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**THE STRUCTURE AND OPERATION OF SECTION 7 OF  
THE NEW ZEALAND BILL OF RIGHTS ACT**

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***Abstract***

*This paper will discuss the structure and operation of section 7 of the New Zealand Bill of Rights Act (NZBORA). This will include the initial development of NZBORA, and the theory behind rights safeguards.*

*I will then examine possible improvements and alternatives to New Zealand's existing rights safeguards. This will include a discussion of judicial review, parliamentary scrutiny, human rights select committees, and policy making processes, specifically the potential of Human Rights Impact Statements as part of the policy process.*

***Word length***

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 9,938 words.*

***Subjects and Topics***

New Zealand Bill of Rights Act 1990-Scope of s 7 of NZBORA-Justiciability of s 7 of NZBORA-NZBORA remedies-Policy Processes-Human Rights Impact Statement-Human Rights Select Committees-Judicial Review-Parliamentary Scrutiny

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# *I The Structure and Operation of Section 7 of the New Zealand Bill of Rights Act*

## *A Introduction*

Section 7 of the New Zealand Bill of Rights Act (NZBORA) requires the Attorney-General to vet any bill introduced to the House of Representatives for human rights implications. I propose to discuss the structure and operation of s 7 of the NZBORA. This will include the initial development of the NZBORA, and the theory behind rights safeguards. I will then examine possible improvements and alternatives to New Zealand's existing right safeguards. This will include a discussion of the effectiveness and potential of judicial review, parliamentary scrutiny, human rights select committees, and human rights impact statements as part of the policy process.

## *B Background.*

The intent of the NZBORA is to restrain the power of government. As noted in the White Paper on the Bill of Rights for New Zealand in 1985 (prior to the introduction of MMP<sup>1</sup>)

“The power of government...is enormous. In some senses it can be compared with the power, claimed as well as actual, of the Stuart Kings before the revolution of the seventeenth century. The basic difference between now and then is of course the electorate. But the electorate role cannot, in the usual case, be focused on a precise issue. A general election is a blunt instrument. It cannot give judgment on particular issues.”<sup>2</sup>

Therefore it was considered a priority to create a clear a legislative protection against human rights abuses, particularly by the executive. A Bill of Rights was one of the policies set out in Labour's 1984 election manifesto.<sup>3</sup> The original concept included the Treaty of Waitangi and was entrenched. Geoffrey Palmer notes in *Bridled Power* that the journey between the policy announcement and the passing of the NZBORA was not an

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<sup>1</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power* (Oxford University Press, Auckland, 1997) at 266.

<sup>2</sup> *A Bill of Rights for New Zealand: A White Paper, A.6 Appendices to the Journal of the House of Representatives*, Wellington, 1985 at 27.

<sup>3</sup> New Zealand Labour Party, *The New Zealand Labour Party 1984 Policy Document*, (Standard Press Limited, Wellington, 1984) at 64.

easy one.<sup>4</sup> He states “the argument of a Bill of Rights was put forward before the 1984 election campaign in a series of speeches. Although Labour MPs showed no great enthusiasm for the concept then or later, there was a political market for it.”<sup>5</sup> This was brought about by the constitutional high-handedness of the Muldoon government, and the events of the Springbok tour.<sup>6</sup> The events of the early eighties had instilled a sense of unease in middle class New Zealand. There was a wariness of the power of the executive, and what it might be used for.<sup>7</sup>

The issue of entrenchment and giving the judiciary the power to ‘strike out’ legislation was examined at select committee. Giving power to the unelected judiciary was not a popular suggestion with the public.<sup>8</sup> This is a very interesting point that we will return to later. Essentially the public chose the protection of politicians over that of the judiciary. Other points raised include:

- A Bill of Rights that is judicially enforceable creates greater inequality, as the poor do not have access to remedies in the same manner as the well off.<sup>9</sup> It is worth noting that this will influence how a legal rights develop, as large companies would have the means to effectively enforce their rights and the average citizen would not.
- It would create uncertainty in the law, as some acts would be repugnant to the Bill of Rights and struck out. This would also increase litigation.<sup>10</sup>
- There are better checks and balances available than a Bill of Rights. For example, an upper House.<sup>11</sup>

These points highlight some of the unintended consequences of codifying rights, and serve as an important reminder that the best-laid plans of mice and men often go awry.<sup>12</sup>

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<sup>4</sup>Palmer and Palmer, above n 1 at 266.

<sup>5</sup> Palmer and Palmer, above n 1 at 267.

<sup>6</sup> Palmer and Palmer, above n 1 at 267.

<sup>7</sup> Palmer and Palmer, above n 1 at 267.

<sup>8</sup> Palmer and Palmer, above n 1 at 269.

<sup>9</sup> Palmer and Palmer, above n 1 at 269.

<sup>10</sup> Palmer and Palmer, above n 1 at 269.

<sup>11</sup> Palmer and Palmer, above n 1 at 269.

<sup>12</sup> Robert Burns, *To a Mouse, on Turning Her Up in Her Nest with the Plough*.

The National Party opposed the entrenchment of the NZBORA. They also opposed the bill as it was enacted.<sup>13</sup> This made things difficult, because constitutional change requires cross party support to be effective.

However a compromise was found between the different points of view. The Treaty of Waitangi was removed. Parliament would retain the ability to pass laws inconsistent with the NZBORA. Section 7 was created, so the Attorney-General would report to Parliament when a bill was inconsistent with the NZBORA, and Parliament would be aware of this before it passed such legislation.<sup>14</sup>

Section 7 states that:

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

- (a) In the case of a Government Bill, on the introduction of that Bill; or
- (b) In any other case, as soon as practicable after the introduction of the Bill,—bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.<sup>15</sup>

The function of section 7 is to alert the House of Representatives to possible rights inconsistencies at an early stage of the legislative process. The House then decides whether this inconsistency is acceptable, and makes changes if necessary. Therefore all enacted inconsistencies are theoretically a result of an informed and conscious choice by Parliament.<sup>16</sup>

### *C Theory*

Rights are not absolute. They must be limited. Protected rights will conflict with one another.<sup>17</sup> It seems trite to state, but it is impossible to anticipate all the circumstances or

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<sup>13</sup> Palmer and Palmer, above n 1 at 270.

<sup>14</sup> Palmer and Palmer, above n 1 at 270.

<sup>15</sup> New Zealand Bill of Rights Act 1990, s 7.

<sup>16</sup> Paul Fitzgerald *Section 7 of the New Zealand Bill of Rights Act 1990: a very practical power or well intentioned nonsense* (1192) 22 VUWLR at 136.

<sup>17</sup> Janet L Hiebert *A Hybrid Approach to Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's model of Parliamentary Scrutiny* 26 Fed. L. Rev. 115 1998 at 119.

nuances of who and what will need to be protected. This is essentially the purpose of judicial review, to remedy the unjust application of a general law to an individual circumstance. And judicial discretion in this area requires judges to consider issues of social policy in a way that they normally leave to Parliament. Essentially the strength and the weakness of judicial review are one and the same, which makes analyzing it mostly a matter of personal opinion on the concept and fundamental nature of rights, Parliament and the judiciary, truth, justice, with a dash of your opinion on humanity thrown in for good measure. We shall persist anyway.

