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New Zealand's experience with an "ordinary law" Bill of Rights Act

This paper is presented by way of a submission to the Legal Affairs and Community Safety Committee's inquiry into whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland, other than through a constitutionally entrenched model. It discusses how such a legislative instrument was adopted in New Zealand by way of the New Zealand Bill of Rights Act 1990 (**NZBORA**) and gives an overview of its operation in the subsequent 26 years.

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1: Background to the NZBORA's adoption

A New Zealand Bill of Rights first was considered following the abolition of New Zealand's upper House, the Legislative Council, in 1952 as it had been promised that replacement checks on parliamentary power would be investigated. One response — by the National Party in the early 1960s — was to propose that New Zealand enact a Bill of Rights similar to that recently adopted in Canada. The policy was regarded as a party political measure and so did not at the time receive significant support. In 1963, a draft Bill was introduced into Parliament, together with a proposal for a written constitution and a second House. These measures were considered by a Constitutional Reform Committee, which unanimously reported back to the House that the proposal should not proceed. The issue then receded into political oblivion.

In 1985, Geoffrey Palmer, one of the leading advocates for a Bill of Rights for New Zealand, resurrected the issue. His ideas were embodied in the form of a White Paper, which was released for public debate and consultation in 1985. The political and social response to the document was fervent and varied.

(a) White Paper

The White Paper argued that a Bill of Rights was necessary, not only to provide protection for fundamental rights and to comply with New Zealand's international obligations (namely under the International Covenant on Civil and Political Rights),[1] but also to safeguard against potential abuses of executive power. The White Paper included a draft Bill that contained three particularly contentious features.

(i) Entrenched law

The Bill of Rights would require a 75 per cent majority vote in the House of Representatives or a simple majority in a public referendum in order to be amended or repealed. It would therefore have an entrenched legal status, limiting the doctrine of parliamentary supremacy.

(ii) Judicial invalidation of inconsistent laws

The White Paper proposed to grant to the judiciary a broad power to strike down legislation, rule common law principles invalid or quash official action that was inconsistent with the Bill. This broad power would have allowed judges to declare statutes unconstitutional, and therefore of no legal effect. Parliament would have ceased to have the last word on the content of the nation's laws.

(iii) Treaty of Waitangi

It was proposed that the Bill of Rights recognise and affirm "the rights of the Maori people under the Treaty of Waitangi".[2] By virtue of the Bill's entrenchment, the Treaty would have become part of a supreme law of New Zealand, and courts would have had the power to invalidate legislation that unreasonably infringed Treaty rights.

Following extensive public consultation, the Justice and Law Reform Select Committee (which received 431 initial submissions, most in opposition to the Bill) recommended that a Bill of Rights be introduced as an ordinary statute, and not as entrenched law. It was concluded that "New Zealand [was] not ready, if it ever will be, for a fully-fledged Bill of Rights along the lines of the White Paper draft".[3]

2: The NZBORA as enacted

The NZBORA, passed on 28 August 1990, closely resembles the recommendations of the Justice and Law Reform Select Committee. While it is a significantly watered-down version of the White Paper's Bill, the courts' interpretation of its provisions has enabled it to assume greater constitutional significance than perhaps first anticipated.

The Long Title to the Act states that it is:

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1 Ratified by New Zealand in 1978. Philip Joseph has argued, however, that the Covenant did not require New Zealand to amend its constitution processes; this was a decision for Parliament. See P Joseph "The Challenges of a Bill of Rights: A Commentary" [1986] NZLJ 416 at 421, and the response from J Elkind at at 423.

2 "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6, cl 4(1) of the draft Bill of Rights.

3 Final Report of the Justice and Law Reform Select Committee "On a White Paper for a Bill of Rights for New Zealand" [1988] AJHR I8C at 3.

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.

It sets out fundamental individual rights and freedoms, but does not include so-called "social and economic" rights, such as the right to an adequate standard of living, housing or health care. By giving legislative recognition to the listed rights, the NZBORA restricts the powers of the executive to behave in ways that unjustifiably limit these rights, while also seeking to ensure that Parliament has regard to them when making law.

(a) Rights and rights holders

Part Two of the NZBORA gives legislative recognition to various specific rights, thereby positively incorporating them into New Zealand's law. These include:

(1) *Rights pertaining to the life and security of the person* — for example, not to be deprived of life; not to be subjected to torture or cruel treatment; not to be subjected to medical or scientific experimentation; and to refuse medical treatment.

