The Bill of Rights and the Legislative Process

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Introduction

When Parliament enacted the New Zealand Bill of Rights Act 1990 it included in the General Provisions of Part I of the Act a procedural requirement in relation to future legislation. Section 7 of the Act provides:

> **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, –
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> (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.

The focus of this paper is to discuss the impact to date and likely future impact of a provision plainly intended to bring protection for the values incorporated in the Bill of Rights Act to bear on the process of Government that is concerned with promotion of new legislation.

The legislative history of s 7

The White Paper "A Bill of Rights for New Zealand"[1] proposed enactment of a statute giving protection for certain rights and freedoms thought essential to the preservation of liberty in a democratic society and declaring the measure to be supreme law. In the words of the White Paper:[2]

> ... it would be supreme law, and accordingly legislation enacted by Parliament which was inconsistent with it would be of no effect.

Thus it was contemplated that the Courts would have powers in the area of public law beyond the interpretation of the law and the review of the lawfulness of the administrative action taken pursuant to it. There would be a power of judicial review of legislation. The power of the Court would extend to enforcing against the agencies of state the guarantees provided for by the Bill of Rights. In short the Court's power was to be akin to that of the Courts in Canada and of the Federal Courts in the United States of America and would extend to striking down legislation found to be inconsistent with the Bill of Rights.

However, as all here know, following its consideration of the White Paper, the Justice and Law Reform Committee recommended the introduction of a Bill of Rights in the form of an ordinary statute, not supreme law and not entrenched, and the measure that is now the New Zealand Bill of Rights Act 1990 was passed in that form.

1 (1985) AJHR A.6.
2 Ibid, para 3.11.

Had it been enacted as supreme law it was well recognized that one of the main ways the Bill of Rights would afford protection was through strong incentives on the process of government to ensure that proposals for new legislation did not infringe the protected rights and freedoms. The White Paper in fact contemplated that the Courts would strike down legislation rarely and only with good reason and added:[3]

> In fact one of the greatest values of a Bill of Rights is that it imposes restraints on politicians and administrators themselves in contemplating new laws and policies. The fact that the courts can strike down legislation operates as a disincentive to the Executive to promote legislation that is likely to be questioned under a Bill of Rights.

Where, despite the disincentive, legislation was enacted of a kind that was at risk of being held inconsistent with protected rights and freedoms, a further means of giving protection short of striking down legislation was provided for. Clause 23 provided:

> **Interpretation of Legislation**
> The interpretation of an enactment that will result in the meaning of the enactment being consistent with this Bill of Rights shall be preferred to any other interpretation.

Section 6 of the measure enacted later provides for this purposive approach. Obviously such a provision would reduce the need for the Courts to strike down legislation to those cases where rights and freedoms could not be accommodated by means of an interpretation sympathetic to giving that protection.

In recommending that the Bill of Rights proceed in the form of a statute that was neither supreme law nor entrenched the Justice and Law Reform Committee of Parliament was influenced by its perception of a "limited understanding of and support for the role of the judiciary" under such a Bill of Rights. New Zealand was seen as not ready for a Bill of Rights along the lines of the White Paper draft. The Select Committee was nevertheless plainly concerned to achieve some of the restraints on the power of the executive that such a measure would bring. The lack of knowledge of fundamental human rights issues and the value a Bill of Rights in another form could have in educative and moral terms to fill that gap were also factors prompting the measure now enacted.

A Bill of Rights, insofar as it provided strengthened protection for human rights in relation to administrative actions, did not need to be supreme law. The Courts could be expected to apply and develop the principles of such legislation in the context of executive action in the full manner the Courts regarded as appropriate. The Select Committee and the then Attorney-General recognized that valuable checks on the executive in this area would flow from a Bill of Rights Act even if it was not supreme law. The decision not to give the statute that status, however, would substantially lessen the incentives on the executive not to promote legislative measures infringing the protected rights. Three mechanisms were mentioned in the final report of the Justice and Law Reform Committee to meet this need. Of these the most significant was the suggestion that the Bill could require the Attorney-General to certify on introduction of a Bill if the Attorney-General considers the

3 Ibid, para 6.6.

Bill is inconsistent with the protected rights. Section 7 of the Bill of Rights Act was the result.

