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NEW ZEALAND BILL OF RIGHTS ACT 1990 s7;
IS IT TIME FOR A RADICAL OVERHAUL?

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ABSTRACT

The object of this paper is an examination of section seven of the New Zealand Bill of Rights Act 1990 ('the Act'). A policy analysis along Natural Justice and Fairness lines will be applied to section seven. The rationale behind the analysis is the fact that this is a vital section of the Act as it provides the only official check on the Executive. This check is in relation to enacting legislation which is inconsistent with the Act. The section is an important part of New Zealand's primary human rights legislation and as such it should accord with ideals consonant with Natural Justice and Fairness principles.

Through the application of this analysis and an examination of the rationale behind the analysis, this paper attempts to illustrate that there are some serious flaws inherent in section seven. These flaws include problems associated with a lack of transparency in the process and the risk of the appearance of bias.

This paper argues that these flaws have significant potential consequences. These consequences include the further erosion of public faith in New Zealand's human rights framework, which incorporates Parliament and the Judiciary. In the current milieu faith in the system is at a critically low point.

In light of the foregoing, this paper argues that radical reform of section seven is required. This paper acknowledges that this is a difficult task. Several options for reform will be identified and their relative strengths and weaknesses will be assessed in order to find the most feasible option. A proposal for reform is then presented by this paper.

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I INTRODUCTION

'We look forward to a world founded on four essential human freedoms. The first is freedom of speech and expression...The second is freedom of every person to worship God in his own way...The third is freedom from want...The fourth is freedom from fear'

(Franklin D. Roosevelt 1882-1945, Message to the Congress, 6 January 1941, in *Public Papers* (1941) vol. 9, p672)

Franklin Roosevelt's words reflect the international recognition given to ideals such as freedom, dignity and respect. New Zealand as a responsible citizen of the world community has a commitment to these ideals. This commitment is borne out in the New Zealand Bill of Rights Act 1990 ('the Act').

This year on the 150th anniversary of the New Zealand Parliament, the Deputy Prime-Minister, the Hon Dr Michael Cullen gave a vigorous speech warning of the dangers of tolerating the emerging view that sovereignty is to be shared by the Courts and Parliament. In relation to the development of an entrenched supreme law for New Zealand, Hon Dr Michael Cullen decried New Zealand's experience to date with the New Zealand Bill of Rights Act, as inspiration for such a move.¹

In light of this atmosphere, the time appears ripe for examination of the New Zealand Bill of Rights Act 1990 ('the Act'). This paper seeks to examine one crucial section of the Act. This is section seven which is commonly known as the 'Attorney – General's vetting provision'. It is a vital section because in the absence of a provision enabling the Courts to strike down legislation on the basis of inconsistency with the Act, it provides the only formal check on the Executive's power in relation to Bill of Rights compliance.

In order to examine section seven a Natural Justice or Fairness policy analysis will be undertaken.

The Natural Justice and Fairness analysis will focus primarily on transparency and appearance of bias issues. These issues will be considered because they have the

¹ (24 May 2004) 617 NZPD 13192

potential to adversely impact on public faith in New Zealand's human rights framework and to compromise the concept of impartiality of the Attorney-General, which is an important part of the Attorney-General's constitutional role.

It is submitted that the policy analysis in this paper will highlight some major flaws in the section seven process. The first of these flaws is a lack of transparency in the two-tiered system which currently assesses Bill of Rights Compliance. This has the potential to affect public confidence in the process and is inappropriate in relation to an enactment which is rights-based. The second and most significant flaw is difficulties analogous to the Natural Justice principle of 'apparent bias'. The problem is that section seven, by its very nature, creates a 'manifest contradiction' in relation to the roles of the Attorney-General. This manifest contradiction seriously compromises the semblance of impartiality of the Attorney-General.

The flaws that this paper highlights require a radical reform of section seven and its associated process. Why is such a reform needed? It is acknowledged that any cure must not be worse than the ill. However, the theme which runs through this paper is that the potential implications of these flaws are too important for a consideration of reform options not to be undertaken.

It is argued that a suitable approach to the challenge of identifying an appropriate substitute scrutineer is to canvass several options. An assessment of the relative strengths and weaknesses of the potential options may then be undertaken and a conclusion reached as to the most viable substitute entity.

Before applying the policy analysis, the significance of the Act and section seven within its framework will be explored.

II SIGNIFICANCE OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990-AND SECTION SEVEN

It is axiomatic that every person has certain inviolable rights in relation to freedom, dignity and respect. This has been recognised in a number of international instruments such as the Universal Declaration of Human Rights 1948. In fact, New Zealand is obliged to report every four years to the International Human Rights

Committee in relation to the rights set out in the international instrument known as the International Covenant on Civil and Political Rights 1966 (ICCPR).² This instrument was ratified by New Zealand in 1978.³

The New Zealand Bill of Rights Act ('the Act') was enacted in 1990. It is an unentrenched Act, which does not have the status of supreme law.⁴ In general, the Act contains international human rights norms relating to civil and political rights in line with the provisions contained in the ICCPR. The Act includes the right to freedom of expression, the right to freedom from arbitrary arrest and detention, the right not to be deprived of life and the right to freely practise one's beliefs and religion.⁵ The Act upholds a number of fundamental rights, which are essential to human rights and dignity.

The Act's significance lies in its function as a compliance mechanism in terms of international human rights standards and to 'affirm, protect, and promote human rights and fundamental freedoms in New Zealand'.⁶

Given the vital nature of the Act, what is the importance of section seven within the Act?

Section Seven of the Act provides;

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights-

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

- a) In the case of a Government Bill, on introduction of the Bill; or
- b) In any other case, as soon as practicable after the introduction of the Bill, -

² See; G Palmer and M Palmer *Bridled Power, New Zealand's Constitution and Government* (Melbourne, Oxford University Press, 2004) 323

³ See; T McBride *New Zealand Civil Rights Handbook* (Auckland, Legal Information Service Limited, 2001) 8/1.

⁴ New Zealand Bill of Rights Act 1990, s.4

⁵ New Zealand Bill of Rights Act, ss 14, 22, 23, 8, 13

⁶ Pre-ambule to the New Zealand Bill of Rights Act 1990

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.

Standing Order 264 imposes a similar obligation on the Attorney-General to indicate that a provision of a Bill appears inconsistent with the Act and how it appears to be inconsistent. This must be done before a motion for the Bill's first reading is moved. Standing Order 264 also states that the relevant indication is to be made by presentation of a paper for publication by order of the House.

Section seven is an integral part of the human rights and freedoms legislative framework established by the Act. The significance of section seven lies in the fact that by necessity it focuses the Government's attention on rights contained in the Act. As the Rt Hon. Sir Geoffrey Palmer stated on the introduction of the Act to the House;

'The significance of the Attorney-General's reporting requirement is that it will necessitate a careful examination of all Government Bills before introduction in light of the rights contained in the Bill of Rights....The possibility of an adverse report by the Attorney-General will, I think, have a salutary effect on those involved in the legislative process. It will send a clear message that legislative proposals must be consistent with those basic principles before a bill is introduced.'⁷

The prophecy referred to above appears to have come to fruition. It has been clearly recognised that the threat of an adverse section seven report has indeed ensured that Departments are mindful of Bill of Rights concerns in policy formulation and legislative drafting. The section has successfully provided a legislative mechanism aimed at keeping Parliamentarians in line with the ideals espoused in the Act.⁸ It has also given formal recognition to the place of the Act in the process of policy development by Government.⁹

⁷ (10 October 1989) NZPD (1989) vol.502, 13039

⁸ Mr David McGee, Clerk of the House of Representatives commented to the writer in an interview on 22nd July 2004, at Parliament, that a great deal of work happens behind the scenes between the Ministry of Justice and other Departments in terms of compliance. The threat of an adverse Bill of Rights report keeps Ministers and Departments in line. Mr McGee also stated that only where there are strong political imperatives should the Government go against an adverse Bill of Rights report. See also; A Butler, "Strengthening the Bill of Rights" (2000) 31 VUWLR, 129, 145.

⁹ P Rishworth, G Huscroft, S Optican, R Mahoney, *The New Zealand Bill of Rights* (Melbourne, Oxford University Press, 2003), 196

III NATURAL JUSTICE AND FAIRNESS POLICY ANALYSIS

This paper seeks to apply a policy analysis of section seven analogous to the principles contained within Natural Justice and legal ideas of Fairness. Analysis along policy lines is appropriate as it is acknowledged that the legal principles of Natural Justice do not strictly apply to the section seven process. This is because Natural Justice applies to specific rights of ascertained individuals (often in a disciplinary context) whereas the exercise of section seven potentially covers non-specific rights of the wider general public.¹⁰ The learned Judges in *Re Royal Commission on Thomas Case*¹¹ stated those having an interest in common with the public are an exception to the Natural Justice idea that interested persons are 'afforded a fair opportunity of presenting their representations and meeting prejudicial matters'.¹²

1. RATIONALE BEHIND ANALYSIS

Despite the fact that Natural Justice does not apply to section seven in strict legal terms, an analysis using principles consonant with Natural Justice and fairness is still a valuable exercise. From a policy perspective, it is necessary to determine whether a key section and process in an Act, which espouses a commitment to human rights and freedoms, accords with accepted ideals of fairness and Natural justice. If New Zealand is to be seen as taking its commitment to fundamental human rights norms seriously, the Act must withstand scrutiny on the analysis referred to above. The aspects which the policy analysis will focus on include;

- a) Independence issues.
- b) Principles relating to the appearance of bias.
- c) Transparency issues.

2. NATURAL JUSTICE AND FAIRNESS

Why is Natural Justice an appropriate analysis model despite the fact it does not strictly apply to the operation of section seven? This question can be answered by examining the nature of Natural Justice. *Furnell v Whangarei High Schools*

¹⁰ See; New Zealand Bill of Rights Act 1990, s27 (1) and PA Joseph, *Constitutional and Administrative Law in New Zealand* (Wellington, Brookers, 2001) Ch 23.

¹¹ *Re Royal Commission on Thomas Case* [1982] 1NZLR 252 (CA)

¹² PA Joseph, *Constitutional and Administrative Law in New Zealand* (Wellington, Brookers, 2001) 258. The learned judges referred to *Re Royal Commission on State Services* [1962] NZLR 96, 117; *Re Erebus Royal Commission (No.2)* [1981] 1NZLR 618

*Board*¹³ described Natural Justice as 'but fairness writ large and juridicially'.¹⁴ In broad terms the rules of Natural Justice or 'Fairness' (which may be used as an alternative term for Natural Justice)¹⁵ have been said to apply whenever the rights, property, or legitimate expectations of an individual are affected.¹⁶ Being a creature of the Common Law, the rules of Natural Justice are flexible and capable of adapting to a variety of different factual circumstances.¹⁷ More specifically, Natural Justice may be described as a set of procedural rules which govern decision-making bodies.¹⁸ The ideal behind the rules of Natural Justice is that when the power of decision-making is exercised in a way that has the potential to adversely affect an individual, that power should be exercised fairly. A decision-maker must therefore act in 'good faith and listen to both sides'.¹⁹

Section seven can be viewed as the exercising of a power which has the potential to adversely impinge on people's rights. This is because the Attorney-General may decide whether or not a Bill contains provisions which are inconsistent with the Act. If he or she decides as a matter of opinion (for the decision is inevitably based on the opinion of the Attorney-General) that a report is required this may stall a piece of legislation which limits individual rights. This may mean that there is a reconsideration by the House of the offending provision. Conversely, if the Attorney-General is of the opinion that no report is warranted then the green light is given to a piece of legislation that others may argue restricts certain personal rights or freedoms. So whilst wider public rights (rather than the rights of specific individuals) and the performing of an obligation (rather than the strict exercising of a power) are involved, an analogy may be drawn with situations where Natural Justice would apply.