(2) *Democratic and civil rights* — for example, electoral rights; freedom of thought, conscience and religion; freedom of expression; manifestation of religion and belief; freedom of peaceful assembly; freedom of association; and freedom of movement.

(3) *Non-discrimination and minority rights* — for example, freedom from discrimination on grounds such as sex, colour or race (rights of minorities).

(4) *Rights pertaining to search, arrest and detention* — for example, rights against unreasonable search and seizure; rights not to be arbitrarily arrested or detained; rights following arrest and detention (such as the right to be informed of the reason for arrest, to instruct and consult a lawyer and to be charged promptly); rights following criminal charge (such as information rights, the right to prepare an adequate defence and release on reasonable terms); minimum standards of criminal procedure (the right to a fair and public hearing; the right to be tried without delay; the right to be considered innocent till proven guilty and other rights pertaining to trial procedure, sentencing and appeal; the right not to be subject to retroactive penalties and double jeopardy; a right to natural justice).

In addition to the listed rights, the NZBORA preserves existing rights or freedoms not expressly included within its ambit (s 28).

The NZBORA states (in s 29) that "the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons." In other words, not only do all individuals in New Zealand (whether citizens or otherwise) enjoy the protection of these rights, so to do organisations that the law recognises as being "persons". Therefore, companies, incorporated associations and other such entities may make use of the Act, so far as it is "practicable" for them to do so.

(b) Operational provisions

It is beyond the scope of this submission to detail the all the various arguments concerning the application of the operational provisions of the Bill of Rights Act. The following discussion highlights some relevant issues by reference to selected cases.[4]

(i) Section 3

Section 3 states that the Act only applies to acts done:

> *(a) by the legislative, executive or judicial branches, or*
>
> *(b) by any person or body in the performance of any public function, power or duty imposed by law.*

This provision has two limbs. If either covers a person or organisation, then the NZBORA applies to the action in question. Under para (a), all individuals or entities that are a part of the three branches of the New Zealand Government are bound by the Act in *everything* that they do.

The legislative branch refers to the Parliament of New Zealand. Consequently, Parliament's internal processes and procedures must be consistent with the NZBORA's requirements.[5] However, as shall be seen below, Parliament is not legally bound to abide by the NZBORA in terms of the *content* of any legislation it enacts.

The executive branch has been given a relatively narrow definition by the courts. In the context of the NZBORA it refers to the "core governmental apparatus",[6] such as government departments and their ministers, or entities with a sufficiently close agency relationship with them.[7] In particular, the courts have found that organisations such as state-owned enterprises[8] or Crown health enterprises[9] do not fall under s 3(a), so the NZBORA does not automatically apply to *all* actions undertaken by such entities.

The NZBORA's application to the third branch of government, the judiciary, also has been controversial. In particular, questions arise as to whether the NZBORA might apply to the courts when deciding common law litigation between two private parties.[10] In *Lange v Atkinson*[11] the Court of Appeal considered the NZBORA's application to the law of defamation. In this case David Lange (a former Prime Minister) sued a political analyst, alleging he had published an untrue and damaging account of Mr Lange's time in office. The Court of Appeal recognised the s 14 guarantee of a right to freedom of expression as a reason to apply and develop the common law defence of "qualified privilege". Although the litigation was between two private individuals, it had a significant public dimension,

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4 For a full discussion on all aspects of the Bill of Rights and its development in law see P Rishworth, G Huscroft, S Optican and R Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003); A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

5 See, for example, *Police v Beggs* [1999] 3 NZLR 615.

6 *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339 at 394.

7 *M v Board of Trustees of Palmerston North Boys' High School* [1997] 2 NZLR 60 at 70; *R v Grayson and Taylor* [1997] 1 NZLR 399 at 407.

8 *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339.

9 *Innes v Wong (No 2)* (1996) 4 HRNZ 247.

10 See AS Butler "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261; A Geddis, "The horizontal effects of the New Zealand Bill of Rights Act, as applied in *Hosking v Runting*" [2004] NZ L Rev 681.

11 *Lange v Atkinson* [1998] 3 NZLR 424, affirmed [2000] 3 NZLR 385.

which meant that the right to freedom of expression under the NZBORA was directly relevant.

