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TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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A GENERAL PUBLIC LAW DUTY TO PROVIDE REASONS: WHY NEW ZEALAND SHOULD FOLLOW THE IRISH SUPREME COURT

Tim Cochrane*

This article draws on a recent judgment of the Irish Supreme Court, Mallak v Minister for Justice, Equality and Law Reform *[2012] IESC 59, to argue that New Zealand courts should recognise a general common law duty on public decision-makers to provide reasons in support of their decisions to affected parties, typically upon request. Following a discussion of* Mallak *and the current New Zealand position on the extent of a common law obligation to provide reasons, the article applies the reasons given in* Mallak *to demonstrate that it is now appropriate for the New Zealand common law to recognise this obligation: recognition of this obligation is supported by the obligations of natural justice and fairness, there is a legal trend in support of this duty in New Zealand and this obligation, which will operate as a rebuttable presumption, can be applied clearly and flexibly by decision-makers and courts.*

I INTRODUCTION

In December 2012 the Irish Supreme Court tackled a divisive issue of administrative law in *Mallak v Minister for Justice, Equality and Law Reform*: whether the common law of Ireland should recognise a presumption that public decision-makers should provide reasons for their decisions.[1] The Irish Supreme Court appears to have answered this question in the affirmative.[2] Meanwhile, the development of an obligation to provide reasons in New Zealand remains stymied. A general

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1 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 [*Mallak* (SC)].

2 At [66]. Since this article was first submitted for publication, the Irish Supreme Court has clarified its position in *Mallak*, above n 1, in *EMI Records (Ireland) Ltd v The Data Protection Commissioner* [2013] IESC 34. This is considered below following the discussion of *Mallak*.

obligation was rejected by the New Zealand Court of Appeal in 1982 in *R v Awatere*.[3] Nearly two decades later, Elias CJ noted that this issue should be reconsidered at the earliest opportunity, speaking on behalf of the Court of Appeal in *Lewis v Wilson & Horton*.[4] However, the Supreme Court's view appears to be that this opportunity is yet to arise.[5]

Recognition of a general duty, or obligation, on public authorities to provide reasons would mean that there would be a presumption in New Zealand's common law that those exercising a public function (regardless of official status, and including but not necessarily limited to state services departments, Crown entities and agencies, local authorities, other statutory bodies, corporations, incorporated or unincorporated societies, and individuals) should provide reasons in support of their decisions to affected parties. This would typically only be required upon request, although fairness may require reasons to be given along with a decision. The use of the term "general" indicates that this presumption may be displaced; in other words, public decision-makers will not be required to provide reasons where there are good reasons to withhold them in the particular circumstances, for example, where legitimate national security concerns arise. In such a case, a decision-maker should at least ordinarily supply reasons for refusing to give reasons.

The requirements of this duty would vary according to the circumstances. In New Zealand, recognition of a general obligation at common law would extend and expand the existing statutory duty in New Zealand's freedom of information legislation, most notably s 23 of the Official Information Act 1982, to all decision-makers exercising public functions.[6] This statutory duty currently only applies to the specific organisations listed in legislation.[7]

This article discusses how the concept of a general duty to provide reasons both *is* and *should be* approached by New Zealand courts. It does so in three sections. First, it discusses the recent judgment of the Irish Supreme Court, *Mallak*. Attention then turns to the current position in New Zealand through an examination of *Awatere*, *Lewis* and other significant judicial decisions, as well

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3 *R v Awatere* [1982] 1 NZLR 644 (CA).

4 *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) at [85].

5 This is indicated by a recent decision of the Supreme Court in which the Court declined to reconsider *Awatere*, above n 3, despite the urging of counsel: *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC Trans 14 at 2–4 and 14–20 [*Manukau Golf* (transcript)]. See also *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 285 at 285 (headnote). The Court was sitting as a court of four, with Elias CJ absent.

6 See also the Local Government Official Information and Meetings Act 1987, s 20.

7 A limited duty is provided by s 23 of the Official Information Act 1982 for central government organisations. This only applies to the specific organisations listed at schs 1 and 2 of the Official Information Act and sch 1 of the Ombudsmen Act 1975. Similar limitations are given in relation to local government organisations: see ss 2 and 22 and sch 1 of the Local Government Official Information and Meetings Act.

as academic commentary. The final section of this article draws on *Mallak* to argue that it is now time for New Zealand to recognise a general (that is, presumed) duty that public decision-makers should provide reasons, subject to appropriate limitations. This article argues that a duty to give reasons stems from the existing public law obligation that those exercising public functions must act fairly and in accordance with natural justice. It also demonstrates that this duty is supported by academic commentary, case law and legislation, and will be workable in practice.

II MALLAK V MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM*: AN EMERGING GENERAL DUTY*

The unanimous judgment in *Mallak* explains why public decision-makers should generally be required to provide reasons. This section examines the reasoning in *Mallak* in four parts. It begins by outlining the background to *Mallak*. It then summarises the reasoning in the court of first instance, before discussing three key points in the Supreme Court judgment on appeal. These points, together, indicate the Irish Supreme Court in *Mallak* has recognised a general, although not unlimited, duty that public decision-makers in Ireland should provide reasons for their decisions. Finally, it comments on *EMI Records*,[8] a further judgment of the Irish Supreme Court, which comments on *Mallak*.

A Background

This proceeding was brought by Mr Mallak, who arrived in Ireland in 2002 as a refugee seeking asylum along with his wife. Both were granted asylum by the Minister for Justice, Equality and Law Reform.[9] In 2005, as their next step towards citizenship, Mr Mallak and his wife applied for certificates of naturalisation.[10] The power to grant these certificates was conferred on the same minister under the Nationality and Citizenship Act 1956 (Ireland) and the Nationality and Citizenship Act 1986 (Ireland). The relevant section provided the Minister with "absolute discretion" to determine applications for certificates of naturalisation.[11]

Several years passed without word. Finally, in November 2008 Mr Mallak's application was determined and declined. Mr Mallak was notified of this decision in a very brief letter from the Minister that gave no reasons for the decision. The Minister's letter noted, however, that Mr Mallak had the right to reapply in the future.[12] Mr Mallak then filed requests for the Minister's reasons, first with the Minister himself and then with Ireland's Office of the Information Commissioner under the

8 *EMI Records*, above n 2.

9 See *Mallak* (SC), above n 1, at [5].

10 At [7]–[8].

11 See the Irish Nationality and Citizenship Act 1986 (Ireland), s 15; see also *Mallak* (SC), above n 1, at [17]–[20].

12 *Mallak* (SC), above n 1, at [8]–[9].

Freedom of Information Act 1997 (Ireland) and the Freedom of Information Act 2003 (Ireland). These requests were unsuccessful. The Information Commissioner reviewed and upheld the Minister's decision, determining that the Minister's absolute discretion under the legislation permitted his decision to refuse to provide reasons.[13]

B The High Court

Mr Mallak's next step was to seek leave for judicial review of the Minister's decision.[14] Leave to the High Court was granted in May 2009.[15] Mr Mallak's application was then heard by Cooke J. Amongst other grounds, Mr Mallak claimed he did not know why his application had been refused, arguing that this refusal was unfair and unreasonable and would hinder any further applications for naturalisation.[16] The High Court declined his application for two reasons. First, it determined that the Minister's absolute discretion permitted him to refuse to give reasons (as the Information Commissioner had determined).[17] It expanded this point by holding that absolute discretion meant, in the circumstances, that the Minister was not required even to *have* reasons.[18] In support of his view, Cooke J relied on the overall scheme of the legislation and relevant case law.[19] He noted in particular that the legislation did not provide Mr Mallak a right of appeal from the Minister's decision. Cooke J considered that the lack of an appeal right reduced the significance of reasons for Mr Mallak in the circumstances.[20] He then cited *Puk Sun Shum v Ireland* for the proposition that there is no general rule of natural justice requiring that an administrative authority provide reasons for its decisions.[21]

The second reason for upholding the Minister's decision arose from a distinction the Court drew between privileges and rights. Cooke J considered that Mr Mallak, in making the application, was seeking a benefit or *privilege* he was not necessarily entitled to rather than a *right* owed by the

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13 *Mallak* (SC), above n 1, at [10]–[11]. See also [12] and [21].

14 Unlike in New Zealand, in Ireland leave must be granted for judicial review: see the Rules of the Superior Courts 1986 to 2011, Order 84, r 20. In contrast, in New Zealand judicial review is available as of right: see the High Court Rules, pt 30 and the Judicature Amendment Act 1972, s 4.

15 See *Mallak v Minister for Justice, Equality and Law Reform* [2011] IEHC 306 [*Mallak* (HC)] at [5]; see also at [6] and [7].

16 *Mallak* (SC), above n 1, at [13]–[14].

17 At [12].

18 At [12].

19 See at [11] and [13]–[31].

20 At [17].

21 At [13]–[16], referring to *Puk Sun Shum v Ireland* [1986] ILRM 593 (HC).

state.[22] The Court commented that, although the extent of the obligation to provide reasons may have expanded in recent years, it "can have no application where an administrative decision is wholly devoid of any detrimental or disadvantageous consequence for its addressee".[23] Therefore, the Court concluded, as Mr Mallak had merely failed to obtained a privilege, the Minister's decision could not have any negative consequences on Mr Mallak that were recognised by law.[24]

C The Supreme Court

Mr Mallak then appealed to the Supreme Court of Ireland. The Court unanimously granted his appeal. Fennelly J, writing for the Court, ordered the Minister to reconsider Mr Mallak's application. He held that "the Minister was under a duty to provide the applicant with the reasons for his decision to refuse the application".[25]

The Court first cleared up two preliminary points. First, contrary to Cooke J's comment, the Court held that the Minister was required to *have* reasons for his decision – the issue was whether the Minister had to *disclose* those reasons. The alternative, Fennelly J recognised, "would be the very definition of an arbitrary power".[26] Secondly, the fact that Mr Mallak was applying for a privilege rather than a right was immaterial. The Court held, "this [distinction] does not affect the extent of his right to have his application considered in accordance with law or to apply to the courts for redress".[27]

The Court then justified its decision on three grounds. The first two grounds indicate that the Court has recognised a general obligation on public decision-makers to provide reasons. The third shows how this general duty can be made workable. First, and most significantly, Fennelly J considered that the absence of reasons meant that Mr Mallak could not exercise meaningfully his legal remedies.[28] The Court acknowledged that the presence or absence of a right to appeal may be relevant, although not determinative.[29] But as Fennelly J noted, Mr Mallak retained the right to apply for judicial review or file a fresh application. To exercise meaningfully either of these options, Mr Mallak needed to know why his original application had been declined.[30] Not only would Mr

22 *Mallak* (HC), above n 15, at [10] and [15]–[16].

23 At [15].

24 At [16].

25 *Mallak* (SC), above n 1, at [76].

