

# Strengthening Section 7 of the New Zealand Bill of Rights Act<sup>#\*</sup>

**Nilay B. Patel<sup>\*</sup>**

## *Introduction*

The introduction of the New Zealand Bill of Rights Act 1990 ('NZBORA') luminously marked a watershed of a new jurisprudence. A short statute of twenty-nine provisions, the most important of them is arguably section 7:

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

This provision is a democratic disinfectant; it is a preventive rather than a curative provision taking effect before all others in the NZBORA schema — during a bill's very early gestational period. The section 7 dichotomy treats government bills distinctly from all other bills.

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<sup>#</sup> This paper has been double blind refereed to full academic standards.

<sup>\*</sup> The author wishes to express his appreciation for the comments of the two anonymous referees.

<sup>\*</sup> Barrister and Solicitor of the High Court of New Zealand (non-active) Legal Practitioner, Supreme Court of Victoria, Australia

This article examines the problems that have arisen with the pre-legislative scrutiny of bills for compliance with human rights laws both before and after the bills have been formally introduced in a parliament.

In New Zealand, government bills are subject to the non-statutory procedural rules that have developed within the executive branch to assist in the Attorney-General's reporting duties. Briefly, the Ministry of Justice, in its supporting role, vets all government bills for consistency except for bills in the name of the Minister of Justice which are vetted by the Crown Law Office. Government bills must be with the Ministry of Justice (or the Crown Law Office as applicable) at least two weeks in advance of the Cabinet Legislation Committee meeting on that bill.<sup>1</sup> The Ministry of Justice, once aware of the matter, will vet bills for compliance with the NZBORA. If an inconsistency is found, section 5 of the NZBORA shapes the next inquiry: whether the inconsistency is a 'reasonable limit ... demonstrably justified in a free and democratic society.' If it is not, a section 7 report is prepared and if concurred upon, the Attorney-General must table it in Parliament when the bill is introduced.

Section 7(b) addresses non-government bills, including member's bills, local bills, and private bills, all of which may be introduced to Parliament by any member of Parliament but without the automatic luxury of an executive branch vet. Upon the Attorney-General alerting Parliament at the introduction of a bill or soon thereafter, the section 7 duty falls into oblivion leaving Parliament unbridled as to human rights norms 'which is more likely in the unicameral Parliament at Wellington'.<sup>2</sup> This was exploited in an unfortunate way in 1999 and section 7, sixteen years post-enactment, continues to maintain this constitutional void as will be examined.

### *Case Study*

When the Criminal Justice Amendment Act (No. 2) 1999 ('CJAA') was passed, judicial interpretative techniques had to assume its place in *R v Poumako*.<sup>3</sup> The retrospective nature of this criminal law marks this Act as a leading candidate for analysis.

The Criminal Justice Act 1985 ('the principal Act') provides that offenders who are subject to life imprisonment or preventive detention must serve at least ten years before becoming eligible for parole.

On 23 February 1999, two Bills were introduced in the House of Representatives ('House'): the Crimes (Home Invasion) Amendment Bill 1999 ('CHIAB') and its

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<sup>1</sup> *Cabinet Office Circular*, Cabinet Office, Wellington, 18 February 2003, para 22.

<sup>2</sup> A Bradley, "Conflicting Statutory Provisions — the impact of fundamental human rights" [2001] *New Law Journal*, 312.

<sup>3</sup> [2000] 2 NZLR 685 (CA).

companion measure, the Criminal Justice Amendment Bill (No. 6) 1999 ('CJAB'). The two Bills were enacted as the Crimes (Home Invasion) Amendment Act 1999 ('CHIAA') and the CJAA respectively.

The CHIAA inserted sections 17A-17E into the Crime Act 1961. The sections introduced a plethora of offences specifically committed while breaking and entering an occupied dwellinghouse.

Problematic is the CJAA which sought to amend section 80 of the principal Act. The CJAA, introduced on 23 February 1999, received its second reading on 2 March 1999. Thereafter, it was sent to the Justice and Law Reform Committee which reported back to Parliament on 22 June 1999. At this stage in the legislative process, the amendments were aimed at giving courts more flexibility to impose longer non-parole periods.