¹³ *Furnell v Whangarei High Schools Board* [1973] 2NZLR 705 at 718 (PC) quoted with approval in *Daganayasi v Minister of Immigration* [1980] 2NZLR 130 at 141 per Cooke J, cited in PA Joseph, 848

¹⁴ PA Joseph, above n

¹⁵ *Daganayasi v Minister of Immigration* [1980] 2NZLR 130, 141 (citing English authorities) cited in PA Joseph, above n12, 848

¹⁶ GA Flick, *Natural Justice-Principles and Practical Application* (Sydney, Butterworths, 1984) 26

¹⁷ GA Flick, above n16, 26

¹⁸ See generally; PA Joseph, above n12 Chapter 23

¹⁹ *Board of Education v Rice* [1911] AC 179 at 182 per Lord Loreburn (HL) quoted in PA Joseph, above n12, 847

The rules of Natural Justice or fairness incorporate a number of different principles. This paper will only focus on those principles which are relevant to the analysis.

The first relevant major tenet of Natural Justice is '*nemo iudex in sua causa*' which is the idea that no person may be judge in his or her own cause. This relates to the Natural Justice principle that Justice should be seen to be done.²⁰

A) *The Rule Against Bias*

This rule falls under the umbrella of *nemo iudex in causa sua*. Professor P Joseph states this rule demands 'general impartiality in decision-making... for maintaining public confidence in the administration of justice'.²¹ Bias can take the form of actual, apparent or presumptive bias. Presumptive bias covers situations where the decision-maker has a personal or financial interest in the outcome of the decision.²² Apparent bias deals with situations where the decision-maker has some relationship to a party or witness or some prejudice against, preference for or pre-determination relating to a particular outcome.²³ The rules relating to bias are flexible and there are varying legal tests depending on the type of bias alleged.²⁴ Apparent bias in the form of pre-determination or pre-judgment is the most relevant type of bias potentially applicable to section seven and as such will be discussed below. The rule here is that a decision-maker may be disqualified from participating in decision-making if he or she has pre-judged the merits of a particular issue.²⁵ It was stated in *Re Royal Commission on Thomas*²⁶ that in relation to predetermination, bias will be judged by outward appearance.

²⁰ PA Joseph, above n12, 874

²¹ PA Joseph, above n12, 874

²² PA Joseph, above n12, 875

²³ PA Joseph, above n12, 875

²⁴ See generally: PA Joseph, above n12, chapter 23

²⁵ GA Flick, above n16, 158

²⁶ *Re Royal Commission on Thomas* [1982] NZLR 252, 258 (CA)

In New Zealand the Courts have followed the approach of Lord Goff of Chieveley in *R v Gough*²⁷. Lord Goff's test for the appearance of bias is whether there was a real danger of bias on the part of the decision-maker.²⁸

B) The importance of the rule against the Appearance of Bias

A main focus of the analysis in this paper is apparent bias. It is axiomatic that the Attorney-General carries out his or her function with the appropriate impartiality. This paper does not argue that the Attorney-General in reality is anything other than non-partisan. However, one of the major flaws in the section seven process is that it is open to criticism on the basis of an appearance of bias. It is submitted that this is unacceptable.

Why is the appearance of bias unacceptable? This question may be answered by looking at the rationale behind the rule against apparent bias. A useful starting point is the classic formulation of principle by Lord Hewart CJ:

'a long line of cases show that it is not merely of some importance but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done'.²⁹

In the case quoted above, at a hearing the acting Clerk of Court was a member of the law firm representing the party suing the applicant in related civil proceedings. The Clerk retired with the Justices at the conclusion of the hearing of the evidence. The applicant was convicted. Subsequently, the applicant's solicitor objected to the Clerk having been present when the Justices were deliberating. Lord Hewart characterised the issue before the Court as not being whether the Clerk had in fact made inappropriate observations or comments during the Justices' deliberations but whether the Clerk was so related to the case in its civil proceedings that he was not fit to carry out his duties as Clerk to the Justices in the relevant criminal proceedings.

²⁷ *R v Gough* [1993] AC 646 at 670 followed in *Auckland Casino Control Authority* [1995] NZLR 142 (CA)

²⁸ *Auckland Casino Ltd v Casino Control Authority* [1995] NZLR 142, 149 (CA) per Cooke P

²⁹ *R v Sussex Justices ex p McCarthy* [1924] 1KB 256,259

Lord Hewart stated that the issue could be decided not on the basis of what was actually done but what might appear to have been done.³⁰

The crucial part of Lord Hewart's judgment for the purposes of the analysis in this paper is the statement that nothing should be done that creates even a suspicion that there has been an interference with the course of justice. Here the Court saw the Clerk as being in an untenable position by virtue of his dual roles. His dual role (as Clerk and counsel associated with related proceedings) was a 'manifest contradiction'. In these circumstances the Court quashed the applicant's conviction.³¹

The question then becomes why, in Lord Hewart's words, should justice manifestly be seen to be done? The House of Lords judgment in the infamous *Pinochet (No.2)*³² deals with this issue. The House of Lords reiterates with approval Lord Hewart CJ's principle that justice must be seen to be done.³³ In *Pinochet (No.2)* the House of Lords in the special circumstances of that case found presumptive bias as the basis for Lord Hoffman's disqualification. Some academics have suggested that this is due to the fact that the House of Lords found it distasteful to have to delve into the test for apparent bias (i.e. whether there was a real danger that Lord Hoffman was biased.)³⁴ Nevertheless, some of the comments made by Lord Browne-Wilkinson regarding the rationale behind the rule against bias might equally apply to apparent bias. The focus of the rule was the need to maintain the concept of impartiality of the Judiciary.³⁵ The current Attorney General, the Honourable Margaret Wilson, has in fact, herself, emphasised the importance of avoiding apparent bias. The Attorney-General commented;

'It is the responsibility of the Attorney-General to uphold the rule of law. That includes maintaining confidence in the courts that hear cases by an independent and unbiased judiciary. Even the perception of bias can be damaging.'³⁶

³⁰ *R v Sussex Justices*, above n29, 259

³¹ *R v Sussex Justices*, above n29, 259

³² *R v Bow Street Magistrates, Ex p Pinochet (No.2)* [2000] 1 AC 119 (HL)

³³ *R v Bow Street Magistrates*, above n 32, 129 and 135

³⁴ PA Joseph, above n12, 23.5.2 (2)

³⁵ *R v Bow Street Magistrates*, above n32, 135

³⁶ Hon Margaret Wilson "Court action follows the rule of law" (2 September 2004) Media release available at <http://www.beehive.govt.nz> (last accessed 28 September 2004). These comments were

From the above, we can derive the principle that the semblance of bias, in whatever form, may undermine the concept of impartiality. This has potentially serious consequences as the concept of impartiality is not only of constitutional importance to the role of the Judiciary, but also to the role of the Attorney-General. In light of this, an analysis based on an analogy with the concept of apparent bias will be undertaken below in relation to section seven of the Act.

C) Duty To Provide Reasons

Generally, there is no strict duty on a decision-maker to provide reasons for their decisions.³⁷ However, in the area of Natural Justice, it has been recognised that it is prudent for decision-makers to provide reasons. This is because a failure to provide reasons for a decision may lead to an inference that a decision lacks foundation and is arbitrary.³⁸ It has been hinted that it may be 'unfair' to not provide reasons.³⁹ So, whilst not strictly recognised by common law, there is a growing acceptance that providing reasons for a decision accords with ideals of Fairness. Again this principle, by analogy may be applied to the operation of section seven.

3. SPECIFIC APPLICATION OF NATURAL JUSTICE AND FAIRNESS PRINCIPLES

Natural Justice, as outlined above, is a fundamental part of the human rights matrix. It is specifically recognised by s27 of the Act, as such it would be illogical that any decision-making powers under the Act itself did not stand up to scrutiny on a Natural Justice analysis. This is true even if the doctrine does not apply in a strict legal sense.

made in relation to the Government's decision to instigate judicial review proceedings of Judge Wickliffe's refusal to adjourn Maori East Coast claims on the foreshore and Seabed.

³⁷ *NZI Financial Corp Ltd v NZI Kiwifruit Authority* [1986] NZLR 159 cited in PA Joseph, above n12 871. See also; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; [1971] 1 All ER 1148 cited by Barker J in *T Flexman Ltd v Franklin County Council* [1979] 2NZLR 690, 698

³⁸ *NZI Fishing Industry Assn Inc v Minister of Agriculture and Fisheries* [1988] NZLR 544 at 554 (CA) cited in PA Joseph, above n12 872

³⁹ *T Flexman Ltd v Franklin County Council* [1979] 2NZLR 690 at 698-99 cited in GA Flick, above n16, 127

If one breaks down the relevant aspects of Natural Justice referred to above several themes become apparent. These themes may be utilised to analyse section seven;

- a) The rule against bias suggests that it is vital for a decision-maker to have the appearance of independence or the appearance of a lack of bias in exercising that function.
- b) The arguments relating to the duty to provide reasons suggests a broader theme of the necessity for transparency in order to satisfy the requirements of Fairness.

Analysis of section seven and the process associated with it will be undertaken below in relation to the two themes above. More particularly, the role of the Attorney General and his or her advisors and the recent operation of the section seven process will be assessed in light of these themes and a conclusion drawn.

IV ROLE OF THE ATTORNEY-GENERAL AND HIS/HER ADVISORS

At the heart of difficulties inherent in the section seven process are the two conflicting roles placed on the Attorney-General under the section which are irreconcilable with each other. As emphasised above it is the appearance of bias rather than the reality of the situation which is crucial to the concept of impartiality. An appearance of bias or appearance of a lack of independence as a scrutinising body is a major flaw in the process. These difficulties stem from the nature of the office of the Attorney-General and the demand placed on it by section seven. This can be illustrated with reference to the recent operation of the section seven process. An assessment of the recent operation of the section seven process will encompass examination of the Ministry of Justice website experiment and the Foreshore and Seabed Bill. These issues all raise significant concerns when the analysis is applied to them.

