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Hon Dr Michael Cullen  
Jeffrey Goldsworthy  
Lord Cooke of Thorndon  
Terence Arnold QC

Andrew Geddis  
Claudia Geiringer  
Neill Atkinson  
Grant Morris

Janet L Hiebert

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VICTORIA UNIVERSITY OF WELLINGTON  
*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

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# RIGHTS-VETTING IN NEW ZEALAND AND CANADA: SIMILAR IDEA, DIFFERENT OUTCOMES

Janet L Hiebert\*

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*This paper analyses how the bureaucratic and political rights-vetting of proposed legislation has evolved in New Zealand and Canada. Despite using similar textual and legal criteria for determining whether a Bill is inconsistent with rights, Canada and New Zealand have had very different experiences with reporting on the compatibility of Bills. At the time of writing, no report has been made in Canada that a Bill is inconsistent with the Canadian Charter of Rights and Freedoms whereas in New Zealand there have been 35 reports of inconsistency. The author argues that neither outcome is well suited to facilitate the objective that underlies the political rights-vetting initiative and recommends changes to the reporting obligation to help facilitate more robust parliamentary review of legislation from a rights perspective.*

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The New Zealand Bill of Rights Act 1990 is associated with what legal and political scholars have characterised as a new model for protecting rights, referred to in various ways including the "Commonwealth model",<sup>1</sup> a "hybrid" approach<sup>2</sup> or a new "parliamentary rights" model.<sup>3</sup> New Zealand, the United Kingdom and the Australian

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\* Professor, Department of Political Studies, Queen's University, Kingston, Canada. I wish to thank Jeremy Clarke for his valuable research assistance in helping to assess the impact of rights-vetting in New Zealand. I would like to thank Grant Huscroft who read an earlier draft of the paper for his helpful comments as well as those of an anonymous reviewer. Financial assistance of the Social Sciences and Humanities Research Council of Canada is gratefully acknowledged.

- 1 Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2002) 49 Am J Comp L 707, 742.
- 2 Jeffrey Goldsworthy "Homogenizing Constitutions" (2003) 23 OJLS 483, 484.
- 3 Janet L Hiebert "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?" (2004) 82 Tex L Rev 1963.

Capital Territory have each adopted bills of rights that reject judicial supremacy,<sup>4</sup> while Canada allows for temporary but renewable political decisions to give primacy to legislative judgment, even when in conflict with judicial interpretations of rights.<sup>5</sup> When most commentators discuss these bills of rights they emphasise limitations on judicial review as the essential point of departure from the more traditional model associated with the United States. This paper has a very different emphasis. Although the introduction of judicial review into parliamentary systems that formerly eschewed any such role represents a radical departure from earlier political and constitutional principles,<sup>6</sup> more significant yet was the decision of these parliamentary jurisdictions to introduce political rights-vetting.<sup>7</sup> By this I mean the establishment of new responsibilities and procedures for public and political officials to assess policy initiatives and legislative Bills in terms of their consistency with protected rights. The combined effects of vetting procedures, statutory responsibilities to report inconsistencies with rights and exposure to judicial review introduce a new dynamic in the quest to ensure that state actions are consistent with fundamental rights. Arguably, it is this dynamic tension between political rights-vetting, parliamentary deliberation and the judicial interpretation of rights that truly marks the significance of this new approach for rights protection.

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- 4 All of these jurisdictions, with the exception of Canada, formally reject the principle of judicial supremacy. Section 33 of the Canadian Charter of Rights and Freedoms allows Parliament or the provincial legislatures to set aside the effects of a judicial decision for most sections of the Charter, or to pre-empt judicial review, but in both contexts this is for a temporary and renewable period. The judiciary retains responsibility to determine the scope and meaning of constitutional rights.
- 5 There are some exceptions to the applicability of the notwithstanding clause of section 33 of the Canadian Charter of Rights and Freedoms. It does not apply to: democratic rights to vote and seek election to the House of Commons; the requirement that the legislative assemblies do not continue for longer than five years and must sit at least once every twelve months; mobility rights of citizens; and language rights, including minority education rights.
- 6 This does not mean that courts did not or could not protect rights in their interpretation and development of the common law. But the doctrine of parliamentary supremacy was interpreted, politically and legally, as constraining courts' capacity to question the legality of duly enacted legislation from a rights perspective. Canada is an exception in terms of judicial review because of its federal nature. Nevertheless, in the period before it adopted the Charter in 1982, judicial review was almost exclusively confined to jurisdictional issues.
- 7 Elsewhere I have referred to the concepts of legislative rights review (for parliamentary review) and political rights review (to include both executive and legislative rights review). I am using the term rights-vetting in this paper because this term is more commonly used in New Zealand. In using this term I am referring to both executive-based review and parliamentary scrutiny of whether Bills are consistent with protected rights. See Janet L Hiebert "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 BJPS 235 and "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?" (2004) 82 *Tex L Rev* 1963.

The paper will analyse how political rights-vetting of Bills has evolved in New Zealand and Canada. Despite using similar textual and legal criteria for determining whether a Bill is inconsistent with rights, Canada and New Zealand have had very different experiences with reporting on the compatibility of Bills. At the time of writing, no report has been made in Canada that a Bill is inconsistent with the Canadian Charter of Rights and Freedoms (the Charter),<sup>8</sup> whereas in New Zealand there have been 35 reports of inconsistency. The paper assesses the respective practices of political rights-vetting and tries to account for such contrary experiences in reporting that Bills are inconsistent with protected rights. It argues that neither practice (the lack of any report or frequent reports of inconsistency) is well suited to facilitate the laudable objective that underlies the political rights-vetting initiative: the development of a political culture in which legislative initiatives that may adversely affect rights are carefully assessed before introduction and during parliamentary evaluation.

The paper is divided into six parts. Part I discusses the origins of the idea of political rights-vetting in both countries. Part II examines how political rights-vetting has evolved. Part III discusses incidents of reporting that a Bill is inconsistent with rights and examines parliamentary responses to these. Part IV assesses the relationship between political rights-vetting and reporting. Part V discusses a new development in reporting – specifically the decision in New Zealand to provide Parliament with the legal advice that was part of the vetting procedure. Part VI recommends a different approach for determining whether or not reports to Parliament are warranted.

## ***I ORIGINS OF THE IDEA OF POLITICAL RIGHTS-VETTING IN CANADA AND NEW ZEALAND***

The introduction of the idea of political rights-vetting dates back to the humble and much maligned Canadian Bill of Rights, enacted in 1960. The introduction of this statutory bill of rights, which applied only to the national government, is notable more for its attempt to change political culture than for any perceptible influence on actual political or judicial outcomes. Although the Canadian Bill of Rights was criticised for its lack of internal cohesion, for representing a weaker version than preferred by many advocates and for its failure to establish a clear and coherent judicial mandate,<sup>9</sup> it envisaged the laudable objective of trying to create a rights culture that was sufficiently robust to protect rights.

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8 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

9 For a good discussion of the origins of the Canadian Bill of Rights, and the debates that led up to its enactment, see Christopher MacLennan *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (McGill-Queen's University Press, Montreal, 2003).

The Canadian Bill of Rights introduced the idea of political rights review. Underlying this concept was the intent to influence bureaucratic, governmental and parliamentary behaviour. The process of evaluating proposed Bills was intended to make public and political officials more conscious of how proposed legislation would affect rights, so that this knowledge would constrain and influence their decisions. But proponents of political rights-vetting did not think that an executive-based system of vetting would be sufficiently robust if not also subject to further critical assessments. Indeed, the idea that robust protection of rights could occur from a government checking itself in an executive-dominated parliamentary system is naïve without some form of external scrutiny – whether from Parliament, the judiciary, or both. Thus, the idea of political rights-vetting contains both an executive and parliamentary component. The Minister of Justice in Canada (who also serves as Attorney-General) is required to alert Parliament where Bills are inconsistent with protected rights. Former Deputy Minister of Justice Elmer Driedger viewed this process as providing for effective rights protection because it would dissuade government ministers from introducing initiatives that violated rights and would consequently require a report of inconsistency. He expected that if a Bill were considered by government lawyers to violate the Canadian Bill of Rights, it would almost certainly be rejected. Cabinet could not afford to proceed with any provision that fundamentally impaired rights because this would likely lead to the resignation of the Minister of Justice.<sup>10</sup> As he suggested, no government could "politically afford to put itself in a position in which the Minister of Justice would resign over the issue or make an adverse report against the Government in the House of Commons as required".<sup>11</sup> This reporting obligation created a process, intensified and made more robust with the subsequent adoption in 1982 of the Canadian Charter of Rights and Freedoms, of carefully and systematically evaluating policy initiatives and either abandoning some legislative objectives outright, or revising their means to ensure consistency with protected rights.

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10 Elmer A Driedger "The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint" (1977) 9 *Ottawa L Rev* 303, 310-11.

11 Driedger, above n 10, 311. He also believed that in the rare event that the Department of Justice initially overlooked a possible conflict with the Bill of Rights, any inconsistency with rights would be caught at the drafting stage, and would still result in sufficient pressure to amend the legislation.

The reporting requirement, as provided in the Department of Justice Act, is as follows:<sup>12</sup>

4.1(1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

New Zealand has borrowed this idea of political rights-vetting. Its decision to adopt this concept was motivated by controversy in earlier political debates about the desirability and scope of a proposed bill of rights. Support for a bill of rights grew out of concerns about empowering Parliament and checking executive dominance,<sup>13</sup> particularly under the leadership of Prime Minister Robert Muldoon, whose propensity to bypass parliamentary, regulatory and judicial scrutiny prompted calls for parliamentary reforms, including a bill of rights.<sup>14</sup> Former opponents of a bill of rights began to espouse its virtue. A significant conversion, in terms of influencing the course of events, came from Geoffrey Palmer. As a legal academic, Palmer had argued against a bill of rights but experiences in Parliament, first as a Labour Opposition member and later as Cabinet Minister and eventually Prime Minister, changed his perception about the desirability of a bill of rights.<sup>15</sup> Although Labour was elected to Government in 1984, the victory was not attributed to public demand for a bill of rights but to a deep distrust of the incumbent government and a general desire for change.<sup>16</sup> Although the Labour Government remained committed to a bill of rights, the idea of allowing judges to not only interpret rights but also to pronounce on the validity of legislation generated considerable

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12 Department of Justice Act RS C 1985 c J-2, s 4.1(1).

13 For a good discussion of the political evolution of the idea of a bill of rights, see Paul Rishworth "The Birth and Rebirth of the Bill of Rights" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and The Human Rights Act 1993* (Brookers, Wellington, 1996).

14 Paul Rishworth describes a series of events between 1975 and 1984, which contributed to the view that a bill of rights may be a valuable check on governmental power, see Rishworth, above n 13, 10-11.

15 Geoffrey Palmer explains his change of reasoning in *Unbridled Power?* (Oxford University Press, Wellington, 1979) 130-40 and in *New Zealand's Constitution in Crisis* (John McIndoe Ltd, Dunedin, 1992) 51-70.

