

# WHAT THE NEW ZEALAND BILL OF RIGHTS ACT AIMED TO DO, WHY IT DID NOT SUCCEED AND HOW IT CAN BE REPAIRED

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*This article, by the person who was the Minister responsible for the introduction and passage of the New Zealand Bill of Rights Act 1990, reviews 25 years of experience New Zealand has had with the legislation. The NZ Bill of Rights Act does not constitute higher law or occupy any preferred position over any other statute. As the article discusses, the status of the NZ Bill of Rights Act has meant that while the Bill of Rights has had positive achievements, it has not resulted in the transformational change that propelled the initial proposal for an entrenched, supreme law bill of rights in the 1980s. In the context of an evolving New Zealand society that is becoming ever more diverse, more reliable anchors are needed to ensure that human rights are protected, the article argues. The article discusses the occasions upon which the NZ Bill of Rights has been overridden and the recent case where for the first time a declaration of inconsistency was made by the High Court in relation to a prisoner's voting rights. In particular, a softening of the doctrine of parliamentary sovereignty, as it applies in the particular conditions of New Zealand's small unicameral legislature, is called for. There is no adequate justification for maintaining the unrealistic legal fiction that no limits can be placed on the manner in which the New Zealand Parliament exercises its legislative power. Under the current arrangements, where the executive continues to dominate the House of Representatives, the legal status of the NZ Bill of Rights Act*

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*needs to be raised and the rule of law needs to be strengthened. Building on the long tradition of the entrenched provisions of the Electoral Act going back to 1956, the article argues that the NZ Bill of Rights Act should be given greater weight, so that the courts have the power to declare provisions invalid if they infringe the Act, while allowing parliament to override the judicial decision by a special majority of 75 per cent or a referendum of the electors by a simple majority.*

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## **I INTRODUCTION**

The purpose of this article is to suggest a course of constitutional action that can be contemplated in New Zealand now after 25 years of experience with the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights Act). The NZ Bill of Rights Act does not constitute higher law or occupy any preferred position over any other statute. As the article discusses, the status of the NZ Bill of Rights Act has meant that it has had positive achievements but it has not resulted in the transformational change that propelled the initial proposal for an entrenched, supreme law bill of rights. In the context of an evolving New Zealand society that is becoming ever more diverse, more reliable anchors are needed to ensure that human rights are protected. I argue for softening the doctrine of parliamentary sovereignty as it applies in the particular conditions of New Zealand's small unicameral legislature. There is no adequate justification for maintaining the unrealistic legal fiction that no limits can be placed on the manner in which the New Zealand Parliament exercises its legislative power. In our current arrangements, where our law-making system is in crisis and the executive continues to dominate the House of Representatives, the legal status of the NZ Bill of Rights Act needs to be raised and the rule of law needs to be strengthened.<sup>1</sup> Building on the long tradition of the entrenched provisions of the Electoral Act going back to 1956, I suggest that the NZ Bill of Rights Act should be given greater weight, so that the courts have the power to declare provisions invalid if they infringe the NZ Bill of Rights Act, while allowing Parliament to override the judicial decision by a special majority of 75 per cent or a referendum of the electors by a simple majority.

I harbour concerns about the New Zealand constitutional system that echo those of Professor Margaret Wilson, who in a recent and thoughtful book explained the issue in this way:<sup>2</sup>

There are three fundamental points to note about New Zealand's constitutional legal architecture. The first is that, like the United Kingdom, it has no formal constitutional document. The second point is that all constitutional legislation can be amended or repealed by a simple majority of the Parliament. The third point is that the notion of parliamentary sovereignty constrains the scrutiny of legislation by the courts.

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1 Matthew SR Palmer "New Zealand's Constitutional Culture" (2007) 22 NZULR 566 at 580 and 588.

2 Margaret Wilson *The Struggle for Sovereignty: New Zealand and Twenty-First Century Statehood* (Bridget Williams Books, Wellington, 2015) at 50.

Thus, we are led to the conclusion that the institutions of the State lack the capacity to restrain the abuse of executive power. I am increasingly nervous about the fluid nature of New Zealand's "unwritten" constitution and the time has come, in my view, to adopt a codified written constitution. This article will focus, however, on strengthening the NZ Bill of Rights Act, which is an essential step to rectifying that constitutional condition and producing a democracy that is better balanced.

## **II THE CASE FOR A BILL OF RIGHTS ADVANCED IN 1985**

The purpose of promoting the NZ Bill of Rights Act enacted in 1990 was to limit the powers of the executive and Parliament and to ensure that human rights were given greater legal weight. The New Zealand constitution then lacked checks and balances to a dangerous degree. The overweening power of the executive caused that great Australian constitutional lawyer, Professor Leslie Zines, to label New Zealand an "executive paradise".<sup>3</sup>

Now, as then, New Zealand does not have a written or codified constitution, as do the vast majority of countries around the world. We have few constitutional rules that cannot be altered easily. Our constitution is political, changes to it result from political activity and, consequently, the features of the constitution at any given time tend to reflect the outcome of political battles in Parliament. Our constitution evolves and mutates remorselessly, like a living, breathing organism.<sup>4</sup>

Subject to one exception, the basic constitutional framework remains the same today as when the NZ Bill of Rights Act was passed in 1990. The exception is important: the adoption of the mixed-member-proportional electoral system (MMP) has bridled the legislative activities of the executive to some degree, although not as much as might have been hoped. Certainly the quality of legislation has not improved.

The NZ Bill of Rights Act had its provenance in the Labour Party's Open Government Policy of 1984.<sup>5</sup> Almost all of the highly specific policy pledges were fulfilled. They included:

- reform of Parliament with a comprehensive select committee system;
- a bill of rights;
- protection for civil liberties;

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3 Leslie Zines *Constitutional Change in the Commonwealth* (Cambridge University Press, Cambridge, 1991) at 47. A surfeit of executive power was the reason I had written *Unbridled Power? – An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979) that was published the day I was selected as the Labour candidate for the seat of Christchurch Central in 1979. It made the case for wide-ranging constitutional reform in a number of areas most of which found their way into government policy eventually.

4 Matthew SR Palmer "What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders" (2006) 17 PLR 133.

5 New Zealand Labour Party "Open Government Policy 1984" in *1984 Policy Compendium* (Wellington, 1984).

- adherence to the rule of law;
- remedies against regulations and red tape;
- freedom of information improvements;
- better law making; and
- a Royal Commission to examine the electoral system.

In addition to the NZ Bill of Rights Act, there were a raft of other important constitutional changes that flowed from the policy that included MMP, the Law Commission and the Regulations (Disallowance) Act 1989. Also included in the package were a presumption against retrospective legislation and an end to government by regulation, including repeal of a number of objectionable statutes that allowed too much executive action without the consent of Parliament.<sup>6</sup> The Legislative Department was abolished and the Parliamentary Service Commission created. A comprehensive system of parliamentary select committees was established, and the Regulations Review Committee became a watchdog over subordinate legislation. There occurred also the effective removal of the ministerial veto under the Official Information Act 1982.

The six primary reasons advanced for the NZ Bill of Rights Act in the policy pledge were to:<sup>7</sup>

- guarantee protection for fundamental values and freedoms;
- restrain the abuse of power by the executive and Parliament;
- restrain the abuse of power by other organisations;
- provide an authoritative source of education about the importance of fundamental freedoms in a democratic society;
- provide a judicial remedy to individuals who have suffered under law or conduct which breaches fundamental rights; and
- provide a set of minimum standards to which public decision-making must conform.

The high handed and dubious constitutional behaviour of the Muldoon Government created a political market for these changes. It was Muldoon's behaviour over the incipient devaluation crisis

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6 The National Development Act 1979, the Public Safety Conservation Act 1932 and the Economic Stabilisation Act 1948 were repealed.

7 The whole policy is included as Appendix 1 in Geoffrey Palmer *Unbridled Power – An Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, Auckland, 1987) at 282–283.

that emerged after the 1984 election that led directly to the Constitution Act 1986.<sup>8</sup> As Muldoon's biographer, Barry Gustafson, put it:<sup>9</sup>

With his devastating personality and fearsome intellect, and holding as he did the two most important posts of prime minister and minister of finance with their superior access to and command of information, Muldoon had too much power. Because power is exercised nearly always in situations of conflict and confrontation, he came to be seen as a dogmatic dictator. His power became too centralised and too arbitrary, and in many ways his Government became presidential rather than parliamentary in both style and substance.

The behaviour of the Government more than amply illustrated that more restraints upon the use of public power in New Zealand were required. The existing checks and balances were fragile and the power of the State had grown massively since the Second World War. There was an apparent need for remedial measures and the Open Government policy was the Opposition's response.

In relation to the NZ Bill of Rights Act, a principal activity in the first term of the Fourth Labour Government was to compose and issue the White Paper, *A Bill of Rights for New Zealand*, which was published in 1985.<sup>10</sup> I said in the Introduction to the White Paper that the Bill would be "a set of navigation lights for the whole process of Government to observe".<sup>11</sup> The White Paper set out a draft Bill that included the fundamental civil and political rights of New Zealanders. The rights followed to a large extent the provisions of the *International Covenant on Civil and Political Rights* and were also influenced by the experience with the Canadian Charter.<sup>12</sup> It included the Treaty of Waitangi.

The White Paper elaborated the arguments in favour of a bill of rights in greater depth and with more particularity than was possible in the earlier political debates. It made clear that the Bill would promote accountable and democratic government. The fact that New Zealand had a one chamber Parliament meant New Zealand needed more protection against rash legislative judgments made in

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8 Department of Justice *Constitutional Reform Reports of an Officials Committee* (Department of Justice, Wellington, 1986).

9 Barry Gustafson *His Way: A Biography of Robert Muldoon* (Auckland University Press, Auckland, 1979) at 9. I have written at length about the features of the Muldoon Government's unconstitutional behaviour. See, for example, Geoffrey Palmer "Muldoon and the Constitution" in Margaret Clark (ed) *Muldoon Revisited* (Dunmore Press, Palmerston North, 2004) at 167. See also the classic decision *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

10 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

11 At 6.

12 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); Canada Act 1982 (UK); and Constitution Act 1982 (Schedule B to Canada Act 1982 (UK)). I visited Canada with my officials to discuss with the Department of Justice in Ottawa the practical implications of the Charter.

the heat of the moment and any incremental erosions of rights. If laws of an unjust and repressive character were passed there was no protection in New Zealand, except public opinion and the House of Representatives. The Bill would apply to the decisions and actions of officials. The White Paper stated:<sup>13</sup>

The power of the Government, alone and through Parliament, without the restraint or even the delay which would come from a second chamber, is enormous. In some sense it can be compared with the power, claimed as well as actual, of the Stuart kings before the revolution of the seventeenth century. The basic difference between then and now is of course the electorate. But the electorate's role cannot, in the usual case, be focused on a precise issue. A general election is a blunt instrument. It cannot give judgment on particular issues.

