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Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense

Paul Fitzgerald*

In 1990 Parliament passed the New Zealand Bill of Rights Act. The Act is not entrenched as supreme law but one of the safeguards built into the legislation is the requirement that the Attorney-General must report where a Bill introduced into Parliament appears inconsistent with the rights and freedoms in the Act. Paul Fitzgerald examines the scope of this requirement and also argues that the Attorney-General's scrutiny of legislation should be extended to cover progress through the parliamentary process.

I INTRODUCTION

Section 7 of the New Zealand Bill of Rights Act 1990 requires the Attorney-General to report to the House of Representatives where a Bill introduced appears to be inconsistent with the Bill of Rights 1990. Despite the section's importance as the only statutory means of highlighting inconsistencies in proposed legislation, and consequently the only formal barrier to the House legislating in derogation of the Bill's rights and freedoms, little critical attention has focused on section 7 since the Bill of Right's enactment in 1990.

The primary purpose of this article is to address a series of questions raised by section 7, relating to both the scope of the section and its effectiveness in practice. These questions include:

(a) What is the meaning of "inconsistent" with any of the rights and freedoms in the Bill of Rights 1990?
(b) What is the nature and extent of the duty placed on the Attorney-General by section 7?
(c) How is the Attorney-General meeting these requirements?
(d) Are there checks on the Attorney-General's performance of the section 7 duties?
(e) Does the scope of section 7 extend beyond pre-introduction scrutiny?

The paper's secondary purpose is to make the case for reform where deficiencies are identified.

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II SECTION 7: PURPOSE AND INTERPRETATION

A *The Legislative Context of Section 7*

Section 7 states that:[1]

> 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.

Section 7 is thus intended to alert the House of Representatives at an early stage to possible inconsistencies so that once alerted, the House is able to decide whether to proceed with, amend, or reject the provision.

As the mechanism for highlighting inconsistencies in proposed legislation, section 7 forms an integral part of the Bill of Rights 1990 as an ordinary statute. Indeed, the Parliamentary select committee considering the original White Paper[2] proposed section 7 to strengthen administrative processes for scrutinising proposed legislation, as a necessary consequence of moving from judicial enforcement of the Bill of Rights to parliamentary enforcement.[3] Given this context, section 7 cannot be looked to for substantive protection of the rights and freedoms contained in the Bill of Rights. The doctrine of parliamentary sovereignty, expressly reinforced by section 4 of the Bill of Rights 1990,[4] allows Parliament to enact inconsistent provisions. However, section 7 does require that inconsistent provisions are identified and reported to the House before or soon after introduction, so that any inconsistencies subsequently enacted are the result of an informed and conscious choice by Parliament, rather than an inadvertent oversight.

The requirements of section 7 are twofold. First, all inconsistencies must be identified. Second, the Attorney-General must report these inconsistencies to the House of Representatives. Fundamental to the first requirement is that the meaning of "inconsistent with any of the rights and freedoms contained in this Bill of Rights"[5] be determined.

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1 New Zealand Bill of Rights Act 1990.

2 *A Bill Of Rights For New Zealand A White Paper* New Zealand. Parliament. House of Representatives. 1985. AJHR. A.6.

3 *Final Report of the Justice and Law Reform Committee On a White Paper on a Bill of Rights for New Zealand.* New Zealand. Parliament. 1988. AJHR. I.8c: 3.

4 Section 4 states that no court shall hold any enactment impliedly repealed, revoked, invalid or ineffective, by reason only of inconsistency with the Bill of Rights 1990.

5 Above n 1.

B What Triggers the Obligation to Report - What is a Section 7 "Inconsistency"?

There are two possible meanings of "inconsistent".[6] The first arises from a plain reading of section 7 and suggests that where a provision in a Bill being introduced is "not in keeping with"[7] or "incompatible with"[8] any of the rights and freedoms in the Bill of Rights 1990 it must be reported, without consideration being had to other factors. This may be termed the "low threshold" meaning.

The second possible meaning arises from considering section 7 against section 5 which states:[9]

> "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."

This suggests a provision is inconsistent only where it is incompatible with any of the rights and freedoms contained in the Bill of Rights 1990 *and* is not a reasonable limit which can be demonstrably justified in a free and democratic society. This may be termed the "high threshold" meaning, and is the meaning the Attorney-General has adopted in meeting the requirements of section 7.[10]

C Which Meaning is Preferable?

A strong argument in favour of the high threshold definition is that the Bill of Rights 1990 must be read as a whole. Thus section 7 must be read in the light of other general provisions in Part I of the Bill, in particular sections 5 and 6. Section 5 provides for reasonable limits to be placed on the rights in the Bill where the limits can be demonstrably justified. Section 6 requires that where an enactment can be given a meaning consistent with the rights and freedoms contained in the Bill of Rights 1990, that meaning is to be preferred. Consequently, on this argument one cannot state a provision is inconsistent without considering it against the requirements of sections 5 and 6.

However, it is also arguable that the low threshold definition is the correct interpretation of section 7. First, a clear distinction can be discerned in the Bill of Rights 1990 between enactments and provisions. Section 4, which is a direction to the courts, refers to "any provision of the enactment," while section 6 refers to an "enactment." On the other hand, section 7 only refers to "provisions." It can thus be argued that sections 4 and 6 refer to Acts of Parliament and Statutory Regulations, and

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6 See G Taylor "That Bill of Rights" (1990) 13 TCL 33/1.

7 *The Concise Oxford Dictionary* (6 ed, Oxford University Press, Oxford, 1976) 546.

8 Above n 7.

9 Above n 1.

10 See the Attorney-General's Section 7 Report on the Kumeu District Agricultural and Horticultural Society Bill, tabled in the House of Representatives on 23 July 1991, that "That clause appeared, *notwithstanding the provisions of section 5* of the New Zealand Bill of Rights Act 1990 ... to be inconsistent ...".

are limited in their scope to being directions to the courts on matters of jurisdiction and interpretation. If this distinction is correct, neither section applies to Bills which, while containing provisions, are not enactments until receiving the royal assent. Consequently, there is no warrant to use section 6 in interpreting Bills to determine consistency with the Bill of Rights 1990.

Second, section 5 states that it must be read subject to section 4 of the Bill of Rights 1990. In the context of interpreting Bills prior to their introduction for consistency with the Bill of Rights 1990, these words of limitation are without meaning, suggesting that the section has no application in that context. However, the words are applicable in the legislative process, reminding the House of Representatives that while it is bound to observe section 5, ultimately Parliament's law-making power is unrestricted.[11] Consequently, section 5 appears applicable once inconsistencies are identified, rather than as the test for identifying them.

