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Notes summarising and commenting on case law and legislative developments should be around 2000 words (though may be longer if the case or legislation merits this). Articles and Notes will be subject to a blind double-peer review process.

Articles and Notes should comply with the current version of the New Zealand Law Style Guide and use headings as set out in this edition of the NZCLR. They should be submitted as Word documents.

Letters to the editor that contribute to debate will be welcomed. In addition, book reviews will feature.

Submissions and correspondence should be addressed to Kris Gledhill at kris.gledhill@aut.ac.nz.

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THE CASE FOR ALLOWING AID IN DYING IN NEW ZEALAND

ANDREW GEDDIS*

Many of us would prefer not to think about the issue of how and when we will die until we are compelled to do so. Should we turn our minds to such matters, understandable fears and emotions quickly can crowd out our higher reasoning facilities. But it is not necessary to embrace Plato's assertion that "those who pursue philosophy aright study nothing but dying and being dead"¹ in order to confront the necessary implications of our mortality: even though we may wish to ignore death, it most assuredly will not ignore us. Uncomfortable and upsetting as they may be, questions about the ending we might want for our particular life story and thus what choices we think ought to be permitted in end of life situations are not something that we can or should avoid confronting with clear eyes and an open mind.

In fact, debates over such matters — more particularly, whether and when persons suffering as the result of an incurable and/or terminal medical condition ought to be allowed to end their lives with the active assistance of others — have become increasingly common around the world. The laws of six countries currently permit such practices,² as do six states within the United States of America.³ Parliaments in both the United Kingdom⁴ and Scotland⁵ recently have voted down legislative proposals to join this group. In contrast, last year a parliamentary committee in the Australian State of Victoria recommended that it should adopt such a law,⁶ with legislation to deliver on that recommendation set to enter the State Parliament in 2017. And in New Zealand, the High Court determined in *Seales v Attorney-General* that our criminal law presently prohibits a doctor from actively assisting a terminally ill patient to die.⁷ Following that judgment, the House of Representatives' Health Committee commenced a wide-ranging inquiry into "all the various aspects of the issue, including [its] social, legal medical, cultural, financial, ethical and philosophical implications", while a Bill in the name of David Seymour MP currently in the members' ballot proposes that our Parliament legislate to allow for such "end of life choice".⁸

* Professor, Faculty of Law, University of Otago. Parts of this article draw on a submission made to the Health Select Committee in conjunction with Colin Gavaghan. My thanks to him for agreeing to allow me to use that joint work here. Thanks also to David Geddis and two reviewers for their comments, as well as Tim Shiels for referencing assistance. All remaining errors are mine.

¹ Plato "Phaedo" in *Plato in Twelve Volumes* (William Heinemann, London, 1966) vol 1 at 64a.

² Belgium, Canada, Colombia, Luxembourg, The Netherlands and Switzerland.

³ California, Colorado, Montana, Oregon, Vermont and Washington.

⁴ Assisted Dying (No 2) Bill (2015-16) (UK).

⁵ Assisted Suicide (Scotland) Bill 2015.

⁶ Legal and Social Issues Committee *Inquiry into End of Life Choices: Final Report* (Victorian Government Printer, Melbourne, 2016).

⁷ *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.

⁸ See End of Life Choice Bill 2015. In addition, Louisa Wall has publicised a draft Member's Bill, the Authorised Dying Bill, but has chosen not to submit this to the ballot. See Phil Taylor "Lecretia

In this article I argue that New Zealand's law should be amended to allow at least those competent and consenting adult persons:

- experiencing unbearable physical or mental suffering;
- as the result of an incurable and terminal medical condition;
- where the best medical advice is that death will occur in the next six months;

to directly request that a willing doctor actively help end their life.⁹ To avoid repetition, I will refer to those in such a situation as being "relevant persons". I focus on the case of relevant persons because it provides the strongest grounds for the proffered proposition; if anyone should be able to receive such help to die, it is they. Conversely, I accept that if the argument fails in respect of such relevant persons, then it fails in all other cases as well. The question whether, if successful for relevant persons, the argument then ought to apply to *other* classes of person — or, indeed, if it is possible to limit the argument's reach at all — will be addressed in the article's final part.

There are two reasons for writing this article now. First, as just noted, the issue is very much a current issue of public policy in New Zealand. Second, my colleague at Otago, Professor Rex Ahdar, recently has published a carefully reasoned article arguing that our present law on the issue should *not* be changed.¹⁰ A clear statement of the general argument in favour of this law reform is thus doubly warranted. As with Professor Ahdar's critique, this article does not closely describe the particular features of current proposals to allow medical help to die in New Zealand; rather, it seeks to establish the general principle that *some* law change should occur to allow it.

I begin in part one with an initial clarification of the various terms used by those involved in this debate. Part two outlines the intertwined moral grounds for allowing medical help to die — recognition of individual autonomy and avoidance of cruelty — and responds to some arguments that these do not justify taking such a step. Part three turns to examine current medical practice, arguing that there is no good reason to distinguish actively helping a relevant person to die from the various end of life choices presently permitted to patients. Part four then considers and responds to two of the most common arguments against permitting such medical help: that determining who may qualify for it results in arbitrary and unprincipled distinctions and that allowing such help will result in a "slippery slope" whereby an ever increasing range of individuals will feel compelled to request it. I then conclude in part five by arguing that the time for a law change is now in that a large proportion of the New Zealand public has repeatedly shown that it supports such a reform.

Seales knew exactly what she was asking for: Louisa Wall" *The New Zealand Herald* (online ed, Auckland, 19 November 2016).

⁹ I assume and accept that actively helping a patient to die should be a matter of individual conscience. Current legislative proposals for allowing aid in dying also do so; see End of Life Choice Bill, cl 6; Authorised Dying Bill, cl 10.

¹⁰ Rex Tauati Ahdar "The Case Against Euthanasia and Assisted Suicide" [2016] NZ L Rev 459.

I. AN INITIAL BRIEF NOTE ON TERMINOLOGY

A preliminary problem when discussing matters of end-of-life choice is that there are a number of different practices that may be called different things by those taking each side of the debate. Consequently, it is worth clarifying at the outset what particular terms refer to. The withdrawal (or withholding) of life-sustaining treatment commonly is described as *passive euthanasia*,¹¹ while the positive act of intentionally causing the death of another person on compassionate grounds is termed *active euthanasia*. A further distinction is drawn between *voluntary euthanasia*, where consent first is obtained, and *non-voluntary euthanasia*, where express consent is not acquired, such as where a person is in a persistent vegetative state or otherwise lacks the capacity to decide.

The common feature in all such cases is that an external party takes a step that directly leads to death, either by consciously choosing to withhold or withdraw treatment or deliberately administering a dose of fatal medication or the like. As discussed further below, passive voluntary euthanasia is lawful in New Zealand whenever a competent person decides upon it. Passive non-voluntary euthanasia also is lawful where a doctor believes that further treatment or intervention is not in a patient's best interests. However, active euthanasia is unlawful in all cases, amounting to culpable homicide.¹² Finally, *indirect euthanasia* (also called the "double effect doctrine") covers the administration of drugs with the primary purpose of relieving a terminally ill patient's pain and suffering, despite a doctor knowing that this treatment likely will have the incidental effect of hastening that person's death.¹³ This practice is lawful in New Zealand.¹⁴

The concept of euthanasia is then very closely related to that of suicide. *Suicide* itself involves an individual actively and directly ending her own life, while *assisted suicide* involves a person taking active steps to aid another individual in committing suicide. A specific form of such assistance is *physician-assisted suicide*, which involves a doctor prescribing a lethal substance to a patient knowing that they intend later self-administration. In New Zealand, committing or attempting suicide is not a criminal offence. However, it is an offence for any person to "aid[] or abet[] any person in the commission of suicide".¹⁵ The High Court has declared that this provision applies to anyone, whether a health professional or otherwise, that supplies even a terminally ill patient with lethal

¹¹ Professor Ahdar denies that such a concept exists, labelling it "misleading and unhelpful" at 461. I simply will note here that the term is both widely used and defensible; see, e.g., Richard Sainsbury "End of life issues" in I M St George (ed) *Cole's medical practice in New Zealand* (12th ed, Medical Council of New Zealand, Wellington, 2013) 107 at 110; E Garrard and S Wilkinson "Passive euthanasia" (2005) 31 J Med Ethics 64.

¹² *Airedale NHS Hospital Trust v Bland* [1993] 1 All ER 821 (HL); *R v Martin (no 2)* HC Wanganui CRI-2003-083-432B, 24 March 2004; Seales, above n 7, at [112]–[114].

¹³ E Emanuel "Euthanasia: historical, ethical and empiric perspectives" (1994) 154 Arch Int Med 1890.

¹⁴ *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC) at 250–251; Seales, above n 7, at [106].

¹⁵ Crimes Act 1961, s 41(1)(b).

medication for the purpose of subsequently ending her own life.¹⁶ Indeed, even informing a person about how to end one's own life painlessly is an offence, if done knowing and intending that the recipient will act on the information supplied.¹⁷

Further complicating matters is the fact that the very use of the terms "euthanasia" and "suicide" are deeply contested in this context, with the phrase "aid in dying" increasingly used in their place.¹⁸ In this parlance, active euthanasia is termed *assisted aid in dying* while physician-assisted suicide is called *facilitated aid in dying*. These descriptors are claimed to be less emotively fraught, given the historical connection between the term euthanasia and the actions of the Nazi regime (which murdered over 100,000 men, women and children who were physically and/or mentally disabled, or otherwise considered "genetically inferior"), as well as the psychological differences between those who commit suicide and those who seek to end their lives voluntarily to escape unbearable suffering.¹⁹ I have preferred these latter terms in previous writings on this topic.²⁰ If for no other reason than the sake of consistency, I shall do so in this article as well. The ultimate question is not what we call the actions in question, but whether they ought to be permitted. To that question I now turn.

II. IT IS MORALLY DESIRABLE TO PERMIT AID IN DYING

As intimated above, the current legal status of aid in dying in New Zealand is reasonably clear. In *Seales v Attorney-General*,²¹ the High Court refused to declare that providing either assisted or facilitated aid in dying is not an offence under the Crimes Act 1961 punishable (at least in theory)²² by extremely long terms of imprisonment.²³ Proponents of aid in dying believe that this current state of our criminal law is morally wrong and should be changed to permit a willing doctor to give such assistance to (at least) relevant persons. The

¹⁶ *Seales*, above n 7, at [147]. See also *R v Davison* [2011] NZHC 1677; *R v Mott* [2012] NZHC 2366. But see Ahdar, above n 10, at 477.

¹⁷ Crimes Act 1961, s 41(1)(a) and (2). See also *R v Tamatea* (2003) 20 CRNZ 363 (HC).

¹⁸ See Kathryn Tucker "At the Very End of Life: The Emergence of Policy Supporting Aid in Dying Among Mainstream Medical and Health Policy Associations" (2009) 10 Harv Health Pol Rev 45 at 45.

¹⁹ Gina Lopes *Dying with Dignity: A Legal Approach to Assisted Dying* (Praeger, Santa Barbara, California, 2015) at 10.

²⁰ Kathryn Tucker and Andrew Geddis "Litigating for the right to die" [2015] NZLJ 172; Andrew Geddis and Colin Gavaghan "Aid in dying in New Zealand: Recent legal developments" (2016) 23 JLM 849.

²¹ *Seales*, above n 7, at [9]. See also Geddis and Gavaghan, above n 20, at 853–857.

²² In practice, recent sentences for individuals who provide aid in dying have ranged from a discharge without conviction to home detention. See, e.g., *R v Ruscoe* (1992) 8 CRNZ 68 (CA); *R v Law* [2002] 19 CRNZ 500 (HC); *R v Faithfull* HC Auckland CRI 2007-044-007451, 14 March 2008; *R v Crutchley* HC Hamilton CRI 2007-069-83, 9 July 2008; *R v KJK* HC Christchurch CRI 2009-009-14397, 18 February 2010; *R v Davison* HC Dunedin CRI 2010-012-4876, 24 November 2011; *Mott*, above n 16.

²³ The sentence for culpable homicide is up to life imprisonment (Crimes Act 1961, s 172(1); s 177(1)), whilst aiding or abetting suicide attracts a potential sentence of 14 years' imprisonment (Crimes Act 1961, s 179(1)).

argument for doing so then rests on two primary propositions.²⁴ First, relevant persons ought to be permitted to choose for themselves how and when they will die. This claim is derived from notions of individual autonomy: the right of such individuals to decide for themselves the time and manner of their life's end demands our collective respect (even if not our agreement). Second, there is no good reason for society to deny relevant persons this choice and thereby require that they continue to suffer against their will. Laws that prevent relevant persons receiving voluntarily provided aid in dying are unnecessarily cruel. And a society that denies individuals their autonomy in a way that is unnecessarily cruel is morally deficient. Establishing the claim that aid in dying ought to be permitted requires both propositions be considered in greater depth.

A. The Argument from Autonomy

The first autonomy-based claim derives from our society's core liberal individualist commitments. We generally presume competent adults to be the superior judges of what is best for them in the particular situation they are confronted with and so should respect their decisions about what actions they do or do not want to take in response. Thus, it is a foundational principle of medical practice that informed consent must be obtained for any procedure on or treatment of a patient who is capable of giving such consent.²⁵ Liberal-individualist presumptions also underpin wider societal decisions as to what people are permitted to do. We collectively allow people to climb up mountains despite the inevitable numerous fatalities that result,²⁶ accept political protests we disagree with at the cost of significant disruption and irritation,²⁷ and even tolerate others listening to *Creed* songs notwithstanding their lack of any musical value whatsoever.²⁸ Indeed, our laws steadily are being reformed to better reflect this basic worldview. Not only were homosexual acts decriminalised in 1986,²⁹ the right of same-sex couples to claim marital status since has been affirmed.³⁰ The solicitation of payment for sex has been decriminalised, with prostitution now recognised as a lawful profession.³¹ Making or publishing a statement that expresses a seditious intention is no longer an offence.³² Students

²⁴ See Glanville Williams "Euthanasia Legislation: A Rejoinder to the Non-Religious Objections", in AB Downing (ed) *Euthanasia and the Right to Die* (Peter Owen, London, 1969) 134 at 134–135; Stuart Beresford "Euthanasia, The Right to Die and the Bill of Rights Act" [2005] Hum Rts Research 3 at 7.

²⁵ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, reg 2, Right 7.

²⁶ There have been, for example, more than 230 known fatalities in the Aoraki/Mount Cook National Park alone, including 78 from climbing Aoraki itself.

²⁷ *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

²⁸ See "Readers' Poll: The Top Ten Worst Bands of the Nineties" (9 May 2013) Rolling Stone <www.rollingstone.com/music/pictures/readers-poll-the-ten-worst-bands-of-the-nineties-20130509/1-creed-0736783>.

²⁹ Homosexual Law Reform Act 1986.

³⁰ Marriage (Definition of Marriage) Amendment 2013.

³¹ Prostitution Reform Act 2003.

³² Crimes (Repeal of Seditious Offences) Amendment Act 2007.

may study at university without having to be a member of a students' association.³³ And so on.

Of course, a claim that individual autonomy is a fundamental precept of our society does not equate to everybody being allowed to do everything they want. Society can and still does impose numerous collective limits on individual choice through the criminal law. We do not let people take some kinds of recreational drugs.³⁴ We do not let people sell their bodily organs.³⁵ We do not let people claim to be entitled to wear medals that they were not properly awarded.³⁶ And so on. While acknowledging the factual existence of such wide-ranging restrictions on personal liberty, an immediate question is whether they are morally defensible. Because pointing to *other* existing laws that are *themselves* an illegitimate infringement of individual autonomy does not really counter the claim that relevant persons should be permitted to receive aid in dying. Doing so is like a bank robber who defends his actions by saying he also robs post offices, pharmacies and toy stores. Instead, we need to examine the applicability of general justifications for society placing collective limits on the individual exercise of decisional freedom. There are three such justifications, none of which (I will argue in the course of this article) apply to the case of aid in dying.

The first is where we judge an individual's exercise of autonomy to be vitiated by some form of cognitive bias or other reasoning defect, such that her decision cannot be trusted to reflect a properly considered understanding of what is best for her. In such circumstances, society may decide to impose a paternalistic fetter on an individual's decisional freedom for that individual's own good. However, in an earlier article Professor Ahdar sounded an appropriate note of caution about this justification for restraining individual action:³⁷

... the range of situations in which such condescending paternalistic claims hold true (on average, over time and allowing for the costs of imposing views on others) is ... fairly limited. It is *not* that the notion that I know better than you what will further your welfare is always false or indefensible. Rather, the point is that experience indicates that as a rule it is *usually* false.

I will argue in more detail below that the claim actually is false in respect of aid in dying, as there simply is no reason for us to assume that collectively we have a superior understanding of what are the true best interests of relevant persons. We cannot honestly say a person is "foolish" or "short-sighted" or "delusional" for wanting to end her life rather than continue a necessarily truncated existence marred by pain and suffering. We know this because we *already* respect such individuals' decision to die. As shall be seen, our law and medical practices treat as sacrosanct a competent patient's decision to end treatment or remove life support, even where such a choice results in her inevitable death. So if we see

³³ Education (Freedom of Association) Amendment Act 2010.

³⁴ Misuse of Drugs Act 1975.

³⁵ Human Tissue Act 2008, s 56.

³⁶ Military Decorations and Distinctive Badges Act 1918, s 4A.

³⁷ Rex Ahdar and James Allan "Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand" [2001] NZ L Rev 1 at 18 (internal citation omitted).

no reason to impose paternalistic constraints on these sorts of end-of-life decisions, then there is no reason to do so with respect to a relevant person's decision to seek aid in dying.