The White Paper made clear that the Bill would protect New Zealanders from breaches of their fundamental rights against the power of the State and would be enforced by the Courts as supreme law.

The Treaty was included to ensure that it was honoured and to settle its constitutional status, so it was not, as it is now, half in and half out of the legal system. At present it depends upon whether the Treaty has been incorporated into the statute law relevant to the issue at hand. Protection of minority rights against the danger of majority tyranny lie at the heart of the work any bill of rights must undertake.

From the publication of the White Paper, there followed a prolonged period of parliamentary consideration and a process of extensive public submission to a select committee that produced both an interim and final report. It was decided to water down the proposal in order to blunt the extensive criticisms that it received, the two most serious of which were that it would transfer power to the judges and make the law uncertain.<sup>14</sup> So the NZ Bill of Rights Act was enacted in 1990 as an ordinary statute and without the Treaty.<sup>15</sup> It was not to be supreme law. Trimming the sails was politically necessary in order to pass the measure.

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13 Palmer, above n 10, at 27.

14 Justice and Law Reform Select Committee "Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand" [1988] I AJHR 8C.

15 For my account as to how all this developed, see Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) at 42–70. See also *Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper – A Bill of Rights for New Zealand* [1987] I AJHR 8A.

### III HOW THE BILL OF RIGHTS HAS FARED

The responsibilities for the implementation of the statute were split between Parliament and the judiciary. Both branches of government over the period of 25 years have done substantial work on the NZ Bill of Rights Act. Nevertheless, serious weaknesses and gaps exist.

The power of the courts comes from the instruction they received from the legislature in s 6 of the NZ Bill of Rights Act:

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

The manner in which the courts approached interpreting the statute initially breathed life into it, particularly the Court of Appeal under the Presidency of Sir Robin Cooke. The statute was seen to be more powerful than its critics had suggested it would be. While the Courts have rendered a great many decisions involving the NZ Bill of Rights Act and the whole idea is not so legally foreign as once it was, the performance has somewhat tailed off in recent years. The use of the NZ Bill of Rights Act since Sir Robin's time has been marked by considerable caution. It is not too much to say the courts have been leery of it. This is not the place to analyse the case law in detail, but the courts have failed to develop the jurisprudence comprehensively over the past 25 years. In civil litigation, in particular, and judicial review of administrative action little impact can be discerned. In the area of remedies great uncertainty remains.

There exist many reported cases concerning the NZ Bill of Rights Act, several significant legal texts and an extensive periodical literature but the Act has not had, as Professor Claudia Geiringer accurately observes, a "transformative effect".<sup>16</sup> Superior judicial results have been evident in the United Kingdom under the Human Rights Act 1998 (UK), a measure similar in its conceptual approach to the NZ Bill of Rights Act, and to which the New Zealand model contributed in important ways.<sup>17</sup>

One example of judicial caution in New Zealand lies in the reluctance to make formal declarations of inconsistency. Under s 4 of the Human Rights Act 1998, the High Court or above can determine whether a provision in primary legislation is compatible with a right contained in the European Convention for Human Rights.<sup>18</sup> If a court finds that the provision cannot be read and

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16 Claudia Geiringer "Inaugural Lecture: Mr Bulwark and the Protection of Human Rights" (2014) 45 VUWLR 367 at 385.

17 Anthony Lester "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" (2002) 33 VUWLR 1.

18 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (signed 4 November 1950, entered into force 3 September 1953).

given effect to in a way that is compatible with the Convention, it can make a declaration of incompatibility. In such a situation, the provision remains in force.

By contrast, the NZ Bill of Rights Act does not explicitly authorise making a declaration of inconsistency or incompatibility. There have been anxious debates in New Zealand over a long period about what, if anything, a court could do when it was of the view a statutory provision could not be interpreted as being consistent with the NZ Bill of Rights Act. A number of discussions on the issue appear in the judgments and judges were clearly nervous about the breadth of issues they would have to consider, including social, legal, moral, economic, administrative and ethical issues.<sup>19</sup> While there were a few indications in judgments to the effect that statutory provisions were not consistent with the Act and only one judge has ever stated, in dissent, that he would have made one, it was not until July 2015 that a formal declaration of inconsistency was made. The recent decision of Heath J in *Taylor v Attorney-General*, making the first judicial declaration of inconsistency under the NZ Bill of Rights Act – 25 years after the enactment of the measure – is both notable and welcome.<sup>20</sup> Heath J issued the declaration of inconsistency in respect of an Act of Parliament passed in 2010 imposing a blanket ban on prisoners voting in parliamentary elections. The Judge found it could not be saved by s 5 of the NZ Bill of Rights Act: the measure was not "demonstrably justified in a free and democratic society". His decision reached the same conclusion as the s 7 report tabled in the House by the Attorney-General that the legislation in issue was contrary to the NZ Bill of Rights Act.

Heath J concluded that Parliament had not intended to exclude the ability of the courts to make a declaration of inconsistency, and that this was in keeping with the general principle that where there has been a breach of the NZ Bill of Rights Act, there is a need for a court to fashion public law remedies to respond to the wrong inherent in any such breach.<sup>21</sup> He found this conclusion reinforced by the provisions of New Zealand's Human Rights Act 1993, noting that it is difficult to see why a superior court could not grant a declaration of inconsistency when the Human Rights Review Tribunal is authorised by Parliament to do so.<sup>22</sup> The government made no public response to the

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19 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at 17. The various judicial views that have been expressed in the case are well analysed in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1610–1620. For a practical view on how to employ the Bill of Rights in public law, see Mai Chen *Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at 659.

20 *Taylor v Attorney-General* [2015] NZHC 1706.

21 At [61].

22 At [64]. The jurisdiction conferred on the Human Rights Tribunal by the 2001 amendments to the Human Rights Act 1993 can be seen as an effort to find a balance on these issues between the courts and the executive, but the fate of the decision of the Court of Appeal in *Atkinson v Minister of Health* [2012] 3 NZLR 456 that was reversed without select committee scrutiny under urgency suggested that this means of mediating executive power was not going to be effective.



decision at the time, although it had argued forcefully in court against such a declaration being made.

It is interesting that despite the declaration of inconsistency being reported in the media, it did not cause a stir. Perhaps this was because the declaration did not change the law. Perhaps it was because there were breaking scandals about prisons to attract the media on the day the decision came down. Whatever the reason, the relative lack of media attention in the decision raises a further possibility. Perhaps the New Zealand public is not as resistant to judicial power as is often is thought. Would the sky have fallen in had such a declaration been made in *Pora* or *Poumako*?<sup>23</sup> I see Heath J's decision as desirable progress, but it does not reach constitutional journey's end for the Bill of Rights.<sup>24</sup>

The Attorney-General has lodged an appeal against the decision to grant the declaration. It is an interesting reflection on the way power is divided in New Zealand that the executive decides whether to appeal a declaration concerning a law passed by Parliament, although in an MMP Parliament it cannot be assumed that the view of the executive is the view of Parliament. Some days after the decision, the Minister of Justice, the Hon Amy Adams, said the government was studying the judgment.<sup>25</sup> While the decision to appeal could be explained on the basis that the Crown needs to know authoritatively the parameters of this new development given the splits that have emerged within the judiciary about declarations, I have been unfavourably impressed over the years by the vigour with which the Crown's legal advisers have resisted application of the NZ Bill of Rights Act by the courts. It is of concern that they should be so determined in respect to a statute that is designed to curb the power of government and see that human rights in New Zealand are protected. It is hard to discern just why jurisdiction to grant a declaration of inconsistency should be resisted. Surely it is in the public interest that the superior courts can determine instances where Parliament has breached the NZ Bill of Rights Act. The public will then be better equipped to make judgments about the propriety of parliamentary action. A declaration does not change the law. It does not

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23 *R v Pora* [2001] 2 NZLR 37 (CA). See also *R v Poumako* [2000] 2 NZLR 695 (CA), interpreting retrospective criminal legislation. For an analysis of split New Zealand jurisprudence on this issue, see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act*, above n 19, at 1017–1027.

24 For a wider range of constitutional arguments than can be presented here, see Geoffrey Palmer "The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?" (2013) 11 NZJPI 257.

25 Imran Ali "Lawyer's bid for prisoners to vote" *Northern Advocate* (online ed, Auckland, 5 August 2015). An editorial said that the Government should act on the ruling and change the law: *The Press* (New Zealand, 27 July 2015) at 10.

disturb either the executive or Parliament. Hopefully, it may cause Parliament to reflect upon the legislative action it has unwisely taken. If the appeal fails, it will be interesting to see whether legislation is introduced to remedy the situation and revert to a more liberal regime in respect to prisoner voting.<sup>26</sup>

On the parliamentary side, the experience with the NZ Bill of Rights Act in New Zealand so far suggests that Parliament does not examine rights issues sufficiently thoroughly and indeed lacks mechanisms to do so. The Attorney-General will table a report under s 7 when a Bill that contravenes the NZ Bill of Rights Act is introduced. Before this, officials and ministers in the preparation of legislation do strive to avoid provisions that will offend the NZ Bill of Rights Act. Ministers are required by the Cabinet Manual to affirm that their Bills comply with the NZ Bill of Rights Act.<sup>27</sup> Much effort goes into this process with the executive during the design of legislation. How many objectionable proposals have been sunk as a result is impossible to tell.

In total, as at 13 June 2016, 70 s 7 reports have occurred in the life of the NZ Bill of Rights Act, half concerning government Bills and half other Bills.<sup>28</sup> These are set out in Appendix 1. Thus far it seems that 23 bills with NZ Bill of Rights Act defects have not been enacted but on 37 occasions Parliament has passed Acts that had been subject to a section 7 report, meaning not only that a right or freedom has been breached by the Bill or a provision in that Bill but also that the breach cannot be justified in a free and democratic society, as required by s 5. There are a greater number of instances of this occurring since 2015. Sometimes such provisions have been passed under urgency without select committee examination.<sup>29</sup> There are six Bills before the House subject to section 7 reports.<sup>30</sup> How many of these will ultimately be passed is not clear, but it seems fair to presume on the basis of past practice that a number of them will be. Obviously, there may also be instances of breaches that are not reported upon and many of these are likely to be when amendments to Bills are

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26 Note a recent and similar application for a declaration of inconsistency, amongst other things, in a case before the High Court has been dismissed: *Taylor v Attorney-General* [2015] NZHC 355.

27 Cabinet Office *Cabinet Manual 2008* at [7.60].

28 See Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>. Some provisions may have been amended in light of NZ Bill of Rights Act concerns but I can find no systematic data on this point.

29 The Health and Disability Amendment Act 2013 was passed without select committee scrutiny under urgency in the face of an Attorney-General's report that it was in breach of the NZ Bill of Rights Act. For a full analysis of the urgency issue, see Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? – Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011).

