.

⁴⁵ Section 7.

⁴⁶ Section 8.

⁴⁷ Section 26.

⁴⁸ Section 68.

⁴⁹ Section 26.

there is a danger that the person would be subjected to torture or the death penalty in the extradition country, if any s 8 discretionary considerations apply, or if there are any extraordinary circumstances such as the age or health of the person that would make it unjust or oppressive to surrender the person. The Minister may also seek any further undertakings from the requesting country that the Minister thinks fit.⁵⁰

(i) The Request for the Surrender of Mr Kim

In March 2011, Chinese authorities issued an extradition request to New Zealand, noting that Mr Kim had travelled from the Republic of Korea to New Zealand in October 2010.⁵¹ Following police investigations and Mr Kim's arrest, the extradition request was dealt with by the Minister of Justice under s 60 of the EA due to the absence of an extradition treaty between New Zealand and China, and it was decided that the process of extradition proceedings provided by Part 3 of the Act would be initiated.⁵²

On 29 November 2013 in the District Court, Judge Gibson reviewed the evidence provided by Chinese authorities, received evidence from New Zealand experts and also heard evidence from Mr Kim and his mother. On the evidence, it was determined that there was a prima facie case for Mr Kim's surrender. His case met the criteria under s 24 of the EA, meaning that he could be extradited if the Minister of Justice decided that it would be lawful and right that he should be.⁵³ The Minister of Justice eventually ordered the surrender of Mr Kim on 30 November 2015 following extensive investigations into assurances from the People's Republic of China regarding the conditions of his surrender,⁵⁴ which reflected the mandatory considerations under s 7 of the EA regarding torture and use of the death penalty.

(ii) Application for Discharge

Mr Kim applied for a discharge of the extradition proceedings under s 36 of the EA on the basis that the Minister of Justice had not acted in an appropriately timely manner in conveying his surrender to China.⁵⁵ Section 36 of the EA allows for an application for the discharge of the requested person if they have not been surrendered within 2 months of the date of issue of the warrant for the detention of the person, unless sufficient cause for delay can be shown.⁵⁶ An application under s 36 of the EA had not been dealt with in New Zealand up until this point. Having

⁵⁰ Section 30.

⁵¹ *Kim v Prison Manager*, above n 10, at [6].

⁵² At [8].

⁵³ *Re Kim*, above n 6.

⁵⁴ *Kim v Minister of Justice*, above n 5, at [50].

⁵⁵ *Kim v Attorney-General*, above n 1.

⁵⁶ Extradition Act 1999, s 36.

interpreted s 36(3) of the EA, and having been assisted by looking to similar cases heard in the United Kingdom, Canada and Australia, the Court held that the Minister needed to show cause by accounting for such a delay.⁵⁷ The focus of s 36 of the EA is on the period from the final determination of legal proceedings through until the date of the person's actual surrender. The overall period of detention is also relevant, and the Court expressed concerns about how long Mr Kim had been detained.⁵⁸ However, the application for discharge was dismissed as it was held that the Minister and her officials had proceeded expeditiously, and the main reason for delay was the time taken to obtain assurances from China regarding the conditions of surrender, which was to the benefit of Mr Kim.⁵⁹

(iii) Judicial Review

Following the first determination by the Minister of Justice that Mr Kim was to be surrendered, an application for judicial review of the decision was made on a number of grounds. They included that the Minister considered irrelevant information, failed to consider relevant information, made errors of law, and failed to provide adequate reasons in coming to what was submitted to be an unreasonable decision.⁶⁰ There was also a claim of bias from the Minister of Justice following public statements made by the Prime Minister of New Zealand, and concerns regarding Mr Kim's treatment in prison.⁶¹ The Court granted the application to review the order to surrender Mr Kim.⁶² The Minister of Justice was ordered to reconsider the decision to extradite Mr Kim because there had been no explicit address as to why she was satisfied that the assurances given by Chinese officials were sufficient, and that more information about the risk of Mr Kim potentially being tortured or ill-treated should be obtained.⁶³ Concern regarding Mr Kim's inability to have a lawyer present during pre-trial interrogations in China was also identified as being problematic. The Chinese authorities had offered to provide New Zealand representatives recordings of these interrogations on request as an alternative. However, it was held that the Minister had not specifically addressed whether that was an adequate substitute for the right to the presence of a lawyer, as is the case in New Zealand.⁶⁴

Following the ordered reconsideration of the first extradition decision, Minister of

⁵⁷ *Kim v Attorney-General*, above n 1, at [105].

⁵⁸ At [111].

⁵⁹ At [111-113].

⁶⁰ *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [3].

⁶¹ At [4].

⁶² At [262].

⁶³ At [259].

⁶⁴ At [260].