On 23 June 1999 however, there came by a Supplementary Order Paper (No. 185) ('SOP'),<sup>4</sup> two proposed amendments of significance. These two amendments were duly passed in the form of section 80(2A); and section 2(4) of the CJAA. Section 80(2A) provides a minimum non-parole period of thirteen years for the offence of murder involving 'home invasion' reproduced in full:

## **2. Minimum periods of imprisonment —...**

(4) Section 80 of the principal Act (as amended by this section) applies in respect of the making of any order under that section on or after the date of commencement of this section, even if the offence concerned was committed before that date.

This retrospective provision which, some eight months after it came into force, set two arms of government — the legislature and the judiciary — on a collision course.

Meanwhile, section 4(2) of the principal Act prohibits courts from imposing any sentence that it could not have imposed on the offender at the time of the commission of the offence.

The offender, in this case study, unlawfully entered a residence on 30 November 1998, and committed murder. The trial judge applied the new section 80(2A) sentencing the offender to a non-parole period of thirteen years imprisonment.<sup>5</sup> The offender appealed his sentence to the Court of Appeal. A chronological summary will place the episodes in context:

30 November 1998: Appellant murders victim in her home.

23 February 1999: Two Bills introduced:

CHIAB (introducing the concept of 'home invasion'); and  
CJAB (amending section 80 of the principal Act).

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<sup>4</sup> In Australia, this is generally known as "Amendments in Committee".

<sup>5</sup> 17 CRNZ 294 (HC).

- 22 June 1999: Select Committee reports on CJAB.
- 23 June 1999: A Member of Parliament proposes two significant amendments: a 13-year non-parole period for murder involving home invasion; and section 80 of the principal Act be retrospective.
- 2 July 1999: CHIAA comes into force (not retrospective).
- 17 July 1999: CJAA comes into force (retrospective).
- 13 October 1999: Appellant pleads guilty to the murder charge.

The Court of Appeal rendered a lengthy judgement as to whether section 80 of the CJAA is to be interpreted as requiring the mandatory non-parole period of thirteen years imprisonment for the appellant who offended prior to 17 July 1999 when the amended section 80 came into force. The unanimous judgement itself is not critical to this article save: (a) the Court's avoidance of expressing a final view on the interpretation issue because the appellant could have been ordered to serve at least thirteen years under pre-existing High Court powers; and (b) Thomas' J. explosively frank words: '[t]his Court would be compromising its judicial function if it did not alert Parliament in the strongest possible manner to the constitutional privation of [s2(4)]'.<sup>6</sup>

### ***Section 7 and the Parliamentary and Governmental Processes***

The parliamentary operators, approximately translating Thomas J above, played false in this case. The passing of s2(4) of the CJAA, while within the parliamentary rules of passage, can arguably be deemed to be an abuse of power and a manipulation of parliamentary procedure with overt indifference as to its constitutional consequence.

The introduction of the proposed amendments through the SOP (Supplementary Order Paper [No. 185]) meant citizens were unable to exercise their right of democratic participation as the amendments were not subject to select committee or public scrutiny. Only one day after the Justice and Law Reform Committee reported to the House, a Member of Parliament introduced amendments to a Bill which was before the House for four months. Whether this was a deliberate strategy to frustrate the proper workings of the Committee remains a mystery.

Moreover, consultation with constitutional 'auditors' was absent. The *Cabinet Manual* specifically provides that the 'Ministry of Justice *must* be consulted on *all* proposals to create new or alter existing criminal offences or penalties...'<sup>7</sup>. This provision is textually very wide in scope and applicability; it is open as to the proposing party and the mechanism through which the proposal is being promoted.

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<sup>6</sup> [2000] 2 NZLR 685, para 70.

<sup>7</sup> *Cabinet Manual* (Cabinet Office, Wellington, 2001), para 5.21. (emphasis added). This provision was in force during 1999 pursuant to the 1996 *Cabinet Manual*.

