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**IS THE FIXED BALL IN OUR COURTS?
THE CRIMINALISATION OF MATCH-FIXING
UNDER THE CRIMES (MATCH-FIXING)
AMENDMENT ACT 2014**

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Abstract

In sport, match-fixing occurs when the result or a particular part of a match is manipulated, removing the uncertainty integral to sporting contests. Match-fixing was criminalised by the New Zealand legislature in the Crimes (Match-Fixing) Amendment Act 2014. This amendment introduces the Crimes Act 1961, s 240A, which expands the definition of 'deception' under s 240 to include match-fixing. The amendment legislation was enacted with a number of laudable aims, primarily focused on protecting the integrity of sport, which this paper believes justified the criminalisation of match-fixing. Such criminalisation can be seen as consistent with other behaviours criminalised in the sporting sphere. However, a number of lacunas discussed in the paper demonstrate that the legislation was not comprehensive in achieving the aims that justified the criminalisation of match-fixing. The paper therefore recommends expanding the legislation, influenced particularly by the specificity of equivalent Australian legislation, and drafts a more comprehensive match-fixing provision that aspires to both remedy the lacunas of the Crimes (Match-Fixing) Amendment Act 2014 and better reflect the legislature's aims in criminalising match-fixing.

Key words: match-fixing; Crimes (Match-Fixing) Amendment Act 2014; integrity of sport; criminalisation; sports law

Table of Contents

<i>I Introduction</i>	4
<i>II Background</i>	5
A <i>Match-Fixing: A Definition</i>	5
B <i>The New Zealand Situation before the 2014 Act</i>	6
<i>III Criminalisation of Match-Fixing is Justified</i>	7
A <i>Primary Harm: Defrauding of Betters</i>	8
B <i>Secondary Harm: Defeats the Integrity of Sport</i>	8
1 <i>No longer an uncertain event</i>	9
2 <i>Undermining the status of sportspeople as role models</i>	10
C <i>Flow-on Effects from Loss of the Integrity of Sport</i>	11
1 <i>Effect on growth and development of sport</i>	11
2 <i>Societal benefits of sport</i>	11
3 <i>Effect on reputation</i>	12
D <i>Secondary Harm: Economic Loss</i>	13
E <i>Conclusion on Justifications</i>	14
<i>IV The 2014 Act</i>	14
<i>V Does the Legislation Comprehensively Accomplish the Legislature’s Aims in Criminalising Match-Fixing?</i>	16
A <i>Acts Not Covered by the Legislation that should be Criminalised</i>	17
1 <i>Aaron Lloyd’s loophole</i>	17
2 <i>Sportsperson lacking intent</i>	18
3 <i>Attempted match-fixing</i>	19
4 <i>Facilitating match-fixing</i>	20
5 <i>Concealing match-fixing conduct</i>	21
6 <i>Use of corrupt conduct information for betting purposes</i>	22
7 <i>Jurisdictional issues</i>	23
B <i>Acts Not Covered by the Legislation that should be Criminalised Elsewhere</i>	25
1 <i>Use of inside information for betting purposes</i>	25
2 <i>Court siding</i>	26
C <i>Acts Not Covered by the Legislation that should not be Criminalised</i>	27
1 <i>Tactical sporting reasons and underperformance</i>	27
2 <i>Companies owning multiple sports teams</i>	28
3 <i>Failing to report match-fixing approaches</i>	29
<i>VI Recommendation to Expand Legislation</i>	29
A <i>New Legislation</i>	30
B <i>The Australian Approach</i>	31
C <i>To Obtain a Material Benefit</i>	33
<i>VII Conclusion</i>	34
 <i>Appendix 1 – Draft Match-Fixing Legislation</i>	36
 <i>Bibliography</i>	39

I Introduction

Sport holds a special place within society. It allows spectators to witness human beings test their personal limits as they push themselves to succeed. Whether it is the All Blacks or school netball, sport directly touches and influences the lives of almost all New Zealanders. Accordingly, threats to the very lifeblood of sport must be eradicated. Match-fixing is one such threat.

Match-fixing undermines the sporting ideals of integrity and fair competition, by deliberately manipulating results for betting outcomes. The issue is not new, with examples in English cricket in the 18th and 19th centuries and the 1919 baseball World Series.¹ However, match-fixing has become more prolific today due to the expansion of sports betting through technology and the Internet.² It is a blight on sport,³ and needs to be penalised to safeguard sport's integrity and high standing within society. With this in mind, the New Zealand legislature enacted the Crimes (Match-Fixing) Amendment Act 2014 (the 2014 Act), which criminalised match-fixing in New Zealand. The Act introduced s 240A into the Crimes Act 1961, which applied the s 240 offence of deception to the match-fixing context.⁴

Section 240A is not an offence in itself. The section clarifies that 'deception' under s 240 includes those who have fixed a sporting event. An offender can be punished with a term of imprisonment,⁵ with a maximum of 7 years imprisonment if the loss or the value of what is obtained exceeds \$1000.⁶

New Zealand was justified in criminalising match-fixing, as this decision attempted to ameliorate potential harm to sporting integrity and is consistent with other criminalisation within the sporting sphere. However, the legislation as enacted is not

¹ David Forrest, Ian McHale and Kevin McAuley "“Say It Ain't So”: Betting-Related Malpractice in Sport" (2008) 3 International Journal of Sport Finance 156 at 157; Simon Gardiner "Match Fixing in Sport: Recent Developments" (2010) 18(2) SLJ 28 at 28.

² Gardiner, above n 1, at 29; Dawn Aquilina and Angelo Chetcuti "Match-fixing: the case of Malta" (2014) 6(1) International Journal of Sport Policy and Politics 107 at 110.

³ Tim Castle "Corruption in International Cricket" in Elizabeth Toomey (ed) *Keeping the Score - Essays in Law and Sport* (University of Canterbury, Christchurch, 2005) at 152.

⁴ Crimes (Match-Fixing) Amendment Act 2014, s 4; Crimes Act 1961, s 240A.

⁵ *Laws of New Zealand Criminal Law* (online ed) at [260].

⁶ Crimes Act 1961, s 241.

broad enough to encompass all match-fixing behaviour that threatens the aims the legislature had in criminalising match-fixing, leaving a number of lacunas. More comprehensive legislation is needed to meet the legislature's aims of criminalisation.

II Background

Before analysing the enacted legislation, knowledge of what match-fixing is and how it was previously approached in New Zealand is first required to understand how far match-fixing's criminalisation currently extends.

A Match-Fixing: A Definition

There is no singular definition for match-fixing. The New Zealand Policy on Sports Match-Fixing and Related Corruption has previously defined 'match-fixing',⁷ as has the International Olympic Committee and United Nations Office on Drug and Crime.⁸

Incorporating elements of these two definitions to reflect both New Zealand and international views, this paper defines 'match-fixing' as: improperly manipulating the outcome or any of the particular parts of a sports match, game, race or event, removing elements of uncertainty, for the material or personal benefit of any person. This behaviour includes fixing a match as a whole; as well as 'spot-fixing', which is the fixing of a match's particular parts.⁹ Such conduct may be motivated by either obtaining a material benefit, such as financial reward achieved through sports betting, or securing a future team advantage, such as greater playoff chances.¹⁰

⁷ "New Zealand Policy on Sports Match-Fixing and Related Corruption" *Sport New Zealand* (April 2014) at 2. This defined match-fixing as: "improperly influencing the overall result or any part ('spot-fixing') of a sports match, game, race or event (generically referred to as a 'match') for financial or personal benefit, rather than for tactical sporting reasons."

⁸ International Olympic Committee and United Nations Office on Drugs and Crime *Criminalization Approaches to Combat Match-fixing and Illegal/Irregular Betting: A Global Perspective* (Laussane/Vienna, 2013) at 18. This defined match-fixing as: "the arrangement on an irregular alteration of the course or the result of a sporting competition or any of its particular events (e.g. matches, races etc.) in order to remove all or part of the uncertainty normally associated with a competition."

⁹ For example, bowling a no-ball in cricket.

¹⁰ Pip Allan and Hamish McIntosh "Match-fixing: coming to a stadium near you" *NZ Lawyer* (New Zealand, 12 July 2013) at 18.

B The New Zealand Situation before the 2014 Act

Prior to the 2014 Act, the regulation of match-fixing in New Zealand was a haphazard jumble of uncertain legislative provisions and non-legislative means. There was no definitive criminal sanction in place.

The Crimes Act 1961, s 240 (obtaining by deception or causing loss by deception) was potentially wide enough to catch match-fixing conduct;¹¹ however, other legislative provisions in the Crimes Act,¹² the Secret Commissions Act 1910,¹³ and Gambling Act 2003¹⁴ were unlikely to apply. Prosecuting under such provisions endeavours to shoehorn match-fixing into old legislation.