Hosking v Runting[12] also involved litigation between two private parties; in this case, between a magazine photographer and a television presenter, who wished to prevent publication of photographs of his children. The Court concluded that the common law included a tort of invasion of privacy. In doing so, it considered the right to freedom of expression under the NZBORA, and the extent to which it might be restricted by a tort of invasion of privacy (this required the Court to consider whether the tort was a "justifiable limit" on freedom of expression, and, therefore, it examined s 5.[13]

The above cases illustrate that the NZBORA may be applied in litigation between private parties (although both these cases have a "public dimension"). As a leading commentator has observed: "[t]he real question is whether the [NZBORA] is relevant, and what weight is to be given to its guaranteed rights when developing common law doctrines that regulate the rights of citizens".[14]

Even if some particular act is not captured by s 3(a) — that is, a person or organisation that is not a part of the legislative, executive or judicial branches of government carries it out — the NZBORA still will apply if s 3(b) is engaged. This paragraph applies the NZBORA to acts done by any person or body in "the performance of any public function, power or duty imposed by law". In most situations, the key question will be whether or not the relevant act is *public* in nature.[15]

In *TV3 Network Ltd v Eveready New Zealand Ltd*[16] Cooke P considered that the NZBORA applied to the broadcaster (a private corporation) on the basis that it was under a statutory duty and exercising public responsibilities, including those relating to balance in controversial issues of public importance pursuant to the Broadcasting Act 1989. This was sufficient to bring the case within the ambit of s 3(b).[17]

The decision in *Eveready* can be compared to that in *Ransfield v Radio Network Ltd*,[18] where the plaintiffs, who had been banned from a talkback radio programme, failed to show that the radio company was exercising a "public function" in this context for the purpose of s 3(b). The judgment emphasised that the decision about whether the NZBORA applies in any particular case will be fact dependent. The Court set out a range of factors relevant to determining whether a body is exercising a public function.

The Court in *Ransfield* also emphasised that the primary focus under s 3(b) should not be whether the individual or entity carrying out the act was "public" or "private", but whether the particular act in question was "public" (or "governmental") in nature. This is significant, as many bodies exercise both public and private functions. For example, in *M v Board of Trustees of Palmerston North Boys' High School*,[19] the High Court was required to

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12 *Hosking v Runting* [2005] 1 NZLR 1.

13 See page 6 below.

14 P Rishworth "Human Rights" [2005] NZ L Rev 87 at 89.

15 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233; *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122.

16 *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435.

17 Individuals exercising public duties and/or statutory functions may likewise be bound (for example, hospital doctors taking blood for the purposes of blood-alcohol testing under the Transport Act 1962). See further PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington 2014) at 1255.

18 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233.

19 *M v Board of Trustees of Palmerston North Boys' High School* [1997] 2 NZLR 60.

consider the trustees' decision to terminate a pupil's boarding contract and whether such termination breached the NZBORA. In that case, the Court drew a distinction between the public statutory function of the Board in providing free education, and the private provision of boarding for its students, which was held to fall outside the ambit of s 3(b).

(ii) Sections 4, 5 and 6

Sections 4, 5 and 6 deal with the relationship between the rights guaranteed by the NZBORA and other laws.

- Section 4 prevents the courts from invalidating or refusing to apply another Act of Parliament because it may be inconsistent with the NZBORA. The section firmly indicates the non-superior status of the Bill of Rights Act — it can be overridden by any other legislation Parliament enacts, or has enacted in the past.
- Section 5 is subject to s 4, and prescribes that the rights and freedoms contained in the NZBORA shall be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- Section 6 requires that, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the NZBORA, that meaning should be preferred.

The interrelationship of these sections has posed problems. Clearly, the first step is to see whether a person or organisation subject to the NZBORA (by virtue of s 3) has acted in a way that limits one of the specific rights contained in the NZBORA. If it has done so, then the courts must determine whether that limit is "demonstrably justified" under s.5. If the limit is *not* justified under this test, and there is no other parliamentary enactment authorising the action, then the limiting act is unlawful.[20] While nothing in the NZBORA expressly sets out this consequence, it inevitably follows from basic public law principles. The NZBORA is an enactment of the New Zealand Parliament. Therefore, if some action is inconsistent with the legislation (it is carried out by someone to whom s.3 applies, infringes on a guaranteed right, cannot be justified under s.5 and is not authorised by another parliamentary enactment) then it is, *ipso facto*, unlawful. Just what a court might do about that fact is then a separate question of remedies, discussed below.

