Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

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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).

As indentified above, one way the deficiencies with the present Attorney-General vetting procedure could be addressed is through the establishment of a dedicated human rights parliamentary select committee as originally proposed. A possible model is provided by the United Kingdom's Joint Committee on Human Rights (JCHR), a select committee which scrutinises Government Bills for compatibility with the European Convention on Human Rights and reports and makes recommendations to the House of Commons and the House of Lords.

The United Kingdom Law Commission has made statements as to the general advantages of having parliamentary committees dedicated to legislative scrutiny.[73] The United Kingdom Law Commission referred to some specific strengths of the JCHR, including its broad terms of reference, its regular consideration of submissions from outside organisations, and the way in which its diverse membership provides a range of expertise and adds to the JCHR's objectivity and credibility.[74] Although the United Kingdom Law Commission's report must be qualified to the extent that the United Kingdom has a joint committee of both of its houses of Parliament and New Zealand's Parliament is unicameral, its general points about diversity and objectivity remain relevant to the potential establishment of a human rights select committee in New Zealand.

If such a committee were established it would ensure that human rights issues are given scrutiny within the unique select committee stage of the legislative process. Lord Norton has noted that although the JCHR and other select committees have no formal powers to enforce their recommendations, their ability to drive change lies in the "authoritative and persuasive nature" of the reports they produce.[75]

There are instances in which warnings from the JCHR about rights-incompatibility were ignored by the United Kingdom government but were subsequently affirmed in court.[76] Even if the New Zealand government were to run the political risk of ignoring the warnings of a dedicated human rights select committee, the establishment of one would at least provide both the legislature and judiciary with meaningful reports on rights issues from the procedural stages of the legislative process, on matters which they could otherwise have been left "in the dark" about under the current section 7 vetting process alone.

In addition to establishing a dedicated human rights select committee, other ways in which Bill of Rights issues could be given a greater focus in the legislative process would be to expand the Attorney-General's vetting duty beyond the introduction stage and to release all vetting advices received by the Attorney-General.

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[73] Post-Legislative Scrutiny (Report) [2006] EWLC 302 (31 October 2006) at 24–26.

[74] Ibid.

[75] Ibid, at 27.

[76] Post-Legislative Scrutiny (Consultation Paper) [2005] EWLC 178 (22 December 2005) at 16. See, for example, *Secretary of State for the Home Department v Limbuela, Tesema and Adam* [2004] EWCA Civ 540; *R v Secretary of State for the Home Department ex parte Adam; R v Secretary of State for the Home Department ex parte Limbuela; R v Secretary of State for the Home Department ex parte Tesema* [2005] UKHL 66.

Each of the options canvassed above 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.

9.3.4 Right of Privacy

The Bill of Rights provides only partial recognition of an individual's right to privacy through the right to be free from unreasonable search and seizure[77] and the rights protecting a person's physical autonomy.[78] The White Paper stated that there is no general right to privacy in New Zealand law. It considered therefore that a general right to privacy should not be included in the Bill of Rights, but did acknowledge that the right was in the course of development.[79] That was 25 years ago and is now, in our opinion, a dated view. At the time it was made, a general right to privacy was to be found in the ICCPR[80] and the European Convention of Human Rights.[81] Subsequently a similar right is to be found in the bills of rights in Victoria,[82] the Australian Capital Territory[83] and the United Kingdom.[84] And of course there have been significant common law developments, such as the development of a privacy tort in New Zealand,[85] and a reshaping of the doctrine of breach of confidence in the United Kingdom. The right to privacy in the ICCPR, Victoria and the ACT is accompanied by a right against unlawful attacks on reputation, a right that is also recognised in the Irish Constitution.[86]

It appears that the original rationale for omitting this right no longer holds. Bills of rights protect individuals from interference by the State (that cannot be justified in a free and democratic society) in their autonomy and in what is personal and individual to them. Protecting against State interference with a citizen's privacy or the State damaging a citizen's reputation is an important function that a bill of rights can have, and has been implemented in other societies similar to New Zealand.[87]

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[77] New Zealand Bill of Rights Act 1990, s 21.

