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**The Impact of Incorrect Problem Identification on New
Zealand Sign Language Reform**

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Abstract

New Zealand Sign Language (NZSL) is the first language of the New Zealand Deaf community. The first attempts to protect the language were through the New Zealand Sign Language Act 2006 which officialised the language. The secondary purposes to promote and maintain the language have not been realised. The fundamental barrier to achieving effective reform around NZSL, is incorrect problem identification. The misunderstood identification issue stems from a perception of Deaf as disabled limiting the potential effectiveness of reform towards NZSL. This approach neglects to view the debate around New Zealand Sign Language as a prominent and fundamental issue linguistically and culturally. In doing so, language mechanisms are not utilised in situations where they otherwise might. This paper seeks to uncover the impact that the incorrect problem identification has had on New Zealand Sign Language both on the Deaf Community itself, as well as in relation to stages of the law reform process aimed at quality decision making. Reform through legislation or policy needs to be implemented to ensure the languages survival. This will not occur unless the issue is placed within a cultural linguistic framework recognising Deaf as a Culture and not as disabled. It is submitted that a national languages policy should be developed to guide and legitimise the sign language issue.

Key Words: law reform; New Zealand Sign Language; problem identification.

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I Introduction

First, last, and for all time, the people of the eye.

George Vedlitz 1910¹

Law reform is a function of upmost importance, with regulation pervading all throughout society.² What is regulated, its design and its operation, is influential in citizens lives.³ The perception of law reform has from one of ‘change’ to ‘change for the better.’⁴ Reform, in law and policy, usually emerges from demand to rectify a problem or issue.⁵ Identification of the problem or issue, and understanding this issue, is the most important aspect of law reform. The identified issue is the backbone of decision making, as recognised in the Legislation Design Advisory Committee (LDAC) Guidelines 2014 stating principles of best practice for quality legislative design.⁶ A flaw at the problem identification stage can negatively impact the whole law reform process including the consultation undertaken, the eventual drafting of provisions and the overall outcomes of the reform itself.

The effects of incorrect, and perhaps shifting, problem identification can be demonstrated by analysing the process of the New Zealand Sign Language Act 2006 (NZSL Act) and the subsequent regulation of New Zealand Sign Language (NZSL). NZSL is the first language of the New Zealand Deaf community. This community includes not only individuals who suffer a form of hearing loss, but also hearing members.⁷ There was a perceived need by the Deaf community for this language to be recognised by Government and protected due

¹ Cited in Rachel McKee *People of the Eye: Stories from the Deaf World* (Bridget Williams Books, Wellington, 2001) at 17

² Geoffrey Palmer “Law-making in New Zealand: is there a better way?” (Annual 2014) 22 Wai L Rev. 1 at 3.

³ Susy Frankel and John Yeasley “Introduction” in Susy Frankel (ed.) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 1 at 2.

⁴ Michael Kirby “Law Reform, Why?” (1976) 50 ALJ 459 at 460.

⁵ Marcia Neave “Law Reform and Social Justice” in Brian Opeskin and David Weisbrot (eds.) *The Promise of Law Reform* (The Federation Press, Sydney, 2005) 358 at 361-362.

⁶ Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation 2014 edition <<http://www.ldac.org.nz/assets/documents/LAC-Guidelines-2014.pdf>> at Chapter 1.

⁷ Above n 1 at 11.

to gaps in law that did not protect them in specific situations, for instance in police interviews.⁸ Due to historical marginalisation of those with hearing impairments, and the language itself, NZSL was relegated to a position of inferiority contributing to the oppression of the Deaf community. In 1999, after approximately twenty years of lobbying, the new Labour government of New Zealand promised to recognise NZSL in their party manifesto,⁹ marking the first time many Deaf individuals had been involved in the law reform and policy process.¹⁰ Through the NZSL Act, NZSL was made an official language of New Zealand. Despite the increased status of NZSL, the Act is largely perceived as being merely symbolic, with the objectives of the Act largely having not been met.¹¹ NZSL use has declined since 2006, and there remains a lack of substantive enforceable language rights for the Deaf community.¹² With the exception of the establishment of the New Zealand Sign Language Board in 2015, the approach towards NZSL promotion and maintenance has remained largely unchanged.

There is a lack of active appreciation for the problem that continues to exist around the promotion and maintenance of NZSL. Acknowledging the issues that plagued the first law reform process, and the similar problems that continue to be suffered by the Deaf community should evoke some response that change for the better is needed. An attempt to highlight this need will begin with an introduction to the NZSL Act itself, and what was achieved as a result of its enactment. The fundamental barrier to achieving the stated objectives of the Government, as well as the Deaf community was that the problem identification was rooted in the misconception that Deaf is a disability rather than a culture.

Viewing Deaf as a disability leads to a flawed approach towards the promotion and maintenance of NZSL. Unnecessary barriers are created towards proposals that could

⁸ Rachel Locker McKee “Action pending: four years on from the New Zealand Sign Language Act 2006” (2011) 42(2) VUWLR (Online) 277 at 108-109.

⁹ Honourable Ruth Dyson Minister for Disability Issues “Government to recognise NZ Sign Language” (*Media Statement*, 24 October 2003, beehive.govt.nz).

¹⁰ Rachel Locker McKee “The Eyes Have It! Our Third Official Language: New Zealand Sign Language” (2002) 4(5) *Journal of New Zealand Studies* 129 at 134.

¹¹ Above n 8 at 114.

¹² At 287-289.

promote and maintain the language more effectively.¹³ NZSL is perceived as merely one tool in achieving access for hearing impaired people. This fails to acknowledge what the Deaf community and Deaf culture actually is, as more than a group of people experiencing hearing loss. Placing the NZSL issue within a disability framework minimises the rights of the Deaf community to their language. Justifications for costly measures aimed at promoting and maintaining NZSL are blocked as other mechanisms, like access technologies, are perceived to achieve what sign language can for those with hearing impairments. As a result of this flawed problem identification, minimal enforceable legislative provisions were established in the NZSL Act, with the languages protection placed within the disability sector.¹⁴ Effective and efficient reform will not be achieved until and unless the underlying perception of Deaf as a disability rather than as a culture is eliminated. Recognising Deaf as a culture will place NZSL issues as a language rights and recognition issue, helping to frame the issue in a way that aligns more with the stated needs and wants of the Deaf community, that continue to be expressed.

The incorrect problem identification created further barriers to processes within the law reform and policy process aimed at creating quality decisions. The Deaf community were afforded participation into the law reform process through consultation. However, important questions are raised as to whether or not the consultations were approach in most appropriate way for the community with which they were conducted. Significantly, while NZSL users were consulted with in relation to problem identification, the approach towards the language was rooted within disability which is not how NZSL users view themselves.¹⁵ In addition, many of the problems participants raised at the beginning stage, continue to be problems post enactment and post review. Just as the law reform process began with the wrong issue identification, so was the consultation process. Beginning consultation with a flawed and misunderstood conception prevented, and will continue to prevent information

¹³ Harlan Lane “Do Deaf People Have A Disability?” (2002) 2(4) Sign Language Studies 356 at 368.

¹⁴ For example no commission or board, and minimal enforceable rights.

¹⁵ Above n 1 at 11; Patricia O Dugdale “Being Deaf in New Zealand: A Case Study of the Wellington Deaf Community” (Doctor of Philosophy in Applied Linguistics thesis, Victoria University of Wellington, 2000) at 163-164.

that the Deaf community could convey and contribute to better quality decision making.¹⁶ Flawed issue identification also impacted on an effective post-enactment review process. Despite a mandatory statutory review revealing the Act had not achieved its stated objectives, no changes were recommended. A similar outcome was discovered in a Human Rights Commission inquiry into the language which arguably kick-started the establishment of the NZSL Board. This raises questions into effective reviews of legislation post-enactment, and how this might be better conducted with regards to the Deaf community in particular.

There is an identifiable problem that deserves to be addressed at the governmental level. To do so, it is essential to change the approach taken towards, and the perceptions of, NZSL. A complete rethinking of the strategy towards NZSL is needed. Possible mechanisms to better protect, promote and maintain the language will be considered. One avenue for change is to place the language within a framework that recognises and guides the importance of language rights and recognition as distinct from, but aided by the disability access rights. The placement of the language within the disability sector confuses the fight for language rights and recognition. The placement of the recently established NZSL Board within the disability sector could limit the success the Board could have in promoting and maintaining the language. Enforceable language schemes within the public sector could aid the change in perception of the importance of NZSL both to the Deaf community but also to wider society. To fundamentally effect change however, a national languages policy would be needed both to legitimise and justify proposed mechanisms towards NZSL for Deaf culture, but also to change wider society's perception of NZSL and the Deaf community.¹⁷ Recognising NZSL within this national language policy would separate the issue from the disability focus on access and will promote the change that the

¹⁶ Mark Bennett and Joel Colon-Rios "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 52-53.

¹⁷ Jennifer Rayman "Why doesn't everyone here speak Sign Language? Questions of language policy, ideology and economics" (2009) 10(3) CILP 338 at 345; Report of the New Zealand Sign Language Inquiry *A New Era in the Right to Sign: He Houhanga Rongo te Tika Ki Te Reo Turi* (Human Rights Commission: Te Kāhui Tika Tangata, September 2013) at p65.

Deaf community thought was going to occur with the enactment of the NZSL Act over eleven years ago.

II The New Zealand Sign Language Act 2006

A Foundations of the NZSL Act.

NZSL has historically been viewed as inferior language, with the community itself designated to a category of ‘disabled.’¹⁸ Historical oppression has systematically affected the educational and earning status of Deaf individuals.¹⁹ After twenty years of grassroots lobbying by the Deaf community, NZSL and Deaf rights finally gained government attention.²⁰ The Deaf movement was aided successfully by the disability movement, who were at the same time heavily advocating for increased access rights recognition. The roots of the NZSL Act can be traced to the 1999 Labour Party manifesto with the promise to ‘recognise New Zealand Sign Language as an official language’ as well as establish a new ministerial portfolio for disability.²¹ International pressure was also placed on the government through a less than favourable review on New Zealand’s implementation of the International Covenant on Civil and Political Rights criticising in particular New Zealand’s protection of languages.²² Problem identification for the NZSL Bill began with consultation with the Deaf community after the development of the 2001 Disability Strategy. The Disability Strategy aimed to produce an enduring framework to ensure that government departments and other government agencies considered disabled people before making decisions.²³

¹⁸ Leila Frances Monaghan “Signing, Oralism and the Development of the New Zealand Deaf Community: An Ethnography and History of Language Ideologies” (Doctor of Philosophy in Anthropology partial fulfilment dissertation, University of California, Los Angeles, 1996) at 6.

¹⁹ Above n 1 at 14.

²⁰ Above n 8 at 280; Hon Ruth Dyson (22 June 2004) 618 NZPD 13774.

²¹ At 280.

²² Above n 9 at 3.

²³ *The New Zealand Disability Strategy: Making A World Of Difference – Whakanui Oranga* (Minister for Disability Issues, April 2001) at 19.

B The New Zealand Sign Language Act.

