

Commonwealth Association of Legislative Counsel

THE LOOPHOLE



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THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Issue No. 3 of 2018

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Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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Editor's Notes

This issue of the *Loophole* continues the publication of articles from the 2017 CALC Conference in Melbourne, grouping them under two topics: complexity and human rights.

The first two articles address complexity in legislation, notably by not making it more complex than it needs to be. Luke Norbury and Toni Walsh describe projects in their offices in the UK and Australia to develop common legislative solutions to drafting types of provisions that recur in legislation. Rather than re-inventing the wheel and confusing things with elegant variation, these jurisdictions have tried to standardize the drafting of these provisions to both reduce the effort needed to draft them as well as avoid interpretive questions about variations in terminology. However, these projects are sensitive to the differences from one piece of legislation to another and advocate a critical use of model provisions for this purpose.

The next three articles deal with the protection of human rights.

Nalini Persad-Salick describes the case law on the constitutional protection of freedom of religion in the Caribbean, and the degree to which this freedom does, or does not, limit legislative action. Freedom of religion is a much-discussed freedom these days and this article provides a valuable perspective from this part of the Commonwealth.

In the second article, Jessica De Mounteney and Lydia Clapinska describe the legislative “journey” over the last 20 years of the provisions in the UK *Equality Act* relating to the duty to make “reasonable adjustments” for people with disabilities. This journey intersects a case involving a wheelchair user and bus services in the UK, looking at the drafting of those provisions, their application and ultimately their adequacy, from a legislative counsel’s perspective.

And finally, Ross Carter provides an expansive view of drafting in New Zealand in relation to human rights, both in terms of protecting them as well as overriding them. He unconventionally (for a legal article) engages the reader’s attention by beginning with comments on the lyrics of a modern pop song and maintains that attention with a meticulously researched analysis of the interplay of human rights and legislation.

This issue concludes with three book reviews, which testify to the level of publishing activity relating to legislative drafting. Don Colagiuri leads off with his review of Peter Butt’s *Legal Usage – A Modern Style Guide*, followed by Lionel Levert’s review of the 2nd edition of Paul Salembier’s *Legal and Legislative Drafting*. Duncan Berry then treats us to a searching review of Mark Adler and Daphne Perry’s *Clarity for Lawyers*.

There is much to read in this issue and beyond.

John Mark Keyes
Ottawa, September, 2018

Common Legislative Solutions

Luke Norbury¹



Abstract

This paper describes a project that has been undertaken by members of the four UK drafting offices, to improve the instructing and drafting process in cases where the policy calls for a commonly occurring kind of legislative provision.

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The Idea

At the 2015 CALC conference in Edinburgh, John Sheridan gave a fascinating presentation about research he had undertaken on the legislation.gov.uk dataset. At that time, John was the Head of Legislation Services at the National Archives in the United Kingdom – the National Archives is responsible for publishing UK legislation, which appears on the legislation.gov.uk website.

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The research outlined in his presentation was to do with pattern languages. The expression “pattern languages” was coined by an architect in the 1970s, and refers to a method of describing good design practices or patterns of useful organisation within a field of expertise. The idea is to break down a complex situation into a series of smaller problems, and for common and recognised good solutions to those problems to be identified.

So for example, in the architectural field, a person may need to design a building – which is a complex project requiring many decisions to be made. It is possible to describe a number of common features of buildings – rooms, windows, latches, doors, staircases and so on – and by describing them and their function, and setting out good examples of each of these common features, you can break the overall project of designing the building down into a series of smaller decisions. This makes the design process simpler and more efficient.

John Sheridan is a computer programmer by background, and he knew about pattern languages because the idea is used in the computer programming world. John wanted to investigate applying the pattern language approach to legislation data. What his research was concerned with was whether he could identify and describe commonly occurring legislative solutions to commonly occurring policy problems.

As those who were at conference in Edinburgh will know, during John’s research various patterns were identified, such as licensing schemes, public registers, and the regulation of professionals. The question was what to do with these insights.

I found John’s talk inspiring, as I had had recent experience of dealing with some of the patterns he had identified but I hadn’t taken a step backwards to think about the fact that there are lots of commonly occurring legislative solutions.

What John’s talk led me to consider were questions such as:

- Why do legislative counsel tend to treat each set of instructions as a unique one off event?
- Why do legislative counsel tend to deal with requests for relatively routine sets of provisions – such as run of the mill licensing schemes – in the same way as we deal with requests for unique or novel legislative solutions?
- Might it be better to deal with commonly occurring matters differently from other matters?

So, I started to think about what we might be able to do to make the overall process of producing drafts for common legislative solutions more efficient. This brought my focus to the topic of instructions.

It’s a familiar complaint from legislative counsel that policy makers and instructing lawyers don’t know how to write instructions, and that they tend to deal with matters in insufficient detail. No doubt policy makers and instructing lawyers similarly complain that legislative

counsel always ask them for more information, rather than just getting on with their job of producing the draft.

I thought that it might be possible to improve the instructions, and save legislative counsel time and effort, by taking the pattern language approach. In other words, if we could break the problem as a whole down into manageable chunks, and articulate some of the issues that arise and some of the options, wouldn't that improve the instructing process and therefore make everyone's life a little easier?

The project

I then produced a proposal for the four UK drafting offices to work together, on the basis that this was too big a project for one small office to undertake by itself, and that four heads (and four sets of perspectives) would be better than one.

The proposal was for legislative counsel from each of the four UK offices to work together with a view to creating, for each common legislative solution:

- an explanation of what the solution does,
- a set of questions that might be used to identify the issues that may or do need to be addressed when adopting the solution, and
- a list of good examples of the solution.

The head of the Northern Ireland Office of Legislative Counsel (OLC, Belfast), Brenda King, supported the idea and, with her backing, I approached the other UK drafting offices (Scottish Parliamentary Counsel Office, UK Office of Parliamentary Counsel and Welsh Office of Legislative Counsel), which also supported the proposal. So thank you also to Andy Beattie, Elizabeth Gardiner, and Dylan Hughes.

A small group of us then started work on producing the guidance for some patterns (or solutions), on a pilot basis. The group comprised: Michael Anderson (PCO, Edinburgh), James George (OLC, Cardiff), Justin Leslie (OPC, London) and me. When Michael moved to OLC (Belfast), Gavin Sellar (PCO, Edinburgh) took his place. Michael continued to contribute to the project, as did Paul Bedding (OLC, Belfast). We were also lucky to have the benefit of input from Claire Fife (Counsel General's Office, Wales), an experienced policy-maker.

I am happy to say that the approach wasn't too resource intensive, though it was sometimes difficult to fit this work in due to other demands on our time.

We reached the end of a pilot phase in Summer 2016, and the heads of office were impressed with what we had managed to achieve, so they approved the continuation of the group's work.

Our next step was to seek feedback from other legislative counsel in our drafting offices, and from policy colleagues and instructors in each of the four jurisdictions. Having taken

their feedback on board, we produced the first edition of our guidance on common legislative solutions. This is available on the members' section of the CALC website.²

The document contains:

- guidance for a number of common legislative solutions (for example, licensing schemes, powers of entry, fixed penalty notices, statutory corporations),
- a list of additional legislative solutions that we wish to create guidance for, in the fullness of time (for example, offences and civil penalty regimes), and
- an introductory chapter putting the specific guidance on particular solutions in context.

We have included a “health warning” in our introductory chapter, emphasising that our overall aim is to stimulate thinking and increase awareness of possible options, and that the guidance is not a replacement for policy analysis, nor should it hinder original thinking. That was due to a concern that arises whenever you have guidance – will people start following the guidance to the letter, rather than think about what is really wanted? Will they feel constrained by the guidance?

We hope to produce further editions of the guidance in due course. To that end, we would welcome feedback from anyone who uses the guidance.

The guidance

The scheme we have adopted for our guidance is as follows:

- to describe the solution, and to refer to any related solutions,
- to ask questions intended to ascertain what is wanted as regards each element of the solution, and
- to give a list of examples of the solution.

These different parts of the guidance are described briefly below.

Description of the solution

This section contains a high-level description of the solution, which is intended to assist policy makers in selecting the correct legislative solution for the policy issue they wish to address.

In some cases there is a section on related solutions. The aim in these cases is to draw the policy maker's attention to alternative policy solutions.

² The guidance appears at: <http://calc.ngo/drafting-manuals>.

Elements of the solution

This section consists of a series of questions that the instructor will or may need to address, in order to enable legislative counsel to produce a draft.

The questions asked are relatively open, which:

- keeps policy options open and should stimulate thought, and
- should enable the guidance to work across all UK jurisdictions (and, indeed, elsewhere).

If particular solutions are preferred in a jurisdiction, it would be possible for the drafting office for that jurisdiction to customise the guidance for its own purposes. Similarly, if there are local policies that instructors need to be aware of or follow, the drafting office for that jurisdiction could insert references to these policies.

Examples of the solution

A list of examples is provided. This is intended to show good examples of the solution, with any special features noted. The aim is to give policy makers a range of examples to refer to so they can see what choices have been made in various contexts.

The list of examples is also intended to provide material which may (or may not!) inspire legislative counsel.

Uses to which the guidance may be put

The guidance is probably best used early on in the instructing process, so we think it is best for policy officials and instructors to use the guidance when they are working up policy on legislation and then producing instructions.

The guidance will assist legislative counsel with a perennial problem, namely that instructions frequently fail to address many of the issues that need to be addressed in order to produce a draft. More general guidance to instructors (for example, an exhortation to develop the policy in detail) does not seem to have much resonance with instructors, whereas this guidance spells out what we need to know.

We also hope that the production of this guidance will have a general educational effect, even where the policy-maker is dealing with a topic not covered by the specific guidance. We hope that the guidance will help policy-makers to appreciate the level of detail (and thinking through) that needs to be done, whatever the legislative scheme adopted.

Further thoughts

The material above formed the basis of a talk I delivered at the 2017 CALC conference in Melbourne. Here are a couple of additional thoughts.

Standard provisions

Examination of particular patterns of legislative activity may of course lead legislative counsel (or a drafting office) to propose the adoption of a particular standard legislative solution. That may lead to the production of a model draft, or to the office proposing or supporting the enactment of a standard set of provisions. This kind of activity is particularly suitable where provisions for a particular solution tend to be in standard form (or where there is no policy reason for them not to be in standard form).

At the Melbourne conference, the Commonwealth OPC in Canberra, Australia, mentioned their work on legislative provisions conferring powers on officials charged with the responsibility for securing compliance with a regulatory regime.³ This led to the enactment of the *Regulatory Powers (Standard Provisions) Act 2014*.

Plain English and the Law

The Victorian Law Commission has recently republished the seminal 1987 report, *Plain English and the Law*.⁴ Paragraph 133 of that report contains suggestions for improving instructions, some of which chime with the work that the pattern languages group has undertaken (described above). It seems that there is nothing new under the sun!

Paragraph 133 notes as follows:

...Suggestions have been made that Chief Parliamentary Counsel...should develop a set of guidelines, or a check-list, to assist policy officers in understanding the matters and the level of detail required to be covered in drafting instructions. Detailed sets of questions could be developed to guide instructing officers in relation to the detail that is needed by parliamentary counsel. On the subject of powers of entry, search and seizure, for example, the questions might include the following:

- (a) Are powers of entry, search and seizure necessary?
- (b) Who is to exercise the power?
- (c) Is a warrant or other authority required?
- (d) What limitations as to time or prior notice should be included?
- (e) Is provision required for an obstruction offence?
- (f) Is a power to stop and search a person or vehicle necessary?
- (g) Is a power to take samples for analysis or a power to seize records necessary?

³ This article is published next in this issue of the *Loophole*.

⁴ Available at: http://www.lawreform.vic.gov.au/sites/default/files/Plain%20English%20and%20the%20Law-republished_forweb.pdf.

- (h) Is a power to take names and addresses necessary?
 - (i) Should there be provision for compensation; if so, in what circumstances?
-

Complexity through process – finding common solutions to common problems

Toni Walsh¹



Abstract

This article discusses how the Australian Office of Parliamentary Counsel has been implementing common solutions to common drafting problems. This is being done through the development of model provisions, tools to assist in using the models and legislation of general application, notably the Regulatory Powers (Standard Provisions) Act 2014.

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Introduction

One of the benefits of the CALC conferences is that they offer an opportunity to swap ideas on how to resolve issues encountered by many drafting offices. So often I come to a CALC conference mulling over how to resolve an issue that the Australian Office of Parliamentary

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Counsel (OPC) is confronting only to find that other drafting offices are working through ways to resolve the same issue. That was certainly the case with this conference. So, rather than publish the paper I was originally going to give, I would instead like to continue a discussion begun by Luke Norbury in his paper on Pattern languages in legislation—creating tools to assist legislative counsel and policy officials.²

Like the UK offices, OPC has been grappling with how to develop common solutions to common drafting problems. And like the UK offices, we have found that one of the areas in which we have been replicating provisions dealing with the same problems over and over again is entry, search and seizure. So I thought it might be useful to outline the way in which we have tried to tackle this issue.

In 2014, the Australian Commonwealth enacted the *Regulatory Powers (Standard Provisions) Act 2014* (the *Regulatory Powers Act*).³ The Act houses suites of standard provisions dealing with monitoring, investigation, civil penalty provisions, infringement notices, enforceable undertakings and injunctions. To be used, those standard provisions need to be “switched on” by another Act. That other Act essentially identifies the provisions to be enforced using the *Regulatory Powers Act*, and plugs in a series of variables to allow the machinery in the *Regulatory Powers Act* to work. These include variables such as who are to be “authorised officers” for the purposes of exercising powers under the *Regulatory Powers Act*.

The *Regulatory Powers Act* is supported by a Drafting Direction, which lays out the issues that commonly arise in using the powers in the Act and includes precedents to switch the *Regulatory Powers Act* on.

The *Regulatory Powers Act* was a response to the complexity that had developed over time on the Statute Book by replicating provisions bill by bill. The need for a new approach became particularly acute, when Government began to push for greater simplicity and a reduction in the volume of provisions on the Statute Book. OPC was expected to find ways to do that.

Our starting point was a little different to that of the UK offices.

In the Australian Commonwealth, it is fairly easy to find and use precedents for new provisions. The Statute Book is essentially organised as a “loose-leaf system”. Each Act deals with a different subject matter, organised alphabetically. A is for *Aged Care Act 1997*. W is for *Work Health and Safety Act 2011*. New material is then organised either by textual amendment of an existing Act or, if the subject matter to be dealt with is sufficiently distinct from existing Acts, by creating a new Act.

² This paper is also published in this issue of *The Loophole*.

³ No. 93, 2014.

The tools available to search the Statute Book are easy to use and designed to allow legislative counsel to find precedents and assess where, how often and how recently they have been used. We use Folio Views infobases to allow us to search the Statute Book. Using the contents pane produced by those searches, it is easy to see where a particular expression appears on the Statute Book, how often it appears in different Acts, and often patterns across Acts or portfolios.

As a result of the ease with which precedents are found and assessed, they are heavily used. Yet despite this, we found that we were not developing common solutions to common problems. Instead, there were provisions across the Statute Book that demonstrated intricate, and often complex, variations on a theme (or several themes).

So why was this happening? There were basically three process issues driving this complexity.

1. Despite the fact that we were all using fairly common precedents, each time a legislative counsel used a precedent they would ask key policy questions as if they had never been asked before. Policy officers, often inexperienced in implementing policy through legislation, would then answer those questions as if they had never been answered before. The amount of variation on a theme generated in this way is not surprising. It is probably inevitable.
2. Once Bills were drafted, they were then referred to other agencies (such as the Attorney-General's Department) for scrutiny. During that process, each suite of provisions was often scrutinised as if it had never been seen before. Given the frequency with which the officers scrutinising the provisions changed, they were often being scrutinised by officers who had never seen them before. While there are some benefits in this, it also generates frequent variation on the theme. Despite the use of guides and other materials, this problem just seemed to recur over and over again.
3. Finally, the bills would be scrutinised by the Senate during the Parliamentary process. The political process often produced changes to respond to a particular issue. Those changes were sometimes also promoted in later bills, even if the context did not justify them there.

So the complexity problem in this case was not actually a drafting problem. It was a process problem. The only solution was therefore either to change the process or remove the provisions from the process. In a sense, we did both.

The first step was to analyse precedents to determine what the “default provisions” would be for the monitoring, investigation and enforcement powers of regulatory agencies within the Commonwealth. Ultimately, this is a policy decision and OPC worked closely with the Attorney-General's Department (AGD) to settle the sorts of powers and processes that would be appropriate to all agencies. So, for example, the investigation powers under the

standard provisions include entry, search and seizure, but they do not include more intrusive powers such as strip-searching or taking equipment off premises for testing.

This does not prevent an agency from arguing for variation of the standard model. It was important for the acceptance of the *Regulatory Powers Act* by agencies that there was sufficient flexibility to add or vary the model. However, it is probably fair to say that the AGD has been able to exert greater influence in preventing unnecessary variation simply because variation is now seen as an exception to a standard model rather than as a normal part of the development of provisions.

Provided the standard model is used, scrutiny by AGD of standard provisions dealing with monitoring, investigation and enforcement is no longer necessary. Where there is a variation from the standard model, scrutiny is focussed on whether the variation is justified.

Similarly, the way in which Parliament deals with monitoring, investigation and enforcement provisions has changed. During the course of debate on the *Regulatory Powers Act*, Parliament (in particular, the Senate) made it clear that once the Act was made, agencies would need to:

- give clear and persuasive policy justification for triggering the *Regulatory Powers Act* in the Explanatory Memorandum for the triggering bill; and
- if the triggering bill includes variations of, or additions to, the standard model— give clear policy justification for the variation or addition in the Explanatory Memorandum for the triggering bill.

The debate in Parliament is no longer about the provisions within the standard model. It has instead shifted to whether the standard model should be used at all and, if so, whether any variation of the model is justified.

One of the key concerns in introducing an Act of general application to deal with such sensitive matters as monitoring, investigation and enforcement was that it would result in an erosion of civil liberties. If there is a suite of powers sitting on the shelf, it is too easy to simply call them up. Given the approach taken by the AGD and the Senate, our experience has been that the opposite is probably true. Instead of becoming distracted by reworking standard provisions, scrutiny is refocussed on whether monitoring, investigation or the particular species of enforcement is justified at all, and whether more extensive powers are warranted.

The *Regulatory Powers Act* seems to be helping not only to remove complexity from the Statute Book, but also to create greater consistency in the processes used by agencies in monitoring, investigation and enforcement. This is largely thanks to work being done by the AGD. OPC's original intention had been to use the standard model only in future Acts. The AGD instead decided to replace existing regimes, triggering the *Regulatory Powers Act*

wherever possible. We have drafted the first bill to retrofit the Act to existing regimes⁴ and are about to begin work on the second.

The Regulatory Powers project illustrates that it is often not “drafting” issues that drive inconsistency and complexity in legislation, but rather process issues.

How processes contribute to complexity probably differs to some extent from office to office. I would, however, like to suggest a number of questions the answers to which throw light on how easy or difficult it may be for a particular office to develop consistent solutions to common problems.

- How easy is it to identify common problems, and the solutions currently adopted to deal with those problems, on the Statute Book?
- Are there processes within the office to identify recurring problems in the Statute Book, evaluate the various responses to the problems and suggest a common solution?
- Is there a mechanism for sharing innovation among legislative counsel within the office, and evaluating and improving the original idea?
- How willing are legislative counsel within the office to work together to develop a common solution to a common problem and adopt that solution? Or is autonomy valued to an extent that inhibits the ability of an office to drive simplicity by developing a common solution to a common problem?
- Is there a mechanism for recognising when the issues have been fully explored and making a decision at that point?
- Once a common solution is developed, how easy is it for legislative counsel to use that solution? Is it well documented? Are there IT tools available to allow legislative counsel to call up a model provision easily, or check a document for inconsistency with office drafting practice?

How easy is it to identify common problems

There are 2 factors that, I think, can affect how easy it is to identify whether there are common problems being solved in different ways on the Statute Book.

1. the way subject matter is organised on the Statute Book; and
2. the tools available to search the Statute Book.

I think the work being done in the UK offices using pattern language is a good example of the tools available to search the Statute Book. I’ve outlined the way the Statute Book is organised in the Australian Commonwealth, and the search tools we use.

⁴ The bill has now been enacted as the *Regulatory Powers (Standardisation Reform) Act, 2017*, No. 24, 2017.

