



New Zealand Centre for Human Rights Law, Policy & Practice

Auckland Law School

University of Auckland

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National update: policy and legislation (click titles for full story)

[Update on the new Parliament](#)

The new Parliament has reinstated most of the bills introduced by its predecessor, according to urgency to three. Two of these reflect Labour policy: the **Families Package (Income Tax and Benefits) Bill**, the **Parental Leave and Employment Protection Amendment Bill**. The **Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act** - also a Labour measure - became law on 9 April 2018. The aim of the Act is to reduce prejudice and stigma arising from a conviction for a historical homosexual offence by enabling an eligible person to apply for expungement of the conviction if the Secretary of Justice decides, on the balance of probabilities, that the conviction meets the test for expungement. Namely it would not be an offence under today's law.

[Child Poverty Reduction Bill](#)

The Bill is designed to encourage a focus on child poverty reduction, facilitate political accountability against published targets, require transparent reporting on child poverty levels and create a greater commitment by Government to address child well-being.

[Equal Pay Legislation](#)

The new government reconvened the Joint Working Group on Pay Equity Principles as a step towards establishing pay equity for New Zealand women. It is hoped that new legislation will be introduced by the middle of the year.



Protected Disclosures legislation review

The Act is designed to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, by providing protection for individuals who report concerns. Special victimisation provisions are in the Human Rights Act 1993.

Privacy Bill

It repeals and replaces the Privacy Act 1993, as recommended in the Law Commission's 2011 review. Its key purpose is to promote people's confidence that their personal information is secure and will be treated properly.

Bill of Rights

The Government has indicated that it proposes amending the **New Zealand Bill of Rights 1990** to allow the country's senior courts to make a declaration of inconsistency recommending to Parliament that it should review and reconsider whether a law contravenes the Bill of Rights.

Inquiry into Mental Health and Addiction

The Government has announced details of the Inquiry into Mental Health and Addiction. The Inquiry will be chaired by former Health and Disability Commissioner, Professor Ron Paterson, and is to report back to Government by the end of October.

Royal Commission of Inquiry into the historical abuse of children in state care

As noted in our last bulletin the Government has announced a Commission into the abuse of children in state care will focus *on* the victims, including any systemic bias based *on* race, gender or sexual orientation, but it will not compensate individual victims. Former Governor-General, Rt Hon Sir Anand Satyanand, will chair the Commission and Mervin Singham has been appointed Executive Director.

International update

(click above for full story)

Examination on New Zealand's performance under ICESCR

The New Zealand Government submitted their [report](#) to the ICESCR Committee in May 2017. The examination was scheduled for March 2018.

List of Issues - CRPD

The Committee on the Rights of Persons with Disabilities has released the list of issues for New Zealand which will form the basis of the examination that is likely to take place in 2019. The list can be found at <http://tbinternet.ohchr.org/layouts/treatybodyexternal>.



Recent cases

(click titles for full story)

[*Dotcom v Crown Law Office* \[2018\] NZHRRT 7](#)

This case examines the right to information

[*Wall v Fairfax New Zealand Ltd* \[2018\] NZHC 104](#)

This case examines the right to freedom of expression and when expression amounts to exciting racial disharmony

[*Chamberlain v Minister of Health* \[2017\] NZHC 1821, \[2017\] NZAR 1271 \[HC judgement\];
Chamberlain v Minister of Health \[2018\] NZCA 8](#)

This case examines the right of families to equal treatment when caring for their disabled relatives

[*Chief Executive of the Department of Corrections v Shane Aaron Gardiner* \[2017\] NZCA](#)

This case examines the right to liberty & freedom from unlawful detention

[*Attorney-General on Behalf of the Department of Corrections v Smith* \[2018\] NZCA 24](#)

This case examines the right to freedom of expression

[*Rudi Hartono and Ors v Ministry for Primary Industries* \[2018\] NZSC 17](#)

This case examines the right to claim unpaid wages



National update: policy and legislation

Update on the new Parliament

The new Parliament has reinstated most of the bills introduced by its predecessor, according to urgency to three, two of which – the **Families Package (Income Tax and Benefits) Bill** and the **Parental Leave and Employment Protection Amendment Bill** – reflect labour policy. The first had its third reading in December last year. The second was accorded urgency on its introduction and first and second reading, receiving the royal assent on the 4th December. The **Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act** – also a Labour measure – became law on 9 April 2018. The aim of the Act is to reduce prejudice and stigma arising from a conviction for a historical homosexual offence by enabling an eligible person to apply for expungement of the conviction if the Secretary of Justice decides, on the balance of probabilities, that the conviction meets the test for expungement. Namely it would not be an offence under today's law. The legislation is not unique to New Zealand. Similar initiatives have already been introduced in England, Wales and some Australian states.

