

## Chapter 8

# Civil and Political Rights in New Zealand

In establishing the foundations for the examination of the interface between counter-terrorism and human rights in New Zealand, the previous two chapters have considered the interface between terrorism, counter-terrorism and human rights at the international level. This chapter looks at New Zealand's civil and political rights framework. In doing so, a focussed approach is adopted, limiting the scope of this chapter to consideration of the key issues that will be involved in the examination of issues under Part III of this text.

With that approach in mind, this chapter provides an overview of the mechanisms through which New Zealand has implemented its obligations under the International Covenant on Civil and Political Rights, this being the document in respect of which most human rights issues arise in the context of counter-terrorism law and practice. Chapter 9 then considers the particular question of the limitation of rights.

### **New Zealand's Civil and Political Rights Framework**

Chapter 6 has provided an overview of the international human rights law framework. New Zealand is, in that regard, a party to what are regarded to be the six 'core' human rights treaties stemming from the 1948 Universal Declaration of Human Rights.<sup>1</sup> The most significant of those, at least for

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<sup>1</sup> *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 9464 UNTS 211 (entered into force 4 January 1969 and ratified by New Zealand in 1975); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 and ratified by New Zealand in 1978); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976 and ratified by New Zealand in 1978); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981 and ratified by New Zealand in 1984); *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987 and ratified by New Zealand in 1989); and *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 43 (entered into force 2 September 1990 and ratified by New Zealand in 1993).

the purpose of this text, is the International Covenant on Civil and Political Rights (the ICCPR). The ICCPR consists of 27 articles enunciating a wide range of civil and political rights, from the right to self-determination, to freedom of speech and association, to minimum guarantees for the conduct of the criminal process.

Although the articulation of those rights is significant in itself, it is not just this aspect that makes the ICCPR an important human rights document. The ICCPR is the instrument through which the Human Rights Committee was established.<sup>2</sup> The Committee has three functions, all linked to civil and political rights protection. The first of these is to receive and comment on periodic reports from States parties to the ICCPR.<sup>3</sup> New Zealand has submitted four reports to the Human Rights Committee under this procedure.<sup>4</sup> Next, the Committee is empowered to make general comments, of its own volition, on any matter touching upon the rights set out in the ICCPR.<sup>5</sup> Finally, and significantly in terms of the enforcement of rights, the Committee carries out a quasi-judicial function under the First Optional Protocol to the ICCPR, which establishes a complaints procedure.<sup>6</sup> The Optional Protocol gives individuals within States which are party to the Protocol the right of direct petition to the Human Rights Committee in

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ratified by New Zealand in 1989); and *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 43 (entered into force 2 September 1990 and ratified by New Zealand in 1993).

<sup>2</sup> The Human Rights Committee was established under Article 28(1) of the *International Covenant on Civil and Political Rights*.

<sup>3</sup> See Article 40(1) of the *International Covenant on Civil and Political Rights*. States parties are required to submit reports to the Human Rights Committee every five years, detailing the measures adopted to give effect to the rights recognised in the ICCPR and on the progress made in the enjoyment of those rights.

<sup>4</sup> For the latest report by New Zealand to, and comments of, the United Nations Human Rights Committee, see Ministry of Foreign Affairs and Trade, *New Zealand's Fourth Periodic Report to the Human Rights Committee (2001)* CCPR/C/NZL/2001/4; and *Human Rights Committee Comments on New Zealand's 4th Periodic Report*, UN Doc CCPR/CO/75/NZL (2002).

<sup>5</sup> General Comments by the Human Rights Committee are authorised by Article 40(4) of the *International Covenant on Civil and Political Rights*. On reading that provision, it might appear that comments are limited to responses to specific periodic reports submitted by states party to the ICCPR. The Committee has adopted the practice, however, of making its comments open to all states parties and in more general terms, with the aim of assisting states with the interpretation and implementation of the Covenant. To view the general comments of the Committee, see URL <[www1.umn.edu/humanrts/gencomm/hrcomms.htm](http://www1.umn.edu/humanrts/gencomm/hrcomms.htm)>.

<sup>6</sup> *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976 and ratified by New Zealand in 1989).

certain well-defined circumstances.<sup>7</sup> Of interest, although prior to the enactment of the NZBORA, Professor Jerome Elkind saw this mechanism as establishing within New Zealand a 'Bill of Rights' in itself and changing the helplessness of New Zealanders in the human rights arena.<sup>8</sup> The NZBORA came into force five months later.

*Legislative Implementation of International Human Rights Obligations in New Zealand*

As discussed within chapter 4, treaties are not law of the land unless incorporated by statute. This begs the question: given the number of international human rights treaty obligations adopted by the New Zealand Executive, which of those have been incorporated by statute and to what extent, therefore, are New Zealand's international human rights obligations reflected in domestic law? The question is important in order to determine what rights and freedoms are guaranteed, albeit that some may already find recognition under the common law.<sup>9</sup>

There have been a number of statutes said to give effect to New Zealand's international human rights obligations under the ICCPR. The three major enactments are the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the Privacy Act 1993.<sup>10</sup> Through its preamble, the NZBORA declares itself as:

An Act - (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

Similarly, the Human Rights Act provides in its long title that it is:

An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights

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<sup>7</sup> For a comprehensive explanation of the communication procedure, see PR Ghandi, *The Human Rights Committee and the Right of Individual Communication* (Ashgate Dartmouth Publishing Ltd, 1998).