A second reason for imposing limits on individual autonomy is that its exercise may result in harm to others. Most of our criminal law reflects a desire to prevent some forms of action immediately and directly impacting negatively on others' interests. Concern about the indirect effect of the exercise of choice on others then underpins much of the criminal law's remaining limits. For example, we legislate against some apparently "victimless crimes" in order to undermine a market that we believe will result in harm to more vulnerable individuals.³⁸ With respect to aid in dying, it is argued that should the practice be permitted for relevant persons, it inevitably will result in incompetent or non-consenting individuals also being coerced into ending their own lives. Alternatively, a slippery slope will develop that leads to its application to an ever-increasing range of individuals and situations, inevitably resulting in pressure on the vulnerable to avail themselves of the option. I will again argue in more detail below that such claims regarding potential harm are both not supported by evidence and at odds with current end of life practices. In particular, there is now sufficient experience from overseas jurisdictions to counter fears about the inevitability of any particular consequences of permitting aid in dying. Furthermore, the very broad decisional freedom we already give to individuals at life's end is inconsistent with claims that allowing aid in dying must result in harm to others. Simply put, if letting people choose how they will die inexorably leads to the vulnerable being pressured to end their lives early, then opponents of aid in dying must explain why it is that current forms of passive euthanasia are not routinely abused in hospitals, rest homes and hospices.

Finally, there is a somewhat nebulous set of constraints imposed on individual freedom of choice out of irreducibly moral judgments regarding the nature of certain acts.³⁹ Most pertinently, the Crimes Act 1961, s 63 states: "No one has a right to consent to the infliction of death upon himself or herself". Thus, even a fully informed, non-coerced decision to (say) voluntarily offer oneself up for human sacrifice to Odin⁴⁰ is overridden by society's collective judgment that human life is too valuable for an individual to agree to permit another to take it from her. It may thus be argued that the provision of aid in dying is a fundamentally wrongful act and our laws should uphold "the sanctity of life" absolutely by allowing no exceptions to the bar on actively participating in another person's desire to die.⁴¹ At this point we may reach an irreconcilable gulf

³⁸ Examples of this are the prohibition on personal possession of illegal drugs, the selling of bodily organs and the viewing of digitally created child pornography.

³⁹ Such constraints seek to combat what Joel Feinberg describes as "free-floating evils"; see Joel Feinberg *The Moral Limits of the Criminal Law Vol 4: Harmless Wrongdoing* (Oxford University Press, Oxford, 1990) at 20–25.

⁴⁰ See, e.g., "Sacrifice" *Vikings* (season 1, episode 8).

⁴¹ Ahdar, above n 10, at 475–476.

in perspectives. Those holding such a core moral belief, be it for religious⁴² or secular⁴³ reasons, are unlikely to be swayed⁴³ by any form of contrary argument.

In contrast, while proponents of aid in dying do not deny that society generally should affirm and protect the value of human life, we think this position ought to be qualified in respect of (at least) relevant persons. For such individuals, the best medical advice is that their medical condition will kill them in the very near future. As such, they are not really choosing *to* end their lives through aid in dying, but rather *how* and *when* their death will occur. And as Eugene Debs poetically expressed the matter a century ago:⁴⁴

Human life is sacred, but only to the extent that it contributes to the joy and happiness of the one possessing it, and to those about him, and it ought to be the privilege of every human being to cross the River Styx in the boat of his own choosing, when further human agony cannot be justified by the hope of future health and happiness.

So proponents of aid in dying do not claim that society should treat the general phenomena of suicide, much less the active euthanasia of incompetent persons, as morally neutral matters. Both our laws and our general societal attitudes should remain opposed to these practices, just as they should continue to prohibit activities such as voluntary human sacrifice to Nordic gods. But proponents of aid in dying believe a general commitment to life's value ought not to harden into a duty on all people to continue to live, no matter their individual circumstances. In particular, we endorse the observations of Collins J in his judgment in *Seales v Attorney-General*:⁴⁵

... the consequences of the law against assisting suicide as it currently stands are extremely distressing for Ms Seales and ... she is suffering because that law does not accommodate her right to dignity and personal autonomy.

Our view is that it is morally wrong to for the law to require that (at least) relevant persons must experience further distress and suffering. Valorising the importance of human life at such a cost is inhumane, involving the improper application of rigid principle over basic human compassion. And we ought not to treat the harm done to relevant persons as merely the sad but necessary collateral damage of our unrelenting moral convictions. Rather, we should change our laws to avoid it.

B. The Prohibition on Aid in Dying Is Unnecessarily Cruel

For some relevant persons, the process of dying is not particularly pleasant to contemplate. It can be extended, be painful and strip a person of the

⁴² See, e.g., John Sutherland Bonnell "The Sanctity of Human Life" (1951) 8 *Theology Today* 194 at 201; Sacred Congregation on the Doctrine of the Faith *Declaration on Euthanasia* (5 May 1980).

⁴³ See, e.g., Immanuel Kant *Grounding for the Metaphysics of Morals* (Hackett, Indianapolis, 1993) at 422; Neil M Gorsuch *The Future of Assisted Suicide and Euthanasia* (Princeton University Press, Princeton (NJ), 2006) at 159.

⁴⁴ Quoted in V Robinson "A symposium on euthanasia" (1913) 19 *Med Rev of Reviews* 143.

⁴⁵ *Seales*, above n 10, at [192].

independence and dignity to which she is accustomed. Take, as an example, the irreversible progression of Motor Neuron Disease (MND), which annually claims some 100 lives in New Zealand:⁴⁶

... eventually individuals will not be able to stand or walk, get in or out of bed on their own, or use their hands and arms. Difficulty swallowing and chewing impair the person's ability to eat normally and increase the risk of choking. Maintaining weight will then become a problem. Because cognitive abilities are relatively intact, people are aware of their progressive loss of function and may become anxious and depressed. ... In later stages of the disease, individuals have difficulty breathing as the muscles of the respiratory system weaken. They eventually lose the ability to breathe on their own and must depend on ventilatory support for survival.

It is easy to urge those suffering such end stage symptoms to follow Dylan Thomas' injunction to "rage, rage against the dying of the light." Undoubtedly some MND sufferers find it within themselves to do so or, alternatively, make their peace with their situation and calmly resign themselves to their fate. But for others the promise of months of slow wasting away until finally their body ceases to function is an utterly horrifying prospect that they would rather avoid by way of a swift and painless end. Similarly, other relevant persons facing comparably bleak end of life circumstances also may wish to receive aid in dying rather than continue to suffer the inescapable effects of their particular condition. Lecretia Seales, when unsuccessfully seeking a declaration that aid in dying is permitted under New Zealand law, expressed the matter thus:⁴⁷

I have lived my life as a fiercely independent and active person. I have always been very intellectually engaged with the world and my work. For me a slow and undignified death that does not reflect the life that I have led would be a terrible way for my good life to have to end.

I want to be able to die with a sense of who I am and with a dignity and independence that represents the way I have always lived my life. I desperately want to be respected in my wish not to have to suffer unnecessarily at the end. I really want to be able to say goodbye well.

For proponents of aid in dying, using the criminal law to deny relevant persons such a final outcome is unnecessarily cruel.

Of course, we do not label as "cruel" *every* societal denial of choice that results in individual suffering. Laws prohibiting sexual contact with minors likely create significant mental anguish for pedophiles, but we would not say that they are treated cruelly as a result. Equally, it is not cruel for Pharmac to decide against paying for some new medication that can cure a medical condition because the organisation's limited funding can better be used buying drugs that relieve the affliction of a greater number of others. In such cases the suffering caused by the legal rule or policy choice is outweighed by some demonstrably greater social good. However, it *is* cruel to tell relevant persons that they must continue to live in pain and anguish against their will *for no good reason*. In the rest of this

⁴⁶ National Institute of Neurological Disorders and Stroke "Amyotrophic Lateral Sclerosis (ALS) Fact Sheet" (2016) <www.ninds.nih.gov/disorders/amyotrophiclateralsclerosis/detail_ALS.htm>.

⁴⁷ *Seales*, above n 7, at [29].

section I consider two arguments to the effect that the law's prohibition on aid in dying does not actually mean that relevant persons must suffer at the end of their lives. The rest of this article then contends that such suffering is unnecessarily cruel because it is imposed without good reasons for doing so.

(i) Current Laws Do Not Provide Sufficient End of Life Choice

It may be argued that laws permitting aid in dying are unnecessary because relevant persons already can take steps to end their lives without having to involve any other person.⁴⁸ As Professor Ahdar notes, the Crimes Act no longer makes it an offence to attempt or succeed at committing suicide, and so "[it] is a viable option, even for the elderly and enfeebled in all but the most rare instances of physical incapacity".⁴⁹ Cashed out fully, that argument must go something as follows. There is no need to change our criminal law to enable relevant persons to receive a lethal dose of medicine from a doctor at a time of their own choosing while surrounded by their loved ones, because such individuals instead can go off on their own and cut their wrists, overdose on paracetamol or jump in front of a train. I do not regard this as an overly compelling claim, for the following reasons.

First, it elides a relevant person's end of life choice with "committing suicide". And while our law presently does not outright *prohibit* suicide, it also does not positively *permit* it.⁵⁰ The Crimes Act 1961, s 41 provides a general defence for anyone who uses "such force as may be reasonably necessary in order to prevent the commission of suicide ... or in order to prevent any act being done which he or she believes, on reasonable grounds, would, if committed, amount to suicide". So current law does not say that relevant persons have a right to actively end their own lives; rather, it says that anyone who wants to can actively stop a relevant person from doing so.⁵¹ The real world consequences of this legal situation recently became apparent when the police served a number of search warrants on elderly people in the Wellington and Nelson regions as well as set up a breath alcohol checkpoint to gather information about those who might be considering an exercise of end-of-life choice.⁵² Far from leaving relevant persons free to end their own lives through suicide, our present criminal law aggressively seeks to prevent this in both theory and practice.

Second, there are important practical differences between how life ends with aid in dying and through suicide. Aid in dying involves a doctor providing, or directly administering, a fatal cocktail of medicines that render a person unconscious before death peacefully occurs. However, it is unlawful to possess such medicines unless prescribed by health professionals, meaning that without legal access to aid in dying a relevant person must turn to other methods. These

⁴⁸ Ahdar, above n 10, at 470–471.

⁴⁹ At 471.

⁵⁰ A point Professor Ahdar recognises at 472–473.

⁵¹ See Colin Gavaghan "Stopping Suicide After *Seales*" [2016] NZCLR 4.

⁵² See Andrew Geddis "Sing me to sleep" (27 October 2016) Pundit <<http://pundit.co.nz/content/sing-me-to-sleep>>.

methods are messy and potentially painful in themselves, with someone then required to cut down the resultant hanging corpse, clean up the shotgun splatter or deal with the train driver's emotional trauma. Furthermore, such methods run a significant risk of failure, which can leave the individual in a worse state than they were in before. Simply put, a cancer sufferer with end stage symptoms who takes an overdose of paracetamol has a non-zero risk of awakening in a hospital bed with not only their cancer symptoms but liver or kidney failure as well.

Finally, the current law on aiding and abetting suicide means that relevant persons cannot safely involve anyone else in their end of life choice. This has two consequences. It means that a person may feel compelled to end their life at a point earlier than they otherwise would, for fear that their deteriorating condition will leave them physically unable to do so later on. This claim is not purely speculative. Extensive evidence that it occurs was presented to the High Court in *Seales v Attorney-General*,⁵³ with Collins J expressly accepting that "the offence provisions of the Crimes Act ... may have the effect of forcing Ms Seales to take her own life prematurely, for fear that she will be incapable of doing so when her condition deteriorates further."⁵⁴ In such cases, the failure to permit aid in dying effectively robs an individual of a quantum of their life; they die earlier than otherwise would be the case. The second consequence is that a relevant person necessarily must end her life alone. The mere presence of anyone else in the room when death occurs opens that person up to investigation and possible subsequent prosecution by the police. By contrast, where aid in dying is permitted, relevant persons can surround themselves with family and friends, recount memories and say goodbyes before taking the medication that will end their life.⁵⁵ Only the most hard-hearted, it seems to me, could consider that these two circumstances are readily interchangeable.

(ii) Palliative Care Is Not a Sufficient Alternative to Aid in Dying

A second argument against the claim that prohibiting aid in dying is unnecessarily cruel is that good and proper palliative care can provide a sufficient guarantee against the end of life experience of pain.⁵⁶ The problem with this assertion is that it is deeply contested at best, simply not true at worst and in any case misdirected. As Collins J concluded from the voluminous evidence presented in *Seales v Attorney-General*, existing palliative care could not guarantee Ms Seales would not suffer pain during the dying process,⁵⁷ while "many of the experts, including those relied upon by the Attorney-General accept that palliative care

⁵³ *Seales*, above n 7, at [51]–[52]. See also *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200 at [96] (per Lord Neuberger); *Carter v Canada (Attorney-General)* [2015] SCC 5, [2015] 1 SCR 331 at [15].

⁵⁴ *Seales*, above n 7, at [166]. See also *Carter v Canada*, above n 53, at [57].

⁵⁵ For an account of such an ending under California's aid in dying law, see Lindsey Bever "A terminally ill woman had one rule at her end-of-life party: No crying" *Washington Post* (online ed, Washington DC, 16 August 2016).

⁵⁶ Ahdar, above n 10, at 497–500.

⁵⁷ *Seales*, above n 7, at [37]–[38].

may not be able to address Ms Seales' psychological and emotional suffering".⁵⁸ This final point is significant, as evidence from the United States indicates that a fear of physical pain is less important to those who choose aid in dying than is a desire to retain control over their end of life situation.⁵⁹ So although the provision of aid in dying should never be regarded as a replacement for good palliative care, the High Court's factual finding is that current practices are unable to provide a general guarantee of a peaceful, painless, dignified ending for all.

A refinement of this argument is that while *current* forms of palliative care may be unable to provide such guarantees, a properly funded and universally available system of care could do so. Therefore, rather than permit aid in dying, societal efforts and resources ought to be spent on improving and expanding existing arrangements. Of course, that argument treats the availability of aid in dying and improved palliative care as necessarily incompatible choices, rather than twin policy goals that can be pursued together. I simply note here that there is no evidence that this is the case. As two opponents of aid in dying admit:⁶⁰

In 2011, the [European Association for Palliative Care] published a report on palliative care development in countries with a euthanasia law. The report highlighted that there has been substantial development in palliative care services in these countries, and that it was not possible to conclude that the development of palliative care had either been hindered or promoted by the legalization of elective death options.

More broadly, suggestions that a universally available and properly funded future system of palliative care will be able to sufficiently alleviate end-of-life suffering in all cases display a remarkably hubristic view of what medical practice can deliver. It also seems strange to argue it is necessary to criminalise a practice because there purportedly are superior alternatives for people to choose instead. Or, rather, if palliative care really can deliver all that is claimed for it, why is it thought that anyone would instead want to avail herself of aid in dying? Because

⁵⁸ At [44].

⁵⁹ In Oregon, 91.6% of individuals who received aid in dying between 1998-2015 cited "losing autonomy" as a reason for doing so, compared to 25.2% who cited "inadequate pain control or fear of it". See *Oregon Death With Dignity Act: 2015 Data Summary* (Oregon Public Health Division, 4 February 2016) at 6. This report is available at: <<https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year18.pdf>>. In Washington state, 87% of individuals who received aid in dying in 2014-2015 cited "losing autonomy" as a reason for doing so, compared to 37% who cited "inadequate pain control or fear of it". See *Washington State Department of Health 2015 Death with Dignity Act Report Executive Summary* (Washington State Department of Health, 2016) at 7. This report is available at: <www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct2015.pdf>.

⁶⁰ Lars Johan Materstvedt and Georg Bosshard "Euthanasia and Palliative Care" in Nathan Cherny et al (eds) *Oxford Textbook of Palliative Medicine* (5th ed, Oxford University Press, Oxford, 2015) at 318. See also Kenneth Chambaere and Jan L Bernheim "Does legal physician-assisted dying impede development of palliative care? The Belgian and Benelux experience" (2015) 41 *J Med Ethics* 657 at 660; Bryn Nelson and Terence J Colgan "In debating the right to die, a shift in tone among physicians: As laws legalizing physician-assisted suicide gain ground in Canada and elsewhere, physicians readjust their stance to retain a say" (2015) 123 *Cancer Cytopathology* 327.

if even a handful of individuals would rather a quick end to their existence than a lingering one protected by the best care that palliative medicine may provide, it is cruel to deny that preference for no other reason than that we think it the “wrong” one to hold. Consequently, while improved palliative care ought to be a societal goal irrespective of any arguments about aid in dying, even the promise of such enhanced care does not nullify the arguments that without full end of life choice some individuals will continue to suffer in an unnecessarily cruel manner.

III. AID IN DYING IS CONSISTENT WITH CURRENT END OF LIFE PRACTICES

This article argues for amending our law to permit a particular form of end of life choice: assisted or facilitated aid in dying, which involves a doctor’s voluntary but active participation in her patient’s decision. As such, it is not *solely* an exercise of a relevant person’s individual autonomy in that it necessarily involves another person in the process. Such involvement, while a matter of conscience for individual doctors, nevertheless would represent a change in what currently is permitted in the doctor-patient relationship. Opponents of aid in dying view this development as “cross[ing] a fundamental legal and ethical Rubicon”, representing “a change of monumental proportions both in the law and in the role of doctors”.⁶¹ In this section I argue that this claim misrepresents the nature of the proposed law reform. The provision of aid in dying actually is quite consistent with the sorts of choices currently available to a patient at the end of her life. And while it would represent an extension of current practices, that extension poses no unmanageable new risks or challenges, while entirely fitting the modern doctor-patient relationship.

A. The Range of Existing End of Life Choices

At present, our law recognises patient autonomy by allowing a competent adult person to choose to die in a variety of ways.⁶² Section 11 of the New Zealand Bill of Rights Act 1990 affirms the right to decline any form of treatment without having to provide a reason. Such refusals must be respected even if the treatment would be effective in prolonging life:⁶³

A person with operable cancer, for instance, who is able to make a decision on what should happen is quite entitled to reject surgery and accept the consequences of not undergoing it, even though on an objective view the surgery would improve the quality of the patient’s life, if not extend or save it.

Neither is the right to decline treatment restricted to what is sometimes called “extraordinary” or “heroic” treatment. Even the provision of food and hydration may be refused,⁶⁴ leading to death by starvation or dehydration. In order to relieve the end of life symptoms of a patient who refuses food or hydration,

⁶¹ Justin Welby “Why I believe assisting people to die would dehumanise our society for ever” *The Guardian* (online ed, London, 5 September 2015).