26 At [43].

27 At [47].

28 At [33].

29 See at [63].

30 At [64].

Mallak's right to judicial review be rendered impossible to meaningfully exercise, the courts would also be unable to effectively review the Minister's decision-making process, as this would similarly require assessing the reasons provided in support of his decision.[31] By rendering Mr Mallak's legal remedies ineffective, the Minister acted unfairly.[32]

The second reason the Court held that the Minister was required to provide reasons arose from its evaluation of relevant legal sources.[33] The Court noted that a number of legal sources indicated there was an emerging legal consensus in favour of recognising a general duty on administrative decision-makers to give reasons.[34] It recognised, however, that there was no clear view evident from lower court authorities in Ireland. On this basis Fennelly J distinguished *Puk Sun Shum*, relied on by the High Court.[35] Instead, the Court drew heavily from other judgments[36] and the limited obligation in s 18(1) of the Freedom of Information Act 1997 (Ireland), which required public bodies to provide reasons for decisions if requested by affected persons in particular circumstances.[37] The Court also identified similar obligations in European Union treaties binding on Ireland.[38] In Fennelly J's view, these authorities strongly supported recognising a general obligation to provide reasons.

Thirdly, it was significant for the Court that the Minister had made no attempt to justify his refusal to provide reasons, aside from stating that non-disclosure of reasons was permitted by the "absolute discretion" conferred on him by the relevant statute. The Court noted that it should be considered "unusual" for a decision-maker to be permitted not to give reasons.[39] It went on to hold that a decision-maker would only be permitted to refuse to give reasons where this refusal was justified.[40] To justify a refusal, it would usually be necessary to give reasons for the refusal.[41] Here,

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31 At [65].

32 At [66].

33 See at [51]–[76].

34 At [67].

35 *Mallak* (SC), above n 1, at [56]–[63].

36 At [68]. The other judgments referred to in support of a general duty in *Mallak* were *State (Lynch) v Cooney* [1982] IR 337 (SC) at [53]; *The State (Daly) v Minister for Agriculture* [1987] IR 165 (HC) at [54]; *International Fishing Vessels Ltd v Minister for the Marine* [1989] IR 149 (HC) at [55]; *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489 (HC) at [58]; *The State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] IR 51 (SC) at [61]; Case C-417/11P *Council v Bamba* [2013] 1 CMLR 53 (CJEU) at [69]; and *R v Secretary of State ex parte Fayed* [1998] 1 WLR 763 (CA) at [70]–[73].

37 *Mallak* (SC), above n 1, at [68].

38 At [69]; compare *Mallak* (HC), above n 15, at [17].

39 At [74].

40 At [74].

however, the Minister had failed to provide good reasons to refuse to explain why Mr Mallak's application had been declined; he had simply relied on the absolute discretion conferred on him by the legislation. For that reason, ultimately, the Minister's decision was quashed. The Court did not determine whether the Minister could have given a justified refusal in the circumstances.[42]

This brings us to the ratio of *Mallak*. This judgment amounts to recognition by the Irish Supreme Court that public decision-makers should generally be obliged to provide reasons for decisions to affected applicants. The clearest articulation by the Court that it supports recognition of a general obligation comes where the Court states:[43]

> In the present state of evolution of our law, *it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision*. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.

This particular extract clarifies that courts will not require that reasons be laboriously written out where these are "obvious" and may be inferred from the circumstances. As Fennelly J stressed, the obligation to give reasons is not a formal inflexible requirement; rather, it is a particular aspect of the duty to act fairly applying to public decision-makers. This recognition highlights the practical approach taken by the Court to recognition of this general duty.

In addition, the Court's decision establishes that this obligation only creates a presumption, which may be displaced by particular circumstances where appropriate. As the Court recognised, exceptions are necessary to allow for those rare cases where a decision-maker may be able to justify a refusal to provide reasons (usually by giving reasons in support of this refusal).[44] Fennelly J cautioned, however, "it would be wrong to spell out cases" in which a refusal to provide reasons would be accepted as justified by the courts.[45] Public decision-makers should operate under a presumption that reasons will be required as this will encourage them to reach reasoned and defensible decisions.

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41 At [74].

42 At [77].

43 At [66] (emphasis added).

44 At [74]. See also at [75].

45 At [74].

D EMI Records

Since this article was first submitted for publication, *Mallak* has been considered in a number of Irish judgments,[46] including the Irish Supreme Court judgment *EMI Records v Data Privacy Commissioner*.[47] It is helpful to briefly comment on *EMI Records* to respond to a potential argument that *Mallak* cannot be read as recognising a general right to provide reasons in light of comments in this later authority.

EMI Records was an appeal from an enforcement notice issued by the Irish Data Commissioner arising from a settlement of a claim for allegedly unlawful file sharing.[48] This enforcement notice was quashed in the High Court "for its failure to provide reasons",[49] contrary to a statutory duty applying to the Data Commissioner.[50] On appeal, this statutory duty meant the Court did not directly consider whether a public law duty existed in Ireland following *Mallak*. However, the Court did note that the first question to determine in a "reasons case" may often be "[d]o reasons have to be given and if so what type of reasons".[51]

One interpretation of this statement is that *Mallak*, which was cited in *EMI Records*,[52] cannot be read as recognising a general obligation to provide reasons, as recognition of a general right would mean that the answer to this first question would simply be presumed. However, Clarke J's comment must be read in light of his judgment as a whole, including his earlier statement that "in any case where any party affected by a decision could be in any reasonable doubt as to what the reasons actually were, it must follow that adequate reasons have not been given".[53] This comment indicates that where inadequate reasons have been provided, judicial review should be available to obtain a remedy. The appropriate reading of *EMI Records*, therefore, is that Clarke J's comment about the first question is simply another way of stating a point made in the final extract from *Mallak* quoted above:[54] where reasons are obvious, they do not need to be laboriously spelled out.

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46 See for example *AJ v Minister of Justice and Equality* [2013] IEHC 296 at [84] and *Governey v Financial Services Ombudsman* [2013] IEHC 403 at [2.10].

47 *EMI Records*, above n 2.

48 At [1.3] and [1.4].

49 At [2.18].

50 See [6.1]. The Data Commissioner had a statutory obligation to provide reasons at s 10(4)(a) of the Data Protection Act 1988 (Ireland).

51 At [6.11]. See also at [6.10].

52 At [6.7]–[6.9].

53 At [6.9].

54 *Mallak*, above n 1, at [66].

Given this view of *EMI Records*, the interpretation of *Mallak* given above remains sound. *Mallak* should be read as recognition by the Irish Supreme Court of a general duty to provide reasons, which will operate as a presumption and be applied practically, taking into account all relevant circumstances.

III THE EXTENT OF RECOGNITION OF THIS DUTY IN NEW ZEALAND

This section discusses the extent to which New Zealand recognises a general obligation on public decision-makers to provide reasons. It discusses the leading cases of *Awatere* and *Lewis*. It explains that these cases continue to represent the law in New Zealand, despite the encouragement by Elias CJ in *Lewis* that a New Zealand appellate court should take the earliest opportunity to reconsider the extent of this obligation. The fact that *Awatere* and *Lewis* continue to represent the New Zealand common law position (that is, that there is no general common law duty to provide reasons) is made clear from a recent judgment of the Supreme Court, *Manukau Golf Club Inc v Shoye Venture Ltd*.[55]

A Awatere*: The Rejection of a General Duty to Give Reasons*

Awatere was a decision of the Court of Appeal delivered by Woodhouse P more than thirty years ago. It was an appeal launched by Donna Awatere against a decision of the High Court upholding her conviction in the District Court on three charges relating to public disorder during Springbok tour protests in 1981.[56] Although a number of grounds of appeal were pleaded in both appellate courts, both courts agreed that "in reality" only one involved any complexity.[57] This was whether the District Court was under an obligation to give reasons for preferring the evidence of prosecution witnesses over defence witnesses. The case law in New Zealand at that time had left the extent of an obligation to provide reasons unclear.[58] The Court of Appeal in *Awatere* canvassed the (then) leading judgments on the extent of an obligation to provide reasons in England, Canada and Australia.[59] After doing so, it commented that "we are unable, with respect, to accept the view that

55 *Manukau Golf*, above n 5.

56 *Awatere*, above n 3, at 644–645.

57 *Awatere*, above n 3, at 646.

58 See *NZI Financial Corporation Ltd v New Zealand Kiwifruit Authority* [1986] 1 NZLR 159 (HC) at 167–170, commenting on the clarity provided by *Awatere*, above n 3. For cases discussing the extent of an obligation to provide reasons in New Zealand prior to *Awatere*, see *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at 346; and *T Flexman Ltd v Franklin County Council* [1979] 2 NZLR 690 (SC) at 698–699.

59 *Awatere*, above n 3, at 646–647.

there is any general rule of law which requires reasons to be given".[60] Nor was the absence of reasons in *Awatere* sufficient to set aside the conviction in the circumstances.[61]

Helpfully, the Court also provided a number of broad comments on the extent of the obligation to provide reasons in New Zealand. Woodhouse P noted that "it must always be good practice to provide a reasoned decision".[62] He considered that the importance of reasons "takes on added importance" where a right of appeal is available.[63] However, the Court stressed the importance of comparing "what is practically possible against the ideal", given in particular "the multiplicity of individual cases of varying kinds" dealt with in the District Court.[64] Woodhouse P concluded by commenting:[65]

> In the end the matter of providing reasons for a decision and the extent to which they might need to be spelled out are matters of practice for domestic determination by this Court in the New Zealand environment. And when the infrequency of the problem is weighed against the volume of cases coming before the District Court, together with the present powers of the High Court to ensure that justice will be achieved by one means or another, we have concluded that it would be both undesirable and impractical to lay down an inflexible rule of universal application that would result in what Laskin CJC has described as an "indiscriminate requirement of reasons".

This decision was affirmed the very next day by a differently constituted majority of the Court of Appeal in *R v MacPherson*,[66] and by the (then) Chief Justice soon after.[67] *Awatere* has also been affirmed a number of times by the Court of Appeal in the decades since.[68] Although in 1998 a

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60 At 647.

61 At 649.

62 At 648.

63 At 648.

64 At 648.

65 At 648–649, quoting *MacDonald v R* [1977] 2 SCR 665 at 672 per Laskin CJC. Since *Awatere*, the Supreme Court of Canada has recognised a limited general obligation to give reasons: *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817. See also the authorities referring to *Baker* at n 162 below.

66 *R v MacPherson* [1982] 1 NZLR 650 (CA) at 653. The majority comprised Roper and McCarthy JJ. Somers J dissented.

67 *Potter v New Zealand Milk Board* [1983] NZLR 620 (HC) at 627 per Davison CJ.

68 See for example *R v Atkinson* [1984] 2 NZLR 381 (CA) at 381; *Marshall Cordner & Co v Canterbury Clerical Workers Union* [1986] 2 NZLR 431 (CA) at 434; *BP Oil v Northern Distribution Union* [1992] 3 ERNZ 483 (CA) at 489; *Big Save Furniture v Bridge* [1994] 2 ERNZ 507 (CA) at 3 per Hardie Boys J; *Bell-Booth v Bell-Booth* [1998] 2 NZLR 2 (CA) at 6–7; *R v Jefferies* [1999] 3 NZLR 211 (CA) at [14]; and *Hathaway v R* CA159/99, 27 July 1999 at [17]–[25].

judgment of the Court of Appeal indicated the possible recognition of a common law right to reasons despite *Awatere*,[69] the current position in New Zealand is that *Awatere* continues to represent the state of New Zealand's common law regarding reasons.[70] This is made clear by the next decision discussed, *Lewis v Wilson & Horton*.