Matters are somewhat more complicated where the matter involves a question of inconsistency with another statute. In such cases, ss 4, 5 and 6 all must be considered. The exact role of s 5 in this process has been controversial: differing judicial opinions on the matter are evident.[21] However, in 2007 the Supreme Court clarified the approach to be taken to the interpretation of parliamentary enactments in Bill of Rights cases in *R v Hansen*.[22] In general terms, the majority agreed that the "rights and freedoms" with which the courts are to prefer a consistent statutory meaning under s 6 are the limited version of those rights as determined by the application of s 5. Simply put, a s 5 analysis must precede the application of s 6.

Justice Tipping summarised the relationship between ss 4, 5 and 6 in a six-step test:[23]

(1) Ascertain Parliament's intended meaning for the relevant statutory provision.

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20 See, for example, *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA); *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648.

21 See, for example, *Ministry of Transport v Noort* [1992] 3 NZLR 260; *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9; *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754 at [13]–[15].

22 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

23 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92].

(2) Ascertain whether that meaning limits a relevant right or freedom.

(3) If a limit is found at step 2, ascertain whether it is nevertheless justified in terms of s 5.

(4) If it is a justified limit, there is no inconsistency with the Bill of Rights Act and Parliament's intended meaning should be applied.

(5) If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the relevant statutory provision again under s 6, to see if it is reasonably possible to give it a meaning consistent (or less inconsistent) with the relevant right or freedom. If so, that meaning must be adopted.

(6) If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

The statutory provision before the Court in *Hansen* was s 6(6) of the Misuse of Drugs Act 1975, which provides that a person found in possession of a certain quantity of a controlled drug will be deemed to be in possession with intent to supply, unless the accused succeeds in "proving" the contrary. A majority concluded that this limit on the presumption of innocence affirmed in s 25(c) of the NZBORA could not be justified in terms of s 5. However, the Court then was unanimous in finding that s 6 of the NZBORA could not be used to give s 6(6) of the Act a meaning consistent with that right — Parliament clearly intended for the provision to have one meaning and one meaning only.

Consequently, s 4 of the NZBORA required the Court to continue to apply the competing legislation regardless of the inconsistency with the NZBORA. While there has been considerable debate about whether a court may then declare or indicate that an enactment is inconsistent with the NZBORA,[24] the Court in *Hansen* did not issue a formal declaration of inconsistency.[25] Instead, the very finding that s 6(6) of the Misuse of Drugs Act 1975 could neither be justified as a limit on s 25(c) of the Bill of Rights, nor given a rights-consistent meaning pursuant to s 6, indicates substantially the inconsistency's existence.[26]

The Supreme Court's inability to give s 6(6) of the Misuse of Drugs Act 1975 a rights-consistent meaning demonstrates the limits to s 6 of the NZBORA.[27] The Court emphasised that it does not permit the courts to ignore the text and purpose of a parliamentary enactment through adopting "strained" or "unnatural" meanings of the statutory language. Consequently, the courts may only use s 6 to prefer a rights-consistent meaning for a statute where it is unclear just what Parliament intended by it,[28] or to depart from Parliament's apparent intended meaning for a statute where societal conditions have changed markedly since its enactment.[29] In other circumstances, the continuing

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24 See the discussion below at page 10.

25 Justices McGrath and Anderson addressed the issue: *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253]–[254] per McGrath J and [267]–[268] per Anderson J.

26 For further discussion of the *Hansen* case see C Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" [2008] 6 NZJPIL 59, and for a comparative approach see K Gledhill "The Interpretive Obligation: the Duty to Do What is Possible" [2008] 2 NZ L Rev 283.

27 A Geddis and B Fenton "Which Is To Be Master? – Rights-Friendly Statutory Interpretation Under the New Zealand Bill of Rights Act" (2008) 25 *Arizona Journal of International and Comparative Law* 733.

28 *Watson v Electoral Commission* [2015] NZHC 666.