The stated purpose of the NZSL Act was to make NZSL an official language of New Zealand and to promote and maintain the language.²⁴ The Bill was to provide clarification of the legal status of NZSL, and place the language on equal footing as other languages.²⁵ Gaps in New Zealand's laws were identified as inadequately protecting Deaf people's right to use their language.²⁶ Legislative models for language recognition around the world were considered, ranging from a simple statement in constitutional laws, to detailed provisions relating to health, education, justice, social services and community participation.²⁷ In contrast to Britain's approach towards British Sign Language (BSL), it was considered that a policy statement would not resolve the difficulties relating to the legal status of NZSL in New Zealand.²⁸ Officialising the language would, it was stated, entitle Deaf individuals with a legal right to an interpreter in all situations. To enable the Bill to pass through the House, it was necessary to expressly state that making NZSL an official language of New Zealand would not affect the status of te reo Māori and English, nor diminish the status of other minority languages in New Zealand.²⁹

The promotion and maintenance of NZSL through the Act is enabled through four mechanisms. The first is raising the status of the language to an official language.³⁰ Secondly, a statutory enforceable right was provided to enable those fitting under the legislative definition of 'Deaf community',³¹ to use NZSL in legal proceedings.³² Section

²⁴ Ruth Dyson above n 20; Rachel Locker McKee and Victoria Manning "Evaluating Effects of Language Recognition on Language Rights and the Vitality of New Zealand Sign Language" (2015) 15(4) Sign Language Studies 473 at 475.

²⁵ (22 June 2004) 618 NZPD 13774.

²⁶ Cabinet Social Development Committee "New Zealand Sign Language Bill" (October 2003) Office of the Minister for Disability Issues at [5].

²⁷ At [16]-[17].

²⁸ Office for Disability Issues "History – New Zealand Sign Language Bill" (2006) Office for Disability Issues <www.odi.govt.nz>.

²⁹ Above n 23; New Zealand Sign Language Act 2006, s8.

³⁰ At s6.

³¹ At s4.

³² At s7.

7 created the only enforceable in the Act as other potential situations were considered to be already protected under the New Zealand Bill of Rights Act 1990 (NZBORA).³³ Third, the Governor General *may* from time to time, make regulations relating to interpreter competency standards or for “any other matters” as may be necessary for the Acts administration.³⁴ The Justice and Electoral Select Committee did not recommend further definition of a “competent interpreter” as interdepartmental working groups were looking into the area including officials from the Ministry of Justice, Deaf experts and NZSL interpreters.³⁵ The fourth mechanism is found under Section 9 of the NZSL Act which lays down a guide of principles that a government department should “so far as reasonably practicable” follow when exercising its functions and powers. Principles expressly stated include consultation on matters relating to NZSL, for NZSL to be used in the promotion to the public of government services and in the provision of information to the public, and for government services and information to be made accessible to the deaf community “so far as reasonably practicable.”³⁶ The purpose for this section is to promote access to government information and services for the deaf community, however, expressly the legislation also states that nothing is to be read as conferring on the deaf community advantages not enjoyed by other persons.³⁷

Section 11 was inserted into the Act after the report of the Select Committee came back to the House. This established a mandatory review provision into the legislation. The Minister for Disability Issues had to prepare a report on the operation of the Act since its commencement and whether any amendments to the scope and contents of the Act were necessary or desirable.³⁸ This review must have been made with some form of consultation with people or organisations representative of the Deaf community.³⁹ This review was

³³ Justice and Electoral Committee *New Zealand Sign Language Bill: Government Bill* (18 July 2005) at 3; Above n 29 at s8.

³⁴ NZSL Act 2006, s13.

³⁵ At s13(1).

³⁶ At s9(1).

³⁷ At s9(3).

³⁸ At ss11(a) and (b).

³⁹ At s11(2).

reported to the House of Representatives in 2011.⁴⁰ Additional reporting from the responsible Minister “may from time to time” be made on the progress in implementing the Section 9 principles. This report could be included in any report on progress being made in implementing the New Zealand Disability Strategy.⁴¹

C The effect of the NZSL Act

The NZSL Act was revered around the world for being forward on human rights and is still looked at by Deaf organizations around the world, mainly the processes that were gone through in order to get the Act where it was.⁴² This was the first time that the Deaf community were involved in the law reform process with amendments made throughout the process to enable enhanced participation of the community. For example, the Justice and Electoral select committee were informed by Deaf community members with instructions for submitters made available in NZSL web clips administered by the ODI, and the committee received submissions in writing, and in NZSL on videotape. To make the proceedings accessible to all participants, sign language interpreters and video-conferences were arranged.⁴³ The Act was an important component of the attitudinal change needed to bridge the divide that limited deaf individual’s ability to participate in society fully.⁴⁴

The main benefit has been symbolic affirmation of Deaf people’s status as a language community and heightened public awareness of NZSL. The Act gives validity to NZSL users as citizens and enables more of a platform for the Deaf community to demand at the very least, the accessibility of government services.⁴⁵ Legal status for NZSL laid down

⁴⁰ Office for Disability Issues *New Zealand Sign Language Act Review 2011* (Ministry of Social Development, ISBN 978-0-478-33538-5 Online, September 2011).

⁴¹ Above n 34 at s10.

⁴² For example the NZSL Act was used as a starting point in getting the BSL (Scotland) Act 2015 started and through the legislative process.

⁴³ McKee above n 8 at 281.

⁴⁴ At 286

⁴⁵ At 286.

potential foundation for the administrative extension of NZSL access to education, social services, and other domains that present language barriers, although this requires further policy effort and political will.⁴⁶ There is a clear stance in the Act, as well as throughout debate and the select committee report for the Bill that further rights and obligations would be set out through the policy process. Unfortunately, to date this extension of rights has not taken place. The mandatory review reported in 2011 found that the Deaf community were still struggling with their language rights since the enactment of the Act.⁴⁷ NZSL use has been declining since 2006⁴⁸ indicating that the Act, nor the approaches taken towards the promotion and maintenance of the language since then, have been unsuccessful.

III Incorrect problem identification – Limits for effective reform

The NZSL Act gave the Deaf community the opportunity to be included and given appropriate access into the law reform and policy process in New Zealand. Access was afforded by amending steps within the process for Deaf people. Deaf were afforded access in consultation processes as well as House of Parliament readings on the NZSL Bill.⁴⁹ In addition, the select committee process was completely changed in order to accommodate those with hearing impairments. David and Rachel McKee, two lecturers at the Deaf Studies Unit at Victoria University assisted the Justice and Electoral Select Committee to understand the submissions made and the issues raised. Deaf individuals were afforded the ability to write in, video in NZSL, or talk to the select committee in their own language for the first time.⁵⁰ Despite the access afforded to the Deaf community, the purported objectives for the Act have not been realised. While there are many barriers affecting law reform, the most fundamental barrier towards effective reform for NZSL is the issue of incorrect and misunderstood problem identification.

⁴⁶ Rachel Locker McKee and Victoria Manning “Evaluating Effects of Language Recognition on Language Rights and the Vitality of New Zealand Sign Language” (2015) 15(4) Sign Language Studies 473 at 479.

⁴⁷ Above n 40 at [121].

⁴⁸ *A New Era in the Right to Sign* above n 17 at 29.

⁴⁹ (22 June 2004) 618 NZPD 13774.

⁵⁰ Above n 10 at 134.

Instead of viewing the promotion and maintenance of NZSL as a prominent and important issue linguistically, the language has been relegated a second rate status compared to access technologies such as cochlear implants. Viewing Deaf as a disability is to see the community as a people who have a disadvantage physically that they must overcome in order to be able to live their ‘fullest lives.’⁵¹ In comparison, te reo Māori has been promoted not only within government, but also in broadcasting and television as the fundamental understanding of the linguistic importance of the language to the Māori culture has been appreciated and understood. Had the process started from this fundamental understanding then more enforceable obligations would have been developed, or at the very least a language board would have been established at the point of enactment. Instead, the language still continues to be regulated within the disability policy sphere which continues to confuse the importance of access technologies, with the language itself. This is important as increased promotion of language technologies threatens the language itself. For example, mainstream schooling has eliminated one of the most important transmission sites for NZSL, the school playground,⁵² with Deaf individuals increasingly not being exposed to NZSL until later on in life.

Recognising Deaf as a culture would assist towards legitimising and justifying proposed mechanisms to protect NZSL. It would recognise the importance of maintaining the language as fundamental to Deaf culture.⁵³ Approaching the issue as one of disability essentially limited the scope of possibilities for protecting and promoting NZSL in a wider transformation of society as the importance of these language mechanisms were understated and not understood.⁵⁴ Placing the issue in the disability policy sphere confuses the concerns towards NZSL within government and the wider hearing society. As hearing people often hold basic misunderstandings

⁵¹ Harlan Lane “Do Deaf People Have A Disability?” (2002) 2(4) Sign Language Studies 356 at 365.

⁵² Above n 1 at 18.

⁵³ Wai 11 “Report of The Waitangi Tribunal on The Te Reo Maori Claim” (April 1986) Te Rōpū Whakamana i te Tiriti o Waitangi, Department of Justice, Wellington, New Zealand at 44.

⁵⁴ *A New Era in the Right to Sign* Above n 17 at 65.

about the nature of sign languages, including the misconception that NZSL is inferior, having NZSL issues within the disability spheres confuses the issue more.⁵⁵ Better outcomes will only be possible once the ‘deafness as a disability’ mentality is challenged and the importance of language rights equal to, or greater than that of access technologies is recognised. It is only until then that Deaf individuals will be enabled to live their fullest lives and to make the fullest contribution that they can to our diverse society.⁵⁶

A Problem Identification and law reform

The first stage of policy analysis and law reform is the identification of the ultimate, practical objective of the policy and to determine what practical changes are needed in the real world to achieve that objective.⁵⁷ The objective of a Bill is its backbone and should be identified early in the development process.⁵⁸ The LDAC Guidelines, representing ‘best practice’ in relation to the development of legislation, state that the broad underlying objective, the policy the bill is implementing or the reason for it, should be identified before substantive work starts. This broad objective must be clear to everyone working on the bill because best practice dictates the provisions of the bill which aim to affect the outcome of the bills purpose. The provisions of the proposed legislation should be consistent with its purpose and the policy that underlines it.⁵⁹ The first question to ask in relation to any proposed Bill, or policy change should be: why is this [law] necessary?⁶⁰ Drafting of regulations is problematic when completed under unsound instructions as to policy as the end result will be provisions suited to meet and remedy the stated issue, rather than the

⁵⁵ Above n 50 at 358.

⁵⁶ Harlan Lane “Ethnicity, Ethics, and the Deaf-World” (Summer 2005) 10(3) J. Deaf Stud. Deaf Educ. 291 at 292.

⁵⁷ Above n 2 at 11; Michael Zander *The Law-Making Process* 7th ed. (Hart Publishing, Oxford and Portland Oregon, 2015) at 8.

⁵⁸ Above n 6 at [1].

⁵⁹ At [1.2]-[1.5].

⁶⁰ Above n 2 at 5 ;Richard Ekins and Chye-Ching Huang “Reckless lawmaking and regulatory responsibility” (2011) 3 NZLR 407 at 411.

actual problem at hand.⁶¹ Clarity can be achieved through a “rigorous definition of the problem” can achieve clarity for the overall reform project.⁶² Clarity however, is ineffective if the root cause of the problem is misidentified.

1 NZSL Bill problem identification – Community Aspirations

The problem identification for the NZSL Bill derived from the objectives of the 2001 Disability Strategy and the consultation findings with the deaf community.⁶³ From the community consultation emerged three themes;⁶⁴

- (1) Low awareness of Deaf people within the state sector and wider society,
- (2) Poor access to government services and discrepancies between the ways in which deaf people and government agencies perceive the accessibility of government services for deaf people and;
- (3) Inadequate funding and development of sign language interpreters.

The Deaf community’s aspirations were dual, for official recognition of their language and for better access to public services and information through NZSL.⁶⁵ The problem identification above led to the implementation of the Bill, the purpose of which was to make NZSL the third official language of New Zealand. Promotion and maintenance of the language were further stated objectives for the proposed Act.⁶⁶ Community support for the recognition of the language was motivated to restore esteem to NZSL users through linguistic and cultural recognition. The community believed that this would be achieved through securing and implementing the right to access public services and information in NZSL, NZSL education for deaf children and that material support for the maintenance

⁶¹ Above n 57 at [1]; Above n 2 at 10.