B Lewis v Wilson & Horton*: A "Lost Opportunity"?*[71]

Lewis is the most recent full articulation by a New Zealand court of the justifications for, and extent of, an obligation requiring public decision-makers to provide reasons. It was a unanimous judgment of a full bench of the Court of Appeal delivered by Elias CJ.[72] The issue on appeal was whether the District Court was right to grant name suppression to an American billionaire, Mr Lewis, who was arrested entering New Zealand in possession of cannabis. The District Court provided no reasons to justify the decision to grant name suppression. On appeal both the High Court and Court of Appeal determined that reasons should have been given in the circumstances. The Court of Appeal described the District Court's decision to grant name suppression without giving reasons as "plainly wrong".[73] Elias CJ explained why: it was "impossible to know from the Judge's remarks … what factors he considered relevant to the decision to prohibit publication and why those he may have identified made it appropriate to grant the order".[74]

This finding was sufficient to dispose of the appeal. However, the Court of Appeal went on to discuss the extent to which New Zealand (at that time) recognised an obligation to provide reasons in light of relevant New Zealand and international decisions.[75] On behalf of the Court, Elias CJ noted that "[t]here is no invariable rule established by New Zealand case law that Courts must give

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69 *Bell-Booth*, above n 68. Thomas J on behalf of the Court of Appeal (Gault, Thomas, and Blanchard JJ) cited *Awatere*, above n 3, and other decisions (at 6–7) but also described reasons for judgments as "a fundamental attribute of the common law" (at 6) and stated that "[t]he absence of reasons should make leave to appeal a formality" (at 7).

70 To the extent *Bell-Booth*, above n 68, indicated a potential recognition of a common law right, it must now be read in light of *Lewis*, above n 4, which expressly refused to overrule *Awatere*, above n 3, and left this point open. As noted in *Sharma v New Zealand Customs* HC Auckland CIV-2005-404-242, 19 December 2005 at [9]: "[i]t is unsupportable to suggest that the Court of Appeal would have intended to overrule *Lewis* without even referring to it". Indeed, *Bell-Booth* was not cited in *Lewis*, and has received little subsequent judicial attention.

71 This is the description given to *Lewis*, above n 4, by Professor Philip Joseph: Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at [24.4.10(2)].

72 The other members of the Court of Appeal in *Lewis*, above n 4, were Richardson P and Keith, Blanchard and Tipping JJ.

73 At [1].

74 At [54].

75 At [74]–[87].

reasons for their decisions."[76] She went on to discuss the importance for judicial decision-makers specifically to provide reasons, noting that additional reasons were identified in the then recent judgment *Singh v Chief Executive Officer, Department of Labour*.[77] The reasons given by Elias CJ were, in summary:[78]

- The provision of reasons is an important part of openness in the administration of justice. This is necessary not only to correct irregularities in a process, and make the outcome understandable to the parties involved, but is also critical to the maintenance of the law more generally in order to ensure accountability of decision-makers.
- Providing reasons is also significant in enabling appellate courts to exercise their supervisory jurisdiction. This is important not just for those who have rights of appeal, but for other parties affected by a decision who wish to obtain redress by way of judicial review, as protected by s 27 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
- They provide discipline for the individual decision-maker, which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice.

The above reasons are significant, and point strongly toward a general obligation on, at least, judges to provide reasons in support of decisions. Further discussion of the rationales for requiring reasons is found in *Singh*[79] and in the academic commentary.[80] Despite these rationales strongly supporting recognition of a general duty in some form, the Court declined in *Lewis* to overrule *Awatere*. The Court's justifications for this reticence were that the issue only arose at the hearing and was not fully discussed, nor was its determination necessary to conclude the appeal. The Court commented, however, that the issue of an obligation to provide reasons (in relation to judges) "is a matter the Court would wish to consider at an early opportunity".[81]

C The Current Position in New Zealand: No General Obligation Exists

Awatere, supplemented by *Lewis*, represents the position in New Zealand. There is no general obligation on public decision-makers to provide reasons. The precedent of *Lewis* is unquestioned. It

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76 At [75].

77 At [76] referring to *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 (CA) at 262–263.

78 *Lewis*, above n 4, at [76]–[82]. These reasons were given in relation to judicial decision-makers specifically, but have been articulated broadly here to explain justifications for requiring reasons to be given by public decision-makers generally.

79 *Singh*, above n 77, at 262–263.

80 See GDS Taylor and PA Roth *Access to Information* (LexisNexis NZ, Wellington, 2011) at [4.2.1]; and Joseph, above n 71, at [24.4.10(1)].

81 *Lewis*, above n 4, at [85].

was affirmed by the Privy Council in *R v Taito*.[82] It was also applied, without extensive analysis or discussion, by the Supreme Court in *Bain v R*, an interlocutory appeal relating to the admission of evidence in the retrial of David Bain.[83]

Both *Lewis* and *Awatere* are commonly referenced by both courts and academic commentary to show that no general obligation to provide reasons exists in New Zealand. Academic authority includes the late Michael Taggart, Philip Joseph, Matthew Smith and Mai Chen.[84] All writers acknowledge that no general duty is currently recognised in New Zealand common law. Some consider it likely that this issue will be revisited by the courts in the near future.[85]

Recent judicial cases commonly cite and apply *Awatere* and *Lewis*.[86] The recent Supreme Court decision *Manukau Golf v Shoye Venture Ltd* is particularly noteworthy. In this case the Supreme Court overturned a decision of the Court of Appeal refusing the successful appellant costs but giving no reasons for this decision.[87] Counsel for the appellant submitted that reasons should have been given for the refusal to award costs either on the precedent of *Awatere* or on a new post-Bill of Rights Act analysis.[88] Counsel also argued that the Court had the opportunity to "change the default rule" to one recognising that "it is normal for judges to give reasons".[89]

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82 *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577 at 585.

83 *R v Bain* [2009] NZSC 59, (2009) 19 PRNZ 524 at [6].

84 Michael Taggart "Administrative Law" [2000] NZ L Rev 439 ["Administrative Law" (2000)] at 439–442; Joseph, above n 71, at [24.4.10], in particular at 984; GDS Taylor (assisted by JK Gorman) *Judicial Review: A New Zealand Perspective* (LexisNexis NZ, Wellington, 2010) at [9.03]–[9.18]; Taylor and Roth, above n 80, at [9.15]; Matthew Smith *The New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011), at ch 60, in particular at 845; and Mai Chen *The Public Law Toolbox* (LexisNexis NZ, Wellington, 2012) at [10.4.15], in particular at 426.

85 See Joseph, above n 71, at [24.4.10(1)], noting that in *Lewis*, above n 4, "the Court of Appeal signalled its intention to revisit *R v Awatere* in the interests of maintaining public confidence in the administration of justice". See also Taylor and Roth, above n 80, at [4.2.2], where Taylor and Roth record their view that in *Lewis* the Court of Appeal "indicated a definite view that it would in an appropriately argued case find that one now exists in New Zealand"; and Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at 153.

86 See for example *Canam Construction (1955) Ltd v LaHatte* [2010] 1 NZLR 849 (HC) at [56]–[57]; *Tamati v Police* HC Hamilton CRI-2011-419-54, 25 August 2011 at [10]; *Kim v Mt Eden Correctional Facility* [2012] NZHC 2417, [2012] NZAR 990 (HC) at [27]–[31]; *Holley v Police* [2012] NZHC 343 at [7]–[11]; and *A1 Commercial Services Limited v Spooner Commercial Ltd* [2013] NZHC 796 at [61] to [80].

87 *Manukau Golf*, above n 5. Similar arguments, that costs awards must be sufficiently reasoned, were made in *Auckland Regional Council v Waiheke Island Airpark Resort Ltd* (2010) 16 ELRNZ 182 (HC) at [24]–[27]; and *FT v JML* [2012] NZHC 1388 at [20].

88 *Manukau Golf* (transcript), above n 5, at 2–4 and 1–20. See also *Manukau Golf*, above n 5, at 307 (headnote).

89 *Manukau Golf* (transcript), above n 5, at 18. See also *Manukau Golf*, above n 5, at 307 (headnote).

Chambers J, writing for a unanimous Supreme Court in *Manukau Golf*, issued a brief decision in favour of the appellant.[90] He noted that, although costs awards were discretionary, "the discretion has never been unfettered and must be exercised judicially".[91] Chambers J stated that the rule that "costs follow the event" was a fundamental principle relating to costs orders.[92] The Court of Appeal had not followed this principle nor offered any reasons for departing from it.[93] He concluded:[94]

> We wish to make clear a court does not have to give reasons for costs orders where it is simply applying the fundamental principle that costs follow the event and the costs awarded are within the normal range applicable to that court. So here, had the Court of Appeal awarded costs in the Club's favour on a standard appeal basis, no further explanation would have been required. It is only when something out of the ordinary is being done that some explanation, which may be brief, should be given.

The above authorities demonstrate that *Awatere* and *Lewis* remain the law in New Zealand. They have not yet been expressly overruled and, therefore, any judicial comment suggesting recognition of a common law duty must be read in light of these cases.[95] This is made particularly clear by the Supreme Court's decision not to revisit this issue in *Manukau Golf*.

IV LEARNING FROM MALLAK*: CRAFTING A GENERAL PUBLIC LAW DUTY TO PROVIDE REASONS*

The remainder of this article draws on *Mallak* to argue that New Zealand should recognise a general obligation for public decision-makers to give reasons to affected parties. In this section, the arguments raised in *Mallak* are considered in the New Zealand context to show why recognition of a general obligation is now appropriate in this jurisdiction. No attempt is made in this article to canvass the full extent of arguments in favour of recognising such a right.[96] Rather, it is argued that

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90 The Supreme Court in *Manukau Golf* sat as a court of four, without Elias CJ. This is particularly relevant because the Chief Justice provided the judgment on behalf of the Court of Appeal in *Lewis*, above n 4. See also *Manukau Golf* (transcript), above n 5, at 1–3.

91 At [7]. See, more broadly, *Mallak* (SC), above n 1, at [43]. See similarly *Bell-Booth*, above n 68, at 6, stating that no legal discretion is unfettered, as unfettered discretion is a contradiction in terms; Robin Cooke "Administrative Law Trends in the Commonwealth" in *The Sultan Azlan Shah Lectures: Judges on the Common Law* (Professional Law Books: Sweetwell & Maxwell Asia, Kuala Lumpur, 2004) at 1; and *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

92 *Manukau Golf*, above n 5, at [8].

93 At [9].

94 At [16] affirming *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (CA).

95 See *Sharma*, above n 70, at [9].

96 For an excellent recent discussion of why a general right to reasons is appropriate, in light of a range of reasons and common objections, given in the context of England and Wales, see Mark Elliott "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56.

the reasons given in *Mallak* for recognition of this obligation are sufficient to justify recognition in New Zealand; it is time for the judiciary to adopt Elias CJ's request in *Lewis* by reconsidering *Awatere* in an appropriate proceeding in the near future.