Had the CJAB been referred, in this instance, to the Crown Law Office, it would have identified a potential inconsistency with section 25 of the NZBORA. Section 25(g) provides for minimum standards of criminal procedure, including the ‘right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.’

The operation of section 7 deserves wider analysis. There is nothing in section 7 preventing a prudent government from reporting to the House an inconsistency surfacing through to the third reading of any bill.<sup>8</sup> All that is needed is a proactive government committed to promoting core constitutional concepts.

The section 7 directive is substantively refined by the Standing Orders of the House. Standing Order 266 reads:<sup>9</sup>

**266. New Zealand Bill of Rights**

(1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the...Bill of Rights Act 1990, the Attorney-General, before a motion for the bill’s first reading is moved, must indicate to the House what that provision is and how it appears to be inconsistent with the...Bill of Rights Act 1990.

Juxtaposed with section 7, one can see two anomalies. First, section 7(b) allows certain flexibility in reporting; yet Standing Orders dictate reporting before the first reading — functionally tantamount to requiring a report at the introduction stage. In reality a non-government bill is unlikely to be available for vetting prior to its introduction to the House<sup>10</sup> rendering the Attorney-General’s compliance with Standing Order 266 improbable at best.

Second, under a literal interpretation of section 7, the Attorney-General must only inform the House of any inconsistency. When the Attorney-General so informs, his or her statutory duty is discharged. However, under Standing Order 266, the Attorney-General must also indicate how a bill is inconsistent with the NZBORA. Parliament could then, as a result of Standing Order 266, proceed to make an informed decision as to the fate of the bill in question, assuming reasons for the inconsistency are given by the Attorney-General.

Another anomaly arises in both section 7 and Standing Order 266. The provisions impose a duty on the Attorney-General to inform the House of an inconsistent non-

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<sup>8</sup> A bill goes through the following stages:

Introduction; First reading; Select committee consideration and report to the House; Second reading; Consideration by a Committee of the Whole House; Third reading; and Royal assent.

<sup>9</sup> *Standing Orders of the House of Representatives* (2005).

<sup>10</sup> The Attorney-General’s Reporting Function under Section 7 of the New Zealand Bill of Rights Act 1990, *2005 Briefings for Incoming Ministers*, para 7.

government bill without exception. Non-government bills, however, are not automatically subject to the vetting process. Vetting is conducted exclusively by the Ministry of Justice or the Crown Law Office. The Ministry of Justice's primary role is to provide advice to the Minister and Associate Ministers of Justice and government in toto. Non-ministerial members of parliament do not have the authority to direct the Ministry to vet their non-government bills. The Crown Law Office provides legal advice and representational services to the government in matters affecting the executive government. They are, therefore, the chief legal advisers to the executive branch, not to the legislature at large. How then can the Attorney-General discharge his or her inherently non-discretionary and statutorily non-exclusionary section 7(b) duty? Legal literature and governmental guidelines are silent on this anomaly.

Section 7 jurisprudence assumes a distinct dimension in relation to regulations which are made under an Act by the Governor-General in Council or by a Minister of the Crown.<sup>11</sup> As section 7 refers only to 'bills', the NZBORA does not require the Attorney-General to report to Parliament on the inconsistency of regulations. That duty is assigned to Parliament's Regulations Review Committee and subtly couched:<sup>12</sup>

### 315. Drawing Attention to a Regulation

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation —...
  - (b) trespasses unduly on personal rights and liberties ...

The Committee, which may or may not include legal practitioners, does the vetting itself.<sup>13</sup> Unlike the section 7 scenario, the majority of the Committee's work is reactive in that it examines all regulations *after* they are made. Of the nine grounds the Committee may examine a regulation, the first is momentous where a regulation 'is not in accordance with the general objects and intentions of the statute under which it is made.'<sup>14</sup> This is the closest to the High Court's power of finding a regulation *ultra vires* the empowering statute with the further power to invalidate the regulation, a power not afforded to the Committee. As noted below, Parliament may pass an Act which is inconsistent with the NZBORA even after the Attorney-General has so informed Parliament. An interesting state of affairs arises where a regulation itself, promulgated under the inconsistent Act, is similarly inconsistent with the NZBORA but consistent, which it has to be, with the empowering Act. The Committee does not have the power to invalidate the regulation on any grounds and

<sup>11</sup> *Regulations (Disallowance) Act 1989*, s 2(a).