Are there processes within the office to identify recurring problems in the Statute Book

Time is often the enemy in developing processes that produce consistency within the Statute Book. Possibly what has been of most help within OPC in addressing this problem has been:

- the use of the caretaker periods during elections to drive these projects; and
- a regular legislative counsel’s meeting, in which they are encouraged to bring to the table problems that they think others may also encounter, in order to discuss responses.

The caretaker periods are probably the most useful times to tackle large projects. In the normal course of sittings, it is usually just not possible to maintain the momentum to drive those projects. If, however, the core work is done during a caretaker period, the project can often be continued as time is available during sittings.

Regular legislative counsel meetings have been a good way of identifying common issues. It can, however, be difficult to walk away with a clear view on what was concluded during the meeting. Ideally, the meeting would be followed by a summary of how the questions raised have been resolved, or “next steps” in cases where the meeting has not been able to resolve the issue. It can be difficult to timetable when those “next steps” might be taken, but if they are identified in a document available to everyone, it is a little easier to know where things are up to and who to talk to when you are faced with an issue that has been discussed.

Mechanisms for sharing innovation, and evaluating and improving on an original idea

This can be a little haphazard. There are many instances in which an email is sent out by a legislative counsel to find out what others have done with a particular problem, but the results of the inquiry not circulated (I would confess to being guilty of this, as I suspect would most of us). There are also times when you stumble on work done by another legislative counsel or team of legislative counsel, which then of course makes you wonder whether there are other cases in which you have missed an existing thread of discussion that might be helpful. Regular legislative counsel meetings can help with these problems, but are probably not a complete solution. The work being done in New Zealand and other jurisdictions through wiki has been food for thought.⁵

I would suggest that even with good mechanisms to share and evaluate innovation, whether innovation “takes” in an organisation also depends on the environment within the organisation.

⁵ See Susanna Parkin, "Wiki-A New Approach To The Law" [2008] AIAdminLawF 13; (2008) 57 AIAL Forum 41 and K. Hickey, ["Wiki to crowdsource changes to Calif. probate code" GCN, 21 January 2014.](#)

- Legislative counsel need to feel safe to express ideas, test assumptions, suggest alternatives and (most importantly) make mistakes. Often, it is our mistakes that tell us most about the core of a problem, and potential solutions.
- Ideas need to stand or fall on their merits, and decisions need to be evidence-based.
- A “battle of the drafts” is never helpful. We expect our instructors to be able to tell us what a draft does or doesn’t do that is problematic. We should show each other the same courtesy.
- The discussion needs a leader. This is important for a number of reasons. One is to ensure that someone with a good idea who hasn’t yet got the confidence to pursue an issue has the opportunity to do that. Another is that the issues have actually all been aired, and someone needs to stop the discussion from going around and around. There will always need to be someone to keep an overview of where the discussion is going, who can then summarise outcomes and identify next steps.

Working together

I was once surprised to hear a small group of legislative counsel discussing the need to keep autonomy in drafting amending formulae. While there are many cases in which our work requires creative problem-solving (too many at times), there are also cases in which nothing is lost by agreeing on a common solution to a common problem.

While there are many problems that require a bespoke solution, many do not. Amending formulae are a good example of the class that does not. Our experience in OPC is that there are a finite number of things happening in textual amendment, so we have agreed how each of them will be handled, documented the approach and ensure that we all handle them in the same way. All the reader needs is a clear description of where the new text is to go. On a cost/benefit analysis, once an effective set of amending formulae is agreed within an office, any benefit from continually revisiting the issues will rarely outweigh the cost in drafting resources needed to do that.

Our experience in working with agencies on the regulatory powers project has been that there are whole-of-government benefits in developing common provisions. One of our portfolio agencies was quite keen to use a standard model because under the multiple regimes currently operating some of their inspectors needed 9 different identity cards to perform functions under various Acts.

Many of the problems we solve do require a bespoke solution, and certainly a creative solution. The argument for common solutions does not underestimate that. The question is really whether all of the things that we regard as requiring that approach really do.

Recognising when a decision has been fully explored, and making a decision

It is probably easier to raise an issue, and invite legislative counsel to comment on it, than it is to steer the discussion so that all of the issues are explored and a decision made. We have probably all seen the seemingly endless chain of email exchanges that led nowhere.

For my own part, I think a discussion of this kind needs to be led. By this I don't mean that the ability of legislative counsel to contribute and raise issues is confined. Rather that someone needs to keep an eye on when a discussion is going down a dead-end and steer it back, recognise when factors that are not relevant to the issues are intruding on the discussion and recognise when the discussion is going around in circles.

It is probably unrealistic to expect that consensus can really be reached on common models within a drafting office. At some point, once all of the issues are on the table, someone has to make a decision on how the office will proceed—and give a persuasive explanation of why that option has been chosen.

Using the model

Our experience has been that if a model is to be successfully used, it needs to be as easy as possible to use it. There are a number of tools we have developed to help us do this:

- drafting directions, electronically available and easily searchable, to document the agreed positions within the office;
- templates, easily called-up and used, so that we don't have to waste time setting up the structure of a document;
- IT shortcuts that allow us to call up standard provisions, such as commencement provisions and amending forms, and use the agreed form of words;
- word-processing macros to help us search for common errors, both editorial and drafting, and link suggestions back to the Drafting Directions.

These tools have proved very useful.

In drafting, we often assume that complexity can be addressed by adopting a simple way to express concepts, or pursuing simpler policy choices by instructors. Complexity is often seen as an individual drafter's struggle with these issues. In reality, however, there are many ways in which complexity can arise. The CALC conference has been a very useful forum for airing those issues, and sharing ideas on how to solve them.

Interpreting Freedom of Religion – A Commonwealth Caribbean Perspective

Nalini Persad-Salick¹



Abstract:

This article examines a series of Caribbean court decisions dealing with freedom of religion and how they have addressed competing rights and considerations. The article argues for a generous interpretation of constitutional rights, seeing them as always speaking and never silent.

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Introduction

I am delighted to be sharing a Commonwealth Caribbean perspective on the Interpretation of Freedom of Religion, at a time when the world is experiencing such divergent views on the topic.

This discussion on the interpretation of freedom of religion will extend in large part to an interpretation of constitutional rights and human rights as a whole.

Universal Declaration of Human Rights (UNDHR)

The UNDHR is the precursor to the Bills of Rights contained in the Commonwealth Caribbean Constitutions, all of which have all been moulded in consonance with the spirit and intent of the UNDHR. In Article 18 the UNDHR states that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.²

The UNDHR recognises the need for the protection of these rights when it states at Article 8 that:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.

The UNDHR is also the precursor to the European Convention on Human Rights (ECHR), which served as the model for drafting Bills of Rights in the Constitutions of the Commonwealth Caribbean during the post-1960 independence era. However, Trinidad and Tobago used the *Canadian Bill of Rights* as its model.

Bill of Rights in Commonwealth Caribbean Constitutions – two models

Commonwealth Caribbean States share more historical, social, legislative and constitutional commonalities than differences. Independent Commonwealth Caribbean States have written constitutions which contain entrenched fundamental human rights provisions in a Bill of Rights. A special feature of Commonwealth Caribbean Constitutions is the savings clause, which is often in tension with the fundamental rights and freedoms expressed in them.

There are primarily two models of the Bill of Rights existing in these States, one fashioned after the ECHR³ and the other after the *Canadian Bill of Rights*.⁴

² United Nations General Assembly Resolution 217A, Paris, 10 December 1948.

³ Council of Europe, Rome, 4 November 1950.

⁴ SC 1960, c. 44.

First Model – ECHR (Barbados Constitution)

The Bills of Rights in the Commonwealth Caribbean, except in the Republic of Trinidad and Tobago, have been modelled after the ECHR.

Article 9 of the ECHR, entitled ‘Freedom of thought, conscience and religion’ is expressed in the following terms:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In the *Barbados Constitution*, the right to freedom of religion is expressed in Article 11 as follows –

- 11.** Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
- (a) life, liberty and security of the person;
 - (b) protection for the privacy of his home and other property and from deprivation of property without compensation;
 - (c) the protection of the law; and
 - (d) freedom of conscience, of expression and of assembly and association,

the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Protection of freedom of conscience

- 19.** (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience and for the purpose of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to

manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains.

(3) No religious community shall be prevented from providing religious instruction for persons of that community in the course of any education provided by that community whether or not that community is in receipt of any government subsidy, grant or other form of financial assistance designed to meet, in whole or in part, the cost of such course of education.

(4) Except with his own consent (or, if he is a person who has not attained the age of twenty-one years, the consent of his guardian), no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion which is not his own.

(5) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) which is reasonably required-

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion; or

(b) with respect to standards or qualifications to be required in relation to places of Education including any instruction (not being religious instruction) given at such places.

(7) References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

Second Model – Canadian Bill of Rights (Trinidad and Tobago Constitution)

In its recognition and declaration of rights and freedoms, the *Canadian Bill of Rights* reads as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

Closely reflecting the *Canadian Bill of Rights*, the *Trinidad and Tobago Republican Constitution* reads:

Chapter 1

The Recognition and Protection of Fundamental Human Rights and Freedoms

Part I

Rights Enshrined

4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) the right of the individual to respect for his private and family life;
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;
- (e) the right to join political parties and to express political views;
- (f) the right of a parent or guardian to provide a school of his own choice for the education of his child or ward;
- (g) freedom of movement;
- (h) freedom of conscience and religious belief and observance;
- (i) freedom of thought and expression;

- (j) freedom of association and assembly; and
- (k) freedom of the press.

While there is diversity in the drafting styles and expressions used in these Constitutions, there is the clear common intent of declaring and protecting the right to freedom of conscience or religion. In interpreting human rights and constitutional rights, courts ought to use a most generous and liberal approach to interpretation. It would appear upon examination of the cases below, that some of the rulings of Commonwealth Caribbean Courts reveal an inconsistent approach, when dealing with the interpretation of the right to freedom of religion.

Commonwealth Caribbean Cases on Freedom of Conscience and Religion

1. R v Hines and King (Jamaica, 1971)

In this case,⁵ King, the co-defendant in a criminal trial, refused to subscribe to the oath in its traditional form to testify in his own defence. Instead, King requested that he make oath in the name of Rastafari, a form binding on his conscience. The Magistrate denied King's request and an appeal was filed.

At the Court of Appeal the Magistrate's ruling was overruled on the ground that Rastafarianism was a religion or 'faith' and that King had a fundamental right to swear in the name of Jah Rastafari and in a form binding on his conscience.

The Court of Appeal's ruling in this matter highlighted the fact that the right of a defendant to testify is intimately connected with the constitutional right of due process. It would have been a travesty of justice if this fundamental right of due process had been hampered by the denial of another equally important fundamental right, the right to freedom of conscience.

2. Hinds v AG of Barbados (1993)

In this case,⁶ Hinds an inmate of the Glendairy Prison in Barbados and a member of the Rastafari faith sought an injunction restraining the Superintendent of Prisons from cutting his hair or "dreadlocks" as was required under the Prison Rules. Such an action would have been in breach of Hinds's right of conscience and would have hindered him in the enjoyment of his freedom of conscience as the long unkempt hair is a central practice of the Rastafarian faith.

The Court denied the application on the point that the issue of religion ought to have been expressly stated in the motion as originally filed. This ruling on a procedural technicality may have denied the court the opportunity to apply the compelling state interest test as set

⁵ (1971) 17 WIR 326 (CA).

⁶ High Court – Civil Division No. 1424 of 1993.

out in section 19 (6) of the Barbados Constitution, (a reflection of Article 9(2) of the European Convention on Human Rights), that is, as it relates to a limitation on the right, reasonably required in the interest of public health and public safety of prison officers and other inmates.

3. *Grant and Chin v Principal of John A. Cumber Primary School, Chief Education Officer and Education Council (Cayman Islands, 1999)*

In this case,⁷ an eight-year old boy, Shemaiah Grant, was expelled from school for non-compliance with the school rules ‘until such time as he complied’. The school rules prohibited the wearing of his hair in ‘dreadlocks’ and prescribed that hair ought to be cut low. The child and his parents were of the Rastafarian faith.

The Education Council on the island informed the child’s parents that it did not wish to be seen as condoning the use of illegal drugs, which was inherent in Rastafarianism. The sacralisation of ganja, (marijuana or cannabis) is central to the practice of the Rastafarian faith.

Shemaiah’s parents therefore made an application for judicial review of the Council’s decision to expel their son claiming that the decision was illegal and a violation of his right to religion and the practice of his faith.

In dismissing the application, the Grand Court held, *inter alia*:

- (1) In the context of the appellant’s allegation that their freedom of religion had been infringed, their Rastafarian faith could be regarded as a religion requiring recognition at common law.
- (2) Since international covenants could not be directly enforced unless they had been incorporated into domestic law, they could in themselves give no ground for the setting aside of administrative decisions based on powers derived at common law.
- (3) While the right to free exercise of religion undoubtedly existed, it was in common with other fundamental freedoms, subject to and governed by the law. In the absence of constitutional entrenchment of such rights, or other protective legislation, the court could not declare the decision to expel irrational in the *Wednesbury*⁸ sense purely because they had been infringed.

The reasoning of the Chief Justice in this case is cause for concern, especially since he placed high emphasis on the fact in the Cayman Islands, the right in question arose as a common law right rather than an internationally recognised fundamental human right.

⁷ 1999 CILR 307.

⁸ *Associated Provincial Picture Houses Ltd. v. Wednesbury* [1948] 1 KB 223 (CA).

4. *Sumayyah Mohammed v Holy Name Convent Secondary School and Ors (Trinidad and Tobago 1995)*

In this case,⁹ a father, acting as next of kin, sought judicial review of a decision of the Board of Management of the Holy Name Convent Secondary School to refuse his daughter admission to the school dressed in the traditional Muslim *hijab*.

The applicant's parents had asked the school to permit the applicant to wear dress conforming to the *hijab*. The principal of the school and board of management refused to allow any such exemption, although they accepted the sincerity of the applicant's belief to conform to the *hijab*. The principal and Board of management explained that, if an exemption were allowed, other parents would also seek exemptions. The applicant attended school wearing a modified version of the school uniform which conformed to the *hijab*; but she was not allowed to attend classes and was in effect suspended.

The court ordered the decision of the respondents be quashed, holding, *inter alia*, that

- (1) Under the constitutional provision maintaining the existing law (section 6) the school was able to insist on compliance with school regulations (including the wearing of school uniform), and the applicant did not enjoy a *de facto* right of exemption from that requirement.
- (2) the respondents had applied the school regulations inflexibly and had not taken into account the psychological effect on the applicant of the refusal to allow her to conform to the *hijab* (to which exception was not taken by the Ministry of Education);
- (3) there was no evidence to support the Respondents' plea that conforming to the *hijab* would be conducive to indiscipline or would erode the sense of tradition or loyalty to the school, nor that it would accentuate distinctions between students from affluent homes and less affluent ones;
- (4) in having regard to the fact that the applicant could apply for admission to another school and their fear that others might follow the example to seek exemption from the requirements as to school uniform, the Respondents had taken irrelevant factors into account;
- (5) in these regards the decision of the Respondents had been an unreasonable exercise of their power conferred by the *Education Act* and was unsustainable.

This ruling recognises religious and ethnic diversity and would lend credence to the view that when courts interpret so as to "to deny all constitutional exemptions, it disregards a country's religious pluralism".¹⁰

⁹ *Mohammed v Moraine* (1995) 49 WIR 371; 3 LRC 475.

¹⁰ Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford University Press: Oxford, 1995) at 139.

Conclusion

The above cases of the Commonwealth Caribbean clearly reveal different approaches to interpreting freedom of religion as a fundamental human right and as a constitutional right. The ruling in the first case, *R v Hines and King*,¹¹ shows clear accommodation, to allow for the protection of two rights, namely, due process and freedom of conscience. In the second case, *Hinds v AG of Barbados*,¹² there was an outright denial of the right to the extent that there was no opportunity to even apply the compelling state interest test.

In the third example involving *Shemaiah Grant*,¹³ two rights, the right to freedom of conscience and the right of every child to receive an education, were undermined. The final decision in the case involving *Sumayyah Mohammed*¹⁴ allowed for an exemption to the application of legislation saved by the very constitution which allowed for the observance of a right protected by the supreme law of the land, the Constitution.

This latter decision is heralded as the return of prudence to interpretation. It is the kind of decision that makes the distinction between having the legal right to do something and doing the right thing.

Courts have the power to adopt a generous if even strained meaning if this is required to make legislation compatible with human or constitutional rights. They must avoid the austerity of tabulated legalism and see the Constitutions as living and always speaking, never silent.

In concluding, permit me to recast a famous extra-judicial quote of Justice Kirby of the High Court of Australia in his Hamlyn Lectures:¹⁵ “As another sage put it: if you construe human rights not as your first but your last rights, that is what they will become, obsequies.”

11 Above n. 5.

12 Above n. 6.

13 Above n. 7.

14 Above n. 9.

¹⁵ Justice Michael Kirby, “Judicial Activism, Authority, Principle and Policy in the Judicial Method”, *The Hamlyn Lectures*, 55th Series (Sweet & Maxwell: London, 2004) at 40,

Towards Equality – A Legislative Journey

Jessica De Mounteney & Lydia Clapinska¹



Abstract

This article describes the trail of the legislative provisions in UK equality legislation relating to the duty to make “reasonable adjustments” for people with disabilities using public transport. It describes a shift in focus from unreasonable “difficulties” faced by disabled people to “substantial disadvantage” which able-bodied people do not face.

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¹ Office of Parliamentary Counsel, London (UK). The views expressed in this article are those of the authors alone.

Introduction

From the 1970s onwards, a significant volume of legislation relating to equality was passed in the UK, ranging across a wide range of characteristics. By 2000, there were 30 Acts, 38 statutory instruments, 11 codes of practice and 12 EC directives relevant to discrimination.

The aim of the *Equality Act 2010* (the “*2010 Act*”)² was to harmonise this vast body of legislation, as well as to reform and strengthen the law in certain areas. A large number of inconsistencies had developed in the law, perhaps inevitably, as a result of the piecemeal way in which equality law had developed.

As enacted, the *2010 Act* contained 218 sections and 28 Schedules and ran to 230 pages. It provides for several “protected characteristics” which are set out in section 4 and are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

In considering the breadth and reach of the Act, we were fascinated to see that the guidance produced by the Equality and Human Rights Commission purely for the purposes of how the Act relates to employment runs to seven volumes, the first of which alone contains 110 pages. By about page 20 of that, we decided that we needed to focus on one protected characteristic only.

So we have chosen to look at equality legislation in the context of disability. Our focus is on the legislative journey over the last 20 years of the provisions relating to the duty to make “reasonable adjustments” for people with disabilities. We will look at the drafting of those provisions, their application and ultimately their adequacy, from a legislative counsel’s perspective. Our starting point is a case which considers the effect of legislative provisions in that terrifying place called the real world.

Case of Doug Paulley

Mr. Doug Paulley was a wheelchair user who in reliance on the *2010 Act* challenged the lawfulness of a bus company’s policy in relation to the use of the space provided for wheelchair users on its buses. His case began in 2012 and worked its way through to courts to be heard in the Supreme Court in June of 2016 with judgment given on the 18th January 2017.³

Mr. Paulley’s case began when he attempted to board a bus at Wetherby bus station, only to find that the wheelchair space was occupied by a pushchair containing a sleeping child. The bus driver asked the child’s mother to fold down her pushchair and move out of the space so

² 2010, c. 15 (UK).

³ *FirstGroup Plc v Paulley* [2017] UKSC 4.

that Mr. Paulley could occupy it in his wheelchair. The woman refused to move and so Mr. Paulley was unable to board the bus.

Mr. Paulley brought a claim in the Leeds county court against the bus company for unlawful discrimination against him on the grounds of disability. His case was that the bus company should require (rather than simply request) a person occupying the wheelchair space to vacate the space if a wheelchair user needed it, even if this meant that that person had to get off the bus.

The legislative route to this claim might be thought, to a non-lawyer, to be somewhat tortuous. And even to legislative counsel it takes some driving around the houses to get where you need to go. We had been hoping to avoid too much reading out of lengthy legislative provisions, but it is impossible to avoid in making sense of this case.

Section 29(7) of the *2010 Act* imposes on the bus company a duty to “make reasonable adjustments”. That in itself is a bald statement and requires further explanation.

Section 20 of the *2010 Act* provides that a duty to make “reasonable adjustments” comprises three requirements, the first of which is the only one relevant to Mr. Paulley and is in subsection (3) of section 20. The first requirement is that where the bus company’s policy puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the bus company must “take such steps as it is reasonable to have to take to avoid the disadvantage”.