⁶² At 3.

⁶³ Above n 1 at 280.

⁶⁴ At 280; Office for Disability Issues “History – New Zealand Sign Language Bill” (2006) Office for Disability Issues <www.odi.govt.nz>.

⁶⁵ Above n 8 at 286.

⁶⁶ Ruth Dyson (22 June 2004) 618 NZPD 13774.

and promotion of NZSL both within Deaf community and society in general would be provided.⁶⁷

2 *Misunderstanding of the “Problem”*

The Justice and Electoral Select Committee acknowledged that NZSL Bill and subsequent Act could become merely symbolic by not materially changing the status quo.⁶⁸ However, in order to stay politically acceptable the NZSL Bill had to remain largely a framework legislation.⁶⁹ Public bodies consulted expressed concern that the Bill did not move too far from the status quo due to “resource limitations”⁷⁰ leading to the Acts largely symbolic status. This approach towards the proposed Bill is in stark contrast to what the Deaf community had conveyed through consultations, and what they believed would be the outcome of the proposed Bill.⁷¹ The reluctance to approach NZSL with any real and active provisions or resources is due to this fundamental misunderstanding of Deaf as a disability and not as a culture. The costs associated towards language mechanisms were not justified as the importance for them were not acknowledged fully. To first understand how problem identification was a barrier for the Deaf community’s rights towards NZSL, it is necessary to first understand the nature of the issue itself.

B Deaf as a culture vs deaf as a disability

⁶⁷ Sheryle Beckham “Submission to the Justice and Electoral Committee on the New Zealand Sign Language Bill.”; Prasadine Cadelis “Submission to the Justice and Electoral Committee on the New Zealand Sign Language Bill.”; Diane Goodall “Submission to the Justice and Electoral Committee on the New Zealand Sign Language Bill.”; Mary Johnson “Submission to the Justice and Electoral Committee on the New Zealand Sign Language Bill.” ; Rachel Locker McKee “Accessing the Vitality of New Zealand Sign Language” (Spring 2017) 17(3) Sign Language Studies 322 at 133-134.

⁶⁸ Justice and Electoral Committee *New Zealand Sign Language Bill: Government Bill* (18 July 2005) at 6.

⁶⁹ McKee above n 10 at 134.

⁷⁰ At 134.

⁷¹ Above n 121; *A New Era in the Right to Sign* above n 17.

The Deaf community have been classified with the label of ‘disability.’ With this label they are fundamentally viewed as a group of people lacking in functions due to a loss of hearing.⁷² ‘Disability’ is not something that you have but something that you acquire.⁷³ ‘Disability’ is a classification of a physical, behavioural or mental difference from the norm that is attributed to biological causes in a particular culture in a given era, as a result of the interventions of interested parties.⁷⁴ When we identify someone as ‘deaf’ we call on a socially constructed set of meanings, one of which is that Deaf people lack a vital sense, that they have lost, or were born with a ‘loss.’⁷⁵ Society, and these classifications of Deaf individuals are the greater cause of any limitations Deaf individuals face in society, as opposed to any sensory limitation that they may have.⁷⁶

Advocating for Deaf people on the basis of their disability is to misunderstand their issues and their struggles.⁷⁷ While individuals within the disability sector are discriminated against because general social customs do not accommodate their bodies, deaf discrimination relates to what is perceived as their inferior language thus equating them more closely with oppressed language minorities. While disability movements want better medical care such as rehabilitation services, deaf people do not attach particular importance to any of these services. Deaf people cherish their interdependence with other people like them, they do not seek to be integrated into normal society but cherish their unique identity and seek integration that honours their distinct language and culture.⁷⁸ The disability framework negates the Deaf community’s protection of their culture as it regulates language with access technologies, when fundamentally the two seek to achieve different outcomes. While access technologies help those suffering from hearing loss to be included in mainstream hearing society, the Deaf language helps ‘Deafness’ and the Deaf culture to flourish without being oppressed by mainstream society. Much in the same way as the

⁷² Above n 13 at 356.

⁷³ Above n 23 at 3.

⁷⁴ Above n 13 at 363

⁷⁵ At 365.

⁷⁶ Rayman above n 17 at 347.

⁷⁷ At 345.

⁷⁸ Above n 13 at 369.

Māori culture are struggling in the predominantly Pākēha world which does not understand or fully comprehend much of the Māori culture, so too the DeafWorld struggles. By placing NZSL in the disability framework relegates the issue as a secondary option, when it should be recognised as the first and predominant option.

There are arguments that sign language will be better protected within a disability framework. Defending the Deaf community's linguistic rights needs a sound legal framework as well as a viable enforcement mechanism either domestically or internationally.⁷⁹ While there is a lack of protection for linguistic minorities, for example the express exclusion of cultural rights from the New Zealand Bill of Rights Act 1990 (NZBORA),⁸⁰ internationally and domestically there is greater protection for disabled peoples. However, as will be analysed, this framework has not worked for New Zealand Sign Language. While there may be protection more readily afforded to the disability sector this is no reason for the Deaf community to settle for their real issues to be relegated to this sector when it clearly has not been working.

By placing the Deaf community within a disability framework, they will continue to be disabled by society. The dominant perspective remains, that a Deaf child will live a 'fuller' life if they can communicate and integrate as much as possible into mainstream society.⁸¹ While the access technologies that have been made affordable are extremely important to the Deaf community, presently, these have come at the cost of language rights and recognition. Protection of NZSL acknowledges that language is fundamental to culture and is worthy of protection.⁸² The technologies providing access for the Deaf community can in fact be aided in their own objectives to properly enhance Deaf individual's lives. Indeed they are necessary in particular for those individuals who have not grown up within Deaf

⁷⁹ Andrea R Ball "Equal accessibility for sign language under the Convention on the Rights of Persons with Disabilities (Divided Loyalties: Professional Standards and Military Duty)" (Winter 2001) 43(3) Case Western Reserve Journal of International Law 759 at 790.

⁸⁰ Joss Opie "A case for including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43 VUWLR 471.

⁸¹ Above n 13 at 358.

⁸² Rachel Ka'ai-Mahuta "The impact of colonisation on *te reo Māori*: A critical review of the state education system." (2011) Kaharoa (Online) at 207-208.

culture or learning NZSL.⁸³ However, many Deaf individuals who have grown up with a cochlear implant, and without sign language have found themselves between two cultures, one hearing and the other Deaf. Many have also struggled, with cochlear implants only affording minimal hearing. Most individuals have stated that if they had learned sign language they would have fared better if not in the hearing world, in the Deaf world.⁸⁴ Fundamentally, to be Deaf is to belong to a different culture. Uplifting Deaf individuals from predominantly lower income brackets and improving their education will not come solely from providing access technology such as cochlear implants, but by recognising their culture, how they thrive and most importantly how they learn, through NZSL.

With the problem identification correctly established as a language and linguistic issue objectives towards promoting and maintaining NZSL will be legitimised, justified and ultimately implemented. This would achieve both the Deaf community's wants, and their needs towards their language and their culture that the disability framework currently used has failed to meet.

C Impact of disability identification in the NZSL Act

Placing the problem identification within a framework of disability limited the provisions of the NZSL Act in a way that would not have occurred had the correct issue been identified. Three examples of limits caused by this misunderstanding are considered. The inaccurate legislative definition of 'Deaf community,' the minimal enforceable legislative provisions established, and the lack of a language commission or board to promote and maintain the language within the policy sector.

1 Legislative definition of 'Deaf community'

⁸³ This is an argument made frequently for the promotion of access technologies over NZSL see: Ball above n 70.

⁸⁴ Ai-Media [Facebook page] For example see: <<https://www.facebook.com/aimediaAUS/>> (further links provided in Bibliography).

The struggle to fully comprehend NZSL as a culture and not a disability is most telling within the legislative definition of Deaf community, and therefore, who could avail the Act of its one enforceable provision.⁸⁵ This is found in Section 4 of the Act;⁸⁶

- (a) The distinct linguistic and cultural group of people who are deaf and who use New Zealand Sign Language as their first or preferred language; and
- (b) People who are deaf and who identify with the group of people referred to in paragraph (a).

The definition excludes hearing individuals who consider NZSL as their first language, or consider themselves as part of the Deaf World.⁸⁷ The people included in the definition are those individuals who use NZSL, and *also* suffer from hearing loss of some kind, loss which is generally equated with ‘disability.’⁸⁸ The exclusion of hearing members of the actual Deaf community was a result of the “desirability of avoiding delays and costs that could be incurred if a hearing person chose to use NZSL in legal proceedings.”⁸⁹ There is no comparative limitation in the Māori Language Act 1987 or Te Ture mō Te Reo Māori. In fact the new Act specifically states that any person, “whether or not they are able to understand or communicate in English or any other language” may avail the provision enabling the right to speak Māori in legal proceedings.⁹⁰ Primary to the aim of promoting and maintaining language, is the use of it in society in general. The approach towards Māori language recognises this, whereas in the NZSL Act the focus is on who *needs* to use the language in that situation.⁹¹ With an approach formed from this understanding of

⁸⁵ Above n 34, s4.

⁸⁶ Section 4.

⁸⁷ Above n 1 at 17.

⁸⁸ Above n 55 at 293.

⁸⁹ Above n 66 at 2.

⁹⁰ Te Ture mō Te Reo Māori 2016, s7.

⁹¹ Wai 262 “Ko Aotearoa tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuara” Vol 2 (2011) Te Rōpū Whakamana i te Tiriti o Waitangi Report at 450.

culture over disability, there would have been no reason to exclude the full ambit of the Deaf community.

2 Limited enforceable rights

Fulfilling the Disability Strategy 2001 was a key factor behind the emergence of the Act, motivated by both disability rights principles of inclusion and by language rights principles recognizing the Deaf community's language and culture.⁹² Although there were consultations with the deaf community to inform law reform process of the Bill, the misunderstanding between whether to treat the Act and issue as a language issue or one of disability is evident throughout passage of the Bill. The process itself was rooted in the viewpoint of disability, leading to many objectives or potential provisions to be overlooked or perceived to be covered by existing legislation. For example, the only enforceable rights created by the Act itself is that in Section 7 allowing those who fit under the legislative definition of 'Deaf community'⁹³ to use NZSL in legal proceedings. Other possible enforceable rights, such as use in police interviews were considered as being covered already under the NZBORA. This is misleading as NZBORA protects against discrimination, but does not promote active protection and maintenance of a language, nor place any active obligations on government for these purposes.

3 Lack of a commission or language board

While there was tremendous support for the Act, with all but one party backing the NZSL Bill, the main political drawback and point of contention were the potential costs. Costs were another main reason for the lack of enforceability provisions established, as well as the lack of a commission or board for the language.⁹⁴ In comparison, the Māori Language Act 1987 established a Māori Language

⁹² At 295.

⁹³ Above n 34, s4.

⁹⁴ Above n 66 at 5.

Commission, Te Taura Whiri i te Reo Māori.⁹⁵ This Commission was set up as a Crown entity to “initiate, develop, co-ordinate, review... in the implementation of policies...”⁹⁶ and to “generally promote the Maori language...”⁹⁷ Key functions of Te Taura Whiri i te Reo Māori are language document, promotion and support of language teaching which the NZSL Act leaves unaddressed.⁹⁸ Undeniably, there is more political motivation to fund costly activities promoting Māori language not least because of the principles of the Treaty of Waitangi, but also because a significant number of people speak te reo Māori compared to NZSL.⁹⁹ Had the process been grounded within recognition of NZSL culture and language rights, perhaps the statutory board may have been considered “necessary”. Instead, the language was relegated to the disability policy sphere with no dedicated body to protect and promote the language for nearly ten years.

