Chapter 18

Self-Incrimination and Police Powers of Questioning

The preceding chapter considered one of two investigative tools, tracking devices, incorporated within the Summary Proceedings Act 1957 as a result of what began as the Counter-Terrorism Bill 2003. This chapter considers the second of the investigative tools introduced under the 2003 Bill: special powers of questioning under section 198B of the Summary Proceedings Act.

Police Powers of Questioning

Section 198B of the Summary Proceedings Act 1957 allows police to demand assistance to access computer data by providing police with any data protection codes or other information necessary to access that data. In evidence before the Foreign Affairs, Defence and Trade Committee, it had been submitted that this provision (under clause 33 of the Counter-Terrorism Bill) offended the privilege against self-incrimination. By compelling a person to provide assistance to police (who may be investigating an offence against that person or who might, as a result of gaining access to the computer data, be provided with information that would incriminate that person) the author had submitted that the provision would offend the privilege.[1]

In apparent response to these submissions, clause 33 was amended, with the Select Committee reporting to the House that this was to explicitly preserve the right against self-incrimination. The Committee stated that:[2]

> Whether a broadly worded statutory provision requiring the supply of information, and making no reference to the privilege against self-incrimination, overrides this privilege is a question of its construction. A Court must be satisfied that a statutory power of questioning was meant to exclude

[1] Alex Conte, *Submissions to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill (27-1, 2003)*, Parliamentary Library 12 May 2003, paras 29-58.

[2] Foreign Affairs, Defence and Trade Committee, *Report on the Counter-Terrorism Bill, A Government Bill, 27-2, Commentary*, presented to the House 8 August 2003, 10.

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> the privilege. We are advised that this conclusion is unlikely to be reached unless it is either explicitly provided for, or is a necessary implication of the provision. Our recommended amendments make it clear that a person is required to provide information that is reasonable and necessary to allow the police to access data held in, or accessible from, a computer in particular circumstances, but that does not itself tend to incriminate the person. We note that there are several other instances of statutory obligations on citizens to assist police or other agents.

As enacted, section 198B of the Summary Proceedings Act retains the original form of subsections (1) and (2), which set out the rule requiring the provision of assistance and to whom that rule applies. The final form of the section now includes new subsections (3), (4) and (5), with subsection (6) retaining the penalty for failure to comply (as had been provided for in the first draft of the Bill). The entirety of the provision now reads as follows:

> **198B Person with knowledge of computer or computer network to assist access-**
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> (1) A constable executing a search warrant may require a specified person to provide information or assistance that is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that is on premises named in the warrant.
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> (2) A specified person is a person who-
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> (a) is the owner or lessee of the computer, or is in the possession or control of the computer, or is an employee of any of the above; and
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> (b) has relevant knowledge of-
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> (i) the computer or a computer network of which the computer forms a part; or
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> (ii) measures applied to protect data held in, or accessible from, the computer.
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> (3) A person may not be required under subsection (1) to give any information tending to incriminate the person.
>
> (4) Subsection (3) does not prevent a constable from requiring a person to provide information that-
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> (a) is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that-
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> (i) is on premises named in the warrant concerned; and
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> (ii) contains or may contain information tending to incriminate the person; but
>
> (b) does not itself tend to incriminate the person.
>
> (5) Subsection (3) does not prevent a constable from requiring a person to provide assistance that is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that-
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> (a) is on premises named in the warrant concerned; and
>
> (b) contains or may contain information tending to incriminate the person.

> (6) Every person commits an offence and is liable on summary conviction to a term of imprisonment not exceeding 3 months or a fine not exceeding $2,000 who fails to assist a constable when requested to do so under subsection (1).

An issue that becomes apparent at the outset is that of interpretation. What exactly do subsections (3), (4) and (5) mean and how do they inter-relate? In its original form, the meaning of the proposed provision was quite clear. Clause 33 was to enable a police constable executing a search warrant to require assistance or information to be given in order to access data in a computer within the premises being searched. Subclause (1) - which remains identical to section 198B(1) - set out the authority by which a constable could make such a request. Subclause (2) - again remaining the same - specified who may be the subject of such a request. Subclause (3) - which became section 198B(6) of the Summary Proceedings Act - created an offence where a person refuses to comply with the constable's request, punishable by a maximum of three months' imprisonment or a fine of up to $2,000.

