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PARLIAMENTARY SCRUTINY UNDER THE
NEW ZEALAND BILL OF RIGHTS ACT 1990
AND THE HUMAN RIGHTS ACT 1998 (UK):
A COMPARATIVE ANALYSIS

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CONTENTS

I	INTRODUCTION	3
II	SECTION 7 NEW ZEALAND BILL OF RIGHTS ACT 1990	7
	A Procedure	9
	B Limitations in the Procedure	10
III	SECTION 19 HUMAN RIGHTS ACT 1998 (UK)	15
	A Procedure	16
	B Limitations in the Procedure	18
	C The Impact of the Joint Committee	21
IV	PROPOSALS FOR REFORM	25
V	SOURCES	28
	A Legislation	28
	B International Agreements	28
	C Cases	28
	D Reports	29
	E Articles	29
	F Texts	30
	G Other Resources	31
VI	APPENDIX	33

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I INTRODUCTION

Both New Zealand ("NZ") and the United Kingdom ("UK") have expressed domestic commitment to international human rights instruments. In particular, the New Zealand Bill of Rights Act 1990 ("BORA") was enacted to fulfill international obligations resulting from ratification of the International Covenant on Civil and Political Rights ("ICCPR").¹ Likewise, the UK's ratification of the European Convention on Human Rights ("the Convention") instigated the Human Rights Act 1998 (UK) ("HRA").² As such, the Acts aim to fulfill international obligations by giving effect to human rights guarantees.

The HRA is extensively modelled on the BORA,³ and the two Acts are comparable in terms of their status within similar constitutional structures. NZ and the UK are both democracies theoretically based on Parliamentary government and in practice controlled mainly by the Executive branch.⁴ The BORA and the HRA both have the status of ordinary statutes. Courts have no power to invalidate conflicting legislation; Parliament is able to enact legislation which limits or overrides their provisions.⁵

¹New Zealand Bill of Rights Act 1990, long title.

²Human Rights Act 1998 (UK), introduction.

³Anthony Lester QC "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" (Speech to New Zealand Centre for Public Law, Victoria University, Wellington, 9 April 2002) 2; However, the extent to which the BORA influenced the HRA is not known since the Lord Chancellor and the Home Secretary have refused access, for another 28 years, to the civil service policy studies upon which Ministerial decisions were made in shaping the HRA. (Anthony Lester QC, "The Magnetism of the Human Rights Act 1998," (Speech to Roles and Perspectives on the Law Conference, Victoria University, Wellington, 4-5 April 2002) 5.)

⁴Anthony Lester QC "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" above, 1. However the adoption of MMP in NZ has led to an increase in multi-party representation in Parliament and a consequent lessening of the Executive's ability to dominate Parliament.

⁵New Zealand Bill of Rights Act 1990, s4, provides:

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;

Human Rights Act 1998 (UK), s3, provides:

- (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

However, by virtue of s3(a) BORA and s6 HRA, the Acts' provisions do bind the functioning of the respective legislatures.⁶ Passing legislation is the primary parliamentary function; consequently the obligations of the UK and NZ Parliaments pursuant to international treaties require the upholding of human rights guarantees through legislation. This includes ensuring all legislation which is passed is consistent with the international human rights enshrined in the BORA and the HRA. This is reinforced by obligations pursuant to the international human rights instruments which gave rise to the Acts. Specifically, Article One of the Convention requires states to secure to those within their jurisdiction the rights and freedoms it sets out.⁷ Similarly, the preamble to the ICCPR refers to the obligation of states to promote universal respect for, and observance of, human rights and freedoms.⁸

Upholding human rights is not solely the preserve of Parliament, however. The judiciary also makes a contribution in this regard by identifying, and adjudicating on, human rights breaches. Furthermore, judicial declarations that legislation is incompatible with the BORA or the HRA are expressly authorised by the UK Act⁹ and are a possibility under the NZ Act.¹⁰ However, such declarations do not necessarily trigger changes to legislation. In the UK and NZ constitutions which are

(2) This section –

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

⁶ New Zealand Bill of Rights Act 1990, s3(a), provides:

This Bill of Rights applies only to acts done –

- (a) By the legislative, executive, or judicial branches of the government of New Zealand;

Human Rights Act 1998 (UK), s6(1), provides:

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

⁷ European Convention on Human Rights and Fundamental Freedoms, Article 1.

⁸ International Covenant on Civil and Political Rights, preamble.

⁹ Human Rights Act 1998 (UK), s4.

¹⁰ Andrew S Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Rev 43, 60; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17; *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 676 per Cooke P.

premised on parliamentary sovereignty, judicial declarations as well as the HRA's and BORA's provisions ultimately can be overridden by the legislature. Therefore, in the context of such a system, the contribution of Parliament will be most vital in ensuring compliance with human rights.¹¹ The most effective aspect of Parliament's role in preventing breaches of human rights is making sure legislation is drafted consistently with them. That is because, firstly, where the judiciary has little power to enforce legislative compliance with human rights once legislation is passed, pre-enactment scrutiny is the most effective means of ensuring compliance. Moreover, "from the point of view of citizens whose human rights are threatened, it is much better to prevent any infringement of those rights being included in legislation in the first place, rather than their having to wait for redress from the courts, perhaps many years later."¹² Secondly, the creation of a "human rights culture" within Parliament and government departments may help protect human rights from being breached by legislative acts. It can thus be concluded that upholding human rights through parliamentary scrutiny of proposed legislation is fundamental to the fulfilment of the objectives of the BORA and the HRA, in terms of meeting international obligations through upholding human rights.

Complementary to these practical arguments is the consideration of principle. As David Kinley points out,¹³ it is consistent with democratic concepts that elected legislators rather than appointed judges take most responsibility for legally protecting human rights.¹⁴

Section 7 BORA and section 19 HRA provide for parliamentary scrutiny of Bills. The sections attempt to provide for legislative compliance with human rights guarantees. As demonstrated, the two provisions can be seen as fundamental to the workings of the Acts as a whole. This paper compares the effectiveness of the two provisions, focusing on the models adopted by NZ and the UK pursuant to the parliamentary scrutiny requirements. In order to assess "effectiveness," that term

¹¹ David Kinley "Parliamentary Scrutiny of Human Rights: A Duty Neglected?" in Philip Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, New York, 1999) 158, 160.

¹² Michael Ryle "Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights" *Public Law* [1994] 192, 197.

¹³ Kinley, above, 158.

must be defined. This will be done by reference to the goals of sections 7 and 19, and those of the BORA and the HRA themselves.

