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SECTION 7 OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990: ORANGE CONE OR ARMED DEFENDER?

LLM RESEARCH PAPER (for LLB(Hons))
PUBLIC LAW: LAWS 505

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ABSTRACT

The following paper investigates the nature and scope of section 7 of the New Zealand Bill of Rights Act 1990 and its role in safeguarding the rights contained in that Act. It uses case studies of proposed, later enacted, legislation which contain (at least prima facie) inconsistent provisions, to trace the effectiveness of section 7 as it is implemented by vetting agencies, and considered by the Attorney-General and Parliament.

It started from the premise that it is a feel-good provision; effectively 'smoke and mirrors' simply diluting the fact that the Bill of Rights was not supreme, entrenched legislation. The objective was to establish this. However, the paper develops a different conclusion.

In light of section 7's stated purposes as a generator of constructive debate in the House on Bill of Rights issues and a constitutional safeguard, it became apparent from the case studies that section 7 achieved its purpose to a limited extent. The objective of the paper became to identify why it was only a limited obstacle to the enactment of inconsistent legislation and further, suggest options which would aid a greater realisation of its potential. That is, the objective became to morph a single orange plastic cone into an armed defenders highway closure.

ACKNOWLEDGEMENTS

I would like to acknowledge and thank Diana Pickard, Ministry of Justice, Michael Hodgen and Andrew Butler, Crown Law Office, George Tanner, Chief Parliamentary Counsel Office, Matthew Palmer, Dean of Law, Victoria University (Supervisor), and my partner and family.

WORD LENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 15, 500 words.

CONTENTS

I INTRODUCTION

The New Zealand Bill of Rights Act 1990 (Bill of Rights), enacted to affirm a range of civil and political rights, also contains a mechanism for alerting Parliament to Bill of Rights inconsistencies in draft legislation. Section 7 requires the Attorney-General to report to the House of Representatives on any provision of any bill introduced to the House that appears inconsistent with the Bill of Rights.

Its purpose was to manifest a constitutional safeguard, presenting Parliament with an "obstacle" [1] to enacting inconsistent legislation and generating constructive debate of Bill of Rights issues in the House.

Over a decade following enactment of the Bill of Rights, this paper is the result of an examination of the nature and scope of section 7, and its day-to-day procedural practicalities in light of case studies concerning controversial provisions in the Land Transport Act 1998, recent changes to bail, and retrospective penalty provisions in Criminal Justice Amendment legislation.

It assesses whether section 7 is fulfilling its purported purpose, or whether it is in fact inadequate, being only a single orange plastic cone charged with road-blocking the abrogation of fundamental human rights. Further, it presents some options to allow section 7 to operate to its intended potential, that of an armed defenders highway-closure, aiding to prevent, at least inadvertent, enactment of inconsistent legislation.

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1 Rt Hon Geoffrey Palmer (21 August 1990) 510 NZPD 3760.

II SECTION 7: NEW ZEALAND BILL OF RIGHTS ACT 1990

A The Nature of Section 7

Section 7 of the Bill of Rights states[2]

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

The provision applies to all introduced legislation requiring, first, the identification of inconsistencies and, second, those inconsistencies to be reported to the House of Representatives by the Attorney-General.

Section 7 is thus[3]

> a safeguard designed to alert members of Parliament to legislation which may give rise to an inconsistency and accordingly enable them to debate the proposals on that basis.

Since the 1995 revisions to the Standing Orders this obligation has been fulfilled by the presentation of a report, which is published as a parliamentary

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2 New Zealand Bill of Rights Act 1990, s 7.

3 *Mangawaro Enterprises Ltd v Attorney General* [1994] 2 NZLR 451, 457 Gallen J.

paper.[4] Current practice dictates that a report is only tabled where there are unjustified inconsistencies identified.

The obligation imposed by section 7 upon the Attorney General is not a right enforceable by a citizen.

B Section 7 as an Enforceable Right

In 1994, in the context of changes to the Forests Amendment Act 1993, an action was brought against the Attorney General for failing to bring provisions in the Forests Amendment Bill which were allegedly inconsistent with the Bill of Rights, to the attention of the House of Representatives.

Gallen J, reinforcing the Court's inability to usurp the authority of Parliament, held that the obligation imposed upon the Attorney-General by section 7 was a part of the proceedings in Parliament (whether or not the Attorney-General decides to table a report) and is therefore encompassed by article 9(1) of the Bill of Rights 1688 which provides[5]

> the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

Further, the Bill of Rights is not entrenched and section 7 itself contemplates the possibility that inconsistent legislation may be initiated and accepted by Parliament. Gallen J stated[6]

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4 New Zealand House of Representatives *Report of the Standing Orders Committee on the Review of Standing Orders*, Wellington, 1995, 51; cited in Sir Geoffrey Palmer and Dr Matthew Palmer *Bridled Power: New Zealand Government under MMP* (Oxford University Press, Auckland, 1997) 272.

5 Bill of Rights Act 1688 (UK), art 9(1).

6 *Mangawaro Enterprises Ltd v Attorney General* above, 457 Gallen J.

> there is nothing to stop Parliament from legislating in some manner inconsistent with the New Zealand Bill of Rights Act 1990.

In conclusion, Gallen J, recognising the impact of section 4 on section 7 when read together, refused to accept section 7 as a right enforceable by the Courts.

C Section 7's Existence: In Context

There was no section 7 in the proposed, White Paper, Bill of Rights.[7] It was unnecessary as the rights contained in the bill were protected by the nature of the bill itself; being supreme, entrenched legislation.

The Justice and Law Reform Select Committee, who inquired into the White Paper, recommended a Bill of Rights implemented through ordinary legislation. This was in response to concerns that a supreme Bill of Rights would infringe the doctrine of Parliamentary Sovereignty. With its inherent protection expropriated, section 7 was introduced to protect the rights from legislative derogation and abrogation. The committee felt [8]

> that if the Bill of Rights had a prophylactic effect on new legislation, this would compensate in part for the subordination of the Bill of Rights to all other legislation.

It was inspired by the Canadian Charter requirement that the Minister of Justice scrutinise all bills and regulations against the rights in the Charter, and report inconsistencies to the House of Commons "at the first convenient opportunity".[9] However, that provision alone does not provide the protection from legislative derogation; the Charter's status as supreme law protects the rights

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7 Ministry of Justice "A Bill of Rights for New Zealand: A White Paper" [1984-1985] AJHR I.A.6.

8 Andrew S Butler "Strengthening the Bill of Rights" (2000) 31 VUWLR 129, 145.

9 Canadian Charter of Rights, section 3; cited in Justice and Law Reform Committee "Final Report on a White Paper Bill of Rights for New Zealand" [1987-1990] XVII AJHR I.8C, 10.

contained in it. Therefore, section 7 effects only a diluted version of its inspiration. It is diluted further by the repercussions of a neighbouring provision.

D The Impact of Section 4 on Section 7

While it was intended that the Bill of Rights would "put obstacles in the way of the Executive when it is framing its legislative proposals" and would be "extraordinarily helpful and beneficial in ensuring that legislation conforms to basic principles, important standards, and real legal tests"[10] the impact of the provisions contained in the Act on each other casts doubt on well-intentioned policy.

Isolated, section 7 is a staunch protector of our rights and freedoms, but read in conjunction with section 4 its effectiveness is considerably diluted.

Section 4 states that[11]

> No court shall, in relation to any enactment (whether passed or made before *or after* the commencement of this Bill of Rights), -
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment -
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> *(Emphasis added)*

Section 4, reinforcing the doctrine of Parliamentary Sovereignty and consequentially establishing the non-binding status of a section 7 report, allows the House to legislate contrary to the provisions of the Bill of Rights. Section 7 merely ensures it does so knowingly.

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10 Rt Hon Geoffrey Palmer (21 August 1990) 510 NZPD 3760.

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

E The Scope of Section 7

A literal interpretation of the provision suggests the Attorney-General's obligation is satisfied following initial scrutiny and reporting (or decision not to) on all proposed legislation. This interpretation means that changes and amendments implemented following select committee recommendations and/or Committee of the Whole House are not checked for consistency with the Bill of Rights.

A purposive interpretation of section 7, in line with the widely accepted approach to the interpretation of human rights guarantees[12], would require section 7 scrutiny procedures to pervade other stages of the legislative process, requiring ongoing reporting by the Attorney-General to place these inconsistencies before the House.

The latter approach has been theoretically accepted by the Ministry of Justice (MoJ) who have suggested that[13]

> nothing in section 7 precludes the Attorney-General from reporting inconsistencies at any time after a Bill's introduction, but the objective is alerting the House at the earliest opportunity.

However, a purposive interpretation of section 7 is construed by the MoJ as creating a negative discretion, (as opposed to a positive obligation), to report inconsistencies which arise later in the legislative process. Further, they have not implemented procedures to monitor the legislative progress of a bill making it difficult to exercise the discretion. Therefore, the MoJ's stance is, arguably, a feel-good one. Effectively, the literal interpretation of the scope of section 7 has

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12 See A Shaw and A S Butler "The New Zealand Bill of Rights Comes Alive" [1991] NZLJ 261. See also the New Zealand Court of Appeal's position stated in *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA).

13 Ministry of Justice "BORA Vetting" (Draft) (Advice to Attorney-General, 22 November 1999).

prevailed since the Bill of Rights' enactment despite it being "seriously at odds with accepted canons of interpretation for Human Rights guarantees".[14]

F A Parallel Requirement

Standing Order (SO) 260 of the House of Representatives requires the Attorney-General to indicate to the House if any bill appears inconsistent with the Bill of Rights. SO 260(1) states[15]

> Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney General, before a motion for the bill's [first][16] reading is moved, must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.

Like section 7, this requirement is manifested in a published paper tabled in the House.[17] While the section 7 obligation and the Standing Order obligation are theoretically separate requirements, they have been, since inception, treated as a single reporting requirement; the SO 260 obligation being subsumed by, and fulfilled through, the section 7 vetting procedure.

(Released following request pursuant to the Official Information Act 1982).

14 Paul Fitzgerald "Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense?" (1992) 22 VUWLR 135, 155.

15 House of Representatives *Standing Orders of the House of Representatives* (Wellington, 8 September 1999), SO 260(1).

16 This read "second reading" until it was amended by Sessional Order to read "first reading" in May 2000. This is discussed in greater detail in Part V.A.4(c) of this paper.

17 House of Representatives *Standing Orders of the House of Representatives* (Wellington, 8

III THE SECTION 7 VETTING PROCEDURE

A Background Information

The MoJ and the Crown Law Office (CLO) have developed procedures for checking proposed legislation for compliance with the Bill of Rights to advise the Attorney-General.[18] This process is referred to as Bill of Rights Act vetting.[19]

On[20], or as soon as practicable following[21], their introduction bills not sponsored by the MoJ are vetted for consistency by MoJ officials. Bills within the portfolio area of the Minister of Justice, to avoid a potential conflict of interest, are vetted by the CLO. This practice dates back to 1991 and is reinforced in the Cabinet Office Manual.[22]

Advice resulting from a three-stage analysis of all bills is tendered to the Attorney-General. Immediately following enactment of the Bill of Rights Act the (then) Attorney-General, Hon Paul East, required formal written advice only where the provisions of a bill were considered to warrant a report to the House under section 7. Since then, the Attorney-General (both Hon Doug Graham and currently Hon Margaret Wilson) request written advice as to consistency of *all* Government bills prior to their introduction and advice on all other bills as soon as possible after their first reading.[23]

September 1999), SO 260(2).

18 Other agencies (for example, the Legislation Advisory Committee (LAC) have developed guidelines also, and while the same or similar, for the purposes of this paper, information regarding the vetting process is taken from Ministry of Justice documents as footnoted. For the LAC guidelines see Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation (2001 edition)* (Wellington, 2001) <http://www.justice.govt.nz/lac/index.html> (last accessed 26 September 2001), para 4.1.1 - 4.1.3.

19 Ministry of Justice "Untitled" (Draft) (9 March 2000), 1. (Released following request pursuant to the Official Information Act 1982).