The new subsections (3), (4) and (5), however, require a close reading. Subsection (3) appears to protect the privilege against self-incrimination, stating that "a person may not be required under subsection (1) to give any information tending to incriminate the person". Certainly, the Select Committee reported that the protection of the privilege against self-incrimination was the intention of this added provision.[3] The author doubts, however, that this is in fact the effect of subsection (3) when read in the entirety of section 198B.

The first point to note is that subsection (3) only prevents a constable (*acting under subsection (1)*) from requiring a person to give information that might incriminate them. The reality is that subsection (1) only authorises a constable to require information to be provided for the purpose of allowing the constable to access data within a computer. That information will take the form of either a password, or information about the location within a computer of certain data. That in itself cannot be incriminating information, since it only informs a constable on how to access data. In other words, subsection (3) does nothing. Even without the additional subsection (3), section 198B(1) can only ever permit a constable to request information on how to access data. It does not authorise a constable to require any further information and the purported restriction upon section 198B(1) created by subsection (3) is therefore redundant. It is

[3] Ibid.

what flows from that preliminary information that is important to the privilege against self-incrimination.

Next, it appears that subsections (4) and (5) in fact expressly override the privilege against self-incrimination. The two provisions are almost identical in nature, except that subsection (4) relates to the provision of *information* necessary to access data (e.g. a password), and subsection (5) relates to the provision of *assistance* necessary to access such data (e.g. the physical operation of a computer). However, the two provisions specifically envisage that data accessed as a result of such information or assistance "contains or may contain information tending to incriminate the person".[4] Subsection 4(b) certainly limits a constable from using section 198B by ensuring that he or she may only obtain information that "does not itself incriminate the person" [emphasis added]. The point, however, is that the information in question (a password or other information required to access data) is not likely to *itself* incriminate a person. Moreover, both subsections envisage (and do not prohibit) that the information or assistance provided may then *result* in the person incriminating him or herself. For those reasons, not even a liberal, rights-based, interpretation of section 198B could be adopted in favour of reading the provision consistently with the privilege against self-incrimination. It is thus concluded that although subsection (3) - when first read - appears to preserve the privilege against self-incrimination, the overall amendment of section 198B does the opposite.

This represents a significant extension to existing police powers and a departure from common law and statutory rights. Two questions arise: (1) what is the extent, and effect, of the common law privilege against self-incrimination and right to be presumed innocent; and (2) how does section 198B interact with the codified rights to silence and legal advice, and the presumption of innocence, under the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights?[5]

The Privilege against Self-Incrimination

In examining the justifiability of the interference by section 198B with the privilege against self-incrimination, this chapter looks first at the common law privilege, then the parallels within human rights instruments.

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[4] *Summary Proceedings Act 1957*, section 198B(4)(a)(ii) and (5)(b).
[5] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Self-Incrimination and the Common Law

Existing quite independently of New Zealand's human rights legislation and corresponding international obligations is the long-held common law privilege against self-incrimination and the right to be presumed innocent. The right to be presumed innocent until proven guilty is exercised through the burden upon the State throughout all stages of the criminal process, from investigation to conviction. For example, an accused person has no obligation to give evidence at trial, nor to disprove any allegation against him or her. This has been held to be so even where the only person in possession of information relevant to the elements of an offence is the accused.[6] The common law privilege against self-incrimination is intimately linked with the presumption of innocence, exercisable through the right to silence. No person may be compelled to say or do anything that might incriminate him or her.[7] The New Zealand Court of Appeal has held that the privilege against self-determination is not limited to testimony and discovery in judicial proceedings. The Court held, in *Taylor v New Zealand Poultry Board*, that this privilege was capable of applying outside court proceedings when the obligation to answer questions, or give information, or to provide or disclose documents, was imposed by statute.[8]

The combined affect of the privilege against self-incrimination and the presumption of innocence is that a person cannot be compelled to assist in the investigation and prosecution of any offence against him or her by being required to make any statement or provide any information (documentary or otherwise). The question, then, is what affect this has upon the operation of section 198B of the Summary Proceedings Act.