<sup>8</sup> Jerome Elkind, "The Optional Protocol: A Bill of rights for New Zealand" [1990] *New Zealand Law Review* 96, 101.

<sup>9</sup> That rights exist in the absence of legislation is implicitly accepted through the wording of the New Zealand Bill of Rights 1990: see sections 2 ("rights affirmed") and 28 ("other rights not affected").

<sup>10</sup> The Fourth Periodic Report to the HRC (n 4) at 16 identifies the following additional enactments as creating the legislative structure within which human rights are protected in New Zealand: *Ombudsman Act 1975*, *Official Information Act 1982*, *Privacy Act 1993*, *Police Complaints Authority Act 1988*, *Children, Young Persons and Their Families Act 1989*, and the *Health and Disability Commissioner Act 1994*.

in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights.

Although the long title to the Privacy Act does not make explicit reference to obligations under the International Covenant, it does hold itself out as being an Act to establish principles concerning:<sup>11</sup>

- (i) The collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and
- (ii) Access by each individual to information relating to that individual and held by public and private sector agencies; and

Those are clearly matters that bear upon the implementation of the right to privacy, as set out in Article 17 of the ICCPR.<sup>12</sup>

#### *The Human Rights Act 1993*

The Human Rights Act (HRA) was enacted in 1993 to combine and extend the Race Relations Act 1971 and Human Rights Commission Act 1977. The original grounds of discrimination under the Race Relations Act and Human Rights Commission Act continue to be prohibited under the HRA through section 21(a) to (g): discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race and ethnic or national origins. The 1993 Act also extends protection against discrimination on the grounds of disability, age, political opinion, employment status, family status and sexual orientation through section 21(h) to (m).<sup>13</sup>

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<sup>11</sup> See preambular paragraph (a) to the *Privacy Act 1993*. Note, also, that the long title does make reference to the recommendation of the Council of the OECD Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.

<sup>12</sup> Article 17 of the *International Covenant on Civil and Political Rights* provides: “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks”. It is not clear why Article 17 was not implemented through the *New Zealand Bill of Rights Act 1990*. In the 1985 White Paper on a Bill of Rights for New Zealand, the implementation of New Zealand’s obligations under the ICCPR was identified as one of the reasons in favour of New Zealand adopting a Bill of Rights: see New Zealand Department of Justice, *A Bill of Rights for New Zealand - A White Paper* (Government Printer, Wellington, 1985), 30 (para 4.21). The paper then states that “some provisions of the Covenant do not appear in the draft”, but gives no explanation for this: para 4.23.

<sup>13</sup> The ground of age is not, strictly speaking, a “new” ground of prohibited discrimination. It was in fact added to the *Human Rights Commission Act 1977* in 1992 - see section 4 of the *Human Rights Commission Amendment Act 1992*.

Part II of the HRA sets out the conditions which are deemed to amount to “unlawful discrimination” in relation to employment, partnerships, membership in professional or trade associations, membership in qualifying bodies and vocational training bodies, access to facilities open to the public, the provision of goods and services to the public, the provision of land, housing and other accommodation and access to educational establishments.<sup>14</sup> Additionally, section 65 of the Act (pertaining to indirect discrimination) is a kind of catch all, prohibiting any policy or practice from having the effect of treating a person or group of persons differently on the basis of one of the prohibited grounds of discrimination, unless there is some “good reason”.

Through the linking provisions between the HRA and NZBORA,<sup>15</sup> discriminatory conduct on the part of the State is also prohibited and subjects government to the discrimination complaints process under Part 3 of the Human Rights Act.

### *The Privacy Act 1993*

The Privacy Act 1993 impacts upon the examination of issues concerning search and seizure, surveillance and access to personal information. The relevance of the right to privacy upon these issues is something that has been seen, for example, within the jurisprudence of the UN Human Rights Committee.<sup>16</sup>

The Privacy Act was enacted on 17 May 1993 “to promote and protect individual privacy” in both the public and private sectors.<sup>17</sup> Section 6 of the Privacy Act establishes 12 Information Privacy Principles, which are concerned with the collection, storage, use and disclosure of personal information. Personal information is defined, under section 2 of the Act, as “information about an identifiable individual”. The Act has been characterised as both a human rights statute and freedom of information statute.<sup>18</sup>

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<sup>14</sup> See sections 22, 36, 37, 38, 40, 42, 44, 53 and 57 of the *Human Rights Act 1993*.

<sup>15</sup> See sections 3 and 19 of the *New Zealand Bill of Rights Act 1990* and Part 1A of the *Human Rights Act 1993* (inserted by the *Human Rights Amendment Act 2001*).

<sup>16</sup> For a more detailed examination of the right under Article 17 of the *International Covenant on Civil and Political Rights*, and its impact upon these matters, see Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (London: Ashgate Publishing Ltd, 2004), chapter 7.

<sup>17</sup> See the preamble to the *Privacy Act 1993*.

<sup>18</sup> See Mackay R and McArtney R, *Privacy Law and Practice* (Butterworths, Wellington, 1995), A/6.

The Act applies to the Crown, and any “agency” dealing with personal information.<sup>19</sup> In a way similar to the Human Rights Act, the Privacy Act establishes a complaints procedure for the investigation of complaints under the Act. It also provides individuals with the means to have access to their records and request correction of any wrong information; and it requires every agency to have Privacy Officers, whose role it is to administer the application of the Privacy Act in their organisation, deal with information privacy requests and work with the Privacy Commissioner on any investigations.

