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Parliamentary Bill of Rights Scrutiny in New Zealand — a 2016 update

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Abstract

This paper considers the impact the New Zealand Bill of Rights Act 1990 has on the legislative process in the New Zealand House of Representatives. It looks at the effectiveness of parliamentary Bill of Rights scrutiny of bills by reference to academic writing, caselaw and analysis of House and select committee proceedings. It also looks at recent changes to Standing Orders to improve the scrutiny process. The paper concludes with observations on further options for improving parliamentary Bill of Rights scrutiny in New Zealand.

Introduction

New Zealand has enjoyed the benefits of the New Zealand Bill of Rights Act 1990 (the **Bill of Rights**) for 26 years. The Act has remained largely unamended in that time. There have been calls to extend the protection of the Act to property rights and economic, social and cultural rights. However at this time the Act affirms and protects only civil and political rights. These are loosely categorised into 4 areas: life and security of the person, democratic and civil rights, non-discrimination and minority rights, and search, arrest, and detention rights.

The Bill of Rights is an ordinary statute that is not entrenched. It confers no power on the courts to strike down inconsistent legislation. However the courts have debated for some time their jurisdiction to make declarations of inconsistency. In July last year Justice Heath took the plunge and declared the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill inconsistent with section 12 of the Bill of Rights.[1] That judgment is currently under appeal by the Crown.

The focus of this paper is on parliamentary Bill of Rights scrutiny of bills rather than judicial application of the Act. However when it comes to considering the effectiveness of parliamentary Bill of Rights scrutiny, the courts views on inconsistency are illuminating and I will return to them.

The Act applies to the legislative, executive and judicial branches of government. While applying to the legislative branch, it is clear that the Act does not constrain parliamentary sovereignty.[2] The House may pass legislation that contains limitations on rights and freedoms not justified in a free and democratic society if it chooses. However the House endeavours to establish procedures so that such decisions are well informed.[3]

The Attorney-General is responsible for reporting on consistency of bills with the Act under section 7 of the Act. The Attorney is required to bring to the attention of the

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[1] *Taylor and Ors v Attorney-General of New Zealand* [2015] NZHC 1706

[2] See New Zealand Bill of Rights Act 1990, s 4 which requires the court to apply enactments irrespective of inconsistency with the Bill of Rights. See also C Geiringer, "The Dead Hand of the Bill of Rights?" (2007) 11 Otago L Rev 389

[3] Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 20

House any provision in a bill that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.[4] For Government bills this consists of a report presented at the same time as the bill is introduced. For members bill and local and private bills, the report is presented as soon as practical after the introduction of those bills.[5] The Cabinet manual emphasises that the Attorney-General acts as an independent law officer and is not bound by cabinet collective responsibility when acting under section 7.[6]

Until 2014 there was no requirement for the House to formally address the reports of the Attorney General. The section 7 report was made available for the benefit of members to inform debate on the bill and its consideration at select committee. In the New Zealand Parliament almost all bills that pass first reading are referred to a select committee for detailed consideration and public consultation. While often referred to in debate or in select committee reports, no formal response to the Attorney-General's report was required. This changed with the start of the 51st Parliament. Standing Orders were amended requiring the Clerk to allocate the report to the most appropriate select committee as an item of business. Such a referral requires the select committee to report back to the House on its consideration of the report. [7]

The Clerk endeavours to refer the report to the committee that is most likely to consider the bill to which it relates following its successful first reading.[8] That is done by informal consultation at the time of the bill's introduction with the Minister or member in charge of the bill as to which committee they intend to nominate following first reading. In most cases the report has been successfully referred to the committee considering the bill to which the report relates. On occasion where the report is referred to a select committee not considering the bill, the practice is for the committee to request comment from the committee considering for the bill. For bills not considered by a select committee, for example a bill that is considered under urgency, or a members' bill that is negatived at first reading, the requirement for a committee report on the section 7 report remains. In practice these have been pro forma responses.