Child Poverty Reduction Bill

New legislation includes the introduction of the **Child Poverty Reduction Bill** designed to encourage a focus on child poverty reduction, facilitate political accountability against published targets, require transparent reporting on child poverty levels and create a greater commitment by Government to address child well-being. The bill has been sent to the Social Services and Community Committee and submissions were due by 4 April.

Equal Pay Legislation

The new government also reconvened the Joint Working Group on Pay Equity Principles as a step towards establishing pay equity for New Zealand women. The original Working Group set up in 2015 had developed a set of principles to guide the implementation of pay equity but was dissolved by the previous Government although legislation was introduced last year to address the issues arising out of the *Terranova* case. The Bill did not address a number of issues faced by women making a pay equity claim and it has now been withdrawn. The Joint Working Group reported in early March recommending the Government clarify and simplify the process for initiating a pay equity claim, and amend the Equal Pay Act 1972 to implement these principles. It is hoped that new legislation will be introduced by the middle of the year. In the meantime a private member's bill – **Employment (Pay Equity and Equal Pay) Bill** – effectively the same as National's earlier



Bill was drawn out of the ballot and introduced on 22 February. Presumably this will be deferred pending the introduction of the government bill.

Protected Disclosures legislation review

A review of the **Protected Disclosures Act 2000** has been announced. The Act is designed to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, by providing protection for individuals who report concerns. Special victimisation provisions are in the Human Rights Act 1993. Recent information suggests that the present process is not working as well as it might and New Zealand is falling behind in terms of international best practice in this area.

Privacy Bill

A new **Privacy Bill** was introduced on March 20. It repeals and replaces the Privacy Act 1993, as recommended in the Law Commission's 2011 review. Its key purpose is to promote people's confidence that their personal information is secure and will be treated properly. The Bill retains the Act's 12 information privacy principles, which seek to protect people's privacy, while accommodating legitimate information use by government, firms, and other organisations. Information privacy principles 6 and 7, for example, continue to provide, respectively, for a person's right to access and correct information about them. The Bill also updates the information privacy principles in some respects, for example, to better protect personal information sent overseas. Submissions to the Justice Committee are due by the 24th May.

Bill of Rights

Perhaps most importantly, the Government has indicated that it proposes amending the **New Zealand Bill of Rights 1990** to allow the country's senior courts to make a declaration of inconsistency recommending to Parliament that it should review and reconsider whether a law contravenes the Bill of Rights. The change comes just as Arthur Taylor's case on the voting rights of prisoners goes to the Supreme Court. The case has caused the courts to assert they already have the jurisdiction to advise the Government where legislation is inconsistent with the Bill of Rights.

Inquiry into Mental Health and Addiction

The Government has announced details of the Inquiry into Mental Health and Addiction. The Inquiry will be chaired by former Health and Disability Commissioner, Professor Ron Paterson, and is to report back to Government by the end of October. More about the Inquiry including the Terms of Reference and bios for the Inquiry chair and members can be



found at: mentalhealth@inquiry.govt.nz

Royal Commission of Inquiry into the historical abuse of children in state care

As noted in our last bulletin the Government has announced a Commission into the abuse of children in state care will focus *on* the victims, including any systemic bias based *on* race, gender or sexual orientation, but it will not compensate individual victims. Former Governor-General, Rt Hon Sir Anand Satyanand, will chair the Commission and Mervin Singham has been appointed Executive Director. The terms of reference have still to be set. Information can be found at: <http://www.dia.govt.nz/Royal-Commission-into-Historical-Abuse-in-State-Care>

International update

Examination on New Zealand's performance under ICESCR

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List of Issues - CRPD

The Committee on the Rights of Persons with Disabilities has released the list of issues for New Zealand which will form the basis of the examination that is likely to take place in 2019. The list can be found at <http://tbinternet.ohchr.org/layouts/treatybodyexternal>. The Government will now spend the rest of the year developing its response. The committee will then assess New Zealand's progress on implementing the convention, highlighting any areas of concern. Significantly, the Government is asked what measures it has taken to review eligibility criteria for funding family members who care for disabled relatives (see more on this in the case note below). Hopefully this will provide a further impetus to the Minister of Health's commitment to revisit the current legislation and accompanying policy.