30 The six Bills subject to a section 7 report that remain before the House are: Taxation (Income-sharing Tax Credit) Bill 2010; Electronic Monitoring of Offenders Legislation Bill 2015; Child Protection (Child Sex Offender Register) Bill 2015; Financial Assistance for Live Organ Donors Bill 2015; Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) Amendment Bill 2015; and Social Security Legislation Rewrite Bill 2016.

made by Supplementary Order Paper in the Committee of the Whole stage.<sup>31</sup> The reports are prepared, as is the legislation upon which they report, by the executive. To ensure adequate checks and balances, scrutiny with some greater degree of detachment from the executive is surely required.

Despite the efforts, conscientiously made, my conclusion is that the section 7 process coupled with the numerous court decisions have not made a sufficient difference to accomplish the vision that propelled the NZ Bill of Rights Act. A mechanism for systematic parliamentary examination should be considered. A select committee to examine human rights issues has been suggested on several occasions in reviews of standing orders but never taken up. The Parliament does not pay sufficient attention to the reports that are tabled. There are occasions when the reports are not even referred to in debate. The conclusion that flows is that Bills that breach the NZ Bill of Rights Act are no big deal so far as Parliament is concerned. It is not a matter of great moment and handled in a rather casual way. One would have thought that derogation from legal human rights standards should be regarded as a serious step, not taken lightly. Such does not appear to be the case.

Why the NZ Bill of Rights Act did not match the original vision has several explanations. The most obvious lies in the fact that it was not made supreme law. It has improved the performance of government on the issues to which it was directed but the performance has not been optimal. Officials and ministers strive to avoid legislation that offends against the NZ Bill of Rights Act. But the dual responsibilities of the courts and the Parliament combined do not add up to a rigorous, hard-edged commitment to ensure guarantees the NZ Bill of Rights Act offers are delivered. In particular, there is no commitment in hard cases where the political sentiment is high. Prisoners' rights are a good example. The rights of unpopular people are just as real as those who live in society's mainstream. These situations are the very ones where rights are most needed.

The NZ Bill of Rights Act was not made supreme law because the idea was alien then to New Zealand constitutional sensibilities and the public was unenthusiastic. Arguments against it ranged from the grotesque to the merely Diceyeen. Some said it did not guarantee New Zealand's sovereignty, or protect the flag, that it aligned New Zealand with the United Nations because of the connection of the Bill with the *International Covenant on Civil and Political Rights* or that it was communist inspired. But others said too much power would go to the judiciary, courts were expensive and people did not have access to them. It would produce uncertainty in the law, and it would freeze New Zealand's constitutional development. Even the New Zealand Law Society preferred to leave things in "a constant state of flux".<sup>32</sup> Maori interests opposed bringing the Treaty

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31 The issues are complex, see Claudia Geiringer, above n 16, at 384. For an expression of scholarly concern that "something may be amiss in the New Zealand processes", see Janet McLean "The New Zealand Bill of Rights and Constitutional Propriety" (2013) 11 NZJPIL 19 at 33.

32 Geoffrey Palmer *New Zealand's Constitution in Crisis*, above n 15, at 55–56, quoting New Zealand Law Society "Submission on the White Paper – A Bill of Rights for New Zealand" (1985).

into the legal system, an attitude that may have been different had the question arisen after the great spate of successful Māori litigation over s 9 of the State-Owned Enterprises Act 1986.

New Zealand has changed since then, and it continues to do so. More than ever our basic rights need adequate protection in the law. It is time to reconsider the place of the NZ Bill of Rights Act in our constitutional arrangements.

#### **IV THE CASE FOR SOFTENING PARLIAMENTARY SUPREMACY IN NEW ZEALAND**

New Zealand remains almost alone as an exemplar of Albert Venn Dicey's theory of parliamentary sovereignty.<sup>33</sup> New Zealand and the United Kingdom are the two jurisdictions where the doctrine has the most sway, but in the United Kingdom accession to the European Community has eroded considerably in practical terms the application of Dicey's doctrine. (This may change as a result of the Brexit referendum, but the future patterns of the United Kingdom's constitutional arrangements have been placed in an uncertain position. It is difficult to predict what will emerge.) Two other like-minded states, Australia and Canada, have entrenched constitutional laws to which all other laws are subject.

For Dicey, Parliament consisted of the Queen, the House of Lords and the House of Commons. When reconciling parliamentary sovereignty with the rule of law, Dicey pointed out that the commands of Parliament "can be uttered only through the combined action of its three constituent parts".<sup>34</sup> So the will of Parliament can be expressed only by acts of Parliament. Dicey did not believe that Parliament was the agent of the electors or a trustee for the constituents. The courts would recognise no trust between Parliament and the people. This leads Dicey to conclude: "The supremacy of law necessitates the exercise of Parliamentary sovereignty".<sup>35</sup>

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33 In modern times there have been a number of criticisms of the doctrine in New Zealand. See Sian Elias "Sovereignty and the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148; and the famous series of dicta of Sir Robin Cooke when President of the Court of Appeal: ("Some common law rights presumably lie so deep that even Parliament could not override them.") in *Taylor v New Zealand Poultry Board* [1994] 1 NZLR 116 (CA) at 398. See also *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA); *Cooper v Attorney-General* [1996] 3 NZLR 480; *Peters v Davison* [1999] 2 NZLR 164 (CA). Writing extra-judicially the same Lord Cooke asked the question "in the pattern of functional distribution of state power is there any real room for real sovereignty?": see Robin Cooke "The Myth of Sovereignty" (2005) 3 NZJPIL 39 at 41.

34 JWF Allison (ed) *The Law of the Constitution* (Oxford University Press, Oxford, 2013) at 180. The material quoted comes from the first edition of Dicey's work and there are some complicated issues about what appeared in successive editions. There is a wonderful essay by Lord Bingham, "Dicey Revisited" in Tom Bingham *Lives of the Law: Selected Essays and Speeches 2000–2010* (Oxford University Press, Oxford, 2011) at 41.

35 Allison, above n 35, at 182.

If what Dicey meant by this was that parliamentary sovereignty is a necessary condition for the supremacy of law, then the statement is neither logical nor politically accurate. Power can be distributed by a formal constitution, as Dicey well knew since he was at such pains to discuss the United States Constitution.

Dicey published his first edition in 1885 at a time before the franchise was far from universal in England. Indeed, Dicey himself was an implacable opponent of votes for women and he was also opposed to proportional representation. The range and nature of the doctrine was simple and absolute. Dicey asserted that parliamentary sovereignty was an undoubted legal fact:<sup>36</sup>

It is complete both in its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.

There are no legal limitations, Dicey said, on the absolute authority of Parliament: "This doctrine on the legislative supremacy of Parliament is the very key-stone of the law of the constitution". The absolutist cast of this assertion raises suspicion that such a bright line rule can hardly be valid for all time, in all situations and without exceptions.

So it is perhaps not surprising that Dicey himself retreated from his own doctrine when confronted with political decisions relating to home rule in Ireland to which he was strongly opposed. In an article published in 1893, he remarked:<sup>37</sup>

The defects of Parliamentary Government as now practised in England result from the unchecked though temporary supremacy of any Party which can obtain a majority in the House of Commons.

He was at pains to draw a distinction between the sovereignty of Parliament and the sovereignty of the House of Commons. This led him to advocate referenda put to the people because such a referendum "places the nation above parties or factions".<sup>38</sup> It would ensure that in matters affecting the constitution the country always came to a decision on a clear and plain issue. And it gives due weight to the wishes of all voters.

Dicey was saying that parliamentary sovereignty must bend to the wishes of all the voters. He was not saying all contentious questions should be decided by referendum, only questions that touch upon the constitution. The rules of the game – the most basic constitutional rules – should not be so

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36 At 41.

37 AV Dicey "The Referendum" (1894) 23 *National Review* 65. Dicey made it clear in this article that he favoured a referendum before any proposals for changing the constitution of the country could become law. He said: "The artificial supremacy again of a Parliamentary majority, occasionally at any rate, deprives large minorities of the due political influence" (at 61). He wanted to "directly secure the fundamental laws of the country from sudden assault" (at 69).

38 At 71.

easily altered in the exigency of the moment. There is an echo of this position contained in s 268 of the New Zealand Electoral Act 1993 shortly to be discussed.

This principle of absolute omnipotence and whether there had been practical changes in the area of parliamentary sovereignty relating to the Dominions was dealt with in the 1915 eighth edition of Dicey.<sup>39</sup> The first question he addressed was the difference between the relation of the Imperial Parliament to a self-governing colony, such as New Zealand, in 1884, and in relation to the same Parliament of the Dominion of New Zealand in 1914.<sup>40</sup> He asserted the possession of absolute sovereignty throughout every part of the British Empire by the Imperial Parliament at Westminster. This at a time when the franchise was much less than universal and there was an hereditary House of Lords. He was at pains to point out that the practicalities of self-government meant that imperial intervention would be rare and relate to matters that directly affected imperial interests. Dicey was clear that no Dominion had the power to repeal any Act of the Imperial Parliament applying to a Dominion and that Dominions had:<sup>41</sup>

... a moral right to as much independence, or at any rate in regard to matters occurring within the territory of such Dominion, as can from the nature of things be conceded to any country which still forms part of the British empire.

These ideas enjoyed considerable support in New Zealand at the time and have done since. Certainly they were not contested by the foremost New Zealand jurist of the time, Sir John Salmond. In his classic study of jurisprudence, the first edition of which appeared in 1902, Salmond dealt with the issue by saying that legislation was either supreme or subordinate and supreme legislation emanates from the sovereign power of the State. He went on to say, quoting Sir William Blackstone: "The legislation of the Imperial Parliament is supreme, for 'what the Parliament doth, no authority upon earth can undo'."<sup>42</sup>

The 1957 edition of Salmond's work repeated the statement in the 1902 edition about the supremacy of the Imperial Parliament and the quote from Blackstone. But there is a significant addition worth quoting in full:<sup>43</sup>

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39 Allison, above n 34, at 412.

40 At 428.

41 At 429.

42 John W Salmond *Jurisprudence* (Stevens & Haynes, London, 1902) at 116. There is no reference to Dicey by Salmond in 1902 despite the fact that Dicey published his first edition in 1885. The last edition produced in Salmond's lifetime in 1924 still contained no reference to Dicey, who by that time had died and could be regarded as an authority.

43 Glanville Williams (ed) *Salmond on Jurisprudence* (Sweet & Maxwell, London, 1957) at 141–142.

In England, the doctrine of Parliamentary supremacy goes beyond this; Parliament is not only supreme, but legally omnipotent. It is now a clear rule that an Act of Parliament cannot be held void for unreasonableness, or indeed upon any other ground. The doctrine of the sovereignty of Parliament, in the sense that there is no legal limit on the power of Parliament (except the inability of Parliament to bind its successors) was expounded by Dicey in his classic treatise, and is now a common place of books on constitutional law.