How Mr. Paulley then arrives at an actionable claim is via section 21 of the Act. This provides in subsection (1) that “a failure to comply with the first... requirement is a failure to comply with a duty to make reasonable adjustments” and in subsection (2) that the bus company discriminates against Mr. Paulley if it fails to comply with the duty in relation to Mr. Paulley.

At first instance, the Recorder found that the bus company’s policy was a policy of first-come-first-served, whereby a non-wheelchair user occupying the space on the bus would be requested to move, but if the request was refused nothing more would be done.

The Recorder found that this policy did indeed place Mr. Paulley and other wheelchair users at a substantial disadvantage by comparison with non-disabled bus passengers. The Recorder found that the bus company could have made “reasonable adjustments” to the policy which would have eliminated the disadvantage.

These reasonable adjustments were (a) an alteration to the notice in the wheelchair space, to require in more forceful terms a non-wheelchair user to move from it if a wheelchair user needed it, and (b) an enforcement policy which would require a non-disabled passenger to leave the bus if they failed to comply with the requirement.

We were interested that the Recorder acknowledged that this adjustment would result in a policy which “might inconvenience a mother with a buggy, but that is a consequence of the

protection that Parliament has chosen to give to disabled wheelchair users and not to non-disabled mothers with buggies”.⁴

Mr. Paulley succeeded in his case and was awarded £5,500 in damages.

The bus company appealed to the Court of Appeal.

The Court of Appeal decided that what had been identified by the Recorder at first instance were not “reasonable adjustments”.⁵ The court decided that adjustments requiring persons to be removed from the bus would be both unfair and impractical because:

- it would be unreasonable for the adjustment to extend to all non-wheelchair users including those whose refusal to vacate the space was reasonable, as such an adjustment could unfairly affect other passengers;
- if the adjustment was limited to those non-wheelchair users who unreasonably refused to move, this would be impractical because it would require the driver to decide whether a passenger was being unreasonable;
- it would not be reasonable to expect a driver to try to enforce such a policy by seeking physically to remove a non-wheelchair user from the bus, or by halting the bus until the person vacated the space or the police arrived.

Before turning to the Supreme Court decision, we will look at the legislative trail to the bus company’s duty under section 29(7) to make “reasonable adjustments”, beginning with a brief background.

Legislative Trail to Reasonable Adjustments – Brief Background

Mr. Paulley’s bus journey, which ultimately led him all the way to the Supreme Court, began in February 2012. Had he been confronted with the same set of circumstances twenty years earlier, he would have found no legislation to assist him.

It did not become unlawful to discriminate against disabled people until the *Disability Discrimination Act 1995* (“the *DDA 1995*”)⁶ came into force.

The Disability Discrimination Bill had its second reading in the House of Commons on 24 January 1995, some twenty years after the *Sex Discrimination Act 1975*⁷ and the *Race Relations Act 1976*.⁸ At that time the Conservative Government, which introduced it, described the Bill as “an historic advance for disabled people...it establishes a new right not to be discriminated against in the field of employment, it establishes a new right of access to goods and services.” However, the Bill was slated by the Opposition and campaigners as not

⁴ Ibid. at para. 30.

⁵ [2014] EWCA Civ 1573.

⁶ 1995, c. 13 (UK).

⁷ 1975, c. 65 (UK).

⁸ 1976, c. 74 (UK).

going far enough, and notably for our purposes, the Bill came in for particular criticism because it specifically excluded access to public transport.

Disability Discrimination Act 1995

Section 19(1)(b) of the *DDA 1995* made it unlawful for a provider of services to discriminate against a disabled person in failing to comply with any duty to make adjustments in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service.

Section 20 defined discrimination for the purposes of section 19 as including a failure to comply, without justification, with that duty to make adjustments.

Section 21(1) of the *DDA 1995* set out a duty of providers of services to make adjustments and provided that:

21 Duty of providers of services to make adjustments

(1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect. [Emphasis added]

Apologies if the legislative thread has already become tangled. This clutch of three provisions together make for a rather circular read. We will focus on section 21.

That provision had the effect of setting the bar rather high for the user of the service and rather low for the provider of the service. The duty on the provider arose only if the “practice, policy or procedure” made it “impossible or unreasonably difficult” for a disabled person to use the service. And even if it was possible to establish the duty, it appears that the extent of the duty was to make an adjustment so that it was no longer “impossible or unreasonably difficult” for a disabled person to use the service. The imposition of the duty belies its inadequacy when one considers that the duty could be met by providing a service that was still very difficult for a disabled person to use, and even then, only if it was reasonable, in all the circumstances, to do so.

However, section 19(5)(b) of the *DDA 1995* (as originally enacted) provided that the section 21 duty to make adjustments did not apply to any service so far as it consists of the use of any means of transport. Instead, section 40 of the *DDA 1995* empowered the Secretary of State to make regulations in relation to access for disabled persons to public service vehicles. Regulations were duly made, which marked significant but insufficient improvements in terms of accessibility to public transport.

That insufficiency was addressed by the *Disability Discrimination Act 2005*⁹ which amended the DDA 1995 to apply that knotty little clutch of provisions, in modified form (thus making it even knottier) to providers of public transport.

Equality Act 2010 “Reasonable Adjustments”

That was how things stood until the enactment of the *2010 Act*. In that Act section 20 replaced what was section 21 of the *DDA 1995*.

The relevant provisions of section 20 read:

20 Duty to make adjustments

Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

The duty comprises the following three requirements.

The first requirement is a requirement, where a provision, criterion or practice of A's *puts* a disabled person at a *substantial disadvantage* in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take *to avoid the disadvantage*. [*Emphasis added*]

As you can see, we now have only one threshold for the “reasonable adjustments” duty, namely that of “substantial disadvantage”, which makes it easier to trigger the duty than the “impossible or unreasonably difficult” criteria of the *DDA 1995*'s section 21.

The duty is to take reasonable steps to avoid a “substantial disadvantage” which people who are not disabled would not face. This marks a significant shift. The focus of the equivalent provision in the *DDA 1995* was the difficulties faced by disabled people. The premise of section 20 is equality. On the legislative journey towards equality, this marks a significant step. It is another step away from what one commentator has described as the “old attitude” which saw the medical condition of a disabled person as the disabling factor, rather than minority exclusion.¹⁰

The Shift

If you read the 162 pages of Explanatory Notes to the *Equality Act 2010*, you won't get much of a sense of this shift. In fact you would be forgiven for thinking that nothing much had changed at all. This isn't due to that great British value of understatement, but rather the strict rules of the Parliamentary authorities that the notes should be explanatory and factual, rather than seek to argue the case for the policy.

⁹ 2005, c. 13 (UK).

¹⁰ Anthony Lester, *Five ideas to Fight For* (One World Publications: London, 2016) at 78.

There were certainly policy changes reflected in the *Equality Act 2010* to improve the rights of disabled people. However, what is of interest to us is how the legislative language conveys the sometimes subtle shift in emphasis towards equality.

Here is one example. Before the Court of Appeal in the *Paulley* case, it was in dispute whether it was the bus company's policy which put users of wheelchairs at a substantial disadvantage, or something else such as the design of the bus. Lady Justice Arden's interpretation of section 20(3) of the *Equality Act 2010* is as follows:

Parliament's use in s 20(3) of the *Equality Act 2010* of the plain English word "puts", rather than the legal term "causes", is a signal that *the court should adopt a practical and purposive approach* to this provision. So the court should interpret and apply s 20(3) in such a way that *the court's review of the Defendant's compliance with the duty to make reasonable adjustments is a real and effective one...*

The adoption of a practical and purposive approach involves asking and answering the statutory question: does the [policy] put the wheelchair user at a substantial disadvantage? *If the [policy] is responsible for the substantial disadvantage to any extent which is not trivial, then, as I see it, the court answers that question: yes.*

...Because we must ask and answer the statutory question in a practical and purposive way, we should put on one side a technical approach, including an inquiry into competing or dominant causes. These might (depending on the circumstances) be relevant if we were dealing with the legal concept of causation.¹¹ [*Emphasis added*]

Lady Justice Arden's interpretation and analysis also serves as a powerful reminder of the potential weight and influence of the words we choose when we draft, of every single word, including the small and seemingly innocuous.

Supreme Court Judgment

So, back to Mr. Paulley to finish the tale.

The Supreme Court allowed the appeal and decided that the bus company had failed in their duty to make reasonable adjustments.

However, we think it is fair to say that there was so much discussion in the 6 judgments from the Supreme Court that it is difficult to summarise precisely what the Supreme Court decided that the "reasonable adjustments" ought to have been. There is much debate in the judgments about competing needs and rights, not only as between disabled and non-disabled people, but between those disabled people who are wheelchair users and those who are not.

The Supreme Court Justices did appear to agree that the Recorder at first instance went too far in ruling that a non-wheelchair user should always be required to get off the bus if

¹¹ Above n. 5 at para. 73.

necessary to accommodate a wheelchair user. But the view was that there were nevertheless reasonable steps that the bus company could take beyond simply asking a non-wheelchair using occupant of the space to move.

To quote from Lord Toulson

I would allow the appeal to the extent of holding that the bus company ought to have adopted a policy of training its staff to make clear, in circumstances where a wheelchair user wanted to board the bus but the wheelchair space was occupied by somebody who could reasonably and readily move to another part of the bus, that the person occupying it must do so.¹²

Conclusion

A number of judges in the Supreme Court and the Court of Appeal made critical comments about the present state of the law in this area. Lord Toulson noted that “the division of opinion in this Court may be thought to reinforce the desirability of it receiving fresh legislative consideration.”¹³

Lady Justice Arden, in the Court of Appeal, had thought that the proper remedy for wheelchair users would be to ask Parliament to strengthen the powers of bus drivers or create new duties on other passengers.¹⁴

We respectfully disagree with those sentiments. As drafters, having reviewed the legislative journey from 1995 to today, we see that we have moved from a place where there was no protection, through a place where the needs of wheelchair users were addressed but inadequately so, to a place where there are comprehensive measures in force. The provisions are drafted in general terms so as to afford flexibility in their application rather than to cover with precision every conceivable scenario in which they might apply. And there is of course always a limit to how far one can go to legislate for common sense and decency. Lord Toulson himself described the concept of “reasonable adjustments” as “intensely practical” and acknowledged that: “Much human behaviour is governed by expectation and convention rather than legal enforcement”.¹⁵

And there, we rest our case.

But this journey has not quite ended. The *Bus Services Act, 2017* has been enacted by Parliament.¹⁶ An Opposition amendment was tabled at Committee stage in the House of Commons which sought to insert a new clause into the Bill to provide a regulation-making

¹² Above n. 3 at para. 85.

¹³ *Ibid.* at para. 87.

¹⁴ Above n. 5 at para. 85.

¹⁵ Above n. 3 at para. 83.

¹⁶ 2017, c. 21 (UK).

power to enforce a policy for priority wheelchair spaces on buses. After a debate in Public Bill Committee on the 16th March 2017, the amendment was defeated. The government pointed to ongoing work on this issue and the need for more time to formulate the best solution.

"You are always on my mind": law drafting for human rights (in)consistency

Ross Carter¹



Abstract:

This paper is about law drafting for, or bearing in mind, human rights-(in)consistency. It compares 4 "parliamentary", "ordinary statute", or "interpretative" Bills of Rights (not overriding or supreme constitutions) in New Zealand, the United Kingdom, and Australia (ACT and Victoria). It looks at

- *What human rights laws and processes exist in those 4 jurisdictions - how do they work and differ?*
- *What challenges do they give drafters instructed to achieve human rights-(in)consistent meanings?*

The paper also looks at rights-(in)consistency as one kind of inconsistency with other legislation (and with other basic legal values) and explores drafters' role in, and tools and techniques drafters can use in, developing new legislation that affects human rights.

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Introduction

“You *were* always on my mind” is a famous song. It was composed as an American country music song by Johnny Christopher, Mark James, and Wayne Carson. It was recorded in 1972 by Elvis Presley. But it was recorded first by Gwen McCrae and Brenda Lee (as "You *Were* Always On My Mind") in 1972. Willie Nelson recorded it in 1982. The Pet Shop Boys recorded it in 1987. The lyrics for the Presley and Pet Shop Boys version are available on-line.²

The Pet Shop Boys are an English electronic pop duo, formed in London in 1981: Neil Tennant (main vocals, keyboards, occasional guitar), and Chris Lowe (keyboards, occasional vocals).

Initially they performed as “West End” because of their love of London’s West End, but later they came up with the name “Pet Shop Boys”, derived from friends of theirs who worked in a pet shop in Ealing.

Neil Tennant, who neither denied nor confirmed gay rumours throughout the 1980s, "came out" in a 1994 interview for *Attitude*, a UK gay lifestyle magazine. Lowe, meanwhile, has not disclosed his own sexual orientation. He has said (in the 2-part 1996 BBC Radio 1 documentary, *About*), rather, that there is only "[human] sexuality". In the 1990 biography *Pet Shop Boys, Literally*, Tennant recalls that for a time their ex-manager, Tom Watkins, incorrectly assumed the musical duo to be a couple.

Neil Tennant has stated that his lyrics are not specifically gay (homosexual). Many of their songs are written from an ambiguous viewpoint. Their lyrics for “Always on my mind/In

² See [Presley version](#) and [Pet Shop Boys version](#).

my house” omit any “Girl” from “[Girl,] I’m so sorry I was blind”. This can be compared with legislative drafting that is gender neutral and uses no personal pronouns.

The Pet Shop Boys thus revisited, and revised, the earlier song. They revisited it to align it with new thinking and values. Equality rights were, and perhaps are, always on their mind.

Human rights laws and processes recognise and protect basic rights, including rights of minorities, that democratic law-making would or may not otherwise properly recognise and protect.

Human rights involve, however, vagueness and inconclusiveness, and so also open-endedness. This can be seen in the rights protected, limits on them, and institutional roles (who is to do what). It can also be seen in laws, new and old, being checked, and endlessly revisited, for rights-consistency. Human rights thus should be, and (perhaps ever) were, are, and will be, always on a law drafter’s mind.

History in New Zealand – “international Bill of Rights” framework – domestic implementation

The Universal Declaration of Human Rights was adopted, by New Zealand and 47 other United Nations’ member states, in Paris in 1948, in light of atrocities committed during World War II.³ Rights were then put in binding international legal form in International Covenants on Human Rights: the International Covenant on Civil and Political Rights (ICCPR)⁴ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁵ UN treaties for specific themes or populations followed. Similar regional instruments include the 1950 European Convention on Human Rights.⁶

New Zealand’s ratification of the 7 major international human rights treaties was evaluated recently through a four-year-long research project culminating in a book.⁷ The project’s 3 authors are Professor Judy McGregor (a former Human Rights Commissioner), Sylvia Bell (a lawyer formerly with New Zealand’s Human Rights Commission), & Professor Margaret Wilson (a former Attorney-General for New Zealand and Speaker of New Zealand’s House of Representatives). Quoting others, they say:

it is important to give the general ethical status of human rights its due, rather than locking up the concept prematurely within the narrow box of legislation – real or ideal’

³ United Nations General Assembly Resolution 217A, Paris, 10 December 1948.

⁴ United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966.

⁵ Ibid.

⁶ Council of Europe, Rome, 4 November 1950.

⁷ McGregor, Bell, & Wilson *Human Rights in New Zealand – Emerging Faultlines* (BWB Books, 2016) at 9–11, quoting Richard Thomson Ford *Universal Rights Down to Earth* (Norton, 2011).

. . . human rights constitute more than legal rights and are secured and enhanced in a variety of ways.

The authors divide New Zealand's reception of international human rights treaties into 3 phases:

- 1948 to 1968, a period characterised by the view that 'there is no need to formally ratify treaties because there is no human rights problem';
- 1968 to 1990, when the growing recognition of the need to formally incorporate human rights treaties into domestic law led to the ratification of the UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁸ in 1972, ICCPR and ICESCR in 1978 and the UN Convention on the Elimination of all Forms of Discrimination Against Women CEDAW⁹ in 1985, as well as the enactment of the *New Zealand Bill of Rights Act 1990 (NZBORA)*¹⁰ and the establishment of the Ministry of Women's Affairs in 1985;
- 1990 to 2016, which was characterised by acceptance of human rights treaties as an integral part of law and practice. The *Human Rights Act 1993* (HRA) [(which is an anti-discrimination measure overlapping with the separate anti-discrimination right in *NZBORA* s 19, plus an Act about New Zealand's Human Rights Commission)] was extended to cover a greater number of grounds of discrimination, as well as the power of the Human Rights Review Tribunal to make a declaration of inconsistency, and litigation under the *NZBORA* became more common.¹¹

International enforcement of international human rights obligations – comparison with UK / Brexit

A country that ratifies a treaty undertakes to comply with the obligations in it. Obligations under a treaty can be affected by reservations made to it and maintained by a party.¹²

⁸ Available at <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

⁹ Available at <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>.

¹⁰ 1990, No. 109.

¹¹ *Human Rights in New Zealand – Emerging Faultlines* (2016) at p 12. See also Imogen Foulkes "Are we heading towards a 'post human rights world'?" at <http://www.bbc.com/news/world-europe-38368848>

¹² New Zealand made, and still maintains, reservations to the ICCPR. Those reservations are summarised at <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/international-covenant-on-civil-and-political-rights/> See also paras [43]-[51] of New Zealand's 2015 periodic report (CCPR/C/NZL/6, 8 May 2015) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/165/37/PDF/G1516537.pdf?OpenElement> See also paras [5]-[6] of the Human Rights Committee's concluding observations on that 2015 report: CCPR/C/NZL/CO/6 (28 April 2016).

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.¹³ As Hon Justice Susan Glazebrook, DNZM, a New Zealand Supreme Court Judge, noted in 2016:

Even if ratified treaties have not been incorporated by legislation . . . [t]here is a presumption in New Zealand that Parliament intends to legislate consistently with international obligations meaning that, to the extent that the words allow, legislation will be interpreted accordingly. . . . if there is a broad-based discretion given to the executive, then this discretion must be exercised consistently with international obligations.¹⁴

Under the ICCPR, the obligation of each state party is one of result, to protect the right and, if not, to provide an effective remedy.¹⁵ So it is likely to be for each state party to decide how to protect the right (by developing common law, or by new legislation – “legislative or other measures”).

By way of monitoring, the ICCPR provides for both:

- a mandatory periodic reporting procedure (Article 40),¹⁶ and
- an optional interstate complaints procedure (Article 41).¹⁷

In 2007, reporting was augmented by a new process called Universal Periodic Review – a comprehensive peer review of states’ performances that draws not only on a country’s own self-reporting, but also allows input from non-governmental organisations (NGOs) and national human rights institutions (NHRIs).¹⁸

McGregor, Bell, & Wilson say:

¹³ Vienna Convention on the Law of Treaties (1969) Art 26 (pacta sunt servanda / agreements must be kept).

¹⁴ S. Glazebrook, "When there becomes here: the domestic application of foreign law" (2015), 14(1) *Otago LR* 61 at 81–87. See also *New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated v Director of Civil Aviation* [2017] NZCA 27 at para. [56] per Harrison J; *Helu* [2016] 1 NZLR 298 (SC) at para. [143], McGrath J (“the international text may not be used to contradict or avoid applying the terms of the domestic legislation”). Ambiguity is still a precondition to the treaty presumption applying in the cases in England and Wales and in Australia: Coxon (2014) 35(1) *Stat LR* 35 at 45–48 and Meagher [2012] *New Zealand Law Rev* 465; Groves "Treaties and Legitimate Expectations - The Rise and Fall of *Teoh* in Australia" [2010] *U Monash LRS* 8.

¹⁵ ICCPR Art 2(1), (2), and (3); Keith [2003] *Aust Journal of Human Rights* 8; and (2013) 11 *NZJPIL* 1, 11.

¹⁶ New Zealand’s 2015 periodic report (CCPR/C/NZL/6, 8 May 2015) is available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/165/37/PDF/G1516537.pdf?OpenElement>.

¹⁷ A UN Office of the High Commissioner for Human Rights webpage says “these procedures have never been used.”: <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>.

Davidson (1991) 4 *Canta LR* 337 at 338 says “the reason for the non-use of the Article 41 mechanism probably lies in the political sensitivity associated with direct complaints of a human rights character”: <http://www.nzlii.org/nz/journals/CanterLawRw/1991/1.html>.