The breach of an Information Privacy Principle will normally amount to an interference with the privacy of an individual, depending on the consequences of the breach.<sup>20</sup> If such a breach proceeds to the Human Rights Review Tribunal, the Tribunal has the power to grant various remedies, including damages up to \$200,000.00. Section 127 of the Act sets out the only criminal offences under the Act, which pertain to interference with the Privacy Commissioner’s investigations or instructions.

### *The New Zealand Bill of Rights Act 1990*

The New Zealand Bill of Rights Act 1990 is, as already noted and reflected within the long title to the Act, the primary instrument through which New Zealand has implemented its obligations under the ICCPR. This part of the chapter only seeks to provide an overview of the Bill of Rights. A more detailed consideration of the operative provisions of the Act, and its ‘limitations clause’ in particular, is given later in this chapter, and in chapter 9. For now, it is sufficient to briefly consider the development of the Bill of Rights, the affirmation of rights within the Act, the application of the Act to the State, and the special role of the Attorney-General under the Act.

#### 1. A Bill of Rights for New Zealand

In his introduction to the White Paper on a Bill of Rights for New Zealand, Sir Geoffrey Palmer set out the motives of the Bill as follows:<sup>21</sup>

A Bill of Rights for New Zealand is based on the idea that New Zealand’s system of government is in need of improvement. We have no second House

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<sup>19</sup> See sections 2 to 5 of the *Privacy Act 1993*.

<sup>20</sup> See section 66 of the *Privacy Act 1993*.

<sup>21</sup> New Zealand Department of Justice, *A Bill of Rights for New Zealand - A White Paper* (Government Printer, Wellington, 1985), 5.

of Parliament. And we have a small Parliament. We are lacking in most of the safeguards which many other countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multicultural society.

The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will provide a source of education and inspiration about the importance of fundamental freedoms in a democratic society. It will provide a remedy to those individuals who have suffered under a law or conduct which breaches the standards laid down in the Bill of Rights. It will provide a set of minimum standards to which public decision making must conform.

In its original form, Sir Geoffrey Palmer intended the NZBORA to have an enormous impact on the field of civil liberties in New Zealand. It was to be supreme law, overriding all other Acts of Parliament, all subordinate legislation and all public practices, in the same way as the Canadian Charter of Rights and Freedoms 1982 (the Canadian Charter).<sup>22</sup> In its final form however, there were many significant changes made to the Bill and differences therefore exist between it and its Canadian equivalent. The most important of these relates to the status of the New Zealand instrument. Under the Canadian Charter, all forms of legislation are subject to the rights and freedoms guaranteed under the Charter. Any provisions of an Act of Parliament inconsistent with those rights and freedoms can be struck down by the judiciary. The rights and freedoms affirmed in the NZBORA, however, are subject to ordinary legislation: the Charter is "supreme" law, while the NZBORA is part of "ordinary" law.

This is a matter that has drawn the repeated criticism by the UN Human Rights Committee in its comments upon New Zealand's reports to the Committee under Article 40 of the ICCPR. In its comments on New Zealand's Third Periodic Report in 1994, the Committee said this:<sup>23</sup>

The Committee regrets that the provisions of the Covenant have not been fully incorporated into domestic law and given an overriding status in the legal system. Article 2, paragraph 2, of the Covenant requires States parties to take such legislative or other measures which may be necessary to give effect to the rights recognized in the Covenant. In this regard the Committee regrets that

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<sup>22</sup> The Canadian Charter is not an instrument on its own, but is in fact Part I of Canada's *Constitution Act 1982*, which is in turn Schedule B to the *Canada Act 1982* (UK).

<sup>23</sup> Ministry of Foreign Affairs and Trade, *New Zealand's Third Periodic Report to the Human Rights Committee* (1994) CCPR/C/64/Add.10; and *Human Rights Committee Comments on New Zealand's 3rd Periodic Report*, (1995) CCPR/C/79/Add.47, para 11.

certain rights guaranteed under the Covenant are not reflected in the Bill of Rights, and that it does not repeal earlier inconsistent legislation, and has no higher status than ordinary legislation. The Committee notes that it is expressly possible, under the terms of the Bill of Rights, to enact legislation contrary to its provisions and regrets that this appears to have been done in a few cases.

In reply to those criticisms by the Committee, the Fourth Report of 2000 seems to have either failed to answer the criticism, or misunderstood it.<sup>24</sup> The Government's response was to redirect the HRC criticism to the limited issue of the ability of Parliament to be able to pass legislation despite a report from the Attorney-General under section 7 of the NZBORA, allowing the possibility of some legislation enacted in breach of the Act and possibly the Covenant. The Fourth Report explained:<sup>25</sup>

Section 7 constitutes a safeguard designed to alert Members of Parliament to legislation which may give rise to an inconsistency with the Bill of Rights Act and, accordingly, to enable them to debate the proposals on that basis (see *Mangawaro Enterprises Ltd. v. Attorney-General* [1994] 2 NZLR 451, 457). The role of scrutinizing bills for consistency with the Bill of Rights Act and providing advice to the Attorney-General on the exercise of his or her duties under Section 7 is performed by the Ministry of Justice (in the case of legislation being promoted by a Minister other than the Minister of Justice), and by the Crown Law Office (in the case of legislation being promoted by the Minister of Justice).

