The New Zealand Bill of Rights Act 1990: its operation and effectiveness

by

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New Zealand Court of Appeal

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Appendix: The New Zealand Bill of Rights Act 1990

Introduction

[1] In 1990 the New Zealand Bill of Rights Act 1990 (the Bill of Rights) was passed. The Bill of Rights is an ordinary statute and not entrenched. It confers no power on the courts to strike down inconsistent legislation. Nevertheless, some would argue that

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1 This paper was prepared for the South Australian State Legal Convention to be held on 22 and 23 July 2004. I would like to acknowledge the help of Court of Appeal clerks, Hamish Forsyth and Malcolm Birdling, in its preparation.
it has already had a profound effect on New Zealand law and that its effects are likely to be even more far-reaching in the future.  

[2] The Bill of Rights was the result of a six year process and went through several iterations on its journey into law. Two draft bills were prepared in 1984 before a “White Paper” was released for public consultation in April 1985. The 1985 proposal was for an entrenched Bill of Rights, with the courts empowered to strike down inconsistent legislation. While most of the rights (and the wording) were drawn from the International Covenant on Civil and Political Rights (ICCPR) and the Canadian Charter of Rights and Freedoms, there was one unique New Zealand factor – a provision recognising the rights of Māori under the Treaty of Waitangi was to be included.

[3] The White Paper was referred to the Justice and Law Reform Select Committee of the New Zealand Parliament, which received several volumes of public submissions. These revealed that public support for an entrenched Bill of Rights was entirely absent, with opposition ranging from those who opposed the concept of a statutory Bill of Rights altogether to those who were concerned about what it did or did not say

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3 It had an even longer pre-history. The National Party had proposed a Bill of Rights for New Zealand in its 1960 Policy Statement. In accordance with that policy, the then Minister of Justice in 1963 introduced a Bill that was modelled on the 1960 Canadian Bill of Rights. This Bill was opposed by the opposition Labour Party and was not proceeded with following an adverse report from the Constitutional Reform Select Committee – see Geoffrey Palmer “A Bill of Rights for New Zealand?” in Kenneth Keith (ed) *Essays on Human Rights* (Sweet & Maxwell, Wellington, 1968) 107-108.
4 Draft Bill of Rights Bill, LEG 7-1-3 (12 October 1984); Draft Bill of Rights Bill LEG 7-1-3 (4 December 1984).
7 The Treaty of Waitangi, signed on 6 February 1840, was an agreement between representatives of the Crown and representatives of Māori. There is ongoing debate as to the terms and effect of the Treaty. In part, this is because the terms used in the Māori and English texts are not synonymous.
on particular issues. The response from the profession and in academic circles was also overwhelmingly against the proposed Bill.

[4] The Select Committee reported back in October 1988, with the majority recommending that the Bill proceed not as entrenched supreme law, but instead as an ordinary statute. It also recommended, in response to Maori opposition, that the Treaty of Waitangi not be included or referenced. The Bill was accordingly redrafted and introduced to Parliament in October 1989. Significantly fewer submissions were received and only small amendments were made to the Bill in committee. It passed through the House, opposed by the then opposition National Party, and came into force on 25 September 1990.

**Overview of the Bill of Rights**

[5] The long title of the Bill of Rights states that the purpose of the Bill of Rights is to affirm, protect, and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand’s commitment to the ICCPR. Section 2 also provides that the rights and freedoms contained in the Bill of Rights are “affirmed.” Conservatives have relied on this section and the use of the word affirm in the long title to argue that the Bill of Rights was not designed to extend the law in any way, but simply guaranteed the status quo. On the other hand, others have argued that the affirmation of human rights and fundamental freedom in the Bill of Rights means that even rights not specifically included in the Bill of Rights are recognised in New Zealand law and that positive steps are required to promote all such rights. The New Zealand Court of Appeal rejected the conservative view of the Bill of Rights early on, accepting that the

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10 Some considered the draft Bill did not go far enough – see Jerome Elkind and Antony Shaw A Standard for Justice (Oxford University Press, 1986) whereas others, notably the New Zealand Law Society, considered that it went too far and ought to be significantly watered down – New Zealand Law Society “Submissions on the White Paper: A Bill of Rights for New Zealand” (20 December 1985).
11 Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand (1988) AJHR I 8A, 3-4. Not including the Treaty of Waitangi was, the Select Committee stated, because, if the Treaty was included in an ordinary statute, it could devalue the Treaty by suggesting that it was of no more value than an ordinary statute.
12 I note here that interestingly the Select Committee had suggested that consideration be given to the inclusion of social economic and cultural rights but this proposal did not proceed.
Bill of Rights would lead to the development of the law.\textsuperscript{13} Debate therefore has focused on the extent to which this development can occur.

\textsuperscript{[6]} Sections 3-7 are the operative sections of the Bill of Rights. These are discussed in more detail below. Basically, s3 is a key gateway to the application of the Bill of Rights. This provides that the Bill of Rights applies to acts by all three branches of Government and also to acts which can be characterised as “public”. Section 4 precludes the courts from invalidating any Act, including Acts passed prior to the Bill of Rights. The effect of this is that, on one view, the Bill of Rights is inferior to other Acts as the normal position is that, in the event of a conflict between two Acts, the later in time prevails.\textsuperscript{14} The over-simplicity of the view that s4 of the Bill of Rights makes it inferior is apparent when we examine s6, which requires all enactments to be read consistently with the Bill of Rights where possible, although s5 allows limitations on Bill of Rights rights so long as they are “demonstrably justifiable in a free and democratic society”.\textsuperscript{15} Section 5 has been described variously as the exception section and the balancing section.\textsuperscript{16} Finally, s7 requires the Attorney-General to inform the House where the provisions of any Bill appear to be inconsistent with the Bill of Rights. This requirement is designed to draw any inconsistency to Parliament’s intention prior to it passing the Bill.

\textsuperscript{[7]} Of note is the absence of any remedies clause from the operative sections. In fact, a remedies clause in the draft Bill appended to the White Paper was deliberately

\textsuperscript{13} In \textit{Simpson v Attorney-General (Baigent’s case)} [1994] 3 NZLR 667, 676, Cooke P stated (repeating an observation from \textit{Ministry of Transport v Noort} [1992] 3 NZLR 260) “The long title shows that, in affirning the rights and freedoms contained in the Bill of Rights, the Act requires development of the law when necessary. Such a measure is not to be approached as if it did no more than preserve the status quo.”

\textsuperscript{14} Interestingly, the same may not be true for the Human Rights Act 1993 (HRA), which among other things, prohibits discrimination by both public and private actors. The HRA formerly contained s151(1), which prevented the implied repeal of other Acts or regulations. That section has now been repealed. However, it should be noted that the anti-discrimination provisions in the HRA are of much narrower scope than the broad rights in the Bill of Rights.

\textsuperscript{15} It is to be noted that some of the rights have inherent limitations, for example the right in s22 not to be arbitrarily arrested or detained.

\textsuperscript{16} There is debate as to whether to give a wide interpretation to a protected right and then apply s5 more broadly or whether to give a narrow, more focussed interpretation of a particular right and apply s5 more stringently.
removed.\textsuperscript{17} This has not impeded the development of remedies for breaches of rights, either in the criminal,\textsuperscript{18} or the civil sphere.\textsuperscript{19}

[8] The rights and freedoms protected by the Bill of Rights are enumerated in Part 2 and reflect some, but not all, of those incorporated in the ICCPR.\textsuperscript{20} In particular, there is no equivalent of Art. 17 of the ICCPR which guarantees “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”\textsuperscript{21} Nor, for example, is there a right to found a family, \textsuperscript{22} a general right of equality before the law,\textsuperscript{23} or additional rights protecting children.\textsuperscript{24}

[9] With regard to security of the person, there is the right not to be deprived of life (s8), not to be subjected to torture or cruel, degrading or disproportionately severe treatment or punishment (s9), or medical or scientific experiment (s10). There is also the right to refuse medical treatment (s11). Democratic and civil rights include rights to vote and stand for Parliament (s12) and to freedom of thought, conscience, religion and belief (s13). There is the right to freedom of expression (s14), as well as rights to freedom of assembly, association and movement (ss16, 17, 18). Freedom from discrimination (except affirmative action) is affirmed (s19). Discrimination is defined

\textsuperscript{17} For discussion of this, see Simpson \textit{v} Attorney-General (Baigent’s case) [1994] 3 NZLR 667, 698-699.
\textsuperscript{18} MOT \textit{v} Noort [1992] 3 NZLR 260.
\textsuperscript{19} In Baigent’s case, 676, Cooke P said: “First, although the New Zealand Act contains no express provision about remedies, this is probably not of much consequence. Subject to ss 4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection.”
\textsuperscript{20} The selection of rights for inclusion was heavily influenced by John Hart Ely’s “process theory” of rights – ie, that to be appropriate for entrenchment in a Bill of Rights, rights should be necessary to buttress the integrity of democratic government. See Paul Rishworth “The Birth and Rebirth of the Bill of Rights” in Grant Huscroft and Paul Rishworth (eds) \textit{Rights and Freedoms} (Brookers, Wellington, 1995) 14.
\textsuperscript{21} However, the New Zealand Court of Appeal has extracted a limited underlying value of privacy from the s21 guarantee against unreasonable search and seizure – see for example R \textit{v} Jefferies [1994] 1 NZLR 290 (CA); R \textit{v} Smith [2000] 3 NZLR 656 (CA). I note also that the fact that individuals can seek remedies under international law in the field of human rights once domestic remedies are exhausted was seen by Gault P and Blanchard J as a factor to be considered when the Court was considering whether there should be a tort of privacy in New Zealand. See Hosking \textit{v} Runting CA101/03 25 March 2004, para 6.
\textsuperscript{22} Art 23, ICCPR.
\textsuperscript{23} Art 26, ICCPR. But note the specific anti-discrimination rights discussed below.
\textsuperscript{24} Art 24, ICCPR.
by incorporating the grounds of unlawful discrimination in Part 2 of the Human Rights Act 1993 (HRA).

[10] Criminal process rights include the right to be secure against unreasonable search and seizure (s21) and the right not to be arbitrarily arrested or detained (s22). Persons who are arrested or detained have the right to be informed of the reasons, to consult and instruct a lawyer, to seek habeas corpus, to be brought before a court as soon as possible and to be treated with humanity and dignity (s23). Persons charged have rights of bail, representation, adequate time and facilities to prepare their defence and trial by jury for offences carrying imprisonment for three months or more (s24). There are minimum standards of criminal procedure, including, in particular, the right to a fair and public hearing before an independent and impartial court, and to the presumption of innocence (s25). Retroactive penalties and double jeopardy are proscribed (s26).