1. THE OFFICE

The office of the Attorney-General was one of the institutions New Zealand adopted when we inherited the Westminster model of government.⁴⁰ After the dawn of responsible government in New Zealand in 1865, the office of the Attorney-General became a political appointment with the portfolio being held by a member of either House of the General Assembly.⁴¹ However, under the *Attorney-Generals Act (NZ) 1866*, the office was transformed into a non-political appointment.⁴² The situation changed again in 1876 when the *Attorney-Generals Act (NZ) 1876* provided that the office could be political or non-political. This meant that the Attorney-General could be a member of the Executive Council but was not required to be so. Similarly, the Attorney-General had the option of elected membership of the Legislative Assembly but this was not mandatory.⁴³ According to Professor J Edwards, the office reverted to its original prerogative character in 1920.⁴⁴

Today the convention has emerged that the Attorney-General is always a Member of Parliament and usually a member of the Cabinet holding other portfolios.⁴⁵ This is in stark contrast to the United Kingdom where the practice is clearly not to accord the Attorney-General with membership of the Cabinet.⁴⁶ In terms of the New Zealand experience, strong arguments have been made for the inclusion of the Attorney-General in Cabinet. For example the Attorney-General can explain the impact and implications of judicial decisions to colleagues.⁴⁷ Comments made by the former Attorney-General, Paul East reflect the idea that the Attorney-General's obligations include upholding the Constitution and ensuring that the Government acts lawfully.⁴⁸ Arguably, these goals can be most successfully achieved from within the ranks of

⁴⁰ PA Joseph ed., *Essays on the Constitution*, The Honourable Paul East, Attorney-General, "The Role of the Attorney-General" (Wellington, Brookers, 1995), 185

⁴¹ (New Zealand Parliamentary Debates, Legislative Assembly, vol.23 pp.20-22, October 4 1876) cited in JLJ Edwards, *The Attorney-General, Politics and the Public Interest* (London, Sweet and Maxwell, 1984), 389

⁴² JLJ Edwards, *The Attorney-General, Politics and the Public Interest* (London, Sweet and Maxwell, 1984), 390

⁴³ Prof. Edwards, above n42, 390

⁴⁴ Prof. Edward, above n42, 390

⁴⁵ PA Joseph ed, Rt Hon. Paul East, above n40, 185

⁴⁶ Eagleson WC, *The Attorney-General and the public interest: Political independence -Reality or Myth?* (LLM thesis, 1998, Victoria University of Wellington), 9

⁴⁷ See: Sir Geoffrey Palmer, "The Role of the Attorney-General in Modern Government" Counsel Brief, October 1986, 6

⁴⁸ Sir Geoffrey Palmer and Prof. M Palmer, above n2, 203

Cabinet, which has been described as the 'powerhouse of New Zealand government'.⁴⁹

So then, what is the role of the Attorney-General? He or she is the chief legal officer of the Crown. Further, the Attorney-General has been described as the 'guardian of the public interest generally'.⁵⁰ The role of the Attorney-General is vested with certain statutory and prerogative functions in the administration of Justice.⁵¹ The role of the Attorney-General also includes, inter alia, acting as a channel of communication between the Government and Judiciary, making recommendations in relation to appointment of High Court and Court of Appeal Judges, and bringing proceedings in matters which affect the public interest.⁵²

In light of the above, especially the Attorney-General's role as 'guardian of the public interest', it is clear that a degree of independence is required.⁵³ However, it has been argued that it is difficult to find any clear legal ground for asserting the Attorney-General's right to act independently of his or her colleagues. This is argued on the basis that the Attorney-General shares in collective responsibility and is responsible to the Crown for the advice it provides the Crown and its servants.⁵⁴ Philosophical difficulty arises in relation to reconciling the potentially conflicting roles of protector of the public interest and active member of the Cabinet of the day. Essentially, the role is supposed to be apolitical or non-partisan despite the political pressures placed on the Attorney-General by virtue of his or her alternate role as a Cabinet Minister holding other portfolios. It is submitted that in New Zealand, despite the aforementioned arguments, the Attorney-General's office retains its air of independence today. However, difficulty arises where the Attorney-General is required to exercise a function which has serious political implications. This is at the very heart of the difficulties innate in section seven which will be discussed below.

⁴⁹ Sir Geoffrey Palmer and Prof. M Palmer, above n2, 78

⁵⁰ Prof. JL Edwards, *The Law Officers of the Crown*, (London, Sweet and Maxwell, 1964) 286

⁵¹ *The Laws of New Zealand- CONSTITUTIONAL LAW*, para 170, <[http://: www.butterworths.com](http://www.butterworths.com)> (last accessed 17 June 2004)

⁵² M Chen and Sir G Palmer *Public Law in New Zealand, Cases, Materials, Commentary and Questions* (Auckland, Oxford University Press, 1993) 15

⁵³ PA Joseph, above n12, 203

⁵⁴ Sir William Anson, *The Law and Custom of the Constitution* (4th ed.) vol.ii, pt 1, pp221-2 cited in G Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford, Oxford University Press, 1984) 112

2. APPLICATION OF NATURAL JUSTICE AND FAIRNESS ANALYSIS

In order to analyse the Attorney-General's role under section seven we must return to Lord Hewart CJ's words. Justice must always be seen to be done. This is fundamental to the maintenance of impartiality and the semblance of it.⁵⁵ The semblance of impartiality, as well as the reality of impartiality, is important for ensuring public faith in the system itself. It is posited that by its very nature section seven creates conflicting duties or roles for the Attorney-General which undermine the semblance of impartiality. These roles are completely irreconcilable. On the one hand the Attorney-General is required to carry out the role of impartial scrutineer in his or her capacity as non-partisan law officer of the Crown. On the other hand, the role of scrutineer inevitably involves scrutiny of the Government's own legislation. This is the legislation of a Government in which the Attorney-General is a member of the Cabinet. Further, the scrutiny involves aspects of political analysis. So then the section seven process is perhaps analogous to the position of the Clerk in *R v Sussex Justices ex p McCarthy*.⁵⁶ In that case the issue was not what the Clerk did in reality, rather the position he was in by virtue of his dual role. The two-fold role created an untenable situation. In relation to the Attorney-General's dual role as Cabinet Minister and non-partisan law officer of the Crown, under section seven a position similar to the appearance of bias dealt with in *R v Sussex Justices*⁵⁷ presents itself.

Difficulty arises from the fact that sometimes Bill of Rights issues surrounding a nascent piece of legislation will be controversial. Section seven essentially enables the Attorney-General to give the green light to legislation, which is opposed by others on the basis of prima facie breach of the Act. Whatever the reality may be, there is a real danger that an Attorney-General performing this obligation could be viewed as having a pre-disposition to favour a view which supports the Government's political and legislative agenda. This potentially compromises the semblance of impartiality attached to the office of Attorney-General.

⁵⁵ *R v Sussex Justices, ex p. McCarthy* [1924] 1 KB 256, at 259 per Lord Hewart CJ

⁵⁶ *R v Sussex Justices, ex p above* n29

⁵⁷ *R v Sussex Justices ex p above* n29

More than the appearance of bias created by the dual role, which raises suspicions of pre-disposition, is the fact that scrutiny under section seven often requires a political analysis rather than a legal analysis. This will be examined in relation to the Foreshore and Seabed Bill 2003. This issue in effect means that the lines between politician and impartial legal officer become blurred under section seven. Given the implications of apparent bias, this is wholly inappropriate.

3. RELATIONSHIP TO THE SOLICITOR-GENERAL

Before examining the Foreshore and Seabed Bill 2003, analysis of the relationship between the Attorney-General and the Solicitor-General must be undertaken. This legal officer is the deputy or junior officer subordinate to the Attorney-General.⁵⁸ Section 9 A of the Constitution Act 1986 states that the Solicitor-General may carry out any function of or duty imposed or power conferred on the Attorney-General. The important distinction between the two roles is that the Solicitor-General is not a Member of Parliament. Prof JL Edwards has stated that normally the Solicitor-General is seen as the final decision maker in legal matters relating to the Crown. However, this practice does not and cannot distort the constitutional relationship between the Law Officers of the Crown where the Attorney-General holds the senior position of power.⁵⁹

The position of the Attorney-General at the top of the Government's legal hierarchy in effect means that in the end the opinion of the Attorney-General will prevail where there is disagreement amongst legal officers of the Crown. In relation to section seven this in effect means that the Attorney-General is not bound by the advice provided by his or her advisors just as Ministers are not bound by the advice of their officials. In the event that there is a difference of opinion between the Attorney-General and Solicitor-General over a particular issue the Attorney General, as senior law officer, prevails. Under the status quo there is no transparency surrounding the process. In effect the public and interested parties will never know when there has been a clash of opinions.

⁵⁸ *Wilkes v R* (1770) Wilm 322 at 329 and 330: 97 ER 123 at 126 cited in 'The Laws of New Zealand' CONSTITUTIONAL LAW, (8) THE CROWN, para 169, < <http://www.butterworthsonline.com> >(last accessed 18 June 2004)

⁵⁹ Professor JL Edwards, above n42, 393

The relationship between Solicitor General and Attorney-General raises issues concerning transparency. Also of significance is the fact that the Solicitor-General is part of a wider legal network of advice and support for the Attorney-General. The Ministry of Justice and the Crown Law Office provide advice to the Attorney-General on Bill of Rights scrutiny issues. In fact these advisors draft the Attorney-General's report.⁶⁰ Therefore, there is a potentially two-tiered system in place where in reality the scrutinising function is largely delegated to the Ministry of Justice and Crown Law officials.⁶¹ These facts are relevant to the reform options posited in this paper.

V RECENT OPERATION OF THE SECTION SEVEN PROCESS

An examination of the recent operation of the section seven process is useful to illustrate the flaws highlighted by a Natural Justice analysis. These relate to both transparency and appearance of bias concerns.

1. WEBSITE OPERATION

Examination of the Ministry of Justice's website raises a number of concerns relating to transparency. The operation of the section seven process has certainly increased in transparency in the last year. In February 2003, the Hon Margaret Wilson issued a media release advising that certain Bill of Rights legal advice would be made available on the Ministry of Justice's website once a Bill had been read in the House a first time and referred to Select committee. The rationale behind this change in policy was that Select Committees were receiving submissions from lawyers and lobby groups which raise Bill of Rights issues and without the Attorney-General's legal advice before them, they are not always in a position to properly evaluate these submissions.⁶² The publication of advice extends only to advice given from 1 January 2003. Pre-January 2003 advice can only be obtained by an application under the Official Information Act 1982 ('the OIA').⁶³ It is also significant to note that advice or (parts of advice) that could be withheld from release under the OIA will also be

⁶⁰ For example, a draft section seven report is stated to be attached to the advice to the Attorney General on the Taxation (Annual Rates, GST, Trans Tasman Imputation and Miscellaneous Provisions) Bill 2003 available at <<http://www.justice.govt.co.nz>> (last accessed 28 September 2004)

⁶¹ See: P Rishworth and others, above n9, 215

⁶² Hon Margaret Wilson, "Minister goes public on Bill of Rights vets" (18 February 2003), published at <<http://www.Beehive.govt.nz>> (last accessed 30 July 2004)

⁶³ See: Sir Geoffrey Palmer and Prof. M Palmer, above n2, 325

withheld from the Ministry of Justice website.⁶⁴ Recent section seven reports are available on the website too and reports made between 1999 and 2002 are available on the Office of the Clerk of the House of Representatives official website.