The New Zealand Government pointed out that this vetting process can involve complex issues and that, in a number of circumstances, it is quite possible for there to be reasonably held competing points of view as to whether a provision does or does not infringe the provisions of the Act. While that is entirely rational, this response failed to answer the Committee's earlier comments to the Third Periodic Report. The comments

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<sup>24</sup> Fourth Periodic Report (n 4) paras 24 to 34 inclusive. One should not, however, take this chapter as treating the Human Rights Committee's criticism as being entirely meritorious. It is, in fact, rather simplistic in its approach and assumes that the judiciary should be the ultimate body deciding upon the extent to which citizens should enjoy rights and freedoms. In a recent report of the Regulations Review Committee, for example, Parliament was described as having this role, the Committee referring to Parliament as the "guardian of the public interest": see Report of the Regulations Review Committee, *Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, NZAJHR (2002) I. 16H, 16. That is, however, a subject outside the scope of this chapter. What is being illustrated is that New Zealand's Fourth Periodic Report effectively ignored the criticism.

<sup>25</sup> Fourth Periodic Report (ibid) para 27.

of the Human Rights Committee did not amount to a criticism of the legislative safeguards against enacting inconsistent legislation; they were in essence stating that this should not be a question for Parliament but one for the judiciary, with the power for the judiciary to strike down inconsistent provisions.

## 2. The affirmation of rights

Part II of the Bill of Rights Act sets out the substantive rights affirmed by the Act, largely reflecting the content of the ICCPR on the subjects of life and security of the person, democratic and civil rights, non-discrimination and minority rights, search, arrest and detention, and rights to justice. A point to note is that the Act expresses itself as ‘affirming’ those rights (section 2), making it specifically clear under section 28 that:

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

## 3. Application to the State

In broad terms, the application of the Bill of Rights is limited to the conduct of the State and its agents:

### **3. Application**

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The text of Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights*, talks at great length about the impact of section 3 upon the legislative, executive and judicial roles of each branch of the State.<sup>26</sup> For the purpose of this text, it is sufficient to note that the Bill of Rights applies to legislation,<sup>27</sup> and the conduct of the executive branch, and the judiciary.<sup>28</sup>

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<sup>26</sup> Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Oxford University Press, 2003), 70-115.

<sup>27</sup> *Ibid*, 72.

<sup>28</sup> *Ibid*, 81-83.

#### 4. The role of the Attorney-General

Already noted within chapter 5 is the fact that the NZBORA requires the Attorney-General to report to the House during the process of law-making:

**7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights**

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 the Bill of Rights.

The role of Attorney-General under section 7 was not something that had been provided for under the White Paper version of the Bill of Rights, but was introduced as a compromise in the removal of the entrenched status of the Act and the introduction of the section 4 ‘sovereignty’ clause.<sup>29</sup> The purpose of the provision is to promote compliance with the Bill of Rights’ substantive rights and freedoms protection, prompting Parliament to turn its mind to the passing of any legislation that would abrogate one of those substantive rights.<sup>30</sup> Two particular matters are relevant. Firstly, the obligation to report to the House only arises when any Bill is “introduced”. There is no duty to review and report on any amendments to a Bill made or recommended as a result of the select committee review process.<sup>31</sup> The second matter of importance is the relevance of section 5 to the Attorney-General’s function. Section 5 sets out a ‘justified limitations’ provision and, according to Crown Law officer Andrew Butler, “almost all advices prepared by the Ministry of Justice and the Crown Law Office for the Attorney-General as part of the section 7 NZBORA vetting process rely to some extent on section 5”.<sup>32</sup>

On the question of law-making, it should also be noted that the Legislative Advisory Committee<sup>33</sup> has adopted *Guidelines on Process and*

<sup>29</sup> *White Paper* (n 21).

<sup>30</sup> Rishworth (n 26) 195-196.

<sup>31</sup> *Ibid*, 196-197.

<sup>32</sup> Andrew Butler, “Limiting Rights”, (2002) 33 *Victoria University of Wellington Law Review* 537, 538. See also Rishworth (n 26) 197.

<sup>33</sup> Established by the Minister of Justice in 1996: see Department of Justice, ‘Who and What is the Legislative Advisory Committee?’ at URL <<http://www.justice.govt.nz/lac/who/index.html>> at 24 March 2004.

*Content of Legislation.*<sup>34</sup> Part of the Committee’s mandate is to “help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines”.<sup>35</sup> The *Guidelines* require law-makers to confirm that proposed legislation complies with the NZBORA, Human Rights Act, Privacy Act, and international obligations.

### **Operation of the NZBORA**

The New Zealand Bill of Rights stands as New Zealand’s primary piece of domestic legislation through which civil and political rights are protected. Having already provided a general overview of matters impacting upon the application of the Act, this part of the chapter will consider two issues in detail: the operative provisions of sections 4, 5 and 6; and the meaning of the term “enactments” (as used in sections 4 and 6 of the Act).

#### *The ‘Unholy Trinity’ of sections 4, 5 and 6*

The precise application of the NZBORA to any perceived conflict between it and any other rule is governed by what Dr James Allan has described as the “unholy trinity” of sections 4, 5 and 6 of the Act:<sup>36</sup>

#### **4. Other enactments not affected**

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
  - (b) Decline to apply any provision of the enactment—
- by reason only that the provision is inconsistent with any provision of this Bill of Rights.

#### **5. Justified limitations**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

#### **6. Interpretation consistent with Bill of Rights to be preferred**

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

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<sup>34</sup> Legislative Advisory Committee, *Guidelines on Process and Content of Legislation* (2001 ed, including 2003 supplement), available at URL <<http://www.justice.govt.nz/lac/>>.

