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Reconstituting the Constitution

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Chapter 9
Protecting Rights

Andrew Butler and Petra Butler

> We are determined, as a country, to make human rights relevant in the daily lives of New Zealanders and of citizens around the world.
>
> Hon Simon Power, Minister of Justice, to the United Nations Human Rights Committee.

9.1 Introduction

It is nearly 21 years since the New Zealand Bill of Rights Act 1990 (Bill of Rights) came into force.[1] It is a timely opportunity to reflect on the place of the Bill of Rights in this country and, in particular, to reflect on the effectiveness of the Bill of Rights in protecting fundamental rights and freedoms. That is not to say that we are commenting on the Bill of Rights merely because of this apparent milestone. Rather, it is timely because over the course of two decades, issues have emerged in New Zealand's approach to protecting rights, and it is important to address these issues before they become entrenched problems.

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[1] The Bill of Rights received Royal Assent on 28 August 1990, and came into force 28 days thereafter on 25 September 1990.

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In 1978, New Zealand ratified the International Covenant on Civil and Political Rights (ICCPR).[2] As a party to the ICCPR, New Zealand has made a commitment to respect the rights recognised in the ICCPR.[3] In particular, New Zealand has undertaken to take steps necessary to give effect to the rights recognised in the ICCPR,[4] and has undertaken to provide "effective remedies" in respect of rights violations.[5]

New Zealand's legislative implementation of these international obligations, primarily through the enactment of the Bill of Rights, has been deficient in two obvious respects. Firstly, the Bill of Rights does not encapsulate all of the rights recognised in the ICCPR.[6] Secondly, the Bill of Rights does not contain an express remedies provision. Despite the absence of an express remedies provision in the Bill of Rights, the New Zealand courts have developed a number of remedies to address violations of human rights. However, the current position with respect to remedies is far from satisfactory.[7]

These deficiencies, among others, have been the subject of criticism from the UN Human Rights Committee (UNHRC).[8] In a similar vein, the UNHRC has raised concern that, because the Bill of Rights lacks supreme law status, individuals are deprived of an effective remedy in circumstances where Parliament has legislated contrary to rights.[9] This line of criticism arises, of course, because the courts, under the current constitutional arrangements, cannot invalidate legislation.[10]

Under the current arrangements, the reality is that the success or otherwise of vindicating rights that have been violated by legislation depends largely on the "political capital" of the "cause". In our view, it is naive to assume that political assessment of the political capital of a given situation will always compel a parliamentary course of action that does not unjustifiably violate rights. That said, the legislature's assessment of the extent to which a right may be justifiably limited is one that should be afforded a certain amount of respect. After all, legislation is mostly (but not always) informed by considered policy advice, and legislation does have the quality of being enacted by a representative body. However, to completely deny an affected individual the opportunity to challenge a legislative violation of his or her rights in a neutral, independent, and respected forum – the domestic courts – over-protects the legislative process and under-protects the individual.

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[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) [ICCPR].

[3] Ibid, art 2(1).

[4] Ibid, art 2(2).

[5] Ibid, art 2(3).

[6] For example, the Bill of Rights does not guarantee a right to privacy and family life (art 17 of the ICCPR).

[7] For further comment see McLay (2008).

[8] *Concluding Observation of the Human Rights Committee on New Zealand's Fifth Periodic Report* CCPR/C/NZL/CO/5 (2010).

[9] Ibid.

[10] New Zealand Bill of Rights Act 1990, s 4, and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

There is a fear that increasing the institutional power of the courts such that they can review legislation will have an unbearably detrimental impact on the independence of the judiciary.[11] At a high level, the concern is that judicial appointments may become politicised. The process of appointment to the Supreme Court in the United States is the usual example trotted out to demonstrate how this concern has indeed materialised overseas. It is not particularly convincing in that there are many other countries where judges have similar powers, and the process around their appointment is not politicised. Moreover, the role of the judiciary that we advocate in this paper – one based on the role of the judiciary in Canada – ameliorates the potential politicisation of judicial appointments to a significant extent.