Rights foundationalists work on the assumption that scholars with a commitment to fundamental human rights believe that ‘the whole point of having rights is to trump decisions rendered by democratic institutions that may otherwise legislate for collective welfare.’<sup>18</sup> Dworkin is also of this highly idealistic frame of mind, conceptualising rights to be trumps over political decisions.<sup>19</sup> Dworkin put forward a theory of great earnestness about the potential of a Bill of Rights to change the culture and make up of the legal profession. In *A Bill of Rights for Britain* he states that:

“If British judges began to create as well as follow constitutional jurisprudence...Law and lawyers might then begin to play a different, more valuable role in society than they now even aim to have. The courts, charged with the responsibility of creating from the Convention a distinctly British scheme of human rights and liberty, might think more in terms of principle and less in terms of narrow precedent. University law courses and faculties might develop in the same direction, trying to produce a legal profession that could be the conscience, not just the servant, of the government and industry. Different men and women might then be tempted to the law as a career, and from their ranks a more committed and idealistic generation of judges might emerge, encouraging a further cycle in the renaissance of liberty.”<sup>20</sup>

He is also making a very interesting point about cultural change and general fitness to make final decisions. If a profession is fine and upstanding, then they attract fine and upstanding people to it. The wider the appeal the more representative the profession will become.

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<sup>18</sup> Bruce Ackerman *We the People: Foundations* (Belknap Press, Massachusetts, 1993) at 11-12.

<sup>19</sup> Ronald Dworkin, *Taking Rights Seriously* (1977) at 269. See also R Dworkin, “Liberalism” in S Hampshire (ed) *Public and Private Morality* (Cambridge University Press, Cambridge, 1978) at 136.

<sup>20</sup> Ronald Dworkin, *A Bill of Rights for Britain* (Chatto & Windus, London, 1990) at 22-23.

This also raises the interesting issue of the public's perception of politician's fitness to protect rights. Whilst the general population certainly doesn't hold the principles of politicians in high esteem, it was demonstrated through the process of enacting the NZBORA that the public preferred not to give the final word to the judiciary, instead preferring it lay with the politicians. While the principles of politicians may not be held in very high esteem, at least they can be voted out of office.

When discussing the theory behind judicial review, it is important to briefly raise the issue of entrenchment. Entrenching rights has the effect of putting them out of the reach of general political debate and revision. A good example of this is the right to bear arms in the Constitution of the United States of America. A right decided upon in 1791 is now amazingly difficult to alter in the face of an increasing number of errant gunmen. This is a particularly interesting example as the sentiment behind this part of the US Constitution was heavily influenced by the British rights protections of the time. However the manner in which the British protected the same right allowed a more malleable view that benefits society, whereas the President of the United States recently noted that "we are the only advanced country in the world that sees these shootings every few months."<sup>21</sup> Britain does not have anywhere near the level of gun violence the United States does. This is a stark reminder that the protection of a right can have disastrous consequence. It also highlights the importance of rights protections being able to evolve along with a civilisation's social advancement.

#### *D The Relevance of Section 5*

The operation of s 7 often requires an inquiry under s 5 to form a substantial part of any report filed. Section 5 of the NZBORA allows for the rights protected in the Act to have "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>22</sup> This is important for the Attorney-General's reporting function under s 7. When considering whether it is necessary to file a report, the Attorney-General considers firstly whether the bill in question is consistent with the rights and freedoms in the NZBORA. In the event that it is not, the Attorney-General then considers whether the limitation is justifiable in a free and democratic society.<sup>23</sup>

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<sup>21</sup> Barack Obama "Statement by the President on the Shootings at Umpqua Community College, Roseburg, Oregon" (James S. Brady Press Briefing Room, The White House, Washington DC, October 1 2015).

<sup>22</sup> Section 5.

<sup>23</sup> Section 5.



The Court of Appeal set out some guidelines for the s 5 inquiry in *Moonen v Film and Literature Board of Review*.<sup>24</sup> The *Moonen* inquiry requires:

Firstly, the identification and assessment of the objective of the limitation. The objective must be significant enough to justify a limit on the right. Secondly, the identification and assessment of the rational and proportionate connection between the objective and the limitation.<sup>25</sup>

The provision must limit a right as little as possible.<sup>26</sup> There must be an established rational link between the limitation and the objective. And the limitation must be proportionate to the objective. The *Legislative Advisory Committee Guidelines* note that “A wide variety of evidence is able to be considered under the *Moonen* inquiry, including empirical evidence and research. The Court of Appeal has held that social, legal, moral, economic, administrative, ethical and other considerations may be relevant to the inquiry under section 5.”<sup>27</sup> This is a broad and wide ranging inquiry enabling the Attorney-General to take into account almost anything that that he or she sees fit. It also acts as an interesting guide of what could or should be considered when limiting a right.

### *1 The concept of “reasonable limitation” on a right*

The concept of a reasonable limitation on a right clearly needs some explaining lest we all slip into a sense of cynical pragmatism. Rights generally conflict with one another. At some point freedom of expression becomes hate speech. Or to put it in a slightly more visceral manner, your right to swing your fist ends where my nose begins.<sup>28</sup>

### *E The Scope of the Attorney-General’s Section 7 Duty*

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<sup>24</sup> *Moonen v Film and Literature Board of Review* [1999] NZCA 329.

<sup>25</sup> *Moonen*, above n 24.

<sup>26</sup> *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939 (PC) at 954 .

<sup>27</sup> Legislative Advisory Committee *Legislative Advisory Committee Guidelines* (May 2001) at 117.

<sup>28</sup> Variations on this concept have been attributed to Oliver Wendell Holmes, Jr. John Stuart Mill, and Abraham Lincoln.

There have been some questions as to the scope of the Attorney-General vetting duty. *R v Poumako* established that section 7 applies strictly as stated.<sup>29</sup> Reports are to be made on introduction for government bills and as soon as practicable for others. The Attorney-General's s 7 duty does not apply to later amendments, for example to changes made by Supplementary Order Paper or at select committee. This is a potential area for improvement.