It has already been established that the BORA and the HRA aim to give effect to international human rights obligations. The sections 7 and 19 parliamentary scrutiny processes primarily aim to assist the legislatures in this goal by passing human rights-consistent legislation. However, legislative compliance with both Acts is subject to the Parliaments' ability to derogate from human rights norms.¹⁵ As a result, any assessment of the effectiveness of section 7 BORA and section 19 HRA must acknowledge this limitation. But given that the Acts apply to acts done by the legislature, derogations should ideally be minimised. Furthermore, they should take place by deliberate decision rather than inadvertent oversight. Moreover, in a democratic society, derogations from human rights by Parliament should be publicly known in order that the electorate maintain the ability to make Members of Parliament accountable for their actions. Therefore, the relative effectiveness of the parliamentary scrutiny provisions will be determined based on the ability of the two processes firstly to assist the legislature in upholding human rights, and secondly to inform public and parliamentary debate in relation to potential derogations from those rights.

Given the importance of parliamentary scrutiny of legislation for human rights breaches in the context of the UK and NZ constitutional structures, this paper seeks to draw conclusions from the comparison between the two models. It recommends some possible improvements to the NZ model. These are based on rectifying identified weaknesses in the NZ model, and adopting strengths from the UK model. The recommendations focus on enhancing the effectiveness of parliamentary scrutiny. Specifically, it will be shown that the procedures adopted to implement section 7 fail to realise the objectives of that provision, and consequently those of the BORA as a whole. The recommendations therefore suggest alterations to the manner in which the procedure is carried out in practice and to the procedure as outlined in the Attorney-General's Memorandum.¹⁶ A second tier of legislative scrutiny is also suggested as

¹⁴ Kinley, above, 159.

¹⁵ New Zealand Bill of Rights Act 1990, s4; Human Rights Act 1998 (UK), s3.

¹⁶ Memorandum entitled "Monitoring Bills for Compliance with the New Zealand Bill of

an improvement to the effectiveness of section 7.

II SECTION 7 NEW ZEALAND BILL OF RIGHTS ACT 1990

First, the NZ parliamentary scrutiny procedure will be examined. Section 7 of the BORA was modelled on procedures for vetting legislation under the Canadian Bill of Rights 1960 and the Canadian Charter of Rights and Freedoms.¹⁷ Section 3 of the Canadian Bill of Rights 1960 provides:¹⁸

- (1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.
- (2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the Statutory Instruments Act to ensure that it was not inconsistent with the purposes and provisions of this Part.

Prior to the Canadian Bill of Rights being effectively superceded by the Canadian Charter of Rights and Freedoms,¹⁹ section 3 was considered to have the potential to ensure legislative consistency with the Canadian Bill of Rights.²⁰ However, this may be largely because, unlike the BORA, the Canadian Bill was interpreted to render invalid or inoperative statutes inconsistent with the rights contained in it.²¹ As well, section 3 was seen as a means of deterring the proposal of legislation which abrogated

Rights Act 1990" from Attorney-General to all Ministers and Chief Executives, 9 April 1991. See Appendix.

¹⁷ Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) 59-60.

¹⁸ Canadian Bill of Rights SC 1960 c44 s3.

¹⁹ Peter W Hogg *Constitutional Law of Canada* (4ed, Carswell, Ontario, 1997) 788.

²⁰ Walter Surma Tarnopolsky *The Canadian Bill of Rights* (2ed, McClelland and Stewart, Toronto, 1975) 128.

²¹ The opening words of the Canadian Bill of Rights SC 1960 c44, s2, provide:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgement or infringement of any of the rights or freedoms herein recognised and declared, and in particular, no law of Canada shall be construed or applied so as to...

These opening words are followed by a detailed list of legal civil liberties; Peter W Hogg *Constitutional Law of Canada* (4ed, Carswell, Ontario, 1997) 795.

rights.²² That is, the effectiveness of the provision lay in the threat that it would be invoked.

Section 7 of the BORA provides:²³

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 in this Bill of Rights.

The first notable difference between section 7 and section 3 of the Canadian Bill of Rights is that subordinate legislation is not mentioned in the NZ provision. This is discussed further below. The second difference is that the NZ provision is more specific as to when the House has to be alerted regarding an inconsistency. This may seek to resolve the controversy which arose under the Canadian model over the appropriate stage at which to report.²⁴

Section 7 places a positive duty on the Attorney-General to report a Bill's inconsistencies with the BORA to Parliament. In theory, this duty would assist in ensuring that rights and freedoms are "affirmed, protected and promoted"²⁵ by enabling the legislature to rectify potential derogations from those rights. At the least, it should "ensure that members of Parliament are fully aware of the consequences of the passing of a particular Bill as proposed."²⁶ This purpose differs from that of the deterrence-focused section 3 of the Canadian Bill of Rights. Section 7 then, has the potential to be effective in providing for the legislature to act consistently with its international obligations and in keeping Parliament informed regarding BORA issues. In order to assess whether practical reality accords with this theory, it is necessary to examine the procedure implemented to uphold section 7.

²² Tarnopolsky, above, 128.

²³ New Zealand Bill of Rights Act 1990, s7.

²⁴ Tarnopolsky, above, 126-128.

²⁵ New Zealand Bill of Rights Act 1990, long title.

²⁶ *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, 458 (HC).

A Procedure

The Crown Law Office and the Ministry of Justice have developed procedures for vetting Bills for compliance with the BORA. The procedures have been established in response to a Memorandum from the Attorney-General, which seeks to implement section 7's requirements.²⁷ These bodies then advise the Attorney-General of their findings so that, if necessary, he or she can submit a report pursuant to section 7. The procedures are based on sections 4, 5 and 6 of the BORA and comprise the following steps.²⁸

The first stage is to assess the provisions of the legislation for compliance with the rights and freedoms within the Bill of Rights Act. This involves:

- Weighing the different interpretations of the apparently inconsistent provision;
- Ascertaining the scope of the right apparently breached; and
- Assessing the provision in light of the right itself to ascertain whether the provision in fact breaches the right.

If there is an inconsistency, the second stage is to ask: is this a "reasonable limit ... demonstrably justified in a free and democratic society" (section 5 of the Bill of Rights Act). The test for this question is the *Moonen* test, which has two components:

- Is the limit substantively justified? – the reason for the limitation must be of sufficient importance to warrant overriding a constitutionally protected right.
- Is the limit proportional? – there must be proportionality between the law limiting the right and the reason for the limitation. The measures adopted must impair the right as little as possible.

The LAC guidelines go on to describe the basic content of the BORA rights.²⁹ Where an inconsistency is found to be unjustified, a section 7 report is prepared for the Attorney-General by the Ministry of Justice, or, in the case of Bills promoted by the Ministry of Justice, the Crown Law Office. The report is then tabled in the House by the Attorney-General.³⁰

The process as a whole aims to ensure legislation is consistent with the BORA

²⁷ Memorandum entitled "Monitoring Bills for Compliance with the New Zealand Bill of Rights Act 1990" from Attorney-General to all Ministers and Chief Executives, 9 April 1991.