Recent cases

Dotcom v Crown Law Office [2018] NZHRRT 7

the right to information

The Tribunal has issued a lengthy in-depth, useful decision about the conditions under which the Crown should release information held about individuals. The case involves Kim Dotcom and is part of his now lengthy litigation resisting extradition to the United States on copyright charges.

In July 2015 Mr Dotcom sent an information privacy request to all Ministers of the Crown and nearly every government department. The requests sought access to all personal information held about him. It sought the material under urgency claiming the material was for “pending legal action”. Most of the requests were transferred to the Attorney General who declined the information under the Privacy Act on the ground that they were vexatious and included trivial information. The main issue was whether there had been an invasion of his privacy under s.66 of the Privacy Act and, in particular, if s.39 allowed the Attorney General to transfer the request and if so, whether there was a proper basis for declining under s.66(2)(b).

The Crown maintained the requests were vexatious. In a letter sent to the Privacy Commissioner, the Solicitor-General described them as a “litigation tactic” and a fishing expedition. Mr Dotcom denied this, claiming he had no ulterior motive and that he simply wanted to see the material and decide whether it was relevant to the extradition proceedings. The Tribunal found that the transfer was not permissible and there was no proper basis for declining access.

In reaching his decision the Chair of the Tribunal canvassed the history of Mr Dotcom’s attempts to access the information beginning with the District Court extradition proceedings when he sought disclosure on similar grounds to those involved in domestic criminal proceedings. Both the District Court and the High Court allowed it but the decision was overturned by the Court of Appeal (an appeal to the Supreme Court was unsuccessful). Rather than broad disclosure being ordered by the Court, the correct way of accessing the information was by Mr Dotcom seeking the information from the relevant agencies himself. So he tried. In July 2015 he sent a pro forma letter to most government departments which were in turn transferred to the Attorney-General and then declined by the Solicitor General who claimed the requests were vexatious.



The transfer was challenged by Mr Dotcom's lawyer who argued that, while it might be appropriate to seek legal advice from Crown Law, the Attorney-General could not lawfully decline the requests. The Crown denied that the decision to transfer the requests was at the behest of the Attorney-General but rather by individuals within the agencies who had received the requests. Ironically, the Tribunal found itself unable to decide whether this was, in fact, the case because the Crown claimed the exchanges were privileged.

The Tribunal did, have to decide whether the Attorney-General was the lawful transferee. Crown Law argued that, as legal adviser to the government, it was entitled to respond to what were a set of "difficult requests": at [56.2]. The Tribunal concluded that the decisions to transfer the requests and to decline the information were made for reasons unrelated to assessing the actual information but rather because the Crown had decided that the requests were a litigation tactic: at [67]. Overall, the Tribunal concluded that the relevant provision of the Privacy Act [s.39(b)(ii)] did not allow the requests to be transferred simply to obtain legal advice or co-ordinate a consistent response to the requests as part of the Crown's litigation strategy. The information to which the requests related was not more closely connected with the functions and activities of the Attorney-General than those of the transferring agencies and the Attorney-General had no authority to refuse to disclose the requested information. It was made clear that despite this the decision was going to be declined anyway: at [109]. This led the Tribunal to observe that accepting that a decision made unlawfully had the same status as one made within the law required a "good deal of cynicism as to the importance of state agencies and of state decision-makers acting within the law. Sight must not be lost of the principle that those who seek to uphold the law must themselves obey it. There is, it observed, a substantial public interest in statutory decision makers making their decisions in accordance with, rather than in disregard, of the law": at [110].

As noted already the Crown claimed that Mr Dotcom's requests were vexatious because they were sought under urgency and covered such a broad area that they inevitably included material that was trivial – although how he could have known this if he didn't know what personal information the departments held rather confounded the issue. The Crown also alleged the requests were not genuine and designed principally to disrupt the extradition hearing. The burden of establishing this lies on the Crown. The Tribunal found that, contrary to the Crown's assertion, Mr Dotcom had discharged the necessary burden and established the requests were entirely legitimate and not designed to disrupt the extradition hearing: at [143].