The New Zealand Policy on Sports Match-fixing and Related Corruption, introduced in April 2014, sets out rules governing how individual sporting bodies will prevent and respond to match-fixing.¹⁵ The 2014 Act was introduced to work in synchronization with the Policy to enable strengthened protections against match-fixing.¹⁶

National sporting organisations have codes of conduct that apply to players, coaches and officials, which include rules against corruption and manipulating matches.¹⁷ This can lead to non-criminal punishment by the national sporting organisations if breached.

¹¹ International Olympic Committee and United Nations Office on Drugs and Crime, above n 8, at 139.

¹² Crimes Act 1961, s 105. Section 105 (corruption and bribery of official) was unlikely to cover sportspeople, as is limited to public officials, not extending to sportspeople.

¹³ Secret Commission Act 1910, ss 3-4. These sections may have covered some match-fixing offences. However, where no corrupt gift is offered – for example, where a player benefits from betting on a match he or she has match-fixed – would not be covered.

¹⁴ Gambling Act 2003, s 9(2)(a)-(b), s 19(1)(a). Such statutory provisions would not extend to match-fixing, as the specified behaviour does not include match-fixing.

¹⁵ “New Zealand Policy on Sports Match-Fixing and Related Corruption”, above n 7, at 8-11.

¹⁶ (30 July 2014) 700 NZPD 19760 per Hon Judith Collins.

¹⁷ For example, see “New Zealand Cricket Code of Conduct” *New Zealand Cricket* (2014) at 1.2.9; “New Zealand Football Code of Conduct” *New Zealand Football* (February 2007) at 1.

The introduction of the 2014 Act was designed to clarify the legal position of match-fixing in New Zealand in this uncertain legislative and regulatory landscape.¹⁸

III Criminalisation of Match-Fixing is Justified

In criminalising a specific behaviour, the legislature declares that an action is morally wrongful, and demonstrates willingness to impose a punishment proportionate to the offence.¹⁹ Criminalising behaviour is severe, imposing the stigma of criminality and a potential loss of liberty. This may seem questionable in the realm of sport.

However, the law is the means by which society determines the rights of individuals in all facets of life, which includes sport.²⁰ Sport without the Rule of Law becomes “chaos”.²¹ The criminal law has already been used to regulate sporting behaviour, as criminal sanctions work as a deterrent against unacceptable behaviour in sport,²² such as non-consensual sporting violence.

In criminalising match-fixing, the New Zealand legislature sought to eradicate a number of primary and secondary harms. Under J. S. Mill’s Harm Principle, the “only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”.²³ Feinberg defines ‘harm’ as “those states of set-back interest that are the consequence of wrongful acts or omissions by others”.²⁴ A harm may be a primary harm, involving direct damage to physical integrity or property,²⁵ or a secondary harm, flowing on from a primary

¹⁸ Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA240A.01]; Laura Ashworth “Because match-fixing just ain’t cricket” (9 May 2014) Chapman Tripp Brief Counsel <<http://www.chapmantripp.com/publications/Pages/Because-match-fixing-just-ain't-cricket.aspx>> at 1.

¹⁹ A P Simester and Andreas von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, Oxford, 2011) at 6.

²⁰ Deborah Healey *Sport and the Law* (3rd ed, University of New South Wales Press, Sydney, 2005) at 1.

²¹ Edward Grayson “Sport and the Law: A Return to Corinthian Values?” (2011) 19 SATLJ 53 at 53.

²² Healey, above n 20, at 137.

²³ John Stuart Mill *On Liberty* (Bedford/St Martins, Boston, 2008) at 27.

²⁴ Joel Feinberg *The Moral Limits of the Criminal Law*, vol. 1: *Harm to Others* (Oxford University Press, New York, 1984) at 215.

²⁵ Simester and von Hirsch, above n 19, at 44.

harm.²⁶ By addressing various harms caused by match-fixing, the 2014 Act was justified in criminalising match-fixing.

The aims in preventing such harms are also consistent with sporting behaviour already criminalised, further justifying the criminalisation of match-fixing.

A Primary Harm: Defrauding of Bettors

The legislature's objectives in enacting the 2014 Act were predominantly to prevent secondary harms. However, there is a primary harm that was addressed: the defrauding of bettors.

Those who have betted on a sporting event are defrauded of their money if match-fixing occurs, as the odds on which they bet do not reflect the actual probability of the events.²⁷ For example, if a match's result is fixed, it may be impossible for a better to win her bet. They are betting on one set of odds, when in reality the event they are betting on is subject to a different set of odds due to the match-fixing. Thus, the better is defrauded of their money, suffering financial loss: this is a primary harm.

B Secondary Harm: Defeats the Integrity of Sport

Match-fixing threatens the integrity of New Zealand sport. This secondary harm was a key focus of the New Zealand legislature in enacting the 2014 Act, which was "designed to protect the integrity of New Zealand sport".²⁸

The importance of sporting integrity is seen in the Court of Arbitration for Sport's (CAS) decision in *Oriekhov v UEFA*.²⁹ Oriekhov, a football referee, was approached to fix a match but refused. However, Oriekhov failed to report the match-fixing approach to UEFA. Despite not match-fixing himself, because the core of sport is that

²⁶ Simester and von Hirsch, above n 19, at 47.

²⁷ (27 November 2014) 702 NZPD 937 per Kevin Hague MP; (4 December 2014) 702 NZPD 1155 per Kevin Hague MP.

²⁸ (30 July 2014) 700 NZPD 19760 per Hon Judith Collins.

²⁹ *Oriekhov v UEFA* CAS 2010/A/2172.

competition is fair and the result is unpredictable,³⁰ Oriekhov’s failure to report endangered the “very essence of football, which relies on matches taking place in a spirit of loyalty, integrity and sportsmanship”.³¹ The CAS upheld his life ban from footballing activities.

The integrity of sport is threatened as match-fixing eradicates uncertainty and undermines the status of sport within society.

1 No longer an uncertain event

Corruption is the complete antithesis to the way in which New Zealanders view sport. We love sport because of its honest content, with both teams doing their very best to win. Match-fixing denies us this honest contest by pre-determining aspects of the match so that betting returns can be made.

*Hon. Dr. Jonathan Coleman*³²

Sport’s unpredictability is one of its *sine qua non* features.³³ Sport is at its best when the competitors are playing to the best of their abilities and pushing their bodies and skill to the limit. The attraction of sport lies in the thrill and unpredictability of sporting competition.³⁴ Match-fixing damages this integrity, as it removes uncertainty and genuineness from the competition. The spirit of “may the best team win” no longer exists.³⁵ The sporting audience is denied an honest contest:³⁶ the match becomes almost scripted, like professional wrestling. Fixed sport is no longer the unpredictable spectacle it once was. It is a betrayal by the match-fixers to all the loyal spectators.³⁷

³⁰ *Oriekhov*, above n 29, at [45].

³¹ At 7.

³² (4 December 2014) 702 NZPD 1155 per Hon Dr. Jonathan Coleman.

³³ Thalia Diathesopoulou and Antoine Duval “The CAS jurisprudence on match-fixing in football: What can we learn from the Turkish cases? – Part 1” (23 September 2014) *Asser International Sports Law Blog* <<http://www.asser.nl/SportsLaw/Blog/post/the-cas-jurisprudence-on-match-fixing-in-football-what-can-we-learn-from-the-turkish-cases-part-1-by-thalia-diathesopoulou>>.

³⁴ International Olympic Committee and United Nations Office on Drugs and Crime, above n 8, at 13; Dylan Cleaver “Cricket: Match-fixing law welcome but should go further: lawyer” *The New Zealand Herald* (online ed, New Zealand, 18 December 2014).

³⁵ (27 November 2014) 702 NZPD 937 per Kanwaljit Singh Bakshi MP.

³⁶ (4 December 2014) 702 NZPD 1155 per Hon Dr. Jonathan Coleman.

³⁷ *R v Amir and Butt* [2011] EWCA Crim 2914 at [32].

This justification aligns with preventing doping in sport. Athletic competition is based on athletes pushing their bodies to their natural limits, and thus using artificial methods to achieve results defeats sporting integrity.³⁸ It also detracts from a level playing field, where all competitors have a fair chance of success.³⁹ Despite this, doping is not a criminal act in New Zealand. Unless a prohibited substance listed on the World Anti-Doping Agency's *The Prohibited List* is also criminalised under the Misuse of Drugs Act 1975,⁴⁰ doping will not be criminal. This raises questions as to whether criminalising match-fixing was too extreme for the aims the legislature hoped to achieve, or doping should also be criminalised to maintain consistency. Arguably, doping should also be criminalised, due to its similarly significant threat to sporting integrity.