The impact of Attorney-General reports

As of 1 June 2016 the Attorney-General has presented 77 section 7 reports. Of these 38 related to Government bills and 39 to members' bills. Of those 77 bills reported on, 44 were enacted. By far the majority of bills receiving section 7 reports that were subsequently enacted were Government bills. This is not surprising and is mostly not

[4] New Zealand Bill of Rights Act 1990, s 7
[5] See New Zealand Bill of Rights Act, s 7 and Standing Orders of the NZ House of Representatives 2014, SO 265(2)
[6] *Cabinet Manual 2008* 4.2 to 4.5
[7] Standing Orders of the NZ House of Representatives 2014, SO 265(5)
[8] The New Zealand House of Representatives has no specialist committee for the consideration of Human Rights issues. The only specialist scrutiny committee is the Regulations Review Committee.

related to Bill of Rights deficiencies. In any Parliament Government bills are more likely to pass. Analysis of which bills pass and which do not tends not shed much light on Bill of Rights scrutiny.

In a more detailed survey of bills receiving section 7 reports from 2002 to 2014, there were 39 reports presented on bills, 20 of which were enacted. Of those 20 bills, 5 were obviously amended in response to the section 7 report by the select committee considering the bill. Twelve reports on those 20 bills engaged actively with the section 7 report and determined that the inconsistency was a justifiable limitation or contained similar reasoning. There were 6 enacted bills in this 12 year period where the respective select committees did not obviously engage with the section 7 report. Two enacted bills receiving Bill of Rights reports were passed under urgency in the period and were not considered by select committees.

I found these figures encouraging. There is a general perception that parliamentary Bill of Rights scrutiny in New Zealand is underperforming. I have in mind titles of academic works such as "The Comparative Irrelevance of the NZBORA to Legislative Practice", an excellent article by Andrew Geddis from 2009, but a bit dispiriting on the face of it. There are certainly a number of areas in which it can be improved, which I will come to. But section 7 reports are playing a significant role in initiating and informing parliamentary scrutiny of bills.

There are a several issues worth considering further on the topic of the Attorney-General's section 7 reports. The first is the threshold triggering a section 7 report. Only bills that appear to be inconsistent with the rights and freedoms contained in the Bill of Rights attract a section 7 report. Vetting of bills for inconsistency with section 7 is done by the Ministry of Justice for the Attorney-General.[9] The Ministry of Justice interpretation of this threshold is that a bill must limit a right or freedom and that limit must be unjustified in a free and democratic society.

The problem with this approach is that the test of whether the limit is justifiable in a free and democratic society is a largely subjective moral and political test. It is a test that members are better placed to consider perhaps than unelected officials. If the Attorney, as advised by officials does not provide a section 7 report based on this test, it deprives the House of the scrutiny trigger that there is an inconsistency. There is a danger that in the absence of a section 7 report members will miss limitations on rights and freedoms and not apply the test of whether a limit is justified in a free and democratic society.

However I note that the legal advice provided to the Attorney-General on bills that do not attract section 7 reports is made available on the Ministry of Justice website. While not presented to the House, rights information is available on every bill before the House. Perhaps the logical step flowing from this in the future will be formalising this

[9] An exception to this is where the bill is one for which the policy has been developed by the Ministry of Justice, in which case the Crown Law office performs the vetting function.

process into presentation to the House of the equivalent of compatibility statements on all bills introduced.

A more critical issue is that section 7 reports are only provided at the introduction of the bill. It has been a long recognised weakness that until recently there has been no systematic Bill of Rights scrutiny of proposed amendments to bills from any branch of Government.

There are cases where this has led to legislation inadvertently being passed in breach of the Act. One well reported example is the 1999 "home invasion" amendments to the Criminal Justice Act 1985 where increased sentences were apparently mandated for murder involving home invasion retrospectively (despite another provision in the Act to the contrary). This resulted from a cross bench amendment made at the committee of the whole stage in a late supplementary order paper.

In *R v Pora*, the Chief Justice considered these provisions and, in finding against retrospectivity, expressed concern about the passage of the amendment:

> It is striking that in the parliamentary debate there is no indication that Parliament appreciated that adoption of s 2(4) was inconsistent with s 4(2) of the Criminal Justice Act and s 56 of the 1993 Act, with the provisions of the New Zealand Bill of Rights Act, and with New Zealand's international obligations under art 15 of the International Covenant on Civil and Political Rights.[10]

The Supplementary Order Paper from the ACT member Patricia Schnauer was apparently agreed to by the Government in a deal to get support for the bill to proceed. It appears there was limited time, if any, for any form of informed scrutiny of this member's amendment at the committee of the whole stage. Realistically members' amendment like this will only get informed scrutiny after the committee of the whole reports its recommendations back to the House. A Bill of Rights vet prior to the third reading would be an option for addressing this. It would at least allow a bill to be recommitted where an amendment was clearly inconsistent with the Bill of Rights.