In deciding whether the requests were vexatious in the context of the Privacy Act, the Tribunal considered that there must be an element of impropriety to the request. Deciding whether this is so must be assessed objectively. Whether a request is vexatious, is highly fact specific and contextual. Under the Privacy Act no reason needs to be given to justify a request for personal information – unlike under civil and criminal discovery where the relevance of the requested information is of critical importance to the obligation to disclose: at [166]. As we have noted already in relation to the question of triviality, if Mr Dotcom had



not been given access to the material, he could not know whether it was relevant to his extradition. As the Tribunal observed “To require him to first establish relevance before being given access to the information turns the Privacy Act upside down and renders illusory the legal right of access to personal information held by state agencies”: at [173]. As for the scope and volume of the requests, any information that is not personal information can be simply disregarded, while the breadth of a request is regulated by the inbuilt statutory limitation that the information is readily retrievable. The requests by Mr Dotcom were not in any way out of the ordinary; there was also no merit in the Crown’s argument that Mr Dotcom had a long history of making request under the Privacy and Official Information Acts; that he had delayed unduly in making the requests; there was no proper basis for requesting urgency and he refused to engage in a co-operative way. The Tribunal concluded that there was no proper basis for refusing to provide the information. Assessing the circumstances objectively and on the facts known at the time, there no reasonably justifiable basis for the refusal decision: at [202]. It followed that there had been an interference with the privacy of Mr Dotcom.

This gave the Tribunal the right to award a remedy. Mr Dotcom had sought:

- (a) A declaration of interference with his privacy;
- (b) An order directing the Crown to remedy the interference by providing access to the requested information;
- (c) Damages for loss of benefit, loss of dignity and injury to his feelings.

The Tribunal granted him the remedies he sought. In respect of the declaration it found there had been no disentitling conduct on his part to deny Mr Dotcom a declaration and there was also no reason why the order seeking access should not be granted.

In relation to damages there needed to be a causal connection between the interference with the privacy of the individual and the loss or damage sustained - the plaintiff must show that the defendant’s act or omission was a material cause. In terms of loss of benefit the loss must be based on an objective assessment of the nature of the benefit which the aggrieved individual might reasonably have been expected to have obtained but for the interference, the seriousness of the interference and the surrounding circumstances: at [238]. This was assessed as \$30,000. In relation to loss of dignity or injury to feelings, the Tribunal found that the claim that his requests were vexatious, not genuine and intended to disrupt the extradition proceedings contained “a real sting”. A litigant’s desire to pursue the truth and to secure a fair hearing is not, without good reason, to be cynically dismissed. While conceding that there is inevitably a subjective element in determining the quantum of damages, the facts here were such that an award of \$60,000 was made.



Wall v Fairfax New Zealand Ltd [2018] NZHC 104

The right to freedom of expression and when expression amounts to exciting racial disharmony

This is the first time the High Court has considered section 61 of the Human Rights Act 1993, which protects freedom of expression. The appeal concerned two cartoons by Al Nisbet relating to the food in schools programme in lower decile schools. One cartoon was published in the *Marlborough Express*, the other in *The Press*. MP Louisa Wall brought the claim against Fairfax New Zealand Limited (Fairfax) for publishing cartoons that she claimed discriminated against Maori and Pasifika and breaches s 61 of the Human Rights Act. She alleged the cartoons depict Maori and Pasifika as likely to abuse the food for schools programme, spending their “money for cigarettes, alcohol and gambling rather than for food for their children and accordingly were despicable and worthless as well as negligent parents.”¹

The Human Rights Review Tribunal considered that three issues needed to be satisfied. The first was whether the cartoons depicted Maori or Pasifika persons, the second whether they were insulting for the purposes of s 61 and the third was whether they were “likely to excite hostility against or bring into contempt any group of persons”. The first two issues were satisfied but on the third, the Tribunal found that the cartoons were not likely to excite hostility against Maori or Pasifika, or bring them into contempt. This was the issue against which Ms. Wall appealed, arguing that the Tribunal had not interpreted and applied the s 61 test correctly. Given that the cartoons were insulting, that in itself meant they were likely to - and did - bring Maori and Pasifika into contempt.