¹⁸ See New Zealand’s 2014 UPR documents: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/NZSession18.aspx>

The main mechanism for ensuring compliance is . . . regular reporting. . . This ‘constructive dialogue’ takes place in public.¹⁹ The committee then produces . . . recommendations . . . to be addressed in the next reporting cycle. . . the reporting mechanism has not always ensured compliance. The reasons for this include the degree of understanding a committee may have of domestic conditions and legislation; the tight timeframes for responding in; and the absence of formal enforcement mechanisms. . . Lack of political will is also a big factor.²⁰

An individual complaints mechanism is provided for in the First Optional Protocol to the ICCPR.²¹ This First Optional Protocol was adopted on 16 December 1966, and entered into force on 23 March 1976. New Zealand ratified this First Optional Protocol on 26 May 1989, giving individuals – at that date,²² and by that Executive treaty making alone (with no domestic implementing legislation) – a right of communication under international law (with direct effect).

An individual communication to the UN Human Rights Committee is inadmissible (that is, Arts 2 and 5(2) of this First Optional Protocol stop the Committee from considering the communication) if— (a) the same matter is being examined under another procedure of international investigation or settlement; or (b) the individual has not exhausted all available domestic remedies (unless the application of those remedies is unreasonably prolonged). Domestic declarations of inconsistency have been sought to help to show that domestic remedies have been exhausted.²³ There have been a few successful New Zealand individual communications to the UN Human Rights Committee.²⁴

¹⁹ A report on New Zealand’s 15 March 2016 interactive dialogue with the UN Human Rights Committee is at [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/3F180FDF2B993E16C1257F7700474B07?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/3F180FDF2B993E16C1257F7700474B07?OpenDocument)

²⁰ J. McGregor, S. Bell & M. Wilson, *Human Rights in New Zealand – Emerging Faultlines* (BWB Books: Wellington, 2016) at 22. The Human Rights Committee’s concluding observations on New Zealand’s 2015 periodic report - CCPR/C/NZL/CO/6 (28 April 2016) – are at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NZL&Lang=EN

²¹ *Elkind* [1990] NZLJ 96; *Davidson* (1991) 4 Canta LR 337; *Ellis* [2004] NZLJ 199.

²² The NZBORA commenced later, on 25 September 1990. In *P v Attorney-General* [2010] NZHC 959 at [207]–[210], Mallon J held NZBORA applies only to conduct on or after 25 September 1990 and not retroactively as far back as New Zealand’s (1978) ratification of the ICCPR. Sir Kenneth Keith (2013) 11 NZJPIL 1, 11; (2016) 47 VUWLR 5 at 13, fn 36 explains that “New Zealand . . . was a party to the [ICCPR] for 12 years before the Bill . . . was . . . enacted. The assessment made in 1978 was that, with four reservations being made on ratification, just two changes to New Zealand law [(in respect of the non-retroactivity of criminal sanctions and deportation procedures)] were needed to give full effect to the [ICCPR] and those changes were made before New Zealand became bound by it.”

²³ An example is *Taylor v Attorney-General* [2015] 3 NZLR 791 (HC) at [67] (and see also [54]–[55]) per Heath J. The Attorney-General’s appeal against this decision was heard by a Full Bench of the Court of Appeal on 26–27 October 2017. Judgment remains reserved.

²⁴ Successful New Zealand individual communications to the UN Human Rights Committee are *Rameka v NZ - CCPR/C/79/D/1090/2002* (breach of Art 9(4), ICCPR – right to test without delay lawfulness of preventive detention; Conte [2004] NZLJ 202; *Newbold* [2004] NZLJ 205), *EB v NZ - CCPR/C/89/D/1368/2005* (breach of ICCPR, Art 14(1), right to expeditious trial of civil application for access

New Zealand told the UN Human Rights Committee in 2016 there was no mechanism to adopt Committee views under this First Optional Protocol, but all views were considered and appropriate responses formulated.²⁵ Giving views on an individual communication that established a violation, the UN Human Rights Committee in 2007 said that, since the ICCPR Art 2 requires New Zealand to provide an effective and enforceable remedy when a violation has been established, “the Committee expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee’s Views”.²⁶

One commentator (Scott Davidson) suggested in 2002 that this wording was a typical formula used by the Committee and used to claim legal competence to make an authoritative determination whether a violation has occurred, and that it would usually be politically unwise to argue that such views are not technically legally binding.²⁷ The Committee’s views on particular cases, and its general comments, are of at least persuasive authority in New Zealand.²⁸ In *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [96], McGrath J declined to follow the view of the majority of the Committee in *Ahani v Canada* CCPR/C/80/D/1051/2002 (on the acceptable duration of detention during review of a national security certificate), preferring instead the view of the minority of the Committee and of a majority of the ECtHR in *Chahal v UK* (1996) 23 EHRR 413. Butler and Butler note Committee general comments were referred to by appellate New Zealand courts in *Hamed*²⁹ (covert surveillance without warrant) and in *Atkinson*³⁰ (meaning of discrimination in NZBORA s 19). New Zealand’s Court of Appeal has said “that since New Zealand’s accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of [New Zealand]’s judicial structure”.³¹

to children in context of allegations of abuse of child), and *Dean v NZ* - CCPR/C/95/D/1512/2006 (breach of Art 9(4), ICCPR – right to test without delay lawfulness of preventive detention): Alternative Shadow Report – Filed By Dr Tony Ellis of New Zealand:
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NZL&Lang=EN.
That website also lists UN Human Rights Committee documents on individual New Zealand communications.

²⁵ Report on New Zealand’s 15 March 2016 interactive dialogue with the UN Human Rights Committee.

²⁶ *EB v New Zealand* - CCPR/C/89/D/1368/2005 at [12].

²⁷ John S (Scott) Davidson “Intention and Effect: The Legal Status of the Final views of the Human Rights Committee” in G. Huscroft, & P. Rishworth (Eds.), *Litigating Rights* (Oxford: Hart Publishing, 2002) at 305-321.

²⁸ A. Butler and P. Butler *The New Zealand Bill of Rights Act—A Commentary* (2nd ed, LexisNexis: New Zealand, 2015) at paras. [4.5.2]-[4.5.10], citing *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA) at 393 per Cooke P (for the Court); *Baigent* [1994] 3 NZLR 667 (CA) at 691, 702 per Hardie Boys J; *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [6] per Gault P and Blanchard J. See also *Helu* [2016] 1 NZLR 298 (SC) at [146]-[150] per McGrath J (NZBORA s 18(2) narrower than ICCPR art 12(4)).

²⁹ [2012] 2 NZLR 305 (SC).

³⁰ [2012] 3 NZLR 456 (CA).

³¹ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266 (per Cooke P for the Court). In late 1999, the UNHRC was held not to be a domestic legal system “judicial authority”, under s 19(1)(e)(v) of the Legal

The ICCPR has been ratified by Australia (1975), Canada (1976), and the UK (1976).

Its First Optional Protocol has been ratified by Canada (1976) and Australia (1991),³² but not the UK.³³

New Zealand's position can, however, be compared to the UK's position as a state Party to a regional human rights convention which covers many of the rights included in the ICCPR: the European Convention on Human Rights and Fundamental Freedoms (ECHR).³⁴

The ECHR was drafted in 1950 by the then newly formed Council of Europe, and entered into force (for the UK, and other founding members of the Council of Europe) on 3 September 1953. The ECHR provides for enforcement by way of individual application – proceedings before the European Court of Human Rights against a State party and brought by any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by the State party of the ECHR or its protocols. On finding a violation of the ECHR or its Protocols, and if the internal law of state Party concerned allows only partial reparation to be made, the Court must, if necessary, afford just satisfaction to the injured party (art 41). Almost all states parties have incorporated the ECHR into some form of domestic law. The *Human Rights Act 1998* (UK) incorporates most of the ECHR into UK law.

On 8 November 2016 the Grand Chamber of the European Court of Human Rights ('ECtHR') in *Magyar Helsinki Bizottság v Hungary*³⁵ decided that Art 10 did indeed confer a right of access to information, thereby effectively overturning the UK Supreme Court's ('UKSC') judgment in *Kennedy v The Charity Commission*³⁶. The facts of Kennedy are well known and the case can be (and has been by Christina Lienen) summarised in just a few words. As Lienen says,

the judgment in *Magyar Helsinki Bizottság* is a powerful reminder that under the current constitutional set-up, there is a higher instance in human rights questions

Services Act 1991, for legal aid purposes: *Tangiara v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (JC).

³² Charlesworth (1991-1992) 18 MeL U L Rev 428; Australian Human Rights Information Centre *Guide* <http://www3.austlii.edu.au/au/other/ahric/booklet/index.html>.

³³ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=en

³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, https://www.echr.coe.int/Documents/Convention_ENG.pdf

³⁵ *Case of Magyar Helinski Bizottság v. Hungary*, European Court of Human Rights, Court (Grand Chamber), (Application no. 18030/11), JUDGMENT, STRASBOURG, 8 November 2016. Available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-167828%22%7D>

³⁶ [2014] UKSC 20.

that unsatisfied claimants can resort to, and that can ‘correct’ domestic interpretation of the ECHR³⁷

This is so whether the ECHR is given effect in the UK via the HRA 1998 or a common law presumption of openness.

In the UK Parliament, a Joint (HC–HL) Committee is looking at the human rights implications of Brexit:

Withdrawal from the EU would mean that the UK no longer has to comply with the human rights obligations contained in the EU Treaties and other sources of EU law, unless Parliament chooses to continue them in force. The EU Charter of Fundamental Rights, for example, would not apply, and the EU Court of Justice would not have jurisdiction over the UK (except possibly for transitional cases that arose before withdrawal). Other EU law protecting rights would also cease to have effect except to the extent that they have already been transposed into UK law.

The EU Charter is often confused with the European Convention on Human Rights (ECHR), as the Court of Justice of the EU in Luxembourg (the CJEU) is with the European Court of Human Rights in Strasbourg (the ECtHR). While both the Charter and the ECHR contain overlapping human rights provisions, they operate within separate legal frameworks. The Charter is an instrument of the EU. It is part of EU law and subject to the ultimate interpretation of the CJEU. EU law is given effect in national law through the *European Communities Act 1972*. Some Charter rights mirror civil and political rights found in the ECHR; others go beyond the ECHR, covering additional rights including some economic and social rights.

...

As is well recognised, withdrawing from the EU does not mean withdrawing from the separate ECHR. Although the Government still indicates that it is planning to repeal the Human Rights Act and replace it with a British Bill of Rights, Theresa May has indicated that the Government does not intend [at least immediately] to withdraw from the Convention.³⁸

³⁷ C. Lienen, 'When Strasbourg Won't Have It - Push for or Limitation of Common Law Constitutional Rights?', U.K. Const. L. Blog (10th Jan 2017). Available at <https://ukconstitutionalallaw.org/>.

³⁸ <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/brexit-human-rights-launch-16-17/> For an argument that *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 applies also to the UK denouncing the ECHR, see A. Peplow, 'Withdrawal from the ECHR after *Miller* – A Matter of Prerogative?', U.K. Const. L. Blog (28th Feb 2017) (available at <https://ukconstitutionalallaw.org/>). See also HL Select Committee on the Constitution *The 'Great Repeal Bill' and delegated powers* (HL Paper 123, 2017). Also this [2016 HL EU Committee report](#) and this [Government response](#), and this [2017 HC Committee report](#). The European Union (Withdrawal) Bill (Bill 005, 2017–19) was introduced (presented and read a first time) in the House of Commons on 13 July 2017. See M. Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', U.K. Const. L. Blog (4th Oct. 2017) (available at <https://ukconstitutionalallaw.org/>).

Comparative analysis: introduction – domestic law models and features (and big-picture reform)

This paper analyses only 4 "parliamentary", "ordinary statute", or "interpretative" Bills of Rights, in New Zealand, the UK, and Australia (the Australian Capital Territory (ACT),³⁹ and state of Victoria).

This paper thus *does not* also analyse overriding or "supreme laws", which enable judicial review of legislation for unconstitutionality – for example, the supreme laws in Canada,⁴⁰ the Hong Kong⁴¹ Special Administrative Region of China, Nauru,⁴² and Northern Ireland,⁴³ Scotland,⁴⁴ and Wales.⁴⁵ (By 2011, 83% of countries had empowered their courts to scrutinise the implementation of the constitution and to “strike down” legislation that was inconsistent with it.)⁴⁶

“Supreme laws” override “ordinary laws”. Supreme laws are therefore often also “entrenched laws” (ones with amendment or repeal processes that are more restrictive than those for “ordinary laws”).

An entrenched law might, for example, be amendable or repealable only by a special parliamentary majority (for example, three-quarters of legislators), or majority support in a

³⁹ ACT Legislative Assembly enactments are of no effect if inconsistent with Australian Commonwealth law in force in the ACT: Australian Capital Territory (Self-Government) Act 1988 s 28(1) (as, for example, in *The Commonwealth v Australian Capital Territory* [2013] HCA 55 (Marriage Equality (Same Sex) Act 2013 (ACT)).

⁴⁰ *Constitution Act, 1982*, Part I (Canadian Charter of Rights and Freedoms), enacted as the *Canada Act 1982* (c. 11) (U.K.) Schedule B (<http://www.legislation.gov.uk/ukpga/1982/11/contents>), commencing 17 April 1982. Section 32 deems inconsistent legislation void; courts do not in fact “strike it down”: B. McLachlin “Bills of Rights in Common Law Countries” (2002), 51 *International and Comparative Law Quarterly* 197 at 200.

⁴¹ For laws enacted by the legislature of the HKSAR, Basic Law Art 11(2) provides that “[n]o law enacted by the legislature of the HKSAR shall contravene the Basic Law”.

⁴² The Constitution of Nauru, Article 2, says: “Supreme Law of Nauru 2. (1.) This Constitution is the supreme law of Nauru. (2.) A law inconsistent with this Constitution is, to the extent of the inconsistency, void.”

⁴³ See *Northern Ireland Act 1998* (1998 c. 47) s 6(1) and (2)(c): “(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly. (2) A provision is outside that competence if any of the following paragraphs apply—... (c) it is incompatible with any of the Convention rights;”. The “Convention rights”, as defined in s 98(1), has the same meaning as in the Human Rights Act 1998 (UK). See Caughey and Russell in Hunt, Hooper, and Yowell (eds) *Parliaments and Human Rights* (Hart, 2015), ch 10.

⁴⁴ See *Scotland Act 1998* (1998 c. 46) s 29(1) and (2)(d). See Adamson in Hunt, Hooper, and Yowell (eds) *Parliaments and Human Rights* (Hart, 2015), ch 9.

⁴⁵ See *Government of Wales Act 2006* (2006 c. 32) s 94(2) and (6)(c). See Sherlock in Hunt, Hooper, and Yowell (eds) *Parliaments and Human Rights* (Hart, 2015), ch 11.

⁴⁶ Tom Ginsburg, James Melton & Zachary Elkins, ‘The Endurance of National Constitutions’, John M. Olin Law & Economics Working Paper No. 511 (2nd Series), 2010, p 2, cited by Constitutional Advisory Panel *New Zealand’s Constitution* (2013) at 140: http://www.ourconstitution.org.nz/store/doc/FR_Full_Report.pdf

referendum of voters.⁴⁷ The entrenching provision can also itself be entrenched. This is known as ‘double entrenchment.’

Entrenchment makes invalid a proposed law to amend or repeal the entrenched law if the proposed law has not followed the required special process for a law amending or repealing the entrenched law. An initial question is usually whether the special process applies at all, for example, because the proposed law is one that, as properly construed, purports to limit or affect (amend or repeal) the entrenched law.⁴⁸

Even if a “constitutional enactment” is not an entrenched law, courts might be reluctant to hold that it has been amended or repealed not expressly, but instead only impliedly, by another enactment.⁴⁹

However, some “ordinary statute” Bills of Rights (for example, New Zealand’s, in s 4) make it quite clear that they do not limit or affect other *inconsistent* enactments. This ensures that these Bills of Rights are, in effect, amendable or repealable by other “ordinary enactments”. However, courts may still strive to give effect to *both* the Bill of Rights *and* the other enactment, instead of reading down *one* of them. NZBORA s 4, on inconsistent enactments being ‘unaffected’ by NZBORA, may obscure wrongly that, under NZBORA s 6, other enactments must be given, if they can be, a rights-consistent meaning.

Bills of Rights that form part of supreme law Constitutions may also operate in parallel with (and so subject to) other provisions of those Constitutions, for example, those on parliamentary privilege.⁵⁰

⁴⁷ New Zealand’s only entrenched laws are those entrenched by the *Electoral Act 1993* s 268 (not itself entrenched), discussed by Palmer & Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, 2016) at 231–234; Palmer & Butler *Towards Democratic Renewal* (Victoria University Press, 2018) at 17–18 and 34–36; McLeay *In Search of Consensus—New Zealand’s Electoral Act 1993 and its Constitutional Legacy* (Victoria University Press, 2018) ch 6. 2017 Standing Order 266 (Entrenched provisions) prevents a proposal for entrenchment from being enacted by, then preventing amendment or repeal except than by more than, a majority of 50% plus one of all MPs.

⁴⁸ See, for example, *Taylor v Attorney-General* [2014] NZHC 2225 at [70]–[72] per Ellis J (“amend” in *Electoral Act 1993*, s 268, likely extends to implied, as well as direct, amendment), and *Taylor v Attorney-General* [2016] 3 NZLR 111 (HC) at [107]–[110] per Fogarty J (*Electoral Act 1993*, s 268, protects specified provisions as reserved so far as they make 18 years the minimum voting age only, and does not cover voters’ qualification generally. The *Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010* was therefore validly passed by a bare majority of the House of Representatives because it was not amending a reserved provision). However, see also the discussion taking the opposite view by Professor Philip Joseph at [2016] NZLJ 251 (“Taylor’s argument was correct and that the impugned provision was enacted in breach of the *Electoral Act 1993*”). On 17 August 2017, however, the NZCA dismissed appeals: *Ngaronoa v Attorney-General* [2017] NZCA 351.

⁴⁹ *Thoburn v Sunderland City Council* [2003] QB 151 (QB). See also *Miller* [2017] UKSC 5 at [66]–[67].

⁵⁰ *Harvey v. New Brunswick (Attorney General)* [1996] 2 S.C.R. 876 at [69], per McLachlin J:

Because parliamentary privilege enjoys constitutional status it is not ‘subject to’ the Charter, as are ordinary laws. Both parliamentary privilege and the Charter constitute essential parts of the Constitution of Canada. Neither prevails over the other. While parliamentary privilege and immunity from improper judicial interference in parliamentary processes must be maintained, so must the fundamental democratic guarantees of the Charter. Where apparent conflicts between different constitutional

On national Bills of Rights, the UK Parliament’s Joint (HC–HL) Human Rights Committee has said:

212. there are, broadly speaking, four possible models for a national Bill of Rights:

- i) Judicial power to strike down legislation for breach of Bill of Rights (cf the US and European jurisdictions with a Constitutional Court, e.g. Germany);
- ii) Judicial power to strike down but subject to parliamentary override (cf. Canada);
- iii) Judicial obligation to interpret statute compatibly with the Bill of Rights and power to declare incompatible if not possible, giving opportunity for legislative response (cf the UK under the HRA);
- iv) Judicial obligation to interpret legislation consistently with the rights and freedoms contained in the Bill of Rights (cf New Zealand [, where, if declarations of inconsistency continue, there will still be an opportunity, but no obligation, to make a legislative response]).⁵¹

And models of judicial review in Westminster systems are categorised by Mark Tushnet as follows:⁵²

Jurisdiction	Model of judicial review
New Zealand	Interpretive mandate—The judiciary cannot enforce guarantees [(except by a rights-consistent interpretation of legislation)].
United Kingdom	Augmented interpretive mandate—The judiciary may issue non-binding declarations of incompatibility.
Canada	“Strong-form” judicial review (declarations of unconstitutionality) and strong form legislative responses (formal political reversal of judicial decisions through constitutional instruments such as the Charter’s notwithstanding clause, section 33).

Stephen Gardbaum talks about an “intermediate model” (for example, in New Zealand), neither pure parliamentary sovereignty nor pure judicial override, where legislatures and

principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.

See also *O’Donohue v Canada* (2003) 109 CRR (2d) 1 (Ont SC), affirmed (2005) 137 ACWS (3d) 1131 (Ont CA). In the Supreme Court, Rouleau J applied the principle that the Charter could not be used to amend or trump another part of the constitution, and further held “[o]ne cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected”: Crown Law Office Advice to Attorney-General on Royal Succession Bill (PCO 15690/2.10) — Consistency with the *New Zealand Bill of Rights Act 1990*.