D Impact of disability identification in policy post-enactment.

The continuing misunderstanding of Deaf as disabled has led to ongoing barriers for the promotion and maintenance of the language. The impact of this will be considered through four areas of concern. Firstly, the main mechanism of promotion and maintenance within the disability sector has led to shortfalls in the development of the language particularly in relation to language rights for Deaf children. Secondly, the NZSL Board, while a great step forward for NZSL, still finds itself within the disability sector and accountable to the ODI and the Minister for Disability Issues. Thirdly, the funding towards the Deaf community uncovers the limits that understanding the issue as one of disability has had, namely focussing on efforts towards access technologies over promoting the language itself.

⁹⁵ Maori Language Act 1987, ss6(1) and (2).

⁹⁶ Above n 34, s7(a).

⁹⁷ Section 7(b).

⁹⁸ Office for Disability Issues “History – New Zealand Sign Language Bill” (2006) Office for Disability Issues <www.odi.govt.nz>.

⁹⁹ Arguably more important in the political arena than any logical justification for difference.

Fourth, many Deaf New Zealanders face major barriers in regards to NZSL interpreters which would have been remedied had the proper issue been identified at the outset.

1 Indirect mechanism for monitoring promotion and maintenance of NZSL

Section 10 of the Act specifies that implementation may be monitored by the Minister via information in annual reports of government bodies on progress in implementing the New Zealand Disability Strategy, under the New Zealand Public Health and Disability Act 2000. However, implementation reports subsequent to the passing of the Act reveal that overall, little development of policy or other actions had been achieved.¹⁰⁰ Arguably this perspective also related to the fact that language actions such as a commission or a board were considered not conducive to the passing of the Act.¹⁰¹ The maintenance of NZSL within the disability sphere has led to many shortcomings that would have been identified had the issue been properly identified as a linguistic issue.

Areas lacking in development include consideration of education linguistic rights, in stark contrast with sign language recognition measures in other countries where education is the focal issue.¹⁰² For example in Sweden, sign language was legally recognised specifically to mandate the provision of bilingual education for deaf children, including support for their families to learn sign language from the time of diagnosis. In addition, the Swedish government has made available to Deaf individual's television shows and news broadcasts in sign language.¹⁰³ Arguably the push for greater recognition has come from being within Europe, as both Finland and Portugal also have recognised sign language users by

¹⁰⁰ New Zealand Sign Language Board "How well are the NZSL Act's guiding principles for government departments being implemented?" Office for Disability Issues < <https://www.odi.govt.nz/nzsl/act-2006/nzsl-act-review-2011/how-well-are-the-nzsl-acts-guiding-principles-for-government-departments-being-implemented/> >.

¹⁰¹ Above n 86 at 5.

¹⁰² Rachel Locker McKee and Hayley Reffell "Motives and Outcomes of New Zealand sign language legislation: a comparative study between New Zealand and Finland" (01 August 2009) 10(3) CILP 272 at 281.

¹⁰³ Nina Timmermans and The Committee on the Rehabilitation and Integration of People with Disabilities "The status of sign languages in Europe" (Council of Europe Publishing, April 2005) at 76.

amending their constitutions and enacting corresponding legislation.¹⁰⁴ Arguably this relates to the greater protection of human rights in relation to culture and language within Europe as compared to New Zealand's comparatively worse protection of these rights in particular.¹⁰⁵ There is no right in New Zealand for deaf children to learn their best language, NZSL, despite having official language status. While there is support for hearing families to learn sign language, there is also a push to encourage the use of cochlear implant technology. In Sweden, hearing families with Deaf children are mandated to use sign language. With the mechanism of implementation for the language in NZSL, and the shortcomings of the Act relative to advancements overseas, it is clear the main barrier to achievements for the Deaf community have come from this misunderstanding as Deaf as a disability which has ultimately limited approaches towards the language itself.¹⁰⁶

2 *Placement of the NZSL Board*

No clear policy enabling the promotion and maintenance of NZSL has been developed. One mechanism for promotion and maintenance of the language has been the annual NZSL Week which was held on the 8th to 14th May 2017.¹⁰⁷ The main achievement is the establishment of the NZSL Board in 2014 following recommendations from an Experts Advisory Group convened by the ODI in response to a Human Rights Commission inquiry into the language reported in 2013.¹⁰⁸ In addition a NZSL Fund was established to “support current government activity and support community initiatives.” Funding is allocated for projects with the specific purpose of promoting and maintaining NZSL.¹⁰⁹ While these are good steps to finally take towards the language, the Board and the fund remain within the disability policy sector, continuing to confuse the disability with culture. The actions of the NZSL

¹⁰⁴ At 80.

¹⁰⁵ Above n 78 at 471.

¹⁰⁶ Above n 101 at 281-283.

¹⁰⁷ For information on NZSL Week visit: < <http://deaf.org.nz/nzslw> >.

¹⁰⁸ Cabinet Social Policy Committee “Promotion and Maintenance of New Zealand Sign Language” (May 2014) Office of the Minister for Disability Issues; Tariana Turia *Establishment of the New Zealand Sign Language Board underway* (Media Statement, 28 May 2014, beehive.govt.nz).

¹⁰⁹ *Promotion and Maintenance of New Zealand Sign Language* above at 7.

Board are ultimately approved by the Minister for Disability Issues, and the final decisions on the allocation of available NZSL funds are made by the ODI.¹¹⁰ These recommendations were made by the Experts Advisory Group probably a result of the fact that there were no other options. A commission similar to Te Taura Whiri i te Reo Māori would not have been approved a result of cost issues and a limited amount of political clout to justify taking this step. Possible solutions to the placement of the NZSL Board are discussed in part V including a national language policy to guide and legitimise the actions of the NZSL Board within the ODI.

3 *Funding*

Confusion between disability and culture is also illustrated through the funding approaches towards technologies of normalisation such as cochlear implants, and funding for NZSL. In early 2017, the government a \$6.5million boost in funding for cochlear implants. The boost in funding for implants came after a petition from a young hearing impaired woman afraid of becoming fully Deaf as to lose her hearing completely would mean her ‘...future would be a big black hole, it would be nothing, because I won’t be able to hear.’¹¹¹ While it is for every individual to decide whether or not they want access to cochlear implants, the important aspect in this article are the sentiments of what being Deaf would mean. To be Deaf is portrayed as to live an inherently negative or inferior life, and the only way to escape this marginalisation is to be as ‘normalised’ as possible which means eliminating the ‘loss’ as best as possible.¹¹² These sentiments are similar to a medicalised model of disability and indicate that the social model advocated for within both Disability Strategies has not managed to pervade deep into wider society.¹¹³

¹¹⁰ At [30] - [44], Media Statement above n 106.

¹¹¹ Cate Broughton “Cochlear implant funding boost announced ‘long overdue’” *Stuff* (New Zealand, August 24 2017, < <https://www.stuff.co.nz/national/health/96072888/cochlear-implant-funding-boost-announcement-long-overdue> >.

¹¹² Above n 13 at 354-355.

¹¹³ Above n 23; McKee above n 10 at 133.

Looking at the funding implications in practical terms, the proposed funding for cochlear implants would only reach about 40-60 more individuals. In comparison, funding and mechanisms for promoting NZSL have the potential to reach more individuals within the community as well as the wider society. The justifications for funding differences have not been elaborated. However, it is clear that focus on normalisation technologies does not solve the inclusion issue. As discussed above, many Deaf adults have expressed that implants did not fully include them in society and their wish for greater sign language education.¹¹⁴ In addition, it is unclear how cochlear implant technologies promote and maintain NZSL itself as they do not encourage use of the language in society. This is a clear misunderstanding of Deaf as disabled and therefore to promote access into society, and Deaf as a culture and therefore to promote and maintain the use of their language.

4 *NZSL Interpreter Issues*

Misunderstanding the issue as one of disability has arguably resulted in the delays and shortfalls with NZSL interpreters. Interpreters represent an enabling mechanism for the Deaf community's assertion of their identity and agenda as a linguistic minority.¹¹⁵ The use and access of interpreters allows Deaf people's lives to change drastically. Using interpreters allows the Deaf community to align themselves with other language and cultural minorities in New Zealand which is essential to changing public perception of what 'deafness' is.¹¹⁶ Interpreters allow Deaf individuals to increase their individual autonomy as well as induce positive benefits towards education, with higher participation in higher education leading onto wider job

¹¹⁴ Above n 83.

¹¹⁵ Rachel Locker McKee "Interpreting as a Tool for Empowerment of the New Zealand Deaf Community" in Sabine Fenton (ed.) *For Better or For Worse: Translation as a Tool for Change in the South Pacific* (St. Jerome Publishing, Manchester, UK & Northampton MA, 2004) 89 at 91.

¹¹⁶ At 108.

prospects.¹¹⁷ Interpreters are part of recognising the cultural and linguistic human rights of the Deaf community.

Had the problem identification properly been grounded in understanding Deaf as a culture, then interpreter regulations and funding would have been at the forefront of any discussion about NZSL. Rather than ‘fixing’ the loss of hearing so deaf individuals can integrate as best as possible into mainstream hearing society, interpreters allow Deaf who have hearing loss to communicate with wider society using their best language. Instead, at the moment funding for interpreters to support the language is limited. There is an obligation on the government to pay for an interpreter where the situation involves a government agency, however funding in other crucial areas such as employment or health situations is limited.

Many times funding is provided for by an organisation such as Deaf Aotearoa or the Workbridge Support Fund, where the situation is employment related.¹¹⁸ Many legal services still remain unfunded by the Ministry of Justice, and were not covered by the NZSL Act, including victim support services or access to community law centres.¹¹⁹ In many situations Deaf individuals have to choose where and when they will use these services as many Deaf cannot afford an interpreter themselves. The Deaf community also view that access to interpreters is lacking, particularly in small towns. For example, while it is an obligation for the government to find an interpreter for visits to Work and Income, in small towns there are few available interpreters around, and visits to this service may have to be made sooner than an interpreter is available. Deaf individuals have indicated the need to have family members or unqualified individuals to help them in these situations. There have been inroads in

¹¹⁷ At 111.

¹¹⁸ New Zealand Sign Language Board “Who pays for sign language interpreter services?” <<https://www.odi.govt.nz/nzsl/tools-and-resources/publications/part-3-booking-and-paying-for-interpreters/who-pays-for-sign-language-interpreter-services/>>.

¹¹⁹ Above n 40 at 9-11.

this area with video interpreting services (VIS), providing online interpreting allowing further access in rural communities.¹²⁰

Recently the deaf community have publicized frustration with exclusion from the 2017 political elections. There was a campaign for funding for political discussion to be held in Auckland, however there was difficulty in finding \$600 needed to pay two NZSL translators for the event.¹²¹ Clearly the Act, nor the policy approach towards NZSL are not working if Deaf New Zealanders, more than ten years on have had to fight for NZSL to be used in general elections limiting their right to actively use their democratic rights in society. The limits faced here also indicate that the protection of NZBORA is not enough to recognise NZSL rights in other situations as was stated in the select committee report.¹²² Recent inroads into the interpreting problem have been reviewed by the ODI with a report sent out in January 2017. Whether anything eventuates from this, and how long it will take will be one to watch.¹²³ What is clear is that the approach towards the language within the disability framework is not working effectively if use of the language has decreased and Deaf individuals are still struggling with the interpreter service provided.