The Bill of Rights is deficient in several other respects: the Attorney-General vetting procedure does not reflect the fact that legislation can change dramatically during the legislative process; social and economic rights are not mentioned at all in the Bill of Rights; there is no right to privacy in the Bill of Rights; nor is there a right to property.

But it is not appropriate to completely focus on the negative. The Bill of Rights has worked reasonably well in protecting those rights it guarantees since its enactment. In particular, in the criminal law sphere, the Bill of Rights has been utilised to secure the fair trial rights of the accused (although the position with respect to the presumption of innocence under the Misuse of Drugs Act 1975 remains a concern).[12] Moreover, the Bill of Rights vetting obligations have given human rights a greater presence in the legislative process than was probably the case before the Bill of Rights was enacted. There has been enhanced recognition given to freedom of expression in the contexts of censorship, defamation, discrimination, as well as in interpreting the criminal law. There has also been a growing awareness of the right to equality and freedom from discrimination, an awareness for which organisations such as the Human Rights Commission can take credit.

Despite these achievements, if New Zealand is to truly honour its international obligations under the ICCPR, and to ensure that the concept of individual is actually given credence when we talk about individual human rights, certain structural issues must be confronted. In our view, the most serious is the balance of power between Parliament and the courts. At the outset we caution that advocating that New Zealand honour its international obligations is not saying that New Zealand should embark on a fundamental shift in the balance of institutional power simply

[11] This argument was rejected in the White Paper. See (1985) AJHR A.6, p. 41 (para 6.7).

[12] In fact, despite the relevant Attorney-General reports referencing *Hansen* (which was delivered by the Supreme Court on 20 February 2007) and stating that there is a problem with reverse onus provisions, on 14 March 2008 Parliament enacted the Misuse of Drugs (Classification of BZP) Amendment Act 2008, and on 22 April 2010 the government introduced the Misuse of Drugs Amendment Bill 2010 (126-1), both of which have the effect of expanding the application of the reverse onus provision in the Misuse of Drugs Act 1975. The reports are *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs (Classification of BZP) Amendment Bill 2007* and *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs Amendment Bill 2010*.

to please the UNHRC. On the other hand, New Zealand's international obligations under the ICCPR should not be dismissed as hollow commitments made by a previous generation. On the contrary, these commitments embody an international consensus as to the essential protections that should be afforded to citizens against encroachments by the State on fundamental rights and freedoms.

Giving the domestic courts the ability to review legislation that violates the Bill of Rights and broadening the range of rights protected by the Bill of Rights are endeavours that should be undertaken, first and foremost, for the benefit of all New Zealanders. Enhancing the protection of the fundamental human rights of all New Zealanders is not inconsistent with honouring this nation's international obligations.

This paper critically examines the operation of the Bill of Rights in today's New Zealand. In Sect. 9.2, the areas in which the Bill of Rights has worked well are briefly canvassed. In Sect. 9.3, the areas in which the Bill of Rights could be improved are examined – this is the focus of this paper. In Sect. 9.4, this paper asks whether a written constitution would make a difference. Section 9.5 contains the conclusions.

9.2 Areas Where the Bill of Rights Is Working Well

We consider that the Bill of Rights has worked well in a number of areas. There are two areas that merit specific acknowledgment. First, freedom of expression has been protected in censorship decisions,[13] broadcasting standards decisions,[14] and in interpreting the criminal law.[15] Even among fundamental civil and political rights, freedom of expression occupies a special place given the importance it has in a free and democratic society. It is therefore pleasing that the courts and other bodies have given the right to freedom of express a broad and generous interpretation.

Secondly, the promotion of equality and anti-discrimination in our view has been advanced through the efforts of organisations such as the Human Rights Commission and active non-governmental organisations. Giving the Human Rights Review Tribunal the power to issue declarations of inconsistency under Part 1A of the Human Rights Act 1993 was an encouraging development.[16] It still remains to

[13] See, for example, *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, (1999) 5 HRNZ 224 (CA).

[14] Decisions of the Broadcasting Standards Authority are available at http://www.nzlii.org/nz/cases/NZBSA/.