16 Rishworth, above n 13, 11-12.



controversy.<sup>17</sup> When it became obvious that an entrenched bill of rights was not a viable option at the time, Palmer expressed interest in the Canadian practice of having the executive review Bills in terms of their consistency with protected rights. He saw this as serving two functions: "First, to ensure that the internal mechanisms of government addressed the issues seriously and with full legal analysis and, second, that the political consequences of breaching the standards were brought to the fore."<sup>18</sup>

This idea of political rights-vetting is embodied in section 7 of the New Zealand Bill of Rights Act 1990, which requires that the Attorney-General advise Parliament when legislative Bills are inconsistent with its provisions. Section 7 reads:

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—  
 (a) In the case of a Government Bill, on the introduction of that Bill; or  
 (b) In any other case, as soon as practicable after the introduction of the Bill,—  
 bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

## II *HOW POLITICAL RIGHTS-VETTING HAS EVOLVED IN CANADA AND NEW ZEALAND*

Not only do both countries share this idea of political rights-vetting and require reports to Parliament where Bills are not consistent with rights, they utilise similar textual and legal criteria for determining consistency. The statutory reporting obligations envisage more than determining whether a legislative Bill infringes on rights. Both the Canadian Charter of Rights and Freedoms and the New Zealand Bill of Rights Act 1990 include a similarly worded general limitation clause, which means that determining whether proposed legislation is consistent with protected rights also requires assessing the reasonableness of any rights infringement it may produce.

In New Zealand the criterion for determining whether or not a Bill that restricts protected rights is, nevertheless, consistent with the New Zealand Bill of Rights Act 1990 is set out in section 5, the general limitation clause, which is similar to section 1 of the Canadian Charter of Rights and Freedoms. Although the affirmation for protecting rights is stronger in section 1, which "guarantees" rights subject only to reasonable limits, the

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17 The Labour Government's proposed bill of rights in the White Paper generated substantial criticism, particularly amongst those who feared a transfer of power from elected parliamentarians to appointed judges. Political support, already tenuous because of divisions within the ruling Labour party, was weakened further when the National Party decided to oppose an entrenched bill of rights. For discussion of the debates and controversy about the development of a bill of rights see Mai Chen and Sir Geoffrey Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993) 445-62.

18 Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe Ltd, Dunedin, 1992) 60.

context for determining what constitutes an acceptable limit is the same: it must be consistent with a free and democratic society. Moreover, the vetting process in each country is heavily influenced by legal assessments of judicial interpretations of these limitation clauses, which are themselves similar as the New Zealand judicial approach has been greatly influenced by the Supreme Court of Canada.<sup>19</sup>

Yet despite these similarities, it is hard to imagine more divergent approaches in how the interpretation of these reporting obligations has evolved. The Charter has been in force for more than 20 years and yet, as noted above, no reports have ever been made that a Bill is inconsistent with protected rights. This is in sharp contrast to New Zealand where 35 reports of inconsistency have been made, of which 18 have been for government Bills. One explanation for this discrepancy is that in Canada only government Bills are subject to reports of inconsistency, whereas in New Zealand all Bills are vetted. Perhaps it is not surprising that local government or member's Bills give rise to reports of inconsistency because the sponsor lacks the resources available to government ministers in terms of anticipating and scrutinising policy proposals for their consistency with rights.<sup>20</sup> But this does not explain the divergence in the incidents of negative reports for governmental Bills. Explanations will be explored below, but first it is necessary to examine how political rights-vetting has evolved in both countries.

#### A *Political Rights-Vetting in Canada*

Part of the explanation for the lack of reports in Canada is the broad and early reach of the Department of Justice in vetting proposed initiatives, allowing for the Minister of Justice to reach judgment about the consistency of a Bill with the Charter before a policy initiative is given the go ahead by Cabinet to be introduced as a Bill to Parliament.

The Human Rights Law Section of the Department of Justice was established in 1982 to review existing legislation, identify Charter problems, bring statutes into conformity with the Charter and provide ongoing advice on Charter issues. Initially the department's role was reactive: to audit existing legislation, propose necessary changes to ensure consistency with the Charter and respond to judicial rulings that legislation was not consistent with

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19 *R v Oakes* [1986] 1 SCR 103 has influenced how reasonable limits are ascertained in New Zealand. The relevant New Zealand judicial decisions are *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) and *Moonen v Literature Board of Review* [2000] 2 NZLR 9 (CA) where the Court of Appeal set out a process for determining whether a limit is justified under section 5. For discussion of the New Zealand approach, see Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Legislation Advisory Committee, Wellington, 2001) ["LAC Guidelines"].

20 On this point see Grant Huscroft "The Attorney-General's Reporting Duty" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 214.

the Charter. But since 1991 the Department of Justice has adopted a more proactive role in terms of Charter advice. It now evaluates policy proposals at early stages of their development.<sup>21</sup> Other departments initially resented this role, which was thought of as interference and an attempt by the justice department to gain prominence and influence arising from its monopoly on Charter legal expertise. Over time, these resentments lessened, as it became clear that the Supreme Court of Canada was taking its new mandate seriously and that a remedy for serious breaches of Charter rights could result in the nullification of legislation. A number of early Supreme Court decisions helped influence departmental behaviour as public officials became more receptive, or at least more resigned, to the Department of Justice's role of assessing Bills and advising on Charter issues. Decisions such as *Singh v Minister of Employment and Immigration*,<sup>22</sup> *Schachter v Canada*,<sup>23</sup> *R v Oakes*<sup>24</sup> and *Hunter et al v Southam*<sup>25</sup> underscored the magnitude of the Charter's implications for governance. To departments they conveyed the message that where rights were adversely affected, the government would have the burden of proof for demonstrating the reasonableness of legislation: if it failed to satisfy the court on this issue, the judiciary would declare legislation invalid or grant other remedies, resulting in substantial policy disruption and fiscal implications.<sup>26</sup>

The evaluation of policy initiatives has been greatly influenced by Canadian Supreme Court jurisprudence, both in determining whether a right has been infringed and whether a proposed Bill can be considered a reasonable limitation on a protected right. The most important decision in terms of assessing reasonableness was *R v Oakes* where the Court articulated its general approach to this inquiry. The approach involves two stages. The question of whether a right has been infringed is analytically separate from whether or not the restriction is a reasonable limit and demonstrably justified in a free and democratic society. This second inquiry also has two stages. The first is to determine whether the Bill

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21 For more on the role of the Department of Justice in terms of vetting Bills see James B Kelly "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its Entry into the Centre of Government" (1999) 42 CPA 476.

22 *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177.

23 *R v Schachter* [1992] 2 SCR 679.

24 *R v Oakes* [1986] 1 SCR 103.

25 *Hunter et al v Southam Inc* [1984] 2 SCR 145.

26 For more on this see Janet L Hiebert *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, Montreal, 2002) ch 1.

represents a significant and important enough objective to restrict rights, while the second is to ascertain if the limit is rational, proportionate and impairs the right as little as possible.<sup>27</sup>

The centrality of Justice's advice in the policy process has been secured by a change in Cabinet procedures that now require that a Memorandum to Cabinet incorporate Charter analysis.<sup>28</sup> James Kelly characterises the transformation of the department's role in terms of moving from "a technical review of legislation to a substantive role in the development of new policy".<sup>29</sup> The influence that the Department of Justice exerts on policy development arises both from the Human Rights Centre's introduction of a screening process based on a Charter checklist it produces and updates for evaluating proposed legislative measures and also from the Justice Department's Legal Service units, located in line departments, who vet policy initiatives at early stages of policy development. Use of this standard checklist ensures that vetting is based on common standards and does not lead to inconsistency in the Charter assessments conducted within or across departments.<sup>30</sup>

The addition of a Charter checklist to the Cabinet Memorandum means that the sponsoring minister's department must address the Charter implications of any legislative initiative. The Department of Justice is the sole provider of this advice. As a result, ministers do not have the political autonomy to introduce Bills that claim to be compatible with the Charter if based on alternative or competing legal opinions. This places pressure on departments to work with Justice officials to address Charter concerns before the memorandum is submitted.

Even more significant than the centralisation of legal advice and its influence at early stages of policy development, however, is the emergence of a bureaucratic and political culture that considers unacceptable the pursuit of a Bill that is so profoundly in tension with Charter values that it would require a report of inconsistency. No government to date has been willing to authorise a Bill that would require the Minister of Justice to alert

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27 *R v Oakes* [1986] 1 SCR 103.

28 This change can be traced to 1991 when, at the insistence of the Deputy Minister of Justice, the clerk of the Privy Council wrote to all deputy ministers stressing that a proactive Charter view must be taken at the earliest stages of policy development. As a result, the Tellier Memorandum called for Charter analysis to be incorporated into the Memorandum to Cabinet, saying that this analysis "had to include an assessment of the risk of successful challenge in the courts, the impact of an adverse decision, and possible litigation costs." Mary Dawson "The Impact of the Charter on the Public Policy Process and the Department of Justice" (1992) 30 Osgoode Hall LJ 596.

29 Kelly, above n 21, 495.

30 For more about the role of the Department of Justice see Kelly, above n 21.

Parliament that it is inconsistent with the Charter. This does not mean that Cabinet has been unwilling to approve of Bills that will likely lead to litigation and where guarantees cannot be provided that legislation will be successfully defended. Cabinet ultimately decides what level of risk it is willing to incur, as long as the Minister of Justice agrees that a credible Charter argument can be made. As James Kelly states:<sup>31</sup>

[T]he decision whether to proceed is the prerogative of the political executive, as there are situations when Justice would prefer the department not go ahead but the minister of a department wants to test the policy in the courts.

This threshold for determining whether or not a report of inconsistency is required – whether a credible Charter argument can be made – is not mandated by the Department of Justice Act<sup>32</sup> but has evolved from practice and convention. Any judgment about whether a credible Charter argument can be made clearly has political and subjective elements and thus may vary depending on the Minister of Justice's philosophical views of the role of the state or the relationship between Parliament and the judiciary when determining the merits of legislation intended to address a particular social problem. Moreover, it is important to recognise that this threshold is broad enough to embrace a wide range of policy initiatives even when they appear to raise serious tension with protected rights. The criterion for evaluating legislative restrictions on rights – whether they are consistent with a free and democratic society – has contributed to the breadth of this threshold. As will be argued at greater length below (in Part VI), evaluating a policy's reasonableness is, and must be, subject to value-laden judgments about the nature of a free and democratic society and also to discretionary interpretations of an evolving (and not necessarily consistent or predictable) jurisprudence with respect to proportionality criteria. Both elements can generate differences of opinion amongst the judiciary and political and public officials. Nevertheless, if the government were intent on pursuing a Bill that was patently inconsistent with Charter values and thus did not permit the Minister of Justice to conclude that a credible Charter argument could be made, the Minister of Justice would likely feel compelled to resign.<sup>33</sup>

Since no report of Charter incompatibility has yet been made, it is understandable if some are deeply sceptical about the quality of the Charter vetting process. Yet the failure of the Minister of Justice in Canada to alert Parliament that Bills are not consistent with the Charter probably says more about the process and culture of how this exercise has evolved than the rigour in which this Charter scrutiny is undertaken. One informed study of the

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31 Kelly, above n 21, 502.