Finally, section 5 states that any limits to the rights and freedoms contained in the Bill of Rights 1990 must be prescribed by law. This is a reference to a legislative act and suggests that where Parliament is *enacting* a provision inconsistent with the Bill of Rights 1990, then the extent of that inconsistency must be demonstrably justifiable.[12] Consequently, it strains the words of the section to suggest an inconsistent provision in a Bill prior to introduction in the House can be "a reasonable limit prescribed by law." On this analysis, section 5 is not part of the test for determining inconsistencies to be reported under section 7, but only applies once the House is considering a provision which has been identified and reported as inconsistent.

D The Consequences of Adopting the High Threshold Definition

Intuitively, the low threshold meaning gives greater protection to the rights and freedoms contained in the Bill of Rights 1990, and is arguably more consistent with the spirit of the Bill, because every inconsistency identified will be reported to the House of Representatives before entering the complex equation of whether section 5 justifies the limitation. Therefore, every inconsistent provision will receive conscious scrutiny by the legislature to decide whether that provision is to be enacted. Furthermore, the legislature will be responsible for determining what limitations are justified.

However, under the high threshold test as adopted by the Attorney-General, Bills may be introduced with low threshold inconsistencies but the attention of the House of Representatives is not drawn to them as they are not deemed to be inconsistencies for the purposes of section 7. The crucial point is that under the high threshold test section 7 is no longer a mechanism for identifying inconsistencies so the House of Representatives may determine whether the limitations are justified. Rather, the role of

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11 On this analysis, s 4 remains suspended or "floating" during the legislative process, only to clamp down on the enactment of legislation thus preventing the courts from strictly enforcing the implications of s 3(a) which binds the legislature to act consistently with the Bill of Rights 1990.

12 See above n 2, 73.

the House is subsumed within the procedure for scrutinising proposed legislation which occurs within departments of the executive branch of government.

The issue is that the House is informed via a section 7 report only if the scrutinising departments consider an inconsistent provision is not a justified limitation. This situation has constitutional implications. One of the fundamental justifications for a Bill of Rights is to prevent the executive making small erosions of basic rights and freedoms.[13] Yet under the high threshold test for inconsistency, legislation promoted in large part by the executive is scrutinised by departments of the executive. This gives rise to misgivings primarily because of the paucity of information made available to the House, and thereby placed in the public domain. For example, during the introduction of the Immigration Amendment Bill 1991 the Opposition claimed that provisions of the Bill were inconsistent with at least four rights in the Bill of Rights 1990.[14] In reply the Attorney-General stated no more than that a "report was prepared, and a protocol was filed. It was found to be in compliance."[15] Thus in the absence of detailed information, the House of Representatives is expected to be satisfied that the correct legal tests have been applied and the right conclusions drawn.

It is submitted that the high threshold test of inconsistency, with its attendant feature of scrutiny within the executive branch of government, is inherently inferior to the low threshold test for three major reasons. First, under the low threshold test the role of the scrutinising department is limited to identifying the inconsistent provisions, leaving the key role of applying section 5 to the legislature. Second, under the low threshold test, scrutiny of the provisions and the application of section 5 would occur in public with an opportunity for public input at the select committee stage. The view of the executive branch would be merely one factor in the equation, rather than the determinant. Finally, it is submitted the end result of conscious, public debate leading to an informed choice by the House of Representatives is more in keeping with the spirit of the Bill of Rights 1990.

III THE INTERIM SCRUTINY PROCEDURE ADOPTED BY THE ATTORNEY-GENERAL

A Scrutiny Procedures for Government Bills

An interim procedure has been put in place by the Attorney-General for scrutinising all legislation to meet the requirements of section 7.[16] The Attorney-General's memorandum establishing the scrutiny procedure places primary responsibility for scrutiny on the Department of Justice, on the rationale that the Department has the

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13 See above n 2, 27.

14 See NZPD vol 516, 1991: 2973-2974.

15 Above n 14.

16 Memorandum entitled "Monitoring Bills For Compliance with the New Zealand Bill of Rights Act 1990" from Attorney-General to all Ministers and Chief Executives, 9 April 1991. See Appendix A.

necessary expertise.[17] However, a distinction is made between Bills promoted by the Department of Justice and those promoted by other Departments. To avoid possible conflicts of interest, Bills promoted by the Department of Justice are referred to the Crown Law Office for scrutiny.[18]

Initially, all draft legislation is forwarded to the Department of Justice prior to presentation at the Cabinet Legislation Committee.[19] This practice is long-standing and has not developed as a specific response to the enactment of the Bill of Rights 1990.[20] However, the Cabinet Office Manual now requires ministers proposing new legislation to declare whether the proposed Bill complies with the Bill of Rights 1990 and if not, to give details.[21]

Once the Cabinet Legislation Committee has approved the draft measure, Parliamentary Counsel will again refer the Bill to the Department of Justice or Crown Law Office. Here specific scrutiny against the criteria of the Bill of Rights 1990 occurs.[22]

In the actual scrutiny stage, the *modus operandi* at the Department of Justice is to attempt to ensure no provisions are inconsistent with the rights and freedoms in the Bill of Rights 1990, even in matters involving government policy.[23] Consequently, some redrafting may occur at this stage of the scrutiny process. Of the government-promoted Bills scrutinised to date, the Department of Justice has recommended at least two be amended to ensure consistency with the Bill of Rights 1990.[24]

Following this scrutiny stage, Bills are ready for introduction in the House.[25] If an inconsistency is detected, the officer making the examination shall report to the Attorney-General and Parliamentary Counsel, accompanying that report with a draft report for presentation to the House by the Attorney-General.[26] Section 7 of the Bill of Rights 1990 then requires the Attorney-General to draw the House's attention to that inconsistency. To date, one government Bill, the Transport Safety Bill 1991, has required an Attorney-General's report.

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17 Above n 16, 3.

18 Above n 16, 3.

19 The writer is indebted to Ms Janet Girvan, Law Reform Division, Department of Justice, New Zealand, for the information on New Zealand procedures.

20 Above n 19.

21 Cabinet Office Manual (1991), Chapter 5, Appendix 1.

22 Above n 16, 1.

23 Above n 19.

24 The Bail (Miscellaneous Provisions) Bill 1990 is the first of these. See the Department of Justice report to the Justice and Law Reform Select Committee, Leg 14-1-9, 7 May 1991. Select Committee Papers on the Bail (Miscellaneous Provisions) Bill 1990. The Finance (No 2) Bill 1990 was the second Bill in which it was recommended that changes be made. See below n 36.