29 *Hopkinson v Police* [2005] NZLR 704; *Re AMM & KJO* [2010] NZHC 977, [2010] NZFLR 629.

supremacy of Parliament requires the courts to apply a statute as Parliament intended, irrespective of its potential rights consequences.[30]

(iii) Section 7

Under s 7 the Attorney-General is required to report to the House when any provision in a Bill that has been introduced appears to be inconsistent with the NZBORA. Section 7 replaces the White Paper's suggested judicial review and invalidation of legislation. The reporting duty aims to encourage compliance with the NZBORA, to prevent inadvertent breaches and to promote political accountability for enactments passed despite a s 7 report which has identified inconsistencies. Section 7 has had a significant impact on the policy development process. In 1991 a "vetting" procedure was established whereby ministers submitting legislative bids to Cabinet's Legislation Committee must identify compliance or non-compliance of the proposed Bill with the NZBORA. In addition, before entering the House, all Bills are independently scrutinised by officials within the Ministry of Justice or Crown Law, who report their conclusions to the Attorney-General.[31] The Attorney-General then determines whether the Bill is inconsistent with the NZBORA and reports any such inconsistency by means of parliamentary paper; in the case of a Government Bill, on the introduction of that Bill, or in any other case, as soon as practicable after the introduction of the Bill.[32]

As at March 2016, there have been 70 s 7 reports to Parliament indicating inconsistency with the Bill of Rights.[33] Some of these reports led to the House removing the problematic provisions from the relevant legislation.[34] However, the vast majority of Government Bills subject to s 7 reports (which account for over half of the total) have been passed without the rights-inconsistent provisions being amended. This is because the NZBORA vetting process described above means that, by the time the Government introduces the measure into the House, it has been made aware of the potential NZBORA inconsistency and decided that it wishes to continue with the legislation anyway. As the Government by definition enjoys majority support in the House it can then be certain of getting the measure enacted. While some commentators argue Parliament is and must be entitled to enact legislation over the top of a s 7 notice,[35] the frequency with which this occurs in New Zealand has been the subject of considerable criticism.[36]

The cases of *R v Poumako and R v Pora*[37] also focused attention on shortcomings in the s 7 reporting function.[38] Specifically s 2(4) of the Criminal Justice Amendment Act (No

30 *Taylor v Attorney-General* [2014] NZHC 2225, [2015] NZAR 705; *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556; *Taylor & Ors v Attorney-General* [2015] NZHC 355.

31 These procedures are set out in the *Cabinet Manual 2008* at [7.60]–[7.62].

32 Standing Order 261 (in the same terms as s 7 of the New Zealand Bill of Rights Act 1990).

33 Ministry of Justice "Section 7 reports": http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/domestic-human-rights-protection/about-the-new-zealand-bill-of-rights-act/advising-the-attorney-general/section-7-reports-published-before-august-2002 (accessed 30 March 2016).

34 See, for example, the Electoral Amendment Act (No 2) 2001, which proposed a ban on the publication of opinion polls in the 28-day period prior to a general election. The Attorney-General's report stated that the limit on the right to freedom of expression could not be justified under s 5 of the Bill of Rights. The Bill progressed after the removal of the provision banning polling.

35 G Huscroft "The Attorney-General's Reporting Duty" in P Rishworth, G Huscroft, S Optican and R Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 214–215.

36 A Geddis "The Comparative Irrelevance of the New Zealand Bill of Rights Act to Legislative Practice" (2009) 23 *NZ Universites Law Review* 465; T Bromwich, "Parliamentary Rights-Vetting Under the NZBORA" [2009] NZLJ 189; S Gardbaum, "A Comparative Perspective on Reforming the New Zealand Bill of Rights Act" (2014) 10 *Policy Quarterly* 33 at 35–37.

37 *R v Poumako* [2000] 2 NZLR 695; *R v Pora* [2001] 2 NZLR 37.