⁶² See generally Peter Skegg “Medical Acts Hastening Death” in Peter Skegg and Ron Paterson (eds), *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) at 623.

⁶³ *Re K* (2002) 22 FRNZ 349 (FC) at 356.

⁶⁴ *Chief Executive of the Department of Corrections v All Means All* [2014] NZHC 1433.

“palliative sedation” — the application of increasing amounts of analgesics and sedatives to render the patient unconscious — may take place until death occurs. A patient also may insist that life-prolonging interventions be stopped:⁶⁵

It has been held overseas, and would accord with my thinking, that [the New Zealand Bill of Rights Act 1990, s 11] enables a patient, properly informed, to require life support systems to be discontinued.

Finally, a patient may be indirectly euthanised by the provision of life-shortening medication under the doctrine of double effect:⁶⁶

... if [a] doctor were to administer a lethal dose of pain relief such as morphine to [a patient], the doctor’s actions may not be an unlawful act within the meaning of s 160(2)(a) of the Crimes Act if the doctor’s intention was to provide [the patient] with palliative relief, and provided that what was done was reasonable and proper for that purpose, even though [the patient’s] life would be shortened as an indirect but foreseeable consequence.

In addition, a number of life-ending choices may be made for patients who are not presently competent to express an autonomous choice. A patient may make an anticipatory refusal of treatment by means of an advance directive.⁶⁷ Medical staff also may elect to withhold or withdraw life-prolonging treatment on behalf of an incompetent patient if they believe that such treatment would not be in the patient’s best interests. The High Court has, for example, permitted the removal of ventilatory support from a patient who, while still believed to be aware, was “unable to communicate by even elementary means”,⁶⁸ and similar decisions have been reached by UK courts.⁶⁹ Against this background, the law’s current failure to permit relevant persons to receive aid in dying is deeply anomalous. The question then is whether there are any morally relevant reasons to distinguish between the broad autonomy accorded to patients when *refusing* any further life sustaining treatment or interventions and the complete denial of such autonomy when it comes to *requesting* active forms of aid in dying.

B. Alleged Problems of Consent and Competence Already Exist

It commonly is claimed that difficulties in determining the competence of a relevant person making a request for aid in dying undermines the autonomy argument for permitting it. How can we be sure she “really” wants to end her suffering by dying?⁷⁰ Alternatively, might not a relevant person’s ostensibly

⁶⁵ *Auckland Area Health Board*, above n 14, at 245.

⁶⁶ *Seales*, above n 7, at [106].

⁶⁷ Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, reg 2, Right 7(5).

⁶⁸ *Auckland Area Health Board*, above n 14, at 238. See also *Re G* [1997] 2 NZLR 201 (HC); *Auckland Healthcare Services Ltd v L* (1998) 5 HRNZ 748 (HC).

⁶⁹ For example, *Re AK (Medical Treatment: Consent)* [2001] 1 FLR 129 (Fam).

⁷⁰ See, e.g., Affidavit of Baroness IG Finlay, 6 May 2015 at [34] (“To end your life is the biggest decision that you could make and is cognitively demanding. But detecting cognitive impairment is very difficult.”). This affidavit is available at: <http://lecretia.org/wp-content/uploads/2015/10/affidavit_of_finlay.pdf>.

voluntary decision really be the result of pressure from others, whether direct or inferred? For example, members of the UK Supreme Court expressed a:⁷¹

... direct concern about weak and vulnerable people in the same unhappy position as Applicants, who do not have the requisite desire (namely “a voluntary, clear, settled and informed decision to commit suicide”), but who either feel that they have some sort of duty to die, or are made to feel (whether intentionally or not) that they have such a duty by family members or others, because their lives are valueless and represent an unjustifiable burden on others.

While such concerns are valid, they fail to offer credible reasons to distinguish aid in dying from the withdrawal of life-preserving treatment or interventions. For all the risks and perils often suggested to accompany aid in dying already arise in the context of existing end of life choices. In particular, the dangers of vulnerability, incapacity, coercion and misinformation are all present in the sorts of routine decisions that doctors and nurses caring for dying patients currently must take. Those decisions necessitate a determination of competence and consent,⁷² and it is not apparent why such a determination would be less reliable in the aid in dying context than in the context where a patient refuses dialysis treatment, food and hydration or a blood transfusion. The difficulty of making such determinations is not then thought to provide an ethical basis for a blanket ban on all life-ending decisions; on the contrary, healthcare professionals are routinely trusted with them.

A recent English Court of Protection case provides an illustration of the approach taken by courts to the question of end of life competence in common law jurisdictions.⁷³ Following an attempt at suicide that destroyed her kidney function, the patient (“C”) sought to refuse life-saving dialysis in spite of medical advice that she could expect to live for a significant further period with it. C’s reasons for refusal included:⁷⁴

... that she believed she may need dialysis for the rest of her life, saw a bleak future if she could not have a life of socialising, drinking and partying with friends, that getting old scared her both in terms of illness and appearance.

The Court’s consideration of these reasons is illustrative of the approach taken to treatment refusals more generally:⁷⁵

The decision C has reached to refuse dialysis can be characterised as an unwise one. That C considers that the prospect of growing old, the fear of living with fewer material possessions and the fear that she has lost, and will not regain, ‘her sparkle’ outweighs a prognosis that signals continued life will alarm and possibly horrify many ... C’s decision is certainly one that does not accord with the expectations of many in society. Indeed, others in society may consider C’s decision to be unreasonable, illogical or even immoral within the context of the sanctity accorded to life by society in general. None of this however is

⁷¹ *R (Nicklinson)*, above n 53, at [86] (per Lord Neuberger). See also at [228] (per Lord Sumption).

⁷² *Sainsbury*, above n 11, at 107–108.

⁷³ *Kings College Hospital NHS Foundation Trust v C* [2015] EWCOP 80.

⁷⁴ At [74].

⁷⁵ At [97].

evidence of a lack of capacity. ... As a capacitous individual C is, in respect of her own body and mind, sovereign.

There is no real doubt that such a patient would be deemed competent to make the same choice in New Zealand. That people may make unwise, idiosyncratic or morally questionable decisions about the value of their lives is not presently accepted as a reason to deny them control over life and death decisions.⁷⁶ Neither is the fact that capacity assessments are not infallible.

Concerns that relevant persons may seek aid in dying on the basis of a perceived "duty to die" also are not really new. After all, we respect the decision of a Jehovah's Witness who tells a doctor she refuses consent to a life-saving blood transfusion because she does not wish to betray the religious beliefs she shares with her family and wider congregation. But if a perceived duty to die is believed to fatally undermine an individual's decisional capacity, why should a doctor refrain from providing treatment in this situation? Equally, we valorise the so-called "altruistic suicides" of individuals like Captain Oates, who actively end their lives in order to benefit others. Such behaviour is seen as the epitome of Christ's injunction that "*Greater love hath no man than this, that a man lay down his life for his friends.*"⁷⁷ It seems odd, then, to conclude that a relevant person's concern about how her condition may impact on the lives of her loved ones automatically vitiates their autonomy, such that we cannot trust the basis of their end of life decisions. Or, rather, if such other-regarding concerns do have this effect, not only does our understanding of capacity in wider end of life situations need revisiting but also our very understanding of what is noble and praiseworthy is flawed.

Therefore, insofar as the mechanisms we currently possess are deemed adequate to distinguish competent from incompetent treatment or intervention refusals, there is no reason why they would be inadequate to distinguish competent from incompetent requests for aid in dying. Insofar as aid in dying poses risks, they are risks that already exist in our end of life decision-making practices. And so if those risks are considered by opponents of aid in dying to be intolerable in respect of that practice, then it is incumbent on such opponents to explain why they are not presently resulting in widespread errors or abuses in current end of life situations. Furthermore, it is important to note that current legislative proposals to permit aid in dying in New Zealand would impose far more rigorous safeguards than exist under current medical practice. Before permitting a relevant person to receive aid in dying, David Seymour's End of Life Choice Bill would require a minimum seven day waiting period;⁷⁸ the certifying medical practitioner to encourage the applicant to consult with his or her family or a close friend about the request, and seek professional counselling;⁷⁹ the mandatory agreement of a second practitioner;⁸⁰ and scrutiny by the Registrar.⁸¹

⁷⁶ See, e.g., *All Means All*, above n 64.

⁷⁷ "John Chapter 15" King James Bible Online www.kingjamesbibleonline.org/John-Chapter-15/.

⁷⁸ End of Life Choice Bill 2015, cl 7(2)(c).

⁷⁹ At cl 8(2).

⁸⁰ At cl 10.

Louisa Wall's draft Authorised Dying Bill proposes an even more extensive authorisation procedure, requiring a specially constituted ethics committee to review and assent to any individual request for aid in dying.⁸² With such mechanisms in place, we can be far more certain that any successful request for aid in dying represents a genuinely consented, non-coerced choice than we can with regard to already permitted patient demands to discontinue life sustaining treatment or refuse further medical procedures.

C. The Act Versus Omission Distinction Is Illusory

Another attempt to distinguish current end of life choices from the provision of aid in dying is through contrasting actions with omissions to act.⁸³ On this view, it is morally permissible — indeed, morally required — for a doctor to refrain from treatment or intervention where a competent adult patient demands this, even if death results. However, it is not ever morally permissible for a doctor to actively and intentionally cause her patient's death, even if requested to do so by a competent adult. The patient's autonomy right thus forms a negative shield from unwanted interference, rather than a positive ground for obtaining aid from another.⁸⁴ Equally, the doctor's forbearance from acting is said simply to allow the patient's condition to take its "natural" course, whereas the provision of aid in dying operates as the immediate cause of death. Thus, there is a relevant moral distinction to be drawn between letting someone die and killing her.

The moral significance of this act-versus-omission distinction has been subject to extensive criticism over many years. For as James Rachels notes: "There is nothing wrong with being the cause of someone's death if his death is, all things considered, a good thing. And if his death is *not* a good thing, then *no* form of euthanasia, active or passive, is justified."⁸⁵ Furthermore, it simply is not true that current end of life practices require only forbearance on the part of health professionals. For example, a patient's request for the discontinuance of respiratory assistance involves a doctor physically removing a breathing tube from the patient's throat. The disabling of a cardiac implantable electronic device requires the positive step of reprogramming its operation, or even operating to remove it altogether. And so on. While the law then treats such procedures as being an "omission" for the purpose of avoiding criminal liability on the doctor's part, this is a legal fiction designed to enable what we regard as morally desirable practices to occur.⁸⁶ We know that this is the case because the exact same *conduct* carried out by another — say, the removal of a breathing tube by a greedy relative anxious to inherit a patient's wealth — would be deemed an

⁸¹ At cl 24.

⁸² At cls 12–21.

⁸³ See, e.g., *Seales*, above n 7, at [143] ("In my assessment, there is an important distinction between those who end their lives by taking a lethal drug and those who decline medical services and die from natural causes.").

⁸⁴ Ahdar, above n 10, at 477.

⁸⁵ James Rachels *The End of Life: Euthanasia and Morality* (Oxford University Press, Oxford, 1986) at 115 (emphasis in the original).

⁸⁶ *Seales*, above n 7, at [115].

“act” to which criminal liability attaches.⁸⁷ The act versus omission distinction thus ultimately rests on a judgment reached on quite separate moral grounds as to whether the behaviour in question should be allowed, rather than anything intrinsic to the nature of that behaviour itself.

The distinction is then *completely* elided in respect of indirect euthanasia, where the double effect doctrine is invoked. This practice involves a doctor giving increasing doses of opioids to a terminally ill patient for the purposes of relieving her pain, while knowing that doing so could depress the patient’s respiratory system and so hasten death. In *Seales v Attorney-General* it was accepted that such practices constitute an act causing death, but Collins J also opined that “the doctor’s actions may not be an *unlawful act*”⁸⁸ as the primary purpose is the relief of suffering. A narrow and a broad point can be made here. First, under this analysis there is a strong argument that facilitated aid in dying likewise should not be viewed as an unlawful act.⁸⁹ For why can the double effect doctrine not extend to a doctor who provides a patient with a dose of fatal medication without intending that the patient actually use this to end her life, but rather wanting only to relieve the suffering caused by the patient’s lost sense of control in their end of life situation?⁹⁰ The broader point is that the practice of palliative sedation fatally undermines any claim that our law ought to strictly uphold the sanctity of life. It patently does not do so. Rather, it condones the positive actions of doctors who cause the death of their patients, so long as their primary intention is deemed to be the easing of suffering rather than a desire to end their patients’ lives. But as the easing of suffering is *precisely* what a relevant person seeks through aid in dying, the distinction in intention becomes morally irrelevant. For how is a doctor who knows her actions in relieving suffering will bring about the end of a relevant person’s life any different to a doctor who brings about the end of a relevant person’s life knowing this will relieve that person’s suffering?

D. Providing Aid in Dying Is Consistent with Medical Ethics

Although I have argued above that aid in dying cannot meaningfully be distinguished from existing forms of end of life choice, it must be acknowledged that a current majority of the medical community does not appear to agree. The professional associations representing New Zealand’s doctors and nurses are united in opposing a law change to permit aid in dying, while international medical associations express similar views at the global level. This view is that intentionally causing a patient’s death, even the death of a relevant person, is

⁸⁷ See, e.g., *Airedale NHS Hospital Trust v Bland* [1993] AC 789 (HL) at 812 (per Lord Goff).

⁸⁸ *Seales*, above n 7, at [106].

⁸⁹ Colin Gavaghan and Mike King “Can facilitated aid in dying be permitted by ‘double effect’? Some reflections from a recent New Zealand case” (2016) 42 J Med Ethics 361.

⁹⁰ Retention of autonomy is the main reason given for requesting aid in dying in those US jurisdictions that permit the practice, see above n 59. Furthermore, in those jurisdictions around 40% of individuals prescribed with aid in dying elect not to make use of it — they consider having the option available to them sufficient to ease their end of life concerns.

fundamentally inconsistent with a health professional's ethical role.⁹¹ However, there is reason to believe that this apparently implacable opposition is less solidly grounded than surface appearances suggest.

We may begin by noting that medical ethics are not a set of fixed and unchanging edicts written in tablets of stone. Take the original Oath of Hippocrates, often cited as the basis for the idea of medicine as a moral community.⁹² Although it required of its taker that "I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect", it also committed him "to teach [medicine to others] — if they desire to learn it — without fee and covenant", whilst stating "I will not give to a woman an abortive remedy". The apparent ethical obligation to provide free teaching is something current debt-stricken medical students may be surprised to discover, whilst the injunction against performing an abortion is now treated as a matter of conscience for individual practitioners. By the same token, currently routine end of life practices were themselves deeply controversial only a matter of decades ago. Although the right of competent patients to refuse life prolonging medical treatment and interventions is now treated as absolute, it once was the subject of serious legal and ethical debate.⁹³ However, over time doctors first accepted the withdrawal of respirators from patients in persistent vegetative states; then it became acceptable to stop any kind of medical intervention, including artificial nutrition and hydration, from patients in any condition. The once untenable became ethically unremarkable.

Furthermore, the (largely)⁹⁴ unified views of professional bodies mask real differences of opinion and even practice amongst individual members of the profession.⁹⁵ While I have until now focused on relevant persons' autonomy interests, the prohibition on aid in dying also impacts upon those providing end of life care. As Glanville Williams noted some 50 years ago:⁹⁶

It is the doctor's responsibility to do all he can to prolong worth-while life, or, in the last resort, to ease his patient's passage. If the doctor honestly and sincerely believes that the best service he can perform for his suffering patient is to accede to his request for euthanasia, it is a grave thing that the law should forbid him to do so.

⁹¹ See, e.g., *Code of Ethics for the New Zealand Medical Association* (New Zealand Medical Association, 2014) <www.nzma.org.nz/publications/code-of-ethics>.

⁹² See, e.g., Edmund D Pellegrino "The Medical Profession as a Moral Community" (1990) 66 *Bull NY Acad Med* 221.

⁹³ See, e.g., Norman L Cantor "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus The Preservation of Life" (1972) 28 *Rutgers L Rev* 228; Robert M Byrn "Compulsory Lifesaving Treatment for the Competent Adult" (1975) 44 *Fordham L Rev* 1.

⁹⁴ There are some doctors groups that adopt a neutral position on aid in dying (for example, the California Medical Association and the American Academy of Hospice & Palliative Medicine) or even support the practice outright (for example, the American Public Health Association and The American Medical Student Association).

⁹⁵ See, e.g., K Mitchell and R Glynn Owens "National survey of medical decisions at end of life made by New Zealand general practitioners" (2003) 327 *BMJ* 7408; J H Havill "Physician-assisted dying—a survey of Waikato general practitioners" [letter] (2015) 128 *NZ Med J* 1409.

⁹⁶ Williams, above n 24, at 135.

Although such doctors may at present form a minority of the profession both in New Zealand and globally, they are by no means an insignificant segment of it. Indeed, in some areas of practice they may well now be in the majority. I have outlined above the end stage effects of MND. Having repeatedly seen these circumstances first hand, a recent survey of 231 Canadian MND doctors and allied health providers reported that some 80 percent believe patients with moderate to severe symptoms should be eligible to seek aid in dying, with only 8 percent not supporting its availability at any stage of the disease.⁹⁷ In regards this particular condition at least, it may be the opponents of aid in dying who are in the minority of medical opinion.

Opponents then have to fall back on general claims that allowing aid in dying even in patient-doctor relationships where both parties accept it is in a relevant person's best interests will create negative consequences for the wider practice of medicine. John Finnis, for instance, warns that aid in dying risks undermining "patient trust" in doctors or creating a "change in heart" in medical practitioners.⁹⁸ However, the limited evidence that has been gathered on such claims fails to substantiate them.⁹⁹ For at its core, medical opposition to aid in dying really seems driven by an underlying, somewhat conservative understanding of the practice of medicine:¹⁰⁰

... the [traditional] professional ideal of the physician-patient relationship held that the physician directed care and made decisions about treatment; the patient's principal role was to comply with 'doctor's orders.' ... When faced with what appeared to be a patient's irrational choices or preferences, physicians were encouraged by this approach to overlook or override them as not being in the patient's true interests.