25 Above n 16, 2.

26 Above n 16, 2-3.

B Scrutiny of Non-Government Bills

For non-government bills, section 7 requires that the Attorney-General report as soon as practicable after the Bill's introduction. To this end, the Department of Justice scrutinises each non-government Bill immediately after its introduction and then follows the procedure outlined above to relay the results of the examination to the Attorney-General.[27] To date, scrutiny of non-government Bills has identified inconsistencies in two Bills, both of which have led to section 7 reports.[28]

An issue arises over the meaning of what is practicable. With the Kumeu District Agricultural and Horticultural Society Bill 1991, the Attorney-General was informed by the Department of Justice on 13 May 1991 that a provision of the Bill was inconsistent.[29] However, the Attorney-General did not report the inconsistency to the House until 23 July 1991.[30] Yet with the Napier City Council (Control of Skateboards) Empowering Bill 1991, the Attorney-General received notice of an inconsistent provision on 13 August 1991 and reported the inconsistency to the House on 15 August 1991.[31] It is submitted that the latter practice falls more naturally within the wording and intent of section 7(b). The purpose of section 7 is to alert the House that an inconsistency exists with as little delay as possible. Consequently, the Attorney-General has little warrant to delay reporting, as this may hinder scrutiny by the relevant select committee.

C Evaluation of the Interim Scrutiny Procedure

It is convenient to assess the scrutiny procedure against the procedure adopted by Canada to deal with inconsistencies against the Canadian Bill of Rights and Charter of Rights and Freedoms. This evaluation is justified by the similarity between the Canadian and New Zealand Human Rights Instruments and their similar requirements for reporting inconsistencies to the respective Houses of Representatives.

The New Zealand scrutiny process differs from the Canadian process in three important aspects.[32] First, in the drafting stage the Canadian process benefits by the Canadian Department of Justice practice of assigning a number of lawyers to each department as legal advisers, one of whom will generally assist in drafting the proposal.

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27 Above n 16, 2.

28 The Attorney-General formally reported on the Kumeu District Agricultural and Horticultural Society Bill on 23 July 1991. A formal report on the Napier City Council (Control of Skateboards) Empowering Bill occurred on 15 August 1991.

29 See the Memorandum from the Department of Justice to the Attorney-General, 13 May 1991, Leg 7-5-27.

30 Above n 28.

31 See the memorandum from the Department of Justice to the Attorney-General, 13 August 1991, Leg 7-5-27.

32 The writer is indebted to Mr D Martin Low, Senior General Counsel, Human Rights Law Section, Department of Justice, Canada, for the information on Canadian procedures.

Given the broad experience of these lawyers in human rights issues, there is a possibility at this early stage for human rights issues to be identified and resolved.

In New Zealand this initial exposure to staff skilled in human rights matters is not reproduced, as draft legislation generally arises either from Parliamentary Counsel drafting a Bill from departmental instructions or the department submitting instructions plus a draft bill.[33] It is only after a period of collaboration between department and Parliamentary Counsel to produce a satisfactory draft bill, that the draft is circulated to other departments who may have an interest, including the Department of Justice.[34]

A second difference between Canada and New Zealand arises from the structure of the departments. In Canada legislative drafting occurs within the Legislation Section of the Department of Justice. According to Low,[35] the bulk of human rights problems will be identified at this stage as the drafter turns the broad proposal into detailed provisions. Problems with potential violations can then be resolved by consultation within the Department of Justice.

In New Zealand however, the Department of Justice, the Crown Law Office, the Parliamentary Counsel Office, and the department involved with any proposed Bill are all separate entities. Each of these entities fulfils different functions during the drafting process and there is potential for objectives to clash, particularly between a department's policy goals and the Department of Justice's scrutiny obligations. Furthermore, problems of communication can arise as seen when clause 5 of the Finance (No 2) Bill 1990 was introduced without the amendment of a provision previously identified by the Department of Justice as inconsistent with section 19 of the Bill of Rights 1990.[36] A clear, albeit inadvertent, breach of section 7 of the Bill of Rights 1990 occurred because the Department of Justice failed to monitor the progress of the inconsistent provision and the Attorney-General was not informed of the inconsistency.

A final difference in procedure arises from the timing of the Attorney-General's report. Formal Canadian scrutiny occurs *after* introduction of a Bill to the House and is governed by statute.[37] This requirement introduces an element of openness into the procedure by having the Bill under scrutiny already in the public arena, and provides more time for the scrutiny process as the Attorney-General need not report until before the second reading of a Bill. By contrast, the requirement that reporting occur

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33 See W Iles QC "The Departmental Solicitor and the Parliamentary Counsel Office" in Legislative Change, Report No 6 by the Legislation Advisory Committee, (December 1991) 60.

34 Above n 33.

35 Above n 32.

36 See the Report of the Department of Social Welfare to the Social Services Select Committee on the Finance (No 2) Bill 1990.

37 Section 3 of the Canadian Bill of Rights and s 4.1 of the Department of Justice Act require the Minister of Justice, who is ex officio Attorney-General, to examine pursuant to the Canadian Charter of Rights and Freedoms Examination Regulations, every regulation and Bill to ensure consistency with the provisions of the Canadian Bill of Rights and Canadian Charter of Rights and Freedoms respectively.

immediately upon introduction compresses the scrutiny period, especially where there is urgency behind the government's legislative programme. Furthermore, openness is replaced by the confidentiality which accompanies proposed legislation in New Zealand prior to its introduction.

IV THE LEGAL CONSEQUENCES ARISING FROM PRE-INTRODUCTION SCRUTINY

At best, the scrutiny procedure places a limited amount of information before the House of Representatives,[38] while in most cases no information is placed before the House as a consequence of the high threshold test. Given that determining whether draft legislation contains human rights issues will be a complex exercise in most situations, two consequences arise.

First, it is possible that potential human rights issues will either be missed completely by Members of Parliament, or the absence of a section 7 report will be sufficient to remove any misgivings. Secondly, and more importantly, the decision not to report a possible inconsistency will rarely be clearcut, for the high threshold test involves determining whether section 5 applies. Consequently, many cases will involve a balancing of factors including normative assumptions. Where officials resolve such compliance questions in favour of not reporting, the House is deprived of any indication that the decision involved a balancing of factors ultimately favouring not reporting. The result is an information gap surrounding the scrutiny process leaving Members of Parliament literally in ignorance of substantive human rights issues in legislation before them.