The origin of the proposal appears to lie in s 3 of the Canadian Bill of Rights, which requires the Minister of Justice to scrutinize all bills and regulations against the rights in the Bill and to report any inconsistency to the House of Commons. The Canadian Bill of Rights was, unlike its successor, the Canadian Charter of Rights and Freedoms, not entrenched, and did not expressly provide for the courts to override other statutes: the context of the Minister's duty was thus analogous. The Canadian experience, it seems, was that the provision operated as a disincentive in the sense that a report was regarded as politically undesirable.

Two other specific suggestions were made by the Select Committee. The first was to reiterate the desirability of a provision directing the courts as to manner of interpretation along the lines of cl 23 of the White Paper. As a consequence s 6 was included in the New Zealand Bill of Rights Act 1990 providing:

> **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.

The other suggestion was to amend Standing Orders of Parliament to establish a Standing Committee on Bill of Rights matters to which all bills might be referred for examination and report on inconsistencies with protected rights.[4]

The New Zealand Bill of Rights Act received the Royal Assent on 28 August 1990 and came into force on 25 September 1990 .

Section 7 in operation

The thesis I offer is that s 7 is a provision intended to have an impact on the political and administrative process by which new legislation is promoted, and in particular to bring the values in the Bill of Rights Act to bear on that process. It is intended to apply some of the incentives in the original form of the Bill. My own view is that it is a provision the value of which is to be seen in that light rather than as one concerned fully to inform Parliament of the content of legislation.

On 8 April 1991 the Attorney-General issued a memorandum outlining the interim procedure to be followed in Government to enable effect to be given to s 7. When a Government Bill reaches drafting stage it is referred to the Department of Justice unless it is a Bill promoted by the Minister of Justice, in which case it is referred to the Crown Law Office to avoid conflicts of interest. Consideration is then given to whether the proposal appears to be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act. In practice, at the time when their proposals are put to the Cabinet Legislation Committee Ministers are required to state whether or not the proposed bill is in compliance with the Bill of Rights Act 1990. That is the point in the

4 No committee of the type suggested has been established.

process when an initial decision must be made, effectively by the Cabinet on the Committee's advice, as to whether the Bill, in draft, is approved for introduction to the House.

An issue arises as to the basis on which the Attorney-General must report under s 7. The obligation to report arises in the case of Government bills on the introduction of the bill and is "to 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 I of the Bill includes a number of general provisions in relation to the rights specified in Part II. They provide broadly that other enactments are not affected by the passing of the Bill of Rights Act (s 4), that rights and freedoms may be subject to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society (s 5) and the direction already mentioned to interpret other legislation consistently with the Bill of Rights where the other Act can be given a meaning that is consistent (s 6). Part II of course specifies the protected civil and political rights.

The issue is the basis on which the Attorney-General should assess whether provisions in the proposed legislation appear inconsistent with the rights and freedoms contained in the Bill of Rights. Is that to be done solely by reference to the words expressing the rights in Part II of the New Zealand Bill of Rights Act? Or should the Attorney-General interpret those words in the context of s 5, thus allowing "reasonable limits" on the rights before reaching the conclusion that inconsistency is established?

Present practice in government is for the Attorney-General to follow the latter course, whereby inconsistency is measured against the rights as expressed in Part II but subject to qualifications in Part I including s 5. Effectively this means that if the Attorney-General is of the view that a Bill to be introduced contains provisions prima facie inconsistent with protected rights, but in a way that the prima facie inconsistency is a justified limitation on the right in a free and democratic society, the Attorney-General is not required to report. On the alternative view he or she would be required to report the inconsistency, although presumably able to add an explanation by reference to section 5 to the effect that the legislation proposed was not in breach of the Act.

The recent Court of Appeal decision in *Ministry of Transport v Noort; Police v Curran*[5] contains passages in the judgments of Cooke P and Richardson J relevant to the issue. Cooke P said:[6]

> Section 5, as to justifiable limitations on the rights and freedoms contained in the Bill of Rights, is subject to s.4. So, if an enactment is inconsistent with any provision of the Bill of Rights, that enactment prevails and the Courts are not concerned with s.5. The Courts may be concerned with s.5 in common law issues, an aspect which need not be explored in the present case. The Attorney-General is likely to be concerned with s.5 in performing his function under s.7. If he considers that any provision of a Bill appears to be inconsistent with any of the rights and freedoms affirmed in the Bill of Rights, in drawing it to the attention of the House he may well wish to draw attention also to s.5 and to the question whether the Bill,

5 (1992) 8 CRNZ 114
6 Ibid, p 19.