Since Parliament is sovereign, the normal interaction between common law and statute is that Acts of Parliament prevail over the common law. As summarised by Professor Philip Joseph, "Parliament's words can be neither judicially invalidated nor controlled by earlier enactment".[9] Prima facie,

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[6] See *Attygale v R* [1936] 2 All ER 116 (PC). Here, the accused was charged in respect of an illegal operation performed on a woman while she was under chloroform. The defence case was that no operation took place. The trial judge directed the jury that, the facts being specifically within the knowledge of the accused, the burden of proving the absence of any operation was upon the accused. On appeal, the Privy Council held that the direction was an incorrect statement of the law, and that the onus of proof to establish that there had been an operation remained with the prosecution.

[7] See *Rice v Connolly* [1966] 2 All ER 649 (Queen's Bench Division), applied in *Waaka v Police* [1987] 1 NZLR 754 (CA).

[8] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA), 401.

[9] Philip Joseph, *Constitutional and Administrative Law in New Zealand*, (2nd ed, Brookers, 2001) 461.

then, the common law privilege against self-incrimination and the presumption of innocence have no impact upon section 198B. As Joseph himself discusses, however, the courts have taken a guarded approach when Parliament has attempted to restrict the role of the judiciary or take away the rights of citizens.[10] In the case of *New Zealand Drivers' Association v New Zealand Road Carriers*, Justices Cooke, McMullin and Ongley noted:[11]

> We have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights.

More strongly worded, Justice Cooke later posited that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them".[12] Despite the apparent strength of those statements, however, no New Zealand court has invalidated or refused to apply a statutory provision on the basis that it encroaches upon common law rights.

It is at this point that further discussion of *Taylor v New Zealand Poultry Board* is called for, the case having similarities with the issue at hand.[13] *Taylor* concerned the operation of regulation 57(3) of the Poultry Board Regulations which, like section 198B of the Summary Proceedings Act, required a person to provide information to prescribed officers.[14] Taylor was a poultry farmer who refused to answer questions properly asked under regulation 57(3) and he was subsequently convicted on three charges under regulation 57(4).[15] Notwithstanding the fact that the Court of Appeal held that the privilege against self-incrimination was capable of applying outside court proceedings, it qualified this decision by stating that the scope of the privilege must be determined in the context of the particular statute being examined. Adopting the words of the Select Committee when reporting on the Counter-Terrorism Bill, the privilege

[10] Joseph (ibid) 485-495.
[11] *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA), 390.
[12] *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA), 121. See also *Taylor v New Zealand Poultry Board* (n 8) 398.
[13] *Taylor v New Zealand Poultry Board* (n 8).
[14] The *Poultry Board Regulations 1980* were made pursuant to an empowering provision in the *Poultry Board Act 1980* (section 24(1)).
[15] Regulation 57(4) of the *Poultry Board Regulations 1980* made it an offence to refuse to answer any enquiries made under regulation 57(3).

against self-incrimination "is a question of its construction".[16] For the Court of Appeal, Cooke J stated:[17]

> The common law favours the liberty of the citizen, and, if a Court is not satisfied that a statutory power of questioning was meant to exclude the privilege, it is in accordance with the spirit of the common to allow the privilege [emphasis added].

In a recent case concerning legal professional privilege in New Zealand, the Privy Council considered the question of statutory provisions overriding or excluding the privilege. The question before it was whether the Law Practitioners Act 1982 excluded legal professional privilege either expressly or "by necessary implication".[18] The Privy Council held that a necessary implication was one which the express language of the statute clearly showed must have been included.[19] In considering the issue, reference was made to Lord Hobhouse's explanation in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*:[20]

> A necessary implication is not the same as a reasonable implication… A *necessary* [original emphasis] implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

In the context of section 198B of the Summary Proceedings Act, it is concluded that the necessary implication of the structure of the provision is to exclude the privilege against self-incrimination. The common law must therefore give way. The wording of subsections (4) and (5) clearly preserves the power of questioning under subsection (1). The courts have no option but to take the statutory power as intending to exclude the privilege and could not interpret the provision as allowing the common law privilege to operate. This constitutes a major shift away from a fundamental privilege that has been developed and affirmed over a long period of time.

