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Reconstituting the Constitution

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was proposed in 1985, the initial White Paper proposal was for it to be supreme law.[31] That proposal was rejected at the time as there appeared to be a concern that it would concentrate too much power in the hands of the unelected judiciary.

Whether New Zealanders are interested in revisiting that perspective is something that will, no doubt, be the subject of attention during the planned Constitutional Review exercise. It would of course represent a fundamental shift in our constitutional arrangements, albeit that adopting a supreme law Bill of Rights would bring New Zealand into line with most other common law jurisdictions. We do not pursue the idea further here.

9.3.1.2 Adopting a Bill of Rights Based on the Canadian Charter

The Bill of Rights could be amended to give greater powers to the courts and, in our view, still preserve parliamentary sovereignty. This is the position in Canada under the Canadian Charter. The Canadian courts can refuse to apply legislation that is inconsistent with rights and freedoms contained in the Canadian Charter. However, under s 33 of the Charter, the Canadian federal and provincial Parliaments are allowed to stipulate in legislation that the legislation (in whole or part) is to operate notwithstanding any inconsistency with Charter rights and freedoms.[32] This is known as using a "notwithstanding clause". In other words, a Parliament can opt out of the Charter on a case-by-case basis.

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[31] See *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A6.

[32] Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act 1982 (Canada)), s 33, which provides:

Exception where express declaration

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

This allows a Parliament to distinguish between accidental and deliberate breaches of rights. If a Parliament does not mean for a piece of legislation to breach Charter rights then it will not include a notwithstanding clause and the courts will ensure, through their power to refuse to apply legislation, that no breach of rights occurs. However, if a Parliament does decide that a piece of legislation should breach rights then it will say so by including a notwithstanding clause.

Perhaps the better function of a notwithstanding clause is its ability to settle debates about whether or not a breach of a right or freedom is justified in a free and democratic society. A Parliament may pass a law that it is aware infringes on a right, but considers that this breach is nonetheless justified. A court may then decide that the breach is not justified. Whether or not any given breach of a right or freedom is justified in a free and democratic society can be contentious. If the Parliament that passed the legislation decides to affirm its original view and disagree with the court, it could do so by passing a notwithstanding clause that would force the courts to apply the legislation, notwithstanding the court's view.

The Canadian model moves beyond the interpretive bill of rights model by giving courts greater powers to protect rights and by giving citizens enhanced participation in human rights protection through this court action, yet still allowing Parliament to be the ultimate forum for resolving questions of what interferences of rights and freedoms can occur. We would argue that it thus preserves parliamentary sovereignty, as we consider parliamentary sovereignty to be the principle that Parliament has the ultimate power to determine what will and will not be law.[33]

It is interesting to note that, while both the Canadian Charter and the New Zealand Bill of Rights preserve parliamentary sovereignty, the UNHRC (which reviews nations' consistency with the ICCPR) has criticised the operative provisions of New Zealand's Bill of Rights more than it has criticised those in the Canadian Charter. The Committee has criticised the Bill of Rights for having "no higher status than ordinary legislation"[34] but appears not to have levelled criticism at the operative provisions of the Canadian Charter,[35] even though Charter rights can still be overridden by Parliaments.

It has been noted by Canadian academics that the Canadian Charter's notwithstanding clause provides for an unique institutional balance of power, by giving courts the power to refuse to apply legislation inconsistent with the Charter but still giving Parliament ultimate determination of what interferences of rights and freedoms can

[33] Butler (1997) at 340.

[34] United Nations Human Rights Committee, Concluding observations on New Zealand's fourth periodic report (CCPR/CO/75/NZL) 7 August 2002, para 8; and United Nations Human Rights Committee, Concluding observations on New Zealand's third periodic report (CCPR/C/79/Add.47; A/50/40, paras 166–191) 3 October 1995, para 176.

[35] See United Nations Human Rights Committee, Concluding observations on Canada's fifth periodic report (CCPR/C/CAN/CO/5) 20 April 2006; and United Nations Human Rights Committee, Concluding observations on Canada's fourth periodic report (CCPR/C/79/Add.105) 7 April 1999.

occur.[36] Structural provisions in the Charter, including the notwithstanding clause, have even been touted the "primary constitutional safeguard against tyranny."[37]

The inclusion of the notwithstanding clause in the Charter was contentious and came about as the result of a political compromise between giving the Charter rights supreme constitutional status and giving federal and provincial leaders the power to declare a particular statute applies notwithstanding inconsistency with the Charter's provisions.[38] Given this political context, the very existence of the clause can arguably be considered an embodiment of the institutional balancing between Canada's legislature and judiciary but the elected representatives having the final say.

