

**Making sense of substantive legitimate
expectations in New Zealand
Administrative Law**

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Introduction

Many years ago Jeremy Bentham noted the peculiar capability of mankind to entertain expectations, yet the concept remained largely obsolete in the law:

It is a proof of great confusion in the ideas of lawyers, that they have never given any particular attention to a sentiment which exercises so powerful an influence upon human life. The word expectation is scarcely found in their vocabulary. Scarce a single argument founded upon that principle appears in their writings. They have followed it, without doubt, in many respects; but they have followed it by instinct rather than reason. If they had known its extreme importance they would not have failed to name it and to mark it, instead of leaving it unnoticed in the crowd.¹

Perhaps due to the waning influence of strict formalism, which would deny legal protection for expectations outside of contract, private law has come to recognise the enforceability of expectations in a number of areas. A driving factor has been the need to protect the autonomy of the individual by ensuring legal certainty, a value supported by both formal and substantive conceptions of the rule of law.² In the different theoretical framework of public law, however, the presence of the wider public as a third party meant that the use of expectations as the basis of an argument was for a long time rejected. The case was concisely put by Rowlatt J in *Rederiaktiebolaget Amphitrite v R*.³ Where the conduct of the Executive amounts to “merely an expression of intention to act in a particular way in a certain event”, it is not open to a court to hold the Executive to the expectation the other party entertained.⁴ That is because “...it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises”.⁵ The traditional view that the proper concern of judicial review is with the process and not the actual merits of a decision also ostensibly prevented courts from enforcing expectations, “The merits of administrative action, to the extent that they can be distinguished from legality, are for

¹ Jeremy Bentham, *Principles of the Civil Code*, reproduced in: CB MacPherson, *Property, Mainstream and Critical Positions* (Blackwell, 1978), at 51

² Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework”, (Autumn 1997) *Public Law* 467, at 469 and 479

³ [1921] 3 KB 500

⁴ *Ibid* at 503

⁵ *Ibid* at 503

the repository of the relevant power and, subject to political control, for the repository alone”.⁶

Never one to be constrained by precedent, Lord Denning recognised the injustice this was apt to cause and in several cases applied promissory estoppel⁷ against public authorities to uphold expectations they had created. Following several years of uncertainty, the English Courts have recently affirmed that expectations may be enforceable in the right case, albeit by the different doctrine of legitimate expectation.

New Zealand appears to be on verge of accepting this principle. This thesis seeks to show that there is no impediment to it doing so, whether the expectation is characterised as procedural or substantive. The tendency to fit expectations into the dichotomy of procedural or substantive seems to have unnecessarily retarded the development of the law and calls for a need to be semantically clear. In the former the expectation is that an authority will afford certain procedural rights in the course of making a decision and in the later the expectation is of some substantive outcome or benefit other than a procedural right. Confusingly, the same dichotomy manifests itself in the remedy a court could grant. When there is an expectation of a substantive benefit or outcome the court can either procedurally protect the expectation, by which specific procedural rights are granted, or substantively protect it, by which the court itself and not the decision maker ultimately decides whether the denial of the expectation is lawful. No doubt influenced by the perception of their proper role, the courts have readily accepted the enforceability of procedural expectations and by natural justice have procedurally protected substantive expectations. The focus of this dissertation is on the controversial issue of substantive protection for substantive expectations in New Zealand public law.

The jurisprudence on legitimate expectations is vast and what follows by no means purports to be a comprehensive analysis of all the issues which would take far more words and time than is currently available. Rather, the focus is on to what extent New Zealand courts have accepted the substantive dimension of legitimate expectations

⁶ *Attorney General (NSW) v Quin* [1990] 93 A.L.R. 1, per Brennan J at p25

⁷ Which he himself revived in *Central London Property Trust Ltd v. High Trees House Ltd* (1946) [1956] 1 All E.R. 256

affirmed in the English case of *R v North East Devon Health Authority, ex parte Coughlan*,⁸ secondly, whether they should adopt this principle given the theoretical objections that have been presented, and thirdly how this principle would apply in practice. Chapter One introduces the ways in which legitimate expectations have been used and to what extent New Zealand courts have accepted these arguments. This will reveal that it is unclear whether or not an applicant can actually enforce an expectation of a substantive benefit, as is how courts should approach such cases. It is the opinion of this author that the courts should, in the right case, enforce expectations of a substantive benefit. The second chapter discusses the theoretical justifications put forward for this proposition and assess the objections that have been offered, ultimately concluding that they are not strong enough to completely deny the existence of such a principle. Having established that, Chapter Three suggests how a New Zealand Court might approach such cases by drawing on the English jurisprudence where the concept is relatively well entrenched.

⁸ [2000] 2 WLR 622

Chapter One:

The different uses of a “legitimate expectation”

It is necessary to identify the different ways in which legitimate expectations can be marshalled and how far New Zealand courts have accepted such arguments to establish what this thesis is *not* about. By creating separate compartments for the law some courts have accepted one application of legitimate expectation and denied another, when it is arguable that “in truth, different applications represent a single principle or at least interlocking principles”.⁹ Courts throughout the Commonwealth have accepted granting procedural protection for expectations. Granting substantive protection for expectations is more controversial and, following a brief review of procedural protection, is the focus of this thesis. It seems that those in New Zealand preferring a restrictive approach have relied on the Australian case of *Attorney General (NSW) v Quin*,¹⁰ where it was held that legitimate expectations do not generate substantive rights. Judges in favour of a more expansive approach cite the various English cases which have accepted that expectations can be substantively protected. The views of commentators in New Zealand are equally divided on the issue. Since the higher courts for New Zealand have offered no definitive guidance, the question becomes; which approach should prevail?

Procedural protection of expectations

Legitimate expectations and natural justice

Lord Denning can be attributed with the first usage of the phrase “legitimate expectation” in the case of *Schmidt v Secretary of State for Home Affairs*.¹¹ Although obiter, he suggested that the applicants’ “legitimate expectation” of being allowed to remain until the expiry of their visas “ought” to entitle them to make representations

⁹ Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363. At para 49, he also alludes to the “lure of over classification” in this field.

¹⁰ [1990] 93 A.L.R. 1, later affirmed in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* [2003] 195 A.L.R. 502

¹¹ [1969] 1 All ER 904

to a decision maker who took steps to remove them before that date. Lord Denning was later attributed with having said that: “it came out of my own head and not from any continental or other source”.¹²

Clearly the expectation in *Schmidt* was of a substantive benefit, namely being permitted to remain in the country for the time specified on the visa. It is important to note that it is not the procedure which was legitimately expected; rather the procedure is afforded “because that legitimate expectation is of an ultimate benefit which is in all the circumstances entitled to the protection of the procedure”.¹³

This use of legitimate expectation is clearly linked to the *audi alteram partem* principle of natural justice. For example, in *Daganayasi v Minister of Immigration*¹⁴ Cooke J held that applicant’s legitimate expectation that the relevant statutory test was fulfilled justified the court holding that the substance of prejudicial reports should have been disclosed to that applicant so as to enable her to make representations on it. Hence, a person with “less-than-rights” might be afforded procedural protection if their legitimate expectation was of an interest sufficient to warrant the courts intervention. In this way the *interest* itself generates the procedural protection.

Courts in New Zealand have accepted this use of legitimate expectation in several cases¹⁵ and in this sense legitimate expectation arguments are not controversial.

Legitimate expectation of procedural rights

Paul Craig notes that in cases of the like discussed above, the focus is on the nature of the interest which is infringed,¹⁶ which is common to natural justice arguments. As he goes onto state; “In some other cases however the primary foundation for the

¹² C. Forsyth, “The Provenance and Protection of Legitimate Expectations” [1988] C.L.J. 238, at 241 note 12

¹³ *Attorney General (NSW) v Quin* [1990] 93 A.L.R. 1, per Dawson J at 40

¹⁴ [1980] 2 NZLR 130, at 145

¹⁵ See, for example *Fowler & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) which concerned a reasonable expectation that a licence would be renewed. The court held this entitled the holder to make submissions to the decision maker before any decision was made. See also *Bradley v Attorney-General* [1988] 2 NZLR 454, Smellie J stated: “it is clear law that if Mr Bradley had a legitimate expectation then he was entitled to a fair hearing before that expectation was denied to him”

¹⁶ P.P Craig, “Legitimate Expectations: A Conceptual Analysis” (Jan 1992) 108 Law Quarterly Review 79, at 81

application of procedural rights will rest on the *conduct* of the public body”.¹⁷ Generally in these cases the conduct of the public body will take the form of some sort of representation. This kind of case is exemplified by the decision of the Privy Council in *Attorney General of Hong Kong v Ng Yuen Shui*.¹⁸ The applicant was an illegal entrant and became liable to removal from Hong Kong following a change in governmental policy. A senior official had announced that before any such persons would be removed they would be interviewed and their case decided on its merits. When he was subsequently issued with a removal order without the opportunity of being interviewed, the applicant sought judicial review. The Board stated:

... when a public body has promised to follow a particular procedure, it is in the interests of good administration that it should act fairly and implement its promise, so long as implementation does not interfere with its statutory duty.¹⁹

In this species of case it is the representation by a public authority which is the source of the applicants’ procedural rights and in a sense the protection can be seen as substantive because the citizen receives what they were led to expect. Courts in New Zealand have accepted this use of legitimate expectation.²⁰

Conclusion on procedural protection

Courts throughout the Commonwealth²¹ have accepted that a legitimate expectation can be procedurally protected. In each case discussed above the foundation for the protection is different; either the *interest* itself, or some *conduct* by a public authority generates it. There may be good reason not to afford the procedural protection and the courts feel they are apt to decide what will constitute good reason in this context.²² Furthermore, procedural rights will not be extended to an applicant where to do so

¹⁷ *Ibid* at 81

¹⁸ [1983] 2 A.C. 629

¹⁹ *Ibid* at 638

²⁰ In *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 Robertson J confirmed that if through conduct or assurances a public body created an expectation of consultation which was not in fact afforded, this would be a ground for relief. See also *Air Nelson Ltd v Minister of Transport* [2007] NZAR 266 where it was stated:

“A legitimate expectation will lead to a duty to consult if the public authority has expressly promised to consult or if it has a regular practice of consulting”.

²¹ In addition to New Zealand and England; for example in Australia see *Attorney General (NSW) v Quin* [1990] 93 A.L.R. 1, and in Canada see *Old St. Boniface Residents Association Inc v The City of Winnipeg and the St. Boniface-St. Vital Community Committee* [1990] 3 S.C.R. 1170

²² See for example *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45, at para 186 where the court held that it was justifiable for the Minister to withhold dates of when a new policy would come into operation because she was minded to avoid a rush of applications seeking the advantage of the old policy

would conflict with an authority's statutory duty, since this would be *ultra vires*.²³ Nonetheless, the process of decision making is something courts feel they are particularly apt to assess on judicial review, as Richardson J stated in *Petrocorp Exploration Ltd v Minister of Energy*,²⁴ "...the proper concern of administrative law is with the process of decision making". This pronouncement also foreshadows part of the reason courts are reluctant to accept that legitimate expectations can generate substantive protection, since that would seem to project them into an assessment of the 'merits'.

Substantive protection: Precedents

Substantive protection expectations based on "informal" representations

Courts in England have recognised that in certain cases an assurance which creates an expectation of a substantive benefit can be enforced in judicial review proceedings. In *R v North East Devon Health Authority, ex parte Coughlan*²⁵ the Court of Appeal stated:

Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.²⁶

Essentially what is involved in this type of case is a "weighing the requirements of fairness against any overriding interest relied upon for the change of policy",²⁷ which may be essentially a test of proportionality²⁸. In the case before the Court a severely disabled patient had been assured that, if she agreed to move, her new residence would be a home for life. The responsible authority subsequently decided to close down that residence, essentially for financial reasons. The Court held that the denial of the expectation was an 'abuse of power' warranting its intervention.

