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A comparative analysis of rights scrutiny of bills in New Zealand, Australia and the United Kingdom: Is New Zealand lagging behind its peers?[1]

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Introduction

This article considers two key mechanisms for rights scrutiny of bills in four parliaments: the New Zealand (NZ) parliament, the Australian Senate, the Victorian state parliament, and the United Kingdom (UK) parliament. The mechanisms which are discussed are: vetting of bills by the executive and examination of bills by parliamentary committees. Vetting is a process whereby the executive assesses bills to identify any rights issues that arise. In certain circumstances this process results in a report to the parliament on those issues. In the different jurisdictions under discussion different legal tests apply, including around when a report to parliament needs to be made. The Victorian and UK parliaments use both scrutiny mechanisms. The NZ parliament has a vetting requirement only. The Australian Senate does not have a legislative vetting requirement but has a specialist scrutiny committee which examines rights issues in bills.

Both the vetting of bills by executives and rights scrutiny by committees, where these occur in the four jurisdictions, are examined. Questions of the adequacy of rights scrutiny of bills in NZ are then considered. Before doing so two matters of context warrant mention. First, rights scrutiny of bills involves the assessment of proposed legislation — which is intended to become law applying to us all — for issues relating to human rights. The 'rights' relevant to the processes under discussion are recognised as fundamental human rights in various international treaties, including the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention). The former was entered into following the horrors of World War II and the formation of the United Nations. Rights scrutiny processes are founded on both the international obligations our governments have agreed to be bound by and the high value we place in protecting these rights in our democratic

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societies. Secondly, the constitutional context in which rights scrutiny occurs also needs to be kept in mind. Although the parliaments discussed are in effect largely dominated by an executive, we share a constitutional system based on the concept of three branches of government. Each branch has a different function and importantly power is split between the different branches so that checks are provided on the exercise of power of each by the other branches. For example, it is commonplace in Westminster systems for the exercise of executive powers to make delegated legislation to be subject to scrutiny by specialist parliamentary committees and the exercise of executive powers more generally to be subject to review in the courts. Having an executive-controlled vetting process as our sole mechanism for rights scrutiny of bills in NZ does not sit comfortably with the idea of a system of checks and balances as between the three branches.

Rights scrutiny of bills

In NZ, section 7 of the *New Zealand Bill of Rights Act 1990* (the Bill of Rights) requires the Attorney-General to report to parliament on any provision in a bill that appears to be inconsistent with any of the rights and freedoms contained in the Act.[2] Generally, the legal test for inconsistency requires, first, to identify whether a right or freedom affirmed in the Act appears to be limited by a provision in a bill, and second, to make an assessment about whether the limit is justifiable under section 5 of the Act.[3] Vetting is done by the Ministry of Justice and the Crown Law Office. Rights scrutiny of bills in NZ is, therefore, largely an executive-controlled process. Whether a section 7 report is done in any case, or where a report is done which human rights issues are identified and included, relies on opinions formed by personnel within the executive. Where the result of vetting is that a government bill is considered to be inconsistent with the Bill of Rights, a section 7 report in the name of the Attorney-General is presented to the House with the bill when it is introduced.

Standing Orders recognise the existence of section 7 reports but place no additional requirements on the Attorney or minister in charge of a bill through the legislative process, even where it has been the subject of a section 7 report.[4] The Cabinet Manual refers to the Attorney's function under section 7 and also requires ministers to confirm, prior to introduction, that bills comply with certain legal principles including the Bill of Rights.[5] However, ministers are accountable to the Prime Minister for compliance with the Cabinet Manual and not to the House, although the Prime Minister may be accountable to the House in some circumstances.[6] Section 7 reports are sometimes the subject of debate amongst members during the legislative process, both in the House and in committees. This occurs at the discretion of members.