2 *Undermining the status of sportspeople as role models*

Sportspeople are role models. Children idolise the manner in which sportspeople compete, their determination and sportsmanship, the integrity of competition, and how athletes strive for excellence.⁴¹ Match-fixing undermines this.

If sportspeople fix matches and fail to perform to the best of their ability, they let down those looking up to them. They are not performing with integrity. They can no longer provide a positive role model for children.⁴² Rather, under Kaplan's secondary harm of modeling,⁴³ children – and society generally – are provided with negative role models to emulate; or, potentially of greater detriment, they will no longer participate in the sports of their 'heroes'.

³⁸ David Thorpe and others *Sports Law* (2nd ed, Oxford University Press, South Melbourne, 2013) at 320.

³⁹ Thorpe, above n 38, at 319; Barry Houlihan *Dying to Win* (2nd ed, Council of Europe Publishing, Strassbourg, 2002) at 7.

⁴⁰ Compare "The 2015 Prohibited List – International Standard" *World Anti-Doping Agency* (20 September 2014); Misuse of Drugs Act 1975, schs 1-4.

⁴¹ Houlihan, above n 39, at 7.

⁴² (30 July 2014) 700 NZPD 19760 per Alfred Ngaro MP.

⁴³ John Kaplan "The Role of the Law in Drug Control" (1972) 1971 Duke LJ 1065 at 1067.

This is similar to the justifications for criminalising non-consensual violence in sport, which creates a negative example for children and the general audience.⁴⁴ Some sporting actions are “so violent” that no participants could impliedly consent to them, and are criminal.⁴⁵ For example, in *R v Tevaga*,⁴⁶ a jaw-breaking punch thrown during a rugby match was held to be criminal, as the defendant delivered a running punch more likely to injure than other assaults delivered in a rugby melee.⁴⁷ Such violence does not set a good role model for young sportspeople who “look to the professionals for guidance and example”.⁴⁸

C Flow-on Effects from Loss of the Integrity of Sport

A loss of sporting integrity flows on to cause other significant secondary harms.

1 Effect on growth and development of sport

Growth and development of sport in New Zealand is hindered if sporting integrity is lost. If the sporting audience believes a competition is not a true reflection of the abilities of the competitors, they will likely choose not to watch it.⁴⁹ Without the support of the public, sport will falter in its growth and development within New Zealand.⁵⁰

2 Societal benefits of sport

If sport is no longer seen as holding integrity, the positive benefits that society gains from sport will decline, with participation in and spectatorship of sport lessening due to a lack of belief in the genuineness of sporting competition.

⁴⁴ *R v Maki* [1970] 14 DLR 3d 164 at 167; “Consent in Criminal Law: Violence in Sports” (1976) 75 Michigan Law Review 149 at 174.

⁴⁵ *R v Cey* [1989] 5 W.W.R. 169, 48 C.C.C. (3d) 480, 75 Sask. R. 53 at [25], cited with approval in *R v Ciccarelli* (1989) 54 CCC (3d) 121.

⁴⁶ *R v Tevaga* [1991] 1 NZLR 296 (CA).

⁴⁷ At 297.

⁴⁸ *R v Maki*, above n 44, at 167; “Consent in Criminal Law: Violence in Sports”, above n 44, at 174.

⁴⁹ Allan and McIntosh, above n 10, at 19.

⁵⁰ (30 July 2014) 700 NZPD 19760 per Rt Hon Winston Peters.

Such benefits that may be lost include: sport's entertainment value;⁵¹ health and fitness benefits,⁵² particularly for children;⁵³ the development of life skills, including teamwork,⁵⁴ recognition of hard work,⁵⁵ and building personal character;⁵⁶ and the development of a sense of national identity, pride and belonging,⁵⁷ from teams such as the All Blacks.

3 *Effect on reputation*

Match-fixing can damage an individual's reputation, as Bean J stated in *Cairns v Modi*: an allegation of match-fixing "goes to the core attributes of his personality and, if true, entirely destroys his reputation for integrity".⁵⁸

More importantly, the legislature passed the 2014 Act to protect New Zealand's reputation. New Zealand prides itself on being corruption free,⁵⁹ and has a strong sporting reputation as being "uncompromising but fair competitors".⁶⁰ Match-fixing's threat to sporting integrity has the potential to compromise this reputation and severely damage New Zealand in the eyes of the international sporting community.⁶¹ This could go further and affect our strong international business reputation as a non-corrupt country.⁶² The New Zealand legislature feared such damage to our hard-earned reputation,⁶³ and thus aimed to prevent it through the 2014 Act.

⁵¹ (4 December 2014) 702 NZPD 1155 per Kevin Hague MP.

⁵² Houlihan, above n 39, at 29.

⁵³ (2 December 2014) 702 NZPD 986 per Louisa Wall MP.

⁵⁴ (30 July 2014) 700 NZPD 19760 per Louisa Wall MP.

⁵⁵ (2 December 2014) 702 NZPD 986 per Louisa Wall MP.

⁵⁶ (2 December 2014) 702 NZPD 986 per Louisa Wall MP.

⁵⁷ (27 November 2014) 702 NZPD 937 per Kevin Hague MP.

⁵⁸ *Cairns v Modi* [2012] EWHC 756 (QB) at [121].

⁵⁹ (27 November 2014) 702 NZPD 937 per Jacinda Ardern MP.

⁶⁰ "New Zealand Policy on Sports Match-Fixing and Related Corruption", above n 7, at 1.

⁶¹ See also Erin Gardner Schenk "Betting on Bowlers: This Just Isn't Cricket" (2014-2015) 43 *Denv.J.Int'l L.& Pol'y* 91, which discusses fears of match-fixing damaging India's sporting reputation.

⁶² Georgina Bond "Match-fixing threat needs attention – sports lawyer" *The National Business Review* (online ed, New Zealand, 5 August 2013).

⁶³ (27 November 2014) 702 NZPD 937 per Meka Whaitiri MP; (2 December 2014) 702 NZPD 986 per Hon Phil Goff.

D Secondary Harm: Economic Loss

A further secondary harm of match-fixing is economic loss. The New Zealand legislature was motivated by such economic incentives in enacting the 2014 Act.

Sports contributes approximately \$5.2 billion to the New Zealand economy annually, or 2.8% of GDP.⁶⁴ If the integrity of sport is lost, spectators will spend less on sport, and this figure will decline. Corporate sponsors and broadcasters are less likely to continue to support sporting codes, leading to greater losses.⁶⁵

Sports betting also has significant economic benefit to New Zealand. The Racing Board is a statutory body,⁶⁶ and operates sports betting in New Zealand. Of the revenue made from sports betting, a totalisator duty of 4% of betting profits,⁶⁷ as well as goods and services tax,⁶⁸ is payable to the Commissioner of Inland Revenue. The Racing Board must pay out a portion of its revenue to national sporting organisations,⁶⁹ which in the 2013/2014 financial year equaled \$5 million.⁷⁰ Such economic benefits to both the Crown and national sporting organisations would decline if the integrity of sport was compromised through match-fixing, as punters would be less likely to participate in sports betting due to a lack of belief that they were betting on a fair match. The Racing Board believes that if their customers no longer trust the integrity of sport, their product will be compromised and negatively impact on both their business and New Zealand.⁷¹ The economic benefits to the economy and sports funding would decline.⁷²

⁶⁴ Paul Dalziel “The Economic and Social Value of Sport and Recreation to New Zealand: An Overview” *Lincoln University* (Wellington, September 2011) at 47.

⁶⁵ Bond, above n 62.

⁶⁶ Racing Act 2003, s 7.

⁶⁷ Racing Act 2003, s 57(1)(c); Gambling Duties Act 1971, s 4(1).

⁶⁸ Racing Act 2003, s 57(1)(b).

⁶⁹ Racing Act 2003, s 57(1)(d).

⁷⁰ “New Zealand Racing Board Annual Report 2014” *New Zealand Racing Board* (2014) at 5.

⁷¹ New Zealand Racing Board “Submission to the Law and Order Committee on the Crimes (Match-fixing) Amendment Bill 2014” at 2.

⁷² Allan and McIntosh, above n 10, at 19; Bond, above n 62.

E Conclusion on Justifications

The New Zealand legislature had a number of laudable aims in enacting the 2014 Act. In essence, the Act was intended to protect the integrity of sport, as a number of detrimental secondary harms flow on from the loss of this integrity.

Sporting integrity is a major issue, and if it is threatened, sport as a whole is threatened. This would lead to a number of negative secondary harms, which the legislature should prevent under the Harm Principle. Thus, as the 2014 Act aimed to prevent these harms, criminalising match-fixing is justified.