The fact that transparency has increased is clearly a positive thing. However, there are some significant limits on this and problems which become apparent. The limit on advice prior to January 2003 in effect means that a great deal of advice still remains far from public view. The reasons given for not publishing pre-January 2003 advice were that it was too difficult to locate, check and format.⁶⁵ With respect, the importance of Bill of Rights advice for those working in areas affected by Bill of Rights concerns and the wider public interest in Bill of Rights issues requires that this stance be reconsidered.

Examination of the published Bill of Rights advice and reports raises further issues of transparency. On the official website there are only two reports made by the Attorney-General for the year 2003.⁶⁶ There are 50 Bills (not including the two reported on by the Attorney-General) for which advice is published on the website. There are two examples of pieces of advice where the legal advisors to the Attorney-General have concluded that a provision in a Bill is inconsistent with the Act and this is unjustified. These pieces of advice urge the Attorney-General to table a section seven report in the House.⁶⁷ No corresponding reports appear on the website. To members of the public it is unclear whether the Attorney-General has disregarded this advice and chosen not to make a section seven report or whether she has made a report and it is simply not published on the website. This has serious implications for transparency and public access to Bill of Rights issues. It must be noted that a Ministry of Justice official referred the writer to specific areas of the Clerk's and Ministry of Justice's website where the relevant reports could be located. The official

⁶⁴ Hon Margaret Wilson, above n62

⁶⁵ Joanna Gould, Public Law Group at the Ministry of Justice, "Joanna.gould@justice.govt.nz", to the author "BORA advice publication" (30 July 2004) email.

⁶⁶ *Report of the Attorney-General under the Bill of Rights Act 1990 on the Care of Children Bill and Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill* available at <<http://www.justice.govt.nz/bill-of-rights>>, (last accessed 16 June 2004)

⁶⁷ See: *Advice on Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill and Advice on Social Security (Long Term Residential Care) Amendment Bill* available at <<http://www.justice.govt.nz/bill-of-rights>> (last accessed 16 June 2004)

acknowledged that the fact the writer had difficulty locating these reports was a concern which the Ministry hoped would be addressed in the upcoming review of the internet publication of advice provided to the Attorney-General on the consistency of Bills with the New Zealand Bill of Rights act 1990.⁶⁸

The transparency concerns highlighted above are symptomatic of more serious flaws in the section seven process as a whole which must be addressed.

2. FORESHORE AND SEABED BILL

This section will examine the section seven report tabled by the Attorney-General in respect of the Foreshore and Seabed Bill. Examination of this report is pertinent because it raises a number of issues in relation to the appearance of independence of the Attorney-General and the difficulty of reconciling the incompatible roles of non-partisan guardian of the public interest and member of the Cabinet which by necessity overlap under section seven. The reason why these roles overlap under the section will be assessed by analysing the Attorney-General's report on the Foreshore and Seabed Bill.

The Foreshore and Seabed Bill is the most controversial piece of legislation on the legislative agenda in recent years. The specific details and legal and political issues surrounding the Bill are outside the scope of this paper. However, some background will be provided to place the issues in context. The Bill was a direct response to the Court of Appeal's decision in *Ngati Apa v Attorney-General* [2003] 3NZLR 643 (CA) ('*Ngati-Apa case*'). This was an appeal following the High Court decision which in effect upheld the *Re Ninety Mile Beach* decision⁶⁹ that the seabed below the low watermark was vested in the Crown under certain legislation and the Maori Land Court had jurisdiction to investigate title to the foreshore but Maori Customary rights were extinguished wherever a Crown purchase or Maori Land Court order described the sea as boundary. A number of questions were placed before the Court of Appeal for consideration.⁷⁰ The Court of Appeal in effect overruled the *Re the Ninety Mile*

⁶⁸ Joanna Gould, above n65

⁶⁹ *Re Ninety Mile Beach* [1963] NZLR 461

⁷⁰ See generally; T Bennion, "The claim of the Crown is weak" Maori LR May 2003.

Beach decision and held, inter alia, that the Maori Land Court had full jurisdiction to determine the status of the foreshore and seabed.⁷¹

The stated purpose of the Bill was to clarify the status of the foreshore and seabed in light of the *Ngati-Apa* case and to provide for recognition and protection of customary rights and interests in the public foreshore and seabed.⁷² The practical impact of the Bill is to remove the ability of Maori to test any claim they may have to the foreshore or seabed at Common Law in the Maori Land Court. Many people feel that this is a 'confiscation' of Maori rights to have their 'day in Court' which is a right guaranteed to all citizens under the Rule of Law.⁷³ Ngai Tahu in conjunction with the Treaty Tribes Coalition have communicated their dismay at the Government's handling of the foreshore and seabed issue at the United Nations Forum on Indigenous Issues in New York.⁷⁴ Anti-Bill sentiment in fact culminated in a Hikoiki to Parliament on May 5 2004. Some estimates put the participation in that Hikoiki at 20,000 people.⁷⁵

Clearly this nascent legislation is highly controversial. In this atmosphere of controversy the Attorney-General provided a section seven report on the Bill. This paper does not assert that the Attorney-General's report was anything other than thorough, well considered or a valid exercise of the function under section seven. However, of importance is the appearance of bias. It is the potential for the appearance of bias which this analysis will focus on. It will be shown that the reasons for the potential for appearance of bias are integrally connected to the factors involved in a section seven analysis.

The Attorney-General's report states that there is no prima facie breach of sections 20, 21 or 27 (3) (rights of minorities, unreasonable search and seizure, and the right of every person to bring proceedings against the Crown...and the right to have those proceedings heard, according to law, in the same way as civil proceedings between individuals) of the Act. The Attorney-General accepted that there was a strong

⁷¹ *Attorney-General v Ngati Apa* [2003] 3NZLR 643 per Elias J 670

⁷² See generally; pre-amble to the Foreshore and Seabed Bill 2003

⁷³ See generally; Ngai Tahu Media Release (11 May 2004) <<http://www.ngaitahu.iwi.nz>> (last accessed 11 June 2004)

⁷⁴ Above n74

⁷⁵ See generally: <<http://www.kiwiblog.co.nz/archives>> (last accessed 11 June 2004).

argument for a prima facie breach of section 19 (freedom from discrimination) and so went on to consider whether the section five test was met (i.e. whether the prima facie infringement of the Act is “demonstrably justifiable in a free and democratic society”). The Attorney-General concluded that if there was a prima facie breach, it was a justifiable limitation in a free and democratic society.⁷⁶

The Attorney-General’s report firstly sets out the reasons for her finding that there is no prima facie breach of sections 20, 21, 27(3). The report then examines the section 19 issue. The Attorney-General acknowledges that section 19 requires that where legislation affects the enjoyment of property rights it must do so in a non-discriminatory way which does not target or affect one racial group as against another.⁷⁷ The Attorney-General states that there are strong arguments in favour of a prima facie breach of section 19 on the basis that the Bill appears to treat holders of “specified freehold interests” and Maori Customary landowners differently (i.e. only the rights of the latter group are extinguished). The Attorney-General concedes that for one group to be deprived of an existing source of rights or title, yet another not to be similarly deprived, reaches the threshold of prima facie breach.⁷⁸

The Attorney-General then goes on to assess whether the section five test is met. Section five states that the rights and freedoms in the Act may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.

At this point it is important to examine the section five test. This is because its application is relevant to the problems intrinsic in section seven of the Act. The operation of the section seven function requires the Attorney-General to assess whether there is a prima facie breach of the Act. The breach must then be examined against section five.⁷⁹ If it is found that the provision is a justified limitation on a particular right in terms of section five, then that is the end of the matter.

⁷⁶ See generally: *The Report of the Attorney-General on the Foreshore and Seabed Bill 2003*, 6 May 2004, <<http://www.justice.govt.nz>> (last accessed 11 June 2004)

⁷⁷ Above n76, para 53

⁷⁸ Above n76, para 79

⁷⁹ PA Joseph, above n12, 1052

Section five by its very nature requires a political rather than legal analysis. As Sir Ivor Richardson has stated, section five is one of the Act's provisions reflecting the reality that rights are not absolute and may be modified in the public interest to take into consideration the rights of other individuals and the interests of the whole community.⁸⁰ The Court of Appeal in *Moonen v Film and Literature Board of Review*⁸¹ discussed the method required to determine whether a particular limitation of a right or freedom can be justified in terms of section five. The Court made it clear that whether a limitation can be demonstrably justified in a free and democratic society is a matter of judgment to be made on behalf of society. The judgment must be made after considering all the issues which may have an influence on a particular case. These considerations may well include social, moral, economic, administrative, ethical, or legal matters.⁸²

Therefore, section five requires political and policy analysis considerations rather than a strict legal analysis. The exercise required by section five has been described as a 'utilitarian calculation as to where the public welfare lies'.⁸³ Determining where the public interest lies is always going to be a judgment based on policy considerations rather than a legal decision. In essence this means that section seven requires the Attorney-General to undertake an analysis that is political. This is where a 'manifest contradiction' arises. Section seven is premised on the basis that the Attorney-General will carry out a scrutinising function in his or her capacity as the impartial senior law officer of the Crown. However, in reality, the exercise of the function, in part, requires political analysis. The potential for the blurring of the line between impartial legal advisor and politician therefore arises. It is at this stage that the dual roles of the Attorney-General become irreconcilable and the possibility of the appearance of bias becomes an issue. This irreconcilability, rather than inherent in the position of the office of the Attorney-General, is created by section seven itself. Below is a discussion of the practical reality of the irreconcilability as it arose in relation to the Foreshore and Seabed Bill 2003.

⁸⁰ Sir Ivor Richardson, 'Rights Jurisprudence-Justice for All?' in PA Joseph, *Essays on the Constitution* (Wellington, Brookers 1995) 75

⁸¹ *Moonen v Film and Literature Board of Review* [2000] 2NZLR 9

⁸² *Moonen*, above n81 per Tipping J, 17

⁸³ See JA Smillie 'The Draft Bill of Rights: Meaningful Safeguards or mere window dressing?' [1985] NZLJ 376 at 378 cited in PA Joseph, above n12, 1037

Sir Ivor Richardson's concept of the 'utilitarian assessment' implicit in section five is endorsed at paragraph 80 of the Attorney-General's report. At paragraph 81 the report explicitly states that the first matters for consideration are the Government's reasons for introducing the Bill and that an assessment will be made weighing up the advantages and disadvantages that may accrue to those Maori and others who may be affected by the Bill.⁸⁴ The reasons stated for introducing the Bill are those set out in the pre-amble to the Bill as discussed above. Some might take the cynical view that there may have been other reasons for introduction of the Bill. The report, however, puts forward the official reasons for introducing the legislation. These reasons include the fact that New Zealand is an island nation and the coastline plays an important part in the social, cultural and economic lives of all New Zealanders and therefore there should be no uncertainty about the nature and extent of public rights in relation to the foreshore and seabed.⁸⁵ The Attorney-General comes to the conclusion that;

'taken in conjunction with existing mechanisms for the recognition and protection of Maori Common Law customary interests in the foreshore and seabed (e.g. the fisheries legislation) and in conjunction with the likely future recognition of such interest (e.g. in relation to aquaculture), I consider that the Bill meets the section 5 test'.⁸⁶

On the above basis the Foreshore and Seabed Bill is stated not to be in breach of the Act.