We would argue that adopting the Canadian model, which increases the judiciary's ability to protect rights while preserving parliamentary sovereignty, would adjust New Zealand's institutional balance in a way which could be more favourably regarded by the UNHRC in its next review.

9.3.1.3 Adopting a Bill of Rights Based on the Human Rights Act 1998 (UK)

As an alternative to the Canadian model, the Bill of Rights could still be strengthened while remaining an interpretive bill of rights, by expressly stating that the courts have the power to make declarations of inconsistency, as is the case under the Human Rights Act 1998 (UK).[39] A declaration of inconsistency occurs when

[36] Kelly and Murphy (2001) at 4.

[37] Ibid.

[38] Cohen (1986) at 69.

[39] Human Rights Act 1998 (UK), s 4, which provides:

> **4 Declaration of incompatibility**
>
> (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
>
> (4) If the court is satisfied –
>
> (a) that the provision is incompatible with a Convention right, and
>
> (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility.
>
> (5) In this section "court" means –
>
> (a) the House of Lords;
>
> (b) the Judicial Committee of the Privy Council;

the courts cannot find a tenable meaning of legislation that is consistent with the Bill of Rights, and so make a declaration that the legislation is inconsistent with the Bill of Rights and allow it to operate with the inconsistency.

The courts in Victoria,[40] the Australian Capital Territory,[41] Ireland[42] and, as mentioned, the United Kingdom[43] have all expressly been given the power to make declarations of inconsistency. In our own Human Rights Act 1993, the Human Rights Review Tribunal has had the express power to make declarations of inconsistency since 2002.[44]

In the United Kingdom some 26 declarations of inconsistency were made between October 2000 and July 2010 – a little less than three per year.[45] So far the New Zealand Human Rights Review Tribunal has made a declaration of inconsistency in respect of primary legislation on only one occasion – the case of *Howard v Attorney-General*[46] about a provision in the ACC legislation that excluded people aged over 65 years from accessing vocational rehabilitation services (an issue which, in any event, has now been addressed and fixed by Parliament).

(c) the Courts-Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility") –

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

[40] Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36.

[41] Human Rights Act 2004 (ACT), s 32.

[42] European Convention on Human Rights Act 2003 (Ireland), s 5.

[43] Human Rights Act 1998 (UK), s 4.

[44] Human Rights Act 1993, s 92J. The Human Rights Amendment Act 2001, which inserted the relevant provisions, came into force on 1 January 2002 (s 2(1)).

[45] Joint Committee on Human Rights, *Responding to Human Rights Judgments* (available from http://www.justice.gov.uk/responding-human-rights-judgements-2009-2010.pdf), page 42). 26 declarations of incompatibility have been made. Of these 26:

- 18 have become final (in whole or in part) and are not subject to further appeal;
- 8 have been overturned on appeal.

Of the 18 declarations of incompatibility that have become final:

- 10 have been remedied by later primary legislation;
- 1 has been remedied by a remedial order under s 10 of the Human Rights Act;
- 4 relate to provisions that had already been remedied by primary legislation at the time of the declaration;
- 3 are under consideration as to how to remedy the incompatibility.

[46] *Howard v Attorney-General* [2008] NZHRRT 10 (15 May 2008).

If the New Zealand courts were given the express power to make declarations, then (as well as ending any residual debate about whether courts can make declarations of inconsistency) a number of benefits would follow.

In particular, a declaration of inconsistency could become a stand-alone remedy so that a plaintiff could take an action to the courts on the sole basis that they seek a declaration of inconsistency regarding a piece of legislation. This is an important way to affirm rights and freedoms, given that affirming rights is about affirming the rights of each individual person, and not just about the courts and Parliament having a dialogue about rights. An individual should be able to go the court to attain a declaration that their rights and freedoms are not being observed. It is important that a citizen is able to participate in the protection of rights and freedoms even when their rights are not infringed. As an example, if the courts had an express power to make declarations of inconsistency, then those who felt that the Electoral Finance Act 2007 unjustifiably interfered with their freedom of expression could have argued this in the courts and sought a declaration.

The other benefits of an express power to make declarations of inconsistency relate to making the government respond to such declarations, and having that dialogue about rights between the different branches of government.

However, under a model where courts can issue declarations of consistency, New Zealand may not escape the same criticism from the UNHRC that citizens lack an "effective remedy".

9.3.1.4 Our View

We favour strengthening the responses available to the courts when confronted with a violation of human rights. Our preferred model is one based on the Canadian Charter. It provides stronger incentives to individuals to protect their rights and overall provides for clearer role definition and processes.