A A General Obligation to Provide Reasons is Required by Natural Justice

The recognised duty on public decision-makers to act fairly and in accordance with natural justice indicates that New Zealand courts should recognise a presumption that reasons should be provided to affected persons. This article proceeds on the basis that these two duties (fairness and natural justice) are analogous,[97] and the terms are used interchangeably throughout this article. However, to the extent they differ,[98] both support recognition of a general duty.[99]

Mallak emphasises that courts should draw from the duties of fairness and natural justice a presumption that decision-makers should provide reasons to affected parties. Fennelly J explained that it is unfair for a decision-maker to render an applicant's rights of redress ineffective. This is the effect where an affected party does not understand how or why a particular decision affecting them was reached. In *Mallak*, it was described as "impossible" for Mr Mallak to exercise meaningfully his rights, either to reapply for an application or to apply for judicial review.[100] More importantly, the Court considered that, as an institution, it would be incapable of carrying out judicial review effectively without understanding the reasons in support of the decision under review.[101] These

97 See *Combined Beneficiaries Union Inc v Auckland COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 [*COGS*] at [23] and [43]. See also, for example, *O'Regan v Lousich: Proprietors of Mawhera v Maori Land Court* [1995] 2 NZLR 620 (HC) at 626; and *Taito*, above n 82, at [20]. Taylor argues strongly that there is no distinction between duties of fairness and natural justice in New Zealand following the Court of Appeal's interpretation of s 27(1) of the New Zealand Bill of Rights Act 1990 [the Bill of Rights Act] in *COGS*: see Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.12]–[13.13] and [13.22]. He acknowledges, however, that the Supreme Court is yet to address this matter: at [13.13]. Joseph takes a similar position: Joseph, above n 71, at [24.1], referring to natural justice and fairness as "alternative descriptions for a single but flexible doctrine". See also GDS Taylor "Fairness and Natural Justice – Distinct Concepts or Mere Semantics?" (1977) Monash UL Review 191, where Taylor argued in favour of collapsing the two concepts into one.

98 See *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 718, referred to approvingly in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141 per Cooke J.

99 The explanation for this is set out below. Contrast, however, *T v Refugee Status Appeals Authority* [2004] NZAR 552 (HC) at [28] where Miller J considered that natural justice does not necessarily require reasons, although also commented that reasons may be necessary "in order to promote public confidence in the administration of justice".

100 *Mallak* (SC), above n 1, at [64].

101 At [65].

comments reflect the Court's focus on fairness and natural justice. Ultimately, what is required by these obligations is that a decision should not leave observers mystified as to its rationale.[102]

The fact that fairness and natural justice are public law obligations in New Zealand cannot be disputed.[103] Natural justice has been described as "fundamental"[104] and "elementary".[105] Matthew Smith considers that it is "a basic legal assumption that powers will be exercised in a fair manner".[106] As these obligations are now recognised in such all-encompassing terms, it is no longer necessary or desirable to speak of duties of fairness in relation to refugees specifically, and it is therefore unlikely that *Mallak* is relevant only in this subject area, given the broad language used.[107] The duties of fairness and natural justice are not limited to judicial decision-making, but will be presumed applicable to all those exercising public functions,[108] although their particular requirements will depend on a variety of factors, including the nature of the power exercised, the interests

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102 At [76]. See also *Hanna v Whanganui District Council* [2013] NZHC 1360 at [14] referring to the "whole point" of providing reasons as being "so that those reasons can be tested on appeal or judicial review if necessary".

103 See *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1 (CA) at 5–6; *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (CA) at 59; *Official Assignee v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722 (CA) at [69]; and *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 766 (CA) [*Lab Tests*] at [382]. See also Joseph, above n 71, at [24.1]; Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.73]; and Smith, above n 84, at ch 57 generally.

104 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121 per Cooke J; *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429 at [60] per Elias CJ; and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [91] per McGrath J. See also Joseph, above n 71, at [24.1].

105 *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129 (CA) at 139. See also Smith, above n 84, at ch 57 (at 787), where Matthew Smith describes natural justice as a "central pillar of judicial review".

106 Smith, above n 84, at [57.1].

107 See *Mallak* (SC), above n 1, at [66], quoted at n 43 above. See also Robin Cooke "Third Thoughts on Administrative Law" (1979) 5 NZ Recent Law Review 218 at 223, referring to a duty to act fairly owed to immigrants in *R v Secretary of State for Home Department, ex parte Mughal* [1974] QB 313 (CA) at 325; and *Chandra v Minister of Immigration* [1978] 2 NZLR 559 (SC). However, in the same article, Cooke J (as he then was) argued at 225 that "[i]t may be said that all authorities having powers affecting the rights of citizens owe this duty [to act fairly]". See also nn 214–216 below in relation to the position of a duty to provide reasons in relation to immigration decisions in New Zealand.

108 See *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA) at 548–549; *Royal Australasian College of Surgeons v Phipps* [1993] 3 NZLR 1 (CA) at 11–12; *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC); *Daganayasi*, above n 98; *Norrie*, above n 105; *Adlam v Stratford Racing Club* [2007] NZAR 544 (HC) at [90]–[95]; *COGS*, above n 97, at [11]; and *Bell v Victoria University of Wellington* HC Wellington CIV-2009-485-2634, 8 December 2010 at [78]. See also Joseph, above n 71, at [24.2.1]; and Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.08]–[13.12].

affected, and the severity of the effect of the decision.[109] Courts now focus on the particular power being exercised rather than the role of the decision-maker.[110] Professor Joseph and Taylor point out that to judicially review a decision-maker for breach of these duties it will ordinarily be necessary to point to an individual affected party.[111] In other words, applicants will ordinarily need to show some particular impact on them from a decision in order to demonstrate they are an "affected party" and therefore deserving of reasons.

Elias CJ provides a useful explanation of why natural justice and fairness give rise to a presumption that reasons should be given in administrative decisions. In "Administrative Law for 'Living People'", the Chief Justice explains that there are now "expectations of justification and rationality of outcome which cannot help affect administrative law".[112] These expectations are "an aspect of human dignity."[113] Ensuring that affected parties understand why decisions affecting them have been reached, the Chief Justice explains, "facilitates participation and prevents human beings being treated as objects".[114] Human dignity is a significant justification for requiring reasons. As the Chief Justice notes, it is a concept underpinning the *United Nations Declaration of Human Rights*[115]

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109 *COGS*, above n 97, at [11]. See also *Lab Tests*, above n 103, at [54]; and Joseph, above n 71, at [24.2.1].

110 See *Bank*, above n 108, at 548–549, applying *Ridge v Baldwin* [1964] AC 40 (HL). See also Joseph, above n 71, at [24.2.1].

111 See Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.11], stating that "[t]he modern focus of attention is on personal rights or expectations"; and Joseph, above n 71, at [24.2.2], which also notes two cases in which s 27(1) of the Bill of Rights Act, protecting natural justice, was applied in the absence of "an individualised, adjudicative setting": *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597; and *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65 (HC) at 99. These comments stem from a need for an applicant in judicial review to establish "standing", a point discussed below at n 201.

112 Sian Elias "Administrative Law for 'Living People'" [2009] CLJ 47 ["Living People"] at 64.

113 At 65. The Chief Justice has also provided additional justifications for requiring reasons in other writings. In addition to the reasons given in *Lewis*, above n 4, at [76]–[82], as referred to at n 78 above, in other extra-judicial writing the Chief Justice has explained that "[j]ustice between the parties is only part of the picture" outlined for requiring reasons: Sian Elias "'The Next Revisit': Judicial Independence Seven Years On" (2004) Canta LR 217 at 221.

114 Elias "Living People", above n 112, at 65.

115 *United Nations Declaration of Human Rights* GA Res 217A, UN Doc A/810 (1948).

and international conventions based on it.[116] Freedom is at the core of human dignity. Any restriction on individual human rights and other freedoms should therefore be justified. To ensure fairness, these justifications should be communicated to the individuals affected, so that they can evaluate the justifications themselves. This reasoning follows from the Chief Justice's comments. For example, in the same article, Elias CJ explains that "if people are given the dignity of reasons, they want them to justify the outcome".[117]

Similar and additional justifications for requiring reasons to ensure fairness and natural justice are demonstrated in judicial decisions.[118] In *Powerco Ltd v Commerce Commission* Wild J noted that "without knowing and understanding why the Commissioner recommended the imposition of control, the Minister could not properly assess whether to accept the recommendation".[119] The Court immediately went on to state more broadly that "[t]he importance of reasons to a reviewing Court, and to parties to the review, is equally obvious".[120] Similar comments were earlier provided by Goddard and Wild JJ in *Matthews v Marlborough DC*. Faced with a submission that there was no invariable right to reasons in New Zealand, the Court responded:[121]

> That may be so, but a lack of any reasons for a critical finding is of no help to an appellate Court required to decide whether that finding is justified. If the reasons are not explained, and cannot be ascertained, then the finding must be collapsed as an unsupported one.

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116 At 65, referring to *Harkson v Lane* [1998] ZACC 12, [1998] (1) SA 300. See also *COGS*, above n 97, at [69]–[70], where Glazebrook J (writing on behalf of herself and Hammond J) suggested that Bill of Rights Act damages for breaches of the s 27(1) right to natural justice may be appropriate where human dignity is engaged; and *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] NZLR 381 at [75] per Hammond J, referring to "the fundamental importance of human dignity as perhaps the legal value in the twenty-first century", citing Grant Hammond "Beyond Dignity" in Jeffrey Berryman and Rick Bigwood (eds) *The Law of Remedies: New Directions in the Common Law* (Irwin Law, Toronto, 2009) 171. Baragwanath J was a particularly strong advocate of recognition of human dignity: see *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360 (HC) at 375–376; *P v Police* [2007] 2 NZLR 528 (HC) at 530; *X v Police* HC Wellington CRI-2006-404-259, 10 August 2006 at [12]; *Mihos v Attorney-General* [2008] NZAR 177 (HC) at [93]; and *R v G* [2008] NZCA 130, [2009] 1 NZLR 293 at [43], referring to human dignity as a "fundamental human right".

117 Elias "Living People", above n 112, at 65. See also *Taunoa*, above n 104, at [89] per Elias CJ, referring to a denial of natural justice as "closely linked" with human dignity.

118 *Matthews v Marlborough DC* HC Wellington CIV-2002-484-232, 23 April 2004; and *Powerco Ltd v Commerce Commission* HC Wellington CIV-2005-485-1066, 24 December 2007. See also *Singh v Simpson* [1989] 1 NZLR 52 (HC) at 56–57.

119 *Powerco*, above n 118, at [318].

120 At [318]. See also *Stewart v New Zealand Police* [2007] DCR 843 (HC) at [8]; and *L W Petchell Limited v Roberts* EmpC Auckland AEC56A/94, 26 September 1996 at 2–3, which notes that an absence of reasons may hamper not only an intending appellant but also an intending respondent. For instance, it is harder to argue in favour of a first instance judgment if the judgment does not provide sufficient reasons.

121 *Matthews*, above n 118, at [31].

The above discussion has shown that to ensure that an affected person understands the reason for a decision it will ordinarily be necessary for a decision-maker to provide an explanation, or to otherwise ensure that the person affected has a basic understanding of the reasons for the decision. To do otherwise risks subverting natural justice. The need for public decision-makers to provide reasons has been described as an important attribute of natural justice[122] and a basic rule of fairness.[123] It is argued that this reason itself is sufficient for recognising a general duty to provide reasons,[124] which will operate as a rebuttable presumption.