3. APPLICATION OF NATURAL JUSTICE AND FAIRNESS ANALYSIS

The above example of the section seven process in action raises a number of issues. These issues relate to the concept of apparent bias or a lack of independence. The report in relation to the Foreshore and Seabed Bill is the most striking recent illustration of the irreconcilable roles of the Attorney-General under section seven. The proposed legislation was hugely unpopular to the point of engendering civil protest action. In this milieu the Government was placed in the position of justifying the Bill. Difficulty arises because the Attorney-General who is also a Member of the Cabinet then had to report on the Bill in terms of compliance with the Act. That report

⁸⁴ Above n76, para 81

⁸⁵ Above n76, para 88

⁸⁶ Above n76, para 103

in addressing the issue, canvasses the Government's reasons for introducing the Bill in depth. The assessment of whether clause 19 of the Foreshore and Seabed Bill was inconsistent with the Act clearly involved pure policy considerations rather than any legal analysis. This could be viewed as crossing the blurry line into the realms of political justification. Moreover, apparent bias also becomes an issue in relation to the fact that the very legislation scrutinised by the Attorney-General was in direct response to litigation which culminated in an unfavourable result for the Government. In fact that litigation was originally brought in the name of the Attorney-General.

Despite the theory of a non-partisan Attorney-General, in situations such as the above questions arise in relation to the appearance of bias or a lack of independence. Whatever, the reality may be, it is the appearance of these things which is crucial in terms of Fairness or Natural Justice. In order for our human rights commitment to be taken seriously Justice must be seen to be done. If the Government is faced with justifying controversial legislation it is inappropriate for the Attorney-General to scrutinise that legislation. Such scrutiny runs the risk of appearing tainted by the potential for bias or pre-determination because of the irreconcilable duties placed on the Attorney-General by virtue of section seven. These irreconcilable duties can be characterised as the duty to scrutinise as impartial law officer of the Crown and the duty to undertake a policy analysis as to where the public welfare lies in respect of the section five test. This policy analysis could potentially appear to be influenced by the Attorney-General's role as a member of the Cabinet.

In the above circumstances it is wholly inappropriate that the Attorney-General continues as scrutineer pursuant to section seven. This is because New Zealand's commitment to human rights necessitates reform to bring the Act in line with principles analogous to Fairness. Moreover, the potential for the appearance of bias is a real threat to public confidence in the Act and its processes. The nature of the Act, as New Zealand's primary human right's legislations, dictates that any risk to public faith in the Act is unacceptable.

Before leaving analysis of section seven and turning to consider options for reform, it is vital to ask whether the cure is worse than the complaint. No common sense lies in proposing major reform if the difficulties associated with that reform

outweigh the original difficulties precipitating the reform. It is hoped that throughout this paper the application of the Natural Justice policy analysis has highlighted the significant flaws in the current process and the serious consequences of these flaws. Impartiality, transparency and fairness are integral to the integrity of our legal and political system. It may sound grandiose, however, in effect the integrity of the system is crucial for public faith and public faith in the system is a necessary requirement for the successful operation of the Rule of Law. At present the appearance of bias and transparency issues created by the section seven process have the potential to erode public confidence and compromise the integrity of the system. It is submitted that in light of implications of this, the need for reform to cure the ill outweighs any inconvenience caused by reform.

VI OPTIONS FOR REFORM

Any reform which is undertaken must cause the least upheaval possible and must not create more significant problems than those sought to be cured. Two obvious possible reform options initially present themselves. The first is the complete removal of section seven and the empowering of the judiciary to strike down legislation which is inconsistent with the Bill of Rights. The second is the removal of the Attorney-General as scrutineer. The role of scrutineer would be devolved to another appropriate entity. Both these options are radical. An assessment of these options below will show that the first option is not viable in the current milieu. However, the second option provides a starting point for considering the reform of section seven.

The Justice and Law Reform Committee in its final report on the White Paper recommended the introduction of a bill of rights which was an unentrenched ordinary statute which was not supreme law. One of the major reasons for opposition to a supreme statute was the argument that it would lead to the inappropriate redistribution of power from elected accountable representatives of the people to an unelected judiciary whose members retained their positions until retirement.⁸⁷ At the time the New Zealand public was seen as not ready for a 'fully fledged' bill of rights⁸⁸ which included the power of the Judiciary to strike down legislation. As an adjunct to its

⁸⁷ See: Justice and Law Reform Committee, 'Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand' [1987-1990] AJHR vol. XVII 1.8 c, 3

⁸⁸ Above n87, 3

recommendation that an unentrenched bill of rights which was not supreme law be introduced, the Justice and Law Reform Committee suggested the incorporation of what is now section seven. As discussed, the theory behind section seven was that in the absence of judicial power to strike down legislation for inconsistency with the Act, section seven would have a 'prophylactic' effect on new legislation.⁸⁹ In other words section seven has provided an obstacle to the introduction of inconsistent legislation, which theoretically assuages the impact of section four.

If section seven were to be repealed then arguably the need for judicial power to strike down inconsistent legislation would be required. This is because in the absence of section seven there are no formal checks or balances in place to impede the enactment of legislation in contravention of the Act. The question is whether this is a viable option at this time? It appears that question can be answered in the negative. Events in the near past suggest that the New Zealand public and parliamentarians are not ready to vest the Judiciary with the significant power to strike legislation down. This is evident in the fact that the Judiciary has been subject to heavy criticism recently. The Hon. Michael Cullen has made it patently clear that there would be no Governmental support for any move to empower the judiciary. He describes the erosion of Parliament Sovereignty as 'a half-pie Americanisation of our judicial system which would be of no benefit in the long term.'⁹⁰ This year has also seen growing acrimony between the Chief Justice and Attorney-General revolving around the new Supreme Court.⁹¹ As well as attacks by the Government on the judicial system, public faith in the system appears to be at a low. This is evident in the fact that Cabinet has approved the Law Commission's suggestion to open up the Family Court to accredited news media. This move was seen as necessary by the Government to maintain confidence in the Court and remove perceptions that the closed Court system allows 'unfair processes and bias'.⁹²

⁸⁹ A S Butler, 'Strengthening the Bill of Rights' (2000) 31 VUWLR 129, 145, see also discussion in Part II Significance of the New Zealand Bill of Rights 1990 and section seven, above.

⁹⁰ Hon Michael Cullen, 'Address to Governor-General on the 150th Anniversary of the New Zealand Parliament' (24 May 2004) NZPD vol.617, 13192-139193

⁹¹ See: 'Court in the middle of a turf war' R Laugesen, Sunday Star Times 1 August 2004 C4

⁹² Hon David Benson Pope "Family Court to be more open" (22 September 2004) Media Release available at <http://www.beehive.govt.nz> (last accessed 28 September 2004)

In the current atmosphere of conflict between Government and the Bench, and public mistrust, which stems in part from misconceptions concerning the functioning of the closed Family Court system, New Zealand does not yet appear ready for a Judiciary empowered to strike down legislation.

What then is an appropriate alternative for the Attorney-General as scrutineer under section seven? It is acknowledged that this is a formidable challenge. No wholly suitable replacement readily presents itself. The goal of this paper is therefore, to canvass several options for reform and assess their relative strengths and weaknesses in order to arrive at the most viable alternative. The most feasible substitute bodies appear to be a Select Committee, independent body outside the Parliamentary system, or a quasi-independent entity akin to an Officer of the House or Parliament which acts as advisory counsel to the House. Below is an examination of these three options. This examination will lead to a conclusion as to the most practicable solution.

A. SELECT COMMITTEE

If the most obvious starting point in canvassing the substitution options is a body already established within the parliamentary system, then a Select Committee is the principle contender. There is much to recommend the Select Committee as a substitute scrutineer. However, there are a number of weaknesses in the argument for a Select Committee which must also be addressed.

Select Committees are linked to particular areas of Government activity. The committees examine and report on Bills within their subject area. They also look at the administration, expenditure and policy of the Departments and quangos associated with their subject area. Certain other Select Committees such as the Privileges Committee and the Officers of Parliament Committee exist to carry out specialist functions and enable the smooth functioning of the House.⁹³

The substitution of the Select Committee as a scrutineer would not be a radical departure from original thinking. This is because the Select Committee was in fact the

⁹³ See: PA Joseph, above n12, 338

first body posited as a suitable scrutineer when section seven was born following the abandonment of the concepts of supreme law and entrenchment in relation to the Bill of Rights. The 'Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand'⁹⁴ suggested that the Standing Orders could be amended to establish a committee to examine Bill of Rights matters. Such a Committee could be empowered to consider all Bills and regulations in terms of the Act and report to the House on consistency.⁹⁵ This idea was not adopted. Instead the Attorney-General was given the reporting function.

Not only has the idea of a scrutineer Select Committee found favour with the Justice and Law Reform Committee but also with the Clerk of the House of Representatives Mr David McGee. The Clerk made a number of submissions in relation to the recent review of the Standing Orders.⁹⁶ One of the proposals put forward by the Clerk was the recommendation that Select Committees report on whether provisions in the Bills they examine appear to limit any of the rights or freedoms contained in the Act. It is clear that this proposal is not directly analogous to the reform proposals this paper canvasses. This is because the Clerk's recommendation concerning a scrutiny obligation for Select Committees was to be supplementary to the Attorney-General's obligation.⁹⁷ The rationale in part behind the Clerk's recommendation in relation to Select Committees was the fact that Select Committees do not have enough direction from the House in regard to examining legislation and would benefit from increased direction. Having BORA compliance consideration obligations clearly set out in the Standing Orders would enhance the level of direction.⁹⁸ The Clerk's submissions also recommended that the Standing Orders Committee consider whether to recommend that the statutory reporting scheme under section seven be extended to amendments proposed to a Bill as it is being debated by the House.⁹⁹ The reason given by the Clerk, Mr McGee, for this

⁹⁴ Justice and Law Reform Committee "Final Report of the Justice and Law Reform Committee on a White Paper for New Zealand" [1987-90] AJHR XVII I 8c, 10

⁹⁵ Above n94, 10

⁹⁶ See generally: Clerk of the House of Representatives, *Submissions of the Clerk of the House of Representatives on Review of the Standing Orders*, (submission to the Standing Orders Committee, 2003) < <http://www.clerk.parliament.govt.nz> > (last accessed 16 June 2004).

⁹⁷ Above n96, Recommendation 49

⁹⁸ Interview with the Clerk of the House, Mr David McGee (the author, 22 July 2004, at Parliament).

⁹⁹ Clerk of the House of Representatives, *Submissions of the Clerk of the House of Representatives on Review of the Standing Orders*, (submission to the Standing Orders Committee, 2003)

proposal is that such a requirement would act as a brake on the Parliamentary process. If the statutory reporting scheme was to be extended to amendments proposed to a Bill this would require the House to pause to think or reflect on the Bill of Rights consequences of legislation passing through the system. According to the Clerk, the real deficiency in the system at the moment is that no notice of amendments has to be given and there is little if any time to reflect on proposed amendments.¹⁰⁰ If the Clerk's suggestion had been adopted it would have held up the process so that appropriate consideration could be given to proposed amendments.

