

Costs in criminal cases: ridiculously ultra vires?

M. B. Rodriguez Ferrere, University of Otago,
proposes revision of the Regulations

Justice Fogarty's judgment on costs in *Carruthers v Otago Regional Council* [2014] NZHC 2212 is the latest to highlight the significant deficiencies in the Costs in Criminal Cases Regulations 1987 and makes the case for their urgent revision.

BACKGROUND

Carruthers involved proceedings against an Otago farmer for digging a river bed and allowing his livestock to disturb the bed in contravention of s 13(1)(b) of the Resource Management Act 1991 (RMA). In July 2012, Mr Carruthers was convicted in the District Court on two charges of contravening s 13 and was fined \$5,400. He appealed to the High Court against these convictions, essentially arguing that the stream was not a 'river' for the purposes of the RMA and therefore his actions did not contravene s 13 of that Act.

In the High Court (*Carruthers v Otago Regional Council* (2013) 17 ELRNZ 156), Fogarty J allowed Mr Carruthers' appeal, holding that the stream was an 'artificial water-course' and thus excluded from the RMA's definition of 'river'. Subsequently, Mr Carruthers applied to the Court for an award of costs against the Otago Regional Council under s 8 of the Costs in Criminal Cases Act 1967 (the Act).

In his subsequent judgment on costs, Justice Fogarty accepted that the substantive proceedings and the appeal "was a particularly complex application of the RMA" (at [3]): the case involved experienced counsel, an unusual site visit by the trial judge and several sophisticated issues of mixed law and fact. Accordingly, under s 8(6) of the Act, since the appeal involved a "difficult or important point of law", the Court had the power to award costs, and Fogarty J favoured the exercise of that jurisdiction. This left only the issue of quantum. Section 8(1) of the Act gives the Court the discretion to "subject to any regulations made under this Act, make such order as to costs as it thinks fit." The problem, as Fogarty J discovered, is that the Costs in Criminal Cases Regulations 1987 (the Regulations) fixed costs at levels that were no longer reflective of the actual costs in bringing an appeal. As Fogarty J stated (at [12]):

The regulations were last updated in 1987. The amount prescribed in respect of an appeal against conviction is \$240 and for appeal against sentence \$136. These amounts are now 27 years out of date. The sums for an appeal against conviction is [sic] now ridiculous, measured against the value of \$240 in 2014 as compared to that sum in 1987.

A RIDICULOUS SITUATION

In fact, the levels are slightly worse than Fogarty J stated, with Schedule 1 of the Regulations prescribing \$226 for each

half day in Court in an appeal against conviction and \$130 for appeals against sentence only. The levels are the same for appearances at trial. Moreover, the Regulations have actually been amended twice since their promulgation in 1987. The first amendment occurred a year later in 1988. Those amendment regulations increased the levels of costs from the original (\$213 and \$107 respectively) to what they are today; they are instead only a mere 26 years out of date. What serves to make the situation truly ridiculous is the second amendment to the Regulations, which occurred in 2013 and 25 years after the first amendment. Those amendment regulations were a consequence of the changes in procedure caused by the Criminal Procedure Act 2011. This amendment provided an ideal opportunity to revisit the levels of costs, but it was not an opportunity seized. As per the explanatory note that accompanied the Costs in Criminal Cases Amendment Regulations 2013, the amendments were simply to harmonise procedure, and "[t]here is no change in the amounts payable as fees."

The reason the levels have not increased in 26 years is unclear, but Fogarty J is certainly not alone in his criticism. In 2000, the Law Commission issued a report on Costs in Criminal Cases (NZLC R60). The Commission noted that there "has been frequent judicial criticism that the scale is unrealistic to cover the actual costs incurred by defendants" (at 28). This led to a recommendation, at 2, that:

There should continue to be a scale of costs under section 13, but it should be modelled on the new civil rules costs structure, which would provide adequately for preparation costs, and be updated regularly.

The Commission's recommendation was never followed. Since the 2000 report, the judicial criticism to which it alludes has only increased in frequency and ferocity. The Court of Appeal in *Page v Page* [2008] NZCA 80 noted, at [25], that as:

... has been remarked on a number of occasions over the years, the scale of costs appearing in the Regulations has long since been well overtaken by inflation and other factors and requires to be substantially increased ... before it could represent what is "just and reasonable" in the circumstances of most cases.

As the Court of Appeal noted, the District Court in the same proceedings was slightly more forthright, referring to the scale as "abysmally low" (at [12]).