IV The 2014 Act

The Crimes (Match-Fixing) Amendment Act 2014, as enacted, inserted into the Crimes Act 1961:⁷³

240A Application of section 240 to match-fixing

(1) For the purposes of section 240, deception includes any act or omission that is done or omitted with intent to influence a betting outcome of an activity of a kind to which subsection (2) applies by manipulating—

- (a) the overall result of the activity; or
- (b) any event within the activity.

(2) This subsection applies to activities of the following kinds:

- (a) sporting competitions, games, matches, races, and rallies involving human participants (whether or not they also involve equipment, horses, vehicles, or vessels);
- (b) dog races.

(3) This section does not limit or affect the generality of section 240.

⁷³ Crimes Act 1961, s 240A.

Section 240A is very general, attempting to cast a wide net to catch as many possible match-fixing offences as possible without defining specific offences.

Match-fixing as deception requires two main elements. Firstly, there must be manipulation, done by an act or omission, of the overall result of or any event within the activity.⁷⁴ This encompasses both match-fixing and spot-fixing. What “manipulating” includes is unclear. *Adams on Criminal Law* reads ‘manipulation’ widely as encompassing “any action which, by whatever means, surreptitiously affects the outcome of the event or an event within it”, including both direct and indirect actions.⁷⁵ This suggests match-fixing is currently a result crime: it requires that the event *is* surreptitiously affected, and thus excludes unsuccessful attempts to match-fix.

Secondly, the section requires a specific mens rea standard of intention, with the act or omission having to have been done with “intent to influence a betting outcome of an activity of the kind to which subsection (2) applies”.⁷⁶ What turns an activity under subsection (2) into something “sporting” is not defined. The generality of the section suggests “sporting” can be read widely, but the extent of this term would require judicial interpretation.

Once s 240A is satisfied, the defendant will have to satisfy the requirements for either obtaining by deception or causing loss by deception under s 240 to be liable for an offence.⁷⁷

It has been suggested that a sportsperson blackmailed into match-fixing would act with intent to avoid embarrassment or protect their marriage rather than to influence a betting outcome,⁷⁸ thus lacking the requisite mens rea for liability. However, this refers to motive rather than intent. Thus, blackmailed match-fixers would be liable under the current legislation.

⁷⁴ Crimes Act 1961, s 240A(1)(a)-(b).

⁷⁵ Robertson (ed), above n 18, at [CA240A.02].

⁷⁶ Crimes Act 1961, s 240A(1).

⁷⁷ Crimes Act 1961, s 240.

⁷⁸ New Zealand Racing Board, above n 71, at 2.

V Does the Legislation Comprehensively Accomplish the Legislature's Aims in Criminalising Match-Fixing?

The 2014 Act is a short, generalised provision that is narrow in its scope, focusing on the most condemnable cases of match-fixing. Arguably, the legislature deliberately left the scope narrow. The harms seeking to be addressed by the criminalisation of match-fixing are primarily secondary harms, which can extend beyond the ordinary scope of the criminal law, and hence legislating to prevent such harms would run contrary to the principle of minimum criminalisation.⁷⁹ Perhaps the legislature believed national sporting organisations were better placed to address behaviour falling outside the legislation. However, while arguable, this is not reflected in the Hansard debates, which instead seem to insist the reason for the legislation's limited scope was time constraints.

The 2014 Act was rushed through the legislative process, with a shortened Select Committee.⁸⁰ This was due to the fast-approaching ICC Cricket World Cup 2015 and the FIFA Under-20 World Cup 2015 – despite these being confirmed years in advance. In the Bill's readings in Parliament, Kevin Hague MP commented that it was a “very brief Bill” that had been “relatively and unnecessarily rushed”, which meant that the Bill would only make “some small contribution” towards reducing match-fixing.⁸¹

Like Mr Hague, others believed the current legislation was but the “first step”.⁸² Only a quick-fix through minor amendments to existing legislation was possible due to the time constraints. Neither complex match-fixing offences nor a stand-alone Match-Fixing Act were considered.⁸³ Instead, match-fixing was shoehorned into the most applicable criminalised conduct – deception – to reduce the risk of the most serious forms of match-fixing.⁸⁴ Potentially, as situations arise, the legislature will react

⁷⁹ See Andrew Ashworth *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013) at 52.

⁸⁰ (27 November 2014) 702 NZPD 937 per Hon Trevor Mallard.

⁸¹ (4 December 2014) 702 NZPD 1155 per Kevin Hague MP.

⁸² (30 July 2014) 700 NZPD 19760 per Kris Faafoi MP.

⁸³ Sport New Zealand *Regulatory Impact Statement: Match-Fixing Criminal Offences* (12 February 2014) at 1.

⁸⁴ Sport New Zealand, *Regulatory Impact Statement*, above n 83, at 15.

pragmatically and adapt the legislation as they see fit in a very piecemeal approach. It is arguable that the New Zealand legislature just wanted to be *seen* by the international sporting community to be putting measures in place to address match-fixing, even if the measures taken weren't completely adequate.

Whether or not the legislature's aims in enacting the 2014 Act have been accomplished is uncertain, as there has been no case law that has tested the legislation at the time of writing. The ICC Cricket World Cup 2015 and the FIFA Under-20 World Cup 2015 both unfolded without any prosecution under the Act.⁸⁵ Therefore, hypothetical situations must be used to illustrate how conduct that defeats the aims the legislature had in criminalising match-fixing would fall into lacunas within the legislation. These hypotheticals will show that the current legislative regime, while justified in criminalising match-fixing, is insufficient to comprehensively achieve the aims of match-fixing's criminalisation.

A Acts Not Covered by the Legislation that should be Criminalised

Due to the rushed nature of the 2014 Act, a number of acts that fall within the ambit of match-fixing are not covered by the legislation. Such situations have yet to be encountered in New Zealand, but using hypotheticals will reveal lacunas within the legislation that need to be criminalised.

1 Aaron Lloyd's loophole

In a New Zealand Herald article, sports lawyer Aaron Lloyd discussed a hypothetical situation not covered by the 2014 Act:⁸⁶

⁸⁵ Claims that FIFA was investigating match-fixing by the Honduras team at the FIFA Under-20 World Cup have been alleged, but at the time of writing, these have not been substantiated. See Adam Cooper "Match fixing allegations haunt FIFA U20 World Cup" *Newstalk ZB* (online ed, New Zealand, 21 June 2015); Dan Smith "Honduras U20 football team under investigation for match fixing" *The News Hub* (online ed, United Kingdom, 4 June 2015).

⁸⁶ Cleaver, above n 34.

You're in the last round of a tournament, it doesn't matter which sport, and you need to win to make the playoffs. The team you are playing has no chance of making the playoffs. The owners could get together and it would be agreed that the team with no chance would throw the match for financial reward.

Such a hypothetical situation is not covered by the legislation.⁸⁷ As it does not relate to a betting outcome, despite the manipulation of the match, there would be no criminal liability for those involved in the manipulation. Neither sports team could be prosecuted for bribery, unless they were public officials.⁸⁸

This is contrary to the aims of criminalising match-fixing. The match is no longer the unpredictable event it once was, defeating the integrity of sport. Punters who bet on the event would not be betting on fair odds, and thus would be defrauded of their money. If such manipulation was exposed, sport's economic benefits would also be detrimentally impacted. This behaviour, despite ticking the boxes of why the legislature criminalised match-fixing, would fall outside the legislation's ambit. Aaron Lloyd's loophole should therefore be filled.

2 *Sportsperson lacking intent*

Wellington lawyer Hamish McIntosh suggested a hypothetical that also exposes a gap in the current legislation.⁸⁹ For example, a man in Bangladesh calls a man in Pakistan, who calls a man in Calcutta, who calls a bowler in New Zealand. The third man tells the bowler to bowl a bouncer as the first ball of his first three overs in an upcoming cricket match in New Zealand, and he will pay \$1000 into his bank account – but importantly, he does not tell the bowler that it is to influence a betting outcome. The bowler does so, and the other men up the chain profit.

⁸⁷ Cleaver, above n 34.

⁸⁸ Crimes Act 1961, s 105.

⁸⁹ Personal communication with Hamish McIntosh, Lawyer (Zane Fookes, 18 June 2015).

The scenario could be complicated further if he was told to bowl a minimum of five bouncers in his ten overs of bowling.⁹⁰ Now, there is only a minimum number to reach, rather than a definitive number; such bowling is a legitimate, and not unusual, strategy; and the bowler may have planned on bowling bouncers regardless.