In *Boscawen v Attorney General* it was argued that the Attorney-General's duty is a continuous one.<sup>30</sup> The appellant argued for a purposive interpretation of s 7, claiming the purpose of the s 7 report is to alert the House to any draft legislation that is inconsistent with the NZBORA, and therefore the duty must apply to the whole of the legislative process. The Court of Appeal did not accept this argument. It was stated that:

It may well be that there is a case to argue that s 7 should require the Attorney-General to report at other stages in the legislative process. But, as Clifford J correctly observed, s 7 is clear and unambiguous in its terms. Purposive interpretation does not extend to rewriting the statute book ... In the present case, s 7 not only imposes the duty, but says when it must be performed (on the introduction of the Bill). A bill can be introduced only once. That means that the duty arises only once.<sup>31</sup>

The effect of this is that a bill may be substantially altered at select committee or by Supplementary Order Paper, so much so that a bill may become inconsistent with the NZBORA during the legislative process. If this happens the House has no formal mechanism to alert it to the fact that there are inconsistencies. It is also important to note that the minister in charge of a bill has the ability to amend it through Supplementary Order Paper. Therefore it is theoretically possible that an aspect of a bill that has the potential to cause political embarrassment could be deliberately not included in the earlier versions. A minister's Supplementary Order Paper could then be put forward at the end of the process, minimising the amount of attention drawn to it, limiting parliamentary debate on the subject, and avoiding the need for the Attorney-General to file a report on the inconsistency. It is important to note that Supplementary Order Papers lodged by a minister in charge of a bill have precedence over other member's Supplementary Order Papers, they are debated first and once amended a section cannot be revisited.<sup>32</sup> This

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<sup>29</sup> *R v Poumako* [2000] 2 NZLR 695; (2000) 17 CRNZ 530; (2000) 5 HRNZ 652 (CA) at [96]

<sup>30</sup> *Boscawen v Attorney-General* [2009] NZCA 12; [2009] 2 NZLR 229; (2009) 8 HRNZ 734.

<sup>31</sup> At 12.

<sup>32</sup> Standing Orders of The House of Representatives 2014, SO 308(2)(a).

process is open to abuse. It is also in principle wrong. For example, when changes were made to the right to protest at sea by Supplementary Order Paper to the Crown Minerals (Permitting and Crown Land) Bill in 2013, the human rights implications of curtailing the right to protest were not vetted by the Attorney-General. The issue is not whether this was an appropriate circumstance to limit a right, and more that it should not be possible to do so without proper public debate.<sup>33</sup>

### *F Operation*

The procedural requirements relating to s 7 of the NZBORA are detailed in the Cabinet Manual and the Standing Orders of the House. When considering whether a s 7 report is required, both the Ministry of Justice and the Crown Law Office may provide advice.

The Cabinet Manual requires that at the policy approval stage ministers in charge of the bill must certify to Cabinet that their legislative proposals comply with the relevant rights standards.<sup>34</sup> I believe a more robust assessment should be integrated into the policy development process.

### *2 Justiciability*

Section 7 reporting function is not justiciable. The Court of Appeal held in *Boscawen v Attorney-General* that “the Attorney-General’s exercise of statutory power under s 7 of the NZBORA was non-justiciable by virtue of art 9 of the Bill of Rights 1688 and the principle of comity between the Courts and Parliament.”<sup>35</sup> The High Court held the same view in *Mangawaro Enterprises Ltd v Attorney-General* fifteen years earlier.<sup>36</sup> Article 9 prevents parliamentary proceedings from being impeached or questioned in the courts.<sup>37</sup> This is based on the comity principle.<sup>38</sup>

### *G General NZBORA Remedies*

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<sup>33</sup> I am indebted to the Hon David Parker for raising this point with me.

<sup>34</sup> Cabinet Office, *Cabinet Manual* 2008.

<sup>35</sup> *Boscawen*, above n 30 at [3].

<sup>36</sup> *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 (HC).

<sup>37</sup> Bill of Rights 1688 (Eng) Interregnum art 9.

<sup>38</sup> *Boscawen*, above n 30 at [36].

It was held in *Simpson v Attorney-General* (commonly referred to as *Baigent's Case*) that remedies are available for a breach of the NZBORA. The Human Rights Act 1993 created a Human Rights Review Tribunal.<sup>39</sup> There is a general ability for individuals who feel their rights have been breached to lodge a complaint with the United Nations Human Rights Committee as part of the International Covenant on Civil and Political Rights.<sup>40</sup> Human Rights Act s 92J allowing courts to issue a declaration of inconsistency with the rights and freedoms contained in the NZBORA.<sup>41</sup> For example *Taylor and Attorney-General of New Zealand* held that the jurisdiction to make declarations of inconsistency with the NZBORA arose out of “an extension of the *Baigent* reasoning from which it is said that Parliament has assigned to the courts the task of crafting effective remedies for a breach of NZBORA.”<sup>42</sup>

It is important to note the wider context in which human rights are protected in the New Zealand legal system. Whilst there is clear room for improvement in the protection of human rights as part of the legislative process, the duty to protect human rights is a broad issue that is the responsibility of the whole of the legal system, not just the narrow area of legislative processes.

## 1 Canada

It is important to briefly outline the situation in Canada. Their legal system is in many ways very similar to ours, but they have chose to protect rights in quite a different way. Like the US, Canadian courts may refuse to apply legislation that is contrary to their *Charter of Rights and Freedoms*.<sup>43</sup> However the Charter also has a provision for legislation to enacted “not-withstanding” the Charter.<sup>44</sup> The public commitment by politicians to human rights that came about through passing the Charter has increased the politics costs to governments of ignoring rights implications.<sup>45</sup> This has changed the culture around human rights in their system of governance. This is a highly desirable

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<sup>39</sup> Human Rights Act 1993, s 93.

<sup>40</sup> United Nations International Covenant on Civil and Political Rights, (Opened for signature 16 December 1966, entered into force 23 March 1976).

<sup>41</sup> Mai Chen *Public Law Toolbox* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2014) at 16.58.

<sup>42</sup> *Taylor v Attorney-General of New Zealand* [2014] NZHC 1630 at [50].

<sup>43</sup> Jeremy Waldron *The Core of the Case Against Judicial Review* 115 YL.J. 1346 at 1355.

<sup>44</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>45</sup> Janet L Hiebert *A Hybrid Approach to Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny* 26 Fed. L. Rev. 115 1998 at 127.

outcome and worth bearing in mind as a positive by-product of public conversation on the subject.

In Canada the Minister of Justice has a statutory obligation to report to the House of Commons any inconsistencies with the Charter in any bill or regulations. The Charter has required new systems to be put in place in their Department of Justice. They now have a human rights section, which functions as a centre for lawyers and public servants.<sup>46</sup> Each government department also has lawyers who specialize in advising on potential Charter issues.<sup>47</sup>

Canada's Supreme Court assesses legislative inconsistencies under the Charter in two stages. Firstly, is the rights infringed. And if so, is the restriction a reasonable one?<sup>48</sup> Section One of the Charter specifically allows that rights can be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>49</sup> This is very similar to our reasonable limitation provision in s 5 of the NZBORA.

### *H Influential Factors*

There are some factors, which through practical process or pressures will increase the levels of compliance with the NZBORA. It is important to note that these factors can be manipulated when convenient to either increase or decrease the pressure on the government.

#### *1 The fourth estate*

This is a highly variable factor. Human rights breaches are an easy target for journalists looking for a story. Media coverage will be reliant on the concerns of the media at the time. As noted earlier, the Attorney-General is also a government minister, and the pressure not to generate unfavourable media coverage must be immense. However the pressure to make a bill compliant with the NZBORA in the first instance is also

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<sup>46</sup> At 123.

<sup>47</sup> PJ Monahan and M Finkelstein, "The Charter of Rights and Public Policy in Canada" in PJ Monahan and M Finkelstein (eds), *The Impact of the Charter on the Public Policy Process* (1993) at 10.