Justice, Amy Adams, once again ordered Mr Kim's surrender to China in September 2016.⁶⁵ Mr Kim was finally released on electronically monitored bail the day after the second extradition decision was made. The Court held that because his passport had now expired, and because electronic bail monitoring technology had improved since the previous bail applications were made, Mr Kim's flight risk could be managed through restrictive bail terms.⁶⁶ This second decision to extradite Mr Kim is once again subject to a judicial review application, which was heard in the Wellington High Court on 3 April 2017. Mr Kim's counsel, Tony Ellis, further submitted that the extradition order should be overturned for concerns over human rights and the ability to obtain a fair trial. Mallon J reserved her decision on the matter.⁶⁷

IV. MODERNISATION OF NEW ZEALAND'S EXTRADITION LAWS

It is worth noting that the Law Commission has made recommendations for reform of New Zealand's extradition arrangements. The proposed Extradition Bill offered by the Law Commission suggests a modern, fit-for-purpose extradition regime, which would create a Central Authority for dealing with extradition requests. Such a move would be aimed at streamlining what can be an at times complicated and prolonged process for requesting countries who seek assistance from New Zealand in extradition requests.⁶⁸ The proposed update of New Zealand's extradition statute would also place an emphasis on strengthening the protection of the human rights of the requested individual. This would be achieved through the role of the proposed Central Authority in making judgments consistent with the New Zealand Bill of Rights Act 1990 as to whether extradition requests should be granted, and by tasking the Court with the responsibility of deciding nearly all of the grounds for refusing surrender which would nullify the role of the Minister of Justice and promote a more transparent hearing process.⁶⁹

V. THE EXTRADITION RELATIONSHIP BETWEEN NEW ZEALAND AND CHINA

Currently, as noted, there is no extradition treaty between New Zealand and China. Media reports suggest that Chinese authorities have been persistent in raising the proposal of a formal extradition treaty arrangement with New Zealand as part of a

⁶⁵ *Kim v Attorney-General*, above n 1, at [4].

⁶⁶ At [37-39].

⁶⁷ John Weekes "Organ Harvesting Fears Raised as Murder-Accused Awaits Extradition Decision" *Stuff* (online ed, New Zealand, 4 April 2017).

⁶⁸ Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at 5.

⁶⁹ At 6.

future upgrade to the Free Trade Agreement between the two nations.⁷⁰ Former Prime Minister John Key acknowledged that the issue was raised in April 2016 when he met with Chinese Premier Li Keqiang in Beijing. Key said he was not opposed to entering an extradition treaty arrangement with China regarding serious cases, provided there were assurances individuals would not be tortured or face the death penalty if convicted.⁷¹ One of the main reasons China has pinpointed New Zealand as a country with which an extradition treaty would be useful is because it is said to have become a destination favoured by fugitive former officials being pursued by Chinese authorities on corruption charges.⁷² There are also claims of many individuals living in New Zealand who the Chinese authorities wish to extradite on allegations of fraud and embezzlement.⁷³

It is of note that New Zealand is not the only target for China in attempting to have a bilateral extradition treaty ratified. The Treaty on Extradition between Australia and the People's Republic of China was concluded in September 2007.⁷⁴ This treaty was signed but not ratified by Australia, because of concerns regarding China's use of the death penalty, which required further investigation by Australian authorities.⁷⁵ In March 2017, the Australian government cancelled a vote to finally ratify the treaty with China, as it conceded that it would fail to gain the required support from opposition politicians controlling the Senate in order to achieve ratification.⁷⁶ The reasons for opposition to ratification of the treaty in Australia relate to concerns regarding deficiencies in the Chinese legal system. In a report following an inquiry by the Law Council of Australia into the China Extradition Treaty, it was commented that China does not act in accordance with procedural fairness and rule of law standards in criminal proceedings.⁷⁷ The conclusion of the report was that there was doubt about an individual's ability to access a fair trial under the Chinese criminal justice system, as it lacks transparency.⁷⁸ There were also concerns that there needed to be more done to take into consideration the conditions existing in the Chinese system regarding allegations of the ill-treatment and torture of prisoners,

⁷⁰ Stacey Kirk Free "Trade Agreement Upgrade Talks at G20 as China Extends Trade Invite" *Stuff* (online ed, New Zealand, 19 May 2016).

⁷¹ Leslie, above n 3.

⁷² Jamie Smyth "Australia and China to Sign Crime-fighting Treaty: Extradition: Diplomatic Drive" *Financial Times* (online ed, 23 December 2016).

⁷³ Leslie, above n 3.

⁷⁴ Stephen Tully "International law: Facing the death penalty: Under a China-Australia Extradition Treaty" (2016) 22 *Law Society of NSW Journal* 90 at 90.

⁷⁵ At 91.

⁷⁶ Packham, above n 4.

⁷⁷ Joint Standing Committee on Treaties "Nuclear Cooperation-Ukraine; Extradition-China" (Report 167, December 2016, Canberra) at [3.11].

⁷⁸ At [3.48].

and the continuing imposition of the death penalty.⁷⁹ The decision not to ratify the treaty, coupled with Australia's signing of a diplomatic letter alongside ten other countries questioning Beijing's treatment of human rights lawyers, has resulted in tense diplomatic relations between the two nations. Since these events, the Chinese government has cancelled a proposed visit to China by Australian lawmakers, who were due to meet Chinese law enforcement officials – possibly a direct response to Australian criticism of the Chinese legal system and failure to ratify the extradition treaty.⁸⁰

