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**Avenues for Enhancing Social Inclusion:
Rethinking New Zealand's Approach to Social Security and
Welfare**

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Contents

I	ABSTRACT	3
II	INTRODUCTION	3
III	SOCIAL INCLUSION – WHAT IS IT?	5
IV	POTENTIAL OBSTACLES TO IMPLEMENTATION	6
	A The Definition Problem	6
	1 Recent Developments – The Material Wellbeing Index	7
	2 Social Inclusion and the Disabled Community – Exclusion from Sex and Intimacy?	8
	3 Accounting for Negative Obligations	10
	4 The Constraints of Public Opinion	11
	5 Education as a Solution?	12
	B The Issue of Sustainability	13
	1 A Universal Basic Income	15
V	EXPLORING SOCIAL INCLUSION IN NEW ZEALAND'S HISTORY	17
	A The Woodhouse Report 1967	17
	B The McCarthy Report 1972	19
	C The April Report 1988	21
	D The Social Development Approach 2001	23
VI	SOCIAL INCLUSION TODAY	24
	A Discrepancies within the Welfare System	24
VII	IMPLEMENTING SOCIAL INCLUSION	24
	A Introduction	24
	B A Right to Social Inclusion in the New Zealand Bill of Rights Act 1990	25
	1 Consistency with New Zealand's Binding International Law Obligations	26
	2 Constitutional Protection of a "Duty" Imposed on the State	28
	3 Robust Progressive Protection	30
	4 Obstacles – The Limitations of a Parliamentary Bill of Rights	30
	5 Obstacles – The Implications of Deferring to Parliament	31
	6 Obstacles – The Nature of Economic, Social and Cultural Rights	35
	C Social Inclusion – A Principle and Purpose of the Social Security Act	37
	1 Work Focus	37
	2 Amending the Purposes and Principles	39
	3 An Opportunity for Change?	40
	D What is the Best Approach?	40
VIII	CONCLUSION	41
IX	BIBLIOGRAPHY	43

I Abstract

At present, an intense focus on paid work undergirds the Social Security Act 1964. However, many argue that a broad emphasis on social inclusion should be the primary focus of New Zealand's social security and welfare legislation. This paper explores how the idea of social inclusion has developed in New Zealand and analyses two options for implementing a greater focus on social inclusion. It will begin by briefly defining social inclusion and identifying some of the obstacles complicating implementation. Namely, it will discuss the difficulty of identifying when social inclusion is achieved and concerns about sustainability. This paper will also examine the different occasions in the past where the Government has given particular focus to this idea of social inclusion. Finally, in terms of implementing a greater focus on social inclusion, it will explore the prospects of introducing a right to social inclusion into the New Zealand Bill of Rights Act 1990 and the consequences of directly amending the Social Security Act to include a focus on social inclusion. It will argue that making direct changes to the Social Security Act is likely the best option.

II Introduction

The Social Security Legislation Rewrite Bill, which seeks to repeal and replace the Social Security Act 1964, was introduced into Parliament on 17 March 2016.¹ It is currently awaiting its second reading.² The 1964 Act has become disjointed after regular and intensive amendments. As a consequence, the Bill is an attempt to rewrite the Act so as to improve the legislative structure and enhance the clarity of New Zealand's primary welfare statute.³ Although some policy changes are proposed, there is a strong desire to keep the Bill largely policy neutral.⁴ The push to preserve the Social Security Act in its current form prompts reflection on whether the social policies undergirding this Act are really worth holding on to. Arguably, they do not represent the best approach to enhancing the wellbeing of New Zealand citizens.

At present, a strong focus on paid employment underlies the Social Security Act.⁵ The Act establishes a number of core benefits, including supported living payments, jobseeker support and sole parent support. The benefits that are administered under the statute are contingent on a number of reciprocal obligations imposed on beneficiaries, primarily in the form of work testing. It has, however, been proposed that instead of an emphasis on work, a broad overarching focus on social inclusion is a better way of thinking about social security and welfare.⁶ In fact, the New Zealand Superannuation and Retirement Income

¹ Ministry of Social Development "The Social Security Legislation Rewrite Bill" <www.msd.govt.nz>.

² New Zealand Parliament "Social Security Legislation Rewrite Bill" (2016) <www.parliament.nz>.

³ Social Security Legislation Rewrite Bill 2016 (122-1) (explanatory note) at 1.

⁴ Ministry of Social Development *Regulatory Impact Statement: Policy Changes Proposed as part of the Rewrite of Social Security Act 1964* (25 May 2015) at 2.

⁵ See Social Security Act 1964, ss 1A and 1B.

⁶ See Mamari Stephens "The Right to Social Security in New Zealand" in M Bedggood and K Gledhill (eds) *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters,

Act 2001 and the Accident Compensation Act 2001, which both provide non-means tested benefits, can be construed as being predicated on a broader focus on enhancing social inclusion. Arguably, this focus should be extended across all of New Zealand's welfare legislation.

This paper explores the idea of social inclusion and examines the Government's approach to enhancing the social inclusion of New Zealand citizens. Rather than engaging with the question as to why we should enhance social inclusion in the first place, the focus of this paper is on *how* a greater focus on social inclusion can be implemented in New Zealand's social policy. It will begin by briefly looking at what is meant by this idea of social inclusion.

The paper will then explore some of the obstacles to developing policies that enhance social inclusion. Namely, there are difficulties associated with ascertaining when social inclusion is achieved and problems pertaining to how such an approach will be sustainable. As part of the discussion relating to the first obstacle, this paper explores the controversial contention made by disability activists that the state should subsidise sexual services for the disabled community. This is on the basis that the inability to have sex is a source of social exclusion for many disabled citizens. This paper will assert that in light of current cultural attitudes towards sex, funded sexual services is unlikely something the state can provide. In regards to the issue of sustainability, it will consider the possibility of introducing a universal basic income and conclude that the uncertainty involved makes it an unrealistic solution to the problem of affordability.

Having considered the obstacles, the subsequent section will illustrate how the idea of social inclusion has developed in New Zealand since the late 1960s. Various reports and approaches initiated by the Government indicate a trend towards a focus on social inclusion. So far, this has culminated in the current approach where work is emphasised as the best means of achieving it. However, there are problems under the current approach. As an example, the discrepancies in benefit levels between beneficiaries falling under the Social Security Act and those covered by the accident compensation scheme is arguably based on an arbitrary distinction. This could be remedied by creating a greater focus on social inclusion that extends to the Social Security Act.

Wellington, 2011) 129; and Michael O'Brien "Welfare Reform in Aotearoa/New Zealand: From Citizen to Managed Worker (2013) 47 Social Policy & Administration 729.

The final section of this paper will analyse two different ways of ensuring a greater focus on social inclusion. Firstly, it will consider the prospects of inserting a right to social inclusion into the New Zealand Bill of Rights Act 1990 (NZBORA). Secondly, it will assess the possibility of amending the purpose and principles provisions of the Social Security Act to accommodate a focus on social inclusion. In light of the limited protection conferred by the NZBORA and the dearth of mechanisms available for supporting social rights, it will argue that the latter is likely the better approach.

III Social Inclusion – What is it?

Social inclusion can be broadly understood as a process by which an individual is able to participate fully in society.⁷ It is related to ideas of wellbeing and poverty.⁸ Though in different words, the process is alluded to by sociologist Thomas Humphrey Marshall in his classic conception of citizenship, which is still widely endorsed today.⁹ Crucially, Marshall divides citizenship into three elements: civil, political and social rights. By social rights he refers to:¹⁰

... the whole range, from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and *to live the life of a civilised being according to the standards prevailing in the society.*

In other words, social inclusion, as a right that can be enforced against the state by virtue of one's citizenship, consists of the ability to experience society as the ordinary citizen could expect to. This does not only involve participation in society's political processes, but also its cultural processes.¹¹ Having the capacity to participate in society is a right all New Zealanders are entitled to enjoy, and as a right of citizenship it is irrespective of economic and social status.¹² As Marshall argues, where citizens lack the monetary means to partake in society, it is the state's obligation to make up for this deficit and enable social

⁷ Compare definition of "social exclusion" in Ministry of Social Development "A social exclusion strategy" <www.msd.govt.nz> at [15] and [16].

⁸ At [3].

⁹ See O'Brien, above n 6, at 741.

¹⁰ TH Marshall "Citizenship and Social Class" in Christopher Pierson, Francis G Castles and Ingela K Naumann (eds) *The Welfare State Reader* (3rd ed, Polity Press, Cambridge, 2014) 28 at 28 (emphasis added).

¹¹ Stephens, above n 6, at 140.

¹² O'Brien, above n 6, at 729; see also Jørgen Andersen and Per Jensen "Citizenship, changing labour markets and welfare policies: an introduction" in Jørgen Andersen and Per Jensen (eds) *Changing Labour Markets, Welfare Policies and Citizenship* (The Polity Press, Bristol, 2002) 1 at 2.

inclusion through its welfare system.¹³ However, as will be seen, determining the extent of government input that is required to achieve social inclusion is not an easy task.

IV Potential Obstacles to Implementation

Introducing a greater focus on social inclusion in New Zealand's social welfare policy is not without its difficulties. This section considers two obstacles that complicate implementation. First, it will explore the difficulty of ascertaining when social inclusion is actually achieved. This will be referred to as "the definition problem". It will then consider the issue of sustainability and the arguments made by proponents of the universal basic income movement.

A The Definition Problem

As part of moving towards a focus on social inclusion, it is essential to identify some desired outcome against which progress can be measured. However, determining when full participation is achieved will likely require more than simple guess work. It is not easy to pinpoint the minimum level of spending power required to achieve social inclusion at any given time.¹⁴ As mentioned above, social inclusion is measured against the ordinary standards prevailing in New Zealand society. The difficulty lies in determining what that standard is, noting that it is subjective in nature meaning there is "no precise formula" for making that determination.¹⁵ However, as legal academic Mamari Stephens suggests, at the very least, it is clear that "the idea of participation is not merely that a needy individual be given enough money to stave off starvation and afford the barest of shelter".¹⁶ She suggests that enabling participation may require "enough money to use public transport, to pay for clothes, to buy newspapers".¹⁷ It is up to the Government, informed by the standard of living enjoyed in New Zealand today, to reasonably define what is required for an individual to achieve social inclusion.¹⁸

Another dimension to the definition problem that may complicated matters is that the minimum level of spending power will be dictated by a person's circumstances, such as the size of a person's household and whether they are living with an impairment. For example,

¹³ See Marshall, above n 10, at 34.

¹⁴ Stephens, above n 6, at 137.

¹⁵ Report of the Royal Commission of Inquiry *Social Security in New Zealand* (Government Printer, Wellington, March 1972) at 105 [*McCarthy Report*].

¹⁶ Stephens, above n 6, at 137.

¹⁷ At 137.