<sup>48</sup> Hiebert, above n 45 at 120.

<sup>49</sup> *Canadian Charter of Rights and Freedoms*, above n 44 at s 1.

considerable. It is also important to consider the changes taking place in the media, and how this may affect the fourth estate's ability to hold the government to account. The news is becoming an increasingly multimedia based platform. Journalists use Twitter, sometimes to draw attention to issues that for a variety of reasons will not be published in a newspaper. A lack of public funding has resulted in increasingly commercialized new outlets. This extended beyond just advertising, to an attempt to make the news 'saleable'. Now that news is available online during the day, people do not have to wait until the next morning for the newspaper. But this also means that as the news must be 'saleable' the newspaper is essentially compromised of the stories that received the highest online traffic the day before. The flow of effect of this is 'click bait' stories being produced by journalists, who angle is being influence by the necessity of packaging the story in an accessible manner. The lack of public funding has also decreased the financial ability of the media to engage in investigative journalism, which is expensive and time consuming. All of these factors hinder the media's ability to effective hold the government to account. It has also contributed the rise of leaked digital material, in cases like that of Julian Assange, Edward Snowden and in New Zealand the leaks that contributed to Nicky Hager's *Dirty Politics*.

## 2 Advice

The Cabinet Manual states "The Ministry of Justice is responsible for examining all legislation for compliance with the New Zealand Bill of Rights Act 1990 and advising the Attorney-General. The Crown Law Office examines bills developed by the Ministry of Justice." The Cabinet Manual states that ministers must confirm that a proposed bill is consistent with the NZBORA when seeking a place for it on the government's legislative programme.<sup>50</sup> This happens prior to receiving approval for the introduction of a bill to the House.

The advice received by the Attorney-General from the Ministry of Justice is then made public on the Ministry of Justice website. *Boscawen v Attorney-General* notes that while the Attorney-General can theoretically claim legal professional privilege and not publish the advice, this is not a common occurrence.<sup>51</sup> Essentially this is a voluntary transparency.

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<sup>50</sup> Cabinet Manual, above n 34 at [7.62].

<sup>51</sup> *Boscawen*, above n 30 at [15].

### 3 *The Legislative Advisory Committee*

The *Legislative Advisory Committee Guidelines* also provide that “all submissions for Cabinet Committees, prepared by government departments on policy and legislation, from May 2003, are required to include a statement of the proposal’s compliance or non-compliance with both the Bill of Rights Act and the Human Rights Act.”<sup>52</sup> This is an interesting flow on effect of s 7 NZBORA. There is a political incentive to encourage compliance to avoid negative publicity. So as government bills are drafted, there is a conscious effort to give effect to the scheme in such a way that does not interfere with the NZBORA. This prevents inconsistencies from occurring, or needing to be litigated for clarity at a later date. This is arguably a more valuable safeguard than a public report of non-compliance with the NZBORA. It is important that human rights are raised prior to the introduction of a bill to the house, as will be discussed in greater detail later.

#### 1 *Politics and Other Problems*

##### 1 *The position of the Attorney-General*

In short, the Attorney-General has conflicting dual roles. An Attorney-General provides objective legal advice to the government in his or her capacity as principal law officer. He or she is also a government minister, in a political role. It is important to note that the decision to file a report is at the discretion of the Attorney-General.<sup>53</sup> This situation is problematic. Attorney-General is put in a difficult position as a government minister who files a discretionary report saying that a government bill unreasonably limits a right. This is at least in part a process-based issue. The process makes is unnecessarily complex to declare a bill non-compliant. The issue needs to be addressed much earlier in the process, and in a less political fashion.

Janet Hiebert in her paper *A Hybrid Approach to Protect Rights* discusses the inherent conflict between the objective obligations of a person assessing whether a right should be limited, and the sense of party loyalty.<sup>54</sup> She is making an assessment in respect of members of a committee assessing rights, as opposed to the Attorney-General, but the essential issue strikes me as the same. Both situations require a politician to put aside the

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<sup>52</sup> Legislative Advisory Committee Legislative Advisory Committee Guidelines (May 2001), at 111.

<sup>53</sup> *Mangawhai Ratepayers’ and Residents’ Assn Inc v Kaipara DC* [2014] NZHC 1147, [2014] 3 NZLR 85.

<sup>54</sup> Above n 45 at 127.

interests of their party and attempt an objective assessment of another person's rights. She notes that "the task of having to wear two hats...is particularly difficult for government members. As members of the governing party, they may have a strong sense of political history of a proposed bill and are sensitive to the government's intents and objectives."<sup>55</sup>

By convention the Attorney-General is essentially left to do whatever they think is right. Any suggestion of bias in their capacity of principal law officer would be regarded with extreme gravity, both by the general public and by other public office holders. In practice, any sustained level of bias would draw the attention of public office holders, the media and then the public. However there should at least be a formal provision allowing the Attorney-General to abstain from voting on a bill that is non-complaint, in order to mitigate the conflicting roles.<sup>56</sup>

## 2 *Discretionary reporting*

As mentioned earlier, the decision to file a report is at the discretion of the Attorney-General. It is "not a general reporting obligation, it arises only when the Attorney-General considers there is something to report."<sup>57</sup> In *Boscawen v Attorney-General* it was noted that "the objective of s 7 is to ensure that Parliament has the benefit of the Attorney-General's assessment. There may be room for different views, but the view which Parliament is to be provided with is the genuinely held view of the Attorney-General."<sup>58</sup> The court recognized that "opinions can legitimately vary on human rights issues" and the Attorney-General is only obliged to provide the House with his or her opinion.<sup>59</sup> The duty is to report back on legislation which "in the principal law officer's view, would be in breach of the rights contained in Bill of Rights."<sup>60</sup> As a check on the power of the legislature, this provision certainly does not appear to have teeth. However it is possible to argue that it is the nature of s 7 that the report will be the subjective view of one person. Its purpose may not be to prevent breaches, merely to make the Attorney-General's personal opinion of them a matter of public record.

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<sup>55</sup> Hiebert, above n 45 at 127.

<sup>56</sup> I am indebted to the Hon Margaret Wilson for raising this point.

<sup>57</sup> *Mangawhai*, above n 53 at 13.

<sup>58</sup> At [20].

<sup>59</sup> At [18].

<sup>60</sup> At [19].



This means that whilst the role of the Attorney-General is generally to provide the government with objective legal advice, in this particular case it may be possible that the nature of the report does not require objectivity, and there is nothing legally wrong with a biased report, or no report at all if that suits the purposes of the government.

## *J Potential Improvements*

### *1 Change*

Essentially we need to optimize the convenience for politicians to produce policy and eventually legislation that supports rights. This is why changes need to be better integrated into the existing system. Ideally a system should be designed to make it very easy to produce good legislation. Rights considerations would be integrated into the process so they are factored in as a matter of course with minimal effort required on the part of the government. The system should make deviating from the process complex and politically embarrassing. This can be helped by a culture change around the way the public and media perceive politicians responsibilities around rights.