32 Department of Justice Act RS C 1985 c J-2.

33 Hiebert, above n 26, ch 1.

process characterises the Department of Justice's approach as proactive in terms of minimising the risk of judicial nullification of Bills on Charter grounds and, as such, comprising a significant influence on policy development.<sup>34</sup> Indeed some parliamentarians perceive that government lawyers have exercised too much influence on policy decisions and have exaggerated Charter risks, resulting in overly cautious legislation.<sup>35</sup>

### ***B Political Rights-Vetting in New Zealand***

The Ministry of Justice evaluates all Bills in terms of their consistency with the New Zealand Bill of Rights Act 1990, with the exception of those promoted by the Minister of Justice, which are evaluated by the Crown Law Office. Scholarly assessment of this subject would benefit from careful study of the differences in the interpretations and approaches taken by these different bodies; specifically, whether closer involvement by the Ministry of Justice in the policy process has different effects on vetting and reporting than occurs in the Crown Law Office.

The criteria for determining whether a Bill is consistent with the New Zealand Bill of Rights Act 1990 are provided in the Legislation Advisory Committee Guidelines,<sup>36</sup> which have been endorsed by Cabinet.<sup>37</sup> As is the case in Canada, the criteria for vetting Bills in terms of their compliance with protected rights are greatly influenced by the Supreme Court of Canada's approach to reviewing reasonable limits in *R v Oakes*, as discussed earlier.<sup>38</sup> As in Canada, assessing the implications of proposed Bills is part of the process of Cabinet decision-making when determining which initiatives will be introduced to Parliament. The Cabinet Manual stipulates that each department must assess the rights implications of a proposed policy and where appropriate, should consult relevant agencies with an interest or experience in human rights issues. The Ministry of Justice is listed as one possible source, but is not specified as either a required or exclusive source. Grant Huscroft characterises the impact of this vetting process as follows:<sup>39</sup>

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34 Kelly, above n 21, 476–511.

35 A good example was the Federal Government's attempt to establish a national DNA data bank for resolving previously unsolved crimes. The Opposition wanted stronger measures that would allow police to collect DNA samples from criminal suspects at the point of arrest. The Federal Government rejected this position, arguing that the judiciary would likely rule this unconstitutional, and promoted legislation that allows for DNA samples to be obtained only after individuals have been convicted of serious offences, such as murder, sexual assault, and breaking and entering. See Hiebert, above n 26, 118–45.

36 *LAC Guidelines*, above n 19.

37 Cabinet Office *Cabinet Office Manual 2001* (Wellington, 2001) para 5.2.

38 *LAC Guidelines*, above n 19, ch 4.

39 Huscroft, above n 20, 196 (footnote omitted).

Governments are risk averse, and as a result have considerable incentive to formulate policy in such a manner as to avoid a report from the Attorney-General. Herein lies the main significance of the reporting duty: it has formalised the place of the Bill of Rights in the policy development process, at least where the government's legislative agenda is concerned. The Cabinet Office Manual requires Ministers to confirm compliance with the Bill of Rights when bidding for a bill to be included in the government's programme, and to draw attention to any aspects of their proposals that have implications for, or may be affected by, the Bill of Rights. Additionally, Ministers are required to confirm that their proposed bill comply with the Bill of Rights (among other things) prior to receiving approval for introduction. Thus, Bill of Rights concerns are likely to be identified and addressed long before a bill reaches Parliament.

The inability of the New Zealand judiciary to declare legislation invalid when inconsistent with rights likely affects how ministers respond to the vetting process. Unlike Canada, where the Minister of Justice exerts considerable influence on the decisions emanating from Cabinet, owing to his or her capacity to pronounce on the likely prospects that legislation will or will not likely survive judicial review, the New Zealand Attorney-General cannot similarly warn that legislation may be invalidated. What may increase the Attorney-General's influence over his or her Cabinet colleagues in the future, however, are changes in how the New Zealand judiciary interprets its role. A Court of Appeal decision in 2000 indicated that the Court believes it may not only have the power but "on occasions the duty" to indicate an inconsistency exists between legislation and the New Zealand Bill of Rights Act 1990.<sup>40</sup> The significance of this for political behaviour is that a judicial willingness to declare that legislation is inconsistent with rights could substantially increase the pressure on Cabinet to avoid such possibilities, particularly if judicial findings of inconsistency create new pressure to remedy such deficiencies. Some have suggested that as a result of this judicial development, "New Zealand is progressing at measured pace toward breaking down the idea that Parliament has the last word in settling the content of New Zealand rights and freedoms" and even to speculation that "the courts will get the power to strike down statutes incompatible with the Bill of Rights Act."<sup>41</sup> It

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40 The case was *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17. For discussion about this development see Andrew S Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Rev 43 and Paul Rishworth "Reflection on the Bill of Rights after *Quilter v Attorney-General*" [1998] NZ Law Rev 683, 689–95.

41 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, South Melbourne, 2004) 318.

remains to be seen how this judicial development evolves or what influences it exerts on political behaviour in terms of promoting policies that incur negative reports of consistency with rights.<sup>42</sup>

### III REPORTS OF INCONSISTENCY AND PARLIAMENTARY RESPONSES

#### A Canada

The absence of reports makes it difficult to assess how this vetting procedure affects subsequent parliamentary evaluation of Bills that have implications for the Charter. Two parliamentary committees evaluate the Charter dimensions of Bills (one in the House of Commons and one in the Senate) but they often lack information relevant for determining whether or not Bills are unduly risky in terms of their prospects of being declared invalid by courts or, alternatively, are not ambitious or comprehensive enough because they utilise overly risk-averse measures in an effort to minimise Charter risks. The Charter has become a focal point for many interest groups in their representations before parliamentary committees and they often provide differing perspectives about the Charter implications of a particular Bill. But the absence of reports from the Minister of Justice and Parliament's lack of independent legal advice make it difficult to assess these competing claims or determine whether or not Bills are justified in the light of their purported adverse effects for rights.<sup>43</sup>

#### B New Zealand

Views are mixed about the benefits that this reporting obligation has had on policy-development in New Zealand. Andrew Butler suggests that a virtue of the section 7 procedure is that it has helped eliminate "a large number of proposals that, if enacted, may have resulted in unjustified intrusions upon human rights." This is because "[m]ost departments, once informed of the human rights implications, are more than happy to alter the proposals in such a way as to accommodate those concerns."<sup>44</sup>

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42 Paul Rishworth says that whether the notion of declarations of inconsistency will become a major feature of litigation is not yet clear but he suspects it will. He says the test of the court's resolve "will be its approach to cases in which the entire cause of action is predicated on the proclaimed jurisdiction to declare inconsistency; that is, where the enactment is clear, is claimed to be inconsistent with the Bill of Rights, and there is no ambiguity generating plausible alternative meaning. There has not yet been such a case." Paul Rishworth "Common Law Rights and Navigation Lights: Judicial review and the New Zealand Bill of Rights" (2004) 14 PLR 103, 114 (footnote omitted).

43 This point is argued in more depth in Hiebert, above n 26, ch 3.

44 Andrew S Butler "Judicial Review, Human Rights and Democracy" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights. Perspectives from Domestic and International Law* (Hart Publishing, Portland Oregon, 2002) 50-51.



But not all commentators believe that the section 7 procedure has worked effectively. Philip Joseph suggests that the vetting procedure "has not fulfilled its promises as a key feature of the legislation" and "has not had the deterrent effect that was expected".<sup>45</sup> Moreover, as will be suggested below, some believe that Attorneys-General have not been sufficiently robust in acknowledging violations of rights. Yet others hold a contrary position and argue that too many reports of inconsistency have been made even when these reports were not required.

### 1 *Under-reporting*

Carolyn Archer argues that the Attorney-General has often failed to acknowledge rights violations.<sup>46</sup> From her perspective, such incidents of under-reporting suggest that it would be better for there to be no section 7 opinion than to have "a constitutional safeguard that is not utilised properly, therefore becoming an obstacle to, rather than a facilitator of, good legislation."<sup>47</sup> Like other commentators she believes that the lack of executive scrutiny of Bills that have been amended represents a serious shortcoming in the reporting procedure,<sup>48</sup> undermining the salutary purposes of section 7.<sup>49</sup> She speculates that the Attorney-General's failure to report on the Criminal Justice Amendment Bill (Number 6) 1999, which provided for a retrospective increase in the penalty for murder involving home invasion, may have provided an incentive for the judiciary to assume responsibility for declaring legislation inconsistent with the New Zealand Bill of Rights Act 1990, despite the fact that this mandate is not explicitly provided for in the Act itself.<sup>50</sup> But this judicial remedy troubles her because she does not consider it consistent with constitutional and institutional responsibilities.<sup>51</sup>

The Attorney-General's failure to bring to the attention of the House a breach of the Bill of Rights Act, perhaps inadvertently, abdicates the responsibility of weighing up legislative facts and deciding questions of policy, to the Judiciary. This is not the judicial function. The issuing

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45 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2002) 1053, as referred to by K D Ewing "Human Rights" in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 316.

46 Carolyn Archer "Section 7 of the Bill of Rights Act" [2004] NZLJ 320, 323.

47 Archer, above n 46, 322.

48 See Butler, above n 44, 55.

49 Archer, above n 46, 323.

50 Archer, above n 46, 323.

51 Archer, above n 46, 323.

of a declaratory judgment is not an appropriate solution for poor legislation. This action effectively amounts to an erosion of parliamentary supremacy.

## 2 *Over-reporting*

Huscroft has mixed views on the benefits of section 7. He considers the process of vetting Bills to be a positive development but adds an important qualification. These benefits arise "provided that the policy development process does not come to be dominated by lawyers."<sup>52</sup> Huscroft's concerns about legal domination explain his criticism of section 7 reporting. It is not under- but over-reporting inconsistencies under section 7 that is the problem. He criticises the issuance of section 7 reports in circumstances where a persuasive argument could be made to justify the legislation as a reasonable limit on a right.<sup>53</sup> Part of the explanation Huscroft offers for this over-reporting of government Bills is that the Attorney-General has ceded too much responsibility for making section 7 judgments to lawyers associated with the vetting process.<sup>54</sup> A serious consequence for over-reporting, he argues, is that it diminishes the significance of these reports.<sup>55</sup>

The main consequence of over-reporting is that the seriousness of a report is diminished ... Such reports [of inconsistency with the Bill of Rights] should be rare, but there is no surprise in this; after all, a report under s 7 signifies the Attorney-General's opinion that proposed legislation would establish limits on fundamental rights and freedoms *that cannot be justified in a free and democratic society*. This is a strong claim to make – perhaps the strongest claim that can be made in opposition to a bill – and the Attorney-General who makes such a claim should be prepared to back it up with the force of his or her office, resigning if his or her advice is not accepted.

Huscroft argues that the willingness of government to promote its legislation, even after the Attorney-General's acknowledgement that the legislation is not consistent with rights, conveys ambiguous messages to Parliament.<sup>56</sup> It suggests that although Attorneys-General take the section 7 duty seriously, the government may not be opposed to legislating in a manner that is inconsistent with rights.<sup>57</sup>

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52 Huscroft, above n 20, 196.