Australia does not have a bill of rights-type statute at federal level, however, the Senate has a formal mechanism for rights scrutiny of bills in the form of a Standing Committee for the Scrutiny of Bills appointed at the commencement of each

parliament. This committee is tasked under Standing Orders to report on whether bills, by express words or otherwise, transgress five separate heads of scrutiny. These include whether any bill trespasses unduly on personal rights and liberties; or makes rights, liberties, or obligations unduly dependent upon insufficiently defined administrative powers; or makes rights, liberties, or obligations unduly dependent upon non-reviewable decisions.[7] The rights content of the committee's work therefore differs from that used in the other three jurisdictions under discussion. It reports any concerns about any bill to the Senate in its *Alerts Digest* and seeks a response to its concerns from the relevant minister and reports a second time on the content of the response in a publication called *The Report*. An inquiry into the future direction of the committee was put on hold following an announcement in April 2010 by the government that as part of its Australia's Human Rights Framework policy it would establish a new parliamentary Joint Committee on Human Rights to review legislation against human rights obligations.[8] This inquiry has lapsed however a second inquiry is now underway.[9]

A submission by the Clerk of the Senate to the first inquiry describes the existing committee's work as following the model of the Regulations and Ordinances Committee which, without the full suite of inquiry powers, assesses delegated legislation against a set of foundation principles. The committee adheres to technical scrutiny of legislation, with cautious language, an avoidance of overt commentary on policy and an apparent reluctance to make recommendations about amendments to legislation.[10] Other submissions indicate some dissatisfaction with the committee's existing mandate. For example, the Australian Human Rights Commission said it considers the Senate Scrutiny of Bills Committee under its current mandate is not able to adequately scrutinise proposed legislation for the Commonwealth's compliance with its human rights obligations and that it is particularly concerned about the lack of clarity as to what rights and liberties should be examined by the Committee.[11]

Victoria has both a vetting requirement and a committee scrutiny process in relation to rights issues in bills. Under section 28 of the Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter) a member of parliament who introduces a bill must lay before the house a statement of compatibility before giving his or her second reading speech on the bill. A statement of compatibility must state whether, in the member's opinion, the bill is compatible with human rights and if so, how it is compatible; and if, in the member's opinion, any part of the bill is incompatible with human rights, the nature and extent of the incompatibility. The Scrutiny of Acts and Regulations Committee is a joint house committee and reports to both Houses of parliament under eight separate heads of scrutiny.[12] These include whether any bill trespasses unduly on rights or freedoms; makes rights, freedoms, or obligations dependent upon insufficiently defined administrative powers; and makes rights, freedoms, or obligations dependent upon non-reviewable decisions. Since 1 January 2007, under section 30 of the Charter, the committee is required to report to parliament on whether any bill is incompatible with the human rights listed in the Charter.[13] The committee reports

an 'initial adverse comment' to parliament in a report called the *Alert Digest*. The committee then seeks a response to its concerns from the relevant minister which is published in the next *Alert Digest*.[14]

As with Victoria, the UK has both a vetting requirement and a committee scrutiny process in relation to rights issues in bills. The Human Rights Act 1998 (Human Rights Act) incorporates the European Convention into the United Kingdom's domestic law and requires ministers to report to parliament, upon introduction of a bill, concerning any human rights implications that arise. The vetting mechanism is based on NZ's section 7 of the Bill of Rights, although section 19 of the Human Rights Act goes much further, and has the effect that the minister responsible for the bill assumes individual responsibility for compliance with Convention rights.[15] A minister is required to make one of two statements, either: in the minister's view the provisions of the bill are compatible with Convention rights; or where this is not the minister's view, a statement that although the minister cannot make a statement of compatibility, the government wishes to proceed with it.[16] The Joint Committee on Human Rights has the role of scrutinising bills.[17] In the early years of operation the committee considered one of its key duties to be the assessment of whether section 19 statements had been properly made.[18] More recently, in 2006, it has operated a new sifting and scrutiny process involving assessment of all government bills on publication to determine whether their provisions meet a raised threshold of human rights significance, with the aim of the committee considering each bill within two weeks of its publication.[19]

Issues arising from the vetting process in NZ

In NZ the vetting of bills by the executive comprises our sole formal rights scrutiny mechanism. Three issues arise from the way in which the vetting process operates: the executive-controlled nature of the process and the impact this has in effect on the amount of information parliament has about rights issues in bills; the contestable nature of human rights assessments; and the application of a high threshold to the apparent inconsistency test to determine when a section 7 report is completed.