> although apparently inconsistent with one or more of the rights and freedoms, nonetheless prescribes a reasonable limit demonstrably justifiable in a free and democratic society. The present Attorney-General, the Hon. Paul East, took precisely that course in speaking to the Transport Safety Bill on 17 December 1991 ....[7]

These observations suggest s 7 should be addressed by reference to the words creating the rights alone. In the Parliamentary speech cited the Attorney-General was reporting on a Bill permitting random breath-testing, whereby enforcement officers could require a driver to take a breath test in the absence of any suspicion that he or she could consume alcohol. The Attorney-General, the Hon Paul East, said:[8]

> Pursuant to s 7 of the New Zealand Bill of Rights Act 1990 I bring to the attention of the House clause 17 of the Transport Safety Bill. The advice that I have received on this matter, and the view that I have formed, is that clause 17 appears to be inconsistent with the rights and freedoms contained in section 21 and section 22 of the New Zealand Bill of Rights Act, *notwithstanding the justified limitation provisions of section 5 of the New Zealand Bill of Rights Act.* Sections 21 and 22 respectively refer to the right to be secure from unreasonable search or seizure and the right not be arrested or detained arbitrarily. Given the importance of the matters raised by my report, I want to explain why clause 17 infringes the New Zealand Bill of Rights Act. (Emphasis added.)

I shall return to the subject of random breath testing and the Attorney-General's speech later, but note that the course the Attorney-General followed, referred to by the learned President, plainly addressed inconsistency having applied section 5.

In his judgment in *Noort* and *Curran* Richardson J appears to see interpretation of the protected rights provision as necessarily taking place in the context of the general provisions of which s 7 is one. He said:[9]

> To sum up at this point, the Bill of Rights Act is a legislative commitment to the protection and promise of those basic human rights and freedoms set out in the Bill. Those rights are not absolute and that commitment does not preclude Parliament from abridging or even excluding their application. Sections 5 and 6 reflect a strong legislative intention to protect the rights and freedoms contained in the Bill of Rights. In determining under s4 whether there is an inconsistency between the provisions of another enactment and a provision of the Bill of Rights, it is proper to have regard to the statutory objectives of protecting and promoting human rights in New Zealand, and New Zealand's commitment to international human rights standards, and also to the limiting provision of s5 and s6. In the end, and in the absence of an express statutory exclusion of a Bill of Rights provision, it must be a question of determining under s4 whether there is any room for reading along with other enactment a Bill of Rights provision whether absolute or modified or limited pursuant to ss5 and 6.

The provisions that His Honour is discussing are expressed in the Act to be "General Provisions" because they are of general application. While his Honour does not expressly

7 521 NZ PD 6376-6378.
8 Ibid, p 6376.
9 *Ministry of Transport v Noort; Police v Curran*, above, note 5, pp.135–6.

refer to s 7 it is of like character and I suggest is appropriately given like application in determining the scope of any protected rights and freedoms under Part II. To require the Attorney-General to report on apparent inconsistency without having regard to the area of justified limits under s 5 is to give the right an absolute status for those purposes. However, the rights and freedoms are not intended to be absolute. There are limits on them. Indeed, at times, rights would be in conflict with each other without allowing for limitations.[10] It is suggested that as a matter of interpretation s 7 requires the Attorney-General to exercise his reporting function by reference to the language expressing the rights taking into account s 5 and indeed the other provisions of general application to the Act.