Such a model of medical care is now quite out of step with all other aspects of the modern patient-doctor relationship. Or, as one US doctor puts it:¹⁰¹

We always listen to the patient. We never tell a patient: "This is what you have to do. You have no choice." Yet at the moment when their life is ending—when they say, "I don't want to live in this bed for the next three weeks waiting to die"—it's an odd change in the consent procedure. Suddenly they become wrong and we become right. That does not make sense to me. Dying should not be completely separate from everything else we do in medicine.

⁹⁷ Agessandro Abrahao et al "Physician-assisted death: A Canada-wide survey of ALS health care providers" (2016) 87 *Neurology* 1152. See also M Maessen "Euthanasia and physician-assisted suicide in amyotrophic lateral sclerosis: a prospective study" (2014) 261 *J Neurol* 1894.

⁹⁸ John Finnis *The Collected Essays of John Finnis, Vol 3, Human Rights and Common Good* (Oxford University Press, Oxford, 2011) at 260.

⁹⁹ See, e.g., M Hall, F Trachtenberg and E Dugan "The impact on patient trust of legalising physician aid in dying" (2005) 31 *J Med Ethics* 693; Anna Lindblad, Rurik Löfmark and Niels Lynöe "Would physician-assisted suicide jeopardize trust in the medical services? An empirical study of attitudes among the general public in Sweden" (2009) 37 *Scand J Public Health* 260; KA Smith and others "Quality of death and dying in patients who request physician-assisted death" (2011) 14 *Jnl Palliat Med* 445.

¹⁰⁰ Dan W Brock and Steven A Wartman "When Competent Patients Make Irrational Choices" (1990) 322 *N Engl J Med* 1595 at 1595.

¹⁰¹ Dr Lonnie Shavelson, quoted in Jennifer Medina "Who May Die? California Patients and Doctors Wrestle with Assisted Suicide" *New York Times* (online ed, New York, 9 June 2016)

Proponents of aid in dying concur with this view. The provision of aid in dying should not be seen as inconsistent with the role of a doctor. It is, rather, something that can be accommodated within the physician's role without undermining the ethical obligation to care for her patients' welfare and interests.

IV. ON LINE DRAWING AND SLIPPERY SLOPES

Beyond objections to aid in dying in principle, there are two commonly made practical objections to its adoption in any form. The first relates to deciding who should be able to access it and the problems associated with distinguishing those who can do so from those who cannot. It is argued that if aid in dying proponents are true to their principles, they cannot limit the scope of aid in dying to relevant persons alone. The second objection relates to potential future effects of adopting even the most limited form of aid in dying. Opponents claim that even if it were possible to create a restricted form of aid in dying that does not threaten to harm vulnerable individuals (which they in any case deny),¹⁰² that model will over time move in an ever more liberal direction. As it does so and aid in dying is practiced in a commonplace fashion, pressure on the elderly, disabled and the otherwise "burdensome" to avail themselves of the option will intensify. In this section I address and rebut both of these claims.

A. On Line Drawing

This article has argued that relevant persons – that is, those suffering unbearably as the result of an incurable and terminal medical condition where death is predicted to occur in the next six months – ought to be permitted access to aid in dying provided by a willing doctor. As noted in its introduction, if the argument is to be successful for anyone, then it will be for this class of persons. Conversely, if the argument is not successful for this class of persons, then it will not be for anyone. However, it may be objected that limiting the argument in this way artificially draws the circle too narrowly. For why should persons suffering from non-terminal but untreatable medical conditions be prevented from accessing aid in dying? Surely their autonomy claim also ought to be respected in that it is even crueler to force them to live in pain and anguish for an indeterminate future length of time? Indeed, it may be argued that if individual autonomy is regarded as so vital, why are *any* limits be placed on it at all?¹⁰³ To return to the case of "C" discussed earlier, why should a person who rejects the "prospect of growing old, the fear of living with fewer material possessions and the fear that she has lost, and will not regain, 'her sparkle'" be barred from receiving a doctor's aid to end her life?

The short answer to this challenge is to admit that any proponent of aid in dying who does not advocate a general right to assisted suicide for everyone inevitably must engage in a line drawing exercise. The reason for doing so is recognition that human life has an inherent value such that not *every* reason for seeking to

¹⁰² Ahdar, above n 10, at 482–483.

¹⁰³ At 476; 484–485.

end it should be accorded the same respect. And amongst those who believe that ending some forms of human suffering ought to outweigh “the sanctity of life” there will be disagreements over who ought to qualify to receive aid in dying. I have argued the minimal case here: that relevant persons at least should be permitted to access aid in dying. In contrast, David Seymour’s Bill would permit individuals suffering “a grievous and irremediable medical condition” to access aid in dying,¹⁰⁴ whilst Louisa Wall’s alternative proposal restricts access to aid in dying to suffering persons whose death is predicted within 12 months. There is thus a degree of potential arbitrariness involved in any decision on qualifying criteria, for a person prohibited from accessing aid in dying under any given regulatory regime always may ask “if them, why not me?”

However, the fact that proponents of aid in dying must engage in creating disputable and perhaps seemingly arbitrary boundaries does not doom the exercise. First of all, a world in which relevant persons *at a minimum* can access aid in dying is *more* morally just than one in which they are not permitted to do so, even if it is not considered *optimally* just by some. Therefore, society ought to respect the right of at least relevant persons to access aid in dying and then seriously consider what other groups (if any) should also qualify. Second, the problem of line drawing exists for those on both sides of the aid in dying debate. For opponents of the proposition either must argue in favour of radically rolling back currently accepted medical practices¹⁰⁵ or else have to justify why certain existing end of life choices (removal of respiratory assistance, palliative sedation, refusal of sustenance, etc) are permitted whilst others (assisted or facilitated aid in dying) are forbidden. The practical application of currently permitted choices then generates its own potential absurdities. For example, a patient with advanced cancer who also has a pacemaker fitted may quickly end their suffering by requiring that it be deprogrammed, whilst another cancer patient without a pacemaker cannot. So at present a person’s right to exercise end of life choice under current law depends upon the particular condition that they happen to suffer from, just as would be the case if aid in dying were to be permitted for some class of persons but not for others.

Finally, problems associated with line drawing are not regarded as a reason for outright prohibiting other practices. Take, for example, the case of a girl aged 16 years and one day who engages in sexual intercourse with a boy aged 15 years and 364 days. Current law deems the girl to have committed a crime punishable by up to 10 years imprisonment,¹⁰⁶ but not the boy. That absurdity may provide

¹⁰⁴ End of Life Choice Bill 2015, cl 4(c)(ii).

¹⁰⁵ As, for example, was attempted in the UK through the Medical Treatment (Prevention of Euthanasia) Bill 2000, cl 1, which proposed that: “It shall be unlawful for any person responsible for the care of a patient to withdraw or withhold from the patient medical treatment ... if his purpose or one of his purposes in doing so is to hasten or otherwise cause the death of the patient.”

¹⁰⁶ Crimes Act 1961, s 134(1).

a reason to revisit exactly how we regulate the age of consent,¹⁰⁷ but no one would seriously argue that we should avoid all line drawing problems in this area by criminalising anyone who engages in sexual intercourse with anyone else. Equally, there is no reason to respond to difficulties in deciding who qualifies to access aid in dying by saying that no one at all may do so. Rather, the better response is to engage in a serious debate about what we see as being the value of life and what particular circumstances so undermine it that an individual ought to be able to decide that they no longer wish to experience it. Only that conversation can tell us where the right line for our society lies.

B. On Slippery Slopes

This article has argued that New Zealand law should be changed to allow competent adult persons to directly request aid in dying where the prognosis of their medical condition is death within six months. Consequently, concerns about such a law change's effect on vulnerable groups — children, the elderly, the disabled, incompetent persons, etc — are misplaced as they simply would not qualify to receive aid in dying. Nevertheless, opponents of such a change argue that the law will slip over time in the direction of permitting ever-wider access to aid in dying. Such slippage, it then is alleged, will increase the threat that aid in dying will pose to vulnerable groups.¹⁰⁸ For as it becomes more available and is practiced in a commonplace fashion, pressure on the elderly, the disabled and the otherwise "burdensome" to avail themselves of the option will intensify.¹⁰⁹ Whatever initial safeguards are adopted will then prove ineffective in protecting the vulnerable, as the practice becomes normalised, even expected. Almost inevitably, such slippery slope claims are accompanied by reference to jurisdictions such as the Netherlands or Belgium and the alleged practices that occur under their regulatory regimes.¹¹⁰

One response to this claim is to look at those jurisdictions where aid in dying is permitted and note that there is no one global, common practice.¹¹¹ Different countries instead have established quite different regimes that permit different classes of individuals to access different methods of aid in dying. As Professor Ahdar also recognises,¹¹² this fact should make us somewhat cautious when drawing "lessons" about the practice of aid in dying from any particular jurisdiction. We instead would be wise to heed Penney Lewis' warning:¹¹³

¹⁰⁷ By, for example, introducing a "Romeo and Juliet exception" to age of consent laws for young adults close in age; see Steve James "Romeo and Juliet were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform" (2009) 78 UMKC L Rev 241.

¹⁰⁸ Ahdar, above n 10, at 485.

¹⁰⁹ At 489–491.

¹¹⁰ At 485, 487–489. Although it should be noted that Professor Ahdar accepts at 486 that "there are also studies that show abuses and slippery slopes have not eventuated [in these places]".

¹¹¹ A second response is to note that Professor Ahdar has not always been so convinced by "slippery slopes" arguments; see Ahdar and Allan, above n 37, at 23–24 (rejecting the argument that permitting the physical discipline of children inexorably leads to child abuse).

¹¹² Ahdar, above n 10, at 478–479.

¹¹³ Penney Lewis, *Assisted Dying and Legal Change* (Oxford University Press, Oxford, 2007) at 188.

Slippery slope arguments, whether logical or empirical, often make distinctly unhelpful contributions to debates over legalization [of aid in dying]. ... Instead, we should learn from the experience in jurisdictions which have legalized assisted dying, while recognizing that because of different social contexts and baseline rates of covert practices, and the use of diverse mechanisms of legal change, those experiences do not translate directly to other jurisdictions.

However, what even a cursory examination of overseas jurisdictions does reveal is that there are examples both of nations that have over time increased the availability of aid in dying and jurisdictions that have remained stable. North America exemplifies the latter case. For some 20 years, Oregon has permitted aid in dying only for individuals suffering a terminal illness and a prognosis of six months to live without changing the qualifying criteria.¹¹⁴ The five US states that then have followed in Oregon's wake all have adopted similarly restrictive qualifying criteria, as has Canada when it recently legislated to regulate aid in dying. This experience is in direct contradiction to any claim that the introduction of aid in dying somehow inevitably results in its application to an ever-widening group of individuals.

Admittedly, the Netherlands and Belgium exemplify the opposite trajectory. Both countries have, over time, expanded the range of individuals who may access aid in dying. However, the particular reasons why they have done so need to be understood. Aid in dying first was allowed in the Netherlands from the 1980s as the result of judicial rulings that permitted the practice in situations other than where an individual is suffering a terminal illness. Consequently, when the Netherlands' Parliament came to enact legislation on the matter, it did so against the backdrop of an already existing, comparatively expansive regulatory regime. A recent discussion of the development of aid in dying in the Benelux nations also points to the particular cultural circumstances that applied in the Netherlands:¹¹⁵

... four salient features of the Dutch legal, cultural, and medical systems ... have affected the debate and attendant legalization of aid in dying in the Netherlands: the notion of "legal tolerance" or "forbearance" (*gedoogbeleid*); the Dutch indisposition toward taboos, or their understanding that everything should be freely discussed (*bespreekbaarheid*); their historically unparalleled trust in physicians; and the Dutch ethos of 'conflict avoidance'.

The Netherlands experience then had a marked impact on its near (and culturally quite similar) neighbours. In other words, the Benelux nations form a cluster of socially and politically similar societies that have adopted a broadly consistent approach to the matter. There is no reason to assume that other nations that do not share those social and political similarities will act likewise. Furthermore, in both the Netherlands and Belgium it has been the country's elected legislature — following a process of open public deliberation — that has decided to define (and then redefine) the criteria that must be met before aid in dying may be accessed.

¹¹⁴ It also is worth noting that Professor Ahdar could not locate any research conclusively demonstrating that these criteria have either been ignored or misapplied in that period. See Ahdar above n 10, at 481–482.

¹¹⁵ Lopes, above n 10, at 142.

At any point in time, the elected legislature in each of those countries could say that it did not wish to make that change. So the fact that the Dutch and/or the Belgians have chosen to do so means little in respect of how we here in New Zealand might decide to address those matters in the future.

V. IN CONCLUSION – THE PUBLIC GETS WHAT THE PUBLIC WANTS

The conclusion to this article is its shortest and most straightforward part. Aid in dying should be introduced into New Zealand because, irrespective of any uncertainties or posited risks, the people of the country support it being a part of our law. Repeated opinion polls over the last couple of years report a steady majority of some 65-75% of respondents support the legalisation of "euthanasia".¹¹⁶ Perhaps most notably, in 2015 some 15,259 participants in Auckland University's New Zealand Attitudes and Values Survey answered the question, "Suppose a person has a painful incurable disease. Do you think that doctors should be allowed by law to end the patient's life if the patient requests it?" Using a Likert scale of 1-7,¹¹⁷ the mean response was 5.6, with some 66 per cent answering 6-7, 21.7 per cent 3-5 and 12.3 per cent 1-2.¹¹⁸ The study authors then confidently assert, "Because we have such a national representative sample of New Zealanders, findings of our study are likely to reflect what the general New Zealand public over the age of 18 think about this issue."¹¹⁹ As such, the data demonstrates that New Zealanders not only are comfortable with the idea of aid in dying occurring in their society, but also positively want their law to allow it to do so.

Opponents of aid in dying then have two standard responses to such indications of public opinion. The first is to call into question the meaningfulness of such polls, citing problems in the way questions are worded or alleging that respondents do not really understand the issues at stake.¹²⁰ I simply will note the consistency of reported views across multiple surveys involving differently worded questions and suggest that were the results reversed, concerns about methodology or participant understanding likely would vanish. The second approach is to deny that aid in dying really is the sort of issue that public opinion

¹¹⁶ Research New Zealand "Should euthanasia be legalised in New Zealand?" (9 April 2015) <<http://researchnz.com/pdf/Media%20Releases/Research%20New%20Zealand%20Media%20Release%20-%2008-04-15%20-%20Euthanasia.pdf>>; Colmar Brunton "One News Colmar Brunton Poll" (19 July 2015). <www.colmarbrunton.co.nz/images/150803_ONE_News_Colmar_Brunton_Poll_report_11-15_July_2015.pdf>; Patrick Gower "Poll: Kiwis want euthanasia legalised" (27 July 2015) 3 News <www.newshub.co.nz/home/health/2015/08/poll-kiwis-want-euthanasia-legalised.html>; Research New Zealand "Should euthanasia be legalised in New Zealand?" (17 October, 2017) <<http://researchnz.com/pdf/Media%20Releases/2016/Research%20New%20Zealand%20Media%20Release%20-%202016-10-28%20Euthanasia.pdf>>.

¹¹⁷ Where a response of "1" means "definitely NO" and "7" means "definitely YES".

¹¹⁸ Carol HJ Lee, Isabelle M Duck and Chris G Sibley "Demographic and psychological correlates of New Zealanders' support for euthanasia" (2017) 130 NZ Med Jnl 9 at 13.

¹¹⁹ Lucy Warhurst "Most New Zealanders Support Euthanasia, Study Suggests" (22 January 2017) Newshub <www.newshub.co.nz/home/health/2017/01/most-new-zealanders-support-euthanasia-study-suggests.html>.

¹²⁰ Ahdar, above n 10, at 501.

ought to decide. Consequently, Professor Ahdar argues, “majority desire *alone* is not the touchstone of public policy”.¹²¹ That claim certainly is true; we can all think of some proposed law that we would regard as unjust even if a majority of the population expressed support for it. However, I have argued that far from being unjust, changing the law to permit aid in dying for at least relevant persons would be a moral advance for us as a society. It also happens to be a law change that a large majority of New Zealanders supports. Therefore, its continuing prohibition by way of the criminal law thus reflects the moral qualms of a small (and apparently shrinking) subset of society.

And, I would contend, it simply is wrong for our criminal law to privilege those minority views at the cost of imposing cruel outcomes on those relevant persons who wish to end their lives on their own terms. That is, at its core, the case for permitting aid in dying in New Zealand.

¹²¹ At 501 (emphasis in the original).

REMOTE SEARCHING: TRAWLING IN THE CLOUD

CHRIS PATTERSON*

The Search and Surveillance Act 2012 (SSA) allows the Police and other enforcement agencies to perform remote searches of data. All searches are, however, subject to the overriding but not absolute principles of the New Zealand Bill of Rights Act 1990 (the BORA), in particular s 21. The application of the BORA should provide a balance between the acts of an enforcement agency carrying out its investigative role and an individual's right not to be subjected to unreasonable search and seizure. Such a right should extend to the protection of an individual's privacy in respect to data stored on internet cloud based servers, requiring enforcement agencies to obtain a warrant in order to search that data. However increasingly, data is stored offshore which gives rise to a number of jurisdictional issues.

The few co-operative arrangements that exist between states are at present considered necessary in order to prevent reciprocated aggressive searches.¹ Any search undertaken pursuant to these arrangements, and in accordance with the SSA, will in most cases be considered a lawful search. However, if a search is undertaken of a target computer from which the location is unknown or authority has not been granted by the governing territory, should the search be considered unlawful?

This article will argue that any Court faced with a remote cross border search will need to consider the implications and application of the BORA as well as whether or not the SSA has an extra territorial effect. This article will also argue that data obtained via remote searching is likely to be considered unlawful in terms of the minimum rights prescribed by the BORA. The article concludes with the proposition that legislative amendments are necessary to provide better guidance and clarity as to the scope of remote searching.