B There is a Legal Trend in Support of a General Duty

The second reason that a general duty to give reasons should be recognised is because this would be consistent with legal developments in New Zealand since *Lewis*. As discussed above, *Awatere* remains the law in this country. However, it is also clear that a wide variety of judicial and academic commentary expects, and is supportive of, a general duty being recognised. This judicial and academic commentary should be taken into account by a court considering whether to recognise a general duty.

Drawing on a legal trend was the second reason outlined in *Mallak* in favour of recognising a general duty. This point applies even more strongly in New Zealand.[125] It is useful to consider academic commentary, case law and legislation in assessing the extent of a legal trend.

Much of the academic commentary has already been outlined. As discussed, Taylor and Professor Roth appear to consider that the general recognition of a duty to give reasons is simply a matter of time.[126] Although most academic writers (including Taylor and Roth) do not express a

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122 Michael Kirby "Accountability and the Right to Reasons" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 36 at 51.

123 *Singh*, above n 118, at 58. See also WG Liddell "Administrative Law" [1989] NZ Recent Law Review 311 at 317–318.

124 Further reasons, however, are available: see, for example, Elliott, above n 96.

125 Since *Lewis*, above n 4, New Zealand has not suffered from the same degree of conflicting judicial authority in relation to recognition of this principle as Ireland: compare *Mallak* (SC), above n 1, at [52]–[63] with the discussion of relevant judicial commentary in New Zealand in this section.

126 Taylor and Roth, above n 80. Taylor made a similar comment a decade earlier: see Graham Taylor "Administrative Law" [1998] 3 NZ Law Rev 403 at 412–413. See also Joseph, above n 71, at [24.4.10(1)]; and Gerard McCoy "The Unity of Public Law" [2004] NZLJ 429, where McCoy states that "[t]he alleged rule is now so porous it holds very little water".

strong view on *whether* a general duty should be recognised Professor Joseph and the late Professor Taggart are significant exceptions.[127]

The views of these writers should be treated seriously. In a number of articles across several decades, Professor Taggart argued for recognition of a general duty that would apply to judicial decision-makers.[128] Not long following *Lewis*, for example, he wrote that "the arguments in favour of appellate judges recognising a legally enforceable obligation on all judges to give factually supported and reasoned judgments appear to me as compelling as ever."[129] More broadly, Professor Joseph has argued forcefully that "[d]ecision-makers should bear a general duty to justify their decisions".[130] For him, the absence of a general duty "is an unwarranted departure from modern standards of good administration".[131]

Other writers have also written supportively of recognising at least a limited general duty, which would apply to judicial decision-makers in New Zealand.[132] For example, in 1998, Lord Cooke

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127 See also Bruce Robertson "The State of Administrative Justice In New Zealand" (Council of Canadian Administrative Tribunals Conference, Westin Bayshore Hotel, Vancouver, 6–8 May 2007) at 8, noting extra-judicially that "I suspect before too long our Court [that is, the Court of Appeal] will find a general common law duty to give reasons".

128 See Taggart, "Administrative Law" (2000), above n 84, at 439–442; Michael Taggart "Administrative Law" [2003] NZ L Rev 99 at 118–120; Michael Taggart "Administrative Law" [2006] NZ L Rev 75 at 79–80; and Michael Taggart "Proportionality, Deference, Wednesbury" [2008] 2 NZ L Rev 423 at 461–465. See also Michael Taggart "Should Canadian Judges be Legally Required to Give Reasoned Decisions in Civil Cases?" (1983) 33 U Toronto LJ 1; Michael Taggart "*Osmond* in the High Court: Opportunity Lost" in Michael Taggart (ed) *Judicial Review in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) at 53; David Dyzenhaus, Murray Hunt and Michael Taggart "The Principle of Legality in Administrative Law" (2001) 1 OUCLJ 5; Michael Taggart and David Dyzenhaus "Reasoned Decisions and Legal Theory" in Douglas E Edlin (ed) *Common Law Theory* (Cambridge University Press, Cambridge, 2007) 134 at 166; and Michael Taggart "'Australian Exceptionalism' in Judicial Review" (2008) 36 Federal L Rev 1 at n 89.

129 Taggart "Administrative Law" (2000), above n 84, at 442. See also Taggart "Australian Exceptionalism", above n 128, at 15, noting that "it seems only a matter of time before the exceptions swallow the hoary old rule [in England and New Zealand] that reasons need not be given".

130 Joseph, above n 71, at [24.4.10(2)].

131 At [24.4.10(2)].

132 See also Robert Fisher "Improving Tribunal Decisions and Reasons" [2003] NZ L Rev 517; McCoy, above n 126, at 428 commenting that "even judges apparently do not have an obligation to give reasons for their decisions … (… until the new Supreme Court finds this offends the principle of legality)"; Noel Anderson "The Harkness Henry Lecture: The Appearance of Justice" (2004) 12 Wai L Rev 1 at 16–17; Paul Paterson "Administrative Decision-Making and the Duty to Give Reasons: Can and Must Dissenters Explain Themselves?" (2006) 12 Auckland UL Rev 1; Janet McLean "Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ L Rev 377 at 406; Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law"(2008) 6 NZJPIL 117 at 151 and n 204; and Jeff King "Proportionality: A Halfway House" [2010] NZ L Rev 327 at 341–342.

commented extra-judicially in favour of a general duty to give reasons applying to administrative tribunals.[133] It is also encouraging that the development of a duty to give reasons is linked by some of these writers to the need for fairness, outlined in the previous section.[134]

Turning to case law, a growing number of judicial comments on *Lewis* are similarly positive. A number of judges appear to have suggested that recognition of a duty applying to judicial decision-makers is only a matter of time. Consider, for example, the following judicial comments: "there is *still no general duty*",[135] "a general rule … has *not yet happened*",[136] "[t]here is *not yet* in New Zealand *a general rule*",[137] a general duty "has *not yet crystallised* in New Zealand thus far",[138] but "the trend is *unmistakably in favour*",[139] and "the trend … has *been towards a requirement* for reasons to be given".[140]

In some cases since *Lewis*, judges have also spoken in favour of a duty applying to public decision-makers generally, rather than one limited to judicial decision-makers. The most significant reference is in the concurring judgment of Keith J sitting in the Supreme Court in *Discount Brands v Westfield (New Zealand) Ltd*. In this case, he referred to "the growing recognition of the obligation on public authorities to give reasons" and cited the principle underlying s 23 of the Official Information Act 1982 and s 22 of the Local Government Official Information and Meetings Act 1987.[141]

Other judges have provided similar broad comments. For example, in *McFadden v Nelson District Law Society* Ellen France J referred approvingly to "the developing jurisprudence on the

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133 Lord Cooke of Thorndon "The Swing of the Pendulum" (Administrative Law Conference, Wellington, 25 March 1998) at 8. Lord Cooke also attributed the same view to Sir Anthony Mason in this article at 21. See also Cooke "Third Thoughts on Administrative Law", above n 107, at 225; and Lord Cooke of Thorndon "Administrative Law: Discretion or Valour?" (Administrative Law Bar Association, Lincoln's Inn, 24 November 2007) at 8.

134 Liddell, above n 123, at 317; Kirby, above n 122; and Joseph, above n 71, at [24.4.10(2)].

135 *Re Vixen Digital Ltd* [2003] NZAR 418 (HC) at [40] per Durie J (emphasis added).

136 *Vercoe v Police* HC Nelson AP No 10/01, 6 June 2002 at [33] per Neazor J (emphasis added).

137 *Edmonds v Baycorp Ltd* [2003] NZAR 111 (HC) at [18] per Baragwanath J (emphasis added).

138 *Westmed Finance Ltd v Wilson Parking New Zealand (1992) Ltd* HC Auckland CIV-2003-404-5913, 8 April 2004 at [32] per Keane J (emphasis added).

139 *Todd v Tuhi* [2009] NZFLR 89 (HC) at [28] per Harrison J (emphasis added).

140 *Wieblitz v Police* HC Auckland CRI-2009-404-000124, 6 July 2009 at [18] per Duffy J (emphasis added); and *Auckland Regional Council v Waiheke Island Airpark Resort Ltd* (2010) 16 ELRNZ 182 (HC) at [26] per Duffy J.

141 *Discount Brands*, above n 111, at [56] . However, this should be compared with Keith J's dissent in *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [205]–[206] for the reasons discussed in John Burrows "Common Law Among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401 at 407.

need for decision makers to give reasons".[142] Also of note is *Powerco Ltd v Commerce Commission*, briefly referred to above.[143] In this decision, Wild J first acknowledged the acceptance by counsel that "there is currently no established common law principle" that public bodies should give reasons.[144] However, he then cited the Privy Council's (then recent) decision *Stefan v The General Medical Council* as representing a judicial trend toward recognition of a duty to give reasons applying to an increasingly wide range of "decision makers of many kinds". As noted by Wild J, this recognition of a trend was justified by the Privy Council as "consistent with current developments towards the increased openness in matters of government and administration".[145]

Finally, particular legislation also supports recognition. The two notable examples are the Official Information Act (and its companion legislation, the Local Government Official Information and Meetings Act) and the Bill of Rights Act. Most significantly, s 23 of the Official Information Act already requires reasons for a decision or recommendation to be provided to an affected person upon request.[146] However, this right is narrowly drafted.[147] This and similar provisions could therefore arguably be interpreted as an expression of Parliament's will that public decision-makers only be subject to a narrow obligation to provide reasons.[148] However, there are many reasons not to adopt a narrow approach but, rather, to allow the "justice of the common law" to supply a

142 *McFadden v Nelson District Law Society* [2003] 3 NZLR 34 (HC) at [103].

143 *Powerco*, above n 118.

144 At [318]–[320].

145 At [315], referring to *Stefan v The General Medical Council* [1999] UKPC 10, [1999] 1 WLR 1293 at [21]. See, however, *R v Jefferies*, above n 68, at [16] where Richardson P, speaking for the Court of Appeal (also comprised of Doogue and Goddard JJ), referred to *Stefan* and other decisions but concluded that *Awatere*, above n 3, continued to apply.

146 Official Information Act, s 23. See also Local Government Official Information and Meetings Act, s 22.

147 Taylor and Roth, above n 80, at [4.3]. The sections themselves are subject to various exceptions and require only a "written statement" of the findings of material issues of fact, reference to the information on which the findings were based (unless there are good reasons to withhold this specifically), and reasons for the decision concerned.

148 This was the approach of the High Court of Australia recently in *Minister for Home Affairs (Cth) v Zentai* [2012] HCA 28, (2012) 246 CLR 213 at [96]. See also the comments of the Ombudsman that s 23 of the Official Information Act is a "code": Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) Part 3C. The reference to "code" should be interpreted narrowly, that is, s 23 is a code in relation to the remaining provisions in the Official Information Act, but this does not mean that common law requirements may not exist outside of the Official Information Act. See also JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis NZ, Wellington, 2009) at ch 16 for a comprehensive discussion of the relationship between common law and statute.

common law obligation to provide reasons.[149] First, a broad approach is supported by reading s 23 in light of the legislation overall. Section 5 is particularly significant. This section cements as an overarching principle of the legislation that the Official Information Act is to be interpreted "in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it". Given that a wide interpretation in favour of making information available is mandatory, s 23 should not be interpreted as a limitation on the common law's ability to recognise a general obligation to provide reasons.