It is submitted that the significance of the Clerk's recommendations is that they illustrate that there are serious difficulties with the section seven process which those at the front line of parliamentary work recognise. The proposal for Select Committee scrutiny canvassed by this paper is radically different to the Clerk's idea of an additional scrutineer. However, it may be argued that the Clerk's submissions lend some weight to the notion that a Select Committee could effectively carry out a Bill of Rights scrutiny function.

It should be noted that the Clerk did not agree with the proposal posited in this paper. Mr McGee was of the view that in practical terms we have the best compliance system in comparison with any other potential system. According to the Clerk, in reality work goes on behind the scenes between the Ministry of Justice and other Departments to secure compliance and the threat of an adverse Bill of Rights report is an effective tool to keep Departments in line.¹⁰¹ The writer acknowledges with respect the Clerk's view, especially given his Office's position at the coal-face of political reality. However, it could be argued that the status quo described by the Clerk still raises serious concerns in relation to the transparency of government. These are the concerns that the proposals in this paper seek to address.

Recommendation 40. It should be noted that Recommendation 49 also proposed that a new requirement be added to the Standing Orders that Select Committees test their own recommended amendments.

¹⁰⁰ Above n96, The Standing Orders Committee did not adopt these recommendations in its *Review of the Standing Orders* (2003) published at <http://www.clerk.parliament.govt.nz>. When asked why he thought these recommendation had not been adopted Mr McGee replied that it should be remembered that in a political environment it is a government's aim to have their political objectives achieved. Governments do not consider that they need to place further obstacles in their way.

¹⁰¹ Interview with the Clerk of the House Mr David McGee (the author, 22 July 2004, at Parliament).

So then the Select Committee has clearly been promoted as a potentially suitable entity for scrutiny. An argument lending weight to the Clerk's and the Justice and Law Reform Committee's stance is the fact that the Select Committee is already firmly entrenched within the parliamentary system and is governed by established rules and procedures. For example Standing Order ('SO') 189 clearly sets out the functions of each particular SO. The benefits of Select Committee integration within the system and the existence of rules governing Select Committees are two-fold. First, in comparison with creating an entirely new scrutineer entity, minimal reform would be required. Potentially, the requisite reform would simply require amendment of section seven and the SO to establish a Bill of Rights Compliance Select Committee. The SO would then clearly set out the functions of this committee. Secondly and more importantly, the fact that Select Committees are already firmly established within the system means that Parliamentarians are familiar and comfortable with them and hence more likely to accept them as a viable alternative to the Attorney-General.

So if the Select Committee were acceptable to Parliamentarians would it be acceptable to the general public from an appearance of bias stand-point? An argument can be mounted that the Select Committee suffers less from the semblance of partisanship than the Attorney-General as scrutineer. It is true that the Select Committee is still comprised of members of the Government. However, membership of Select Committees must, so far as reasonably practicable be proportional to the party membership in the House (SO 185(1)). In addition, Cabinet Ministers are no longer members of the subject Select Committees. Academics have argued that this reflects an attempt to separate the Executive from Parliament's function.¹⁰² In this way Select Committees can be seen as avoiding the same level of political taint that the Attorney-General as sole scrutineer attracts.

The fact that Select Committees are clearly subject to Natural Justice adds weight to the argument that they may be a suitable scrutineer. In 1995 Professor Joseph reported to the Standing Orders Committee on the application of Natural

¹⁰² Sir Geoffrey Palmer and Professor Matthew Palmer, *Bridled Power New Zealand's Constitution and Government* (Melbourne, Oxford University Press, 2004), 174

Justice to the parliamentary environment.¹⁰³ That report states that the right to Natural Justice as recognised by section 27 (1) of the Act clearly applies to the House and its committees with some concessions taking in to account the functions of the House.¹⁰⁴ The SOs reflect this. For example SO 232 provides for disqualification of a member for apparent bias. This paper has argued that it is imperative that principles analogous to Natural Justice apply to any body carrying out the section seven function. As such a body which is clearly ruled by Natural Justice presents an attractive option for reform.

Finally, in favour of a Select Committee as substitute scrutineer is the fact that there is already an established body which could potentially take over the Attorney-General's role with relative ease. If it is accepted that a Select Committee is a viable option then the Regulations Review Committee ('RRC') is a natural choice for reform. This is because it already carries out a scrutinising function in relation to regulations. The SO set out the functions and obligations of the RRC. These include examining all regulations¹⁰⁵ and the Committee may consider any matter relating to the regulations and report on this to the House.¹⁰⁶ The RRC's functions would have to be extensively amended if it was to adopt the section seven function. This is because there is a significant difference between scrutinising delegated legislation in terms of procedural and ultra vires issues and scrutinising primary legislation in relation to substantive rights considerations. Although, of note is the fact that one of the grounds on which the RRC is to bring a regulation to the special attention of the House includes the fact that the regulation 'trespasses unduly on personal rights and liberties'.¹⁰⁷ In essence this is a function not dissimilar to that required under section seven. As the Rt Hon Jonathan Hunt has said of the RRC:

'(the RRC) has an important constitutional role to ensure that law-making powers are exercised within the limits set by Parliament'¹⁰⁸

¹⁰³ See: P Joseph "Report to the Standing Orders Committee on Natural Justice" (1995) AJHR 118A Appendix F.

¹⁰⁴ Above n103, 213 and 216

¹⁰⁵ Standing Order 377 (1)

¹⁰⁶ Standing Order 377 (4)

¹⁰⁷ Standing Order 378 (1) (b)

¹⁰⁸ Rt Hon J Hunt, "The Regulations Review Committee"[1990] NZLJ 402, 408.

A description similar to the Member's comments above is surely one of the goals of any body created to undertake the section seven function.

Despite the fact that significant reform would be needed, the appeal of the RRC is the fact that the seeds of scrutinising ability already exist within its current functions. In fact the Justice and Law Reform Committee recognised its potential for carrying out the section seven function in its final report on the White Paper.¹⁰⁹

Finally, prima facie the Select Committee appears an attractive option because it has a precedent in the United Kingdom ('UK') Joint Committee on Human Rights ('JCHR'). This is a committee of the UK Parliament. The JCHR has a function similar to that of the Attorney-General under section seven. Under section 19 of the UK Human Rights Act 1998 ('the UK Act') the Minister in charge of a Bill in either House must make a statement as to compatibility with the UK Act. However, the procedure adopted to implement section 19 is much broader than the New Zealand procedure.¹¹⁰

The JCHR comes into play beyond the compatibility statement procedure. The Committee examines every Bill presented to Parliament and assesses it in terms of compliance with the UK Act and also provisions of other international human rights instruments to which the UK is a signatory.¹¹¹ Its terms of reference also include consideration of matters relating to Human Rights in the UK but excluding individual cases.¹¹² A key function of the JCHR is scrutinising section 19 ministerial statements.¹¹³

In relation to its operation, the JCHR appears to have broad powers relating to its function. For example it can require the submission of written evidence and

¹⁰⁹ Justice and Law Reform Committee, "Final Report on the White Paper for a Bill of Rights for New Zealand by the Justice and Law Reform Committee", [1987-1990] AJHR XVII I 8C 10

¹¹⁰ See generally: L Hare, *Parliamentary Scrutiny Under the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1998 (UK): A comparative analysis* (LLB (Hons) Research Paper, Victoria University of Wellington, 2002) 15.

¹¹¹ <<http://www.publications.parliament.uk>> 'Joint Committee on Human Rights Thirteenth Report'.

¹¹² <<http://www.parliament.uk/commons/selcom>> (last accessed 12 June 2004)

¹¹³ Joint Committee on Human Rights 'Joint Committee on Human Rights Fourteenth Report, Session 2001-2002, Scrutiny of Bills: Private Member's and Private Bills (8 March 2002) para 1 cited in L Hare, above n110, 17

documents. It can also examine witnesses, appoint specialist advisors and make reports to both Houses.¹¹⁴ It has a maximum of six members appointed by each House. Currently, the membership is comprised of six Members of the House of Lords from the Labour, Liberal Democrat and Conservative Parties and six members of the House of Lords associated with the three aforementioned political parties.¹¹⁵

The JCHR has been a positive Human Rights protection in the UK. It is the 'public watchdog'¹¹⁶ of the JCHR that gives section 19 of the UK Act its muscle.¹¹⁷ Therefore, the JCHR appears to provide a successful precedent for any New Zealand Select Committee undertaking the Bill of Rights scrutiny function. This will be addressed further below.

There are a number of strong arguments in favour of a Select Committee acting as substitute scrutineer which have been traversed above. However, it is argued that a number of serious problems arise in relation to the Select Committee model which may ultimately render it inappropriate as a substitute.

The most glaring problem with the Select Committee model is that it is essentially still a political animal. The Select Committee is comprised of politicians each with their own party agendas and political concerns. If a primary goal of substitution is to remove any appearance of political bias then the Select Committee as a model would not be truly acceptable as an alternative. Moreover, it is debatable whether it is wholly appropriate for a quasi-partisan body to deal with Human Rights issues. It is submitted that Bill of Rights issues are too important to risk being the tool of political positioning and game playing. The fact that the Select Committee is comprised of members from different political parties may also mean that consensus might be difficult to reach on Bill of Rights issues. In fact the SO specifically allow for the divergent opinions of Select Committee members to be incorporated into the Select Committee's recommendations.¹¹⁸ It is posited that this might have the effect

¹¹⁴ <<http://www.publications.parliament.uk>> (last accessed 10 June 2004)

¹¹⁵ Above n112

¹¹⁶ A Lester "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" (2002) 33 VUWLR 1, 24.

¹¹⁷ Above n116

¹¹⁸ Standing Order 244

of lessening the weight of the recommendation and Bill of Rights issues are too significant to be the subject of lukewarm recommendations.

Another innate problem with the Select Committee model is the constitution of its membership. The Select Committee is made up of politicians and generally not trained legal counsel. In this respect it may be distinguished from the JCHR. For example the current JCHR includes a couple of QCs, a former law lecturer, and a solicitor. The current Chairperson the Rt Honourable Jean Corston MP is also a barrister.¹¹⁹ This ensures that the issues are considered and reported on by those with a great deal of legal expertise and experience.

Another reason why a Committee such as the RRC would not be a suitable replacement is the fact that a Committee produces recommendations. A Select Committee produces a recommendatory report to the House which may incorporate differing views of the members rather than a definitive legal opinion on which the House may choose to rely. The need for scrutiny or examination of a piece of legislation in relation to Bill of Rights compliance by its very nature requires a definitive legal opinion and not a series of recommendations. Given the significance of Bill of Rights issues it is appropriate that the House is presented with a definitive legal opinion in relation to the issues rather than a merely recommendatory report which may not contain a consensus opinion on the issue. Any level of uncertainty is unsuitable in relation to Bill of Rights matters and these matters must be accorded the weight that a recommendatory report cannot provide.