I. INTRODUCTION — THE NEXT PHASE OF THE DIGITAL REVOLUTION — CLOUD COMPUTING

The significant advancements during the last 30 years in information communication technologies (ICT), has heralded an unprecedented and exponential increase in the creation and storage of information. It is arguable

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¹ See the Convention on Cybercrime CETS 185 (opened for signature 23 November 2001, entered into force 1 July 2004). Note, despite Recommendation 7.13 of the Law Commission *Search and Surveillance Powers* (NZLC R79, 2007) at 229, New Zealand has not sought to become a party to the Convention. For a discussion and commentary on the convention see: Alana Maurushat "Australia's Accession to the 'Cybercrime Convention': Is The 'Convention' Still Relevant in Combating Cybercrime in the ERA of Botnets and Obfuscation Crime Tools?" (2010) 33 UNSWLJ 431.

that smartphones can be described as mobile portable computers given they share a number of characteristics, including having a processor. The average smartphone user spends more time on their device using the internet or a wide range of applications for communication, work and/or entertainment, than making phone calls. A standard smartphone has more computing power and storage capability than many commercial mainframe computers of the 1980s. Whilst denied, some have attributed Bill Gates as saying that "64 kbps is more memory than most computer users will ever need". Whether or not this statement was in fact made, advances in technology have established that significantly more is required to drive modern technology. Now most New Zealanders have an ability to obtain and create what would have been unimaginable 20, or even 10, years ago in terms of receiving, creating, sharing and storing vast volumes of data.

Large quantities of the data created by individuals is personal in nature. The proliferation of personal data gives rise to a number of serious privacy and freedom from unreasonable search issues. The drafters of the New Zealand Bill of Rights Act 1990 (the BORA) would likely not have considered, or even contemplated, the implications that it would have on the creation and collection of personal data stored on personal electronic devices. They certainly would not have appreciated the impact that cloud computing would have on the day-to-day lives of many New Zealanders.

The digital landfill each individual creates on a daily basis includes, at one end, information that could be described as digital waste, such as a deleted application and its associated files, and at the other, highly personal and sensitive information such as bank account details. There may be, and often is, more than one location in which an individual's digital files are stored, especially if he or she uses more than one device.

Physical devices are not the only data storage technology used by individuals. Increasingly we are utilising the cloud to store files.² Storage of personal information in the cloud has become, in many cases, completely seamless. An example is the automatic uploading of photographs taken on smart phones to a cloud storage application such as Dropbox or iCloud. So what exactly is the cloud? The United States Department of Commerce National Institute of Standards and Technology defines cloud computing as "a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (eg. networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."³

² Louis Columbus "Roundup of Cloud Computing Forecasts and Market Estimates, 2016" *Forbes* (online ed, United States of America, 13 March 2016).

³ Peter Mell and Timothy Grance "The NIST Definition of Cloud Computing" Special Publication 800-145 (28 September 2011) NIST <<http://www.nist.gov/>> at 2.

In the absence of syncing their local computer and cloud account, if a Dropbox user wishes to access their files in Dropbox, as with any other cloud based service, they can only do so by remote means. The user has to login to the relevant cloud service using their account details. A user can then conduct as many remote searches of the files that are contained within their account as they like. However, what if that person is not the account holder? What if that person is a member of an investigating authority which has been issued with a warrant to remotely search a specific user's account? What are the key legal issues that arise and would they justify one or more amendments to the SSA?

II. FROM THE PHYSICAL TO THE PURELY INTANGIBLE

The case law in respect to computer searches both here in New Zealand and overseas has focused on the search and seizure of physical equipment, documentation, or information obtained at a specific location. The search and seizure of computer equipment is usually authorised by way of a warrant that prevents those executing the warrant from being otherwise liable in either trespass and/or conversion. Warrants are required to provide sufficient particulars so as to enable those subjected to the execution of a warrant to ascertain the scope and bounds of the authority granted to those who are executing the warrant. It is a long-standing rule that a general warrant is invalid.⁴

Striking an appropriate balance to ensure that an individual is free from being subjected to an unnecessary search and seizure and ensuring his or her right to privacy is protected, can and should be provided for by way of conditions contained in the warrant as stipulated by the issuing officer. The conditions applicable to computer searches can be separated into two groups or categories. These are items that can be seized and then searched, and items which are seized after the initial seizure and search. In relation to the latter, it is not uncommon to utilise forensic tools to search for relevant data. To varying degrees, forensic technology is used to remain within the scope of the warrant by filtering and separating the data which is relevant from that which is irrelevant or subject to legal privilege. This point, however, is unsettled.

On one hand, authorities have suggested that the police are able to use forensic technology to identify privileged material.⁵ Equally, the courts have also suggested an independent examiner locate the privileged material instead.⁶ This latter view is consistent with the view in the United States in *United States v Comprehensive Drug Testing*.⁷ It is the author's opinion if a balance is to be struck in a manner to protect legal privilege, the approach taken in the United States in *United States v Comprehensive Drug Testing* is to be followed.

⁴ *Dotcom & Ors v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745, (2014) 27 CRNZ 537, minority at [32] and majority at [71].

⁵ At [204].

⁶ *Chief Executive of the Ministry of Fisheries v United Fisheries Ltd* [2010] NZCA 356, [2011] NZAR 54 at [59] per Baragwanath J dissenting in part.

⁷ *United States v Comprehensive Drug Testing* 579 F 3d 989 (9th Cir 2009) at 1006.

Otherwise, it is leaving material in the hands of the organisations in charge of prosecution to protect the interests of the accused.

III. THE PURPOSE OF A REMOTE SEARCH

Investigative authorities undertaking a remote search are doing so because either the account user is unwilling or unable to provide, or is likely to attempt to destroy or conceal, relevant evidence if advised that the account is of interest to the investigative authority. A remote search gives the investigative authority access to a remote device, application or email account which then enables the investigator to copy, pursuant to any warrant conditions, the data contained within the remote device. An example could be all of the emails stored in a specific Hotmail email account. An investigator will in most, if not all, cases want to copy the data contained in the account for subsequent forensic analysis.

Criminal enterprise has been quick to adopt and use, whether intentionally or otherwise, new technologies to evade the authorities and conceal evidence of criminal activity. The risk of digital evidence being erased is a common concern for investigators. Investigators will, at a minimum, seek to preserve relevant or potentially relevant evidence before it can be erased or moved elsewhere for concealment. The challenge for law enforcement agencies is the same across a number of nations. As Brenner has noted:⁸

Law enforcement officers from various countries are grappling with the conflict that currently exists between the need to deploy "computer intrusion techniques that exist in a legal gray area" if they are to battle cybercrime effectively and the need to preserve individual privacy.

IV. LEGISLATIVE FRAMEWORK

A. New Zealand Bill of Rights Act 1990

Section 21 of the BORA codifies the common law principle that individuals have a right to be free from unreasonable search and seizure. The codification of the rights set out in s 21 is consistent with New Zealand's international commitment to arts 17.1 and 17.2 of the International Covenant on Civil and Political Rights, by ensuring that all persons within New Zealand are not subjected to "arbitrary or unlawful interference with [their] privacy, family, home or correspondence ..." and that each person has the "right to the protection of law against such interference or attacks".⁹

⁸ Susan Brenner "Law, Dissonance, and Remote Computer Searches" (2012) 14 NCJL & Tech 43 at 91-92 quoting Ryan Gallagher "US and Other Western Nations Met with Germany over Shady Computer-Surveillance Tactics" *Slate* (United States of America, 3 April 2012).

⁹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 Dec 1966, entered into force 23 March 1976).

Section 21 provides:

Unreasonable search and seizure

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

There is a large volume of case law relating to the application of s 21.¹⁰ In the context of seizure and search of data pursuant to a warrant, the Supreme Court in *Dotcom & Ors v Attorney-General*¹¹ (*Dotcom*) affirmed the Court of Appeal's acknowledgement in *Tranz Rail Ltd v Wellington District Court*¹² that general warrants are invalid and in breach of s 21 of the BORA.

The Supreme Court in the *Dotcom* case held:¹³

The potential for invasion of privacy in searches of computers is high, particularly with searches of computers located in private homes, because information of a personal nature may be stored on them even if they are also used for business purposes. These are interests of the kind that s 21 of the Bill of Rights Act was intended to protect from unreasonable intrusion.

The threshold issue in which the Courts interpret statutory provisions authorising searches is beyond the scope of this article and will not be traversed.

B. Search and Surveillance Act 2012

The warrant issued in the *Dotcom* case was granted by the District Court at Auckland pursuant to the Mutual Assistance in Criminal Matters Act 1992 less than three months before the commencement of the equivalent empowering section contained in pt 4 of the SSA. The passing and commencement of the SSA does not diminish the underlying principles of s 21 of the BORA. The Law Commission has stated that:¹⁴

... section 21 will remain as an important statement of general principle that will guide the interpretation and application of the search and seizure provisions that we propose, just as it is currently.

The relevant empowering sections of the SSA relating to remote searches are s 103, which sets out the form and content of search warrants, and s 111 which provides:

Remote access search of thing authorised by warrant

Every person executing a search warrant authorising a remote access search may —

¹⁰ See also s 5 of the BORA which enables the Courts to apply s 21 to statutory searches. See also *Hamed & Ors v R* [2012] 2 NZLR 305 which, in the context of a surveillance, confirms at [11] that "the values protected by s 21 are not simply property-based, as were the common law protections which preceded it. Rather, they provide security against unreasonable intrusion by State agencies into the personal space within which freedom to be private is recognised as an aspect of human dignity."

¹¹ *Dotcom & Ors v Attorney-General*, above n 4, minority at [32] and majority at [71].

¹² *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [38] and [41].

¹³ *Dotcom & Ors v Attorney-General*, above n 4, at [191].

¹⁴ Law Commission, above n 1, at 2.49.

- (a) use reasonable measures to gain access to the thing to be searched; and
- (b) if any intangible material in the thing is the subject of the search or may otherwise be lawfully seized, copy that material (including by means of previewing, cloning, or other forensic methods).

“Remote access” is defined as “a search of a thing such as an internet data storage facility that does not have a physical address that a person can enter and search”.¹⁵

“Internet data storage facility” is not defined in the Act. Most, if not all, cloud apps and remote email accounts, including Hotmail,¹⁶ Gmail,¹⁷ Google Drive¹⁸ and Dropbox¹⁹ being the type of material that will be of interest to an investigative authority, are all internet data storage facilities as they are all accessed via the internet and they store data. However, cloud apps and remote email accounts also store data on computer servers. The applicable computer servers are located at specific addresses or physical locations. It would be fair to assume that the respective addresses where each server is located is a physical address that a person can enter and search given that a person, such as an employee or contractor engaged by the cloud service provider, would have had to enter the address in order to install and maintain the server.

A “person” is not defined in the SSA, although the ordinary meaning of person can likely be assumed.²⁰ “Search” is also not defined, however this is likely for consistency with s 21 of the BORA in which a definition for “search” is also omitted. Blanchard J, when considering what constitutes a s 21 “search” in *Hamed v R*, adopted the view of the Supreme Court of Canada in *R v Wise*²¹ when he stated “if the police activity invades a reasonable expectation of privacy, then the activity is a search.”²² In a cloud app context, a remote search would be considered a search in terms of the *Hamed v R* guidelines as a person would have a reasonable expectation that law enforcement agencies do not trawl through his or her accounts, particularly given the majority of accounts are protected by passwords. It could also be interpreted by reference to its common usage in computing i.e. the act or process of electronically viewing data. However, a good reason to omit providing a statutory, or indeed judicial, definition of the term is to keep it technologically neutral given the advancement in techniques used to perform a search, and an individual’s expectation of privacy, may change over time.

¹⁵ Search and Surveillance Act 2012 (SSA), s 3.

¹⁶ <<http://www.hotmail.com/>>.

¹⁷ <<http://www.gmail.com/>>.

¹⁸ <<http://www.google.com/drive>>.

¹⁹ <<http://www.dropbox.com/>>.

²⁰ Interpretation Act 1999, s 29.

²¹ *R v Wise* [1992] 1 SCR 527.

²² *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, (2011) 25 CRNZ 326 at [163].

C. Check and Balance – Issuing Officer Approval

The requirement that a remote search must be authorised by a warrant is the one and only check and balance provided for under the SSA. The issuing officer will be reliant on the enforcement agency applying for the warrant to provide them with “full information to allow him or her to assess”²³ the appropriateness and necessary specifics of a warrant.

An obvious difficulty in achieving an effective balance in the context of a remote search is the issuing officer’s dependence on the enforcement agency providing sufficient information to enable the issuing officer to make an informed decision. Issuing officers are not currently required by law to have sufficient, or even any, knowledge of the technical and legal issues associated with a remote search.²⁴ The Court of Appeal in *A Firm of Solicitors v District Court at Auckland* in the context of a computer search by the Serious Fraud Office suggested that:²⁵

... the jurisprudence that has developed in relation to [civil search]²⁶ orders in the civil jurisdiction of the High Court could provide useful guidance in the development of appropriate procedures in cases [involving privilege].

A key aspect of civil search orders is proportionality. The scope of a civil search order should be no greater than is necessary to ensure that relevant evidence is located and secured. The obligation rests on the applying party to make full material disclosure so that the judge considering the application can balance the competing interests of both sides. It is perhaps too much to expect an enforcement agency will always adhere to the strict requirements of the High Court Rules and general jurisprudence relating to search orders. However, to enable the appropriate balance to be struck it has to be recognised that not all, if any, issuing officers will necessarily have the specific technical and legal experience required to be able to fully consider an application for a warrant to authorise a remote search. It would go some way forward to improving the likelihood that the correct balance will be struck if the application followed a process similar to a civil search order. As an example, the application should include an affidavit from a forensic information technology expert setting out, in everyday language, what the scope of the warrant sought will entail, what processes will be followed to minimise or eliminate access to irrelevant material, and what steps will be taken to avoid and protect inadvertent access to personal information.

²³ *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 at [76].

²⁴ David Harvey *Internet.law.nz* (4th ed, revised, LexisNexis, Wellington, 2016) at [8.369 - 8.374].

²⁵ *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 at [140].

²⁶ The Court of Appeal referred to an Anton Piller order. A number of safeguard conditions arising out of the Anton Piller jurisprudence are found in pt 33 of High Court Rules which came into effect on 1 February 2009. See also, for a general commentary of the search order jurisprudence, RA McGechan (ed) *McGechan on Procedure* (looseleaf ed, Brookers) at [HRPt 33].

D. Possible Fine Tuning (s 357)

Section 357 of the SSA requires the Minister of Justice to call for a joint review of the operation of the SSA by the Law Commission and Ministry of Justice. The joint review must be completed by the delivery of a report to the Minister of Justice within one year i.e. by 30 June 2017. On 28 June 2016 the Minister of Justice, pursuant to s 357, referred a review to the Law Commission.²⁷ One of the three terms of reference is "whether any amendments to the Act [the SSA] are necessary or desirable".²⁸ On 28 June 2016 the Law Commission issued a media release that contained the following Q&A:²⁹

Will the impact of new technology be considered in the review? Yes. For example, since the Act was enacted in 2012 there has been a significant increase in the use of smart phones and "the cloud" to store information. Also, technology presents Police and enforcement officers with new ways to investigate crime that were not envisaged in 2012. The review will examine whether the provisions of the Act provide adequate powers and protections in light of these changes.

Given the purpose of remote searches as discussed above, the definition of "remote search" and s 111 should both, or at least one, be amended to meet the objective of creating "greater consistency and transparency in the way in which such [remote] search ... powers [are] carried out".³⁰ I suggest that a number of amendments relating to remote searches should be considered. These include:

- The definition of "Remote Access Search" in s 3 should either remove the words "that does not have a physical address that a person can enter and search" or, alternatively, a reasonable practicality exception should be included. The wording could be amended to "that has a physical address that a person cannot reasonably, for practical purposes, be expected to enter and search". Such an amendment would reduce any arguments that a server hosting a cloud app that is the subject of a warrant is located at a physical address. It is accepted that the amendment proposed would keep the door open to more cross border searches. It is only a question of striking an appropriate balance.

Reasonable practicality could be determined in terms of a balancing exercise. Putting aside the jurisdictional implications which are addressed later in this article, reasonable practicality may include a risk that data could be destroyed or concealed during the passage of time, or in circumstances where it is unreasonable to expect an investigating authority to travel to far flung locations to physically undertake a search of a server, such as when it is known the relevant server is located elsewhere, for example, travel to Singapore in order to physically undertake a search of a server.³¹

²⁷ Law Commission "Search and Surveillance Act 2012" (28 June 2016) Law Commission <<http://www.lawcom.govt.nz/our-projects/search-surveillance-act-2012>>.

²⁸ Law Commission "Terms of Reference for the Statutory Review of the Search and Surveillance Act 2012" (28 June 2016) <<http://www.lawcom.govt.nz/>>.

²⁹ Law Commission "Law Commission Begins Joint Review of the Search and Surveillance Act 2012" (press release, 28 June 2016) <<http://www.lawcom.govt.nz/>>.

³⁰ Law Commission "Law Commission Begins Joint Review of the Search and Surveillance Act 2012" (press release, 28 June 2016) <<http://www.lawcom.govt.nz/>>.

³¹ As an example Microsoft Inc has its cloud computing Microsoft Office 365 servers which are accessed by New Zealand customers located in datacenters in Singapore: "New Office 365 Datacentres" (8 February 2015) <<http://imageframe.co.uk/new-office-365-datacentres/>>.

- Another section that would be desirable to amend is s 111(b). It is difficult to comprehend a remote search that did not include “any intangible material”. All remote searches by their very nature involve “intangible material”. Data is merely electronic information, which by its very nature is therefore “intangible material”.³² As tangible material can only be searched via direct means, by its very nature it needs to be located somewhere physical. Therefore, a person (such as an investigator) could physically enter the address of where the tangible material is located and undertake the search in person. The simple amendment is to delete from s 111(b) the words “if any intangible material in the thing is the subject of the search or may otherwise be lawfully seized”.