The second reason that the Official Information Act should not be read in a restrictive way arises from the first reason given for recognising a general duty: there is a presumption that the law favours duties of fairness and natural justice.[150] Legislation should therefore be read in light of that presumption.[151] Indeed, it appears to be for this reason that Fennelly J referred to a similarly narrowly drafted statutory provision as supporting recognition of a duty to provide reasons in *Mallak*.[152] There was also no suggestion by Elias CJ in *Lewis* that the Official Information Act would restrict the ability of the courts to recognise a general duty, nor has this been suggested in other New Zealand judgments.

Thirdly, a range of commentary suggests that the Official Information Act and related legislation should not restrict common law development and/or should in fact accelerate judicial recognition of a common law duty.[153] Additional analysis on this point has been given by Professor Burrows.[154] In "Common Law Among the Statutes", he recognises that issues of natural justice and

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149 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 (Comm Pleas) at 194. See also *Day v Mead* [1987] 2 NZLR 443 (CA) at 451 per Cooke P as cited in Michael Taggart "The Official Information Act 1982 in New Zealand Courts" [1989] NZ Recent Law Review 195 at 197. The principle of *Cooper* was described as "undoubted" by the Court of Appeal recently: see *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA) at [36].

150 See for example *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 (SC), discussed in Joseph, above n 71, at [24.3.4]. See also Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.34]–[13.35] and [13.39].

151 This is reflected in s 6 of the Bill of Rights Act.

152 See above n 37.

153 Liddell, above n 123, at 318; Michael Bowman "Judicial Review of Administrative Action in the 1980s – Problems and Prospects: Conference February 1986, Auckland" (1987) 5 Auckland UL Rev 363 at 363 referring to Kirby, above n 122; Taggart "Australian Exceptionalism", above n 128, at 15; and Taggart "The Official Information Act 1982 in the Courts", above n 149, at 197, stressing that "this is one area of New Zealand law that cries out for development by analogy to statute", referring to s 23. See also Joseph, above n 71, at [24.2.3], noting that the common law will import duties of fairness in particular circumstances.

154 Burrows, above n 141. It is consistent to view Professor Burrows as supporting recognition of a common law duty to provide reasons arising out of the existing statutory duty. This would accord with his view that certain principles that originate in statute may come to be "applied by analogy in a similar common law field": see 406.

judicial review are particularly suitable for common law development by judges, and notes that common law principles and values that guarantee human rights and support the rule of law have been flourishing as a result of recent common law development.[155] For example, Professor Burrows points out that the Official Information Act and related legislation were referred to by the Court of Appeal in *Lange v Atkinson* as being relevant in the Court's decision to recognise an enlarged common law privilege for political discussion in the law of defamation.[156] From this commentary, the better view is that the Official Information Act and related legislation have not usurped the common law, but rather may be relied on to assist with its development.

Finally, the Bill of Rights Act removes any doubt that the Official Information Act should be interpreted restrictively as a code. Moreover, it also provides an independent reason for recognising a common law duty. In other words, the Bill of Rights Act is helpful in two respects. This is because, first, where possible the Official Information Act, like all New Zealand legislation, should be interpreted consistently with the Bill of Rights Act,[157] and, secondly, it is now increasingly recognised that the common law itself should be developed in light of the Bill of Rights Act.[158] Therefore, if the Bill of Rights Act supports recognition of an obligation to provide reasons (as is suggested below) then two results follow. First, the Official Information should be interpreted narrowly to permit this. Secondly, courts should recognise a general duty in the common law to give effect to the Bill of Rights Act.

There is clear support for a duty to provide reasons in the Bill of Rights Act. Two of the three main reasons recognised in *Lewis* for requiring reasons are underpinned by s 27 of the Bill of Rights Act, which affirms the right to natural justice in New Zealand.[159] In particular, s 27(1) provides that

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155 At 408.

156 At 406, citing *Lange v Atkinson* [1998] 3 NZLR 424 (CA) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

157 Bill of Rights Act, s 6.

158 *MOT v Noort* [1992] 3 NZLR 260 (CA) at 271–272 per Cooke P and at 295 per Gault J; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [13] per Elias CJ and [180] per McGrath J; Susan Glazebrook "The New Zealand Bill of Rights Act 1990: its operation and effectiveness" (South Australian State Legal Convention, 22 and 23 July 2004) at [21]–[29]. See also for example *Lange v Atkinson* [2000], above n 156; *Solicitor-General v Smith* [2004] 2 NZLR 540; *Hosking v Runting* [2005] 1 NZLR 1; and *O'Connor v Police* [2010] NZAR 50.

159 See *Canam Construction*, above n 86, at [57]; *Lewis*, above n 4, at [80]; *Vixen Digital*, above n 135, at [40]–[43], where Duffy J acknowledged, in relation to a bare statutory obligation to give reasons, that the importance of giving reasons and the ambit of this obligation is strengthened as a result of the Bill of Rights Act, in particular, s 27; Andrew Geddis and Bridget Fenton "'Which is to be Master?' – Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25 Arizona Jnl of Int'l & Comparative L 733. See also *R v Hathaway*, above n 68, at [26]; Anderson, above n 132, at 16; and Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.34]–[13.35]. Taylor notes at [13.34] that:

each person has the right to natural justice, while s 27(2) records the fundamental right to judicial review. Rights to natural justice generally and judicial review specifically were also highly relevant in *Mallak*. This interpretation of s 27 of the Bill of Rights Act as supporting a right to reasons is also supported by the White Paper itself which initiated the parliamentary and public debate over this legislation.[160] In light of this, both the Official Information Act and the common law should be interpreted and developed to provide for a right to reasons as an aspect of natural justice.

When articulated this way, it becomes apparent that the second ground for requiring reasons set out in *Mallak* – that recognition is supported by legal authorities – underpins the first. Providing reasons is a requirement flowing from the overarching public law principles that decision-makers must act fairly and in accordance with natural justice. As this section has discussed, a growing number of academic and judicial decision-makers are open to, and even supportive of, the prospect of a general duty. These developments are relevant for a court considering whether to recognise a new common law duty.[161] It is also material that jurisdictions overseas are incrementally recognising a general duty to provide reasons.[162]

C A General Duty Is Workable

Public law obligations should be both sufficiently clear (that is, capable of definition and explanation) and flexible (that is, capable of being applied in a wide range of situations in a manner that ensures justice). A general duty to provide reasons is such a duty, as was made clear in *Mallak*. The final section of this article outlines five elements, including in particular flexibility, that ensure

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> … exclusion of natural justice is something to be found only reluctantly and where necessary … [because] s 27(1) of the NZBORA cuts across the common law to strengthen greatly the common law presumption.

160 See Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985) at 110, linking what became s 27 to the existing limited statutory obligation to provide reasons set out in s 23 of the Official Information Act.

161 See for example *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 (HC).

162 International developments in an area of law overseas may indicate that an area of law should be revisited in New Zealand: see *Owens Transport Ltd v Watercare Services Ltd* [2010] NZAR 568 (HC) at [37]. A general duty was recognised in Canada in *Baker*, above n 65, and, similar to New Zealand, a narrow common law duty is being incrementally expanded in the United Kingdom: see the discussion in Elliott, above n 96. A common law duty was rejected in Australia in *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656. This decision remains the law in Australia (see *Zentai*, above n 148, at [93]–[96]) despite criticisms: see Kirby, above n 122, at 39–43; KJ Keith "Open Government in New Zealand" (1987) 17 VUWLR 341 at 340–342; and Taggart "*Osmond* in the High Court: Opportunity Lost", above n 128. See also Margaret Allars "Of Cocoons and small 'c' Constitutionalism: The Principle of Legality and an Australian Perspective on *Baker*" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oregon, 2004) at 307. It appears, however, that the Australian High Court is poised to revisit *Osmond* at the time of writing: see Matthew Groves "Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*" [2013] 35 Syd LR 627. See also "Administrative Law" (2000), above n 84, at 442, summarising the experience of New Zealand's Pacific neighbours.

that this general duty can be applied by decision-makers and (if necessary) courts in a fair, sensible and consistent manner. As this section explains, an appreciation of these elements serves as an appropriate response to objections commonly raised to the recognition of a general duty to give reasons.

An attempt was also made to articulate the parameters of the duty in *Mallak*, where the Court also commendably focussed on the flexibility of the application of a duty to give reasons. This appears from the third reason for allowing Mr Mallak's appeal: the Court pointed out that the Minister had not only failed to provide reasons but had also refused to offer an adequate justification for doing so.[163] Implicit in this comment is that in appropriate circumstances decision-makers will be permitted to refuse to provide reasons. Fennelly J held, however, that such a refusal will ordinarily need to be justified, that is, a decision-maker should usually at least provide reasons to explain why reasons for the decision are not being provided.[164]

As discussed in the introduction, a common law duty to provide reasons would expand the existing narrow statutory obligations, albeit with several significant exceptions. In New Zealand, articulation of a duty to provide reasons is heavily aided by the existing statutory provisions of the Official Information Act and other freedom of information legislation. This statute, recently reviewed,[165] has been in force for more than 30 years and, along with the Bill of Rights Act,[166] has assisted in the development of a "culture of justification" in this country.[167] Drawing from the Official Information Act and other public law matters, a duty to provide reasons can be articulated by reference to five factors set out below.

The first is *flexibility*. It is important that legal remedies are able to be applied by courts in a flexible manner to ensure that they deliver justice.[168] As Lord Steyn has noted, "[i]n law context is

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163 *Mallak* (SC), above n 1, at [74].

164 At [74].

165 See Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) [*Public's Right to Know*]; and Ministry of Justice *Government Response to Law Commission Report on The Public's Right to Know: Review of the Official Information Legislation* (4 February 2013).

166 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, Wellington, 2005) at [6.81]–[6.83] and [6.9.10] referred to in *Brooker v Police* [2007] NZSC 30, [2007] NZLR 91 at [210] and [231]–[232] per Thomas J.

167 See Susan Glazebrook "To the Lighthouse: Judicial Review and Immigration in New Zealand" (Supreme Court and Federal Judges Conference, Hobart, 24–28 January 2009) ["To the Lighthouse"] at 52 and n 291; and Elias "Living People", above n 112, at 64.

168 See Edmund Thomas "An Endorsement of a More Flexible Law of Civil Remedies" (1999) 7 Wai L Rev 23.

everything".[169] This point is particularly significant in public law, given the varied nature of the subject matter of public law proceedings.[170] The flexibility of this duty means that it will be applied by reference to each particular circumstance, namely, both *what* a duty requires, and *whether* it is to be applied (or displaced) will be factually dependent.[171]

The element of flexibility in this duty arises as a result of grounding the duty in the obligation to act fairly and in accordance with natural justice. Natural justice is a "flexible concept which adapts to particular situations".[172] For instance, the duty to provide reasons will typically require that reasons should be provided to affected parties upon request, rather than at the time a decision is reached. Sometimes, however, reasons may be required to accompany a decision, such as where a limited statutory timeframe is given for appeal of the decision concerned. The touchstone will be what is fair in the particular circumstances; a "rigidly dogmatic" and "unvarying" approach should be avoided.[173] It is possible, although beyond the scope of this paper, that a duty grounded in other public law concepts, such as the need for accountability of public decision-makers, may be less flexible. For example, a general duty grounded in accountability may create a strong presumption that public decision-makers should release reasons in support of decisions, regardless of the needs of affected parties but in order to promote reasoned decision-making by the decision-makers concerned.