²³ *Ng Yuen Shui, supra* n 18

²⁴ [1991] 1 NZLR 1, at 46

²⁵ [2000] 2 WLR 622

²⁶ *Ibid* at para 57

²⁷ *Ibid* at para 57

²⁸ Paul Craig and Soren Schonberg. "Substantive legitimate expectations after Coughlan" (Winter 2000) Public Law 684, at 699. See also Mark Elliot, "Legitimate Expectations and the Search for Principle: Reflections on Abdi & Nadarajah", (2006) Judicial Review 281, at 285

The substantive benefit which was expected in *Coughlan* was that Miss Coughlan would be able to stay in Marsdon House for life. Another example of a substantive benefit which may be expected is that a ‘policy’ will apply to a discretionary power which is to be exercised in respect of an individual.²⁹ In *R v Secretary of State for the Home Department, ex parte Asif Mahmood Khan*³⁰ there was a representation in a letter to the applicant about the policy according to which the discretionary power in question, whether leave would be granted to adopt an overseas child, was to be exercised. By making his decision on a basis not included in the represented policy the applicant was led to expect would apply, the Court of Appeal held the Minister had acted unfairly and unreasonably.

These two cases are provided here as examples of the general principle of substantive protection for substantive expectations and to illuminate the discussion of how far New Zealand Courts have recognised this principle. A fuller discussion of the English jurisprudence, and what (if any) difference there is between “policy” and other cases, follows in Chapter Three.

The principle of irrevocability

The type of cases discussed above concern what might be called ‘informal representations’, short of actual decisions. There is another line of precedent concerning ‘decisions’ and whether they can be revoked once issued. Although the language is different, it is clear the same justifications inform this “principle of irrevocability”,³¹ and the basic structure for assessing such problems is very similar to legitimate expectation cases.

The classic English example is provided by *Re 56 Denton Road, Twickenham, Middlesex*.³² In November 1940 the applicant’s house suffered severe damage as a

²⁹ Whilst this could be argued to be a procedural benefit, the better view is that it is substantive, see the comments of Laws LJ in *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, at para77. See also Melissa Poole, “Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety” (1995) N.Z. Law Rev. 426, at 431 who states that “to say that a person has a legitimate expectation about the application of a substantive policy goes beyond the realm of the procedural protections aspect of administrative law”

³⁰ [1984] 1 WLR 1337

³¹ See Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2000), 14

³² [1953] 1 Ch 51

result of German bombing and shortly after was completely demolished. The War Damage Commission had to establish the quantum the applicant was entitled to as a result of her home being demolished. The applicant was informed she would receive the greater of two possible amounts via a letter from the regional manager of the Commission. Six months later the Commission wrote again, this time stating that “it has been decided to revert to [the lesser amount]”. Eight months after that the Commission issued a “Notice of Determination” confirming what was communicated by the prior letter. Vaisey J relied on *Livingstone v Westminster Co*³³ and *Robertson v Minister of Pensions*³⁴ for the proposition that:

[any] such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot, in the absence of express statutory power or the consent of the person or persons affected, be altered or withdrawn by that body ... the contrary view would introduce a lamentable measure of uncertainty.³⁵

The court issued a declaration that stated the defendants must be deemed to have determined the quantum in the manner originally communicated. This principle was acknowledged, although not followed in *Rootkin v Kent County Council*.³⁶

Although Canadian courts have rejected a role for legitimate expectation outside of procedural fairness,³⁷ there is support for the principle of irrevocability in the majority judgement of the Supreme Court in *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)*.³⁸ There had been a representation by the Minister to the Centre that once they effected a move to Montreal the required permit to practice would be issued. The Minister subsequently declined to issue the permit. While the facts of the case seemed tailor made to adopt a *Coughlan* type analysis; neither the majority nor the minority, who both upheld the applicants claim, did so.³⁹ Bastarche J,

³³ [1904] KB 109

³⁴ [1949] 1 QB 227

³⁵ *Re 56 Denton Road*, *supra* n 26 at 56-57

³⁶ [1981] 2 All ER 227, see also *Thrasylvoulou v Secretary of State for the Environment* [1990] 2 A.C. 273 where the similar *res judicata* doctrine was affirmed

³⁷ See *Old St. Boniface Residents Association Inc v The City of Winnipeg and the St. Boniface-St. Vital Community Committee* [1990] 3 S.C.R. 1170, *Reference re Canada Assistance Plan* [1991] 2 S.C.R. 525 and *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817. In general see David J Mullan, *Administrative Law* (Toronto : Irwin Law, 2000), Chapter Nine

³⁸ [2001] 2 S.C.R. 281

³⁹ Genevieve Cartier suggests that nonetheless “the values and principles that inform the UK version” undoubtedly influenced the decision of both the majority and minority, see “A Mullian Approach to the Doctrine of Legitimate Expectations: Real Questions and Promising Answers”, in *Inside and Outside*

writing for the majority, characterised the situation not as a ‘renewal’ of the permit, but rather as the issuing of a new permit. The relevant section stated simply that the Minister shall issue a permit if he considers that it is in the public interest. The Judge stated that the Minister had exercised his discretion under this section when he made a representation that the modified permit requested by the centre would be issued, and in reliance on that caused the Centre to move to Montreal. In other words, having decided it *was* in the public interest, the relevant decision had been made:

The actual granting of the permit was deferred until the move to Montreal was made ... This does not mean that in a different set of circumstances the Minister could not, based on overriding policy concerns, in exceptional circumstances, reverse a prior discretionary decision.⁴⁰

Although the court acknowledged that overriding policy considerations could sometimes justify departure from the ‘decision’, since the Minister had offered no valid reason the original decision had to stand. *Mount Sinai* is an example of how the definition of a ‘decision’ can sometimes be stretched to include something which is actually only a promise of a decision.

Substantive protection in New Zealand

The holder of a substantive expectation in New Zealand will usually qualify for some form of procedural protection. This thesis now considers how the courts received the precedents establishing substantive protection set by *Coughlan*, *Khan* and *Denton Road*.

Substantive protection of expectations based on “informal” representations

In *Challis v Destination Marlborough Trust Board Inc*⁴¹ Wild J held that since on the material before the court the applicant could not establish a legitimate expectation of obtaining a renewal of their contract, he did not have to decide whether in New Zealand a court could enforce a legitimate expectation of a substantive outcome.⁴² Despite this, His Honour went on to state that there was no estoppel available in public

Canadian Administrative Law; Essays in Honour of David Mullan (University of Toronto Press, 2006), at p 201-202

⁴⁰ *Mount Sinai*, *supra* n 39 at 333

⁴¹ [2003] 2 NZLR 107

⁴² *Ibid* at para 103

law since “None of these estoppel principles can properly achieve anything in the public law arena that cannot now be achieved by invoking breach of a legitimate expectation”.⁴³ It is implicit in this statement that a legitimate expectation could in fact be invoked to prevent a public body from resiling from representations inducing a substantive expectation. The explanation for this apparent contradiction with his earlier statement, that he did not have to decide whether a court could enforce a substantive expectation, lies in the fact that for the later proposition His Honour relied on the English case of *R v East Sussex County Council ex Parte Reprotech (Pebsham) Ltd*.⁴⁴ In that case the House of Lords noted that following the exposition of English law on legitimate expectations in *Coughlan* there was no need to rely on the private law concept of estoppel.⁴⁵ *Challis* cannot, therefore, be seen as clear authority for the principle of substantive protection.

The concept of a substantive legitimate expectation was used to *reinforce* the courts conclusion in *Aoraki Water Trust v Meridian Energy Ltd*,⁴⁶ thereby offering muted support for the principle. The applicant applied for water rights that had been fully allocated to Meridian but the court held that Meridian’s consents operated as a legal constraint, in part because “the latter [Meridian] must reasonably expect to proceed with planning and investment on the basis that the consent authority will honour its commitment”.⁴⁷

In *Lawson v Housing New Zealand, Minister of Housing and the Minister of Finance*⁴⁸ Williams J noted the controversy over whether legitimate expectations could be invoked to challenge the merits of a decision and seemed to favour the approach of the Australian High Court in *Attorney General (NSW) v Quin*⁴⁹. His Honour held that the “robust rejection of the notion that legitimate expectation will result in a favourable outcome” in that case was a matter to be “kept in mind”.⁵⁰

⁴³ *Ibid* at para 105

⁴⁴ [2002] 4 All ER 58

⁴⁵ The roots of substantive protection of expectations in estoppel are considered in more detail in Chapter Two.

⁴⁶ [2005] 2 NZRMA 251

⁴⁷ *Ibid* at para 39-42

⁴⁸ [1997] 2 NZLR 474

⁴⁹ [1990] 93 A.L.R. 1

⁵⁰ *Lawson, supra* n 42 at 489

Similarly, reference was made to comments in Taylor⁵¹ to the effect that “legitimate expectation of itself cannot be invoked as a challenge to the substance or merits of the decision”. His Honour, however, did not reach a concrete conclusion on the position in New Zealand since, like in *Challis*, it could not be shown that the applicant entertained a valid expectation.

In *Lumber Specialties Ltd v Hodgson*⁵² the applicants’ alleged they had a legitimate expectation that beech trees would continue to be available for harvest on a sustainable basis. Hammond J rejected the proposition that a legitimate expectation of a substantive benefit could be enforced, “At least as the law presently stands, the law [sic] does not recognise any such concept”.⁵³ The precedent relied on that proposition was *Quin* and the same passage cited in *Lawson* was cited here.

Quin was also referred to in *Travis Holdings Ltd v Christchurch City Council*.⁵⁴ Tipping J held that since the concept of legitimate expectation is directed primarily to “procedure and not outcome”,⁵⁵ the applicant could have no expectation that an issue would be decided in a particular way.

*Coal Producers' Federation of New Zealand Incorporated v Canterbury Regional Council*⁵⁶ concerned a proposal to ban the use of coal in domestic heating appliances. The Coal Producers’ Federation claimed that they had a legitimate expectation, based on two documents issued by the council, that a proper opportunity to be heard would be accorded them before any decision was made. Chisholm J concluded that the legitimate expectation, coupled with the nature of the power in question and how it will affect the applicants’ interests, overwhelmingly justified the imposition of procedural rights in favour of the Federation. Although obiter, His Honour observed, again with reference to *Quin*, that where the court enforces a legitimate expectation it will take the form of procedural protection and that substantive protection requiring

⁵¹ GDS Taylor, *Judicial Review: a New Zealand perspective* (Butterworths, 1991), p 256

⁵² [2000] 2 NZLR 347

⁵³ *Ibid* at para 137

⁵⁴ [1993] 3 NZLR 32

⁵⁵ *Ibid* at 50

⁵⁶ [1999] NZRMA 257

the public authority to exercise their discretion in a particular way will not be afforded.⁵⁷

*Staunton Investments Ltd v Chief Executive Ministry of Fisheries*⁵⁸ falls within the precedent of the “policy” type cases exemplified by *ex parte Khan*. Here the applicant claimed to have a legitimate expectation that a particular formula, arrived at following consultation, would be applied in respect of their payments. Gendall J first considered whether the formula itself was a mandatory relevant consideration. He held that the formula was a guideline which could not be applied in every case regardless of the circumstances⁵⁹ and that how proper regard was to be given to the formula was a matter for the discretion of the Ministry, reviewable only for unreasonableness.⁶⁰ He then went onto consider the legitimate expectation argument, which essentially covered the same ground. In reviewing the law on legitimate expectation His Honour noted, “Historically, breach of legitimate expectation gave rise to a procedural remedy only and one could not have (or rarely have) a legitimate expectation of a substantive result or outcome”.⁶¹ Without any real discussion, Gendall J, seemingly borrowing from *Coughlan*, then stated that the root of the doctrine has to be “abuse of power so that it would be unfair to permit a Public Authority to depart from its promulgated policy or promise”.⁶² This suggests that an applicant can obtain a substantive result or outcome via legitimate expectation; indeed this much is attributed to the judgement in the head note to the case, though it is not clear this was a finding. His Honour then treated the expectation that the policy would apply as a mandatory relevant consideration, one which may be disregarded if particular circumstances arise which, in the Ministers opinion, suggest that the policy should not apply.⁶³ Ultimately the same result is reached as was under the alternative ground discussed above. It is suggested in Chapter Three that there are shortcomings in treating an expectation as a mandatory relevant consideration. It is only likely to avail the applicant when, like in

⁵⁷ *Ibid* at 272, although not necessary to determine the case, this analysis of *Quin* can be found in the head note of the report.

⁵⁸ [2004] NZAR 68

⁵⁹ *Ibid* at para 20

⁶⁰ *Ibid* at para 21

⁶¹ *Ibid* at para 28, we might question His Honour’s conclusion, it is clear that an applicant can have a substantive expectation, what is unclear is whether it is to be procedurally or substantively protected

⁶² *Ibid* at para 29

⁶³ *Ibid* at para 31

Tay v Attorney General,⁶⁴ the ultimate decision maker was not aware of the expectation and the detriment suffered by the applicant in reaching the decision. It cannot address a claim that insufficient weight was given to the expectation.