20 New Zealand Bill of Rights Act 1990, s7(a).

21 New Zealand Bill of Rights Act 1990, s7(b).

22 Cabinet Office *Cabinet Manual* (Department of the Prime Minister and Cabinet, Wellington, 2001) 69, para 5.39.

23 Ministry of Justice "BoRA Vetting" (Draft) (To Attorney-General, 22 November 1999) 4.

B Outline of the Analysis

The MoJ and CLO follow the statutory interpretation methodology articulated and adopted by the New Zealand Court of Appeal in *Moonen v Film and Literature Board of Review* (*Moonen*).[24] When developing the methodology, the Court of Appeal were undoubtedly (though not expressly) influenced by the test expounded by the Supreme Court of Canada in *Regina v Oakes* (*Oakes*).[25] The *Oakes* test had been used in this part of the vetting process prior to *Moonen*, but the latter judgment has provided clarity. However, much of the relevant case law used by vetting officials is found in judgments of the Canadian Courts dealing with comparable provisions in the Canadian Charter of Rights and Freedoms.[26]

1 Identifying an inconsistency

The vetting process is made up of three separate stages. First, the policy objectives and provisions of the bill are assessed for compliance with the rights and freedoms within the Bill of Rights.

This step involves

(1) identifying and weighing the different interpretations available[27] of the apparently inconsistent objective and/or provision;

(2) ascertaining the scope of the right apparently breached; and

(3) assessing the objective and/or provision in light of the right itself to ascertain whether the objective and/or provision in fact breaches the right.

(Released following request pursuant to the Official Information Act 1982).

24 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

25 *Regina v Oakes* (1986) 24 CCC (3d) 321; (1986) 26 DLR (4th) 200 (SC).

26 Ministry of Justice "BORA Vetting" (Draft) (To Attorney-General, 22 November 1999) 3.

27 This has been understood to mean "properly open" (*Moonen v Film and Literature Board of Review* above, 10).

2 The "reasonableness" analysis

If there is an inconsistency, it is determined whether the inconsistency is a "reasonable limit ... demonstrably justified in a free and democratic society".[28] This is essentially the analysis required of the courts by section 5 of the Bill of Rights. The approach expounded by the New Zealand Court of Appeal in *Moonen* is directly imported to assist in this inquiry. It essentially consists of two components:

(1) Determining whether the limit is substantively justified, the test requiring the limitation to be of sufficient importance to warrant overriding a constitutionally protected right; and

(2) Determining whether the limit is proportional, the test requiring proportionality between the law limiting the right and the reason for the limitation, ie. the measures adopted must impair the right as little as possible.

The incorporation of the section 5 analysis in the vetting procedure results in only unjustified limits being considered to be inconsistent with the Bill of Rights. Therefore, Parliament is not made aware only of prima facie inconsistencies, only unjustified ones.

3 Advice and Section 7 Reports

The legal advice resulting from the above procedure is tendered to the Attorney-General who is free to accept or reject it. Where an unjustified inconsistency is identified a section 7 report is drafted by the vetting agency and attached to the letter of advice. If accepted, it is tabled in the House by the Attorney-General.

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28 New Zealand Bill of Rights Act 1990, s 5.

As noted above, section 7 reports are only tabled in the House where an impugned provision is considered to be an unjustified limitation on the rights and freedoms contained in the Bill of Rights Act. The report may include options for consideration if it is decided to amend the impugned provision to comply with the Bill of Rights.[29]

C *The Analysis in Application*

1 *Identifying an inconsistency*

When a bill first comes before the vetting agency the objective that the policy is seeking to achieve is ascertained. Once that is determined, it is considered alongside the rights and freedoms contained within the Bill of Rights. Once a potential breach of a right or rights is identified the objective is assessed in light of the right itself to determine whether it in fact breaches the right.

If the objective is in some way inconsistent with the Bill of Rights' protections the bill is then scrutinised, applying section 5 principles, to establish whether the objective is a justified limitation on the affected rights.

If the objective is consistent with protected rights the resulting legislation must also be consistent. Therefore, each provision of the bill is examined to ascertain its compliancy with the Bill of Rights.

Generally there will be a number of ways that a provision can be worded with the same objective in mind. The formulation that both achieves the objective

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29 For example, then Attorney-General Hon Paul East suggested a number of possibilities in his report on both the Films and Videos and Publications Classification Act 1993 and the Children, Young Persons and their Families Amendment Act 1996 for the select committee to address.

of the legislation and is most consistent with the Bill of Rights is identified. Once an interpretation, "properly open"[30] on the words of the provision, is determined it is considered alongside the rights contained in the Act and potential breaches are identified. The provision is then examined in light of the right itself to ascertain whether the provision is justified in all the circumstances.

2 A justified limitation?

Section 5 of the Bill of Rights, read in conjunction with section 4, is a statutory recognition that the State has a legitimate interest in limiting some rights.[31] A provision which is prima facie inconsistent with a right or rights contained in the Bill of Rights is deemed to be consistent when it is justified in a free and democratic society.

Section 5 of the Bill of Rights Act provides[32]

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Assessing whether an impugned provision is justified, in essence, consists of two primary components.

(a) Substantive justification

First, the objective of the impugned provision is identified. The importance and significance of that objective is then assessed,[33] because the reason for the limitation must be of sufficient importance to warrant overriding a

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30 *Moonen v Film and Literature Review Board*, above, 10.

31 Ministry of Justice, "Untitled" (Draft) (9 March 2000) 5. (Released following request pursuant to the Official Information Act 1982).

32 New Zealand Bill of Rights Act, s 5.

constitutionally protected right or freedom. Information from the Department responsible for a Bill can be important at this stage.[34]

(b) Proportionality

The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. That is, "a sledge hammer should not be used to crack a nut".[35]

The test of proportionality consists of three components:[36]

(1) The measures adopted must be rationally connected[37] to the objective;

(2) the measures should impair as little as possible the right or freedom in question; and

(3) there must be proportionality between the law limiting the right and the objective of the limitation, that is, the limitation must not be so deleterious of a right as to outweigh the substantive justification for the limitation.

At the second stage it is recognised that, in achieving the specific objective of the limiting legislation, although the particular right should be impaired no more than is necessary to meet the objective, there is a margin of

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33 *Moonen v Film and Literature Board of Review*, above, 11.

34 Ministry of Justice "BORA Vetting" (Draft) (To Attorney-General, 22 November 1999) 3. (Released following request pursuant to Official Information Act 1982).

35 *Moonen v Film and Literature Board of Review*, above, 11.

36 Ministry of Justice "BORA Vetting" (Draft) (To Attorney-General, 22 November 1999) 3. (Released following request pursuant to Official Information Act 1982).

37 The "rational *connection*" terminology is used by the Canadian Supreme Court in *Regina v Oakes*, above; the New Zealand Court of Appeal inquire whether there is a "rational *relationship*" between the objective and the right affected in *Moonen v Film and Literature Board of Review*, above. (Emphasis added).

error within which reasonable legislators could disagree.[38] This principle acknowledges the inherent subjectiveness of the inquiry.

If a provision satisfies the *Moonen* test, the MoJ or CLO will advise the Attorney-General that the provision is a justified limitation under section 5 and is therefore consistent with the Bill of Rights. A section 7 report will not be produced.

3 Tabling a Report

After a finding of a unjustified inconsistency in a bill advice outlining the analysis is tendered to the Attorney-General, along with a draft section 7 report. The Attorney-General is free to reject or accept the advice and the report, but if it is accepted she tables the report in the House of Representatives. It is then available to the relevant Select Committee and the House during the bill's legislative progress.

Once tabled, section 7 reports are public documents, published in the Appendices to the Journals of the House of Representatives.

IV CASE STUDIES ILLUSTRATING THE APPLICATION AND EFFECT OF SECTION 7

To assess the practical effect of section 7 in the legislative process three core bills containing potentially inconsistent provisions have been chosen randomly. Their legislative process will be traced and assessed in this part of the paper.

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38 See *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939, 954 (PC).

A The Land Transport Act 1998

The Land Transport Bill was tabled in Parliament by a National government, the measures in which reflected "the Government's determination to make [New Zealand] roads safer"[39].

The Ministry of Transport was the sponsoring department, so the vetting procedure was undertaken by the MoJ. Three clauses in the Bill were reported as being inconsistent with the Bill of Rights Act and the (then) Attorney-General, Hon Paul East, tabled a section 7 report in the House of Representatives.

1 The Impugned Clauses

The three identified clauses concerned evidential presumptions relating to alcohol testing, and 28-day licence suspension and vehicle impoundment.

(a) Clause 117: Presumptions relating to alcohol-testing

Clause 117, paragraphs (1) and (2) stated:[40]

> (1) For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which an evidential breath test was undergone by the defendant, it is to be conclusively presumed that the proportion of alcohol in the defendant's breath at the time of the alleged offence, was the same as the proportion of alcohol in the defendant's breath indicated by the test.
>
> (2) For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which a blood specimen was taken from the defendant .. it is to be conclusively presumed that the proportion of alcohol in the defendant's blood at the time of the alleged offence was the same as the proportion of alcohol in the blood specimen taken from the defendant.

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39 Hon Maurice Williamson (27 November 1997) 565 NZPD 5746.

40 Land Transport Bill 1997, no 87-1, cl 117.

The Attorney-General's report stated that clause 117 was inconsistent with section 25(c) of the Bill of Rights Act which states:[41]

> Everyone who is charged with an offence has, in relation to the determination of the charge, ...
>
> (c) The right to be presumed innocent until proved guilty according to law.

Canadian decisions on the basis of the equivalent provision in the Canadian Charter were used in the report to substantiate the report's conclusion. It had been held by a majority of the Canadian Supreme Court that [42]

> any burden on an accused which has the effect of dictating a conviction despite the presence of reasonable doubt, whether that burden relates to proof of an essential element of the offence or some element extraneous to the offence but nonetheless essential to the verdict contravenes [the equivalent section] of the [Canadian] Charter.

Other Canadian decisions indicated that issues surrounding conclusive-presumption provisions arise from the possibility that an accused could be convicted while a reasonable doubt exists.[43]

Further, a similar, but less intrusive, alcohol-testing provision was introduced in the Canadian Criminal Code which created a rebuttable presumption; that tests are proof in the absence of evidence to the contrary. This was deemed by the judiciary to be contrary to the Canadian Charter. As the law stands now in Canada only a reasonable doubt need be raised by a defendant to rebut the proof of the tests.

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41 New Zealand Bill of Rights Act 1990, s 25(c).

42 *R v Holmes* [1988] 1 SCR 914, 934 Dickson CJ.

43 In *R v Whyte* (1988) 51 DLR (4th) 481 the Court held that the presumption of innocence

The extent of clause 117's inconsistency, in the Attorney-General's opinion, was substantial. The report questioned whether the clause abrogated the section 25 right, rather than merely limited it. Preceding on the basis that the clause imposed a limit on the right, a section 5 analysis of the clause was reported.

Using the *Oakes* test (*Moonen* not yet having been decided) the following factors were balanced:[44]

(1) The significance in the particular case of the values underlying the Bill of Rights Act;

(2) The importance in the public interest of intrusion on the particular right protected by the Bill of Rights Act;

(3) The limits sought to be placed in the application of the Act's provision in the particular case; and

(4) The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

The report identified the objective of the provision as being the "substantial and pressing need to control problems created by drinking drivers, namely deaths and injuries on our roads."[45] It considered the objective and the provision to be rationally connected "because it is based upon empirical data previously accepted by parliament which rationally connects the proved and presumed facts".[46]

It assessed the extent of the impairment on the right in question in light of the bill's objective. There was an awareness of Police concerns that any

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applies regardless of whether the clause in question creates a presumption dispensing with proof of a fact otherwise required to be proved in order to establish a Crown case or establishes a separate defence which the defendant is required to prove.

44 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63, 6.

45 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63, 7.

46 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63, 7.

relaxation of the conclusive presumption rule would lead to difficulties in prosecuting drink-driving offences, with more resources required to be devoted to prosecutions, legal uncertainty and higher rates of acquittals. Against these concerns was weighed evidence that if alcohol is consumed immediately prior to apprehension, a person's blood/alcohol level reading may continue to rise for a period after consumption has ceased. The report emphasised the importance of recognising that the conclusive presumption is capable of operating in such a way as to lead to the conviction of persons who in fact were under the relevant legal breath or blood alcohol limit, can demonstrate this fact, and may in no way be at fault. This was seen as being in "complete conflict"[47] with the values underlying the presumption of innocence. These findings, coupled with the fact that clause 117 is more severe than that adopted in Australia and Canada, resulted in the conclusion that the clause did not infringe the right in question as little as possible.