This passage might suggest that the inability of Parliament to bind its successors means that New Zealand is powerless to adopt a supreme law constitution. This may also be supported by the actions of New Zealand's Parliament in 1956 when it entrenched certain provisions of the Electoral Act that were fundamental to the protection of democracy, such as the secret ballot, the three-year parliamentary term and the Representation Commission but did not entrench the entrenching provision. The successor provision in the Electoral Act 1993, s 268,<sup>44</sup> is similarly not entrenched, for reasons that have never been articulated despite entrenchment being recommended by the Royal Commission that recommended the adoption of MMP.<sup>45</sup> It should be noted, however, that no legislation to repeal the entrenched provisions has ever been passed except in accordance with the requirement of a special majority. Further, the Standing Orders of the House in practice make it

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44 Section 268 reads:

- (1) This section applies to the following provisions (hereinafter referred to as reserved provisions), namely—
  - (a) section 17(1) of the Constitution Act 1986, relating to the term of Parliament;
  - (b) section 28, relating to the Representation Commission;
  - (c) section 35, and the definition of the term General electoral population in section 3(1), relating to the division of New Zealand into electoral districts after each census;
  - (d) section 36, relating to the allowance for the adjustment of the quota;
  - (e) section 74, and the definition of the term adult in section 3(1) and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote; (f) section 168, relating to the method of voting.
- (2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal—
  - (a) is passed by a majority of 75% of all the members of the House of Representatives; or
  - (b) has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts: provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

45 "Royal Commission on the Electoral System Towards a Better Democracy" [1986] I AJHR H3 at 302.

impossible unless Standing Orders are suspended.<sup>46</sup> Consequently, there may now well exist an established constitutional convention in New Zealand prohibiting use of any legal power to repeal an entrenched provision without a 75 per cent majority.<sup>47</sup>

Section 268 of the Electoral Act is the only provision in which amendment by ordinary legislative process is prohibited in New Zealand. The fashionable theory in 1956 was that Diceyan orthodoxy meant that Parliament could not effectively doubly entrench a provision.<sup>48</sup> That is to say, a bare majority could repeal s 268(2) and then repeal the rest with the same majority. By the time the Electoral Act 1993 was passed, that was no longer regarded as the orthodox position. When the NZ Bill of Rights Act was originally promulgated in the White Paper published in 1985 the legal position was reviewed and after examining the leading authorities it was concluded:<sup>49</sup>

These cases do not dispute the proposition that Parliament cannot bind itself as to the content of future legislation, but a distinction is drawn between a law which purports to say that Parliament cannot enact certain laws, and a law which says that Parliament can enact certain laws only if it follows a certain procedure, or if it is composed in a special way. On this view the current rule that an Act of Parliament is to be passed through the House of Representatives only by a simple majority is a rule of law which Parliament can change, because Parliament's power to change the law includes the power to change the law affecting itself. In requiring a special procedure for enacting or repealing a statute, Parliament is not binding its successors, but only redefining "Parliament" or laying down a new procedure for a certain purpose.

But the White Paper also acknowledged the validity of Sir Robin Cooke's extrajudicial utterance about the legitimacy of a change of this sort. Such a Bill, he said, would require "practical

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46 See Standing Orders of the House of Representatives 2014, SO 266 (Entrenched Provisions), which reads:

- (1) A proposal for entrenchment must itself be carried in a committee of the whole House by the majority that it would require for the amendment or repeal of the provision to be entrenched.
- (2) A proposal for entrenchment is any provision in a bill or amendment to a bill that would require that that provision or amendment or any other provision can be amended or repealed only by a majority of more than 50 percent plus one of all the members of the House.

47 Kenneth J Keith "The New Zealand Bill of Rights Act 1990: An Account of its Preparation" (2013) 11 NZJPIL 1 at 11; and Kenneth J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" [2004] CLJ 581 at 590.

48 KJ Scott *The New Zealand Constitution* (Oxford University Press, Oxford, 1962) at 10. This point was explicitly made by the Attorney-General in the parliamentary debates: see (1956) 310 NZPD 2839.

49 Palmer, above n 10, at 55. It is significant that in *Taylor v Attorney-General* [2016] NZHC 355 the High Court accepted that a failure to follow section 268 of the Electoral Act 1993 would invalidate any legislation not passed in accordance with its requirements. The Crown did not even dispute that this would be the consequence.



sanctity";<sup>50</sup> that is, to produce this supreme law it would be necessary to have a special parliamentary majority to adopt it or secure a simple majority in a referendum.

The decision of the United Kingdom House of Lords in 2006 in the *Fox Hunting* case suggests that manner and form requirements of this sort must be followed by the Parliament.<sup>51</sup> It was held that the special enacting procedures that resulted from the Parliaments Acts 1911 to 1949 (UK) were legally effective, although they were not expressly protected. The ban on fox hunting which had been passed under the special procedures in those Acts and which lacked the assent of the House of Lords were valid. This was the case in which Lord Steyn remarked that the supremacy of Parliament was no longer absolute and "can now be seen to be out of place in the modern" world.<sup>52</sup> Indeed, the rule of law seems to have been the determinative factor in the minds of the law lords.

The most enthusiastic neo-Diceyan scholar in recent years has been an Australian, Professor Jeffrey Goldsworthy.<sup>53</sup> While he does not argue that it would be impossible to adopt a higher law constitution – after all, Australia has one – he does suggest that there resides in parliamentary sovereignty a great public good. Most of his book is concerned with proof of the proposition that Dicey was essentially correct about the law on historical grounds and on philosophical grounds but he then goes on to make a number of observations to try and rehabilitate the doctrine in light of the universal suffrage that now obtains:<sup>54</sup>

The consequences of the doctrine of parliamentary sovereignty are generally beneficial: democratic decision-making is facilitated, and reasonably just statutes are enacted. Unjust statutes are sometimes enacted, but they are rarely obviously and egregiously unjust. Occasional injustice is a price that must be paid for democracy – as indeed any decisionmaking procedure, since none can be guaranteed never to

50 Robin Cooke "Practicalities of a Bill of Rights" (FS Dethridge Memorial Address to the Maritime Law Association of Australia and New Zealand, 1984) reprinted in (1984) 11 Council Brief 4.

51 *R (Jackson) v Attorney-General* [2006] AC 262 (HL).

52 See *R (Jackson) v Attorney-General* [2005] UKHL 56 at [102] per Lord Steyn:

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.

53 Jeffrey Goldsworthy *The Sovereignty of Parliament* (Clarendon Press, Oxford, 1999). See also Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010); and Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPI 7. For the debate between Goldsworthy and TRS Allan, see TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2005).

54 Jeffrey Goldsworthy *The Sovereignty of Parliament*, above n 53, at 269.

produce unjust laws. It is possible to imagine "hard cases", involving statutes so outrageously unjust that morally they ought not to be obeyed, even by judges. But it does not follow that the doctrine of parliamentary sovereignty ought to be abandoned, and the judges authorized to invalidate outrageously unjust statutes. They might interpret that authority too broadly, and invalidate statutes that are not outrageously unjust.

The tenor of Goldsworthy's analysis is that a judicially enforceable bill of rights contains abstract and flexible principles and it is not obvious that a judiciary is better at interpreting those than a sovereign legislature. Indeed, he thinks the legislature is better in every conceivable circumstance. Experience as an MP does not convince me that legislatures are better in every conceivable circumstance, especially when it comes to constitutional fundamentals. I prefer power to be shared rather than for one body to enjoy absolute power.

In New Zealand, constitutional law scholarship remains heavily influenced by the oracular utterances of Dicey although that does not, in my view, excuse the lack of both political reality and legal aridity that surrounds the doctrine. The actual place of parliamentary supremacy in our governance arrangements today is explored in a relatively new stream of scholarship of which Professor Stephen Gardbaum is the leading proponent. Gardbaum argues for the new Commonwealth model, in which bills of rights find a middle ground between the competing extremes of parliamentary supremacy on the one hand and judicial supremacy on the other.<sup>55</sup> The United Kingdom, Canada and New Zealand are cited as the leading examples of this intermediate approach.

In the United Kingdom, the Human Rights Act 1998 gives the last word to the Parliament in a more expansive manner than the Canadian Charter of Rights and Freedoms.<sup>56</sup> While the Act accepts that the rights conferred by the European Convention on Human Rights are important, they are not supreme law. In so doing, it preserves parliamentary sovereignty to a greater degree.

Of the three, Canada is the country that protects rights most strongly. There is provision for a legislative override of judicial decisions by the Supreme Court of Canada contained in s 33 of the Constitution Act 1982. This provision allows the Federal Parliament or the provincial legislatures to expressly declare in an Act that a provision of the Charter shall operate notwithstanding the Charter. It applies to the fundamental freedoms, and the legal and equality rights set out in the Charter, but not to the right to vote, in s 3. An override can last five years and it can be renewed.

Apart from the early years in the Province of Quebec, the override has hardly been used. It has never been imposed by the federal government. This has led commentators to the view that there is virtually a constitutional convention against using the power, buttressed by the argument that resort

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55 Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707.

56 Canada Act 1982 (UK); and Constitution Act 1982 (Schedule B to Canada Act 1982 (UK)).

to it would provoke such heavy political consequences that governments eschew its use. Nevertheless, the power remains and it could be used. While it remains it cannot be said that Canadian judges have the last word on Charter rights.

Although Gardbaum believes that the reluctance to use the override provisions means Canada is lurching towards judicial supremacy, the Canadian invention has been praised as a sound solution to the "counter majoritarian difficulty"<sup>57</sup> that Alexander Bickel so famously outlined as a problem with the American doctrine of judicial review.<sup>58</sup> Conflicts between the Canadian courts and other branches of government can be resolved because the legislature has the last word if it chooses to use it.

Professor Gardbaum has recently examined the situation in New Zealand.<sup>59</sup> In his view of the Commonwealth jurisdictions that have adopted the new model, New Zealand is performing best. Nevertheless, he finds that New Zealand is not functioning "in anything like an 'ideal' fashion".<sup>60</sup> Given the concentration of power within the executive in New Zealand and the undermining of political accountability, judicial supremacy is an option, but generally for him lesser judicial power is preferable. He favours some tweaks to the existing NZ Bill of Rights Act. He argues that steps should be taken to improve the quality of legislative consideration on rights issues in New Zealand, including introducing section 7 reports to Parliament, as has now been done by change to the Standing Orders, and not allowing Bills with negative reports to be enacted under urgency. He also thinks there may be advantages in transferring the reporting function to the minister responsible for the legislation. He favours also a specialist committee in the Parliament on human rights issues. In order to overcome the reluctance of courts to make declarations of inconsistency, the NZ Bill of

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57 Alexander M Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, Indianapolis, 1962) at 16. Constitutional theorists have devoted much attention to the ways in which judicial review of legislation can be reconciled with democracy. Who has the final say is an important question. The mechanism by which the views of the people on constitutional matters can be achieved in a practical and efficient manner has been the subject of great debate. See, for example, Joel Colón-Ríos "The Counter-Majoritarian Difficulty and the Road not Taken – Democratizing the Amendment Rules" (2012) 25 *Can JL and Jurisprudence* 53. The strong form of judicial review in the United States raises the counter majoritarian difficulty in an acute way because the United States Constitution is so difficult to amend. See, *The Constitution of the United States of America, Article V*. The New Zealand method for dealing with entrenched provisions of the Electoral Act raises many fewer issues because of the baseline of a referendum of a simple majority of voters or alternatively a special majority in Parliament. So the counter majoritarian argument can be effectively removed: nothing can be more democratic in a representative democracy than a simple majority of the voters at a referendum.