An executive-controlled process: shortly after the Bill of Rights was enacted, Rishworth stated that the biggest potential effect of the Bill of Rights would be on executive action — that it would serve as a constraint on the exercise of public power.[20] More directly relevant to the vetting of bills process, Palmer and Palmer say that vetting by the executive requires earnest and careful analysis to be carried out in government before legislation is introduced, to ensure that it does not breach any of the principles enacted in the Bill of Rights.[21] Joseph says that the prospect of an adverse section 7 report operates as a disincentive to infringing legislation and that many government bills are modified before their introduction following advice received from the Crown agencies which vet bills.[22] A set of guidelines published by the Ministry of Justice advises the public sector that where rights affirmed by the Bill of Rights are engaged by any policy proposal — including contained in a

legislative proposal — a detailed assessment of that proposal must be undertaken, to determine whether it can be justified under section 5 of the Bill of Rights.[23] There was, therefore, some expectation that vetting by the executive in NZ would provide comprehensive and robust assessments of whether rights affirmed by the Bill of Rights are limited by any bill. But is this happening? Joseph says the reporting procedure has not had the deterrent effect that was hoped.[24] One problem with answering this question is that much of this work occurs within the executive and detailed information about the process and issues considered in any case is not readily available for evaluation, including for the reason that some of this information is withheld from public view on the basis of legal professional privilege.

There are three possible scenarios in the vetting process. First, the executive makes an assessment that a bill contains no limits on rights (the first step in the legal test for inconsistency under the Bill of Rights). No section 7 report is completed. Any rights issues which may have been considered and dismissed in-house are not advised to parliament. In 2009 in *Boscawen v Attorney-General* the New Zealand Court of Appeal held that an alleged failure to complete a section 7 report is not justiciable.[25] Nor will the House intervene in this circumstance. In 1991 the then Speaker ruled that the question of whether a report is to be made lies with the Attorney-General, not with the House.[26] The second possibility is the executive makes an assessment that a bill limits rights but also takes the view that these are justifiable under section 5 (the second step in the legal test for inconsistency). No section 7 report is presented to parliament. The result is a so-called "positive vet". Positive vets were initially withheld from public view on the basis of legal professional privilege but since 2003 have been published on the Ministry of Justice website. The third possibility is the executive makes an assessment that a bill limits rights but also takes the view these are not justifiable under section 5. A section 7 report is completed and presented to parliament. Section 7 reports are available on parliament's website and are provided to select committees considering bills.

The vetting process operates to, in effect, limit the amount of information about rights issues in bills which is formally made available to parliament by the executive. Only in the third scenario does this occur. Approximately 60 section 7 reports have been presented to the House since 1990.[27] This is a small proportion of the bills passed by the House in this period. As well, wider information about the consideration of rights issues in bills by the executive, short of positive vets and section 7 reports, does not appear to be readily available. Butler, writing as a Crown Counsel in 2000, said at that time the two agencies engaged in the Bill of Rights vetting process had adopted a policy of refusing access to the documentation surrounding the vetting process and the (now) Ministry of Justice invoked legal professional privilege to protect disclosure of vetting information under the Official Information Act.[28] He was referring specifically to the withholding of 'positive vets' which since 2003 have been published. The Ministry of Justice's current approach stated on its website is:[29]

> The Attorney-General retains legal professional privilege in respect of unpublished advice written before January 2003, as well as unpublished advice written since January 2003 on Bills on which the Attorney-General has tabled a section 7 report in the House of Representatives. The advice is not subject to the Official Information Act 1982; however, the Attorney-General will consider requests for the release of such advice on a case by case basis.

Legal professional privilege was claimed in relation to vetting information in the *Child Poverty Action Group v Attorney-General* case in 2008.[30] The Attorney-General, as defendant, claimed legal professional privilege to prevent disclosure through the discovery process of vetting information concerning a welfare policy which had been enacted in legislation and which was the subject of the proceedings. The Human Rights Review Tribunal agreed that the material was protected from disclosure through the discovery process on the ground of legal professional privilege.[31] This was the approach taken initially in the UK under the Human Rights Act. In 2002 Lester, described the executive in the UK as being initially concerned to protect the legal privilege usually accorded to the advice of law officers and therefore being reluctant to give reasons for a certificate of compatibility required to be presented to parliament under the Human Rights Act.[32] It is accepted that there is some value in protecting internal legal advice with privilege, including promoting free and frank advice within the executive. However, the vetting process is also the mechanism by which the Attorney-General performs his or her function under section 7 of the Bill of Rights, which in the view of the Court of Appeal in *Boscawen* is a parliamentary process. Joseph says one of purposes of section 7 is to ensure that parliament does not legislate in ignorance of the Bill of Rights.[33] At present, it is fair to say only that parliament is not legislating in ignorance of the executive's conclusions in relation to what human rights issues are significant, and its application of the relevant tests, in any case.