The legal issue arising is whether this information gap in the pre-introduction procedure can be overcome by Members of Parliament seeking departmental reports on a Bill's provisions under the Official Information Act 1982. Currently, this course is barred by the Department of Justice claiming legal professional privilege for all documents relating to the scrutiny process.[39]

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38 See the Attorney-General's report on the Kumeu District Agricultural and Horticultural Society Bill. However, notice must be taken of the Attorney-General's explanation to the House of the compliance issues in cl 17 of the Transport Safety Bill 1991.

39 Similarly, in Canada the Access to Information Act contains three provisions preventing access to scrutiny information. Section 21(1)(a) allows the head of a government institution to refuse to disclose any record that contains advice or recommendations developed by or for a government institution or minister of the Crown. Section 23 allows the head of a government institution to refuse to disclose any record requested that is subject to solicitor-client privilege. Finally, s 69(1) states that the Access to Information Act does not apply to confidences of the Queen's Privy Council for Canada, including inter alia advice to Cabinet and draft legislation.

A *The Barrier of Legal Professional Privilege*

In New Zealand, section 9(2)(h) of the Official Information Act 1982 specifies that official information may be withheld to "maintain legal professional privilege."[40] The Department of Justice alleges that everything on the files concerned with the scrutiny of legislation is covered by section 9(2)(h).[41] There are two issues to be decided here. First, whether the documents are covered by legal professional privilege. Second, whether the privilege is sufficient to defeat the principle of availability found in section 4 of the Official Information Act 1982.

1 *Does legal professional privilege cover documents produced during the scrutiny process?*

The legal professional privilege relied on by the Department of Justice arises from the Official Information Act 1982. Consequently, the meaning attributed to the statutory provisions by the Ombudsman[42] must be weighed alongside the approach of the courts in considering this issue.

The first question is whether documents generated during the scrutiny process fall within the privilege? At least two different categories of document are generated during the scrutiny process:[43]

(a) Formal memoranda to the Attorney-General indicating whether a report is necessary, or the Department's conclusions where compliance issues have been complex.
(b) Working papers recording the Department's conclusions and indicating the reasons for arriving at these conclusions.

There is a scarcity of authority on whether the formal memoranda are covered by the privilege,[44] as most decided cases considering the scope of legal professional privilege concern actual litigation. However, it is at least arguable that as section 7 of the Bill of Rights Act 1990 involves the Attorney-General acting as Principal Law Officer of the Crown, formal advice from the Department of Justice may fall within the privilege as a professional communication in a professional capacity.[45]

While it is arguable that there is scope for legal professional privilege, that argument is far from decisive. Section 7 of the Bill of Rights 1990 confers a public

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40 Official Information Act 1982.
41 Letter from Secretary of Justice to writer, 18 July 1991.
42 The Office of the Ombudsman has statutory responsibility for dealing with requests for official information under the Official Information Act 1982, s 28.
43 Above n 41.
44 A request to the Ombudsman seeking an investigation of the decision by the Department of Justice to withhold papers relating to the scrutiny process was made in July 1991. As yet no decision on this issue has been made by the Ombudsman.
45 See *Lawrence* v *Campbell* (1859) 4 Drew 485; 62 ER 186.

function on the Attorney-General to publicise inconsistencies between Bills and the Bill of Rights. Thus, in enacting section 7 of the Bill of Rights 1990, Parliament has sought to place the debate over possible inconsistencies squarely in the public domain. As the formal memoranda form the basis of the Attorney-General's opinion on any possible inconsistency, they are crucial documents in ensuring information is publicly available on such inconsistencies. Consequently, the notion of legal professional privilege sits uncomfortably alongside the aims of informed public debate over Bills, better informed and focused parliamentary debate on possible inconsistencies, and ultimately, better legislation.

Different considerations apply to the working papers. These papers lead to the formal memoranda considered above, unless no inconsistencies are detected, in which case no communication occurs between the Department and the Attorney-General.[46] The issue is whether the privilege covers documents where no actual communication occurs between solicitor and client.

The essential point is that the working papers are drawn up to determine whether advice is necessary. Consequently, they are existing documents rather than documents produced specifically for communication to a client. Authority suggests that existing papers will be covered by legal professional privilege only if a test of "dominant" or "sole" purpose is met.[47] In a case concerning internal file notes withheld on grounds of legal professional privilege, the Ombudsman accepted that in principle the privilege may cover internal documents but each document must be considered separately in light of the full circumstances to ascertain the purpose for which it had been written.[48] The Ombudsman applied the test from *Guardian Royal Exchange* v *Stuart*,[49] of whether litigation was in progress or reasonably apprehended when the information came into existence, and whether the dominant purpose in preparing the document was to enable a legal adviser to conduct or advise regarding litigation.[50]

Applying this test to the working documents, in the absence of impending litigation there is nothing for the Department of Justice to found its privilege on. The dominant purpose in preparing the working papers is to determine whether advice should be given, or to serve as the source of advice should the Attorney-General request it. Consequently, the documents are being generated not for specific advice, but as part of an ongoing scrutiny process. It is submitted that this ongoing generation of documents takes them outside a dominant purpose test.

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46 Above n 16.

47 Case no 1308, 9th Compendium of Case Notes of the Ombudsman (Office of the Ombudsman, Wellington, 1989) 168.

48 Above n 47.

49 [1985] 1 NZLR 596.

50 See also *Re Llianos* v *Secretary, Department of Social Security* (1985) 7 ALD 475, 479, where the Court required actual communication and a dominant purpose before legal professional privilege attached.

2 Does the public interest in disclosure outweigh the need to maintain the privilege?

An application for release of documents under the Official Information Act 1982 "does not stop" upon establishing that legal professional privilege applies.[51] A further question arises whether the public interest in disclosure outweighs the interest in maintaining legal professional privilege. In the absence of direct authority, the issues arising in an analogous decision regarding a draft Bill are worth considering.[52]

A proposed Competition Bill was drafted but never introduced. A request for the Bill under the Official Information Act was declined on grounds of legal professional privilege.[53] However, upon investigation the Ombudsman agreed that in a complex area of law there was a strong public interest in increasing the availability of information on proposed laws to enable more effective participation.[54] While the Ombudsman did not sanction release of the Bill itself because of legal professional privilege, background information indicating the reasoning underlying the formulation of policy contained in the Bill was released.