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[16] Foreign Affairs, Defence and Trade Committee report (n 2) 10.
[17] *Taylor v New Zealand Poultry Board* (n 8) 402.
[18] *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC).
[19] *B v Auckland District Law Society* (ibid) 349.
[20] *B v Auckland District Law Society* (ibid) 349. See *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] WLR 1299 (HL), para 45.

Self-Incrimination and Human Rights Instruments

The first point to note about the interaction between section 198B of the SPA and both the Bill of Rights Act and the International Covenant on Civil and Political Rights is that neither of the latter instruments contains an express privilege against self-incrimination. The question is whether the provisions of the NZBORA and/or the ICCPR might be taken to incorporate this privilege.

1. Article 14(2) of the ICCPR

Article 14(2) of the International Covenant sets out the presumption of innocence until proven guilty according to law. It is the only provision within the ICCPR dealing, expressly or impliedly, with rights relevant to the privilege against self-incrimination. Its limitation, however, is that the right only applies to persons "charged with a criminal offence". Thus, the starting point is to acknowledge that - where a person has *not* been charged with any offence - Article 14(2) does not apply, even in principle.

More importantly, even where a person is charged with an offence and - in the investigation of that offence - the person is asked for information by a police officer under section 198B(1) of the Summary Proceedings Act, it is highly doubtful that Article 14(2) lends any protection. It would be implausible to suggest that the presumption of innocence, by itself, implies a privilege against self-incrimination. Certainly, the jurisprudence of the Human Rights Committee has not sought to infer such a privilege in its application or consideration of Article 14(2).[21] It is therefore concluded that section 198B of the Summary Proceedings Act 1957 does not breach Article 14(2) of the International Covenant on Civil and Political Rights.

2. Sections 23 and 25 of the NZBORA

The point made about Article 14(2) of the ICCPR is equally applicable to section 25 of the NZBORA (minimum standards of criminal procedure). The rights set out within section 25 apply only to those that are "charged with an offence" and do not by themselves infer a privilege against self-incrimination. The rights to silence and to a lawyer under sections 23(1)(b) and 23(4) are similarly limited in the scope of their potential application,

[21] Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2004), 125-126.

this time to situations where a person is "arrested" or "detained under any enactment". Only then are any rights triggered.

The right to silence does more directly reflect the privilege against self-incrimination and the guarantee of a right to consult with counsel strengthens the operation of that privilege by ensuring that a person is advised of its application to the process of investigation. In other words, in the limited situation of a request under section 198B(1) being made following the arrest or detention of a person, section 23(1)(b) and (4) of the Bill of Rights can operate. However, it is only section 23(4) (the right to silence) that is *directly* relevant and the subject of further examination. The right to counsel is seen by the author as a supporting mechanism that may at times facilitate the exercise of the right to silence.

Application of the Bill of Rights to Section 198B

Adopting the methodology for the application of the operative provisions of the NZBORA, as advocated by Professor Paul Rishworth and others in their text *The New Zealand Bill of Rights*, the first step in that process is satisfied.[22] By way of reminder, the authors identify a four-step process in the application of the Bill of Rights to another enactment, requiring consideration of the following questions: (1) does the enactment establish a limit on a right; (2) is the advocated meaning 'inconsistent' with the right; and (3) is an alternative meaning possible? The final step demands that one must adopt the consistent meaning, if properly available. In the context of the current examination, and limited to the specific situation identified in the preceding discussion, section 198B of the SPA can operate to establish a limit upon the right to silence.

Proceeding with the next step, one then has to consider whether the operation of section 198B(1) is 'inconsistent' with section 23(4) of the NZBORA where a person is arrested or detained. In doing so, one must first determine whether section 198B(1) effects a limitation upon the right to silence. In other words, how far does the right to silence stretch? Consider the following situation:

> A (a New Zealand citizen) has made a donation to B (an organisation in Auckland, which has been made the subject of a final designation as an associated terrorist entity). Police arrive at A's property and formally arrest her, charging A with an offence under section 10(1) of the Terrorism Suppression Act 2002 (making money available to B, knowing that B was

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[22] Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (2003), 135-157. See further, infra, chapter 8.