<sup>35</sup> *Ibid*, Term of Reference (e).

In general terms, the provisions are easy enough to understand. Section 4, a last-minute insertion into the Bill as a means of protecting Parliamentary sovereignty, ‘protects’ enactments by preventing the courts from ruling them to be invalid or ineffective as a result only of their inconsistency with the NZBORA. Section 6 requires that, where a provision of an enactment is open to more than one interpretation, then the interpretation that is consistent with the NZBORA is to be adopted. Section 5, an almost identical reflection of section 1 of the Canadian Charter of Rights and Freedoms 1982, permits limitations to be placed upon the rights and freedoms within the NZBORA where this reasonable, prescribed by law, and demonstrably justified in a free and democratic society.

The difficulty lies with the inter-relationship of the sections and the order in which they are to be applied. Section 4 talks of protecting provisions that are “inconsistent” with the Bill of Rights, while section 6 speaks of adopting meanings that are “consistent” with it. Section 5 sets out a limitations test, but expresses itself to be “subject to section 4”. The early approaches to the application of these provisions were set by the New Zealand Court of Appeal in *Noort v MOT; Curran v Police*.<sup>37</sup> On the one hand, Cooke P took the view that primary focus should be placed upon sections 4 and 6 by determining whether there is an “irreconcilable conflict” between the legislation and the NZBORA. That is, the Court should first apply section 6 to try to achieve a consistent interpretation and then, if there is no consistent application, apply section 4 to override the NZBORA. In contrast, the approach of Justices Richardson, Hardie Boys and McKay placed emphasis on section 5 by first asking whether or not the provision or practice in question can be justified under section 5 of the Act. Delivering a more recent judgment of the same Court in *Moonen v Film and Literature Board of Review*, Tipping J outlined a five-step approach that he described as ‘helpful’ to the practical application of the operative provisions.<sup>38</sup> It is notable, however, that this methodology was later

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<sup>36</sup> James Allan, “The Operative Provisions - An Unholy Trinity” [1995] *Bill of Rights Bulletin* 79.

<sup>37</sup> *Noort v MOT; Curran v Police* [1992] 3 NZLR 260.

<sup>38</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17. The five-step process was described as follows: (1) Identify the different interpretations of the words contained in the enactment being examined: if only one interpretation is open: that meaning should be adopted (s4); if more than one meaning is open, proceed to the next step. (2) Identify the meaning which constitutes the least possible limitation on the right or freedom in question and adopt that meaning (s6). (3) Having adopted the appropriate meaning (through either steps one or two), identify the extent – if any – to which that meaning limits the relevant right or

expressed by the Court of Appeal as not intended to be prescriptive and that other approaches were open to application of the operative provisions of the Bill of Rights Act.<sup>39</sup>

Taking into account that the final step advocated in *Moonen* is merely announcing the result of the fourth step, Professor Rishworth's text arrives at a four-step process in the application of sections 4, 5 and 6. The text also explains that the second and third steps in *Moonen* are reversed, rationalising that although there is little practical difference in doing so overall, the change makes the exercise more efficient by considering consistency before ambiguity.<sup>40</sup> For the purpose of this chapter, the four-step approach adopted in that text is summarised as follows:<sup>41</sup>

1. Does the enactment establish a limit on a right?

It is for the party seeking to invoke the Bill of Rights to firstly define the right being invoked and demonstrate that it applies to the circumstances being complained of. If the party is unable to do so, then the NZBORA is neither applicable nor relevant.<sup>42</sup>

2. Is the advocated meaning 'inconsistent' with the right?

An enactment is 'consistent' with the Bill of Rights, explains the text, if "it either (a) effects no limitation on a right or freedom at all, or (b) limits a

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freedom. (4) Consider whether that limitation (if found) can be demonstrably justified in a free and democratic society (s5): if it can, then that is the end of the matter; if it cannot, proceed to the next step. (5) Although a particular meaning to the enactment will have been adopted by this stage (ss4 or 6), if that meaning "fails" the s5 test, then it is a limitation that is not justifiable in a free and democratic society. Step 5 accordingly requires the Court to issue a declaration to that effect (termed a declaration of inconsistency or incompatibility).

<sup>39</sup> *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754, 760 (para 15). See also *Hopkinson v Police* [2004] 3 NZLR 704, 709 (para 28), in which France J in the High Court observed that the five-step process outlined in *Moonen (No 1)* was not a prescriptive one and other approaches were available in Bill of Rights cases.

<sup>40</sup> Rishworth (n 26) 136.

<sup>41</sup> *Ibid.*, 135-157.

<sup>42</sup> See, for example, *Palmer v Superintendent Auckland Maximum Security Prison* [1991] 3 NZLR 315 (where it was held that section 4 of the *Criminal Justice Act 1985* had no application to the right of a prisoner to be credited with time spent on remand in determining eligibility for parole), and *Hart v Parole Board* [1999] 3 NZLR 97 (where it was held that recall from parole was part of the punishment for the original offending and did not therefore amount to a double punishment).

right or freedom to the extent permitted by s. 5”.<sup>43</sup> This second step therefore calls for careful consideration of whether the enactment does limit a right or freedom and, if it does, whether (by application of section 5) such a limit is justified.<sup>44</sup> There are three potential outcomes. Firstly, the enactment does not effect a limitation upon the advocated right, in which case the right is fully protected and there is no need for further enquiries to be made.<sup>45</sup> Secondly, if the enactment does effect a limitation, it might be concluded that the limitation is demonstrably justified in a free and democratic society. In that event, the enactment is not ‘inconsistent’ with the Bill of Rights and this again brings consideration of the NZBORA to a close. It is only in the third potential outcome that the matter must proceed to steps 3 and 4: where the enactment does effect a limitation upon a right or freedom and the limitation cannot be justified under section 5 of the NZBORA.