The severity of the situation is clear once contrasted with the applicable scale in civil proceedings mandated by the High Court Rules, which were — for further contrast — recently updated in 2012. Category 1 proceedings, namely

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those “of a straightforward nature able to be conducted by counsel considered junior in the High Court” (r 14.3(1)) are afforded a daily recovery rate of \$1,320. Category 3 proceedings — those requiring counsel with special skill and expertise — are afforded a rate of \$2,940. In *Carruthers*, the appellant retained Colin Withnall QC, one of New Zealand's most experienced barristers who, incidentally, took silk in 1988, the same year as the Regulations were last amended. From Fogarty J's judgment, it is clear his expertise and experience was necessary given the significant complexity of the issues involved; the proceedings might have been category 3 in the Court's civil jurisdiction. However, since they were instead in the Court's criminal jurisdiction, the appellant could only recover costs at 15 per cent of that rate.

Obviously, the rationale behind costs in civil proceedings is vastly different from that in criminal proceedings. This is highlighted by the High Court Rules' principle that the unsuccessful party pays the costs of the successful party (r 14.2(a)) in contrast to the Act's explicit statement that there is no presumption for or against awarding a successful defendant costs (s 5(3)). Awarding costs to successful defendants in criminal proceedings is a significantly more vexed question than in civil proceedings, if for no other reason than difference in evidential burdens means that success is more difficult in the former. However, the Act recognises this issue and accordingly makes clear that “no defendant shall be granted costs...by reason only of the fact that he has been acquitted” (s 5(4)). The decision to grant costs to a successful defendant is entirely discretionary, and a defendant is obliged to provide good reasons why the Court should exercise that discretion in his or her favour. To this extent, the Act compensates for the different factors at play when awarding costs in criminal proceedings, such that the disparity between the levels remains unjustified and not explained by those different factors. In any case, as discussed below, the Court does not appear to see that difference as an insurmountable barrier to making an analogy. Moreover, from a different perspective, if the increase of the 1988 amendment regulations — \$13 per half day — was continued year on year, the amount specified in the Regulations would now be \$564 per half day, and thus similar to that of category 1 proceedings, showing that that current rate is deficient regardless of the benchmark adopted.

FORCING THE COURT'S HAND

The Court is not completely restricted to the scale set by the Regulations; s 13(3) of the Act allows the Court to make an order for costs in excess of that scale when satisfied that the case is especially difficult, complex or important. It seems that frequently, however, the inadequacy of the scale costs provided by the Regulations forces the Court's hand to invoke s 13(3) in situations where those criteria are not necessarily met. The Law Commission found that in the 22 cases between 1996 and 2000 where defendants were successful in applying for costs against the Crown, 18 of the awards were in excess of scale (at 17). It seems contrary to the rationale of the s 13(3) exception that 80 per cent of cases were of special difficulty, complexity or importance. Instead it seems more likely that the Court instead uses 13(3) as a way of avoiding the injustice of applying anachronistic regulations.

In *Carruthers*, Fogarty J invoked s 13(3) to grant costs in excess of scale, although given the complexity of the issues involved, this was arguably exactly the type of proceedings

envisaged by that exception. In determining the appropriate quantum, any distinction between the rationale for costs in civil proceedings and criminal proceedings — as detailed above — was ignored. Mr Withnall QC argued that two-thirds of the defendant's actual costs was an appropriate amount, that being the “theoretical benchmark” of costs in civil proceedings (at [15]). Justice Fogarty agreed to an extent, holding that “[t]hese proceedings under the RMA are similar to civil proceedings, less so to ordinary criminal proceedings” and “[w]ithout directly applying the two-thirds rule”, he awarded the defendant \$4000: well in excess of the scale provided by the Regulations (at [16]–[17]).

Might the state of the Regulations force the Court's hand in another way? The importance of *Carruthers* is that for the first time the Court questioned the validity of the Regulations directly. Justice Fogarty states, at [12], that: “Regulations could not be made today in these amounts. They would be ultra vires.” If this is the case, the question becomes whether the scale provided by Regulations can or should retain its validity despite its increasing obsolescence.