The High Court discussed the interpretation of s 61 agreeing with the Tribunal that s 61 was intended to capture civil and criminal behaviour that was “at the serious end of the continuum of meaning”.² The word “contempt” was to be read as ‘despicable’ rather than ‘being of little value’. In doing so the Court looked at *who* was likely to be incited to act in a hostile way against Maori and Pasifika, or was likely to hold them in contempt. The effect on Maori and Pasifika is not relevant to this part of the test. It is an objective test on the effect on *others* and how their attitudes toward Maori and Pasifika may have been changed. “Self-contempt” of Maori and Pasifika is not sufficient to meet this test. The audience with which to whether they have been brought into contempt is not all potential readers, nor is it the reasonable person or even the apprehension of what the reasonable person’s reaction would be. The Human Rights Commission had submitted a test that focused on the “susceptible” or “persuadable” portion of the potential audience. While the Court did not adopt the test verbatim, it did accept the “susceptible” or “persuadable” aspect, acknowledging that whilst not a complete test, it was nonetheless a useful one. The Court commented on the value of editorial cartoons in providing unpopular views that may cause offence and reflect intolerant

¹ *Wall v Fairfax New Zealand Limited* [2017] NZHRRT 17 at [29.2].

² *Wall v Fairfax New Zealand Limited* [2018] NZHC 104 at [11].



attitudes held by some within society, in order that they may be challenged. With this in mind, the Court did not find that even those who might be persuaded would be excited to hostility or feelings of contempt toward Maori or Pasifika. The Court affirmed the Tribunal's approach that the language of s 61 was elastic and open to a continuum of meaning. While it was appropriate for the Tribunal to adopt a *Moonen* approach in deciding the scope of the right to freedom of expression (one that is not absolute), a *Hansen* approach was unlikely to have produced a different result.³ The Court took no issue with the conclusion that the s 61 language establishes a high threshold, at the serious end of the spectrum.

Ms. Wall had also argued that the case involved a conflict between freedom of expression and freedom from discrimination and s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA).⁴ This was because s 61 refers to "other forms of discrimination". The Court agreed with the Tribunal that the right to freedom of expression was the issue and the situation was better described "in terms of a conflict between Fairfax's *right* to freedom of speech and the government's *interest* in protecting its citizens from harmful speech and discrimination."⁵ The s 19 NZBORA right to freedom from discrimination was not engaged because the plaintiff did not allege that she was discriminated against personally. The High Court confirmed there were two-limbs to s.61. Namely, material must be both insulting "likely to excite hostility against or bring into contempt any group of persons". As the second limb of the s 61 test was not met, the Court concluded that s 61 was not breached and dismissed the appeal.

Chamberlain v Minister of Health [2017] NZHC 1821, [2017] NZAR 1271 [HC judgement]; *Chamberlain v Minister of Health* [2018] NZCA 8
The right of families to equal treatment when caring for their disabled relatives

The Chamberlain case is yet another step in the ongoing saga of the Ministry of Health's resistance to pay family members to support their disabled relatives. Beginning with a complaint of discrimination to the Human Rights Commission, the Ministry of Health has vigorously defended its policy in a succession of cases culminating in 2012 when the Court of Appeal found that it was discriminatory on the grounds of family status and contrary to s.19 of the New Zealand Bill of Rights Act 1990⁶. In response, while technically allowing funding for relatives to care for resident family members, Parliament amended the New Zealand Public Health and Disability Act 2000 by adding Part 4A to keep funding of such services "within sustainable limits". At the time the amendment attracted considerable criticism as it was introduced under urgency and without public consultation or scrutiny by

³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

⁴ Section 19 NZBORA protects the right to freedom from discrimination.

⁵ Above n 2 at [35].

⁶ *Atkinson v Ministry of Health* [2012] NZCA 184, [2012] 3 NZLR 456; a further case, *Spencer v Attorney-General* [2013] NZHC 2580 also addressed an aspect of the policy



a Select Committee. The fact that it prevents further complaints to the Human Rights Commission or the courts that a policy is discriminatory was also contentious.

The wording in Part 4A is so tortuous that it is unclear who is eligible for payment and for what. Chamberlain is a good illustration of this. It allows for up to 40 hours funding per week for “personal care” and “household management” services as part of a Funded Family Care (FFC) policy. The level of funding is assessed by providers of needs assessment and coordination services (NASC) under contract to the Ministry.