IV Further Law Reform Barriers

While the main law reform issue in relation to NZSL and recognising Deaf community's rights has been the incorrect problem identification, further barriers to the reform process have been identified. Both consultation processes as well as post-enactment review will be analysed in relation to the NZSL Act and the Deaf community who pose a new challenge for reformers as both an oppressed minority culturally, and individuals who want access to

¹²⁰ Fitzgerald & Associates "A review of NZSL interpreting standards developed for the NZSL Board" (January 2017) at [5.3.3].

¹²¹ Deaf Action Campaign to House of Representatives "Remove Official Language Barriers by 2020 Elections"< <https://our.actionstation.org.nz/petitions/remove-official-language-barriers-by-2020-elections?source=facebook-share-email-button&time=1505371389> >.

¹²² Above n 66 at 5.

¹²³ Above n 6.

society. It is hoped that this will shed light on how further reform in this area can be attempted to result in better outcomes for the Deaf Community.

A Consultation

According to the LDAC Guidelines, public consultation is key to ensuring that the government has all the information it requires to make ‘good’ law.¹²⁴ Consultation basically defined is the act of ensuring that information be made available to the public in a manner that enables people affected by the proposed legislation to make their views known, as well as to enhance the input of knowledge into government ideas and decisions.¹²⁵ An effective consultation programme can contribute to higher quality legislation, the identification of more effective alternatives, lower administration costs, better compliance, increased public buy in and faster regulatory responses. A failure to consult may result in valuable perspectives and information being overlooked and also risks unintended consequences. A failure to consult could result in a failure to identify alternative means of achieving a policy objective.¹²⁶ “Public engagement is not just desirable, it is a condition of effective governance.”¹²⁷

The limits of the knowledge that traditional players in the design of the law reform process is becoming increasingly recognised. The involvement of the public in the law reform and policy process it is argued, not only increases the democratic legitimacy of decisions, but also the overall outcome of the project by enabling those with practical, invaluable knowledge on the issue, into the process.¹²⁸ Consultation with the process can enhance democracy by leading to more active participation in the process, as well as enhancing transparency and accountability. It can also encourage debates leading to broad consensus

¹²⁴ At [1.4].

¹²⁵ Above n 16 at 25.

¹²⁶ Above n 6 at [1.4].

¹²⁷ Citing Donald G Lenihan (Advisor on Public Engagement to the Government of New Brunswick, Canada) in OECD Studies on Public Engagement “Focus on Citizens: Public Engagement for Better Policy and Services” (2009) <www.oecd.org/publishing/corrigenda> at 22.

¹²⁸ Above n 123 at 24-25.

either in support of, or opposition to government proposals increasing the likelihood of success.¹²⁹

As identified above, problem identification is the important first step in any law reform process, and consultation with those affected can help to shape what the particular issue is, and therefore any proposed mechanisms in response to this issue.¹³⁰ Just as any policy or legislation needs to be effective and efficient, so too does consultation in order to achieve maximum input and output from the process.¹³¹ Effective consultation, in order to gain this maximum output, involves acknowledging the barriers to the process and employing the correct mechanisms in order to overcome them.¹³² Examples of objective barriers to participation involve time, public awareness, and importantly for the Deaf community, language. Identified subjective barriers include people's lack of faith that the government will listen a low confidence in their ability to express themselves.¹³³ An OECD study on public engagement found that over three quarters of the respondents identified cultural barriers are an "important" or "most important" barrier to overcome.¹³⁴ Mechanisms to overcome these perceived barriers include building capacity, skills and knowledge to participate effectively.¹³⁵ In relation to the Deaf community, capacity and knowledge building is particularly important in order to enable full and effective engagement in matters not only pertinent to NZSL, but other reform initiatives.

1 Consultation on the NZSL Bill

The mechanism of involving the Deaf community in the law reform process was through 'consultation.' Through this mechanism the decision maker attempts to gain information and opinions from the public, with the parties affected by particular regulations given the

¹²⁹ Above n 125 at 205.

¹³⁰ Above n 123 at 32.

¹³¹ At 28.

¹³² Above n 123 at 48.

¹³³ At 49.

¹³⁴ At 50.

¹³⁵ At 52.

opportunity to express their point of view about the content of the rules that are being considered. Consultation effects a form of indirect participation into the decision making process, giving at most the participants the right to influence the decision maker through the exchange of arguments and information but their views are not binding.¹³⁶ The aim of this process is usually information gathering rather than complex discussion and is suitable where there is no desire to have citizens make a decision themselves but where the decision maker seeks information and opinions from people who usually do not participate in ordinary political processes. This mechanism of input has often been perceived as ineffectual simply being used to legitimate decisions or to give an appearance of consultation without there being any intent of acting on recommendations.¹³⁷

The ODI began consultation with the Deaf community in 2003.¹³⁸ Consultation went through many stages. The first ran from May to June 2003 in five main centres to get an appreciation of the need and priorities for the NZSL Bill. Three themes emerged from this stage of consultation;¹³⁹

- 1) Low awareness of deaf people within the state sector and wider society.
- 2) Poor access to government services and large discrepancies between the ways in which deaf people and government agencies perceive the accessibility of government services for deaf people.
- 3) Inadequate funding and development of sign language interpreter services.

These findings gave a direction for a draft Bill to address the Deaf community's dual aspiration for official recognition of their language and for better access to public services and information through NZSL.¹⁴⁰ Consultation on the Bill was also carried out within the public sector with input of 27 government agencies revealing concern about severe

¹³⁶ Above 125 at 53.

¹³⁷ At 62.

¹³⁸ Above n 28 at 133.

¹³⁹ New Zealand Sign Language Board "NZSL Act 2006 History" <<https://www.odi.govt.nz/nzsl/act-2006/history-of-the-new-zealand-sign-language-act/#intro>>.

¹⁴⁰ Above n 10 at 134.

resource limitations if the Bill moved too far from the status quo to meet what was held to be important in the deaf community consultation process.¹⁴¹ In October 2003 the Government formally agreed for a Bill to be developed that would give recognition of NZSL as an official language of New Zealand. In the media statement released, Ruth Dyson, the Minister for Disability stated that the purpose of official recognition was to acknowledge Deaf peoples language as a unique New Zealand language and to give it equal status to that of spoken languages.¹⁴² In December 2003 a second round of consultations on the Bill were carried out. Once again organised by the ODI, these consultations were community meetings with the Deaf community held in Auckland, Palmerston North, Wellington and Christchurch with a Māori Deaf meeting also held in Auckland. Key stakeholders were also met with to discuss further work around NZSL interpreters and removing language barriers in education, health, employment and public broadcasting. The Deaf advisory group advised the government on what to say in community meetings in order to get full information to the Deaf community who by and large had never been involved in the law reform process before. Common barriers for all consultations, the Deaf community meetings were limited by a tight time frame and limited resources, hence the meetings were only held in some key centres. It is stated that this consultation informed the problem definition and was used to develop proposals for the Bill.¹⁴³

From these consultations it was revealed that the poor acknowledgment of NZSL as a real language resulted in injustices for Deaf people in many arenas. Frequently cited scenarios included the denial of use of interpreters in court, the fact that unqualified interpreters have been used, and that Deaf had been charged with disorderly behaviour where the use of NZSL had been misunderstood as aggressive behaviour.¹⁴⁴

2 Evaluation of the consultation process

¹⁴¹ At 134.

¹⁴² Above n 9.

¹⁴³ Above n 137.

¹⁴⁴ Above n 9.

Benefits of involving the Deaf community in the decision making process through consultation, include the fact that the Deaf community were involved in developing the problem identification of the Act. Input by the community was acknowledged in some respects as contributors noted the issue that NZSL was not utilized in many situations such as police interrogations.¹⁴⁵ Consultations also contributed to recognising the shortcomings within government itself, in particular the differences with government agency perception on the accessibility of their services, and the actual experiences of Deaf people.¹⁴⁶ Many of the Deaf community's concerns were however left out of the Act itself to be discussed and regulated within the policy sector.

It is highly likely that the consultation undertaken was not as effective as it could have been if the correct mechanisms and identification of significant barriers been recognised. This conclusion is drawn from the fact that the whole reform project was undertaken on a problem identification misunderstood by most of those involved in the reform. In addition, the main concerns of the Deaf community were not actually addressed in the legislation itself which suggests that the government, while acknowledging these concerns did not consider them relevant to their agenda for reform. Limiting the effectiveness of consultation possibly emanates from the fact that consultations were undertaken from within the disability sector, directed by the ODI.¹⁴⁷ With this starting point perhaps the right questions were not being asked or the outcomes of the consultation were focussed on points not particularly enumerated by the Deaf community, but instead fitting what the government felt was the issue or needed to be remedied.

Ineffective consultation also appears from the amount of dissatisfaction with the NZSL Act itself. Participants in reviews looking into the Act and NZSL have expressly stated their dissatisfaction with the outcomes. Criticism revolved around the same issues that informed the consultation before the Bill entered the House. These issues include interpreter standards and regulations, the lack of an NZSL advisory board, and the continued perceived

¹⁴⁵ Above n 26 at 4.

¹⁴⁶ Above n 10 at 134.

¹⁴⁷ Above n 137.

injustice the Deaf community face in other areas of the justice sector such as when in police custody.¹⁴⁸ Either these insights were taken into account and decided not to be necessary, or they were disregarded due to a lack of understanding where these concerns came from due to this underlying perception of Deaf as a disability.

In addition, this process was the first time most of the Deaf community had been involved in anything to do with law reform or the law itself.¹⁴⁹ In this respect there is a wider consideration of how the government can meaningfully engage with this community, beyond providing interpreters. Education for the deaf community into the law reform process would be a valuable first step. Only then will individuals wholly new to the concept of the law reform and policy reform will understand how to more effectively participate in government decisions. For example, an important democratic stage in New Zealand's law reform process is that of the select committee.¹⁵⁰ While concessions were made for the Deaf community to access this process, the input actually given was not informative or effective. The participation would have improved the legitimacy of the law with the community however the input would not have led to greater outcomes.¹⁵¹

Submissions from Deaf individuals usually were limited to the select committee template online and limited to one or so sentences. Many of them stated very brief sentences on the proposed bill including "Will be good for NZ," "Go ahead,"¹⁵² and "Deaf need representation."¹⁵³ This is not to minimise the participation that was involved in the NZSL Bill, however the participation itself could have been a lot more effective if the Deaf community had knowledge on what change they could effect. The evidence of this can be shown in comparison to submissions written by the New Zealand Law Society (NZLS) on proposed Bills who have vast knowledge of the law reform process. For example, they

¹⁴⁸ Above n 40; *A New Era in the Right to Sign* above n 17.

¹⁴⁹ Above n 8 at 281.

¹⁵⁰ Rt Hon. Sir Geoffrey Palmer "The Law Reform Enterprise in New Zealand" (2006) 32(3) Commonwealth Law Bulletin 373 at 378.

¹⁵¹ Above n 16 at 30.

¹⁵² This was a frequent submission statement.

¹⁵³ Submissions above n 62.

point out where the Bill is perceived to be lacking in a certain area and then propose a solution to this.¹⁵⁴ They use their expertise in such a way as to effectively convey their suggestions to the select committee. The Deaf community's submissions were not done so in this way. Therefore, even though consultation legitimised the Bill before enactment, any legitimacy towards the Act decreased as reality of the practical implications of the Act eventuated. Not only was the process not legitimized, but the consultation did not lead to greater quality provisions.

Quality and effective consultation with the Deaf community, in regards to the approach towards NZSL, will not occur until the process is approached from the perspective of language rights recognition and the Deaf community are educated on the issues in front of them, and of the law reform and policy process.