Some might argue that the Canadian model is not in practice different to a supreme law model, because although there is a "notwithstanding" clause in the Canadian Charter, it has in fact never been invoked by the Federal Government (though it has been used by provincial governments). In practice, therefore, under the Canadian model the unelected judges of the Supreme Court have, more or less, the same powers that they would have under a supreme law model.

If that is indeed the case in Canada, the New Zealand public may not have the appetite to give the power to strike down legislation to unelected judges (just as there was no appetite for such change 20 years ago). But if one considers the approach of the New Zealand Parliament with respect to human rights, the "de facto supreme law" situation that may have arisen in Canada is unlikely to occur in New Zealand if New Zealand adopted the Canadian model. That is because the New Zealand Parliament may not be as reluctant to invoke a "notwithstanding" clause. In particular, the New Zealand Parliament has demonstrated, especially in recent times, that it is quite willing to override the Bill of Rights even where the

Attorney-General has reported that a bill is inconsistent with the Bill of Rights.[47] For the New Zealand public (or at least for those concerned about institutional transfers of power), the key feature that makes the Canadian model attractive is that the legislature remains supreme.

There would still be significant merit in retaining and enhancing the mechanism by which Parliament is alerted to potential breaches of rights in legislation, namely s 7 of the Bill of Rights, even though Parliament can and does legislate despite an adverse report under s 7, because of, inter alia, the important role that such reports have in shaping legislation during the policy development phase.

9.3.2 No Express Remedies Provision

The Bill of Rights was enacted without an express remedies provision. The draft Bill attached to the 1985 White Paper proposed an express remedies provision, but that provision was removed during the legislative process for reasons that are not entirely clear.[48] However, the absence of an express remedies provision has not prevented the courts from developing various remedies to address violations of human rights, including *Baigent* damages,[49] the exclusion of evidence,[50] and ordering a stay of proceedings.[51] The courts have also suggested that a declaration of inconsistency may be available under the Bill of Rights in certain circumstances.[52] However, the courts have never actually issued a declaration of inconsistency under the Bill of Rights.[53]

Although they may have their imperfections, these developments by the courts were essential to breathe life into the Bill of Rights. From the case law it emerges

[47] For example, in late 2010 the Attorney-General reported to Parliament, pursuant to s 7 of the Bill of Rights, that the Alcohol Reform Bill 2010 and the Criminal Procedure (Reform and Modernisation) Bill 2010 were inconsistent with the Bill of Rights and that such inconsistency could not be justified in a free and democratic society. Despite those reports from the Attorney-General, both Bills have continued through the legislative process, as yet without any amendment to address the Bill of Rights inconsistencies.

[48] In *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) *[Baigent's case]* at 699, Hardie Boys J speculated that the motive for dropping the explicit remedies clause that was contained in the White Paper draft was its close association with the supreme law status for the Bill of Rights that had been envisaged in the White Paper.

[49] Ibid.

[50] The prima facie exclusionary rule arose in *R v Kirifi* [1992] 2 NZLR 8 (CA), but the first extensive discussion of the "rule" took place in *R v Butcher* [1992] 2 NZLR 257 (CA). In *R v Shaheed* [2002] 2 NZLR 377 (CA) the Court of Appeal replaced the prima facie exclusionary rule with a balancing approach.

[51] See *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750. In *Williams*, the Supreme Court affirmed that a stay is available, but that a stay was not the mandatory or even the usual remedy for delay. It would not be appropriate to stay or dismiss the proceeding unless there could no longer be a fair hearing or it would otherwise be unfair to try the accused.

[52] For example, in [*Moonen*].

[53] For further comment, see Geiringer (2009).

that there was a real concern that, without appropriate remedies, the enactment of the Bill of Rights would be seen as merely paying lip service to New Zealand's international obligations.[54]

All of that said, in practice the courts have been reluctant to award a Bill of Rights remedy, particularly *Baigent* damages, in circumstances where a common law remedy is perceived as already providing sufficient redress for an unjustifiable breach of human rights.[55] Emphasising the residual character of remedies for a breach of the Bill of Rights, the courts have said that such remedies should only be awarded where other remedies are not sufficient.[56] This perhaps reflects the statement of Sir Geoffrey Palmer, made during the Bill's second reading that the Bill creates "no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue."[57]

Justice Susan Glazebrook, writing extra-judicially in the context of judicial review applications, has noted that litigants have generally framed their claims in terms of a more conventional piece of legislation and run the Bill of Rights as an alternative only.[58] Glazebrook J suggests that the broad language of the rights, combined with the potential for a s 5 justification notwithstanding a prima facie breach, makes it difficult to predict with any certainty whether an act or decision would be in breach of the Bill of Rights.[59] If Glazebrook J's suggestion – that litigants plead the Bill of Rights in the alternative – is correct, then the practice of the courts to treat Bill of Rights remedies as a supplement to traditional remedies is not an unreasonable practice.