In 2000, Butler recognised that the lack of disclosure of vetting information raised questions about the integrity of the system and perhaps suggested that not all vets were sufficiently robust to warrant disclosure and public scrutiny.[34] Geiringer says that in the absence of formal mechanisms for parliamentary scrutiny, the adequacy of scrutiny in any particular case is dependent upon three factors, including the availability and quality of the advice received by the Attorney-General under section 7.[35] The NZ executive may be satisfied with the current vetting process in terms of its own requirements, however, a lack of transparency means there is no way of independently evaluating the quality of the process which parliament is relying on to inform it about human rights issues in bills.

Greater transparency around rights issues engaged by bills operates in the other three jurisdictions. For example, in Victoria and the UK, a different legal test determines what information is made available by the executive to parliament. Here section 7 reports are presented to parliament where the Attorney is of the view that a bill contains an apparent inconsistency with rights. In Victoria and the UK ministers must make a statement of compatibility to the parliament in relation to

every bill introduced to parliament. In addition, both jurisdictions impose additional information requirements in relation to these compatibility statements. In Victoria, section 28(3) of the Charter requires the relevant minister to give reasons why a bill is considered to be compatible with human rights and where any part of the bill is considered to be incompatible, the nature and extent of the incompatibility. Currently in the UK, ministers are advised in the Cabinet Office *Guide to Making Legislation* that the government has made a commitment to provide more detailed information about the most significant human rights issues in government bills in its explanatory notes. The guide says the assessment of the bill's impact on Convention rights should be as detailed as possible setting out any relevant case law and presenting the government's reasons for concluding that the provisions in the bill are Convention compatible. The purpose of the explanatory notes is stated as including to assist parliament.[36] In New Zealand the vetting process and the apparent inconsistency test in section 7 result in comparatively limited information about rights issues in bills being made available to our parliament.

Contestable assessment: it is important to remember that, in any case, a section 7 report is a legal opinion on the application of rights principles to a particular policy scenario. In all four of the jurisdictions under discussion, this area of law involves consideration of contested thresholds and complex concepts such as reasonableness and proportionality.

The appellants in *Boscawen* took a different view to the Attorney in relation to the need for a section 7 report on the Electoral Finance Bill. Contrary to the Crown view, in their view the bill clearly raised issues around free speech. More recently, Price described the vetting system in NZ as invariably giving bills that raise free speech issues a green light with no real attempt to test the restrictions for their justifiability.[37] And more recently Geddis raised concerns about the absence of a section 7 report in relation to the emergency legislation passed in response to the Canterbury earthquake in September 2010.[38] In *Boscawen*, the Court of Appeal said of the appellant's approach that it failed to acknowledge that opinions can legitimately vary on human rights issues, particularly on the issue of whether any limitations on rights are justified in a free and democratic society, and on assessing the appropriate balance between rights and other values where these may be apparently in conflict.[39] In that case this principle operated in the Crown's favour, however, it also supports the making available of wider vetting information to parliament, so that possible rights issues raised by bills — including those which have been dismissed in-house by the executive — can be debated by legislators.

Apparent inconsistency test in section 7: one key contestable issue relating to the vetting process arises in section 7 itself. The section requires the Attorney to bring to the attention of the House any provision in a bill which *appears to be inconsistent with* specified rights. Butler and Butler say that successive Attorneys-General in New Zealand have taken the view that a section 7 report is required only where the introduction copy of the bill (in his or her view) *is* inconsistent with the Bill of Rights and not *may be* inconsistent.[40]