[11] There is also (s27) a more general right to natural justice before tribunals and public authorities, together with rights to apply for judicial review and to bring civil proceedings against the Crown. Section 28 prevents existing rights or freedoms from being abrogated or restricted by reason only that they are not included in the Bill of Rights and s29 extends the benefits of the Bill of Rights to legal persons “so far as practicable”.

Application of the Bill of Rights – s3

[12] Any examination of the influence the Bill of Rights has had over New Zealand law must begin with an understanding of how the Bill of Rights applies. With a couple of arguable exceptions, the gateway through which any purported application of Bill of Rights must pass is s3. Section 3 states:

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25 By s21 of the HRA those grounds are: sex, martial status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, sexual orientation.

26 Most consider that the right to natural justice is a procedural guarantee, rather than a substantive guarantee of a remedy.

27 The application of the Bill of Rights to the common law and its use as a tool of statutory interpretation need not necessarily rely on s3.
**Application**

This Bill of Rights applies only to acts done—

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

**Section 3(a)**

[13] If the Bill of Rights applies by virtue of s 3(a) it does so because the act concerned is performed by a qualifying actor. In s3(a) the qualifying actors are the three core branches of government. Because application of the Bill of Rights under this subsection is actor-determined only, even commercial acts by government may be caught. Most applications of the Bill of Rights rely on this subsection.

[14] Taking first the application of the Bill of Rights to the Executive, it is trite that any act done by the police is an act done by the executive branch of Government. It follows that the application of the Bill of Rights is seldom an issue in the criminal context. Acts done by core government departments will also obviously come within s3(a). The main debate over the meaning of the executive branch is whether its scope extends to quasi-governmental agencies such as State-Owned Enterprises. However, in most cases, those seeking to apply the Bill of Rights to actions of these bodies have relied on bringing the Act concerned within s3(b), rather than trying to demonstrate that the body as a whole is sufficiently proximate to the core executive government to be classified as “the executive branch”.

[15] The simplest case of the Bill of Rights application to the Executive is the invalidation of public acts (most commonly decisions). In this case, an action would be invalidated simply because it would be contrary to an Act of Parliament, the Bill of Rights. In assessing whether something is contrary to the Bill of Rights there is,

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28 State owned enterprises (SOEs) exist by virtue of the State-Owned Enterprises Act 1986. SOEs are publicly owed bodies accountable to shareholding ministers but, other than statutory social responsibility objectives, operate in the same manner as a private corporation with the objective of making profits.

however, a two stage process. The first is to determine whether the act is prima facie contrary to an applicable right. The second is to consider whether the breach is nonetheless saved by s5 of the Bill of Rights. Only if the second question is answered in the negative can invalidation result.

[16] Very few review applications have challenged public actions as being illegal simply for being contrary to the Bill of Rights. Perhaps the reason for this is that the broad language of the rights, combined with the potential for a s5 justification notwithstanding a prima facie breach, makes it difficult to predict with any certainty whether an act or decision would be in breach of the Bill of Rights. In such situations, litigants have generally framed their claims in terms of a more conventional piece of legislation and run the Bill of Rights as an alternative only. As a result, the courts have seldom been called upon to pronounce on whether individual public acts are illegal solely by virtue of breaching the Bill of Rights. That said, declaratory relief has occasionally been sought, especially where there is publicity value in a particular act or decision being declared to be contrary to the Bill of Rights.

[17] The application of the Bill of Rights to acts of the legislative and judicial branches of Government is more complex. There are two main approaches here. The first is that literally all acts performed by these branches are subject to the Bill of Rights. The second is that only procedural acts are so subject. Even if only the procedural acts of the Legislature are subject to the Bill of Rights, parliamentary privilege (both in statute and at common law) and principles of comity and justiciability mean that it would be difficult to challenge these procedures in court on the basis of the Bill of Rights.

[18] As regards the law making function, s4 of the Bill of Rights provides that no enactment shall be invalidated by reason only of inconsistency with the Bill of Rights.

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30 One example of where an unsuccessful application was made on this basis was Lawson v Housing New Zealand [1997] 2 NZLR 474 (HC) where the plaintiff argued that Housing New Zealand’s decision to terminate her tenancy of a state house was illegal as contrary to the s8 right to life in the Bill of Rights.

31 See for example Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218 where a policy was declared to be contrary to the Bill of Rights following an application under the Declaratory Judgements Act 1908.

32 The House of Representatives is clearly seen as part of the legislative branch of Government.

33 Art 1, Bill of Rights 1688 (Imp).
This means any breaches in this regard are non-justiciable (although the application of the Bill of Rights may be intended as a reminder to the Legislature to be self-policing in that regard). It also means that the Legislature retains its right to legislate in a manner that is inconsistent with the Bill of Rights. Normally, however, it would not do so. It would either come to the conclusion there was in fact no inconsistency or would justify any apparent inconsistency in terms of s5, which, as indicated above, allows limitations on rights as long as they are “demonstrably justifiable in a free and democratic society.”

[19] The extent to which s4 protects subordinate legislation as well as primary legislation remains unclear. Section 4, however, protects any “enactment”. Because s29 of the Interpretation Act 1999 defines enactment as including both Acts and regulations, it would appear that a regulation cannot be struck down as being inconsistent with the Bill of Rights. But that is not the end of the story. Section 6 requires all legislation to be interpreted consistently with the Bill of Rights where possible. This obviously includes the empowering provisions under which any regulation is made. Therefore, it is open to the courts to use the Bill of Rights to construe the empowering provision in such a way that the regulation is ultra vires, an approach the Court of Appeal took in Drew v Attorney-General. \(^{34}\) This can be seen as the indirect use of the Bill of Rights to strike down subordinate legislation. Subordinate legislation has, however, seldom been the subject of successful challenge on Bill of Rights grounds.

[20] Bylaws are, however, not subject to s4 of the Bill of Rights. Section 155(3) of the Local Government Act 2002 provides that “No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990, notwithstanding section 4 of that Act.” Thus, any bylaw inconsistent with the Bill of Rights will be automatically ultra vires the Local Government Act. It must not be forgotten, however, that inconsistency is not made out until after the s5 test has applied. Even

\(^{34}\) The Court reached this conclusion in Drew v Attorney-General [2002] 1 NZLR 58, 73 at para 68, Blanchard J for Richardson P, Keith, Blanchard and Tipping JJ said: “To the extent that it is necessary to refer to the Bill of Rights, the regulation is invalid because the empowering provision, read, just like any other section, in accordance with s 6 of the Bill of Rights, does not authorise the regulation. The Court merely gives s 45 a meaning that is consistent with the rights and freedoms contained in the Bill of Rights. In accordance with s 6, that meaning is to be preferred to any other meaning...s 4 is not reached.”
so, this development may have a significant impact on bylaws as increasingly local bodies legislate to address social problems.

[21] The importance of the debate as to whether the Bill of Rights has procedural or substantive effect comes through when considering the judicial branch. The procedural approach would confine the application of the Bill of Rights to procedural decisions taken by the courts, for example regulating the procedure of the court using contempt proceedings. The procedural approach was the view espoused by Blanchard J in *TVNZ v Newsmonitor Services Ltd*:\(^35\)

\[
\text{It may possibly be that s3 requires the Courts to conduct themselves in accordance with the NZBORA [Bill of Rights] in terms of their processes and procedures, but…not [in] the substance of their judgments and orders which flow out of those judgments.}
\]

[22] A substantive as against a procedural approach has the potential to produce a very different result. At its highest, it could mean that any decision made by the courts (and not only those involving statutory interpretation)\(^37\) must be in accordance with the Bill of Rights. The view of Elias J\(^38\) in *Lange v Atkinson* was that:

\[
\text{The application of the Act to the common law seems to me to follow from the language of s3 which refers to acts of the judicial branch of the Government of New Zealand.}\]

[23] A full-blown substantive approach would require common law that is in breach of the Bill of Rights to be changed. The obvious significance of this is that the Bill of Rights would have horizontal application (ie application as between private parties)\(^40\) as opposed to the more traditionally accepted vertical application (i.e.

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\(^{35}\) *Solicitor-General v Radio NZ* [1994] 1 NZLR 48 (Full Court of HC).

\(^{36}\) *TVNZ v Newsmonitor Services Ltd* [1994] 2 NZLR 91, 96 (HC). Blanchard J is now a judge of the newly constituted highest New Zealand Court, the Supreme Court, which, from 1 July 2004, replaced the Privy Council.

\(^{37}\) The Bill of Rights requirements for statutory interpretation are discussed in more detail below.

\(^{38}\) Now Chief Justice and a Supreme Court Judge.

\(^{39}\) *Lange v Atkinson* [1997] 2 NZLR 22, 32 (HC).

\(^{40}\) This may lead to an approach similar to that taken by the US Supreme Court in *Shelley v Kraemer* (1948) 334 U.S. 1 (SCt). In *Shelley* the plaintiff sought to enforce a racially restrictive covenant made between two private parties. Despite the fact that the common law principles used in interpreting the covenant were entirely neutral, the court refused to enforce it. The court held that the private covenant, standing alone, did not violate the Constitution. However, the act of issuing a judicial decision enforcing the covenant was held to constitute a state action that breached the right to equal protection to which the state was bound to give effect.
application between citizen and State).\textsuperscript{41} It should be remembered, however, that, even on this strong approach, the outcome will not necessarily be dramatic. This is because of the effect of s5 of the Bill of Rights.

[24] It is much more widely accepted, however, that the Bill of Rights applies to the common law as a tool of influence rather than an injunction.\textsuperscript{42} In this sense, the Bill of Rights operates as a guide to considerations of high policy, which will always be relevant in the development of the common law. The Bill of Rights may thus be said to be potentially relevant to all common law litigants, even if the substantive approach is not accepted. This is similar to the approach that has been adopted by the Supreme Court of Canada.\textsuperscript{43}

[25] An example of judges’ use of the Bill of Rights in the development of the common law arises in the recent decision of \textit{Hosking v Runting}\.\textsuperscript{44} In that case the Court of Appeal was asked to pronounce on whether a tort of privacy existed in New Zealand law. The question in the case was whether the publication of photographs of a media celebrity’s 18 month old twins taken in the street could be prevented. The Court was unanimous that publication of the photographs could not be prevented but split on the question of whether there was a tort of privacy, the majority opting for a limited tort of privacy, subject to a legitimate public concern defence.