[78] Ibid, ss 9–11.

[79] *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A6, para 10.144.

[80] ICCPR, art 17.

[81] European Convention on Human Rights, art 8.

[82] Charter of Human Rights and Responsibilities Act 2006 (Vic), s 13.

[83] Human Rights Act 2004 (ACT), s 12.

[84] Human Rights Act 1998 (UK), Sch 1, Part 1, art 8.

[85] *Hosking v Runting* [2005] 1 NZLR 1 (CA); subsequently applied in *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 (CA) (affirmed *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 (SC)).

[86] Constitution of Ireland 1937, art 40.3.2°.

[87] See, for example, Human Rights Act 1998 (UK), s 1 (which incorporates art 8 of the European Convention of Human Rights into the ambit of the Act).

Developments in other jurisdictions (including recognising a general right to privacy in many national bills of rights, as noted above), developments in New Zealand with the emergence of a tort of privacy,[88] and the current work of the Law Commission in the area of privacy, are all developments that indicate that the rationale for the non-inclusion of a right to privacy in the Bill of Rights ought to be revisited.

New Zealand is obliged under the ICCPR to protect the right to privacy and the right against unlawful attacks on reputation.[89] Under art 17 of the ICCPR, everyone has the right to protection of the law against arbitrary or unlawful interference with his privacy, family, or correspondence and attacks on his honour and reputation.[90] Accordingly, New Zealand has an obligation to ensure that its laws afford such protection. While the inclusion of a right to privacy in the Bill of Rights is an important aspect of honouring New Zealand's obligation, by itself such inclusion is not sufficient. That is because the Bill of Rights on its face applies only to bodies covered in s 3 of the Bill of Rights (leaving aside the vexed question of the so-called "horizontal application" of the Bill of Rights). The protections envisaged by art 17 of the ICCPR are much broader than the protection against *State interference* with privacy, family, and reputation. Rather, those protections contemplate that State Parties ensure their *laws* protect their citizens' privacy, family, and reputation against interference by all comers. That must mean that State Parties are obliged to provide such protection, not only in their Bill of Rights (that is, the law that applies citizen *vis-a-vis* State), but also in their general law (that is, the law that applies citizen *vis-a-vis* other citizens).

In our view, the general law in this area – the recently conceived (and therefore underdeveloped) tort of privacy, the antiquated tort of defamation, and the Privacy Act 1993 – does not afford adequate protection. Inclusion of a privacy right in the Bill of Rights would influence the court's development of the torts of privacy and defamation. In particular, such inclusion may strengthen the weight given to a right to privacy in balancing against a defence based on freedom of expression. In our view, that would be a desirable development in light of New Zealand's international obligations.

9.3.5 Social and Economic Rights

The Bill of Rights does not contain any social and economic rights.[91] In our view, social and economic rights are essential to the practical enforcement and delivery of human rights. We repeat, as Dr. Rodney Harrison QC did in his 1998 seminar on

[88] See *Hosking v Runting* [2005] 1 NZLR 1 (CA).

[89] ICCPR, art 17.

[90] Ibid.

[91] By social and economic rights we mean the rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) [ICESCR].

protecting human rights, the moving words of former Commonwealth Secretary-General Sir Shridath Ramphal:

> Mindful that human rights are more than a legal shibboleth; that, indeed, they have no meaning for people who are hungry and unemployed and without hope of relief; that the right they strive for most urgently is the right to sustain life at a tolerable level of existence so that they can better enjoy those other more exotic civil and political rights of which we often speak; mindful that for most of your countries man's basic and most threatened right is the right of survival itself: mindful of all this, I urge you to let your concern for those rights ripen at the level of the grass roots where they have the best chance of taking root, rather than have them at loftier levels like **banners that buy no bread**.[92]

In 1978, New Zealand ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). In our view, the essential social and economic rights that are especially relevant in the New Zealand context are a right to housing,[93] a right to education,[94] and a right to health.[95] These three rights are essential to ensure that all citizens can enjoy their civil and political rights.