*Northern Roller Milling Co Ltd v Commerce Commission*⁶⁵ is a similar case. The applicant had obtained an assurance as to how interest would be calculated in 1986 from the responsible authority. The responsible authority then changed to the Commerce Commission, who represented that the existing policies would remain unaltered and continue to apply. Subsequently the Commission issued a determination in relation to the applicants' affairs which departed from the prior basis upon which interest was calculated. Gendall J noted the nexus between substantive unfairness and legitimate expectations before reviewing the authorities. He observed that in *Quin* although Mason CJ was reluctant to accept that substantive results could flow from legitimate expectations, he did go on to say that if there was no detriment to the public interest substantive remedies could be granted. His Honour went on:

There is authority then for the proposition that where a decision-making authority has indicated the criteria which will be taken into account in arriving at that decision, but proceeds on some other basis, the decision may be flawed for misdirection or even for irrationality ... *The difficulty* [presented by the no-fetter principle] *may to some extent be met if indications given by the authority prior to the making of a formal decision can themselves be regarded as a preliminary decision.*⁶⁶

The final italicised sentence seems to be alluding to the principle of irrevocability. Gendall J set aside the decision of the Commission on the basis of a failure to take into account the state of affairs it had induced and which were relied on by the applicant, thereby treating the expectation as a mandatory consideration. An order was made to reconsider the matter. *Northern Roller* is the clearest precedent for the principle of substantive protection of expectations, although it is not clear what the result would have been had the authority given full consideration to the expectation in reaching its decision.

Fisher J took an expansive approach in *E v Attorney General*,⁶⁷ although in this case the applicants' neither relied on, nor even knew of, the policy in question. The

⁶⁴ [1992] 2 NZLR 693

⁶⁵ [1994] 2 NZLR 747

⁶⁶ *Ibid* at p 754

⁶⁷ [2000] NZAR 354

expectation was that in determining their applications for temporary visas, the Immigration Service would apply a presumption that a temporary permit would be granted to a refugee claimant in the absence of special factors making detention necessary. Fisher J held that it was not necessary to confine legitimate expectations to procedural as opposed to substantive expectations.⁶⁸ Nor need reliance be shown where, as here, the expectation was based on material published by the government to the public at large, since there is a public interest in holding the government to statements of how it intends to act.⁶⁹ His Honour granted substantive protection for this expectation by quashing the decisions and directing that they be made again, this time according to the presumption which had been established. This case would have been a clear authority for the proposition that legitimate expectations can generate substantive results, but, in *Attorney-General v E*⁷⁰ the Court of Appeal reversed the decision. It held simply “we do not see this as a case of legitimate expectation”,⁷¹ rather the critical issue was whether there was a presumption to be applied. The court differed from Fisher J in finding that there was no such presumption, and rather unhelpfully declined to comment on whether legitimate expectation might be an appropriate vehicle to achieve adherence to this presumption if it could be established.

The Privy Council has offered some support for the principle in *New Zealand Maori Council v Attorney-General*⁷² where, in reference to an assurance by the Solicitor General, it was stated:

The assurance once given creates the expectation, or to use the current parlance the "legitimate expectation", that the Crown would act in accordance with the assurance, and if, for no satisfactory reason, the Crown should fail to comply with it, the failure could give rise to a successful challenge on an application for judicial review⁷³

This thread of principle, however, has remained under developed by subsequent courts.

⁶⁸ *Ibid* at para 23, relying on *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73 (CA)

⁶⁹ *Ibid* at para 24, relying on *R v Secretary of State for the Home Department, ex parte Khan* [1985] 1 All ER 40

⁷⁰ [2000] 3 NZLR 257

⁷¹ *Ibid* at para 41, we may interpolate that this was because it could not realistically be said that the applicants expected anything.

⁷² [1994] 1 NZLR 513 (PC)

⁷³ *Ibid* at 525

In an obiter sentence⁷⁴ in *Attorney General v Steelfort Engineering*⁷⁵ the Court of Appeal appeared to offer support for the principle recognised in *Coughlan* and for the principle of irrevocability. The court had previously decided⁷⁶ that under the legislation at the time the Inland Revenue Department was not entitled to forgo the collection of tax since that would have been *ultra vires* the statute. This prevented applying the case of *R v IRC, ex parte Preston*⁷⁷ to enforce bargains made with the citizen. However it was recognised that in the present case it was permissible under the Customs Act 1996 for the Comptroller to waive small amounts of duty if agreement could be achieved:

Ordinarily, the Department will not be free thereafter to depart from the arrangement it has made with the importer. *To attempt to do so could be seen as an abuse of power or as an endeavour to exercise a power which, by virtue of the compromise, no longer exists in the particular situation.*⁷⁸

The case illustrates the importance of the statutory context within which an expectation is created and the vexed issue of *ultra vires* representations, which is addressed in more detail in Chapter Three. Richard Best⁷⁹ has suggested that this case provides “the primary seeds for the [NZ] Court of Appeal’s acceptance of *Coughlan*”. It seems, however, that this judgement has not had the effect Best suggested it might.⁸⁰

New Zealand commentators seem to be equally divided on the issue. Best⁸¹ seems to advocate the adoption of the principle enunciated in *Coughlan*, believing, despite the objections raised in the case law, that it is only a matter of time before the Court of Appeal does so. Conversely, Melissa Poole⁸² believes that the doctrine must be confined to procedural protection and argues against the recognition of any review of the merits of administrative decisions outside reasonableness. Similarly, Mark

⁷⁴ The decision was ultimately decided on a different basis

⁷⁵ (1999) 1 NZCC 61,030 (CA)

⁷⁶ *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655

⁷⁷ [1985] 2 All ER 327

⁷⁸ *Supra* n 73

⁷⁹ Richard Best, “Legitimate Expectation of a Substantive Benefit” (August 2000) NZLJ, 307, at 311

⁸⁰ A Lexis Nexus search (15/9/2007) revealed no case where this point has been picked up. In *Accent Management Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19, 758, Venning J accepted that this case meant that the CIR was entitled to enter a settlement in the course of tax litigation. Case affirmed on appeal, (2007) 23 NZTC 21, 366, (CA).

⁸¹ Best, *supra* n 77

⁸² Melissa Poole, “Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety” (1995) N.Z. Law Rev. 426

Campbell⁸³ believes the concept of legitimate expectation to be useful only when confined to procedural remedies, and that awarding substantive remedies is “inappropriate” since other private law doctrines cover the same ground.

The principle of irrevocability

The principle of irrevocability was confirmed and explained by the Court of Appeal in *Goulding v Chief Executive, Ministry of Fisheries*⁸⁴ :

A valid administrative decision in the exercise of a statutory power, which is the outcome of a completed process, but which has not been formally communicated to interested parties, has not been perfected. It may be revoked and a fresh decision substituted at any time prior to communication of it to affected persons in a manner which indicates intended finality. Once such a decision is so communicated to the persons to whom it relates, in a way that makes it clear the decision is not of a preliminary or provisional kind, it is final. A final decision which is made in the exercise of a power which affects legal rights, including those arising from the grant of a licence, is irrevocable.⁸⁵

Conclusions on substantive protection in New Zealand

The statement of Randerson J in *The New Zealand Association for Migration and Investments Incorporated v Attorney General*⁸⁶ seems to provide an accurate summation of the position in New Zealand at present:

Although the concept of legitimate expectation (at least in procedural matters) has long been recognised in administrative law, its boundaries are not well settled and it is far from straightforward to apply in practice.⁸⁷

The analysis of New Zealand authority above reveals a diversity of approaches amongst the judiciary and it seems reasonable to suggest “clarification ... is urgently needed”.⁸⁸ The Court of Appeal has affirmed that the principle of irrevocability applies in New Zealand, although this might be due to the greater degree of formality or certainty in resting an expectation on a “decision” as opposed to an “informal representation”. There are, however, difficulties associated with determining exactly when a decision has been made⁸⁹ and, as the English jurisprudence shows, the

⁸³ Mark Campbell, “The Legal Consequences of Promises and Undertakings Made by Public Bodies” (2002) *Canterbury Law Review*, 237

⁸⁴ [2004] 3 NZLR 173

⁸⁵ *Ibid* at para 43

⁸⁶ [2006] NZAR 45

⁸⁷ *Ibid* at para 137

⁸⁸ Schonberg, *supra* n 31 at 113

⁸⁹ See the comments of Binnie J for the minority in *Mount Sinai*, *supra* n 38 at 291

requirements for establishing a legitimate expectation are stringent enough to allay concerns about opening the “floodgates”. Nonetheless, if an applicant is able to cast the representation as amounting to a ‘decision’ this line of precedent will be useful. *Mount Sinai* suggests that the closer a representation looks like a decision, in so far as the authority has given full consideration to the ramifications of what it has said and has held it out as something to be relied upon, the more acceptable it will be to treat the authority as somehow bound by it.

Despite accepting that decisions which are not expressly provisional will be of the irrevocable, there is a complete absence of a reasoned conclusion on applicability of the principle enunciated in *Coughlan* in the New Zealand case law. The Court of Appeal and Privy Council have offered very limited support, but the lower courts have not developed these precedents. It seems that those who prefer to limit the concept simply refer to the robust rejection that legitimate expectations can generate substantive rights in the Australian case of *Quin*. Yet given the different constitutional context which partly compelled that conclusion, it may not be appropriate to rely on this case.⁹⁰ Other judges, taking an expansive approach to review, refer to the English authority on the subject, although the standard of review which is to apply is by no means clear.

Hereafter this dissertation seeks to resolve some of this uncertainty by showing that a coherent argument can be made for granting substantive protection for legitimate expectations in an appropriate case and attempts to provide some guidance for approaching such cases. This authors opinion on the issue is summed up by Sedley J in *R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*. Noting that where the expectation is procedural it is directly enforced by the court, His Honour stated:

It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision maker than it is to frustrate a legitimate expectation that the applicant will be listened too before the decision maker decides whether to take a particular step.⁹¹

⁹⁰ This point is developed in Chapter Two

⁹¹ *R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, at 724

Chapter Two:

Justifications and objections relating to the principle of substantive protection

Mark Campbell suggests that there are no convincing policy reasons which justify substantive protection of expectations.⁹² In this chapter that assertion is countered by a consideration of the theoretical justifications that do exist. The objections that have been put forward will then be assessed to see whether they require refusing to accept the principle.

Justifications

Legal Certainty

In England and Europe the concept of legal certainty has provided a major theoretical justification for enforcing substantive expectations. Several authors have analysed the concept in detail.⁹³ This section puts forward a broad overview of the concept of legal certainty and suggests how it might relate to the concept of reliance, which itself has been offered as a justification⁹⁴. Certain similar areas of the law where it can be seen operating will then be considered.