Fitzgerald agrees that the Attorney-General has adopted a high threshold definition for section 7 reports.[41] He says that the executive is completing both steps of the legal test or analysis for inconsistency under the Bill of Rights and rather should be drawing to the attention of the House rights issues which trigger the first step of the test — whether a right appears to be limited by a provision in a bill — so that the House can determine the second step of the test — whether the limitation is justified (under section 5).[42] Applying a low threshold test (or in other words splitting the two steps of the legal test in the Act between the executive and parliament) would, he suggests, mean that scrutiny of the provisions and the application of section 5 would occur in public with an opportunity for public input at the select committee stage. In such a process the view of the executive would be merely one factor in the equation, rather than the determinant.[43] The Butlers accept that it is arguable that the phrase *inconsistent with* in section 7 requires the Attorney to report to parliament when a bill discloses a prima facie interference with a right (the first step of the test).[44] This threshold issue directly impacts on the amount of information which parliament obtains on a formal basis about rights issues in bills. If Fitzgerald's approach had been taken historically, all the positive vets would have been the subject of section 7 reports tabled in parliament. The apparent inconsistency test, including the way it is being applied, results in only a small proportion of bills being the subject of a report to parliament or in other words the subject of formal advice from the executive to parliament about rights issues in bills.

By contrast, in both Victoria and the UK detailed information is required to be provided by the executive relating to the compatibility of *all* bills with specified rights. Responsibility is placed on the sponsoring minister to confirm in his or her statement to parliament that a bill is compatible with human rights. Lester sees the requirement in the United Kingdom for a minister to personally take responsibility for the statement of compatibility as an important aspect of the process in the United Kingdom.[45] There is little doubt that these parliaments are better informed about a wider range of human rights issues in bills and that the NZ parliament could be better informed if the executive applied a lower threshold to the section 7 obligation.

Rights scrutiny by select committees

NZ does not have a specialist committee considering rights issues in bills, nor is there any requirement placed on existing select committees when examining bills to consider or reach conclusions on human rights issues, including assessments under the Bill of Rights. In contrast with Australia generally, most bills are subject to detailed select committee scrutiny here, which includes consideration of policy matters. When doing so a select committee can consider a section 7 report which has been made in relation to any bill before it. Select committees are free to come to a different view than the Attorney-General.[46] However, in NZ, even where a section 7 report is done, there is no obligation on select committees to seek further information about, or to form an independent view on, the issues raised in it. Geiringer describes the adequacy of rights scrutiny as being dependent on the skills

and predilections of particular members of parliament.[47] Further, she says, that select committee reports and parliamentary debates provide little evidence of systematic and comprehensive parliamentary scrutiny of the Bill of Rights implications of legislation.[48]

The option of greater select committee involvement in rights scrutiny has been considered in NZ. Establishment of a specialist select committee to undertake rights scrutiny of bills was recommended more than two decades ago by the Justice and Law Reform Committee when it reported back to the House on the *White Paper on a Bill of Rights for New Zealand*[49] but the recommendation was not adopted. In 2003, the then Clerk of the House, David McGee, recommended that Standing Orders be amended to require select committees to report on whether provisions in bills appear to limit the rights and freedoms contained in the Bill of Rights, and if so, to report on whether those provisions can be demonstrably justified in a free and democratic society (under section 5).[50] McGee suggested that this would supplement the Attorney-General's reporting function under section 7 and importantly increase parliament's level of understanding about the rights implications of bills.[51] The Standing Orders Committee rejected this recommendation.[52] In 2009 the Regulatory Responsibility Taskforce recommended that bills be scrutinised for compatibility with specified principles of responsible regulation, including a 'liberties' principle.[53] The Taskforce also recommended that select committees be required to address compatibility of bills with the principles; and that consideration be given as well to the options of establishing a specialist select committee to recommend amendments to bills to address any incompatibility, or for the Regulations Review Committee to scrutinise bills against the principles.[54] The work of the Taskforce has resulted in the Regulatory Standards Bill which is currently before the House. At the same time the Taskforce reported, Knight suggested it was perhaps time that NZ considered adopting a specialist Bill of Rights vetting select committee following what he considered to be an inappropriate adoption of the views of the Crown Law Office or Attorney in a select committee report on the Land Transport (Enforcement Powers) Bill.[55]