¹⁸ *McCarthy Report*, above n 15, at 105.

a 2010 "cost of disability" research study, funded by the Ministry of Social Development (MSD) and the Health Research Council of New Zealand, revealed that the additional weekly costs for a disabled person can range from \$200 to over \$2,500.¹⁹ This is dependent on the type and degree of impairment. The study takes into account activities of daily living, food and clothing, health and well-being, housing, access to information, resources needed to access one's occupation and participation.²⁰

1 Recent Developments – The Material Wellbeing Index

Though what constitutes an ordinary standard of living can be variously interpreted, the Government has to an extent provided a definition. MSD's Material Wellbeing Index (MWI) measures the wellbeing of New Zealanders according to the day-to-day living conditions experienced by households.²¹ There are 24 items comprising the MWI. The items reflect the activities and goods and services that are commonly sought after in order to ensure that the index applies well to a range of ages and household types.²² The domains used to guide the selection of these items give an indication of the different aspects of an ordinary life in modern day New Zealand. They demonstrate that full participation in society is not simply about having the basic needs of survival. The domains include:²³

... food, accommodation (and therefore implicitly, clean water on tap and sanitation/flushing toilets), heating, clothing, transport, household goods, leisure pursuits, access to health care, and the ability to cope with modest shocks to the household budget...

In addition, many of the items listed provide further guidance as to the level of resources needed to be socially included in New Zealand society. The items are specific. For example, they include things like having at least two pairs of shoes suitable for daily activities, a meal with meat (or a vegetarian equivalent) at least every second day and being able to afford basic items without spending less on hobbies and interests or postponing repairs.²⁴ It should be noted that some of the other items comprising the MWI are non-essentials. This is to allow those with higher standards of living to also be measured by the index. Therefore, a separate index dedicated to the indicia of social inclusion, based on

¹⁹ Disability Resource Centre *The Cost of Disability Final Report* (2010) at 16.

²⁰ At 36.

²¹ Bryan Perry *The Material Wellbeing of New Zealand Households: trends and relativities using non-income measures, with international comparisons* (Ministry of Social Development, August 2016) at 7.

²² At 36.

²³ At 36.

²⁴ At 38.

ordinary standards of living, will still need to be compiled. The MWI does, however, indicate that the definition problem can be overcome to an extent.

However, while it may be possible to ascertain when the ordinary New Zealander is said to participate fully in the community at different stages of their life, appealing to generalisations risks overlooking the needs of minorities. For example, members of the disabled communities may have different ideas of what is required for social inclusion.

2 Social Inclusion and the Disabled Community – Exclusion from Sex and Intimacy?

Not only might people living with impairments incur additional weekly costs to carry out common household activities such as buying groceries, but the aspects of life from which they are socially excluded may also be greater. As an example, it has been argued that many disabled citizens are socially excluded because of their inability to have sexual intercourse.

In recent years, sex is increasingly being characterised by a number of disability activists as a human right. Activists argue that sex is "inherently natural" and much like any other basic human entitlement.²⁵ It is claimed to be an essential part of living an ordinary life and beneficial to mental wellbeing. Surveys have revealed that many disabled persons who have sought out sexual services were able to fulfil needs of intimacy, self-esteem, warmth, validation and connection.²⁶ The idea that the state ought to assist its disabled citizens to realise their sexual freedom has gained some traction internationally, particularly in the Netherlands and the United Kingdom.

However, there are obvious problems with depicting sex as a human right. The language implies an entitlement to sex held by all members of society, which can be construed as conflicting with the laws around consent.²⁷ These laws in themselves imply that sex is widely considered to be something less than a right. In addition, by framing sex in this way, activists seek to impose a positive obligation on the state; it simply would not be possible for the Government to fund consensual sexual services for all members of society. However, proponents argue that an exception should be made for members of the disabled community because many have a lesser capacity to fulfil their sexual needs.

²⁵ Teela Sanders "The politics of sexual citizenship: commercial sex and disability" (2007) 22 *Disabil Soc* 439 at 450 – 451; see also Jacob M Appel "Sex Rights for the disabled?" (2010) 36 *J Med Ethics* 152.

²⁶ Tom Shakespeare "Disabled sexuality: towards rights and recognition" (2000) 18 *Sexuality and Disability* 159 at 164.

²⁷ See Crimes Act 1961, part 7.

The contention is that people should have the opportunity to fulfil their sexual needs, and many members of the disabled community are arguably deprived of this opportunity.²⁸ Firstly, the nature and degree of an impairment can render disabled members of society incapable of satisfying their needs for intimacy without having to purchase sexual services.²⁹ Physical and intellectual impairments can be obstacles to accessing social environments conducive to establishing "normal" relationships. Disabled persons are often restricted to a solitary lifestyle,³⁰ which has resulted in many suffering from isolation, loneliness and a lack of self-worth.³¹ Many disabled New Zealanders have noted that social participation is the biggest issue in their lives.³² In addition, the range of prospective partners for people living with impairments, and therefore their sexual opportunities, are also limited because of entrenched cultural ideas of what is attractive.³³ The lack of control over their circumstances arguably justifies state provision of subsidised sexual services to the disabled community as an exception to the rule.

Secondly, it is argued that people with disabilities have been "systematically devalued and excluded" by society throughout history. This rings true particularly for people with intellectual impairments. In the past, they were often referred to in national legislation as lunatics, imbeciles and mental defectives.³⁴ In addition, as part of the rise of the eugenics movement in the nineteenth century, those with intellectual impairments were segregated from the rest of society and placed in institutions to prevent them from having children. This was also due to the emphasis at the time on medical treatment rather than the social inclusion of the disabled.³⁵ The process of deinstitutionalisation in New Zealand continued for almost four decades with the last institution closing as late as 2006.³⁶

While there have been significant developments in integrating disabled people into society, many argue that the historical portrayal of them as "asexual, oversexed, innocents or perverts" has resulted in the continued "de-sexing" of the disabled community today.³⁷ For example, disabled people are often perceived as in need of protection and unable to

²⁸ Sanders, above n 25, at 451.

²⁹ Frej Klem Thomsen "Prostitution, disability and prohibition" (2015) 41 J Med Ethics 451 at 455.

³⁰ Sanders, above n 25, at 443.

³¹ At 445.

³² *New Zealand Disabled Person's Organisations Report* (31 July 2014) at 10.

³³ Sanders, above n 25, at 443.

³⁴ See for example the Imbecile Passengers' Act 1882, the Lunatics Ordinance 1846 and the Mental Defectives Act 1911.

³⁵ Office of Disability Issues "Disability in New Zealand: A changing perspective" <www.odi.govt.nz>.

³⁶ Ruth Dyson "End of Institutionalisation a milestone for NZ" (press release, 14 November, 2006).

³⁷ Sanders, above n 25, at 443.

consent,³⁸ which contributes to the perception that they are devoid of sexual needs and not viable sexual partners. It is arguable that the Government may need to compensate for its part in moulding societal attitudes about disability.

Thirdly, reports reveal that people with impairments are less likely to have access to paid work and more likely to have lower levels of personal income.³⁹ As most members of the disabled community tend to rely on a social benefit, which is typically insufficient to cover conventional everyday costs, they generally have a restricted capacity to buy sexual services as compared to people living without impairments.⁴⁰ As a result, many have appealed to the state to subsidise sexual services for disabled people, and in the case of the Netherlands and the United Kingdom they have been relatively successful.⁴¹

The crux of this issue comes down to whether subsidised sexual services is something the state can or should provide for its disabled citizens. Academic and former politician Michael Ignatieff, in his book *The Needs of Strangers*, proclaims that some needs can be satisfied through politics while others cannot.⁴² It may perhaps be unrealistic or "utopian"⁴³ to require the Government to fund sexual services. A line must be drawn "between the needs which can be made a matter of public entitlement and those which must be left to the private self to satisfy."⁴⁴ Sex, which is largely regarded as a private matter, likely falls into the latter category.

3 *Accounting for Negative Obligations*

While the frustration felt by members of the disabled community is certainly deserving of sympathy, it simply does not seem to be the case that sexual services can be reasonably funded by the state. It is important to appreciate that many rights do not impose positive obligations on governments. In regards to the alleged *right* to pursue a sexual life, traditionally the state is only subject to negative obligations to abstain from interfering in such private and personal matters. This is largely linked to conservative attitudes towards sex, which will be further discussed below. Most individuals likely prefer that the state does not directly involve itself in such matters. In this sense, although the inability to have

³⁸ Marguerite Ward "The Surprising Way the Netherlands is Helping its Disabled Have Sex" (13 March 2014) Mic <www.mic.com>.

³⁹ Hilary Stace "Disability Policy in New Zealand" (15 February 2015) Briefing Papers <www.briefingpapers.co.nz>.

⁴⁰ Sanders, above n 25, at 448.

⁴¹ See Laura Donnelly, Michael Howie and Ben Leach "Councils pay for prostitutes for the disabled" (14 August 2010) The Telegraph <www.telegraph.co.uk>, and Marguerite Ward, above n 38.

⁴² Michael Ignatieff *The Needs Of Strangers* (Picador USA, New York, 2001) at 18 – 19.

⁴³ At 18 – 19.

⁴⁴ At 135.

a sex life may be an aspect of social exclusion for many disabled citizens, subsidising sex cannot be categorised as a state responsibility. On the other hand, it is arguable that there is a societal responsibility to make up for the effects of social attitudes about sex and disability. In fact, it has been suggested by some academics that a better way to fund sexual surrogates for the disabled is through charitable non-profit organisations.⁴⁵

4 *The Constraints of Public Opinion*

Overall, in order to determine when social inclusion is achieved, and more specifically, what an ordinary standard of living in modern society entails, effective consultation with the New Zealand public is a crucial first step. However, consultation does not address the dimension to the definition problem outlined above. Namely, this process is intrinsically uncondusive to accommodating minority views on what social inclusion might involve. Even if the Government accepts that there is positive obligation imposed upon it to fund sexual services, the prospects of this policy will nevertheless be constrained by public opinion. At present, it is unlikely that the general New Zealand public will be on board with state subsidised sexual services. Therefore, while the Government may wish to hold special meetings with relevant interest groups within the disabled community as a gesture of good faith, the political reality renders implementation of this kind of policy highly improbable at this point in time.

In a democratic society, law reform is necessarily constrained by popular public opinion.⁴⁶ This is because the parliamentary term is only a short three years making elections frequent. Naturally, politicians will strive for re-election and this is a deciding factor in policy development and overall strategy.⁴⁷ Academic Hyam Gold notes that politicians are often careful to refrain from adopting policies that offend majority perceptions. This is because voters are "not entirely rigid party supporters", but are "markedly ready to punish parties and governments for their transgressions."⁴⁸ For this reason, politicians and officials routinely assess their decisions. This is to detect potential repercussions on the party's standing with voters and whether or not significant sections of the voting population will likely disapprove.⁴⁹

There are multiple reasons why a proposal to fund sexual services for disabled citizens will likely be rejected by the general population. One reason is that there is still stigma attached

⁴⁵ For example, see Ezio Di Nucci "Sexual Rights and Disability" (2011) 37 J Med Ethics 158 at 159 – 161.

⁴⁶ Hyam Gold "Political Culture: Contemporary Patterns" in Hyam Gold (ed) *New Zealand Politics in Perspective* (3rd ed, Longman Paul, Auckland, 1992) at 14.

⁴⁷ Richard Mulgan *Politics in New Zealand* (3rd ed, Auckland University Press, Auckland, 2004) at 267.

⁴⁸ Gold, above n 46, at 15.

⁴⁹ Mulgan, above n 47, at 267.

to sex work. While prostitution has been decriminalised in New Zealand since 2003,⁵⁰ the profession is nevertheless one the Government cannot be seen promoting as the "industry remains controversial."⁵¹ This is due to divided opinions on the matter, which includes concerns that it is potentially harmful to women.⁵² In fact, the rationale behind decriminalisation was never to promote prostitution as a career option, but rather to protect sex workers.⁵³ In addition, continuing problems with "exploitative employment conditions"⁵⁴ also makes it problematic for the Government to be involved in any way.