V. JURISDICTION – THE PROBLEM OF REMOTE CROSS BORDER SEARCHES

The issue of jurisdiction does not arise when an investigator searches and seizes, for subsequent examination, a device located in New Zealand. Likewise, putting aside the issues identified above in relation to the current wording of the legislation, a remote search undertaken in respect to a server located in New Zealand is unlikely to raise any jurisdictional issues. If, however, a data centre is located outside New Zealand, as is the case for a large majority of data centres, an issue as to jurisdiction will arise. The former Solicitor-General, Michael Herron QC, has commented that: “This jurisdictional point is likely to be the biggest obstacle to using remote access searches effectively.”³³ In some jurisdictions, such as Germany, the use of remote searches are prohibited on constitutional grounds,³⁴ and in others are indefensible.³⁵

Recognising and respecting territorial sovereignty is an important obligation of every responsible nation. Michael Sussmann³⁶ makes it clear that customary international law prohibits conducting an investigation in the territory of another state. He suggests that “[g]overnments have three potential solutions”. These are to either:

1. Forego the development of principles, allowing for each country to decide for itself whether trans border searches constitute an acceptable law enforcement practice;
2. Limit trans-border searches to cases where production of the data could otherwise be compelled through [domestic] legal processes; or
3. Creating principles permitting law enforcement agencies to conduct trans-border searches under clearly defined circumstances.

³² Data is defined as quantities, symbols and characters that are transmitted or stored via electrical signals on, or through, a computer: English Oxford Living Dictionary <<https://en.oxforddictionaries.com/definition/data>>.

³³ Michael Heron and Dale La Hood *Search and Surveillance Act 2011 – New Powers* (New Zealand Law Society, 2012) at 32.

³⁴ Steven Bellovin, Matt Blaze and Susan Landau “Comments on Proposed Remote Search Rules” Computer Science at Columbia University <<http://www.cs.columbia.edu/>> and Alana Maurushat “Australia’s Accession to the Cybercrime Convention: Is The Convention Still Relevant In Combating Cybercrime in the ERA of Botnets and Obfuscation Crime Tools?” (2010) 33(2) UNSWLJ 431.

³⁵ *Microsoft Corporation v United States of America* 829 F 3d 197 (2nd Cir 2016).

³⁶ Michael Sussmann “The Critical Challenges From International High-Tech and Computer-Related Crime at the Millennium” (1999) 9 Duke J Comp & Int’l L 451 at 471–472.

As will be evident above, New Zealand has adopted, in s 111, Sussmann's third solution but without any "clearly defined circumstances". The absence of specificity in s 111 is, in my view, a serious matter that needs to be addressed. Legislation is presumed to only have domestic application (i.e. no extra-territorial application) unless the wording of the legislation explicitly or implicitly creates extra-territorial effect.³⁷ Otherwise, the aim of striking the appropriate balance between effective criminal investigation and the protection of individual privacy cannot be met.

It is expected the New Zealand public would be concerned if a foreign power started undertaking remote searches on computer systems based in New Zealand, and which contained personal information relating to New Zealand citizens and/or residents. However, what is good for the goose should also be good for the gander. The use of reciprocal assistance arrangements is one way to respect territorial sovereignty and operate within agreed bounds. Simply legislating empowering authority for New Zealand enforcement agencies to conduct, albeit with a warrant, remote cross border searches is unlikely to enhance New Zealand's reputation within the international community. There is a real risk that a New Zealand enforcement agency may commit an offence under the laws of a foreign country, such as Germany, simply by executing a remote cross border search. This should not be ignored.

The Law Commission was alive to some of the risks mentioned above but nevertheless went on to recommend that remote cross border searches be permitted subject to the search being:³⁸

- limited to open-source (publicly available) data; or
- conducted in accordance with mutual assistance arrangements in place between New Zealand and the relevant jurisdiction; or
- specifically authorised under a search warrant.

The first of the three conditional recommendations cannot be justified if one accepts that the harm created by a remote cross border search is not just in terms of the data obtained on an individual level, but more importantly the "intentional interference with the searched state's power to provide privacy or property protections within its territory".³⁹

The Law Commission's first two conditional recommendations, on their face, do not appear to be too objectionable. However, they never made their way into s 111. Rather, it was the third condition which is reflected. A remote search, under

³⁷ For example, s 144A of the Crimes Act 1961. See also *LM v The Queen* [2014] NZSC 110, [2015] 1 NZLR 23 at [38] per Glazebrook and Arnold JJ as authority for extra-territorial application of party offences under s 144A despite s 6, which limits the extra-territorial application of the Act unless it is provided for in the Act or any other enactment. The case involved a situation in which the appellant was a New Zealander, but the party who committed the alleged offending was not a New Zealander, and therefore under New Zealand law did not commit an offence. Note the author was counsel for the appellant.

³⁸ Law Commission, above n 1, at Recommendation 7.12.

³⁹ Patrica L Bellia "Chasing Bits Across Borders" (2001) U Chi Legal F 35 at 74.

the SSA, must be authorised by a search warrant. This condition alone ignores the risks, legal and reputational, associated with remote cross border searches. Instead, it expressly authorises a remote cross border search provided that the authorisation has been granted, via a warrant, by an issuing officer.

The SSA does not contain any express extraterritorial authority. The Supreme Court has held, in the general context, that “the default position is that New Zealand criminal law does not apply extraterritorially”.⁴⁰ Presumably, the same can be said that criminal procedure including the authority to authorise a remote search, by default, would not extend beyond New Zealand. The Law Commission has noted that “there is a customary international law prohibition on conducting investigations in the territory of another sovereign state”.⁴¹ New Zealand investigative authorities usually have to rely on mutual assistance arrangements with other jurisdictions to facilitate or carry out investigative processes outside of New Zealand that require legal authorisation, such as the obtaining and execution of a search warrant overseas.

In the absence of an express power the courts could be asked to interpret s 111 as having an implied extraterritorial effect. It is arguable that s 111 should not be read as implying a right to undertake a remote cross border search. Nothing in the wording of the section would suggest that a remote cross border search “goes without saying”. Additionally, the implication of an extension of jurisdiction beyond New Zealand is not necessary to give effect to any commitments made by New Zealand in terms of its international obligations.

A review of Hansard relating to the SSA provides no insight into the intention of the legislature with respect to territorial sovereignty.⁴² The Law Commission, in its final report, made a number of key recommendations relating to searches of computers including providing “statutory authorisation for law enforcement agencies, when exercising search powers to: ... conduct remote cross border searches in limited specific circumstances.”⁴³

VI. COMPARATIVE ANALYSIS

The scope of this article only allows a short comparative analysis of two jurisdictions - Canada and the United States. The United States is an obvious choice due to its size and influence as a first mover in respect to the ongoing development of jurisprudence relating to the internet and, therefore, cloud computing. Canadian law provides insight into this issue from a common law perspective.

⁴⁰ *LM v The Queen*, above n 37, at [16]. Note that exceptions do exist, see ss 7 and 7A of the Crimes Act 1961.

⁴¹ Law Commission, above n 1, at 7.109.

⁴² (04 August 2009) 656 NZPD 5399; (1 March 2012) 677 NZPD 761; (7 March 2012) 678 NZPD 933; (20 March 2012) 678 NZPD 1095; (22 March 2012) 678 NZPD 1245.

⁴³ Law Commission, above n 1, at 7.9.

The Canadian Federal Court (the Federal Court) in *Re X* reviewed an application for a warrant to conduct mobile phone surveillance by the Canadian Security Intelligence Service (CSIS).⁴⁴ The Federal Court's judgment, delivered by Justice Richard Mosley, affirmed the position taken by the Canadian Supreme Court in *Hape* that:⁴⁵

... it is a well established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law.

In *Re X* the CSIS were not seeking judicial authorisation to violate any foreign law "but acknowledged that was the likely effect of the activities for which authorization was sought".⁴⁶ The Federal Court had to consider whether it had jurisdiction to "authorize acts by the CSIS in [Canada] which entails listening to communications and collecting information abroad."⁴⁷ The Canadian Federal Court appointed, and had the benefit of, one of her Majesty's Queens Counsel as an amicus curiae to assist in determining the issue. The Federal Court appears, while not exactly clear from the judgment, to have rejected the submission of the amicus that:⁴⁸

... the Service could not execute a warrant obtained under s 21 [Canadian Security Intelligence Service Act RSC 1985] and exercise its information gathering powers in another country unless it had obtained the permission of the country where the targets were located or was a party to a treaty or agreement covering the use of its powers in that country.

The Federal Court noted that Canada had participated in the development of, and signed, the Convention on Cybercrime (the Convention) but had not ratified the Convention due, in part, to "the legislation required for domestic implementation of the data preservation and disclosure measures" having a "potential impact on privacy issues".⁴⁹ The Federal Court, in approving the issuance of a cross border warrant, distinguished "the norms of territorial sovereignty" from the exercise of a country's enforcement jurisdiction. The Federal Court held that the CSIS's statutory authorisation is "not subject to territorial limitation" and that there was nothing unlawful in the CSIS collecting from Canada information that was located outside of Canada.⁵⁰ With respect to the Federal Court, its analysis and reasoning lacked any reasonable level of theoretical rigor. The Federal Court took the position that, provided the CSIS was initiating its investigative processes within Canada, it mattered not that those

⁴⁴ *Re X* 2009 FC 1058, [2010] 1 FCR 460.

⁴⁵ *R v Hape* 2007 SCC 26, [2007] 2 SCR 292 at [65].

⁴⁶ *Re X*, above n 44, at [11].

⁴⁷ At [27]. The Canadian Federal Court, at [59], reframed the issue as being "whether the Court may authorize the CSIS to listen to and record the communications at a location within Canada" and then, at [64], "whether the Court may authorize such actions in Canada knowing that the collection of such information in a foreign country may violate that state's territorial sovereignty".

⁴⁸ At [11].

⁴⁹ At [71].

⁵⁰ At [75].

processes would cross borders and therefore infringe the territorial sovereignty of one or more other nations.

The first instance judgment of the United States Magistrate Judge James C Francis IV in *A Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation (Microsoft)* commenced with a quote:⁵¹

The rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactory, by any current territorially based sovereign.⁵²

The United States District Court (the US District Court) in *Microsoft* had to consider a challenge by Microsoft against the issuance of a warrant to search for data on one of its servers located in Dublin, Ireland.⁵³ Under the warrant Microsoft was directed to produce emails of one of its customers saved on its server. Microsoft unsuccessfully argued that "Federal courts are without authority to issue warrants for the search and seizure of property outside the territorial limits of the United States."⁵⁴ The US District Court held that Microsoft's analysis was inconsistent with the legislation that authorised the issuing of the warrant. Importantly, the US District Court accepted the United States Government's argument that the warrant was a hybrid, being part warrant and part subpoena in that:⁵⁵

It is obtained like a search warrant when an application is made to a neutral magistrate who issues the order only upon a showing of probable cause ... On the other hand, it is executed like a subpoena in that it is served on the ISP in possession of the information and does not involve government agents entering the premise of the ISP to search its servers and seize the e-mail account in question.

On that basis the warrant, as argued by the US Government and accepted by the US District Court, did "not implicate principles of extraterritoriality".⁵⁶ The US District Court also commented on the practical implication of treating the warrant as a conventional search warrant in that "it could only be executed abroad pursuant to a Mutual Legal Assistance Treaty" which, especially if there is no treaty in place, "make it unlikely that Congress intended to treat [an] order as a warrant for the search of premises located where the data is stored".⁵⁷ The issuance of the warrant was upheld and Microsoft's motion to quash it was dismissed.

⁵¹ *A Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation* 15 F Supp 3d 446 (SD NY 2014).

⁵² David Johnson and David Post "Law and Borders — The Rise of Cyberspace" (1996) 48 *Stan L Rev* 1367 at 1375.

⁵³ Issued pursuant to s 2703(a) of the United States' Stored Communications Act (commonly known as a "SCA Warrant") which is part of the Electronic Communications Privacy Act of 1986 18 USC (US).

⁵⁴ *A Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, above n 51, at 470.

⁵⁵ At 471.

⁵⁶ At 472.

⁵⁷ At 475.

The United States Court of Appeals has subsequently overruled the decision.⁵⁸ It affirmed Microsoft's argument that Congress' characterisation of the instrument as a warrant carried traditional territorial limits.⁵⁹ Nothing in the Stored Communications Act explicitly or implicitly suggested the application of the warrant overseas.⁶⁰ Requiring Microsoft to comply with the warrant in this situation would require ignoring the Supreme Court's repeated emphasis of the presumption against extraterritoriality. The Court stated it did not have the freedom to do so.⁶¹

One of the issues facing remote cross border searches initiated in the United States is the Constitutional Fourth Amendment (the Fourth Amendment). The Fourth Amendment is the closest equivalent to s 21 of the BORA. The approach of courts in the United States to issuing warrants authorising remote cross border searches has been criticised for allowing the United States government to "run roughshod over territorial-based limitations" contained in the Fourth Amendment.⁶²

In 2013, the United States judicial approval for remote cross border searches was firmly brought into question. In *re Warrant to Search a Target Computer at Premises Unknown*, the United States District Court declined an application by the Federal Bureau of Investigation (FBI) for a warrant to conduct a remote access search.⁶³ The reason given was out of a concern that Federal Rules of Criminal Procedure 41 (Rule 41) places a restriction on a judge's authority to issue only warrants within his or her district. That requirement cannot be met if the judge does not know where the computer server that is the subject of the warrant is located. To get around this issue the Department of Justice wrote to the Advisory Committee on Criminal Rules suggesting amendments to Rule 41. In response, on 28 April 2016 the United States Supreme Court issued a letter to the United States Congress advising it of a number of changes to the Federal Rules of Criminal Procedure (FRCP) including an amendment to Rule 41 authorising a magistrate judge to issue an extraterritorial remote search warrant.⁶⁴ The amendment to the FRCP will take effect on 1 December 2016 unless the United States Congress passes legislation preventing the amendment.

The amendment to Rule 41 proposes:

Rule 41. Search and Seizure

(b) Venue for a Warrant Application. At the request of a federal law enforcement officer or an attorney for the government:

⁵⁸ *Microsoft Corporation v United States of America*, above n 35.

⁵⁹ *Microsoft Corporation v United States of America*, above n 35, at 5.

⁶⁰ *Microsoft Corporation v United States of America*, above n 35, at 6.

⁶¹ *Microsoft Corporation v United States of America*, above n 35, at 6.

⁶² See Jennifer Daskal "The Un-Territoriality of Data" (2015) 125 Yale LJ 326.

⁶³ *Re Warrant to Search a Target Computer at Premises Unknown* 958 F Supp 2d 753 (SD Tex 2013).

⁶⁴ Supreme Court of United States *Proposed Amendments to the Rules of Criminal Procedure* (28 April 2016, Supreme Court of the United States) <www.supremecourt.gov/orders/courtorders/frcr16_mj80.pdf> at 6 – 7.

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 USC § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

The amendment proposed introduces express extraterritorial effect provided the location of the computer server has been concealed, or five or more computers owned by financial organisations or the United States Government that are located in different districts have been damaged. Zack Lerner argues, amongst a number of points, that:⁶⁵

... the need for extraterritorial authority only extends to the acquisition of a user's most basic identifying information [and that] after collecting the user's IP or MAC address, the FBI can, and should continue its investigation as if the suspect had never concealed his or her identity in the first place.

Section 111, as enacted, contains no such condition.

VII. CONCLUSION

Sections 3 and 111 of the SSA require a number of general drafting amendments including refining the meaning of "remote search" and removing the reference to "intangible material".

The current joint review of the SSA by the Law Commission and the Ministry of Justice provides an opportunity to question whether s 111 strikes an appropriate balance between the legitimate need for enforcement agencies to investigate crimes and ensuring freedom from unreasonable searches or invasions of privacy. In my opinion s 111 gives enforcement agencies more authority than is necessary to identify and obtain relevant evidence. Too much reliance is then placed on the issuing officer to ensure that appropriate conditions are imposed to act as a counterbalance. Issuing officers cannot be expected to act as an effective independent safeguard given the complex and multi-layered technical and legal issues that require consideration. A possible solution may involve:

- Requiring enforcement agencies to utilise mutual assistance arrangements;
- Expressly limit remote searches to within New Zealand; and/or
- Require enforcement agencies to make full material disclosure and provide expert evidence as to the steps that will be taken to eliminate or mitigate any intrusions against individual privacy.

The circumstances where remote searches may be required will only increase with time. The fifty-nine words that make up s 111 are not sufficient to carry the

⁶⁵ Zack Lerner "A Warrant to Hack: An Analysis of the Proposed Amendments to Rule 41 of the Federal Rules of Criminal Procedure" (2016) 18 Yale JL & Tech 26.

weight necessary to strike the appropriate balance between the conflicting interests of the state and the individual.

CASE NOTE: MARINO V THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS [2016] NZSC 127

KRIS GLEDHILL*

Core components of the rule of law include the accessibility of the law and its production of foreseeable results. Legislation sometimes seeks to pursue complex or conflicting policies, and its meaning may require discussion or even a ruling from a judge. But this should not be so when the aim is a simple one such as setting the length of time for which the Department of Corrections is entitled to detain a sentenced prisoner and indeed duty-bound to detain a prisoner to give effect to a court sentence. Whilst criminal sentencing may be factually complex in various situations, when a case has to go to the Supreme Court to confirm the proper interpretation of the length of a sentence, the legislative drafting may be marked down from a rule of law perspective. Fortunately, the solution adopted by the Supreme Court in *Marino v The Chief Executive of the Department of Corrections* leaves the matter easier to administer.¹ However, it has overturned an established approach and revealed that many prisoners have been detained for too long.

I. THE STATUTORY PROVISIONS DESCRIBED: SENTENCING AND EARLY RELEASE

The Sentencing Act 2002 outlines the various factors from which the courts construct a sentence of imprisonment. Sections 81-85 include rules that include the prohibition on taking into account pre-sentence detention (see s 82)² and, for multiple offending, allow cumulative and concurrent sentences (ss 83 and 84)³ but require that account be taken of totality principles (s 85). The existence of early release on parole (ie, the fact that sentences are not necessary served in full) is expressly noted: s 86 empowers the sentencing court to impose a minimum period before release on parole is possible which is longer than otherwise would arise under the early release provisions if that is necessary for accountability, denunciation, deterrence and public protection.⁴ This in turn means that sentencing courts have to be cognisant of the rules as to early release. These, and the regime as to sentence

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¹ *Marino v The Chief Executive of the Department of Corrections* [2016] NZSC 127 [*Marino – Supreme Court*]. There was a second appellant in a joined case, *Booth v R*, but that case fell away in light of the decision in *Marino*.