²⁸ *Legislation Advisory Committee Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993*, para 4.1.1 <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html> (last accessed 18 June 2002).

²⁹ *Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993*, above, para 4.1.2.

³⁰ *Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993*, above, para 4.1.1.

wherever possible.³¹ It also attempts to ensure that legislation which derogates from Bill of Rights guarantees does so as a result of deliberate, considered decision rather than inadvertent oversight.³² Further, section 7 reports seek to promote informed public and parliamentary debate regarding inconsistencies in proposed legislation.³³ This is in part effected by their tabling in Parliament for debate and by being placed on the web.³⁴

B Limitations in the Procedure

Certain features of the section 7 reporting process hinder its effectiveness. The first of these is the narrow scope which has been afforded the reporting procedure. Although the Attorney-General's duty to report inconsistencies is unqualified, in practice reports are only tabled where inconsistencies appear to be unjustified in a free and democratic society.³⁵ This practice is a result of the application of the procedure which has been outlined and limits the extent of the legislature's compliance with the BORA in several ways.

Primarily, it fails to draw the attention of the House to BORA inconsistencies except in the case of those which cannot be justified. This limits the extent to which the reports can aid public and parliamentary debate in relation to legislative compliance with the BORA. For example, where a report is not made, it is not clear whether this is because the proposed legislation has raised no BORA issues, or because the inconsistencies the Bill has exhibited were found to be demonstrably justified in a free and democratic society.³⁶ This constraint is of further concern given that the test adopted in response to section 7 requires personal or value judgments to be made at some points by public servants on behalf of the Attorney-General. These

³¹ *Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993*, above, para 4.1.2.

³² 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, 136.

³³ *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, 457 (HC).

³⁴ The section 7 reports can be found at "Office of the Clerk of the House of Representatives" <<http://www.clerk.govt.nz>> (last accessed 24 August 2002).

³⁵ New Zealand Bill of Rights Act 1990, s5, provides:

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.

³⁶ New Zealand Bill of Rights Act 1990, s5.

judgments are not subject to any scrutiny where a section 7 report is not made, and public service procedures are not transparent. As well, the public service officials who make the judgments are not elected. This further reduces their accountability. The subjectivity of the section 7 test also increases the likelihood of errors, or at least of contestable decisions,³⁷ and consequently of the legislature limiting human rights inadvertently where the Attorney-General decides not to report.

All these factors increase the need for checks on section 7 decisions. However, Parliament and the public have no opportunity to check the procedures followed and criteria applied by departments apart from the section 7 reports published on the web. In addition, the public will not be made aware of any potential inconsistencies where the Attorney-General does not report. This limits their ability to act as a check on a Parliament that chooses to derogate from their rights. The problem is certainly a valid one, since the media and public seem to take seriously their involvement with the section 7 process. This is evidenced by the publicity given to the section 7 report on the Land Transport (Street and Illegal Drag Racing) Amendment Bill, otherwise known as the "Boy-racer Bill." The Attorney-General's finding that the power given to police to seize and impound cars for 28 days was an unjustified limitation on BORA rights³⁸ appears to have been the subject of fairly widespread public debate.³⁹

The subjectivity inherent in the section 7 reporting and the high threshold⁴⁰ which must be reached for a report to be triggered are exacerbated by the fact that the process gone through in deciding whether or not to report is not subject to public scrutiny through the Official Information Act 1982. Once again, this potentially places limitations on legislative compliance with BORA rights and precludes informed debate on inconsistencies. Section 7 reports are tabled in Parliament so,

³⁷ Andrew S Butler "The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain" *Oxford Journal of Legal Studies* vol 17 1997 323, 335-336.

³⁸ Attorney-General Report Under the New Zealand Bill of Rights Act 1990 on the Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002 AJHR [2002] E 63.

³⁹ For example, Jonathan Milne "Confiscation of cars against Bill of Rights" (8 June 2002) *The Dominion* Wellington 1; "Ignore Bill of Rights at Your Peril" (10 June 2002) *The Evening Standard* Palmerston North 7; [No Published Headline] (13 June 2002) *The Timaru Herald* Timaru 4.

⁴⁰ A "low threshold" interpretation would arise from a plain reading of section 7 such that whenever a provision in a Bill being introduced is inconsistent with the BORA, a report will be triggered. (Paul Fitzgerald "Section 7 of the New Zealand Bill of Rights Act 1990: A very

where they are made, the Attorney-General's legal advice is available to the public. However, where for whatever reason the Attorney-General does not report, the reasons for this decision are not presented to the public. The Ombudsman found in 1999 that the Attorney-General, when acting in that capacity, is not subject to the Official Information Act.⁴¹ Further, legal advice provided to the Attorney-General by the Ministry of Justice in relation to a particular Bill was found to be held by the Attorney-General in that capacity.⁴² As a result, legal advice pertaining to section 7 BORA reports does not fall under the Official Information Act 1982 and thus does not have to be provided on request.⁴³ In practice, BORA vets are copied to the Minister of Justice and the Minister promoting the Government Bill, who are subject to the Official Information Act.⁴⁴ They must provide official information on request. However, applications for the disclosure of legal advice can always be refused under the Act.⁴⁵ While legal professional privilege can be waived, the Attorney-General does not normally do this in relation to BORA vets.⁴⁶ The failure to systematically release BORA vets significantly restricts the amount of information which is available to Parliament and the public as to the consistency of proposed legislation with the BORA. It is only in the small number of instances where the Attorney-General finds an unjustified limitation on rights⁴⁷ that any comprehensive analysis of compatibility has to be publicised. Openness of the parliamentary scrutiny process is vital to the fulfillment of the BORA objectives of promoting parliamentary and public debate. Moreover, a process which is both subjective and confidential must be inherently flawed in its ability to ensure consistency with BORA norms. The effectiveness of the section 7 process is thus significantly impeded by its confidentiality.

As mentioned, section 7 does not apply to secondary legislation.⁴⁸ This places a potentially serious limitation on its effectiveness, especially given the large number of

practical power or a well-intentioned nonsense" (1992) 22 VUWLR 135, 137.)

⁴¹ 12th Compendium of Case Notes of the Ombudsmen Case No. W41067 (Office of the Ombudsmen, New Zealand, 2000) 167.

⁴² 12th Compendium of Case Notes of the Ombudsmen Case No. W41067, above, 167.

⁴³ 12th Compendium of Case Notes of the Ombudsmen Case No. W41067, above, 167-168.

⁴⁴ Official Information Act 1982, s2.

⁴⁵ Official Information Act 1982, s9(2)(h).

⁴⁶ This information was provided by Kelly Harris from the Ministry of Justice.

⁴⁷ The Attorney-General has so far reported on 23 Bills.