Concerns about prostitution aside, sex on its own is a taboo subject.⁵⁵ The very idea of the state funding sex in any circumstances is likely to be deemed unpalatable by most members of the New Zealand public. In the United Kingdom, where sexual services are sometimes funded by local authorities on a case by case basis, many found the use of taxpayers' money for that purpose to be "deeply worrying".⁵⁶ It was seen to be a waste of public funds, which could be used on essential services more traditionally associated with social welfare. While the frustration and isolation felt by many disabled citizens is most probably legitimate, popular public opinion on this issue will make it immensely difficult to implement this kind of policy.

5 *Education as a Solution?*

However, this does mean that subsidised sexual services for the disabled may be a possibility in the future if there is a shift in societal attitudes towards sex. This may be facilitated by initiatives to change the way sex is perceived and to educate the New Zealand public about the social exclusion experienced by disabled citizens. Some efforts have already been made in Australia and the United States through the use of visual media including films and documentaries.⁵⁷ This comes back to the earlier contention that it is a societal responsibility to change perceptions about sexuality and the disabled community.

There are possibly two outcomes. Attempts to educate the public may either enable disabled persons to be more commonly perceived as viable sexual partners. Or, in keeping with this idea of a state responsibility, it may mean that funded sexual services will be more

⁵⁰ See Prostitution Reform Act 2003.

⁵¹ Parliamentary Service *Prostitution Law Reform in New Zealand* (July 2012) at 10.

⁵² Thomsen, above n 29, at 451.

⁵³ Prostitution Reform Bill (66-2) (select committee report) at 1.

⁵⁴ Parliamentary Service, above n 51, at 5.

⁵⁵ Sanders, above n 25, at 443.

⁵⁶ Paul Sims "Councils Pay for Disabled to Visit Prostitutes and Lap-dancing Clubs from £520m Taxpayer Fund" (18 August 2010) Daily Mail <dailymail.co.uk>.

⁵⁷ See Catherine Scott (director) *Scarlett Road* (documentary produced by Pat Fiske, Australia, 2011); and Alexander Freeman (director) *The Last Taboo* (United States, 2013).

palatable in the eyes of the public. Of course, there are still questions as to how to go about educating the public and how long it will take to change perceptions. Undoubtedly, inducing societal change is often a long and difficult process. However, there appears to be no way of getting around this. In order for minority views to be given any real consideration during the consultation process, the general public will need to be on board.

B The Issue of Sustainability

One of the more confronting issues of working towards a socially inclusive society is that of sustainability. More specifically, whether policies aimed at social inclusion are able to be maintained by the Government without having to make major adjustments in the future.⁵⁸ The very idea of allowing greater social inclusion for all New Zealanders may perhaps be idealistic. This is given the hefty demands on public funds such an endeavour is likely to require.

It is important that the Government is careful to ensure that its policy commitments are sustainable. This is particularly true for social policy. In the Treasury's 2013 statement on New Zealand's long term fiscal position, it identified a number of future cost pressures that the country is likely to face.⁵⁹ The three main areas of Crown expenditure are social security and welfare, health and education. According to the Treasury's projections, the costs in the areas of social security and welfare and health will only rise in the future, engendering a greater need to remain prudent about current spending. For example, due to the ageing of the population, New Zealand Superannuation will become more costly with spending estimated to grow from 4.3 per cent of GDP in 2010 to 7.9 per cent in 2060. In addition, an increasing demand for healthcare services and the rising prices needed to pay for those services will increase spending from 6.8 per cent of GDP in 2010 to 10.8 per cent in 2060.⁶⁰

The Treasury identified three broad approaches to tackling future financial challenges. These were to increase the percentage of taxation as a percentage of GDP, restrict spending growth or to redefine services to compensate for the ageing of the population.⁶¹ At present, the National-led Government's primary focus is to reduce the number of welfare recipients and overall social spending in the future.⁶² In light of this focus and given the costs that an

⁵⁸ The Treasury *Affording Our Future: Statement on New Zealand's Long-term Fiscal Position* (July 2013) at 11.

⁵⁹ At 3.

⁶⁰ At 15.

⁶¹ At 31.

⁶² See Ministry of Social Development *Statement of Intent 2013 – 2016* (Wellington, May 2013).

enhanced emphasis on social inclusion will entail, a system enabling the full participation of all New Zealanders does not appear to be forthcoming.

However, there is a need to strike the right balance between spending too much and not spending enough. Notably, the decline of total welfare expenditure, as a percentage of GDP, almost reflects the percentages at which healthcare and New Zealand Superannuation is expected to grow.⁶³ The Treasury described this decline as "striking" and raised the question of whether the Government ought to be spending more on increasing living standards.⁶⁴ This was in light of the 2012 Children's Commissioner's report, which raised concerns about the meagre living standards of some New Zealand children.⁶⁵

The intense focus on reducing social spending has also meant that difficult decisions have been made, and it must be queried whether the results are acceptable in modern day society. For example, the New Zealand Public Health and Disability Amendment Bill (No 2) 2013 was introduced as a response to the Court of Appeal's decision in *Ministry of Health v Atkinson* (the *Family Carers* case).⁶⁶ The Court, upholding the decisions of the High Court and Human Rights Review Tribunal, determined that a policy of not paying family carers for the provision of disability support services to their adult children, where a non-family member would be paid, amounted to unlawful discrimination on the basis of family status.⁶⁷ As a response the amendment limited the Crown's liability to pay family carers. This was done on the basis that requiring the Government to pay all family carers would "result in unmanageable fiscal costs to the Government."⁶⁸

Inevitably, sustainability is a pervasive issue that will need to be confronted by the Government in relation to any policy initiative. As illustrated, cost concerns will be a particularly formidable obstacle to enhancing social inclusion. However, the issue of costs cannot be a sufficient reason to neglect the wellbeing of citizens and halt social progress. While it is a difficult problem to overcome, the current social issues faced by New Zealanders do still need to be addressed. The question that remains is how the Government might go about doing so.

⁶³ The Treasury, above n 58, at 61.

⁶⁴ At 61.

⁶⁵ See Children's Commissioner *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012).

⁶⁶ *Ministry of Health v Atkinson* [2012] NZCA 184.

⁶⁷ At [139].

⁶⁸ New Zealand Public Health and Disability Amendment Bill (No 2) 2013 (118-1) (explanatory note) at 1.

1 A Universal Basic Income

In thinking about sustainable options for enabling social inclusion for all New Zealanders, it is perhaps prudent to consider the prospects of a universal basic income. The feasibility of providing a basic income to all citizens has been a hotly debated topic in recent years. Depending on the outcome of test cases, a universal basic income may be the solution to problems pertaining to sustainability as proponents argue that it is an affordable means of eradicating poverty. Of course, introducing a universal basic income is not essential to establishing a focus on social inclusion in New Zealand. However, this section considers whether it may be a viable option for developing a cost effective system.

Essentially, a universal or unconditional basic income is a minimum income guarantee provided by the state to every citizen in the form of a cash transfer. Ideally, it is not means tested, there are no work requirements and it is not targeted to specific categories of individuals.⁶⁹ Rather it is a "genuine unconditional minimum floor" additional to any income an individual receives from other sources.⁷⁰ The notion of a universal basic income was formed in the nineteenth century combining the ideas of a minimum wage and an unconditional one-off grant.⁷¹ Generally, proposals either seek to totally replace means-tested schemes, or to replace them partially. The latter has proven to be more desirable, whereas, the former is often perceived as a "utopian" model.⁷² In theory, the size of the cash transfer should be sufficient to allow individuals to meet the basic needs of living. Whether a universal basic income is conducive to a socially inclusive society will depend on the level of the basic income.

In terms of sustainability, part of the concern is that people will lose the incentive to work. However, it is argued that recipients of a basic income will continue working in pursuit of the rest of their livelihood, but with a greater scope for choice.⁷³ In fact, the results of a small scale Canadian study provides some support for this assumption. Between 1974 and 1979, a basic income in the form of monthly cheques was provided to the poorest residents of Dauphin, a small city situated in Manitoba. This was part of the "Mincome" programme that was also being conducted in the United States. The effect was the elimination of

⁶⁹ Phillippe Van Parijs "The Universal Basic Income: Why Utopian Thinking Matters, and How Sociologists Can Contribute to It" (2013) 41 *Politics and Society* 171 at 174.

⁷⁰ Philippe Van Parijs "Basic Income and the Two Dilemmas of the Welfare State" in Christopher Pierson, Francis G Castles and Ingela K Naumann (eds) *The Welfare State Reader* (3rd ed, Polity Press, Cambridge, 2014) 342 at 343.

⁷¹ Basic Income Earth Network "History of basic income" <www.basicincome.org>.

⁷² Van Parijs, above n 69, at 176.

⁷³ Herbert J Gans "Basic Income: A Remedy for a Sick Labor Market" (2014) 57 *Challenge* 80 at 81.

poverty in the five years of running the programme with no real impact on work ethic.⁷⁴ It is also thought that the labour supply of people at the bottom end of the earning scale will increase with the abolition of the poverty trap, in which people are deterred from taking up employment in fear of having to relinquish their benefits.⁷⁵ Phillippe Van Parijs, one of the dominant advocates for a universal basic income, proclaims that "it is about the power to decide what sort of life one wants to live."⁷⁶

However, the notion of a universal basic income has been criticised as fiscally and politically unrealistic. In fact, the 1988 Royal Commission on Social Policy rejected calls for the replacement of all benefits by a universal basic income as it was deemed to be too costly.⁷⁷ However, Van Parijs argues that a basic income "does not rely on some absurdly optimistic assumption of abundance."⁷⁸ Generally, the idea is that, depending on the level and form of basic income that is implemented, the costs can be offset by adjusting taxes and savings from eliminating or reducing the size of the bureaucracy.⁷⁹

Although the idea is appealing in theory, whether the implementation of a universal basic income, at a nation-wide level, is a sustainable option for increasing social inclusion is yet to be seen. Though the idea is already a couple of centuries-old, proposals to introduce a comprehensive universal basic income are still in their infancy. For example, a two year basic income experiment in Finland is still awaiting its commencement in 2017.⁸⁰ At this point in time, a universal basic income does not provide a robust solution to whether enabling social inclusion for all New Zealanders is fiscally possible. Implementing a universal basic income would require a complete overhaul of New Zealand's social security system. National's Finance Minister, Bill English MP maintains the view that it "would be very expensive and likely discourage work".⁸¹ Such drastic change is unlikely to garner much support in lieu of greater certainty around the benefits of a universal basic income.

⁷⁴ See Evelyn L Forget "The Town with No Poverty: The Health Effects of a Canadian Guaranteed Annual Income Field Experiment" (2011) 37 *Canadian Public Policy* 283; and Zi-Ann Lum "A Canadian City Once Eliminated Poverty And Nearly Everyone Forgot About It" *The Huffington Post* (online ed, Canada, 23 December 2014).

⁷⁵ See Van Parijs, above n 69, at 176.

⁷⁶ At 174.

⁷⁷ Jo Barnes and Paul Harris "Still Kicking? The Royal Commission on Social Policy, 20 Years on" (2011) 34 *Social Policy Journal of New Zealand* 70.

⁷⁸ Van Parijs, above n 70, at 343.

⁷⁹ Gans, above n 73, at 15 – 16.

