Kennedy v The Charity Commission: A New Zealand Perspective

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Introduction

In March 2014 a majority of the Supreme Court recognised a common law disclosure obligation applying to public authorities in *Kennedy v The Charity Commission* [2014] UKSC 20, [2014] EMLR 19. A full discussion of this judgment can be found in 5RB's case note.

In this article, Tim Cochrane, a Pegasus Scholar from New Zealand visiting at 5RB, discusses *Kennedy* from a New Zealand perspective by considering whether a similar "*common law approach*" (adopting the language of Lord Toulson at [140]) is likely to be recognised in his jurisdiction. This article first outlines *Kennedy*. It then explains why this common law approach should be recognised in New Zealand. Finally, it evaluates the extent to which this approach will be available, given the broad ambit of New Zealand's freedom of information legislation (compared with the UK's). This task is valuable not only for New Zealand but also the UK as this discussion can assist practitioners to understand the ambit of this important common law obligation going forward.

Kennedy v The Charity Commission

Mr Kennedy was a reporter seeking access under the Freedom of Information Act 1998 (FOIA) to information relating to inquiries conducted by the Charities Commission. The FOIA applies to public authorities in England, Wales, and Northern Ireland. A separate, but similar statute applies to public authorities in Scotland. The FOIA includes a general right of access to information held by public authorities (at s 1), which is subject to various exceptions. Here, the Commission relied on an "*absolute exemption*" given by s 32(2) of the FOIA, which it claimed exempted information relating to inquiries from the s 1 disclosure requirement for a 30-year period.

Mr Kennedy raised various arguments before the Court, all of which were rejected: see [9] per Lord Mance. Of particular interest from a New Zealand perspective was Mr Kennedy's argument that Article 10 of the European Convention on Human Rights (ECHR), which guarantees freedom of expression, provided him with a positive right to receive information

from public authorities. From this, Mr Kennedy argued that the Human Rights Act 1998 required that s32(2) must be "*read down*" (see, for example, [9] and [35] of Lord Mance and [104] of Lord Toulson) to mean the exception would cease to apply when an inquiry was complete) so as to give effect to this positive right. Although this argument found favour with Lords Carnwath and Wilson, the majority of the Court dismissed it: see [42] per Lord Mance, [137]–[140] per Lord Toulson, and [154] per Lord Sumption (each supported by Lords Neuberger and Clarke, who did not deliver separate judgments). One justification for the majority's conclusion was that Article 10 omitted any express right to "seek" information in its text, in contrast with other human rights instruments: [98] per Lord Mance and [154] per Lord Sumption.

The majority did, however, provide Mr Kennedy with a remedy through *obiter* comments. In these, the majority recognised that public authorities, such as the Charity Commission, may owe obligations to disclose information outside of the general statutory requirement at s 1 of the FOIA. A common law approach was never argued for by Mr Kennedy ([9] per Lord Mance), nor did the Commission ever raise the possibility that this may be available to Mr Kennedy in its communications with him: [195] per Lord Wilson. Nonetheless, a majority (Lords Mance, Toulson, Sumption, Neuberger, and Clarke) held that a common law approach existed and was potentially available in the circumstances. Notably, Lord Mance (delivering the lead majority judgment) stated at [6] that the intention (and effect) of exemption provisions within the FOIA such as s 32 was not that information caught by those sections should necessarily not be disclosed; rather, *"[i]ts intention was to take such information outside the FOIA*", leaving questions as to disclosure to be addressed under any other applicable statutory schemes and the common law. The majority supported this point by relying on s 76 of the FOIA, which emphasized that "*nothing*" within that legislation restricted the ability of public authorities to disclose information; in other words, the FOIA was not a code: [4] and [34] per Lord Mance and [156] per Lord Sumption. It was also particularly relevant, as Lord Mance pointed out (see [1], [47], and [56]) that the common law recognised a strong presumption in favour of openness. Interestingly, the majority declined to find this obligation (fully or partly) as stemming from any rights Mr Kennedy may have under Article 10: see [46] per Lord Mance and [133] per Lord Toulson.

In this particular context, the majority located a statutory scheme arising from the general objectives, functions, and duties in the Charities Act 2005 (which included a function to disseminate information), in light of the common law (see [43]–[56] per Lord Mance, [126] per Lord Toulson, and [157] per Lord Sumption). This scheme gave rise to a presumption

that, where information requested was of public interest, the Commission "*must show some persuasive countervailing considerations to outweigh the strong prima facie case that the information should be disclosed*": [56] per Lord Mance.

Would *Kennedy* be followed in New Zealand?

It is likely that *Kennedy* would be followed in New Zealand, given the similar relevant common law principles and freedom of information legislation within each jurisdiction. These two types of similarities, which provide two interrelated reasons for following the majority's approach, are discussed below.