B Review procedures in the law reform and policy process

Increasing and improving the quality of our laws and rules has been on the forefront of governments agendas, including New Zealand's, for some time. Measures to improve the quality of decisions in New Zealand have been on the government agenda for some time, including the quality of the drafting of legislation, as well as the policy development of decisions. Quality control mechanisms pre-enactment include increasing public participation in the decision making process, the establishment of the LDAC Guidelines, and introduction of Regulatory Impact Statements.¹⁵⁵ Increasingly it is recognised that post-legislative review mechanisms should be established in order to measure the quality of the laws passed. Post-legislative review mechanisms have the aim of looking rigorously at the effect of the legislation that has been passed, and ensuring that it has achieved its

¹⁵⁴ New Zealand Law Society *Domestic Violence – Victims' Protection Bill* (01/05/2017).

¹⁵⁵ Above n 6; DPMC "Public Participation" <<https://www.dPMC.govt.nz/our-programmes/policy-project/policy-methods-toolbox/public-participation> >; The Treasury: Kaitohutohu Kaupapa Rawa "Regulatory Impact Statements Information Release" (26 Sept 2017) <<http://www.treasury.govt.nz/publications/informationreleases/ris> >;

objectives or caused any unforeseen consequences.¹⁵⁶ Through these mechanisms if a law is not working out in practice as intended then it can be uncovered as to why, and to address how any problems can be remedied quickly and cost-effectively.¹⁵⁷

The processes pre-enactment that aim for quality law reform, however well formulated, cannot predict how the legislation is working in practice. The law reform process is perceived to be busy and plagued by resource constraints so the cost of undertaking evaluation is outweighed by other priorities.¹⁵⁸ Legislation will never be perfect. Drafting is similar to theory, how it reacts in practice can only be analysed once the rule is in place and has had a chance to either succeed or fail. Post-legislative scrutiny can enable legislators to uncover how the legislation is working in practice, whether it is working as intended, and if not to discover why and to address how any problems can be remedied.¹⁵⁹ It can improve the accountability of governments for the decisions that they make and ultimately lead to better more effective decisions. While at the moment New Zealand does not have a formal system of post-legislative scrutiny, mandatory review provisions have been included in some legislation, including the NZSL Act. While this is good practice, there are relatively few reviews clauses in New Zealand's statutes compared to other countries.¹⁶⁰

1 Reviews into NZSL

In the NZSL Act, a mandatory review provision was inserted at the select committee stage.¹⁶¹ A report was required to be prepared looking into the operation of the Act and

¹⁵⁶ Sir Geoffrey Palmer "Law reform and the Law Commission in New Zealand after 20 years: We need to try a little harder" (Winter 2006) 88 [online] REFORM; <<http://search.informit.com.au/fullText;dn=20062862;res=AGISPT>> ISSN: 0313-153X at 23.

¹⁵⁷ The Law Commission "Post-Legislative Scrutiny" (LAW COM No 302, October 2006, United Kingdom) at 8-10.

¹⁵⁸ Above n 2 at 4.

¹⁵⁹ Above n 155 at 32-33.

¹⁶⁰ At 26.

¹⁶¹ Above n 33 at 5.

whether any amendments to its scope and contents are necessary or desirable.¹⁶² The insertion of the review provision was in response to submitters concerns about the need for ongoing and strategic funding to ensure that NZSL can be effectively maintained and promoted. The Justice and Electoral Select Committee considered that there was a need to monitor and report on the legislation before making any recommendations about funding.¹⁶³ Many of the submitters recommendations were considered to need further working out including NZSL provision in education, interpreter requirements, an NZSL commission or advisory board and the right to use NZSL in wider justice sector proceedings. Given that the Act was the first to legislate for NZSL, and that it largely is a framework provision setting out guides or future goals, to not have pre-planned post legislative review would have been irresponsible.

In 2011, the Minister for Disability Issues requested the ODI undertake the required statutory review under the NZSL Act. The ODI were asked to review how the Act was working, and whether any changes were needed to the legislation.¹⁶⁴ In January 2011 there was a call for Deaf people and others to have their say about the NZSL Act. Over three months submitters could send their views by email, fax, post or by sending a video in NZSL. Deaf Aotearoa helped organise meetings around the country to help Deaf people take part in the review submissions. The input into the review process revealed that changes to the legislation were wanted.¹⁶⁵ Proposed changes included establishing an NZSL commission, creating a right to use NZSL for Deaf people in all levels of education, requiring access to NZSL interpreters in other parts of the justice system, making the use of NZSL a requirement for social and cultural matters, and adding Crown entities such as hospitals to those government agencies covered in the NZSL Act. The Minister for Disability Issues decided that no change was needed to the NZSL Act, that the changes people wanted could occur without changes to the Act.¹⁶⁶ Nine proposals were put forward

¹⁶² Above n 34, s11.

¹⁶³ Above n 33 at 5.

¹⁶⁴ Above n 26 at [8].

¹⁶⁵ New Zealand Sign Language Board *NZSL Act Review 2011 – Cabinet paper* (Office for Disability Issues, 2011) at [28]-[29].

¹⁶⁶ At [49.3].

that were less enforceable and hard hitting than what the participants to the review wanted. Recommendations included Ministers signing a greeting similar to te reo Māori in their speeches, reminding crown entities that people should not be discriminated against, and that government departments should know when they need to use a NZSL interpreter and how to get them.¹⁶⁷

In September 2013, the Human Rights Commission (HRC) released a report on their inquiry into NZSL.¹⁶⁸ Action plans after the statutorily enforced review clearly had not mitigated the concerns of the Deaf community, as the Commission were still receiving concerns and complaints around many of the issues the 2011 review sought to solve. Before and during the HRC inquiry the Commission heard stories of the denial of people's rights to use NZSL. Issues which the NZSL Act, and the subsequent 2011 review were meant to resolve. The Inquiry found that there was no monitoring of when and if government agencies were consulting with representatives of the Deaf community, and that there were reports of government agencies refusing to arrange or pay for qualified NZSL interpreters despite this being against the principles in the NZSL Act, and the acknowledgment in the 2011 review for government agencies to be more receptive to NZSL.¹⁶⁹ The Commission recommended a NZSL statutory Board be established to monitor NZSL.¹⁷⁰ This recommendation at least, was achieved in 2015.¹⁷¹ However, many measures proposed in both reviews have yet to be established, despite recognition into the limited promotion and maintenance of the language which is the main objective of the NZSL Act.

2 *Evaluation of the NZSL review process*

The shortcomings of the reviews arguably stem from the misunderstood issue identification underpinning both the NZSL Act and the policy approach towards the language.

¹⁶⁷ At [32].

¹⁶⁸ *A New Era in the Right to Sign* above n 17.

¹⁶⁹ At 11-12.

¹⁷⁰ At 13.

¹⁷¹ Media Statement above n 106.

Underpinning any review process is what the review aims to examine. The mandatory review undertaken in 2011 was simply to look into the operation of the Act, and whether any amendments to it were necessary or desirable.¹⁷² This review was undertaken with the objective underpinning the Act itself, which has already been identified as incorrect. The fact that the review itself came proceeded from the ODI indicates that the approach towards NZSL protection remained within the framework of disability, and not one properly recognised the Deaf community's language rights and recognition. Without appreciating the correct policy objective for the Act, the seriousness of the deficiencies that were uncovered, including the lack of a language board, or interpreter standards arguably are not met with the sincerity that they should be afforded. In order for reviews to fully be effective then they should recognise the deficiencies of the original reform process, this was not done in regards to NZSL and hence the language continues to decline.¹⁷³

Reform for better quality rules will not be effected through legislation unless this recognition for change is considered important either to the general public or to government. Generally this is indicated through public uproar, or being put on a Ministers agenda and appealed to in parliamentary hearings.¹⁷⁴ This indicates a flaw mandatory review provisions inserted into legislation pre-enactment. When mandatory reviews are carried out, how can they be effected strongly rather than perhaps undertaking the review merely because they need to tick this box? In regards to NZSL, at both the 2011 review and the 2013 HRC review, the uproar or support for what was being reviewed was not evident. In contrast, law reform in relation to te reo Maori occurred when there was recognition of the issues in relation to the language.

For instance, the 1987 Act was enacted after findings from the Waitangi Tribunal in the WAI11 report highlighted the serious shortfalls of the government towards the language.¹⁷⁵ The recent Maori Language Act was enacted amidst a Waitangi Tribunal report which was

¹⁷² Above n 34, s11.

¹⁷³ Stats NZ "2013 Census QuickStats about culture and identity" < <http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-culture-identity/languages.aspx> >.

¹⁷⁴ Above n 5 at 162.

¹⁷⁵ Above n 52.

looking at the language, as well as through the political spout of the Minister for Maori Affairs, with heightened support from the government of the day through a coalition agreement.¹⁷⁶ The only support for NZSL seems to be for funding of the language. Without support for an actual change in approach to fully appreciate and consider all the issues currently faced towards the issue, the quality of the decisions towards NZSL will not be increased. Until then, objectives to promote and maintain the language will continue to move at the same rate.

Both consultation and post-enactment review pose challenges in most law reform and policy processes. What is clear when dealing with NZSL and the Deaf community, is that processes designed to increase the quality of decision making will not deliver the intended quality decisions if the problem identification is not at first correctly approached. Problem identification pervades the decision making process. While there are aspects of the process which could be changed, no approach will be effective unless this underlying problem identification issue is remedied.

V Looking forward

There is an identified problem that deserves to be remedied by government processes. In light of problems and obstacles to gaining what could have been achieved through official recognition of NZSL, how do we now approach the issue to achieve the outcome that the Deaf community desires and needs? The only option is to finally approach the issue as one of language rights and recognition, to treat the Deaf community as a culture and not merely a group of people experiencing a disability. While comparatively few New Zealanders speak NZSL in relation to te reo Māori,¹⁷⁷ this should not be used as a justification to prevent active steps towards protecting the language, including the issue of cost. The relatively few speakers of NZSL is the cause of historical oppression of the language.¹⁷⁸

¹⁷⁶ Above n 89.

¹⁷⁷ Above n 171.

¹⁷⁸ Above n 10 at 130.

The use of this justification would continue the perception of the language as inferior and its oppression.

Law reform and policy changes would enable the incorporation of more enforceable rights for NZSL use in important situations, such as within police detention or Crown Entities such as hospitals.¹⁷⁹ Any adequate recognition in the current political climate would have to be achieved in conjunction with approaches towards protecting te reo Māori. The NZSL Board is a great first step in the promotion and maintenance of NZSL. However, the issue concerning problem identification still remains with the Board established within the disability policy sector. The current approach to languages in New Zealand is fairly lacking. The NZSL Board is established within the disability sector either because the issue is still approached from a disability framework, or because there is no other suitable organisation for the Board to work from, or both.

To change the perception of Deaf as a disability, and legitimise the need to promote and maintain NZSL, enforceable language schemes could be established. This could work alongside the NZSL Board in order to increase use of NZSL within government and wider society replacing the weak principles currently in place.¹⁸⁰ Ultimately, the ideal solution would be for New Zealand to develop an overarching national languages policy which would remedy the framework issue surrounding NZSL from the source. By placing the language within a framework explicitly and solely focussed on language will enable further decisions to be drafted with proper objectives in mind. The NZSL Board could instead be held to account to this policy rather than the Minister for Disability Issues and the ODI. With the starting point towards NZSL as one of language, the decisions emanating from this starting point would lead to more effective outcomes towards the promotion and maintenance of the language.

¹⁷⁹ Proposals expounded by the Deaf community in: *A New Era in the Right to Sign* above n 17.

¹⁸⁰ Above n 34, s9.