[26] Gault P and Blanchard J,\textsuperscript{45} in a judgment delivered by Gault P, were not prepared to infer a legislative rejection of a tort of privacy from the non-inclusion in the Bill of Rights of the equivalent of Art 17 of the ICCPR, which provides for freedom from arbitrary or unlawful interference with privacy, family, home or correspondence and from unlawful attacks on honour and reputation. They considered international and New Zealand developments in the field of privacy, as well as Art 17 of the ICCPR, in coming to their conclusion that a limited tort of privacy existed.

\textsuperscript{41} Tipping J, now a Supreme Court Judge, in \textit{Hosking v Runting} (2004) 7 HRNZ 301 at para 229 said: “The Bill of Rights is designed to operate as between citizen and state. Nevertheless it will often be appropriate for the values which are recognised in that context to inform the development of the common law in its function of regulating relationships between citizen and citizen. The judicial branch of government must give appropriate weight to the rights affirmed in the Bill of Rights when undertaking that exercise.”

\textsuperscript{42} This is the view espoused in Rishworths et al \textit{The New Zealand Bill of Rights}, 100-102.

\textsuperscript{43} \textit{Hill v Church of Scientology} [1995] 2 SCR 1130, 1169-1171, Cory J.

\textsuperscript{44} \textit{Hosking v Runting} (2004) 7 HRNZ 301.
They considered that an appropriate balance could be struck between freedom of expression and privacy through the defence of legitimate public concern.

[27] A similar approach was taken by the other Judge favouring a limited tort of privacy, Tipping J. He considered that in the privacy field it is necessary to reconcile competing values. There is the value to society of the right to freedom of expression recognised in s14 of the Bill of Rights as well as the values involved in the broad concept of privacy recognised in New Zealand’s international commitments and also implied from the Bill of Rights, Tipping J seeing privacy as implied in part from the s21 right against unreasonable search and seizure. He went on to apply s5 of the Bill of Rights and concluded that a limited tort of privacy would meet the test in that section.

[28] Keith J and Anderson J, in separate judgments, considered that there should be no free-standing tort of privacy, placing significant emphasis on the Bill of Rights (and in particular the right to freedom of expression) in coming to that conclusion. Anderson J responded to the suggestion that the tort of privacy met the s5 test by noting that it was not possible to equate the value of privacy with the right to freedom of expression guaranteed by the Bill of Rights. He said:

> The small residue of the concepts with which cases such as the present are concerned [referring to privacy] has not been a right at all but an aspect of a value. An analysis which treats that value as if it were a right and the s14 NZBORA [Bill of Rights] right as if it were a value, or treats both as if they were only values when one is more than that is, I think, erroneous.

[29] If cases such as *Hosking* and *Lange* do not go as far as directly applying the Bill of Rights to the common law, they certainly make it clear that the Bill of Rights is an important influence on the common law. How strong that influence is has varied from case to case. It is fair though to conclude that a general sensitivity to rights,

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45 Both now Supreme Court Judges.
46 See *Hosking*, paras 224-226, 229-237 and 251-254.
47 Now a Supreme Court Judge.
48 Now President of the Court of Appeal.
49 *Hosking* paras 178-184 and paras 208-222 (Keith J) paras 265, 267, 269 and 271 (Anderson J).
50 *Hosking*, para 265, Anderson J.
51 The Bill of Rights is often used as an auxiliary reason to take a particular position rather than the main reason.
whether from the Bill of Rights or from other sources, has pervaded litigation in
general.

[30] This brings me to one of the other indirect effects of the Bill of Rights on New
Zealand law, being the greater internationalisation of precedent. This has occurred in
two main ways. First, the very general wording of the rights as set out in the Bill of
Rights has forced both counsel and the courts to look further afield for interpretative
assistance. Canadian, United States, European Union and South African case law
have all featured, as has jurisprudence from Ireland and India. Secondly, international
law jurisprudence, in the form of interpretations of the ICCPR and other international
instruments is now frequently cited. This takes the form of decisions of the United
Nations Human Rights Committee and decisions of other supra-national bodies
interpreting provisions similar to those contained in the ICCPR, for example decisions
of the European Court of Human Rights interpreting the European Convention on
Human Rights. There has long been a presumption that legislation is to be interpreted
consistently with treaties, but it seems fair to say that the statutory reference to the
ICCPR in the Bill of Rights has strengthened that presumption where human rights
are at issue and, as can be seen from the judgments in Hoskings, has brought that
dialogue also into discussions of the common law.

[31] Another effect of the Bill of Rights has been the encouragement of more
argument from first principles. In New Zealand, while policy debate has always
informed legal argument, it has usually in the past been confined to a brief evaluation
of potential consequences. Now reference to political philosophy has become more
acceptable and that can be attributed in part to the new dialogue arising from the Bill
of Rights. Expositions of principle from Hobbes, Bentham, and Kant, for
example, have all featured in recent Bill of Rights cases.

52 For a brief discussion of this approach see Forsyth and Todd, “The Rule of Law, Human Rights and
53 New Zealand Air Line Pilots’ Association Inc v Attorney-General [1997] 3 NZLR 269 Keith J for the
court.
54 See for example: R v Pora [2001] 2 NZLR 37, 56, para 78 Keith J (CA); R v Poumako [2000] 2
NZLR 695, para 75 Thomas J (CA).
55 See for example: Quilter v Attorney-General [1998] 1 NZLR 523, 558 Keith J (CA);
56 Re Victim X [2003] 3 NZLR 220, 241, para 51 Hammond J (HC). Hammond J is now a Judge of the
Court of Appeal.
Section 3(b)

[32] The other direct route of application of the Bill of Rights is s3(b). Essentially, under this paragraph an act must cumulatively meet the criteria of being: (i) an act done by any person or body (ii) in the performance of any public function, power, or duty (iii) conferred or imposed on that person or body by or pursuant to law.

[33] In terms of the second requirement, analogies can be drawn with what makes a body 'public' for the purposes of public law review. This approach was explicitly recognised by Lord Woolf in the English Court of Appeal decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*, in developing a list of factors indicating whether a body (as distinct form an act) is public for the purposes of the application of the Human Rights Act 1998 (UK). In terms of the third requirement, there are two major issues: (i) how directly a public function or duty needs be imposed by law (proximity) and (ii) what qualifies as “law”. For example one question is whether a contractual obligation can count as law.

[34] There is very little case law on either of these criteria. Suffice to say that, in terms of the second criterion, a requirement need not be explicitly included in a statute for it to be conferred or imposed by law, and, in terms of the third criterion, the case law is inconclusive, although a contract alone is unlikely to be sufficient to

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57 For a list of such factors see for example: *Electoral Commission v Cameron* [1997] 2 NZLR 421; *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815. The factors in *Datafin*, as summarised by De Smith, Woolf and Jowell, in *Judicial Review of Administrative Actions* (5th ed 1995) were: "(i) The “but for” test – whether, but for the existence of a non-statutory body, the government would itself almost inevitably have intervened to regulate the activity in question. (ii) Whether the government has acquiesced or encouraged the activities of the body under challenge by providing “underpinning for its work”, has woven the body into the fabric of public regulation or that body was established “under the authority of the government”… The mere fact that existence of the body is explicitly or implicitly recognised in legislation is insufficient. (iii) Whether the body was exercising extensive or monopolistic powers, for instance by effectively regulating entry to a trade, profession or sport…(iv) Whether the aggrieved person has consensually submitted to be bound by the decision-maker…"

58 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 69 Woolf LJ.

59 Forsyth H, Understanding the horizontal effect of the New Zealand Bill of Rights Act 1990: a dissertation submitted in partial fulfilment of the requirements of the degree of Bachelor of Laws with Honours at the University of Otago, Dunedin, New Zealand (2002) 64.

60 *Lawson v Housing New Zealand* [1997] 2 NZLR 474, 492 (HC).
meet it.\textsuperscript{61} It should also be noted that the s3(b) approach carries the implication that the acts of quasi-governmental bodies might be divided into acts which are sufficiently public and prescribed by law to be caught by s3(b) and acts that do not meet these criteria (for example, private commercial arrangements) which will not be caught.

**Statutory interpretation and ss4, 5 and 6 of the Bill of Rights**

[35] As touched on above, s6 has the effect of requiring legislation to be interpreted in a Bill of Rights consistent manner where possible. Section 6 applies even to legislation passed before the Bill of Rights. This was confirmed by the Court of Appeal in *Flickinger v Crown Colony of Hong Kong* where the Court noted that, in order to give the full measure of the fundamental rights and freedoms, settled statutory meanings might have to be reconsidered in light of the Bill of Rights.\textsuperscript{62}

[36] In applying s6 the first issue is the interpretation of the rights themselves. The Bill of Rights is expressed in general terms.\textsuperscript{63} This both admits and requires a greater freedom for judges in their interpretative role, something that not all are comfortable with. A generally worded Bill of Rights, however, allows for easy adaptation to particular circumstances or changes in society. This flexibility is intended to facilitate the best possible protection of fundamental rights,\textsuperscript{64} although the cynical have argued

\textsuperscript{61} In *Federated Farmers v New Zealand Post* (1992) 3 NZBRR 339, 394-395 the High Court considered the “conferred by law” requirement and observed that: “The genesis is found within the statutory assembly of the State-Owned Enterprises Act 1986, Companies Act 1955, and the Postal Services Act 1987, plus on-flow of private contracts. NZP activity does not have its genesis in whim, or voluntary decision.” This gives some recognition to contract. In *M v Palmerston North Boys High School* [1997] 2 NZLR 60, 71 (HC) Goddard J relied on the statutory scheme in determining the contract for the provision of boarding to be essentially a private arrangement and therefore outside the Bill of Rights, rather than the fact that the arrangement was governed by a private law contract.

\textsuperscript{62} *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440-441 Cooke P for the court.

\textsuperscript{63} One of the interesting issues that is likely to arise more is the question of which rights require positive action by the State and the extent to which any failure to take appropriate positive action is justiciable. See eg *Dunmore v Ontario (Attorney-General)* (2001) 207 DLR (4th) 193 (SCC).