Personal autonomy is central to legal certainty.⁹⁵ Jeremy Bentham noted that “we have the power of forming a general plan of conduct”,⁹⁶ yet to be able to formulate such a plan we must be able to “foresee with some degree of certainty the

⁹² Campbell, *supra* n 83 at 259

⁹³ Paul Craig has discussed the concept in several of his works:

“Substantive Legitimate Expectations in Domestic and Community Law” (July 1996) *Cambridge Law Journal*, 304-310

EU administrative law (Oxford University Press, 2006), chapter 16

Administrative Law (4th ed, Sweet & Maxwell, 1999), chapter 19, p615-617

In addition see:

J. Schwarze, *European Administrative Law* (Sweet and Maxwell, 1992), chapter 6

Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2000), p12-23

⁹⁴ Schonberg, *supra* n 31 at 9

⁹⁵ *Ibid* at 12

⁹⁶ Bentham, *supra* n 1 at 51

consequences of [our] action”.⁹⁷ In Craig’s words, “A basic tenet of the rule of law is that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions”.⁹⁸ This is a value that is accepted by proponents of both formal and substantive conceptions of the rule of law.⁹⁹ Following on from this, Raz (subscribing to the formal conception¹⁰⁰) formulates several requirements which should guide the format of our law if it is to be “capable of guiding the behaviour of its subjects”.¹⁰¹ Of particular relevance here is that the law is “subject to a requirement of predictability and certainty”.¹⁰²

In formulating these requirements Raz clearly had in mind general norms that should apply to *laws* themselves, this being desirable for many aspects of the citizen’s life.¹⁰³ It can, however, be argued that the need for legal certainty also exists on the lower plane of the *administration* of laws. This is especially so when the law in question grants a wide discretionary power. These are common place in administrative law,¹⁰⁴ indeed the uncertainty inherent in such discretionary powers must form part of the reason departments publish ‘policy’ documents. Therefore, when representations in the nature of official statements are made to a citizen by those responsible for exercising the power, either as to how it will be exercised or what result will be reached, the life of the citizen is made more predictable, in so far as they are respected. Where they are not, as Schonberg states:

The legal protection of expectations by administrative law principles is a way of giving expression to the requirements of predictability, formal equality and constancy inherent in the rule of law.¹⁰⁵

⁹⁷ Schonberg, *supra* n 31 at 12

⁹⁸ Paul Craig, “Substantive Legitimate Expectations in Domestic and Community Law” (July 1996) Cambridge Law Journal, 304-310

⁹⁹ Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” (Autumn 1997) Public Law 467, citing Joseph Raz (formal) at 469 and Sir John Laws (substantive) at 479

¹⁰⁰ *Ibid* at 469

¹⁰¹ Joseph Raz, *The authority of law : essays on law and morality*, (Oxford : Clarendon Press, 1983), at 212-219

¹⁰² Schonberg, *supra* n31 at p12

¹⁰³ See Max Weber (noted by Schonberg, *supra* n 31 at 12) on the importance of predictability in commerce: Max Weber, *Economy and Society: An Outline of Interpretive Sociology* ed. by Guenther Roth and Claus Wittich; trans. by Ephraim Fischhoff *et al* (Berkeley: University of California Press, 1978) at 336.

¹⁰⁴ On discretionary power in general see Denis Galligan, *Discretionary powers : a legal study of official discretion* (Oxford University Press, 1986)

¹⁰⁵ Schonberg *supra* n 31 at 13

The relevance of reliance

Legal certainty is not, however, an absolute value and cannot justify enforcing every expectation. It is a value which must be balanced against the wider public interest, which on basic utilitarian theory will often prevail. But when it is appreciated why we want lives to be predictable, to be able to form a “general plan of conduct”, the importance of *reliance* becomes apparent. Reliance is offered as a justification for enforcing expectations by Schonberg distinct from the concept of legal certainty,¹⁰⁶ but here it is suggested that they are interrelated.

Reliance is a factor which tips the scales in favour of the value of legal certainty in the envisaged balancing exercise¹⁰⁷ or justifies a more intense standard of review.¹⁰⁸ This is because reliance is usually manifested in the citizen having undertaken some course of action, or alternatively forgone some opportunity, and in neither case is it possible to go back to the position they were formerly in. The representation or assurance has, in Bentham’s words, caused them to form a “*general plan of conduct*”.

The reliance must be reasonable,¹⁰⁹ which it often will be given the ‘contract like’ relationship that exists where there has been an ‘individualised representation’. The fact that ‘decisions’ are treated as irrevocable suggests that the closer the representation looks like a decision, the more reasonable it will be to rely on it. Another factor relevant to the reasonableness of the reliance will be exactly who made the representation. Only those who have “ostensible authority”¹¹⁰ to make the representation should be relied on, but the citizen should not have to inquire further to establish whether internal procedures such as formal delegation have been complied with.¹¹¹ If the citizen is aware that a further decision is yet to be made, it will not be reasonable to rely on the initial representation.¹¹² It must also be appreciated by the

¹⁰⁶ Ultimately he finds it too inflexible

¹⁰⁷ See comments of Laws LJ in *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, at 1131 holding that if there had been reliance he would have granted relief

¹⁰⁸ As I suggest in Chapter Three

¹⁰⁹ *ex parte Begbie supra* n 107, per Sedley J at 1134

¹¹⁰ See *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, at 231B

¹¹¹ *Ibid* at 231. But, problematically, if they have not, then the representation will be ultra vires, see *R v Leicester City Council, ex parte Powergen UK plc* [1999] PLR 91 where it was held that since the officers had no delegated power to waive certain conditions, their representations could not bind. See further discussion in Chapter Three

¹¹² For example in *Re 56 Denton Road, Twickenham, Middlesex* [1953] 1 Ch 51 it was held that a decision which is expressly provisional can be revoked.

citizen that the public body intended to create an expectation which would be relied upon,¹¹³ such as in *Coughlan* where the promise was held out as an inducement to consent to being moved to the new hospital. In these circumstances it will clearly be unfair to depart from what was relied on unless there is a very strong justification for doing so.

Thus, the centrality of personal autonomy to legal certainty explains the weight which is given to the presence of reliance. Since the citizen has *actually* planned their life upon the basis of a representation, the need for legal certainty is heightened because of the harm which will be caused if that reliance is frustrated. The expectation of reliance is also a significant reason the duty of care is imposed in making utterances or giving advice in negligence cases.¹¹⁴

We might, therefore, expect that reliance would need to be present in all cases, yet it has been suggested that where there has been a “general representation” reliance need not be shown.¹¹⁵ These cases, exemplified by *E v Attorney General*,¹¹⁶ involve expectations that published governmental policy indicating how discretion will be exercised will in fact be followed. Craig states:

Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such.¹¹⁷

Since the rule of law also seeks to ensure consistency and equality, it is thought that reliance need not be shown. In Chapter Three, however, it is argued that the absence of reliance means a less intensive standard of review, such as bare rationality, is apt for such cases because the plaintiff has not suffered any “*pain of disappointment*”.¹¹⁸ Alternatively, where the applicant is simply not aware of the material on which the “expectation” is said to be based, a different doctrine altogether, such as the principle of consistency, may be more appropriate.

¹¹³ Paul Craig, *Administrative Law* (4th ed, Sweet & Maxwell, 1999), p 619

¹¹⁴ Noted by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* [2003] 195 A.L.R. 502 at para 62

¹¹⁵ Schonberg *supra* n 31 at p125

¹¹⁶ *E v Attorney General*, *supra* n 67 at para 29

¹¹⁷ Paul Craig, *Administrative Law* (5th ed, Sweet & Maxwell, 2003) at page 652

¹¹⁸ Bentham, *supra* n 1 at 51

Legal Certainty in other areas of the law

There are other similar areas of the law where the concept of legal certainty can be seen operating. One clear example is estoppel. In fact, before the doctrine of legitimate expectation evolved in English law, promissory estoppel was directly applied against public bodies in a number of cases,¹¹⁹ so there is a definite analogy between the concepts.¹²⁰ Estoppel is an example of legal certainty because it is granted where there has been reliance causing the representee to take some *course of action* to their detriment. In other words the representation caused them to plan their lives, yet that plan was frustrated when the representation was departed from. Similar factors justify remedies for breaches of contract.¹²¹

Legal certainty also informs the doctrine of officially induced error of law, which operates against public bodies to afford substantive protection to a citizen's reliance. Thus, where a citizen has approached an official responsible for administering a particular law for advice and in reliance on that advice an offence is in fact committed; the citizen will have a good defence to any prosecution.¹²² That the citizen receives some remedy for relying on mistaken advice about the law in this situation reinforces the applicant's claim where they have relied on an *ultra vires* representation.¹²³

The requirement of certainty is also present where there has been plea bargaining in the criminal context. Thus, if these public officials seek to renege on such deals courts will usually intervene and enforce the promise. For example, in *Delellis v R*¹²⁴ the appellant had entered into an agreement that he would tell the police about the location of a large quantity of cocaine in return for an assurance that he would not be prosecuted for importing cocaine. The judge held that to now bring charges against

¹¹⁹ *Robertson v Minister of Pensions* [1949] 1 QB 227, *Wells v Minister of Housing and Local Government* [1967] 1 W.L.R 1000, *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222 and *Congreve v Home Office* [1976] 2 W.L.R 291.

¹²⁰ This was noted in noted in *R v East Sussex County Council ex Parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58

¹²¹ Schonberg, *supra* n 31 at 10

¹²² In *Tipple v Police* [1994] 2 NZLR 362 the court stated:

“in a case in New Zealand of officially induced error of law resulting in a person committing a crime believing it on that ground to be lawful, it was in the public interest as well as just that such a person should not be criminally liable”

¹²³ Discussed further in Chapter Three

¹²⁴ [1989] 4 CRNZ 601

the appellant was inconsistent with the recognised purposes of the administration of criminal justice, and was therefore an abuse of the process of the court. The charge of importing cocaine was stayed.¹²⁵ It is interesting that courts will intervene in decisions about whether or not to prosecute despite the fact these decisions essentially involve “the exercise of a discretionary public power”,¹²⁶ which are generally treated as non reviewable.

Trust and Good Administration

Both Craig¹²⁷ and Schonberg¹²⁸ suggest that protecting legitimate expectations fosters good administration and trust in government. Craig points out that it is important to realise that “such protection can also benefit the public authority”¹²⁹:

... administrative power is more likely to be perceived as legitimate authority if exercised in a way which respects legitimate expectations. Perceived legitimate authority is more efficacious because it encourages individuals to participate in decision making processes, to co-operate with administrative initiatives and to comply with administrative regulations.¹³⁰

¹²⁵ There are several instances of these kinds of cases. See *R v Croydon Justices, ex parte Dean* [1993] QB 769 and *Chu Piu-wing v Attorney General* [1984] HKLR 411. In *Fox v Attorney General* [2002] 3 NZLR 62 the CA affirmed that “a circumstance which could result in continuation of a prosecution being an abuse of process is if the change of course by the police created prejudicial consequences for the person charged. The facts of *Dellelis v R* illustrate that situation.”

¹²⁶ *Fox v Attorney General* [2002] 3 NZLR 62, at para 30

¹²⁷ Craig, *EU Administrative Law* (Oxford University Press, 2006) at 613

¹²⁸ Schonberg, *supra* n 31, at 24

¹²⁹ Craig, *supra* n 127, at 613

¹³⁰ Schonberg, *supra* n 31, at 25

Objections

Despite the justification discussed above, there are other values and arguments which count against the enforcement of substantive expectations. This section assesses these and considers whether they are strong enough to negate the justifications.

The value of unfettered powers

Legal certainty is not an absolute value. In administrative law the paramount duty of a public authority is to exercise their powers in the public interest, representing the utilitarian premise that underlies much of our thinking in this field. Inevitably the wider public interest may conflict with the enforcement of a citizen's expectation. The rule against estopping public authorities and the no fettering rule derive from the principle that public authorities must be able to exercise their powers in accordance with the "needs of the community when the question arises".¹³¹ This has led some to conclude that there can be no substantive protection for expectations.¹³²

Our initial conceptualisation of a legal problem will influence its resolution¹³³ and blind us to alternative solutions. If in conceptualising the paradigm substantive legitimate expectation problem we only consider the principle that a public body cannot fetter its ability to develop policy,¹³⁴ "substantive legitimate expectations should not, as a matter of principle, be held to exist".¹³⁵ It is, however, important to recognise that there are two legal values at stake in such cases, the principle of legality *and* legal certainty:

Once it is accepted that the value of legal certainty should be of relevance in this initial evaluation of the problem, then the legal rule which follows looks markedly different from that which exists if the only value is legality taken in the sense described above. The very realisation that there are two values at stake means that the denial of *any* doctrine of substantive legitimate expectations is no longer plausible ... The relevant legal rule would have to accommodate both of the values through some form of balancing approach.¹³⁶

¹³¹ *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500, at 503

¹³² See in particular Dawson J in *Attorney General (NSW) v Quin* [1990] 93 A.L.R. 1 and also *Coal Producers' Federation of New Zealand Incorporated v Canterbury Regional Council* [1999] NZRMA 257

¹³³ Paul Craig, "Substantive Legitimate Expectations in Domestic and Community Law" (July 1996) *Cambridge Law Journal*, 289, at 299

¹³⁴ What Craig calls the principle of legality, *ibid* at 299

¹³⁵ *Ibid* at 299

¹³⁶ *Ibid* at 299

Thus, where the dangers against which the no fettering/no estoppel rule guard against are not present or are negligible, then the value of legal certainty must prevail. This much seems to have been recognised by Mason CJ in *Quin*,¹³⁷ where it was said that if there was no public interest justifying the departure, an estoppel could lie.¹³⁸ Hence the modern English jurisprudence envisages a balancing test of whether the claimed public interest justifies departure from the representation.