### 3. Is an alternative meaning possible?

The third step is to establish whether an alternative interpretation of the enactment (one that *is* consistent with the right invoked) is possible. The important feature here is that any alternative meaning must not be as a result of a strained interpretation of the enactment, contrary to its ordinary meaning or to Parliament’s intent.<sup>46</sup> Andrew Butler adds that, since consideration of section 5 needs to precede the determination of a binding interpretation of an enactment, section 6 can only demand that the courts apply a meaning which least reasonably limits the NZBORA.<sup>47</sup>

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<sup>43</sup> Rishworth (n 26) 138.

<sup>44</sup> Which is, as pointed out by Rishworth, analogous to the methodology adopted under the *Canadian Charter of Rights and Freedoms*: *ibid*, 138; see also *R v Oakes* [1986] 1 SCR 103, 138-139.

<sup>45</sup> That is effectively the same outcome as failing to demonstrate that the right invoked applies to the circumstances being complained of (step 1).

<sup>46</sup> Rishworth (n 26) 143-147. See, in particular, *R v Clarke* [1985] 2 NZLR 212, 214, where the Court of Appeal criticised an earlier obiter approach in *Flickenger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, in which the Court has discounted the statutory context and history of section 66 of the *Judicature Act 1908* in favour of a literal meaning of the provision. The meaning adopted must be ‘reasonably available’: see, for example, *R v Phillips* [1991] 3 NZLR 175, 176-177, *Noort v MOT*; *Curran v Police* [1992] 3 NZLR 260, 272, and *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667, 674.

<sup>47</sup> Butler (n 32) 577. Compare this to the approach under section 3(1) of the *Human Rights Act 1998* (UK), where the UK Parliament rejected the New Zealand model of requiring a reasonable interpretation: see discussion on this point by the House of Lords in *Ghaidan v Mendoza* [2004] 3 All ER 411, 426.

#### 4. Adopt the consistent meaning, if properly available

The previous investigations all lead to the application of the directions under sections 4 and 6 of the Bill of Rights Act. If there is an alternative meaning properly available in the interpretation of the enactment, then section 6 directs that this must be adopted. If there is no alternative meaning, then the enactment is (in the words of Cooke P) in an “irreconcilable conflict” with the Bill of Rights and must, by application of section 4, prevail.

#### *The Meaning of the Term “Enactments”*

As might be evident from the preceding discussion, the meaning of the term “enactments” has significant consequences upon the application of the operative provisions. In basic terms, if the provision being complained of is not an “enactment”, then section 4 of the NZBORA cannot act to ‘preserve’ the provision where it is in conflict with one of the rights and freedoms within the Bill of Rights. Against that background, the issue to consider is what the meaning of “enactments” is - in particular, whether subordinate legislation falls within the scope of the term. Two potentials exist. The first, by way of a broad interpretation, is that the term is taken to include subordinate legislation as well as Acts of Parliament. Alternatively, by way of restrictive interpretation, the term could be taken to refer to Acts of Parliament alone.<sup>48</sup>

There are a number of arguments that could be made in support of both approaches. With respect to the broad approach, three main points can be made that tend to favour that approach. The first pertains to the Interpretation Act 1999, in which the term “enactment” is defined as inclusive of both primary and subordinate legislation.<sup>49</sup> Following this approach, an enactment is the whole or part of any Act of Parliament and includes subordinate legislation made under its principal. In his most recent edition of *Statute Law in New Zealand*, Professor John Burrows concludes

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<sup>48</sup> The various arguments presented below are discussed in more detail in the author’s article “The Application of Section 4 of the Bill of Rights Act 1990 to Subordinate Legislation” [1997] 3 *Human Rights Law and Practice* 146.

<sup>49</sup> The earlier *Acts Interpretation Act 1924* only defined the term “Act” (as “an Act of the General Assembly and includes all rules and regulations made thereunder”); whereas its successor, the *Interpretation Act 1999*, defines “enactment” as “the whole or a portion of an Act or regulations”.

that this definition is to be applied to the terms as used in section 4 of the Bill of Rights, unless the regulations were *ultra vires*.<sup>50</sup>

In his second edition of *Statute Law in New Zealand*, Professor Burrows discussed the matter in more detail and posited that the term “enactments” must extend to regulations as well as Acts of Parliament if one considers the language of section 4 of the Bill of Rights Act.<sup>51</sup> In doing so he points to the fact that section 4 of the Bill of Rights Act refers to enactments “passed” or “made”. Since Acts of Parliament are *passed* by Parliament, and subordinate legislation *made* by delegates, the logical conclusion to be drawn is that Parliament must have intended “enactments” to include both Acts of Parliament and subordinate legislation. There is weight in this argument, particularly when one has further regard to the wording of section 4 (sub-paragraph (a) in particular), which refers to provisions impliedly “repealed” or “revoked”. As before, an Act of Parliament is *repealed*, whereas subordinate legislation is *revoked*.