58 Paul C Weiler "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 *U Mich JL Reform* 51 at 80.

59 Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013); and Stephen Gardbaum "A Comparative Perspective on Reforming the New Zealand Bill of Rights" (2014) 10 *Policy Quarterly* 33.

60 Gardbaum "A Comparative Perspective" above n 59 at 34.

Rights Act should be amended to give them the express power to do this, and the appropriate minister could be required to respond to such a declaration within a specified time.

Gardbaum regards the NZ Bill of Rights Act as enacted as "a notable constitutional experiment".<sup>61</sup> I do not so regard it. Rather it seems to me a way point on a journey to a more balanced constitutional destination. It is necessary to have a structure designed to cope with the particular political and legislative behaviours of the New Zealand polity that I have had the advantage of seeing at close quarters from many different angles over the years.

In an essay published in 2013, I gave it as my judgement that the cure for the NZ Bill of Rights Act was to go the whole way and make it supreme law and that I was not attracted to carrying out minor fiddling of the type that Professor Gardbaum favours.<sup>62</sup> But I also said then if that step was thought to be too risky a legislative override could be included. The politics of legislatively removing rights after a court decision determines they apply are not attractive. That said, I believe after consideration of 2013 Report of the Constitutional Advisory Panel and other developments that I shall soon set out that a legislative override is the appropriate solution. Gardbaum's view is that Canada has gone too far down the judicial empowerment route. But it should not be assumed that New Zealand would behave the same way as Canada. New Zealand political culture is different from Canada's. If Parliament retained the final word here it would exercise it from time to time. The best evidence for that is the number of measures passed after a negative section 7 report. However, due to New Zealand having one house and MMP, the override would need to be by a special majority and made after a judicial decision when all appeal rights had been exhausted.

Tom Hickman has reached a number of conclusions that reinforce my view to a degree.<sup>63</sup> Hickman regards declarations of inconsistency as useful constitutional placeholders but not as a principled destination for constitutional reform.<sup>64</sup> He says such declarations are neither principled nor effective because they decouple rights from remedies, there is no incentive to seek a declaration because it has no legal effect and a declaration does not put the problem back on Parliament's agenda to do something about it. He calls for a more ambitious approach. While I do not share his opposition to declarations per se, they are clearly not sufficient. I do share his reservations about the possibilities of dialogue between the courts and Parliament as being politically unrealistic, despite its popularity in the literature.

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61 At 38.

62 Geoffrey Palmer "The Bill of Rights after Twenty-One Years", above n 24, at 284–288.

63 Tom Hickman "Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model" [2015] NZ L Rev 35; and Tom Hickman "The New Zealand Bill of Rights Act: Going Beyond Declarations" (2014) 10 Policy Quarterly 39.

64 Hickman "Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model", above n 63, at 46.

New Zealand, like the United Kingdom, followed the tradition of treating rights as important but not constitutionalised in any legal sense. They could be protected reliably by Parliament, public officials acting in the public interest, conscientious ministers, an informed public opinion and vigilant media. Safeguards against the misuse of public powers were not then regarded as legally enforceable matters for the most part.<sup>65</sup> No doubt the overall character of the political culture is important in encouraging a culture of liberty and respect for human rights. Yet experience with the NZ Bill of Rights Act so far indicates these issues often escape official attention, emphasis or even analysis. Providing some degree of legal bite is necessary to guard against encroachment into these fundamental rights.

## **V THE POLITICAL REALITY AND THE ROAD AHEAD**

The doctrine of parliamentary supremacy, the New Zealand tradition of entrenched provisions and the rule of law can all be woven together to produce a coherent argument as to how and why the NZ Bill of Rights Act should be strengthened. There is a counter majoritarian difficulty involved in a strong form bill of rights analogous to the Constitution of the United States, or even perhaps the Canadian Charter. But, in New Zealand, we can strengthen our Bill of Rights in such a way as to leave Parliament with the last word. We need to increase the legal clout of the NZ Bill of Rights Act to a degree, but not in such a way that it becomes absolute. An American approach is not congenial to the New Zealand political culture because it gives the last word to the courts. That does not mean, however, that a simple majority in Parliament should carry all before it on everything.

There is a pressing need for a stronger bill of rights in New Zealand due to the inroads being made into our democracy as a result of an executive-dominated Parliament, and weaknesses in the operation of critical checks and balances that underpin our law making processes. At the centre of my argument lies the fact that the New Zealand Parliament is small, 121 MPs, with only one House, and, even under MMP, this has serious ramifications for law making in our country. Currently, seven political parties are represented in the Parliament. All Cabinet ministers come from the National party. Two support parties have ministers outside Cabinet, a third a parliamentary under-secretary. Our experience to date shows that MMP does not usually produce single party majority governments, but despite this, under MMP, Parliament in New Zealand remains dominated by the executive. The numbers needed to support controversial Bills are gathered by the executive in negotiations and political deals that lack transparency, and open up gaps in the protection of human rights.

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65 This was the approach in the prescribed text when I studied constitutional law as a student in New Zealand: Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, London, 1960) at 255–279. I was rather convinced by it as evidenced in Geoffrey Palmer "A Bill of Rights for New Zealand" in KJ Keith (ed) *Essays on Human Rights* (Sweet & Maxwell, Wellington, 1968) at 106. So many things in the techniques of governance and society have changed since then, impelling a different approach. Judicial review of administrative action has drawn the courts closer to the centres of power.

The system is weak when it comes to technical scrutiny. The scrutiny of draft legislation is a parliamentary function.<sup>66</sup> However, on the NZ Bill of Rights Act there is no scrutiny operating independently of the executive. Since legislative schemes are designed in secret within the executive this is problematic. According to one analysis, assessments of contestable concepts are made under s 7 by the executive in-house in a non-transparent manner, and it concludes that New Zealand is lagging behind its peers in rights scrutiny.<sup>67</sup> Other recent research demonstrates the failure of technical scrutiny of Bills in the Parliament.<sup>68</sup> Some of this work used to be done by the Legislation Advisory Committee, but that has now been abolished in favour of the Legislation Design and Advisory Committee that will look at design in the early stage of about 25 significant Bills each year.<sup>69</sup> This is a committee of the executive: there is no one outside the executive who sits on it, which by its nature will mean that scrutiny will not be undertaken effectively. Lately, however, an external advisory committee has been added to the structure. In parliamentary debate the human rights issues are sometimes not even canvassed. After 25 years it cannot be convincingly asserted that the Parliament has a strong grip on human rights issues.

The scrutiny of legislation from a political point of view by select committees hearing public submissions is a sound feature of the New Zealand legislative system, although that scrutiny appears to have become more perfunctory in recent years. Tabled s 7 reports are now referred to select committees but committees considering Bills have no obligation to consider rights issues even where an adverse report has been made. There is no select committee that focuses on human rights or NZ Bill of Rights Act matters. Nor will it be easy to establish one. The New Zealand Parliament is small and ministers do not normally sit on select committees. Given the existing structure of subject matter committees, a new human rights committee is not an easy fit but it should be undertaken.

A searching examination of the human rights scene in New Zealand completed in 2015 that concentrated on New Zealand's response to international human rights treaties suggests that there are serious gaps in New Zealand's observance of these obligations. The researchers state: "How and by what means the State fulfils its international obligations is seen as a matter not only of

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66 There is some irony here. Professor Dawn Oliver in her article concerning the methodology for technical scrutiny relied to some extent upon the work of New Zealand's Legislation Advisory Committee: Dawn Oliver "Improving Scrutiny of Bills: The Case for Standards and Checklists" [2006] Public Law 219.

67 Catherine Rodgers "A Comparative Analysis of Rights Scrutiny of Bills in New Zealand, Australia and the United Kingdom: Is New Zealand Lagging Behind its Peers?" (2012) 21 Australian Parliament Review 4.

68 Tim Workman "Technical Scrutiny of Bills in New Zealand" (2010) 25 Australasian Parliamentary Review 179.

69 Cabinet Office Circular Revised Legislation Advisory Committee Guidelines: Cabinet Requirements (22 May 2015) CO 15/3; and Christopher Finlayson "Establishment of Legislation Design and Advisory Committee" (press release, 29 June 2015).

parliamentary sovereignty but of executive sovereignty."<sup>70</sup> A more doleful constitutional conclusion about the Parliament on human rights could hardly be made. The prime recommendation of the researchers, who included a former Speaker of the House, was that the Justice and Electoral Select Committee be re-designated as the Justice, Electoral and Human Rights Committee and given responsibility for oversight of New Zealand's human rights commitments. The inability of the Parliament to free itself from executive domination on human rights issues seems plain. In my gloomier moments I think the performance of the House generally has not greatly improved since the severe judgment visited upon it by the first modern political scientist to study it carefully, Professor Leslie Lipson, who concluded in 1948 when New Zealand still had an upper house: "A representative democracy which does not produce a better legislature than this one is running a serious risk".<sup>71</sup>

The use of urgency allowed under New Zealand Standing Orders raises issues. The Standing Orders allow on a majority vote truncation of the legislative process, the avoidance of proper scrutiny and the speedy passage of measures so reducing public attention. In a single chamber Parliament this raises special problems. Perhaps the best rights example was the fate of the judicial decisions in *Atkinson v Ministry of Health*.<sup>72</sup> In that case at all levels of the judicial decision-making it was held that a health policy of the Ministry that no family members were to be eligible for payment for care given to adult disabled family members was an unjustified interference with the right to be free from discrimination on the grounds of family status as protected by s 19 of the NZ Bill of Rights Act. Clearly the amount of increased government expenditure flowing from the litigation was very substantial. The decision was legislated away by Parliament in a budget measure and that measure passed all its parliamentary stages in one sitting day under urgency without select committee scrutiny. In order to secure support it was made a budget issue, thus a confidence measure requiring support parties to vote for it. This assertion of executive power over Parliament can hardly be regarded as an appropriate way of dealing with an important human rights issue. It is, however, an illustration of the point that executive power remains potent in New Zealand even after MMP was adopted.