⁸⁰ See Sosiaali-ja Terveysministeriö "Ministry of Social Affairs and Health requests opinions on a basic income experiment" (press release, 25 August 2016).

⁸¹ Simon Collins "Labour considers 'universal basic income' policy" *The New Zealand Herald* (online ed, Auckland, 21 March 2016).

V Exploring Social Inclusion in New Zealand's History

Having examined some of the obstacles to implementation, this section explores different occasions where the Government has nevertheless given particular attention to enabling social inclusion for all members of society. The idea is not new to New Zealand. Arguably, it all began with the introduction of a universal superannuation in 1936.⁸² The idea of social inclusion further developed in a collection of Royal Commission reports released between the 1960s and the 1980s. These reports emphasised ideas of full participation, signalling a social democratic approach to social welfare.⁸³ Furthermore, in spite of the impact of a shift to neo-liberal policies in the 1990s, the Government returned to a social democratic approach in 2001, revitalising its commitment to social inclusion.

A The Woodhouse Report 1967

New Zealand's recognition of the need for social inclusion can perhaps be traced back to 1967. This was the year the Royal Commission of Inquiry's report on *Compensation for Personal Injury in New Zealand* was released.⁸⁴ Also known as the *Woodhouse Report*, its recommendations influenced the development of New Zealand's no-fault accident compensation scheme.⁸⁵ The scheme came into operation in 1974 and continues to reflect the five core principles stipulated in the *Woodhouse Report*. These principles are community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.⁸⁶

These principles all reflect ideas of social inclusion. Community responsibility is premised on the notion that society reaps benefits from the productive work of its members. Therefore, society should be responsible for those who are willing to work, but are prevented from doing so as a result of personal injury.⁸⁷ Comprehensive entitlement refers to the notion that workers sustaining the same injuries should be treated equally. In other words, it should not make a difference whether an injury is suffered in the course of employment or at home.⁸⁸ These two principles relate back to the idea that a person's social entitlements arise from his or her status as a full member of a society. That is, payments are not a form of charity, but a social obligation.

⁸² See Pensions Amendment Act 1936.

⁸³ Stephens, above n 6, at 138.

⁸⁴ Report of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, December 1967) [*Woodhouse Report*].

⁸⁵ Stephens, above n 6, at 137.

⁸⁶ *Woodhouse Report*, above n 84, at [55].

⁸⁷ At [56].

⁸⁸ At [57].

What really set the *Woodhouse Report* apart was its focus on complete rehabilitation. This idea of "rehabilitating" members of society did not feature in other parts of New Zealand's social security system; for example, it was absent from the Social Security Act 1938. Even today, we do not view rehabilitation as being an objective of social security and welfare policies in general. The Commission recognised the need to allow a person to make a full recovery before returning to employment. This was thought to not only be beneficial to an individual's wellbeing, but also to the community as whole. This is because rehabilitation is not only conducive to full participation, but also enables a person to re-join the workforce at full productive capacity. The report stipulated that this would require compensating for the lost income incurred as a result of taking time off work.⁸⁹

In terms of real compensation, by providing an amount adequate to cover real losses, injured individuals are protected from social exclusion arising from unemployment. In formulating this principle, the Commission moved away from calculations based solely on need. The 1960s was a time of affluence for New Zealand. On this basis, the Commission asserted that compensation reflecting actual loss was affordable and should, therefore, be provided.⁹⁰ In terms of the principle of administrative efficiency, the Commission was referring to the idea that the "collection of funds and their distribution as benefits should be handled speedily, consistently, economically, and without contention."⁹¹ These factors are important for ensuring that as a means of facilitating social inclusion, the accident compensation scheme is fair and sustainable.

In terms of achieving its goals for social inclusion in New Zealand, the *Woodhouse Report* is arguably the most successful of the three reports highlighted in this paper. This likely comes down to the fact that it was the only proposal to adequately confront issues of sustainability. Unlike the recommendations in the other reports, "virtually no new money" was needed for the accident compensation scheme.⁹² Rather than requiring an adjustment in taxes, the scheme was to be paid for by the monies used to fund the tort system and workers' compensation system. These were costly to run and it was determined that they were to be replaced by one comprehensive system.⁹³

⁸⁹ *Woodhouse Report*, above n 84, at [58].

⁹⁰ At [61].

⁹¹ At [62].

⁹² Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 204.

⁹³ At 204.

B The McCarthy Report 1972

The National Government set up the Royal Commission of Inquiry on Social Security (the McCarthy Commission) in 1969. The McCarthy Commission reviewed the benefits provided in New Zealand since the inception of the Social Security Act 1938.⁹⁴ This was the country's first comprehensive social security statute. By 1972, the report of the Royal Commission of Inquiry on *Social Security in New Zealand* (otherwise known as the *McCarthy Report*) was released.⁹⁵

While the accident compensation scheme ensures all New Zealanders are protected from social exclusion as a result of personal injury, it does not protect those who are unable to fully participate in society as a result of sickness. As will be discussed later in this paper, this has caused many to criticise the welfare system as arbitrary and discriminatory. In this sense, the *McCarthy Report* went a step further than the *Woodhouse Report* by looking at social inclusion more generally. However, in terms of making recommendations for dramatic change, the McCarthy Commission was arguably more conservative.⁹⁶ This may also account for its lack of success as compared to the *Woodhouse Report*. In fact, Sir Geoffrey Palmer has observed that the Royal Commission on social security, discussed below, had "not recommended anything along the lines" of the 1967 *Woodhouse Report*.⁹⁷

The report described the principles underlying New Zealand's social welfare system, referring also to this idea of community responsibility. Specifically, it stipulated that enhancing social welfare is a responsibility that should be borne by society through the taxation system. It stated that:⁹⁸

[the system should] ensure...that everyone is able to enjoy a standard of living much like that of the rest of the community, and thus be able to feel a sense of participation in and belonging to the community.

This idea was not exclusive to New Zealand. Rather, during the 1960s, a number of western countries began to define "poverty" more broadly to encompass the idea of participation.⁹⁹

⁹⁴ See Margaret McClure "A Decade of Confusion: The Differing Directions of Social Security and Accident Compensation 1969 – 1979" (2003) 34 VUWLR 269 at 271.

⁹⁵ *McCarthy Report*, above n 15, at 65.

⁹⁶ McClure, above n 94, at 270.

⁹⁷ Palmer, above n 92, at 205.

⁹⁸ *McCarthy Report*, above n 15, at 65.

⁹⁹ McClure, above n 94, at 271.

The *McCarthy Report*, in recognising that poverty was relative to societal standards, clarified that an "ordinary standard of living" means that:¹⁰⁰

[N]o-one is to be poor that they cannot eat the sort of food that New Zealanders usually eat, wear the same sort of clothes, take a moderate part in those activities which the ordinary New Zealander takes part in as a matter of course. The goal is to enable any citizen to meet and mix with other New Zealanders as one of them, as a full member of the community...

In order to ensure that all New Zealanders are able to attain this standard of living, the McCarthy Commission recommended an increase in government expenditure on the benefit system.¹⁰¹ A number of the report's recommendations were implemented. This included the introduction of the Domestic Purposes Benefit and an increase in overall benefit levels.¹⁰²

The emphasis on social inclusion in the *McCarthy Report* is perhaps also reflective of the economic conditions that defined the period. Following the Great Depression and the Second World War, New Zealand experienced years of economic growth. In fact, the period from the 1950s to the early 1970s has come to be known as the "golden age of welfare."¹⁰³ New Zealanders had "one of the highest standards of living in the world and were wealthier than ever before."¹⁰⁴ At the time, productivity levels were rising and inflation and unemployment was low.¹⁰⁵ Achieving full employment was still a viable policy goal, whereas now there is no longer an expectation that it can be achieved.¹⁰⁶ The economic boom at the time rendered the McCarthy Commission's recommendations both publicly acceptable and affordable.¹⁰⁷ Arguably, the realisation of social inclusion to the extent specified in the *McCarthy Report* in today's conditions might not be viable.

In the end, the McCarthy Commission's vision for social inclusion in New Zealand was hampered by global recession. The period from 1973 to 1984 was characterised by rapidly increasing unemployment and inflation.¹⁰⁸ Policy-makers started to question whether the

¹⁰⁰ *McCarthy Report*, above n 15, at 62.

¹⁰¹ At 101 – 102.

¹⁰² McClure, above n 94, at 272.

¹⁰³ The Treasury, above n 58, at 60.

¹⁰⁴ Margaret McClure *A Civilised Community: A History of Social Security in New Zealand 1898 – 1998* (Auckland University Press, Auckland, 1998) at 131.

¹⁰⁵ Barnes and Harris, above n 77, at 71.

¹⁰⁶ The Treasury, above n 58, at 28.

¹⁰⁷ Barnes and Harris, above n 77, at 71.

¹⁰⁸ McClure, above n 104, at 202.

social security system was sustainable.¹⁰⁹ Ultimately, mounting fiscal pressures caused aspects of the welfare system to be wound back.¹¹⁰ What followed was a trend of neo-liberal economic policies since the Labour Government's inception in 1984.¹¹¹ New Zealand's Prime Minister, the Rt Hon David Lange, asserted that the New Zealand which had produced the McCarthy Commission was "not New Zealand now";¹¹² therefore, a shift away from the ideas stipulated in the *McCarthy Report* was necessary.¹¹³

C The April Report 1988

Nevertheless, in 1988 the report of the Royal Commission of Inquiry on *Social Policy*, also known as the *April Report*, revived the idea of social inclusion. Despite the Government's neo-liberal philosophy in its economic policies, Mr Lange encouraged a review to help "make the economy fit for people to live in."¹¹⁴ This was possibly an attempt to compensate for the radical changes being made,¹¹⁵ and to "salvage some of Labour's social democratic heritage".¹¹⁶

Much like its predecessor, the *April Report* emphasised the right of citizens to partake fully in and have a sense of belonging in the community:¹¹⁷

[income redistribution should] ensure that all New Zealanders *have access to a sufficient share of income and other resources to allow them to participate in society* with genuine opportunity to achieve their potential and to live lives that they find fulfilling. In so doing to provide a measure of certainty and security for all throughout their lives.

However, this renewed focus on social inclusion had little effect on social policy. Historian Margaret McClure observes that the *April Report* failed to convincingly address issues of funding and lacked a coherent basis for its ideals.¹¹⁸ In addition, its sheer size and chaotic layout played a great part in reducing its readership. The report comprised of 4000 pages

¹⁰⁹ At 205.

¹¹⁰ The Treasury, above n 58, at 28.

¹¹¹ Barnes and Harris, above n 77, at 71.

¹¹² David Lange *Making Social Policy* (Palmerston North, 1985) at 3 – 4.

¹¹³ McClure, above n 104, at 211.

¹¹⁴ At 226.

¹¹⁵ At 226.

¹¹⁶ Barnes and Harris, above n 77, at 71.

¹¹⁷ Report of the Royal Commission of Inquiry *Social Policy* (Government Printer, Wellington, April 1988) at 5 [*April Report*] (emphasis added).