In our view, it would be desirable to include an express remedies provision in the Bill of Rights. The current practice of the courts to characterise Bill of Rights remedies as residual is not necessarily consistent with promoting human rights. It follows then that we propose the inclusion of an express remedies provision in the Bill of Rights. The harder question is determining the form that the remedies provision takes. There are several options available. The guiding principles ought to be: tailoring the remedies provision to New Zealand's circumstances; ensuring that the flexibility of the courts' current approach is retained; and, in our view most importantly, ensuring that the Bill of Rights' causes of action are not relegated to "residual" causes of action.

At present, it seems that the absence of an express remedies provision is driving the judiciary to look first to common law remedies.[60] This appears to have the incidental

[54] *Baigent's case*.

[55] See, for example, *Manga v Attorney-General* [2002] 2 NZLR 65 (CA) [*Manga*] and *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) [*Dunlea*], both of which are discussed in McLay (2008) at 345.

[56] Ibid.

[57] 510 NZPD 3450 (14 August 1990).

[58] Glazebrook (2004) at [16].

[59] Ibid.

[60] See for example, *Manga* and *Dunlea*.

effect of undermining the potency of a Bill of Rights action. The drafters of the express remedies provision must be mindful of the present approach of the courts in relation to remedies, so as to avoid this phenomenon.

Many, but by no means all, other countries' bills of rights contain an express remedies provision[61] and the experience of overseas jurisdictions will be valuable in choosing a workable model for New Zealand. For example, and at a very high level, the remedies provision in the Human Rights Act 1998 (UK) is rather prescriptive and the process is rather detailed.[62] By

[61] For countries with bills of rights containing express remedies provisions, see, for example: s 24 (1) of the Canadian Charter of Rights and Freedoms (1982); s 38 of the South African Constitution (1996); s 8(1) of the Human Rights Act 1998 (UK); art 32 of the Indian Constitution. For countries with bills of rights that do not contain an express remedies provision, see, for example: the United States Constitution (1789); and the Irish Constitution (1937). However, in both the United States and in Ireland, the Supreme Courts of both countries have inferred from their respective consitutions' supreme law status and the traditional role of Courts as guardians and enforcers of rights that courts have power to order appropriate remedies where a violation of constitutional rights has occurred.

[62] The remedies regime under Human Rights Act 1998 (UK) is primarily provided in s 8. Declarations of incompatibility are addressed in s 4 (which is extracted above at n 39). Section 8 of the Human Rights Act 1998 (UK) provides:

8 Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining –

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated –

(a) in Scotland, for the purposes of s 3 of the [1940 c. 42.] Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

contrast, the remedies provision in the Canadian Charter is framed rather broadly.[63]

We favour an amalgam of the two approaches.[64] The general principle ought to be that a court is empowered to award any remedy that is just in all the circumstances. That said, the courts ought to have a clear and explicit mandate as to all of the remedies available to it. Given the current approach, it seems that such a mandate can really only be achieved by an express direction from the constitutional document itself.

Moreover, to avoid the Bill of Rights having a "residual" status, we consider that an express remedies provision should provide that a court is not to deny a plaintiff a remedy in relation to a claim based on the Bill of Rights simply because the plaintiff can find in the common law a remedy which is adequate to vindicate the plaintiff's rights.

(b) for the purposes of the [1978 c. 47.] Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section –

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under s 6(1).

[63] Canadian Charter of Rights and Freedoms (1982), s 24, the English version of which provides:

Enforcement of guaranteed rights and freedoms

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[64] The remedies provision that we propose is:

 # Remedies

(1) Subject to s 4, a court may grant the relief it considers appropriate for a breach of this Bill of Rights unless –

(a) the breach is the result of an act done or a decision made under an enactment; and

(b) the enactment cannot be given a meaning that is consistent with this Bill of Rights.

(2) A court must not deny relief under subsection (1) by reason only that relief can be sought another enactment or rule of law.

9.3.3 *Attorney-General Vetting Procedure*

Section 7 of the Bill of Rights requires the Attorney-General to bring to the attention of the House of Representatives any provision in the introduction copy of a Bill that appears to be inconsistent with the Bill of Rights.[65] This reporting requirement was not contained in the White Paper Draft Bill of Rights,[66] but was proposed in the Justice and Law Reform Committee's Final Report on the White Paper.[67] In recommending that the original supreme law bill of rights proposed in the White Paper be replaced by a statutory bill of rights the Committee proposed some new measures that would give the latter some teeth. The duty to report to Parliament on the Bill of Rights inconsistency was one of these.