A recent example raises a similar issue at the select committee stage. Two bills before the House dealt with the issue of protecting the community from convicted child sex offenders after they have served their sentence. The government bill set up a child sex offender register to be used across relevant government agencies to identify those who constitute a risk of further offending.[11] The member's bill dealt with a subset of the issue by removing the ability of convicted child sex offenders to change their name on their birth certificate.[12]

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[10] *R v Pora* [2001] 2 NZLR 37

[11] Child Protection (Child Sex Offender Register) Bill

[12] Births, Deaths, Marriages, and Relationships Registration (Preventing Name Change by Child Sex Offenders) Amendment Bill, bill withdrawn on 12 May 2016.

The Attorney-General presented section 7 reports on both bills. The report on the member's bill noted the bill was an unjustified limitation on the right to freedom of expression. The report on the Government bill considered the bill was an unjustified limitation on rights protected under section 9 and 26 of the Act. It infringed the rule against double jeopardy and in some cases imposed life-long limits on freedoms without the possibility of review.

The bills and their section 7 reports were referred to the Social Services committee to be considered. The committee came to the conclusion that the member's bill should not proceed, but that the issue of name change should be dealt with in the Government bill. The proposal that was agreed to was that persons on the register should only be permitted to change their names with the approval of the Commissioner of Police. The option of simply requiring an offender to notify the police of a name change was considered but rejected. The committee noted the Attorney-General's concerns in the section 7 report relating to the members' bill. It considered the modified proposal was a justified limitation. It does not appear that the committee sought any further Bill of Rights advice on the new proposal.

In terms of the child sex offender register proposal itself the committee was divided on whether the concerns of the Attorney-General had been adequately addressed. The committee inserted new clauses to address some of these concerns. One provided for the removal of a child sex offender from the register after 15 years if prescribed conditions are met. Another provided a right of challenge to protect against mistaken entry on the register. However the retrospective application of the bill and the potential double jeopardy situation this creates is still a part of the bill as it currently awaits its second reading. Labour, the Greens and the New Zealand First Party all oppose the bill, but only the Green party cites Bill of Rights concerns for their opposition.

There are two main points I would draw from this example. The first is that Bill of Rights scrutiny process for the Government bill seemed to work pretty well. Concerns were flagged in the section 7 report on the Government bill. These were supplemented by further oral advice to the committee by Ministry of Justice officials, a submission by the New Zealand Law Society and a report of the Human Rights Commission, amongst others. The Clerk of Committee also drew the issues in the section 7 report to the attention of the committee for specific consideration. The Police departmental report advising the committee on the bill agreed with a number of the concerns in submissions and recommended amendment to the bill to address some of the issues raised in the section 7 report. The committee agreed to the amendments.

This shows the scrutiny process functioning well. The Bill of Rights issues are well highlighted in the section 7 report, there is an opportunity for these issues to be submitted on and developed, and ultimately for some of the issues to be resolved. While some issues raised in the section 7 report were not resolved, they were at least addressed by the committee.

The other point, which is more concerning is the very late stage in the committee's consideration of the bill at which the proposal to incorporate the change of name clauses in the bill was accepted, and the limited scrutiny given to this last minute amendment. There is no evidence of written advice on this change being provided to the committee. No reason is given for preferring a requirement for approval over notification of a name change. Instead, the committee report addresses the Attorney-General's concern that prohibition from name change is an unjustified limit on freedom of expression by simply noting that the Police Commissioner may approve name changes in some circumstances. These examples highlight the concern that parliamentary Bill of Rights scrutiny does not cope well with amendments made at a late stage in the process.

Improvements to Bill of Rights scrutiny

At the end of each Parliament the Standing Orders committee calls for public submissions and conducts a review of Standing Orders to make recommendations for improving Standing Orders for the next Parliament. The Speaker chairs the committee and it endeavours to reach a consensus on the proposed changes to ensure the House adopts the recommendations.