Whether or not this approach is correct my view is that the course followed by the Attorney-General is sound in terms of achieving policy goals in terms of incentives on Government to give weight to the protected rights in legislative proposals. It thus reflects the apparent intent of s 7. The Rt Hon Geoffrey Palmer, Prime Minister, saw s 7 as a measure that "will ensure that pressure to get things right is placed on those who are involved in the legislative process .... If for some reason a Government should wish to introduce a bill that is inconsistent with the Bill of Rights the House would be given notice of that inconsistency through the Attorney-General's report."[11]

If the need for an Attorney-General's report is premised on whether the proposed legislation is inconsistent with rights and freedoms in the context of the Act as a whole, including whether the justified limitation clause has application, that will be the focal point for politicians and administrators involved in promoting legislation. There will generally be a strong incentive on the Minister introducing the legislation, which will pass down through governmental process to his or her officials, to ensure the measure does not include provisions inconsistent with the Bill of Rights Act. There will be in the process a desirable incentive to avoid an Attorney-General's report because the very act of reporting will denote a criticism of the measure.

If, however, the Attorney-General must report whenever a right is limited without regard to whether or not that is a justified limitation in terms of s 5, it seems likely a pattern will develop whereby many reports are made – including explanations that s 5 excuses inconsistency with the Bill. Inevitably there will be little or no incentive on the executive to avoid any report at all. My view is that unless proceeding with proposed legislation that will be subject to an Attorney-General's report comes to be seen as warranted only in extraordinary political circumstances there is a danger that the Bill of Rights Act will fall into disrepute. Rishworth in his comment on *Noort* appears to be in accord with my preference.[12] Other commentators see value in leaving the legislature the question of justifiability of limits.[13] My concern is that if a report comes to be seen as anything other than a strong impediment in the legislative process a valuable restraint on the executive's powers to promote legislation will disappear.

10 See the discussion in the White Paper, paras 10.24-10.26.
11 Hansard, 14 August 1990, p.3450.
12 "How does the Bill of Rights Act Work?" [1992] NZ Recent Law Review 189, 198, note 21.
13 Eg, Fitzgerald: "Section 7 of the New Zealand Bill of Rights Act 1990" (1992) 22 VUWLR 135, 139.

I instance my point with some examples. In late 1990 the Minister of Justice was considering the form of appropriate legislation introducing new restrictions on the grant of bail. The particular proposal in its original form would have required the courts to refuse bail to any person charged with a "specified offence" who had two or more previous convictions for such an offence. "Specified offences" are certain violent crimes. There was to be an exception where there were special circumstances persuading the Court that bail should be granted. The measure being considered would have effectively removed the element of judicial discretion in granting bail, confining it to cases of "special circumstances". At issue was whether such a measure would infringe section 24(b) of the Bill of Rights Act, providing:

> Everyone who is charged with an offence (a) ....
> (b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention.

The advice given the Minister was that the fact that an applicant for bail had previous convictions could not without more constitute "just cause for continued detention" and refusal of the application. Nor could it be said to be a justified limitation on the s 24(b) right. The restriction on the right was a substantial one, especially given the very strong curtailment of the courts' discretion. Accordingly the proposal would require a report by the Attorney-General if introduced in that form.

The Minister of Justice was not prepared to introduce a measure requiring such a report. As is well known the measure ultimately enacted in 1991 (now in s 318 of the Crimes Act) provides that no person charged with and previously convicted for a "specified offence" is to be granted bail unless the person satisfies the judge on the balance of probabilities that bail should be granted and that no offences involving violence or danger to safety of any person will be committed. The provision in other words retained a judicial discretion on an application for bail albeit subject to a reverse onus provision. The Attorney-General was advised the amended proposal was consistent with the right concerned and accordingly no report was required. The case is an example of how s 7 of the Bill of Rights Act brings to bear incentives on the executive to amend proposals for legislation so as to comply with the Bill of Rights Act.

This example, however, highlights a potential weakness in the process. Section 7 applies to what is done at the time of introduction of the Bill. That may bear little relation to the Bill as it emerges in final form. As introduced the Bail Amendment Bill provided differently from both the original and the final form proposal. It would be a matter of concern if a practice emerged whereby changes relevant to the Bill of Rights Act protection were to be made at stages subsequent to introduction. To date Parliament has not established in the Select Committee structure the type of continuing review mechanism that the Justice and Law Reform Committee had suggested in its final report in 1990.