¹¹⁸ McClure, above n 104, at 227 – 228.

in four large unindexed volumes making it extremely difficult to navigate. Many public servants and politicians simply chose to ignore it.¹¹⁹

In addition, the 1990s saw a discernible shift away from ideas of participation. Once the National Government came to power in 1990, it pursued a number of harsh neo-liberal reforms.¹²⁰ The Government sought to reduce government expenditure on social welfare by cutting the rates of social security benefits in 1991. This included a reduction of superannuation, which went against election pledges.¹²¹ The living standards of working-age beneficiaries fell dramatically as a result of the 1991 budget cuts.¹²² This was due to the fact that the reform was carried out without inquiring into the adequacy of benefits or the standard of living of those who rely on state support.¹²³ Supplementary benefits became more important and was a means of adjusting levels for extreme hardship.¹²⁴ One of the effects was a substantial increase in applications for special benefits as people were unable to meet costs.¹²⁵

The reforms also involved the introduction of work-testing and strict eligibility requirements. The goal was to provide a safety net only for those most in need and to promote self-reliance.¹²⁶ Furthermore, in 1998 the community wage was introduced to replace unemployment benefits.¹²⁷ As part of a work-for-the-dole programme, those receiving the community wage were expected to be available for community work. The programme was a means of enforcing the reciprocal obligation beneficiaries allegedly owed to the state according to neo-liberal thinking.¹²⁸ The strong focus on work in return for a benefit presents a marked shift from the citizenship focus apparent in the Royal Commission reports where welfare was perceived as a right of all citizens, not just the so-called deserving poor.

¹¹⁹ McClure, above n 104, at 227 – 228.

¹²⁰ Stephens, above n 6, at 138.

¹²¹ McClure, above n 104, at 235 – 237.

¹²² O'Brien, above n 6, at 736.

¹²³ McClure, above n 104, at 242.

¹²⁴ At 237.

¹²⁵ See *Ankers v Attorney-General* [1995] NZFLR 193 (HC) at 197 – 198 for background on special benefits and a ruling against using mechanical formula in place of exercising discretion to determine need.

¹²⁶ See Jenny Shipley *Social Assistance: Welfare that Works: A Statement of Government Policy on Social Assistance* (Wellington, 1991) at 13.

¹²⁷ Peter McCardie "The Community Wage" (press release, 22 April 1998).

¹²⁸ Jane Higgins "From Welfare to Workfare" in Jonathan Boston, Paul Dalziel and Susan St John (eds) *Redesigning the Welfare State in New Zealand: Problems, Policies, Prospects* (Oxford University Press, Auckland, 1999) 260 at 260.

D The Social Development Approach 2001

Under a Labour-led Coalition, the Social Development Approach was introduced. Set out in MSD's 2001 *Pathways to Opportunity* report, it signalled New Zealand's return to the idea of social inclusion once again.¹²⁹

Extending opportunities so no group is excluded from society or is denied the full rights, benefits and responsibilities of citizenship is a key challenge being addressed by the Government.

The Ministry recognised that social exclusion occurs where there is poverty, unemployment, educational failure and social isolation.¹³⁰ Reflecting the ideas of participation in the *McCarthy Report*, it is acknowledged that these outcomes "inhibit people, families and communities, from both effectively participating in, and belonging to, society."¹³¹

The difference here is a focus on work and self-reliance as means of achieving social inclusion. Under this approach, reducing social exclusion involves both protection and prevention. This involves protecting those who are socially excluded with income support and public health services as well as reducing the risk of social exclusion by addressing its causes.¹³² The causes of social exclusion are identified as a lack of access to resources or capital, a lack of opportunity, adverse random events and previous experience of social exclusion.¹³³ Therefore, one of the strategies of the Social Development Approach is "making work pay."¹³⁴ This involves increasing people's working skills so they are able to take advantage of opportunities to participate in the labour market. In addition, it relies on providing financial incentives to move off the benefit and into stable work.¹³⁵ When the fifth National Government came to power in 2008, it adopted the Social Development Approach, but with an intensified work-focus.¹³⁶

¹²⁹ Ministry of Social Development *Pathways to Opportunity, Nga Ara Whai Oranga: From Social Welfare to Social Development* (June 2001) at 22.

¹³⁰ Ministry of Social Development, above n 7, at [3].

¹³¹ At [4].

¹³² At [47].

¹³³ At [34].

¹³⁴ At [47].

¹³⁵ Ministry of Social Development, above n 129, at 10 – 13.

¹³⁶ Stephens, above n 6, at 140.

VI Social Inclusion Today

A Discrepancies within the Welfare System

As the section above shows, there has been a renewed focus on social inclusion, but it now appears to be captured by this focus on work. However, while the Social Security Act reflects this narrow work-focus, it should be noted that there other programmes within the welfare system that facilitate participation, but are not guided by an emphasis on paid employment. This includes New Zealand Superannuation, which is a non-means tested universal benefit. It is available to citizens as well as permanent residents aged 65 and over as long as they have lived in New Zealand long enough and fall within a few other eligibility requirements. As already mentioned the accident compensation scheme is another feature of the welfare system that does not rely on a focus on work to enhance social inclusion.

The different focuses within New Zealand's welfare system has led to some problematic, or discriminatory, outcomes. The issue lies in the resulting discrepancies between the level of benefits administered under the Accident Compensation Act and the Social Security Act. As the latter is not guided by the principles of real compensation and rehabilitation, recipients are typically entitled to a lot less than those who are covered by the accident compensation regime.¹³⁷ Under the current welfare system, the amount one receives can also be based on an arbitrary distinction, namely, the cause of a person's incapacity. Sir Geoffrey Palmer has described New Zealand's system of cash benefits as "more in the nature of a *lottery* than a humane and rational method of maintaining income for people."¹³⁸ As the accident compensation scheme only covers personal injury, a person suffering from a heart attack or cancer will be treated "much less generously" than someone who suffers an accidental injury that results in the same incapacity.¹³⁹ In light of these problems, the Government might want to consider re-evaluating its social security system. This might involve adopting a broader focus on social inclusion across all welfare legislation.

VII Implementing Social Inclusion

A Introduction

Our history reveals that the direction of New Zealand's social policy has gone back and forth when it comes to a focus on social inclusion. As a previous section illustrates, the

¹³⁷ Geoffrey Palmer "Income Maintenance at the Cross Roads" in Geoffrey Palmer (ed) *The Welfare State Today* (Fourth Estate Books, Wellington, 1977) 3 at 5.

¹³⁸ At 5 (emphasis added).

¹³⁹ Palmer, above 92, at 204.

idea of social inclusion has, however, remained pertinent in New Zealand since the introduction of the Social Development Approach in 2001. While the focus can now be described as one of social inclusion through work, the idea of social inclusion seems to have, to an extent, found a place in our thinking about social security and welfare. Although developments may not reflect the ideals envisaged by the McCarthy Commission in 1972, New Zealand is arguably on the right track. However, should the Government wish to ensure greater social inclusion and consistency within the welfare system, it will likely have to formally solidify social inclusion as the overarching focus for New Zealand social policy.

At present, although governments have shown some support for enhancing social inclusion, there is yet to be any formal acknowledgment of the idea to reflect its ongoing importance in New Zealand. As a corollary, there is no mechanism placing an obligation on the Government to continue to reflect on and improve social inclusion. In addition, there is no way of holding governments accountable for policies that lead to social exclusion. There needs to be some means of fortifying New Zealand's commitment to enhancing the social inclusion of its citizens. Formal recognition would give the notion of social inclusion greater force.

One of the difficulties is that, at present, there appears to be no indication of a desire to formalise an overarching focus on social inclusion in New Zealand. Rather than confronting this issue, this section of the paper will focus on how the idea might be incorporated if a desire to do so is expressed. It will consider two avenues through which an ongoing focus on social inclusion could be implemented. Firstly, it will look at the consequences of inserting a right to social inclusion in the NZBORA. It will then examine the effects of inserting social inclusion as a purpose and principle of New Zealand's primary welfare statute: the Social Security Act.

B A Right to Social Inclusion in the New Zealand Bill of Rights Act 1990

An increased focus on social inclusion could be fostered by establishing a rights-based approach to social security and welfare. This can be done by inserting into the NZBORA a right to social inclusion according to the standards prevailing in society. Or more broadly, a right to social security and welfare. Of course, the latter approach will need to specify social inclusion as part of that right. However, while there are a number of benefits to undertaking a rights-based approach, there are also many obstacles in the way of implementation.

1 Consistency with New Zealand's Binding International Law Obligations

As a fundamental principle of international law, the obligations contained in an international treaty are binding on ratifying parties.¹⁴⁰ This means that when a state ratifies a treaty, it is obliged to modify its domestic laws to give effect to the contents of the treaty. Failing to do so renders a state in breach of its binding international obligations.¹⁴¹ This is because without incorporating international law into domestic law, New Zealand's international obligations remain unenforceable.

In a 2015 report, Judy McGregor, Sylvia Bell and Margaret Wilson offered a grim assessment of New Zealand's compliance with six major human rights treaties.¹⁴² The report noted that human rights implementation, especially in the realm of economic, social and cultural rights, has potentially come to a standstill and there are also "worrying signs of regression".¹⁴³ This was in reference to the New Zealand Public Health and Disability Amendment Act 2013, which was enacted under urgency in a single sitting day. Furthermore, the report describes New Zealand's human rights profile as a "paradox".¹⁴⁴ Despite New Zealand's lack of domestic implementation, internationally the country has a long-running reputation as a leader in human rights. For example, New Zealand was heavily involved in the development of the Universal Declaration of Human Rights and, more recently, in the Convention on the Rights of Persons with Disabilities.¹⁴⁵

One of the benefits of inserting a right to social inclusion into the NZBORA is that it will bring New Zealand closer to fulfilling its binding international law obligations. The right to social security and welfare fall into the category of economic, social and cultural rights referred to in the report. There is currently no right to social security and welfare recognised in New Zealand's domestic legislation. Thus, there is also no acknowledged right to social inclusion. This is in spite of the fact that a number of international instruments ratified by New Zealand expressly or implicitly establish such a right.¹⁴⁶

¹⁴⁰ Malcolm Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014) at 660.

¹⁴¹ Claudia Geiringer and Matthew Palmer "Human Rights and Social Policy in New Zealand" (2007) 30 *Social Policy Journal of New Zealand* 12 at 21.

¹⁴² Judy McGregor, Sylvia Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (Law Foundation Research Report, Wellington, 2015).

¹⁴³ At 177.

¹⁴⁴ At 175.

¹⁴⁵ At 175.

¹⁴⁶ Stephens, above n 6, at 142.

For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises "the right of everyone to social security, including social insurance."¹⁴⁷ More specifically, art 11.1 states that:¹⁴⁸

...States Parties to the present Covenant recognize the right of everyone to an adequate standard of living... including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The ICESCR was intended to ensure "the protection of people as full persons".¹⁴⁹ This involves allowing an individual the right to pursue social, economic and cultural activities. Such a right is described in the preamble as deriving from the inherent dignity of human beings.¹⁵⁰ Broader ideas of social inclusion can also be seen in arts 13 and 15 of the ICESCR, which refer to the "right of everyone to education" and to take part in cultural life, respectively. Furthermore, on 26 September 2008, New Zealand ratified the Convention on the Rights of Persons with Disabilities.¹⁵¹ As stated in art 3, one of the principles of the Convention is to allow disabled persons "full and effective participation and inclusion in society."¹⁵²

Along with the Human Rights Act 1993, the NZBORA represents an incorporation of some of New Zealand's international human rights obligations into domestic law. However, the NZBORA only reflects a partial compliance with international obligations because of its limited scope. More specifically, the Act only "affirms New Zealand's commitment to the International Covenant on Civil and Political Rights"¹⁵³ (ICCPR). As a result, it neglects to account for the country's obligations in relation to the enhancement of economic, social and cultural rights under the ICESCR which was ratified by New Zealand in 1978, the same year it ratified the ICCPR.¹⁵⁴

There have been calls to insert economic, social and cultural rights into the NZBORA. For example, in 2013, the Constitutional Advisory Panel released a report recommending that the Government establish a process to explore options for improving the NZBORA, such

¹⁴⁷ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 9 [ICESCR].