Submissions on improving parliamentary Bill of Rights scrutiny are frequently submitted. In 2011 the committee focussed on submissions suggesting a requirement for section 7 reports for all bills introduced and for formal Bill of Rights scrutiny of select committee amendments and amendments made at committee of the whole House stage.[13]

The committee noted that legal advice provided to the Attorney-General on bills that do not receive section 7 reports is now published on the Ministry of Justice website. It recommended that select committees take note of that advice and promote its availability to those making submissions on bills. The committee also recommended that the Government amend Cabinet guidelines to require regulatory impact statements to address Bill of Rights matters at a bills introduction and to require Bill of Rights reporting on substantive Supplementary Order Papers (SOPs).

In the 2014 review the Standing Orders committee noted that progress had been made on Bill of Rights reporting on substantive SOPs through a new disclosure statement regime.[14] This regime requires Government departments to publish disclosure statements providing information on core technical scrutiny matters from the Legislation Advisory Committee guidelines. The statements are expected to disclose whether bills contain provisions inconsistent with various aspects of the guidelines and to disclose consultation and analysis that has informed the inclusion of the provisions. The committee noted that only SOPs containing material policy changes received a full disclosure statement and that short form disclosure statement for other SOPs should address Bill of Rights matters.

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[13] Standing Orders Committee *Review of Standing Orders* (September 2011) [2008-2011] AJHR I.18B, at 19

[14] Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A

In 2015 there were 10 SOP disclosure statements from 44 Government SOPs. Of those only 3 were long form statements including Bill of Rights matters. The 3 long form statements refer the reader back to the original section 7 report. None of the disclosure statements provided additional information on Bill of Rights consistency in respect of the SOP.

To date in 2016 there has only been one SOP disclosure statement. That was on the Environment Canterbury (Transitional Governance Arrangements) Bill. It was a short form disclosure. The statement notes

> The Ministry of Justice does not routinely vet Supplementary Order Papers for compliance with the Bill of Rights Act. We do not consider that the proposed amendment would alter the conclusion in the Bill of Rights advice on the Bill as introduced.

The reader is then referred to the original advice from the Ministry of Justice to the Attorney-General that the bill does not appear to be inconsistent with the Bill of Rights. While no further information is given, this is a marginal improvement. At least comment is made on the SOP's consistency with the Bill of Rights. To date there is little evidence of additional Bill of Rights information being made available to the House and its committees through disclosure statements on amendments to bills.[15]

The 2014 submissions on Bill of Rights to the Standing Orders committee continued themes from submissions on the 2011 review. The submissions continued the call for section 7 reports to be made at a later stage in the legislative process. The Green party called for a requirement that bills attracting a section 7 report must not pass unless they have been referred to a select committee for public consultation. This would prevent bills with Bill of Rights implications from being considered under urgency. A number of submitters called for a specialist Human Rights committee to provide specialist scrutiny on Bill of Rights matters.

The 2014 review of Standing Orders took a conservative approach to these issues, opting to specifically refer all section 7 reports to a select committee (except in the case of a bill accorded urgency) to ensure that those reports are given proper consideration and are reported on by a select committee.

The report notes that the Office of the Clerk is working to enhance its support to improve legislative outcomes and to provide more analytical support for members in carrying out their work. In the Bill of Rights context this has involved a project that has identified scrutiny resources and criteria and set about building the capability of

[15] The disclosure statement regime is under further review. Currently it is mandated under Cabinet Rules. An amendment before the House to the Legislation Act 2012 proposes making it a statutory requirement. Consultation is under way with the object of making disclosure statement more informative on consistency amendments with the Bill of Rights.

committee clerks. Capability building has been through internal and external training, and strategic partnership with the Office legal services team, and through knowledge management tools to retain and share scrutiny learnings. It is difficult to evaluate the success of this project to date, but there is no doubt that committee staff are better equipped now to draw members' attention to Bill of Rights issues in briefings and in the course of committee proceedings.

The Standing Orders committee has to date resisted calls for the establishment of a specialist human rights scrutiny committee. The advice from the Clerk of the House has emphasised the capability and powers of the existing select committee system with 13 subject select committees to provide the scrutiny function. In a Parliament of 121 members, members (not including Ministers) are already thinly spread. There is also the view that Bill of Rights scrutiny involves balancing competing public interests as much as technical legal issues. These competing issues are central to the role of the member and may be best considered in the context of policy decisions that members of select committees are making in respect of bills.[16] That is not to say independent technical scrutiny advice is not necessary. If a section 7 report or disclosure report is not available on provisions in a bill under consideration, it is important to have either external or internal Bill of Rights advice available to meet the timetable demands of the select committee. But the view remains that Bill of Rights scrutiny is best conducted as part of general quality of legislation scrutiny by subject select committees.