The flexibility of the proposed duty to give reasons deals with two common objections put forward against recognition of the duty. The first arises from the fear that recognition of a general duty will be onerous, particularly for small or otherwise under-resourced decision-makers.[174] However, the flexibility of *what* this duty requires militates against this concern. Unlike compliance with the Official Information Act, no formal statement of reasons is necessarily required.[175] As *Mallak*

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169 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 56, [2001] 2 AC 532 [*Daly*] at [28] applied by Lord Cooke in *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [9]; and see Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [3.07]–[3.08]. See also Smith, above n 84, at [22.4] and ch 27 generally, noting that "the courts emphasise that it is appropriate to develop, to interpret and to apply legal rules and principles in a realistic way".

170 See *Daly*, above n 169, at [32] per Lord Cooke, referring to the varying subject matter of judicial review proceedings.

171 See for example *Waiamakariri Employment Park Ltd v Waimakariri District Council* HC Wellington CIV-2003-484-1226, 5 February 2004 at [47] that "[i]n the end it all depends upon context and the particular case".

172 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [67].

173 Drawing on the words of McCarthy P in *Coles v Chairman, Councillors and Inhabitants of the County of Matamata* CA69/74, 30 April 1976 at 1.

174 See, for example, *Awatere*, above n 3, at 649. See also *Kapa v Police* (1989) 4 CRNZ 306 (HC) at 311; and *Dempsey v Police* HC Christchurch A212-99, 27 October 1999 at [7].

175 Official Information Act, s 23. See also Local Government Official Information and Meetings Act, s 22.

makes clear, what is fundamentally required is that a person is able to understand the reasons for which a decision affecting him or her has been made.[176] Where reasons are "evident without express reference" they do not need to be spelled out.[177] In this way, a common law duty would be superior to the somewhat formulaic requirements of the existing s 23 statement of reasons.[178]

In addition, experience in New Zealand and overseas demonstrates that this objection should be discounted. The Ombudsman has rejected a similar argument against application of the existing s 23 statutory duty,[179] and has pointed out that this section is rarely used.[180] Professor Taggart, referring to experience in other jurisdictions, considered that this demonstrated that the "much relied upon 'practical difficulties' and the fear of formulaic incantations and inflexibility are overblown".[181]

This flexibility should also be kept in mind when considering whether the duty to provide reasons requires, merely, that a summary of reasons be required, or whether an affected party is also entitled to be supplied with material supporting the decision to allow them to understand what material has been relied on by the decision-maker (and possibly to mount an application on the basis that relevant considerations were excluded and/or irrelevant considerations included).[182] A flexible application of this duty recognises that, in particular situations, supporting material should be provided in addition to the reasons themselves, although often it may be overly onerous to require that a public decision-maker provide such material.

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176 See *Mallak* (SC), above n 1, at [66]. See also *Kapa*, above n 174, at 311–312; *Lewis*, above n 4, at [81]; *Takarei v Police* HC Hamilton AP77/02, 22 November 2002 at [14]; *R v Pegler* CA214/03, 21 October 2003; *Samuels v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2004-485-0207, 4 October 2005 at [56]; *FT v JML*, above n 87, at [20] and [21]; and *Manukau Golf*, above n 5, at [16].

177 *Lewis*, above n 4, at [81]. See also *Chen v New Zealand Police* HC Auckland CRI 2010-404-000344, 22 February 2011; *Stewart v New Zealand Police* HC Wellington CRI-2008-485-231, 6 May 2008 at [30]–[31]; and *Television New Zealand Ltd v West* HC Auckland CIV-2010-485-002007, 21 April 2011 at [80]. See also Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.73] (in relation to the obligations of natural justice generally); and *Manukau Golf*, above n 5, at [8], explaining that no reasons are required for costs decisions where these simply apply the default "fundamental principle" (as discussed above at n 92).

178 However, the Ombudsman has attempted to apply s 23 in a robust manner: see Office of the Ombudsman *11th Compendium of Case Notes of the Ombudsmen* (1998), Case Note W30823 at 68–69 and Case Note W33956 at 88–89.

179 Office of the Ombudsman, above n 178, Case Note A5622 at 88.

180 David McGee "The OIA as a Law Tool" [2009] NZLJ 128 at 129. See also Chen, above n 84, at [10.4.15].

181 Taggart "Administrative Law" (2000), above n 84, at 442; and Joseph, above n 71, at [24.4.10(3)].

182 This point will typically only be relevant where the public decision-maker concerned does not fall under the Official Information Act or the Local Government Official Information and Meetings Act, and where the information requested is not otherwise "personal information" that the applicant is entitled to under the Privacy Act 1993.

The related objection that this additional common law duty will be abused by sophisticated applicants is also without merit, again due to the flexible application of the duty. As Taylor discussed, the extent to which courts review the exercise of public powers by decision-makers differs based on a number of factors, including the sophistication of the parties before the Court.[183] Courts should – and already do – adopt the same approach when faced with a cause of action alleging a failure to provide reasons.[184] This reflects the fact that the standard of reasons required will differ depending on the circumstances. For example, a decision with a significant impact on the human rights of a particular individual is more likely to require that reasons be spelt out[185] than a pricing decision affecting only sophisticated applicants.[186]

The second factor necessary for articulating a common law duty in New Zealand is that it should be of *general application*. In other words, a duty to provide reasons should apply to all decision-makers exercising a public function. Although the leading cases in New Zealand to date have focussed on the obligation as it would apply to the judiciary,[187] there is no principled reason for restricting it to a subset of public decision-makers, as is currently the case under the Official Information Act. The primary reason for this flows directly from the overarching justification for requiring reasons generally: reasons are required to ensure that public decision-makers act fairly and in accordance with natural justice to particular parties and (although this point was not pursued in *Mallak*) to ensure the accountability of public decision-makers.[188] It is now recognised that obligations of natural justice apply to public decision-makers regardless of their particular title or role.[189] For the same reason, there should be a presumption that public decision-makers will provide

183 Compare for example *Tupou v Removal Review Authority* [2001] NZAR 696 (HC) at [16] as referred to by Knight, above n 132, at 128, with *Unison Networks*, above n 91. See also Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [3.07]–[3.09]; and Joseph, above n 71, at [21.7].

184 See *Powerco*, above n 118, at [320], which records the submission of Mr Dobson (as he then was) that "the standard of reasons expected should be adjusted to reflect the calibre of those receiving them. Less explicit reasoning is required when dealing with an informed audience."

185 See, for example, *Mallak* (SC), above n 1; *Zhang v Minister of Immigration* [2013] NZHC 790, which was, however, recently overruled by the Court of Appeal in *Minister of Immigration v Zhang* [2013] NZCA 487; and *Tupou*, above n 183, at [16]. At the time of writing, an application for leave to appeal in *Zhang* is pending before the Supreme Court.

186 See for example *Unison Networks*, above n 91, at [66]–[67].

187 *Awatere*, above n 3; *Lewis*, above n 4; and *Manukau Golf*, above n 5.

188 Indeed, this is the first reason listed by Elias CJ in *Lewis*, above n 4, at [76]–[82] as referred to at n 78 above. See also Kirby, above n 122.

189 See *Bank*, above n 108, at 548–549; *Royal Australasian College of Surgeons v Phipps*, above n 108, at 11–12; *Phipps v Royal Australasian College of Surgeons*, above n 108; *Daganayasi*, above n 98; *Norrie*, above n 105; *Adlam*, above n 108, at [90]–[95]; *COGS*, above n 97, at [11]; and *Bell*, above n 108, at [78]. See also Joseph, above n 71, at [24.2.1]; and Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [13.08]–[13.12].

reasons to affected parties upon request or, where circumstances warrant it, at the time a decision is released.

This duty should be applicable whenever decisions of a public nature are made, including to private decision-makers when they are exercising public functions. This proposal has met with concern, stemming from the fear that a common law duty will be overly onerous for small or under-resourced private decision-makers. This is evidenced in *Hopper v North Shore Aero Club*.[190] The Court of Appeal upheld a judgment that the North Shore Aero Club was under no duty to give reasons as a private club even if assumed to be exercising a public function.[191] The High Court reasoned that the Club operated "relatively informally"[192] and noted that "not even courts are required to give reasons or full reasons on all occasions".[193] However, the Court's concern about requiring reasons from the Club is misguided for two reasons. First, courts will apply this obligation flexibly as appropriate in the circumstances, as they already do when applying existing public law obligations to small private entities.[194]

Secondly, this obligation will only apply to private entities when, and to the extent that, they are exercising public functions. In this way, a common law duty has an advantage over the existing statutory regime. This is clear from the Law Commission's recent review, which included consideration of which agencies should be subject to the Official Information Act and Local Government Official Information and Meetings Act.[195] It pointed out that this question does not have "as clear-cut an answer as one might wish".[196] It rejected the idea that performance of a public function was sufficient for an agency to be subject to freedom of information legislation. The Law Commission noted, by way of example, that many electric and telecommunications companies perform public functions but recommended, despite this, that these companies should not become subject to freedom of information legislation because "many are private enterprises and it would be

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190 *Hopper v North Shore Aero Club Inc* [2007] NZAR 354 (CA) [*Hopper* (CA)] at [13(b)]. See also *Hopper v North Shore Aero Club* HC Auckland CIV-2005-404-2817, 6 December 2005 [*Hopper* (HC)] at [37] and [39]–[40].

191 See *Hopper* (CA), above n 190, at [9] where O'Regan J (as he then was) described the amenability of the Club's decision to judicial review as "doubtful".

192 *Hopper* (HC), above n 190, at [40].

193 At [40]. This objection falls away if the common law recognises an obligation on judicial decision-makers specifically.

194 See *Adlam*, above n 108; *Khan v Ahmed* [2008] NZAR 686 (HC); *Tamaki v Maori Women's Welfare League Inc* [2011] NZAR 605 (HC); and *Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] NZAR 699.

195 *Public's Right to Know*, above n 165, at ch 14.

196 *Public's Right to Know*, above n 165, at [14.11].

unrealistic to press for their inclusion".[197] However, a common law duty would not operate so blindly. A breach of a common law duty could be successfully raised to the extent that existing public law duties are already raised against state-owned enterprises and private enterprises: these organisations are only reviewable when, and to the extent that, they are exercising a public function, that is, there needs to be a "public" element of a particular decision for it to be subject to judicial review.[198] This shows that fears of imposing onerous administrative burdens on private entities are overblown. It also suggests that a common law duty would be superior to the existing statutory obligation in that it would, where necessary, ensure that reasons must be given on request to all those affected by public decisions, absent a good reason to withhold this information, while not operating in a blunt and overly invasive manner.

This conclusion – that the duty should apply broadly to public decision-makers, regardless of type – does not overlook the fact that there are significant ways in which public decisions differ: the judge deciding whether to award costs to a successful applicant[199] is making a very different decision to the minister deciding whether to grant citizenship status to an individual.[200] Yet in both these cases and, indeed, in all cases in which public decision-makers are making decisions it is obvious that the decision must be *reasoned*. It is no great stretch to say that the reasons for any public decision should be made available on request to an affected party unless there are good reasons not to do so.