A improved model of pre-legislative scrutiny would be an effective solution. The reason for this is at least in part pragmatic. This is the area in which change is the most realistically achievable.<sup>61</sup> There are political costs involved with legislative change in this area. It requires buy in from the public and a certain measure of cross party support. The fact of the matter is that in New Zealand's current political atmosphere there is very little political gain to be had for improving upon our existing system. The benefits of comprehensive rights analysis on policy and legislation are broad and diffuse, and therefore difficult to quantify. They are impossible to reduce to a media sound bite. Unfortunately given the current prevalence of 'sound bite politics' this is problematic. The media don't like to pick up issues that are not easy to create a sound bite from. Politicians are less likely to pick up issues the media won't carry. The public doesn't know or doesn't care. Therefore in this particular situation the appropriate mode of operation will not be sweeping widespread change, but a measured response in keeping with the structure and principles of the existing system. The important issue is identifying

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<sup>61</sup> Simon Evans *Improving Human Rights Analysis in the Legislative and Policy Processes* 29 Melb. U. Rev. 665 2005 at 666.

the point within the existing system that can be altered to have the maximum effect on the rest of the process.

Ideally changes made to the policy-making process in a cautious manner would likely encounter little opposition. There is the potential to preface changes with a commission or inquiry on the subject. Given the choices made in jurisdictions like Canada and England, it is relatively likely that any report resulting from an inquiry would suggest something more radical such as a Canada's Charter or strengthened judicial review. Therefore making a few process-based changes might appear as a suitable compromise between the extremities of the hypothetical report and our current system.

## 2 *Section 3(a) – it's the vibe*

It may be possible to argue that s 3(a) provides that the actions of the Executive (including policy development) must be guided by the 'vibe' of NZBORA. The guidelines note that:

“Section 3(a) of the Bill of Rights Act states that the Bill of Rights Act applies in respect of all acts done by the legislative, executive, and judicial branches of government. As Ministers and their departments form the core of the Executive, the Bill of Rights Act will apply to most, if not all their activities, whether that is in the form of legislative and policy development or in the delivery of services.”<sup>62</sup>

So there is a legislative provision for the consideration of rights issues within the policy development process. The issue is not the principled consideration of whether it should be included in the process, but the lack of framework within the process to allow the time and personnel for the consideration of human rights issues.

This means change could be achieved with any legislation being passed through Parliament. If legislative license was needed s 3(a) would suffice, and it could simply be framed as changes in the policy process to give better effect to s 3(a). It would even be possible under s 3(a) to argue that these changes to policy processes are necessary. At present there is the opportunity to consider human rights when developing policy. But it is possible to argue that the existence of optional guidelines followed by a brief statement

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<sup>62</sup> Ministry of Justice, NZ. *Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (2004).

in a Cabinet paper does not amount to the appropriate application of the NZBORA in policy development. It is specifically stated that the NZBORA applies in respect of policy development, yet our systems to ensure this remain woefully inadequate.

### *3 Integration*

It is important that rights checks are well integrated into the policy development process. By the time a bill is introduced to Parliament it is too late to change very much without considerable political embarrassment. Changes need to happen much earlier in the process, so the government is not left between a rock and hard place amending a bill they have invested a lot of political capital in, or ignoring reports of inconsistencies in order to save face.

There are good reasons for restricting a right, but a badly managed system is not one of them. Rights considerations need to be integrated into the policy process so they function with a certain inevitability, and hopefully invisibility. Once a bill has been introduced to Parliament the government already has a significant political investment in the bill. We need to make sure that problems are ironed out prior to the government becoming significantly invested in it. Hopefully rights considerations, if made obvious early in the process, may actually influence which policies a government does or does not choose to adopt.

We must assume a government that wants to restrict a right can and will. However dubious policy may be redeemed by good legislative drafting that gives effect to the policy without restricting a protected right. New Zealand has the potential to create a process that would make it both hard and politically embarrassing for a government to pass laws that unreasonably restrict rights. But pressure must be applied strategically, at the stage that will cause maximum impact. Introducing a bill to the House with the support of the government is not the ideal moment to consider human rights implications, and from a political strategy perspective it is disastrous. It must happen earlier in the process, when the policy or concept is malleable enough that it can be turned into something that does not unnecessarily restrict protected rights.

In her article *Human Rights Act 2004; A New Dawn for Rights Protection?* Elizabeth Kelly make the point that institutionalized statement of compatibility with human rights

are most effective at the beginning of the policy process.<sup>63</sup> She goes on to say that this work will be invisible to practitioners and the public, but it is arguably where the biggest impact will be felt.<sup>64</sup> This sentiment was also observed in a discussion paper, written by an independent evaluation team, released by the then Associate Minister for Justice Margaret Wilson in 2000:

“If taken into account early in the policy making process, human rights tend to generate policies that ensure reasonable social objectives are realised by fair means. They contribute to social cohesion and, as the Treasury's Briefing to the Incoming Government (1999) observes: 'Achieving and maintaining a sense of social cohesion and inclusion is an important aspect of welfare in the broadest sense ... Fairness to all parties involved extends both to the processes by which things are done and to the outcomes themselves. Social cohesion is low when individuals or groups feel marginalised.' Policies which respect and reflect human rights are more likely to be inclusive, equitable, robust, durable and of good quality. Critically, such policies will also be less vulnerable to domestic and international legal challenge.”<sup>65</sup>

The crux of this point is that human rights analysis makes better policies. Not just better in terms of not infringing protected rights, but analysis of this kind requires a more general consideration of the greater social good in a potential policy. It requires big picture thinking, a conscious effort is made to give effect to a scheme in a way that is beneficial to citizens. While we would hope this happens anyway, it is simply human nature that considerations would generally be those that are immediately obvious to a public servant or politician engaged in policy-making activity. What does the Minister want, what are other countries doing in this area, how do we frame it so it is easily drafted, easily passed, easily packaged for (or hidden from) the media? Enabling high-level considerations in the analysis process will result in better policies. Also as noted above, it is more stable. Good policies are hard to criticize and hard to change. Governments all advocate for social change and improving methods of governance, however much they may disagree on the best method of achieving this. A change in the policy process can help them achieve this in a lasting manner, ensuring their political legacy is well respected.

### ***K Where Do Policies Come From?***

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<sup>63</sup> Elizabeth Kelly, 'Human Rights Act 2004: A New Dawn for Rights Protection?' (2004) 41 AIAL Forum 30 at 33.

<sup>64</sup> At 33.

<sup>65</sup> *Re-evaluation of the Human Rights Protections in New Zealand* (11 August 2000), Beehive <<http://www.beehive.govt.nz>> at [206] and [207].

*Well when a politician and a lobby group love each other very much...*

Policy comes from a wide range of sources. Potential origins include think tanks, policy committees of political parties, government departments and lobby groups. In order to become government bill, a policy must be adopted by the government of the day who will then send it to the appropriate ministry for development.