The first reason *Kennedy* is likely to be followed in New Zealand arises from the fact that, similar to the FOIA, the equivalent New Zealand legislation is not a code, that is, it does not exclude the possibility of alternative statutory or common law disclosure obligations. This is unsurprising, given that the FOIA was in part modeled on the New Zealand freedom of information legislation, titled the Official Information Act 1982 (OIA). Section 52(1)(b) of the OIA is particularly relevant. This provides that nothing within the OIA "*derogates from any provision which is contained in any other enactment and which authorizes or requires official information to be made available"*. On its face, this section only expressly preserves other *statutory* obligations to provide information; it makes no mention of potential *common law* obligations. This savings provision is therefore more narrowly drafted than the equivalent s 76 of the FOIA (referred to above). Nonetheless, it is appropriate to interpret s 52(1)(b) in a broad way to permit recourse to common law rights to request information (if any), for two reasons. First, courts usually require legislation to be express before it will be interpreted as overriding the common law. This would be particular important here, given the purpose of the OIA: this legislation was intended to "*increase progressively*" the amount of information available (s 4(a)) and must be interpreted consistently with its overarching principle that "*information should be made available unless there is good reason for withholding it*". A narrow interpretation of s 52(1)(b) that excludes the availability of common law disclosure obligations would be contrary to this intention. For further in relation to why the OIA should be interpreted so as to permit recourse to the common law, see Tim Cochrane "A Public Law Duty to Provide Reasons: Why New Zealand Should Follow the Irish Supreme Court" (2013) 11 NZJPIL 517 at 538–540.

In any event, a narrow interpretation of s 52(1)(b) that removes access to common law rights would also be contrary to judicial interpretations of the OIA to date. For example, in *McGowan v District Court at Christchurch* HC Christchurch CIV-2009-409-2303, 14

December 2009 at [34]–[39]) Panckhurst J recognised that particular common law obligations relating to disclosure in criminal cases had not been rendered "*impotent*" ([39]) by the enactment of the OIA, but rather "*remained relevant*" ([33] and moreover had continued to expand ([38]). Members of the New Zealand Supreme Court have also provided similar comments recently: see *Dotcom v USA* [2014] NZSC 24 at [71]–[76] per Elias CJ and [158] per McGrath and Blanchard JJ.

The second reason in favour of adopting a common law approach in New Zealand stems from the similar underlying common law principles between the two jurisdictions. Indeed, it was not until the second half of the 20th Century that New Zealand courts began to take seriously the idea of a separate New Zealand common law: see, for example, Robin Cooke "Divergences – England, Australia and New Zealand" [1983] NZLJ 297. It is now recognised that New Zealand's common law "reflects the special needs of this country and its society", subject to the point that "New Zealand common law can never be in conflict with its statute law": *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150] per Tipping, McGrath, and Blanchard JJ. In any event, New Zealand common law undoubtedly includes both a general presumption of openness (see, for example, *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA), and specifically prizes *freedom of information*: *R v Mahanga* [2001] 1 NZLR 641 (CA) per [33]; *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [9] per Elias CJ.

Moreover, the right to freedom of expression guaranteed by s 14 the New Zealand Bill of Rights Act 1990 (NZBORA) serves as additional evidence that the New Zealand should uphold a common law public disclosure requirement. It is increasingly recognised that the common law should be developed in accordance with the NZBORA and other fundamental rights: see *Hill v Church of Scientology* [1995] 2 SCR 1130 at 1169–1172 per Cory J; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 per Elias CJ. This recognition may be viewed as an attempt to achieve a "synthesis" between common law and human rights, as posited by Lord Mance in *Kennedy* at [46]. Here, significantly, the fact that s 14 of the NZBORA does expressly include a right to "seek" information (in contrast with Article 10 of the ECHR) is particular compelling in suggesting that the NZBORA includes a positive right to obtain information, and that New Zealand common law should therefore be developed in accordance with this right. It is also notable that New Zealand courts recognise that, along with the OIA, the NZBORA should be credited for accelerating common law development of particular disclosure obligations: *Marfart v Prieur* [2006] NZSC 33, [2006] 3 NZLR 18 at [39] per Elias CJ, Blanchard, and McGrath JJ; *Dotcom* at [74] per Elias CJ.

The extent to which a *Kennedy* approach is available

The above discussion explains why a common law disclosure obligation should be considered available in New Zealand, following *Kennedy*, under the common law. The next logical question to consider is the extent to which this common law approach is available, given the broad reach of the OIA. Although the existence of the FOIA did not appear to limit recourse to a common law approach in *Kennedy*, there is a significant difference between the operation of the FOIA and OIA that should be discussed as this risks reducing the potential availability of a *Kennedy* common law disclosure obligation in New Zealand.

This difference arises from the way in which the FOIA and OIA each carve out limitations to their general statutory disclosure requirements. As discussed above, the FOIA includes a series of "exceptions" applying to categories of information. The majority in *Kennedy* held that the effect of this was that requests for information in one of these excluded categories must be considered outside the FOIA in light of any applicable statutory and common law obligations. Importantly, this approach did not give authorities an unfettered right to withhold information falling within these categories altogether.