¹⁴⁸ Article 11.1.

¹⁴⁹ McGregor, Bell and Wilson, above n 142, at 44.

¹⁵⁰ ICESCR, preamble.

¹⁵¹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

¹⁵² Article 3(c).

¹⁵³ New Zealand Bill of Rights Act 1990, long title.

¹⁵⁴ McGregor, Bell and Wilson, above n 142, at 26.

as "adding economic, social and cultural rights" into the Act.¹⁵⁵ Furthermore, the Economic and Social Committee of the United Nations has repeatedly asserted that it is necessary for New Zealand to include these rights in a specific statutory framework, particularly the NZBORA. However, as with the Constitutional Panel's recommendation in 2013, this was rejected by the New Zealand Government.¹⁵⁶ The stubborn reluctance to recognise economic, social and cultural rights demonstrates the inferior status the country continues to accord to them as compared to civil and political rights.¹⁵⁷

The advantage is that concept of social inclusion is simple and, as demonstrated, sufficiently broad to encompass a number of the economic, social and cultural rights contained in New Zealand's binding international treaties. Rather than having its own specific content, a right to social inclusion in the NZBORA can be construed in a way that allows it to be overarching. Recalling that social inclusion refers to the process whereby an individual is able to fully participate in society according to the prevailing standards, it would seem that almost all of the rights contained in the ICESCR fall within the umbrella of social inclusion. For example, on top of those rights already mentioned, the right to work, housing and physical and mental health are conceivably all aspects of being included in society. There are also advantages to having an open-ended right like social inclusion in that it can be interpreted variously and, therefore, expanded upon as time progresses and as people's perceptions begin to change. Quite possibly, social conditions in the future may make state subsidised sexual services for disabled citizens a reality enforceable under the NZBORA.

Thus, introducing a right to social inclusion into the NZBORA is a good starting point to improving the country's commitment to its international obligations, as well as preserving its reputation as an international human rights leader. Optimally, it would serve as only a precursor to the full incorporation of all these Conventions in the future. Adopting a focus on social inclusion should hopefully foster a culture more conducive to incorporation. Specifically, one where economic, social and cultural rights are perceived as having similar importance to civil and political rights.

2 *Constitutional Protection of a "Duty" Imposed on the State*

Although the NZBORA is not entrenched law, meaning it can be amended or repealed by a simple majority in the House of Representatives, it occupies an important place in New

¹⁵⁵ Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (Wellington, 2013) at 17.

¹⁵⁶ McGregor, Bell and Wilson, above n 142, at 46.

¹⁵⁷ At 19.

Zealand's constitution. Essentially, due to the constitutional nature of the Bill of Rights, a right to social inclusion ought to be better protected by the Act than any other document. For example, the right to social inclusion will be safeguarded against displacement resulting from fluctuations in socio-economic conditions and political ideologies. This is because the Government is generally reluctant to take away from the rights contained in the NZBORA.

Since its introduction in 1990, the NZBORA has only been amended two times. The first amendment was made to s 19 to reflect the reorganisation of the prohibited grounds of discrimination in the Human Rights Act 1993.¹⁵⁸ The second amendment came about as a result of the Criminal Procedure (Reform and Modernisation) Bill 2010 which sought to increase the penalty threshold for the right to a jury trial.¹⁵⁹ This proposal was largely supported because it did not remove the fundamental right to a fair trial and bolstered the right to be tried without undue delay.¹⁶⁰ So far, no rights or freedoms have been repealed from the NZBORA.

Furthermore, by recognising that social inclusion is a right, rather than a construct arising from a particular party's social policy, greater importance is accorded to the notion of social inclusion. That is to say, the language of rights places a duty on the state. This is in contrast to a needs-based approach which places no legal or moral obligation on any other person.¹⁶¹ As a result, the Government will be obliged to guarantee social inclusion for its citizens. Furthermore, Mamari Stephens argues that under a rights-based approach to New Zealand social policy, discrepancies in entitlements would less likely be tolerated. She suggests that decisions like *Trevethick v Ministry of Health*,¹⁶² which is further discussed below, may have been decided differently if there was a right to social security and welfare.¹⁶³ As an additional advantage, placing an obligation on the state will also have the effect of changing societal perceptions of welfare beneficiaries. While a focus on need has a tendency to portray beneficiaries as victims and recipients of charity, a right to social inclusion empowers beneficiaries by presenting them as holders of entitlements.¹⁶⁴

¹⁵⁸ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [2.10.1].

¹⁵⁹ See New Zealand Bill of Rights Amendment Act 2011.

¹⁶⁰ New Zealand Bill of Rights Act, s 25(b).

¹⁶¹ Geiringer and Palmer, above n 141, at 15.

¹⁶² *Trevethick v Ministry of Health* [2008] NZCA 397.

¹⁶³ Stephens, above n 6, at 151.

¹⁶⁴ Geiringer and Palmer, above n 141, at 15.

3 *Robust Progressive Protection*

The nature of the obligation imposed on the state will also be robust. As stated previously, social security and social inclusion fall into the category of economic, social and cultural rights.¹⁶⁵ Unlike civil and political rights, these rights are relative and progressive, rather than absolute.¹⁶⁶ They do not only require active protection, but also "progressive implementation".¹⁶⁷ In order to not infringe the right to social inclusion, the New Zealand Government will, therefore, be expected to take "positive measures" to allow an individual to fully participate in society. It will be required to provide the resources and mechanisms needed to ensure that social inclusion is achieved.¹⁶⁸ In other words, a positive duty will be imposed on the state to implement a social security scheme that facilitates social inclusion.

Applying the interpretation offered by legal academics Claudia Geiringer and Matthew Palmer, policy makers will be required to undertake "ongoing and reasonable engagement with the scope and effect"¹⁶⁹ of the right to social inclusion. This involves policy makers actively considering the scope of the protected right, the extent to which it has been realised, the state's current capacity to realise the right and how the right can be more fully realised in light of resource constraints.¹⁷⁰

On the face of it, taking a rights-based approach should result in a greater focus on enabling social inclusion when formulating social policy. If a right to social inclusion is implemented, given the nature of a right, we would imagine there to be a number of changes made to the welfare system to create a more inclusive society. Unfortunately, enhancing the Government's focus on social inclusion will likely entail more than simply inserting another entitlement into the NZBORA. As New Zealand has a parliamentary Bill of Rights, there are a number of limitations on the protection that is conferred. In addition, the insertion of economic, social and cultural rights into New Zealand's Bill of Rights framework is unprecedented and comes with its own difficulties.

4 *Obstacles – The Limitations of a Parliamentary Bill of Rights*

As mentioned above, New Zealand is a country with a parliamentary Bill of Rights. This means that the NZBORA is not superior to any other legislation and it does not operate as

¹⁶⁵ Stephens, above n 6, at 144.

¹⁶⁶ McGregor, Bell and Wilson, above n 142, at 44.

¹⁶⁷ Stephens, above n 6, at 144.

¹⁶⁸ See UN Committee on Economic, Social and Cultural Rights *General Comment No 19: The Right to Social Security (article 9)* E/C12/GC/19 (2007) at 47 – 50.

¹⁶⁹ Geiringer and Palmer, above n 141, at 23.

¹⁷⁰ At 23.

a "substantive legal constraint" on Parliament's law-making power.¹⁷¹ In other words, there is nothing preventing Parliament from enacting legislation that contravenes the NZBORA. In fact, s 4 expressly prohibits the courts from striking down inconsistent legislation, while s 5 states that the rights and freedoms contained in the Bill of Rights may be subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁷² These qualifications mean that, as with the other stated rights, absolute protection will not be afforded to a right to social inclusion under the NZBORA.

However, the Act does arguably function as a "procedural constraint" because if the Government wishes to override protected rights, it will have to do so explicitly by enacting legislation and facing the political consequences that follow.¹⁷³ In addition, mechanisms built into the cabinet decision-making process also act as a sort of deterrent to developing policies that offend the Bill of Rights. For example, as stated in the Cabinet Manual, ministers must affirm that their Bills are compliant with the NZBORA.¹⁷⁴ Indeed, Sir Geoffrey Palmer observes that ministers and officials often strive to avoid introducing provisions that are rights-inconsistent.¹⁷⁵ Nevertheless, as at 13 June 2016, 70 s 7 reports have occurred since the enactment of the NZBORA and there have been 37 instances in which Parliament has passed Bills in breach of a right or freedom in a way that cannot be justified.¹⁷⁶ One of these instances was the enactment of the New Zealand Public Health and Disability Bill (No 2).¹⁷⁷

5 *Obstacles – The Implications of Deferring to Parliament*

The problem with s 5 is that the tradition of judicial deference to Parliament may render an open-ended right like social inclusion to be unenforceable in certain circumstances. For instance, the imperative to protect the public purse might always be asserted as a justified limitation on such a right. In fact, the Attorney-General's s 7 report on the New Zealand Public Health and Disability Bill (No 2) asserted that:¹⁷⁸

¹⁷¹ Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago LR 389 at 390.

¹⁷² New Zealand Bill of Rights Act 1990, s 5.

¹⁷³ Geiringer, above 171, at 390.

¹⁷⁴ Cabinet Office *Cabinet Manual 2008* at [7.60].

¹⁷⁵ Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why It Did Not Succeed and How It Can be Repaired" (2016) NZJPIL (forthcoming) at 10.

¹⁷⁶ At 10.

¹⁷⁷ New Zealand Public Health and Disability Amendment Bill (No 2) 2013 (118-1).

¹⁷⁸ Christopher Finlayson *Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2)* (16 May 2013) at [9].

The Crown does not have access to a limitless pool of money. Decisions about how scarce resources are to be allocated must reside with the Crown...The enactment of the Bill of Rights Act was not intended to alter that.

As mentioned previously, this Bill came about as a response to the outcome in the *Family Carers* Case. The Court of Appeal affirmed the High Court's finding that the Ministry of Health's policy of non-payment of family carers was discriminatory. Specifically, the Court found that there was differential treatment as between groups in comparable situations on the basis of their family status.¹⁷⁹ Family status is one of the prohibited grounds of discrimination set out in s 21 of the Human Rights Act 1993.¹⁸⁰ Section 19 of the NZBORA affirms the right to freedom from discrimination on these prohibited grounds. The Court upheld the determination that the limitation on s 19 was not justified as required by s 5.¹⁸¹ Applying the test set out by Tipping J in *R v Hansen*,¹⁸² the High Court found that the policy limited the right more than was reasonable necessary and was not in due proportion to the importance of the policy's objectives.¹⁸³

In contrast, the Attorney-General, the Hon Christopher Finlayson MP, in carrying out his vetting function under s 7 of the NZBORA, was of the opinion that the prohibition at issue in the *Family Carers* case did not amount to a breach of the NZBORA. Indeed, Mr Finlayson observes that eligibility for benefits under New Zealand's social welfare system and the obligations placed on beneficiaries are "inherently discriminatory".¹⁸⁴ As the social security system targets those most in need, it draws distinctions on a number of prohibited grounds of discrimination including family status, disability, age and employment status. However, he states that in most cases these distinctions are deemed to be justified under s 5.¹⁸⁵

In the report, Mr Finlayson opined that to the extent the Bill overrides the *Family Carers* case, he considers any limits on s 19 of the NZBORA to be justified under s 5. Contrary to the Court's decision, he was of the view that it was reasonably necessary and in due proportion to the importance of the Bill's objectives. In criticising the Court's approach he stated:¹⁸⁶

¹⁷⁹ *Ministry of Health v Atkinson*, above n 66, at [139].