The situation faced by Australia is of interest because, just like Australia, New Zealand counts China as its largest trading partner. New Zealand was the first Western country to sign a Free Trade Agreement with China eight years ago, and is currently working with China to upgrade the agreement. This was the prominent focus of Li Keqiang's most recent visit to New Zealand in March of this year.⁸¹ The ratification of a bilateral extradition treaty between China and New Zealand will no doubt be high on the agenda for the Chinese when negotiations of an updated Free Trade Agreement begin. This presents as a difficult balancing act for the New Zealand government, which will want to strengthen ties with China, but will be asked to again consider signing an extradition treaty with a country notorious for using torture and the death penalty in criminal proceedings.⁸² The Chinese on the other hand will contend that New Zealand can be reassured that any human rights concerns are unjustified. China recently sought that New Zealand citizen William Yan return to China to face trial on fraud charges. Mr Yan returned to China voluntarily for two months to face trial with his lawyer Marc Corlett QC, and returned to New Zealand safely afterwards.⁸³ Although the outcome of his trial has not been disclosed, Chinese authorities are likely to point to cases such as this one as evidence that an individual can return to China and receive a fair trial and not be subjected to human rights breaches. It will be of interest as to how New Zealand approaches the likely request for an extradition treaty with China as trade negotiations progress. And it will be of particular interest to see how China reacts if New Zealand refuses to agree to such a treaty or voices criticism of their legal system.

⁷⁹ At [3.46].

⁸⁰ Associated Press "China Cancels Australian Lawmakers' Trip as Tensions Deepen" *New Zealand Herald* (online ed, Auckland, 6 April 2017).

⁸¹ Demelza Leslie "Work begins Next Month on Upgrading China FTA" *Radio New Zealand* (online ed, 28 March 2017).

⁸² See Amnesty International, *Annual Report China 2016/17*, which records widespread use of torture abuse of process and ill treatment </www.amnesty.org/ >.

⁸³ Jared Savage "William Yan safely returns to New Zealand after Fraud Trial in China" *New Zealand Herald* (online ed, Auckland, 17 January 2017).

VI. CONCLUSION

Kyung Yup Kim's case provides an insight into the process involved in the handling of an extradition request by New Zealand, particularly in cases where no bilateral extradition treaty exists. In Mr Kim's case, the New Zealand government and police have shown a willingness to offer assistance in an instance where jurisdiction is clearly established by the requesting country. However, the lengthy and ongoing litigation history shows that the establishment of jurisdiction is just the beginning of what can be a lengthy process. Mr Kim's case has become particularly lengthy due to the direction by the Court that the Minister of Justice reconsiders the decision to grant extradition. The litigation continues following the decision of the Minister of Justice to order the extradition of Mr Kim for a second time. It will no doubt continue to be submitted by Mr Kim's counsel that the assurances from the Chinese that they will not subject Mr Kim to torture or the death penalty cannot be relied upon. Mr Kim's case is a timely example of the difficulty New Zealand faces in terms of offering assistance to China in extradition requests. The diplomatic relationship between the two countries is of vital importance to New Zealand, as China is our largest trading partner. Cases like this, and the ongoing pressure from Chinese authorities for New Zealand to enter into a bilateral extradition treaty, mean that a balancing act is required to maintain diplomatic relations and promote New Zealand's economic interests, while at the same time protecting the human rights of the individual residing in New Zealand. The final decision in Mr Kim's case against the Minister of Justice will give an indication as to how the judiciary believe New Zealand should approach Chinese extradition requests in criminal matters. It will then be of interest to see how the New Zealand government approaches the question of whether to enter into a bilateral extradition treaty with China when the matter is inevitably raised once again.

JOHNSTON V R – WHEN DO ATTEMPTS BEGIN AND END?

JEREMY FINN*

In *Johnston v R*¹ the Supreme Court took the opportunity to examine the law relating to proximity in attempts and to lay down the correct approach to determining whether an attempt had begun, but it gave very limited thought to when an attempt may end, the focus of this case note. In a fairly brief judgment, the Supreme Court considered the law as to proximity of attempts and affirmed the approach taken by the Court of Appeal both at an earlier stage of proceedings in *Johnston's* case and in *R v Harpur*.²

I. THE FACTS

The facts of *Johnston v R* can be succinctly stated. The appellant had been found in the back garden of a house, having with him gloves and a beanie which could have been used to avoid leaving fingerprints or to conceal identity respectively. He was arrested shortly thereafter. The garden also contained a sleep-out in which a teenage female member of the family usually slept. There was evidence that the appellant had reconnoitred the premises on earlier occasions. Most importantly, there was both strong propensity evidence that the defendant was a rapist with a fixation on teenage girls and a habit of attacking them in detached buildings, and direct evidence from witnesses to whom the appellant had spoken that he had plans to rape a teenager in the near future. On this basis the prosecution contended that the appellant was guilty of an attempt to sexually violate the female teenager who normally slept in the sleep out. The defence argument was, essentially, that the appellant's conduct was equally compatible with his being there to commit burglary and theft – and therefore could not be sufficiently proximate for an attempt to commit sexual violation. At his first trial the appellant had been found guilty, but the conviction was quashed by the Court of Appeal.³ Although the appellant's acts were considered to be sufficiently proximate,⁴ the judge, in his summing up, took the point accepted in *Harpur* that a remote actus reus will constitute an attempt if the intent is clear to an extreme, and had introduced a possibility that the appellant had been on another reconnoitring expedition with intent to rape at a later date – something neither side had argued – and thus the jury had been asked to convict on a basis which the appellant had not been given an opportunity to provide a defence.

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¹ *Johnston v R* [2016] NZSC 83, [2016] 1 NZLR 1134.

² *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909.

³ *Johnston v R* [2012] NZCA 559, [2013] 2 NZLR 19.