The idea of a second level of scrutiny of rights issues by a parliamentary committee clearly has some support in New Zealand. This could be done by way of establishing a new specialist human rights committee or by imposing rights scrutiny requirements on existing select committees. Such reforms would not require legislation or amendment to the Bill of Rights but could be achieved through Standing Orders, as in the Australian Senate. Evans and Evans say that such committees give members of parliament a chance to become better informed about rights, and allow for a more focused dialogue about rights between the executive and the legislature.[56]

Tolley says that the work of the Joint Committee in the UK has had little effect, however, he points to one example of the value of the committee's work being the debate in parliament on the Counter-Terrorism Bill in 2008. [57] He says the House appeared to have been well informed by the committee's work, Hansard contained several explicit references to the committee's report in the debate, and members of

the committee rose to speak against the bill. He concludes that the committee clearly had some impact on the debate and vote in the Commons.[58]

A parliamentary rights scrutiny committee may not necessarily provide a silver bullet, however an important consequence is that the consideration of contested thresholds and concepts in an area of high public interest is done independently of the executive and is more transparent. This contrasts with the vetting system as it currently operates here. Transparency is a value in and of itself, particularly in an area concerning fundamental rights and where the application of the relevant legal tests can be finely balanced. To some, for example Fitzgerald, a key benefit of committee scrutiny of rights issues is that it is legislators who make the final determination about human rights issues in proposed legislation.[59]

Conclusion

NZ does not have a rights scrutiny of bills process operating independently of the executive as seen in the other parliaments discussed. Assessments of contestable concepts are made in-house by the executive in a largely non-transparent process. The apparent inconsistency test in section 7 and the high threshold which has been applied to it results in comparatively limited information being formally made available to our parliament when it legislates. Vetting is an important process. It is desirable for executives to give consideration to human rights issues during the policy making process, including whether limits on fundamental rights in proposed legislation are necessary and justifiable. However, an executive-controlled vetting process cannot also provide adequate human rights scrutiny for the legislative process. The provision of limited information to parliament in NZ is one issue. A second issue relates to parliamentary process: even where the Attorney has formed the view that an encroachment on rights is not justified under section 5 of the Bill of Rights there is no provision for on-going dialogue with the executive as part of the legislative process. Where a section 7 report is presented to the House both the Attorney and the responsible minister are free to not address any human rights issues raised in the report further. As well, select committees have no obligation to consider rights issues, even when a section 7 report has been done.

By contrast, in both Victoria and the UK, ministers have a greater responsibility to provide parliament with detailed information about rights issues arising in bills. As well, in both jurisdictions and in the Australian Senate ministers must engage in dialogue about rights issues in bills throughout the legislative process. Parliamentary debate is better informed and independent assessments, including of justification of infringements on rights, are made by parliamentarians. The NZ parliament needs to take steps to require more information from the executive about rights issues in bills so that ultimately legislators can make the call about the necessity for, and justifiability of, limits on rights in legislation. Consideration also needs to be given to a parliament-controlled scrutiny mechanism separate from executive vetting as a means of contesting conclusions reached by the executive. Two alternative approaches are the specialist select committee approach used in the

other three jurisdictions discussed, or the McGee approach whereby existing select committees would be required to consider rights issues and report to parliament on conclusions reached by them, independently of any executive advice on these issues. A greater degree of scrutiny of rights issues by parliament could be achieved by changes to Standing Orders, legislation is not required.

When making law parliaments sometimes impose limits on fundamental rights and freedoms. This requires careful consideration of the claimed necessity and justifications for doing so. In order to make assessments about these matters parliaments need comprehensive and robust information as well as a means of engaging with the executive about these issues during the legislative process. At present, in NZ, there is good reason to consider that we are lagging behind some of our peers in this important area. ▲

Endnotes

[1] Winner of the ANZACATT Parliamentary Law, Practice and Procedure Program Prize 2010

[2] Reports relating to government bills must accompany the bill upon introduction. Reports relating to non-government bills must be completed as soon as practicable after their introduction.

[3] Justifiable limits under section 5 of the Bill of Rights are defined as ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Although note there is a view that the section 5 step does not apply to some rights, such as those with internal qualifiers.

[4] Standing Orders of the House of Representatives (New Zealand): SO 261.