> designated under the Act as an associated terrorist entity). A is properly cautioned under section 23(1)(b) and (4) of the NZBORA. Police have a warrant to search A's premises, suspecting that she may have funded other proscribed entities. They locate a computer in her study and request A to provide the password to the computer (under section 198B(1) of the Summary Proceedings Act). Having been told upon arrest that she has the right to silence, A refuses to provide the police with the computer password.

The author concludes that the right to silence extends - at least in principle - to this situation. Section 198B(1) thus purports to limit the right to silence by requiring A to provide information to the police enabling them to access data on her computer. That being the case, the next question within Rishworth's second step is whether this limitation is 'consistent' with the Bill of Rights by application of section 5 of the NZBORA.

1. Application of section 5 of the Bill of Rights

Addressing the preliminary issues in the application of section 5, the first point is that the onus would be upon the Crown to establish that section 198B is a justified limitation in any challenge against its validity or operation.[23] Next, it must be established that section 198B only effects a 'limitation' upon the right to silence, rather than an exclusion of the right.[24] By being limited in its operation to the situations identified in subsections (1) and (2), section 198B satisfies this requirement. Finally, section 198B is clearly a prescription by law (being a statutory provision).[25]

The substance of section 5 then requires the enactment to pursue a sufficiently important objective, by proportional means. There is considerable jurisprudence on this substantive test, particularly in Canada

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[23] This was held to be so by the Supreme Court of Canada in *Re Southam (No 1)* [1983] 41 OR (2d) 113, 124. The New Zealand Court of Appeal has taken the same view, stating that it is for the party seeking reliance on section 5 to advance the argument that limits on rights are reasonable, in *Noort v MOT; Curran v Police* [1992] 3 NZLR 260, 271 and 283. See also *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC).

[24] Although not considered in New Zealand, Canadian case law has drawn a distinction between "limits" and "exceptions". In *Attorney General of Quebec v Quebec Association of Protestant School Boards* [1984] 2 SCR 66, the Supreme Court held that where a restriction amounts to an "exception" to a provision of the Charter, it cannot be justified by the limiting provision in section 1 of the Charter. If a prescription collides directly with a provision of the Charter so as to negate it in whole, it held, that prescription is not a "limit" capable of justification (87). See also *Ford v Quebec (Attorney General)* [1988] 2 SCR 712, where the Supreme Court examined the distinction between "limits" and "exclusions" in more detail.

[25] For a further discussion of these preliminary requirements and their application to counter-terrorist legislation, see Alex Conte, 'A Clash of Wills: Counter-Terrorism and Human Rights' (2003) 20 *New Zealand Universities Law Review* 338, 356-359.

through the application of section 1 of the Canadian Charter of Rights and Freedoms 1982 (upon which section 5 of the NZBORA was based). The most often cited New Zealand formulation of the test is to be found in the High Court case of *Solicitor-General v Radio New Zealand Ltd*, where the Court expressed the test as follows:[26]

> To establish that the limit is both reasonable and demonstrably justified in a free and a democratic society the law creating the limit on the right of freedom must have an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom… The means chosen by the law to achieve the objective must be proportional and appropriate to be objective… To meet the requirement of the proportionality test there are three components. First, the limiting measures or the law must be designed to achieve the objective not being arbitrary, unfair or based on irrational considerations. This is described as being rationally connected to the objective. Second, the measures or the law should impair as little as possible the right or freedom. Third, there must be a proportionality between the effects of the measures or the law responsible for limiting the right or freedom and the objective. The law which restricts the right must not be so severe or so broad in application as to outweigh the objective.

The difficulty in applying the substantive test under section 5 of the NZBORA is that section 198B of the SPA has no clear, or single, objective other than to assist general law enforcement through the investigation of offences. Although this provision was part of the Counter-Terrorism Act package, it is a provision of the Summary Proceedings Act 1957 and is not restricted in its application to the pursuit of counter-terrorism. Section 198B has the potential to apply to *any* situation in which the police are executing a search warrant. Taking this general objective, the first question in the application of section 5 is whether the objective (assisting law enforcement through the investigation of offences) relates to concerns which are pressing and substantial in a free and democratic society. Law enforcement is certainly an important societal concern and, for the sake of continuing with this enquiry, it will be assumed that a court would take this limb of the section 5 test to be satisfied.