⁴ At [28] and following.

At the retrial Johnston was again convicted and his appeal to the Court of Appeal was dismissed. When the matter came before the Supreme Court it was common ground that the real issue was the correctness of the Court of Appeal's decision following the first trial, where it had held that the appellant's conduct was proximate enough for an attempt to commit sexual violation (absent the learned District Court Judge's intervention about timing).

II. THE PROXIMITY ISSUE

The Supreme Court approved the reasoning of the Court of Appeal both in the immediate case and also in *R v Harpur* where the defendant was held to have been correctly convicted of attempting to sexually violate a child that was the figment of his imagination (dreamed up by police authorities), principally because his conduct evinced a clear intention to do so.⁵ The core issue in both cases was whether the alleged offender's conduct – to use a neutral word – was sufficiently proximate to amount to an attempt.

Section 72 of the Crimes Act 1961 provides:

72. Attempts—

- (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
- (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
- (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

The Supreme Court rejected an argument that subs (2) required the judge determining the proximity issue to take into account only the conduct of the defendant, and to put to one side any evidence of intent. The Court stated:⁶

The alternative of considering whether a defendant's acts amount to more than preparation without reference to the evidence before the Court as to intention seems to us to be unworkable. If the maker of the "more than preparation" decision ignores evidence of intention, he or she will have to decide that question without considering what the defendant's actions were aimed at, that is, what offence the defendant intended to commit. That would mean that the acts of a defendant would fall short of an attempt unless:

⁵ The defendant was exchanging e-mails with a person who, under police guidance, indicated the existence of a young girl to whom the defendant could have access for sexual purposes.

⁶ *Johnston v R* [2016] NZSC 83, [2016] 1 NZLR 1134 at [53].

- (a) the defendant had actually done everything required to commit the offence but failed to achieve his or her aim (such as swinging a fist at the intended victim but missing because the victim evaded the punch); or
- (b) the defendant's acts were so close to achieving the completion of the offence that they could only be explained as an attempt.

As the Court further noted,⁷ this approach would resurrect the “unequivocal test” abolished by s 72(3).

Consistently with the earlier law, the court emphasized that evidence of intent would not of itself turn a merely preparatory act into an attempt.⁸ However, where evidence of intent was available and demonstrated planning by the defendant, the decision as to whether conduct was to be classed as preparation only or as sufficiently proximate could be made with much greater certainty.⁹ On that basis the judge at Johnston’s first trial had correctly taken into account the evidence as to prior intent and used that in assessing whether the conduct was sufficiently proximate.

While there has been academic criticism of this interpretation of s 72 as enunciated in earlier stages of the proceedings against Johnston,¹⁰ the Supreme Court’s approach is a much more natural reading of s 72(2) than is the alternative advanced by the appellant. The decision may therefore be seen as providing clarity and – to a large extent - certainty in the law. The qualification is necessary because the approach confirmed in *Johnston v R* raises, but only partially answers, a significant question.

III. THE TERMINATION OF AN ATTEMPT ISSUE

If an attempt may be complete at a point significantly before an unequivocal act is committed, does liability for that attempt terminate if the offender experiences a change of heart and abandons the enterprise? The Supreme Court gave a partial answer to that question late in their judgment,¹¹ endorsing the view of Woodhouse J in *Police v Wylie*¹² that an intent which was qualified or conditional in that the offender would desist should circumstances become unfavourable was nevertheless

⁷ At [54].

⁸ At [58].

⁹ At [58].

¹⁰ Margaret Briggs “The Conduct Requirement in the Law of Attempt: A New Zealand Perspective” (2015) 44 CLWR 145.

¹¹ *Johnston v R* [2016] NZSC 83, [2016] 1 NZLR 1134 at [61].

¹² *Police v Wylie* [1976] 2 NZLR 167 (CA) at 169.

sufficient for the intention to commit the offence and thus for an attempt. That view is undoubtedly correct.

However it leaves unresolved the issue of whether there is (and should be) liability where an attempt has been committed but the offender desists voluntarily after a change of mind which involved completely abandoning the former plan. Let us suppose that A has formed a plan to break into a house and assault B, a resident, because A believes B had disclosed criminal offending by A's younger brother to the police. In furtherance of that plan, A procures from C a skeleton key which will fit the lock on B's house and informs C of her plans and motive. That night A travels to a street near B's house. On the test in *Johnston v R*, it would appear that A can be convicted of attempted burglary although there is still some separation between A's conduct and state of mind and an actual breaking and entering of B's house, even if it is difficult to determine exactly when the conduct ceased to be merely preparatory. However let us further assume that while walking in the street near B's house, A first receives a text message from D admitting it was D who had disclosed A's brother's offending to the police. A then has a chance meeting with C, and informs C that because of D's message A has given up on her plan to assault B. A also returns the skeleton key to C.

On those facts, should A continue to be criminally liable for the attempt committed earlier? It is suggested that imposing criminal liability in such circumstances is both incorrect in principle and undesirable as a matter of policy.