The legislative treatment of these rights varies. The Education Act 1989 provides that everyone is entitled to a free education.[96] There are, however, no equivalent direct legislative entitlements in respect of housing[97] or health.[98] Even though New Zealand has a reasonably good record on providing housing and healthcare to those in need, there are still people who find adequate healthcare cost-prohibitive, and there are still people who struggle to secure housing that is resonant with their own inherent dignity. In short, there are still too many people living in poverty.

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[92] Harrison (1998).

[93] ICESCR, art 25(1). New Zealand ratified the ICESCR on the same day that it ratified the ICCPR, namely 28 December 1978.

[94] Ibid, art 26.

[95] Ibid, art 25(1).

[96] Education Act 1989, s 3.

[97] According to the website of the Human Rights Commission (http://www.hrc.co.nz/report/chapters/chapter13/housing01.html, accessed 12 August 2010), the right to housing is not specifically provided for in any New Zealand legislation, although it is addressed in a range of central government housing policies, laws and entitlements, including: Building Act 1991 (including The Building Code, Schedule 1 of the Building Regulations 1992); Housing Improvements Regulations 1947 (under the Health Act 1956); Residential Tenancies Act 1986; Local Government Act 1974 (where still in force); Local Government Act 2002; Resource Management Act 1991; Fire Service Act 1975.

[98] According to the website of the Human Rights Commission (http://www.hrc.co.nz/report/chapters/chapter14/health01.html, accessed 12 August 2010), the right to health is expressed in a variety of legislation, including: New Zealand Public Health and Disability Act 2000 (PHDA); Local Government Act 2002; Health Act 1956; Health Practitioners Competence Assurance Act 2003; Mental Health (Compulsory Assessment and Treatment) Act 1992; Protection of Personal and Property Rights Act 1988; Alcoholism and Drug Addiction Act 1966; Health and Safety in Employment Act 1992 (and the 2002 Amendment); Smoke-free Environments Act 1990; Health and Disability Commissioner Act 1994; Privacy Act 1993.

We urge that serious consideration be given to the inclusion of a right to education, health, and housing in a strengthened Bill of Rights; if adopted, our preference would be that the rights be framed as positive guarantees. An argument against the inclusion of social and economic rights in the Bill of Rights is that such inclusion will inevitably place the judiciary in the unhappy position of having to decide how to allocate scarce resources taking into account factors which are inherently political and based on social policy. This, so the argument goes, is a role that the judiciary has neither the experience nor the training (not to mention the democratic mandate) to undertake with any great hope of satisfying both the affected individual and the needs of the wider population.

With respect, in our view, that will not be the role of the judiciary if the three mooted social and economic rights are included in the Bill of Rights. These social and economic rights are minimum standards; standards that all human beings are entitled to by virtue of their inherent dignity. Accordingly, it will be only in obvious cases where these rights will need to be invoked. Questions surrounding the justiciability of social and economic rights have been raised in comparative literature. But as Nolan, Porter, and Langford said in summarising their excellent review of arguments and case law concerning such justiciability questions, "concerns about the justiciability of social and economic rights are generally ill-conceived and run contrary to experience".[99] The review of Nolan, Porter, and Langford reveals that the courts in overseas jurisdictions have been able to give content and effect to a range of social and economic rights. In our view, the New Zealand courts will also be able to enforce social economic rights in a practical and effective manner.

9.3.6 Property Rights

One obvious omission from the Bill of Rights is a right not to be unjustly deprived of property.[100] The importance of property (including labour) to human well-being and freedom has been emphasised in many writings on human rights, including those of John Locke, William Blackstone, Georg Hegel and Henry Maine. Unsurprisingly then, a right to property is provided for in the Universal Declaration of Human Rights,[101] the European Convention on Human Rights,[102] the American Convention on Human Rights,[103] the African Charter on Human and Peoples'

[99] Nolan et al. (2007).