⁵¹ Joint Committee on Human Rights - Twenty-Ninth Report (Session 2007-08) at [212] : <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm>

⁵² Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press: Princeton, 2008) at 25–33.

courts are “joint and supplementary rather than alternative exclusive promoters and protectors of rights” – so resulting in “legislative” or “political” rights review in legislatures (and by legislators).⁵³

Another model is to combine supreme and ordinary laws: Ireland appears to have elements of *both* a superior law constitution *and* an ordinary statute Bill of Rights (the latter related to the ECHR).⁵⁴ Mark Tushnet has also remarked that “there is some evidence, mostly from Canada but some from New Zealand, that ‘weak form’ systems do become ‘strong form’ ones.”⁵⁵

A New Zealand constitutional review panel, in its report in November 2013, recommended that:

the Government . . . set up a process, with public consultation and participation, to explore in more detail the options for amending the *New Zealand Bill of Rights Act 1990* to improve its effectiveness such as:

- adding economic, social and cultural rights, property rights and environmental rights
- improving compliance by the Executive and Parliament with the standards in the Act
- giving the Judiciary powers to assess legislation for consistency with the Act
- entrenching all or part of the Act.⁵⁶

New Zealand’s Minister of Justice, Hon Amy Adams, told the UN Human Rights Committee on 15 March 2016 the Government had no plans to review NZBORA:

Regarding the [NZBORA], the delegation said that the Bill . . . was intended to supplement [A]cts. It did not enable courts to strike down legislation and it did not have precedence over [other] laws. The system was designed so that the Parliament . . . had the right to always be the final decision maker.⁵⁷

The UN Human Rights Committee, in its concluding observations on New Zealand’s 2015 periodic report, recommends that New Zealand considers entrenching NZBORA and strengthening the role of the judiciary, as well as parliamentary scrutiny, in assessing the consistency of enacted laws with the ICCPR.⁵⁸ Sir Geoffrey Palmer QC and Dr Andrew

⁵³ Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press: Cambridge, 2013).

⁵⁴ Fiona de Londras (2013) 35(1) *Stat LR* 50-65.

⁵⁵ (2004) 2(1) *NZJPI* 7.

⁵⁶ Constitutional Advisory Panel *New Zealand’s Constitution* (2013) at 16 and 47–56:
http://www.ourconstitution.org.nz/store/doc/FR_Full_Report.pdf

⁵⁷ Report on New Zealand’s 15 March 2016 interactive dialogue with the UN Human Rights Committee.

⁵⁸ CCPR/C/NZL/CO/6 (28 April 2016) at [10(c)]:
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NZL&Lang=EN

Butler say⁵⁹ that the views of the members of the UN Human Rights Committee “are a powerful statement of what can be considered best practice”. Palmer and Butler also said in 2016 that:

We have had an un-entrenched [ordinary statute] Bill of Rights for 25 years. Over that time Parliament has passed laws that breach it⁶⁰ on at least 37 occasions, in spite of the Attorney-General advising MPs in writing that they were doing so. Parliament needs greater encouragement to honour human rights better than it does.⁶¹

Changes may occur even though New Zealand’s Government has no plans to review NZBORA or enact a supreme law Constitution. New Zealand’s Parliament’s Standing Orders Committee in 2014 said:

The ordering of civil society requires Parliament to enact legislation that limits or affects rights, and the *New Zealand Bill of Rights Act 1990* does not prevent this. However, the legislature is obliged by section 5 of the Act to make rights subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. ... To meet this obligation, the House should ensure that members are equipped to make an informed judgment when a question arises as to whether a limitation of rights meets this important test. ... papers presented by the Attorney-General under section 7 of the NZBORA should receive detailed consideration by being referred automatically to select committees. We encourage committees to invite officials or Ministers to assist them in their consideration of these [rights-(in)consistency] issues.⁶²

Until 2014, there was no requirement for the House of Representatives to address formally the Attorney-General’s presented NZBORA s 7 reports. But Standing Order 265(5), effective 15 August 2014, ensures every s 7 report presented to the House stands referred, as an item of business (under Standing Order 189(1)(h)), to a select committee that the Clerk allocates as the most appropriate, with the consequence that the select committee must consider, and report to the House on, the s 7 report.

The s 7 report is referred before it is known whether the Bill concerned will be referred to a select committee at all and, if so, which one. If the report is referred to a select committee not considering the Bill, the practice is for the committee to request comment from the committee considering the Bill. If the Bill is not read a first time (because it is withdrawn, or

⁵⁹ Palmer and Butler, *A Constitution for Aotearoa New Zealand*, above n. 47 at 163.

⁶⁰ The laws said to “breach” NZBORA are laws inconsistent with NZBORA, but with effect anyway under s 4. Some think s 4 ensures laws inconsistent with affirmed rights and freedoms are not “in breach” of NZBORA.

⁶¹ Palmer and Butler, “Simplified constitution critical for future”, *New Zealand Herald*, 25 October 2016 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11734846 See also (2016) 14 NZJPIL at 178.

⁶² *Review of Standing Orders 2014* (l.18A) at 20: https://www.parliament.nz/resource/en-NZ/50DBSCH_SCR56780_1/5b3f0906a023a3728df0e64dff9db13295214dab

defeated at first reading), or the Bill is not referred to a select committee (for example, because after its first reading the House has accorded urgency to the Bill: (2014) Standing Order 288(1)), then the Standing Order 189(1)(h) requirement for a select committee report on the s 7 report remains. In that situation, the committee has reported only pro forma (that the committee has had no matters to bring to the attention of the House).⁶³

Requiring a select committee to report to the House on each presented NZBORA s 7 report has enhanced express and reported engagement, on behalf of and by the House, with reported issues of rights-(in)consistency. But there are varying assessments of the success of the change. A Principal Clerk (Legislation) in the Office of the Clerk of the House of Representatives, Tim Workman, says s 7 reports “are playing a significant role in initiating and informing parliamentary scrutiny of Bills”.⁶⁴

Less positive assessments are made by Professor Andrew Geddis. In 2009, he referred to “The Comparative Irrelevance of the NZBORA to Legislative Practice”.⁶⁵ In 2016, writing about “Rights scrutiny in New Zealand’s legislative processes”, He said:

where the political incentives are right ministers repeatedly have proven willing to pursue legislative proposals they are told are inconsistent with the NZBORA’s guarantees. ... their formal legal status is that they are simply another matter of social policy to weigh up and set aside where their demands become too inconvenient.⁶⁶

⁶³ Report of the Finance and Expenditure Committee *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill* (15 October 2015), Report of the Finance and Expenditure Committee *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Affordable Healthcare Bill* (10 December 2015), Report of the Justice and Electoral Committee *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Bill* (20 November 2015).

⁶⁴ Workman, “Parliamentary Bill of Rights Scrutiny in New Zealand — a 2016 update” (Australia-New Zealand Scrutiny of Legislation Conference, 11–14 July 2016, Perth) at 4: [http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-mr-tim-workman/\\$file/Session%2020Mr%20Tim%20Workman,%20Parliamentary%20Bill%20of%20Rights%20scrutiny%20in%20New%20Zealand.pdf](http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-mr-tim-workman/$file/Session%2020Mr%20Tim%20Workman,%20Parliamentary%20Bill%20of%20Rights%20scrutiny%20in%20New%20Zealand.pdf)

⁶⁵ (2009) 23 NZULR 466. Compare Sir Geoffrey Palmer QC (2016) 14 NZJPIL 169 at 179 and 200 (“Bills that breach [NZBORA] are no big deal so far as Parliament is concerned...derogation from legal human rights standards should be regarded as a serious step, not taken lightly... The Parliament does not rigorously analyse human rights issues...”. Sir Geoffrey at 187–188 notes the “hardly used” Canadian override ensures Canadian judges cannot have the last word on Charter rights, adding that “The politics of legislatively removing rights after a court decision determines they apply are not attractive... That said, I believe... that a legislative override is the appropriate solution”. See also Palmer & Butler *A Constitution for Aotearoa New Zealand* (VUP, 2016).

⁶⁶ Geddis (2016) 4(3) *The Theory and Practice of Legislation* 355 at 377. Research on legislative rights review under the NZBORA and HRA 1998 (UK) and by 2 Canadian Political Scientists (Janet L Hiebert and James B Kelly *Parliamentary Bills of Rights – The Experiences of New Zealand and the United Kingdom* (CUP, 2015)) says at 30 “attempts to use the NZBORA and HRA [(UK)] as instruments to alter the norms of legislative decision-making have had little impact on the substance or nature of political behaviour or parliamentary debates. Party leaders have not adopted a compatibility-based lens for assessing bills ... and thus MPs regularly ignore s 7 reports (New Zealand) or JCHR reports (UK) and fail to press ministers to explain why they believe bills should be passed or amended to redress compatibility concerns”.

The matter (including how select committees, after briefings from official advisers, have performed in considering and reporting to the House on referred NZBORA s 7 reports) was (re)considered by the Standing Orders Committee in the *Review of Standing Orders 2017*.⁶⁷

A Bill as introduced is subject to NZBORA s 7, but post-introduction amendments are not.⁶⁸ However, pre-introduction vetting informs, or settles, the (in)consistency of some, but not all, amendments.) and some consider that s 7 “is not an exhaustive statement of the Attorney-General’s constitutional obligations.”⁶⁹ Parliamentarians can, and do, continue to raise questions about the consistency of legislation with the NZBORA. Committees have, for example, previously asked the Attorney-General or the Attorney-General’s advisers to reconsider their initial view that the legislation was (or was not) (in)consistent in the light of submissions to the committee.⁷⁰ Whether the invitation to reconsider an initial view is acted upon is for the Attorney-General to decide.⁷¹

Even where such questions are not raised, it has been suggested that the Attorney-General should inform the House “when an inconsistency arises subsequent to the first reading if reliance on his or her earlier report (or decision not to make such a report) would cause Parliament to be misled.”⁷²

The New Zealand Law Society’s submission on the *Review of Standing Orders 2017* recommended that the Standing Orders ought to make amendments (for example, those on Supplementary Order Papers, and for the Committee of the whole House stage) subject to reporting by the Attorney-General on whether they are consistent with the NZBORA.⁷³

Tim Workman says:

Scrutiny would be effected either by referral of the bill back to a subject select committee for the consideration of the Attorney-General’s report and subsequent report back to the House, or potentially a debate on the SOP before the committee of the whole stage can progress. The Attorney-General indicated support for this approach [(either referral back or debate)]. Another option promoted by submitters and

⁶⁷ Workman, “Parliamentary Bill of Rights Scrutiny in New Zealand — a 2016 update”. The 2017 review is at https://www.parliament.nz/resource/en-NZ/SCR_74675/70c7a3972ff528fea2a062cc9aad17b6507200c3

⁶⁸ *Boscawen v Attorney-General* [2009] 2 NZLR 229 (CA) at [46] per O’Regan J; *R v Poumako* [2000] 2 NZLR 695 (CA) at [25] per Gault J, [66] Henry J, and [96] per Thomas J.

⁶⁹ Paul Rishworth (and others) *The New Zealand Bill of Rights* (OUP, 2003) at p 197.

⁷⁰ Reports of select committees 1996, p.230 (Chemical Weapons (Prohibition) Bill); 1996-99, AJHR, I.22, p.413 (Evidence (Witness Anonymity) Amendment Bill). The Attorney-General’s s 7 report on the Land Transport Amendment Bill 2016 (173—1) includes suggested amendments the select committee on the Bill can consider.

⁷¹ D G McGee, *Parliamentary Practice in New Zealand* (3rd ed, 2005), Chapter 27, at p 345 and 346 and 356.

⁷² Paul Rishworth (and others) *The New Zealand Bill of Rights* (OUP, 2003) at 197.

⁷³ http://www.lawsociety.org.nz/_data/assets/pdf_file/0016/107062/Standing-Orders-Review-25-11-16.pdf

academic writing⁷⁴ would be to have either full section 7 vetting by the Attorney-General following the committee of the whole, or the option for a further section 7 report following the committee of the whole stage, where the Attorney-General considers there remains a Bill of Rights issue that merits further consideration.⁷⁵

In 2015, New Zealand's Attorney-General, Hon Christopher Finlayson QC, said:

I think a number of suggestions are worth exploring, especially requiring the Attorney-General to report to the House:

- on changes made to a bill after it is introduced (post-introduction scrutiny);
- where a bill appears to be consistent with the Bill of Rights Act but nonetheless raises significant human rights issues; and
- on the consistency of bills with New Zealand's international obligations; or
- on a supplementary order paper.⁷⁶

The Clerk's Office's submission to the *Review of Standing Orders 2017* raised as reform options: (1) a statutory requirement for disclosure statements to deal with NZBORA issues; (2) a Standing Order power for the Attorney-General to trigger a time-limited debate on outstanding NZBORA issues in a Bill following committee of the whole House stage by presenting a paper detailing the outstanding issues, with the option of recommittal to committee of the whole House to address the issue.⁷⁷

Vetting a Bill after its committee of the whole House stage in the New Zealand Parliament could be somewhat like the 4-week challenge period after a Bill passes stage 3 in the Scottish Parliament. During that period, the Law Officers of the Scottish and UK Governments (the Advocate General for Scotland, the Lord Advocate, or the Attorney General) may refer a question about legislative competence (including rights-consistency) to the UK Supreme Court.⁷⁸ The Secretary of State also has a separate power to challenge the

⁷⁴ For example, H McQueen, "Parliamentary: A Critical Review of Parliament's Role in New Zealand's Law-Making Process" (2010) 16 Auckland University Law Review 1 at 16.

⁷⁵ Workman, "Parliamentary Bill of Rights Scrutiny in New Zealand — a 2016 update" at 10.

In Canada, litigation on the correct legal standard to apply in vetting of Bills for Charter consistency is on-going: *Schmidt v Canada (Attorney General)* 2016 FC 269 Hon Mr. Justice Simon Noël's 2 March 2016 decision, itself under appeal to the Federal Court of Appeal (see the 1 April 2016 notice of appeal): <http://charterdefence.ca/appeal-related-info.html> ; <http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/142734/index.do> ; http://charterdefence.ca/uploads/3/4/5/1/34515720/notice_of_appeal_-_a-105-16_-_issued_april_1_2016.pdf ; <http://www.theglobeandmail.com/news/national/former-justice-department-lawyer-loses-charter-lawsuit-against-minister/article28995911/> ; <http://www.lawyersweekly.ca/articles/2633>

⁷⁶ Hon Christopher Finlayson QC "Section 7 of the Bill of Rights" (Speech to Transparency International New Zealand, 7 October 2015): <http://www.chrisfinlayson.co.nz/section-7-of-the-bill-of-rights/>

⁷⁷ https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/51SCSO_EVI_00DBSCH_OTH_71094_1_A540680/clerk-of-the-house-of-representatives-office-of-the at pages 25–26.

⁷⁸ *Scotland Act 1998* (UK) ss 32 to 34, especially s 33 (Scrutiny of Bills by the Supreme Court). Compare also *Government of Wales Act 2006* (UK) s 112. In *Local Government Byelaws (Wales) Bill 2012* –

Bill.⁷⁹ After this period, if there is no challenge, the Presiding Officer submits the Bill to The Queen for Royal Assent. Once the Bill receives Royal Assent, it becomes an Act of the Scottish Parliament and is part of the law of Scotland. If there is a rights-consistency challenge, the Scottish Parliament may reconsider the bill (in a "reconsideration stage").

Limited legislative competence is not involved for New Zealand's Parliament, but review, and possible reconsideration (by recommittal before third reading), would ensure better informed decision making.

Reporting on 26 July 2017, the Standing Orders Committee said:

[a] "section 7 report" . . . stands referred to a select committee . . . Select committees should, of course, also examine their own proposed amendments for consistency with the NZBORA, and seek relevant advice where necessary. . . . The question then remains about how to inform members about NZBORA issues that arise from amendments proposed for the committee of the whole House. . . . As a Minister, the Attorney-General has the ability to present a paper on any working day under Standing Order 372(1) . . . no change to the Standing Orders is required to enable the Attorney-General to report on NZBORA issues arising from amendments. We encourage the Attorney-General to do so in future, and will follow the matter with interest through the next [52nd] Parliament.⁸⁰

Comparative analysis: more detailed look at Bills of Rights in New Zealand, UK, ACT, and Victoria

Introduction

Human rights feature when legislation is developed, interpreted, and assessed for rights-consistency.

Reference by the Attorney General for England and Wales [2012] UKSC 53; [2013] 1 All ER 1013 at [71]–[73], Lord Hope explains that a restricted patient being detained in the state hospital challenged the Scottish Parliament's legislative competence on the ground that the first Act passed by it (the *Mental Health (Public Safety and Appeals) (Scotland) Act 1999* (1999) asp 1, repealed in 2005) was incompatible with his convention (ECHR) rights. It took nearly 2 years before the challenge was dismissed: *Anderson v Scottish Ministers* [2001] UKPC D5, [2002] 3 LRC 721, [2003] 2 AC 602. Dylan Hughes, First Legislative Counsel to the Welsh Government, has explained that his Office's Welsh drafters

assist in the process of advising on the National Assembly's legislative competence. Advising on such matters is primarily a matter for our Legal Services Department and the Office of the Counsel General, but we contribute also. We do so because the system is a complex one that is difficult to make work – largely in my view because the power devolved is too narrow. (It is not by chance that three Welsh Bills have been referred to the Supreme Court in three years.)

See "The multiple roles of legislative counsel in the emerging Welsh legal jurisdiction" *CALC Newsletter* (Nov 2016) at 7: <http://www.calc.ngo/sites/default/files/newsletter/2016%2011%20CALC%20Newsletter%20-%20November%202016%20-%2010%20November%202016.pdf>

⁷⁹ *Scotland Act 1998* (UK) s 35 (Power to intervene in certain cases).

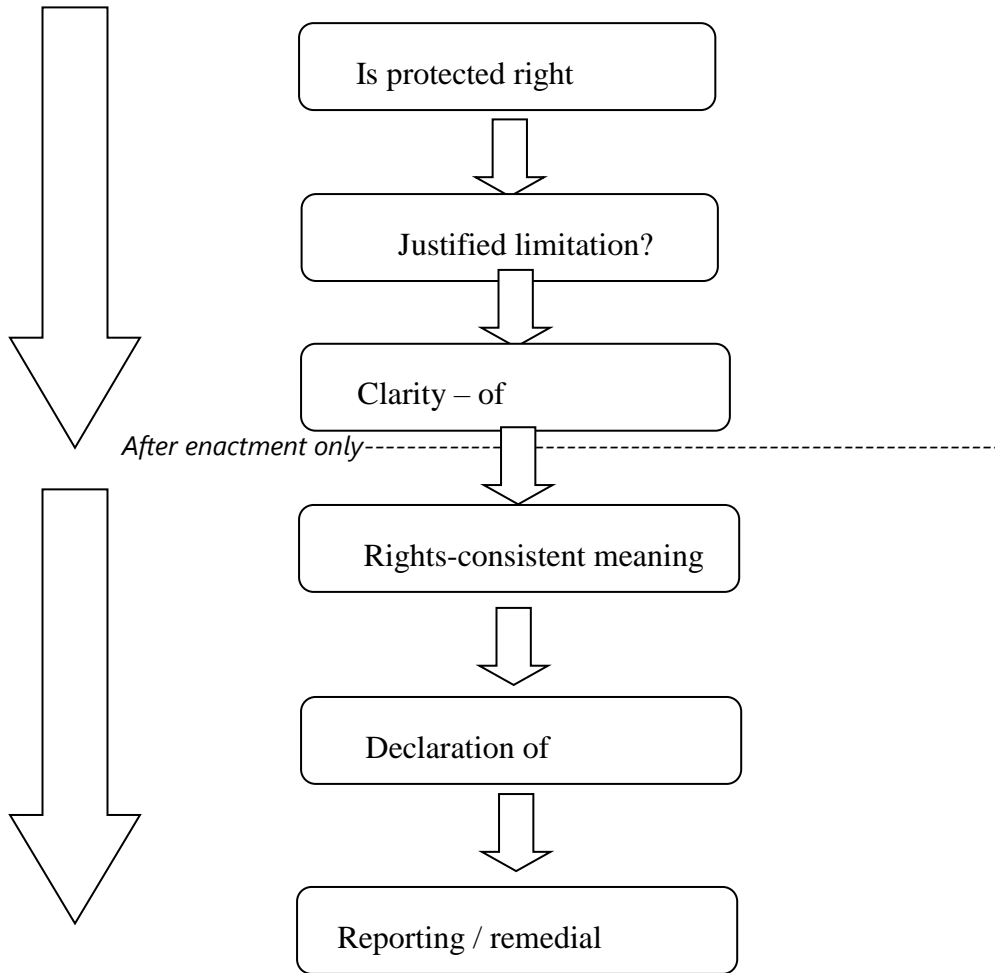
⁸⁰ [Review of Standing Orders \[2017\] AJHR 1.18A](#) at 25–27.