53 Huscroft, above n 20, 214–15. One example given is the Sale of Liquor (Health Warnings) Amendment Bill 2000.

54 Huscroft, above n 20, 215.

55 Huscroft, above n 20, 215 (emphasis in original).

56 Huscroft, above n 20, 214.

57 Huscroft, above n 20, 215–16 (footnotes omitted).

Huscroft's concern that over-reporting may not be conducive to effective or robust parliamentary responses seems to be supported by early experience. At the time of his assessment, the Attorney-General had made reports of inconsistency with respect to eight government Bills. These included the Transport Safety Bill 1991, the Films, Videos, and Publications Classification Bill 1992, the Children, Young Persons and their Families Amendment Bill 1993, the Land Transport Bill 1997, the Casino Control (Moratorium) Amendment Bill 1997, the Housing Restructuring (Income-Related Rents) Bill 2000, the Electoral Amendment Bill (No 2) 2001 and the Social Security (Residence of Spouses) Amendment Bill 2001. Two of these reports triggered parliamentary pressures to change Bills. One, involving a mandatory reporting obligation to alert a social worker or the police about suspected child abuse, saw the impugned provision deleted at the suggestion of the select committee studying the Bill. But Huscroft does not agree with the Attorney-General's conclusion that this provision of the Bill could not be considered a justifiable restriction of freedom of expression.<sup>58</sup> A second Bill where an impugned provision was removed was the Electoral Amendment Bill (No 2) 2001, after the Justice and Electoral Committee concluded there was insufficient cause to restrict citizens' right to freedom of expression in this Bill that sought to ban the publication of public opinion poll results for 28 days prior to an election.<sup>59</sup> But the remainder of these reports did not have much effect on parliamentary assessments. In two instances the issue of contention was not the decision to proceed with the legislation but the actual requirement for a report at all.<sup>60</sup> In three other instances the relevant Bills were passed without any amendments to address the provisions that prompted the report of inconsistency.<sup>61</sup>

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58 Huscroft, above n 20, 210.

59 Electoral Amendment Bill (No 2) 2000, no 110-2 (Select Committee report) 11.

60 For example, in the Transport Safety Bill 1991, the Attorney-General reported that a provision authorising random breath-screening of drivers infringed upon the right to be secure against unreasonable search and seizure and the right not to be arbitrarily arrested or detained, and could not be justified as a reasonable limit. The President of the Law Commission challenged this report, arguing that mandatory breath-screening is consistent with the New Zealand Bill of Rights Act 1990. See K Keith "Road Crashes and the Bill of Rights: A Response" [1994] NZ Law Rev 119. In the Films, Videos, and Publication Classification Bill 1992, which proposed a comprehensive scheme of censorship, the Attorney-General's section 7 report focused on a strict liability offence of possession of objectionable materials, as an inconsistency with the New Zealand Bill of Rights Act 1990. But this advice was challenged by the Legislation Advisory Committee, arguing that although the strict liability provision may be criticised as bad policy, it was not inconsistent with the New Zealand Bill of Rights Act 1990. For discussion of parliamentary evaluation of Bills that have been accompanied by section 7 reports, see Huscroft, above n 20, 202-15.

61 See Huscroft's discussion of the Land Transport Bill 1997, the Casino Control (Moratorium) Amendment Bill 1997, the Electoral Amendment Bill (No 2) 2001, and the Social Security (Residence of Spouses) Amendment Bill 2001 in Huscroft, above n 20, 210-13.

### 3 *Government Bills with section 7 reports since Huscroft's assessment*

As suggested above, it was anticipated that the section 7 procedure would have two principal effects. Firstly, it would ensure that the government assessed how proposed legislation might affect rights, with the purpose of anticipating and avoiding measures that resulted in serious rights infringements; secondly, it would enhance Parliament's awareness of rights so that parliamentary scrutiny would provide for effective rights protection. With regard to the first anticipated effect, the principal impact of section 7 has been the establishment of procedures and criteria for internally evaluating Bills.<sup>62</sup> As for the second function, reports in recent years have seldom prompted amendments to address identified rights violations. Ironically, the most significant rights-based amendments were to a Bill for which no section 7 report was made, although serious concerns about rights inconsistency had been raised elsewhere (the Climate Change Response Bill 2002, discussed below).

The following discussion carries on from where Huscroft left off in his analysis of the first 24 Bills with section 7 reports. At the time of his assessment there were section 7 reports for 16 non-government Bills and 8 government Bills. Since that time, the Attorney-General has made another 10 reports of inconsistency for the following government Bills:

- War Pensions Amendment Bill (No 2) 2001
- Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002
- Income Tax Bill 2002
- Care of Children Bill 2003
- Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill 2003
- Parole (Extended Supervision) and Sentencing Amendment Bill 2003
- Social Security (Long-Term Residential Care) Amendment Bill 2003
- Future Directions (Working for Families) Bill 2004
- Criminal Procedure Bill 2004
- Relationships (Statutory References) Bill 2004

The above list includes a Bill formerly introduced as a member's Bill but subsequently taken over as a government Bill (the Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002).

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<sup>62</sup> Huscroft, above n 20, 213.

(a) War Pensions Amendment Bill (No 2) 2001

This Bill proposed to carry over existing entitlements and to introduce changes that included an abatement scheme. The reported rights violation was discrimination, arising from differential treatment between same-sex couples and opposite-sex couples. The Attorney-General reported that this treatment perpetrated the historical and ongoing stigmatisation of those in same-sex relationships and was not justified because the distinction was not relevant to the Bill's objectives and, therefore, was not rationally or proportionately connected to the Bill.

The Social Services Committee recommended passage of the Bill subject to amendments but with no changes to redress the cause of discrimination. The Committee indicated that it would take up the issue "with officials from [Social Development] when they give evidence to us on other occasions"<sup>63</sup> but did not amend the definition of spouse to include same-sex partners. In wider parliamentary debate, two political parties addressed the Attorney-General's report. The Green Party focused on broader issues relating to the efficacy of the welfare scheme, suggesting that a better way to achieve equality was not to treat same-sex couples as married, but to provide war pension support based on "individual entitlement and assessment in every regard, ensuring the autonomy of women and men – no matter what their sex, sexuality, or any other differential arising from the patriarchal past."<sup>64</sup> Although the Green Party expressed its displeasure at the third reading with the way that the Committee dealt with the bill of rights issues,<sup>65</sup> it voted in favour of the legislation. The National Party expressed surprise that the Government was willing to proceed in a manner not consistent "with legislation that is part of our constitution"<sup>66</sup> but supported the Bill.

(b) Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002

This Bill proposed to create three new offences relating to illegal street and drag racing and to give enforcement officers the discretion to impound motor vehicles suspected to be involved in these activities. Its intent was to combat problems associated with drag racing and the practice of performing dangerous stunts on public roads. The Attorney-General reported that impounding a motor vehicle conflicted with protection from unreasonable search and seizure and that this new authorisation would not constitute a reasonable limit. Although the objective of deterring "boy racer" behaviour was seen as important, the

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63 War Pensions Amendment Bill (No 2) 2001, no 187-2 (Select Committee report) 4-5.

64 S Bradford MP (3 May 2002) 600 NZPD 16,033.

65 S Bradford MP (4 March 2003) 606 NZPD 3947.

66 R Worth MP (4 March 2003) 606 NZPD 3943.

means were neither rational nor proportionate. The seizure of a vehicle would not prevent a violator from driving, only from driving that vehicle. Moreover, the unreasonableness of the seizure was compounded by the inability of the owner (not necessarily the driver) to appeal the seizure of a vehicle, even if unaware of another driver's prior conviction under the Act.

The Law and Order Committee recommended passage of the Bill with amendments including the repeal of the provision that would have prevented an owner from appealing the seizure of a vehicle. But the Committee was not convinced by the Attorney-General's advice that impounding vehicles would be an unreasonable violation of rights, noting that "other provisions in transport bills that have attracted section 7 certificates (random testing, conclusive presumption as to alcohol limits and impoundment for 28 days) are now accepted mainstays of traffic enforcement in New Zealand."<sup>67</sup> The Committee also disagreed with the Attorney-General's conclusion that the legislative means were not rational, suggesting that to give the police the power to impound the vehicle was a prudent way to discourage street racing.<sup>68</sup> In broader parliamentary debate, the Green and ACT parties voted against the Bill at third reading, based in part on the failure of the government and select committee to address the Attorney-General's concerns that rights would be unreasonably infringed.<sup>69</sup> Nevertheless, the legislation subsequently passed, with some Labour members dismissing the seriousness of the Attorney-General's report about rights violations arising from police powers to impound vehicles<sup>70</sup> while others, such as the Transport Minister, concluding that the Committee's amendment to include a right to appeal struck a fair balance.<sup>71</sup>

(c) Income Tax Bill 2002

This Bill was part of a longer-term project revising New Zealand's income tax regime. The rights infringements arose from the continuation of earlier practices of treating married persons, opposite-sex couples and same-sex couples differently for the purposes of determining tax liability. The Attorney-General reported that these differences violated freedom from discrimination because they could have adverse financial implications for

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67 Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002, no 216-2 (Select Committee report) 11.

68 Land Transport (Street and Illegal Drag Racing) Amendment Bill 2002, no 216-2 (Select Committee report).

69 See for example statements by N Tanczos MP (1 April 2003) 607 NZPD 4560 and S Franks MP (1 April 2003) 607 NZPD 4573-74.

70 M Gallagher MP (1 April 2003) 607 NZPD 4606-07.

71 Hon P Swain MP (1 April 2003) 607 NZPD 4548-49.

non-married partners and could result in social disadvantage by perpetuating assumptions that de facto relationships or same-sex partnerships were not as valuable in society as married relationships. The Attorney-General concluded that these distinctions did not constitute reasonable limitations because the differential treatment was neither rationally nor proportionately connected to the legislative objective. She noted that the issue of differential treatment of same-sex and opposite-sex couples was a "significant and outstanding issue" that was the "subject of substantial policy work by the Government." But while the "Government recognise[d] that it [was] important to implement reform in a comprehensive manner" proposals for future reforms did not justify the infringements in the Bill.<sup>72</sup> The Attorney-General's conclusion did not have an impact on the Finance Committee: their proposed amendments did not alter the definition of spouse to redress the discrimination identified by the Attorney-General.<sup>73</sup>

(d) Care of Children Bill 2003

This Bill sought to authorise a wide range of responsibilities for guardians of children, until the age of 18. Parliament had earlier decided that the appropriate threshold for differential treatment by reason of age is 16 years. Thus, the question was whether the continuation of guardianship for those aged 17 was age-based discrimination and, if so, whether this constituted a reasonable limit. The Attorney-General reported that although the objective for guardianship was compelling (being to protect children who lack maturity, experience or competence to decide certain important matters affecting their lives), the age distinction could not be justified as a reasonable limit for several reasons. These included: the impossibility of establishing an appropriate single and fixed age limit for a broad range of matters over which a guardian is given responsibility; the limit of 18 being inconsistent with other statutory age limits; giving guardians such broad powers may not be consistent with obligations arising under the Convention on the Rights of the Child; and recourse to Family Court may not provide an adequate remedy.<sup>74</sup> The Attorney-General suggested that unreasonable effects of the Bill could be reduced if the Bill were to reverse the role of judicial oversight and allow 16 and 17 year olds to make decisions that guardians could then appeal to the court to nullify.<sup>75</sup>

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72 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Income Tax Bill 2002" (13 November 2002) 3-4.