Due to the Crimes Act 1961, s 7,⁹¹ the initial caller and the intermediaries used to lengthen the chain of callers may be liable for match-fixing, provided their behaviour was held to constitute ‘manipulation’.⁹² However, the bowler himself would not be liable, as he did not have intent to influence a betting outcome. He may have suspected the caller’s purpose, but the statute prescribes “intent to influence the betting outcome” as the mens rea standard required, not recklessness. Provided the caller did not explicitly tell the bowler that he would be influencing a betting outcome (and he did not ask), he would not be liable.

This is the type of activity the legislation is seeking to prevent. Such behaviour threatens the integrity of sport, regardless of whether the sportsperson knows there is a betting outcome being manipulated. It will also have the ability to cause significant economic detriment. High-level sportspeople are educated from early on to recognise potential signs of match-fixing;⁹³ thus ignorance as to participating in match-fixing in this situation should not inhibit criminal liability.

3 *Attempted match-fixing*

As discussed previously, the word ‘manipulation’ in the 2014 Act suggests match-fixing is a result crime, and thus an offender will not be liable if an attempt to match-fix did not result in actual manipulation. While a person would be liable for an inchoate attempt,⁹⁴ there would not be liability for a primary offence.

⁹⁰ McIntosh, above n 89.

⁹¹ Section 7 is discussed in detail below.

⁹² Whether such facilitation constitutes ‘manipulation’ under s 240A is discussed below.

⁹³ “New Zealand Policy on Sports Match-Fixing and Related Corruption”, above n 7, at 10; *R v Amir and Butt*, above n 37, at [34].

⁹⁴ Crimes Act 1961, ss 72 and 311(1).

Due to the unpredictable nature of sport, even the best-made match-fixing plans may not succeed. Attempting to match-fix still significantly threatens sporting integrity, as it intends to corrupt the match, and should be included within the definition of match-fixing as a primary offence. Match-fixing should therefore be a conduct crime, to capture those who both succeed and fail in their attempts at match-fixing.

4 *Facilitating match-fixing*

What ‘manipulation’ in the 2014 Act encompasses is undefined and unclear. As discussed previously, *Adams* reads ‘manipulation’ widely.⁹⁵ Nevertheless, without case law, how broadly this term can be read remains unclear.

The statute’s vague generality creates potential gaps. Acts such as offering to engage in match-fixing, encouraging another person to engage in match-fixing,⁹⁶ and entering into an agreement to engage in match-fixing may fall within ‘manipulation’; but this is not as clear as a sportsperson actively match-fixing by bowling a no-ball, for example.

Whether or not ‘manipulation’ extends to the aforementioned actions, two would be caught as inchoate offences. Encouraging match-fixing is incitement,⁹⁷ while entering into an agreement to engage in match-fixing is conspiracy.⁹⁸

However, an offer to engage in match-fixing would not be covered. If a sportsperson offered to his captain to participate in match-fixing, but the captain turned his offer down, the sportsperson has not committed an offence under s 240A as he has not manipulated either the result of or an event within an activity. He has not committed a conspiracy, as there is only one complicit party.⁹⁹ It may constitute an attempt to match-fix under s 311(1),¹⁰⁰ but whether it is a “real and practical step” towards the

⁹⁵ Robertson (ed), above n 18, at [CA240A.02].

⁹⁶ Encouraging another to engage in match-fixing would include the use of ‘honey traps’ to snare players into match-fixing schemes. See Matthew Theunissen “Cricket ‘honey trap’ warning” *Herald on Sunday* (online ed, New Zealand, 11 January 2015).

⁹⁷ Crimes Act 1961, s 311.

⁹⁸ Crimes Act 1961, s 310.

⁹⁹ *R v Kotyszyn* (1949) 95 CCC 261 (Qué KB).

¹⁰⁰ Crimes Act 1961, ss 72 and 311(1).

commission of the offence is uncertain.¹⁰¹ An intention to corrupt the sport through match-fixing is the very threat to integrity that this legislation was designed to prevent, yet an offer to engage in match-fixing would unlikely be covered in s 240A's current state.

All forms of facilitating match-fixing should be criminalised, as such behaviour promotes match-fixing and negatively impacts on the integrity of sport. Specific offences are required to ensure certainty in the law, rather than relying on inchoate offences.

5 *Concealing match-fixing conduct*

Another facet of match-fixing not covered under the legislation is a person concealing, or encouraging another person to conceal, match-fixing conduct. Such conduct is likely too far removed from the wide definition of 'manipulation' that *Adams* provides to be covered under the legislation.

However, if this occurred before or contemporaneously to the match-fixing, the offender may be prosecuted as a party aiding the offence;¹⁰² and if match-fixing had already occurred and a person concealed this conduct, they may be liable as an accessory to the match-fixing offence after the fact.¹⁰³

The problem lies with encouraging concealing of match-fixing, which would be unable to be prosecuted under party liability as there is no principal offender to derive liability from – only another secondary party who has aided.

Both concealing and encouraging concealing of match-fixing should be criminalised specifically within the statute, to enable prosecution of such behaviour as primary offences and avoid any issues of remoteness for secondary liability. Concealing or encouraging concealment of match-fixing behaviour threatens the integrity of sport,

¹⁰¹ *Police v Wylie & Another* [1976] 2 NZLR 167 at 170.

¹⁰² Crimes Act 1961, s 66(1)(b).

¹⁰³ Crimes Act 1961, ss 71 and 312.

as it seeks to avoid detection of match-fixing behaviour. If left unprosecuted, match-fixing will proliferate, and sporting integrity will suffer.

6 *Use of corrupt conduct information for betting purposes*

The following hypothetical situation demonstrates another lacuna within the current legislation. A punter acquires knowledge that a sports match is going to be fixed: one team is intentionally going to lose. He possesses corrupt conduct information, which is information about conduct or proposed conduct in the sporting activity that will corrupt a betting outcome.¹⁰⁴ He bets on the match, creating financial gain. However, if he has not actively been involved in the manipulation himself and only possesses this knowledge through being told about the match-fixing, he will not be liable under the current legislation. He has not committed an act or omission with intent to influence a betting outcome via manipulation; he only is seeking to take advantage of the current match-fixing arrangement for his own financial benefit. It may be argued under s 240(2)(b) that he was deceptive through omitting to disclose to the betting agency a “material particular” – that the match he was betting on was fixed – but this would be unlikely to succeed, as the better would have no “duty to disclose” this material to the agency.¹⁰⁵ This duty generally only arises as a fiduciary duty, or if the deceived places trust and confidence in the word of the alleged deceiver;¹⁰⁶ neither arise in this situation. The better would negatively affect the economic benefits of sport and sports betting, as well as implicitly supporting the degradation of the integrity of sport, yet would not be liable due to not actively participating in the manipulation.

This situation isn’t purely hypothetical: in *Director of Public Prosecutions (NSW) v Elias*,¹⁰⁷ the defendant allegedly knew about match-fixing in a certain Australian NRL game, and structured a series of TAB bets to take financial advantage. While there was not enough evidence to find the defendant guilty beyond reasonable doubt,

¹⁰⁴ See Criminal Code Act (NT), s 237L(2).

¹⁰⁵ Crimes Act 1961, s 240(2)(b).

¹⁰⁶ Robertson (ed), above n 18, at [CA240.16].

¹⁰⁷ *Director of Public Prosecution (NSW) v Elias* [2013] NSWSC 28.

he could have been prosecuted under Australian legislation, which under current New Zealand legislation would not be possible.

This hypothetical can be further complicated if the punter passed on the information about the fixed match so his friend could bet on that match. The situation also worsens if he told his friend to bet on the match without communicating that the match was fixed, so the friend was unsure why he was betting. Neither situation would be covered under the legislation, as despite facilitating the corrupt betting, the betting itself is not criminal.

The use of corrupt conduct information to enhance a betting outcome – either for yourself or another – should be criminalised, as it is a clear threat to the economic benefits of sports betting and the integrity of sport.

7 *Jurisdictional issues*

Match-fixing naturally encounters jurisdictional issues, as by its very nature sport often comprises international competition with an international audience. A New Zealand sports team may have fixed a match whilst playing overseas, or a person located overseas may have fixed a match occurring in New Zealand.

Even if an offence occurs outside of New Zealand's jurisdiction, it may still affect the integrity of sport in New Zealand – and thus enable flow-on effects such as damage to New Zealand's sporting reputation – if the match-fixing involves New Zealanders. Extra-jurisdictional match-fixing has the possibility to be just as dangerous as match-fixing occurring wholly in New Zealand. For example, former New Zealand cricketer Lou Vincent received a life ban from cricket for match-fixing overseas,¹⁰⁸ blackening New Zealand's reputation for integrity in the eyes of the sporting world.