\textsuperscript{64} Grant Huscroft in “Rights, Bill of Rights, and the Role of Courts and Legislatures” in G Huscroft and P Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Oxford, 2002) at 5 says it is difficult to argue against an expansive interpretation of Bill of Rights rights for this reason.
that general wording is chosen in such circumstances to secure agreement. Generally worded rights can cover a wide spectrum of political views.\footnote{Randal N Graham “A Unified Theory of Statutory Interpretation” (2002) 23 Statute L Rev 91, 122-126. James Allan has argued that this makes such language highly inappropriate for judges to interpret. See for example James Allan, “Paying for the Comfort of Dogma” (2003) 25 Sydney L Rev 63. But, even if his view is correct in theory, the reality remains that Parliament has enacted the Bill of Rights in this form, and the courts must give meaning to the rights as best they can.}

[37] Once the rights themselves have been interpreted, s6 requires a Bill of Rights consistent interpretation of other legislation. Views on the importance of s6 differ. Cooke P has described s6 as establishing a rule of interpretation ‘comparable in importance to – perhaps even of greater importance than – s5(j)’\footnote{This section (now repealed) stated: “Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.” The modern equivalent in the Interpretation Act 1999 is the pithy s5(1): “The meaning of an enactment must be ascertained from its text and in the light of its purpose.”} of the Acts Interpretation Act 1924.\footnote{Ministry of Transport v Noort [1992] 3 NZLR 260 at 272 (CA).} By contrast, Gault J has opined that sections 4, 5 and 6 “probably go little further than the common law presumption of statutory interpretation that where possible statutes are not to be interpreted as abrogating common law rights of citizens.”\footnote{Simpson v Attorney-General, at 712 Gault J (CA). Rishworth considers that the common law presumptions remained somewhat latent until the 1980s and 1990s but, with the explosion of human rights consciousness, even without s6, the Bill of Rights would have had the same effect - see Rishworth et al, The New Zealand Bill of Rights (2003) 132-3. He suggests, however, at 124 that a major contribution of the Bill of Rights has been to elevate unwritten norms of the constitution into positive law.} In a sense, this divergence of views reflects the divergence in views on the influence of the Bill of Rights as a whole. The perceived difference in importance can be accounted for by the fact that s6 was introduced at a time where the human rights movement was gaining rapid ascendancy and therefore arguably the various common law presumptions relating to human rights would have been applied in any event to greater effect than in the past.

[38] Whichever view one subscribes to, an important legal issue is the strength of the s6 effect. There has been debate since the beginning of the Bill of Rights jurisprudence over how ambiguous words must be for the s6 injunction to apply. The courts have taken the position that there must be another meaning that is properly
open before s6 can require that meaning to be preferred.69 This qualification on the scope of s6 was explained by the Court of Appeal in the case of Quilter v Attorney-General. In Quilter two women applied for a marriage license and were refused by the Registrar, as by his interpretation they could not be “husband” and “wife” under the Marriage Act 1955. Ms Quilter sought review of the decision and failed in the High Court. In the Court of Appeal she argued that s6 required the word “marriage” to be read consistently with the s19 freedom from discrimination (which protects against discrimination on the grounds of both gender and sexual orientation) so as to include same-sex marriages.

Although the Court was divided over whether the Marriage Act was discriminatory as such, it was unanimous that s6 could not be used to stretch the meaning of marriage as far as was contended. Gault J wrote:70

> The Marriage Act is clear and to give it such different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament. That is particularly so in an area where the law reflects social values and policy.

Tipping J explained that the meaning contended for could not be a “proper” meaning that could fall to be considered under s6:71

> That question, which arises under s 6 of the Bill of Rights, is whether the Marriage Act can properly be given the meaning for which the appellants contend. They assert that such meaning is necessary to achieve consistency with the right to freedom from discrimination provided for in s 19. Only if such meaning can properly be given may it be preferred to any other meaning. By “properly” I mean by a legitimate process of construction.

Inevitably what is “proper” could be somewhat subjective. However, what can be said is that when a possible meaning that is consistent with the Bill of Rights is open, and that meaning is not contrary to the apparent purpose of the legislation, s6 will be more readily applied. The difficulty comes where, although there is a genuine textual ambiguity, the purpose is strong and a Bill of Rights approach might be taken as defeating the purpose of the statutory words.

69 See the discussion of the position in the UK by Danny Nicol, “Statutory interpretation and human rights after Anderson” Public Law (Summer 2004) at 274.
[42] There have been cases in which s6 has arguably had a particularly notable effect. Perhaps the strongest position on s6 (albeit in obiter comments) was that taken by the Court of Appeal in *R v Poumako*. Mr Poumako was convicted of murder committed in the context of home invasion. A mandatory non-parole period of 13 years was imposed. As a result of the crime of which Mr Poumako was convicted (which had caused considerable public outrage) Parliament had acted swiftly to increase sentences for crimes involving home invasion. It seemed fairly clear that at least some retrospective effect was intended for that change.

[43] The majority decided that the minimum non-parole period imposed by the judge would have been appropriate under the pre-amendment regime. Nonetheless, they did make some comments on the retrospectivity issue. They identified two interpretative choices open to them, the latter of which would have deprived the enactment of some, but not all, of its retrospective effect. In writing for the majority Gault J opined that, while the court could not deprive the amendment of all retrospective effect, the more restrictive interpretation should be adopted.

These possible constructions are to be considered by reference to s6 of the Bill of Rights Act. The meaning to be preferred is that which is consistent (or more consistent) with the rights and freedoms in the Bill of Rights. It is not a matter of what the legislature (or an individual member) might have intended. The direction is that wherever a meaning consistent with the Bill of Rights can be given, it is to be preferred. The legislature’s intention in this regard is clear.

[44] The position taken by the majority, therefore, was that s6 operates as a statutory direction. If a Bill of Rights consistent meaning is available, that is deemed to be what the legislation means, regardless of indications to the contrary. This will, however, be subject to the role of s7 of the Bill of Rights (discussed below) which requires the Attorney-General to report to Parliament on whether proposed Bills are Bill of Rights compliant. If a Parliament is apprised that a Bill is inconsistent with the Bill of Rights following a s7 report but enacts that Bill anyway, it is likely to be inferred that the Parliament positively intended that the right should be overridden.

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72 *R v Poumako* [2000] 2 NZLR 695.
73 Thomas J was unable to subscribe to this interpretation and would have declared the legislation inconsistent with the Bill of Rights.
74 *R v Poumako*, 702, para 37, Gault J for the majority.
Thus far, however, s7 has not been directly at issue in the cases and has received little judicial comment.

[45] The decision in *R v Pora*, another retrospectivity case on the same legislation considered in *Poumako*, also illustrates the potential strength of the s6 requirement. This case also concerned the retrospective application of sentencing legislation. Mr Pora had been convicted of a murder committed in 1992. His conviction was overturned on appeal but he was convicted again on his retrial. The sentencing judge considered that he had no choice but to impose a mandatory minimum non-parole period of 13 years, given the crime had involved home invasion.

[46] A bench of seven was confronted with an apparent contradiction between s4(2) of the Criminal Justice Act 1985, which provided that, notwithstanding any rule of law to the contrary, there was no power to order a penalty that could not be made against the offender at the time of the offence, and s2(4) of the Criminal Justice Amendment Act (No 2) 1999 which stated that the new s80(2A) (providing for minimum periods of imprisonment for home invasion murders) applied even if the offence had been committed before the date on which the amendment came into force.

[47] The Court allowed the prisoner’s appeal, but split in its reasoning. Gault, Keith and McGrath JJ allowed the appeal on the basis that, where there was a choice between limited and expansive readings of the retrospective effect, s6 of the Bill of Rights created a presumption that a retrospective statute did not have more retrospective effect than necessary to achieve its purpose. Taking the most limited reading, the judges held that the statute did not apply retrospectively to Mr Pora as his crime had been committed at a time when there was no power to order minimum non-parole periods.

[48] Elias CJ and Tipping J took a more robust approach, resolving the conflict by concluding that s4(2) of the Criminal Justice Act was the dominant provision, and that there could be no retrospective effect. They wrote:

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75 *R v Pora* [2001] 2 NZLR 37 (CA).
76 *R v Pora*, paras 50-52, Elias CJ and Tipping J. Thomas J wrote separately but largely supported the reasoning of Elias CJ and Tipping J.
Neither the fact that s 2(4) is later legislation or that it is more specific than s 4 is determinative of the meaning of the legislation or the question as to which of the two irreconcilable provisions is to prevail. These Judge-made rules of thumb do not displace the statutory directions contained in s 6 of the New Zealand Bill of Rights Act and s 7 of the Interpretation Act. It is not a correct approach to assume that pro tanto implied repeal of s 4 is to be preferred to lack of efficacy for s 2(4). It is improbable where human rights are affected that Parliament would do by a side wind what it has not done explicitly. The legislation, properly construed, establishes that s 4 prevails.

…It implements Parliament's own requirement in s 6 of the New Zealand Bill of Rights Act that Parliament must speak clearly if it wishes to trench upon fundamental rights.

The significance of this was that the s6 approach, supported by general human rights norms, allowed a general ban on retrospectivity to override a specific, directed section that was passed later in time. Effectively, s6 displaced the traditional approaches to statutory interpretation. The judges then went on to equate s6 with introducing a general principle of legality into New Zealand law, whereby anything entrenching on fundamental rights must be sufficiently certain for the courts to give effect to it.

By s 6 the New Zealand Parliament has adopted a general principle of legality. … Such principle was applied as a principle of the common law before the United Kingdom Human Rights Act 1998 …and in R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115 (per Lord Steyn at p 130 and Lord Hoffmann at p 131). In the latter case Lord Hoffmann acknowledged the “importance of the principle of legality in a constitution which, like ours, acknowledges the sovereignty of Parliament”:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

77 R v Pora, para 53, Elias CJ and Tipping J.
[50] On one view, there was nothing radical about what was decided in *Pora*. It was simply a case of conflicting primary legislation, in that both s4(2) of the Criminal Justice Act and s7 of the Interpretation Act78 clearly prescribed the retrospectivity provided for by s2(4) of the Criminal Justice Amendment Act. The common law presumptions would also have operated arguably in a similar manner.79 Some commentators, however, consider that there could be major implications for the concept of Parliamentary sovereignty if this approach is taken too far.80

[51] There has also been much debate over how s6 interacts with ss4 and 5.81 Much of this debate has now been superseded by the Court of Appeal’s decision in *Moonen v Film and Literature Board of Review*.82 Tipping J, writing for a court of five, laid down a step by step process for the application of the Bill of Rights to questions of statutory interpretation. In terms of ss5 and 6, he said:83

[17] Although other approaches will probably lead to the same result, those concerned with the necessary analysis and application of ss 4, 5 and 6 of the Bill of Rights may in practice find the following approach helpful when it is said that the provisions of another Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights. After determining the scope of the relevant right or freedom, the first step is to identify the different interpretations of the words of the other Act which are properly open. If only one meaning is properly open that meaning must be adopted. If more than one meaning is available, the second step is to identify the meaning which constitutes the least possible limitation on the right or freedom in question. It is that meaning which s 6 of the Bill of Rights, aided by s 5, requires the Court to adopt. Having adopted the appropriate meaning, the third step is to identify the extent, if any, to which that meaning limits the relevant right or freedom.