⁴⁸ No instruments other than Bills are referred to in section 7. (New Zealand Bill of Rights Act 1990, s7.)

regulations that is passed every year⁴⁹ and that they often effect the policy provided for in legislation. As such, where they breach BORA rights, they correspondingly limit executive compliance with human rights. Regulations are not currently vetted under the section 7 procedure.⁵⁰ This inhibits the procedure's effectiveness. Although important, this issue is one which concerns executive compliance with the BORA and as a result is beyond the scope of this paper, which focuses on legislative compliance.

The tabling of the section 7 report takes place on introduction of Government Bills and as soon as practical after introduction of other Bills.⁵¹ This is very early in the legislative process; many and substantial amendments to proposed legislation may be implemented after its introduction. The section 7 reporting requirement is not ongoing, so it fails to flag inconsistencies which may arise following any amendments to a Bill.⁵² Clearly, opportunities arise for the legislature inadvertently or covertly to derogate from BORA guarantees. This could occur without any, or much less informed, parliamentary and public debate. This runs contrary to the spirit of section 7 and the BORA itself. One such example occurred with the Criminal Justice Amendment Act (No 2) 1999. Section 2(4) of the amending Act inserted a new s 80(2A) into the Criminal Justice Act 1985. The new provision sets out minimum periods of imprisonment for home invasion murders which are to apply even if the offence has been committed before the date on which the amendment came into force.⁵³ In *R v Poumako*⁵⁴ the Court of Appeal acknowledged that the new provision is inconsistent with section 25(g) BORA, which sets out the principle against retrospective increased penalties.⁵⁵ However, the offending provisions were adopted

⁴⁹ 422 regulations were published in 2001 under the Acts and Regulations Publication Act 1989 in the SR series. (Regulations Review Committee "Activities of the Regulations Review Committee during 2001" [2002] AJHR I 16J.)

⁵⁰ Although, the grounds of complaint to the Regulations Review Committee include that a regulation "trespasses unduly on personal rights and liberties." (Standing Orders s382(2)(b).)

⁵¹ New Zealand Bill of Rights Act 1990, s7.

⁵² David McGee *Parliamentary Practice in New Zealand* (2ed, GP Publications, Wellington, 1994) 296; Anthony Lester QC "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" (Speech to New Zealand Centre for Public Law, Victoria University, Wellington, 9 April 2002) 4.

⁵³ Criminal Justice Amendment Act (no 2) 1999, s2(4).

⁵⁴ [2000] 2 NZLR 695.

⁵⁵ *R v Poumako* [2000] 2 NZLR 695, 700; New Zealand Bill of Rights Act 1990, s25(g), provides: Minimum standards of criminal procedure – Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

...

by supplementary order paper during the Committee of the Whole House stage of the legislative process and as a result were not the subject of any report to the House under section 7 BORA.⁵⁶ This legislative act was thus carried out without acknowledgement of the fact that it breached a BORA right. Such an example clearly demonstrates a weakness in the section 7 process which significantly undermines its effectiveness.

Finally, further detriment to the effectiveness of the section 7 process is caused by its lack of enforceability. In *Mangawaro Enterprises v Attorney-General*⁵⁷ the plaintiffs wanted the Forests Amendment Act 1993 declared void because the Attorney-General had not identified its alleged inconsistencies with the BORA, as required by section 7.⁵⁸ Gallen J found that the Attorney-General's obligations under section 7 are "proceedings in Parliament" in terms of article 9(1) of the Bill of Rights 1688 (UK).⁵⁹ Thus, to question the Attorney-General's decision not to report would constitute usurping the authority of the democratically-elected legislature.⁶⁰ However, if there is no way to monitor the Attorney-General's compliance with section 7, this must substantially weaken the provision's ability to inform Parliament and the public of the consequences of passing legislation and in turn weaken it as a safeguard of rights.

The high threshold, subjective test combined with the confidentiality of the section 7 process significantly impair its ability to meet its objectives and those of the BORA as a whole. Moreover, those who carry out the section 7 procedures do so with minimal transparency and accountability to the electorate and the courts. These factors consequently weaken to a considerable degree the potential to achieve the objectives of ensuring legislative compliance with BORA guarantees and promoting

(g) The 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.

⁵⁶ *R v Poumako*, above, 700.

⁵⁷ *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, 457 (HC).

⁵⁸ *Mangawaro Enterprises Ltd v Attorney-General*, above, 453.

⁵⁹ *Mangawaro Enterprises Ltd v Attorney-General*, above, 455; Bill of Rights Act 1688 (UK), Article 9(1), provides:

Freedom of speech - that 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.

public and parliamentary debate regarding legislative derogations from those guarantees. In practice, the section 7 model is not the "potent weapon" it was predicted to become.⁶¹ Such weaknesses are further highlighted by comparison with the UK parliamentary scrutiny procedure.

III SECTION 19 HUMAN RIGHTS ACT 1998 (UK)

As discussed, the enactment of section 19 of the HRA was influenced by section 7 of the BORA. Section 19 provides:⁶²

- (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –
 - (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or
 - (b) make a statement to the effect that although he is unable to make a statement of compatibility the government wishes the House to proceed with the Bill.
- (2) The statement must be in writing and be published in such a manner as the Minister making it considers appropriate.

The objectives of the provision are comparable to those of section 7 BORA. That is, it was stated in the Explanatory Memorandum to the Bill, that it is "highly desirable for the government to ensure as far as possible that legislation which is placed before Parliament in the normal way is compatible with the Convention rights, and for Parliament to ensure that the human rights implications of legislation are subject to proper consideration before the legislation is enacted."⁶³ Therefore, the process attempts to ensure legislation is consistent with the HRA guarantees and to inform public and parliamentary debate in relation to potential derogations from those guarantees. However, the process adopted to fulfill the section 19 requirement is much broader in scope than its NZ equivalent.⁶⁴

⁶⁰ *Mangawaro Enterprises Ltd v Attorney-General*, above, 458-9.

⁶¹ Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) 59.

⁶² Human Rights Act 1998 (UK).

⁶³ Anthony Lester QC "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" (Speech to New Zealand Centre for Public Law, Victoria University, Wellington, 9 April 2002) 2; Rights Brought Home: the Human Rights Bill (1997) CM 3782, para 3.1.

⁶⁴ Lester, above, 2; Memorandum entitled "Monitoring Bills for Compliance with the New Zealand Bill of Rights Act 1990" from Attorney-General to all Ministers and Chief Executives, 9 April 1991.