It is submitted that applying this reasoning to documents generated by the Department of Justice during the scrutiny process suggests both the formal memoranda and working papers be released on public interest grounds. Release of the documents will encourage more informed scrutiny of legislation by Members of Parliament and more effective public participation in the legislative process, particularly at select committees. Furthermore, a public interest argument for the release of these documents is stronger than with the draft Competition Bill because the requirement to report is a statutory duty, and the documents indicate the reasoning underlying the decision whether the Attorney-General is advised pursuant to that duty.[55]

3 Does public policy support the use of legal professional privilege in this issue?

Leading cases suggest that the central concern of the courts in maintaining legal professional privilege lies in the administration of criminal justice.[56] In *R* v *Uljee*[57] Cooke J stated some reasons why the public interest is served by allowing legal professional privilege. These reasons include:

(a) A more efficient administration of justice;
(b) Bringing to light and better presentation of defences;

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51 See Case 393, Seventh Compendium of the Case Notes of the Ombudsmen (Wellington, 1986) 192.
52 See Case 31, Fifth Compendium of Case Notes of the Ombudsman (Office of the Ombudsman, Wellington, 1984).
53 Above n 52.
54 Above n 52.
55 Above n 41.
56 See *Rosenberg* v *Jaine* [1983] NZLR 1.
57 [1982] 1 NZLR 561, 569.

(c) Encouragement of lawful conduct;
(d) Avoidance of litigation;
(e) Possibilities of guilty pleas or co-operation with police.

Given the heavy emphasis on criminal justice contained in these principles, an argument on grounds of public policy may be made against extending legal professional privilege to cover documents relating to the Attorney-General's exercise of a statutory public law function, where no litigation is contemplated.

Two considerations need to be balanced. The Department of Justice considers it undesirable to make information public about legislative proposals still in the drafting stage. It is certainly arguable that until the government decides the final form of provisions to be introduced into the House and such provisions undergo formal scrutiny against the Bill of Rights 1990, it may be premature to highlight possible inconsistencies.[58] Furthermore, once the government has notified the Clerk of the House of Representatives of its intention to introduce the legislation, the Bill becomes subject to parliamentary privilege and information about its provisions cannot be released until the moment of introduction.[59]

However, once a Bill is introduced in the House there should be no objection to making information available to Members of Parliament to facilitate informed debate of the Bill's provisions. This course merely extends the Attorney-General's current practice of making the formal memorandum from the Department of Justice available to select committees after a section 7 report has been made to the House. Furthermore, because complex issues surrounding compliance with the Bill of Rights 1990 may be present, and analyses of limitations under section 5 may go beyond legal issues and involve normative decisions, there are strong grounds for such information being placed before the House.

Support for this argument is found in the views of the Committee on Official Information. In their Supplementary Report to the official report *Towards Open Government*[60] the Committee distinguished between advice and opinions relating to actual and potential legal proceedings, and advice of the Crown Law Office or departmental legal officers of a general nature, including opinions and statements on constitutional matters. The Committee suggested such opinions ought to be publicly available.[61]

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58 Although significantly, s 6 of the Human Rights Commission Act 1977 allows the Commission to report to the Prime Minister on proposed legislation affecting human rights, and to publish those reports.

59 See the First Report of the Standing Orders Committee 1985. New Zealand. Parliament. 1985. AJHR I 14:17.

60 Committee on Official Information *Towards Open Government* (Government Printer, Wellington, 1981) Supplementary Report, 67.

61 Above n 60.

Consequently, once legislation is introduced in the House public policy favours openness rather than the confidentiality of legal professional privilege. It is submitted the Attorney-General should table in the House a report of compliance issues raised in Bills being introduced. Such a course will not undermine the pre-introduction scrutiny process, but rather will lead to better and more informed debate in the House, and more complete scrutiny of legislation by select committees.

V THE INTRODUCTION OF LEGISLATION IN THE HOUSE

Section 7 of the Bill of Rights 1990 is intended to alert the House of Representatives at the earliest opportunity that an inconsistency exists,[62] so the House can make a conscious decision whether to pass, amend, or reject the provision.

A number of factors limit the duty section 7 imposes. First, the high threshold meaning of inconsistent severely limits the number of likely section 7 reports. As Taylor notes, "[w]ould a Cabinet member ever say Cabinet's legislation is not 'demonstrably justified in a free and democratic society?'"[63] Second, section 7 gives the Attorney-General a discretionary power to report *only* when a provision *appears* to be inconsistent. A provision may actually be inconsistent, but if the Attorney-General considers it consistent, no report is necessary. Finally, given the current confidentiality surrounding the scrutiny process, there is an absence of readily accessible checks to determine if the Attorney-General is fulfilling the statutory requirement.

This latter point is significant. Under the low threshold definition of inconsistency, Attorney-General's reports would likely occur regularly. Equally, under the high threshold definition, ensuring compliance with section 7 would be unproblematic if access to departmental working papers on Bills was possible, or the Attorney-General tabled departmental reports on Bills at introduction. However, given the high threshold definition and confidentiality, the only recourse is to political checks or judicial review of the Attorney-General's section 7 responsibility.

A *Political Checks on the Attorney-General*

The Attorney-General's failure to report an inconsistency has potentially serious political consequences.[64] Once the Department of Justice or Crown Law Office indicate an inconsistency exists, then the Attorney-General choosing not to report that inconsistency to the House entails risking the consequences of that report being "leaked" to the press. The result, a compromising of the Attorney-General's independent position as Principal Law Officer and possible charges of misleading the House of Representatives, are so career-threatening that no Attorney-General could contemplate not reporting.

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62 Report of the Department of Justice to the Justice and Law Reform Committee, Select Committee Papers on the New Zealand Bill of Rights Bill 1989, 14.

63 Above n 6.

64 The writer is indebted to Hon David Caygill for indicating this point.

B Is Judicial Review of the Attorney-General Possible?

The issue of judicial review was raised but not confronted during parliamentary debate on the Bill of Rights 1990.[65] However, the question has major implications for the Bill of Right's effectiveness as a check on legislation. A right of review will be a useful tool for ensuring that compliance decisions during the scrutiny process are correct.

1 Will the courts undertake review?

Courts have a traditional reluctance to interfere in the parliamentary process,[66] as orthodox constitutional theory holds the separation of judiciary and legislature as a fundamental tenet. However, the enactment of the Bill of Rights 1990 as a statutory declaration of fundamental rights and freedoms binding the legislature may alter this traditional relationship.[67] In particular, it is difficult to assert categorically that the courts have no role in scrutinising the application of those provisions of the Bill of Rights directly impacting on the legislature, such as sections 7 and 27.