Finally, it should be noted that the JCHR is not an ideal model for New Zealand. As the Clerk of the House asserted to the writer, this is because the UK system is very different to the system in New Zealand.¹²⁰ On a basic level the UK Parliament is a much larger bi-cameral Parliament compared with New Zealand's small uni-cameral legislature. The existence of the House of Lords, which contains a number of distinguished legal counsel, obviously has implications in relation to the functioning of a committee with a consideration and reporting function and the quality

¹¹⁹ See generally: <<http://www.Parliament.uk/parliamentary-committees>> (last accessed 28 July 2004). For example both Lord Lester of Herne-Hill and Lord Campbell of Alloway are Queen's Counsel and Kevin McNamara Esq, MP is a former lecturer in law at Hull College of Commerce.

¹²⁰ Interview with the Clerk of the House, Mr David McGee, (the author, 22 July 2004, at Parliament).

of the final product presented to the House.¹²¹ The level of legal expertise and the different nature of New Zealand's Select Committee system due to the nature of our Parliament and electoral system mean it is doubtful a scrutineer Select Committee could achieve the standard of the JCHR.

B. INDEPENDENT BODY

If the Select Committee model is tainted by partisanship, would a truly independent body advising the House be more appropriate? This model presupposes a body sitting outside the parliamentary system. This body might be akin to an independent tribunal made up of professional and perhaps lay people.

There are precedents for independent bodies which undertake statutory duties and functions under the umbrella of a Minister of Government whilst maintaining the appearance of independence. One such example is the Mental Health Review Tribunal ('the Tribunal'). In general terms the Minister of Health determines how many tribunals exist at one time and appoints the members. The Tribunal then undertakes its functions independently of the Ministry of Health. Each tribunal comprises three members, one of which must be a psychiatrist and one which must be a barrister or solicitor.¹²² The Tribunal reviews the status of patients who are subject to compulsory treatment orders and who have been assessed as unfit to be released from the order.¹²³ The Tribunal also investigates complaints concerning breach of patient rights after an investigation of the complaint if the patient finds an initial investigation unsatisfactory.¹²⁴ The Tribunal prepares a written decision similar to a legal judgment in relation to its reviews and investigations. Other examples of independent bodies exercising statutory powers and functions include the Tenancy Tribunal and the Commerce Commission.

These bodies largely carry out decision-making functions and as such are not directly analogous to the functions which would be undertaken by a Bill of Rights

¹²¹ See: above n120

¹²² Mental Health (Compulsory Assessment and Treatment) Act 1992, s101 (1) and (2).

¹²³ Mental Health (Compulsory Assessment and Treatment) Act 1992, s102

¹²⁴ Mental Health (Compulsory Assessment and Treatment) Act 1992, s75

compliance body. However, an independent statutory body such as the Mental Health Review Tribunal which has the ability to focus on legal and policy issues and provide a quasi-legal decision, might provide a starting point for an appropriate model. The type of body envisaged by this paper is a panel comprised of practising lawyers, retired judges or retired officers of Parliament (such as a former Race-Relations Conciliator) who have a working knowledge of the Act. It might be that the body has the power to appoint specialist advisors on an ad hoc basis to advise on specific policy issues as they arise.¹²⁵

Several arguments make the independent body appear attractive as a potential model. The first of these is the fact that such a body would avoid any appearance of bias, which is one of the major flaws of section seven as it stands. Such a body would be comprised of members who are outside the parliamentary system and therefore would not be constricted by political considerations in the way politicians inevitably are. Moreover, the approach taken by non-politicians to Bill of Rights compliance issues would appear more objective and legalistic than an analysis by politicians. This might engender more confidence in the process amongst the public who are traditionally sceptical of politicians and their intentions.

Further, there is greater scope for the incorporation of members with the appropriate skills for Bill of Rights compliance analysis than in a Select Committee. Unlike, the JHCR, Select Committees in New Zealand do not contain the same level of legal expertise. Select Committees in New Zealand are comprised of politicians who may or may not have a modicum of legal training. The independent body model is premised on the basis that the members will have extensive legal and perhaps policy knowledge. It may be that this would have a positive impact on the quality of Bill of Rights compliance advice to the House. This cannot be a negative thing.

Notwithstanding, the positive aspects of an independent body, some serious obstacles present themselves.

¹²⁵ See: Mental Health (Compulsory Assessment and Treatment) Act 1992, s103 which gives the Mental Health Review Tribunal panel the power to co-opt suitable people to sit on the Tribunal on a one-off basis in special circumstances.

The primary drawback of such a model is that Parliamentarians may be reluctant to accept an independent body as an alternative for two reasons. First, the concept might impinge on the idea of Parliamentary sovereignty and secondly, from a logistical standpoint the establishment of such a body would involve significant reform and resources.

The doctrine of Parliamentary sovereignty is a crucial part of the Westminster system of government, which was born from writings and decisions in the seventeenth century.¹²⁶ The doctrine encapsulates the idea that Parliament is supreme. As Sir Edward Coke was quoted by Blackstone:¹²⁷

‘so long therefore as the English constitution lasts we may venture to affirm that the power of Parliament is absolute and without control’.

Dicey described Parliament as ‘supreme legislator’¹²⁸ and in real terms neither the Courts nor any other body may invalidate or control an enactment of Parliament.¹²⁹ This principle is still recognised today three hundred years after its birth. For example Justice Robertson’s persuasive obiter in *Rothmans of Pall Mall (NZ) Ltd v AG*¹³⁰ makes it clear that the constitutional position is unambiguous:

‘Parliament is supreme...The Courts do not have the power to consider the validity of properly enacted laws.’¹³¹

The risk, therefore, is that there are those who would see an independent body outside the boundaries of Parliament which scrutinises legislation as usurping the functions and powers of Parliament. It could be argued that in accordance with the doctrine of Parliamentary sovereignty it should be a parliamentary body which assesses legislation for compliance under the Act. Recent comments made in the House on the 150th Anniversary of Parliament make it clear that Parliamentary

¹²⁶ *The Laws of New Zealand Constitutional Law*, (3) Parliament, Parliamentary Sovereignty, Basic Principles, para 71 <<http://www.butterworthsonline.com>> (last accessed 26 June 2004)

¹²⁷ William Blackstone, W Morrison ed., *Blackstone’s Commentaries on the Laws of England* vol. I (London, Cavendish Publishing, 2001), 120.

¹²⁸ AV Dicey *Introduction to the Study of the Law of the Constitution* (10ed, MacMillan, London, 1960) 411

¹²⁹ Above, n128

¹³⁰ *Rothmans of Pall Mall (NZ) Ltd v AG* [1991] 2NZLR 323

¹³¹ Above n130, 330

Sovereignty is close to the heart of many Parliamentarians. The Deputy Prime Minister the Honourable Dr Michael Cullen rigorously argued for the protection of Parliamentary sovereignty;

“ There is an increasing tendency to challenge the exercise of ...(Parliamentary) sovereignty. This comes not just from some radical Maori. It also comes from within the heart of New Zealand’s judiciary... we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty...for the sake of good order and government.”¹³²

As discussed above, there is a heightened sensitivity by parliamentarians to issues affecting Parliamentary sovereignty.

It is submitted that the scrutinising contemplated would not in fact impinge on Parliamentary sovereignty as the independent body would simply be providing an opinion to the House. Ultimately the power would reside in the House to accept the advice and act accordingly or disregard the advice. Despite this, of concern is the fact that there may be those who would still consider such an independent body as trampling on Parliamentary sovereignty.

Close to the hearts of many Parliamentarians is also the issue of resource allocation and logistical difficulties. If a new scrutinising body were formed, substantial reform would be required. A great deal of work would have to be undertaken to decide on the appropriate formulation of such a body. Legislation and regulations would have to be drafted to establish and regulate the body. Finally, people with the requisite skills would have to be identified and secured as members of the body. An education programme might also have to be undertaken to garner the support of the public and politicians. The necessary reform is significant. Significant reform involves substantial financial and people resources. It is questionable, therefore, whether Parliamentarians would be prepared to accept such a reform.

Finally, a body still faces problems associated with the end product. Because a body is comprised of a number of constituent members with potentially differing opinions what would be produced after analysis of the relevant legislative provision is

¹³² Hon Dr Michael Cullen (Deputy Prime Minister) address to the Governor-General on the 150th Anniversary of the New Zealand Parliament, (24 May 2004) NZPD 617, 13192

a report. This report would be similar to the recommendatory report produced by a Select Committee. It is clear that the effective exercise of the section seven function requires the production of a definitive legal opinion and not a recommendatory report as discussed above.

C QUASI-INDEPENDENT COUNSEL

The major flaws identified in relation to the options for reform identified so far are a failure to avoid the semblance of bias or a lack of independence, potential non-acceptance by Parliamentarians and the capacity only for production of recommendatory reports rather than definitive legal opinions. The question, therefore, is can a model be found that is capable of producing definitive legal opinions and is sufficiently independent yet still acceptable to those within the parliamentary system? Establishing such a model is a formidable challenge.

If one tries to find precedents within the system for a model that is both acceptable to politicians and yet wears the mantle of independence the obvious choice is an entity akin to an Officer of Parliament or an Officer of the House.¹³³

1. OFFICER OF PARLIAMENT OR THE HOUSE

The inherent flaws in two viable possibilities for reform, which lie at opposite ends of the spectrum, have been traversed. On one hand, the Select Committee, can be seen as too entrenched in the party political system. The alternative option of a fully independent body outside the Parliamentary system suffers from a potential lack of acceptance due to its complete removal from the parliamentary system. The question, therefore, becomes whether a balance can be struck. A body is required which is sufficiently associated with the system to be accepted by Parliamentarians. However, the body must also appear independent to a degree that cures the current flaws in the section seven process. It must also incorporate people with the requisite skill base in

¹³³ The idea for an officer of the House to undertake the function the writer is proposing was suggested to the writer as a possibility by the Clerk of the House, Mr David McGee CNZM, QC at an interview on the 22nd July 2004 at Parliament. The writer is very grateful to Mr McGee for this suggestion.

order to provide quality advice to the House in the form of a definitive legal opinion. It is posited that the ideal candidate for this role is an Officer of Parliament or the House in the form of a quasi-independent legal counsel.

This section will examine the role of an Officer of Parliament or the House, assess current examples of Officers of Parliament and the House, and evaluate potential strengths and weaknesses of this type of entity. A proposal will then be put forward for a legal advisory office or counsel to the House akin to an Officer of the House or Parliament to carry out the section seven function.