The starting point for jurisdictional issues is the Crimes Act 1961, s 6, which states the default position is that criminal acts and omissions occurring extraterritorially are

¹⁰⁸ Andrew Alderson "Lou Vincent banned from cricket for life" *The New Zealand Herald* (online ed, New Zealand, 1 July 2014).

not within the New Zealand courts' jurisdiction.¹⁰⁹ This is subject to two qualifications. The first is the Crimes Act 1961, s 7, which states that if any act or omission forming part of any criminal offence occurs in New Zealand, the offence is within the New Zealand courts' jurisdiction.¹¹⁰ The second qualification is whether s 6 is overridden by express words granting extraterritorial effect in other statutory provisions.¹¹¹

The s 7 qualification to s 6 will apply to several cases of match-fixing under s 240A. If either the match-fixing activity itself or the betting on the fixed event takes place in New Zealand, it will fall under s 7 and prosecution for match-fixing is possible under the current legislation.

However, if a New Zealand sportsperson or team competing overseas fixed a match and no betting activity took place in New Zealand, no liability could exist under s 240A as the conduct occurred wholly outside of New Zealand.¹¹² Despite the international media shadow that Lou Vincent's behaviour cast on New Zealand's reputation for sporting integrity, he could not be prosecuted under the current legislation, for example. This runs contrary to the 2014 Act's aims.

Similarly, if the receipt of the proceeds of match-fixing are given to a person in New Zealand but no element of the actual offence occurs in New Zealand, arguably the current legislation will not cover such an offence. Potentially, however, "betting outcome" may be read widely to cover such a situation.¹¹³

Perhaps the legislation should be extended to include liability in such instances by modeling on provisions such as the Crimes Act 1961, s 144A, which allows for the prosecution of sexual conduct with children and young people outside of New Zealand provided the offender is "a New Zealand citizen or ordinary resident in New Zealand".¹¹⁴ Obviously, match-fixing and pedophilia are incomparable in terms of

¹⁰⁹ Crimes Act 1961, s 6; see also *LM v R* [2014] NZSC 110, [2015] 1 NZLR 23 at [16].

¹¹⁰ Crimes Act 1961, s 7.

¹¹¹ Robertson (ed), above n 18, at [CA6.01]. For example, see Misuse of Drugs Act 1975, s 12C; Crimes Act 1961, s 144A.

¹¹² Laura Ashworth, above n 18.

¹¹³ Robertson (ed), above n 18, at [CA240.18].

¹¹⁴ Crimes Act 1961, s 144A(1).

harm, but the extra-jurisdictional approach of s 144A may be useful in the match-fixing context.

Jurisdictional issues particularly apply to online betting. The rapid growth of online betting has allowed greater ease with which to participate in match-fixing, degrading the integrity of sport.¹¹⁵ Betting funds may originate in one country, be placed with a bookmaker in another country, in relation to a sports match occurring in a third country.¹¹⁶ Such issues of globalisation of betting through online markets directly relates to the jurisdictional issues discussed above. Under s 240A, “betting outcome” is not defined, and thus we are not certain whether this encompasses international betting services or is confined exclusively to New Zealand bets.

Such issues of jurisdiction should be clarified. Players representing New Zealand abroad can affect New Zealand’s sporting reputation for integrity, and thus should attract the heavy hand of the criminal law.

B Acts Not Covered by the Legislation that should be Criminalised Elsewhere

Some behaviour, similar to match-fixing in terms of manipulating betting outcomes, should be criminalised; however, because such behaviour does not constitute or involve match-fixing, it should be dealt with in legislation other than the 2014 Act.

1 Use of inside information for betting purposes

The 2014 Act deliberately did not criminalise the use of inside information – such as knowledge of pitch conditions or team strategies – to enhance betting outcomes.¹¹⁷

However, such acts should be legislated against. Knowing a team’s key sportsperson is injured enables the punter to be advantaged in betting.¹¹⁸ Manipulating betting

¹¹⁵ Aquilina and Chetcuti, above n 2, at 110; Mai Chen “Mai Chen: Match fixing legislation needs to become law” *The New Zealand Herald* (online ed, New Zealand, 30 May 2014).

¹¹⁶ Forrest, McHale and McAuley, above n 1, at 159.

¹¹⁷ Sport New Zealand, *Regulatory Impact Statement*, above n 71, at 3; (30 July 2014) 700 NZPD 19760 per Hon Judith Collins.

outcomes would have negative economic impacts on sports betting in New Zealand, if such behaviour became common.

National sporting organisations may be best placed to respond to the use of inside information when it involves a sportsperson, official or other person governed under their Code of Conduct.¹¹⁹ However, if the punter is a third party unconnected to the sporting code, they are unlikely to fall within the jurisdiction of the sporting body; whereas, the criminal law applies evenly to all.

Inside information use does not relate to match-fixing per se, unlike corrupt conduct information, and does not threaten sporting integrity. It should not be criminalised under a match-fixing provision. However, as it manipulates a betting outcome leading to negative economic implications, such behaviour should be criminalised under a separate legislative provision.

2 *Court siding*

Court siding, or pitch siding, occurs when a spectator at a sports match relays the match's happenings instantaneously to overseas gambling syndicates, who take advantage of the information and slightly delayed broadcasting times to manipulate betting to their advantage.¹²⁰ Currently court siding is not illegal, despite having a presence in New Zealand. One man was ejected from Christchurch's Hagley Oval during an ICC Cricket World Cup 2015 match for court siding.¹²¹ He used his cellphone to provide a betting cartel with information on the outcomes of bowling deliveries,¹²² which breached the terms and conditions of his ticket.¹²³

Again, court siding is not match-fixing per se, but in its intentional manipulation of betting outcomes, there are clear similarities between the two. Harm to economic

¹¹⁸ (30 July 2014) 700 NZPD 19760 per Louisa Wall MP.

¹¹⁹ New Zealand Racing Board, above n 71, at 2.

¹²⁰ Pip Allan and Jonathan Pow "Hitting match-fixing for 6" (9 April 2015) Wynn Williams Lawyers <<http://www.wynnwilliams.co.nz/Publications/Articles/Hitting-Match-Fixing-for-6>> at 2.

¹²¹ Neil Reid "Cricket World Cup: Police bust betting cartel" *The New Zealand Herald* (online ed, New Zealand, 15 February 2015).

¹²² Reid, above n 121.

¹²³ Allan and Pow, above n 120, at 2.

benefits would occur, detrimentally affecting the reputation of sports betting facilities such as the TAB. However, as court siders generally do not have any connection to the sport itself, court siding would impact minimally on sporting integrity. Such behaviour should be criminalised, but in a separate legislative provision.

C Acts Not Covered by the Legislation that should not be Criminalised

A number of gaps in the legislation, while relating to match-fixing, do not significantly threaten sporting integrity. Such behaviour should not be criminalised.

1 Tactical sporting reasons and underperformance

As well for financial reward, the other main motivation for match-fixing is to secure future team advantage, such as improved playoff chances.¹²⁴ The 2014 Act was not designed to address this variant of match-fixing.¹²⁵ It was believed that national sporting organisations' codes of conduct were better placed to deal with match-fixing motivated by tactical sporting reasons.¹²⁶

New Zealand is no stranger to this match-fixing variant. In 2009, New Zealand bowls national fours captain Gary Lawson was found guilty of such match-fixing.¹²⁷ He was suspended for six months, with a \$5000 fine.¹²⁸ Match-fixing for tactical sporting reasons threatens the integrity of sport, but to a lesser degree than actual involvement in match-fixing to manipulate betting outcomes.

A number of reasons suggest criminalising this variant is unnecessary. Such match-fixing is motivated by a desire to improve a team or individual's opportunity to ultimately win the tournament they are competing in, not for financial gain. Difficulties also arise in drawing a definitive line in what constitutes this type of

¹²⁴ Allan and McIntosh, above n 10, at 18.

¹²⁵ Law and Order Committee *Crimes (Match-Fixing) Amendment Bill* (7 November 2014) at 1.

¹²⁶ Law and Order Committee, above n 125, at 1; (27 November 2014) 702 NZPD 937 per Carmel Sepuloni MP.

¹²⁷ Allan and McIntosh, above n 10, at 19.

¹²⁸ "Bowls: Lawson suspended after match-fixing scandal" *The New Zealand Herald* (online ed, New Zealand, 17 February 2010). His teammates were each given \$1000 fines.

match-fixing. Fielding a team that is not at top strength may be reasoned as preparing younger players for coming seasons, resting experienced players, and allowing injuries to heal.¹²⁹

Sports bodies adequately cover this type of match-fixing already.¹³⁰ Sporting codes are powerful in the lives of sportspeople: a code allows the implementation of a sportsperson's life ban from sport, which ruins their career, limits their earning potential and is hugely embarrassing. Criminalisation is thus not required.