The issue of principle can be approached in two ways. Firstly there is some authority that the inchoate offence of conspiracy can be terminated short of completion of the offence agreed upon. The English Court of Appeal in *R v Bajwa*¹³ stated that:

[O]nce the conspiracy has begun, it will normally (in the absence of evidence to the contrary) be a reasonable inference that it continues until its object had been achieved. Evidence to the contrary might include specific evidence of words or writings by which the conspirators agreed to call the whole thing off, or of actions on their part from which it can reasonably be inferred that they must have done. Likewise, once a particular defendant has joined a conspiracy, it will normally (in the absence of evidence to the contrary) be a reasonable inference that he remained a party to it until the conspiracy as a whole came to an end, typically because its object had been achieved. Evidence to the contrary might include specific evidence of words or writings by which that defendant indicated an intention to withdraw, or of actions on his part from which it can reasonably be inferred that he must have done. Often that will be in the form of a communication by conspirator (A) to another conspirator (B), or to a non-conspirator, that (A) was ceasing to be involved.

¹³ *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601 at [60].

The court in *Bajwa* thus clearly contemplates that a conspirator may limit his or her criminal liability by effective withdrawal from the original agreement. That is to accept that an inchoate offence can terminate prior to commission of the full offence earlier agreed upon.

There is an obvious comparison with the defence of withdrawal from party liability, as recently recognised by the Supreme Court in *Ahsin v R*.¹⁴ The Court stated that:¹⁵

Under both subsections of s 66, party liability unconditionally attaches only when the principal offender attempts or commits the crime to which the secondary offender becomes a party. Those whose conduct prospectively makes them a party to an offence upon its commission may have a window of opportunity before the offence is perpetrated during which it is conceptually possible to withdraw from involvement before criminal liability attaches.

In that case the Supreme Court stressed the need for the withdrawing party to have effectively counteracted any encouragement or assistance given to her co-offenders prior to the withdrawal.¹⁶

It is suggested that the logic underlying both *R v Bajwa* and *Ahsin v R* is that an offender who has effectively withdrawn from planned offending and taken steps to try to ensure the offence is not committed should no longer be at risk of conviction.¹⁷ If that is so, then surely there is a strong case for applying a similar principle to attempts. Indeed in *Ahsin v R* the majority judgment stated that:¹⁸

... under s 66(2) the actus reus for party liability is complete at the time the defendant forms or joins a common purpose. Liability is then contingent only on commission of the offence by the principal offender in prosecution of that purpose.

The defence of withdrawal, which the Court recognised, must therefore be taken as nullifying the completion of the actus reus of party liability – changing conduct which was conditionally criminal to non-criminal on the basis of a change of mind accompanied by acts which seek to cancel out the earlier conduct.

If that is so, should not the law of attempts take a parallel step? A withdrawal defence for attempts would mean that a person who commits an attempt but then withdraws effectively from the enterprise – manifested by a change of mind and conduct which cancels out the earlier conduct – would no longer be regarded as criminally liable for the earlier conduct. True, this requires a major shift in the traditional view that a criminal act cannot be undone, but if that shift has already

¹⁴ *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

¹⁵ At [113].

¹⁶ At [134].

¹⁷ See particularly at [122].

¹⁸ At [117].

been made in party liability, it may well be made in inchoate crimes. It is recognised that the context is somewhat different; in party liability the secondary party's liability is derived from the principal's once the offence occurs, while an individual who crosses the threshold in attempt fixes their own conduct as criminal. Nevertheless, if the Supreme Court can accept that a party can undo their support for a principal through withdrawal of that support, then why not accept that someone who enters the zone of attempt can withdraw from it?

It may not obviously serve the notion that it is intrinsically wrong to engage in an attempt to inflict harm. But what if the defendant is making a valid effort to ensure the wrong never materialises? It may also be argued that such a change would undercut the deterrent policy of the law of attempt. However, that may not be so. There is a clear and obvious policy reason for recognising a withdrawal defence for attempt. If an offender was aware that once a sufficiently proximate act had been performed there was no escaping criminal liability, there would be no incentive to think again and abandon the transaction. It is therefore, at least somewhat more likely, that the offender will carry on with the planned offending and may well commit the full offence which would not otherwise have occurred. The interests of victims – and of society generally – are surely much better served by encouraging offenders to abandon attempted offending rather than completing it. It will be interesting to see whether the New Zealand courts are prepared to investigate this possibility further if a suitable case presents itself.

**BOOK REVIEW: DAVID MATHER *PAROLE IN NEW ZEALAND – LAW AND PRACTICE*
(THOMSON REUTERS, WELLINGTON, 2016)**

WARREN BROOKBANKS*

I. GENERAL

Judge David Mather has compiled a valuable account of parole law in New Zealand. This is a first in an area of penal law that has grown in importance in recent years. Judge Mather's interest in this area of criminal practice arose out of his appointment as a member and panel convenor of the New Zealand Parole Board in 2012, and having presided in the summary criminal jurisdiction over the same period. Judge Mather is well-qualified to have written this book, having also a long-held interest in prison and penal reform and having chaired, for five years during the 1990s, a trust providing halfway house accommodation for released prisoners.

This book fills an important gap in legal writing in an area of law which is strongly statute-based but which gives rise to many issues of interpretation and practice.

As the author notes in the introductory chapter, the first Parole Board in New Zealand was not created until 1954, although a statutory Prisons Board had existed since 1910. This Board had limited powers to determine sentence lengths and grant release on probation, but only in respect of offenders serving indefinite sentences. The establishment of the Parole Board in the Criminal Justice Act 1954 signalled the beginning of a new era in parole with a Board chaired by a Supreme Court Judge, with the Secretary of Justice and five other appointed members as the constituent body. It, nevertheless, had a limited recommendatory role, with only the Minister of Justice having the power to order release from prison.