<sup>12</sup> *Standing Orders of the House of Representatives* (2005), SO 315(1).

<sup>13</sup> The Ministry of Justice may also provide comment and guidance (not legal advice) on regulations but only when requested.

<sup>14</sup> *Standing Orders of the House of Representatives* (2005), SO 315(2)(a).

the High Court does not have the jurisdiction to invalidate on the grounds that it is inconsistent with the NZBORA. The balance sheet is clear: the regulation stands and wider-spread transgressions on human rights may be inflicted.

The Committee however, under Standing Order 315(1) can, by drawing the special attention of the House to one or more of the nine grounds enumerated in Standing Order 315(2), make it possible for Parliament to disallow a regulation. But it would be inconsistent in itself in the event that a regulation is disallowed by Parliament as '[trespassing] unduly on personal rights and liberties' for example, but its empowering Act be allowed to be inconsistent with the NZBORA.

That aside, the case study and the ensuing analysis vividly highlights the slippery nature of section 7 and raises questions of its enforcement.

### ***Enforcement of Section 7***

Even if the judiciary were to enforce section 7, courts would be transgressing the boundaries of Article 9 of the Bill of Rights 1688. Gallen J was made aware of the matter in *Mangawaro* and opined:<sup>15</sup>

The obligation imposed upon the Attorney-General [is not] a right of the citizen at all. It is a safeguard designed to alert members of Parliament to legislation which may give rise to an inconsistency and accordingly to enable them to debate the proposals on that basis. That would appear to bring it directly within the ambit of the term 'proceedings of Parliament' [in Article 9].

One may measure these words against the inconsistency of the CJAA with the NZBORA, an instance where the Members of Parliament were not alerted by the Attorney-General, a precursor to a policy debate. However, even if members of Parliament are so alerted by whosoever, Parliament may still choose to proceed.<sup>16</sup> The Member of Parliament responsible for the 1999 SOP had this to say:<sup>17</sup>

I would ... like to draw the House's attention to the impact that this will have because ... once this Bill becomes law, ... the impact of that provision will affect those who are now before the courts on murder charges in the context of home invasion ... So I urge members to consider that ...

Read in the context of her whole speech, the wording and placing of this message hardly imprinted the 'constitutional privation' of the measure.

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<sup>15</sup> *Mangawaro Enterprises Ltd. v Attorney-General* [1994] 2 NZLR 451, 457 (HC).

<sup>16</sup> For example, the *Transport Safety Bill 1991* which was to introduce random breath testing, which the Attorney-General stated, posed an unjustified limit on the right to be free from arbitrary detention and unreasonable search and seizure. (521 *New Zealand Parliamentary Debates*, 6367 (1991)).

<sup>17</sup> 578 *New Zealand Parliamentary Debates*, 17687 (1999).

The executive branch most certainly cannot be relied upon to enforce section 7 because it could be politically inexpedient particularly where government bills are involved and where to do so would hamper the government's legislative program where timeliness may be crucial.

The legislature itself cannot hold the Attorney-General to section 7. A former Speaker of the House explicitly stated that '[t]he responsibility lies with the Attorney-General, who has an obligation to report to Parliament if any provision in the Bill appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights...The matter of whether a report is to be made lies with the Attorney-General, not with the House'.<sup>18</sup>

### *Section 7 Policy Developments*

Motive unknown, the New Zealand Cabinet revised its consideration of human rights issues in the policy development and legislative processes in 2003. The Cabinet Office states that:<sup>19</sup>

Effective from May 1, 2003 all submissions to Cabinet and Cabinet committees on policy proposals and government bills are to include a statement on the consistency of the policy proposal or bill with ... the Bill of Rights Act 1990 ...

and that:<sup>20</sup>

This change implements the Cabinet decision, of 17 February 2003, to revise official processes to ensure all human rights issues are considered early on and **throughout** the policy development and **legislative process**...