Turning to the second limb of section 5, three questions must be considered.[27] First, is the legislative provision (section 198B) rationally connected to the achievement of its objective? It is sufficient, here, to show that the provision logically furthers the objective and this question is

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[26] *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC), 60-61. For further discussion on the application of section 5, see Andrew Butler, 'Limiting Rights', (2002) 33 *Victoria University of Wellington Law Review* 537.

[27] *Solicitor-General v Radio NZ* (ibid).

normally answered in the affirmative without too much trouble, unless the connection is not plainly obvious.[28] Section 198B provides police with the means to access computer data, which clearly furthers the objective of assisting law enforcement through the investigation of offences. The second proportionality question asks whether the legislative provision impairs the right to a minimal extent (as little as reasonably possible).[29] It is reasonably difficult to consider this second factor separately from the third, proportionality, factor. Combined, there is considerable difficulty in satisfying the justified limitations test in the current examination, because of the broad nature of section 198B (applying to the execution of *any* search warrant).

In any application of the final part of the proportionality test, achieving a balance between the importance of the objective and the effect of the limiting provision, much will depend on the specific limitation in question and how it impacts upon rights and freedoms. An examination of the relevant Canadian Supreme Court judgments reveals that the Court has provided little general guidance. Its approach has been to consider the particular legislative provision on the facts and such a line is the only reasonable one to take. Much has depended on the specific limitation in question and how it has impacted upon rights and freedoms. The only truly 'guiding' principles are those set out by the Court in *R v Oakes* and *R v Lucas*.[30] The Court in *Oakes* spoke of the need to ensure that the law which restricts the right is not so severe or so broad in application as to outweigh the objective, adding in *Lucas* that this requires consideration of the importance and degree of protection offered by the human right being limited.

This therefore requires careful consideration of the effects of the limitation, the importance of the objective, and the importance of the right being affected. In an attempt to formulate a process by which this complex

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[28] Consider *Lavigne v Ontario Public Service Employees Union* [1991] SCR 211 (SCC), 219, where Wilson J stated that "[t]he *Oakes* inquiry into 'rational connection' between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means the government has chosen to adopt". Compare this with situations where the connection is not clear, as in *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912 (SCC).

[29] Again, this part of the overall test has been applied in a reasonably flexible manner by the Supreme Court of Canada, focussing upon whether the provision is an appropriate means of giving effect to the objective, rather than whether the provision is proportional: consider *R v Scwartz* [1988] 2 SCR 443 (SCC), 492-493, and *Figueroa v Canada* (ibid).

[30] *R v Oakes* [1986] 1 SCR 103 (SCC), 138-139; *R v Lucas* [1998] 1 SCR 439 (SCC), para 118.

issue might be considered the following set of questions and answers is offered:

- What are the effects of the limiting provision upon the right invoked? The answer is that section 198B of the Summary Proceedings Act has the purported effect of negating the right to silence (where it operates following the arrest or detention of a person), requiring that person to provide access to computer data that may incriminate him or her.
- What is the importance of (or degree of protection provided by) the right invoked? The right to silence when charged with an offence, and the underlying privilege against self-incrimination, are two of the most important rights in the criminal process. The European Court of Human Rights has described the right to silence and the accompanying privilege as "generally recognised in international standards which lie at the heart of the notion of a fair [criminal] procedure".[31] Rishworth describes the rights as "fundamental in New Zealand's criminal procedure".[32] As already discussed, they are rights that the common law has long-recognised too.
- What is the level of importance of the objective of the provision? The difficulty in answering this question lies in the fact that section 198B applies to the execution of any search warrant. It must therefore be concluded that the importance of the objective depends upon the particular circumstances surrounding the issuing of the warrant (that is, the reasons for the warrant being issued, and the type of criminal conduct to which the evidence sought to be obtained through the warrant relates). In the factual scenario set out earlier, for example, the warrant to search A's premises is based upon the suspicion that A has funded terrorist entities, contrary to section 10(1) of the Terrorism Suppression Act. This is an important objective. However, it should be noted that a search warrant can be issued for the purpose of finding evidence relating to any offence punishable by imprisonment[33] including, for example, indecent exposure under the Summary Offences Act 1981 (making a person liable to imprisonment for a term not exceeding three months).[34]