[5] Cabinet Manual (2010) at paras 7.60–7.62 at <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>. Recently, the New Zealand Standing Orders Committee has recommended to the Government that Cabinet guidelines be amended to require analysis of Bill of Rights and other constitutional matters be included in explanatory material supporting the introduction of bills, and to require Bills of Rights reporting on substantive Supplementary Order Papers <http://www.parliament.nz/NR/rdonlyres/A1275CB0-5B78-4DBF-AA31-7EAC60C9FF89/202306/DBSCH_SCR_5302_ReviewoftheStandingOrdersI18B_8589_.pdf>. A response from the Government is expected following the opening of Parliament following the General Election in November 2011.

[6] See Speaker’s ruling 7 December 2010 at <http://ourhouse.parliament.nz/en-NZ/PB/Debates/Debates/3/3/f/49HansD_20101207_00000013-Speaker-s-Rulings-Questions-for-Oral-Answer.htm>.

[7] Standing Orders of the Australian Senate: SO 24.

[8] Summary of interim report 12 May 2010 at <http://www.aph.gov.au/senate/committee/scrutiny/future_direction_2010/interim_report/index.htm>.

[9] See http://www.aph.gov.au/Senate/committee/scrutiny/future_direction_2011/index.htm. The reporting date for the Inquiry is 30 November 2011.

[10] Submission by the Clerk of the Senate 6 April 2010 at <http://www.aph.gov.au/Senate/committee/scrutiny/future_direction_2010/submissions/sub20.pdf>.

[11] Submission by Australian Human Rights Commission 19 March 2010 at <http://www.aph.gov.au/senate/committee/scrutiny/future_direction_2010/submissions/sub11.pdf>.

[12] Parliamentary Committees Act 2003 (Vic): s 17(a).

[13] Note that the Victorian Charter uses the concepts of both compatibility and incompatibility. The vetting requirement refers to both. The reporting requirement for the Scrutiny of Acts and Regulations Committee refers to the latter only.

[14] Scrutiny of Acts and Regulations Committee, Practice Note 1 at 33 at <http://www.parliament.vic.gov.au/images/stories/committees/sarc/annual_reports/Annual_Review_2009.pdf>.

[15] Anthony Lester QC 'Parliamentary Scrutiny of Legislation Under The Human Rights Act 1998' (2002) 33 VUWLR 1 at 3.

[16] Lester above at 3.

[17] Standing Orders of the House of Lords: SO 152B.

[18] Lester above at 8.

[19] Joint Committee on Human Rights *The Committee's Future Working Practices* (July 2006) at 25 at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/239.pdf>.

[20] Paul Rishworth "The potential of the New Zealand Bill of Rights" (1990) NZLJ 68 at 71.

[21] Geoffrey Palmer and Matthew Palmer *Bridled Power New Zealand's Constitution and Government* (Oxford, 4th ed, 2004) at 324.

[22] Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, 2007) at para 14.6.8.

[23] Ministry of Justice *The Non-discrimination Standards for Government and the Public Sector Guidelines on how to apply the standards and who is covered* (2002). Note the test has now been refined in *R v Hansen* [2007] 3 NZLR 1 (NZSC).

[24] Joseph above at para 27.4.7.

[25] *Boscawen v Attorney-General* [2009] 2 NZLR 229 (NZCA). Two of the three appellants were members of parliament who were of the view that a section 7 report should have been completed in respect of the Electoral Finance Bill, which they said contained restrictions on the right to freedom of expression and the right to vote, which were not demonstrably justified. The Court referred to the Attorney's reliance on advice from officials in Crown agencies when undertaking the section 7 reporting role, which it said indicated an executive role was being undertaken; and this, it said, was supported by the setting of rules around the performance of the role in the Cabinet Manual.[25] However, the Court concluded that the Attorney's reporting role was part of the legislative process and therefore covered by the principle of comity.[25] The Court would not therefore order a report be completed or even express a view about the matters in issue. Note there was one caveat being the suggestion the Court might consider such a challenge if the allegation was that the Attorney-General had not exercised the role in good faith.

[26] Speakers Rulings 1867-2008 inclusive (2008) at 99/4.