There are other reasons why the fear public bodies will be unduly fettered is misplaced. Since substantive protection will generally be limited to cases where there has been a direct representation which is relied on, a discretion will only be fettered in respect of one, or very few, citizens.¹³⁹ Also, as Craig notes,¹⁴⁰ most claims will have a temporal limit or dimension. Furthermore, the applicant will have to show the existence of the expectation based on a clear and unambiguous representation, which cases like *ex parte Preston*¹⁴¹ and *ex parte MFK*¹⁴² show will not be easy.¹⁴³

Genevieve Cartier has also shown that a strict interpretation of the non fettering rule would preclude granting even procedural protection for legitimate expectations.¹⁴⁴ She explains that if we accept that in at least some cases procedural rights have an instrumental effect then they will have some influence over the substance of the decision actually reached, thereby operating as a fetter on discretion. Thus, “the procedural aspect of the doctrine of legitimate expectations is incompatible with or cannot be explained under, the ultra vires doctrine”.¹⁴⁵ This has not been suggested in any of the case law, perhaps due to the belief that procedural matters are the proper concern of judicial review.

¹³⁷ *Quin*, *supra* n 132

¹³⁸ This was also how Lord Denning got around the no estoppel rule, see *British Airways v Laker Airways* [1977] QB 643, at 707 and *H.T.V Ltd v Price Commission* [1976] ICR 170, at 185

¹³⁹ For example, in *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR, relief was denied because the applicant before the court had not relied on a representation made to another pupils parents.

¹⁴⁰ Craig, *supra* n 127, at 614

¹⁴¹ *R v IRC, ex parte Preston* [1985] 2 All ER 327

¹⁴² *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545

¹⁴³ Craig, *supra* n 127, at 614

¹⁴⁴ Genevieve Cartier, “A Mullian Approach to the Doctrine of Legitimate Expectations: Real Questions and Promising Answers”, in *Inside and Outside Canadian Administrative Law; Essays in Honour of David Mullan* (University of Toronto Press, 2006), at 194-197

¹⁴⁵ *Ibid* at 196

Although not every legitimate expectation will give rise to substantive protection, only those where the departure can be shown to be *unjustified*, some would still object since this exercise entails:

curial interference with administrative decisions on the merits by precluding the decision maker from ultimately making the decision which he or she considers most appropriate in the circumstances.¹⁴⁶

Excessive intrusion into the merits

Some commentators doubt whether courts can make assessments of the ‘merits’,¹⁴⁷ suggesting instead that legitimate expectations should only be procedurally protected.¹⁴⁸ The strength of this objection is questionable. The quotation above is taken from the judgement of Mason CJ in *Attorney General (NSW) v Quin*.¹⁴⁹ That this factor prevented recognising substantive expectations was strongly reinforced by Brennan J:

The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone ... those limitations [which have been developed] are not calculated to secure judicial scrutiny of the merits of a particular case.¹⁵⁰

We have seen in Chapter One that those in New Zealand who favour limiting legitimate expectations to matters of procedure rely on this case, but give little consideration of the reasons for its conclusion. In order to appreciate why in Australia ‘merits’ review is precluded it is necessary to delve a little deeper, which will reveal why the objection does not have as much force in New Zealand.

The court in *Quin*, particularly Brennan J, offered a strong rejection of the contention that there could be an enforceable substantive expectation, instead holding legitimate expectations were to be indicators of what natural justice might require.¹⁵¹ Although *Quin* fell relatively early in the context of the evolution of legitimate expectation, and

¹⁴⁶ *Attorney General (NSW) v Quin* [1990] 93 A.L.R. 1, per Mason CJ at 15

¹⁴⁷ Mark Campbell, “The Legal Consequences of Promises and Undertakings Made by Public Bodies” (2002) *Canterbury Law Review*, 237, at 257

¹⁴⁸ Melissa Poole, “Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety” [1995] *N.Z. Law Rev.* 426. This author argues strongly against recognising any substantive review outside of rationality

¹⁴⁹ *Supra* n 146

¹⁵⁰ *Supra* n 146 at 25

¹⁵¹ *Supra* n 146 at 40 per Dawson J

despite some members of that court subsequently changing their view on the issue,¹⁵² the High Court of Australia affirmed *Quin* in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*.¹⁵³ The joint judgement of McHugh and Gummow JJ (with the express support of Calligan J on this point) stated:

That [the judgement in *Quin*] remains the position in this court and nothing in this judgment should be taken as encouragement to disturb it by adoption of recent developments in English law with respect to substantive benefits or orders ... An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.¹⁵⁴

In an article referred to in this judgement by Bradley Selway QC,¹⁵⁵ the peculiar constitutional setting in Australia which compels this result is explained. Selway notes that courts in England and New Zealand have accepted a wider basis for judicial review, focussing on the nature of the power being exercised,¹⁵⁶ whereas in Australia the courts have tended to adhere with an approach which conforms to the concept of *ultra vires*. Selway poses the question whether Australia should follow the English lead, which he believes it cannot because of Australia's particular constitutional context:

The Constitution itself limits the role and function of the federal courts. It is not their role or function to carry out the executive function of administration or the legislative function of determining policy. These are the proper role of the other arms of government. The proper role of the federal courts is to determine if the relevant legislative or executive act or decision was in breach of or unauthorised by the law or was beyond the scope of the power given to the decision maker by the law. In this broad sense, the proper role of the federal courts is to determine if the act or decision was *ultra vires* and was consequently of no legal effect, or if the relevant decision maker had failed to comply with the law and should be compelled to do so.¹⁵⁷

What this means is that:

¹⁵² Sir Anthony Mason, albeit and perhaps significantly, in a different jurisdiction. See *Ng Siu Tung v The Director of Immigration* [2002] HKCFA 3.

¹⁵³ [2003] 195 A.L.R. 502

¹⁵⁴ *Ibid* at paras 67-76

¹⁵⁵ Bradley Selway QC, "The Principle Behind Common Law Judicial Review of Administrative Action" (2002) 30 Federal Law Review 217

¹⁵⁶ The acceptance of substantive legitimate expectations in *Coughlan* is cited as an example of this approach

¹⁵⁷ Selway, *supra* n 155, at 234

The vigorous debate that has occurred in England over the last decade as to the proper role and function of judicial review ... is fundamentally irrelevant to Australian judges and lawyers.¹⁵⁸

Other commentators also note that adoption of *Coughlan* is unlikely in the Australian constitutional context.¹⁵⁹ Instead of allowing courts to judicially review the ‘merits’ of administrative decisions the legislature in Australia has expressly provided a body with such powers; The Administrative Appeals Tribunal.¹⁶⁰ Arguably this precludes the need for other courts to review ‘merits’. Even where the legislature declines to afford such a right of appeal, this must be regarded as a conscious choice.

Given that the merits objection so prominent in *Quin* and *Lam* rests on Australia’s particular constitutional context, it is inappropriate for New Zealand courts, absent a consideration of their own constitutional context, to rely on it. In fact New Zealand’s “unwritten” constitution resembles more closely England than Australia. This is borne out by the wider approach to judicial review alluded to by Selway.

It is important to recognise that substantive review in New Zealand is not limited to reasonableness or rationality. In the case of *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd*¹⁶¹ President Cooke articulated the ground of substantive unfairness upon which to review the merits of administrative decision making, suggesting that it “shaded into” but was not identical to unreasonableness. He went on, “Inevitably this means, whatever the verbal formula of review adopted, that the quality of an administrative decision as well as the procedure is open to a degree of review”.¹⁶² The two other members of the court, whilst agreeing in principle, were more cautious. Fisher J agreed that some of the grounds of review might be brought under the head of substantive fairness, but also expressed reservations, “on each occasion that the expression ‘substantive unfairness’ is applied to a case it will

¹⁵⁸ Selway, *supra* n 155, at 234

¹⁵⁹ Sir Anthony Mason suggests it would “require a revolution in Australian judicial thinking”, “Procedural Fairness: Its development and continuing role of legitimate expectation” (2005)12 AJ Admin L 103, at 108. See also Wendy Lacey: “A Prelude to the Demise of Teoh: The High Court Decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam” (2004) SydLRev 7

¹⁶⁰ Established by the Administrative Appeals Tribunal Act 1975 as part of a general reorganisation of Australian administrative law, itself prompted by the Kerr Report. See generally David Pearce *Australian Administrative Law Service* (Butterworths, 1979)

¹⁶¹ [1994] 2 NZLR 641 (CA)

¹⁶² *Ibid* at 652

continue to be necessary to identify a more specific and principled administrative law basis for intervention”¹⁶³.

Melissa Poole has doubted whether the authority relied on by President Cooke is accurate,¹⁶⁴ however, it is significant for present purposes that one of the cases relied on is *ex parte Preston*,¹⁶⁵ which itself can be seen as an early legitimate expectation case. Of further relevance is the suggestion of Fisher J that “departures from assurances given”¹⁶⁶ may exhibit substantive unfairness. The potential nexus between these concepts was also recognised by Gendall J in *Northern Rolling Mills*.¹⁶⁷ Substantive unfairness has been applied in a number of cases,¹⁶⁸ albeit not in respect of a legitimate expectation. Nonetheless, its presence does evidence a wider function for New Zealand courts in judicial review to include some merits based review, unlike in Australia.

There are other reasons the merits objection lacks strength. Firstly, an unacceptable intrusion into the merits of administrative decisions would be one which lacks a coherent and principled basis for doing so. Brennan J inferred legitimate expectation was “too nebulous” to provide a basis to interfere in the merits.¹⁶⁹ “Unreasonableness”,¹⁷⁰ “substantive unfairness”¹⁷¹ and the English concept of “abuse of power”¹⁷² can rightly be regarded as offering little guidance for their application. It is clear, however, that these are mere labels “for various aspects of substantive

¹⁶³ *Ibid* at 654

¹⁶⁴ Poole, *supra* n 148 at 433-444

¹⁶⁵ *R v IRC, ex parte Preston* [1985] 2 All ER 327. Indeed Craig has suggested substantive unfairness may be but another name for “abuse of power”: Craig, *supra* n 114, at 622

¹⁶⁶ *Supra* n 161 at 654

¹⁶⁷ *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747, at 750

¹⁶⁸ For example, *Shaw v Attorney-General (No 2)* [2003] NZAR 216 and *B v Commissioner of Inland Revenue* [2004] 2 NZLR 86

¹⁶⁹ *Supra* n 146 at 27

¹⁷⁰ See the comments of Thomas J in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA), at 400-401 that semantics cannot overcome the subjective element inherent in an assessment of reasonableness. See also Lord Cooke’s dissatisfaction with the concept prompting a reformulation in *R v Chief Constable of Sussex* [1999] 1 All ER 129, at 157: “whether the decision in question was one which a reasonable authority could reach”.

¹⁷¹ See the reservations of McKay J, *supra* n 161 at 654

¹⁷² In *R (Bibi) v Newham LBC* [2002] 1 WLR 237, at 244 Schiemann LJ stated that:

“the case law is replete with words such as “legitimate” and “fair”, “abuse of power” and “inconsistent with good administration”. When reading the judgments care needs to be taken to distinguish analytical tools from conclusions which encapsulate value judgments but do not give any indication of the route to those conclusions.”

impropriety”¹⁷³ and that in each case “it will continue to be necessary to identify a more specific and principled administrative law basis for intervention”.¹⁷⁴ It is on this lower plane that substantive legitimate expectations operate, providing a specific example of the more general ground of “substantive impropriety”. Since the law in England has developed to a stage where the application of the principle is reasonably certain, this cannot be seen as an unprincipled and incoherent means to interfere in the merits of administrative decisions. In fact it presents a more objective approach than the unstructured value judgements inherent in labelling a decision “unreasonable” or “unfair”.