[15] See, for example, *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

[16] Part 1A of the Human Rights Act 1993 came into force on 1 January 2002. A breach of Part 1A occurs where, inter alia, an enactment is made that is an unjustified limit on the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990. Under s 92 J of the Human Rights Act 1993, if the Human Rights Review Tribunal finds that an enactment has been made in breach of Part 1A, then the Tribunal may grant a declaration of inconsistency (but may not award any other remedy such as those listed in s 92I(3) of the Human Rights Act 1993).

be seen whether the courts will depart from or clarify the Court of Appeal's decision in *Quilter*.[17] In our view, *Quilter* has left anti-discrimination law in New Zealand in a rather unhappy place. For instance, each of the judges in *Quilter* takes a different approach to the discrimination analysis, and the majority's approach allows for an unstructured discrimination analysis. As the "leading case" on s 19 of the Bill of Rights, *Quilter* ought to have provided guidance as to the proper approach to the discrimination analysis. Instead, as the Human Rights Review Tribunal recently put it in *CPAG v Attorney-General*,[18] we are left with "difficulties in articulating exactly what the word 'discrimination' was intended to mean". From a broader perspective, inherent in the approach of the Court of Appeal in *Quilter* in finding that the Marriage Act 1955 is incapable of being read consistently with the Bill of Rights is a message from the Court that it does not view s 19 of the Bill of Rights as intended to be transformative.[19] It is encouraging, however, that despite the confusion arising from *Quilter*, the Human Rights Review Tribunal has developed (in light of New Zealand and overseas jurisprudence) a clear approach to discrimination law.[20] At the time of writing, two important discrimination cases are progressing through the judicial hierarchy: *Smith v Air New Zealand (Smith)*,[21] and *Ministry of Health v Atkinson (Atkinson)*.[22] It remains to be seen how the Courts will approach discrimination law in this iteration of cases, although there are indications in both *Smith* and *Atkinson* that a robust, structured approach will emerge.

While there are particular outcomes in particular cases with which we disagree, on the whole, in these two contexts (and indeed in others) the Bill of Rights has worked reasonably well.

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[17] *Quilter v Attorney-General [Quilter]* [1998] 1 NZLR 523. In *Quilter,* three lesbian couples argued that it was unlawful for the Registrar of Births, Deaths and Marriages to deny them marriage licences under the Marriage Act 1955. The 1955 Act does not define marriage, although the common law understanding of "marriage" has been of a union between members of the opposite sex. The Court of Appeal ruled: first, by a majority (3:2) that a prohibition on same-sex marriage did not amount to a prima facie infringement of the appellants' right to be free from discrimination; and secondly, unanimously that the concept of marriage contemplated by the Marriage Act was the traditional female–male partnership and, accordingly, it would not be right to interpret the Act in a manner consistently with the right to be free sexual orientation discrimination because that would be to repeal the Act contrary to s 4 of the Bill of Rights.

[18] *CPAG v Attorney-General [CPAG]* [2008] NZHRRT 31 (16 December 2008) at [41].

[19] For further comment on our disagreement with the approach in *Quilter*, see Butler and Butler (2005) at 490.

[20] For instance, see *CPAG v Attorney-General [CPAG]* [2008] NZHRRT 31 (16 December 2008) at [126] and [207] where the Tribunal clearly and succinctly sets out its methodology.

[21] *Smith v Air New Zealand* [2011] NZCA 20. As at the date of writing, no appeal rights have been exercised in respect of the decision of the Court of Appeal.

[22] *Ministry of Health v Atkinson & Ors* HC Wellington CIV-2010-404-000287, 17 December 2010. As at the date of writing, the Ministry of Health has sought leave to appeal the decision of the High Court.