A Procedure

At the policy approval stage, the relevant department highlights for its Minister the Convention issues which may arise under the proposed legislation.⁶⁵ Then at the drafting stage, the department's lawyers prepare a report which underpins the Minister's section 19 statement.⁶⁶ In line with the NZ counterpart, formal procedures have been developed for preparing statements of compatibility.⁶⁷

As in NZ, a test for compatibility is applied to Bills. A section 19(a) statement is regarded as a "positive statement of compatibility" such that, in order to make one, the arguments must, at least on balance, support compatibility.⁶⁸ Legal advisers must therefore consider whether the relevant provisions would *on balance* be likely to withstand challenge on Convention grounds in the domestic courts and the European Court of Human Rights ("Strasbourg Court.")⁶⁹ If this standard is not met, a section 19(b) statement should be made. Policy guidelines emphasise that a section 19(b) statement does not indicate that provisions are incompatible with the Convention, but merely that a positive statement of compatibility cannot be made.⁷⁰ Both section 19(a) and section 19(b) statements are presented by the Minister in a prescribed form.⁷¹

In determining compatibility, departments apply a series of tests to decide which, if any, Convention rights are relevant. In relation to each of the Articles, the Guidance for Departments sets out substantive requirements for ensuring compliance.⁷² The process followed in complying with section 19 of the HRA is extensively prescribed.

⁶⁵ Lord Chancellor's Department *The Human Rights Act 1998 Guidance for Departments*, para 34 <<http://www.humanrights.gov.uk/guidance.htm>> (last accessed 19 June 2002).

⁶⁶ *The Human Rights Act 1998 Guidance for Departments*, above, para 36.

⁶⁷ *The Human Rights Act 1998 Guidance for Departments*, above.

⁶⁸ *The Human Rights Act 1998 Guidance for Departments*, above, para 36.

⁶⁹ *The Human Rights Act 1998 Guidance for Departments*, above, para 36.

⁷⁰ Lord Chancellor's Department *The Human Rights Act 1998 Guidance for Departments*, para 36 <<http://www.humanrights.gov.uk/guidance.htm>> (last accessed 19 June 2002).

⁷¹ *The Human Rights Act 1998 Guidance for Departments*, above, para 37; for the format of the prescribed form, see Annex A to *The Human Rights Act 1998 Guidance for Departments*.

⁷² *The Human Rights Act 1998 Guidance for Departments*, above, paras 41-78.

Further practice has been established in the UK for ensuring compliance with section 19 in the form of a Parliamentary Joint Committee on Human Rights ("the Joint Committee.")⁷³ The Joint Committee's terms of reference⁷⁴ include assessing the compatibility of draft legislation with Convention guarantees.⁷⁵ It now regards scrutinising ministerial section 19 statements as a "key duty."⁷⁶ The Joint Committee's role includes monitoring the section 19 process and reporting to Parliament as to the HRA compatibility of proposed legislation.⁷⁷ The test applied to determine compatibility incorporates the principles of legal certainty and proportionality.⁷⁸ In combination, the preparation of section 19 statements of

⁷³ UK Parliament, Joint Committee on Human Rights, <<http://www.parliament.uk/commons/selcom/hrhome.htm>> (last accessed 19 June 2002).

⁷⁴ UK Parliament, Joint Committee on Human Rights, above: the Joint Committee's terms of reference are:

To consider:

- (a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);
- (b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and
- (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order 73 (Joint Committee on Statutory Instruments).

⁷⁵ Joint Committee on Human Rights, First Report, Session 2000-01, Criminal Justice and Police Bill (26 April 2001).

⁷⁶ Joint Committee on Human Rights, Fourteenth Report, Session 2001-02, Scrutiny of Bills: Private Members' Bills and Private Bills (8 March 2002), para 1.

⁷⁷ Anthony Lester QC "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" (Speech to New Zealand Centre for Public Law, Victoria University, Wellington, 9 April 2002) 5-6.

⁷⁸ Joint Committee on Human Rights, First Report, Session 2000-01, above, Annex 2:

Legal certainty requires:

if an interference with a right is to be justifiable, it must be lawful, and:

- (1) the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case;
- (2) a norm cannot be regarded as law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

The principle of proportionality requires decision-makers:

to balance the severity of the interference with the intensity of the social need for action. Proportionality has a number of elements. They have never been codified, but the following factors are often relevant.

- (1) An interference must not take away the very essence of a right...
- (2) There must be sufficient factual basis for believing that there was a real danger to the interest which the State claims there was a pressing social need to protect...
- (3) The State's measure or act must interfere with the right in question no more than is reasonably necessary in order to achieve the ultimate legitimate aim...
- (4) Measures are likely to be regarded as disproportionate if they impose heavy burdens on one individual or group, apparently arbitrarily, in order to achieve a social benefit, or if they impose penalties which appear to be excessive in relation

compatibility and the Joint Committee Reports on Bills have a similar role to the NZ section 7 reports although the addition of the Joint Committee greatly extends the scrutiny process by adding a second parliamentary tier of scrutiny.

B Limitations in the Procedure

The section 19 procedure contains features which weaken its effectiveness in a manner comparable to the NZ model. However, the UK procedure is more effective overall. Firstly, in NZ, where the Attorney-General does not consider there to be any unjustified limitations on BORA rights in a Bill, no report is made. By contrast, in the UK, a section 19 statement is required for every Government Bill. Moreover, the section 19 obligation has given rise to a much more stringent test than that adopted in NZ pursuant to section 7. As discussed, a Minister treats section 19(a) as requiring a "positive statement of compatibility."⁷⁹ The House will therefore always be made aware where there are any inconsistencies with Convention rights. In contrast, the NZ Parliament is told only of inconsistencies which are regarded as unjustified in a free and democratic society.⁸⁰ The section 19 procedure is thus *prima facie* more likely to give fuller effect to the objectives of legislative consistency with the HRA and informing Parliament of potential inconsistencies.

On the other hand, where section 7 reports are made, the Attorney-General does table in the House the reasons for finding a Bill inconsistent with the BORA. These reasons effectively comprise the legal advice given to the Attorney-General. In contrast, section 19 never requires disclosure of the advice given to Ministers. Likewise, statements of compatibility contain only the view that a Bill is consistent

to the circumstances of the offence to which they relate...

- (5) The effectiveness of any legal controls over the measures in question, and the adequacy of compensation or legal remedies for those affected by the measures, will be relevant to the proportionality of any interference.
- (6) All these matters fall to be assessed in the light of the circumstances, and must be reassessed when circumstances change.

⁷⁹Lord Chancellor's Department *The Human Rights Act 1998 Guidance for Departments*, para 36 <<http://www.humanrights.gov.uk/guidance.htm>> (last accessed 19 June 2002).