Nevertheless, if judicial review of the Attorney-General's failure to fulfil the obligations imposed by section 7 is to occur then two threshold barriers must be overcome. First, it must be shown that review is not barred by Article 9(1) of the Bill of Rights 1688, which is a foundation of parliamentary privilege. Second, it must be shown that judicial review proceedings are not an attempt to enforce a statute in Parliament, as that is barred by the rule in *Bradlaugh* v *Gossett*.[68]

2 Is the decision "Proceedings in Parliament"?

One privilege Parliament asserts is control of its own proceedings on the authority of article 9(1) of the Bill of Rights 1688, which states:

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

Consequently, judicial review will be barred if the Attorney-General's failure to report a section 7 inconsistency is a "proceeding in Parliament". The term "proceedings in

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65 NZ Parliamentary Debates Vol 510, 1990:3762, Mr Paul East MP.

66 For a recent expression of this reluctance see *Turners & Growers* v *Moyle* (Unreported, 15 December 1988, High Court Wellington Registry CP 720/88 per McGechan J) 68.

67 See F C Brookfield "Constitutional Law" [1990] NZ Recent Law Review 220, 224-225.

68 (1884) 12 QBD 271.

Parliament" has not been authoritatively defined, either by Parliament itself or the courts.[69] Erskine May suggests that:[70]

> The primary meaning, as a technical parliamentary term ... is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process ... by which it reaches a decision.

McGee[71] submits that anything directly and formally connected with an item of business in the House or in a committee is a parliamentary proceeding. This includes speaking in debate, preparing and drafting questions, Bills, and amendments, and certain communications with the public where that communication is directly connected with business to be transacted in the House.[72] While it follows that any actual section 7 report is *prima facie* a "proceeding in Parliament," it does not follow that a failure to report is a "proceeding."

The question is whether the Attorney-General's failure to report an inconsistent provision is part of the process by which the House ultimately reaches a decision on that Bill. This is a difficult point, especially in the abstract. However, two points are worth considering. First, while the decision is intimately connected with some Bill about to be introduced and thus is business to be transacted in the House, conduct described as within the term "proceedings in Parliament" are actions themselves rather than omissions.[73] Thus a failure to report appears to fall into the "grey area," referred to in Erskine May,[74] of matters closely relating to an action in the House but not conclusively "proceedings in Parliament."

The second point to note arises from the decision of Popplewell J in *Rost* v *Edwards and Others*.[75] In discussing the term "proceedings in Parliament" his Lordship suggested that where a document or action is not clearly a "proceeding in Parliament" but falls within a "grey area," the jurisdiction of the courts should not be ousted.[76] Following this reasoning, it is submitted that a failure by the Attorney-General to act pursuant to section 7 may fall within such a "grey area." Consequently, article 9 of the Bill of Rights 1688 may not bar review of an Attorney-General's failure to report.

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69 See DG McGee *Parliamentary Practice in New Zealand* (Government Print, Wellington, 1985) 427.

70 C J Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21 ed, Butterworths, London, 1989) 92.

71 Above n 69.

72 Above n 69.

73 Above n 69.

74 Above n 70.

75 [1990] 2 WLR 1280. For a discussion of this case see D McGee "The Application of Article 9 of the Bill of Rights 1688" [1990] NZLJ 346.

76 Above n 75, 1293.

3 *Is judicial review barred by* Bradlaugh *v* Gossett?[77]

It is clear law that a statute is binding on the House of Representatives and its members.[78] However, where a statute relates to the internal proceedings of the House, the courts will not interfere on the authority of *Bradlaugh* v *Gossett*.[79] In essence, *Bradlaugh* prevents courts awarding substantive remedies directing the House or its members to perform some action. Consequently, if judicial review of the Attorney-General's failure to report is undertaken, *Bradlaugh* will prevent the court directing the Attorney-General to report that inconsistency to the House.

However, a declaration under section 4 of the Judicature Amendment Act 1972 will state the court's opinion on a matter of law, without necessarily involving provision for enforcement by way of substantive remedy, thus avoiding charges of attempting to enforce the statute. A litigant could seek a declaration that the Attorney-General had failed to give proper consideration to reporting under section 7 of the Bill of Rights 1990.[80] Provided the court is not ousted from the "grey area" surrounding "proceedings in Parliament," the court may be able to review this question and make a declaration on the point of law.

The combination of *Bradlaugh* and parliamentary sovereignty appear to prevent any remedy other than a declaration. An injunction to prevent the passage of a Bill is an express involvement in the House's proceedings and is barred by the rule in *Bradlaugh*. Similarly, courts cannot refer provisions back to the House for reconsideration because of a procedural irregularity, such as the Attorney-General's failing to place before the House the information required by section 7 of the Bill of Rights 1990.[81] The courts also remain bound by *Hoani Te Heuheu Tukino* v *Aotea District Maori Land Board*,[82] where the Privy Council held that the court cannot go behind what has been enacted by the legislature to inquire how the enactment came to be made. Rather the court must accept the enactment as law and be confined to construing and applying it.[83] Further, section 4 of the Bill of Rights 1990 expressly prevents a court holding any provision of any enactment invalid or ineffective by reason of inconsistency with the Bill of Rights 1990.

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77 Above n 86.

78 Above n 69, 432.

79 Above n 68, 280-281 per Stephen J.

80 Recent trends suggest that standing should not be a barrier to litigants. The Court of Appeal decisions in *Environmental Defence Society Inc* v *South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 and *Finnigan* v *New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 suggest that standing will follow in important cases where some interest distinct from the public interest is involved, however minor that interest may be.

81 *British Railways Board* v *Pickin* [1974] AC 765.

82 [1941] AC 308, 322-3 per Viscount Simon.

83 Although the New Zealand Law Society in its submission to the Select Committee during the passage of the Bill of Rights 1990 suggested this point was unclear. See submission 49, Select Committee Papers on the New Zealand Bill of Rights Bill 1989.

Consequently, if the Attorney-General does not report pursuant to section 7, that decision may be susceptible to a challenge on the grounds that some aspect of the Bill is inconsistent with the Bill of Rights 1990 and the Attorney-General has failed to give sufficient consideration to reporting that inconsistency to the House. Successful challenges may be limited to declarations of the law, but such declarations are entirely compatible with the statutory scheme of the Bill of Rights 1990.

VI POST-INTRODUCTION SCRUTINY

A What is the Scope of Section 7 after Introduction?

Once a Bill is introduced into the House of Representatives, either with or without a section 7 report, its passage through the legislative process is governed by the procedures contained in the Standing Orders of the House. However, provisions of the Bill of Rights 1990 affecting the House, in particular section 3(a), raise significant legal issues.