The report's final conclusion was that clause 117 infringed the rights conferred by section 25(c) of the Bill of Rights in a manner that could not be treated as a reasonable limit for the purposes of section 5 of the Bill of Rights Act.

(b) Clauses 56 and 57: 28-day licence suspension and vehicle impoundment

Clause 56 of the Land Transport Bill provided for the immediate suspension of a driver's licence for a period of 28 days where the driver had been caught driving with excess breath[48] or blood-alcohol[49] levels, had failed or

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47 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63, 7.

48 Land Transport Bill 1997, no 87-1, cl 56(1)(a)(i).

49 Land Transport Bill 1997, no 87-1, cl 56(1)(a)(ii).

refused to undertake a blood test when requested to[50], or driven at a speed 50 kilometres an hour in excess of the applicable speed limit[51].

Clause 57 of the Bill provided for the mandatory impoundment of a motor vehicle for a period of 28 days where the driver was disqualified from holding or obtaining a driver licence[52], the driver's licence was suspended or revoked[53], or the driver was unlicensed[54].

There was no provision to enable a Court, imposing sentence for an offence relating to the conduct which gave rise to the licence suspension or vehicle impoundment, to terminate the licence suspension or vehicle impoundment.

The Attorney-General identified these clauses as being potentially inconsistent with section 26(2) of the Bill of Rights Act in so far as they did not provide for the termination of suspension and impoundment.

Section 26(2) of the Bill of Rights contains the double jeopardy rule which states[55]:

> No one who has been finally acquitted or convicted of or pardoned for an offence shall be tried or punished for it again.

The report recognised that the scope of section 26(2) in New Zealand is uncertain but proceeded on the basis that even if a narrow interpretation was taken sanctions of a penal nature come within the scope of the section.

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50 Land Transport Bill 1997, no 87-1, cl 56(1)(b).
51 Land Transport Bill 1997, no 87-1, cl 56(1)(c).
52 Land Transport Bill 1997, no 87-1, cl 57(1)(a).
53 Land Transport Bill 1997, no 87-1, cl 57(1)(b).
54 Land Transport Bill 1997, no 87-1, cl 57(1)(c).

The report considered similar suspension regimes in overseas jurisdictions. In the United States the Ohio Supreme Court held that administrative licence suspension and subsequent prosecution did not infringe a double jeopardy provision in the Constitution, but that an administrative licence suspension ceases to be remedial and becomes punitive in nature to the extent that the suspension continues subsequent to adjudication and sentencing[56]. The scheme in issue in that case involved suspension for a minimum of 90 days and up to five years on subsequent occasions, so New Zealand's proposed scheme was distinguishable on that basis, however, in another American case the court held that a seven day licence suspension was contrary to double jeopardy protections.[57]

The objective of the proposed clauses 56 and 57 was identified in the report, taken from draft Cabinet Committee papers, as being deterrence by the "imposition of swift, certain and severe penalties on serious and repeat traffic offenders"[58].

The section 5 analysis involved the weighing of the factors outlined above. The report's 'substantive justification' assessment took into account suggestions by the Ministry of Transport that a provision automatically terminating administratively imposed licence suspension or impoundment may operate to frustrate the legislative intention of the regime by reducing its deterrent effect and/or allowing drivers who present a risk to public safety to regain their vehicles and/or be able to use their licences at an inappropriately early stage after apprehension.[59]

The report found that allowing the continuation of a licence suspension or impoundment regime following sentencing is rationally connected with the

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55 New Zealand Bill of Rights Act 1990, s26(2).

56 *Ohio v Gustafson* 668 NE 2d 435 (1996).

57 *Murphy v Commonwealth* 896 F Supp 557 (DC Va 1995)

58 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63, 12.

objective of protecting the public from unsafe or disqualified drivers.[60] Further, disqualification would often be imposed in the event of conviction for an offence arising out of conduct for which licence suspension was imposed, but the court retained the discretion not to impose disqualification in certain circumstances[61].

In assessing the extent of the impairment on the right, the Attorney-General was influenced by a Canadian decision[62] which expressed concern at using the deterrence argument to justify the imposition of penal sanctions abrogating a protected right, where increasing the prospects of detection of an offence would act as a more effective deterrent than imposing penal sanctions.

The report stated that in order to constitute a reasonable limit the sentencing Court should be given some discretion to terminate a licence suspension or vehicle impoundment following sentencing of a defendant.[63]

Therefore, the section 7 report concluded that clauses 56 and 57 infringed the rights conferred by section 26(2) of the Bill of Rights Act in a manner that could not be treated as a reasonable limit for the purposes of section 5 of the Bill of Rights Act.

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59 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63, 13.

60 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63, 13.

61 Land Transport Bill 1997, no 87-1, cl 38 and 55; cited in Attorney General "Report on the Land Transport Bill" [1997] AJHR E.63, 13.

62 *Horsefield v Registrar of Motor Vehicles* (1997) 30 OTC 138 (Ontario Court of Justice (General Division)).

2 Consideration of the Section 7 Report as the Bill Progressed

(a) Second Reading

The bill proceeded straight to second reading, its introduction and first reading omitted by virtue of Standing Order 273[64].

At second reading[65] the report was acknowledged by members, most of whom suggested that "[t]here is work to be done on this Bill by the select committee to overcome these problems".[66] Other members took the attitude that "[t]hese tough administrative actions at the roadside ... will, I believe, meet the objective of improving road safety and can be justified."[67]

(b) Select Committee Consideration and Report

The Bill was referred to the Transport and Environment Committee for consideration on 7 August 1998.

Submissioners were divided in their support for clause 117, but the committee were influenced by information provided by the sponsoring department, the Ministry of Transport. They emphasised the need to reduce road trauma caused by drunk drivers from pleading technical defences. They submitted that if the presumption was made rebuttable, defendants would

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63 Attorney-General "Report on the Land Transport Bill" [1997] AJHR E63,13.

64 Standing Order 273 allows for any bill which the House has accorded urgency, to be introduced and to proceed at any time but not so as to interrupt a debate (House of Representatives *Standing Orders of the House of Representatives* (Wellington, 1999), SO 273). Urgency (pursuant to the 1996 Standing Orders) was accorded the Land Transport Bill on 20 November 1997.

65 (27 November 1997) 565 NZPD 5747-5761.

66 John Wright (27 November 1997) 565 NZPD 5754.

67 Hon Maurice Williamson (27 November 1997) 565 NZPD 5747.

potentially have more technical loopholes to use as defences in drinking and driving cases.[68]

The committee was also influenced by information that provisions having the same effect as clause 117 have been present in New Zealand law since 1970 (in relation to blood-alcohol levels) and 1978 (for breath-alcohol levels)[69].

The committee recommended that the clause proceed and the conclusive presumption be retained. They supported the initiative to reduce road fatalities and injuries caused by drunk drivers and recognised that strong enforcement measures may deter offenders. A primary reason for their decision to support the clause was a determination to prevent a legal loophole, allowing such defences as the "hip-flask" defence[70], undermining the deterrence of drinking and driving.

The committee's consideration of clause 56 (renamed clause 59ZJ) was coloured by broad support of the provision by submissioners. However, the New Zealand Law Society and the Legislation Advisory Committee concurred with the Attorney-General's findings that a defendant has the right not to be punished twice for the same offence.

In conclusion the committee agreed that the deterrence mechanism would be undermined if the court were able to terminate the licence suspension.

Clause 57 (renamed clause 59ZK) did not receive comment on the Bill of Rights issues identified by the Attorney-General's report. This was probably because the arguments accorded to clause 56 were equally applicable in the context of clause 57. Overall the committee supported the clause.

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68 Transport and Environment Committee " Report on the Land Transport Bill" [1998] AJHR I.23, 843.

69 Culminating in section 58 of the Transport Act 1962, as amended.

70 The hip-flask defence involved people claiming that they had had a quick drink to steady their

(c) Consideration of the Select Committee's report

The Transport and Environment Committee's report was considered in the House in November 1998.

There was a notable absence of debate regarding the committee's consideration of the Attorney-General's report. There was a recognition by the (then) Minister of Transport that the Bill of Rights safeguards the rights of New Zealanders, but his emphasis was that "[t]here are situations .. where limitations have to be placed on those rights in the interests of the greater public good."[71] He emphasised that while the Attorney-General felt some provisions were contrary to the Bill of Rights his concerns were effectively countered by the select committees determination that the limitation on driver's rights is justified.[72]

(d) Committee of the Whole

The Bill was considered by the House in Committee. Two members' speeches mentioned the impugned clauses and their Bill of Rights concerns. Hon Phil Goff described it as a "debateable legal point" whether the clauses put a person in jeopardy of being punished twice, but dispelled it as an "academic debate".[73] Hon Jim Sutton described limiting protected rights as "a small price to pay."[74]

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nerves after a crash or other incident, but were not in fact intoxicated at the time of the incident.

71 Hon Maurice Williamson (5 November 1998) 573 NZPD 12942.

72 Hon Maurice Williamson (5 November 1998) 573 NZPD 12942.

73 Hon Phil Goff (24 November 1998) 573 NZPD 13540.

74 Hon Jim Sutton (24 November 1998) 573 NZPD 13541.

Both clauses 56 and 57 were agreed to on a vote with minor amendments made to each, but the amendments did not affect the Bill of Rights inconsistencies.

There was no debate on clause 117.

(e) Third Reading

Although the Bill's safe passage by this stage was a mere formality, Owen Jennings raised Bill of Rights concerns again at third reading on 3 December 1998. He recognised that "it [had] become apparent in the debate that there are too few members of the House who are prepared to stand up and speak on behalf of civil liberties."[75] He stated [76]

> [t]he Bill represents a worrying encroachment on the personal liberty of New Zealanders for what might be determined to be a dubious gain. The dearly held justice of being innocent until proved guilty in a court of law has once again been breached by this Parliament. ... We should not let them go without a struggle. The ease with which we trade away these liberties for short-term questionable gains at the behest of what are often narrowly focused interest groups is quite alarming.

Lianne Dalziel expressed a similar view suggesting[77]

> [w]e should properly train young people how to drive well and how to take responsibility for their actions on the road. That would do far more to improve our road safety objectives and to make our country a more secure place. We have given up legitimate rights and freedoms, and, sadly, I do not believe that we will achieve the objectives that this Bill states that it is there to achieve.

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75 Owen Jennings (3 December 1998) 574 NZPD 13822.

76 Owen Jennings (3 December 1998) 574 NZPD 13822.

77 Lianne Dalziel (24 November 1998) 574 NZPD 13825.

(f) The Act

The Land Transport Act 1998 was passed by Parliament on 3 December 1998.

Clause 117 is enacted as section 77 and came into force on 1 March 1999. Clauses 56 and 57, now sections 95 and 96 respectively, came into force on 3 May 1999.

3 Initiatory Observations

This case study illustrates Parliament's treatment of a section 7 report and their exercise of Parliamentary Sovereignty (reinforced by section 4) to legislate contrary to the Bill of Rights.

It illustrates the implementation of the vetting procedure, as outlined in the section 7 report. It illustrates a House leaving substantial Bill of Rights issues to the relevant select committee to resolve, who in turn, using section 5 terminology but without undertaking the section 5 analysis, determine the provisions to be justified in light of their objective. In this way, it illustrates the apparent status of a section 7 report as a submission, considered amongst other submissions at that stage of the process.

It illustrates a relaxed (majority) attitude to the Bill of Rights Act even when reminded by a minority (two-member) tag-team of the unjustified inconsistencies in the Bill.

B The Bail Act 2000

The Bail Bill was tabled in mid-1999. Amongst its objectives was the consolidation of "the main bail provisions [previously] scattered through several Acts of Parliament" and the codification of "some common law bail principles and elements of bail procedure."[78] Further, it sought to reduce the likelihood of bail for repeat offenders and those who breach bail conditions, the bill addressing[79]

> what consultation indicates is the prime concern with bail law and procedure; namely the high rate of offending while on bail.

The Bail Act 2000 was chosen as a case study because of the reverse onus provisions contained in sections 10 and 12, creating certain classes of defendant who are bailable only if *they* satisfy the judge that they should be.

Reverse onus provisions are accepted as being prima facie inconsistent with section 25(c) of the Bill of Rights, that is, the right, once charged, to be presumed innocent until *proved* guilty according to law.[80] (Emphasis added). In the context of bail, reverse onus provisions deny the presumption in favour of bail, allowing the State to hold defendants[81]

> against their will [and deprive them] of their personal liberty despite the fact that they have not been tried, convicted or sentenced.