However, these restrictions ceased with the creation of a new Parole Board in the Criminal Justice Act 1985. The new Board had jurisdiction extending to offenders serving life sentences, sentences of seven or more years, and preventive detainees. The 1985 reforms envisaged a Board comprising seven members, chaired by a High Court Judge and sharing a complementary jurisdiction with District Prison Boards which had a jurisdiction to consider parole for offenders serving sentences of less than seven years.

However, the enactment of the Parole Act 2002 led to the abolition of District Prison Boards and the creation of a newly-constituted Parole Board, based on a panel

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structure to carry out its functions. The book describes the structure and operation of the Parole Board as it currently operates within the stand-alone statutory regime of the 2002 Act.

The second chapter outlines the most recent iteration of the establishment of the Parole Board which, as an independent statutory body, works closely with the Department of Corrections. It briefly describes the procedures and functions of the Board. Appointments are now made by the Governor-General on the recommendation of the Attorney-General. However, unlike in its previous incarnations, the Board no longer sits as a unitary body but as a series of panels of at least three members, chaired by a "panel convenor" or the chair of the Board. Under the Parole Act, the chair of the Board must be either a sitting or former High Court Judge, or a sitting or former District Court Judge. Panel convenors must be either sitting or former District Court Judges, but provision is also made for barristers of seven years standing to serve in that capacity.

II. ELIGIBILITY

Parole eligibility is the subject of chapter 3. The chapter outlines the difference between determinate and indeterminate sentences, noting that as at 30 June 2015, 546 offenders were serving indeterminate life sentences in New Zealand prisons. Unsurprisingly, the vast number of these (542) were for murder, with one for manslaughter and three for drug offending. Determining eligibility for parole for both offenders serving determinate and indeterminate sentences is governed by particular provisions in the Parole Act and is dependent on a sound working understanding of a number of defined terms, including the "parole eligibility date" (PED), "non-parole period", "notional single sentence", "release date" and others. The chapter also briefly discusses the issue of parole eligibility following subsequent offending and the rules governing compassionate release, for which most applications to the Board are granted.

III. CONSIDERATION FOR PAROLE

The issue of consideration for parole is the subject of ch 5. As the author notes, consideration for parole is not a question of individual application but a statutory right. The Board is required to consider all eligible offenders as soon as practicable after the PED. As the Courts have observed, prison sentences typically have two components, described as the 'penal' or 'punishment' part and the 'balance of the sentence' part. The penal part is what must be served for the 'just deserts' component of the offending, and until parole eligibility arises. The balance of the sentence part is the period from parole eligibility until the last day of the sentence. This part may still be served depending on whether the Parole Board determines it

would be unsafe or otherwise inappropriate to release the prisoner following completion of the punishment phase.

In “exceptional circumstances” the Parole Board Chair can refer a person for parole consideration where they have not reached their PED. The power of the Board to release following such referral is determined by the requirements of community safety and the interests of justice. Consideration of parole may also be postponed by an order of the Board where the Board is satisfied that the offender will not be suitable for release during the postponement period. The courts have indicated that changes in the offender’s risk profile are most likely to be determinative of release suitability.

The chapter also outlines the requirements for further consideration for parole. An important change in this regard, effective from 2 September 2015, is that the previous “statutory cycle” of 12 months has now been extended to any time over the following two years. Other factors, including the imposition of an additional prison sentence or where an offender is unlawfully at large, may also warrant a delay in parole consideration.

IV RELEASE CRITERIA

Chapter 5 examines the criteria for release on parole, the guiding principles for which are set out in ss 7 and 28(2) of the Act. These can be briefly summarised as: the paramountcy of safety of the community; parsimony (detention no longer than is consistent with community safety); information concerning decisions; victims’ rights; availability of support and supervision; and public interest in reintegration.

The issue of “undue risk” has been considered by the courts. This has been held to be a “deliberately elastic test”, insofar as each parole application must be evaluated in light of all factors relevant to the offender’s risk of offending¹. However, as Judge Mather notes, the risk that the Board is competent to assess, at least in respect of offenders serving a finite sentence, is from the time parole is being considered until the sentence expiry date: “[a]ssessment of the risk of reoffending after the sentence expiry date is not part of the Board’s function.”² This is in contrast to risk assessment for offenders serving indeterminate sentences of imprisonment or preventive detention, for whom risk must be assessed in relation to the period for which they are subject to recall, namely, the remainder of their lives.

¹ *Edmonds v New Zealand Parole Board* [2015] NZHC 386 at [34].

² David Mather *Parole in New Zealand: Law and Practice* (Thomson Reuters, Wellington, 2016) at 25.

V. INFORMATION FOR PAROLE HEARINGS

This is the subject of the sixth chapter. As the author notes, the Board must make its decision on the basis of all relevant information available at the time, which may come from a range of sources, both written and oral. While oral information must “add significantly” to the available written information and be capable of being made available to offenders, it is routinely provided to the Board by offenders, counsel, family members and their supporters. Typically any or all of the following information sources may be available to the Board in making a parole decision: the Offender Detail Record (ODR); Offender’s RoC*RoI score (risk assessment undertaking by Department of Corrections); judicial sentencing notes; police summary of facts/indictment, pre-sentence reports; full criminal history; and prior Board decisions. In addition, the Corrections Department routinely provides a detailed Parole Assessment Report (PAR) on every offender appearing before the Board, outlining the offender’s progress within the institution and detailing the offender’s release plan. Other relevant reports may include psychological, psychiatric and youth offender reports. Written victim submissions may also be considered in appropriate cases.