Two other instances during 1991 show that legislative proposals can die in circumstances where it seems likely that the Bill of Rights Act has contributed to their demise. The Napier City Council (Control of Skateboards) Empowering Bill provided for the Council to make bylaws controlling or prohibiting use of skateboards in public places that might include the right to seize or confiscate any skateboard. Difficulties, depending on the

terms of bylaws passed, were pointed out in advice given to the Attorney-General. They related to s 21 of the Bill of Rights Act in relation to unreasonable seizure of property. The Select Committee recommended the Bill not proceed for reasons that included non-compliance.[14]

The Kumeu District Agricultural and Horticultural Society Bill reconstituted that Society. Clause 8 provided that those who contravened or failed to comply with bylaws on conviction could be liable to a fine "and shall also be civilly liable for all damage caused by the contravention or non-compliance". At issue was first whether the provision was in breach of the right under s 27(1) of the Bill of Rights Act to observance of natural justice and secondly, if so, whether this was a justified limitation on that right. The advice given was that the right was infringed without there being justification for the limitation. The offending provision was omitted by the Select Committee.

However, perhaps the most interesting example of the testing of the Bill of Rights in the legislative process, and one as yet not concluded, is the Transport Safety Bill previously mentioned. There the legislative proposal is to authorize random breathalysing of motorists. The Attorney-General was advised that such a measure was contrary to ss 21 and 22 of the Bill of Rights Act:

> **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.

In this case, however, introduction proceeded vigorously defended by the responsible Minister. Inconsistency with the Bill of Rights did not prove to be an insurmountable impediment. However, of importance is the speech of the Attorney-General in reporting on the inconsistency pursuant to s 7. Mr East noted that current law permits random stopping but allows a breath test only on a basis of reasonable cause. Canadian authority indicated a demand for a breath sample was a "search" and taking it a "seizure" under the equivalent of s 21.[15] The Attorney-General continued:[16]

> Accordingly, in terms of the New Zealand Bill of Rights Act, the question is whether that search and seizure is a reasonable one. In determining the reasonableness of the search and seizure it is important to note that road safety is a high priority. Its achievement may necessitate measures that, in other contexts, would be considered unjustified. However, the advice that I have is that the standard of reasonableness, in terms of search and seizure, must require that there be a clear link between the road safety objective and the proposed provision in clause 17. The evidence available to date on that link, in my view, is inconclusive. Rather, it tends to support the view that the observational method, that is, observing what the driver looks like and whether he or she has been drinking – coupled with the effect of random stopping, which is, in effect, our present approach, is more effective at detection and equally effective at deterring the intoxicated motorist. Other factors

14 See (1992) 522 NZPD 6589.
15 See *R v Holman* (1982) 28 CR 3rd 378.
16 521 NZPD 6367.

> such as the resources also appear relevant to the success rate in this regard. In essence, the evidence suggests that the current law is likely to be an equally effective but less intrusive means of reducing drunken driving. Consistency with s 21 of the New Zealand Bill of Rights Act would require that the least intrusive method be adopted.

Mr East then referred to s 22 and reported that a provision that gives an officer power to breath-test at his or her discretion without any criteria express or implied to govern the exercise of that discretion is arbitrary and cl 17 accordingly breached s 22 of the Bill of Rights Act. He then said:[17]

> The final question is whether it is, none the less, a justified limitation in terms of s 5 of the New Zealand Bill of Rights Act. Section 5 provides that the rights in the Act are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The approach taken in determining whether the provision is a justified limit again requires some rational connection between the road safety objective and the random breath-testing proposal. The principal aim of the proposal is deterrence. The difficulty, in terms of the New Zealand Bill of Rights Act, is that the available evidence is not convincing on the deterrent effect of random breath-testing. Again, the present law appears to achieve the same result but in the least intrusive way. Accordingly, clause 17 appears to be inconsistent with the New Zealand Bill of Rights Act and is not saved by s 5 of that Act.

Finally the Attorney-General concluded:[18]

> Personally, while I am very aware of the need for effective enforcement of our drinking/driving laws, I am not persuaded that the evidence of the benefits that will flow from random breath-testing is such that a departure from the New Zealand Bill of Rights Act is justified. The available evidence suggests rather that the current ability to stop randomly and breathtest on suspicion is likely to be as effective, while at the same time, complying with the New Zealand Bill of Rights Act. However, others take a different view and consider that the problem of death and injury on the road has reached such a proportion that fresh measures have to be tried.