The approach under the OIA is different. The OIA does not exclude categories of information. Rather, the OIA includes a number of reasons (at ss 6–9) that may be relied on by public authorities to justify withholding information. In most cases, the power to withhold information on the basis of one or more of these reasons is limited by a public interest test. This means that information can only be withheld if the reason for withholding that information is not outweighed by any particular countervailing public interest considerations. A small number of reasons (at s 6) are, however, "*conclusive*", in that no public interest balancing is required (see, for example, s 6(d), which states that good reason to withhold information exists if making that information available would be likely to "*endanger the safety of any person*"). In all cases, however, the public authority is simply given *discretion* to withhold the information; it "*may*" do so (under s 18), but there is no requirement that information not be disclosed (*Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [85]).

The problem raised by the different approach taken by the OIA, in contrast with that adopted by the FOIA, is that it appears to rule out Lord Mance's conclusion that where the FOIA

exempted various categories of information from disclosure requests for such information could be made under a common law approach. This seems unavailable in New Zealand because where information is withheld in response to a request under the OIA it is withheld because a good reason to do so is available *under that legislation* rather than because the legislation does not apply to that type of information. Therefore, in contrast with the FOIA, the withholding provisions of the OIA do appear to provide public authorities with "*broad power*" to withhold information: contrast with [139] per Lord Toulson.

One interpretation of the OIA approach (in contrast with the FOIA) is that this legislation vastly narrows the availability of a common law approach to disclosure of information in New Zealand. On this view, in effect, an applicant would only be entitled to rely on a common law approach to require disclosure from a public authority where, either, the applicant was seeking information from a public authority not subject to the OIA at all (which only applies to particular subset of named public authorities) or where the general application of the OIA to that public authority was overridden by a specific statutory disclosure requirement (which would then need to be interpreted consistently wth the common law approach). In respect of all other public authorities, however, the common law approach would remain unavailable until and unless the "*rug*" of the OIA were pulled back, to adopt the Bennion metaphor: Oliver Jones *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) at 168–169, cited in *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 at [53]. Speaking generally, whether legislation overrides the common law is a matter of context in each particular situation. "Everything depends upon the construction of the Act in question, the ability of the common law and statutory provisions to 'live together' without too much difficulty, and how fundamental the common law principle is": F Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 555.

In this context, the OIA should not be seen as prohibiting recourse to the common law approach; in other words, an applicant should be free to request, and a public authority required to assess whether to provide, information in response to a request under the common law approach, even from public agencies subject to the OIA. It should be stressed again that, as outlined above, the OIA is not a code. Therefore, just as the common law approach in the United Kingdom "*runs with the grain of the FOIA*" ([140] per Lord Toulson), so a New Zealand common law approach should be seen as running consistently with the overall approach of the OIA. As discussed, an overarching principle of the OIA includes progressively increasing the amount of information available to the public. Indeed it would be inconsistent with that principle to read the OIA as restricting the availability of a common law

approach in the manner outlined. In this manner, recognition of a broad common law power, as in *Kennedy*, may produce "*a more just result*" because courts will be "*able to exercise a broad judgment about where the public interest lies in infinitely variable circumstances*": [140] per Lord Toulson. This will be particularly true in respect of information in respect of which a public agency may seek to withhold under a conclusive withholding ground under s 6 of the OIA. For avoidance of doubt, it should be noted that the ability of courts to judicially review refusals to provide information (both under the OIA and the common law) is accepted in New Zealand: see, for example, *Police v Ombudsman* [1998] 1 NZLR 384 (CA); *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 (HC) at 122–123; *Marfart v Prieur*. In addition, it is helpful that comments of the majority in Kennedy suggest that the common law approach may be available even where recourse could be had to the FOIA: for example, at [135] Lord Toulson noted that disclosure of information "*could be done through the common law, but it cannot be done [that is, cannot* also *be done] through FOIA unless section 32(2) can properly be circumvented*".

This interpretation is also supported by the fact that a majority of the Court in *Kennedy* was willing to identify an alternative statutory scheme, supplemented by the common law, in the duties, functions, and purposes of legislation governing a public authority. If alternative statutory schemes were recognised in similar broad circumstances in New Zealand (contrary to the arguments of the minority in *Kennedy*: see [199] per Lord Wilson and [230] per Lord Carnwath), a large number of public authorities would potentially find themselves subject to disclosure obligations outside the OIA in any event. Given this possibility, it would be simpler – and preferable – for the common law to be seen as running alongside the OIA, rather than merely filling in the gaps. There would, in other words, be no material advantage in distinguishing between those (few) public authorities that were not subject to an alternative statutory scheme (as properly supplemented by the common law) and those that were not. In this way, a broadly applicable common law approach would be fair, understandable, and easily applicable. For further on how a common law approach would be workable in practice, see the discussion (on applying a similar common law duty to provide reasons separate from the OIA) set out in Cochrane, "A Public Law Duty to Provide Reasons" at 541–550.

Conclusion

This article has argued that it is appropriate for the New Zealand common law to recognise a common law disclosure obligation, following the approach of the majority in *Kennedy*. This would be supported by the OIA and New Zealand's existing common law principles. Notably,

this approach would also be consistent with, and build on, a potential obligation already evident from s 14 of the NZBORA.