73 Income Tax Bill 2002, no 11-2 (Select Committee report).

74 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Care of Children Bill 2003" (11 June 2003) ["Section 7 Report on the Care of Children Bill 2003"].

75 "Section 7 Report on the Care of Children Bill 2003", above n 74, para 21.

The report appears to have had little effect on the Justice and Electoral Committee's evaluation. It recommended passage of the Bill subject to amendments, but did not make changes to address the Attorney-General's report.

(e) Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill 2003

The Bill proposed a number of changes to taxation laws, one of which was identified by the Attorney-General as discriminating on the grounds of marital status and sexual orientation. The relevant clause provided for the deferral of tax deductions but distinguished between married persons and unmarried partners. In so doing it would have created a financial advantage for unmarried partners who may be eligible for tax deductions that married persons were not. Yet despite this financial advantage, the Attorney-General reported that the distinction resulted in social disadvantage because non-married partners were treated differently than married partners. Same-sex partners incurred an even more significant disadvantage because they did not have the option to marry. She concluded that this infringement was not justifiable because the legislative provision was not rationally or proportionately connected to the legislative objective. As in other reports, the Attorney-General acknowledged that the issue of differential treatment of same-sex and opposite-sex non-married partners was currently the subject of policy review by the government, but that "proposals for future reform [could] not justify the particular inconsistencies of this Bill."<sup>76</sup>

The Finance and Expenditure Committee suggested extensive amendments to the Bill, but these did not address the substance of the Attorney-General's section 7 report. In broader parliamentary debate Hon M Cullen, the Minister of Revenue, acknowledged that the Bill had not received a positive vetting for consistency with the New Zealand Bill of Rights Act 1990. Rather than explain the justification of this rights infringement, he noted the difficulty of dealing with the issue of same-sex equality on a Bill-by-Bill basis.<sup>77</sup>

(f) Parole (Extended Supervision) and Sentencing Amendment Bill 2003

This Bill proposed extended supervision for child sex offenders, which included provisions for 24 hour electronic monitoring. The extended supervision would not only apply to new offenders but also to previous offenders who had been convicted before the Bill was introduced and were either still in prison or who had been released from prison and had satisfied their release conditions within six months of the Bill coming into force.

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76 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill 2003" (25 June 2003).

77 Hon M Cullen MP (26 June 2003) 609 NZPD 6655.



The Attorney-General reported that the retrospective dimensions of the Bill violated the protection against double jeopardy and that 24 hour electronic monitoring violated the right to be free from unreasonable search and seizure. The Attorney-General recognised that courts "have repeatedly demonstrated their aversion to retrospective laws or legal remedies that breach the more general concept of double jeopardy"<sup>78</sup> and concluded that neither form of infringement could be considered reasonable under section 5.

The Justice and Electoral Committee acknowledged the Attorney-General's report but disagreed with her conclusion that the extended supervision order constituted punishment, concluding instead that these measures should be considered a form of rehabilitation and that the retroactive application did not result in double jeopardy.<sup>79</sup> In broader parliamentary debate, the Green Party raised concerns arising from the Attorney-General's report. Although the Party agreed that there is a need to address "the very serious problem of convicted child sex offenders – who will almost certainly reoffend – being released into the community", it worried that the rights infringement was too significant.<sup>80</sup> The Party supported referring the Bill to committee with the hope of amendments that would strike a better balance between safety and respect for rights<sup>81</sup> but ultimately voted against the Bill. Other parties did not appear as troubled by the adverse implications for rights. Labour acknowledged prima facie breaches of double jeopardy<sup>82</sup> and the right to be secure from unreasonable search and seizure<sup>83</sup> but suggested that the Bill allowed society to exercise "justifiable control over high-risk offenders, so as to protect vulnerable children".<sup>84</sup> The United Future Party disagreed with the Attorney-General's conclusions, indicating that "such limits on offenders are completely and utterly justifiable, given the severity of the offences committed."<sup>85</sup>

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78 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill 2003" (11 November 2003) 3.

79 Parole (Extended Supervisions) and Sentencing Amendment Bill 2003, no 88-2 (Select Committee report) 5.

80 N Tanczos MP (19 November 2003) 613 NZPD 10201.

81 Tanczos, above n 80.

82 Hon P Goff MP (11 November 2003) 613 NZPD 9847.

83 Hon P Goff MP (19 November 2003) 613 NZPD, 10195.

84 Hon P Goff MP (11 November 2003) 613 NZPD 9847.

85 M Alexander MP (19 November 2003) 613 NZPD 10202.

(g) Social Security (Long-Term Residential Care) Amendment Bill 2003

This Bill proposed a number of changes to the Social Security Act 1964, most notably with respect to income and asset testing to determine eligibility for state funding of longer-term care. The identified rights violations arose from the Bill's failure to recognise the status of same-sex relationships. The Attorney-General concluded that the failure of the Bill to recognise the status of same-sex relationships was inconsistent with the right to freedom from discrimination and could not be considered a justifiable restriction because the distinction based on sexual orientation was not relevant to the objectives of the legislation. The Attorney-General also noted that this unreasonable discrimination could be remedied by "a straightforward drafting amendment".<sup>86</sup>

The Social Services Committee made a number of recommendations but these did not address the discrimination reported by the Attorney-General. However, the Committee did note that recently introduced legislation, the Relationships (Statutory References) Bill 2004 (discussed below) would "amend the principal Act in regard to the treatment of same-sex couples."<sup>87</sup>

(h) Future Directions (Working for Families) Bill 2004

This Bill proposed amendments to the Social Security Act 1964 to provide increased financial support to low- and middle-income families with dependent children. The reported rights violations arose from the failure of the Bill to recognise same-sex relationships. The Attorney-General reported the restriction could not be justified and that the cause of the infringement could be "remedied by a straightforward drafting amendment."<sup>88</sup>

The Bill was not sent to a select committee for evaluation. The Bill came out of a budget commitment, was subject to first and second readings on the same day of the budget and had its third reading the following day. The rushed time-frame gave Parliament little opportunity to evaluate the Bill or assess the significance of the Attorney-General's section 7 report.

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86 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Social Security (Long-Term Residential Care) Amendment Bill 2003" (16 December 2003).

87 Social Security (Long-Term Residential Care) Amendment Bill 2003, no 103-2 (Select Committee report) 9.

88 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Future Directions (Working for Families) Bill 2004" (27 May 2003) 4.

(i) Criminal Procedure Bill 2004

This Bill proposed reforms to criminal procedures, the most significant being the creation of exceptions to the double jeopardy rule. The Bill allowed for the reopening of trials where an acquittal had been obtained by a "perversion" of the justice system, where the offence was sufficiently severe and where new and compelling evidence was discovered.<sup>89</sup>

The Attorney-General recognised that the Bill authorised prima facie breaches of the New Zealand Bill of Rights Act 1990 and focused on whether these restrictions could be considered reasonable under section 5. She concluded that although the objective was compelling (to protect notions of justice and ensure confidence in the judicial system) the Bill did not satisfy proportionality criteria because too many criminal offences would be subject to these new rules. She suggested that the Bill might have constituted a reasonable limit on rights had its goal been achieved by way of a "specific and limited schedule of offences", similar to the approach taken in the United Kingdom.<sup>90</sup> The Select Committee was expected to report on this Bill in July 2005.

(j) Relationships (Statutory References) Bill 2004

This Bill proposed to amend some of the legislation subject to earlier section 7 reports. Its principal effects were to give effect to civil unions and to ensure that laws were neutral in their application to married, civil union and de facto relationships involving opposite and same-sex couples. Yet despite the intentions of addressing equality, the Attorney-General found two aspects of the Bill inconsistent with the New Zealand Bill of Rights Act 1990. One was with respect to changes to the Social Security Act 1964 that extended benefits to widows and to women who were in a civil union or a de facto relationship. The Attorney-General concluded that this gender-based benefit constituted discrimination. Although the historic justification for these benefits was that many women did not work outside the home and were economically dependent on their spouses, the Attorney-General reported that without evidence of a demonstrable need for women only to continue receiving these benefits, she was unable to conclude that this distinction constituted a reasonable limit under section 5.<sup>91</sup>

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89 Attorney-General "Report of the Attorney-General Under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure Bill 2004" (22 June 2004) ["Section 7 Report on the Criminal Procedure Bill 2004"]. The exception to the double jeopardy rule would only allow an accused person to be tried a second time for specified serious offences (defined as offences punishable by a term of imprisonment of 14 years or more).

90 "Section 7 Report on the Criminal Procedure Bill 2004", above n 89, para 25.

91 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Relationships (Statutory References) Bill 2004" (22 June 2004).

The Bill also proposed changes to the Immigration Act 1987 that, according to the Attorney-General, constituted discrimination on the basis of age. The relevant provision would have allowed the Immigration Minister to reject an application made by a person under 17 if the Minister believed that a parent or guardian has not consented to the application. Although the Attorney-General recognised that the goal of ensuring that young applicants have secured parental control was a legitimate exercise of the State's prerogative, in the absence of evidence to justify the rationale for choosing 17 as the defining age, she found that this differential treatment was an unjustifiable restriction on the right to freedom from discrimination.

The Select Committee reported back in March 2005, recommending amendments, including those to ensure that marriage was referred to separately from civil union and de facto relationships.<sup>92</sup> For strategic purposes, the Government earlier decided to separate a proposal for same-sex civil unions from the comprehensive legislative reforms to address discrimination in the law. After a heated parliamentary and public debate, the Civil Union Bill 2004 was passed in December 2004, by 65 votes to 55. The Relationships (Statutory References) Bill 2004 has now also been passed and came into force on 26 April 2005.

#### 4 *Non-government Bills*

The Attorney-General has also made two reports of inconsistency with respect to members' Bills: the Death with Dignity Bill 2003 and the Sentencing (Community Sentencing to Fit the Crime) Amendment Bill 2004.

##### (a) Death with Dignity Bill 2003

This member's Bill would have allowed persons who were terminally or incurably ill, and who experienced pain, suffering or distress, to request assistance from a medically qualified person to end their lives. The Attorney-General reported that assisted suicide would violate section 8 of the New Zealand Bill of Rights Act 1990, which provides that "[n]o one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice." The Attorney-General reported that the restriction could not be considered a reasonable limitation because the procedural safeguards were not adequate. Moreover, the term "incurably ill" was too broad. The Bill was narrowly defeated at first reading in Parliament.

##### (b) Sentencing (Community Sentencing to Fit the Crime) Amendment Bill 2004

This member's Bill sought to reinstate court control over punishment by repealing certain provisions of the Sentencing Act 2002 that authorised the imposition of community

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<sup>92</sup> Relationships (Statutory References) Bill 2004, no 151-2 (Select Committee report) 3.

based sentences, such as supervision and community work. The Bill sought to extend the conditions attached to supervision to a broader range of offences and also required scheduled and random testing for drug and alcohol abuse. Finally, the Bill allowed judges to impose supervision at the end of prison sentences and restored judges' powers to state where community work should be done. The Attorney-General reported that one clause of the Bill, which was designed to deter criminal associates from contacting the offender, was not proportionate and that the objective of the Bill could be achieved by less intrusive means.<sup>93</sup> The Bill was defeated at its first reading.