The dangers that lurk in New Zealand's constitutional arrangements were well known to the designers at Westminster. Professor Mark Hickford unearthed the nature of the debates that took

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70 Judy McGregor, Sylvia Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (Law Foundation Research Report, Wellington, 2015) at 18. This 209-page report makes grim reading for those who thought New Zealand is meticulous about its observance of international human rights treaty obligations.

71 Leslie Lipson *The Politics of Equality: New Zealand's Adventures in Democracy* (University of Chicago Press, Chicago, 1948) at 364.

72 *Atkinson v Ministry of Health* [2010] NZHRRT 1, (2010) 8 HRNZ 902; *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC); and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, (2012) 9 HRNZ 572.

place in the United Kingdom before and after the passage of the New Zealand Constitution Act 1852 (UK).<sup>73</sup> What is proposed in Hickford's paper is not contrary to a number of matters considered earlier when New Zealand constitutional tradition was formed. Among these are:

- the importance of meaningful normative functions;
- the nature of the political community;
- the concern expressed both before and after conferring responsible government in New Zealand and the need for corrective balance;
- the dangers of despotism and the need to provide checks;
- the serious proposal to give the New Zealand Supreme Court the power to decide whether the legislature had exceeded its power;<sup>74</sup>
- the need to protect minorities and the lamentations of Earl Grey about putting Māori as a majority of the population under European domination;<sup>75</sup> and
- the importance of dispersed political authority.

In large part these features ring true today, and provide important reasons for changing our current condition. The doctrine of parliamentary sovereignty acts to protect the Parliament and decision makers and legislation from the NZ Bill of Rights Act. It encourages them to fashion the constitutional limits for their own convenience of the political moment. To say that they do this in the name of democracy is politically naïve and neglects to explore the counterfactual concerning the methods of how political decisions are made and enacted. Governments act to remain in power as long as they can and they tend to try and get away with whatever they can. They will observe no limits so long as there are none. The reality in New Zealand lies in the fact that the executive cannot be relied upon to respect constitutional boundaries. It has the capacity to command resources and influence situations and outcomes to the point where it is not so much the public interest that the executive in the name of the Crown is representing, as the executive's political interest.

The doctrine of parliamentary sovereignty disguises issues about the distribution of public power, creating an erroneous impression that the present situation is immutable and cannot be altered. That does not comport with any realist approach to the distribution of public power in a democracy. Clearly power can be reallocated. Whether it should be is another issue. But the doctrine

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73 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford, Oxford University Press, 2011) at 324; Mark Hickford "The Historical Political Constitution – Some Reflections of Political Constitutionalism in New Zealand's History and its Possible Normative Value" [2013] NZ L Rev 585; and Mark Hickford "Considering the Historical-Political Constitution and the Imperial Inheritance in Mid-Nineteenth Century New Zealand: Balance, Diversity and Alternative Constitutions" (2014) NZJPIL 145.

74 Hickford "The Historical Political Constitution", above n 73, at 611.

75 At 614.



of parliamentary sovereignty in its modern formulation is defended on the ground that members of parliament are elected so there is democratic control and thus popular sovereignty exists and all is well.

The theory elides and fails to face the realities concerning the exercise of political power by a Cabinet in the Parliament, the machinations of parties, methods by which law is made and the techniques used to manipulate public opinion and pressures to secure partisan advantage. Furthermore, the doctrine produces conclusionary reasoning: do not examine how power is exercised in fact and whether those features are normatively desirable because the doctrine teaches the outcomes must be good because parliamentarians are elected. The absolute character of the doctrine and its superficial simplicity hides the reality that general elections are a blunt instrument and not usually about a single issue. It is accepted that almost all matters of policy should be decided by a simple majority. It does not follow that the most basic constitutional rules should not be so easily altered in the exigency of the moment. In logical terms it is a simple non-sequitur.

In looking for a solution to our current circumstances, the New Zealand protected provision tradition has the attraction of simplicity; any element of the constitution and law can be amended by statute, except the entrenched provisions discussed above. New Zealand does not have a constitution that is difficult to amend. That should continue to be the situation in my view. New Zealand can retain the formula that has become part of the sinews of our constitutional practice since 1956. To thicken the constitution, however, more elements can be added to the existing protected provisions. The NZ Bill of Rights Act should be one of them. Popular control by the electorate over the structures would be maintained. Special majorities and constitutional referenda will ensure that the people are in the final analysis in charge.

I have previously argued that there exists now a constitutional convention that single entrenchment is effective in relation to the entrenched provisions of the Electoral Act, notwithstanding the legal fact that they are not supported by double entrenchment. Enacting double entrenchment for these issues would be a sound idea and, as I have argued, the legal theory now exists to support the idea that such a step is within the competence of the Parliament. But there exists within the New Zealand tradition an ambiguity. Which of the two methods set out in s 268 should be employed on any particular issue? When should a referendum be held and when is a 75 per cent majority in Parliament sufficient? Since either would be sufficient under my argument to change constitutional provisions it becomes important to know when one is more appropriate than the other. As matters stand, if a legally binding referendum is to be held, Parliament must enact a statute defining the question, setting up how the referendum will be conducted and establishing the legal consequences that flow from the decision of the voters. There is some current indication that referenda are to be encouraged on such questions; recently in New Zealand there were two referenda on the New Zealand flag, an issue that is undoubtedly constitutional but not one legally upon which a referendum is required. It could have all been done by Parliament.

Probably the main point of differentiation between the two methods lies in the significance of the issue. Bigger constitutional changes should attract a referendum of the voters and for smaller ones a special majority vote in Parliament would be sufficient. In an MMP Parliament with minority governments depending upon support parties with confidence and supply agreements being the norm, coupled with a highly representative and politically diverse composition, there may be less need to use referenda of the voters. It is less clear what should be done in the event that Parliament passes a measure by a 75 per cent majority and a majority of the voters oppose it. Can their voice be heard? While this event is unlikely, it is worth thinking about. The answer may lie in the development within Parliament of cross-party understandings of the types of constitutional issues that need to be submitted to referendum.

In constitutional terms, it is unsound to allow a parliamentary majority of one to prevail on every question where important constitutional principles are at stake. New Zealand has accepted that idea since 1956 for certain provisions in electoral law. That principle can be extended to other features of constitutional importance. And it would be wise to do so in the absence of a second House.

In reality, the weakness of the contrary argument becomes evident when an analysis is conducted of the way in which a Parliament with a single House passes legislation.<sup>76</sup> Parliaments in New Zealand are often careless. They are often too busy. They do not have time to give consideration to human rights issues in any depth, and indeed the record demonstrates that in New Zealand they do not do so. They have had 25 years under the NZ Bill of Rights Act to be encouraged into a proper consideration of the issues. But the record demonstrates that too often these matters are not properly dealt with.

There is a contrary trend to the one I have outlined in the political reality of New Zealand. There is a feeling that should a strengthened bill of rights be adopted it would make our courts like those in the United States. This line of reasoning fails to deal with the legal fact that many other countries, notably Germany, have given the power to courts to hold legislation invalid. In Germany this happens as a matter of routine. Indeed, the whole enterprise of the European Court of Human Rights is based on that very power. The United States Constitution presents peculiar difficulties that are not present and will not be present in New Zealand. The United States Constitution is very old and interpreting it has spawned some peculiar theories, such as "originalism", to decide how to deal with what the archaic language means.<sup>77</sup> The problem is further compounded by the difficulty of

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76 I have in recent times examined the weaknesses in the system for making of legislation in some detail. See Geoffrey Palmer "The Harkness Henry Lecture: Law Making in New Zealand – Is There a Better Way?" (2014) 22 Waikato Law Review 1. See also Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (2015) 131 LQR 402.

77 Steven G Calabresi (ed) *Originalism – A Quarter-Century of Debate: 25<sup>th</sup> Anniversary of the Federalist Society* (Regnery Publishing, Washington, 2007).

amending that constitution. There exists also the added complication of federalism. With a bill of rights based on a modern international human rights instrument, accepted by many other countries, recondite interpretative difficulties do not arise here. Clarity should ensure that the legislature and the courts should not collide as much as occurs in the United States.

But that is not quite the end of the issue. Part of the counter majoritarian difficulty stems from the idea that wider policy considerations of some undefined sort should not be jeopardised by issues being examined through a human rights prism. Some of these issues require, so the argument runs, a societal consensus: the Parliament must speak on them, not the Courts. As a small country with a greater sense of collective will and less emphasis on the individual freedom than predominates in the United States we are more comfortable with Parliament alone. Abortion, same-sex marriage and euthanasia are all issues of this character. It is true that the United States Supreme Court has courted controversy, sometimes, as in the abortion cases, lasting generations.<sup>78</sup> On the other hand, the Supreme Court decisions invalidating criminal laws against homosexuality seem to have attracted less resistance as has also been the case with its recent decisions on same-sex marriage.<sup>79</sup> At the same time, the increasingly pluralistic nature of New Zealand society has weakened those common bonds mentioned above, and societal consensus may not be so easy to reach in the future. But the principled answer to the point lies in the proposal to retain the possibility of a parliamentary override. That power has the potential to keep both sides – the Parliament and the Courts – from pushing the boundaries too much. It is all about checks and balances.

In a unicameral legislature there is only one attempt at getting it right. I do not wish to argue for a second chamber; I think there are several obstacles to establishing one in New Zealand. The short point is that if a second House was of the same political complexion as the Parliament it would be of no use and if it were not there would be clashes of an unmanageable sort. The proper legal position

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78 *Roe v Wade* (1973) 410 US 113.

79 *Lawrence v Texas* (2003) 539 US 588; and *Obergefell v Hodges* (2015) 576 US, docket no 14-556.

in the United Kingdom stated by Professor Ewing is equally applicable to New Zealand.<sup>80</sup> No legal bar exists to the adoption in New Zealand of an entrenched bill of rights that imposes judicially enforceable limits on a future Parliament. In order to ensure that the Courts do not have the final word, a judicial decision should be capable of being negated by a special majority of 75 per cent of the House or a referendum of the electors. Either course would require an Act of Parliament.

In many ways New Zealand is a different country than it was 25 years ago, as I shall argue in the next section. We are moving in a direction where a bill of rights with greater legal capacity is required. In Canada, the Parliament retains the capacity to override a decision of the Supreme Court that invalidates a statutory provision. There are several ways in which Parliament can be given the last word in New Zealand. It could be done by requiring more than a simple majority as I have argued above or by having the override exercised in the succeeding Parliament. Either way what is known as the counter majoritarian difficulty is overcome.

My reservation about a simple majority being allowed to legislate a right away lies in the fact we have a unicameral legislature. As the White Paper remarked in 1985:<sup>81</sup>

[T]o enact a Bill of Rights which can be overridden, either expressly or impliedly, by a simple majority of the Government's parliamentary supporters would be no real advance on our present situation with respect to the protection of our basic rights and freedoms.