As it stands, public servants who are developing policy have some guidance in the form of a document titled *Guidelines on the New Zealand Bill of Rights Act 1990*. Once a policy is presented to Cabinet, the associated Cabinet papers are required to include an analysis of potential rights implications. There is also a risk analysis requirement during the development process that has the potential to raise human rights issues. However risk analysis is a very broad undertaking. It does not require specific consideration of human rights issues, and even when they are raised they are easily overwhelmed by more immediate political issues.

While it is important to acknowledge the existing systems in place, and the value of them, I do not believe this goes far enough. As noted above good human rights make for good policy. These issues need to be formally addressed in a comprehensive fashion prior to Cabinet sign off. A system must be clearly integrated into the policy development process, not handed out to the legal department to be rubber stamped prior to Cabinet.

### *1 In support of Human Rights Impact Statements*

There is a strong argument to be made for implementing Human Rights Impact Statements (HRIS) in the same manner that Regulatory Impact Statements (RIS) are used, creating a framework that can be applied from the start of the policy making process. This formalised framework would improve the efficacy of the existing rights consideration within the policy-making process.

As noted by the Simon Evans in his paper *Improving Human Rights Analysis in the Legislative and Policy Processes*, Human Rights Impact Statements are a “logical extension of the commitment...to evidence based policy-making.”<sup>66</sup> They promote a culture of awareness of human rights in the executive branch of government.<sup>67</sup> He notes the particular importance of integrating the human rights analysis within the existing

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<sup>66</sup> Evans, above n 60 at 665.

<sup>67</sup> At 665.

policy process. His observations are about the Australian system, but much of what he says is applicable to the New Zealand system as well. We too relegate human rights concerns to the end of the process.

Human Rights Impact Statement would be required for all policy proposals that make have a significant direct or indirect effect on human rights.<sup>68</sup> Borrowing Simon Evans outline, a HRIS would:

- 1 identify the problem or issues which may give rise to the need for action;
- 2 identify the desired objective or objectives of the action;
- 3 identify the policy instruments that might be employed to achieve the desired objective or objectives;
- 4 include an assessment of the human rights impact of each option;
- 5 identify the extent of the consultation with those who will be affected by the proposed action and summarise their views;
- 6 identify and give reasons supporting a recommended option; and
- 7 describe a strategy to implement and review the recommended option.<sup>69</sup>

Essentially a HRIS would function the same way as a RIS, its structure would be the same, and the content would simply be human rights instead of economic impact. The significance criteria that trigger the need for a RIS could be adapted for a HRIS.

And frankly, if we can do it for economic impact, it is a sad reflection on the priorities of a government that won't do it for human rights.

There is also the option of having HRIS's reviewed by an external body.<sup>70</sup> This is also a suitable alternative to having Members of Parliament sit on committees that assess the human rights implications, as discussed below. This body has the advantage of being independent. It would increase the level of political accountability. This body would not need to have any final power. It would not disrupt the existing system at all, or alter the balance we have in place. Parliament would still be free to pass any law it felt restricted rights in a reasonable manner. But there would be an independent report which comments on the effectiveness and impartiality of HRIS's. This would increase the public's confidence in the existing institutions.

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<sup>68</sup> Evans, above n 60 at 686.

<sup>69</sup> At 678

<sup>70</sup> At 693.

## *L Judicial Review*

### *1 A theoretical argument considering Dworkin and Waldron*

Ronald Dworkin is a prominent defender of judicial review.<sup>71</sup> Dworkin believes in judicial review as the modern vehicle for “intractable, controversial and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries.”<sup>72</sup> Jeremy Waldron believes judicial review is a ‘deviant institution’ in democracy.<sup>73</sup> In his paper *The Core Case Against Judicial Review* Waldron states that judicial review is “politically illegitimate, so far a democratic values are concerned by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.”

It is important to note that Waldron’s despise is limited to strong judicial review, ie the striking down or non-application of legislation by the courts.<sup>74</sup> This is demonstrated in some European courts, and in America.<sup>75</sup> He also considers Canada included, their override provision allowing the legislature to exempt certain statutes from the judicial review of the courts notwithstanding.<sup>76</sup> In New Zealand courts cannot decline to apply legislation, though they may “strain to find interpretations that avoid the violation.”<sup>77</sup> This is ‘soft’ judicial review.

### *2 The tyranny of the majority*

The basic premise of the concept of the ‘tyranny of the majority’ is that democratic legislatures which are by virtue of their democratic nature organized on a majoritarian basis, may give expression to the “tyranny of the majority.”<sup>78</sup>

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<sup>71</sup> Jeremy Waldron *The Core of the Case Against Judicial Review* 115 YL.J. 1346 at 1349.

<sup>72</sup> Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, Massachusetts, 1996) at 74.

<sup>73</sup> Waldron, above n 71 at 1349.

<sup>74</sup> At 1348-9.

<sup>75</sup> At 1355.

<sup>76</sup> At 1355.

<sup>77</sup> At 1355.

<sup>78</sup> At 1395.

Dworkin argues that majoritarian decision-making is inherently tyrannical.<sup>79</sup> He argues that respect for rights is a fundamental condition for the legitimacy of any system of political decision-making.<sup>80</sup> His premise is that democratic procedures are legitimate only among people who respect one another's rights.<sup>81</sup> Dworkin's argument is not logically or ethically wrong, but it is abstract, so much so that it is difficult even to distil an overarching principle that could be applied to human rights safeguards.

Waldron attempts to refute Dworkin's position by differentiating between 'decisional majorities' and 'topical majorities'.<sup>82</sup> Decisional majorities are quite self-explanatory. They are the majority of the group of people who make a decision on a right. A topical majority is the group of people whose rights or interests are at stake.<sup>83</sup> He states that if topical majorities align with decisional majorities then we do in fact have legitimate grounds for concern.<sup>84</sup> However he claims that it is striking how rarely this happens.<sup>85</sup> He then goes on to provide two examples: abortion and affirmative action.<sup>86</sup> His reasoning is stated thus:

“In neither case is there the sort of alignment that might be worrying. Many women support abortion rights, but so do many men; and many women oppose them. Many African-Americans support affirmative action, but so do many members of the white majority; and many African-American's oppose affirmative actions.”<sup>87</sup>

Here Waldron is essentially missing his own point. Any person, regardless of demographic, could hold any personal position on a right. That argument is verging on that of Schrödinger's cat. Just because a person appears to belong to a certain demographic doesn't mean they'll hold the opinion that benefits that demographic. But this argument doesn't take into account the self-interested of humans. The issue is that the decisional majority is made up of people who are unlikely to be personally affected by either access to safe and legal abortions, or the help of affirmative action. The majority of decision makers in decisional majorities are straight white men, regardless of whether

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<sup>79</sup> At 1399.

<sup>80</sup> Dworkin, above 72 at 25.

<sup>81</sup> At 25.

<sup>82</sup> Waldron, above n 70 at 1401.

<sup>83</sup> At 1401.

<sup>84</sup> At 1401.

<sup>85</sup> At 1401.

<sup>86</sup> At 1401.

<sup>87</sup> At 1401.



you believe the legislature or the judiciary should have the final word. Ironically, that is actually the purpose of affirmative action, to improve the representation of minorities in decisional majorities.