[100] For further discussion on the relationship between property and the constitution, see McLean (ed) (1999).

[101] Universal Declaration of Human Rights, art 17. We note that the ICCPR does not guarantee a right to property.

[102] European Convention on Human Rights, Protocol 1, art 1.

[103] American Convention on Human Rights, art 21.

Rights[104] and many national human rights charters and constitutions. The recently enacted bill of rights in Victoria also contains a right to property.[105]

Recognising and respecting a right to property is an important restraint on State power and provides comfort and certainty for those who have property that their property will be respected, or will only be taken with due compensation. While some argue that a right to property only serves to protect the well-off and risks perpetuating the hegemony of the moneyed, the reality is that overseas case law on property rights does not validate that proposition. The argument also ignores the fact that it is those who have only modest means who are often most affected by the unjustified deprivation of property rights.

It is also interesting that the effective guarantee of the right to property has been linked to economic prosperity. In a report released in 2009, the New Zealand Institute for the Study of Competition and Regulation at Victoria University argued that protecting a right to property is a crucial step towards transforming the economy to have a focus on investment in technology and high value-added businesses that are developed and owned locally. Drawing on economic analysis, the report argues that not adequately protecting a right to property affects the ability of the economy and the standard of living to grow.[106]

Parliament has twice considered inserting a right to property in the Bill of Rights and has declined to on both occasions,[107] partly, it would appear, because of a fear of what might be included in the term "property". If that is the concern, then as a minimum Parliament could simply include a right not to be deprived of *land* although that could result in under-effective protection of the new economy. An alternative formulation of a right to property could focus on the right to acquire and dispose of property[108] or the right to the use and enjoyment of one's property or possessions.[109]

The Regulatory Responsibility Taskforce also recommended that a principle against the taking of property be included in the Regulatory Responsibility Bill.[110] If that Taskforce Bill were enacted, then a right to property would have greater protection than the rights and freedoms contained in the Bill of Rights, given that the Taskforce Bill has a more rigorous vetting process and allows declarations of

[104] African Charter on Human and Peoples' Rights, art 14.

[105] Charter of Human Rights and Responsibilities Act 2006 (Vic), s 20.

[106] See Evans et al. (2009).

[107] The New Zealand Bill of Rights (Private Property Rights) Amendment Bill (a Member's bill in the name of Gordon Copeland) was defeated at second reading in November 2007 (see 643 NZPD 13352 (21 November 2007)). The New Zealand Bill of Rights (Property Rights) Amendment Bill was defeated at second reading in February 1998 (see 566 NZPD 6809 (25 February 1998)).

[108] See, for example, Universal Declaration of Human Rights, art 17 (1).

[109] See, for example, European Convention on Human Rights, Protocol 1, art 1; Human Rights Act 1998 (UK), Sch 1, Part 2, art 1.

[110] Regulatory Responsibility Bill (as recommended by the Regulatory Responsibility Taskforce), cl 7(1)(c).

inconsistency to be sought. The better place for protecting a right to property would in an improved Bill of Rights, with an enhanced vetting process and enhanced role for the judiciary. Including a right to property in the Bill of Rights as it currently operates may not have much impact on how the courts interpret legislation, as the common law has developed a principle of interpretation for legislation that affects property rights which is similar to the modern principle of legality.[111] But a right to property in the Bill of Rights would ensure a heightened level of respect for that right at the legislative level. If this was the case then, for example, the government would have had to explain its view on the rights consistency of the Foreshore and Seabed Bill. The Regulatory Responsibility Taskforce outlines other instances of taking of property without compensation.[112] The Prime Minister recently announced in his first address to Parliament in 2011 that his government "will introduce a Regulatory Responsibility Bill and send it to a Select Committee for submissions and debate."[113] As at the date of writing, the text of the next iteration of the Regulatory Responsibility Bill has not been made available, and there has been no indication either way as to whether the Bill will include a principle against the taking of property.