[52] A significant feature of this pronouncement is that the meaning which constitutes the least possible limitation on the right must be chosen. The words of s6 only require a Bill of Rights consistent interpretation, from which it follows on one view of the language, that s6 precludes only an inconsistent interpretation. This may become an issue where there are several consistent interpretations, but where some

78 Section 7 of the Interpretation Act 1999 states that “An enactment does not have retrospective effect.”
81 See the different approaches produced by Cooke P and Richardson J in *Noort*.
82 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
83 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para 17.
can be characterised as more rights-limiting than others. The answer lies in s5, which allows only such limits on a right as can be demonstrably justified. Tipping J said the following on s5:

[18] The fourth step is to consider whether the extent of any such limitation, as found, can be demonstrably justified in a free and democratic society in terms of s5. If the limitation cannot be so justified, there is an inconsistency with the Bill of Rights; but, by dint of s4, the inconsistent statutory provision nevertheless stands and must be given effect. In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved. Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.84

[53] The combination of ss5 and 6 requires an interpretation resulting in the least possible limitation on the right necessary to achieve the objective, having regarding the importance and difficulty of that objective. This may of course, not necessarily be the least rights-limiting approach. In cases of rights that are not normally subject to limitations,85 the courts will, however, no doubt be more prepared to take a strong approach in using ss 5 and 6 to achieve a rights-consistent outcome.

[54] Section 4 prevents a court from invalidating any Act on the basis that it is inconsistent with the Bill of Rights. So what happens when a court goes through the ss5 and 6 processes and finds an Act inconsistent? This question was partially answered by the Court of Appeal in Moonen v Film and Literature Board of Review where Tipping J observed that the court may be required to declare there to be an

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84 *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9 at para 18.
85 The right against retrospectively, like the right to a fair trial, is generally considered to be an absolute right.
inconsistency even though required to give effect to the inconsistent statute in accordance with s4. He said:  

[19]  The fifth and final step which arises after the Court has made the necessary determination under s 5, is for the Court to indicate whether the limitation is or is not justified. … If that limitation is not justified, there is an inconsistency with s 5 and the Court may declare this to be so, albeit bound to give effect to the limitation in terms of s 4.

[20]  It might be said that the potentially difficult and detailed process involved under s 5 is somewhat academic when the provision in question is bound to be applied according to its tenor by dint of s 4. Section 5 would have had more than persuasive effect if the Court had been given the power, as in Canada, to declare legislation invalid. That was deliberately not done in New Zealand and the late introduction of s 4 into the Bill of Rights was not accompanied by any express recognition of the remaining point of s 5. That section was, however, retained and should be regarded as serving some useful purpose, both in the present statutory context and in its other potential applications. That purpose necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.

[55]  The suggested declaration has become known as a declaration of inconsistency or incompatibility. Such a declaration has yet to be formally made. The key point to note is that these declarations have no legal effect – any effect will be political or extra-legal. It has been argued that the availability of declarations will have a profound effect on the constitutional role and functions of the judiciary, adding to the political role of the courts and involving them as a legislative assistant. The fact that no declaration has yet been issued makes this thesis impossible to test. It has also been argued that the making of such declarations is an inappropriate judicial function as it challenges Parliament’s exclusive prerogative to make law. However, with the

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86 [2000] 2 NZLR 9,17, paras 19-20, Tipping J for the Court.
87 Its theoretical origins were somewhat earlier. Professor Brookfield first suggested Bill of Rights declarations in his article F.M. Brookfield “Constitutional Law” [1992] NZ Rec LR 231, 239.
88 However, in R v Poumako [2000] 2 NZLR 695, 720, paras 106-107, in his dissent, Thomas J stated that he would make a declaration of inconsistency.
90 See for example: James Allan “Moonen and McSense” (2002) NZLJ 142.
introduction of a statutory power for the Human Rights Review Tribunal to make such declarations where there is an inconsistency with the HRA, it seems Parliament at least has not seen declarations per se as inappropriate.\(^\text{91}\)

\(^{56}\) It also must be recognised that the process of statutory interpretation itself will result in the courts having to decide that an Act is inconsistent with the Bill of Rights. This is on the basis that a provision fails the s5 test and a Bill of Rights consistent interpretation under s6 cannot be found. The judgment will of necessity state that there is this inconsistency, while being required, under s4, to apply the statute anyway. It is difficult to see how this challenges Parliament’s sovereignty or politicises the Court’s role any more than any other exercise in statutory interpretation. The making of a declaration may, however, add more formality and therefore be a departure from the normal role of the courts.\(^\text{92}\)

**The influence of s7 of the Bill of Rights**

\(^{57}\) Section 7 of the Bill of Rights requires the Attorney-General to report to the House whenever a Bill appears to be inconsistent with the Bill of Rights. The failure of the Attorney-General to report an inconsistency to the House will not, however, impugn the validity of an Act. It is not a manner and form requirement.\(^\text{93}\) The act of making a s7 declaration provides a springboard for discussion of whether legislation is important enough to justify any incursion on rights. Section 7, therefore, exists to facilitate informed legislative activity by Parliament. As alluded to above, it may also assist in the interpretation of legislation passed in spite of an adverse s7 report.

\(^{58}\) An exacting process to determine the existence of such inconsistencies was laid out in a 1991 memorandum by the then Attorney-General. It is carried out largely by officials from the Ministry of Justice and the Crown Law Office, with the latter advising primarily on Bills drafted by the former to avoid any appearance of conflict.

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\(^{91}\) Section 92J of the HRA empowers the Human Rights Review Tribunal to declare an enactment inconsistent with s19 of the Bill of Rights (that section being freedom from discrimination).

\(^{92}\) Professor Jowell QC in “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] Public Law 671 argues that the ability of courts in the UK to make declarations heralds a move to a model of democracy based upon limited government where courts are charged with declaring the rights of individuals upon which even a democratically elected parliament should not encroach.

\(^{93}\) *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, 457 (HC).
of interest.\textsuperscript{94} While the process has not traditionally been carried out in public, for the past few years the advice provided to the Attorney-General on most Bills has been made publicly available over the Internet.\textsuperscript{95} Furthermore, Standing Orders now require the Attorney-General to provide the s7 advice by way of a paper which is published by the House.\textsuperscript{96}

[59] A shortcoming of the current process is that reports are only required on inconsistencies which exist at the time of a Bill’s first reading, and there is no requirement for the Attorney-General actively to monitor a Bill for any inconsistencies which develop as a result of amendments during its passage. This may change if a recommendation of the Clerk of the House of Representatives is actioned. The Clerk has proposed that Standing Orders be amended to include a requirement for Select Committees to report on whether provisions in Bills appear to be inconsistent with the Bill of Rights.\textsuperscript{97}

[60] It appears that the Attorney-General invariably follows the advice of officials when making s7 reports. The consequence is that the Attorney-General will frequently draw to the House’s attention Bill of Rights concerns with Government Bills. In many cases, potential Bill of Rights conflicts will, however, be dealt with even before a Bill reaches the House. The Cabinet Office Manual requires Ministers proposing legislation to declare whether or not it is complaint with the Bill of Rights, HRA, Privacy Act 1993 as well as New Zealand’s international obligations.\textsuperscript{98} As any potential conflict between a piece of proposed legislation and the Bill of Rights Act will likely also conflict with New Zealand’s international obligations under the ICCPR if one is triggered so too will the other.\textsuperscript{99}

\textsuperscript{94} See Attorney-General “Memorandum: Monitoring Bills for Compliance with the New Zealand Bill of Rights Act 1990” reproduced in Mai Chen and Sir Geoffrey Palmer Public Law in New Zealand (OUP, Auckland, 1993), 556 and appended to Paul Fitzgerald “Section 7 of the New Zealand Bill of Rights Act: A very practical power or a well-intentioned nonsense” (1992) 22 VUWLR 135, 156-158.
\textsuperscript{95} See \url{http://www.justice.govt.nz/bill-of-rights/bill-list.html} (Last Accessed 30 May 2004).
\textsuperscript{98} New Zealand Cabinet Office Cabinet Office Manual (2001 rev), para 5.35.
\textsuperscript{99} This was noted by Sir Kenneth Keith in “‘Concerning Change’: The Adoption and Implementation of the New Zealand Bill of Rights Act 1990” (2000) 31 VUWLR 721, 732.
The House is free, however, to ignore the Attorney-General’s advice on a Bill and legislate anyway. In some instances, members will conclude on the basis of other advice that, despite an adverse s7 report, there is no breach of the Bill of Rights. An example of this was the Transport Safety Bill 1991 which was to introduce random breath testing in an effort to curb drunk driving. The then Attorney-General reported to the House that the Bill posed an unjustified limit on the right to be free from arbitrary detention and unreasonable search and seizure. The Select Committee examining the Bill received contrary advice from the President of the Legislation Advisory Committee and concluded that there was no such breach.

There has been some criticism at the frequency with which Attorneys-General have made s7 reports, and of the fact that reports are made in “borderline cases” where there is a good argument that any breaches could be considered as justified. Others argue that s7 reports should be required with regard to all legislation, including legislation thought to be consistent.