Secondly, the balancing test of whether a public interest justifies some conduct on the part of the state envisaged in legitimate expectation cases is hardly a novel or particularly unsuitable task for the judiciary. As we have seen, the courts feel they are able to decide what will constitute good reason *not* to grant expected procedural rights¹⁷⁵, so why should they not be able to decide whether the reason is sufficient to justify *departing* from the expectation? The balancing exercise is similar to that found in several areas, for example under s5 of the New Zealand Bill of Rights Act 1991¹⁷⁶ and the method for excluding evidence formulated in *R v Shaheed*.¹⁷⁷ There is also a parallel here with the task allotted to courts in cases concerning what used to be known as “Crown Privilege”.¹⁷⁸ When the Crown perceived the “public interest” required that evidence in proceedings should not be disclosed it could claim “Crown Privilege” to prevent it being produced.¹⁷⁹ As Wade states:

The court could not question a claim of Crown privilege made in proper form, regardless of the nature of the document. Thus the Crown was given legal power to override the rights of

¹⁷³ *Waitakere*, *supra* n 170 at 412

¹⁷⁴ *Supra* n 161 at 654

¹⁷⁵ *The New Zealand Association for Migration and Investments Incorporated v Attorney General* [2006] NZAR 45

¹⁷⁶ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. One commentator has suggested that the greater the extent of the judiciaries power of reviewing legislation the more readily such a jurisdiction should accept substantive protection for expectations, Calvin Eversley “Legitimate Expectation and the Creation of Procedural and Substantive Legal Rights in Commonwealth Caribbean Public Law” (December 2004) *Common Law World Review*, 332

¹⁷⁷ [2002] 2 NZLR 377, refined in *R v Williams* [2007] 23 CRNZ 1, now enshrined in s30 of the Evidence Act 2006

¹⁷⁸ In general see Craig, *supra* n 113 at 821-824

¹⁷⁹ See *Ellis v Home Office* [1953] 2 QB 135 and *Broome v Broome* [1955] P 190

litigants not only in cases of genuine necessity but in cases where a government department thought fit.¹⁸⁰

In *Conway v Rimmer*¹⁸¹ the House of Lords reversed this position with the effect that “in every case the court had the power and the duty to weigh the public interest of justice to the litigants against the public interest asserted by the government”.¹⁸² The fact that otherwise the Crown would be the judge in its own cause has particular relevance to legitimate expectation cases. What Wade calls “undue indulgence by the courts to executive discretion, followed by executive abuse”¹⁸³ is as undesirable, if not more, here as it was under “Crown Privilege”.

Furthermore, concerns about excessive interference into the merits can be addressed by applying varying intensities of review. As Laws LJ comprehensively stated in *ex parte Begbie*¹⁸⁴:

It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake ... The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis ... The case's facts may be discrete and limited, having no implications for an innominate class of persons ... In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.¹⁸⁵

This means that deference can be shown where it is appropriate.¹⁸⁶

It seems hard to deny that what the courts are doing when they embark on the balancing test is an assessment of the merits of a decision already made by the public authority. Yet even if this is accepted, judicial review is not thereby precluded. Merits based review under the rubrics of reasonableness or substantive unfairness is very

¹⁸⁰ HWR Wade, *Administrative Law* (5th ed, Clarendon Press, 1982) at 722

¹⁸¹ [1968] AC 910

¹⁸² Wade, *supra* n 180 at 726. In the New Zealand context see *R v Hughes* [1986] 2 NZLR 129

¹⁸³ Wade, *supra* n 180 at 721

¹⁸⁴ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115

¹⁸⁵ *Ibid* at 1130

¹⁸⁶ See *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 402 and *Tupou v Removal Review Authority* [2001] NZAR 696 at 704 for a discussion of intensity in the New Zealand context

much a feature of NZ based judicial review, unlike our Australian cousins whose constitutional context is said to inhibit substantive review. Whilst substantively protecting expectations may shift part of the balance between the executive and the judiciary, in England, where this has been accepted, “the sky over Whitehall is still more or less in place”.¹⁸⁷

Most claims covered by other grounds

Mark Campbell suggests that since most cases can be dealt with either by estoppel or negligence, the substantive dimension of legitimate expectations is redundant.¹⁸⁸ Whether this is true is doubtful.

Estoppel appears to have been overtaken by legitimate expectation. It is true that in several cases Lord Denning¹⁸⁹ applied promissory estoppel to public authorities binding them to representations they had made to citizens.¹⁹⁰ However, applying the private law concept of estoppel to public authorities in the different theoretical framework of judicial review was problematic in the face of a general rule thought to prohibit this.¹⁹¹ Lord Denning suggested that the general rule preventing a public body being estopped was:

...subject to the qualification that it [a public body] must not misuse its powers: and it is a misuse of its power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it.¹⁹²

Despite His Lordships readiness to enforce estoppel against public bodies, other judges were more cautious.¹⁹³ In *Western Fish Products Ltd v Penwith District Council*¹⁹⁴ the court characterised cases where Lord Denning had enforced an

¹⁸⁷ Rt Hon Lord Justice Sedley, “The last 10 years’ development of English Public Law”, (2004) 12 AJ Admin L 9, at 20

¹⁸⁸ Campbell, *supra* n 14 at 259

¹⁸⁹ Who himself resurrected the concept in *Central London Property Trust Ltd v. High Trees House Ltd* (1946) [1956] 1 All E.R. 256.

¹⁹⁰ *Robertson v Minister of Pensions* [1949] 1 QB 227, *Wells v Minister of Housing and Local Government* [1967] 1 W.L.R 1000, *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222 and *Congreve v Home Office* [1976] 2 W.L.R 291. *H.T.V Ltd v Price Commission* [1976] ICR 170

¹⁹¹ The origins of that rule can be traced back to *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500 and *Maritime Electric Company Ltd v General Dairies Ltd* [1937] A.C 610

¹⁹² See *H.T.V Ltd v Price Commission* [1976] ICR 170, at 185 and *British Airways v Laker Airways* [1977] QB 643, at 707

¹⁹³ *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416, at 424

¹⁹⁴ [1981] 2 All ER 204

estoppel as exceptions to the general rule. As was noted by Lord Hoffman in *ex parte Reprotech (Pebsham) Ltd*,¹⁹⁵ this approach to reconciling the conflicting principles did not receive universal satisfaction.¹⁹⁶ Instead, at least by 2002, legitimate expectation was the better doctrine:

It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.¹⁹⁷

Given the clear analogy between the approaches the difference may be one of semantics rather than substance and one which helpfully sidesteps the circular objection that an estoppel cannot hinder a public body. It appears that under either approach a court must grapple with the same issues. Nonetheless the House of Lords in *Reprotech* has severed any ties with estoppel, meaning that now legitimate expectation is the doctrinal vehicle by which a public authority can be held to its representations or assurances. This seems to have been confirmed in New Zealand by Wild J in *Challis v Destination Marlborough Trust Board Inc*,¹⁹⁸ “estoppel has no place in modern public law, and I hold against the existence of this cause of action”.¹⁹⁹

It is also doubtful whether negligence is the correct vehicle to use where expectations are frustrated. In *Meates v Attorney General*²⁰⁰ the Court of Appeal held the government liable for a failure to implement a promise to support a company in the event of financial difficulties, holding that there was a duty to take care in making assurances *and* to take reasonable steps to ensure that promise was honoured (arguably going beyond the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*²⁰¹). Yet it is hard to see how a duty of care conceptually fits a promise to do some act in the future, indeed this judgement was later criticised by the Privy Council in

¹⁹⁵ *R v East Sussex County Council ex Parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58, at 66, para 35

¹⁹⁶ See the comments of Dyson J in *R v Leicester City Council, ex parte Powergen UK plc* [1999] PLR 91, at 100-101, “I find it difficult to discern the true scope of these exceptions ...”

¹⁹⁷ *Supra* n 195 at 66, para 35

¹⁹⁸ [2003] 2 NZLR 107

¹⁹⁹ *Ibid* para 105

²⁰⁰ [1983] NZLR 308

²⁰¹ [1964] AC 465, see J Smillie, “Certainty and Civil Obligation” (annual 2000), *Otago Law Review* 633, at 647-649

Meates v Westpac Banking Co,²⁰² which was an appeal arising from the same set of facts. The Board stated that:

Their Lordships have considerable difficulty in grasping the concept of a duty in tort to take reasonable care to pay or procure payment of a sum which nobody is under a contractual obligation to pay.²⁰³

It is also not clear how a negligence action could accommodate the need for public authorities to depart from an assurance when the public interest so requires. Although it is questionable whether *Meates* was legally correct, it does present an interesting precedent, especially for an applicant who is seeking monetary compensation instead of the traditional public law remedies.²⁰⁴ A *Hedley Byrne* action may also avail the applicant who relies on an *ultra vires* representation, as is suggested in Chapter Three.

The “Osmosis” theory

The protection of substantive legitimate expectations is a central principle of European Community administrative law.²⁰⁵ It can be argued that this was a significant impetus for the developments which have taken place in the United Kingdom, although Lord Denning later disavowed any continental influence over his adoption of legitimate expectation in *Schmidt*.²⁰⁶ It would clearly be undesirable to have so-called “two speed justice” operating in the UK. As Schonberg explains,²⁰⁷ this would occur if the domestic courts in the UK were to accept only the procedural aspect of legitimate expectations, yet in matters “which have an EC dimension” the courts would be bound to enforce substantive expectations in the right case. This continental influence is noticeably absent New Zealand and with it, perhaps, a major justification for enforcing substantive expectations.

Whilst it cannot be denied that the European jurisprudence has significantly influenced English developments,²⁰⁸ it is doubtful whether this will prevent such

²⁰² [1991] 3 NZLR 385

²⁰³ *Ibid* at 403

²⁰⁴ The Law Commission has indicated that it may review the procedures and remedies available on review, see New Zealand Law Commission, *Mandatory Orders Against the Crown and Tidying up Judicial Review*, Study Paper 10, March 2001

²⁰⁵ Schwarze, *supra* n 93, chapter six

²⁰⁶ Forsyth, *supra* n 12

²⁰⁷ Schonberg, *supra* n 31 at 26-27

²⁰⁸ See in particular the judgment in *R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, and the work of Paul Craig who is undoubtedly the leading academic in this field

developments in New Zealand. Until the very recent creation of the Supreme Court²⁰⁹ “osmosis” would have been an apt phrase to describe the relationship of English to New Zealand law.²¹⁰ Even now those ties have been severed, the position in England on a contentious issue in New Zealand would be a highly relevant consideration, indeed more recent cases have increasingly acknowledged, although by no means adopted, the principle in *Coughlan*.²¹¹ This is reinforced by the fact that our executive systems and ways of controlling that through judicial review remain very similar. Therefore, “osmosis” may in fact provide the means by which this originally European concept finds its way through England down to the antipodes.

Procedural protection sufficient

Procedural rights are not always sufficient. There is often an air of unreality about claims to procedural expectations, whether they are thought to be instrumental or non instrumental. It is inconceivable that a person affected by a particular decision would go to court and seek review of the decision for a failure to consult if a favourable outcome was reached. Generally decisions are only reviewed because of dissatisfaction with the result, and an unfair procedure is one way to quash such a decision. Realism suggests the applicant’s objection always lies in the substance of the decision. Furthermore, if the courts were to completely withdraw from assessing the merits of decisions, a dangerous precedent would be set whereby an authority could freely represent matters to citizens, safe in the knowledge that so long as correct procedures were followed, they could never be held to it. In this area the judiciary has an important role in constraining the executive, since an individual such as Miss Coughlan will not alone be able to hold it to account through the democratic process.

An undue “chilling effect”

It could be argued that if expectations based on representations were enforceable against them then public authorities would be extremely reluctant to issue guidelines and give informal advice. This in turn would make the individuals life even more unpredictable and actually offend legal certainty. Schonberg, however, argues that

²⁰⁹ Via the Supreme Court Act 2003

²¹⁰ Indeed the privy council intimated that the same law applied in NZ in *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC)

²¹¹ See for example *Beaton v Institute of Chartered Accountants of New Zealand* unreported, HC Auckland, CIV 2005-4042642, 17th November 2005, Allen J, at para 147. See also *Lalli v Attorney General* unreported, HC Auckland, CIV 2006-404-00435, 27th April 2006, Asher J, at para 29.

there is no empirical evidence from states where expectations are enforced that there exists such a “chilling effect”.²¹² Furthermore, as he points out, even if the quantity of advice is reduced, its quality, in terms of accuracy and reliability, is likely to be greatly enhanced. As was pointed out as long ago as *Denton Road*:

This judgement can do no harm to the defendants. Let them mark every intimation of a “determination” of theirs as “provisional”, “subject to alteration”, “not to be relied on” or words to that effect.²¹³

This would have the desirable effect of negating the “pain of disappointment” caused by renegeing on assurances.

²¹² Schonberg, *supra* n 31 at 19

²¹³ *Re 56 Denton Road, Twickenham, Middlesex* [1953] 1 Ch 51, at 58

Chapter Three:

How it works in practice

This chapter focuses on the English jurisprudence which, on the basis of the justifications discussed above, has accepted that in the right case a court may enforce an expectation of a substantive benefit. The English cases show how a New Zealand court should approach such cases. The first question is whether a legitimate expectation can be established on the facts before the court. Having shown that, the court must go on to assess whether the denial of what the citizen had been led to expect is justifiable having regard to the claimed public interest.