Human rights therefore influence all of legislation's lifecycle: policy development, drafting, reporting to and scrutiny by legislators, interpretation (by all users), (declaratory) relief for inconsistency, and any reporting or remedial response to a declaration of inconsistency.

Key steps in the rights analysis 'lifecycle', at each stage are shown by the following diagram.

Rights analysis “lifecycle”: key steps

Before or after enactment-----



This section of the paper is a comparative analysis of Bills of Rights in four jurisdictions: New Zealand, the UK, the ACT and Victoria⁸¹ at each stage, focussing on some matters key to legislative counsel.

What rights are protected (by the ordinary Act) varies from jurisdiction to jurisdiction.⁸²

⁸¹ One more extensive comparison is Gledhill *Human Rights Acts – The Mechanisms Compared* (Hart, 2015).

⁸² Justin Leslie tweeted on 10 November 2016: “Tonight's Archers: Eddie: "A custard slice isn't a human right". Neil: "It should be".”: <https://twitter.com/justincjleslie/status/796820754415357952?refsrc=email&s=11>

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRRA 2006
Mostly ICCPR rights	Mostly ECHR rights	ICCPR rights, plus ICESR right to education	Mostly ICCPR rights

By contrast, all Australia’s duties under the main UN human rights treaties are “human rights” under s 3(1) of, and for the purposes of, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).⁸³

Persons whose rights are protected (by the ordinary Act) also varies from jurisdiction to jurisdiction:

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRRA 2006
Individuals, but also (s 29) legal persons so far as practicable (ICCPR applies to individuals only) – cf Canadian Charter 1982	Act not explicit but ECHR may be used by “non-governmental organisations” including legal persons	Individuals only (s 6)	Individuals only (s 6(1), s 3, “person”)

⁸³ See Williams and Burton “Australia’s Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection” in Hunt, Hooper, and Yowell *Parliaments and Human Rights* (Hart: ..., 2015) at 257–277 Daniel Lovric, “Human Rights: The Role of Legislative Counsel” (August 2011) 2011 No 3 *The Loophole* 73 says the Act is unique, and creates an exclusively parliamentary model that is self-regulating, and to a large extent voluntary, as statements of compatibility produce no legal consequences and cannot be reviewed by the courts). See also the most recent scrutiny report of the Parliamentary Joint Committee on Human Rights (PJCHR) – Human rights scrutiny report (Report 1 of 2017): http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2017/Report_1_of_2017

Policy development

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRRA 2006
Each department is responsible for assessing rights impact – usually in consultation with Ministry of Justice, Crown Law Office, or both (specialist human rights advisers) – policy approvals indicate any areas of concern ⁸⁴	Rights impact assessed, with legal advice (from department’s own advisers, primarily, but perhaps also from Ministry of Justice or Law Officers) ⁸⁵	Policy officer advised by HRT of Department of Justice and Community Safety ⁸⁶	Policy and legislative Cabinet proposals include human rights impact assessments ⁸⁷

Policy development should, and does, include human rights analysis, including legal analysis (sometimes by, or involving, government human rights experts and law officers). This can help avoid problems. Policy may however evolve before or in drafting, or may be added to or implemented in a way not anticipated by the human rights analysis done as part of policy development. At least what is done at this initial policy stage is available to inform proposals, and drafting instructions, for new legislation – plus more formal (in)consistency reporting (done later in the process). It also allows the building of shared experience of, and capability to perform, rights analysis of policy proposals.

In Victoria, advises Paul O’Brien, drafters are copied, and consulted on, draft submissions to Cabinet seeking approval in principle for the drafting of legislation, including drafting instructions, and check the human rights impact assessment for whether the responsible department has identified all matters in the proposal that appear to engage (and limit unreasonably) a human right.⁸⁸ New Zealand PCO legislative counsel can, if consulted on policy proposals, and the analysis occurs to them, also help in this way.

⁸⁴ See <https://cabguide.cabinetoffice.govt.nz/policy-papers> (human rights implications). See also <http://www.justice.govt.nz/assets/Documents/Publications/Guidelines-to-Bill-of-Rights-Act.pdf> and <http://www.justice.govt.nz/assets/Documents/Publications/Non-discrimination-standards-for-government-guidelines.pdf>

⁸⁵ Cabinet Office *Guide to Making Legislation* (July 2015) ch 12, especially at [12.6]: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf

⁸⁶ *Guidelines for ACT Departments Developing Legislation and Policy* (4 February 2010): <http://www.justice.act.gov.au/publication/view/95> and *Guide to ACT Departments on pre introduction scrutiny: The Attorney-General’s Compatibility Statement under the Human Rights Act 2004* (<https://justice.act.gov.au/publication/view/96>)

⁸⁷ Charter of Human Rights – Guidelines for Legislation and Policy Officers in Victoria <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/charter+of+human+rights+guidelines+for+legislation+and+policy+officers+in+vicoria>

⁸⁸ Paul O’Brien “The Victorian Charter of Human Rights and Responsibilities – Implications for Parliamentary Counsel” (PCC’s 5th Australasian Drafting Conference, Brisbane, Australia, 2008) at 8 (see para [3.1]).

Pre-introduction consultation with expert groups (for example, in New Zealand, the Legislation Design and Advisory Committee), or exposure draft processes, may also involve rights analysis of policy.

On drafters, policy, and human rights, Daniel Lovric has raised these typically insightful points:

- Legislative counsel have always had a significant role in human rights protection.
- Legislative counsel have tended to take an *ad hoc* approach to human rights.
- Legislative counsel deal with human rights issues with a light touch.
- They have a modest view of their role in human rights protection and tend to defer, in the final analysis, to human rights experts.
- Legislative counsel play a role at the periphery of human rights protection – not at the centre.
- Legislative counsel’s role in a human rights issue expands as the political prominence of the issue decreases.
- A highly prominent issue will be covered by the scrutiny of politicians, human rights specialists and public opinion.
- An issue with little or no prominence will not have this comprehensive external scrutiny: here the legislative counsel will become more active so as to cover some of the scrutiny gap.
- However, even in the latter case, the domain of the legislative counsel is a limited one. The legislative counsel holds up a light to policy problems (and obvious solutions), but deliberately refrains from becoming an active human rights advocate.
- The limited role of the legislative counsel is often a function of the extent of his or her knowledge of human rights law.
- Many legislative counsel do not have the time or inclination to become human rights experts (especially in systems where human rights do not have a constitutional status).
- But they can gain a basic working knowledge without a huge investment in time and training.
- Only a small proportion of human rights case law deals with more abstract issues of the general consistency of legislation with human rights standards.

- Only a handful of human rights (for example, about criminal procedure and search, privacy, and discrimination) are generally relevant⁸⁹ to the day-to-day work of legislative counsel.⁹⁰

Drafting

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRRA 2006
NZ PCO practice	OPC (UK) practice (cf Scotland, Wales, NI)	ACT PCO practice	OCPC practice

If a proposal for legislation seems rights-inconsistent, the usual response is to do one of the following:

- revisit the analysis that the policy (and drafting) is rights-inconsistent
for example, dispute whether certain rights are engaged at all, or propose new or more persuasive demonstrably justified limits on the engaged rights (with justified limits being a matter involving policy officials, engaging with relevant evidence);
the open-endedness of protected rights, and of justified limits on them, may give room to move, even though drafters tend to defer, in the final analysis, to human rights experts.
- change the policy (and any related drafting) to make provisions rights-consistent
how human rights affect the policy should be addressed and resolved in policy development, not during drafting. However, if human rights concerns become clear only after drafting starts, policy-makers can be invited to, and may be prepared to, reconsider their effect on the policy.
- preserve the policy unchanged, but change the drafting to make provisions rights-consistent:
for example, draft an offence so as *not* to impose a legal burden of proof on an accused, if such a burden would be contrary to the right to be presumed innocent,⁹¹ and if an offence with an evidential burden, or no burden, on the accused, also achieves the unchanged policy;

⁸⁹ The rights featuring most often in NZBORA s 7 reports are freedom of expression, non-discrimination, unreasonable search and seizure, and criminal procedure rights: <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/section-7-reports/> See also Hon Christopher Finlayson QC “Section 7 of the Bill of Rights” (Speech to Transparency International New Zealand, 7 October 2015): <http://www.chrisfinlayson.co.nz/section-7-of-the-bill-of-rights/>

⁹⁰ Above n. 80.

⁹¹ *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure (Reform and Modernisation) Bill* (15 November 2010) at [61]–[78] discusses when the right to be presumed innocent may be subject to demonstrably justified limitation:

for example, draft a search power so as *not* to make it a warrantless power exercisable without reasonable grounds if such a power would limit unjustifiably the right to be free from unreasonable search, and a power on warrant and reasonable grounds also achieves the unchanged policy;

for example, draft to avoid a test with a prohibited ground of discrimination, if such a test would be contrary to a right to be free from discrimination, and if a test with no prohibited ground of discrimination also achieves the unchanged policy;⁹²

Sometimes this “best of both worlds” option is a real possibility – but it requires openness to reconsidering “how” the policy achieves the essential policy outcome (which is unchanged) – unless the “how” is the essential policy outcome.

New Zealand’s Attorney-General has said that

quite often during the new bill drafting stage, ministers of the Crown approach the Attorney-General seeking ways to avoid activating the s 7 Statement of Compatibility provision under the NZBORA. We do not even get to the section 7 procedure because the threat of it acting as some sort of ... legislative sword of Damocles means that ministers often engage with me even at a reasonably late stage of a bill’s development to ensure that it is Bill of Rights compliant.⁹³

- confirm that unchangeable policy requires provisions to proceed, and to be clear and otherwise effective (as drafted and enacted), *even though* they are rights-inconsistent (or appear to be so to the Attorney-General, so triggering a NZBORA s 7 report).⁹⁴

66. For example, a reverse onus provision may be justifiable where: 66.1 the defendant is voluntarily involved in a regulated activity; 66.2 the offence would apply in very limited circumstances; and 66.3 the element to be proven is within the knowledge of the person concerned and proof of it would not impose an undue burden on the defendant [See, for example, *R v Wholesale Travel Group* [1991] 3 SCR 154 (Supreme Court of Canada). The point was noted with possible approval but not decided in *Hansen* at [43], [66] and [227].

⁹² See the Education (Tertiary Education—Criteria Permanent Residents Studying Overseas must Satisfy to be Domestic Students) Regulations 2016 (LI 2016/212). Reg 5(2)(b) and (3) uses presence in (being “familiar with”) a foreign country in the 5 years before study begins as part of the criteria permanent residents studying overseas must satisfy to be treated as domestic students (for tertiary education eligibility, fees, and tuition subsidies). A test of ethnic or national origins, including nationality or citizenship, involves a prohibited ground of discrimination, and so would require demonstrable justification (which may not be possible).

⁹³ Queensland Parliament Legal Affairs and Community Safety Committee *Inquiry into a possible Human Rights Act for Queensland* (Report No. 30, 55th Parliament, June 2016) at p 19 para 4.3.1: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1030.pdf> and <http://www.parliament.qld.gov.au/documents/committees/LACSC/2015/14-HumanRights/14-trns-11Apr2016.pdf>

⁹⁴ An example of a provision vetted (when a Bill) as not inconsistent, but held (when enacted) to be inconsistent, with NZBORA s 27(2), and held to be ineffective in 1 case, is s 83 of the Legal Services Act

NZBORA contains “unstable” compromises, or contradictions.⁹⁵ Indeed, a Supreme Court Judge has referred to the “parliamentary” Bill of Rights model’s “inherent schizophrenia in the contrast between the ringing guarantees of certain rights and freedoms in the Bill of Rights and the deliberate negation of the notion that it renders any other statute invalid”.⁹⁶ Section 4 of NZBORA refers to enactments passed or made, *after NZBORA’s commencement*, that are “inconsistent with any provision of this Bill of Rights”, and makes it clear that these inconsistent enactments are legally effective (not invalid or ineffective, and to be applied). Some think NZBORA is a legal direction to Parliament, for Parliament to self-enforce (as the courts *cannot* enforce it against Parliament), *not* to enact laws that breach the Bill of Rights; others doubt that is legally correct, and point out inconsistent laws can be and are enacted, and that this can occur even if legislators disregard, or do not engage clearly with, rights.⁹⁷ As a former Clerk of the House, D G McGee QC put it,

This does not mean that Parliament will never decide to legislate inconsistently with the Bill of Rights Act. It may, in an appropriate case, decide to do this if it considers that the circumstances warrant it. But Parliament should do this knowingly and only after considering carefully the relevant provisions of the Bill of Rights Act. These must in every case create a strong initial presumption of good practice that should be departed from only for compelling reasons.⁹⁸

It is one thing for Parliament to have legal power to determine finally the scope of rights, and another for it to disregard them (or to leave it unclear if and how it has engaged with them), because the courts have no power to contradict them or to require any kind of engagement.⁹⁹ Some see enactment, without change, of a

2011: *McGuire v Secretary For Justice* [2017] NZHC 365 per Cull J (“I am not prepared to read s 83 as a mandatory requirement that a person must apply for a review to the Review Authority, before taking ...judicial review.”).

⁹⁵ “Do I contradict myself? Very well, then I contradict myself, (I am large, I contain multitudes).”: Walt Whitman, “Song of Myself” in *Leaves of Grass* (1855), section 51. Paul Rishworth QC has said that combining judicial review of legislation for rights-(in)consistency with parliamentary supremacy is an “unstable compromise”: *Litigating against the Crown* (2010 NZLS Continuing Legal Education Seminar) at 78.

⁹⁶ Sir Peter Blanchard [2008] 2 NZ L Rev 263.

⁹⁷ Professor Claudia Geiringer (2014) 45 VUWLR 367 at 383–384, citing Paul Rishworth and others *The New Zealand Bill of Rights* (2003) at 72; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2005) at 87–89, and Geiringer (2007) 11 Otago LR 389.

⁹⁸ D G McGee *Parliamentary Practice in New Zealand* (3rd ed, 2005) ch 26 at 326: https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/document/00HOOOCPNZ_261/chapter-26-preparation-of-legislation#_Toc249263058 See also at 356:

there are cases where a committee, while accepting that there is an inconsistency with the Bill of Rights Act, considers that the public interest justifies overriding a right or freedom given expression in that Act and that legislation containing such a provision should be passed nonetheless.

⁹⁹ The *Bill of Rights 1688* (Imp) Art 9 prohibits courts impeaching or questioning proceedings in Parliament. The principle of comity also requires the separate and independent legislative and judicial branches of

Bill that has attracted a NZBORA s 7 report, as inherently involving engagement with rights, and perhaps also reasoned disagreement with the report, even if the record does not show clearly if and how legislators engaged with rights. New Zealand's (2014) Standing Orders require select committees to consider and report on NZBORA s 7 reports, and so help to ensure the record shows clearly that and how legislators, while they were enacting inconsistent Bills, engaged with rights (whether the issue is justified limits under NZBORA s 5, or whether a Bill should be enacted in reliance on NZBORA s 4). Legislative counsel are concerned mainly about ensuring the legislation is clear and effective, but must also keep in mind that enacting legislation in reliance on NZBORA s 4, if instructors' policy requires that legislation, may mean New Zealand is in breach of the ICCPR. Ultimately, it is not legislative counsel, but rather instructors and legislators, who promote or enact inconsistent legislation (and they do so only after receiving, and considering, detailed formal advice from human rights experts).

Experience with s 7 reporting also shows some inconsistencies are unclear or marginal (and so can reasonably be disagreed about, domestically, internationally, or both):

*For example, reasonable people may disagree on what is inconsistent – random breath testing – volte face – An NZBORA s 7 report was made on the Transport Safety Bill (introduced on 17 December 1991). Provisions for random (without probable cause) breath-testing for drink driving offending were regarded as breaching rights to be free from unreasonable search and seizure, and arbitrary detention, and as being without reasonable justification. After the legislation was passed, a number of academics commented on the Bill and on its (in)consistency with NZBOR.¹⁰⁰ In 1998, the issue of the (in)consistency of random breath-testing with the NZBORA surfaced again with the passage through the House of the Land Transport Bill. The Bill was essentially an overhaul of the *Transport Act 1962*, and included the random breath-testing provision in the same form as it appeared in that Act. This time around, however, the provision went largely unnoticed, and while a s 7 report was made on the Bill, the report made no mention of random breath-testing. Interestingly, the report was made by the same Attorney-General, Hon Paul East, who 6 years earlier had concluded that random breath-testing breached NZBORA. The main reason given for the change of*

government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges. Hence in *Boscawen v Attorney-General* [2009] 2 NZLR 229 (CA) the Attorney-General's s 7 power was held non-justiciable.

¹⁰⁰ J B Elkind, "Random Breath-Testing, the Bill of Rights and the International Covenant" (1993) *NZ Rec L Rev* 335; Sir Kenneth Keith, "Road Crashes and the Bill of Rights: A Response" (1994) *NZ Recent L Rev* 115.

opinion on random breath-testing was the fact that the measure had succeeded in doing what it was intended to; that is, it had reduced the road death toll.¹⁰¹

For example, questions of inconsistency are marginal or open to reasonable dispute – An NZBORA s 7 report was made on the Care of Children Bill 2003. The report concluded cl 27, under which guardianship in respect of a child continues until that child reaches the age of 18 years (or marries or enters into a de facto relationship), appeared inconsistent with the right to be free from discrimination on the grounds of an age of or over 16 years (NZBORA, s 19(1), *Human Rights Act 1993*, s 21(1)(i)) and not a justifiable limit (NZBORA s 5).¹⁰² Under the former *Guardianship Act 1968*, guardianship continued until a child was 20 years old. The s 7 report said it was unjustifiably disadvantageous for 16- and 17-year-olds to be required to have a guardian determining for or with the child, or helping the child to determine, questions about important matters affecting the child. This was so even though the 16- or 17-year-old child had a right of recourse to a Family Court to review a guardian's decision. The report suggested the problem would be resolved if the Bill provided for 16- or 17-year-olds to make their own decisions subject to Court determination on an application by a guardian. Although the Attorney's report concluded the Bill would infringe the right to freedom from age discrimination in a manner that was not demonstrably justified in a free and democratic society, no Member of Parliament raised the Bill of Rights, nor the Attorney's report, during debates on the Bill in the House. The Justice and Electoral Select Committee (which considered the Bill) also refrained from discussing the alleged Bill of Rights breach. To date no case law, legal commentary, or media report has discussed the issue.

For example, re-enactment of existing law in rewritten form, and despite it including unjustifiable positive discrimination in favour of the totally blind (to allow policy review later) – An NZBORA s 7 report was made on the Social Security Legislation Rewrite Bill 2016. The Attorney-General said that the Bill

¹⁰¹ Hon Maurice Williamson, Land Transport Bill second reading, 27 November 1997. Hon Christopher Finlayson QC has said "No section 7 report was ever presented on the Foreshore and Seabed Act 2004 or the *Electoral Finance Act 2007*. The longer I am Attorney-General, the more I am shocked by those decisions. I do not see how an Attorney-General acting impartially as senior law officer could not have produced a section 7 report on those two bills, both now repealed.": <http://www.chrisfinlayson.co.nz/section-7-of-the-bill-of-rights/> That Attorney-General has also said:

on a couple of occasions...I have produced ...a 'not a section 7' [report] because ...if there was a line call, for example, on the Public Safety (Public Protection Orders) Bill, I provided a report to parliament saying why it did not appear to be inconsistent ...because ...I thought that it would be useful They are the exception rather than the rule. There is no provision in the legislation for it.": <http://www.parliament.qld.gov.au/documents/committees/LACSC/2015/14-HumanRights/14-trns-11Apr2016.pdf> Paul Rishworth QC says at [2015] *NZ Law Rev* 259 at 262 that "Section 7 reports are better reserved for cases where a bright line of inconsistency with the Bill of Rights standard has been crossed (though I would not rule out rare cases where an Attorney-General might report that the decision is a close call and invite careful consideration by parliamentary colleagues.