Bill of Rights compensation

One of the interesting features of the Bill of Rights is the absence of a remedies clause and therefore one of the more controversial developments was the decision to allow monetary compensation for a breach of the Bill of Rights. In Baigent’s case the police held a search warrant for the address occupied by Mrs Baigent (thinking that it was the house of a suspected drug dealer). Upon arrival they were met by the plaintiff’s son who contacted his sister, a Wellington barrister. Despite having ascertained that they were at the wrong home, the police allegedly proceeded to conduct a search anyway. The plaintiff sued for damages on a number of grounds, including a then novel claim of a breach of the right to be free from unreasonable search and seizure under s21 of the Bill of Rights. This claim and

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100 Hon Paul East (1991) 521 NZPD 6367-6368. This was on the basis that there was not sufficient evidence that random breath testing would add to road safety over and above the random stopping measures already in place. The least rights limiting approach should therefore be taken.
103 This was born out of the case of Simpson v Attorney-General [1994] 3 NZLR 667. It is generally called Baigent’s case as that was the name of the victim. She died before trial and her executors carried on the proceedings.
others were struck out by the High Court on the grounds that such claims were defeated by statutory immunities. On appeal, the Bill of Rights cause of action (together with two other causes of action) were reinstated.

[64] The significance of the case was twofold. First, the Bill of Rights contains no remedies clause and, on one interpretation, no new remedies were intended, although there is material to support an alternative interpretation. I pause here to note that there was no statutory mandate for the exclusion of evidence following Bill of Right breaches either, but the use of this criminal remedy has escaped much of the criticism levelled against Baigent compensation.

[65] Second, in order to give “full measure” to the rights protected under the Bill of Rights, the Court in Baigent’s case formulated the action in such a way as to avoid a particular immunity from tortious actions which the Crown would otherwise have had. In essence, the majority’s reasoning was that, because the Bill of Right’s action was neither tortious nor vicarious in nature but was instead a direct “public law action” against the State, the Crown’s statutory protection from vicarious tortious liability where its agents acted in the execution of a judicial process (i.e. a search warrant) would not apply.

[66] Bill of Rights damages have been successfully sought for arbitrary detention, breach of the right to a fair trial and there have been claims for breach of the right to natural justice and breach of the right to adequate facilities to prepare a defence. Recent litigation over Bill of Rights compensation has focussed on the measure of damages. For example, there is the question of whether consequential

104 In the second reading of the Bill, 14 August 1990, the Rt Hon Geoffrey Palmer stated “Sixth, the Bill creates no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue.”
105 Simpson v Attorney-General, 677 where Cooke P said: “The [explanatory] note includes ‘Action that violates those rights and freedoms will be unlawful. The Courts might enforce those rights in different ways in different contexts.’”
106 R v Kirifi [1992] 2 NZLR 8, 12, Cooke P for the court.
107 This is probably because the exclusion of evidence was already available at common law and the new exclusion rule could be seen as merely an extension of that.
110 Brown v Attorney-General [2003] 3 NZLR 335 (HC) (currently under appeal in the Court of Appeal). In the High Court the exceptional nature of the remedy was stressed as was the position that breach of the requirements for a fair trial are normally met by appeal rights.
economic loss is included. Litigation has also focussed on whether New Zealand’s accident compensation regime is a bar to compensatory damages in Bill of Rights claims. Finally, in assessing the impact of the creation of Baigent’s case, it should be noted that many cases claiming Bill of Rights compensation have settled before trial.

[67] The advent of Bill of Rights damages claims has undoubtedly been one of the most jurisprudentially significant developments under the Bill of Rights. Unlike many other developments, it is not one that would likely have occurred as a result of a general increase in the profile of human rights. I note too that, despite the initial controversy surrounding its birth, Bill of Rights compensation appears to be here to stay.

Operation of the Bill of Rights in the criminal context

[68] The next section of this paper examines the operation of the Bill of Rights in selected areas in the criminal context in order to assess its impact in that field. As will be seen, the area where the Bill of Rights has had the most impact is on the rules relating to the exclusion of evidence. In other areas the Bill of Rights has had little obvious impact, given that the rights involved are covered under other legislation or under the common law. Even where this is the case, however, arguably developments of the law in those areas owe their genesis (or at least the timing of their introduction) to the Bill of Rights. The Bill of Rights has also changed the dialogue in the area of criminal procedure. Instead of relying on the more generalised concept of a fair

111 Sugrue v Attorney-General [2004] 1 NZLR 207 – the High Court (Chisholm J) allowed a consequential economic loss measurement of Bill of Rights damages. The High Court was reversed on appeal, but on different grounds.

112 New Zealand’s system of no fault compensation for personal injuries that largely debars civil claims for damages for such injuries.

113 In Wilding v Attorney-General [2003] 3 NZLR 787 (CA) the Court of Appeal decided that a statutory bar to “damages” arising directly or indirectly out of personal injury did apply to Bill of Rights compensation, despite its distinctive character.

114 In “Crown Liability and Judicial Immunity: A Response to Baigent’s Case and Harvey v Derrick” NZLC R37, the Law Commission recommended that there be no legislative interference. None has occurred.

115 As Sir Ivor Richardson remarked recently in his address to the Australian Federal and Supreme Court Judges’ Conference in January 2004, the fact that most of the early Bill of Rights cases were in the criminal field meant that the Bill of Rights came to be perceived by many as a rogues’ charter rather than a balanced protection of our liberties reflected through private law and public law as well as crime.
the more specific Bill of Rights rights are instead invoked. This is in contrast to the position in Australia. In a recent address Spigelman CJ spoke of a:

fundamental principle of administration of justice, the principle of a fair trial… I use the word principle deliberately. In Australia we do not have, in the form of a Bill of Rights or any equivalent document, a formal recognition of a right to a fair trial. A principle of a fair trial in our system leads me to doubt whether, at least in this respect, the adoption of a Bill of Rights’ type provision containing such an express undertaking would lead to any substantial difference in the actual operation of our legal system…. In Australian jurisprudence, the principle of a fair trial is based on the inherent power of a court to control its own processes, particularly, on its power to prevent abuse of its processes. This is quite different in its origins to foundation of such a principle in a Bill of Rights or other such overriding code provision.

Search and seizure

[69] This is dealt with in s21 of the Bill of Rights which prohibits unreasonable search and seizure. This is considerably different from the pre-Bill of Rights position, where the validity of searches was determined almost exclusively by reference to whether they were authorised by a statutory or common law power. The starting point was the Entick v Carrington position that state officers had no right to commit a trespass (either to person or property) unless they had positive lawful authority to do so. The consequence of this was that legislative authority was required for criminal investigations which amounted to trespassory interference with persons or property.

[70] After the passage of the Bill of Rights, the New Zealand courts have consistently, since R v Jefferies, recognised that illegality and unreasonableness are not synonymous. As the Court of Appeal stated in R v Grayson and Taylor [1997] 1 NZLR 399, 407:

Illegality is not the touchstone of unreasonableness. In terms of s 21 what is unlawful is not necessarily unreasonable. The lawfulness or unlawfulness of a search will always be highly relevant but will not be determinative either way.

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118 (1765) 19 St Tr 1029; 95 ER 807 (KB)
119 Grant Huscroft and Paul Rishworth (eds) Rights and Freedoms, 301.
The approach which has instead been adopted is one which is flexible and specific to each individual situation — see *R v Grayson and Taylor* [1997] 1 NZLR 399, 407:

A search is unreasonable if the circumstances giving rise to it make the search itself unreasonable or if a search which would otherwise be reasonable is carried out in an unreasonable manner. So too seizure. Whether a police search or seizure is unreasonable depends on both the subject-matter and the particular time, place and circumstance.

In the same case, the Court also emphasised (at 409) that:

The Bill of Rights is not a technical document. It has to be applied in our society in a realistic way. The application and interpretation of the Bill must also be true to its purposes as set out in its title of affirming, protecting and promoting human rights and fundamental freedoms in New Zealand, and affirming New Zealand's commitment to the International Covenant on Civil and Political Rights. The crucial question is whether what was done constituted an unreasonable search or seizure in the particular circumstances. Anyone complaining of a breach must invest the complaint with an air of reality and must lay a foundation for the complaint before the trial Court by explicit challenge or cross-examination or evidence.

With the relaxation of the prescriptive prima facie rule for exclusion of evidence and the invocation of a more flexible balancing approach (discussed below), there is some suggestion that lawfulness may become more determinative than it has been. In *R v Maihi*, the Court of Appeal stated that “[u]nless the Crown is able to advance sufficient countervailing material, the Court is likely to find an unlawful search to be unreasonable”. The reasonableness or otherwise of a search or seizure is “ultimately a value judgment which the Court must make on a principled basis, bearing in mind all the relevant factors of the case”.

The courts were also quick to expand protection beyond the traditional trespass categories. In *R v Jefferies*, the Court of Appeal broadened the scope of the guarantee against unreasonable search and seizure, in line with the approach of the

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United States Supreme Court\textsuperscript{124} and the Supreme Court of Canada.\textsuperscript{125} In \textit{Jefferies}, Richardson J noted that “the right of the citizen reflects an amalgam of values: property, personal freedom, privacy and dignity”\textsuperscript{126} and Thomas J emphasised the centrality of privacy.\textsuperscript{127} The approach thus broadened from one focussed on protecting property rights to one focussed on the protection of the privacy interests of individuals.

[75] In practice, this has resulted in several types of investigatory techniques, which may have been beyond scrutiny at common law, falling within the compass of s21. These include audio and video surveillance,\textsuperscript{128} aerial observation as part of a cannabis surveillance operation,\textsuperscript{129} and the retrieval of mobile phone text messages from a telephone company.\textsuperscript{130} It has been argued that this would not have occurred were it not for the enactment of the Bill of Rights, with the common law tying the control of such activities to a pre-existing and relatively narrow bundle of rights dealing with the protection and defence of property, resulting in a set of principles which failed to keep pace with new, increasingly invasive, investigative techniques.\textsuperscript{131}

[76] In summary, the changes described above demonstrate the shift in search and seizure situations from a focus on statutory rules to one on case law. The standard of “reasonableness” is one which necessarily requires interpretation and application by courts. This can be contrasted with the situation prior to the Bill of Rights, where the court’s function was centred on the legality of the search pursuant to statute and a few common law rules.\textsuperscript{132}

\textsuperscript{124} \textit{Katz v United States} 389 US 347 (1967)
\textsuperscript{125} \textit{Hunter v Southam} [1984] 2 SCR 145
\textsuperscript{126} \textit{R v Jefferies}, 302 Richardson J.
\textsuperscript{127} \textit{R v Jefferies}, 319 Thomas J.
\textsuperscript{128} See Rishworth et al \textit{The New Zealand Bill of Rights} at 422; \textit{R v A} [1994] 1 NZLR 429(CA), \textit{R v Smith (Malcolm)} [2000] 3 NZLR 656 (CA); \textit{R v Fraser} (1997) 15 CRNZ 44 (CA); \textit{R v Gardiner} (1997) 4 HRNZ 7. For an example of the contrasting common law approach, see \textit{Malone v Metropolitan Police Commissioner} [1979] 1 Ch 344.
\textsuperscript{129} Rishworth et al, \textit{The New Zealand Bill of Rights} 422; \textit{R v Peita} (1999) 17 CRNZ 407.
\textsuperscript{130} Rishworth et al, \textit{The New Zealand Bill of Rights} 422; \textit{R v Zutt} (2001) 19 CRNZ 154.
\textsuperscript{131} Rishworth et al, \textit{The New Zealand Bill of Rights}, 302.
\textsuperscript{132} Rishworth et al \textit{The New Zealand Bill of Rights}, 302.
**Right to counsel**

[77] The right of a person arrested to have access to counsel is of fundamental importance to a fair trial and is guaranteed by s23(b) of the Bill of Rights. Although the Judges’ Rules contain a similar guarantee, the Bill of Rights has helped to develop it. Expanding the scope of the right to counsel, for example in *Police v Kohler*, the Court of Appeal decided that implicit in the right to consult and instruct a lawyer is a right to do so in private.