VI. RELEASING INFORMATION TO OFFENDERS

The provisions governing the release of information to inmates are fundamental to the parole process. They are considered in ch 7. In particular, under s 13 of the Act the Board is required to “take all reasonable steps” to ensure that information it receives relating to a decision by the Board is made available to the offender at least 5 days before the hearing, or as soon as is practicable before the hearing. The prejudicial effects of delay and fundamental rights to natural justice are implicated in the release of information, because of the need for an offender to be able to consider and respond to information at a hearing. While the Board also has power to withhold information in exceptional circumstances, this is typically in relation to victim submissions containing personal information which the victim wants withheld.

The Act also makes provision for “confidentiality orders” which can forbid disclosure or publication of particular information to anyone other than a Board member in any case where there is a perceived risk of danger to the source of the information or prejudice to the maintenance of the law. The implications of the Privacy Act 1993 and the Official Information Act 1982 are also considered in this chapter.

VI. THE PAROLE HEARING

This is the subject of ch 8. Understandably, the requirements for the provision of material to the Board and notice to affected parties prior to a hearing are quite prescriptive. Clearly, “relevant information” will include all relevant offender information, and available departmental and health professional reports, including, where appropriate, care co-ordinator reports under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) and any reports relevant to the Children, Young Persons, and their Families Act 1989. Notice should also be given to the offender, any victim, the prison manager, relevant officials under the Mental Health Act and IDCCR Act and the police.

Hearings may be attended physically or by remote access, with the agreement of the Board. They are to be run as an inquiry and in a manner that maximises free and frank oral presentations. As with hearings under the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Board may regulate its own procedure, subject to relevant regulatory requirements. Typically, Board panels travel to prisons to conduct hearings in a designated room within the prison, although in recent years video-conferencing has become a more common mode of conducting hearings. These usually involve allocating half an hour for inmates serving determinate sentences and three-quarters of an hour for those serving indeterminate sentences. Inmates may, and commonly do, waive attendance at Board hearings, but this does not debar the Board from deliberating in the offender’s absence. Reasons for granting or declining parole are given and the date of the offender’s next appearance before the Board is given.

Offenders may, with the Board’s leave, be represented by counsel at a parole hearing, but can have legal representation as of right for postponement hearings, final recall hearings and in the case of a non-release order being sought. Offenders can have one or more support persons at a hearing, typically family/whanau or other supporters. Such people must be approved by prison authorities in advance of the hearing.

Corrections officers also routinely attend hearings, as may psychiatrists or psychologists who have had significant engagement with an offender. Their input provides useful additional information and clarification or correction of information that may have been provided to the Board. Legislation also makes provision for interpreters, including interpreters for deaf offenders, to be present where required.

The author usefully outlines the procedure for hearings which will be of value for counsel and supporting parties unfamiliar with the Parole Board practice. These include introductions of attending parties, the right to make submissions through

counsel, consideration of the views of victims, panel deliberation and oral communication of the Board's decision. Evidence may be given informally, although the right of the offender to challenge evidence and respond to it may be given by the Board. Hearings can also be adjourned to obtain additional information or to accommodate the unavailability of counsel or significant support people.

While decisions of the Board may be challenged on a judicial review application, this will seldom be successful where the Board has followed its statutory obligations and given a reasoned decision.

VIII. ASSESSING RISK

The New Zealand Parole Board has adopted the "Structured Decision-Making" methodology in dealing with parole applications. This approach, discussed in ch 9, involves making a systematic analysis of data from many sources in order to achieve consistency and to avoid biased, idiosyncratic or pretextual decisions. The strong focus, in this regard, is on actuarial data which is considered a more likely means of avoiding or minimising arbitrary decision-making. This may involve the use of reliable and well-validated assessment tools, which assess for different forms of risk. Offenders' scores on such assessments assist, but are not necessarily determinative of decision-making, which may also look to a range of other factors to determine risk. These might include:

- the circumstances of the offending,
- the offence and imprisonment history,
- the current charges,
- the offender's behaviour in prison, and
- the security classification.

Integrative steps taken to prepare offenders for transition back into the community are also considered by the Board, including such measures as approved leave, release to work and pre-release residence arrangements. At the end of the day overall assessment of risk is of paramount importance, in particular whether the defendant poses an undue risk of safety to the community.

IX. MENTAL HEALTH AND RELATED ISSUES

Chapter 10 deals with the issue of mental health and intellectual disability which, as Judge Mather notes, pose significant challenges to the criminal justice system. Offenders with significant mental health and intellectual disability histories regularly appear before the Board, which is dependent on the advice and assessments of health assessors, including psychiatrists, psychologists, and specialist assessors. As with risk assessment generally, the Board's principal concern is to determine

whether the offender's intellectual disability or mental illness creates an additional concern regarding undue risk to the safety of the community. This chapter discusses the various statutory measures for assessing insanity and unfitness to stand trial. Although such questions are not a direct concern of the Parole Board, they may be relevant where an offender has been found fit to stand trial following a hearing and ultimately sentenced to imprisonment, but is mentally fragile at the point of parole consideration. The chapter also considers the statutory framework for offenders convicted of a criminal offence but needing treatment in the hospital at the time of sentence and how prisons manage the needs of mentally disordered and intellectually disabled offenders.