Section 3(a) binds the legislative branch of government to act consistently with the Bill of Rights 1990. Consequently, the House of Representatives must carry out its legislative functions within the framework laid down in Part I of the Bill.[84] The key component of this statutory framework is section 5, which restricts limitations on the Bill's rights and freedoms to only those as are demonstrably justified. It cannot be argued that this statutory requirement is satisfied by the pre-introductory scrutiny procedure, as amendments are made to legislation at the select committee and Committee of the Whole House stages of the legislative process. These amendments have the potential to contain inconsistencies with the Bill of Rights 1990.[85] Consequently, scrutiny for inconsistencies must extend beyond pre-introduction if the full implications of section 3(a) are to be addressed.

The only means in the Bill of Rights 1990 empowering scrutiny and reporting of inconsistencies for the House of Representatives is section 7. Therefore, the crucial question is whether the Attorney-General's responsibility under section 7 extends beyond introduction to cover all stages of the legislative process where inconsistencies may arise? The answer to this question is not clear, because at least three interpretations of the post-introduction scope of section 7 are possible.

1 A literal interpretation with no scrutiny

A literal reading of section 7 suggests the Attorney-General has no obligation to scrutinise and report on government Bills after introduction, and the obligation on other Bills ends once the initial scrutiny is completed as soon as practicable after introduction.

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84 Remembering that on the analysis suggested by this paper, s 4 "floats" during the legislative process, only coming into effect after a Bill is enacted.

85 For a Canadian example, see *Pacific Press Limited* v *The Minister of Employment and Immigration* [1991] Unreported decision of the Federal Court of Appeal A-1026-90.

Consequently, no mechanism is required for identifying inconsistent provisions placed in legislation either as a result of select committee recommendations being adopted by the House or during the Committee of the Whole House stage of the legislative process.

2 A purposive interpretation imposing a continuing obligation to scrutinise and report

The Bill of Rights 1990 is an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand.[86] Authorities suggest that such a guarantee of human rights requires a purposive approach to interpretation aimed at giving full measure to the rights and freedoms contained therein.[87] As Shaw and Butler[88] note:

> The Privy Council, the European Court of Human Rights, the United Nations Human Rights Committee, and the Supreme Court of Canada, amongst others, have positively established the purposive approach as the guiding principle in interpreting human rights guarantees.

A purposive interpretation aiming to give full measure to the rights and freedoms in the Bill of Rights 1990 will require section 7 scrutiny procedures to extend beyond pre-introduction. Because amendments to legislation occur at the select committee and Committee of the Whole stages of the legislative process, full protection of the rights and freedoms contained in the Bill of Rights 1990 will require ongoing scrutiny to detect possible inconsistencies arising at these stages, and ongoing reporting by the Attorney-General to place these inconsistencies before the House.

3 A purposive interpretation giving the Attorney-General a discretion to report

The possibility of a purposive interpretation giving the Attorney-General a discretionary power to report arises from the Department of Justice's response to Mr Antony Shaw's submission to the select committee considering the Bill of Rights 1990.[89] Mr Shaw suggested it is unrealistic to expect the Attorney-General to identify all the human rights implications at or prior to introduction as many arise only after more careful scrutiny. Consequently, Mr Shaw recommended the Bill of Rights 1990 be amended to empower the Attorney-General to report at any stage during the passage of a Bill.

Acknowledging the issue of principle underpinning Mr Shaw's submission, the Department of Justice suggested nothing in section 7 precludes the Attorney-General from reporting inconsistencies at any time after a Bill's introduction, but the objective is alerting the House at the earliest opportunity.[90] This suggestion entails an ongoing

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86 Above n 1, Long Title.

87 See *Minister of Home Affairs* v *Fisher* [1980] AC 319.

88 See A Shaw and A S Butler "The New Zealand Bill of Rights Comes Alive" [1991] NZLJ 261.

89 Above n 62.

90 Above n 62, 15.

scrutiny of legislation by the Attorney-General through all stages of the legislative process, with a *discretion* to report inconsistencies rather than the obligation to report suggested above.

B Which Interpretation is to be Preferred?

Since the Bill of Right's enactment, the literal interpretation of the scope of section 7 has prevailed within the House of Representatives. Amongst those with responsibility for legislative scrutiny, only the Department of Justice acknowledges some attempt to remain aware of Bills passing through the legislative process, albeit with the caveat that there is no statutory requirement for such scrutiny.[91] However, the Department concedes that this scrutiny is practically very limited.[92]

Neither the Chief Parliamentary Counsel, responsible for drafting amendments to government Bills, nor the Clerk of the House of Representatives, the principal permanent officer of the House responsible for providing procedural and legal advice to the Speaker, accepts any responsibility for drawing inconsistencies with the Bill of Rights 1990 to the House's attention. When asked what procedures are being put in place to consider whether amendments to Bills at the various stages are consistent with the Bill of Rights 1990, Chief Parliamentary Counsel replied that "No such procedures are required by the Act and none are being put in place."[93] Similarly, the Clerk of the House rejects any responsibility for detecting inconsistencies other than as part of the select committee consideration of legislation.[94]

However, it is submitted that the literal interpretation of section 7 is seriously deficient in two major areas. First, the absence of post-introduction scrutiny procedures frustrates Parliament's intention in enacting the Bill of Rights 1990. The Long Title to the Bill declares its purpose is to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand."[95] A literal interpretation denying the need for post-introduction scrutiny defeats all three of these aims as the rights and freedoms are affirmed, protected and promoted only prior to introduction. After introduction the lack of scrutiny allows both intentional and inadvertent inconsistencies to progress unchecked. Furthermore, by failing to identify inconsistencies with the Bill of Rights 1990, there is a real likelihood that the Bill's rights and freedoms will be eroded without the section 5 requirement of justified limitations being satisfied, thus leaving the House of Representatives in breach of the law.

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91 Above n 19.