¹⁸⁰ Human Rights Act 1993, s 21(1)(l).

¹⁸¹ At [167] and [180].

¹⁸² *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

¹⁸³ At [154].

¹⁸⁴ Finlayson, above n 177, at [10].

¹⁸⁵ At [10] – [11].

¹⁸⁶ At [9].

With respect, [the courts] lack the institutional competence to consider the range of competing claims on public funds which the government must contend with every day... In the *Family Carers* case I do not consider [the] courts sufficiently deferred to the Crown's view of the most appropriate way to manage the limited funds it has available to provide disability support services.

With regards to this idea of deference, the courts have generally accepted that in matters involving social security and the allocation of public funds, a greater degree of latitude in decision making is to be afforded to the legislature.¹⁸⁷ This has wide implications for how enforceable a right to social inclusion will be in practice. In *R v Hansen*, Tipping J stipulated that judicial assessment of whether a limitation is justified under s 5 "involves a difficult balance" as judges are expected to protect individual rights, but must also "show some restraint when policy choices arise".¹⁸⁸ The Court of Appeal in *Child Poverty Action Group v the Attorney-General* reiterated that "particularly in a case like the present which involves the complex interaction of a range of social, economic, and fiscal policies", some degree of leeway is to be given to the legislature.¹⁸⁹

In the abovementioned case, the Child Poverty Action Group argued that the In Work Tax Credit, forming part of the Working for Families package, unlawfully discriminates against beneficiary families on the basis of employment status.¹⁹⁰ This is because the In Work Tax Credit is paid to tax payers with dependent children, while the off-benefit rule renders families on an income-tested benefit ineligible to receive the tax credit. The Court of Appeal affirmed the High Court and Tribunal rulings that the policy was *prima facie* discriminatory.¹⁹¹

However, the Court upheld the findings that the off-benefit rule is a justified limitation under s 5 of the NZBORA. The objective of the off-benefit rule is to create a sufficient gap between the earnings on a benefit and the earnings in work so as to incentivise beneficiaries to pursue paid employment.¹⁹² The upshot is that, even though one of the purposes of the policy was to alleviate child poverty, it excludes children belonging to the poorest

¹⁸⁷ *Child Poverty Action Group v Attorney-General* [2013] NZCA 402 at [79].

¹⁸⁸ *R v Hansen*, above n 182, at [117].

¹⁸⁹ *Child Poverty Action Group v Attorney-General*, above n 187, at [91].

¹⁹⁰ At [2].

¹⁹¹ At [47].

¹⁹² At [95].

families.¹⁹³ This is one example of the repercussions of a focus on work as prioritised over a focus on social inclusion. Although the Court acknowledged child poverty to be a serious issue, it nevertheless deferred to Parliament and held that the off-benefit rule is proportional to the work incentive objective.¹⁹⁴

The relative proportions of money spent for relief of poverty as distinct from the other objective of moving people off-benefit and into work is very much a matter of overall political judgment.

Trevethick v Ministry of Health also illustrates the effects of deferring to the legislature on matters of social policy. This case dealt with the issue pertaining to the discrepancies between the benefit levels under the Social Security Act 1964 and the accident compensation scheme. The applicant suffered from multiple sclerosis and was denied ACC cover because her disability was not a qualifying personal injury. She did, however, receive assistance from the public health system. However, if the applicant's disability had been caused by accident rather than illness, she would have received greater financial support under the accident compensation regime.¹⁹⁵ The applicant argued that differential treatment on the basis of the cause of her disability amounted to unlawful discrimination under the Human Rights Act on the ground of disability. The Court of Appeal accepted that denying the applicant ACC cover could be prima facie discriminatory.¹⁹⁶ Nevertheless, it struck out the leave application on the basis that it was justified,¹⁹⁷ despite conceding that the policy choice "may give rise to anomalies of the sort raised by the applicant".¹⁹⁸

Both of these cases demonstrate the constraints placed on the courts when dealing with issues that involve social policy. Even at the international level, it is recognised that there is a need to provide some leeway for parliamentary choice. Article 2(1) of the ICESCR has a similar effect to s 5 of the NZBORA. It requires ratifying states to undertake to "take steps" to fully realise the rights contained in the Covenant "to the maximum of its available resources". The Committee on Economic, Social and Cultural Rights described the article as "a necessary flexibility device, reflecting the realities of the real world".¹⁹⁹ On the other hand, Geiringer and Palmer are concerned that the contingent nature of the obligation under

¹⁹³ Human Rights Commission *Human Rights in New Zealand: Ngā Tika Tangata O Aotearoa* (10 December 2010) at 226.

¹⁹⁴ *Child Poverty Action Group v Attorney-General*, above n 187, at [149].

¹⁹⁵ *Trevethick v Ministry of Health*, above n 162, at [3].

¹⁹⁶ At [18].

¹⁹⁷ At [20].

¹⁹⁸ At [18].

¹⁹⁹ Ben Saul, David Kinley and Jacqueline Mowbray *The International Covenant of Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, Oxford, 2014) at 155.

art 2(1) creates a conundrum. They posit that the substantial discretion the provision confers to states, to determine how the rights contained in the covenant are to be realised, erodes the distinction between needs and rights.²⁰⁰ Arguably, s 5 has a similar effect in that it diminishes the salience attached to the concept of a right.

Overall, Parliament's ability to limit the rights contained within the NZBORA, and the tendency for the judiciary to pay deference to Parliament in its s 5 assessment, is problematic. More specifically, it has the implication of limiting the effect of having a right to social inclusion in the first place. In light of the limitations of the Bill of Rights, a rights-based approach may not be the best means of establishing a greater focus on social inclusion in the New Zealand context. Rather it may be better pursued through more direct channels that allow social inclusion to be recognised as a more certain objective for specific areas of the social welfare system.

6 Obstacles – The Nature of Economic, Social and Cultural Rights

An additional obstacle arises from the fact that economic, social and cultural rights are not contained in the NZBORA. As already mentioned, the Act affirms New Zealand's commitment to the ICCPR, not the ICESCR. The consequence is that, notwithstanding the limited protection conferred by the Act generally, the current Bill of Rights mechanisms that are designed to protect civil and political rights, may not be suited to protecting social rights such as a right to social inclusion anyway. As stated in the 1985 White Paper, the Bill of Rights "points to the fact that certain sorts of laws should not be passed, that certain actions should not be engaged in by Government."²⁰¹ In this sense, civil and political rights can be described as negative rights, while social and economic rights are often perceived as positive rights requiring state intervention for their realisation.²⁰² The negative obligations imposed by the NZBORA has meant that existing mechanisms tend to focus on what a policy *does* and not what it *fails* to do.²⁰³ In other words, they focus on preventing state interference instead of promoting positive state action to ensure rights are better realised.²⁰⁴ One such example, is the courts.

When Parliament was still debating whether or not to pass the NZBORA, the Justice and Law Reform Committee suggested including economic and social rights in the Bill.²⁰⁵

²⁰⁰ Geiringer and Palmer, above n 141, at 22.

²⁰¹ Justice and Law Reform Committee *A Bill of Rights for New Zealand: A White Paper* (1985) at 6.

²⁰² Paul Hunt "Reclaiming Economic, Social and Cultural Rights" (1993) 1 Waikato L Rev 141 at 149.

²⁰³ Geiringer and Palmer, above n 141, 33.

²⁰⁴ Hunt, above n 202, at 149.

²⁰⁵ Ran Hirschl "'Negative' Rights vs 'Positive' Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order" (2000) 22 HRQ 1060 at 1085.

However, it was determined that these rights would be better implemented through other means. Sir Geoffrey Palmer firmly opposed their inclusion on the basis that the "broad policy questions" they raised would make the Act "unmanageable" for the courts.²⁰⁶ By their nature, these rights impose specific obligations that are subject to change, making them uncertain and non-justiciable.²⁰⁷

Judges are trained to enforce the Crown's negative obligation to refrain from interfering with rights.²⁰⁸ In relation to judicial review applications, typically the courts "consider the facts and the law" and determine the lawfulness of the decision rather than "quash an unlawful decision and substitute its own."²⁰⁹ As there are more policy choices associated with realising social rights, it is argued that the courts cannot enforce social rights without stepping outside their legitimate role and usurping the role of the legislature.²¹⁰ It is not the courts' function to dictate what the Crown's positive obligations, but rather to defer to Parliament on policy issues, as discussed above.

To an extent, the preference for a Bill of Rights that encompasses only civil and political rights reflects the treatment of economic, social and cultural rights at the international level. Professor Paul Hunt observes that even in relation to the international Bill of Rights,²¹¹ "the international machinery relating to civil and political rights is more sophisticated than the equivalent arrangements" for social and economic rights.²¹² Regarding the New Zealand context, as Geiringer and Palmer suggest, supporting mechanisms that move away from a checklist approach to human rights protection will need to be introduced if a right to social inclusion is to be enforceable.²¹³ This might include replicating the s 7 reporting process and adapting it to accommodate economic, social and cultural rights.²¹⁴ New vetting procedures will have to monitor not only what policies and legislation achieve, but also what they fail to achieve.²¹⁵

²⁰⁶ Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) at 57.

²⁰⁷ Justice and Law Reform Committee, above n 201, at 112.

²⁰⁸ Geiringer and Palmer, above n 141, at 38.

²⁰⁹ Hunt, above n 202, at 155.

²¹⁰ Alana Klein "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2008) 39 *Colum hum Rts L Rev* 351 at 361.

²¹¹ Together, the Universal Declaration of Human Rights, the ICESCR and ICCPR form the international Bill of Rights.

²¹² Hunt, above n 202, at 142.

²¹³ Geiringer and Palmer, above n 141, at 33.

²¹⁴ At 35.

²¹⁵ Stephens, above n 6, at 151.

However, changes to vetting procedures do not resolve the problem as issues about the justiciability of economic, social and cultural rights pose a greater challenge for enforcement and, therefore, implementation. As the Bill of Rights mechanisms that are currently in place do not support the introduction of a right to social inclusion, it is definitely worth exploring more direct options for implementation that can be accommodated by the present system.

C Social Inclusion – A Principle and Purpose of the Social Security Act

Inserting a right to social inclusion into the NZBORA is an indirect means of influencing the trajectory of New Zealand's social policies and the overarching focus of the Social Security Act. An alternative, and perhaps more straightforward, route would be to make direct changes to the purposes and principles of the Social Security Act without relying on the Bill of Rights. As already mentioned, the Social Security Act 1964 establishes a number of New Zealand's fundamental legal entitlements to social assistance.²¹⁶ This includes sole parent support, disability allowances, the unsupported child's benefit (which is to be replaced by the supported child's payment if the Rewrite Bill is passed), supported living payments, jobseeker support and more. Therefore, introducing a focus on social inclusion into the Act will have an impact on a variety of benefits.