In general, 'Officer of Parliament' ('OP') is a fluid term. There is no definition at law of what an OP entails.¹³⁴ Although, the Public Finance Act 1989 section two does state that an 'Officer of Parliament' means the Parliamentary Commissioner for the Environment, the Office of the Ombudsmen, and the Auditor-General as defined in section four of the Public Audit Act 2001. It has been said that the primary function of an OP should be as a check on the Executive.¹³⁵ Certainly this is a function that is consonant with that which is required under section seven. The Finance and Expenditure Committee reported on an inquiry into OPs in 1989.¹³⁶ This report led the way for the establishment of the 'Officers of Parliament Committee', the functions of which will be discussed below in relation to the issue of independence. The same report set out five criteria for the establishment of any new OP. Some of these criteria would be relevant to a Counsel for Bill of Rights Compliance if this role were to be created. These criteria include;

- a) An OP must only be set up to provide a check on the arbitrary use of power by the Executive.
- b) An OP should be created rarely.
- c) Each OP should be created in separate legislation devoted to that position.¹³⁷

¹³⁴ PA Joseph, above n12, 361

¹³⁵ Finance and Expenditure Committee, "Report of the Finance and Expenditure Committee 1989; Report on the Enquiry into Officers of Parliament" (1987-90) AJHR XVII I 4.B 5

¹³⁶ See generally: above n135

¹³⁷ See: D McGee, 'Parliamentary Practice in New Zealand' (Government Printer Publications, Wellington, 1994) 56

If a suitable OP were to be established for the section seven function, these criteria would need to be adhered to.

The real attraction of an OP is its semblance of independence. It is part of the parliamentary system yet distance is kept from political considerations. As the Clerk of the House Mr McGee has stated;

'If a position is to be established as an Officer of Parliament it should be subject to the conditions that flow from being an arm of the legislative branch of the state such as being outside the public service and not subject to ministerial control'¹³⁸

In assessing the independence of OPs it is necessary to examine the appointment procedure relating to them. The relevant legislation creating separate OPs will often set out an appointment procedure for the role. For example section 3 (2) of the Ombudsmen Act 1975 states that the Governor-General on recommendation of the House shall appoint the Ombudsmen. This is subject to the limited exception that the Governor-General in Council may appoint an Ombudsman where a vacancy has occurred and Parliament is not in session. The House must confirm the appointment within two months of the commencement of the new session of Parliament, otherwise, the appointment will lapse.¹³⁹ Similarly, the Controller and Auditor General are also appointed by the Governor-General on the recommendation of the House.¹⁴⁰ The Clerk has observed that a convention has arisen relating to the appointment procedure whereby in terms of recommendations to the House, the appropriate Minister should take a lead in identifying candidates. This may involve advertising for candidates for the position.¹⁴¹

In respect of independence issues, the role of the Officers of Parliament Committee ('OPC') must also be considered. Standing Order 381 sets out the functions of the OCP.¹⁴² The OCP has a broad consideration and recommendation function in relation to funding, auditing, creation and appointment of Officers of Parliament. It must be noted that the House is not bound to follow the OCP's

¹³⁸ Above n137, 55

¹³⁹ See generally: Ombudsmen Act 1975, s7

¹⁴⁰ Public Audit Act 2001, s7 (2)

¹⁴¹ Above n135, 56

¹⁴² *Standing Orders of the House of Representatives* (As Amended 16 December 2003) SO 381

recommendations in relation to estimates to be included in the Appropriation Bill. Although, the convention appears to be that it invariably does

Officers of Parliament

There are a number of bodies that fall within the ambit of an 'Officer of Parliament'. A brief discussion of two such bodies will follow in order to assist with assessment of OPs as an appropriate option for reform.

The office of the Audit-General and Controller is a well-established OP. The Public Audit Act 2001 sets out the functions and powers of the Auditor-General and Controller. The basic function of this office is to provide a check on the spending of public money and to maintain financial accountability in the public sector. As its name suggests the office is the auditor of every public entity.¹⁴³ In addition to financial auditing, the office may also 'performance audit' a public entity. This function includes looking at a public entity's compliance with its statutory obligations and the extent to which a public body is carrying out its activities effectively and efficiently.¹⁴⁴

The Ombudsmen's office is another Officer of Parliament. Its functions are set out in section 13 of the Ombudsmen Act 1975. In general these functions include investigating complaints concerning administrative decisions or recommendations or failure to disclose official information on request made by government bodies. The Ombudsmen then have a reporting function in relation to the Department or organisation concerned.¹⁴⁵

Officers of the House

In New Zealand the Office of the Clerk of the House of Representatives is classified as an Officer of the House.¹⁴⁶ The function of the Office of the Clerk is to act as the legislature's secretariat. The Office provides assistance and specialist advice

¹⁴³ Public Audit Act 2001, s14. The Act sets out an exhaustive list of bodies that constitute 'public entities'. These include; the Crown, Offices of Parliament, Local Authorities, Crown Entities, and Departments of Public Service as defined in the relevant pieces of legislation governing those bodies.

¹⁴⁴ Public Audit Act 2001, s16

¹⁴⁵ See: Ombudsmen Act 1975, ss 13 and 22.

¹⁴⁶ See: Clerk of the House of Representatives Act 1988, s2

to the House and its committees in relation to parliamentary law and procedure.¹⁴⁷ It also examines and may assist in the preparation of papers, motions, petitions, Bills and questions and makes sure that they are presented to the House in accordance with the Standing Orders and Speakers rulings. The Clerk's Office's duties also include the overseeing of the opening of Parliament and relations with other Parliaments.¹⁴⁸

The United Kingdom Speaker's Counsel

This Officer of the House is peculiar to the United Kingdom Parliament. The Speaker of the House appoints the Speaker's Counsel. Currently Speaker's Counsel consists of two posts, Counsel for Legislation and Counsel for European Legislation. There are also two Assistant Counsels. The Speaker's Counsel and the Assistant Counsel form the Legal Services Office in the Department of the Clerk of the House.¹⁴⁹ Their function includes advising Joint and Select Committees on Statutory Instruments. He or she also has the general duty of advising the Speaker and Officers of the House on legal matters arising out of public business or affairs of the House.¹⁵⁰

In general terms, an entity akin to an Officer of Parliament or the House appears an appropriate alternative scrutineer body. This is because such an entity is an integral part of the Parliamentary system, yet it is not tainted by partisanship. The types of function (such as auditing and advising Government and the public sector) these bodies carry out are generally consonant with those that an effective scrutineer body would carry out. The appointment procedures pertaining to many Officers also appear to be an appropriate model. Appointment by the Governor-General on advice of a Minister or by the Speaker maintains some semblance of non-partisanship. Officers of the House and Parliament as well as being acceptable to Parliamentarians, engender respect in the wider community. For example the Office of the Ombudsman has enjoyed a good reputation amongst the public since its inception. Finally, there is an ideal model for a scrutineer entity in the form of the UK Speaker's Counsel. This is

¹⁴⁷ See: <<http://www.clerk.parliament.govt.nz>> (last accessed 30 July 2004)

¹⁴⁸ PA Joseph, above n12, 376

¹⁴⁹ Liz Carless, House of Commons Information Office, "HCINFO@parliament.uk", House of Commons, London, to the author (3 August 2004) email.

¹⁵⁰ See: *Halsbury's Laws of England* PARLIAMENT 3. THE HOUSE OF COMMONS, (4) CONDUCT OF BUSINESS, (iv) Permanent Officers, 651. Speaker's Counsel, Comptroller and Auditor-General and Parliamentary Commissioner for Administration <<http://www.butterworthsonline.com>> (last accessed 29 July 2004)

an office that provides legal advice to the House on a wide range of matters. It is posited that a body such as this, with no membership of the Government but a duty to provide legal opinions to the House, could potentially cure the inherent flaws in section seven identified by this paper whilst still be acceptable to Parliamentarians and the wider public.

VII PROPOSAL FOR REFORM

It is argued that an Officer of Parliament perhaps known as Counsel for Bill of Rights Compliance should be established. Such an entity would comprise a Senior Counsel and several Assistant Counsel. It is envisaged that the primary duties of such an office would be as follows;

- i) To bring to the attention of the House any provision of any Bill which appears inconsistent with any right or freedom contained in the New Zealand Bill of Rights Act;
- ii) Where any provision in any Bill appears to be inconsistent with any right or freedom contained in the New Zealand Bill of Rights Act 1990, the Counsel for Bill of Rights Compliance must present a paper for publication by order of the House, in relation to the relevant inconsistency. In the case of a Government Bill the paper must be presented to the House before the motion for the first reading of the Bill is made. In the case of any other Bill Counsel for Bill of Rights Compliance must present the paper to the House as soon as practicable.
- iii) Where any amendment is proposed to a Bill progressing through the House the Amendment must first be scrutinised by Counsel for Bill of Rights Compliance. Where any provision of a proposed amendment appears inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act, the Counsel for Bill of Rights Compliance must present a paper for publication to the House before the proposed amendment is voted on by the House. (It is acknowledged that there may be some practical difficulties in implementing this provision. A timeframe for this process may be appropriate to prevent the legislative process stalling).

- iv) To advise the House and its Committees on request in relation to any matter relating to the New Zealand Bill of Rights Act 1990 or any human rights issues relating to any domestic legislation or international instrument, which New Zealand has ratified.

The Counsel's office would be comprised of qualified legal counsel preferably with significant experience in Bill of Rights and/or human rights law. It is envisaged that the Governor-General on the advice of the Minister of Justice would appoint the Senior Counsel. Assistant Counsel could then be appointed as needed by the Senior Counsel. A fixed term longer than any term of Government (for example seven years) might be appropriate to strengthen the appearance of non-partisanship.

The opinion of the Counsel would be a definitive legal opinion presented to the House for publication and as such it would be a matter of public record. As there would be no second layer of legal advisors (as there are under the current system) confusion and concerns about transparency related to the website and behind the scenes dealing with Departments would be avoided.

Further, those who hold tight to the ideal of Parliamentary Sovereignty could find comfort in the fact that such a body was still an integral part of the Parliamentary system. A part, however, that maintained the semblance of non-partisanship.

VIII CONCLUSION

Recent history has witnessed growing tensions between the Government and Bench and a loss of public confidence in the system. Some of the rhetoric associated with this has centred on New Zealand's experience with the New Zealand Bill of Rights Act 1990. This coupled with the importance of the Act as an integral part of New Zealand's ongoing commitment to international human rights norms, provides the impetus for detailed examination of the Act.

This paper has examined one important section in the Act's framework by applying a policy analysis analogous to Natural Justice or Fairness principles. It is

vital that every part of an Act which espouses human rights principles accords with accepted ideals of fairness and justice.

Application of the analysis has highlighted that there are serious flaws in the section seven process. These flaws revolve around transparency and apparent bias issues. The practical consequences of these flaws may be significant. The real risk of erosion of public faith in a system already viewed with some scepticism by sectors of the public emerges. Moreover, the potential exists for undermining of the appearance of impartiality of the office of Attorney-General. The aura of impartiality has always been constitutionally crucial to the role of Attorney-General in this country.

The emergent flaws and potential consequences of these flaws require that consideration be given to the reform of section seven. After canvassing the possible alternatives it appears that the most feasible starting point is the creation of a quasi-independent counsel to advise the House on Bill of Rights compliance issues.

It is acknowledged that the reform of section seven would be a formidable task. However, the difficulties inherent in the section and the potential consequences of this, in conjunction with the significance of the Act and its place in the imagination of New Zealanders, demands that the reform issue be considered.

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