The 2014 report concludes its Bill of Rights section:

> We suggest that future reviews of Standing Orders consider how developments have contributed to the House's scrutiny of legislation. The House should provide mechanisms for those issue to be duly considered, so that the decision as to whether a limitation of rights is demonstrably justified is taken as a conscious exercise of the collective political and moral judgment of members.[17]

Options for future improvement

I will conclude this paper by considering some of the matters that the Standing Orders Committee had in mind for future review.

A recurring theme in Bill of Rights related submissions to the Standing Orders Committee is how best to deal with scrutiny of amendments. To date the approach has been to rely on information in disclosure statements provided by departments and the ability of select committees to call on officials from the Ministry of Justice and other Bill of Rights experts to provide evidence or advice to the committee on Bill of Rights matters.

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[16] A similar point is made by Harry Evans in *Bill of Rights and Legislative Scrutiny: Two Different Worlds* given at the 2009 Scrutiny of Legislation conference where he distinguished between technical scrutiny of bills and the more political environment of making decisions on competing rights.

[17] Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 20.

This is a start but the material reviewed in preparing this paper suggests that disclosure statements on amendments are not yet meeting their potential, and relying on committees to seek out information in the fast moving world of committee politics is unreliable. A heavy burden rests on committee staff to draw Bill of Rights issues to the attention of members. Also these latter measures offer no support to members at the committee of the whole stage considering SOPs.

An area considered for future review by the committee is the effectiveness of committee consideration of section 7 reports. Now that section 7 reports stand referred to a subject select committee for report back to the House in the 51st Parliament, it has become easier to analyse the performance of select committee consideration. In the 51st Parliament, 3 out of the 5 committee reports on section 7 reports have been a pro forma no matters to report. In one case this was because the bill passed under urgency and was not considered by the select committee. The other 2 reports related to members' bills that the respective committees recommended not progress.

A proposal set aside by the Standing Orders Committee for future consideration was for the Attorney-General to report again to the House if matters raised in a section 7 report remained unresolved following select committee consideration. Should this occur the further report could be considered during the committee of the whole stage of the bill. In this way the specific issues raised in the section 7 report would receive consideration with the possibility of further amendment. The Standing Orders Committee consulted with the Attorney-General on this proposal who indicated his support, but the proposal was not adopted.

A further proposal for future consideration is that amendments proposed at the committee of the whole stage in SOPs also be reported on by the Attorney-General if they raise Bill of Rights issues. Scrutiny would be effected either by referral of the bill back to a subject select committee for the consideration of the Attorney-General's report and subsequent report back to the House, or potentially a debate on the SOP before the committee of the whole stage can progress. The Attorney-General indicated support for this approach.

Another option promoted by submitters and academic writing[18] would be to have either full section 7 vetting by the Attorney-General following the committee of the whole, or the option for a further section 7 report following the committee of the whole stage, where the Attorney-General considers there remains a Bill of Rights issue that merits further consideration.

These proposals have much to recommend them. Section 7 reports are viewed as a rich and reliable source of analysis on Bill of Rights issues. They are considerably more informative than current disclosure statements and the Ministry of Justice together with

[18] For example H McQueen, "Parliamentary: A Critical Review of Parliament's Role in New Zealand's Law-Making Process" (2010) 16 Auckland University Law Review 1, at p 16

the Crown Law office are New Zealand's best resourced source of Bill of Rights analysis. Against this is the risk of all the scrutiny eggs being placed in one Executive sourced basket. There is merit in having an independently source of analysis to inform members on Bill of Rights issues. In practice however the Bill of Rights vetting provided by the Ministry of Justice and Crown law is well respected as independent advice and there is no perception of Executive taint.

The merit in these proposals is that the House is made fully aware of the Bill of Rights issues involved in legislation before law is passed. The Bill of Rights permits rights and freedoms to be subject only to such limitations prescribed by law as can be demonstrably justified in a free and democratic society. The work that is being done to improve parliamentary Bill of Rights scrutiny seeks to ensure members are well informed when making this judgment. I am hopeful we are making progress.