A *What we have now – NZSL Statutory Board*

The establishment of the NZSL Board in May 2014 shows that legislative reform is not the only avenue of change that can be utilised to transform the approach taken towards NZSL. The board was established following recommendations from an Experts Advisory Group convened by the Office for Disability Issues in response to the Human Rights Commission (HRC) Inquiry into NZSL from July 2012 to June 2013.¹⁸¹ The Justice and Electoral Select Committee, on the NZSL Bill, strongly recommended that a board of this type should be established in their 2005 report.¹⁸² The HRC inquiry found that NZSL is crucial to the ability of Deaf people to learn, communicate and participate in society, although these points were also noted in the consultations that informed the policy of the NZSL Bill, as well as in deaf participants submissions at the select committee stage.¹⁸³ The work of the NZSL Board will help the government meet its commitments under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), and its obligations under the NZSL Act 2006.

The purpose of the NZSL Board is to promote and maintain the use of NZSL by ensuring the development and preservation and acquisition of the language, to ensure the rights of deaf people and NZSL users to use NZSL as outlined in the NZSL Act 2006 and the UNCRPD and other national and relevant international legislation, and to provide expert advice to government and the community on NZSL, including recommendations on allocation of the NZSL Fund.¹⁸⁴ The NZSL Board has responsibilities across leadership, advice, strategy and coordination and monitoring. The board has up to 10 members in total, all of whom are NZSL users, and a majority of members are Deaf NZSL users. The NZSL Fund was established by the Government to support projects that promote and maintain NZSL, the oversight of this fund undertaken by the NZSL Board.¹⁸⁵ The NZSL Board has

¹⁸¹ New Zealand Sign Language Board “About the NZSL Board” < <https://www.odi.govt.nz/nzsl/about-board/> >.

¹⁸² Above n 33 at 5.

¹⁸³ Above n 174; above n 17; Submissions above n 62.

¹⁸⁴ Above n 179.

¹⁸⁵ Above n 106 at [24].

established a NZSL Board Action Plan 2016-2018 the purpose of which is to support the achievement of this vision by guiding the NZSL Board and government agencies in progressing priorities for NZSL as approved by Cabinet. Their stated vision is for the promotion and maintenance of NZSL, a strong, vibrant language, recognised and embraced by New Zealand society.¹⁸⁶ There are five identified priorities in the action plan,¹⁸⁷

- (1) Include NZSL in education;
- (2) Promote NZSL in the home;
- (3) Provide access to information and services in NZSL;
- (4) Provide access for Maori Deaf;
- (5) Develop interpreter standards.

Notably, the NZSL Board is established within the Office for Disability Issues.

1 Considerations regarding the NZSL Board

While officialising a language raises the status of the language, merely raising the status of the language does not lend to its promotion and protection. Recognition must be real and significant meaning anyone who wants to use that language on any public occasion or when dealing with any public authority ought to be able to do so. To recognise a language as official is one step, the next is to enable its use widely.¹⁸⁸ In New Zealand in regards to both NZSL and te reo Māori, there is no legislative definition of what designating a language as ‘official’ correlates with.¹⁸⁹ Without any language board promoting purely the language, NZSL was left without any active steps enabling its use widely, as evidenced with the decrease in users of the language post-enactment. Therefore the establishment of the NZSL Board is a great first step towards protecting NZSL and Deaf culture.

¹⁸⁶ Office of the Minister for Disability Issues *Disability Action Plan 2014-2018: Update 2015* (Cabinet Social Policy Committee, 2015).

¹⁸⁷ At 4.

¹⁸⁸ At 47.

¹⁸⁹ Above n 34, s6; Māori Language Act, s3; Te Ture mō Te Reo Māori 2016, s5.

Widespread recognition will depend on the successful establishment of a body to promote the language for both the Deaf community, and for New Zealanders as a whole, to watch over progress and suggest strategies that overcome the difficulties that are bound to rise.¹⁹⁰ The Waitangi Tribunal in their WAI11 report, informing the Maori Language Act 1987, recommended that a supervising body be established to supervise and foster the use of the Māori language. Recommendations for a central language sector agency were echoed in the WAI262 report recently released. The tribunal stated that this agency would address the problems caused by the lack of ownership and leadership identified with past Māori language sector agencies of which there were six overlapping agencies.¹⁹¹

Regarding NZSL, a language commission perhaps would not be justifiable in terms of cost in regards to the number of NZSL language speakers in comparison to te reo Māori speakers. However, the select committee regarding the Bill did consider the establishment of an advisory group which would have the role of monitoring the effects of the legislation against its stated purposes.¹⁹² They considered that such a group would provide a focus for contact between government and the community, and look at new areas in which work could be done. While considering the matter to be better left to the Government to progress separately from the bill, the select committee recommended its serious consideration.¹⁹³ It is uncertain why this took about nine years to develop but the establishment of the NZSL Board is a step in the right direction.

Unfortunately, the continuing incorrect problem identification could hinder the impact that this body could have in promoting and maintaining NZSL. The NZSL Board is established within the Office for Disability Issues. While the Board is comprised solely of NZSL users and therefore individuals who understand the issues and problems identified on the basis of deaf community's ideals, their actions and plans are still monitored through the ODI and the Minister for Disability.¹⁹⁴ In comparison, Te Mātāwai is a central language agency has

¹⁹⁰ Above n 52 at [8.2.9].

¹⁹¹ Above n 89.

¹⁹² Above n 33 at 5.

¹⁹³ Above n 33 at 5.

¹⁹⁴ Above n 179.

the authority to protect te reo Māori. The body reports to the Minister for Māori Development who supervises any policy or issue that affects Māori, including Māori language policy.¹⁹⁵ To get full recognition and development of NZSL as a language and the promotion and maintenance of Deaf language rights, the NZSL should be established within a language sector and removed from the Office of Disability Issues. This could be provided through a delegated NZSL commissioner or Minister, or a dedicated Minister or Commissioner for languages. Mechanisms to promote and maintain the language will continue to struggle to advance policies and decisions for NZSL if this fundamental problem identification issue is not rectified.

B Language Schemes

An important driver behind the flawed approach towards NZSL policy identification is the misunderstanding the government and the general public have of Deaf as disabled. This is largely driven by the fact that the policy behind the promotion and maintenance of the language remains in the disability sector. For language legislation or policy to have a significant impact there needs to be careful strategies in relation to public services and the right for speakers to use their languages in these domains.¹⁹⁶ Language schemes could be a mechanism the government could employ to justify and legitimise the everyday use of NZSL. Language schemes are statutory obligations placed on public bodies to make specific provision for the delivery of public services in a coherent and agreed way. A language scheme is essentially a statutory internal language plan drawn up by the public body outlining how it will augment its services in the protected language over an agreed timeframe.¹⁹⁷ As evidenced through the reviews undertaken into NZSL, the guiding

¹⁹⁵ Te Puni Kōkiri: Realising Maori potential “Te Mātāwai: Pānui tēnei i roto i te reo Māori” <<https://www.tpk.govt.nz/en/a-matou-kaupapa/strengthening-maori-cultural-wealth/te-reo-maori/te-matawai/>>.

¹⁹⁶ John Walsh and Wilson McLeod “An overcoat wrapped around an invisible man? Language legislation and language revitalisation in Ireland and Scotland” (March 2008) 7(1) Language Policy [online] 21 at 21.

¹⁹⁷ John Walsh “Language policy and language governance: a case-study of Irish language legislation” (13 April 2012) 11(4) Language Policy [online] 32 at 39.

principles established by the Act¹⁹⁸ have not significantly brought about changes in governmental culture towards NZSL. Placing enforceable obligations on government departments could not only change the use of NZSL in government as well as in wider society. Increasing the usage of the language would go some step towards changing the perception of Deaf as disabled rather than a culture, but ultimately is just one step at the end of the process without actually changing the flawed problem identification itself.

1 Overseas Experience

Language schemes are used overseas in the promotion and development of indigenous languages. For example, language schemes are mandated for the Irish Gaelic language in the Official Language Act 2003. The Irish language is considered to be in a strong position, its recognition is part of the Constitution of the country and there are provisions secured for de facto rights for Irish speaking citizens.¹⁹⁹ The Official Language Act 2003 legislated to;²⁰⁰

“... promote the use of the Irish Language for official purposes in the state... and for those purposes, to provide for the establishment of the [Office of the Official Languages Commissioner] and to define its functions, to provide for the publications by the Commissioner of certain information relevant to the purposes of this act, and to provide for related matters.”

Similarly the Welsh Language Act provides a legal basis for the implementation of bilingual services in Wales. The Welsh Language Act 1993 established the Welsh Language Board. Language schemes are the principal instrument that the board has to promote Welsh as the language of service delivery in Wales. In 2011 the Welsh Language

¹⁹⁸ Above n 34, s9.

¹⁹⁹Paedar O Flatharta, Siv Sandberg and Colin H Williams “From Act to Action: Implementing Language Legislation in Finland, Ireland and Wales” (An chéad chló, 2014, Fiontar, Ollscoil Chathair Bhaile Átha Cliath) at 122.

²⁰⁰ Official Language Act 2003, ss11-14.

Measure was passed which abolished the Welsh Language Board and created the office of the Welsh Language Commissioner. The Commissioner is given strong regulatory powers and allows for an official investigation of instances where there is an attempt to interfere with the freedom of Welsh speakers to use the language with one another. Language schemes are replaced by Welsh Language Standards to ensure the delivery of public services through the medium of Welsh. Language standards explain how organisations are expected to use the language in different situations.²⁰¹ Other organizations, for example, Crown Bodies, will continue to implement their schemes and revise in order to strengthen them.²⁰² Language schemes are also used in Scotland, through the Scottish Language Act 2005. The Act established a statutory Board with a view to securing official language status for the Gaelic language.

2 *Language schemes in New Zealand?*

Notably, the language schemes above were used for the indigenous native languages of each country. If language schemes were to be used in New Zealand, application would necessarily cover te reo Māori. A change in approach to language protection in New Zealand would be necessary to incorporate language schemes. Firstly, the legislation protecting both the Irish and Welsh languages have more detailed and in depth purposes expressly stating the protection of the language within the public sector.²⁰³ Whereas in New Zealand, for both the Māori language and NZSL there is just a mere statement of declaring the language official without going into further detail for what this entails.²⁰⁴ Weaknesses recognised with language schemes overseas that could be relevant in regards to NZSL is the fact that there are relatively few fluent speakers of the language. In Ireland, fluent speakers play an important role in the development and delivery of Irish-medium schemes

²⁰¹ Comisiynydd y Gymraeg Welsh Language Commissioner “What are standards?” <<http://www.comisiynyddygydraeg.cymru/English/Language%20duties/Pages/What-are-standards.aspx>>.

²⁰² Above.

²⁰³ Paedar O Flatharta “Language Schemes – A Useful Policy Tool for Language Planning?” (2015) 16(4) *Current Issues in Language Planning* 378 at 380, 382.

²⁰⁴ Māori Language Act 1987, s3; Te Ture mō Te Reo Māori 2016, s5; NZSL Act, s6.

and services.²⁰⁵ In addition, designating large numbers of jobs as at the very least, bilingual fluent, would be extremely politically controversial, especially in light of the debate around compulsory education in te reo Māori.²⁰⁶

Language schemes require strong bureaucratic support to ensure they operate effectively, and overseas they are monitored through either statutory boards or language commissioners.²⁰⁷ In New Zealand the current approach is that the official languages are promoted and maintained through statutory boards or commissions.²⁰⁸ Greater cooperation between these bodies and public bodies could ensure that the latter are supported in developing their language schemes in an effective way. This would eliminate the difficulties faced overseas where public bodies have struggled formulating language schemes themselves such as reliance on external translation services due to lack of competence in the protected language.²⁰⁹ Further information on public bodies duties in regards to language schemes would need to be formulated which can be done through a policy statement or a national languages policy which will be analysed below.