[27] In November 2010 the then Minister of Justice Simon Power stated that as at November 2010, 57 section 7 reports had been done on bills since 1990 in 'Speech to Bill of Rights

Act Symposium' at <http://www.beehive.govt.nz/speech/speech-bill-rights-act-symposium>. A further 1 or 4 other reports have been presented to the House depending on whether the minister's figures included those done in November 2010 or not see <http://ourhouse.parliament.nz/en-NZ/PB/Presented/Papers/Default.htm>.

[28] Andrew Butler 'Strengthening the Bill of Rights' (2000) 31 VUWLR 129 at 145.

[29] *See comments on Advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of Bills with the Bill of Rights Act 1990 at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.*

[30] *Child Poverty Action Group Incorporated v Attorney-General* [2008] NZHRRT 31 (16 December 2008) at <http://www.nzlii.org/nz/cases/NZHRRT/2008/31.html>. These proceedings were taken under Part 1A of New Zealand's Human Rights Act 1993 which allows challenges in the courts to legislation which is claimed to be discriminatory. The legislative provisions under challenge were s MD8(a) and s MD9(4) of the Income Tax Act 2007 which provide for payment a certain tax credit which the plaintiff alleged discriminated against one group of children on the basis of their parents' employment status. Note that the interlocutory decision by the Human Rights Review Tribunal to uphold the claim to legal professional privilege in relation to the vetting documents is not mentioned in this case report but is in the knowledge of the writer who was counsel for the plaintiff in the proceedings.

[31] Note that the interlocutory decision by the Human Rights Review Tribunal to uphold the claim to legal professional privilege in relation to the vetting documents is not mentioned in the case report cited above.

[32] Lester above at 20.

[33] Joseph above at para 27.4.7(1).

[34] Butler above at 145. Although note he was talking only about the withholding of positive vets at that time.

[35] Claudia Geiringer 'The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?' (2007) 11 Otago Law Review 389 at 400.

[36] United Kingdom Cabinet Office *Guide to Making Legislation* at http://www.cabinetoffice.gov.uk/sites/default/files/resources/Guide-to-Making-Legislation.pdf at paras 11.63, 12.27 & 12.28.

[37] Steven Price "Officials drop the BORA on 92A" (2009) Media Law Journal at <http://www.medialawjournal.co.nz/?p=220>.

[38] Andrew Geddis CERRA vs NZBORA or when acronyms attack 25 September 2010 at <http://pundit.co.nz/content/cerra-vs-nzbora-or-when-acronyms-attack>.

[39] See *Boscawen v Attorney-General* above at para [18].

[40] Andrew and Petra Butler *The New Zealand Bill of Rights Act a commentary* (LexisNexis, 2005) at para 8.6.1.

[41] Paul Fitzgerald 'Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense' (1992) 22 VUWLR 135 at 138.

[42] Fitzgerald above at 138-139.

[43] Fitzgerald above at 139.

[44] Butlers above at para 8.7.

[45] Lester above at 3.

[46] David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, 2005) at 356.

[47] Geiringer above at 400.

[48] Geiringer above at 400.

[49] Justice and Law Reform Committee *Final Report on a White paper on a Bill of Rights for New Zealand* (1987-1990) 17 AJHR I.8C at 11.

[50] Submission of the Clerk of the House of Representatives to the Standing Orders Committee for its Review of Standing Orders (May 2003) at 63.

[51] Submission of the Clerk of the House above.

[52] Report of the Standing Orders Committee *Review of Standing Orders* (December 2003) I18.B, 59.

[53] Report of the Regulatory Responsibility Taskforce (September 2009) at para 4.49 at <http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport/rrt-report-sep09.pdf>. Note the 'liberties' which would be the subject of scrutiny are more limited than those which apply to any of the jurisdictions under discussion, including under the Bill of Rights, therefore this recommendation does not appear to necessarily be intended to achieve a scrutiny role similar to that currently undertaken in these including in the Australian Senate.

[54] Report of the Regulatory Responsibility Taskforce above at paras 5.7 and 5.8.

[55] Dean Knight 'Vetting of Bills — whose responsibility?' (2009) Laws179 Elephants and the Law at <http://www.laws179.co.nz/2009_09_01_archive.html>.

[56] Carolyn Evans and Simon Evans 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) Public Law 785 at 786.

[57] Michael Tolley 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 Australian Journal of Political Science 41.

[58] Tolley above at 53.

[59] Fitzgerald above at 139.