The s 7 reporting requirement has had a significant and important role to play in creating visibility for BORA at the policy formulation and legislative drafting phases within the executive. It has, therefore, contributed in a real and practical way to the observance of human rights in New Zealand. Nonetheless, it is deficient in a number of respects and could be improved in a number of ways.[68]

First, the s 7 obligation only arises in respect of the introduction copy of a Bill. Accordingly, there is no statutory obligation on the Attorney-General to report inconsistencies with the Bill of Rights that appear in amendments to the introduction copy of a Bill.[69] There have already been a number of incidents in which BORA-inconsistent amendments to the introduction copy of a Bill have been incorporated into enacted legislation. The best-known example occurred in 1998. It concerned amendments to the introduction copy of a Bill designed to implement the so-called "home invasion" amendments to the Crimes Act 1961 and the Criminal Justice Act 1985. The particular amendments violated s 25(g) of the Bill of Rights as they purported to retrospectively increase the mandatory term of imprisonment in respect of murders commissioned in the course of a home invasion. They were introduced by way of Supplementary Order Paper by a non-government MP and formed part of a deal agreed to by the government in order to be able to pass its "home invasion" amendments.[70] No report was undertaken on

[65] New Zealand Bill of Rights Act 1990, s 7.

[66] (1985) AJHR A.6.

[67] (1998) AJHR 1.8C, 3 and 10.

[68] See Lester (2002); Butler (2000).

[69] That is not to say that the Bill of Rights consistency cannot be addressed at later stages of a Bill's passage through Parliament. References to the Bill of Rights are becoming more frequent in select committee reports and in Parliamentary Debates more generally: see Hiebert (2004).

[70] The Member of Parliament who had promoted the amendments stated, "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, and it seems that the majority of parliamentarians wish that to be so, then *the impact of that provision will affect those who are now before the Courts on murder charges in the context of home invasion*.": 578 NZPD 17687 (24 June 1999) (Emphasis added).

these amendments and they slipped onto the statute book without the benefit of a formal report.

Secondly, s 7 of the Bill of Rights focuses on a reporting obligation, but does not provide a mechanism that channels the productive use of the information gleaned through the making of such a report. The creation of a select committee charged with the scrutiny of bills for consistency with the Bill of Rights had been proposed during the enactment of the Bill of Rights.[71] The select committee would have ensured that the Attorney-General's reporting obligation under s 7 would be monitored for quality and that issues of consistency with the Bill of Rights could be dealt with in a focused way.[72] However, a select committee dedicated to Bill of Rights scrutiny has not been created, nor has Bill of Rights scrutiny been added to the mandate of a particular existing select committee. Instead, Bill of Rights consistency issues arise before the relevant subject-matter select committee on an ad hoc basis, and are very much driven by the expertise and interest of individual committee members and by the quality and thrust of submissions received from members of the public and departmental officials.

Thirdly, because the views of successive Attorneys-General have been that the obligation to report pursuant to s 7 only arises where (a) he or she is of the view that a provision *is* inconsistent with the Bill of Rights (not may be); and (b) the concept of inconsistency with the Bill of Rights is only triggered where the limit placed on a Part II right or freedom is not reasonable in terms of s 5 of the Bill of Rights. Parliamentarians are not advised through the formal s 7 mechanism of those instances where the consistency of a proposed measure with the Bill of Rights is a matter of fine judgement (and the Attorney-General's assessment is that this judgement should be exercised in favour of consistency with the Bill of Rights). Thus, so it is argued, Parliamentarians are kept "in the dark" on many rights issues and are completely reliant on receiving alternative streams of advice (from, for example, submissions received from the public) in order to: (a) realise that a particular proposal may implicate rights and freedoms protected by the Bill of Rights; and (b) be able to assess whether or not the particular limit in the proposal is or is not a reasonable limit on rights and freedoms protected by the Bill of Rights. In turn, this means that the ability of s 7 to provide guidance to MPs is seriously compromised.

Possible ways of remedying these deficiencies could include establishment of a dedicated parliamentary select committee as originally proposed (which is explored in more detail below), the expansion of the vetting duty beyond the introduction stage, and release of all vetting advices received by the Attorney-General. Each of these options would bring with it a cost, but if an enhanced scrutiny of legislation for consistency with the Bill of Rights would result the cost may well be worth incurring.

[71] 502 NZPD 13040 (10 October 1989) (Geoffrey Palmer).

[72] 510 NZPD 3764 (21 August 1990) (Richard Northey).