⁸⁰Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993*, para 4.1.1 <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html> (last accessed 18 June 2002); New Zealand Bill of Rights Act 1990, s5.

with the Convention – no reasons are given.⁸¹

In practice, some effort has been made to resolve this limitation. Firstly, a Minister is required to be able to “give a general outline of the arguments which led him or her to the conclusion reflected in the statement,”⁸² although confidentiality of the advice itself prevents any effective check on this policy. As well, since January 2002, the explanatory note of every government Bill has had to acknowledge the main Convention issues raised.⁸³ Finally, the Guidance for Departments is more detailed than its NZ counterpart so that the process of establishing incompatibility is more transparent.⁸⁴ An example of this can be demonstrated by examining departmental guidelines in relation to a particular Convention right. In order to establish that Article 10⁸⁵ is affected by the proposed legislation, the legislation must be deemed to affect a person’s freedom of expression.⁸⁶ The Guidelines set out the coverage of the article, including situations in which the right may be restricted.⁸⁷ Instructions for domestic courts regarding relief which may affect the right are also set out.⁸⁸ As well, the Strasbourg Court’s attitude to Article 10 analysis is summarised as follows:⁸⁹

Decisions of the Convention institutions in Strasbourg have recognised the fundamental place of the Article 10 right to freedom of expression. The European Court of Human Rights has acknowledged that freedom of expression constitutes an

⁸¹ *The Human Rights Act 1998 Guidance for Departments*, above, Annex A.

⁸² *The Human Rights Act 1998 Guidance for Departments*, above, para 39.

⁸³ The Lord Chancellor (18 December 2001) 630 HLD no 43.

⁸⁴ *Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993*, above; Lord Chancellor’s Department *The Human Rights Act 1998 Guidance for Departments* <<http://www.humanrights.gov.uk/guidance.htm>> (last accessed 19 June 2002).

⁸⁵ European Convention on Human Rights and Fundamental Freedoms, Article 10, provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁸⁶ *The Human Rights Act 1998 Guidance for Departments*, above, para 65.

⁸⁷ *The Human Rights Act 1998 Guidance for Departments*, above, para 65.

⁸⁸ *The Human Rights Act 1998 Guidance for Departments*, above, para 66.

⁸⁹ Lord Chancellor’s Department *The Human Rights Act 1998 Guidance for Departments*, para 67 <<http://www.humanrights.gov.uk/guidance.htm>> (last accessed 19 June 2002).

essential foundation of a democratic society and is particularly important as far as the press is concerned.

The issues considered and tests applied by Departments in undertaking scrutiny of the Bill are extensively prescribed and therefore transparent and fairly consistent. In contrast, in order to establish that a Bill breaches the freedom of expression right in NZ,⁹⁰ departmental guidelines state broadly about all democratic and civil rights that:⁹¹

The democratic system is based on the recognition of these inherent rights: the rights to freedom of expression (including the freedom not to say anything), peaceful assembly, association, thought, conscience and religious belief, movement, the right to practice your religion or beliefs and the right to vote and be a candidate for Parliament.

Here, the process of establishing inconsistency with the right is impossible to ascertain in much detail. Furthermore, that process may vary considerably between Bills. Since neither the NZ nor the UK procedures require reasons for their assessment of proposed legislation in all cases, it can be concluded that both are unsatisfactory in terms of transparency. However, the extensive prescription of procedure under the UK model does provide a safeguard to ameliorate the effects of this drawback. Confidentiality is in direct opposition to the objective of informing the public and Parliament of limitations that proposed legislation places on international human rights. Consequently, this feature significantly impedes the effectiveness of both parliamentary scrutiny processes.

In the same way as the section 7 process, the section 19 process takes place before a Bill's Second Reading and is not an ongoing requirement.⁹² This raises similar concerns regarding the compatibility of later amendments as have been outlined above. The problem is redeemed to some extent in the UK in that the explanatory notes to Bills are updated twice in the legislative process in relation to the Convention issues they raise.⁹³ However, this change alone can not adequately

⁹⁰ New Zealand Bill of Rights Act 1990, section 14, provides:

Everyone has the right to freedom of expression, including the freedom to seek receive, and impart information and opinions of any kind in any form.

⁹¹ Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993*, para 4.1.2 <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html> (last accessed 18 June 2002).

⁹² Human Rights Act 1998, s19.

⁹³ (19 March 2002) 632 HLD no. 127.

achieve the goal of fully informing Parliament and the public of potential legislative HRA breaches.

Like section 7 BORA, section 19 HRA does not apply to delegated legislation.⁹⁴ It has been determined above that this issue exceeds the scope of this paper. However, it should be mentioned that this limitation is addressed in the UK by the Guidance for Departments. The Guidance recommends that Ministers nevertheless give their view on compatibility "as a matter of good practice."⁹⁵

A major limitation of the UK procedure which is not evident in the NZ equivalent is that section 19 applies only to Government Bills.⁹⁶ That the provision does not encompass Private Members' Bills severely impedes its effectiveness by failing to provide for any parliamentary scrutiny of those Bills. This is also an arbitrary omission from the scrutiny process since Private Members' Bills are legislative acts and thus are equally bound by the international obligations enshrined in the HRA.⁹⁷ In sum, while the model adopted in compliance with section 19 contains similar weaknesses to the NZ section 7 model, the effectiveness of the former has been immeasurably improved by the advent of the Parliamentary Joint Committee on Human Rights.

C The Impact of the Joint Committee

The Joint Committee was set up in January 2001⁹⁸ in response to the British Government's view that a Parliamentary Committee would be the best way to enable Parliament to play a leading role in protecting human rights.⁹⁹ In addition, the problems of independence which arise where the task of scrutinising Government

⁹⁴ No instruments other than Bills are referred to in section 19. (Human Rights Act 1998, s19).

⁹⁵ Lord Chancellor's Department *The Human Rights Act 1998 Guidance for Departments*, para 40 <<http://www.humanrights.gov.uk/guidance.htm>> (last accessed 19 June 2002).

⁹⁶ Human Rights Act 1998, s19; *The Human Rights Act 1998 Guidance for Departments*, above, para 38.

⁹⁷ Anthony Lester QC "The Magnetism of the Human Rights Act 1998," (Speech to Roles and Perspectives on the Law Conference, Victoria University, Wellington, 4-5 April 2002) 18.

⁹⁸ Anthony Lester QC "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" (Speech to New Zealand Centre for Public Law, Victoria University, Wellington, 9 April 2002) 5, fn 19.

⁹⁹ Rights Brought Home: the Human Rights Bill (1997) CM 3782, para3.6.

legislation is carried out solely by the government are significantly reduced by having a Parliamentary check on the process.¹⁰⁰ The Joint Committee has had a huge impact on the ability of the section 19 process to uphold Convention guarantees in legislation. Specifically, it has greatly enhanced Parliament's awareness of where it has proposed legislation which is inconsistent with the Convention, and has allowed for more informed debates in this regard. The primary way in which the Joint Committee enhances the ability of section 19 to meet its objectives and those of the HRA as a whole is by providing a check on the section 19 process.