9.3.7 Treaty of Waitangi

The Treaty of Waitangi was included in the original draft of the Bill of Rights. It will be recalled that the original draft proposed an entrenched Bill of Rights that had status as supreme law. It seemed only fitting that the nation's founding document be accorded such status. The model we advocate based on the Canadian Charter does not give the Bill of Rights supreme law status. Accordingly, Māori (and indeed others) may still have the same concerns that they did about including the Treaty of Waitangi in a Bill of Rights that lacks supreme law status. The place of the Treaty in New Zealand's constitutional framework is an issue better dealt with as standalone issue, or as part of a complete constitutional review. Without having the benefit of such analysis, our tentative view is that we ought not to include the Treaty of Waitangi in a strengthened Bill of Rights. That said, however, if New Zealand adopts an all-encompassing written constitution, the Treaty we would have thought is highly likely to be included, as the Bill of Rights would be, as an essential part of that written constitution.

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[111] See, for example, *Laing v Waimairi County* [1979] 1 NZLR 321 (CA) at 324 per Richardson J, who cites *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 (PC) at 359 per Lord Warrington of Clyffe for the Court, and *Hartnell v Minister of Housing and Local Government* [1965] AC 1134.

[112] Report of the Regulatory Responsibility Taskforce (September 2009) at [2.11].

[113] Prime Minister's Statement to Parliament (8 February 2011). Available at: http://admin.beehive.govt.nz/sites/all/files/PM_Statement_to_Parliament.pdf

9.4 Would Having a Written Constitution Make a Difference?

It is often assumed that the existence of a written constitution necessarily entails a constitutional arrangement under which the judicial branch of government has the power to invalidate legislation that is inconsistent with the written constitution. This argument is made to advance opposition to a written constitution. The argument runs along the lines that a written constitution is simply incompatible with Westminster "tradition".

This assumption is based on a premise that is not necessarily correct. If a nation has decided to encapsulate, in a single written document, the key aspects of the relationships between the branches of government as well as between citizen and State, it does not necessarily follow that that document must provide that the judicial branch of government has the power to invalidate legislation inconsistent with the written constitution. For example, the Indian Constitution sets out a range of directive principles of social policy. But notwithstanding their constitutional status, those principles are not enforceable by the courts. In particular, art 37 of the Indian Constitution provides:

> The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Our mention of art 37 of the Indian Constitution is not intended to indicate support or otherwise for such provisions. Rather, we mention it to demonstrate that the assumption that having a single written constitution necessarily entails judicial power of invalidation is flawed. We may have been laboured this point somewhat, but we have done so to demonstrate the arrangements based on the Canadian Charter are not incompatible with having a written constitution. Indeed, having a written constitution and a strengthened Bill of Rights are complementary endeavours that will no doubt enhance understanding by all New Zealanders of their rights.

9.5 Conclusions

Under the institutional arrangements that we advocate, the courts would indeed have a power to invalidate legislation, unless Parliament has squarely confronted and accepted the political cost of violating rights by way of a notwithstanding provision. It need not be thought that such a shift in institutional power will lead to the politicisation of judicial appointments. The Canadian experience on which our recommendation is based demonstrates that the judiciary can remain independent despite the apparent political power it may possess.

In our view the inclusion of economic and social rights, a right to privacy, and a right to property, will strengthen the Bill of Rights. In addition to enhancing the satisfaction of New Zealand's international obligations and providing the benefits that we have canvassed above, encapsulating these rights in a written constitution will, at least in terms of perception, enhance the relevance of human rights to more New Zealanders.

In short, our recommendations are:

- The inclusion of a declaration of rights as a key part of a written constitution;
- Institutional arrangements based on the Canadian arrangements;
- The inclusion of a right to privacy, a right to property, social and economic rights;
- Practical measures to enhance access to forums in which rights can be vindicated, and to enhance awareness and understanding of the declaration of rights.

We do not think these recommendations are radical, nor do we think they should be cast aside as changes for the sake of change. But they are changes that need to be made.

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