However, these and cousin changes by Cabinet have no impact on, an appreciation of, or even attention to post-introduction changes to bills. The legislative process does not necessarily follow a linear progression. In fact, bills can go backwards in the process such as being reverted to the select committee during the third reading stage. Consider the *Children and Young Persons Bill 1988* which consisted of 250 clauses upon introduction but emerged from the select committee with 469 clauses.

Although the Government recognizes that 'there is no formal post-introduction vetting process',<sup>21</sup> neither is there an informal one. Most amendments by SOPs, by select committees, or by the Committee of the Whole House are not referred to the Ministry of Justice or the Crown Law Office. In 2004, the then Attorney-General (now Speaker of the House) promoted a preference for enhancing the post-introduction scrutiny of bills. In 2006, the new, and now former, Attorney-General asked 'officials to examine the feasibility of vetting government [SOPs] for

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<sup>18</sup> 516 *New Zealand Parliamentary Debates*, 2968 (1991).

<sup>19</sup> *Cabinet Office Circular* (Cabinet Office, Wellington, 18 February 2003), para 4.

<sup>20</sup> *Ibid* at para 5. (emphasis added).

<sup>21</sup> Above n 9, para 21.



consistency with the Bill of Rights Act ...'.<sup>22</sup> This examination, minute in scope, lacks comprehensiveness as it excludes forums capable of producing changes of profound width and depth to bills. In the recent words of Sir Geoffrey Palmer, former Prime Minister and the architect of the NZBORA and now President of the New Zealand Law Commission, 'New Zealand ought to be able to do better than that.'<sup>23</sup> The status quo remains firmly intact seven years after the constitutional repugnancy of 1999.

Constant changes in the Attorney-Generalship, lack of high priority, and less than total commitment to human rights are all non-finite variables in the equation of neglect.

### ***Recommendations***

Nothing short of a comprehensive amendment to section 7 will ensure constitutional compliance. Through contra-constitutional manoeuvres aided by clever political tacticians, section 7 can be subverted for it is nothing more than a symbolic gesture rendering the House without an effective mechanism of control in the realm of fundamental human rights. Adopting language such as the following can strengthen section 7:

**7. Attorney-General to report to Parliament where Bill appears to be inconsistent with the Bill of Rights** — Where any Bill, or any amendments thereto howsoever made, is introduced by any Minister of the Crown or any Member of Parliament into the House of Representatives, the Attorney-General shall bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights as soon as practicable before the presentation of the Bill for royal assent.

Such a section should prevent the House and the Attorney-General from bartering away the rights of all people. However, the NZBORA does not have the status of supreme law and any supremacy-connoting language in this recommended section 7 would be a constitutionally null. The result could be that a defiant Parliament may still pass laws that are inconsistent with the NZBORA, but given effect to pursuant to section 4 of the NZBORA. Simultaneously however, this non-supremacy also allows an amendment to section 7 with a bare parliamentary majority.

Another recommendation is to consider whether Parliament should conduct the vetting of bills with the executive branch. In the context of government bills, the executive is expected to assume its legislative responsibilities. The argument would

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<sup>22</sup> Hon David Parker, speech at the *Ministry of Justice Symposium: The New Zealand Bill of Rights Act 1990*, 10 February 2006.

<sup>23</sup> Rt Hon Sir Geoffrey Palmer, Keynote Speech, *Ministry of Justice Symposium: The New Zealand Bill of Rights Act 1990*, 10 February 2006.

be that Parliament should not only be reactive to section 7 parliamentary announcements, but also be proactive in vetting non-government bills. How should this vetting be carried out by the legislature? Should it be assigned to a committee? If so, should it be assigned to the appropriate and existing subject-matter committee or should a special vetting committee be established? Are committees not already burdened with legislative timetables? At what stage should a bill be referred to the committee? Or should the House as a whole engage in the vetting process? If so, should it be immediately prior to the bill's presentment to Governor-General for assent in order to avoid another CJAA episode? Does it even matter if, even after the House is informed of the inconsistency with the NZBORA, whether by chance and/or subtly as with the CJAB, the House is nevertheless resolved to passing a bill? The recommendation, it is submitted, has merit but would involve considerable complexity in its design and implementation.