##### 5 *Patterns in section 7 reporting*

Despite the frequency of section 7 reports, they have seldom led to amendments to redress the perceived inconsistencies. In some cases, the relevant committee explicitly challenged the conclusion that the reported rights infringement was indeed unreasonable or unjustified.

A number of similarities are evident when assessing section 7 reports. Half of the reports were based on legislative distinctions that accorded benefits or recognition in a manner that discriminated against unmarried and/or same-sex partners.<sup>94</sup> In these reports the Attorney-General acknowledged that although the government was developing policy reforms to redress these violations, that intention did not negate the responsibility to report the inconsistencies. This coupling of a promise of future policy reforms with repeated statements of inconsistency for current Bills raises a number of questions. Why were incremental changes to these Bills not made if the government was willing to engage in policy reform, as it subsequently did in the Relationships (Statutory References) Bill 2004? Did the frequent acknowledgements of inconsistency serve a political purpose of anticipating criticism that might be made for comprehensive reforms, such as the subsequent Civil Union Bill 2004, by reminding parliamentarians that continued inaction was inconsistent with the New Zealand Bill of Rights Act 1990? In two of these Bills (the Social Security (Long-Term Residential Care) Amendment Bill 2003 and the Future Directions (Working for Families) Bill 2004) the Attorney-General reported that some of the rights violations could have been redressed by a straight-forward drafting amendment.

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93 Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing (Community Sentencing to Fit the Crime) Amendment Bill 2004" (19 October 2004).

94 These are the War Pensions Amendment Bill 2001, Income Tax Bill 2002, Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions Bill 2003, Social Security (Long-Term Residential Care) Amendment Bill 2003, and the Future Directions (Working for Families) Bill 2004.

If this was the case, why were these drafting problems not caught and corrected before the Bills were introduced to Parliament?

Some of the reports of inconsistency were made because of age- or gender-based distinctions in Bills. These reports provoke two contrary responses. One is scepticism about whether or not a report of inconsistency is even required. Governing requires making distinctions between who will benefit and who will be burdened by legislation; a difficult but discretionary task that is often conducted in the absence of obvious parameters. As long as these distinctions are not motivated by illiberal intentions, unreasonable assumptions or recklessness when questioning the effects of a distinction, should these distinctions be interpreted as unreasonable discrimination, particularly when the difference at issue is between the ages of 16 and 17? Moreover, if empirical evidence is required to demonstrate the justification of these distinctions (evidence was said to be lacking in the decision to give widows and not widowers benefits under the Relationships (Statutory References) Bill 2004) what are the implications of this presumption for policy development? Will it discourage the pursuit of legislative initiatives in circumstances where hard evidence does not exist to support the utility, effectiveness or justification for legislative distinctions?

A second, and contrary, response is that since Parliament had already determined that 16 years was the appropriate threshold for differential treatment, why was this judgment not respected? Why did the rights-vetting procedure for departmental assessments not result in more pressure to justify that a different age was appropriate for determining the age of maturity in the relevant Bills?

Finally, two of the Bills (the Parole (Extended Supervision) and Sentencing Amendment Bill 2003 and the Criminal Procedural Bill 2004) pursued objectives or utilised legislative means that represented such serious rights infringements that they challenged the depths of the rights culture purportedly facilitated by the New Zealand Bill of Rights Act 1990 when assessing the merits of governmental initiatives. The willingness of ministers to introduce these Bills raises important questions: How influential is the New Zealand Attorney-General in Cabinet in terms of constraining choices that clearly contradict with protected rights? How much of a constraint do ministers believe that the New Zealand Bill of Rights Act 1990 should have to affect policy decisions? It is particularly striking that despite the Attorney-General's suggestion that the unreasonable nature of the rights infringement in the Criminal Procedure Bill 2004 could be addressed by adopting a "specific and limited schedule of offences",<sup>95</sup> as is the case in the United Kingdom, this suggestion did not influence the scope of the Bill.

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95 "Section 7 Report on the Criminal Procedure Bill 2004", above n 89, para 25.

#### IV ASSESSING THE RELATIONSHIP BETWEEN RIGHTS-VETTING AND REPORTING

As stated above, despite the fact that Canada and New Zealand share similar reporting obligations and utilise comparable criteria for determining whether a Bill that restricts a right is reasonable (being lawyers' assessments of reasonable limits, heavily influenced by the Supreme Court of Canada's interpretation of *R v Oakes*), remarkable divergence appears in their respective approaches to reporting. Canada has not had any reports and is unlikely to do so unless a profound transformation in the culture of Cabinet decision-making occurs, whereas New Zealand has had 35 reports of inconsistency, including 18 for government Bills. As stated above, part of the explanation for this is the broader scope for rights-vetting in New Zealand where, in addition to government Bills, local government and member's Bills are also subject to the review process.<sup>96</sup> But what explains the variation in terms of reporting inconsistencies in government Bills? And what implications can be drawn from this contrast between Canada's failure to issue any reports on government Bills and the frequency of reports in New Zealand? Although extensive research is necessary to fully understand the impact of the process of vetting on policy-development and on Cabinet decisions, a number of observations can be made based on previous work on the Canadian approach and on assessments of section 7 reports and parliamentary debates in New Zealand.

The discrepancy in reporting practices can be explained by the following interrelated factors: a more hierarchical relationship in Canada between the Minister of Justice and other ministers when assessing the merits of legislation where rights are implicated; differences in Cabinet decision-making with respect to willingness to pursue initiatives that may require a report of inconsistency; different consequences of reporting that a Bill is inconsistent with rights; and more reliance by the New Zealand Attorney-General on governmental lawyers' advice when determining whether or not a Bill represents a reasonable limitation on a protected right.

##### A *The Cultures of Reporting*

Canada and New Zealand have different cultures about the appropriateness of pursuing Bills that would require reporting inconsistencies with protected rights. In Canada, the culture that governs the vetting procedure presumes that it is inappropriate to proceed with a Bill that would require a report of inconsistency. The prevailing assumption is that if a policy initiative cannot be considered a reasonable limit, it will either be withdrawn or amended so as to allow the Minister of Justice to reach a judgment

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<sup>96</sup> In Canada only government Bills are subject to this process, although very few members' Bills manage to work their way through Parliament and become enacted.

that the initiative is consistent with the Charter (the criteria for this assessment is whether a credible Charter argument can be made if litigation arises). This certainty, that for policy initiatives to be approved they must be deemed consistent with the Charter, represents a powerful constraint on the pursuit of legislative initiatives that blatantly violate rights. This is reinforced by clear disdain for use of the controversial section 33 notwithstanding clause (no federal government has yet considered the notwithstanding clause to constitute a viable policy option, even though invoking this power would enable a government to sustain invalid legislation affecting a majority of Charter rights for renewable five-year periods). This practice of ensuring that Charter consistency is verified, as a condition for policy approval, has become part of the culture of Cabinet decision-making.

A speculative comment should be added here about this culture. The leader of the current opposition party (Stephen Harper of the Conservative Party) has indicated willingness to consider use of the notwithstanding clause in some circumstances, in contrast to the practice of non-use of every Prime Minister to date.<sup>97</sup> If he were to become Prime Minister it is conceivable that this more favourable view of the notwithstanding clause could affect how the responsibility for reporting Charter inconsistencies evolves. If an alternative government has a greater tolerance for pursuing Bills that require use of the notwithstanding clause to sustain legislation, it is also likely to be more willing to introduce legislation that requires alerting Parliament to any fundamental inconsistency.

In contrast, the Cabinet decision-making process in New Zealand does not require verification that policy initiatives constitute reasonable limitations before they proceed as Bills introduced to Parliament, as is evident in the frequency with which government Bills subsequently result in reports of inconsistency under section 7.

#### ***B Different Consequences of Reporting that a Bill is Inconsistent with Rights***

The Canadian practice of non-reporting is influenced by differences in the scope of judicial review and the implications this has for policy survival. The broader scope of judicial power in Canada has important implications for political rights-vetting. The ability of the judiciary to invalidate legislation that is not consistent with the Charter increases the incentives to ensure that Bills are not introduced to Parliament where they stand a strong chance of being declared unconstitutional and subject to nullification (particularly in the light of the current reluctance to use the notwithstanding clause). Second, the ability of courts to declare legislation invalid makes it difficult, politically, for a government to proceed with a Bill that requires the Minister of Justice to acknowledge that it is not consistent with the Charter. Such an acknowledgement would make it extremely difficult

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<sup>97</sup> See for example "Liberals Highlight Left-Right Fault Line" (4 June 2004) *Globe and Mail* Toronto A10.



for any subsequent successful defence of the legislation if it were later subject to Charter litigation. Unless the judiciary has a profound disagreement with the Minister of Justice's judgment, it is unlikely that a court would rule that legislation represents a reasonable limit after the Minister of Justice has conceded that it is not reasonable. The inability of the New Zealand judiciary to nullify legislation reduces the consequences of pursuing actions that may be inconsistent with rights.<sup>98</sup>

### *C Different Interpretations of how to Determine Consistency*

Another important part of the explanation for the discrepancy in reporting practices is that the context for determining whether or not a report is required is different in Canada and New Zealand. In New Zealand the section 7 reports appear to be more heavily influenced by lawyers' judgments about consistency. In Canada, lawyers' assessments are important but do not replace political judgment about whether a Bill is or is not consistent with a free and democratic society. As argued above, the threshold for concluding that a report to Parliament is not necessary is sufficiently wide to permit a high tolerance for perceived Charter risk. Decisions about whether or not a Bill is reasonable incorporate legal assessments and political and philosophical judgments about the importance of the legislative objective, the role of the government and the harmful effects of either proceeding or not proceeding with a proposed legislative initiative.

The Supreme Court of Canada's approach to judicial review has contributed to the greater willingness in Canada to make value-based judgments about whether or not a Bill is consistent with a free and democratic society. As is well known, the Court has distinguished the issue of whether a right has been infringed from the determination of whether that restriction is justified. The regularity of this second inquiry has affected political vetting. The judiciary's two-stage approach has produced a fragmented jurisprudence that lacks coherence or predictability. The explicit inquiry into the justification of impugned legislation has involved assessments of social science and other data, particularly when applying proportionality criteria. In so doing, these judicial inquiries explode any (lingering) myth of the possibility of reaching objectively correct

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98 This does not mean that no consequences flow from passing legislation that results in claims of inconsistency. The adoption of a bill of rights helps encourage and sustain a political culture that places higher priority on rights when assessing the merits of legislation, even if the judiciary is unable to nullify offending legislation. But there is an important relationship between the ability of courts to pronounce on the legal validity of legislation and the persuasiveness of rights claims on political decision-making. Claiming a right has been infringed is not just a moral argument but is often a political strategy to give more effect to criticisms of policy. To that end, when societal criticism of impugned legislation is verified by judicial invalidation, it becomes more difficult for a government to resist pressure to redress the perceived flaw in the initial legislative decision (even if it has a mechanism for disagreeing with the judicial decision, such as a notwithstanding clause).

constitutional answers. They necessarily involve philosophical judgments about the proper role of the state, what kinds of social problems are worthy of redress and policy-laden judgments about whether or not a particular legislative regime is more reasonable than some hypothetical other. What is important for the vetting and reporting obligations is that the discretionary elements of this judicial task reveal opportunity to shape and influence judicial perspectives by making persuasive arguments, utilising legislative debates and adopting legislative techniques (such as preambles) with the clear intent of not only anticipating judicial responses but trying to influence the judicial resolution of a potential Charter conflict. Stated differently, the regularity and discretionary elements of the judicial inquiry into whether impugned legislation is reasonable encourage proactive attempts to influence the scope and meaning of Charter interpretations, resulting from an acute awareness of the policy consequences of assuming an assertive, and not simply reactive, response to the Charter.<sup>99</sup> As such, political judgments in Canada about whether or not Bills are consistent with the Charter, although heavily influenced by lawyers' assessments of relevant jurisprudence, are not as legal- or court-centric as are the Attorney-General's section 7 reports in New Zealand.