1 Work Focus

The Social Security Amendment Act 2007 inserted ss 1A and 1B into the Social Security Act. These provisions outline the purposes and principles of the Act, respectively, and provide legislative support for a strong focus on paid employment.²¹⁷ The main purpose of the current system is to assist people into paid employment and provide financial support to those who are unable to support themselves and their dependants through paid work.²¹⁸ The general principles equally emphasise the importance of work, with paid employment considered as the best opportunity for achieving social and economic wellbeing.²¹⁹ Furthermore, finding, retaining or preparing for work are also deemed to be a priority for people of working age.²²⁰

In accordance with these principles and purposes, in recent years, the Government has demonstrated a commitment to ingraining a focus on work into the social security system. For example, in 2011 a comprehensive welfare reform package was introduced with the

²¹⁶ Finlayson, above n 178, at [4].

²¹⁷ Social Security Act, ss 1A and 1B.

²¹⁸ Sections 1A(a)(i) and 1A(a)(ii).

²¹⁹ Section 1B(a).

²²⁰ Section 1B(b) and 1B(c).

aim of reducing welfare dependency and "transforming the benefit system into one that is modern, active and work-focused."²²¹ The resulting changes include tougher work obligations for sole parents, a 13 week stand-down period for beneficiaries turning down suitable employment (in lieu of a sufficient reason) and a widening of the number of beneficiaries available for work.²²² The National Government's long term investment approach also focuses on getting people "off welfare and into work."²²³

Critically, the purposes and principles of the Act do not include any reference to the idea of social inclusion or enhancing the participation of beneficiaries. Rather, as observed by the New Zealand Human Rights Commission (NZHRC), in a 2010 report on human rights in New Zealand, the justification for providing financial support "is more narrowly defined",²²⁴ in the sense that it is simply "to help alleviate hardship".²²⁵ The absence of any express focus on social inclusion has caused Dr Louise Humpage and Professor Susan St John to describe the Social Security Amendment Act as wiping away "any notion that our social security system is about ensuring everyone can participate as citizens."²²⁶

The abovementioned point made by the NZHRC, about the purposes of providing financial support, relates to this idea of "relative poverty" expounded in the 1972 *McCarthy Report*. The Commission considered that the narrow focus in the Social Security Act made it questionable whether the adequacy of benefit levels is determined only by their ability to address absolute deprivation or "whether the financial position of those on benefits relative to others is also deemed relevant."²²⁷ What the Commission implies, is that given the limited focus of the Act, it does not appear that the social inclusion of beneficiaries as measured against prevailing societal standards is a consideration under the Act. On the other hand, the purposes of the Accident Compensation Act 2001 includes a focus on protecting the social inclusion of claimants. For example, it states that the Corporation's "primary focus" should be on rehabilitating claimants to restore "health, independence, and participation."²²⁸

²²¹ Paula Bennett *Paper A – Welfare Reform: Overview of Package* (Office of the Minister for Social Development, 15 February 2012) at [1].

²²² (20 September 2012) 684 NZPD 5514.

²²³ Ministry of Social Development "Welfare Reform fact sheet information" (1 November 2011) <www.msd.govt.nz>; and Paula Bennett "Welfare Reforms Pass into Law" (press release, 9 April 2013).

²²⁴ Human Rights Commission, above n 193, at 227.

²²⁵ Social Security Act, s 1A(b).

²²⁶ Louise Humpage and Susan St John "A Bill the Poor will Pay for" *The New Zealand Herald* (online ed. Auckland, 11 July 2007). See also O'Brien, above n 6.

²²⁷ Human Rights Commission, above n 193, at 227.

²²⁸ Accident Compensation Act 2001, s 3(c).

2 *Amending the Purposes and Principles*

A work focus is not necessarily incompatible with enhancing social inclusion. In fact, as unemployment can lead to material deprivation, and thus social exclusion, encouraging access to the labour market is a plausible and necessary strategy for bridging the gap and increasing social inclusion.²²⁹ However, in order to alter the focus of social policy, the prolific emphasis on work in the Social Security Act will need to be supplanted by a broader emphasis on social inclusion. More specifically, the stated purposes and principles undergirding the Act will need to be amended so as to bring social inclusion to the forefront of policy deliberations. This is because, while the two objectives are not mutually exclusive, the consequence of relying on paid employment to achieve social inclusion, necessarily leaves a number of beneficiaries who are unable to obtain paid work excluded from fully participating in society. Indeed, the focus on incentivising work often involves creating a gap between benefits and wages.

However, it is not to say that any focus on supporting beneficiaries into paid work should be completely eradicated. This is a legitimate objective, but it can be encompassed by a broader focus on social inclusion. The point of an amendment to the purposes and principles of the Social Security Act should be to make social inclusion the *primary* focus in the same way that rehabilitation is the primary purpose of the Accident Compensation Act. Incentivising work, therefore, should not be done at the expense of a person's ability to participate in society. If the Government truly recognises "that most beneficiaries can and do want to work"²³⁰, this should not be an issue.

3 *A Provision Requiring Ongoing Review*

In its 2010 report, the NZHRC recommended that the adequacy of core benefits should be reviewed.²³¹ Moreover, as observed by the Commission, in order to ensure social inclusion, according to the standards prevailing in society, is achieved, core benefits will "need to be regularly adjusted to reflect changes in actual living costs, and to maintain relativity with standards of living across the wider community."²³² As already mentioned, what constitutes social inclusion will vary depending on the circumstances; what makes for an ordinary standard of living often changes over time. Therefore, if the benefits delivered under the Social Security Act are to be guided by a principle of social inclusion, a provision requiring ongoing review of what social inclusion means may also be necessary. For example, the

²²⁹ Bent Greve *Welfare and the Welfare State: Present and Future* (Routledge, London, 2015) at 167.

²³⁰ Ministry of Social Development, above n 223.

²³¹ Human Rights Commission, above n 193, at 236.

²³² At 227.

Evidence Act 2006 contains a provision requiring periodic review of the operation of the Act.²³³ This is to be conducted by the Law Commission at least once every five years. A periodic review of the meaning of social inclusion will likely not need to occur as frequently.

3 An Opportunity for Change?

As mentioned at the beginning of this paper, the Social Security Legislation Rewrite Bill, which seeks to repeal and replace the Social Security Act, is currently awaiting its second reading.²³⁴ While this Bill brings New Zealand's social security system to the attention of the House, it does not represent an opportunity to review the system and introduce significant alterations. The Bill is intended to be as policy neutral as possible as the main goal is to improve the clarity and coherence of the 1964 Act.²³⁵ Indeed, the policy changes that are proposed in the Bill are a point of contention in parliament. Labour's spokesperson, Carmel Sepuloni MP, argued that policy changes should not be introduced into the long-awaited rewrite and that any changes "should be put through a different avenue".²³⁶ Furthermore, the lack of neutrality deterred the Green Party from supporting the Bill altogether. In light of the purpose of the Act, introducing a focus on social inclusion will likely need to be reserved for another Bill.

In any case, at this stage of the legislative process, introducing significant changes to the architecture of any Bill is unlikely to be possible. Although amendments can be made via ministerial supplementary order papers, in reality, the window of opportunity to make substantial changes likely expires not long before a Bill is introduced.²³⁷ Therefore, introducing social inclusion into the statute will likely need to occur at a later stage, that is, once a new Social Security Act has been enacted.

D What is the Best Approach?

Comparing the two options, the goal of redirecting New Zealand's approach to social policy, to include a focus on social inclusion, will likely best be achieved by amending the principles and purposes of the Social Security Act. Of course, both approaches have their advantages and disadvantages. For example, unlike the effect of adding a right to the NZBORA, inserting social inclusion into the purpose and principles of the Social Security

²³³ Evidence Act 2006, s 202.

²³⁴ New Zealand Parliament, above n 2.

²³⁵ Ministry of Social Development, above n 4, at 2.

²³⁶ (10 May 2016) 713 NZPD 16.

²³⁷ Geoffrey Palmer "Law-making in New Zealand: Is There a Better Way?" (2014) 22 Waikato L Rev 1 at 15.

Act will only touch those beneficiaries receiving entitlements under that Act. On the other hand, taking a rights-based approach to social inclusion will result in a wider impact, that is, it will have an effect on a wider range of legislation.

Furthermore, the NZBORA as a constitutional document, has the potential to provide greater protection against displacement that may be caused by changing social-economic circumstances or ideologies. However, as already mentioned, there is a greater element of uncertainty about how social rights will be implemented and enforced when it comes to the NZBORA. Making direct changes to the Social Security Act will likely result in a greater commitment to the idea of social inclusion amongst policy makers. This is because it will establish a more concrete and certain obligation on decision makers to see that social inclusion is considered and enhanced. The express policy goal in relation to social security might also make it easier for the courts to enforce. Of course, it would also be possible to pursue both options, however, whether this would be necessary is another matter.

VIII Conclusion

Social inclusion is not a new idea. As this paper has demonstrated, there have been various attempts to introduce a greater focus on social inclusion in New Zealand over a span of decades. While some have been more successful than others, this idea of social inclusion has nevertheless found a place in how social policy is approached today. The primary focus is now on work. The rationale is that this is the best means of achieving social inclusion. This can be described as a more narrow focus than was envisaged in the *McCarthy Report*.

As this paper suggests, if the Government wishes to broaden its focus to ensure consistency within the welfare system and that the unemployed are also able to participate fully in society, there are two possible options that it might wish to consider. Namely, inserting a right to social inclusion into the NZBORA or amending the purposes and principles of the Social Security Act to create a greater focus on social inclusion. There are a number of factors that likely render the NZBORA to be less effective in protecting social rights than it could be. The fact that rights-inconsistent legislation can be passed as long as it is justified, the courts' tendency to defer to Parliament on matters of social policy and the lack of Bill of Rights mechanisms available to support a right to social inclusion all make it a less attractive option. The best approach to enhancing the focus on social inclusion is likely the latter approach of making direct amendments to the Social Security Act.

However, as this paper illustrates, introducing a greater focus on social inclusion will not be a simple endeavour. As the development of the MWI indicates, the definition problem

may be able to be overcome to an extent. However, there is still the question of whether it is possible to pinpoint when social inclusion is achieved in a way that accounts for the views of minority groups. As this paper explains, what constitutes social inclusion may be perceived differently by minority sectors. Using the example of how having a sex life could be perceived as an important part of social inclusion by some disabled citizens, this paper illustrates the difficulties involved in law reform. While this is perhaps an extreme example, the success of policy initiatives of this kind will likely be determined by popular public opinion. In order for subsidised sexual services to be a possibility in the future, society's attitudes about sex and the sexuality of disabled people will have to change. As suggested, it may be a societal responsibility to educate on these matters.

Whether a greater focus on social inclusion is sustainable is also a problem to which there appears to be no concrete solution. In comparison to the obstacle referred to above, it would seem that issues around sustainability pose a more formidable threat to proposals to enhance social inclusion. While the rationale behind a universal basic income is appealing, it does not present a viable solution to the problem at this point in time. At present, there are still dividing opinions as to whether a basic income is sustainable. Of course, a universal basic income is not essential to enhancing social inclusion in New Zealand and there may be other ways around the sustainability problem that are yet to be seen. However, in relation to the potential for a universal basic income, the uncertainty around it means that it does not present a realistic option for today. However, depending on the outcome of test cases, it may be a possibility for the future.

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