While it was not until 1999 that this Bill and its reverse onus clauses came before Parliament, reverse onus bail provisions already had a place in our law.

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78 Bail Bill 1999, no 300-1, Explanatory Note, 1.
79 Bail Bill 1999, no 300-1, Explanatory Note, 1.
80 New Zealand Bill of Rights Act 1990, s 25(c).
81 Lianne Dalziel (20 August 1991) 518 NZPD 4182.

In 1991 a reverse onus bail provision was passed and implemented via amendment to the Crimes Act 1961. What began as the Bail (Miscellaneous Provisions) Bill became the Crimes Amendment Act (No 2) 1991 by Supplementary Order Paper[82] which split the bill into three separate bills[83]. Clause 19 of the Bill repealed section 318 of the Crimes Act and substituted a new section restricting the grant of bail to adult[84] offenders, charged with or convicted of specified offences,[85] who have one[86] or more previous convictions for a specified offence. These offenders needed to satisfy a High Court judge[87] on the balance of probabilities that bail should be granted. In determining the application the Court was to pay particular regard to protecting the public.

It is arguable that the safe passage of this reverse onus provision had an impact on the enactment of the reverse onus provisions in the Bail Act 2000. As a result, a brief investigation of the impact of section 7 of the Bill of Rights Act on the passage of section 318 of the Crimes Act, as amended, will be used to put the later Bail Act and section 7 vet in its proper legislative context.

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82 Bail (Miscellaneous Provisions) Bill 1991, no 12-1 (Supplementary Order Paper No 57, 10 October 1991).

83 Those bills became the Summary Proceedings Amendment Act (No 2) 1991, the Crimes Amendment Act (No 2) 1991 and the District Courts Amendment Act (No 2) 1991.

84 Persons 17 years and over.

85 Specified offences are listed in the Crimes Act 1961 and include murder, manslaughter, sexual violation and aggravated robbery.

86 The measure as introduced applied the provision to anyone with two or more convictions for serious crimes. The Justice and Law Reform Committee amended the clause (in response to a directive by the then Minister of Police, Hon John Banks after submissions were heard) to apply were a defendant has one or more convictions for serious crimes. This amendment was enacted in section 318.

87 The clause also implements a change in jurisdiction for serious offenders requiring their bail applications to be heard by a High Court judge only rather than a District Court judge as was the case previously.

1 The Bail (Miscellaneous Provisions) Bill 1991

The Bail (Miscellaneous Provisions) Bill [88], (the 1991 bail bill), was introduced a matter of months following the coming into force of the Bill of Rights Act. Therefore, the progress of the bill should be read in light of possible teething problems in the early stages of the implementation of section 7 vetting procedures, which were alluded to by the, then, Minister of Justice during debate on the 1991 bail bill. He indicated that "some parts of the procedure that relate to the New Zealand Bill of Rights clearances need review ...".[89]

A section 7 report was not tabled in the House by the (then) Attorney-General, Hon Paul East, which seems to indicate that, on advice from the CLO (because the MoJ were the sponsoring department), clause 19 was considered to be either consistent or justifiably inconsistent with the Bill of Rights.

However, in the second reading debate Rt Hon David Lange suggested the advice tendered identified inconsistencies in the Bill stating[90]

> [t]he Solicitor-General's conclusion on the Bill that he examined in December 1990 was that the Bill ought to be the subject of a report to the House by the Attorney-General, because on the evidence tendered to him he did not consider that there could be a case made out for its not being in conflict.

Therefore, a section 7 report may not have been presented because the Attorney-General did not accept the tendered advice.

The tendered advice, being the subject of legal professional privilege, can only be released with the consent of the Attorney-General. The Attorney-General refused to release the advice received on the Bail (Miscellaneous Provisions) Bill.

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88 Bail (Miscellaneous Provisions) Bill 1991, no 12-1.

89 Hon D A M Graham (15 October 1991) 519 NZPD 4868.

Interestingly, the Attorney-General personally endorsed the clause during debate in the House and voted for its enactment. He stated[91]

> [m]any New Zealanders are concerned that people charged with very serious offences are wandering the streets and committing more offences while awaiting a hearing on the earlier offences. In years gone by it was almost unheard of for somebody charged with murder to be granted bail. I can remember in the late 1960's one case when bail was granted and it was virtually unheard of. Now it is becoming more and more common. The Government is sending a message to the judiciary through the Bill. Parliament should support it.

The select committee, in considering the Bill, asked for advice from the sponsoring department, the MoJ, whose response to the committee contained one line on the reverse onus issue, stating[92]

> a reverse onus provision, such as contained in the Bill as introduced would comply with the principle set out in the New Zealand Bill of Rights Act.

In it's submission the New Zealand Law Society only tentatively supported the clause as it stood, applying to a defendant who had two or more previous convictions. Their position may have changed after the amendment made by the Select Committee as a result of a directive by the then Minister of Police, Hon John Banks. This amendment was made following the hearing of submissions, but may have had a significant impact on consistency issues.

There was inadequate information provided to the House to debate the proposals in light of the Bill of Rights issues. This is evidenced by the speeches during second reading debate.

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90 Rt Hon David Lange (9 October 1991) 519 NZPD 4787.
91 Hon Paul East (20 August 1991) 518 NZPD 4189.
92 Cited by Lianne Dalziel (15 October 1991) 519 NZPD 4869.

Lianne Dalziel stated [93]

> I have attempted to get copies of the advice received on this matter from the Solicitor-General and the Department of Justice. ... [At select committee] we were informed that there was no inconsistency with the New Zealand Bill of Rights Act, and I accepted that advice at face value. However, in considering the matter further, I did not realise that the advice did not disclose the basis on which that advice was given, and that is why I have sought the information from the Minister. The Minister has sent me two pieces of information, and he has declined me access to three more that he says are still under consideration. I suppose that without the other three reports, or at least those reports - I am not sure whether there are only three more reports to come or whether there are more - it is very difficult to assert that the New Zealand Bill of Rights Act has indeed been complied with. In my opinion the Bill infringes against section 24 of the New Zealand Bill of Rights Act, and there ought to be a report to the House that this is so.

The legal privilege which attaches to vetting material impedes section 7 effecting its purpose. All information should be available to members to ensure constructive debate on Bill of Rights' issues.

While section 7 was inadequate in this instance to safeguard a protected right from being, arguably unjustifiably, limited, its deficiencies may only reflect teething problems in its early development. Whatever the cause, and despite continued concern from members regarding the constitutionality of the reverse onus provision[94] clause 19 was enacted and remained in force until its repeal pursuant to the Bail Act 2000, on 1 January 2001.

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93 Lianne Dalziel (9 October 1991) 519 NZPD 4781.

94 Most notably by Rt Hon David Lange (9 October 1991) 519 NZPD 4787, Lianne Dalziel (20 August 1991) 518 NZPD 4182; (9 October 1991) 519 NZPD 4781; (15 October 1991) 519 NZPD

2 *The Bail Bill 1999*

(a) Section 7 vet and Introduction to the House

The 1999 Bail Bill's objectives included improving the quality of information available to judges at bail hearings, and making it harder for three classes of defendants to obtain bail before the determination of their charge. The latter objective was achieved by extending the reverse onus provision, introduced by the Crimes Amendment (No 2) Act 1991 (discussed above), to include defendants who, having previously received a custodial sentence[95], commits a Crimes Act offence carrying a maximum sentence of three of more years imprisonment while on bail or at large [96] for committing a similar offence[97].

The reverse onus provisions in the Bill are prima facie inconsistent with section 25(c) of the Bill of Rights which protects the fundamental tenet of the criminal justice system, that a defendant is presumed innocent until proven guilty.

As the MoJ was the sponsoring department, the section 7 vetting procedure was undertaken by the Crown Law Office (CLO). No section 7 report was tabled in the House by the Attorney-General after receiving advice from CLO, containing a one line assurance that "the particular reverse onus provisions [were] justified in terms of section 5 of the Bill of Rights"[98].

4869 and Hon Richard Prebble (20 August 1991) NZPD 4184.

95 Bail Bill 1999, no 300-1, cl 10(c).

96 Bail Bill 1999, no 300-1, cl 10(b).

97 Bail Bill 1999, no 300-1, cl 10(a).

98 Michael Hodgen and Andrew Butler (Crown Counsel) "The Bail Bill 1999" (Advice to Attorney-General, 28 May 1999). (Privilege waived and released on request)

(b) Second reading

At second reading, the (then) Minister of Justice, Hon Tony Ryall, began the debate by stating[99]

> ... we have retained the Crimes Act provision that reverse the onus for serious violent offenders. ... We have added an extra offence to the list of serious vile offences that trigger reverse onus ... We want to extend this reverse onus further to serious offences not involving violence, committed while on bail.

The debate proceeded on the understanding that the Bill was consistent with the Bill of Rights Act. However, it is evident from Hansard that members were aware of the Bill of Rights tight-rope they were walking. This is illustrated through repeated justification of the reverse onus provision; not to exculpate the House for breaching a fundamental right, but to substantiate the provision's consistency with the Bill of Rights; a subtle, but significant, difference.

Hon Phil Goff stated[100]

> [i]t makes a mockery of our justice system if we do not have a system that at least puts the rights of the community to be safe from the predations of hard-core recidivists on a par with the rights of the offender to be regarded as innocent until proven guilty. That is an important principle, but that principle has to become qualified when a person, by a track record of offending and offending on bail, is likely to continue to offend.

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99 Hon Tony Ryall (Minister of Justice) (1 June 1999) 578 NZPD 17240.

100 Hon Phil Goff (1 June 1999) 578 NZPD 17242.

and Patricia Schnauer stated[101]

> [w]hile we must adhere to the presumption of innocence, none the less that presumption has to be weighed against the rights of the community to be protected. There will always be that balancing of factors; the balancing of the different views.

(c) Select Committee consideration

The Bill was then referred to Select Committee for consideration. The Select Committee briefly considered the consistency of reverse onus provisions with the Bill of Rights generally and concluded [102]

> [w]e note the concerns expressed regarding reversed onus provisions, but continue to believe that, when appropriately targeted, they are a justifiable means of addressing offending on bail.

Some substantial amendments, which did not directly affect Bill of Rights issues, were made at this stage ,[103] but the report contained a recommendation, which remained extrinsic to the Bill awaiting advice from the MoJ, which would affect consistency with the Bill of Rights.

Their recommendation broadened the pool of defendants caught by the reverse onus provision, ensuring recidivist property offenders were caught. The MoJ tendered advice to the Select Committee outlining why they did not support widening the net to catch property offenders.

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101 Patricia Schnauer (1 June 1999) 578 NZPD 17244.

102 Justice and Law Reform Committee "Report on the Bail Bill" [1999] AJHR I.A8, vi.

103 For example, a standard of proof was added to the reverse onus provision (the balance of

(d) Advice received from the MoJ

The MoJ determined[104] that the recommended amendment was contrary to section 6 of the Criminal Justice Act 1985 which requires the detention of property offenders only in special circumstances.[105] This section is reinforced by section 7 of the Criminal Justice Act which provides that the Court keep offenders in the community "so far as that is practicable and consonant with promoting the safety of the community". This is subject to section 5 of that Act which provides that relatively serious violence should be punished by imprisonment.

The MoJ felt that as a result of these provisions, hard-core property offenders would receive a custodial remand and sentence without reversing the onus of proof in bail hearings.

Further, the Ministry felt the determination of bail on the basis of past convictions was "probably ... in breach of the New Zealand Bill of Rights Act 1990."[106] While they acknowledged that it was not, as a result, unlawful they suggested that it was a "good indication that the proposed law is contrary to one of the fundamental principles upon which our democratic nation is founded".[107]

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probabilities).

104 Mandy McDonald, Deputy Secretary for Justice, (Criminal Justice) "Consideration of the Bail Bill and the Crimes (Bail Reform) Bill. Restricting Bail for Hard Core Recidivist (Property) Offenders and Other Matters" (To Justice and Law Reform Select Committee, 16 August 1999) 2-3. (Released following request pursuant to Official Information Act.)

105 Generally, where any other sentence would be inadequate or inappropriate.

106 Mandy McDonald, Deputy Secretary for Justice (Criminal Justice) "Consideration of the Bail Bill and the Crimes (Bail Reform) Bill. Restricting Bail for Hard Core Recidivist (Property) Offenders and Other Matters" (To Justice and Law Reform Select Committee, 16 August 1999) 4.(Released following request pursuant to Official Information Act 1982).