2 *Companies owning multiple sports teams*

AEK Athens considered whether match-fixing was at issue if a parent company owned two sporting teams competing for the same spot in a sporting competition.¹³¹ A parent company controlled both AEK PAE and SK Slavia Praha, two footballing clubs eligible to compete in UEFA Club Competitions. After UEFA instituted a rule stating only one club under common ownership could compete in a UEFA competition, AEK was not admitted to the UEFA Cup while Slavia was, despite both having qualified. Under an appeal against the rule, the CAS determined match-fixing was not the main issue regarding integrity that the rule intended to promote.¹³²

This situation could potentially give rise to match-fixing, as owners could force one team to purposely lose to promote the other team's chances of progression. Two teams with common ownership would be particularly susceptible to falling into Aaron Lloyd's loophole.

While common ownership of two competing teams is not match-fixing, it does pose a threat to the integrity of sport, as even a perceived lack of fairness would impact on spectators' belief in the contest's uncertainty. However, rather than requiring criminalisation, it should only draw particular attention from enforcement agencies due to the strong opportunity it provides for match-fixing.

¹²⁹ Thorpe, above n 38, at 243.

¹³⁰ Allan and McIntosh, above n 10, at 19.

¹³¹ *AEK Athens and SK Slavia Prague v Union of European Football Associations (UEFA)* CAS 98/200.

¹³² At [30]. Ultimately, the CAS held that the contested rule could be upheld: see at [163].

3 *Failing to report match-fixing approaches*

As already discussed regarding *Oriekhov*,¹³³ sporting organisations may hold a person liable who fails to report a match-fixing approach, even if it is not accepted, due to compromising sporting integrity.¹³⁴ A failure to report an invitation to match-fix would not be covered under the current legislation, as such an omission would not be done “with intent to influence a betting outcome”. Arguably, such an omission should be criminalised, as by allowing a match-fixer to continue to approach others, the person approached allows sporting integrity to be compromised.

However, this is imposing a requirement to do a positive act, which is against the scope of the criminal law in the absence of a statutory duty.¹³⁵ To impose the weight of the criminal law on such an omission is widening the scope of liability too far. National sporting organisations should be left to deal with such cases using non-criminal sanctions.

VI *Recommendation to Expand Legislation*

The 2014 Act is laudable in its aims to curb match-fixing behaviour, promoting certainty and addressing the most problematic match-fixing behaviour. In its current form, the legislation has supporters. The New Zealand Racing Board believes it is comprehensive, and behaviours falling outside the legislation are better left for national sporting organisations to deal with.¹³⁶ Allan and Pow believe the legislation has successfully “hit match-fixing for six”.¹³⁷

While these views hold weight, the 2014 Act is rushed legislation, pushed through by the legislature to be enforceable for international sporting events in New Zealand in

¹³³ *Oriekhov*, above n 29.

¹³⁴ See also *N & V v UEFA CAS 2010/A/2266* at [33] and [36]. This can be similarly seen in the rule 2.4.4 of the ICC Anti-Corruption Code, which makes failing to disclose invitations to engage in corruption (including match-fixing).

¹³⁵ Crimes Act 1961, ss 151-157.

¹³⁶ Personal communication with Carl Jackson, Manager – Sports Partnerships, New Zealand Racing Board (Zane Fookes, 24 June 2015).

¹³⁷ Allan and Pow, above n 120, at 3.

2015. A number of lacunas, as discussed above, prevent a full realisation of the legislation's aims.

I recommend that to remedy these lacunas, the current legislation needs to be reviewed and expanded. A more carefully thought-out legislative provision would enable the legislature's aims to be better achieved and the scourge of match-fixing further provided against within New Zealand in a criminal context.

A New Legislation

I have attached new draft legislation as Appendix 1. This legislation creates specific criminal offences to – hopefully – criminalise all behaviour required to fulfill the legislature's aims in criminalising match-fixing, particularly ensuring sporting integrity. This legislation focuses on specificity, rather than generality, to best police match-fixing conduct, and removes lacunas that draw an arbitrary line between prosecutable and non-prosecutable conduct. It also includes numerous definitions to add certainty.

The definition of 'manipulation' includes attempting to match-fix, making match-fixing a conduct crime.

Section 5 outlines jurisdictional issues, and, following the language of s 144A, enables the criminalisation and prosecution of behaviour committed by New Zealand sporting representatives in overseas sporting events.

I believe such legislation should be inserted within the Crimes Act 1961, rather than as separate legislation, and, as a comprehensive code, should repeal the current s 240A.

The elements on which this new legislation is based are set out below.

B The Australian Approach

New South Wales assented to the Crimes Amendment (Cheating at Gambling) Act 2012 in September 2012. This inserted specific match-fixing offences into the state's Crimes Act 1900.¹³⁸ Subsequently, similar provisions based on the New South Wales legislation – albeit with minor modifications – were introduced in South Australia,¹³⁹ Victoria,¹⁴⁰ the Northern Territory,¹⁴¹ the Australia Capital Territory,¹⁴² and Queensland.¹⁴³

The Australian legislation specifies a number of particular match-fixing offences, rather than the coverall of the 2014 Act. These are:

- engaging in conduct that corrupts the betting outcome of an event;¹⁴⁴
- facilitating conduct that corrupts the betting outcome of an event,¹⁴⁵ including offering to engage in conduct,¹⁴⁶ encouraging to engage in conduct,¹⁴⁷ or entering into an agreement to engage in conduct that corrupts a betting outcome of an event;¹⁴⁸
- concealing any conduct or agreement to corrupt the betting outcome of an event from any appropriate authority;¹⁴⁹
- the use of corrupt conduct information for betting purposes;¹⁵⁰ and
- the use of inside information for betting purposes.¹⁵¹

I have modeled the legislation in Appendix 1 on the Australian approach, as it has a number of benefits.

¹³⁸ Crimes Amendment (Cheating at Gambling) Act 2012 (NSW), sch 1-2; Crimes Act 1900 (NSW), ss 193H-193Q.

¹³⁹ Criminal Law Consolidation Act 1935 (SA), ss 144G-144K.

¹⁴⁰ Crimes Amendment (Integrity in Sports) Act 2013 (Vic); Crimes Act 1958 (Vic), ss 195B-195F.

¹⁴¹ Criminal Code Act (NT), Sch 1, ss 237A-237N.

¹⁴² Criminal Code 2002 (ACT), ss 363A-363E.

¹⁴³ Criminal Code Act 1899 (Qld), ss 443-443F.

¹⁴⁴ For example, see Crimes Act 1900 (NSW), s 193N.

¹⁴⁵ For example, see Crimes Act 1900 (NSW), s 193O.

¹⁴⁶ For example, see Crimes Act 1900 (NSW), s 193O(2)(a).

¹⁴⁷ For example, see Crimes Act 1900 (NSW), s 193O(2)(b).

¹⁴⁸ For example, see Crimes Act 1900 (NSW), s 193O(2)(c).

¹⁴⁹ For example, see Crimes Act 1900 (NSW), s 193P.

¹⁵⁰ For example, see Crimes Act 1900 (NSW), s 193Q(1).

¹⁵¹ For example, see Crimes Act 1900 (NSW), s 193Q(2).

The creation of such offences would provide specificity, rather than the current legislative generality. Specificity would more comprehensively target match-fixing behaviour. The listed offences sufficiently cover a number of lacunas in the current New Zealand legislation.¹⁵²

New Zealand and Australia's sporting environments are similar, with sporting codes crossing over in Trans-Tasman competitions.¹⁵³ This suggests similar laws will work in New Zealand as in Australia. It will also allow consistency in prosecuting match-fixing in Trans-Tasman competitions.

Similar legislation will allow cross-fertilisation of jurisprudence. New Zealand courts would be able to draw on the Australian courts' jurisprudence for guidance, as we currently lack case law. Australia has already prosecuted using their match-fixing legislation: for example, Gerry Gsubramaniam's prosecution under the Victorian legislation for fixing Victorian Premier League football.¹⁵⁴ If we wish to divert from such jurisprudence and forge our own unique path to better suit the New Zealand legal environment, we can adapt or change the Australian approach.

The Australian legislation notably does not limit the requisite mens rea of the offences to intention, but rather includes recklessness to whether the conduct corrupts a betting outcome of the event as a possible mens rea standard.¹⁵⁵ However, intention to obtain a financial advantage or cause a financial disadvantage is still required.