A bill of rights that lacks force over time can easily become whittled away by Parliament, first by this piece of legislation, then another. Such a bill of rights will over time lose its force and effect and become a sort of public relations document rather than an instrument that confers real rights on people and limits the power of government.

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80 AW Bradley, KD Ewing and CJS Knight *Constitutional and Administrative Law* (16th ed, Pearson, London, 2015) at 64–65:

The authority of Parliament includes power to legislate on constitutional matters, including both the composition of Parliament and the 'manner and form' by which new legislation may be made. While the Courts may not of their own accord review the internal proceedings of Parliament, the scope for judicial decision could be extended if, by statute, Parliament altered the common law rules according to which Courts recognised or identify an Act of Parliament. The doctrine of parliamentary supremacy is no bar to the adoption of a written constitution for the United Kingdom which imposes judicially enforceable limits upon a future legislature, at least if such structural changes are made that the new legislative process is radically different from the present process by Lords, Commons and royal assent.

The authors observe at the end of their chapter on parliamentary supremacy, at 74: "It is, however, doubtful whether the political system does adequately protect individuals or minority groups who may be vulnerable to oppressive action by the state." Professor Philip Joseph in his leading New Zealand constitutional text reaches a similar conclusion after exhaustive analysis: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (Thomson Reuters, Wellington, 2014) at 607.

81 Palmer, above n 10, at 53.

## VI THE CHANGING FACE OF NEW ZEALAND

In Bob Dylan's words, "the times they are a-changin". There are several features that make the case for increased rights protection more pressing now than it was in the 1980s. By the time of the report of the Constitutional Advisory Panel in 2013 things had changed. After widespread consultation the panel reported that consideration should be given to advancing the NZ Bill of Rights Act. The most central recommendation is a reflection of the comparative constitutional ignorance of the general New Zealand population that was reflected in the NZ Bill of Rights Act debate 30 years earlier. The Panel recommended the government develop:<sup>82</sup>

... a national strategy for civics and citizenship education in schools and in the community, including the unique role of the Treaty of Waitangi, te Tiriti o Waitangi, and assign responsibility for the implementation of the strategy.

On the Bill of Rights, the panel recommended that the government:<sup>83</sup>

- sets up a process, with public consultation and participation, to explore in more detail the options for amending the Act to improve its effectiveness such as:
  - ♦ adding economic, social and cultural rights, property rights and environmental rights
  - ♦ improving compliance by the Executive and Parliament with the standards in the Act
  - ♦ giving the Judiciary powers to assess legislation for consistency with the Act
  - ♦ entrenching all or part of the Act.

I am unaware of any actions on any aspect of this report that have been taken by the executive government. The report came out in December 2013. It has shared the same fate as a similar select committee Constitutional Review chaired by the Hon Peter Dunne that reported in 2005.<sup>84</sup> That review was set up mainly because of some unease about abolition of the right of appeal to the Privy Council and the establishment of the New Zealand Supreme Court. It made no recommendations of any significance. It did suggest, however, that the existing arrangements were not well understood. Accurate, neutral and accessible information should be provided.

Demography is transforming New Zealand and that will change many things about how we live. It will certainly impact upon New Zealand's sense of its own identity. New Zealand is rapidly

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82 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (Wellington, 2013) at 16. See <[www.ourconstitution.org.nz](http://www.ourconstitution.org.nz)>.

83 At 17.

84 Constitutional Arrangements Committee *Inquiry to Review New Zealand's Existing Constitutional Arrangements* (10 August 2005).

becoming a highly diverse society. The composition of the New Zealand population is changing quickly and the high level of shared values that used to be a feature of New Zealand is breaking down. Statistics New Zealand project the following ethnic populations by 2038:<sup>85</sup>

European or other:	3.43 – 3.82 million
Māori:	1.00 – 1.18 million
Asian:	1.06 – 1.26 million
Pacific:	0.54 – 0.65 million

Professor Paul Spoonley, a distinguished professor from Massey University, underlines the point:<sup>86</sup>

In coming years, the European/Pakeha population will decline as a percentage of the total population. Maori will continue to grow in size but remain about the same percentage, while Pasifika communities will become a slightly larger part of the New Zealand community. But it is the Asian population that will grow the most. Already one-quarter of Aucklanders identify with an Asian ethnicity. These communities are growing three or four times faster than any other. By the mid-2020s, the Asian population of New Zealand will overtake the Maori population in size.

The consequences of such diversity mark a considerable departure from the traditional New Zealand. It has been in modern times composed of a population that was largely British in origin with a substantial indigenous Māori minority. That mix, despite the injustices visited upon Māori, seems to have engendered for a remarkably long time a rather homogeneous culture exhibiting a high level of shared values. The need for frameworks in the New Zealand of my youth was small; there was such a high level of social conformity. This is a New Zealand we have lost and it will not return. Our heterogeneity needs to be celebrated but it also requires clear frameworks that do not rely on vague and mysterious constitutional conventions and customs unknown to many and unknowable to most. Something more concrete is required. What the diversity says about social consensus over individual rights poses interesting questions. My reading is that it means individual

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85 I have had the advantage over the years of many conversations with Mai Chen on diversity issues in New Zealand. See Mai Chen *The Superdiversity Stocktake: Implications for Business Government in New Zealand* (Superdiversity Centre, 3 November 2015), replicated on <[www.superdiversity.org](http://www.superdiversity.org)>. See also Mai Chen *Superdiversity, Democracy and New Zealand's Electoral & Referenda Laws* (Superdiversity Centre, 3 November 2015). In the wake of this work there has been established in Auckland the Superdiversity Centre for Law, Policy and Business. For Statistics New Zealand's projections, see Liz MacPherson "National Ethnic Populations Projections: 2013(Base)–2038 (21 May 2015) Statistics New Zealand <[www.stats.govt.nz](http://www.stats.govt.nz)>.

86 Paul Spoonley "Welcome to the new New Zealand" (14 November 2014) Massey University <[www.massey.ac.nz](http://www.massey.ac.nz)>.

rights have to be elevated in order to be adequately protected. Greater diversity requires greater tolerance.

New Zealand is not part of any larger political organisation that can exert any effective moderating influence on its constitutional trends and performance in the way the United Kingdom is under the European Convention on Human Rights and decisions of the court at Strasbourg.<sup>87</sup> New Zealand is subject to periodic review by the United Nations Human Rights Council and the Human Rights Committee. The deliberations of these bodies do not produce remedies in the way a court does. Individuals in New Zealand can complain to the Human Rights Committee because New Zealand ratified the Optional Protocol that provides for the committee to receive and consider communications from individuals who claim to be victims of a violation by their State of any of the rights set forth in the Covenant.<sup>88</sup> The views of the committee on the complainant are forwarded to both the complainant and the government, but they do not constitute a judicial decision and they are not binding.

There are serious challenges ahead for public policy in New Zealand. The global geopolitical situation raises many issues. Economic turmoil could occur and populist sentiments could produce ugly outcomes. The transformational changes that will be necessary because of climate change will challenge the delivery of fairness to people in our society. Preservation of the liberal democratic state seems important. It would be better to bed in something solid before adverse events occur. In these senses the reforms here being advocated are conservative, designed to preserve fairness and democratic values. The basic human rights principles we have enacted and with which we have now had 25 years' experience should be elevated in the degree of protection they enjoy in the New Zealand legal system.

Despite the introduction of MMP, New Zealand still lacks the necessary checks and balances on the use of public power that it lacked in 1984.<sup>89</sup> A unicameral legislature is capable of breaching human rights and has done so since the NZ Bill of Rights Act was passed. But, both the government machine and the courts now have some facility with NZ Bill of Rights Act issues and how they impact on government decision-making. It would be safe enough now to elevate the status of the NZ

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87 Cases in the United Kingdom still proceed to Strasbourg despite the enactment of the Human Rights Act 1998, and they will continue to do so despite the decision of the United Kingdom to leave the European Union. The decision does not affect the status of the United Kingdom as a signatory to the European Convention on Human Rights. The European Court of Human Rights was established independently from the European Union and is part of the Council of Europe system.

88 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 3.

89 As to the effects of MMP on the legislative process, see Ryan Malone *Rebalancing the Constitution: The Challenge of Law-Making Under MMP* (Institute of Policy Studies, Victoria University of Wellington, 2008).

Bill of Rights Act, and it can be done so as to insulate court decisions on it against reversal by a simple majority in Parliament. It can be inferred from the relatively conservative interpretations that the courts have given the Bill that the system of government and the body politic will not be unduly disturbed by such a development.

The Parliament does not rigorously analyse human rights issues and lacks the institutional mechanisms for doing so. Our constitutional law is too thin and the flexibility of the public law system knows no limits. This sets up a situation where, if we do not act.<sup>90</sup>

The death of democracy is not likely to be an assassination from ambush. It will be a slow extinction from apathy, indifference and undernourishment.

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90 Robert Maynard Hutchins, Dean of the Yale Law School, then the Chancellor of the University of Chicago, said this in 1954: see Antony Jay (ed) *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) at 186.



**Appendix One: Bills Subject to Section 7 Reports (as at 13 June 2016)**

	<b>Date</b>	<b>Bill</b>	<b>NZ Bill of Rights Act Section</b>	<b>Type</b>	<b>Date of Section 7 report</b>	<b>Outcome</b>
1	1991	Kumeu District Agricultural and Horticultural Society Bill	27(1)	Non-Govt (Private)	23/07/91	Received assent 29/08/91
2	1991	Napier City Council (Control of Skateboards) Empowering Bill	21	Non-Govt (Local)	15/08/91	Negated at second reading 18/03/92
3	1991	Transport Safety Bill	21, 22	Govt	17/12/91	Received assent 14/12/92
4	1992	Films, Videos and Publications Classification Bill	26(1)	Govt	(Oral Report): 02/12/92	Received assent 26/08/93
5	1993	Children, Young Persons and their Families Amendment Bill	27(3)	Govt	10/08/93	Received assent 09/12/94
6	1994	Technology and Crimes Reform Bill	14, 21, 25(c)	Non-Govt (Members')	24/08/94	Negated after select committee 30/07/97
7	1995	Disclosure of Political Donations and Gifts Bill	21	Non-Govt (Members')	29/11/95	Bill ruled "out of order" as it involved appropriation 13/12/95
8	1996	Degrees of Murder Bill	9	Non-Govt (Members')	19/03/96	Negated at consideration of select committee report 17/10/2000. Did not proceed beyond second reading 20/03/96
9	1997	Animal Welfare Bill	21	Non-Govt (Members')	10/09/97	Negated at consideration of select committee report 16/06/99. Did not proceed beyond second reading 10/09/97
10	1997	Casino Control (Moratorium) Amendment Bill	27(3)	Govt	23/10/97	Received assent 23/10/97
11	1997	Land Transport Bill	25(c), 26(2)	Govt	26/11/97	Received assent 26/11/97