107 Mandy McDonald, Deputy Secretary for Justice (Criminal Justice) "Consideration of the Bail Bill and the Crimes (Bail Reform) Bill. Restricting Bail for Hard Core Recidivist (Property) Offenders and Other Matters" (To Justice and Law Reform Select Committee, 16 August 1999) 4. (Released following request pursuant to Official Information Act 1982).

(e) Consideration of Select Committee report by the House

Despite the advice received from the MoJ, the extension of the reverse onus provision to include property offenders was described by the (then) Attorney-General, Rt Hon Sir Douglas Graham, in debate as[108]

> [adding] emphasis to the general restriction on bail that the clause as introduced provided. .. and the Government supports it.

The Attorney-General referred in his speech to the section 7 vet by the CLO. He re-stated its resulting consistency with the Bill of Rights Act on the premise that it "narrowly targeted a group for which there was just cause to refuse bail",[109] and re-stated the provision's objective as targeting "serious recidivist offenders no matter what the nature of their alleged offending".[110] As a natural progression from these statements he concluded that the inclusion of property offenders in the reverse onus provision did not broaden the provision as it was first introduced and vetted by the CLO, but merely clarified its scope. Thus, what was once consistent was still consistent.

Patricia Schnauer shed light on the kamikaze-like attitude of the Select Committee toward the Bill of Rights when she said [111]

> ... some members of the committee did feel that if it breached the New Zealand Bill of Rights Act in some way, then perhaps that Act itself needed amending ... .

Consideration of the Select Committee's report was interrupted for what became a period of five months. During that time Hon Phil Goff introduced a Supplementary Order Paper.

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108 Rt Hon Sir Douglas Graham (31 August 1999) 580 NZPD 18928.
109 Rt Hon Sir Douglas Graham (31 August 1999) 580 NZPD 18927.
110 Rt Hon Sir Douglas Graham (31 August 1999) 580 NZPD 18927.
111 Patricia Schnauer (31 August 1999) 580 NZPD 18930.

(f) Supplementary Order Paper (No 220) 1999

Alongside a clause reiterating the Select Committee's amendment requiring a Judge's satisfaction that a serious property offence would not be committed while on bail, was the adoption of the Select Committee's recommendation (contrary to MoJ advice) to broaden the pool of defendants caught by the reverse onus provision, on the basis of previous criminal history.

It proposed the implementation of a reverse onus clause targeted at offenders charged with a Crimes Act offence carrying a maximum sentence of 3 or more years imprisonment, with at least 10 previous convictions for offences carrying the same penalty as the offence charged, who has breached bail or offended on bail at least once previously.[112]

This amendment was introduced immediately prior to a general election which resulted in a change of government and interrupted the Bill's progress.

(g) Committee of the Whole House and Supplementary Order Paper (No 26) 2000

When the House returned following the election and a change in government, consideration of the Select Committee report continued, culminating in referral to debate by Committee of the Whole House.

Debate centred around a proposed amendment, introduced by Supplementary Order Paper[113] again sponsored by Hon Phil Goff, who had become Minister of Justice.

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112 Bail Bill 1999, no 300-1 (Supplementary Order Paper No 220,2 September 1999).

113 Bail Bill 1999, no 300-1 (Supplementary Order Paper No 26, 30 May 2000).

The amendment lowered the trigger-threshold of the reverse onus provision from 10 previous convictions to 14 previous custodial sentences. However, there was no requirement to have previously breached, or offended while on, bail. [114]

During debate, the Bill of Rights was contemplated and minimalised by the sponsoring member in the same breath. While acknowledging the need to take the Bill of Rights Act "into account"[115], he expressly reminded the House of their capability to legislate contrary to the Bill of Rights Act and of the most recent example of the House exercising this capability.[116]

He opined the provision to be consistent with the Bill of Rights Act because preventing re-offending on bail is "just cause" for a custodial remand, for the purposes of section 24 of that Act. In doing so he purposively or inadvertently (and publicly) ignores the implications of the provision on the right to a presumption of innocence.

There was concern expressed by some members that the provision was inconsistent with the Bill of Rights. Tony Ryall queried accepting such an amendment without outside advice from the MoJ. In answer Mr Goff stated[117]

> I want to advise the member that the advice given to me by the Ministry of Justice is supportive of the amendment moved. I want to advise him that the Crown Law Office opinion, which I can make available to him, indicates that this is not a breach of the New Zealand Bill of Rights Act.

The above advice was not made available to Opposition parties when it was requested from the Minister.[118]

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114 Bail Bill 1999, no 300-1 (Supplementary Order Paper No 26, 30 May 2000), cl 10(1)(b).
115 Hon Phil Goff (24 February 2000) 581 NZPD 789.
116 This example was the Land Transport legislation discussed above.
117 Hon Phil Goff (30 May 2000) 584 NZPD 2634.

Further, Tony Ryall quoted comments made by Mr Goff which allude to his arguably relaxed view of the Bill of Rights. Regarding the earlier 'ten previous convictions' amendment, he stated [119]

> [w]hen I talked bout the New Zealand Bill of Rights Act being a problem he said "Some say the threshold is too high. Interestingly the Attorney-General says there may be conflict with the Bill of Rights ..." Mr Goff said of the then Attorney-General: "I suggest that he will have little support for his position. ... He ignored the advice and continued to platform up and down the country ...

The Bill proceeded with a Green-initiated amendment which lowered the trigger-threshold further, in light of the objective of the Bill, requiring a history of breaching, or offending whilst on, bail.

(h) Third reading

Hon Phil Goff opened debate and discussed the impugned clause as amended in Committee. In relation to Bill of Rights consistency, rather than assessing the consistency of the provision itself, the Minister of Justice alluded to its consistency in terms of previous inconsistencies, 'creating' consistency by implication. He stated[120]

> [t]he change does not go as far as the Supplementary Order Paper that I proposed last year, that would have set a lower threshold for the reversed onus measure. I have been advised that the earlier proposal was too wide sweeping, and consequently breached the New Zealand Bill of Rights Act. ... The threshold, as it has now been targeted, does not breach the New Zealand Bill of Rights Act but it will still put away 2,000 more hard-core offenders each year.

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118 Tony Ryall (30 May 2000) 584 NZPD 2660. It was stated "We wrote several weeks ago for [the advice]. He denied the information. He continues to deny it."

119 Tony Ryall (30 May 2000) 584 NZPD 2651-2652.

120 Hon Phil Goff (4 October 2000) 587 NZPD 5904.

Debate evidences an arguably misplaced focus of the debate on the public's "very clear message to this Parliament, .. that they want this Parliament to recognise the seriousness of crime".[121] Despite this message, the government had "tossed out with scorn"[122] the Truth in Sentencing Bill, and seemed to compensate failed policy by imposing harsh reverse onus provisions on repeat offenders.

The impugned provision, as amended by the House in Committee, was enacted and came into force on 1 January 2001 as section 12 of the Bail Act 2000.

3 Initiatory Observations

This Bail (Miscellaneous Provisions) Bill case study illustrates the Attorney-General's residual discretion to reject the advice tendered by the vetting agency. It illustrates the lack of transparency in the process; the advice tendered to the Attorney-General by CLO being protected by legal professional privilege for the Attorney-General to waive at his or her discretion. It illustrates the Attorney-General's ability to go beyond excusing a provision and extend to endorsing it in debate in the House, which can imply consistency and therefore mislead members. It also illustrates flaws in the timing of the vet, where consistency-issues can arise from amendment at the select committee stage after the hearing of public submissions. It illustrates that this problem arose even before the reorganisation of the legislative process as implemented by the 1999 Standing Orders.[123]

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121 Janet Mackey (4 October 2000) 587 NZPD 5908.

122 Stephen Franks (4 October 2000) 587 NZPD 5908.

123 House of Representatives *Standing Orders of the House of Representatives* (Wellington, 8 September 1999).

The 1999 Bail Bill case study illustrates the subjectivity of the *Moonen*/vetting process. It illustrates the brevity of advice sometimes tendered by the vetting agency, which must be detrimental to an objective assessment of the advice by the Attorney-General when determining whether to accept or reject it. It illustrates how rights can be slowly eroded, by using an earlier-enacted breaching provision to justify later, more extensive, breaching provisions.

It illustrates how extensive select committee amendments can be, how a section 5 analysis of amendments is absent from deliberations, and, more positively, how further advice regarding Bill of Rights' implications can be sought from the bill's sponsoring agency. However, it also illustrates how this advice can be overshadowed by the will of the sponsoring member.

It illustrates how often a single provision can be amended throughout the legislative process, particularly by Supplementary Order Paper. It illustrates how advice can be withheld from Opposition parties requiring members to accept assurances from the sponsoring member. It illustrates how the focus of debate can be misplaced and overshadow issues regarding Bill of Rights consistency.

C The Criminal Justice Amendment Act (No 2) 1999

This amendment of the Criminal Justice Act 1985 was introduced as the Criminal Justice Amendment Bill (No 6), a companion measure to the Crimes (Home Invasion) Amendment Bill.

Its purpose was to lower the threshold for imposing non-parole periods enabling courts to impose them in a wider range of cases than was being exercised, and included, but was not limited to, murder cases involving home invasion.[124]

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124 Criminal Justice Amendment Bill (No 6) 1999, no 261-1 (Explanatory Note), 1.

1 The impugned clause

Clause 2 implemented the policy outlined above and the CLO vet identified no inconsistencies with the Bill of Rights, as the legislation was not retrospective when the amendment was introduced by the Government. The Bill was referred to the Justice and Law Reform Committee at its second reading, and it was duly considered.

It was reported back to the House with amendments and debated clause by clause in Committee. Two Supplementary Order Papers were introduced at this stage, one by Hon Phil Goff [125], the other by Patricia Schnauer[126].

The former was negatived on 24 June 1999.

The latter Supplementary Order Paper introduced clause 2(4) which stated[127]

> (4) Section 80 of the principal Act (as amended by this section) applies in respect of the making of any order under that section on or after the date of commencement of this section, *even if the offence concerned was committed before that date.* (Emphasis added).

This clause, introduced at the eleventh hour, was debated by the House, In Committee.

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125 Criminal Justice Amendment Bill (No 6) 1999, no 261-1 (Supplementary Order Paper No 182, 23 June 1999).

126 Criminal Justice Amendment Bill (No 6) 1999, no 261-1 (Supplementary Order Paper No 185, 23 June 1999).

127 Criminal Justice Amendment Bill (No 6) 1999, no 261-1 (Supplementary Order Paper No 185, 23 June 1999) cl 2(4).

Concerns regarding a potential anomaly were heavily debated. The fact that the clause could result in a harsher penalty for a murder occurring inside a house than one committed in the front garden of the same house overshadowed what has since been identified by the Courts[128] as a blatant inconsistency with the Bill of Rights. The Bill of Rights was not mentioned in debate between members.

2 Consideration of the clause in light of the Bill of Rights

Section 25(g) of the Bill of Rights Act states[129]

> Everyone who is charged with an offence has, in relation to the determination of the charge .. [t]he right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

Patricia Schnauer referred to the clause's retrospective effect, but not in light of the Bill of Rights, and from a position of advocate. She stated [130]

> I would also like to draw the House's attention to the impact that this will have because, of course, once this Bill becomes law .. then the impact of that provision *will affect those who are now before the courts on murder charges* in the context of home invasion.

As recognised by Thomas J these comments are indicative that[131]

> [w]hile no individual or individuals are named, section 2(4) [is] expressly aimed at accused persons already facing charges of murder. Widespread media publicity relating to crimes in the home had been given to certain cases, and the persons who the provision [is] aimed at [are] readily ascertainable.

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128 By the Court of Appeal in two cases arising from the implications of the provision, *R v Poumako* [2000] 2 NZLR 695 (CA) and *R v Pora* [2001] 2 NZLR 37 (CA).

129 New Zealand Bill of Rights Act 1990, s25(g).

130 Patricia Schnauer (24 June 1999) 578 NZPD 17687.

He was referring specifically to a defendant charged and later convicted with the home invasion murder of Beverley Bouma which outraged the nation and provided the catalyst for this, and its companion home invasion, bill.

Clause 2(4) progressed to third reading without amendment and was enacted as section 2(4) of the Criminal Justice Amendment Act 1999.