[78] An issue worthy of more detailed discussion is how far the right to counsel must be facilitated by the State (normally the police). In *R v Mallinson* the Court of Appeal held that:

> There is no duty on the police when informing persons arrested of their right to a lawyer to go on to give advice designed to facilitate the exercise of that right. The police officer may decide to do so in order to assist in the understanding of the right. But any duty to facilitate the manner of its exercise is not triggered until there is an indication by the person arrested of the desire to consult a lawyer.

[79] *Mallinson* makes it clear that the right to counsel is a right to access to counsel and not a right to provision. But an issue currently under debate is whether police should be required to inform detainees that a free lawyer is available through the police legal detention scheme. This is particularly interesting because it questions the extent to which the Bill of Rights should be considered as charter of negative guarantees rather than one imposing positive duties. *Mallinson* has been interpreted by some judges as meaning that there is no universal duty on police to inform detainees that a lawyer is free. The Court of Appeal in *R v Schriek* noted that the question was undecided. The recent decision of *R v Ji Kai*, however, suggests an impending change that would give more recognition to this tenet by “giving the full measure of the right.” The Court commented that:

> There is a question whether advice as to the existence and availability of legal assistance such as the PDLA [Police Legal Detention Scheme] scheme

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133 [1993] 3 NZLR 129 (CA).
134 [1993] 1 NZLR 528, 531(CA).
136 [1997] 2 NZLR 139 (CA).
amounts merely to facilitation, or whether it is integral to the existence of what this Court referred to in *Mallinson* at p 530 as a:

... fair opportunity for the person arrested to consider and decide whether or not to exercise that right.

It seems to the majority of the Court that the latter view is more consonant with an appreciation of the realities of detention, and with the principle of access to justice acknowledged by the Legal Services Act 2000.137

[80] The other question that often arises is the limit placed on the State once the detainee, having fully understood the right, has elected to consult a lawyer. The general position appears to be that the State can do nothing actively to elicit information from the accused prior to the initial consultation with the lawyer (unless it is clear the right has been waived).138 Police questioning, after the right to counsel has been enjoyed is a matter closely associated with questioning after invoking the right to silence and a similar rule applies.139

**Right to silence**

[81] Section 23(4) of the Bill of Rights provides that everyone who is arrested or detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement, and to be informed of that right. Given the concurrence between this and the pre-existing common law position, it is to be expected that the introduction of the Bill of Rights would be of very limited, if any, practical effect.140

[82] The right to silence has been longstanding in New Zealand law. This right was, both prior to the introduction of the Bill of Rights and now, protected by the common law via the Judges’ Rules141 and the fairness rules for confession evidence.142 As McMullin J put it in 1994:

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139 *R v Barlow* (1995) 14 CRNZ 9,24 Cooke P.
140 Rishworth *et al The New Zealand Bill of Rights*, at 651 suggest, however, that inclusion of the right in the Bill of Rights might necessitate a “more stringent approach” than that of the common law.
At common law every citizen enjoys the right to silence; neither a private citizen nor a constable has any effective power to demand answers to questions put to a citizen in the belief that he has committed an offence or is under some other form of liability.\footnote{Taylor v New Zealand Poultry Board [1984] 1 NZLR 394, 406.}

[83] In practice, s23(4) is seldom relied upon in the context of pre-trial statements. It has been suggested that this is the result of two factors.\footnote{Ibid, 651.} First, where there has been a failure to give advice regarding the right to silence there is usually also a failure to advise of the right to counsel. Consequently many cases where s23(4) is potentially relevant are instead primarily pursued as breaches of the right to counsel. The second reason is that foreshadowed above, that the right replicates the pre-existing common law position and therefore many cases are dealt with using pre-existing common law rules, without recourse to the Bill of Rights.

[84] Section 23(4) (together with the right to counsel) has had application in cases where the Police have been advised by a suspect’s lawyer that their client will not be making a statement, but the Police successfully press the suspect to make one nonetheless. In \textit{R v Kau},\footnote{CA 179/02, 22 August 2002.} the Court of Appeal stated that the Police are under an obligation to cease interviewing a suspect when they receive such advice.\footnote{Cf the earlier case of \textit{R v Pinkerton} CA342/92, where the Court of Appeal ruled that the Police could continue an interrogation in circumstances where they considered that the suspect had decided not to follow his lawyer’s advice.}

\textit{Exclusion of evidence}

[85] Relevant to all situations in which evidence had been obtained as a result of a breach of the Bill of Rights is the question of whether such evidence is admissible in a prosecution. The “White Paper” draft of the Bill of Rights Act contained a clause which would have allowed a court to grant “such remedy as the court considers appropriate and just in the circumstances”.\footnote{A Bill of Rights for New Zealand: A white paper (1985) AJHR A6, 114.} While this did not carry through to the eventual Act, the commentary to the White Paper stated that:\footnote{A Bill of Rights for New Zealand: A white paper (1985) AJHR A6, 114.}

[i]n the great bulk of the situations covered by this Bill, the law and the courts will be able to provide a remedy from their present armoury. Thus… evidence
which is obtained in breach of the prohibitions on torture or unreasonable
search and seizure may be excluded from a trial; a stay of proceedings may be
sought.

[86] This was clearly a reference to the inherent power of courts to exclude
evidence where it is unfairly obtained. It was uncontroversial, then, when the courts
identified that they had a similar power to exclude evidence where rights under the
Bill of Rights Act had been breached. However, a significantly more controversial
question was whether a breach of the Act necessitated
such a remedy. In 1993 the
Court of Appeal, initially in the context of confessions, developed a rule of prima
facie exclusion, whereby, unless there were compelling reasons why the evidence
should be admitted, it would be inadmissible.149 The rule was quickly extended to
cover real evidence.150

[87] Although in practice this effectively became a conclusive rule demanding
exclusion in every case, that was not the original intention. In the 1993 case of R v H,
Richardson J delivered the judgment of the Court of Appeal, highlighting the
extensive potential for exceptions to the rule:151

The prima facie rule may be excluded and the evidence admitted where the
breach was inconsequential, where there was no real and substantial
connection between the breach and the obtaining of the evidence or where the
evidence would have been discovered in any event. The only justification in
any such case or in any other case for allowing the admission of the evidence
is that the overriding interests of justice require it notwithstanding breach of
that fundamental right affirmed and protected by the Bill of Rights.

[88] The failure, particularly by Judges in lower courts, to develop exceptions to
the rule led to its modification.152 When the rule as a whole was re-examined by a
seven member bench in the 2002 case of R v Shaheed, Blanchard J (joined by
Richardson P and Tipping J) commented on its practical effect in the following
terms:153

in practice the exclusion of evidence has followed almost automatically once
it has been established that there has been a breach which is more than trivial

150 R v H [1994] 2 NZLR 143; Simon Mount “R v Shaheed: The Prima Facie exclusion rule re-
151 R v H [1994] 2 NZLR 143, 150.
45, 61.
and that there is a sufficient connection between that breach and the availability of the challenged evidence. The use of the terminology of “rule”, “prima facie” and “exceptions” (to the rule) has often led, in our opinion, to a relatively narrow and almost mechanical approach by Judges, without going through a balancing of the relevant considerations, once they have determined that a breach of a right has occurred which was more than trivial and that the circumstances did not demand urgency. There has been a tendency to go no further than looking for a category of exception to the “rule”, rather than seeking to ascertain whether exclusion of the evidence would be a truly proportionate response to the breach.

[89] In Shaheed, all but one member of the Court rejected the prima facie exclusion rule in favour of a more flexible balancing approach. Under the new approach, all of the circumstances of each particular situation are considered to determine if the extent of the breach of the Bill of Rights Act is significant enough to warrant excluding the evidence – a similar approach to that set out almost ten years earlier by Richardson J in R v H. The sole dissenting judge on this point was Elias CJ who was not persuaded that experience with the working of the New Zealand Bill of Rights Act necessitated a reconsideration.154

[90] Shaheed has been criticised as inviting uncertainty and an unacceptable amount of discretion into the area.155 On the other hand, it has also been pointed out that Shaheed has provided a structure for the application of the existing judicial discretion to exclude evidence due to unfairness in all cases – including those not involving the Bill of Rights.156

[91] The Shaheed approach is still significantly different from the pre-Bill of Rights common law position. The basic common law principle was that relevant evidence was admissible, with Courts not generally concerned with how it was obtained,157 subject to the discretion to exclude evidence where it was unfairly obtained or would result in an unfair trial.158

**Right to be informed of the nature and cause of the charge**

157 See the discussion of this by Elias CJ in R v Shaheed [2002] 2 NZLR 377, 384 paras 15-16.
158 Additionally there was the residual discretion to stay proceedings where they would amount to an abuse of the court’s process.
[92] Under s24(a), an accused has the right to be informed promptly and in detail of the nature and cause of any charge against him or her. In practice, this has not proved to be troublesome to prosecuting authorities. This is because of the interpretation given to the term “charged”. In *R v Gibbons* [1997] 2 NZLR 585, 595 the High Court said that:

> having regard to the scheme of the Bill of Rights Act, and the individual sections, "charged" must refer to an intermediate step in the prosecutorial process when the prosecuting authority formally advises an arrested person that he is to be prosecuted and gives him particulars of the charges he will face.