Dianne Moody has cared for her middle aged son, Shane, all of his life. On the advice of the NASC, the Ministry paid Dianne for 17 hours a week under the FFC policy. Shane and his mother argued he was entitled to funding for the maximum 40 hours. As Palmer J observed at the High Court, the argument was essentially about whether the funding decisions were based on an accurate assessment of Shane’s needs in terms of the policy, interpreted lawfully.⁷ Paul Dale, acting for Dianne Moody and Shane, claimed that the funding decisions amounted to an error of law in interpreting and applying the policies consistently with the aim of the Act. The Crown, on the other hand, claimed that the proceedings attacked “the philosophy and mechanics of the entire disability support system in a way which is perverse and the antithesis of the principles promoted by the (Disability) Convention and the government’s strategic goals”.⁸ In order to decide whether Dianne Moody was entitled to the number of hours she claimed Palmer J had to decide what was meant by “personal care” and “household management”. He found that they were discrete specific services which did not include general supervision or oversight of a person with a disability. Part 4A was of little assistance in interpreting the terms – the definition of support services for example did not throw any light on the scope of the services intended to be funded, although it was conceded it might have been different if there was evidence that a contract service provider received materially more funding. It followed that the funding decisions in relation to Shane were consistent with the meaning of “personal care” and “household management” as used in the policies. As a result he declined to make a declaration that the Minister’s funding decision was unlawful for want of consistency with the relevant FCC under the Public Health and Disability Amendment Act. Dianne Moody challenged the decision.

The Court of Appeal allowed the appeal, setting aside the allocation of funding for 17 hours, directing the Ministry to reassess Shane’s application consistently with the Disability Convention and the Public Health and Disability Act 2000. Describing the policy as legal instrument that determines entitlement to services, the Court saw the issue as whether “personal care” and “household management” were broad enough to cover services such as safety supervision and intermittent care, given the reasons for funding family care. It followed that the phrases should not be construed narrowly and limited to specific examples of discrete tasks or tied to earlier specifications which predated Part 4A. They must be interpreted in a way which advanced the purposes of home and community funding within

⁷ *Chamberlain v Ministry of Health* [2017] NZHC 1821 at [49]

⁸ *Ibid.* at [45]



the Act generally.⁹ Family relationships cannot justify excluding carers acting as support workers when the law now recognises that they are equally eligible for funding in performing the same disability support services as contracted third party carers. Turning to New Zealand's obligations under the Disability Convention, the Judges found that Dianne's caring of Shane at home reflected the Convention requirement that disabled persons should be able to belong to and participate in the community to reduce social isolation. This goal should not be overridden by fiscal expediency. The Court concluded that "a formulaic approach to assessment [was] inconsistent with the spirit and purpose of the Act"¹⁰. By failing to recognise the full range of services that Shane was eligible for the NASC assessment misinterpreted the Policy and, as a result, the Minister had erred in law. The error was serious and warranted judicial review. Accordingly, the Minister was directed to reassess Shane's application for funding in a manner consistent with the purposes of the Act and the content of the policy as set out in the judgment.¹¹

The Court added a postscript with which we can only agree. Noting that it was the third time that a dispute about this subject had reached the Court of Appeal, the Judges expressed the hope that in future parties to such disputes would be able to settle their differences without resorting to litigation. They also criticised the complexity of the statutory instruments governing eligibility for disability support services as "verging on the impenetrable" and hoped that the Ministry was able to find an effective way of streamlining the regime so it was accessible for the people who needed it most. In fact we would go further and encourage the repeal of Part 4A entirely and a more rights consistent approach to the payment of carers. We note that in its pre-election manifesto, Labour said it would repeal the legislation and would ensure all family caregivers could "provide and be paid for assessed care for their disabled adult family member".

Chief Executive of the Department of Corrections v Shane Aaron Gardiner [2017] **NZCA 608**

The right to liberty & freedom from unlawful detention

Shane Gardiner was kept in custody by the Department of Corrections for longer than he should have been. He claimed false imprisonment and sought an award of damages.

The facts were relatively straight forward. Mr Gardiner was released on 23rd September 2016, prison staff understanding that his statutory release date was the 2nd October as a result of the Court of Appeal's interpretation of credit for pre-sentence detention in *Taylor v Superintendent of Auckland Prison*¹². Ironically, on 22nd September the Supreme Court held

⁹ CA at [70]

¹⁰ Ibid. at [83]

¹¹ Ibid. at [88]

¹² [2003] 3 NZLR 752 (CA). Although his release date was 2nd October, pursuant to s.52(2) of the Parole Act 28 September was the earliest release day preceding his statutory release date.



that *Taylor* was wrongly decided¹³. Applying the Supreme Court's interpretation Mr Gardiner should have been released on 24th August 2016. He had therefore spent 30 days longer than he should have in prison. He successfully sued for false imprisonment and in a subsequent judgment was awarded damages of \$10,000 and costs¹⁴. Both decisions were appealed by the Chief Executive who contested the finding of liability and award of damages arguing that the Supreme Court's decision was prospective and damages were barred by the Prisoners and Victims Claims Act 2005 (PVCA). Mr Gardiner appealed the quantum of damages.