¹⁰² https://www.parliament.nz/en/pb/papers-presented/current-papers/document/47DBHOH_PAP9147_1/attorney-general-report-under-the-new-zealand-bill-of

was inconsistent with section 19(1), which affirms the right to freedom from discrimination on the grounds of disability. He said that the Bill's advantageous treatment of people who are totally blind, compared with its treatment of people with other disabilities, is not demonstrably justified in a free and democratic society. Under existing law, people who are totally blind can receive a supported living payment regardless of whether they have work or are able to work. They can receive this benefit even if they are working full time. For people with other disabilities to claim the same benefit, they must prove that they are unable to work more than 15 hours per week. Provisions about the supported living payment, in Part 2, subpart 4 of the Bill, would not change this. The Social Services select committee, which considered the Bill, said: "The provisions that advantage totally blind people are not new. They are part of existing law. Because of the generally policy-neutral approach to this rewrite Bill, we do not propose any change to the supported living payment at this time."¹⁰³ The Committee had been advised a policy review was being undertaken, and had also received submissions from some totally blind beneficiaries supportive of the status quo.

*For example, Member's Bill (not Government policy, but enjoying popular support) – prisoner voting ban – In New Zealand, a Member's Bill – rather than a Government Bill (which is one introduced by a member of Parliament who is a Minister of the Crown) – was enacted in 2010. The Bill removed rights to vote of people incarcerated in a prison and serving a sentence of imprisonment for a term shorter than 3 years.¹⁰⁴ The former law, between 1993 and 2010, was derived from the 1986 *Report of the Royal Commission on the Electoral System*. The Royal Commission's *Report* noted (among other things) that contemporary penal theory is generally opposed to the view that imprisonment entails a general suspension of the rights of citizenship such as the right to vote. It also recommended (at 9.21) that a disqualification be limited to prisoners serving a sentence of imprisonment "equal to or greater than the maximum period of continuous absence overseas consistent with retaining the right to vote, namely 3 years". The 3-year limit was also based on an opinion of then Solicitor-General, Mr JJ McGrath QC, from whom the Department of Justice had sought advice about whether absolute prisoner disenfranchisement was a justified limitation on the right to vote. Both the Royal Commission and the Solicitor-General favoured a 3-year limit. That took account of the triennial election cycle and minimised the possibility of arbitrary and disproportionate application (for example, due to when sentence is served, rather than seriousness of offending, and excluding*

¹⁰³ A related question is whether s 7 ought to contain an exception for re-enactment, without change, of existing inconsistencies. Compare the proviso to the Electoral Act 1993 s 268. That proviso excludes, from the restrictions on amendment or repeal that are imposed by s 268, consolidating Acts that repeal reserved sections and re-enact them without amendment, and still subject to those restrictions.

¹⁰⁴ See the history of New Zealand prisoner disenfranchisement as recited in *Taylor v Attorney-General* [2015] NZAR 705 at [2]–[16] per Ellis J and *Taylor v Attorney-General* [2015] 3 NZLR 791 (HC) at [16]–[26] per Heath J.

home detention detainees whose sentence is for equally serious offending). The select committee that considered the Bill for the 2010 Act was aware of the rights issues.

One party's minority view said "the breach of the NZBORA is not justified".

Another party's minority view said about the Bill for the 2010 Act:

- it is certainly contrary to Article 25 of the United Nations International Covenant on Civil and Political Rights (ICCPR) which New Zealand has ratified.
- it is out of line with international law relating to blanket restrictions on the right of prisoners to vote.

If enacted, this legislation would lead to New Zealand violating its obligations under international law, and will lead to criticism by the United Nations and in other international forums.

In litigation about the 2010 Act, counsel for the Attorney-General informed the court that the Attorney did not resile from the view expressed in his s 7 report that the voting ban appeared to be inconsistent with NZBORA s 12, and could not be justified under s 5.¹⁰⁵ The High Court held it could declare the legislation inconsistent with the right to vote. The declaration would not deprive the ban of effect, but would draw all New Zealanders' attention to the fact that Parliament had legislated inconsistently with a fundamental right. Jurisdiction to make a declaration existed even though there was no live controversy between the parties, and so the declaration would be "stand-alone" relief (as is the case when the Human Rights Review Tribunal (HRRT) exercises jurisdiction under s 92L of the *Human Rights Act 1993*). An appeal by the Attorney-General against the High Court's decision was heard in late 2016, but is yet to be decided.¹⁰⁶

Reliance on NZBORA s 4 should not also be exaggerated. Very few Bills are passed each year known to contain unjustifiable (or, at the least, not demonstrably justified) breaches of rights.

Even so, it is problematic to be, or perhaps to be, legislating in breach of international legal obligations – which are often express limits on powers to

¹⁰⁵ *Taylor v Attorney-General* [2015] 3 NZLR 791 (HC) at [32] per Heath J.

¹⁰⁶ See [Public Hearing Inquiry into a Possible Human Rights Act for Queensland. Transcript of Proceedings, 11 April 2016, p.3:](#)

"Mr Finlayson: The case is under appeal so I had better be careful in the comments I make. The judge was prepared to make a declaration, but the interesting issue that arises is that my section 7 report could be said to be an extension of a parliamentary proceeding in terms of our Parliamentary Privilege Act [2014], and whether or not it could be said the judge was interfering with a proceeding of parliament is an interesting question, an aspect of which may come up on appeal." (for example, if raised by counsel for the Speaker):

See also *Taylor v Attorney-General of New Zealand* [2014] NZHC 1630 per Brown J and *Taylor v Attorney-General* [2015] 3 NZLR 791 (HC) at [69]–[77] per Heath J. See also Palmer (2016) 14 NZJPIL169 at 177–178 ("It is hard to discern just why jurisdiction to grant a declaration of inconsistency should be resisted.")

make subordinate legislation.¹⁰⁷ Inconsistencies may arise from amending rights protected by a national Bill of Rights,¹⁰⁸ or from limiting the availability under domestic law of an effective remedy for rights breaches.¹⁰⁹

Limitation defences appear to be able to be justified limitations.¹¹⁰

¹⁰⁷ See, for example, *Commodity Levies Act 1990* (NZ) s 5(2)(k) (Minister not to recommend levy order unless imposition of the levy on imported commodity will not be contrary to international legal obligations). Compare *Biosecurity Act 1993* (NZ) s 100L(5)(e), and *Imports and Exports (Restrictions) Act 1988* (NZ) s 3A(1). The *Civil Aviation Act 1991* s 33(1) and (2) are noted in *New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated v Director of Civil Aviation* [2017] NZCA 27 at [14]–[21] per Harrison J.

¹⁰⁸ In 2013 New Zealand's jury trial right was altered so it applies only to offences for which the maximum penalty available is or includes imprisonment for (instead of more than 3 months) 2 years or more. By restricting the NZBORA s 24(e) right by definition (with no discretionary decision in which justified limits can arise), the change was necessarily inconsistent with the former s 24(e). But the Attorney's s 7 report noted "The significance of that inconsistency is qualified, both because the jury trial right is not provided in international human rights law [(for example, the ICCPR or ECHR)] and because the proposed [new] three year threshold [(reduced to 2 years as enacted)] remains consistent with broad practice in comparable jurisdictions": https://www.parliament.nz/resource/en-NZ/49DBHOH_PAP20779_1/46bc4c066cb14e95ca3286839b0996a8f12caa15.

¹⁰⁹ In 2011 the Attorney concluded a Bill's denial of an effective remedy for breach of NZBORA was itself a breach of NZBORA (and of the ICCPR) and not justified under NZBORA s 5: <https://www.justice.govt.nz/assets/Documents/Publications/BORA-Prisoners-and-Victims-Claims-Redirecting-Prisoner-Compensation-Amendment-Bill.pdf>. Crown Law Office advice in 2004 and in 2012 was that constraints upon the awarding and payment of monetary compensation, in Bills for and to extend and make permanent the Prisoners' and Victims' Claims Act 2005, were not inconsistent with NZBORA. Compare judicial breaches: *Attorney-General v Chapman* [2012] 1 NZLR 462 (SC); (NZLC IP35, 2014) at [4.12]. See also Varuhas (2016) 1 *New Zealand Law Rev* 213, and Varuhas *Damages and Human Rights* (Hart: Oxford, 2016).

¹¹⁰ For example, *Limitation Act 2010* (NZ) ss 11 and 12(2)(c). CLO advice dated 7 May 2009 to the Attorney-General on the 2009 Bill for the 2010 Act concluded "the limitation periods provided by the Bill, which are reasonably long and of general application, do not amount to undue restrictions". Compare the *Human Rights Act 1998* (UK), s 7(5), and ACT *Human Rights Act 2004* s 40C(3).

Vetting / advice

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRRA 2006
<p>MoJ / CLO / LDAC / PCO, advice on Bills</p> <p>Attorney-General report of Bill’s inconsistency (s 7)</p> <p>PCO certifies regulations (LIs) – sometimes based on CLO advice (for example, on NZBORA), including on basis that LI may be drawn by RRC to House’s special attention¹¹¹</p>	<p>Dept prepares legal issues memo,¹¹² Ministry of Justice Human Rights Division, Law Officers</p> <p>Ministerial statements of Bill’s compatibility (s 19)</p>	<p>Vetting / advice: HRT of Department of Justice and Community Safety</p> <p>Attorney-General’s compatibility statement on government Bills (s 37)</p>	<p>Vetting / advice: VGSO / HRU of Dept of Justice and Regltn</p> <p>Member in charge’s statement of Bill’s compatibility (s 28)</p> <p>Minister’s human rights certificate for “statutory rules” and “legislative instruments” (<i>Subordinate Legislation Act 1994</i> ss 12A, 12D)¹¹³</p> <p>OCPC certificate that “statutory rule” within power (<i>Subordinate Legislation Act 1994</i> s 13(a))</p>

Vetting continues, and formalises as legal advice, thinking done earlier, in policy development and drafting. It involves assessment – and reporting – of the rights-(in)consistency of a settled draft. The different jurisdictions require different people to report on, or certify, different things.

In New Zealand, vetting advice for Bills, and s 7 reports, are generally public, and a valuable resource. “[T]he numerous opinions from Crown Law and the Ministry of Justice on the rights-consistency of bills are a valuable source of jurisprudence on the substance of rights in the Bill of Rights.”¹¹⁴

This advice is from expert advisers at arms-length from the government organisation(s) leading the Bill’s development. New Zealand’s Chief Justice Dame Sian Elias has indeed

¹¹¹ <http://www.pco.parliament.govt.nz/working-with-the-pco#guide5.1>

¹¹² Cabinet Office *Guide to Making Legislation* (July 2015) at 3.14, 8.1, 11.44, 11.80-11.81, ch 12: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf

¹¹³ On the categories “statutory rules” and “legislative instruments”, see Bushby (Oct 2015) *The Loophole* 30: <http://www.calc.ngo/sites/default/files/loophole/oct-2015.pdf>

¹¹⁴ Paul Rishworth [2015] NZ Law Rev 260–263 (“Section 7 reports and the ‘constitutional standard’”) at 261.

said “The success of the New Zealand *Bill of Rights Act* is not principally to be gauged from reading court decisions”.¹¹⁵

Certification may be a statutory role, and may apply even if the legislative counsel settles others’ drafts. (If a centralised law drafting office does not draft or certify the subordinate legislation concerned, other legislative counsel and legal advisers will be involved in assuring makers that it is within power.)

Most vetting – of draft legislation for rights-(in)consistency – is done by human rights specialists. However, drafters often have more of a role in respect of subordinate legislation, especially delegated legislation made under general powers to be given, where they can be, a rights-consistent meaning.

Unless they spell it out expressly and unequivocally, empowering provisions in an Act will not be interpreted as empowering subordinate legislation that is contrary to fundamental rights.¹¹⁶ In *Collector of Customs v Kilburn Car Sales Ltd*, Fisher J declined to hold invalid the *Customs Import Prohibition (Trade Descriptions) Order 1991* (SR 1991/122) (banning importation of used vehicles with false odometers), but noted:

Although a statutory regulation or order is probably an ‘enactment’ for the purposes of [NZBORA] s 4, [NZBORA] s 6 appears to prevail ... by narrowing the enabling provision, and hence the permitted scope of the regulation, before direct conflicts between the regulation and the Bill of Rights could fall to be considered.¹¹⁷

In *Cropp v Judicial Committee*, Blanchard, J said

Subordinate legislation involving a relevant guaranteed right or freedom will be invalid when the empowering provision, read in accordance with s 6 of the Bill of Rights, does not authorise its making.¹¹⁸

However, the empowering law, properly interpreted, may authorise subordinate legislation that is not rights-consistent and, if so, the subordinate legislation is valid (for example,

¹¹⁵ Elias CJ “A voyage around statutory protections of human rights” Human Rights Law in Victoria Conference Paper, 7 August 2014, pp 2–3. Compare Stephen Sedley *Lions under the Throne – Essays on the History of English Public Law* (CUP, 2015) at 205 (the UK HRA 1998 “s 19, which was widely thought to be a piece of window-dressing, has turned out to have a material impact on the legislative process”).

¹¹⁶ *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) (a result reached by applying common law principles, but supported by the Bill of Rights Act). The HRRT lacks direct power to declare invalid regulations inconsistent with the non-discrimination right in the NZBoRA 1990 s 19: *Human Rights Act 1993* ss 92I(1), 92J, and 92R to 92T. But the High Court can hold regulations *ultra vires* in NZBORA 1990 proceedings: s 92J(4).

¹¹⁷ *Collector of Customs v Kilburn Car Sales Ltd* [2004] NZAR 500 (HC) at 506 Fisher J. See also Geiringer and Price in Finn and Todd (eds) *Law, Liberty, Legislation* (2008) p 304 and *Television New Zealand Ltd v W* (High Court, Auckland CIV 2007-485-1609, 18 December 2008) at [14] and [98] per Courtney J.

¹¹⁸ *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SCNZ) at [25] per Blanchard J (racing rule 528, requiring random urine samples for drug testing, was held not to be *ultra vires* ss 29 and 31 of the Racing Act 2003, due to inconsistency with s 21 of the Bill of Rights Act or the general law).

Victorian *Charter of Human Rights and Responsibilities*, 2006, s 32(3)(b)). Paul O'Brien explains that, given specific authorisations to limit human rights are rare,¹¹⁹ assessing whether the empowering law authorises rights-inconsistent subordinate legislation often involves assessing whether the empowering law clearly authorises the subordinate legislation to provide for something (for example, prescribe an age limit or ground of entitlement) that is rights-inconsistent.¹²⁰

In New Zealand, there have been very few successful *vires* challenges to subordinate legislation on NZBORA grounds.¹²¹ But rights-consistency has been raised in quite a lot of *vires* challenges.¹²²

Successful challenges arise, at least now and then, in other jurisdictions, for example, the UK.¹²³

Over 200 UK judges won recently a landmark ruling that the Lord Chancellor and the Secretary of State for Justice discriminated unlawfully against them by making changes to their pensions based on age. The *Public Service Pensions Act 2013* (UK) s 18(1) involves mandatory closing of an existing pension scheme, as part of transfer to a new and less favourable one. Exceptions to s 18(1) are set out in transitional provisions in Part 2 of Schedule 2 of the *Judicial Pensions Regulations 2015*. But the exceptions (either "full protection" or "tapered protection" exceptions) are based on judges' ages. In the London Central Employment Tribunal, Employment Judge Williams held that, through the regulations, the respondents have treated and continue to treat the claimants less favourably than their comparators because of their age.¹²⁴ Judge Williams also held that the

¹¹⁹ A rare, and anomalous, exception is the Prostitution Reform Act 2003 (NZ) s 13(2), which enables a bylaw under s 12 (about bylaws controlling signage advertising commercial sexual services) to be made even if, contrary to section 155(3) of the Local Government Act 2002 (NZ), the bylaw is inconsistent with NZBORA.

¹²⁰ Paul O'Brien "The Victorian Charter of Human Rights and Responsibilities – Implications for Parliamentary Counsel" (PCC's 5th Australasian Drafting Conference, Brisbane, Australia, 2008) at 8 (see para [3.2]).

¹²¹ *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) (Penal Institutions Regulations 2000, reg 144, denying an inmate legal representation in prison discipline proceedings, was held an unauthorised limit on natural justice); *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) (gang insignia ban bylaw held disproportionate); *Hudson v Attorney-General* [2017] NZHC 1441 (prison authorised property rules infringe free expression right).

¹²² See, for example for example, *Turners and Growers Ltd v Zespri Group Ltd* (2010) 9 HRNZ 365 (HC) at [66]–[78] per White J (Kiwifruit Industry Restructuring Act 1999, s 26(1)(d) regulations not unauthorised for infringing unjustifiably freedom of association). A challenge also failed in *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZAR 1217 (HC) (freedom camping bylaws, freedom of movement).

¹²³ *Re P and others (adoption: unmarried couple)* [2008] UKHL 38; Herring (2009) 125 LQR 1. See also *Daly & Ors, R (on the application of) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58: <http://www.bailii.org/uk/cases/UKSC/2016/58.html>; T. Raine, 'The Value of Article 14 ECHR: The Supreme Court and the "Bedroom Tax"' U.K. Const. Law Blog (28th Nov 2016).

¹²⁴ Case Nos. 2201483/2015 & Others: <https://www.judiciary.gov.uk/judgments/mccloud-and-others-v-ministry-of-justice/>. See also <http://www.legislation.gov.uk/uksi/2015/182/schedule/2/made> and

respondents have failed to show their treatment of the claimants to be a proportionate means of achieving a legitimate aim. The *Equality Act 2010* (UK) implements the *Employment Equality Framework Directive*¹²⁵, and the Act’s statutory authorisation exception (see s 191 and Schedule 22 of that Act) applies only if the discrimination occurs due to a *requirement of* (so not *use of a discretion in*) an enactment.

Scrutiny by legislators

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRRA 2006
Subject Committees, (2014) Standing Order 265(5), MoJ / CLO briefings on s 7 reports, Clerk’s Office’s Enhanced Legislative Scrutiny (ELS) initiative, ¹²⁶ Committee reports on s 7 reports Possible further reform: Review of SOPs, or A-G report, if select committee does not resolve issue	JCHR – Standing Orders of HC – Public Business (2002) SO 152B ¹²⁸	HRA s 38 (duty of relevant standing committee of Assembly to report to Assembly about human rights issues raised by Bills presented to it) Standing Committee on Justice and Community Safety (JACS) ¹²⁹	Scrutiny of Acts and Regulations Committee (SARC), ¹³⁰ CHRRA ss 30 and 31 (Override by Parliament – 5yrs renewable – but s 31 not limiting as matter of law – used in 2013 and 2014, but repeal recommended in 2015) <i>Subordinate Legislation Act 1994, s 21(1)(ha)</i>

<http://www.thetimes.co.uk/article/judges-win-landmark-fight-over-age-discrimination-in-pensions-hhj2tcfdd>
 Compare [LEUNG KWOK HUNG ALSO KNOWN AS “LONG HAIR” v. COMMISSIONER OF CORRECTIONAL SERVICES](#) [2017] HKCFI 65 and [CAP 480 Sex Discrimination Ordinance s 38 Government](#).

¹²⁵ 2000/78/EC.

¹²⁶ Office of the Clerk of the House of Representatives, *Annual Report for the year ended 30 June 2016* (A.8) at13 (limit on NZBORA s 14 reasonable):

In 2015/16, the Office continued to embed business processes to support the scrutiny of legislation by select committees, with the ultimate objective of enhancing legislative quality. Every bill referred by the House to a select committee for consideration is now examined by the Office for constitutional and administrative law issues, including for consistency with rights and freedoms contained in the NZBORA. Where substantive issues are identified, the clerk of committee provides information and advice to the select committee on these issues and on possible lines of inquiry.