#### **V NEW PRESSURES: DEMANDS FOR LEGAL ADVICE**

The Parliaments in both countries have expressed frustration in their assessments of Bills, particularly in circumstances where the absence of a report of inconsistency is challenged in committee proceedings by individual and interest group submissions alleging a serious rights infringement.

This frustration is more serious in Canada because of the culture of non-reporting. Committee evaluations of Bills have expressed concern that members lack either adequate time or information to make informed judgments about the extent and nature of Charter concerns.<sup>100</sup> Their requests for assessments that explain the government's assumptions

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99 Janet L Hiebert "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82 *Tex L Rev* 1963–87.

100 A telling example occurred with respect to the legislative response to a Supreme Court decision to change a common law rule affecting the ability of police to enter private dwellings. See Hiebert, above n 26, ch 7.

about Charter issues<sup>101</sup> have been denied, leaving some committee members feeling compromised in their ability to assess the constitutional implications of Bills. The fact that the government has not reported to Parliament that a Bill is inconsistent with the Charter makes it difficult to assess the testimony of individuals or groups who regularly raise what they consider to be serious Charter problems. As one member described the difficulties these committees encounter:<sup>102</sup>

We find ourselves in a terrible position where we are asked to pass legislation in respect of which we do not have the resources to make a judgment as to whether [it is] in accordance with the Charter. We take the word of the Minister of Justice, but we never have an opportunity to find out to what extent that word is based on reality.

To date, the Minister of Justice has not been willing to provide access to the legal advice that helped determine whether a Bill was consistent with the Charter. Nor has the Minister provided an explanation to Parliament for why he or she believes a credible Charter justification exists for pursuing legislation that imposes a serious prima facie rights violation. In the absence of this information, committees frequently call upon Justice lawyers to appear in committee to answer Charter related questions.<sup>103</sup> But this raises difficulty for the lawyers who, as public officials, are being asked questions that may challenge traditional lines of responsibility and accountability. Moreover, it is important to remember that the client these lawyers serve is the government, not Parliament, and thus Parliament may lack confidence in the objectivity of this testimony.

In New Zealand, an important change to the reporting process occurred after Attorney-General Margaret Wilson announced in February 2003 that the legal advice associated with vetting Bills would be publicly available after a Bill has been read in the House for a first time and referred to the select committee. The Attorney-General explained this change in

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101 Individual members have requested copies of reports from the Minister of Justice to explain conclusions reached from its process of evaluating Bills. In the early days of the Charter, requests by committee members to speak to the person "who has certified a Bill" in terms of the Charter were met with various explanations for why this was not possible. Included in these were that the concept or word "certify" is a "misnomer" for the process undertaken; that the person certifying a Bill is the chief legislative counsel but he or she acts on the advice that is provided by the department; and that "ultimately, the guardian of our Charter advice is the human rights law section." Senate Standing Committee on Legal and Constitutional Affairs (21 June 1993) 50:44-48, as discussed by Hiebert, above n 26, ch 1.

102 Hiebert, above n 26, ch 1.

103 Hiebert, above n 26, ch 1.

policy as enabling select committees and the public to better understand the government's position on any Bill, particularly when presented with contrary opinions about possible rights infringements. As she stated:<sup>104</sup>

Many select committees are receiving submissions from lawyers on behalf of lobby groups that raise questions about Bill of Rights issues. Without the Attorney-General's advice they are not always in a position to properly evaluate these submissions.

This change means that Parliament now has the legal advice associated with the decision to report that a Bill is inconsistent with the New Zealand Bill of Rights Act 1990. Yet as Attorney-General section 7 reports appear heavily based on the legal analysis done by government lawyers, the most significant impact of this new policy arises with respect to Bills that do not result in reports of inconsistency.

The event that appears to have precipitated this movement towards greater transparency was a 2002 report by the Select Committee on Foreign Affairs on the Climate Change Response Bill 2002.<sup>105</sup> The Committee was troubled by the lack of a section 7 report on inconsistency, particularly having heard from several human rights experts who submitted that a number of provisions relating to powers of entry, search and seizure, unreasonably restricted protected rights. The Committee wanted assurance that the Bill was consistent with the New Zealand Bill of Rights Act 1990 and wrote to the Attorney-General requesting the advice she had received with respect to the Bill's compliance. The Committee was advised that the Attorney-General was unable to provide this legal advice or an explanation for her judgment. In its review of the Bill the Committee indicated concern about its difficulty evaluating rival claims about whether or not the Bill was compatible. As it reported:<sup>106</sup>

While we understand why the Attorney-General has chosen not to provide us with the advice in current circumstances, it places us in a difficult situation in terms of responding to submitters' concerns on this issue ... Without the benefit of the Attorney-General's advice or the time to utilise independent advice for the Bill of Rights Act, we are in an impossible position to refute submitters' claims that the bill is not compliant with the Bill of Rights Act.

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104 Hon M Wilson, Attorney-General (18 February 2003) Media statement.

105 Carolyn Archer concludes that the decision to make public the legal advice used to vet Bills for section 7 purposes was "undoubtedly triggered by the debate in the House on the absence of a section 7 report in relation to the Climate Change Response Bill", see Archer, above n 46, 320.

106 Climate Change Response Bill 2002, no 212-2 (Select Committee report) 14.

The Committee suggested that without access to the relevant legal advice, the compliance process lacked transparency and was "obstructive"<sup>107</sup> to the Committee's deliberations. Absent this information, a committee's only alternative would be to seek an independent legal assessment; an option that could pose problems both in terms of the time-frame required to deal with Bills and also in the event that this independent judgment differed from the determination of the Attorney-General.<sup>108</sup> Despite suggesting uncertainty about whether or not rights were infringed, a majority of the Committee indicated willingness to respond to many of the claimed rights infringements that arose in evidence and proposed several related amendments,<sup>109</sup> most of which were subsequently incorporated into the legislation.<sup>110</sup> The Committee also urged the government to review its policy while indicating that it would raise the issue with the Standing Orders Committee.<sup>111</sup>

It remains to be seen what effects access to legal advice will have on parliamentary deliberation. Following the government's decision to publish its legal advice, the Standing Orders Committee indicated that although this legal advice would be helpful, "any committee that has concerns about the impact of legislation ... does not need to rely solely on these reports."<sup>112</sup>

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107 Climate Change Response Bill 2002, no 212-2 (Select Committee report) 14.

108 Climate Change Response Bill 2002, no 212-2 (Select Committee report) 14-15.

109 Climate Change Response Bill 2002, no 212-2 (Select Committee report) 13-14. Amendments it proposed included: requiring the power of entry in clause 38 to be authorised by the Minister responsible for the inventory agency, upon being satisfied that the information can not be collected from the owner or occupier; omitting the ability to use force to make entry or exercise the power in clause 38; requiring that before making regulations for the collection of information any disproportionate burden on one group must be considered; limiting the inspection power in clause 39 to only auditing certain types of information; requiring reasonable notice be given to an owner or occupier in most instances under that clause; requiring all other entry be under search warrant where there are grounds to believe that evidence of an offence may exist in the place being searched (clause 40); not allowing force to be used except where a search warrant on these grounds has been obtained; and allowing entry under clauses 38, 39 or 40 only be made during business hours.

109 Climate Change Response Bill 2002, no 212-2 (Select Committee report).

110 Exceptions included the committee's recommendation that before making regulations for the collection of information, any disproportionate burden on one group must be considered, and that the inspection power in clause 39 be limited to auditing only certain types of information.

111 Climate Change Response Bill 2002, no 212-2 (Select Committee report) 14-15.

112 Standing Orders Committee "Review of Standing Orders" [2003] AJHR I 18B, 51.

One proposal to further improve the scrutiny procedure was rejected by the Standing Orders Committee. Both the Clerk of the House and the Public Law Committee of the Wellington District Law Society recommended that Bills be examined for their compliance with the New Zealand Bill of Rights Act 1990 if they are subsequently amended. The concern here was that committees may recommend amendments that adversely affect rights and that Parliament, therefore, should be advised of the implications of these changes for protected rights.<sup>113</sup> As stated above, several commentators have similarly expressed this concern and have advocated post-committee review of Bills. But the Standing Orders Committee rejected this recommendation, stating that if enacted, this recommendation "may cause delays in the legislative process and would carry a considerable compliance cost in terms of the need for increased legal advice to enable the Attorney-General to identify the Bill of Rights implications of amendments."<sup>114</sup>

Canada has not incurred similar pressures to alert Parliament about the consequences of amendments for the Charter. The Canadian political process has extreme concentration of power in the executive, an electoral system that frequently produces majority governments and relatively weak committees, resulting in fewer successful legislative amendments. The continued evaluation of legislative Bills by the Department of Justice enables the government to resist amendments that are perceived to be incompatible with the Charter. Moreover, even if amendments were to be passed that resulted in serious rights infringements, the legislation could be subject to judicial review, in which case the judiciary would have the power to provide appropriate remedies.

#### ***VI CONSIDERATION FOR DIFFERENT CRITERIA FOR REPORTING TO PARLIAMENT***

One of the objectives of the statutory responsibility to report to Parliament where Bills are inconsistent with protected rights is to ensure that Parliament is sufficiently knowledgeable about the implications of Bills for protected rights so that it can compel the government to explain and justify legislative priorities where rights may be adversely affected. But reporting procedures have not evolved in a manner that is helpful to facilitate this objective. A similar reason explains this shortcoming in both countries (ironically, in the light of the stark discrepancies in the willingness to report inconsistencies). This is the failure to provide the Canadian House of Commons or the New Zealand House of Representatives with sufficient information and context for evaluating whether a Bill with adverse implications for rights is warranted and justified.

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113 Standing Orders Committee, above n 112.

114 Standing Orders Committee, above n 112, 51.

In Canada, the practice of non-reporting to the House of Commons that Bills are inconsistent with the Charter occurs because the Minister of Justice has concluded that a credible Charter argument can be made in support of the claim that the Bill is reasonable. But this denies Parliament the information or assumptions that led to this conclusion. The absence of any explanation also denies Parliament relevant information for assessing whether or not the government has been overly risk-averse or cautious in its legislative decisions. Parliament should not be placed in the untenable position of having to either pass legislation that may have a high degree of risk of subsequently being declared invalid or, alternatively, having insufficient information to assess decisions that avoid ambitious objectives or comprehensive means because of governmental and bureaucratic attempts to manage or avoid Charter risks.