Waldron's argument is also so abstract it doesn't apply to any real political system. He attempts to validate it by setting some baseline assumptions about the functionality of a democracy.<sup>88</sup> However he sets the bar too low. For example he believes that assumption of a general commitment to rights in a society is easily satisfied by the existence of a bill of rights.<sup>89</sup> However logic is only as good as its premise. Whilst this assumption clearly includes the state of modern governance in New Zealand, the United States, Canada and England, one assumes he is not taking into account the state of human rights in England in 1688 when they passed their Bill of Rights. Or the issue of slavery in the United States 1864 when the Thirteenth Amendment made slavery unconstitutional.<sup>90</sup> Clearly more is needed than the existence of a Bill of Rights. Whilst this is an extreme example, it is necessary to highlight the fundamental issue. Waldron's assessment is highly abstract. His logic, while excellent, blithely ignores the realities of human nature and its predisposition towards self-interest.

### 3 *Practical concerns*

Proposing a Bill of Rights has attracted some concern about the effect this may have on political responsibility.<sup>91</sup> The argument is that enabling judicial review of codified rights lessens politician's responsibility to undertake potentially controversial political decisions, instead making them the responsibility of the judiciary. This would mean that politicians could operate with different priorities and values, knowing that doing the 'right' thing is now take care of by another arm of government. On a similar note, it can be argued that rights claims as presented in courts are not distinct from policy considerations.<sup>92</sup> This particular concern is well demonstrated in the Canadian system, where the judiciary actually reviews the executive's policy making as a means to determine whether rights are adequately protected.<sup>93</sup>

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<sup>88</sup> For further discussion of this, please refer to Jeremy Waldron *The Core of the Case Against Judicial Review* 115 YLJ. 1346 for reasons of space, it will not be discussed in detail here.

<sup>89</sup> At 1401.

<sup>90</sup> Us Const. amend. XIII.

<sup>91</sup> Hiebert, above n 45 at 115.

<sup>92</sup> Hiebert, above n 45 at 116.

<sup>93</sup> Hiebert, above n 45 at 122.

The alterative argument is that judges are not subject to the pressure of electoral and party politics, and therefore their decision-making will be based on principle not policy or partisan considerations.<sup>94</sup>

Judicial review is theoretically the best option. Bearing in mind that practical considerations will mean that judicial review is an unlikely change to be made in the New Zealand system, due to our commitment to parliamentary supremacy. In theory, a robust system of policy processes, legislative checks, and judicial review would be in place.

#### *4 Subjectivity and having the final word*

It is possible to argue that rights issues are essentially subjective. That checks and balances all eventually result in a politician or judge making a subjective call as to where to draw the line between two conflicting rights. This raises the issue of which arm of government is better placed to make the final call. Are politicians inherently better placed as elected officials? Are judges inherently better situated, as they are charged with making principled and objective decisions? If politicians are held to account by a majority surely they are badly placed to protect minority rights, and minority rights are usually the ones infringed upon. Or are politicians as democratically elected representatives the better option, not judges who bias is accountable to no one?

I believe that the political culture of compromise is worth raising as an issue. ‘Swallowing dead rats’ is not something a judge is every required to do. Political positions on any issue turn on the whim of the electorate. It is not desirable to have rights subjected to policy cycles. Therefore the impartiality of judicial review does have a place. When considering who is best placed to have the final word, it becomes obvious that there are compelling argument against both Parliament and the judiciary. But the fact is judicial review is that is doesn’t necessarily need to be a better system for determining rights, it just needs to act as a check or balance on the existing, parliamentary based system.

All rights must have inherent limits. They are not infinite, because one right must end where another starts. Therefore there issue is determining the ‘right’ place to draw an invisible line in the sand. Our sense of ‘right’ and ‘wrong’ changes as issues of social

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<sup>94</sup> Hiebert, above n 45 at 116.

justice come and go. For example Ireland recently voted in marriage equality by popular referendum, compared to their stance 20 years ago it become apparent how dramatically our perception of ‘right’ and ‘wrong’ can change within a generation. So essentially any limitation of a right will be decided upon by a person who is influenced by not just their immediate environment (whether politics, or the justice system) but also by the time that they live in, and their personal perspective on it. This is influenced by issues such as their social background and education. Therefore it is in the best interests of society to have people who are diversely representative, principled, unbiased, and hopefully immune to external pressures. Judges may be less diverse, but they are more independent. Arguably judges are better situated (politically and intellectually) to engage in principled decision-making.”<sup>95</sup>

However the essence of the problem is not whether a truly democratic society needs judicial review, or whether it remains truly democratic with a system of judicial review. Regardless of difference in opinion on judicial review, we can all agree that ideally a system would develop which minimizes the need for any law or personal grievance to get so out of hand that it requires judicial review. Ideally the processes (legislative and political, including policy development) that contribute to the system of governance evolve in such a way that enables the nurturing of all rights and freedoms in a reasonable manner. This thereby minimizes the negative effects of either judicial review or parliamentary sovereignty.

##### *5 Judicial review and policy processes*

It is worth noting from an academic perspective that assessment of the reasonable limitations on a right, which is present in both the New Zealand and Canadian jurisdictions are an odd thing to foist upon judges, as is done in the Canadian system.<sup>96</sup> They have no particular expertise in this area, and this task is closely related to policy analysis. It requires an assessment of the merits of legislation from the perspective of the policy’s conceptualisation and drafting. Policy-making requires multiple objectives to be addressed. This is an inherently a discretionary exercise. It is possible to argue that judges stepping outside their usual role, because someone has to do it and hopefully they’ll bring their objective and principled views to the situation. But the argument that social policy considerations are the preserve of Parliament as elected representatives also has merit.

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<sup>95</sup> Hiebert, above n 45 at 118.

<sup>96</sup> Hiebert, above n 45 at 121.

It is possible to reframe the argument. Who has the final say is not necessarily the paramount issue for the smooth running of a democratic society. Instead we should consider if the balance of power is right. Are all the separate functions of governance being held appropriately to account by the others? The Canadian Charter's provision for judicial review of policy processes is fascinating from this perspective. It shines a light on an often overlooked area in the corridors of power, and makes it not only open to public scrutiny, but open to judicial condemnation and potential nullification. The requirement is "that the policy be reasonable under the circumstances."<sup>97</sup> Here the court seems to have essentially developed their own tests, which gives the safeguards a rather circular and self-fulfilling feel. The courts have outlined their task as considering whether the ways and means of policy are appropriately designed, not asking whether the policy objectives themselves are acceptable.<sup>98</sup>

There are two points to be made here. The first is that this makes it very different to conceptually distinguish between the subjective and discretionary considerations that shaped the policy decision, and the exercise that takes place in the courts. This raises an interesting legal point as to whether this is the role of a judge. Does this add weight to the suggestion that these decisions are the exclusive right of the executive? Should judges sometimes be allowed to make decisions in this manner? Are we simply being obtuse or willfully blind in suggesting that judges do not make subjective decisions which are often influenced or guided by social policy in the ordinary course of their work? Or is it generally undesirable but to be allowed in the context of rights cases?