Following on from this, and as a limit on the general applicability of this duty, the third factor is that a general duty should only be exercisable by persons who are demonstrably *affected* by a decision. Applicants claiming a breach of an obligation to provide reasons will need to establish that they have been impacted in some specific way. Limiting this obligation to being applicable to affected parties accords with the existing statutory approach under s 23 of the Official Information Act and also has similarity to the "standing" requirement in judicial review.[201] This should not, however, be seen as an overly restrictive limit, given New Zealand's "liberal approach to standing",

197 At [14.17].

198 *Lab Tests*, above n 103, at [45] referring to Sue Arrowsmith *The Law of Public and Utilities Procurement* (2nd ed, Sweet & Maxwell, London, 2005) at 79–85; and Dean R Knight "Privately Public" (2013) 24 PLR 108 comparing *Hopper* (CA), above n 190, with *Stratford Racing Club*, above n 108. See also, for example, *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385 (PC).

199 See for example *Manukau Golf*, above n 5.

200 See for example *Mallak* (SC), above n 1.

201 See *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045, [2013] NZLR 230 at [69]–[72]; and Taylor *Judicial Review: A New Zealand Perspective*, above n 84, at [7.01]–[7.05].

particular in matters of public interest.[202] In this manner, this common law obligation should be relatively familiar and therefore easy to apply. This factor also limits the scope of the duty and should therefore further reduce fears about the administrative burden of recognising the duty.

Fourthly, a common law obligation to provide reasons would operate as a *presumption only*, that is, it would be a duty generally applicable to public decision-makers, but one that would "yield in deserving cases".[203] This is likely to be particularly applicable for the types of decision-makers envisaged in *Hopper v North Shore Aero Club*.[204] This is necessary as there are often good reasons for public decision-makers to refuse to provide reasons, particularly where these decision-makers are under-resourced. This is an approach already recognised under the Official Information Act. This legislation presumes information should be made available unless there is a good reason to withhold it.[205] If in doubt, a decision-maker should err on the side of releasing the information.[206] The Official Information Act provides two categories of good reasons to withhold the release of information.[207] First, ss 6 and 7 list a number of conclusive reasons for withholding information. For example, if release of information is likely to damage New Zealand's international relations, the information may be withheld.[208] Secondly, s 9(2) provides an additional list of reasons which must be balanced against any public interest in disclosure. Information may only be withheld for a reason listed in this latter category if the strength of any particular withholding reason is not outweighed by any public interest in disclosure, which is, after all, the focus of the Act. For example, merely

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202 See *Whanganui District Council v New Zealand Parole Board* [2012] NZHC 2248 at [67]; and *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [322] per Glazebrook J. See also, for example, *Right to Life New Zealand v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762 at [37]; and *Great Christchurch Buildings Trust*, above n 201, at [62]–[80].

203 See Joseph, above n 71, at [24.4.10(2)]. See also Elliott, above n 96, at 65. Elliott responds to concerns about exceptional circumstances in which reasons would be inappropriate by pointing out (emphasis in original):

> "… it is an argument either against a general duty *that admits of no exceptions* or against a general duty that is formulated such that, when applicable, it requires the *disclosure of reasons to an extent that is inconsistent with competing policy concerns*. What it is not is an argument against a general duty per se."

204 *Hopper* (CA), above n 190.

205 Official Information Act, s 5. See *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (CA) at 305–306 per McMullin J noting that "the passing of the [Official Information] Act reversed the thrust of the law as it had been under the Official Secrets Act 1951".

206 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391 per Cooke P.

207 Official Information Act, ss 6, 7 and 9.

208 See, for example, Office of the Ombudsman, above n 178, Case note W37800 at 57 withholding information about the proposed ship visit of the USS Buchanan under ss 6(a) and 6(b)(i) of the Official Information Act.

because information is subject to legal professional privilege does not make it immune from disclosure; the Ombudsman recently ordered disclosure of a legally privileged memorandum relating to the Government's negotiations for the Hobbit films.[209]

The existing statutory framework could form the basis of a presumptive common law obligation. Decision-makers should disclose reasons for decisions to affected parties unless, objectively, they have good reasons not to do so. Where a decision-maker has a good reason not to release reasons, it should at least ordinarily justify this refusal, as Fennelly J pointed out in *Mallak*.[210] In rare situations, as the Official Information Act already envisages, a decision-maker may be justified in refusing to even provide a reason for refusing to disclose its reasons.[211] However a decision-maker's determination (as to whether they have good reasons not to disclose reasons or justify this refusal) would be subject to review by the courts.

The Official Information Act is useful in crafting a general duty, but should not be generically extended to provide a comprehensive understanding of the operation of a common law duty to provide reasons. For instance, the meaning of "good reason" to refuse to disclose reasons should be developed on a case-by-case basis. In addition, rather than having any specific conclusive grounds for withholding information, it may be preferable to adopt a general public interest balancing test for all supposed good reasons, rather than only some, which is the case under the current operation of the Official Information Act. Relevantly, this would also accord with the New Zealand approach to claims of public interest immunity in New Zealand, which also draw directly from the reasons for refusing to disclose information set out in the Official Information Act.[212]

Furthermore, if the development of the common law in any particular subject area was considered inappropriate, this intrusion could be reversed by legislating for a specific, unambiguous statutory restriction.[213] Indeed, this has been attempted in the immigration sphere in New Zealand, the same area of law at issue in *Mallak*. As in *Mallak*, New Zealand's Immigration Act 2009 provides the relevant decision-maker with "absolute discretion" over particular immigration

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209 *Opinion of David McGee, Ombudsman, on Requests for information regarding the production of The Hobbit and film production generally* (January 2013). Although the Ombudsman accepted that the memorandum remained privileged, he nonetheless ordered it be disclosed because it was used by ministers to respond to submissions and "Ministers cannot expect their correspondence with submitters on policy issues to remain confidential": at 27–28.

210 See n 40 above. See also the Official Information Act, s 10; and Local Government Official Information and Meetings Act, s 17.

211 Official Information Act, ss 10 and 18(b); and Local Government Official Information and Meetings Act, ss 8 and 17(b).

212 See the Evidence Act 2006, s 70.

213 Liddell, above n 123, at 318.

matters.[214] However, unlike the legislation in *Mallak*, the term absolute discretion is expressly defined under the Immigration Act to mean that a decision-maker does not need to provide reasons when declining particular applications under the legislation, other than refer the applicant to the relevant section defining absolute discretion.[215] The effect of this legislation on attempts to review immigration decisions for a failure to provide reasons is yet to be fully judicially determined.[216] However, it is generally accepted that the common law may be effectively overridden or limited by unambiguous statutory language,[217] and it is at least arguable that a court will determine that a common law right to reasons will not apply where decision-makers are exercising absolute discretion under this legislation.

Finally, it is appropriate to consider what *remedies* may be available to applicants for breach of this duty. A range of potential remedies may be appropriate, depending on the circumstances of each case. It is likely that the common response by courts will be either to declare the decision invalid, as in *Mallak*, or to order disclosure of reasons,[218] as is typically required by the Ombudsman in response to a finding that s 23 has been breached.[219] Decision-makers would be wise to respond to an order that reasons be disclosed. As Professor Joseph advises, a failure to do so may lead a court to determine that a decision was arbitrary, that relevant considerations were ignored or irrelevant considerations were taken into account, or that the decision-maker acted beyond its powers.[220] It may also invite the conclusion that the decision-maker was predetermined or otherwise biased.

V CONCLUSION

This article has argued that New Zealand courts should draw from the Irish Supreme Court's decision in *Mallak* to support recognition of a general public law duty to provide reasons in New Zealand common law. The value of such a comparative approach to the law is widely recognised.[221]

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214 See, for example, Immigration Act 2009, s 20, noting that an application for a visa by a person unlawfully in New Zealand is a matter for the absolute discretion of the decision-maker.

215 Immigration Act, s 11. See also ss 27 and 177.

216 See Doug Tennant "Absolute discretion in immigration" [2012] NZLJ 144; Jessica Birdsall-Day "Section 177 of the Immigration Act" [2012] NZLJ 229; and Doug Tennant "Absolute Discretion" [2013] NZLJ 2. See also *Zhang*, above n 185.

217 See Burrows and Carter, above n 148, at 18.

218 To the extent that a failure to provide reasons is a breach of natural justice, the "traditional" public law remedies described above are likely to be appropriate, as noted by Blanchard J in *Taunoa*, above n 104, at [261].

219 See, for example, Office of the Ombudsman, above n 178.

220 Joseph, above n 71, at [24.4.10(1)].

221 See, for example, *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 86, [2013] 2 NZLR 297. See also Robin Cooke "Fundamentals" [1988] NZLJ 158; Lord Cooke "The Dream of an International Common Law" in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia*

A New Zealand court considering whether to recognise the public law duty argued for in this article should readily draw from its common law counterparts, including Ireland.[222] Recognition would, in turn, allow New Zealand to contribute further to the developing jurisprudence in this area across the common law world.

Fundamentally, a general duty to provide reasons flows from the requirements on decision-makers to act fairly and in accordance with natural justice. There is no principled reason for not recognising a presumption that reasons will be provided to affected parties. An affected person should not be kept in the dark and left mystified about why a particular decision affecting them has been reached. Absent special reasons for withholding these, affected persons ought to have a right to receive an explanation of why decisions impacting them have been reached.

A common law duty to provide reasons can and should be flexible in its application and scope, but specific enough to be easily applied by both public decision-makers and courts. In this way, the duty would be clear and workable without being onerous on decision-makers, including non-state decision-makers exercising public functions. Its flexibility also offers tangible advantages over the existing statutory procedure.

Elias CJ's caution in *Lewis* is understandable. There are legitimate fears of unintended consequences flowing from recognition of a new public law obligation and, as with any new common law doctrine, such an obligation will inevitably require continued interpretation by the courts as potentially troubling aspects are worked through.[223] However, the support for recognition identified in the judicial, academic, and legislative sources outlined, coupled with the generally accepted requirements of natural justice, will provide sufficient assistance and support for courts when identifying and clarifying this area of law.

The absence of a common law duty in New Zealand to date is regrettable, and has left an odd gap in the "culture of justification" that permeates New Zealand's public law framework.[224] This comparison of New Zealand's existing legal landscape with the approach recently taken by the Irish

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(Federation Press, Sydney, 1996) 136 at 142–145; and similar articles referred to in Tim Cochrane and Elizabeth Chan "'The Lord Cooke Project': Reviewing Lord Cooke's Extrajudicial Writing" (2013) 44 VUWLR 247 at 252–254.

222 See also the jurisdictions referred to at n 162.

223 One particular problem is *ex post facto* manufactured reasons, that is, where decision-makers produce reasons following a request that appear to differ from those in fact relied on in support of their decisions, a point raised by the blind referee to this paper. If the risk of this is known in advance, fairness may dictate reasons be provided along with the decision concerned. However, the possibility of this problem remains, as arose recently before the English Court of Appeal: *Lanner Parish Council v The Cornwall Council* [2013] EWCA Civ 1290.

224 See Butler and Butler, above n 166; Glazebrook "To the Lighthouse", above n 167, at 52 and n 291; and Elias "Living People", above n 112, at 64.

Supreme Court demonstrates that the time is ripe for the New Zealand common law to recognise a general public law duty to provide reasons. It is hoped that a court will heed Elias CJ's urging in *Lewis*, and recognise this duty at the earliest available opportunity.