Dealing with these issues in turn. The Supreme Court's judgment having settled the law, what was relevant here was whether it operated retrospectively. Before the decision, pre-sentence detention where there were concurrent sentences were calculated on a charge by charge – rather than an aggregate -basis. Using this formulation Mr Gardiner would have been correctly detained until 2nd October. The Supreme Court had held, however, that pre-sentence detention is to be calculated in the aggregate so that a prisoner serving concurrent sentences is entitled to credit for all pre-sentence detention even where it pre-dates the offence that received the longest sentence at subsequent sentencing. In relation to the question of whether judges can make law that has retrospective effect, the position in New Zealand is that prospective-only ruling remains an open question that will require an answer only if a court has reason to think that retrospective overruling will change settled expectations and cause hardship to such an unusual extent that departure from normal practice might be justified; at [19].

The Court upheld the decision in Mr Gardiner's case, noting that had the Supreme Court meant to limit the retrospective effect of its judgment it would have said so. The Chief Executive had argued that such an outcome would be unfair. He had followed *Taylor* in good faith and to decide otherwise would expose him to liability to many other prisoners. While the Court found his concern to be understandable, it held that good faith is no defence to the tort of false imprisonment. The Chief Executive was liable as an agent of the State and unlawful detention is prima facie unfair to the individual detained no matter how many prisoners were affected: at [24].

As to the issue of compensation under the PVCA, a claim for compensation by a prisoner for an act or omission of the Crown can only be awarded if the plaintiff has made reasonable use of "reasonably available complaints mechanism and had no redress". The Chief Executive argued that Mr Gardiner's failure to employ all the complaints mechanisms was a bar to compensation even if they wouldn't have done him any good because the understanding was that the law was as stated in *Taylor* and Corrections had to follow it. The Court disagreed. It considered that Parliament could not have intended that a prisoner must use mechanisms that could not possibly offer any redress and which he might rightly think were pointless. The PVCA did not bar Mr Gardiner's claim.

¹³ *Booth v R* [2016] NZSC 127; [2017] 1 NZLR 223

¹⁴ *Gardiner v Chief Executive of the Department of Corrections* [2017] NZHC 1831; [2017] NZAR 1348



As to whether damages were the right remedy and a declaration would have sufficed, the Court found that cases such as this could be considered exceptional for reason such as the impact on the person's liberty or the unavailability of alternative redress. It followed that compensation was merited in this case. As to the quantum of damages, the Court discussed the difficulties in applying the Cabinet Guidelines and the difficulties a prisoner can face in such cases noting too that liberty is a fundamental right and its unlawful loss may justify the emphasis of an award of damages, but the amount need not be the same in all circumstances. It went on to conclude that an award must be large enough to vindicate the important liberty interest, but there was no need cause to increase that sum for emotional harm or deterrence: at [69]. Accordingly there was no reason to increase the sum of damages. On the other hand, Mr Gardiner had been successful in resisting the Chief Executive's appeals so he was entitled to costs.

The case is a useful indication of the price that society places on the right to liberty. As Simon France J observed in the High Court, *the right not to have one's liberty removed other than with lawful authority is a key plank of our society and one of its most important and fundamental rules ... False imprisonment is a tort of strict liability for good reason.*

Attorney-General on Behalf of the Department of Corrections v Smith [2018] NZCA 24

Right to freedom of expression

This was an appeal by the Crown against a High Court decision that found Mr Smith's right to freedom of expression had been breached when he was unable to wear a wig while in prison. The Court found that in denying him the right to do so, the Prison Manager should have followed a process which acknowledged his NZBORA rights and why the breach could be justified.