The second point is that having a court of law able to review the policy decisions of the Executive would put tremendous pressure on what is generally a quiet undertaking. Policy design is not an obvious area of power and influence, but none-the-less policy makers do have extraordinary power. Governments who front the policies that are held to account by the electorate, but it is an interesting point to consider the possibility of increased accountability for policy-makers as well.

There is an argument to be made in the long term for revisiting the idea of judicial review in New Zealand. It is possible that there is potential compromise between New Zealand's commitment to parliamentary supremacy and the strengthening of judicial review. As Waldron acknowledges, there is a 'soft' judicial review that even he is not opposed to. It

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<sup>97</sup> R v Chaulk (1990) 3 SCR 1303 at 1343.

<sup>98</sup> Hiebert, above n 45 at 122.

may be possible to extend the powers of the court when making a declaration of inconsistency. If the courts had the power to force Parliament to reconsider an act they deem to be inconsistent with the NZBORA, this would serve as a check on their power without removing the principle of parliamentary supremacy.<sup>99</sup> It would also raise the political cost of limiting the right, discouraging Parliament from doing so.

### *M Parliamentary Scrutiny*

Parliamentary scrutiny is often raised as safeguard by academics and the judiciary, or as a potential forum for a constructive contribution to be made. *Boscawen v Attorney General* states “Where there are differencing views on possible inconsistency with NZBORA rights as to whether any limitations on any NZBORA right is justified in a free and democratic society, it is appropriate that those issues should be debated in Parliament.”<sup>100</sup> Issues when they arise should be debated in Parliament. However the effectiveness of parliamentary debate as a safeguard for rights is also somewhat dubious. A minority in Parliament does not have the power to amend legislation. Simply having a member raise an issue in Parliament does not mean anything will be done about it. Arguably Parliament doesn’t scrutinize anything. The highly partisan atmosphere values point scoring above robust debate, because that has a greater bearing on the political maneuverings taking place. A law put forward by the executive cannot be changed without majority support. Lack of quorum requirements and party voting systems mean that the number of members actually in the house can be alarmingly low. A speaker is allocated a certain amount of time, and if it is politically expedient (for example, when filibustering legislation) a seasoned member can get through most of a speech before they even begin to address the subject matter. There can be very few members listening to any given speech, and while it will then be recorded in Hansard, this publication is not exactly widely read. Depending on the time of day and subject matter being debated, the press gallery may or may not have anyone in it. A journalist may or may not be inclined to draw attention to a point made by a member. It is hardly the robust debate and public scrutiny it is often portrayed as by academics.

New Zealand has a very low quorum requirement. It is necessary to have a minister in the Chamber, and the Speaker of the House.<sup>101</sup> Ordinarily you would also require a member

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<sup>99</sup> I am indebted to the Hon David Parker for raising this idea.

<sup>100</sup> At [16].

<sup>101</sup> Standing Orders of the House of Representatives 2014, SO 40.

to speak. This member can be the Minister in question, so it is hypothetically possible for the House to be in session while a minister speaks to a room empty but for the Speaker. The length of time they speak for depends on the debate rules at the time. But at the committee stage the Minister could continue to seek calls for as long as he or she wished, provided the Speaker did not decide the content was becoming repetitive.

Hiebert makes an interesting point in relation to the power dynamics of the Canadian Parliament, which I believe is equally applicable to most democracies.

“Parliament is not generally a forum where independent members engage in robust philosophical debates in a principled, non partisan, manner. Rather, it is a weak institution where the structure of power ensures that members assume a subordinate role, disciplined along party lines in which issues are dealt with in an adversarial format that assures that the resolution to multi-faceted conflicts can be reduced to two viewpoints – in favour and opposed.<sup>102</sup>

Whilst this is a fairly damning assessment of a democratic institution, it is not inaccurate. The purpose served by parliamentary debate is one of political power play, not a principled and nuanced discussion. This is partly the fault of the highly competitive and rather brutal nature of politics. This observation is in no way meant to undermine the value of parliamentary debate in the wider scheme of democracy, simply to outline that it is and blunt instrument not suitable for the purpose at hand.

#### *N Human Rights Select Committees*

After dismissing parliamentary debate as a potential help, it is important to consider select committees. England has the Joint Committee on Human Rights.<sup>103</sup> Canada has the Senate’s Standing Committee on Human Rights.<sup>104</sup> Australia has the Parliamentary Joint Committee on Human Rights established by the Human Rights (Parliamentary Scrutiny) Act 2011.<sup>105</sup> Select committees are a mechanism by which business before the House is considered in greater depth than would ordinarily be possible through parliamentary debate.

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<sup>102</sup> Hiebert, above n 45 at 125.

Australia's Parliamentary Joint Committee on Human Rights was established by the Human Rights (Parliamentary Scrutiny) Act 2011.<sup>106</sup> In New Zealand they could either be established by a bill, or by passing a motion in the house to that effect.<sup>107</sup> As such they would be extremely easy to put into action.

The main consideration is whether a human rights select committee would have any substantial effect. It would be subject to the same pressures as parliamentary debate. A select committee has proportional representation of the parties in Parliament. As such the governing party has the chair and often deputy chair of a committee, and a majority on it. So while opposition MPs are given the opportunity to consider the human rights implications of a bill closely, and they can file a minority report as part of the select committee report that would be presented to the House. However any concerns would already have been recorded in Hansard at first reading, and this process would not materially alter the balance of power enough to be effective. The same concerns previously raised about partisan politics would apply here. The concerns raised about the conflicting roles of the Attorney-General apply to government members (who hold the majority on the committee) who would be juggling two hats, as a member of the governing party trying to pass the bill, and as an objective assessor of human rights.

### *O Conclusion*

In conclusion, our current system of reporting on potential breaches of the NZBORA is open to exploitation. It is a system that depends entirely on the discretionary opinion of one person. This person is dealing with duties that often directly conflict. The NZBORA's greatest power is the pre-legislative influence to produce a bill that complies with the NZBORA, as opposed to its ability to prevent limitations on human rights.

Judicial review and human rights select committees have the potential to contribute to a robust system of human rights analysis. However given the current state lack of appetite for change in New Zealand, attention is best focused on the policy process. This is an area where there is both room for improvement, and remarkable flexibility in implementing it.

New Zealand would benefit from an integrated human rights analysis process starting at the policy determination stage. The positive effects of this would be amplified by an

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<sup>107</sup> Standing Orders of the House of Representatives 2014, SO 184.

independent body established to provide guidance and reports on the compliance of ministries to the new system. This would be best achieved through the implementation of HRIS's, which would be easily adaptable from the existing RIS processes. This change would require some additional funding as existing ministries expand their human rights analysis capacity, but it is not significant enough to be prohibitive. Establishing an independent body to review HRIS's would be more costly, but once again the cost is unlikely to be prohibitive.

In the long term it may be possible to consider a version of 'soft' judicial review to serve as a check on the power of Parliament and the executive. It is possible to find a compromise between the principle of parliamentary sovereignty and the necessity of an external check on the power of Parliament.



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