Despite these positives, a straight application of Australian legislation to New Zealand would not be completely sufficient. Lacunas in our current legislation exist in the Australian legislation also, as it focuses on offences that corrupt the betting outcome of an event. The revised legislation in Appendix 1 expands the motivation

¹⁵² This particularly applies in regard to facilitating and concealing conduct that corrupts the betting outcome of an event, and the use of corrupt conduct information for betting purposes.

¹⁵³ For example, in rugby (Super Rugby), football (A-League), rugby league (NRL), and netball (ANZ Championship).

¹⁵⁴ Jamie Nettleton and Karina Chong "Australia: Match-Fixing Criminal Offences – Guilty Pleas to Football Match-Fixing Charges" (20 December 2013) Addisons Lawyers <<http://www.addisonslawyers.com.au/knowledge/assetdoc/9692c98d9e8819ab/Australia%20Match%20Fixing%20Criminal%20Offences.pdf>>.

¹⁵⁵ For example, see see Crimes Act 1900 (NSW), s 193N.

for match-fixing beyond the manipulation of a betting outcome to sufficiently capture all match-fixing behaviour the legislature was seeking to criminalise.

While the Australian legislature criminalised the use of inside information for betting purposes, their legislation is targeting “Cheating at Gambling”, rather than New Zealand’s target of integrity of sport. Therefore, their legislation should cover such offences, whilst ours should not.

C To Obtain a Material Benefit

Currently, the requisite mens rea standard under the 2014 Act is intention to influence a betting outcome of an activity listed in subsection (2).¹⁵⁶ This is limiting and should be expanded.

Involvement in the manipulation of a sporting event via act or omission with intent to obtain a material benefit is the only requirement for an offence under the legislation in Appendix 1. Under this legislation, the mens rea required is intention to obtain a material benefit, defined as:¹⁵⁷

in relation to doing a thing, means obtain, directly or indirectly, any goods, money, pecuniary advantage, privilege, property, or other valuable consideration of any kind for doing the thing (or taking an action that forms part of doing the thing).

This includes benefits beyond financial advantage. It will prevent lacunas such as Aaron Lloyd’s loophole and crimes lacking knowledge of the manipulation of a betting outcome, as intent to gain any material benefit through match-fixing will allow liability. It also protects sporting integrity to the highest degree, reflecting the central aim of the legislature in enacting the 2014 Act.

If match-fixing is done with intent or recklessness as to whether the conduct corrupts a betting outcome, in addition to intent to obtain a material benefit, the maximum

¹⁵⁶ Crimes Act 1961, s 240A(1).

¹⁵⁷ Crimes Act 1961, s 2.

penalty under the Appendix 1 legislation increases to reflect the potential economic detriment such acts may have. If match-fixing is done with intent or recklessness as to whether the conduct corrupts a betting outcome, but with a lack of intent to obtain a material benefit – for example, if a sportsperson fixes a match as a gratuitous favour – such behaviour is still criminalised.

VII Conclusion

Match-fixing has grown to become one of the biggest threats to sport internationally. Such behaviour threatens the integrity of sport, as match-fixers prioritise their own financial gain over the uncertainty of sporting competition.

Before hosting the ICC Cricket World Cup 2015 and the FIFA Under-20 World Cup 2015, the New Zealand legislature recognised the inadequacy and uncertainty of legislation to deal with the blight of match-fixing, and in response enacted the Crimes (Match-Fixing) Amendment Act 2014, making match-fixing a form of deception under the Crimes Act 1961 and thus prosecutable under s 240. The legislature had a number of laudable aims in enacting such legislation, addressing potential harm to the integrity of sport and its economic benefits, which justified the criminalisation of match-fixing.

Despite recognising inadequacies in the then-current legislation to deal with match-fixing, the legislation as enacted is similarly inadequate to sufficiently accomplish the legislature's aims that justified criminalising match-fixing. With a number of lacunas, threats to both the integrity of sport and its economic benefits were lessened by the legislation but not eradicated. In the rush of preparation for the upcoming sporting events, the legislature was not comprehensive.

Threats to sporting integrity cannot be entirely eradicated, but it is possible to draft comprehensive legislation to more adequately deal with match-fixing and better achieve the legislature's aims in criminalising match-fixing. The attached legislation in Appendix 1 attempts to accomplish this, by removing lacunas within the current

legislation. Modeled on the Australian legislation, it prioritises specificity over generality, attempting to better address the harms of match-fixing.

Like most crime, match-fixing will not go away simply because criminal sanctions have been put in place. The high financial reward it offers means that match-fixers will craftily attempt to circumnavigate the law to avoid detection. However, implementing effective, comprehensive and specific legislation will act as a major deterrent to those who consider match-fixing and will enable the full weight of the criminal law to come down on match-fixers. It will work towards the protection of sporting integrity and the economic benefits that sport provides. While it won't be able to completely eradicate match-fixing, legislation more comprehensive than the Crimes (Match-Fixing) Amendment Act 2014 will put match-fixers on the back foot and the ball back in justice's court.

Appendix 1 – Draft Match-Fixing Legislation

Interpretation

Betting outcome means

- (a) both a particular bet and the odds offered by the party accepting the bet or wager; and
- (b) encompasses any bet, whether placed through an organised system or a private wager; and
- (c) includes any bet, whether placed through a national or international betting agency.

Corrupt conduct information means information about conduct, or proposed conduct, that can be used to manipulate a sporting event.

Manipulation means any act or omission which, by whatever means, surreptitiously affects or attempts to affect the outcome of the event or an event within it.

Manipulating a sporting event means either the manipulation of:

- (a) the overall result of the activity (match-fixing); or
- (b) any event within the activity (spot-fixing).

Obtain a material benefit, in relation to doing a thing, means obtain, directly or indirectly:

- (a) any goods, money, pecuniary advantage, privilege, property, or other valuable consideration of any kind for doing the thing (or taking an action that forms part of doing the thing); and
- (b) does not include the obtaining of any tactical sporting advantage.

Sport means an activity involving any physical exertion and skill, especially one regulated by set rules or customs in which an individual or team competes against another or others.

Sporting event includes:

- (a) sporting competitions, games, matches, races, and rallies involving human participants (whether or not they also involve equipment, horses, vehicles, or vessels); and
- (b) dog races.

Offences

1 Engage in conduct that manipulates a sporting event

Every one commits an offence who engages in conduct that manipulates a sporting event with intent to obtain a material benefit.

2 Facilitate conduct that manipulates a sporting event

(1) Every one commits an offence who facilitates conduct in order to manipulate a sporting event with intent to obtain a material benefit.

(2) A person facilitates conduct that manipulates a sporting event under subsection (1) if the person:

- (a) offers to engage in conduct that manipulates a sporting event; or
- (b) encourages another person to engage in conduct that manipulates a sporting event; or
- (c) enters into an agreement about conduct that manipulates a sporting event.

3 Concealing conduct or agreement about conduct that manipulates a sporting event

(1) Every one commits an offence who conceals or encourages another person to conceal from any appropriate authority conduct, or an agreement about conduct, that manipulates a sporting event with intent to obtain a material benefit.

(2) In this section, an appropriate authority includes:

- (a) a police officer; or
- (b) a body that has the official function of controlling, regulating or supervising an event, or any betting on an event.

4 Use of corrupt conduct information to manipulate a sporting event

(1) Every one commits an offence who possesses information in connection with an event that is corrupt conduct information, and who knows or is reckless as to whether the information is corrupt conduct information, if the person:

- (a) bets on the event; or
- (b) encourages another person to bet on the event in a particular way; or
- (c) communicates the information to another person who the first person knows or ought reasonably to know would or would be likely to bet on the event.

(2) In proceedings for an offence against subsection (1)(b) or (c), it is not necessary to prove that the person encouraged to bet, or to whom information was communicated, actually bet on the event concerned.

5 Jurisdiction for offences ss 1-4

Every one commits an offence under ss 1-4 if:

- (a) any act or omission forming part of the offence occurs in New Zealand; or
- (b) being a New Zealand citizen or ordinarily resident in New Zealand, and representing New Zealand in or at a sporting event outside of New Zealand, commits an act or omission forming part of the offence.

6 Penalties

If any of the offences in ss 1-4 are committed, the maximum penalty is 4 years imprisonment.

7 Alternative Mens Rea

(1) If any of the offences in ss 1-4 are not committed due to a lack of intent to obtain a material benefit, but the actus reus is completed with intent or recklessness as to whether the conduct corrupts a betting outcome of the sporting event, the offence may be made out and the maximum penalty is 4 years imprisonment.

(2) If any of the offences in ss 1-4 are committed by a person:

(a) with intent or recklessness as to whether the conduct corrupts a betting outcome of the sporting event; and

(b) with intent to obtain a material benefit;

the maximum penalty is 7 years imprisonment.

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