38 See PA Joseph "Review of Constitutional Law" [2000] NZ L Rev 301.

2) 1999, which imposed a retrospective penalty for murder involving home invasion contrary to s 25(g) of the NZBORA, was not subject to a s 7 report. This was because a Supplementary Order Paper introduced the infringing provision after the second reading debate (and not at the introduction of the Bill). This problem has renewed calls for the need to extend the vetting and reporting function throughout the parliamentary procedure.[39]

(e) Remedies under the Act

The NZBORA contains no remedies provision; the statute largely is silent as to what happens if it is breached. Therefore, it has been left up to the judiciary to determine what remedies are available. Section 4 does rule out one potential consequence by specifically prohibiting the courts from invalidating or refusing to apply any parliamentary enactment it finds to be inconsistent with the NZBORA, whether passed before or after 1990.[40] And other remedies follow simply as a matter of general public law principles. Any person or organisation covered by the NZBORA that unjustifiably limits a guaranteed right is acting in breach of an Act of Parliament. Consequently, the rights-limiting action will be unlawful, and the courts are able to declare it as such (as well as make other orders prohibiting further such action).[41]

In addition to existing public law remedies, the courts have developed a range of remedies particular to the NZBORA. Two of these relate to specific rights: those that guarantee a fair trial held without undue delay;[42] and those that constrain how evidence of criminal offending may be obtained.[43] As regards the former set of rights, the courts have ruled that where a criminal trial would be unfair or occur after too great a delay (for which the state was responsible) the proceedings should be "stayed".[44] The consequence for the defendant is the same as an acquittal; they are held to be not guilty of the offence. However, the New Zealand Supreme Court has indicated that the availability of this remedy is very much the last option, to be applied only where "a delay [in trial] has been egregious, or there has been prosecutorial misconduct or a sanction is required against a prosecutor who does not proceed promptly to trial after being directed by a court to do so."[45] With respect to the latter set of rights, the courts have ruled that evidence obtained in breach of them — by way of an "unreasonable" search, or interview conducted without a lawyer present — may be excluded from a subsequent criminal trial.[46] This decision is made following a balancing test that weighs up the nature of the rights breach against a range of factors such as the severity of the alleged offending, the importance of the evidence at issue, whether it could be obtained by other means and the like. Following judicial development of this remedy, Parliament endorsed its application by codifying it in the *Evidence Act 2006.*[47]

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39 The criticisms levelled at the use of Supplementary Order Papers to introduce substantial amendments to a Bill are discussed below at para 4.4.2(c).

40 See page 7 above.

41 Unless, that is, a competing Act of Parliament authorises or even requries the action in question. In such cases, s 4 means that the rights limiting action is not unlawful (see page 7 above).

42 Section 25(a) and (b).

43 Sections 21, 23(1)(b), 23(4) and 24(c).

44 *Martin v District Court at Tauranga* [1995] 2 NZLR 419; *R v Williams* [2009] 2 NZLR 750.

45 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 at [18]

46 *R v Shaheed* [2002] 2 NZLR 377.

47 Evidence Act 2006, s 30.

Other remedies potentially apply to a breach of any of the NZBORA's rights. In *Simpson v Attorney-General (Baigent's case)*,[48] the Court of Appeal concluded that monetary compensation (public law damages) could be awarded for a breach of the NZBORA. The Court reasoned that to leave a person whose rights had been infringed without a remedy would be to fail in the Court's duty to uphold the NZBORA, and as no other remedy was appropriate in this case the Court ought to invent a new one. However, damages for a breach of the NZBORA are not given automatically; they are available only if no other remedy will suffice and it is necessary to "vindicate" the rights breach.[49] The quantum of such damages also is comparatively small — a prisoner unlawfully held in solitary confinement and subject to unlawful strip searches and other forms of degrading treatment for a period of some 2 years and 8 months was awarded $35,000.[50] Furthermore, the Supreme Court has held that damages cannot be obtained at all for a judicial breach of the NZBORA.[51]

A final remedy may be available in cases where Parliament has passed legislation that is inconsistent with the NZBORA. As noted above, s 4 prevents the courts from invalidating or refusing to apply such enactments. However, they may still be able to issue a formal "declaration" that such legislation is inconsistent with the Bill of Rights Act, in that it imposes limits on rights that cannot be demonstrably justified. In late 2015 the High Court issued such a declaration in *Taylor v Attorney-General*,[52] relating to a provision in the Electoral Act 1993 prohibiting all sentenced prisoners from voting. Heath J found that this measure limited the NZBORA's s 12(a) right to vote in a way that could not be justified under s 5. Even though the provision had only been enacted in 2010 and Parliament was clear in its intent when doing so, Heath J stated that "[t]he general principle is that where there has been a breach of the [NZBORA] there is a need for a Court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right. Should the position be any different in respect of the legislative branch of Government? In my view, the answer is 'no'."[53] This declaration had no immediate legal effect, as it could not change the status of the legislative prohibition on prisoner voting. It was, however, a very strong judicial denunciation of that law's effect.[54]