The New Zealand House of Representatives, despite being the recipient of frequent reports of inconsistency under section 7, is not given adequate information to assess whether a Bill is warranted, despite its adverse implications for rights. The inclination of the Attorney-General to furnish Parliament with section 7 reports that are heavily influenced by legal advice, without incorporating political and philosophical judgment relating to why the government is supporting a Bill that has such serious implications for protected rights, makes it difficult to assess the seriousness of the purported rights infringement. Parliamentarians are effectively being asked to accept or refute the legal assessments of human rights lawyers, rather than engage in normative judgment about whether a Bill is justified despite its adverse implications for rights. Moreover, the government's support for measures that impose restrictions on rights that are apparently unreasonable in a free and democratic society sends mixed messages to Parliament about whether or not respect for protected rights is an important obligation on those who exercise power. In short, the ambiguous nature of the section 7 reporting procedure undermines the incentives for Parliament to take seriously the task of assessing the legitimacy of Bills in terms of rights.

This suggestion that judgment about inconsistency should not be based so heavily on government lawyers' assessments may be controversial. Concern about over-reliance on lawyers' interpretations of relevant jurisprudence, as the essential feature of determining compatibility, echoes concerns expressed earlier by Huscroft about lawyers dominating the process of determining whether or not Bills are consistent with the New Zealand Bill of Rights Act 1990. Huscroft argues that questions about whether or not Bills are inconsistent do not always boil down to matters of fact. As he suggests "there is often room for

reasoned disagreement about the operation of the Bill of Rights, in particular whether limits on rights are reasonable and demonstrably justified in a free and democratic society".<sup>115</sup>

But not everyone agrees with this perspective. Soon after the New Zealand Bill of Rights Act 1990 was enacted, Geoffrey Palmer argued that the Attorney-General's reporting obligation was "not a matter of political judgment, but of law."<sup>116</sup> Palmer later reiterated this position, a view shared by Matthew Palmer, when they jointly argued that because "[t]he Attorney-General's power to issue a negative section 7 report can be a potent weapon", such a report "must be done on proper professional legal advice; it is not a matter of political judgment, but of formal legal opinion."<sup>117</sup>

But it is important to clarify what is meant by political judgment. No one could persuasively argue that reasoned judgment about whether or not a Bill is consistent with protected rights is so malleable as to entertain partisan calculations. In suggesting that reports of inconsistency should entail political judgment, it is important to distinguish between "political" in a broad and/or philosophical sense and "political" in a partisan sense. Indeed, it is clear from Huscroft's discussion of "reasoned disagreement" about compatibility<sup>118</sup> that he is not arguing that the independence and professionalism of the Attorney-General should ever be impugned. He considers the role of the Attorney-General to be unlike that of any other Minister, in that he or she is required to act independently and to eschew partisan political considerations.<sup>119</sup> In other words, while Huscroft may believe that questions about consistency with the New Zealand Bill of Rights Act 1990 are not purely matters of legal fact, he does not accept that the Attorney-General should act in a manner inconsistent with his or her "claim to the mantle 'the guardian of the public interest'".<sup>120</sup>

What likely accounts for this disagreement about whether reports of incompatibility should be based on political judgment or formal legal opinion, are differences about what is entailed in the task of determining whether restrictions on rights are reasonable and consistent with a free and democratic society. I argue here, as I have elsewhere,<sup>121</sup> that the

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115 Huscroft, above n 20, 196.

116 Palmer, above n 18, 59.

117 Palmer and Palmer, above n 41, 325.

118 Huscroft, above n 20, 196.

119 Huscroft, above n 20, 198.

120 Huscroft, above n 20, 199.

121 See for example, Janet L Hiebert *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press, Montreal, 1996).



judgments associated with this inquiry are inevitably prone to value-based assessments of the nature of a particular social problem and the role of the state and discretionary assessments of the quality of the legislative means to pursue an objective.

The inclusion of general limitation clauses in the respective bills of rights that are subject to judicial review encourages many to equate their interpretation with legal judgment. While there is certainly a legal dimension to judgment about whether or not the restriction on a right satisfies the criteria of section 5 of the New Zealand Bill of Rights Act 1990 or section 1 of the Canadian Charter of Rights and Freedoms, these inquiries should not be construed as exclusively subjects for legal analysis. The particular context for these determinations in both countries – a free and democratic society – is sufficiently broad that it invites philosophical debates about the legitimate role for the state within a regime that seeks to protect rights. But neither this normative criterion for evaluating restrictions on rights, nor the judicial articulation of proportionality tests, provide objective rules or standards for evaluating impugned legislation. Reasoned opinions, both amongst and beyond the judiciary, will differ on what constitutes harm or comprises an appropriate use of state power to redress the harm, which is a necessary part of judgment about whether or not a legislative objective is justified in the light of its adverse implication for protected rights. But this is by no means the only subjective element of the inquiry.

Reasoned opinions will also differ on how to apply the proportionality criteria. The judicial tests utilised in both countries comprise questions such as whether a rational connection exists between the legislative objectives and means chosen, did the legislation impair rights in a minimum fashion and are the salutary effects of the legislation sufficient to justify its deleterious effects? But no matter whether judges, legal experts or those with policy expertise interpret these criteria, these "rules" envisage subjective judgments and often-specialised knowledge about a particular social problem. The development of social policy is by nature a discretionary undertaking that reflects comparative experiences, previous trials and failures, judgments about conflicting social science evidence and informed best estimates. No one can fully anticipate or predict whether an ambitious legislative objective will be effective, what effects it will have in redressing the intended objective or identified harm, or what unintended consequences may arise. Moreover, whether the assessors of legislation are judges or government lawyers, they are often generalists on the relevant policy issue and are making decisions without specialised knowledge or competence to assess relevant (and often competing) debates about how to redress the identified social problem. For these reasons, it is misleading to portray the

judgment about whether a Bill is reasonable and consistent with a free and democratic society as one of legal opinion alone.<sup>122</sup> It is even harder to treat the determination of reasonableness as subject to legal fact.

But if reasoned disagreement arises about the justification of a Bill that obviously has adverse implications for rights, it is not helpful for the Canadian Parliament to be denied an explanation of why the Minister of Justice concludes that a Bill is consistent with the Charter, particularly where it has serious Charter implications. Similarly, the New Zealand House of Representatives is not being well-served by section 7 reports that emphasise legal advice only or provide little political judgment or explanation for why a legislative objective should be supported in the light of its deleterious effects. For these reasons, a preferred approach would be to reassess how these reporting obligations are interpreted.

In Canada, the intent of the reporting obligation would be improved if it were reinterpreted to compel the Minister of Justice to alert Parliament where the government is proceeding with a Bill that incurs a substantial Charter risk, even if the Minister of Justice believes that the Bill has a credible chance of surviving litigation.

The intention of this interpretation is to focus parliamentary deliberation on the justification of the initiative, which the government anticipates will likely culminate in litigation under the Charter. The report should be viewed as an opportunity for the Minister of Justice to express publicly why he or she believes that a particular Bill is justified, despite obvious or perceived tensions it raises with Charter values. The report should provide information relevant to debate about the merits and justification of the legislative objective, such as the harm or social concern that the legislation seeks to address, the significance and severity of the rights violation, why obviously less restrictive measures are not being utilised and the degree of anticipated Charter risk. But this information should be provided in a way that avoids unnecessary legalese.<sup>123</sup>

In New Zealand, judgment about compatibility with protected rights must ultimately reflect on whether the purposes of a Bill are sufficiently important in the light of their deleterious effects. But the Attorney-General should be more willing to acknowledge the normative and discretionary elements of determining whether a Bill is consistent with a free and democratic society, and that lawyers' assessments may not be the only reasonable judgment on this issue.

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122 It is interesting to note that while the Palmers recognize that the limitation clause of section 5 is in recognition that a bill of rights regime must have a balancing dimension, to "apply to the difficult issues of policy-making that confront government" this does not seem to influence their conclusion that the section 7 report must reflect formal legal opinion rather than political judgment, Palmer and Palmer, above n 41, 318.

123 Hiebert, above n 26, chs 1, 3.

If the Attorney-General continues frequently to conclude that a government Bill is not consistent with a free and democratic society, the implications of delivering this message should prompt serious reflection on whether changes are necessary to the way policies are assessed for departments and approved by Cabinet. As it stands, the frequent indication that the government is willing to proceed with a Bill that is inconsistent with a free and democratic society suggests two very different interpretations. One is that the vetting process is not a meaningful way to gauge the justification of a Bill. A second interpretation is that the government's commitment to rights in some circumstances is thin and, consequently, it has little moral difficulty proceeding with legislative initiatives despite their obvious inconsistency with rights. Both interpretations are worrisome. If the government's commitment to respect rights is robust and the Bills it introduces do not necessarily warrant the labels "unreasonable" or "inconsistent with a free and democratic society", depicting them in this manner unnecessarily tarnishes its reputation and undermines the incentives for Parliament to take these reports seriously. But if ministers are not sufficiently constrained in their abilities to introduce Bills that so profoundly conflict with rights that they are inconsistent with a free and democratic society, the frequent occasions for these reports signal an equally serious concern that the New Zealand Bill of Rights Act 1990 has not sufficiently permeated political culture or influenced government behaviour.

## VII CONCLUSIONS

Despite a similar obligation to scrutinise Bills for their consistency with rights and report to Parliament any inconsistencies, Canada and New Zealand have interpreted their responsibilities very differently. Although an explanation for why these approaches have evolved in such a different manner is interesting, what is more significant is that these approaches have similar adverse implications for the ideal behind vetting and reporting procedures: to enlighten and empower Parliament to satisfy itself that the legislation it passes is justified in the light of a commitment to protect fundamental rights. The absence in Canada of any reports to Parliament, or subsequent explanation for why a Bill is justified even though it is likely to culminate in litigation, ensures that Parliament will not have adequate information to assess Bills that may have a high degree of Charter risk. Parliament will also lack sufficient information to determine whether risk-averse strategies have distorted legislative goals or the means to implement these, resulting in non-comprehensive or non-ambitious legislation. In New Zealand, the frequency of reports on government Bills and their preoccupation with legal assessments provide insufficient context and convey confusing messages about how the House of Representatives should assess these and what weight should be attached to the apparently alarming message that the government wishes to pass legislation that is not consistent with a free and democratic society.

Changes to the reporting obligation would facilitate more robust parliamentary review if in Canada these reports were to focus on why a Bill is reasonable and justified and in New Zealand if judgment about incompatibility were not ceded to legal public servants. These changes, along with explanations and information to support political judgments, would provide Parliament with a richer framework for the task that is envisaged in these reporting obligations: of evaluating whether or not the legislation it passes is consistent with a free and democratic society. Absent changes, a disservice is being done to Parliament by presenting this issue as either the exclusive prerogative of Cabinet (Canada) or a technical and legal judgment for government lawyers (New Zealand).