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[31] *Murray v United Kingdom* (1996) 22 EHRR 29 (ECHR), para 45.
[32] Rishworth (n 22) 646.
[33] *Summary Proceedings Act 1957*, section 198.
[34] Section 27(1) of the *Summary Offences Act 1981* provides that "Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who, in or within view of any public place, intentionally and obscenely exposes any part of his or her

While the exposure of one's genitals in public is not something that the public should be expected to tolerate, the objective of countering such activity is clearly not as important as countering the financing of terrorist organisations. That conclusion is supported by the fact that an offence against section 10(1) of the Terrorism Suppression Act makes a person liable to imprisonment for a term of up to seven years (as opposed to a maximum of three months for indecent exposure). Thus, the currently broad scope of section 198B has the very undesirable effect that the importance of its objective relies upon the particular context in which the provision is applied.

- Are the effects (identified at (a) above), having regard to the importance of the right (identified at (b) above), proportional to the objective (identified at (c) above)? It is here that the broad scope of the potential application of section 198B is felt and provides materially different outcomes. Consider again the two examples above (execution of a warrant in the investigation of charges of (1) the financing of terrorism versus (2) indecent exposure). In the first case, the author takes the view that although the right to silence is indeed of very high import, the limitation upon the right effected by section 198B may be considered proportional to the objective of suppressing the financing of terrorism.[35] In the second case, however, the author concludes that limiting the right to silence in the pursuit of evidence relating to an offence carrying a maximum penalty of three months' imprisonment is not proportional. The latter objective is, relatively speaking, not as important as the right to silence and the underlying privilege against self-incrimination.

2. Conclusion on the 'consistency' of section 198B with the Bill of Rights

Returning to the application of Rishworth's steps in the application of the NZBORA, his second step cannot therefore be answered outside the specific application of section 198B. The most that can be said is that

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genitals". The relevance of this to section 198B is that computer data might, for example, include electronic photographs of such an event.

[35] Note that the New Zealand courts have been clear on the permissible limits of warrants issued under section 198 of the *Summary Proceedings Act* concerning the type of evidence that may be seized during the execution of a warrant. The New Zealand Court of Appeal pronounced at an early stage that any item seized must be referable to the offence in respect of which the warrant was issued: *McFarlane v Sharp* [1972] NZLR 838 (CA), 84. The case was cited with approval, although distinguished in its application to the facts, in the more recent decision in *R v Burns* [2002] 1 NZLR 203 (CA), 211.

section 198B *might* be consistent with the Bill of Rights, depending on the nature and circumstances surrounding the issuing of the search warrant. Where this results in a finding that the operation of section 198B is justified under section 5 of the NZBORA, this means that its operation is 'consistent' with the Bill of Rights, bringing consideration of the Bill of Rights to an end. Where the operation of section 198B fails the proportionality test, however, one must proceed to Rishworth's third step. In part, these differing results prompt the author to advocate reform which will be considered later.

3. The availability of an alternative meaning

The third step advocated by Rishworth is to determine whether an alternative interpretation of the enactment (section 198B) is possible and whether this is consistent with the right invoked. If it is, then section 6 of the NZBORA will demand that the courts apply this alternative interpretation. The writer takes the view that such an alternative interpretation of section 198B is not open, having regard to subsections (4) and (5) of that provision. As already concluded, these subsections envisage (and do not prohibit) the provision of information and assistance which will *result* in the person incriminating him or herself.

As such, 'step four' results in a finding that section 198B will (in the absence of satisfying the proportionality test) be in an 'irreconcilable conflict' with the Bill of Rights. As such, section 4 of the NZBORA will demand that section 198B must prevail over the right to silence.