What must be shown to establish a legitimate expectation?

The first question must be whether the citizen had a legitimate expectation. Space precludes a detailed assessment of the relevant factors which are more comprehensively covered elsewhere.²¹⁴ In any case these factors, for the most part,²¹⁵ are not contentious. In this section the focus is on the structural requirement that a representation must be *intra vires*.²¹⁶

The problem of *ultra vires* representations

A representation may be *ultra vires* in two senses, either the authority which made it had no power to do so, or the particular official had no power to make it.²¹⁷ The rationale for this is said to be that otherwise public authorities would be able to extend their powers at will.²¹⁸

²¹⁴ See for example Paul Craig, *Administrative Law* (4th ed, Sweet & Maxwell, 1999), at 618-620

²¹⁵ There is some disagreement over whether the applicant must subjectively entertain the expectation, I return to this point below

²¹⁶ *R (Bibi) v Newham LBC* [2002] 1 WLR 237, at 249

²¹⁷ Craig, *supra* n 214 at 638

²¹⁸ *Minister of Agriculture and Fisheries v Hulkin*, unreported, but cited in *Minister of Agriculture and Fisheries v Mathews* [1950] 1 KB 148 at 153. Referred to by Craig, *supra* n 214 at 642

The problem is best illustrated by the facts of *Rowland v Environment Agency*.²¹⁹ The case concerned public rights of navigation (PRN) over a stretch of the river Thames, which had been thought to exist “since time immemorial” at common law and under statute. Nonetheless, for over one hundred years the stretch was treated by successive Navigation Authorities as private. In 2000 the defendant reconsidered the matter and affirmed that there was in fact a PRN. The applicant, who owned adjacent property, claimed a legitimate expectation that the water way was in fact private. Her claim failed because her expectation was based on conduct which was *ultra vires* the authority. They had no power to waive the PRN over the water way. May LJ reached this conclusion with “undisguised reluctance ... because I regard the outcome as unjust”.²²⁰

Paul Craig similarly regards this situation as unfair. He shows that most cases concern not intentional conduct, but rather an inadvertent or careless extension of power by the public authority. In such cases “it is not clear why the loss should be borne by the representee”.²²¹ The fact that the citizen has a defence when they are the victim of an “officially induced error of law” reinforces the suggestion that their reliance on an *ultra vires* representation should be protected in some way.²²² In both situations the citizen cannot be expected to second guess advice obtained from state officials, suggesting that the relevant authority must take some responsibility instead of sheltering behind an *ultra vires* argument. Craig argues that the court should undertake a balancing approach; that if the harm to the individual outweighs the harm of allowing *ultra vires* conduct to be binding, then the representation should bind.²²³

The balancing approach does, however, have shortcomings. By indirectly sanctioning unlawful conduct the courts would seem to be undercutting the rule of law, from which the principle of legal certainty and the justification for enforcing substantive expectations derives. As Craig acknowledges, this balancing approach would also create a large degree of uncertainty, as well as offend Parliamentary Sovereignty.²²⁴

²¹⁹ [2004] 3 WLR 249, for a comparable New Zealand case see *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655

²²⁰ *Ibid* at 282

²²¹ Craig, *supra* n 214 at 640

²²² See discussion in chapter two

²²³ Craig, *supra* n 214 at 644

²²⁴ *Ibid* at 647

Alternatively Craig suggests that compensation should be available in these situations,²²⁵ but again there are problems with this. The most significant is the availability of funds. Another option might be a negligence claim under *Hedley Byrne*.²²⁶ Here the public authority would be held to be under a duty of care when they purport to make declarations of what the law is.²²⁷ Since, as Craig highlights, most cases of *ultra vires* representations stem from carelessness on the part of officials or authorities, negligence is an appropriate action.²²⁸ Otherwise, the expectation, although based on *ultra vires* conduct, could be treated as a mandatory relevant consideration. This was done in *Tay v Attorney General*²²⁹, but again, this will only assist an applicant where the decision maker was not in fact aware of the detriment suffered.

What should a court do when that expectation is frustrated?

Having shown the expectation to be legitimate, the court must then ask what should be done in situations where it is frustrated.

Following the early estoppel and “revenue” cases, there was a significant degree of uncertainty over what the correct standard of review was in cases involving the deprivation of a substantive benefit which was legitimately expected.²³⁰ Indeed, whether a court could intervene at all in such cases, as opposed to where the claim

²²⁵ *Ibid* at 649

²²⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

²²⁷ See for example *Minister of Housing and Local Government v Sharp and Another* [1970] 2 QB 223 where a duty of care was imposed on the registrar when conducting searches of the registrar.

²²⁸ There may still be problems in cases where the applicant has taken all due care but the interpretation of a law or policy by an official is simply held to be wrong

²²⁹ [1992] 2 NZLR 693

²³⁰ In *R v Inland Revenue Commissioners, ex parte Unilever plc and Related* [1996] STC 681 Simon Brown LJ regarded legitimate expectation “as essentially but a head of *Wednesbury* unreasonableness”. In *R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 Sedley J envisaged a balancing of the imperative behind the policy change against the applicants’ expectation, akin to a proportionality test. This was later characterized as “heresy” by Hirst LJ in, *R v Secretary of State for the Home Department and another, ex parte Hargreaves and others* [1997] 1 All ER 397, rather “on matters of substance, *Wednesbury* provides the correct test”.

was to procedural rights²³¹ could not be regarded as settled. More recently the Court of Appeal²³² and the House of Lords²³³ have confirmed the existence of the principle and different approaches have emerged as to what a court should do when an expectation has been frustrated.

Categorisation

Lord Woolf MR undertook a much needed consideration and categorization of the extant case law on legitimate expectation in *R v North East Devon Health Authority, ex parte Coughlan*.²³⁴ This case concerned an explicit promise to Miss Coughlan and other severely disabled patients who were under the care of the National Health Service. They were assured that if they agreed to move from their current facility to 'Marsdon House', the new residence would be their home for life. Despite this, the local health authority decided that financial considerations meant that the facility had to be closed down. The court considered that where, as here, a legitimate expectation could be shown there were three possible outcomes:

- (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation... giving it the weight it thinks right... Here the court is confined to reviewing the decision on conventional *Wednesbury* grounds... This has been held to be the effect of changes in policy....
- (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken....
- (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit that is substantive, not simply procedural, authority now establishes that here too the court will in proper cases decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power...the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.²³⁵

The court acknowledged that the problem will often be deciding which category a given case fits into.²³⁶ The second category is uncontroversial. The real difficulty with

²³¹ *R v Secretary of State for Transport, ex parte Richmond Upon Thames London BC* [1994] 1 All ER 577

²³² *R v North East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622

²³³ *R v Secretary of State for the Home Department, ex parte Zegiri (FC)* [2002] UKHL 3 and *R v East Sussex County Council ex Parte Reprotect (Pebsham) Ltd* [2002] 4 All ER 58

²³⁴ [2000] 2 WLR 622

²³⁵ *Ibid* at para 57, at 645

²³⁶ *Ibid* at para 59, p 645

this tripartite division is the distinction between category one, where the applicable standard is unreasonableness, and the third category, where the court itself will decide whether the claimed public interest justifies departure from the representation. On the facts before the court the third category was appropriate, because the promise was limited to a discrete group and the right to housing was involved. The court held that the essentially financial justifications offered did not entitle the authority to resile from the representation.²³⁷

*R v Secretary of State for Education and Employment, ex parte Begbie*²³⁸ was heard a month after *Coughlan* was decided. Sedley LJ stated “that the distinction drawn in *Coughlan* ... between the first and third categories of legitimate expectation [might deserve] further examination”.²³⁹ Laws LJ noted that both categories involve the deprivation of a substantive benefit and suggested:

As it seems to me the first and third categories explained in *Coughlan* are not hermetically sealed. The facts of each case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review.²⁴⁰

His Lordship was undoubtedly correct in suggesting that the categories each exhibit a different intensity of review, and that the facts should steer the court towards the appropriate standard. Richard Clayton, however, has criticised the two factors identified by Laws LJ as determinative; the number of individuals affected and the nature of the policy creating the expectation. Instead Clayton suggests that “... policy as such should be the decisive factor distinguishing the first from the third category”,²⁴¹ and there is some support for this view in the language Lord Woolf MR used in the passage quoted above. He also suggests that this lesser standard of review is apt for ‘policy’ cases because an applicant need not show reliance on their expectation in such situations.²⁴² The reason for this is that when the expectation claimed is based on published governmental policy:

²³⁷ It is not entirely clear from the report what remedy the court granted. In the court below the decision to close the facility was quashed. It seems a reasonable inference that this would then be used by Miss Coughlan as a bargaining tool in further negotiations with the local authority.

²³⁸ [2000] 1 WLR 1115

²³⁹ *Ibid* at 1134

²⁴⁰ *Ibid* at 1130

²⁴¹ Richard Clayton, “Legitimate Expectations, Policy, and the Principle of Consistency” (March 2003) *Cambridge Law Journal*, 93, at 100

²⁴² *Ibid* at 102

Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such.²⁴³

Several authors have, however, noted the slight of hand involved in saying an applicant had an expectation based on something of which they were not even aware. In *E v Attorney General*²⁴⁴ the expectation, neither subjectively entertained nor relied on, was simply that whatever policy was in force at the time should apply. Mark Elliot argues that legitimate expectation is not the correct vehicle where the applicant is unaware of the existence of a policy upon which the expectation is based:

... the unfairness in cases like *Rashid*²⁴⁵ and *A*²⁴⁶ consists not in the dashing of subjectively – and legitimately – held expectations, but in the administration’s failure to adhere to its own self proclaimed decision making norms, thereby raising the prospect of inconsistent and unequal treatment of individuals.²⁴⁷

Campbell notes that the very phrase expectation “suggests a subjective element, for there can be no expectation without knowledge of the undertaking”.²⁴⁸ Forsyth argues that the existence of an expectation is therefore a question of fact, “If that person did not in fact expect anything then, even if others did expect something, that persons expectation, being non existent, cannot be protected”.²⁴⁹ Thus, cases where the applicant was not even aware of the policy at all should be decided on some other juridical basis, such as the principle of consistency.²⁵⁰ Otherwise, as has been noted by one New Zealand judge,²⁵¹ the concept may be stretched too far. Fisher J was therefore mistaken in applying legitimate expectation in *E*.