One of the major drawbacks identified in relation to both the NZ and UK processes was the lack of checks they incorporate. This is an especially important concern given the necessarily subjective nature of the tests for consistency applied to Bills. The problem manifests itself in the inability of the public and the legislature to gain access to the reasons for conclusions on consistency. The Joint Committee tables in Parliament detailed reports on Bills, which analyse their compatibility with the HRA. As such, they extensively check the Minister's section 19 statement. The extensive nature of this check is illustrated by the scope of the Joint Committee's investigations. These include,¹⁰¹

the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place within the United Kingdom no more than four times in any calendar year, to appoint specialist advisers, and to make Reports to both Houses.

The conclusions drawn by the Joint Committee from the Bill under analysis include an assessment of whether or not the section 19 statement has been correctly made.¹⁰² Conclusions have also become increasingly detailed over time, for example, the recent report on the Nationality, Immigration and Asylum Bill¹⁰³ outlined fourteen very specific human rights concerns raised by the Bill.¹⁰⁴ These concerns included, for instance, "the implications of depriving someone of British citizenship, apart from

¹⁰⁰ David Kinley "Parliamentary Scrutiny of Human Rights: A Duty Neglected?" in Philip Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, New York, 1999) 158, 166-167.

¹⁰¹ Joint Committee on Human Rights, First Report, Session 2001-02, Homelessness Bill, (7 November 2001).

¹⁰² Joint Committee on Human Rights, First Report, Session 2001-02, above, para 12.

¹⁰³ Joint Committee on Human Rights Seventeenth Report, Session 2001-02, Nationality, Immigration and Asylum Bill, (21 June 2002).

¹⁰⁴ Joint Committee on Human Rights Seventeenth Report, Session 2001-02, above, para 112.

their immigration rights,”¹⁰⁵ and “the reluctance of the Government to recognise the absolute nature of the obligation to avoid treating people in ways that would amount to degrading treatment contrary to ECHR Article 3.”¹⁰⁶ Thus the reports constitute a rigorous critique of the section 19 statement, which is then drawn to the attention of Parliament and consequently made available to the public.¹⁰⁷ The Minister’s legal advice is not revealed, but he or she is required to answer written questions from the Joint Committee to assist them in their investigations.¹⁰⁸ The Minister must therefore account to Parliament, albeit indirectly, and the public for his or her conclusion as to Convention compatibility. In this way, the problems of transparency and accountability are solved without interfering with the doctrine of legal professional privilege.

The detail of the Joint Committee Reports mean that they are not only helpful in meeting objectives in relation to informing debate on legislative compliance with Convention rights. Because they point to specific Convention issues, the reports also allow Bills to be easily amended to make them more Convention-consistent. As a result, the Joint Committee Reports at least have the potential to enhance significantly the effectiveness of parliamentary scrutiny in promoting both debate and legislative compliance with the Convention.

Also demonstrated as limiting the effectiveness of sections 7 and 19 was the fact that the scrutiny requirements are not ongoing. The Joint Committee has rectified this problem to the extent that it has decided to examine and report to the House on any amendments made subsequent to the section 19 statement.¹⁰⁹ This will significantly promote the potential for Bills to become legislation which is consistent with human rights.

As discussed above, section 19 applies only to Government Bills and does not

¹⁰⁵ Joint Committee on Human Rights Seventeenth Report, Session 2001-02, above, 112.

¹⁰⁶ Joint Committee on Human Rights Seventeenth Report, Session 2001-02, above, 112.

¹⁰⁷ Joint Committee reports can be found at

<<http://www.parliament.uk/commons/selcom/hrhome.htm>>

¹⁰⁸ Joint Committee on Human Rights Seventeenth Report, Session 2001-02, Nationality, Immigration and Asylum Bill, (21 June 2002) para 4.

¹⁰⁹ Joint Committee on Human Rights, First Report, Session 2000-01, Criminal Justice and Police Bill 2001, (26 April 2001) para 1.

require scrutiny of Private Members' Bills. Nevertheless, the Joint Committee has decided to assess these Bills for compatibility questions.¹¹⁰ They are subject to less rigorous scrutiny than Government Bills. The Joint Committee justifies this by pointing out that many do not make much progress through the legislative process.¹¹¹ Moreover, the Joint Committee believes that the sponsors of Private Members' Bills are unlikely to be resourced to answer their questions relating to compatibility, although no reasons for this belief are given.¹¹² The latter in particular does not appear to be a very principled reason for allowing proposed legislation a greater opportunity to proceed through the legislative process containing encroachments on human rights. However, the Joint Committee's decision to scrutinise Private Members' Bills, at least to some extent, does improve the effectiveness of the section 19 parliamentary scrutiny process by ensuring that it applies to a greater proportion of proposed legislation.

The procedure adopted pursuant to section 19 of the HRA contains many of the same features and limitations as the equivalent NZ procedure. However, the Joint Committee has effectively addressed many of these limitations, significantly improving the potential for informed debate about legislative consistency with the HRA and correspondingly improving the chances of legislative compliance with the rights contained in the Act. Overall, the advent of the Joint Committee has impacted enormously on the effectiveness of the section 19 HRA parliamentary scrutiny process. As a result mainly of the Joint Committee, it is clear that the UK parliamentary scrutiny process has far more potential than its NZ equivalent to enable legislation to be passed which is consistent with human rights. The UK legislature thus gives greater effect to the international human rights instruments to which it is a party. The Joint Committee has also been able to provide Parliament and the public with more information and opportunity to debate the treatment of human rights by the legislature than has the NZ section 7 model.

¹¹⁰Joint Committee on Human Rights, Fourteenth Report, Session 2001-02, Scrutiny of Bills: Private Members' Bills and Private Bills, (8 March 2002) paras 4-5.

¹¹¹Joint Committee on Human Rights, Fourteenth Report, Session 2001-02, above, para 3.

¹¹²Joint Committee on Human Rights, Fourteenth Report, Session 2001-02, above, para 3.

IV PROPOSALS FOR REFORM

As discussed, section 7 BORA itself is broad enough in scope to enable parliamentary scrutiny of proposed legislation to be effective. As a result, this paper need not recommend amendments to the provision itself. However, alterations could be made to the procedure adopted pursuant to section 7 which would greatly enhance its ability to fulfill the objectives of section 7 and the BORA as a whole. This would require changes in practice and change to the Attorney-General's Memorandum.¹¹³

Firstly, section 7 obligates the Attorney-General to report where there appear to be inconsistencies with a Bill,¹¹⁴ not only where those inconsistencies appear to be unjustified in terms of section 5.¹¹⁵ There is no objection to the Attorney-General making a section 5 assessment, however Parliament and the public should be made aware of *any* inconsistencies in the interests of effectiveness and of fulfilling the section 7 obligation. Access to such information would also lessen the problems created by the subjective nature of the section 7 test. Lowering the threshold of the test for whether to report may risk the consequence that "numerous reports of minor, technical, or otherwise unimportant inconsistencies with the Bill of Rights would have to be made."¹¹⁶ Regardless of the validity of that concern, deciding whether human rights violations are justifiable is the function of Parliament. Therefore, the risk is outweighed by the need for transparency in the scrutiny process. Another objection to more frequent reporting is that the threat of a section 7 report would be undermined in its capacity to deter the legislature from proposing Bills which may breach human rights.¹¹⁷ But again, openness of the scrutiny process is of primary importance. Parliament must be able to decide on whether breaches are justified so the public can check such decisions. Deterrence is at the most a subsidiary goal. This change would not require alterations to the Memorandum but merely that all BORA vets which identify an inconsistency be drawn to the attention of the House of Representatives as

¹¹³ Memorandum entitled "Monitoring Bills for Compliance with the New Zealand Bill of Rights Act 1990" from Attorney-General to all Ministers and Chief Executives, 9 April 1991.