[93] Consequently, in most instances the accused will be formally notified of the details of the charge at the same time they are charged, satisfying the requirements of s24(a). One possible situation where s24(a) may be of some significance is where Police conceal or downplay the seriousness of the charges an accused faces in order to facilitate questioning about a criminal offence. In such situations, the Police risk a finding that any admissions obtained as a result of the questioning were obtained in breach of s24(a), and therefore would need to satisfy the *Shaheed* test before they could be admitted.

**Right to be released on reasonable terms and conditions**

[94] Section 24(b) creates a right to be released on reasonable terms and conditions unless there is just cause for continued detention. This is, in essence, a right to bail. However, the Bail Act 2000 forms a detailed and comprehensive statutory code for bail matters, central to which is a virtually identical provision. Consequently, the presence of the right in the Bill of Rights is of little practical consequence, apart from arguably encouraging judges to examine more critically the arguments put forward by the Crown as justifying pre-trial detention.

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159 See *R v Lory (Ruling 4)* HC Hamilton T6/96, 3 September 1996, Hammond J; and the discussion in Rishworth et al *The New Zealand Bill of Rights* at 602-603.

160 Section 7(5), which provides “Subject to sections 9 to 17, a defendant who is charged with an offence and is not bailable as of right must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention.” The equivalence of these provisions was noted by the Court of Appeal in *R v Payne* [2003] 3 NZLR 638, 640, para 9.

161 See Rishworth et al *The New Zealand Bill of Rights* at 614.
Right to adequate time and facilities to prepare a defence

[95] Section 24(d) accords those charged the right to adequate time and facilities to prepare a defence, something which has been characterised by the Court of Appeal as “a fundamental right protective of personal liberty and an important element of a fair trial”. The Court of Appeal has also stated that “[i]t is difficult to contemplate a case involving a breach of s24(d) of the Bill of Rights but occasioning no miscarriage of justice.” However, these rights are not new. Section 354 of the Crimes Act has provided for over forty years that “[e]very person accused of any crime may make his full defence thereto by himself or by counsel”. They also have even deeper common law roots – see *R v West*:

The principle which is fundamental and which admits of no departure therefrom – namely, that every accused person must have the fullest opportunity of putting forward his defence and there is, too, the supplementary principle that it is important in the conduct of judicial proceedings not only that what is done shall in fact be perfectly fair but that it should bear the appearance of fairness.

[96] As this indicates, if the s24(d) right is breached, the result will be an unfair trial – something the common law has been concerned with for centuries.

[97] The ability of self-represented defendants adequately to research and present their defence is, however, an area where s24(d) has had an impact. In *R v Payne* [2003] 3 NZLR 638, the accused claimed that he should be granted bail pending his trial as he was prejudiced in preparing his defence due to an inability to access legal texts and other sources relevant to the preparation of various interlocutory applications. The Court considered that “[t]he right under the Bill of Rights set out above is an essential one – essential to the rights of those charged and a fair system of justice overall” but nevertheless declined the application as such potential disadvantage had not yet taken a concrete form. However, the Court considered that, if proper arrangements could not be made to satisfy those rights, a further bail

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162 *R v B* [1995] 2 NZLR 172, 182 (CA).
164 [1960] NZLR 555, 562 (CA)
165 See the comments of Richardson P in this regard in *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740, 756 para 48 (CA).
application based on concrete circumstances and subject to proper safeguards might well have a better prospect of success.

[98] Section 24(d) might also potentially mean that the facilities (including computer facilities) provided to prisoners awaiting trial may need to be expanded. In *R v Greer* 4/6/03, CA197/01, the Court of Appeal (at para 39) stated:

> We comment that it may be open to doubt in the twenty first century that the provision of writing materials only to an inmate, could in all cases be regarded as adequate facilities with which to prepare that defence, particularly if the inmate plans to conduct his or her own defence. It may therefore be time for the regulations relating to computers in cells to be revisited or at least for prisons to ensure that access to computers is provided in another manner to those who may need them to prepare their defence.

[99] It has also been suggested that s24(d) has “supplemented” existing rights to criminal discovery. It is questionable, however, whether the Bill of Rights has substantially altered the pre-existing position. The main reason for this is that the requirements of s24(d) are, for the most part, adequately met by pre-existing discovery mechanisms. The Official Information Act 1982 and the Privacy Act 1993 provide rights of access to some categories of discoverable information. This was noted in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, where the Court of Appeal held that the Official Information Act was wide enough to allow discovery of personal information contained in briefs of evidence, witness statements or notes of interviews, upon request by the defence. Furthermore, the common law has developed rules requiring disclosure in a pragmatic fashion where it is necessary to ensure a fair trial.

[100] Significant change to the current criminal discovery rules would need legislative change, as has been recommended on several occasions. This looks...
likely to occur as a result of the Criminal Procedure Bill, which was introduced to the House in June 2004.

[101] Another interesting development is that Courts have held that s24(d) can impose a duty on Police to preserve evidence where failure to do so would obstruct the defence of a criminal charge. The first case to do so was \textit{R v Donaldson} [1995] 3 NZLR 641, where a driver was stopped and detained after exhibiting signs of being under the influence of alcohol despite passing a breath screening test. Her requests for a potentially exculpatory blood test were refused by the Police, who proceeded to hold her for several hours. The Court of Appeal quashed the driver’s conviction for driving under the influence of alcohol as the refusal, combined with her detention for a period that precluded her from obtaining a blood test elsewhere, were considered an obstruction of section 24(d).

[102] The Court, however, cautioned that there was a distinction to be drawn between obstructing the preparation of a defence (which impugned s24(d)), and the existence of an affirmative duty on Police to assist in the collection of evidence useful for the defence. Furthermore, in subsequent cases, Courts have been clear that the evidence which was lost must have been of “material assistance to the defence” so as to be “necessary for a fair trial”\textsuperscript{170}

\textbf{How effective has the Bill of Rights been?}

[103] This paper has provided an overview of how the Bill of Rights operates and its effect on New Zealand law.

[104] The exact extent of the effect the Bill of Rights will remain a matter of debate. Those who contend for its being insignificant generally argue that the increasing presence of human rights values would have in any case brought about many of the changes that the Bill of Rights is credited with through common law development.

Such people take the example of statutory presumptions associated with the Bill of Rights as simply repackaged common law liberty presumptions. Those in the other camp accept the relevance of the human rights movement as an impetus for developing human rights protections, but argue that the existence of a domestic Bill of Rights has accelerated that process and that the existence of legislation formally recognising these rights has meant the three branches of Government have had to be more rights conscious. They also argue that it has legitimised the judicial creativity needed to increase protection of rights. They point to the creation of new remedies such as Bill of Rights compensation and the changed exclusionary rules for evidence in support of their view.

[105] Ultimately, although the Bill of Rights has existed for 14 years, it is still too early to gauge its full impact accurately. Certainly, there is the potential for its influence to grow, particularly if it is given wider application. But whether that potential will be realised is still impossible to predict – much may turn on whether trends in internationalisation and human rights recognition continue with the same momentum they have at present.

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170 *R v Ruka* CA 74/97, 17 September 1997, 3; see also *R v Bevin* CA 389/96, 16 December 1996 where Henry J held that a breach of section 24(d) amounting to a miscarriage of justice “could only have resulted if the unavailability of these items prevented the appellant from having a fair trial”.

171 Sir Kenneth Keith in “The New Zealand Bill of Rights Experience: Lessons for Australia” 2002 Bill of Rights Conference, 21 June 2002, says; “Overall, important rights, particularly of citizens in their dealings with the police, courts and public authorities and of freedom of speech, have been given greater protection both through Parliament and through the Courts.”
APPENDIX

New Zealand Bill of Rights Act 1990

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
BE IT ENACTED by the Parliament of New Zealand as follows:

1 Short Title and commencement
(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.
(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

Part 1—General Provisions

2 Rights affirmed
The rights and freedoms contained in this Bill of Rights are affirmed.

3 Application
This Bill of Rights applies only to acts done—
(a) By the legislative, executive, or judicial branches of the government of New Zealand; or
(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4 Other enactments not affected
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

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

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

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

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—
(a) In the case of a Government Bill, on the introduction of that Bill; or
(b) In any other case, as soon as practicable after the introduction of the Bill,— bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

Part 2—Civil And Political Rights

Life and security of the person

8 Right not to be deprived of life
No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9 Right not to be subjected to torture or cruel treatment
Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10 Right not to be subjected to medical or scientific experimentation
Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11 Right to refuse to undergo medical treatment
Everyone has the right to refuse to undergo any medical treatment.

Democratic and civil rights.

12 Electoral rights
Every New Zealand citizen who is of or over the age of 18 years—
(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
(b) Is qualified for membership of the House of Representatives.

13 Freedom of thought, conscience, and religion
Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14 Freedom of expression
Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

15 Manifestation of religion and belief
Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16 Freedom of peaceful assembly
Everyone has the right to freedom of peaceful assembly.

17 Freedom of association
Everyone has the right to freedom of association.

18 Freedom of movement
(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
(2) Every New Zealand citizen has the right to enter New Zealand.
(3) Everyone has the right to leave New Zealand.
(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-Discrimination and minority rights

19 Freedom from discrimination
(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

20 Rights of minorities
A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Search, arrest, and detention

21 Unreasonable search and seizure
Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22 Liberty of the person
Everyone has the right not to be arbitrarily arrested or detained.

23 Rights of persons arrested or detained
(1) Everyone who is arrested or who is detained under any enactment—
   (a) Shall be informed at the time of the arrest or detention of the reason for it; and
   (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) Arrested; or

(b) Detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24 Rights of persons charged

Everyone who is charged with an offence—

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

(b) The right to be tried without undue delay:

(c) The right to be presumed innocent until proved guilty according to law:

(d) The right not to be compelled to be a witness or to confess guilt:

(e) The right to be present at the trial and to present a defence:

(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

(g) 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:

(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.
26    **Retroactive penalties and double jeopardy**
(1)    No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
(2)    No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27    **Right to justice**
(1)    Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
(2)    Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
(3)    Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

**Part 3—Miscellaneous Provisions**

28    **Other rights and freedoms not affected**
An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29    **Application to legal persons**
Except where the provisions of this Bill of Rights otherwise provide, 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.