Because the clause was introduced after the section 7 vet there was no official report to the House identifying its inconsistency with the Bill of Rights Act. However, "the unconstitutionality of the provision and its departure from the rule of law [is] clear". [132]

3 Initiatory Observations

This case study illustrates issues associated with the timing of the vet. It provides an example of how late an amendment can be introduced in the legislative process which can impact on a bill's consistency with the Bill of Rights Act. It also illustrates that no other agency is plugging the gap to prevent eleventh-hour inconsistencies from being enacted. An implication of this flaw, also illustrated by this case study, is the role of the judiciary as a constitutional safeguard after inconsistent provisions are enacted.

Further, debate of the Supplementary Order Paper in the House illustrates not only the members' disregard of the Bill of Rights when faced with an emotive public, but, more disturbingly, their apparent lack of knowledge of the rights and freedoms contained in the Act and a lack of understanding of the impact of legislative provisions on ratified international treaties, existing domestic legislation, common law rules and, ultimately, the rule of law itself.

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131 *R v Poumako* above, 713 (CA) Thomas J dissenting.

132 *R v Poumako* above, 713 (CA) Thomas J dissenting. The Court of Appeal were unanimously of this view.

V SECTION 7 - ORANGE CONE OR ARMED DEFENDERS SQUAD?

The case studies provide a restricted but useful platform from which section 7 can be assessed in light of its nature and scope, and its constitutional status. They illustrate a number of sub-issues which can be categorised within two broader issues; timing and transparency.

A Timing of the Vetting Process

As section 7 stands, a bill's is assessed for consistency with the Bill of Rights at a single point in its legislative process. The type of bill determines when that vet takes place,[133] but irrespective of type one vet is undertaken and consistency is assessed prior to debate and consideration, and inevitable subsequent amendment, by the House and relevant Select Committee. This, and associated issues, question how convincing section 7 is as a generator of constructive debate and constitutional safeguard of our recognised rights.

1 Status of the section 7 report to the House

The section 7 vet for consistency occurs at the beginning of a bill's legislative process and, more importantly, prior to select committee consideration. As a result of this timing, the House appears unashamedly reliant on the relevant select committee to rectify consistency issues either by amendment or by re- assessment of the reasonableness of the inconsistency. This is illustrated by the Land Transport case study.

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133 A Government bill is vetted on the introduction of that bill, (section 7(a), Bill of Rights Act 1990). Any other bill is vetted as soon as practicable after the introduction of that bill, (Bill of Rights Act 1990, section 7(b)).

At second reading the House expressly transferred the implications of the section 7 report to the Transport and Environment committee to resolve. In light of the section 7 report, Hon Maurice Williamson stated "[t]he Transport and Environment Committee will need to consider the New Zealand Bill of Rights Act implications of these provisions",[134] and John Wright, regarding acknowledged inconsistencies, stated "[t]here is work to be done on this Bill by the select committee to overcome those problems".[135]

Interestingly, the select committee "process" of resolution did not involve an independent vet using the *Moonen* analysis. Despite its outcome being couched in *Moonen* terms (that is, that the provisions contain 'justified' inconsistencies) its value was decided using the same procedures as the value-determination of other select committeee submissions.

In its report to the House, the Transport and Environment Committee acknowledged, in light of the section 7 report, that [136]

> this bill does contain provisions which *could* have implications in terms of the limitations of personal freedoms ... *(Emphasis added.)*

Specifically, regarding clauses 56 and 57, they concluded[137]

> [t]he fact that the sentencing court would not have power to terminate the licence suspension, upon sentencing of the defendant, was integral to the Attorney-General's finding. The New Zealand Law Society and the Legislation Advisory Committee also pointed to the right not to be punished twice for the same offence. However, we concur with the view of officials that the deterrence mechanism ... would be undermined if the court were able to terminate the licence suspension.

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134 Hon Maurice Williamson (27 November 1997) 565 NZPD 5748.

135 John Wright (27 November 1997) 565 NZPD 5754.

136 Transport and Environment Committee "Report on the Land Transport Bill" [1998] AJHR I.23, 843, 854.

137 Transport and Environment Committee "Report on the Land Transport Bill" [1998] AJHR I.23,

Following the Select Committee's recommendation that the section 7 report be ignored, debate on the inconsistency issue was limited to one member. Hon Maurice Williamson stated[138]

> [t]he New Zealand Bill of Rights Act safeguards the rights of New Zealanders. There are situations, however, where limitations have to be placed on those rights in the interests of the greater public good.

The select committee recommendation to pursue the inconsistent provisions was upheld in the House and they were enacted.

This approach, combined with factors previously outlined such as section 7's status alongside section 4[139] and the non-binding nature of a section 7 report[140], arguably relegates a section 7 report to the status of a select committee submission; hardly the status envisaged by the drafters of the provision and the status accorded its Canadian equivalent.

2 The potential for amendment following the section 7 vet

(a) Amendment at Select Committee

An obvious flaw in the section 7 process results from the requirement that the single vet for consistency with the Bill of Rights Act is undertaken prior to select committee perusal and amendment.

While Standing Order 282 requires that select committee amendments be relevant to the subject matter and consistent with the principles and objects of the

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843, 853.

138 Hon Maurice Williamson (5 November 1998) 572 NZPD 12942.

139 See Part II.D of this paper.

140 See Part II.D of this paper.

bill, there will often be more than drafting changes. Frequently there are changes made to a bill's substance and policy; in fact, "[i]t is not unknown for bills to emerge from select committees almost totally rewritten."[141] The Bill of Rights itself is an example of a bill which underwent substantial amendment during its legislative process.

A potentially significant change was made to the 1991 bail bill at the Select Committee stage, changing the trigger for the reverse onus provision from defendants with two previous convictions to defendants with only one prior conviction. This amendment was purportedly made at the directive of then Minister of Police, Hon John Banks which illustrates the potential for abuse of the current system. That is, a Minister, or party, can avoid a damning section 7 report being tabled in the House, and stem criticism from interested parties, by recommending or introducing amendment following the hearing of select committee submissions.

(b) Amendment In Committee

The above is true if the bill is subjected to the scrutiny of Committee of the Whole House. Further, inconsistent amendments, introduced post-section 7 vetting, can only be more likely now, in an MMP environment. The 1999 bail bill illustrates a substantial change made at the initiative of a Green party member at this stage in the bill's legislative process[142].

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141 Sir Geoffrey Palmer and Dr Matthew Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed, Oxford University Press New Zealand, Auckland, 1997) 161.

142 The requirement that a defendant have previously breached, or offended while on, bail (Bail Act 2000, section 12(1)(b)(iii)).

(c) Supplementary Order Papers

Inconsistent provisions can be added by Supplementary Order Paper at any stage during a bill's legislative process following introduction and, therefore, vetting. The 1999 bail bill case study provides an illustration of numerous amendments introduced by Supplementary Order Paper throughout its process. The extent of this flaw is evidenced by the amendment to the Criminal Justice Amendment Act, introduced by Supplementary Order Paper, which resulted in the enactment of a retrospective penalty provision.

(d) A change in Government

Some bills, by chance or due to delays in their legislative progress, span a general election. The 1999 bail bill is an example of a bill surviving a change of government. However, it also illustrates the volume of amendments which can result. In that case study the majority of the House was in favour of the legislation so amendment was not as substantial as it would be when the major parties commit to significantly different policy.

A bill could arguably benefit from a change in government, and resulting new Attorney-General, during its legislative process, as the consistency-status of a bill may change, for better or worse, if the new Attorney-General's views differ significantly from the incumbent's. This is due to the arguably subjective nature of the test.[143] However, because section 7 (and Standing Order 260[144]) requires only a single vet at the introduction of a bill, there is no obligation for the new Attorney-General to re-assess the initial vet, or request or undertake another vet of the bill as introduced.

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143 Discussed in detail in Part V.B.1 of this paper.

144 Standing Order 260 of the 1999 Standing Orders requires the Attorney-General to provide a written indication to the House of Representatives, before second reading, if a bill is inconsistent with the Bill of Rights Act. This obligation is not treated as a separate requirement from section

3 *Plugging the Section 7 Gap*

(a) Parliamentary Counsel Office

The main function of the Parliamentary Counsel Office (PCO) is the drafting of legislation. This includes the drafting of Bills and amendments to those bills before Select Committees and during the Committee stages in the House (in the form of Supplementary Order Papers). As all legislation must comply with the Legislation Advisory Committee's guidelines, amendments must be consistent with the Bill of Rights Act.[145]

When asked if PCO considers vetting amendments for consistency, (that is, plugging the section 7 gap), as part of their role, George Tanner, Chief Parliamentary Counsel, replied "of course", but acknowledged that there were no specific systems in place to do so. However, when asked about the enactment of the retrospective penalty provisions outlined in the Criminal Justice Amendment case study, he uttered "no comment", but was prepared to say "advice was proffered". [146]

7, as is discussed in more detail in Part II.F of this paper.

145 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation (2001 edition)* (Wellington, 2001) <http://www.justice.govt.nz/lac/index.html>(last accessed 26 September 2001), Chapter 4.1.

146 Discussion with George Tanner, Chief Parliamentary Counsel (the author, Wellington, 12 September 2001).

(b) Section 6

Section 6 of the Bill of Rights Act states[147]

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

That is, the judiciary are to interpret prima facie and justified inconsistent legislation in a way that prevents inconsistency.

The approach to section 6, adopted by the majority in *R v Pora* (a case which arose from the retrospective penalty provision in the Criminal Justice Amendment case study), is illustrative of successful judicial gap-plugging.

As a result of the extent of the inconsistency, with not only the Bill of Rights but also with instruments of international law, common law and the rule of law doctrine, the majority of the Court of Appeal imported an, arguably, "strained" meaning to the provision so as to give effect to section 6, rather than be overridden by section 4 of the Bill of Rights. Elias CJ implied that the Court would be in breach of section 3 if they did not adopt that approach, because[148]

> [t]he New Zealand Bill of Rights Act applies to acts done in performance of public functions and to the acts of the legislature *and the judiciary* (s3). ... If Parliament has enacted legislation which imposes a penalty retrospectively, it is in breach of the obligation recognised by s 3 ... (Emphasis added.)

Therefore, instead of giving full retrospective effect to the provision and breaching section 3, the Court limited its retrospective effect, which on its face is

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147 New Zealand Bill of Rights Act 1990, s 6.

148 *R v Pora* above, 47 (CA). See generally Andrew S Butler "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261.

"tenable". However, in effecting their approach, they strained the meaning of the provision so that retrospectivity applied only to the fifteen days between enactment of the Crimes (Home Invasion) Act and the Criminal Justice Amendment legislation in question. This was clearly not intended by Parliament.

The success of their gap-plugging is indicated in comments by Keith J in *R v Pora.* He stated [149]

> The Solicitor-General was able to indicate to this Court that the government was aware of that strong criticism. The government was actively considering the position in terms of principle and appropriate remedy and it was doing that independently of a concurrent broader review of the legislation governing sentencing which was under way. Such an exchange between the Court and the government, with the prospect of legislation being indicated, seems to us to conform with the relationship reflected in and to some extent regulated by the New Zealand Bill of Rights Act 1990.

This illustrates the judiciary's approach to a provision which is abhorrently repugnant to fundamental legal principles, and one which was enacted as a result of inadequacies in the section 7 process. Gault J stated [150]

> [b]ecause of the stage at which the amendments were introduced in the Bill these amendments were not the subject of any report to the House under section 7 of the Bill of Rights Act ...

However, in reality an assertive approach is probably restricted to similarly abhorrent provisions, as the judiciary appear markedly more cautious when applying section 6 to (borderline) inconsistent provisions.

In *Ministry of Transport v Noort* [151] Cooke P said that a "strained meaning would not be enough".[152] Tipping J, in *Quilter v Attorney-General*, stated[153]

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149 *R v Pora* above, 53 (CA) Keith J.

150 *R v Poumako* above, 700 (CA) Gault J.

> [o]nly if such meaning can properly be given may it be preferred to any other meaning. By properly I mean by a legitimate process of construction.

Further, Thomas J stated[154]

> [s]ection 6 does not authorise the courts to legislate. Even if a meaning is theoretically possible it must be rejected if it is clearly contrary to what Parliament intended.