²⁴³ Paul Craig, *Administrative Law* (5th Ed Sweet & Maxwell, 2003), 652

²⁴⁴ [2000] NZAR 354

²⁴⁵ *R(Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744

²⁴⁶ *R (on the application of A) v Secretary of State for the Home Department* [2006] EWHC 526

²⁴⁷ Mark Elliot, “Legitimate Expectations and the Search for Principle: Reflections on Abdi & Nadarajah”, (2006) JR 281, at 282. See also Mark Elliot, “Legitimate Expectations: Procedure, Substance, Policy and Proportionality” (July 2006) Cambridge Law Journal 254, at 255 suggesting there is a strong argument for doctrinal desegregation here

²⁴⁸ Campbell, *supra* n 147 at 252-253

²⁴⁹ Christopher Forsyth, “Wednesbury Protection of Legitimate Expectation” (1997) PL 375, at 376

²⁵⁰ Clayton suggests that “analytical simplicity” could be achieved if expectations generated by policy were explained on some other basis, such as the “principle of consistency” by which a public body will be held to its published policy and any inconsistency should be assessed in terms of reasonableness. There is support for this principle in *R v Home Secretary Ex P Gangadeen* [1998] 1 FLR and *R v Home Secretary Ex p Urmaza* [1996] COD 479

²⁵¹ Asher J noted that these kinds of cases fit uneasily with the concept of “legitimate expectation” in *Lalli v Attorney General* unreported, HC Auckland, CIV 2006-404-00435, 27th April 2006, Asher J at para 27, suggesting there should be a need for the applicant to actually have an expectation

Nonetheless, when the applicant is aware of the policy in question but simply did not manifest any reliance on it, given the values of consistency and equality, and if the promulgation of policy is to be more than mere window dressing, the first category in Coughlan provides a useful mechanism to hold authorities to their published policy. The absence of reliance justifies applying the less intensive standard of reasonableness since there is no “pain of disappointment”. This is reinforced by the fact that policies are not rules which must be adhered to in every case; rather there remains a discretion to not apply the policy in exceptional circumstances.²⁵²

Whilst Clayton suggests that policy should be the decisive factor in the distinction, the better view may be that instead reliance should be the decisive factor. If one of the reasons a less intensive standard should be used in policy cases is the absence of reliance, then where there is reliance on a policy, surely the more intense scrutiny in category three is appropriate? There is some support for this proposition in the case law. *Ex parte Khan*²⁵³ is the prime example; there was a representation via a letter to the applicant about the policy applicable to the discretionary power in question (whether leave would be granted to adopt an overseas child). The applicant expected that a favourable result would be reached if the criteria were applied and in reliance on that travelled to Pakistan to effect the adoption. Leave to adopt was subsequently refused on a ground not included in the policy that had been represented. In quashing that decision Dunn LJ held that the conditions the applicant was led to expect would apply should not be departed from “without affording interested persons a hearing *and only then if the overriding public interest demands it*”.²⁵⁴ So the applicant’s expectation of a substantive benefit could be protected procedurally,²⁵⁵ and substantively, in that it could only be defeated if an overriding public interest demanded such, which is essentially the test in the third category in *Coughlan*. Therefore, where there is reliance on an “individualised” representation to a citizen

²⁵² See *Practical Shooting Institute (NZ) Inc v Commissioner of Police* [1992] 1 NZLR 709 for a summary of the principles applicable to the application of policy. In addition see Chris Hilson, “Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place?” (2006) JR 289

²⁵³ *R v Secretary of State for the Home Department, ex parte Asif Mahmood Khan* [1984] 1 WLR 1337

²⁵⁴ *Ibid* at 1344

²⁵⁵ Which fits with the comment of Lord Reid in *British Oxygen Co Ltd v Minister of Technology* [1970] 3 All ER 165, at 170 that a decision maker must not shut their ears to an argument that the policy should or should not apply in the particular case.

about government policy that is then departed from, the more intrusive review in category three of *Coughlan* is justified.

Whilst the categorisation in *Coughlan* may not be completely coherent, especially the distinction between category one and three, the presence of reliance and the difference between “generalised” and “individualised” representations can usefully differentiate which is the appropriate standard of review. The third category will be limited to cases “where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract”.²⁵⁶

Mandatory Relevant Consideration

In *R (Bibi) v Newham LBC*²⁵⁷ Schiemann LJ suggested that the appropriate remedy should be a declaration that the “authority is under a duty to consider the applicants’ applications for suitable housing on the basis that they have a legitimate expectation that they will be provided by the authority with suitable accommodation on a secure tenancy”.²⁵⁸ There are, however, shortcomings in treating an expectation of a substantive benefit as merely a mandatory relevant consideration. Such a remedy will only be useful when the authority in question has not actually taken the expectation into consideration. It cannot answer claims that the authority did not give proper weight to an expectation, “if we do employ relevancy in such cases we are, in effect, using it as a surrogate for a more direct appraisal of the public bodies actions”.²⁵⁹

Proportionality

The recent case of *Nadarajah v Secretary of State for the Home Department*²⁶⁰ explicitly acknowledges the role of proportionality in legitimate expectation cases. The applicant contended that a policy should be applied to him in its original form as interpreted in the courts below. Laws LJ denied relief, but finding his judgement in that regard little short of “purely subjective adjudication”,²⁶¹ sought a more principled basis for the decision. Although the concept of “abuse of power” was seemingly

²⁵⁶ *Coughlan*, *supra* n 234 at para 59

²⁵⁷ [2002] 1 WLR 237

²⁵⁸ *Ibid* at 252

²⁵⁹ Craig, *supra* n 114 at 623

²⁶⁰ [2005] EWCA Civ 1363

²⁶¹ *Ibid* at para 67

affirmed as the root of the doctrine by the House of Lords in *R v Secretary of State for the Home Department, ex parte Zeqiri (FC)*,²⁶² his Lordship observed:

Principle is not in my judgment supplied by the call to arms of abuse of power ... it goes no distance to tell you, case by case, what is lawful and what is not.²⁶³

In an example of classic common law rule making, Laws LJ extracts the common principle from the considerable body of case law. This he identifies as:

Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so.²⁶⁴

This may be said to be an aspect of “fairness” or, as Laws LJ prefers, a requirement of “good administration”. From that principle his Lordship formulates the following test to assist future judges:

Accordingly, a public body’s promise or practice as to future conduct may only be denied... in circumstances where to do so is the public body’s legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest.²⁶⁵

Laws LJ thus makes explicit what seemed to inform the balancing test envisaged in the third category in *Coughlan* and in *ex parte Hamble Fisheries*.²⁶⁶ This approach has been followed in the recent cases of *R (on the application of Hillingdon London Borough Council) v Secretary of State for Education and Skills*,²⁶⁷ and formed the basis of argument in *R (on the application of X) v Headteachers of Y School and another*.²⁶⁸

There are several advantages in using proportionality to assess legitimate expectation cases. It provides a structured three part test²⁶⁹ which is far more precise than the ambiguity inherent in the notions of “amounting to an abuse of power”, or “so

²⁶² [2002] UKHL 3

²⁶³ *Supra* n 257 at para 67

²⁶⁴ *Ibid* at para 68

²⁶⁵ *Ibid* at para 68

²⁶⁶ Mark Elliot, “Legitimate Expectations and the Search for Principle: Reflections on Abdi & Nadarajah”, (2006) JR 281, at 285

²⁶⁷ [2007] EWHC 514 (Admin), CO/3117/2006

²⁶⁸ [2007] EWHC 298 (Admin), CO/10461/2006

²⁶⁹ See *R v Home Secretary, Ex Parte Daly* [2001] AC 532 per Lord Steyn at para 27, for an exposition of that test

unreasonable that no reasonable authority could have reached it”.²⁷⁰ It also forces the authority to give reasons for its decisions, which is beneficial since it creates transparency and structure in the decision making process.²⁷¹ Furthermore the proportionality test is “capable of being applied more or less intensively”²⁷² and can therefore accommodate the lesser standard of review appropriate in the kind of “policy” cases where there is no reliance. The test formulated is also valuable because it is derived from the principle which informs all, or at least the vast majority, of the case law. It has, however, been doubted whether his Lordship was right to suggest this test should apply equally to procedural expectation cases.²⁷³

Applicability in New Zealand

Which test a New Zealand court would use remains largely speculative, although there can be no real objection to these kinds of substantive review given the recognition that “the quality of an administrative decision as well as the procedure is open to a degree of review”.²⁷⁴ At least two New Zealand judges have noted a potential nexus between substantive unfairness and legitimate expectation,²⁷⁵ but that is not the end of the matter. Simply labelling a decision “substantively unfair”, “unreasonable” or an “abuse of power” involves an inappropriate value judgement. The court must show *why* the decision is unfair, which, in the present context, will be because the fair treatment of the individual is not outweighed by the wider public interest. This is the essence of both the test under the third category in *Coughlan*, and the test in *Nadarajah*, although the later is structurally clearer. While proportionality is not yet itself a ground of review in New Zealand,²⁷⁶ this should not inhibit a court “develop[ing] a specific test of review for expectations cases”,²⁷⁷ especially given the role it has played in other areas of the law²⁷⁸. In *New Zealand Association for*

²⁷⁰ Craig, *supra* n 114 at 622. See also Paul Craig and Soren Schonberg, “Substantive Legitimate Expectations after *Coughlan*” (Winter 2000) PL 684, at 699

²⁷¹ Craig, *supra* n 114 at 622

²⁷² Elliot, *supra* n 266 at 286

²⁷³ See Mark Elliot, “Legitimate Expectations and the Search for Principle: Reflections on Abdi & *Nadarajah*”, (2006) JR 281, at 285-287 and also Phillip Sales, “Legitimate Expectations” (2006) JR 186, at 190-191

²⁷⁴ *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA), per Cooke P at 652

²⁷⁵ Gendall J in *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747, at 750 and Fisher J in *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA), at 654

²⁷⁶ *Wolf v Minister of Immigration* [2004] NZAR 414, at para 25 -36

²⁷⁷ Schonberg, *supra* n 31 at 154

²⁷⁸ See Chapter Two under “Excessive Intrusion into the Merits”

*Migration and Investments Inc v Attorney-General*²⁷⁹ Randerson J stated that in no case could he envisage the court granting the substantive benefit claimed.²⁸⁰ This, however, can be read narrowly as meaning a court will not issue mandamus to *compel* the authority to grant the remedy. Simply quashing the relevant decision and directing it be taken again in light of the courts conclusion is likely to suffice in most cases, whilst respecting the separation of powers doctrine.

²⁷⁹ [2006] NZAR 45

²⁸⁰ *Ibid* at 56, para 159

Conclusion

Lord Denning, with his acute sense of justice, was the first judge to attempt to justify estopping public authorities and was also the first judge to appeal to the concept of legitimate expectation. At the time of the later he perhaps did not foresee that the two concepts would blend to so as to allow citizens substantive expectations to be enforced by the courts, though he would no doubt have led the charge. That stage has now been reached in England, although the courts are still refining the approach for assessing whether it is justifiable to depart from such expectations. Thus, although originally a source of procedural protection, the doctrine of “legitimate expectation” has now evolved as a source of substantive protection.

New Zealand has accepted the former and appears to be on the verge of accepting the later principle. It has been the aim of this thesis to show that there are no theoretical objections to it doing so, and to suggest how such cases might be approached.

Before availing themselves of the concept of legitimate expectation, if an applicant can cast the representation made as amounting to a “decision”, then that will be irrevocable once communicated in terms that are not expressly provisional. New Zealand Courts have affirmed the existence of the “principle of irrevocability” and the Canadian decision of *Mount Sinai* shows that a promise of a favourable decision can sometimes amount to an actual decision. This principle reinforces enforcing promises which are held out by an authority as something which can be relied on.

The majority of cases, however, seem to involve “informal” representations for which legitimate expectation is the appropriate principle. There must be conduct, taking the form of an unambiguous representation to an individual or group by a public authority, giving rise to an expectation of some substantive benefit. The substantive expectation may be that a particular policy will apply to the citizen’s application. The authority must have had the power to make it, in the sense that it is not *ultra vires*. If it is *ultra vires* it cannot be enforced without harming the very concept from which the primary justification for protecting expectations derives, although other means of redress may be open. There must be reliance on the representation by the citizen, which must be

reasonable in the senses discussed above. Reliance need not be present where the expectation is based on generally published governmental policy, but it seems reasonable to require that the applicant was actually aware of the material on which the expectation is based, lest the concept be stretched too far.

Having established a legitimate expectation on the facts of the case, the court must then go onto ask whether the frustration of that expectation by a public authority can be justified. There are a variety of options open to a court at this stage, none of which a New Zealand court should be inhibited from adopting given the recognition that the “quality of an administrative decision as well as the procedure is open to a degree of review”. If the decision maker has not considered the fact a citizen entertained a legitimate expectation in making their decision, then the decision can simply be quashed with a direction to reconsider the matter, this time treating the expectation as a mandatory relevant consideration. However this approach cannot avail the applicant who claims that insufficient weight has been given to the expectation. In these circumstances the court itself must decide whether the denial of the expectation is lawful.

One option, following the categorisation in *Coughlan*, would be to ask whether the denial of the expectation was so unfair as to amount to an abuse of power. Here the court must balance fairness to the applicant with the vindication of some aim in the public interest. The less intrusive “reasonableness” standard in the first category is appropriate where the applicant has not relied on the representation in question. A similar approach would be to ask whether the denial of the expectation is a proportionate response, having regard to a legitimate aim pursued in the public interest. This has the benefit of presenting a structured process of reasoning and although not itself a ground of review in New Zealand, there can be no objection to using proportionality as a test specifically for expectation cases.

The uncertainty over the status of substantive expectations in New Zealand needs to be resolved. The arguments against enforcing expectations are not strong enough to completely deny the existence of such a principle. Although some Judges, recognising the particular moral force of a promise and the threads of the principle in Court of Appeal and Privy Council precedents, have supported enforcing expectations against

public authorities, they have done so “by instinct rather than reason”. It has been the aim of this thesis to show that *reasoned* arguments can be constructed within the framework of judicial review to hold public bodies to their assurances, whilst respecting the indisputable need to allow departure where an overriding public interest compels it.

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