The Attorney-General has, I suggest, reported in terms that fully reflect the element of independence in his office. That the measure was introduced and referred to a Select Committee (it has not at the present time finally been enacted) reflects the strong concern of Ministers to find means of preventing and to be seen to be promoting prevention of road accidents. While it is still an early period in the application of the Act it may be the case that a matter must assume a high level of political significance before ministers will be willing to promote legislation in the face of an Attorney-General's report.

If this turns out to be the case s 7 will be seen to have an important place as a restraint on the powers of the executive in its promotion of legislation. While many would prefer never to see a Bill introduced which was the subject of a report that in my view is unrealistic given the rejection of a Bill of Rights that is supreme law. The Act can still, however, operate as a disincentive if its values must be outweighed by heavy political factors before an adverse report is accepted by the Government. As long as that happens

17 Ibid, pp 6367-6368.
18 Ibid, p 6368.

s 7 will be a provision of value as a curb on an aspect of executive power that has previously lacked restraint.

Judicial review of the s 7 power?

The decision of the Attorney-General on whether or not to report under s 7 is one based on the Attorney-General's opinion on a question of law – whether any provisions in the Bill appear inconsistent with the protected rights and freedoms of the Act. On such a matter opinions can of course vary. That raises the issue of whether the Attorney-General's report or failure to report is susceptible to judicial review for error of law.

It is perhaps unsurprising that a Solicitor-General takes an orthodox view on this issue. My starting point is art 9(1) of the Bill of Rights 1688:

> The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament.

My view is that the functions of the Attorney-General under s 7 of the New Zealand Bill of Rights Act 1990 constitute a proceeding in Parliament.[19] To seek judicial review of the exercise or non-exercise of the functions, even if all that was sought was a declaration, would, I suggest, be to question them.

This approach is supported by the line of cases which emphasizes the reticence of the courts when asked to interfere with the processes by which legislation is prepared, introduced and passed. Quite apart from their constitutional obligation the courts have consistently refused to inquire into the manner in which a Bill was initiated when resulting legislation is before them.

In *Pickin v British Railways Board*[20] it was alleged that the Board had misled Parliament in obtaining the passing of the British Railways Act 1968 and argued that Act was therefore ineffective to deprive Mr Pickin of land. The House of Lords, however, was unanimous that the Court could not go behind the Act to examine proceedings in Parliament in order to demonstrate that the Board, by misleading Parliament, had caused the plaintiff loss.

Lord Reid said:[21]

> The function of the Court is to construe and apply the enactments of Parliament. The Court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. Any attempt to prove they were misled by fraud or otherwise would necessarily involve an inquiry into the manner in which they had performed their functions in dealing with the Bill which became the British Railways Act 1968.

As Robertson J has noted in a recent New Zealand decision applying *Pickin* outside of the

19 "Parliamentary proceedings cover everything that is directly and formally connected with an item of business in the House or in a committee": McGee, *Parliamentary Practice in New Zealand* p.427.

20 [1974] AC 765 (HL).

21 Ibid, p 787G; see also Lord Simon of Glaisdale, pp 788-789.

Bill of Rights Act 1990 context ,"(the) position is not restricted to the end of the law making process, but applies to steps necessarily preliminary to it".[22]

If such an approach were followed by a New Zealand Court in any application for judicial review of action or inaction under s 7, in my opinion, that would accord not only with the legislative history of the New Zealand Bill of Rights Act 1990 but also its prospects for a future beneficial influence on our legislative process. The Act is plainly not intended to disturb the sovereignty of Parliament. Its place as an incentive for those involved in the process of promoting new legislation is still to be ascertained. However, one can even now, I suggest, see the prospects of a convention emerging which will ensure that the executive, in this aspect of its functions, comes to give full weight to the values the Bill of Rights Act was passed to protect. Judicial intervention, I suggest, would not promote the incentives concerned and may rather have negative consequences. Application of constitutional orthodoxy in this area is more likely to make this Act a positive force in the content of legislation.

22 *Rothmans of Pall Mall v Attorney-General* [1991] 2 NZLR 323, 330.