	<b>Date</b>	<b>Bill</b>	<b>NZ Bill of Rights Act Section</b>	<b>Type</b>	<b>Date of Section 7 report</b>	<b>Outcome</b>
12	1997	Resource Management (Cellsite Moratorium) Amendment Bill	27(3)	Non-Govt (Members')	11/11/97	Negated at second reading 12/11/97, 26/11/97
13	1997	Trade in Endangered Species Amendment Bill	14	Non-Govt (Members')	14/05/97	Received assent 10/08/98
14	1999	Crimes (Bail Reform) Bill	24(b)	Non-Govt (Members')	28/04/99	Negated at consideration of select committee report 22/03/00. Did not proceed beyond second reading 28/04/99
15	2000	Criminal Justice (Parole Offenders) Amendment Bill	9	Non-Govt (Members')	08/11/00	Negated at first reading 06/12/00
16	2000	Electoral (Public Opinion Polls) Amendment Bill	14	Non-Govt (Members')	22/08/00	Negated at first reading 16/08/00, 06/09/00
17	2000	Films, Videos and Publications Classification (Prohibition of Child Pornography) Amendment Bill	14	Non-Govt (Members')	16/08/00	Negated at second reading 14/03/01
18	2000	Housing Restructuring (Income-Related Rents) Amendment Bill	19	Govt	23/05/00	Received assent 08/08/00
19	2000	Sale of Liquor (Health Warnings) Amendment Bill	14	Non-Govt (Members')	05/09/00	Negated at first reading 06/09/00; 11/10/00
20	2000	Summit Road (Canterbury) Protection Bill	24(d), 25(a), 25(e)	Non-Govt (Local)	08/11/00	Received assent 08/10/01
21	2000	Volunteers Employment Protection Amendment Bill	27(1)	Non-Govt (Members')	06/09/00	Received assent 30/03/04
22	2001	Electoral Amendment Bill (No 2)	14	Govt	13/03/01	Received assent 28/02/02
23	2001	Social Security (Residence of Spouses) Amendment Bill	19	Govt	15/05/01	Received assent 07/08/01

<b>Date</b>	<b>Bill</b>	<b>NZ Bill of Rights Act Section</b>	<b>Type</b>	<b>Date of Section 7 report</b>	<b>Outcome</b>
24	2001 War Pensions Amendment Bill (No 2)	19	Govt	13/12/01	Received assent 14/04/03
25	2002 Land Transport (Street Racing and Illegal Drag Racing) Amendment Bill	21	Govt	06/06/02	Received assent 04/04/03
26	2002 Income Tax Bill	19	Govt	13/11/02	Received assent 07/05/04
27	2003 Care of Children Bill	19	Govt	11/06/03	Received assent 21/11/04
28	2003 Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill	19	Govt	25/06/03	Received assent 25/11/03
29	2003 Death with Dignity Bill	8	Non-Govt (Members')	26/06/03	Negated at first reading 30/07/03
30	2003 Parole (Extended Supervision) and Sentencing Amendment Bill	21, 26(2)	Govt	11/11/03	Received assent 06/07/04
31	2003 Social Security (Long-term Residential Care) Amendment Bill	19	Govt	16/12/03	Received assent 06/12/04
32	2004 Future Directions (Working for Families) Bill	19	Govt	27/05/04	Received assent 03/06/04
33	2004 Criminal Procedure Bill	26(2)	Govt	22/06/04	Received assent 25/06/08
34	2004 Relationships (Statutory References) Bill	19	Govt	22/06/04	Received assent 24/03/05
35	2004 Sentencing (Community Sentencing to Fit the Crime) Amendment Bill	17	Non-Govt (Members')	19/10/04	Negated at first reading 16/03/05
36	2005 Marriage (Gender Clarification) Amendment Bill	19	Non-Govt (Members')	11/05/05	Negated at first reading 7/12/2005
37	2005 Manukau City Council (Control of Graffiti) Bill	19	Non-Govt (Local)	07/12/05	Received assent 22/04/08

	<b>Date</b>	<b>Bill</b>	<b>NZ Bill of Rights Act Section</b>	<b>Type</b>	<b>Date of Section 7 report</b>	<b>Outcome</b>
38	2005	Manukau City Council (Control of Street Prostitution) Bill	23(4)	Non-Govt (Local)	07/12/05	Negated at second reading 11/10/06
39	2006	Human Tissue (Organ Donation) Amendment Bill	19	Non-Govt (Members')	29/03/06	Negated at second reading 7/11/07
40	2006	Human Rights (One Law for All) Amendment Bill	19, 20	Non-Govt (Members')	28/06/06	Negated at first reading 28/06/06
41	2007	Auckland Regional Amenities Funding Bill	19	Non-Govt (Private)	19/09/07	Received assent 29/08/08
42	2007	Misuse of Drugs (Classification of BZP) Amendment Bill	25(c)	Govt	22/08/07	Received assent 14/03/08
43	2008	Wanganui District Council (Prohibition of Gang Insignia) Bill	14	Non-Govt (Local)	20/02/08	Received assent 09/05/09
44	2009	Criminal Investigations (Bodily Samples) Amendment Bill	21	Govt	10/02/09	Received assent 02/11/09
45	2009	Sentencing and Parole Reform Bill	9	Govt	18/02/09	Received assent 31/05/10
46	2009	Parole (Extended Supervision Orders) Amendment Bill	22, 26(1), 26(2)	Govt	02/04/09	Received assent 03/04/09
47	2009	Eden Park Trust Amendment Bill	19	Non-Govt (Private)	08/04/09	Received assent 22/08/09
48	2010	Liquor Advertising (Television and Radio) Bill	14	Non-Govt (Members')	2/07/09	Negated at first reading 01/07/09
49	2010	Electoral (Disqualification of Convicted Persons) Retitled: Electoral (Disqualification of Sentenced Prisoners) Amendment Bill	12	Non-Govt (Members')	17/03/10	Received assent 15/12/10
59	2010	Social Assistance (Future Focus) Amendment Bill	19	Govt	24/03/10	First reading not held
51	2010	Head of State Referenda Bill	19	Non-Govt (Members')	21/04/10	Negated at first reading 21/04/10

	<b>Date</b>	<b>Bill</b>	<b>NZ Bill of Rights Act Section</b>	<b>Type</b>	<b>Date of Section 7 report</b>	<b>Outcome</b>
52	2010	Misuse of Drugs Amendment Bill	25(c)	Govt	23/04/10	Received assent 08/08/11
53	2010	Local Electoral (Maori Representation) Amendment Bill	19	Non-Govt (Members')	16/06/10	Negated at first reading 16/6/10
54	2010	Taxation (Income-sharing Tax Credit) Bill	19	Govt	16/08/10	Has not progressed passed select committee. Report dated 21/03/11. Still before the House
55	2010	Smoke-free Environments (Removing Tobacco Displays) Amendment Bill	14	Non-Govt (Members')	22/09/10	Has not progressed beyond first reading zzzzz22/12/11. Does not appear on the Schedule of Bills or Order Paper 10/03/16
56	2010	Alcohol Reform Bill	14, 19, 22, 25(c), 27(2)	Govt	08/11/10	At Committee of the Whole House (06/12/12) was divided into:  Sale and Supply of Alcohol Act 2012; Local Govt (Alcohol Reform) Amendment Act 2012; and Summary Offences (Alcohol Reform) Amendment Act 2012. All received assent on 18/12/2012

Date	Bill	NZ Bill of Rights Act Section	Type	Date of Section 7 report	Outcome
57	2010 Criminal Procedure (Reform and Modernisation) Bill	24(e), 25	Govt	15/11/10	<p>At Committee of the Whole House (29/09/11) was divided into 18 Bills:</p> <p>Bail Amendment Act, Children, Young Persons, and Their Families Amendment Act (No 2) 2011, Crimes Amendment Act (No 4) 2011, Criminal Disclosure Amendment Act 2011, Criminal Procedure (Mentally Impaired Persons) Amendment Act 2011, District Courts Amendment Act (No 2) 2011, Evidence Amendment Act 2011, Juries Amendment Act 2011, Justices of the Peace Amendment Act 2011, New Zealand Bill of Rights Amendment Act 2011, Sentencing Amendment Act (No 2) 2011, and Summary Proceedings Amendment Act (No 2) 2011 received assent 17/10/11;</p> <p>Corrections Amendment Act 2013 received assent on 04/03/13; and Victims' Rights Amendment Act 2014 received assent on 06/06/14</p>

<b>Date</b>	<b>Bill</b>	<b>NZ Bill of Rights Act Section</b>	<b>Type</b>	<b>Date of Section 7 report</b>	<b>Outcome</b>
58	2011 Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill	Right to an effective remedy	Govt	13/10/11	Has not progressed passed first reading 03/12/12. Does not appear on Schedule of Bills or Order Paper 10/03/16
59	2012 Lobbying Disclosure Bill	14	Non-Govt (Members')	12/06/12	Has not progressed passed select committee. Report dated 22/08/13. Not on Schedule of Bills or Order Paper 10/03/16
60	2012 Land Transport (Admissibility of Evidential Breath Tests) Amendment Bill	25(c)	Govt	17/10/12	Has not progressed passed select committee. Report dated 07/03/14. Not on Schedule of Bills or Order Paper 10/03/16
61	2013 New Zealand Public Health and Disability Amendment Bill (No 2)	27(2)	Govt	16/05/13	Received assent 20/05/13
62	2013 Land Transport Amendment Bill	25(c)	Govt	19/11/13	Received assent 07/08/14
63	2014 Parole (Extended Supervision Orders) Amendment Bill	26	Govt	17/04/14	Received assent 11/12/14
64	2015 Electronic Monitoring of Offenders Legislation Bill	18(1), 21, 26(2)	Govt	13/05/15	Has not progressed beyond select committee. Report dated 20/11/15. Still before the House
65	2015 New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill	18(3), 19	Non-Govt (Members')	21/07/15	Negated at first reading 16/09/15
66	2015 Financial Assistance for Live Organ Donors Bill	19	Non-Govt (Members')	18/07/15	Select committee report due 23/09/16

	<b>Date</b>	<b>Bill</b>	<b>NZ Bill of Rights Act Section</b>	<b>Type</b>	<b>Date of Section 7 report</b>	<b>Outcome</b>
67	2015	Child Protection (Child Sex Offender Register) Bill	9, 26(2)	Govt	13/08/15	Second reading completed 02/06/16
68	2015	Affordable Healthcare Bill	19	Non-Govt (Members')	16/09/15	Negated at first reading 02/12/15
69	2015	Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) Amendment Bill	14	Non-Govt (Members')	01/12/15	Select committee report tabled 12/05/16
70	2016	Social Security Legislation Rewrite Bill	5	Govt	17/03/2016	Select committee report due 15/09/2016