² It used to be the case that the judge could take this into account in sentence: but, as noted by William Young J in *Marino – Supreme Court*, above n 1, at [68], practice was uneven. As he then described at [70]–[77], the Criminal Justice Act 1985 alternated between an administrative process and judicial account being taken, but since 1993 the 1985 Act and then its successor has used an administrative process. This has the advantage from a public deterrent and denunciation purpose of involving a longer sentence being pronounced in court.

³ Section 83(3) notes that a person who has been released and recalled on an interim basis is not detained under that sentence (meaning that nothing can be cumulative or concurrent with that).

⁴ This period cannot be longer than the shorter of 10 years or two-thirds of the sentence. This may allow the judge to impose a shorter overall sentence and secure the same time in custody than under a longer sentence. However, the various features that justify a longer non-parole period should also justify a longer determinate sentence (which in turn would have a longer period in custody before eligibility for early release).

calculation, are found in the Parole Act 2002,⁵ which can be summarised as follows in relation to determinate sentences:⁶

- (i) sentences are short-term or long-term, the latter being more than 24 months (s 4);
- (ii) cumulative sentences are combined into a notional single sentence (ss 4 and 75);⁷
- (iii) a sentence has three key dates (according to the interpretation section, s 4), being the start date, expiry date and release date, each of which is to be determined by the Chief Executive of the Department of Corrections (s 88); a long-term sentence has an additional important date, the parole eligibility date, also to be calculated by Corrections (s 88);
- (iv) the start date of a sentence is generally the date it is imposed (or the date the first sentence was imposed in a series that form a notional single sentence) (ss 76 and 77);⁸
- (v) the sentence expiry date is the final date of the sentence (including of a notional single sentence) (s 82);
- (vi) the parole eligibility date for a long-term prisoner is the expiry of the non-parole period, which is one third of the sentence (or the term specified by the sentencing court, as noted above) (s 84); but if the sentence involves a notional single sentence, the non-parole period of each individual term – including short-term sentences which by themselves do not have non-parole period – is to be added together to determine the PED for the notional single sentence (ss 84(4) and (5));
- (vii) for a short-term sentence, the release date is the half-way point of the sentence (s 86);
- (viii) for a long-term sentence, the release date is the sentence expiry date (s 86);
- (ix) long-term prisoners who have been released on parole may be recalled on risk-based grounds (ss 59 and following); there is a statutory release date, defined in s 17 as the “release date of the sentence to which the offender is subject (including any notional single sentences) that has the latest release date”.

II. THE PARTICULAR QUESTION IN MARINO: THE EFFECT OF PRE-SENTENCE DETENTION

An additional question for determination is the impact of detention prior to the start date of the sentence (ie, if the person is not on bail throughout). As noted, the

⁵ The Act did not change the approach to those sentenced before its commencement date, which remain governed by the Criminal Justice Act 1985: these “pre-cd” (pre-commencement date) sentences affect only a relatively small number of prisoners now, but provide some complexity to the statutory regime.

⁶ Sentences may also be indeterminate; and the account set out does not deal with what happens if a person is caught by the three-strikes provisions in ss 86A-I of the Sentencing Act 2002; nor does it deal with issues of compassionate release.

⁷ It is to be noted that s 75 refers most obviously to sentences passed on different occasions, since it refers to earlier and later sentences. William Young J in *Marino* comments that this is a quirk of drafting and that cumulative sentences passed on one single occasion will also be treated as a notional determinate term: *Marino – Supreme Court*, above n 1, at [52]. An alternative approach is to say that, as with concurrent sentences, cumulative sentences amount to a single sentence and the purpose of s 75 is to clarify that this single sentence approach applies also to cumulative sentences passed on different occasions.

⁸ There are rules in ss 78–81 for various situations, such as where a different sentence is imposed on appeal.

Sentencing Act precludes it being taken into account: but s 90(1) of the Parole Act indicates that the key dates, non-parole period, parole eligibility date and statutory release date should be calculated on the basis of the detainee being “deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention”. Section 91 defines what counts as “pre-sentence detention”. The proper meaning of these sections was the key question raised in *Marino*.

A. *The Facts*

Mr Marino’s offending involved family violence (a total of 10 charges)⁹ and attempting to pervert the course of justice (two charges). The former led to a sentence of 12 months’ imprisonment on each charge; the latter to 22 months’ imprisonment on each charge. The judge directed that the sentences be concurrent.¹⁰ Mr Marino had been remanded into custody on 11 February 2015 on the family violence charges. The charges of attempted perversion of the course of justice related to phone calls made from prison in late February and early March encouraging the complainant and a friend respectively to not give evidence and were laid on 18 March and 19 June 2015. When sentence was passed, in October 2015,¹¹ the judge referred to the sentence on the attempted perverting as the lead charge, but indicated that his understanding was that the release date was “fast approaching”.¹² As William Young J suggested in the Supreme Court, the judge seemingly assumed that there was a total sentence of 22 months, which would convert to 11 months in custody as a short-term sentence, would be counted back to the first remand into custody on the family violence charges and lead to release in January 2016.¹³ But the Department of Corrections determined that there were 12 sentences, that the approach was to deduct pre-sentence detention from each charge, and that the combined effect of all this was that the 11-month period was calculated from 19 June 2015, being the date that pre-trial detention started on the second of the matters for which a 22-month sentence was imposed (arising out of the phone call in March 2015).¹⁴

In habeas corpus proceedings, the issue was whether or not Mr Marino should have been released on 12 January 2016 (the apparent assumption of those participating in the sentencing) or was properly to be detained until 19 May 2016 (as Corrections calculated it). The difference, 127 days, is clearly significant. Counsel for Corrections argued that they had properly applied the statutory provisions to the several sentences imposed; for Mr Marino, the argument was that there was one

⁹ Assault and breaching a protection order: see *Marino v The Chief Executive of the Department of Corrections* [2016] NZCA 133 [*Marino – Court of Appeal*] at [4]. It seems that nine of these were charged at the outset, but a tenth was added in July 2015: see [10].

¹⁰ The judge specifically rejected an application from the prosecution to make the sentences cumulative in light of the totality principle: *Marino – Court of Appeal*, above n 9, at [5].

¹¹ Guilty pleas were entered in July 2015 on the basis of a sentence indication of 22 months: *Marino – Court of Appeal*, above n 9, at [5].

¹² *Marino – Court of Appeal*, above n 9, at [6].

¹³ *Marino – Supreme Court*, above n 1, at [55].

¹⁴ *Marino – Court of Appeal*, above n 9, at [10].

consolidated sentence and that pre-trial detention in relation to any of the charges comprising that sentence counted.¹⁵

B. The High Court and Court of Appeal Ruling for Corrections

Simon France J dismissed the application for habeas corpus,¹⁶ finding that previous authority arising under the Criminal Justice Act 1985, *Taylor v Superintendent of Auckland Prison*,¹⁷ governed. Mr Taylor received a total of 15 years' imprisonment from cumulative terms imposed on four different sentencing dates (which extended over five years). The first two were key to the dispute and involved a robbery and an aggravated burglary. He was arrested on the former on 30 August 1991 and on the latter on 2 June 1993; he was sentenced on the former on 16 July 1993 and had by then spent 361 days on remand (having also spent some time on bail or serving another sentence). The judge imposed a sentence of nine years' imprisonment, expressly reducing it from 10 years to take into account time on remand: the statutory regime then applicable (s 81 of the Criminal Justice Act 1985 as amended)¹⁸ required the judge to make this calculation and adjustment to the sentence.

Mr Taylor was already in custody on the second matter at the date of sentence; it led to a sentence of two years' cumulative on 19 July 1994. He later received an additional year and an additional three years' for the other offending, all cumulative to the original sentence of nine years. By the time of these cumulative sentences, the statutory regime had changed and the prison was required to calculate and deduct the pre-sentence detention. The effect of transitional provisions was that this occurred even if credit had already been given by the judge, and so the sentence was reduced by a further 361 days,¹⁹ and Mr Taylor argued that the effect of the statutory language was that the 361 days should also count towards the second sentence as he had been in custody on that before sentence on the first matter.

The statutory language on which he relied required the prison to calculate and deduct:²⁰

... the total period during which the person is detained ... on remand at any stage of the proceedings leading to the person's conviction or pending sentence, whether that period or any part of it relates to any charge on which the person was eventually convicted or any other charge on which the person was originally arrested or that the person faced at any time subsequent to his or her arrest and prior to conviction.

¹⁵ In the High Court, it seems that there was a slightly less expansive argument, at least in the alternative, arguing that the release date should be based on 11 months from the first remand into custody on the first charge relating to the phones calls, 18 March 2015: see *Marino v The Chief Executive of the Department of Corrections* [2016] NZHC 459 [*Marino – High Court*] at [4]–[6].

¹⁶ *Marino – High Court*, above n 15.

¹⁷ *Taylor v Superintendent of Auckland Prison* [2003] 3 NZLR 752 (CA). His Honour was counsel for the prison superintendent.

¹⁸ The different regimes arising during the time-frame of the facts are described by William Young J: *Marino – Supreme Court*, above n 1, at [70]–[75].

¹⁹ *Taylor v Superintendent of Auckland Prison*, above n 17, at [4].

²⁰ Criminal Justice Act 1985, s 81(1), as amended in 1993.

The Court of Appeal held that this language meant that when a person was already in custody on a charge and then was remanded into custody on unrelated charges, the pre-trial detention period on the second set of charges commenced only when he or she was charged with the latter and did not count back to the remand on the first charges.²¹ The core reasoning was that “the proceedings” in question were those relating to the particular charge.²²

Simon France J in *Marino* held that the effect of *Taylor* was maintained under the Parole Act 2002:²³

Unless the new charge is truly an amended or substituted charge for the one on which the offender was originally charged, it does not come within s 91. Rather, it is governed by the provisions of s 90(2) which makes it plain the Chief Executive’s task, in relation to concurrent sentences, is to calculate the amount of pre-detention sentence applicable to *each* sentence and then to deduct only the amount determined in relation to that sentence.

Section 91, as noted above, is the provision that defines what counts as pre-trial detention. According to section 91(1), it is detention in prison (or various other places, such as a hospital):

... that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
(a) any charge on which the person was eventually convicted; or
(b) any other charge on which the person was originally arrested; or
(c) any charge that the person faced at any time between his or her arrest and before conviction.

This language is, it can be seen, substantively the same as was construed in *Taylor*, but merely put into a numbered list. The period within this definition is applied towards the sentence in accordance with s 90, also noted above and which in full provides:

90 Period spent in pre-sentence detention deemed to be time served

(1) For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender’s statutory release date and parole eligibility date, an offender is deemed to have been serving the sentence during any period that the offender has spent in presentence detention.

(2) When an offender is subject to 2 or more concurrent sentences,—

- (a) the amount of pre-sentence detention applicable to each sentence must be determined; and
- (b) the amount of pre-sentence detention that is deducted from each sentence must be the amount determined in relation to that sentence.

(3) When an offender is subject to 2 or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional sentence.

²¹ *Taylor v Superintendent of Auckland Prison*, above n 17, at [22].

²² At [14]. In *Marino*, William Young J noted that Mr Taylor did in fact receive credit towards the second sentence for the period from his remand into custody on the second charge, which amounted to several weeks: *Marino – Supreme Court*, above n 1, at [92].

²³ *Marino – High Court*, above n 15, at [15].

In essence, what Simon France J rejected was what he termed an “expansive reading of s 91(1)(a), (b) and (c)”,²⁴ namely that the “proceedings” in s 91(1) relate to any charge faced between arrest and sentence: he found that this had been rejected in *Taylor*, which indicated the need for a relationship between the charge and the subject matter of the sentence.

The Court of Appeal dismissed Mr Marino’s appeal.²⁵ It found that the key was the distinction drawn in the Parole Act 2002 between cumulative and concurrent sentences and that the legislation clearly required separate calculation of the release date for concurrent sentences, each of which was to be considered separately, as Simon France J had held. Mr Marino argued that to find him to be serving a single sentence of 22 months to which pre-sentence detention since the first remand into custody applied was (i) consistent with the totality principle in relation to sentencing and (ii) avoided the risk of different outcomes based on how a sentence was constructed or when the prosecution chose to lay a charge or whether a defendant had been on bail or in custody prior to sentence, which could entail arbitrary detention.²⁶

The Court of Appeal’s reasoning was that the Parole Act required that required pre-sentence detention be calculated for each concurrent sentence, unlike for cumulative sentences because statutorily they were combined into a notional single sentence (which was not done for concurrent sentences and so represented a legislative choice).²⁷ It commented that any potential arbitrariness could be addressed by the judge in sentencing²⁸ and that the legislative aim in relation to credit for pre-trial detention was only to cover detention on charges such as mentioned in s 91(1).²⁹

On this final point, the Court of Appeal does not explain how the language of s 91(1), and in particular s 91(1)(c), which expressly refers to any charge on anything, does not mean that any period of should *not* be counted, but it endorses a comment in *Maile v Manager, Mt Eden Correctional Facility*³⁰ that prisoners should not be able to escape punishment by making use of “completely unrelated pre-sentence detention”.³¹ This is no doubt also the core reasoning of *Taylor*, where there was an evident desire to ensure that the quirk of statutory language that gave him credit for

²⁴ *Marino – High Court*, above n 15, at [10]; see also [16].

²⁵ *Marino – Court of Appeal*, above n 9.

²⁶ At [13]–[14]. The points made were that cumulative sentences totaling 22 months would have a different result if the decision below were correct, that the effect of the police not charging the second phone call until June even though they knew about it in March was problematic, and that a person who received 22 months (however constructed) who had been on bail prior to sentence would serve 11 months.

²⁷ At [22]–[24]. The points made were that cumulative sentences totaling 22 months would have a different result if the decision below were correct, that the effect of the police not charging the second phone call until June even though they knew about it in March was problematic, and that a person who received 22 months (however constructed) who had been on bail prior to sentence would serve 11 months.

²⁸ At [26]–[27]. Of course, as noted, the sentencing judge seems to have understood that he was imposing a sentence that would run from the initial remand.

²⁹ At [22] and [25].

³⁰ *Maile v Manager, Mt Eden Correction Facility* [2012] NZAR 39 (HC).

³¹ *Marino – Court of Appeal*, above n 9, at [25].

361 days twice – ie the judge reduced the sentence and then he was given administrative credit, a fact which the government conceded – did not extend to three times that credit.³² However, the counter-arguments remain obvious, namely that this policy-based reasoning does not sit easily with the fact that s 91(1)(c) does not require that the detention in question be related to the charges on which the person was sentenced: it just has to occur whilst the proceedings are ongoing. Moreover, the focus on “escaping punishment” ignores the fact that the construction reached would mean that a defendant could not claim credit for time in detention only on an earlier unrelated charge that led to an acquittal.

This point, however, was not determinative on the facts: the key conclusion of the Court of Appeal was that each sentence was separate, such that the 11 months imposed in relation to the second telephone call ran from the date of his remand into custody on that charge, even though there had been a delay of many weeks in laying the charge. Implicitly, the Court found that the sentencing judge should have constructed the sentence differently to achieve the outcome he expected: this in turn would mean that Mr Marino’s counsel should have been fully familiar with the early release provisions to alert the judge to the fact that the sentence imposed would not have the effect the judge thought. This would probably also apply to the prosecution, given that objective advice on the effect of a sentence (a matter of law) should come from them as well.

C. The Supreme Court Ruling for Mr Marino

The Supreme Court allowed Mr Marino’s appeal. Glazebrook J, speaking for all but William Young J, opened with a point also made by the latter, namely that the effect of the timing of the second charge of attempting to pervert the course of justice in the context of a statutory construction of all 12 sentences as individual ones was that Mr Marino received no credit at all for the time already spent in custody, namely from 12 February to 19 June 2015.³³ Setting out such a stark fact in the opening chronology may be a precursor of support for the person adversely affected, in just the same way as referring to Mr Taylor as seeking to triple dip rather than being content with his good fortune in double credit set the course of the judgment against him.

So it turned out to be. For Glazebrook J, the key point was that s 91(1) provided for an aggregation of pre-trial detention during the proceedings, whatever the charges involved in that pre-trial detention:³⁴ there was, she noted, “no warrant in the language of s 91(1) for it to be calculated on a charge by charge basis”.³⁵ Further, the idea that there had to be an evaluation of whether there was detention for related or unrelated offending so that the latter could be excluded was simply not

³² See *Taylor v Superintendent of Auckland Prison*, above n 17, at [5], where reference is made to “triple dipping”.

³³ *Marino – Supreme Court*, above n 1, at [5] per Glazebrook J and [56] per William Young J.

³⁴ At [15]–[17].

³⁵ At [17].

justified on the statutory language.³⁶ The distinction between concurrent and cumulative sentences in relation to credit for pre-sentence detention on which the Court of Appeal had relied was found to be unwarranted: ss 90(2) and (3) did not detract from the generality of ss 90(1) and 91(1) but provided guidance on calculation.³⁷ Section 90(3) was designed to make clear that there could be no double counting in the case of cumulative sentences (which was implicit in light of them being a notional single term):³⁸ this prevented the argument made in *Taylor*. Section 90(2) reflected the fact that the release dates for concurrent sentences of different lengths would differ (as would other key dates), but this did not alter the fact that:³⁹

the pre-sentence detention on each charge will be the same (as long as the charges were ones faced during the proceedings leading to the conviction or pending sentence of the person).

This interpretive conclusion was said to be bolstered by s 92 of the Parole Act 2002. This requires the compilation of a record of:

- (a) the date on which a person is admitted to the detention place on detention ...; and
- (b) the total period during which the person is subsequently detained before sentence in that detention place, whether on the original charge or any other charge.

As such, it does not proceed on a charge by charge basis. Nor does it require a record of when a further charge is laid, or whether a sentence is cumulative or concurrent, which would be necessary if the Court of Appeal was correct.⁴⁰ Other factors identified to support the conclusion were:

- (i) the absence of any good policy reason to treat the counting of pre-trial detention differently in relation to cumulative and concurrent sentences;⁴¹
- (ii) the simplicity and certainty of a single approach, important in the context of sentence calculation;⁴²
- (iii) no greater anomalies arose under the approach suggested for Mr Marino than under the Court of Appeal approach;⁴³
- (iv) the result was the same as would have applied under the predecessor legislation and there was no indication of a desire to change the outcome when the legislation changed;⁴⁴
- (v) the Court of Appeal decision produced arbitrary results, since cumulative sentences or an earlier laying of a charge would produce an earlier release date.⁴⁵

³⁶ At [18]. It was also pointed out that cumulative sentences often reflected unrelated offending and yet became a notional single sentence to which from which all pre-sentence detention was deducted, which undermined any policy as to not deducting time served on an unrelated concurrent sentence: [26].