¹¹⁴ New Zealand Bill of Rights Act 1990, s7.

¹¹⁵ New Zealand Bill of Rights Act 1990, s5.

¹¹⁶ Grant Huscroft "The Attorney-General, the Bill of Rights, and the Public Interest" in G Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 133, 139.

a matter of practice.

It is further recommended that the Attorney-General's Memorandum prescribe in detail the process by which assessment of Bills' consistency with the BORA is made. As recognised earlier, the procedure is only broadly set out in the LAC guidelines.¹¹⁸ More extensive prescription in the Memorandum such as that found in the UK Guidance for Departments¹¹⁹ would provide for a more consistent approach to vetting. This would consequently enhance the transparency of the process, without interfering with legal professional privilege.

The establishment of the Joint Committee has substantially improved the effectiveness of section 19 of the HRA relative to what had been a procedure comparable to that adopted under section 7 of the BORA. A similar committee was suggested by the NZ Justice and Law Reform Committee when considering the proposed BORA,¹²⁰ but was never established. The recommended Parliamentary select committee was to operate in addition to the Attorney-General's section 7 reporting requirements. That is, it was foreseen that "the bill of rights could require the Attorney-General to certify on the face of a bill when the Attorney-General considers that the bill derogates from the bill of rights, and the select committee of Parliament to take similar action and report to the House on provisions in any Bill that appeared contrary to the principles and specific articles in the Bill of Rights."¹²¹ Such a committee should be established in NZ to improve the effectiveness of pre-legislative scrutiny. Specifically, adding an extra and separate tier of scrutiny would, as it has in the UK, substantially improve the accountability of the process. It would also counteract the fact that the Attorney-General's role is not enforceable, by providing information relating to legislative compliance even where the Attorney-

¹¹⁷ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 1052.

¹¹⁸ Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2000 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993* <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html> (last accessed 18 June 2002).

¹¹⁹ Lord Chancellor's Department *The Human Rights Act 1998 Guidance for Departments* <<http://www.humanrights.gov.uk/guidance.htm>> (last accessed 19 June 2002).

¹²⁰ Justice and Law Reform Committee "Final Report on a White Paper on a Bill of Rights for New Zealand [1987-90] AJHR I 8c, 11.

¹²¹ Justice and Law Reform Committee, above, 3.

General decides not to report. Also as in the UK, the select committee would be free to report regarding amendments made after the section 7 process has taken place, thus rectifying problems arising as a result of the section 7 requirements not being ongoing. Finally, the transparency of the process in terms of assessing the existence and extent of derogations from human rights would be enhanced and scrutinised, again without interfering with legal professional privilege.

The outcome of these changes would be to enhance the effectiveness of the section 7 process, using the UK model as a guide. That is, the process would be of more assistance to the legislature in its duty to uphold human rights. The process would also be improved in its ability to inform public and parliamentary debate in relation to potential derogations from those rights. The existence of section 4 BORA¹²² and the doctrine of parliamentary sovereignty prevent compulsory compliance with the BORA. However, an improved section 7 procedure and a Parliamentary select committee could at least ensure that any derogations are made with maximum awareness, transparency and consequent accountability to the NZ electorate.

¹²²New Zealand Bill of Rights Act 1990, s4.

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VI APPENDIX

8 April 1991

ALL MINISTERS

ALL CHIEF EXECUTIVES

Monitoring Bills for Compliance with the New Zealand Bill of Rights Act 1990

- 1 Section 7 of the New Zealand Bill of Rights Act 1990 places the Attorney-General under an obligation to draw to the attention of the House any provision in a Bill that appears to be inconsistent with any of the rights and freedoms contained in the Act.
- 2 Such a report is made –
 - (a) In the case of a Government Bill, on its introduction; and
 - (b) In the case of any other Bill, as soon as practicable after its introduction.
- 3 So that the Attorney-General can make such a report where that is appropriate, Bills will have to be monitored for compliance with the New Zealand Bill of Rights Act 1990. Accordingly, an interim procedure (which will be reviewed at the end of 1991) has been put in place for the monitoring of Bills.
- 4 An outline of the procedure is as follows:
 - (1) The procedure applies to all Bills (other than Imprest Supply Bills and Appropriation Bills as they are basically standard form Bills made up of provisions that would not be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990).

- (2) Where a Government Bill (other than an Imprest Supply Bill or an Appropriation Bill) reaches the drafting stage, Parliamentary Counsel will refer that Government Bill to the Department of Justice (unless that Government Bill is being promoted by the Department of Justice) so that an officer of the Law Reform Division of that department can consider whether any provision of that Government Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.
- (3) Where a Government Bill that is being promoted by the Department of Justice reaches the drafting stage, Parliamentary Counsel will refer that Government Bill to the Crown Law Office so that an officer of the Crown Law Office can consider whether any provision of the Government Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.
- (4) Where the Parliamentary Counsel who refers a Government Bill to the Department of Justice or the Crown Law Office considers that any provision of that Government Bill may be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, that Parliamentary Counsel shall, in referring the Bill, identify that provision.
- (5) Where a Bill that is not a Government Bill is introduced, the Department of Justice will examine that Bill as soon as practicable after its introduction.
- (6) Where, on examination, no provision of the Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the officer who conducts the examination shall –
 - (a) In the case of a Government Bill, so inform the Parliamentary Counsel who is drafting the Bill; and
 - (b) In any other case and the Chief Parliamentary Counsel.

- (7) Where, on examination, any provision of a Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the officer who conducts the examination shall –
- (a) In the case of a Government Bill, report accordingly both to the Attorney-General and to the Parliamentary Counsel who is drafting the Bill; and
 - (b) In any other case, report accordingly both to the Attorney-General and to the Chief Parliamentary Counsel.

- 5 The Department of Justice is to examine Government Bills because it has the necessary expertise. The Crown Law Office is to examine Bills promoted by the Department of Justice to avoid any perception of conflict of interest.
- 6 If a department requires information about the ambit of the New Zealand Bill of Rights Act 1990, it should direct its inquiries to the Law Reform Division of the Department of Justice.

PAUL EAST

ATTORNEY-GENERAL

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