Generally, the Court may invalidate delegated legislation (such as regulations) for several reasons, including that it is: beyond the scope of its empowering provision; repugnant to other primary legislation; too uncertain; or is unreasonable: *Conley v Hamilton City Council* [2008] 1 NZLR 789 (CA) at [45]. When applying these criteria to the Regulations it is unclear whether Fogarty J was correct in his supposition that they would be ultra vires if enacted today. The empowering provision — s 13 of the Act — states that regulations may be made for the purpose of “prescribing the heads of costs” (s 13(1)(a)) and the “maximum scales of costs” (s 13(1)(b)) that can be awarded. This empowering provision does not indicate that these regulations must prescribe scales of costs that are fair or accurate and nor does the Act itself indicate that this is one of its purposes; simply that it will prescribe amounts. This means that as they currently stand, the Regulations appear to fall within the four corners of their empowering provision. Moreover, the Regulations appear to be sufficiently certain and do not undermine other statutes such that they are repugnant to primary legislation. The inadequacy of the levels the Regulations prescribe might lead one to conclude they are unreasonable, but the test for unreasonableness is that regulations are “beyond the limits of reason”: *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131. Whilst clearly inadequate and perhaps ridiculous, it is unlikely that the Regulations and the amounts they prescribe are beyond the limits of reason: simple disagreement with the scale, even if widespread, frequent and vehement, is insufficient to meet the threshold of this criterion.

Assuming for the moment, however, that the Regulations — if enacted today with the same amounts — would be ultra vires, a more significant problem is that given the amounts they prescribe were sufficient in 1987, they were clearly intra vires when they were first promulgated. That likely means there is little the Court can do with them today, since there is no apparent authority for the proposition that a Court has the ability to invalidate delegated legislation that has *become* ultra vires simply through the passage of time. The Court's supervisory power over delegated legislation focuses on its promulgation; the executive's action in using legislative power delegated to it by Parliament. This means that once promulgated validly, delegated legislation ought to retain its validity ad infinitum. Accordingly, the Court does not appear to have

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the power to attack the Regulations directly, which is perhaps why all it has done thus far is complain.

A POTENTIAL AVENUE FOR REDRESS

The inability of the Court to review or amend validly promulgated delegated legislation is not the end of the matter. Where the Court lacks this power, Parliament possesses it, and its Regulatory Review Committee would be the appropriate body to review the Regulations and determine whether they are still fit for purpose. Under Parliament's Standing Orders, the Committee can hear complaints about existing regulations on a number of grounds, including that they are "not in accordance with the general objects and intentions of the [empowering] statute" (SO319(2)(a)). This is a broader test than that which the Court adopts to determine whether

delegated legislation was validly promulgated, and allows the Committee to question whether the general intention of the Act was to allow the amounts to remain so low such that they are now commonly derided. The Committee can then report to the House and make non-binding recommendations to Government if it concluded that revision is necessary.

Justice Fogarty's decision in *Carruthers* simply adds another voice to the chorus voicing dissatisfaction with regulations that have been left fallow for 26 years. Whilst it is unlikely that the Court could invalidate the Regulations directly, this does not in any way detract from the fact that they are currently unacceptable, and need to be revised as soon as possible to reduce their unfairness, injustice and ridiculousness. □

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As *W* and other scenario technique examples demonstrate, however, significant pressure can be created outside of custody. Given that the decision to detain is a police one and (subject to funds) is not necessary if the equivalent of an interrogation can be completed in a non-custodial setting, this would seem an odd distinction to make. Such improper conduct can be avoided if undercover questioning is limited in whatever setting to an essentially investigative purpose. In those circumstances any confession would have the appearance of being essentially voluntary.

This distinction may be possible to draw under the current law explicitly in rights terms. In *R v Allen* (HC Rotorua CRI-2007-087-1729, 10 February 2009) the High Court observed that while the NZBORA does not explicitly recognise a common law right to silence, s 28 of the NZBORA recognises that existing rights or freedoms shall not be held to be abrogated or restricted by reason of non-inclusion in the NZBORA and accordingly a broader right to silence can

co-exist with the statutory right. Even if it must continue to be done under an "unfairness" rubric, right to silence considerations provide a powerful reason that the decision in *W* should not be limited.

In hearing the appeal in *W* the Supreme Court is likely to deal with several features of the scenario technique which may cause concern apart from the right to silence. Whether strictly cognisable as legal objections, a number of features of the technique might be of interest to the public, such as the significant police resources deployed in such operations, factors concerning state use of psychological pressure and the potentially lasting effect on the life trajectory of a conceivably innocent person.

It should be noted, however, that there is a High Court order in the *W* proceedings under s 205 of the Criminal Procedure Act 2011 for suppression of evidence and submissions, although the earlier decision in *R v Cameron* [2009] NZCA 87 appears to be publicly available and does not appear to be suppressed. In Canada the use of the scenario technique is public knowledge and subject to public discussion. □