³⁷ At [19]–[21].

³⁸ At [20].

³⁹ At [21].

⁴⁰ At [22]–[23].

⁴¹ At [26].

⁴² At [27].

⁴³ At [28].

⁴⁴ At [29]–[31]. This was a point of difference with William Young J, as noted below.

The consequence of all this was “pre-sentence detention” as defined in s 91(1) is “detention during the whole of the court process or processes from the original remand in custody on any charge up to the imposition of a sentence (or sentences) of imprisonment”; and the effect of s 90 – and in particular, s 90(1), which is the core provision – is that the “entirety” of the pre-sentence detention:⁴⁶

... is deducted from each sentence or sentences of imprisonment imposed ... whether the sentence of imprisonment relates to a single charge or more than one, whether or not the sentence of imprisonment relates to the charge for which a person was originally arrested, whether or not sentences are imposed cumulatively or concurrently and whether or not the sentences are imposed at the same time or subsequently as long as any charges for which the sentence or sentences of imprisonment relate were faced after arrest and before conviction.

There is no formal overruling of the decision in *Taylor* on which reliance had been placed below, but the reasoning is clearly inconsistent with the application of the *Taylor* approach to the current statutory regime, and the express rejection of the need for detention in relation to “related” detention overturns the reasoning on which *Taylor* depended.

The outcome is that concurrent sentences are indeed separate sentences but the pre-sentence detention is aggregated and will be deducted from each sentence. The key and important dates will then be calculated; invariably, the longest of the concurrent sentences will be the one that controls the other key and important dates.

D. The Different Reasoning of William Young J and a Critique of it

The separate opinion by William Young J leads to the same outcome on the facts, and he would have granted a declaration as to Mr Marino having been entitled to be released on 12 January 2016;⁴⁷ he also opined that the legislation merited a review in light of ongoing anomalies.⁴⁸ His reasoning has some overlapping elements with that of Glazebrook J but also some significant differences, and it is much more complex. He started with contextual matters, noting that as the Sentencing Act 2002 and Parole Act 2002 were passed together, it is intended that they be a coherent whole⁴⁹ and that concurrent and cumulative sentences can be passed either on a single occasion or on separate occasions and are always bound by the totality principle, such that it should not matter how the sentence is structured.⁵⁰ This was a precursor to the important comment that the effect of the decision of the Court of Appeal is that “a great deal depends on chance”⁵¹ – such as whether a cumulative sentence is imposed or the date a charge is laid. This resulted in arbitrary detention

⁴⁵ At [32]–[34]. This was a point developed further by William Young J.

⁴⁶ At [24].

⁴⁷ At [118].

⁴⁸ At [117].

⁴⁹ At [43].

⁵⁰ At [44]–[46].

⁵¹ At [63].

within the meaning of s 22 of the New Zealand Bill of Rights 1990 and so brought into play the interpretive obligation to avoid this (s 6 of the NZBORA).

The complexity now arises. His Honour had described the statutory regimes, noting the choice they made between making the pre-sentence detention for the court or for the prison, and indicated that the legislative history of the Parole Act sections did not help to clarify their meaning in his view.⁵² He was, however, clear that on the version of the Criminal Justice Act 1985 that was in place before the Parole Act came into effect, described above in the discussion of *Taylor*, the full amount of pre-sentence detention on all charges would have been counted.⁵³ This flowed from being the most obvious reading of the language in the situation of Mr Marino, though he noted in this context that there was no equivalent then to s 90(2) of the Parole Act 2002 (ie that referring to concurrent sentences).⁵⁴ He also outlined the case law that arose in relation to pre-sentence detention under the prior and current legislation and commented that the issue of whether offending was “related” was a matter of nuance that was difficult for administrative officials, albeit that the legislation helped by allowed prisoners to seek a review.⁵⁵

He noted the approach adopted by Corrections (and upheld by the courts below) was to treat the calculation of pre-sentence detention under s 91(1) on a charge-by-charge basis; this could include detention on a charge that differed from that on which the person was convicted by reason of s 91(1)(b) and the reference to changes on which the person was originally arrested: His Honour described this to involve a related charge. He accepted that the approach set out in *Taylor* to the effect that this is limited to a holding charge or one that evolved into the final charge at the time of conviction and sentence was not the only meaning available because, as Glazebrook J for the majority holds, the language could convey only a temporal overlap rather than one looking to the substance of the charges.⁵⁶ Moreover, he noted that Mr Taylor’s “unattractive” attempt at double-counting – which he realistically accepted was relevant to the dismissal of his case – had been cut-off by the language of s 90(3), which allows only one deduction of time from a notional single sentence.⁵⁷ But he concluded that the *Taylor* reasoning should be upheld because it was also a tenable reading and had been applied for so long.⁵⁸

Having upheld the reasoning in *Taylor*, he found that it did not govern the facts for two reasons. First, the attempted perverting charges were related and so the proceedings commenced when he was arrested on the family violence charges (ie before the attempting to pervert offences had even occurred);⁵⁹ and, secondly, any

⁵² At [94].

⁵³ At [75]–[76].

⁵⁴ At [76] read together with [71].

⁵⁵ At [96]. The review provisions are in s 92 of the Parole Act 2002, the record-keeping section found important by Glazebrook J.

⁵⁶ At [102].

⁵⁷ At [103].

⁵⁸ At [104].

⁵⁹ At [107].

sentences that are imposed on a “single sentencing occasion” are covered by the statutory language.⁶⁰

Both these are difficult to sustain. In the first place, it may be very much a matter of chance as to whether matters are sentenced on one occasion: it may depend on such things as whether files relating to separate matters are consolidated.⁶¹ Secondly, the inherently contestable question of what is a “related” charge should not be implied into what should be a simple matter of calculation rather than evaluation by officials. In *Marino*, although there was a clear link in that the attempts to pervert the course of justice would not have occurred in the absence of the existing charges because it was in relation to those charges that he sought to persuade witnesses not to give evidence, they were also of a very different nature and so one could argue that the link was inadequate. Were the approach of William Young J the one to apply, it would invite questions as to how far it went. For example, if a person in custody sought to have drugs brought into prison because of their importance in that context, and so formed a conspiracy to that end, would that be related? It might well be that the two sets of charges went to trial and each involved co-defendants, so avoiding the opportunity for a single occasion for sentencing that would avoid the question.

His Honour also accepted that the referability test was difficult to reconcile with the requirement in s 90(2) to determine and deduct pre-sentence detention from each concurrent sentence. Rather than the explanation of Glazebrook J, namely that this was merely a calculation section relevant to parole eligibility and final release dates, William Young J was compelled to suggest that s 90(2) apparently required the separation of pre-sentence detention on a charge by charge basis even if the pre-sentence detention was consolidated in the way he suggested was applicable on the facts. For him, it was this literal interpretation that led to arbitrary detention (eg because it depended on such matters as the date a charge was laid) and meant that the interpretation of s 91(1) that he favoured was rendered ineffective.⁶² It was at this stage that he introduced the interpretive obligation under s 6 of the NZBORA to hold that an available meaning of s 90(2) was that all pre-sentence detention referable to any charge that led to the concurrent sentences was to be deducted from the sentence for each charge.⁶³

But, consistently with his view that the single sentencing occasion was a key feature, he added that there might be a different conclusion if concurrent sentences were imposed on separate occasions.⁶⁴ This might mean that had Mr Marino admitted the family violence charges and been sentenced on those, but denied the attempting to pervert charges and been convicted on those after a trial and sentenced to a concurrent sentence on a separate occasion, the result would be different. This would create a significant difference from the judge imposing a cumulative term

⁶⁰ At [106] and [108].

⁶¹ The assignment of legal aid counsel on a random basis for less serious offences may militate against this.

⁶² At [109]–[111].

⁶³ At [112]–[114].

⁶⁴ At [114(c)].

reduced to take account of the totality principle, since then there would be a single notional term and detention from the earliest would count.

In addition to these imponderables, there is a significant gap in the analysis of His Honour as he presents *Taylor* as being limited to what is now s 91(1)(b), whereas it also concerned with what is now s 91(1)(c).⁶⁵ As has been noted, the simple point is that this sub-section includes within pre-sentence detention that on any charge between arrest and sentence, with no mention of any need for it to be related to any detention on any other charge. How this rule as to what is pre-sentence detention interplays with the obligation in s 90 to take it into account is solved much more simply by Glazebrook J. Her Honour holds that s 90(1), the core provision, requires that all pre-sentence detention be deducted from “a sentence of imprisonment” to calculate the key dates in that sentence: in effect, the structure of the sentence is irrelevant, and the prison officials have a fairly simple dual inquiry of determining (i) the total length of the sentence being served and (ii) the amount of detention served on any matter between the first remand into custody prior to the date of sentence and the sentencing date.

One surprising feature of the decision is the failure to mention the principle of lenity, namely the idea that ambiguous penal provisions should be interpreted in a way that secures the least disadvantageous outcome for the defendant. That would have secured the same outcome for the majority and should have steered William Young J away from his convoluted reasoning to preserve *Taylor* given the tenable alternative approach.

E. Implications of the Decision

As was illustrated in the judgment of William Young J, the legislature has decided regularly to change the mechanism for the calculation of pre-sentence detention, and so one can expect that this will happen again. However, the call by His Honour for this to be done in light of the concerns he had is less compelling if the critique of his reasoning is correct. The reasoning of Glazebrook J for the majority leaves a situation that it easier to comprehend and, one would hope, administer.

The more major implication of the decision is illustrated by the fact that Mr Marino had been released before the Supreme Court decision, having served the additional 127 days in issue. Not surprisingly, he is now seeking damages, as are others who have been detained for longer than they should have been in light of the correct explanation of the law, using false imprisonment as the relevant tort. Corrections is, also understandably, arguing that they had no power to release other than when they did because *Taylor* governed their actions. A similar point has been argued in England and Wales in *R v Governor of Her Majesty's Prison Brockhill, ex parte Evans (No 2)*,⁶⁶ which involved a woman detained an additional 59 days on the basis of the

⁶⁵ William Young J merely mentions this sub-section in passing at [99]. In *Taylor*, its equivalent language is emphasised but side-lined because of the gloss of requiring that charges be somehow related: *Taylor v Superintendent of Auckland Prison*, above n 17.

⁶⁶ *R v Governor of Her Majesty's Prison Brockhill, ex parte Evans (No 2)* [2001] 2 AC 19 (HL).

prison governor correctly applying the law as it had been previously stated. Reflecting what has happened in *Marino*, this understanding was changed as a result of *R v Brockhill Prison, ex parte Evans*,⁶⁷ in which the Divisional Court overturned the previous sentence calculation decisions.

False imprisonment involves imprisonment that is not lawful: it is a matter of strict liability in the sense that it does not require fault, but the dispute in *Evans (No 2)* was whether the lawfulness of the detention was assessed by reference to the law as understood at the date of the detention or the law as understood at the time of the claim. When there has been a change in that understanding, the argument becomes one of whether the declaration that the law is to be understood differently is prospective only or retrospective (though limited in effect by limitation periods). The House of Lords determined that the choice between leaving uncompensated the prisoners who were the victims of the court's previous error and making the prison (ie the state) pay compensation for a detention they were blameless in enforcing was to be resolved in favour of the prisoners.

The argument as to what should happen in New Zealand came in front of Simon France J.⁶⁸ He ruled⁶⁹ that the proper approach was to regard the Supreme Court as having clarified what the law always was – the so-called declaratory theory as to the impact of judgments – and that there was no proper basis for an argument that the ruling was prospective only. Amongst his reasons were that the Chief Executive should have asked the Supreme Court to make clear that its ruling was prospective only if it wanted to avoid the normal, declaratory effect of a judgment.

This civil aspect of the case involved a second applicant: the flawed understanding and application of the law for more than a decade in the context of New Zealand's relatively high use of imprisonment⁷⁰ will no doubt mean that there are a significant number of claims, albeit that some will be time-barred.

⁶⁷ *R v Brockhill Prison, ex parte Evans* [1997] QB 443.

⁶⁸ This may be thought somewhat poetic, given that his argument for the government in *Taylor* is the root cause of the problem that is now being unravelled.

⁶⁹ *Marino v Chief Executive of the Department of Corrections* [2016] NZHC 3074.

⁷⁰ 210 per 100,000 of the population at the time of writing (compared to 162 in Australia, 145 in the UK, and 114 in Canada): figures from "World Prison Brief data" World Prison Brief <www.prisonstudies.org/world-prison-brief-data>.

BOOK REVIEW: D WILSON *GENETICS, CRIME AND JUSTICE* (EDWARD ELGAR, CHELTENHAM, 2015)

KRIS GLEDHILL*

The dominant motif in criminal law is that people make choices, and if a criminal act/omission is committed, punishment is justified as a desert for an improper choice or to deter future improper choices. This assumption of choice and therefore of control over behaviour is also the starting point for many aspects of the political and economic structure of the current world.

At the same time, it is relatively well established that many convicted people have not made fully rational choices. Hence the prevalence of mental disorder amongst prison inmates;¹ and the success of problem-solving courts, with their emphasis on finding solutions to allow people to manage the features of their lives that drive their actions. In other words, many people who are involved in the criminal justice system have constrained capacity to make choices.

Indeed, some have questioned the idea that humans as a whole — not just those in criminal settings — engage in rational behaviour. Instead, they posit that the concept of decision-making through cost-benefit analyses is a rationalisation. An alternative explanation is that behaviour is a more primal process whereby most actions are the product of drives and other factors that operate instead of rational planning. Writing in 1996, George Loewenstein concluded that “there is little evidence beyond fallible introspection supporting the standard decision-theoretic assumption of complete volitional control of behavior”.²

That in turn leads to various questions, ranging from the high-level questions of the propriety of the system of crime and punishment that is in operation; down to the more pragmatic questions of how to use the evidence of constrained choices in the context of the current criminal justice system. Debra Wilson’s informative text explores both the normative and practical questions, focussing on one of the developing areas of research as to what might be a significant causative factor in criminal behaviour, namely genetic predispositions. Importantly and usefully, the book also collates a wealth of material from scientific literature and organises it in a digestible fashion.

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¹ It has recently been noted that 91% of prisoners currently in New Zealand prisons have had either a mental disorder or a substance abuse disorder at some stage in their lives, and for 62% (and 75% of female prisoners) there was such a disorder within the last 12 months of the survey: D Indig, C Gear and K Wilhelm *Comorbid Substance Use Disorders and Mental Health Disorders among New Zealand Prisoners* (New Zealand Department of Corrections, Wellington, 2016). A study published in 1998 indicated that 84% of prisoners (based on a study at Wanganui Prison) had received a traumatic brain injury during their lives: TV Barnfield and JM Leathem “Incidence and Outcomes of Traumatic Brain Injury and Substance Abuse in a New Zealand Prison Population” (1998) 12 *Brain Injury* 455–466.

² G Loewenstein “Out of Control: Visceral Influences on Behavior” (1996) 65 *Organizational Behavior and Human Decision Processes* 272 at 276.

After a brief context-setting history of the use made of genetic arguments as to behaviour being conditioned, chapter 3 discusses the use of genetic testing in criminal investigations, particularly in the form of DNA collection and retention, and the ethical issues arising. This sets the background to the main purpose of the book, which starts in chapter 4 with an outline of the growing body of research indicating a genetic marker that predisposes individuals to heightened levels of aggression. Importantly, science suggests that the genetic markers interact with various environmental factors. There is, it is worth noting, a further field developing, namely epigenetics, which traces the interaction between “nature and nurture” factors in explaining conduct and suggests that genetic markers may be modified by adverse circumstances.

The summary of the science and the wider issues around its use leads to the comprehensive discussion in chapter 5 of arguments that have been deployed in criminal litigation, primarily in the USA, as to the presence of a genetic component that may explain (and even excuse) behaviour, or at least provide a sensible line of mitigation. As these real cases demonstrate, lawyers have sought to introduce the science within the existing criminal justice structure.

Chapter 6 then turns to the wider questions of the very nature of the criminal justice system, and explores whether the evidence of genetic predispositions should cause us to reformulate our approach to punishment. This involves posing the question of whether the criminal justice system should be based on evidence as to how people operate rather than our theory of the rational decision-maker; whether the philosophical concept of free will is so dominant as a legal concept that the science should not make a difference; or whether there is some middle ground.

Dr Wilson calmly suggests that the current system is sufficiently flexible to be able to take into account the developing science. However she proceeds to outline the ethical issues that are likely to arise if the scientific evidence becomes strong enough to suggest that we need to move towards a system that recognises the importance of a differential approach to those whose genetic make-up leads to different reactions on their part.

This is a book that will be of great interest to those who think about criminal justice issues, whether from more liberal or more public-protection positions. The former will be interested to explain behaviour in a way that suggests a person has not simply revealed a choice for anti-social behaviour. Those who focus on protection may be interested more in the potential to identify risk and the possibility of preventive action. Common to both should be a realisation that science can help to explain why a minority of people in society seem less able to avoid engaging in criminal conduct.

In addition to those who consider these issues from a policy perspective, there is a great deal in this book that is of value to those whose main interest is in making use of the criminal justice system as it currently exists. For example, if a defendant presents with a repeated tendency to engage in violent conduct despite the repeated use of typical criminal justice responses, namely sentences of increasing

severity (including, perhaps, the application of the three strikes regime), it may be that there should be an investigation into why the defendant is not responding in a rational way. Expert evidence relating to mental disorder of one form or another may provide relevant evidence of the need to approach the management of the defendant in a different way. Similarly, as Dr Wilson highlights, there may be influences in the genetic make-up of the defendant that should be investigated to provide a rationale for seeking a different response to the conduct.

In short, this book provides a readable and insightful introduction to the intersection between criminal law and science. These insights are already being used in some contexts and may form a significant backdrop to discussions as to how responses to criminal conduct should reflect our state of knowledge about the drivers of human behaviour.