Operation of Investigative Tools outside Counter-Terrorism

Chapter 17 examined tracking devices under the Summary Proceedings Act 1957, as introduced under the Counter-Terrorism Bill legislative package. It was discussed in that chapter that the Bill was introduced to ensure that New Zealand had a comprehensive legislative framework in place capable of combating terrorism.[36] The Explanatory Notes to the Counter-Terrorism Bill identified the objectives the Bill as including the establishment of

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[36] See Phil Goff MP, 'Counter-Terrorism Bill – Introduction', Parliamentary Speech, 1 April 2003, summarised online: <http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=16392> (last accessed on 4 March 2005).

investigative powers to assist in the detection of terrorists, terrorist acts and terrorist or associated entities.[37]

The powers of questioning under section 198B of the Summary Proceedings Act, however, are not restricted in their application to the investigation and combating of terrorism. The power in fact arises in the investigation of any offence carrying a maximum penalty of more than three months' imprisonment. Chapter 17 has explained how this general application of a counter-terrorism measure was the subject of much criticism within the Foreign Affairs, Defence and Trade Committee and, more importantly perhaps, contrary to international guidelines on the countering of terrorism in a manner consistent with human rights. Given that this was a matter considered in chapter 17, however, the point is taken no further here.

Reform

The analysis of section 198B of the Summary Proceedings Act has thus far revealed various matters. The report of the Select Committee to the House of Representatives advised that its proposed amendment to clause 33 of the Counter-Terrorism Bill would explicitly preserve the privilege against self-incrimination. In actual fact, however, the words of the provision (as enacted) show that the it envisages and does not prohibit the compelling of a person to give information and assistance which might result in the police gaining access to incriminating evidence. This is contrary to the long-held common law right to silence and privilege against self-incrimination. Due to the express terms of section 198B and the primacy of legislation over the common law, however, the courts will not be in a position to interpret section 198B as allowing these common law rights to operate.

It has also been concluded that although section 198B does not conflict with the ICCPR, nor with section 25 of the NZBORA, the relationship of the provision with section 23 of the Bill of Rights is more complex. Where section 198B is activated following an arrest or detention, there are numerous difficulties in justifying the limitation imposed by section 198B upon the right to silence. Although section 4 of the Bill of Rights ultimately acts to save section 198B from invalidation, there are significant weaknesses in finding that the provision is not a justified limitation (in the operation of the provision, for example, to the investigation of minor

[37] Foreign Affairs, Defence and Trade Committee, *Counter-Terrorism Bill, A Government Bill, 27-1, Explanatory Note*, presented to the House 2 April 2003, 1.

offences). Furthermore, section 198B is not limited in its application to the countering of terrorism.

All these factors point to the need for reform. The author advocates amendment of section 198B to restrict its operation to the investigation of terrorist offences, the suppression of which can be justified as a pressing and substantial concern proportional to the important status of the right to silence. Section 198B could be restricted by inclusion of the following subsection:

> A constable may require assistance under subsection (1) if -
> (a) the premises named in the warrant are owned, leased or occupied by an entity for the time being designated under the Terrorism Suppression Act 2002 as a terrorist entity or as an associated entity; or
> (b) the computer at the premises named in the warrant is owned, leased or used by an entity for the time being designated under the Terrorism Suppression Act 2002 as a terrorist entity or as an associated entity; or
> (c) the constable believes, on reasonable grounds, that the computer holds data relating to the preparation or commission of a terrorist act, as defined by section 5 of the Terrorism Suppression Act 2002.

It is concluded that these restrictions address the weaknesses identified in the justification of section 198B under section 5 of the Bill of Rights. The advocated reform restricts the application of section 198B to counter-terrorism by linking it to the two principal features of New Zealand's counter-terrorist legislation (the designation process and the definition of terrorist acts). As an aside, the restrictions might also be expanded to include other pressing and substantial concerns, such as the suppression of child pornography for example.

Conclusion

Section 198B of the Summary Proceedings Act 1957 has introduced a power of questioning that not only goes beyond the investigation of terrorism, but also overrides the common law privilege against self-incrimination and limits the right to silence under section 23(4) of the Bill of Rights. The operation of section 198B outside the investigation of serious offences is an unjustifiable limitation, both within the terms of section 5 of the NZBORA and international guidelines. Reform has been advocated within this chapter, which would see the scope of the powers of questioning restricted to a proportionate level.