9.3 Areas Where the Bill of Rights Could Be Improved

In our view the Bill of Rights could be strengthened by addressing a number of concerns. In short, our concerns are:

- There is no domestic remedy in cases where Parliament has unjustifiably legislated in breach of the Bill of Rights (except that in relation to discrimination, Part 1A of the Human Rights Act 1993 permits a declaration of inconsistency to be made), which means that, all idealism about the so-called "dialogue model" and the power of the citizenry aside, legislative violations of rights are not subject to domestic challenge;
- The absence of an express remedies provision creates unnecessary uncertainty for litigants and may have had an adverse impact on the way in which courts approach claims for remedies for a breach of the Bill of Rights, which effectively relegates actions based on the Bill of Rights to a subsidiary status;
- The current vetting procedure under s 7 of the Bill of Rights does not provide for a review of legislative amendments submitted after a bill's introduction, which means that people can be left in blissful ignorance of the consequences of amendments on fundamental rights (and a cynic might suggest it allows politicians to wait for the latter stages of the legislative process to sneak in questionable amendments);
- The Bill of Rights does not contain a right to privacy, which means that New Zealand is not honouring its international obligations under the ICCPR;
- The Bill of Rights does not contain any social and economic rights, which means that New Zealanders who lack the basic necessities of life must rely on the benevolence of the particular government of the day; and
- The Bill of Rights does not explicitly refer to property rights, which means that New Zealanders miss out on protections for a right regarded by many as fundamental and one which, indeed, is to be found in most domestic human rights instruments and in the Universal Declaration of Human Rights (1948).

We will examine each area of concern in turn. In doing so, we will outline the present situation, outline the problems we perceive, and propose a possible solution. We also have some comments to make in relation to the Treaty of Waitangi.

9.3.1 Lack of Domestic Remedy Where Legislation Breaches Rights

As mentioned in the introduction to this paper, the UNHRC has raised concerns that New Zealanders have no domestic remedy where Parliament has legislated contrary to

fundamental rights.[23] This is because the courts lack the ability to invalidate legislation.[24] Under the Bill of Rights the courts' role is limited to one of interpretation.[25] This is no accident. Most of the criticism of the 1985 White Paper draft Bill of Rights was directed at the new role that the judiciary would have.[26] The criticism centred on the fact that the draft Bill would give unelected and unaccountable judges the power to invalidate the legitimate policy choices of democratically elected Members of Parliament.[27] However, those concerns were, in our view, misplaced. We agree with the White Paper comment that if the courts had such a power to invalidate legislation, it would be used very sparingly.[28] We say that because, in our view, the judiciary would be mindful of notions of deference and a desire for comity between the branches of government. The courts would only intervene where truly necessary.

Our view of the present situation is that it is unsatisfactory that where a New Zealander's fundamental human rights (other than the right to freedom from discrimination) are unjustifiably violated by primary legislation, the avenues for redress are rather unattractive: redress can be sought from the international organisations[29]; or redress can be sought by way of pursing the yet-to-be-determinatively-established remedy of a declaration of inconsistency for all the good it may bring in the absence of a clear parliamentary process such as that provided under the Human Rights Act 1993.[30]

In our view, the solution lies in adjusting, to a greater or lesser extent, the institutional balance of power. Possible solutions include:

- Adopting a Bill of Rights that is supreme law;
- Adopting a Bill of Rights based on the Canadian Charter of Rights and Freedoms (1982) (Canadian Charter); or
- Adopting a Bill of Rights based on the Human Rights Act 1998 (UK).

9.3.1.1 Adopting a Bill of Rights That Is Supreme Law

The Bill of Rights could be made supreme law, which would mean a departure from parliamentary sovereignty in favour of a system of judicial supremacy. It would thus represent a significant change to New Zealand's constitution. When the Bill of Rights

[23] *Concluding Observation of the Human Rights Committee on New Zealand's Fifth Periodic Report*, above n 8.

[24] New Zealand Bill of Rights Act 1990, s 4, and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 [*Hansen*].

[25] *Hansen*.

[26] (1987) AJHR I.14, p 8.

[27] Ibid.

[28] (1985) AJHR A.6, p44 (paras 6.16 and 6.17).

[29] For example, under the First Optional Protocol to the ICCPR, individuals can make complaints to the UNHRC where a State Party has violated one or more rights set forth in the ICCPR.

[30] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, (1999) 5 HRNZ 224 (CA) [*Moonen*].

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).