In the context of the Criminal Justice Amendment case study, Thomas J stated[155]

> [t]o attribute a statutory provision which is neither equivocal nor malleable in its terms a meaning which is admittedly contrary to Parliament's discernible intent is to effectively challenge Parliament's primacy. ... If the Court proclaims a statute to mean something that does not meet [the] threshold requirement [that only tenable interpretations should be proffered], then, even though that meaning may be more consistent with the Bill of Rights, the Court will be seen to have acted arbitrarily. The construction will be seen to be unduly strained and the credibility of the judicial system will be impaired.

Therefore, the judiciary could not arguably be relied on to plug the timing gap in all circumstances, although section 6 is arguably an adequate safeguard for dealing with the enactment of abhorrent inconsistencies.

4 On-going monitoring of bills for consistency with the Bill of Rights

Undertaking a vet at the beginning of a bill's legislative life would not be problematic, in fact would remain desirable, if there were a system of on-going monitoring in place, to implement continual checks for consistency as

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151 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).
152 *Ministry of Transport v Noort* above, 272 (CA) Cooke P.
153 *Quilter v Attorney-General* (1996) 3 HRNZ 170, 232 (CA) Tipping J.
154 *Quilter v Attorney-General* above, 193 (CA) Thomas J.

amendments are introduced. On-going monitoring of bills throughout their legislative process appears not only preferable, but was arguably envisaged as part of the implementation of section 7.

(a) A purposive interpretation of section 7

As mentioned earlier,[156] section 7 is capable of a broader meaning than that attached to it by the vetting agencies. A purposive interpretation (in line with accepted human rights jurisprudence[157]), would require "section 7 procedures to extend beyond pre-introduction"[158] to prevent "both intentional and inadvertent inconsistencies to progress unchecked."[159]

(b) Intent of drafters

Ongoing monitoring was arguably envisaged by Justice and Law Reform Select Committee who considered the Bill of Rights White Paper. They recommended a cautious approach, proposing the introduction of the Bill as an ordinary statute and opposing a supreme, entrenched bill of rights. As a corollary to that recommendation they proposed a number of administrative safeguards intended to protect the rights and freedoms contained in the Bill from Parliamentary derogation.

One of the proposed safeguards was for the "operation of the bill of rights to be monitored by a select committee".[160] Further, that select committee was intended to [161]

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155 *R v Poumako* above, 714 (CA) Thomas J dissenting.

156 In Part II.E of this paper.

157 See note 12.

158 Fitzgerald, above, 153.

159 Fitzgerald, above, 154

160 Justice and Law Reform Committee "Final Report on a White Paper on a Bill of Rights for New Zealand" [1987-1990] XVII AJHR I.8C, 3.

161 Justice and Law Reform Committee "Final Report on a White Paper on a Bill of Rights for New

> take similar action [to the Attorney-General's section 7 process] and report to the House on any provisions in any bill that appeared contrary to the principles and specific articles in the Bill of Rights.

Arguably, it was envisaged that there would be a separate, specialised Bill of Rights select committee who monitored amendments for consistency. This view is reinforced in the report, where it states [162]

> ... all bills and regulations could stand referred to the committee which would be empowered to examine them and report to the House on any inconsistencies with any of the rights in the bill.

It also recommended that the committee be empowered to examine and report on inconsistencies in "any enactments ... either on its own initiative or on receipt of a written complaint from a member of the public".[163] Therefore, it arguable that it was envisaged that a bill would be monitored throughout its process, or at least to the select committee stage of its process.

The former approach would reduce the likelihood of inconsistent amendments being introduced and passed at the eleventh hour, which may have prevented enactment of the retrospective penalty provision in the Criminal Justice Amendment case study.

The latter approach would check amendments made at second reading and at select committee stages. This would arguably have had an impact on amendments made to the impugned provisions discussed in the 1999 Bail Bill

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Zealand" [1987-1990] XVII AJHR I.8C, 3.

162 Justice and Law Reform Committee "Final Report on a White Paper on a Bill of Rights for New Zealand" [1987-1990] XVII AJHR I.8C, 11.

163 Justice and Law Reform Committee "Final Report on a White Paper on a Bill of Rights for New

case study. Due to the changes made in the legislative process, discussed below,[164] this system would not have much impact today as it would immediately follow the section 7 vet. However, the concept of both a specialised select committee and on-going monitoring is as valid, if not more so in an MMP environment, today.

(c) Likelihood of change

The possibility of on-going monitoring for section 7 consistency has not directly arisen since enactment of the Bill of Rights, but a recent change to Standing Order 260 (the parallel requirement[165]) generated debate as to the possibility.

As mentioned above, Standing Order 260 provides that, where a provision in a bill appears to be inconsistent with the Bill of Rights Act, the Attorney-General shall indicate to the House what the provision is and how it appears to be inconsistent with the Act, before a motion for the bill's second reading is moved.[166]

In 1999, a number of changes were implemented as a result of a revision of the Standing Orders[167], the most significant being a change to the order of the legislative process. Pursuant to the 1999 Standing Orders the second reading of a bill now occurs after a bill is reported back from select committee, where previously it was before referral to select committee.

Zealand" [1987-1990] XVII AJHR I.8C, 11.

164 The 1999 Standing Orders changed the order of the legislative process. This change is discussed in more detail in Part V.A.4(c) of this paper.

165 Discussed in Part II.F of this paper.

166 House of Representatives *Standing Orders of the House of Representatives* (Wellington, 1999), SO 260(1).

167 House of Representatives *Standing Orders of the House of Representatives* (Wellington, 1996).

Prior to the amendments, the section 7 report and the Standing Orders requirements were treated as a single reporting function. As a result of the changes, there was a concern that, inadvertently[168], the Attorney-General would be required to report twice to the House regarding Bill of Rights consistency; once, before or upon introduction pursuant to the section 7 requirement, and again, following select committee consideration and report, prior to second reading, pursuant to Standing Order 260. Implementation of a dual reporting system would necessitate the monitoring of the progress of bills beyond consideration and amendment by a select committee.

The MoJ assessed the implications of a dual reporting function. The Ministry's conclusions and recommendations against implementation are illustrative of the likely arguments against the implementation of on-going monitoring for the purposes of fulfilling the section 7 obligation.

The MoJ concluded that such a system would have "resource implications"[169], requiring more staff (holding specialist legal qualifications and experience) at both vetting agencies,[170] due not only to increased workload from two vets, but because of existing workload in the form of high priority policy re-evaluations. Further, it was considered unfavourable to assess select committee changes to bills as they would be [171]

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168 Justice officials were advised by the Clerk of the House that the change in the Attorney-General's obligation under the Standing Orders was inadvertent. (Hon Margaret Wilson, Attorney General "Request Amendment to Standing Order 260(1) by way of Sessional Order" (Letter to Dr Michael Cullen, Leader of the House, 18 May 2000). (Released following request pursuant to the Official Information Act 1982)).

169 Matthew Palmer, Deputy Secretary for Justice (Public Law) "New Zealand Bill of Rights Act 1990 Vetting: Issues to be Considered" (To Attorney-General, 1 February 2000) 4. (Released following request pursuant to the Official Information Act 1982).

170 Matthew Palmer, Deputy Secretary for Justice (Public Law) "New Zealand Bill of Rights Act 1990 Vetting" (To Attorney-General, 24 March 2000) 2. (Released following request pursuant to the Official Information Act 1982).

171 Matthew Palmer, Deputy Secretary for Justice (Public Law) "New Zealand Bill of Rights Act 1990 Vetting" (To Attorney-General, 24 March 2000) 2. (Released following request pursuant to the Official Information Act 1982).

> likely to be more public and highly politically charged than the current pre-introduction assessment. This [would] require rigorous quality assurance mechanisms and intensive management attention.

It is submitted that if the existing pre-introduction vetting process is adequate to safeguard Bill of Rights protections at that stage, the same process is adequate to withstand public scrutiny of a vet at a later stage in the legislative process. The suggestion that the process would require adjustment if it became subject to public scrutiny is, arguably, indicative of inadequacies in the current procedure.

The implementation of on-going monitoring was, at best, deferred. The advice to the Attorney General suggested that

> ... a successful bid for more resourcing in the budget round and the settling down of the Ministry's work programme [may] allow the new function to be undertaken in 2001.

At the date of writing, there has been no further discussion at the MoJ regarding the implementation of on-going monitoring as part of the section 7 obligation.

B Transparency in the Vetting Process

Section 7 was not enacted to prevent inconsistent provisions from being passed, however, it is arguable that it was intended to, not only, generate constructive debate in the House, but be a more convincing legislative obstacle than it currently is. This can arguably be achieved by making the section 7 process more transparent.

1 Value Judgment

While the exercise of the vetting role takes place within a legal framework it leaves scope for the incorporation of value judgments particularly in the section 5 assessment, outlined above.[172] Indeed the Court from who's judgment the vetting procedure was adopted, placed significant emphasis on this fact. Tipping J stated [173]

> [o]f necessity value judgments will be involved ... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment ...[made] on behalf of society which it serves and after considering all the issues which may have a bearing ..., whether they be social, legal, moral, economic, administrative, ethical or otherwise.

The MoJ vetting-procedure guidelines also acknowledge this aspect of the process. It states[174]

> [t]he issues that arise in the vetting process are frequently complex, and in many circumstances it is possible to reasonably hold competing points of view as to whether a provision does or does not infringe the provisions of the Bill of Rights Act.

In light of the subjective nature of the assessment, and given the adversarial nature of not only our courts but our Parliament, it is interesting that unilateral arguments are presented to the Attorney-General for consideration. In the interests of procedural fairness, to use an analogous judicial review principle, the tendering of alternative outcomes of the section 5 analysis to the Attorney-General, (and the tabling of alternative approaches in Parliament for constructive debate), particularly in borderline cases, for example the 1999 bail bill case study.

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172 See Part III.C.2 of this paper.

173 *Moonen v Film Literature Board of Review*, above, 16-17.

174 Ministry of Justice "BORA Vetting" (Draft) (To Attorney-General, 22 November 1999) 3.

In that case study, I submit there was clear evidence of alternative, non-inconsistent measures which could be implemented to achieve the objective. For example, a re-arrangement of the "just cause" criteria would establish previous criminal history as a mandatory consideration rather than the discretionary factor it is as enacted. Further, a flaw in the incumbent bail system was the lack of information available to judges at bail hearings. This was markedly improved with the introduction of the Bail Act 2000. Time would have proved its effectiveness in achieving the objective. Also, immediately prior to the introduction of the Bill a Judges Practice Note implemented changes providing greater time to prepare for bail hearings, which also would have proved effective over time. Further, implementation of the proposal that bail hearings for serious offenders be heard before a High Court Judge would have raised the status of the hearings for this group offenders, arguably making it inherently harder for the targeted group of offenders to receive bail. The Bail Act 2000 also introduced the right of the prosecution to appeal a bail decision, where previously it was a defence right only. The above, separately and certainly cumulatively, provide scope to achieve the objective without impairing rights contained in the Bill of Rights Act.

Because of the limited information released to the author, (a one line assurance that the reverse onus provisions are justified[175]), it is not known whether the above factors were considered and adequately refuted, or not considered at all.

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175 Michael Hodgen and Andrew Butler (Crown Counsel) "The Bail Bill 1999" (Advice to Attorney-General, 28 May 1999). (Privilege waived and released on request.)

2 Appearance of bias

The current vetting procedures specifically attempt to eradicate any conflict of interest of the vetting agency by requiring CLO to vet MoJ sponsored bills. However, on judicial review principles, this strategy hardly removes the appearance of bias. The substance of justice bills, for example those implementing criminal justice policy, affects directly the same Crown Law officers who vet the proposed legislation. The underlying principle in bias is that a person cannot be judge in their own cause, but, in a section 7 context, a provision the CLO vet today is a provision they enforce as prosecutors tomorrow. CLO should be in the position of submissioners in these situations as they are akin to any other interested party.

However, any specialist body established for the purposes of vetting would be established by the Crown which may inherently import bias. Arguably a specialist (Bill of Rights) select committee, like the one envisaged by the select committee considering the White Paper discussed above [176], would remove the appearance of bias, particularly in an MMP political environment. To further remove unfairness, its membership could be, not proportional to party representatives in the House, but manifested in equal representation, for example constituted by one representative from each elected party. The details of the select committee consideration would then be tabled in the House (and, therefore, in the public arena) for debate and preparation for standard select committee procedures. Having members of the vetting team in the House when the report is tabled would allow for more rigorous and fervent debate of the outcome.

Arguably, at least, the appearance of bias presents a strong argument for transparency in the process, particularly in light of the subjective nature of the section 5 analysis.