3: The constitutional significance of the Bill of Rights today

There is little doubt that the NZBORA is an important part of New Zealand's constitutional arrangements. Since the first NZBORA case to reach the Court of Appeal,[55] a purposive approach has been favoured, and narrow or technical constructions rejected. This means that the courts will endeavour to adopt an interpretation of the NZBORA itself that best

48 *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667. For discussion of *Baigent's case* in the context of the relationship between the judiciary and the legislature see para 3.5.1(b).

49 *R v Taunoa* [2008] 1 NZLR 429.

50 *R v Taunoa* [2008] 1 NZLR 429.

51 *Attorney-General v Chapman* [2012] 1 NZLR 462.

52 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791. For a discussion of this case see A Geddis, "New Zealand—prisoner voting and consistency with the New Zealand Bill of Rights Act 1990" [2016] *Public Law* 325.

53 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [61].

54 This decision currently is under appeal to the Court of Appeal.

55 *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439.

gives effect to the underlying purpose of the right. This expansive approach is evident in many NZBORA cases. For example, the word "arrest" in s 23, which the Crown argued should be given a formal, technical meaning, has been interpreted broadly.[56] Lawyers have also used the provisions relating to arrest and detention, particularly in driving with excess blood-alcohol cases.[57] The Bill of Rights is argued on a daily basis in the courts especially in relation to rights relating to criminal procedure (search, arrest, detention, and abuse of process, particularly where there has been undue delay).

The purposive approach to human rights legislation also was favoured in *Simpson v Attorney-General (Baigent's case)*[58] and *Taylor v Attorney-General*,[59] which recognised that effective remedies should be available for breaches of the Bill of Rights. Such new public law causes of action reflect the underlying purpose of the legislation: "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand". Unless there are remedies available for unjustified limits on these rights and freedoms, they cannot be adequately protected and promoted. However, at the same time the fundamental principle of parliamentary sovereignty is not displaced by these developments. Parliament retains the final word on the content of the law, even where the courts believe that it imposes an unjustifiable limit upon one of the Bill of Rights Act's guaranteed rights. Courts up to the level of the Supreme Court have accepted that this is the case and have turned away from pleas to adopt "strained" or "unnatural" meanings for legislation in order to "fix" a rights inconsistency.

This ongoing legislative supremacy is not merely theoretical. New Zealand's Parliament has in practice continued to regularly enact legislation even after being told that the courts likely would, if asked to examine the question, consider it to contain unjustified limits on individual rights. It also has stepped in to legislate to effectively undo the consequence of judicially awarded remedies under the NZBORA. For example, in response to a court decision awarding NZBORA damages to a group of prisoners because of their unlawful treatment by prison authorities Parliament enacted the *Prisoners' and Victims' Claims Act 2005*. The effect of this legislation was to place any money given by such awards into a quarantined account, with victims of the prisoners' crimes able to have first call on it. Only after any such claims were paid out would the prisoner receive the benefit of any remaining funds. It is notable that this legislation was enacted in spite of it itself receiving a s 7 notice from the Attorney-General.

Consequently, any evaluation of the NZBORA's impact on New Zealand's constitutional and legal order necessarily must be nuanced. It has led to a somewhat more active judicial role in policing and enforcing individual rights. Just how much of that increase is attributable to the NZBORA alone, however, may be debated. There has been something of a "rights explosion" across the world over the past 26 years, so it may well be that some developments would have occurred in New Zealand irrespective of whether the NZBORA had been enacted. Furthermore, while the NZBORA undoubtedly has resulted in more attention being paid to individual rights issues being more carefully considered during the legislative design and drafting process, it has not hobbled Parliament in its lawmaking function.

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56 In *R v Kirifi* [1992] 2 NZLR 8, the Court of Appeal held that "arrest", in terms of the Bill, extended beyond formal arrest and applied to de facto detention also. This approach was confirmed in *R v Butcher* [1992] 2 NZLR 257.

57 See *Ministry of Transport v Noort* [1992] 3 NZLR 260.

58 *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

59 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.