A third argument in favour of a broad interpretation of the term “enactments” could be based on the case of *Black v Fulcher*.<sup>52</sup> The New Zealand Court of Appeal held in that case that, generally, the word “enactment” is a convenient and succinct term embracing any Act or rules or regulations made thereunder and any provision thereof. In the absence of some “good reason”, the then President Cooke would not accept that the term should be given a restrictive interpretation to refer only to an Act or any provision of an Act. This position must be tempered, however, by the fact that this decision was made prior to the Interpretation Act 1999. At that time, the Acts Interpretation Act 1924 was in force, which only defined the term “Act”, whereas the current Interpretation Act defines the term “enactment”.

In favour of a restrictive interpretation (excluding regulations from the meaning of enactments under section 4), it is posited that one needs to start with consideration of the general rule of statutory interpretation that an Act of Parliament has primacy over subordinate legislation so that, if there is a conflict between an Act and a regulation, the regulation must give way.<sup>53</sup> If that is correct, it should follow that where there is a conflict between the

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<sup>50</sup> John Burrows, *Statute Law in New Zealand*, (3rd ed, LexisNexis, 2003), 259. The question of regulations being *ultra vires* through application of the *New Zealand Bill of Rights Act 1990* is discussed later in this section of the chapter.

<sup>51</sup> John Burrows, *Statute Law in New Zealand*, (2nd ed, Butterworths, 1999), 337.

<sup>52</sup> *Black v Fulcher* [1988] 1 NZLR 417.

<sup>53</sup> See dictum of Lord Herschell in *Institute of Patent Agents v Lockwood* [1894] AC 347, 360 - followed by Stout CJ and Adams J in *Lee v Macpherson (No 1)* [1923] NZLR 1296, 1304.

NZBORA and an item of subordinate legislation, then section 4 cannot save the subordinate legislation and the Bill of Rights will prevail.

The next point to note is Justice Henry's consideration of the term "enactments", as used in the Third Schedule of the Transport Amendment Act (No 2) 1963, in the case of *Munro v Auckland City*.<sup>54</sup> In that case, Justice Henry concluded that:<sup>55</sup>

...the word 'enactments' does not include the Act and the regulations which are described in the first column of Part IV. The word 'enactments' is of narrower import and should not be extended to mean the whole Act and regulations unless the context so requires.

Considering the constitutional importance of the Bill of Rights Act, and the purposive approach adopted by the judiciary in the application of the Act, it is suggested that this context does not require the word to be given a broad interpretation so as to allow delegates to legislate inconsistently with the rights and freedoms guaranteed under the Bill of Rights Act.

Regard might also be had to Hansard. At its second reading, the Bill of Rights Bill was presented before the House with a new "Clause 3A" inserted (now section 4 of the Act). During the debates of the second reading, Attorney-General Paul East discussed the motives of this new provision.<sup>56</sup> The purpose of the clause was said to protect Parliament's role of making law.<sup>57</sup> While the original Bill was introduced as supreme legislation, clause 3A was added to do away with this so that Parliament was not prevented from effecting changes to human rights aspects of the law if it felt it should do so in the future. However, the Parliamentary debates did not focus on a delegate's power to make subordinate legislation. Similarly, the specific wording of the clause ("pass" versus "made" and "repeal" versus "revoke") was a product of Select Committee recommendations and the distinctions alluded to by Professor Burrows were not contemplated by Parliament in its debates.

Furthermore, section 7 of the Bill of Rights itself points to the adoption of a restrictive interpretation of the term "enactments" so that it refers to Acts of Parliament alone. The NZBORA is an ordinary statute, giving

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<sup>54</sup> *Munro v Auckland City* [1967] NZLR 873. Again, this decision was made prior to the enactment of the *Interpretation Act 1999*.

<sup>55</sup> *Ibid*, 874.

<sup>56</sup> New Zealand, *New Zealand Parliamentary Debates*, No 19, 3460, 14 August 1990.

<sup>57</sup> This was clearly a concern of various members of Parliament, as evident in their debates on the Bill of Rights Bill. See New Zealand, *New Zealand Parliamentary Debates*, No 62, 13038, 10 October 1989 (introduction); New Zealand, *New Zealand Parliamentary Debates*, No 19, 3460, 14 August 1990 (second reading); and New Zealand, *New Zealand Parliamentary Debates*, No 20, 3759, 21 August 1990 (third reading).

Parliament the freedom to legislate inconsistently with its provisions. However, section 7 of the Act makes this power conditional in that it requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill which appears to be inconsistent with the rights and freedoms guaranteed in the Bill of Rights Act. By doing so, Parliamentary supremacy<sup>58</sup> is still preserved since the final decision as to whether to contravene any right or freedom is left with Parliament, New Zealand's elected officials. It is in this context of limiting fundamental rights that the importance of section 7 can be seen. On a political level, section 7 brings any potential contravention of the Bill of Rights Act by any Bill before the House out into the open and forces Parliament to make a conscious decision on whether to limit any right or freedom. Therefore, Parliament's legislative powers are well monitored to protect our fundamental freedoms.