Mr Smith had been sentenced to life imprisonment in 1996. Sometime later he began to lose his hair and sought permission to wear a wig as a way of boosting his confidence and self-esteem. After granting him the right to do so, the Prison Manager revoked permission after he absconded while on temporary leave. When Mr Smith subsequently appeared in the District Court in connection with his escape he was completely bald and the media published photos of him with and without his wig, the wig having changed his appearance partly facilitating his escape.

Mr Smith appealed. The Court of Appeal had to decide whether his wish to wear a wig engaged the right to freedom of expression and, if this was found to be the case, should the Prison Manager have undertaken a proportionality analysis to decide whether infringement of the right was justified under s.5. It found that s.14 not only protects speech but also conduct. Recognising that free speech is the engine room of a democratic society and is valuable as human self-fulfilment. Wearing a wig is not excluded from the protection of s.14 but one must



question whether it amounts to expression. The issue is the purpose of the conduct. The Supreme Court of Canada held that expression requires an activity that conveys a meaning¹⁵. Not all purely physical activities convey a meaning. To bring it within s.14 a person would need to show that an act was performed for this purpose. In the United States, appearance cases have usually failed the expression test. For example in *Karr v Schmidt*¹⁶ it was held that while long hair might convey a “discrete message”, merely liking having long hair did not assert any purpose. The First Amendment did not protect vague attenuated notions of expression. Rather, one needed to demonstrate that the conduct could be fairly described as imbued with elements of communication conveying a particularised message that was understood by those who viewed it. In New Zealand, Blanchard J in *Brooker v Police*¹⁷ observed that behaving in a disorderly fashion while drunk does not engage a NZBORA dimension and in *Thompson v Police*¹⁸, Priestley J stressed the need to ensure that expression which has a protected status is not to be confused with mindless utterance or sounds.

It follows that the jurisprudence imposes a limit of protected expression – the expression must involve an attempt to convey a meaning to someone else and should not be used to protect behaviour that is totally devoid of meaningful content. Parliament could not have intended s.14 to apply in cases other than those involving conduct which was intended to convey - or attempt to convey – a meaning to others. While Mr Smith’s case the wig made him appear less distinctive and more ordinary, the fact that it simply made him feel better was the antithesis of expression. Wearing a wig for this reason did not convey meaning and it thus failed to meet the necessary requirements of s.14.

Rudi Hartono and Ors v Ministry for Primary Industries [2018] NZSC 17

The right to claim unpaid wages

In our September bulletin we reported on the case of *Sajo Oyang Corp v Ministry for Primary Industries*¹⁹ which dealt with whether the crew of foreign fishing boats forfeited to the Crown could register a claim against the vessels for unpaid wages when they had not worked on those boats. The men had been successful at the High Court but not the Court of Appeal which had concluded that claims for wages constituted an “interest” only if the wages had been earned on the vessel in question or proceedings in rem had been commenced before forfeiture. The Supreme Court disagreed finding it came down to what was meant by an “interest” under the Fisheries Act, the legislation which governs activities of foreign fishing vessels operating in New Zealand’s Exclusive Economic Zone. Before 2002, ownership of a foreign vessel was the only interest recognised. It followed that a crew’s lien in respect of unpaid wages was not accepted for the purposes of relief against forfeiture. An amendment to the Fisheries Act was

¹⁵ *Attorney-General (Quebec) v Irwin Toy Ltd* [1989] 1 SCR 927 at 96

¹⁶ *Karr v Schmidt* 460 F 2d 609 (5th Cir 1972) at 613.

¹⁷ [2007] NZSC 30, [2007] 3 NZLR 91 at [58].

¹⁸ [2012] NZHC 2234, [2013] 1 NZLR 848 at [75]

¹⁹ [2017] NZCA 526



introduced in 2002 in response to a situation involving the provision of support and repatriation costs for foreign crews where their local agent had become bankrupt. In order to cover such contingencies, s.256 (which related to forfeited property) was amended to confer an interest on charitable third parties who had supported foreign crews.

The Supreme Court found that the changes were consistent with a general understanding that claims for wages could be brought not only against the vessel on which the crew member worked but also other vessels. Given the vulnerable position of crews on foreign vessels and the reality of the bonding and release arrangements, such vessels can be outside the jurisdiction of the New Zealand courts and thus the practical reach of any wages claims: at [45]. The court held that claims for wages amounted to an “interest”, irrespective of whether they gave rise to a maritime lien or proceedings in rem had been commenced before forfeiture. The appeal was allowed, the judgment of the Court of Appeal set aside and that of the High Court reinstated.

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