X. RELEASE AND CONDITIONS

Release and conditions of release is the subject of ch 11. This is obviously an important feature of the parole provisions, and may involve quite complex calculations to determine the appropriate release date. The direction for release on parole may be amended or revoked, by the Board at its discretion, usually dictated by some event occurring between the hearing and the decision to release on parole. The nine standard release conditions automatically apply when an offender is released on parole and, in addition, the Board may specify special release conditions. These are detailed in the chapter. Residential restrictions may also apply, together with GPS monitoring in an appropriate case. A special condition relating to monitoring of compliance with release conditions can be imposed where the 'special circumstances of an offender' dictate that need. The Board is able to monitor compliance for up to 12 months from the date of release, where the offender is released on parole or compassionate release, and for six months from the date of release where the offender is released at the statutory release date. The chapter also considers how variation and discharge of conditions may be effective and what happens where a short-term sentence is imposed on a parolee. The chapter concludes with a discussion of the rules governing release at the statutory release date.

Chapter 12 is a brief discussion of what happens where a non-New Zealand citizen is served with a deportation order prior to parole eligibility date. The issue of extradition from New Zealand for a person charged with certain offences is also briefly discussed here.

XI. VICTIMS

In ch 13 there is an account of the Parole Board's obligations regarding victims. These apply only to victims of certain "specified offences", including some sexual offences and serious violence offences. In appropriate cases such victims are entitled

to notice in respect of certain hearings of the Parole Act and inclusion on the Victim Notification Register. The Board must then notify the victim of the offender's impending temporary release, escape from prison detention, death while in prison, convictions or sentences for breaching release conditions, and decisions on appeal quashing final report order. They are also entitled to notice of the sentence end date. As the author notes, the Board is especially mindful of concerns and views of victims and may go to great lengths to ensure that victims are involved appropriately in the parole process.

XII. PRISON NETWORK AND PROGRAMMES

Chapters 14 and 15 deal respectively with the prison network and programmes in prisons. These provide an outline of location of New Zealand prisons and prison musters as at 31 December 2014. The total of male and female prisoners of 8641 had expanded to 9914 by 31 December 2016, and continues to rise. Chapter 15 provides a useful account of the different specialised rehabilitative programmes available in New Zealand prisons. Eighteen such programmes are available in prisons throughout the country, ranging from adult sex offender treatment programmes to young offender programmes available in Youth Units at two regional prisons.

XIII. REVIEW AND APPEAL RIGHTS

Chapter 16 outlines the limited review and appeal rights under the Parole Act, which include a right of review of Board decisions and certain rights of appeal to the High Court. In addition, proceedings for judicial review and habeas corpus are available to offenders and are commonly exercised. The chapter outlines the principal cases involving prisoner applications, noting that there have been few successful judicial review applications. While there have been a number of habeas corpus applications involving prisoners since the Parole Act came into force, the courts generally favour judicial review over habeas corpus as a means of challenging parole decisions.

Recall to prison is the subject of ch 17. The power resides with the chief executive of Corrections, a probation officer or the Commissioner of Police. Typically such applications are made by probation officers, with the approval of senior managers. The grounds for recall are outlined, including the procedure for making an interim recall order, and the criteria for making a final recall order. The differentiation between the two types of orders is explained.

IV. EXTENDED SUPERVISION ORDERS

The final substantive chapter, ch 18, outlines the law governing extended supervision orders (ESO). This is an important jurisdiction of the Parole Act, which has been amended twice since ESOs were introduced in 2004. Originally targeting offenders who had completed sentences for sexual offences against children, the provisions now extend to both serious sexual and serious violent offences. The conditions of ESOs are outlined. The chapter concludes with a brief discussion of the provision in s 107 of the Parole Act that certain offenders not be released before the “applicable release date”.

XV. THE MEDIA

The final chapter, ch 19, briefly outlines the role of media in respect of parole hearings and how the Board deals with official information requests. Generally the Board encourages responsible media coverage of its decision-making, with all Board decisions being available under the Official Information Act 1982.

XVI. APPENDICES

The book also includes a number of appendices. Perhaps the most useful of these is Appendix 1, containing a full reproduction of the Parole Act 2002 and Appendix 5 which describes the various risk assessment tools used by Corrections. Other Appendices list prison statistics as at 31 December 2014, the New Zealand Prison Network, a Glossary of Abbreviations, Security Classification Placement Summary and resources dealing with the Parole process in New Zealand.

XVII. IN SUMMARY

This book provides an excellent summary of the main elements of parole in New Zealand. It is well laid out and provides a clear and systematic account of the Parole Board and its operation. It will be of value to students studying criminal justice, lawyers dealing with prisoners as clients, community corrections and corrections staff, and judicial officers wishing to familiarise themselves with the parole process in New Zealand. It will provide a useful supplement to more comprehensive accounts of the Parole Act like *Adams on Criminal Law – Sentencing*. It is a welcome addition to the available resources dealing with the New Zealand criminal justice system.