The Regulations (Disallowance) Act now require all regulations to be laid before the House of Representatives, including regulations made under the United Nations Act 1946.<sup>59</sup> The House may then, by resolution, disallow any regulations or provisions of regulations or amend or substitute any regulations.<sup>60</sup> The Disallowance Act does not provide for any reporting procedure relating to apparent contraventions of the Bill of Rights Act, as section 7 of the NZBORA does in respect of Parliamentary Bills. Nevertheless, since January 1995, all draft regulations submitted to Cabinet for approval must be accompanied by a specified cover sheet.<sup>61</sup> The cover sheet is based on that used for draft Bills and is designed to ensure that Cabinet has due regard to a number of factors prior to approval of such regulations. Item 4(a) of the cover sheet requires the submitting Minister to indicate whether the regulations comply with the Bill of Rights Act.<sup>62</sup> It therefore appears that the abrogation of human rights by a delegate of legislative power is guarded against to some extent, although the extent to

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<sup>58</sup> The protection of which is the aim of section 4: see David Paccioco, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] *New Zealand Law Review* 353, 355.

<sup>59</sup> Regulations under the *United Nations Act 1946* are made by the Governor-General in Council: see section 2(1) of that Act. "Regulations" within the jurisdiction of the *Regulations (Disallowance) Act 1989* include regulations made by the Governor-General in Council: see section 2(a)(i) of that Act.

<sup>60</sup> See sections 5 and 9 of the *Regulations (Disallowance) Act 1989*.

<sup>61</sup> See Cabinet Office circular "Procedures for Regulations Made by Order in Council" of 13 December 1994 CO(94)17; and Cabinet Office circular "Revised Procedures for regulations made by Order in Council" of 6 April 1995 CO(95)5.

<sup>62</sup> See Cabinet Office circular "Revised Procedures for Regulations Made by Order in Council" of 6 April 1995 CO(95)5, Appendix 2.

which the Regulations Review Committee is able to consider potential conflicts (having regard to time and resources) is debateable.

Notwithstanding the author's position that the term "enactments" might be given a restrictive interpretation for the purpose of section 4 (to exclude subordinate legislation), the practical approach taken by the New Zealand Court of Appeal in *Drew v Attorney-General* does away with the need to determine the issue.<sup>63</sup> Facing a charge of using heroin without the authority of a medical officer, Drew (a prison inmate) was heard by the deputy superintendent of the prison, who found the charge against him proved. On appeal to the Visiting Justice, Drew was refused permission to be represented by a lawyer at the hearing (in accordance with regulation 144 of the Penal Institutions Regulations 1999) and the Visiting Justice also found the case proved. The question before the Court of Appeal was whether Drew had the right to legal representation in prison disciplinary hearings and whether regulation 144 (made under the empowering provision of section 45(1) of the Penal Institutions Act 1954) properly did away with the right to representation. Although the Court concluded that regulation 144 was an "enactment", it held that the regulation was not protected by section 4 of the Bill of Rights Act. Instead, the Court focussed on the issue of interpreting the empowering provision in a manner consistent with the NZBORA so to exclude the possibility of making regulations made under the empowering provision in conflict with the Bill of Rights:<sup>64</sup>

It is therefore not really necessary to respond to Mr Butler's argument that the regulations in question are protected by s4 of the Bill of Rights... Counsel was correct, of course, when he said that a regulation is an "enactment." Section 29 of the Interpretation Act 1999 confirms that position. But the answer to counsel's argument is that, in striking down the regulations because they are ultra vires the empowering section (s45), the Court is not doing so only because they are inconsistent with the Bill of Rights. To the extent that it is necessary to refer to the Bill of Rights, the regulation is invalid because the empowering provision, read, just like any other section, in accordance with s6 of the Bill of Rights, does not authorise the regulation. The Court merely gives s45 a meaning that is consistent with the rights and freedoms contained in the Bill of Rights. In accordance with s6, that meaning is to be preferred to any other meaning. As Mr Wilding said, s4 is not reached.

Thus, the conclusion is this: the arguments in favour of adopting a broad interpretation of the term "enactments", to include subordinate legislation, appear to be dominant. There are, at least in theory and in the writer's

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<sup>63</sup> *Drew v Attorney-General* [2002] 1 NZLR 58.

<sup>64</sup> *Ibid*, 73 (para 68).

opinion, considerable problems with that position. Ultimately, however, those problems are mollified by the approach of applying section 6 of the NZBORA to the empowering provision of an Act. In doing so, regulations made under the authority of the empowering provision, so as not to be *ultra vires*, must be made consistently with the NZBORA.

The question of “enactments” and the potential for empowering provisions to allow the making of regulations inconsistent with the Bill of Rights is examined further in chapter 11, in the context of regulations made under the United Nations Act 1946.

## **Conclusion**

New Zealand’s civil and political rights framework is established primarily through its party status to the International Covenant on Civil and Political Rights and, on a municipal level, through the New Zealand Bill of Rights Act 1990. Various implications arise through those instruments, from the impact of them upon statutory interpretation, to matters of reporting and the provision of effective remedies for breaches of human rights. The primary focus of this chapter has been upon the application of the Bill of Rights, not in any particular context, but in the abstract sense.

The application of the New Zealand Bill of Rights is a difficult enterprise. The operative provisions of the Act call for an intricate methodology to be adopted in the examination of any perceived conflict between an enactment and the Bill of Rights. This chapter has chosen to adopt the methodology explained by Rishworth and others, applying sections 4, 5 and 6 through a four-step process. It has been posited that, in the case of regulations, the question of whether regulations are “enactments” within the meaning of sections 4 and 6 is not so important. The enquiry to be made is whether the regulations have been made in a manner that is consistent with the Bill of Rights so that they are not *ultra vires* the empowering provision (by application of section 6 of the NZBORA).