Any justification for enforceable language schemes for NZSL will not be supported unless the importance of the language to the community as a culture is recognised. Within the current framework of Deaf as a disability, this justification is lessened as alternatives to NZSL, such as cochlear implants allowing individuals with hearing loss the opportunity to integrate into hearing society and to use English are seen as alternatives to additional costly mechanisms.

C Overarching national language policy?

²⁰⁵ Above n 194 at 35.

²⁰⁶ At 32; Jude Barback “The Big Debate: Should Te Reo Be Compulsory In Our Schools?” *Education Review* (April 2017) [online].

²⁰⁷ Above n 194 at 22.

²⁰⁸ Above n 184; Te Taura Whiri i te Reo Māori “Our Work: Language development, language planning” <<http://www.tetaurawhiri.govt.nz/a-matou-mahi/te-matapuna-language-advice/>>.

²⁰⁹ Above n 194 at 67.

While language schemes are one mechanism that can achieve greater promotion and maintenance of languages, they will not be effective in respect to NZSL unless the problem identification underlying the issue is approached on a cultural-linguistic platform. The platform would provide the proper identification of NZSL protection for human rights and lend towards greater justification in the implementation of costly mechanisms designed to promote the language. A national languages policy in New Zealand could help to support this perception shift both in government and wider society by raising perception of NZSL and the Deaf community as a culture, as well as providing justification for the language. NZSL promotion will be approached on the basis of supporting the human rights of the Deaf community, rather than as simply providing another avenue of access for those with hearing impairments.

1 What is a national language policy?

A national languages policy is a set of nationally agreed principles which enables decision makers and the community to make choices about languages issues in a rational, comprehensive and balanced way.²¹⁰ The policy would form the basis for the allocation of resources to meet the needs of all sections of the community and be based on information and policies proposed by knowledgeable and interested groups.²¹¹ Given the undeniable relationship between language and evolving social change, language practices and policies will increasingly play an important role in emerging national issues.²¹² Some issues associated with language can only be properly addressed through a national approach including needs for interpreting and translating services for non-English speakers such as Deaf individuals.²¹³ The benefits of a language policy can be evidenced with a focus on Montreal, Canada. In the 1960s, English was in widespread public use. However, through

²¹⁰ The Royal Society of New Zealand: Te Aparangi “Languages in Aotearoa New Zealand” (March 2013) at 3.

²¹¹ At 3.

²¹² At 2.

²¹³ Te Ropu Matapaki Kaupapa Reo Mo Aotearoa National Languages Policy Secretariat *Towards a national languages policy for New Zealand: a background paper = Hei putake mo tetahi kaupapa reo mo Aotearoa: he whakamarama* (National Languages Policy Secretariat, Wellington, September 1989) at 8.

development of a national languages policy, the linguistic landscape is overwhelmingly French. This change was largely effected through a set of managed and planned interventions through an explicitly made policy change, enforced by law and implemented by a government agency.²¹⁴

A national languages policy would require cooperation and coordination at all levels of government and the community. The most important component would be acknowledging the benefits language rights and recognition can have to the whole of the country. Any implementation of such policy will not occur until it is recognised and appreciated that the linguistic richness of New Zealand constitutes a “valuable resource which should be developed in order to serve the country’s domestic and external interests, and the aspirations and needs of New Zealanders in a context of national cohesion.”²¹⁵

Perceived benefits of a national languages policy include the provision for adequate opportunities for New Zealanders to achieve their full potential, the ability to enhance the status of te reo Maori, and NZSL as official languages and the provision of adequate resources to ensure its survival and to enrich New Zealand cultural and intellectual life.²¹⁶ Importantly, a national languages policy would enhance the recognition of the importance of NZSL, both to the community as well as to New Zealand society at large, through invoking a change in attitude and awareness towards language protection as a legitimate goal beneficial to society.²¹⁷ By providing an elaboration of principles to guide the process of decision making and form the basis for the allocation of resources, choices subsequently promoted would be principled, deliberate and capable of justification. When choices are made explicitly they are capable of being subsequently modified and improved if

²¹⁴ Spolsky (2012) cited in Harvey Sharon “A national languages policy for New Zealand: Still relevant today?” Auckland University of Technology. (January 2014, Conference Paper) <https://www.researchgate.net/publication/281852131_A_national_languages_policy_for_New_Zealand_S_till_relevant_today>.

²¹⁵ Above n 211 at 6-7.

²¹⁶ At 9.

²¹⁷ Above n 208 at 7.

evaluation and review procedures find this necessary.²¹⁸ Where language policies are not developed explicitly this is not necessary. Had a national languages policy been in place to guide the 2011 review into the NZSL Act, perhaps some more elaborate and concrete proposals could have been established and put into place

The Royal Society of New Zealand have issued a paper placing language as an issue of economic interest to hold more sway in the current political climate. Language skills are modelled as skills in demand through a simple ‘job-market’ based approach. This would differ from a market good whose value decreases with its availability as the more a language is used the more valuable it is as a tool for those who already use it.²¹⁹ The approach could evaluate direct and non-direct impacts outlined by evaluating four distinct areas of policy;²²⁰

- (1) Private monetary effects. For example, increased earnings from developing a skill in demand or reaping cognitive benefits from language learning.
- (2) Private non-monetary effects. For example, personal satisfaction from engaging in activities in two languages, or the decrease in stress accruing to members of the public when the minority language is legitimised through policy.
- (3) Social monetary effects. For example, reduced healthcare costs of a lower prevalence of Alzheimers disease amongst bilingual speakers.
- (4) Social non-monetary effects. For example, more harmonious community relations or positive value placed on diversity in its own right.

2 National language policy for New Zealand?

The Waite report (“Aotearoa”), published in 1992, was a draft of how a national languages policy in New Zealand would be established. This had originally been commissioned under

²¹⁸ Richard Benton “Towards a Languages Policy for New Zealand Education” (1995) 4 New Zealand Annual Review of Education 161 at 161.

²¹⁹ Above n 210 at 3.

²²⁰ At 3-4.

the previous Labour led government. Despite economic rationales seemingly haven bitten the National party interest, the report did not gain any further political traction at the time.²²¹ There have been subsequent efforts in language policy however these have been ‘slow, piecemeal and subject to fits and starts.’²²² A renewal in the call for a national languages policy occurred in the New Zealand Action Plan for Human Rights and at the New Zealand Diversity Forum in 2005.²²³

Increasingly it has been acknowledged that it is not enough for a language to be tolerated but that it should be actively provided for and promoted.²²⁴ This recognition has resulted due to the fact that even with tolerance based rights, languages are becoming extinct at increasing rates. In New Zealand this has been evidenced with the continuing decline in the use of te reo Maori and NZSL despite their declaration of “official language” status.²²⁵ Language support and learning in New Zealand are provided for in a number of widely distributed sectors including education, labour, house, law, foreign affairs and immigration. However, at present there is little unification of policies making it challenging to produce analyses of the evidence regarding language provision and practice in New Zealand.²²⁶

New Zealand is even more ethnically and linguistically diverse than it was at the time of the publication of Aotearoa.²²⁷ A national languages policy would legitimise the language rights and recognition approach to take towards NZSL. With governmental recognition of the importance of growing and fostering languages, including NZSL, support from wider society will help to promote and maintain the language and, instead of Deaf New Zealanders fighting for access into society, society will be more accessible for Deaf New

²²¹ Above n 216 at 161.

²²² Above n 212 at 6.

²²³ Human Rights Commission: Te Kāhui Tika Tangata “Languages in Aotearoa Statement on Language Policy” (February 2008) <www.hrc.co.nz/diversity>

²²⁴ Above n 208 at 2.

²²⁵ Above n 221 at 3.

²²⁶ At 3.

²²⁷ *Scoop Media [Online]* “A national languages policy for New Zealand” *AUT University Press release* (18 August 2017) <<http://www.scoop.co.nz/stories/ED1708/S00069/a-national-languages-policy-for-new-zealand.htm>>.

Zealanders.²²⁸ The barrier to NZSL protection has been that the relegation of the language to the disability policy sector. Establishing a national languages policy will enable a more stable foundation for the language itself to be focussed on.²²⁹

Instead of seeking support for action plans through the Minister for Disability Issues, the NZSL Board would have a framework based solely on language recognition and rights in which to work off and in which any additional costs could be justified. In addition, the language itself, and the rights afforded to the community through this language, will increasingly be recognised in New Zealand, rather than simply perceiving NZSL as another way that hearing impaired individuals can “access” society. Justification for increased cost for language mechanisms would also occur through the increased recognition of the importance of advancing languages in society. A national policy would contribute to viewing language protection as legitimate expenditure, as well as help to guide government departments with language schemes and legitimise the process for these departments from one of simply a box ticking exercise to one of significance.

VI Conclusion

The law reform and policy process is one that is met with many challenges for decision makers. The most important aspect of the process is the correct policy identification for the issue that is under examination. The identification of this problem or issue has ramifications for the whole process subsequent. The NZSL Act, and the regulation of NZSL within the disability process unfortunately provides a good example of the impact of incorrect policy identification. The regulation of NZSL within a framework of Deaf as a disability has minimised efforts that would have promoted the language had the problem been identified within a Deaf as culture framework.

²²⁸ Above n 89 at 477.

²²⁹ Above n 216 at 2.

NZSL has been relegated to one of the access mechanisms available to hearing impaired individuals allowing them access into mainstream society. This downplays the importance of NZSL as the New Zealand Deaf community's language and therefore the bedrock of Deaf culture. Mechanisms to promote and maintain the language have been overlooked or minimised due to this flawed framework, including the lack of enforceable rights to use NZSL, the lack of an NZSL board (until relatively recently), and the displacement of funding towards access technologies rather than the language itself including towards NZSL interpreters. Had the correct problem been identified at the outset then these purported language mechanisms would have been more justified if not at the point of drafting the NZSL Act, through a policy regime for the language.

Incorrect policy identification also impacts on methods within the law reform and policy process that aim to improve the quality of the decisions made. In relation to NZSL this was evident in the participation process involving the Deaf community, as well as the review mechanism provided for within the Act itself.

While highlighting the fundamental importance of problem identification in the law reform and policy process, this paper is also a call for action, from child of Deaf adults, for increased protection towards NZSL. Suggestions for future reform on NZSL have been outlined. Firstly, while the establishment of the NZSL Board is a step in the right direction, the Board remains within a disability framework, answering to the Minister for Disability Issues, as well as the ODI. Whether this will generate as much a change as is hoped will have to be established through a few more years of practice. However, this still creates a barrier in changing social attitudes and perceptions of Deaf as a culture and not as a disability. Enforceable language schemes on the public sector are a mechanism used overseas which could be utilised in New Zealand to combat the relatively weak principles that currently govern the public sectors obligations towards the Deaf community under the Act. These are however costly and the justification to use them in relation to NZSL will not evident until the underlying framework for the language is remedied.

Ultimately what is needed to both change the framework itself, and to support the promotion and maintenance of the language is a national languages policy. This would provide the explicit and coordinated effort needed to guide the direction of languages policy in New Zealand, and would help to justify the purported mechanisms for NZSL promotion and maintenance. Changes to the approach to NZSL fundamentally rests with the government. Actions do not have to be done legislatively but within the policy sector as evidenced with the establishment of the NZSL Board in 2014. However, further ad hoc developments towards NZSL are unlikely to make the changes that the Deaf community wants and needs unless the problem identification is altered. At the very least, dialogue towards this issue should begin with a concerted effort to change the perception of NZSL within first, the public sector, and then wider society.

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