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176 See Part V.A.4(b) of this paper.

3 *Prima facie Inconsistencies*

As mentioned earlier,[177] current practice implements a high threshold approach, tabling a report only when unjustified inconsistencies are identified. At best, this places only a limited amount of information before the House, and in many cases no information is presented, and therefore debated, as a consequence of the high threshold test.[178]

It is arguable that prima facie inconsistencies should be identified to the House, leaving the House to debate through a section 5 analysis. This would also place that inquiry firmly in the public arena, where the public could see section 7 working. The MoJ consider that the reporting of prima facie inconsistencies would result in the reporting of minor technical breaches which would be administratively cumbersome. Arguably, however, administrative difficulties should not be a reason to dispel effective means of protecting fundamental human rights.

Further, the high threshold approach prevents an objective of the Bill of Rights Act from being achieved, that is, to prevent "small erosions of basic rights and freedoms".[179]

4 *Erosion of Protected Rights*

The case studies provide illustrations of two ways previous vets have been used to further erode protected rights.

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177 See Part II.A of this paper.

178 See Paul Fitzgerald, above, 143.

179 Ministry of Justice "A Bill of Rights for New Zealand: A White Paper" [1984-1985] AJHR I.A.6.

Where an arguably inconsistent provision has been enacted and implemented and the public's behaviour as been altered, the evidence arising from the altered behaviour can be used to re-enact arguably inconsistent provisions. The earlier provision may have been enacted before or after enactment of the Bill of Rights Act. An example of the latter are the random breath screening provisions in our Land Transport legislation.

In 1991, the Transport Safety Bill received a section 7 report from the Attorney-General identifying inconsistencies in proposed random breath-screening provisions. However, in that instance, Parliament chose not to accept the Attorney-General's advice and enacted the impugned breath-screening provisions. The Land Transport Bill 1997 proposed to enact the same provisions, but were required to be re-vetted pursuant to section 7. The Ministry of Justice concluded [180]

> that [the] provisions still [constituted] a *prima facie* infringement of sections 21 and 22 of the Bill of Rights Act. However, there now [appeared] to be sufficient evidence, in terms of section 5 of the Bill of Rights Act, to justify the limits that they impose on the rights provided for in sections 21 and 22.

Infringement was deemed to be justifiable because[181]

> [t]he *Oakes* test does not present the same difficulties as it did when random breath screening was initially introduced as there is now some evidence to suggest that it has a deterrent effect somewhat greater than the pre-existing system.

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180 Mark Gobbi, Legal Adviser (Ministry of Justice) "Random Breath Screening Provisions in the Land Transport Bill 1997" (Advice to Attorney-General, 19 November 1997). (Privilege waived and released on request.)

181 Mark Gobbi, Legal Adviser (Ministry of Justice) "Random Breath Screening Provisions in the Land Transport Bill 1997" (Advice to Attorney-General, 19 November 1997). (Privilege waived and released on request.)

An inconsistent provision enacted prior to enactment of the Bill of Rights Act was used in the 1999 Bail Bill case study to justify, not only re-enactment of the previous breaching provision, but an extension of it.

At second reading the Minister of Justice announced[182]

> we have retained the Crimes Act provision that reverses the onus for serious violent offenders. ... We want to extend this reverse onus further to serious offences not involving violence, committed while on bail.

This was the approach taken even in light of statistics which illustrated the extent of the inconsistency and erosion of the public's rights. Stephen Franks informed the House at the bill's third reading that[183]

> on the statistics both Ministers have, only 43% of those this legislation is intended to hold would commit a new offence if they were out. Fifty-seven percent would not and under the new law, 141 people will now be held for an average of 432 extra days - more than a year each - on custodial remand. Eighty of those 141 would not have offended. One hundred and twelve will spend an average of 34 days each in custody and then be acquitted or not even sentenced to imprisonment.

5 *Judicial Interpretation*

Despite the normally cautious approach to section 6 interpretation by the judiciary Andrew Butler, Crown Counsel and Bill of Rights vetter at CLO, has indicated reliance on section 6 at the vetting stage by stating [184]

> [i]n a good many cases, bills receive a positive vet only because officials in the Ministry of Justice and Crown Law Office have anticipated that, not withstanding its language, the

182 Hon Tony Ryall (1 June 1999) 578 NZPD 17240.
183 Stephen Franks (4 October 2000) 587 NZPD 5907.
184 Andrew S Butler "Strengthening the Bill of Rights" (2000) 31 VUWLR 129, 146.

> measure will be interpreted by the Courts in accordance with the direction in section 6. In turn, this advice is made available to the Attorney-General (usually emphasised in the body of the advice letter tendered to the Attorney) and is the basis of the Attorney's advice to Cabinet that the Bill raises no Bill of Rights issues and should proceed.

This approach by vetters, in light of the judiciary's cautious approach to section 6, presents a persuasive argument for transparency in the vetting procedure. Currently, vetting documentation is not provided to the Court to aid in the interpretation of prima facie inconsistent provisions, despite the value in providing such information to them. As further pointed out by Butler, [185]

> that advice could indicate to counsel and court the possible uses of section 6 in the context of the measure as enacted and could well make the difference in persuading the court to rely on section 6 of the Bill of Rights in preference to section 4.

6 Accountability

Transparency in the process is arguably an effective mechanism to achieve a level of accountability of section 7's major players .

(a) The accountability of the Attorney-General

A worrying aspect of section 7 is the lack of accountability of the Attorney-General in the process. Outside Parliament, Article 27 of the White Paper, in the context of a supreme Bill of Rights Act, provided for the Attorney-General to intervene in legal proceedings to justify inconsistent legislation and prevent it from being struck down by the judiciary. While the Justice and Law Reform committee derogated from the idea of the Bill of Rights as supreme law, they recommended the retention of the Article 27 requirement. They arguably envisaged accountability outside Parliament by requiring the Attorney-General to

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185 Andrew S Butler "Strengthening the Bill of Rights" (2000) 31 VUWLR 129, 146.

justify an inconsistent provision, and therefore defend the section 7 vet, in legal proceedings. This recommendation was not implemented and so the Attorney-General's actions remain isolated, unquestionable by the House, the courts or the public.

Paul Fitzgerald (writing in 1992) was uncertain whether the A-G, acting pursuant to section 7, could be the subject of judicial review, but opined that[186]

> [a] right of review [would] be a useful tool for ensuring that compliance decisions during the scrutiny process are correct.

This possibility has since been addressed by the Courts and dispelled. As mentioned earlier, section 7 does not create a right enforceable by a citizen who is affected by a decision of the Attorney-General which results in (allegedly) inconsistent provisions being enacted.[187]

However, a citizen can litigate to expose an inconsistent provision but, as yet, there is no adequate remedy in light of section 4. The possibility of declarations of inconsistency has not been finally accepted by the judiciary despite continued advocacy of some of its members.[188] However, in light of clauses 5 and 6 in the Human Rights Amendment Bill [189], it is arguable that Parliament are finally acknowledging the potential.

Although a New Zealand citizen has recourse to the United Nations Human Rights Committee on the basis that the NZ government has breached their covenant rights the expense alone means access to this type of recourse is limited to a small portion of society.

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186 Fitzgerald, above, 149.

187 *Mangawaro Enterprises Ltd v Attorney-General*, above.

188 Most notably, Thomas J. See *Quilter v Attorney-General* above (CA); *R v Poumako* above (CA) and *R v Pora* above (CA).

189 Human Rights Amendment Bill 2001, 152-1.

(b) The accountability of Government

It is said that [190]

> It is the very essence of democracy that it allows for people to hold differing views on controversial issues, and for the democratically elected Government of the day to adopt a standpoint thereon but for which of course it must take responsibility in the normal way at the next election.

and that[191]

> Parliamentary sovereignty [and, in New Zealand, section 4 of the Bill of Rights Act] means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon its exercise by Parliament are ultimately political, not legal.

However, this type of accountability will not always redress breaches of minority group's fundamental human rights. An election instead could indicate that the majority of the public are apathetic toward the breach, or simply don't know about the breach. There is also the possibility that the majority of the public will agree with taking away the rights of some individuals. This is particularly true of rights attaching to charged defendants of alleged criminal activity, who the public (and the majority of Parliament) label "criminals".

In fact, Parliament often use this sector of society to mandate the enactment of inconsistent provisions. Hansard evidences this approach in debate of the 1999 bail bill where there was continua; reference to the public's desire for

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190 Ministry of Justice "A Bill of Rights for New Zealand: A White Paper" [1985] AJHR I.A6, para 6.17

191 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131 (HL) Lord Hoffman.

the provisions.[192] However, the extent of the submissions on the impugned provisions, and bill as a whole, do not support these references. Only eight submissions were received and considered at select committee on the bill. Further, members relied on public feeling evidenced in the citizens referenda presented by Norm Withers an indirect victim of violence administered to his mother. However, the support shown in that referenda was for truth in sentencing legislation (which was dropped by the Government) and not bail provisions.

7 Section 7 and the Executive

It has been suggested that negotiations prior to the section 7 vet, in accordance with it, prevent numerous inconsistencies from becoming an issue at a bill's introduction and beyond. However, in light of the case studies which illustrate that inconsistent provisions are still enacted, (whether purposefully or inadvertently), this is not evidence publicly and, further, the argument does not counteract the many other issues presented in this paper.

8 Transparency as an option

Earlier this year the current Attorney-General, Hon Margaret Wilson, announced her intention to implement a policy of transparency within the section 7 procedure. All vetting documentation (positive and negative) was to be published on-line, on the MoJ website. This was to be implemented by August 2001. At that time, the Attorney-General rescinded. Ironically, the reasons for her decision are being withheld, even from MoJ officials.

It should be noted that vetting officials at MoJ and CLO advocate transparency in the process.

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192 For example, the speeches of Hon Tony Ryall (1 June 1999) 578 NZPD 17239-17241; Hon Phil Goff (1 June 1999) 578 NZPD 17241-17243 and (4 October 2000) 587 NZPD 5902; and Patricia Schnauer (1 June 1999) 578 NZPD 17243-17244.

VI CONCLUSION

While section 7 is generating preliminary debate in the House on Bill of Rights issues, its potential as a constitutional safeguard is being limited by timing and transparency flaws identified in Part V of this paper.

The case studies illustrate that a single vet occurring at a bill's introduction is failing to provide adequate information to the House, beyond select committee consideration, for debate of Bill of Rights consistency issues in the numerous inevitable amendments throughout a bill's legislative process. They illustrate that the timing of the vet, and the approach taken by the House to section 7 issues, has relegated section 7 reports to the status of a select committee submission. The effect is the circumvention of debate in the House by determining consistency issues in select committee.

The case studies illustrate that there are currently inadequate alternative mechanisms to prevent "inadvertent" enactment of inconsistent provisions resulting from amendment subsequent to the section 7 vet. This suggests the need for on-going section 7 monitoring which was arguably envisaged by the drafters of section 7.

The lack of transparency in the section 7 process not only prevents the public from seeing the provision working, but impedes Parliamentary debate and judicial interpretation.

The value judgment inherent in the *Moonen* vetting procedure, evident specifically in the 1999 Bail Bill case study, provides evidence that more options should be tendered to the Attorney-General, and tabled in the House, or that

importing a lower threshold test, identifying and debating prima facie inconsistencies, would fulfil section 7's purpose more successfully.

The appearance of bias within the vetting agencies (particularly CLO) suggests the need for transparency in the system. Further, the agencies' prediction of subsequent judicial interpretation of a provision as a determining factor in the vetting procedure justifies the need for transparency; the provision of currently privileged information to the Courts to aid their application of section 4 and 6 of the Bill of Rights.

Transparency would increase accountability of the Attorney-General and the House, which would, in turn, aid in effecting section 7's purpose by strengthening the procedures to withstand public scrutiny.

In conclusion, while section 7 was not intended to prevent inconsistent provisions from being enacted, (section 4 and the doctrine of Parliamentary Supremacy are testament to that), it was implemented for the purpose of diluting the effect of an ordinary, repealable, Bill of Rights. It was intended to generate constructive debate and, arguably, to create a more convincing obstacle to the enactment of inconsistent provisions than it is currently manifesting. Currently, both purposes are being achieved to only a limited extent. On-going monitoring of bills and procedural transparency would arguably transform section 7 from an orange plastic cone charged with blocking a highway, to a full armed defenders highway closure.

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