92 Above n 19.

93 Letter from Mr Walter Iles QC, Chief Parliamentary Counsel, to the writer, 27 May 1991.

94 Communication to writer from David McGee, Clerk of the House of Representatives, 18 April 1991.

95 Above n 86.

Second, as noted above, a literal interpretation is seriously at odds with accepted canons of interpretation for human rights guarantees.[96] Authority supports adopting a purposive approach to interpreting the Bill of Rights 1990, and this approach is accepted in the growing jurisprudence arising from the New Zealand Court of Appeal. In *Flickinger* v *Crown Colony of Hong Kong*,[97] the Court observed there was force in arguing that a purposive interpretation is necessary to give *full measure* to the rights and freedoms in the Bill of Rights 1990.[98] This purposive approach was continued by the majority in *R v Crime Appeals 227/91 and 228/91*,[99] the most important decision on the Bill of Rights 1990 to date. Significantly, President of the Court of Appeal Sir Robin Cooke states in *Crime Appeals* that "... [a] Parliamentary declaration of human rights and individual freedoms ... is not to be construed narrowly or technically."[100]

Consequently, it is submitted that the literal approach to post-introduction scrutiny should be abandoned in favour of a purposive approach. Further, it is submitted that this approach requires on-going scrutiny throughout the legislative process and places an obligation on the Attorney-General to report inconsistencies whenever such are identified, rather than the discretion to report suggested by the Department of Justice. Reliance on a mere discretion to report is flawed by not acknowledging that removal of the statutory requirement to report *ipso facto* removes the requirement to scrutinise the legislation. The real benefit of statutorily required pre-introduction scrutiny is that legislation is scrutinised for inconsistencies with the Bill of Rights by those officials with the greatest experience in such matters. Removing the duty to report on Bills also removes the duty to have those Bills scrutinised by the officials and in the absence of formal scrutiny only ad hoc scrutiny will occur. Such ad hoc scrutiny will likely prevent the benefits of a purposive approach being attained, and consequently fail to ensure that full measure is given to the rights and freedoms contained in the Bill of Rights 1990.

VII CONCLUSION

Opinions on the value of section 7 were diverse prior to the Bill of Right's enactment, ranging from section 7 providing Parliament with "a very practical power",[101] to the section being "a well-intentioned nonsense."[102] Our examination of section 7's operation since the Bill of Right's enactment enables a more informed and accurate assessment. In particular, three critical points can be made.

First, the value of pre-introductory scrutiny of legislation is diminished by the policy of non-disclosure of issues raised in Bills. It is submitted that it should be a matter for the public record on every Bill whether any compliance issues were identified,

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96 See above n 88.
97 [1991] 1 NZLR 439.
98 Above n 97, 441 per Cooke P.
99 Unreported 25 October 1991.
100 Above n 99, 12.
101 Above n 65, 3760, Rt Hon Geoffrey Palmer MP.
102 Above n 65, 3767, Hon George Gair MP.

and if so, how they were resolved. There is no sustainable reason for the Attorney-General's failing to place before the House of Representatives at the appropriate time a copy of the departmental report on compliance with the Bill of Rights 1990. Such an action will ensure it is publicly known whether the House of Representatives needs to be alerted to and seised of Bill of Right's issues, and by encouraging informed debate, demonstrate the House's commitment to affirming, protecting and promoting fundamental human rights and freedoms.

Second, the House of Representatives should address the need for formal post-introduction scrutiny of legislation. Sections 3(a) and 5 of the Bill of Rights 1990 require the House to conscientiously ensure that only justified limitations are placed on any right contained in the Bill of Rights 1990. Consequently, unless the House continually has before it some means of scrutinising legislation, identifying inconsistencies, and bringing such to the House's attention, the statutory requirement of consistency with the Bill of Rights placed on the House by section 3(a) will likely be breached.

Finally, the view that the Bill of Rights 1990 is irrelevant to the legislative process has been dispelled by the positive impact of the Bill in its first year of enactment. The Bill of Rights 1990 is currently creating a new environment within which the work of the legislature proceeds. Consequently, there is a need to assess the full impact on the House of Representatives of provisions such as sections 3, 5 and 7. Little critical attention has gone into the scope of these provisions when deciding on appropriate scrutiny procedures, resulting in a limited and narrow view of the Bill's application. It is submitted that this narrow view is erroneous, especially now that the Bill of Rights 1990 is firmly established as a constitutional document of significance with a purpose and spirit fully recognised in the courts. It will be unfortunate indeed if the Bill of Right's purpose and spirit continue to be frustrated within the legislative process by outdated conventions and inadequate procedures.

APPENDIX A

8 April 1991

ALL MINISTERS
ALL CHIEF EXECUTIVES

Monitoring Bills for Compliance with the New Zealand Bill of Rights Act 1990

1 Section 7 of the New Zealand Bill of Rights Act 1990 places the Attorney-General under an obligation to draw to the attention of the House any provision in a Bill that appears to be inconsistent with any of the rights and freedoms contained in the Act.

2 Such a report is made -
(a) In the case of a Government Bill, on its introduction; and
(b) In the case of any other Bill, as soon as practicable after its introduction.

3 So that the Attorney-General can make such a report where that is appropriate, Bills will have to be monitored for compliance with the New Zealand Bill of Rights Act 1990. Accordingly, an interim procedure (which will be reviewed at the end of 1991) has been put in place for the monitoring of Bills.

4 An outline of the procedure is as follows:

(1) The procedure applies to all Bills (other than Imprest Supply Bills and Appropriation Bills as they are basically standard form Bills made up of provisions that would not be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990).

(2) Where a Government Bill (other than an Imprest Supply Bill or an Appropriation Bill) reaches the drafting stage, Parliamentary Counsel will refer that Government Bill to the Department of Justice (unless that Government Bill is being promoted by the Department of Justice) so that an officer of the Law Reform Division of that department can consider whether any provision of that Government Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

(3) Where a Government Bill that is being promoted by the Department of Justice reaches the drafting stage, Parliamentary Counsel will refer that Government Bill to the Crown Law Office so that an officer of the Crown Law Office can consider whether any provision of the Government Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

(4) Where the Parliamentary Counsel who refers a Government Bill to the Department of Justice or the Crown Law Office considers that any provision of that Government Bill may be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, that Parliamentary Counsel shall, in referring the Bill, identify that provision.

(5) Where a Bill that is not a Government Bill is introduced, the Department of Justice will examine that Bill as soon as practicable after its introduction.

(6) Where, on examination, no provision of the Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the officer who conducts the examination shall-

(a) In the case of a Government Bill, so inform the Parliamentary Counsel who is drafting the Bill; and
(b) In any other case and the Chief Parliamentary Counsel.

(7) Where, on examination, any provision of a Bill appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the officer who conducts the examination shall -

(a) In the case of a Government Bill, report accordingly both to the Attorney-General and to the Parliamentary Counsel who is drafting the Bill; and
(b) In any other case, report accordingly both to the Attorney-General and to the Chief Parliamentary Counsel.

5 The Department of Justice is to examine Government Bills because it has the necessary expertise. The Crown Law Office is to examine Bills promoted by the Department of Justice to avoid any perception of conflict of interest.

6 If a department requires information about the ambit of the New Zealand Bill of Rights Act 1990, it should direct its inquiries to the Law Reform Division of the Department of Justice.

PAUL EAST
ATTORNEY-GENERAL