Should section 7 reports should be required for bills that are deemed consistent? Such reports would present an outward manifestation that a bill was, in fact, vetted rather than leaving the spectator to assume that an absence of a report equates to an absence of inconsistency. The United Kingdom requires that the Minister in charge of a bill must 'make a statement ... that in his view the provisions of the Bill are compatible with the [European Convention on Human Rights] ('a statement of compatibility')'.<sup>24</sup>

### ***International Paradigms***

Section 7 and its international counterparts are all enacted to further one goal: to secure a constitutional audit of bills and make informed decisions thereon on constitutional encroachments. International paradigms serve as beacons lights for domestic law and this section looks at seven such paradigms.

Section 7 counterparts, it might be noted, are rare. The reasons for this may be numerous but among them include the fact that many countries either have: (1) a bicameral system of government; (2) a constitution that is the supreme law of the land where inconsistent laws are void if so pronounced by the court empowered to assess constitutional issues; (3) instituted some type of measure pursuant to a non-statutory or unofficial mechanism; (4) a mechanism wholly to ensure compliance with the *procedural* provisions (such as quorum or majority requirements) of the constitution or equivalent document rather than consistency with the *substantive* provisions;<sup>25</sup> or (5) not instituted a system at all to vet bills.

Some countries not only serve as beacons for domestic law, but also constitute the originating point for a given domestic law. For instance section 7 of the NZBORA is based on section 3 of the *Canadian Bill of Rights 1960*. Its pertinent part reads:

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<sup>24</sup> *Human Rights Act 1998*, s 19(1)(a).

<sup>25</sup> See for example, *Sri Lanka Constitution 1978*, Article 77.

3. (1) ... the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council ... and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

However, the Canadian reporting procedure did not facilitate such reporting and 'only once in 22 years did the Minister of Justice report to Parliament under [section 3].'<sup>26</sup> In New Zealand however, sixteen section 7 reports were made by the Attorney-General from 2002 to 2006.

Countries facilitating a comparative analysis include Ireland. The *Constitution of Ireland 1937* provides that:<sup>27</sup> 'The President may, after consultation with the Council of State, refer any Bill ... to the Supreme Court for a decision on the question as to whether such Bill or any ... provisions of such Bill is or are repugnant to this Constitution ...'.

Chronologically sound, every such reference must be made *after* the date on which such Bill have been presented by the Prime Minister to the President for his or her signature. This, of course, removes any possibility of constitutionally mischievous bills, tactfully introduced to circumvent section 7-like schemes. In New Zealand, the Governor-General may still grant royal assent to bills infringing on the NZBORA, a by-product of a non-supreme constitutional document. Not so in Ireland:<sup>28</sup> 'In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this article is repugnant to this Constitution ..., the President shall decline to sign such Bill'.

The power of these twin provisions was made clear in 2004 when the *Health (Amendment) (No. 2) Bill* was rushed through the Oireachtas (the Irish legislature) *after* it emerged that a provision was likely to be unconstitutional, somewhat reminiscent of New Zealand's then CJAB. The President activated Article 26(1.1) and the Supreme Court in 2005, in a lengthy and unanimous pronouncement, held the Bill to be unconstitutional.<sup>29</sup>

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<sup>26</sup> Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993, The Law Book Company Limited, Sydney) at 870.

<sup>27</sup> Article 26(1.1).

<sup>28</sup> Article 26(3.1).

<sup>29</sup> *In the Matter of Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004* [2005] IESC 7.

A middle ground is struck in South Africa where, if the ‘President has reservations about the constitutionality of [a] Bill, [he or she must] refer it back to the National Assembly for reconsideration.’<sup>30</sup> The Constitution continues to state that:<sup>31</sup>

If, after reconsideration, a Bill fully accommodates the President’s reservations, the President must assent to and sign the Bill; if not, the President must either —

- (a) assent to and sign the Bill; or
- (b) refer it to the Constitutional Court for a decision on its constitutionality.

The President may still assent to a suspect bill as in New Zealand, but if the Constitutional Court decides that the Bill is constitutional, the President must assent to the Bill.<sup>32</sup> Silent as to the course of action if the Court finds it unconstitutional, one may apply reverse logic and conclude that the President, almost as in Ireland, may, but perhaps not ‘must’, decline to give assent.

The South African model prompts the question whether in New Zealand a Governor-General is empowered to recommend amendments to legislation prior to assent being given. Although such recommendations are not known to have taken place in New Zealand in respect to bills being inconsistent with the NZBORA, there does not appear to be any legal impediments for the Governor-General to embark upon such course of action. In Australia, section 58 of the *Commonwealth of Australia Constitution Act* provides that the ‘Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation.’

This, however, is not a solution to the problem presented in New Zealand. Section 58-like allowances are a more general in nature not suited for instances where section 7 fails. A reading of sample section 7 reports indicates the complexity of analysis that bills are subject to during the vetting phase. It would be unreasonable to expect the Governor-General, who may or may not be a lawyer, let alone a constitutional lawyer, to conduct his or her own complex analysis or even to look to the Governor-General as the final bastion of human rights.

Singapore has a framework that is specific in its application. The Presidential Council for Minority Rights is charged with drawing attention to any Bill if that Bill is, in the Council’s opinion, a ‘differentiating measure’.<sup>33</sup> Pursuant to Article 78, the Council must consider bills that have been passed by Parliament but before it is

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<sup>30</sup> *Constitution of the Republic of South Africa 1996*, Article 79(1).

<sup>31</sup> *Ibid* at Article 79(4).

<sup>32</sup> Above n 28, Article 70(5).

<sup>33</sup> *Constitution of the Republic of Singapore 1963*, Article 77. A “differentiating measure” is, briefly, any measure which is or likely to be disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities.

presented to the President for assent. The Council must report to the Speaker if there are any 'differentiating measures' and if there are Parliament may override the Council by two-thirds majority and proceed to present the bill to the President. Directly relevant to the CJAB episode, amendments to bills must also be 'vetted' by the Council.

The less visible Vanuatu also has a referral provision where, if its President considers a bill to be inconsistent with the Constitution, he or she must refer it to the Supreme Court for its opinion. If the Court concurs, the bill cannot be assented to.<sup>34</sup>

In April 2006, the Law Society of Kenya promoted an innovative approach: it wants to be involved in the drafting and vetting of bills. Its Chairman noted that some 'unpalatable' bills had found their way into Parliament following improper vetting.<sup>35</sup>

### ***Conclusion***

The contradictions confronting contemporary New Zealand with respect to human rights have been demonstrated by the CJAB episode, its legal ramification in the CJAA and its judicial manifestation in *Poumako* where justice may have been done but was not seen to be done; indeed the sentence may have been different under pre-existing statutes.

Vetting and reporting mechanisms are currently inadequate. The Regulations Review Committee is responsible for alerting the House but this duty is textually discretionary. The Attorney-General must alert the House on inconsistent government bills which have been prematurely vetted. Reporting of private and local bills, although falling on the Attorney-General in theory, is practically reposed in individual Members of Parliament who may or may not subject their bills to a non-existent vetting procedure.

Human rights are the universal assets of humanity recognised in New Zealand by the NZBORA and made concrete in a plethora of international instruments. But in New Zealand policy developments have been non-comprehensive and what little has happened is confusing and haphazard. ▲

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<sup>34</sup> *Constitution of the Republic of Vanuatu 1980*, Article 16(4). See also *Timakata v Attorney-General* [1992] VUSC 9; [1980-1994] Van LR 691, where the Court considered three referred bills.

<sup>35</sup> <<http://www.eastandard.net/print/news.php?articleid=1143951118>>