¹²⁸ <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/>

¹²⁹ [http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-jurisdiction-report-act/\\$file/Australian%20Capital%20Territory%20Jurisdiction%20Report.pdf](http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-jurisdiction-report-act/$file/Australian%20Capital%20Territory%20Jurisdiction%20Report.pdf)

¹³⁰ [http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-hon-richard-dalla-riva/\\$file/Session%202020Hon%20Richard%20Dalla-Riva%20MLC%20and%20Sarala%20Fitzgerald.%20The%20role%20of%20human%20rights%20advisors%20under%20Victoria%E2%80%99s%20Charter.pdf](http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-hon-richard-dalla-riva/$file/Session%202020Hon%20Richard%20Dalla-Riva%20MLC%20and%20Sarala%20Fitzgerald.%20The%20role%20of%20human%20rights%20advisors%20under%20Victoria%E2%80%99s%20Charter.pdf)

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHHRA 2006
RRC review: regulations ¹²⁷			

Scrutiny by legislators means, in particular, scrutiny by committees, general or special, and performing scrutiny or reporting functions imposed either by legislation or by Standing Orders. Specialist advisers to committees can certainly also strengthen greatly their scrutiny and recommendations. A draft set of international best practice principles and guidelines for parliamentary human rights scrutiny says “Parliaments should identify or establish a specialised parliamentary Human Rights Committee [which should be] supported by specialised staff with expertise in human rights law and policy.”¹³¹

In New Zealand in 2014, the Standing Orders Committee rejected a specialist committee. It said:

The answer is not to shut NZBORA matters away in a specialist committee, as that could in fact be counter-productive. New Zealand has a well-regarded system of subject select committees that have multiple functions and exercise general oversight of policy, legislative, and administrative matters within their subject areas. Bill of Rights scrutiny should be part of a mainstream discussion about legislative quality that takes place in all subject select committees and is applied in all policy contexts.¹³²

Reporting on 26 July 2017 its *Review of Standing Orders*, Standing Orders Committee said:

We do not favour the establishment of a separate select committee to look at rights matters. Consistency with the NZBORA is an important element of legislative quality, and it is for all committees to be mindful of legislative quality when considering bills. We endorse the comments of the previous [2014] Standing Orders Committee on this matter.¹³³

Recent and possible changes in New Zealand to reinforce parliamentary scrutiny are discussed above (in connection with the 2014 and 2017 Reviews of Standing Orders).¹³⁴

¹²⁷ The RRC cannot invalidate a regulation for being ultra vires the empowering Act, but can draw it to the House’s special attention as not in accordance with that Act’s general objects and intentions ((2014) SO 319(2)(a)) or as making some unusual or unexpected use of the law-making power ((2014) SO 319(2)(c)), or as trespassing unduly on personal rights and liberties (for example, those in NZBORA). The *Legislation Act 2012*, Part 3, subpart 1 power of amendment or disallowance is exercisable on any ground. See, for example, RRC’s report on a *Complaint Regarding the New Zealand Teachers’ Council (Conduct) Rules 2004* (12 August 2013), as discussed by Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, 2016) at 49 and 53.

¹³¹ Hunt in Hunt, Hooper, and Yowell (eds) *Parliaments and Human Rights* (Hart, 2015) at pp 483, 486, and 489.

¹³² *Review of Standing Orders 2014* (l.18A) at 15: https://www.parliament.nz/resource/en-NZ/50DBSCH_SCR56780_1/5b3f0906a023a3728df0e64dff9db13295214dab

¹³³ *Review of Standing Orders [2017] AJHR I.18A* at 25–27.

¹³⁴ See above, n. 62 and the accompanying text.

Two recent examples of scrutiny of Bills by legislators provide an instructive contrast.

The first example shows that, for some Bills, legislators' opportunity for scrutiny is very limited indeed. In 2012, the Court of Appeal decided a policy for payment of family carers providing disability support services to family members discriminated unlawfully on the basis of family status. To manage the fiscal implications, a Government Bill was introduced and enacted as the *New Zealand Public Health and Disability Amendment Act 2013*. The Bill attracted a s 7 report as breaching the s 27(2) right to seek judicial review and potentially also the s 19 right to be free from discrimination. The breaches arose as the Bill prevented payments except under policies that could discriminate unjustifiably, and because the Bill also prevented new discrimination complaints or proceedings, and limited relief for existing discrimination complaints or proceedings (but also saved the position of specified litigants). The Bill was, under urgency, introduced and passed through all stages on one day (16 May 2013). The Bill was not referred to a select committee for consideration and report to the House. Its enactment attracted a lot of public and specialist criticism,¹³⁵ and some consequential litigation.¹³⁶

The second example shows the possibility and reality of changes in response to a s 7 report. On 21 September 2016, the Health Committee reported¹³⁷ as follows on a member's Bill, the Financial Assistance for Live Organ Donors Bill (39-2) (now the Compensation for Live Organ Donors Act 2016):

the Attorney-General presented a report¹³⁸ ... under section 7. The Attorney-General concluded that the bill was inconsistent with section 19(1) ... This section supports the

¹³⁵ For example, Palmer and Butler *A Constitution for Aotearoa New Zealand* (2016) at p 14 ("a shocking piece of legislation that ousted well-known constitutional protections and removed New Zealand citizens' rights to be free from discrimination in certain cases") and McGregor, Bell, & Wilson *Human Rights in New Zealand – Emerging Faultlines* (BWB Books, 2016) at 60–62 ("confirms ... fundamental resistance to curtailing the power of Parliament and governments to make policies and law, even if it is contrary to the human rights treaty").

¹³⁶ See *Attorney-General v Spencer* [2015] 3 NZLR 449 (CA) (eg, at [73] per Harrison J: "if Parliament intends to limit a right prescribed by the Bill of Rights Act and actively respond to the *Atkinson* decisions in a manner inconsistent with the Tribunal's findings [(ie, to validate the policy for existing litigation)] it could be expected to do so clearly and explicitly, not by a sidewind.") and *Spencer v Ministry of Health* [2016] 3 NZLR 513 (HC) (HRRT referral of relief to HC, and for order under HRA 1993 s 92O, at [145] per Keane J: "Mrs Spencer is, we find, entitled to an award for pecuniary loss but not as from 22 December 2001, when her cause of action accrued. Her award should run from 20 October 2005, when the *Atkinson* claimants [also under s 70G] filed their first statement of claim.").

¹³⁷ https://www.parliament.nz/resource/en-NZ/51DBSCH_SCR71042_1/99ad52b6ee625ad238d20418701f3febd7d74826

¹³⁸ https://www.parliament.nz/en/pb/papers-presented/current-papers/document/51DBHOH_PAP64494_1/attorney-general-report-of-the-under-the-new-zealand

The Attorney-General's s 7 report on the Land Transport Amendment Bill 2016 (173—1) includes suggested amendments to a Land Transport Act 1998 new s 96(1AB)(b) vehicle impoundment power available if information is not supplied. They address apparent inconsistency with NZBORA s 21 (unreasonable seizure): <https://www.justice.govt.nz/assets/Documents/Publications/20160909-s7-land-transport-amendment-bill.pdf>

right to be free from discrimination on the prohibited grounds of discrimination. ... Employment status is one of those grounds. ... The proposed amendments to the bill would mean donors would receive reimbursement for 100 percent of forgone employment income, regardless of whether they are a beneficiary ... these changes address the issues. ... the bill is no longer inconsistent ...

Interpretation

NZ – NZBORA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRR 2006
NZBORA 1990 s 6	HRA s 6 See also s 2 on UK courts and tribunals “taking into account” authorities of ECtHR ¹³⁹	HRA s 30	CHRR s 32

New Zealand’s leading case is still *Hansen*.¹⁴⁰ It involves a full (multiple-step, and structured) analysis. The s 5 limits bit can be explained (and Ministry of Justice advisers explain it to MPs) along these lines:

To be demonstrably justifiable, a provision or policy must first be seeking to achieve an objective that is important enough to warrant some limit on the right or freedom.

If the objective is sufficiently important, then the limitation needs to satisfy three conditions in order to be justified:

- first, it needs to be rationally connected to the objective
- second, the limitation must impair the right no more than reasonably necessary to achieve that objective, and
- finally, the limit needs to be in due proportion to the objective.

But *Hansen* also leaves open simpler analyses, some more, or all, “in the round” (‘at once’ or unitary). A recent example is *Watson*, a case about free expression and electoral advertising or broadcasting.

In the High Court, Clifford J said:

Parliament is telling the courts that where it imposes limitations on NZBORA rights and freedoms that cannot (in terms of s 5) be demonstrably justified, it will endeavour

¹³⁹ “Taking account does not preclude difference. By their nature, certain human rights are imperfect obligations (in trade parlance ‘qualified’) and in that respect the possibility of (serious) disagreement over their application is part of the discipline of human rights. The extent to which international court judgments actually bind UK Supreme Court jurisprudence against its own better judgment is minimal.”: Danny Friedman QC [2016] 4 EHRLR 378 at 386.

¹⁴⁰ *R v Hansen* [2007] 3 NZLR 1 (SC). Leading commentary includes that of Geiringer, (2008) 6 NZJPIL 59. For a flowchart summarising the *Hansen* approach, see R Carter (ed) *Burrows and Carter – Statute Law in New Zealand* (5th ed, 2015) Ch 11 at 400.

to do so clearly. That is, it will express itself in such a way that, notwithstanding the s 6 directive, a rights-consistent meaning cannot be given to the relevant provision. There, the prohibition in s 4 prevails. Where Parliament does not legislate in that clear way, s 6 directs the courts to an NZBORA rights consistent interpretation and, in adopting that interpretation, a Court is not acting contrary to the prohibition found in s 4.... I find support for this assessment of the effect of ss 4, 5 and 6 in a recent article by Professor Paul Rishworth, who puts it this way:¹⁴¹

I think s 6 is best regarded as Parliament's message to assist courts in determining the meaning of its enactments and does not contemplate a level of interpretive impact that is different from the conventional approach.¹⁴² On the other hand, the idea of seeking rights-consistency may enliven the conventional approach, and generate interpretive possibilities that would otherwise not be appreciated.

On that basis, Professor Rishworth suggests a synthesis of the *Hansen/Brooker* approaches . . . where, as here, it is clear an NZBORA right is implicated, the Court should start with the claimed meaning and ask whether that meaning (here that the Song and the Music Video are election advertisements and election programmes, and do not come within the editorial content/personal expression of view, comments programmes exceptions) would impose an unreasonable limit on that right. If that is the case, the Court then asks if there is another properly available meaning (in terms of the principles of statutory interpretation, including the interpretational mandate in s 6) that does not unreasonably limit that right.¹⁴³

The Court of Appeal (Miller J), agreeing with the High Court's view that a song and related music video were *not* regulated election advertisements and *not* regulated election programmes, said:

Clifford J did not find it necessary to undertake a full analysis under ss 4 to 6 of the New Zealand *Bill of Rights Act 1990* (NZBORA). He interpreted the legislation by examining the Commission's preferred meaning and, if the meaning imposed unreasonably on the right, inquiring whether a more rights-consistent interpretation was available. A challenge to his methodology was abandoned before us, the Commission sensibly recognising that nothing turned on it. The NZBORA question

¹⁴¹ Paul Rishworth "Human Rights" [2012] NZ L Rev 321 at 330–331.

¹⁴² This "conventional approach" includes interpretation, as required by the *Interpretation Act 1999* s 5, that is ascertaining meaning from text and *in the light of purpose*. Compare the *Charter of Rights and Responsibilities Act 2006* (Vict), s 32(1): "So far as it is possible to do so consistently with their purpose, ...". Compare also the (proposed, but never enacted) New Zealand Bill Of Rights Bill 1963 (52—1) cl 3: http://www.nzlii.org/nz/legis/hist_bill/nzborb1963521251/nzborb1963521251.html and *Anderson v R* [2017] NZCA 293 at [34] and [44] per Winkelmann J.

¹⁴³ *Watson v Electoral Commission* [2015] NZHC 666 at [104]–[106], per Clifford J. See also *Watson v Electoral Commission* [2015] NZHC 666 at [112].

that remains is simply whether the Commission's preferred interpretation of the Electoral and Broadcasting Acts limits the right to free expression no more than reasonably necessary to achieve the legislative objective.

... the Commission should assess effect in a rights-sensitive manner: more so, as will be seen, than it did here. The definitions and exclusions also limit the Commission's capacity to intervene. ... We will take interpretation so far as we can, acknowledging . . . there comes a point where the legislature must be left to change the law¹⁴⁴ if it thinks fit....

...The [Electoral] Act [1993] regulates the publication of election advertisements by anyone, not just participants and their parallel campaigners. That is why the parties have focused on the definition of election advertisement. But that definition does not fully protect political speech by non-participants in the electoral process. People who are not parallel campaigners or representatives of vested interests, and who do not incur any or any significant expenses, may publish views that have the effect of encouraging voters to vote for, or not for, some party or candidate by reference to views adopted or not adopted. The exclusions for editorial content and personal political views published on the internet must be interpreted generously, as we have just explained, but they do not protect all political speech by non-participants. There is nothing this Court can do about it, apart from drawing the problem to Parliament's attention. To restrict s 204B(1) and (3) to parallel campaigners would be to go beyond the permissible bounds of interpretation....

Messrs Watson and Jones ...were simply expressing their own political views... the Commission plainly thought the song, taken alone, had the effect required of an election advertisement, but it is not clear to us why the Commission formed that opinion. The lyrics denigrated Mr Key as uncaring and even venal, and they advised voters who cared about that not to vote for him, but the legislation requires more. As we see it, the lyrics did not encourage voters to vote by reference to views or positions adopted by Mr Key. Any such effect was surely too indirect to count. . . We agree with Clifford J that the exclusion for personal political views published on the internet also applied to the song and video...

... the [Broadcasting Act 1989 election programme regime] has a very substantial effect on free speech. That being so, a rights-consistent approach must be taken when establishing what is an election programme, when assessing such programme's effect on voters, and when interpreting the exceptions.... We have concluded that the prohibition in s 70 is indeed confined to programmes broadcast for political parties or candidates, being those entitled to benefit from an allocation of broadcasting time

¹⁴⁴ The Justice and Electoral Committee report *Inquiry into the 2014 General Election* (1.7A, April 2016) at 33 recommended that the definitions of election advertisement and election programme be reconciled, having regard to work being done by officials on the convergence of broadcast and digital media.

under Part 6¹⁴⁵... by excluding comments the Act recognises what Clifford J characterised as an underlying distinction between [candidates' and party representatives'] participation in and commentary upon the electoral process. To interpret election programme as we have done is consistent with that distinction.... the [s 70] prohibition is not limited to paid programmes. The word paid [(in the heading to s 70)] appears to be an oversight.... We turn to the exceptions for comments. Clifford J held that the song and video were comments... Comments is not defined, although the statutory language envisages that it means something different from news or current affairs programmes, and further that a comment need not be a programme in itself; in other words, it may be made as part of a programme, such as a personal political view expressed by a caller to a talkback show.... the Commission's view is that the song was an election programme and so was the video. Clifford J disagreed, and so do we.... In our opinion the Commission was wrong to characterise the song as an election programme without regard to context. It was not a party or candidate advertisement, and if it was to be broadcast as part of another programme, a judgment had to be made about that programme... if viewed in isolation the song and video were comments for purposes of s 70. That is so because they were personal political views offered by people who were neither candidates nor party representatives.¹⁴⁶

Discretions, or other provisions in broad and general terms, often involve rights as mandatory considerations in the decision-making process, and may also involve substantive outcomes not inconsistent with protected rights. As McGrath and Arnold, JJ said in *Dotcom v. Attorney General*,

The Bill of Rights Act plays an important role in the interpretation of the scope of powers affecting protected rights that are expressed in broad or general terms. Legislative provisions conferring discretions and powers are, like all statutory provisions, to be read in accordance with s 6 of the *Bill of Rights Act*.¹⁴⁷

¹⁴⁵ A leading commentator saw this holding as effecting a major change in electoral law: Andrew Geddis <http://pundit.co.nz/content/politics-coming-soon-to-a-screen-near-you> and <http://thespinoff.co.nz/politics/27-02-2017/how-i-tested-electoral-law-by-dropping-a-30-second-tirade-amid-hard-hitting-ganja-tunes-and-why-it-really-matters/> and <http://www.stuff.co.nz/national/politics/opinion/89849345/andrew-geddis-open-slayer-for-election-year-attack-ads-by-individuals-and-wellfunded-pressure-groups> and <http://www.radionz.co.nz/news/political/325501/fears-planet-key-ruling-will-herald-dirty-politics>. Part 6 is also to be re-enacted rewritten to increase flexibility in the use of funding allocations provided to political parties for election programmes: Broadcasting (Election Programmes and Election Advertising) Amendment Bill (199—2). See especially cl 4, new Part 6, new ss 69 and 70.

¹⁴⁶ *Electoral Commission v Watson* [2017] 2 NZLR 63 (CA) at [25], [35], [65] and [82] per Miller J. Compare other major free expression cases, *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 (SC); *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 (SC); and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

¹⁴⁷ *Dotcom v Attorney-General* [2015] 1 NZLR 745 (SCNZ) at [100], per McGrath and Arnold JJ. See also *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [77]–[82] and *Watson v Chief Executive of the Department of Corrections (No 2)* [2016] NZAR 1264 (HC).

Professor Geiringer explains that proportionality is, under NZBORA, a substantive standard of discretionary decision making in these 2 ways:

- The first way is that (most) discretionary decision-making powers are subject to “an implicit proviso”; they cannot lawfully be exercised in a way that would result in inconsistency with the affirmed rights (in the *Hansen* case sense of non-compliance with s 5).
- The second way is via the combined effect of ss 3 and 5. Section 3 stipulates that the Bill “applies” both to acts done by the legislative, executive, and judicial branches of government, and to other persons or bodies when performing “any public function, power or duty conferred or imposed by law”. If the Bill “applies” to administrative action by those branches, persons and bodies then, so the argument goes, the relevant actor is prohibited from acting inconsistently with the affirmed rights. Applying the logic from the *Hansen* case, that means refraining from contravening those rights, unless the limit is proportionate and thus authorised by s 5.¹⁴⁸

Both of those 2 ways are displaced if the discretionary power requires (and thus also authorises) the decision maker to act in a rights-*inconsistent* way, so that s 4 of the NZBORA protects that rights-*inconsistent* outcome. A claim that a discretionary decision has limited unjustifiably a right is sometimes taken by a court to be only a claim that the right is limited by the legislation.¹⁴⁹

¹⁴⁸ Geiringer (2013) 11 NZJPI 123. In a recent case, *Smith v Attorney-General* [2017] NZHC 463 at [80]–[88], Wylie J held a Prison Director was not required to conduct a full step by step proportionality analysis but could and should have acknowledged in a transparent way the prisoner’s right to free speech in deciding to revoke permission for the prisoner to wear a hairpiece. See Geiringer [2017] NZLJ 232 (“There is no general proposition of New Zealand law, nor ought there to be, that the question of public authority compatibility with the NZBORA is to be assessed solely as a question of result. Further, on the particular facts of [*Smith v Attorney-General*], the Judge’s [Wylie J’s] process-based approach was both appropriate and best calculated to deliver justice in all the circumstances.”) On 26 September 2017, the NZCA heard, and reserved its decision on, an appeal by the Attorney-General against the NZHC decision. “Solicitor-General Una Jagose, QC, said the issue of the wig lacked the expressive conduct or thought that was protected under the Bill of Rights, and risked trivialising the right to freedom of expression.”: “Appeal over killer’s rights”, *The Dominion-Post*, 27 September 2017, page A5. “Court of Appeal President Stephen Kós . . . suggested in court recently during a freedom of expression case, that he actually had hankering for a mullet hairdo, short on the front and sides, long at the back. ‘It’s long since been only a dream of mine,’ he lamented.”: *The Dominion-Post*, 29 November 2017, page A7. Compare also *K v The Queen* [2017] NZCA 51 (race or colour discrimination and search powers).

¹⁴⁹ *Obiaga v R* [2016] NZSC 162 at [5] and [9]. Contrast *Booth v R* [2016] NZSC 127 at [25], [32] per Glazebrook J (“the interpretation urged on us . . . leads to arbitrary results, contrary to s 22 of the Bill of Rights”), and [63], [98], and [112] per William Young J (“Applying s 6, I consider that there is an available non-literal interpretation of s 90(2) which avoids (or at least limits) the scope for arbitrary detention and which I should prefer.”). In *R v Harrison and R v Turner* [2016] NZCA 381 at [94], Stevens J said “the phrase ‘manifestly unjust’ must be interpreted to make [the Sentencing Act 2002] s 86E work as Parliament intended without contravening s 9 of [NZBORA].” Compare also *Genge v Superintendent of Christchurch Men’s Prison* [2017] NZHC 20 (Habeas Corpus Act 2001 s 15 finality provision is *either* not inconsistent with NZBORA s 23(1)(c) right (to test validity of detention without delay by way of habeas corpus) *or* under NZBORA s 4 overrides clearly that right).

But the NZBORA was not drafted, as Professor Geiringer says, primarily as a set of rules to constrain administrative decision making, and it is less clear and direct on proportionality review than the later statutory rights charters adopted in the UK, ACT, and Victoria.¹⁵⁰ New Zealand administrative law scholars say there is considerable uncertainty about discretions, and a gap between what they envisage should happen under NZBORA and what judges actually do in practice.¹⁵¹ Pending any amendment of NZBORA to address these matters, there could well be merit in drafting discretions so as to acknowledge expressly, and make clearer the role of, NZBORA. An example might be the *Harmful Digital Communications Act 2015* s 19(6), which says:

In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand *Bill of Rights Act 1990*.

The District Court has said s 19(6) “reinforces” (but does not modify) s 6 NZBORA.¹⁵² Another view is that adding express provisions to observe NZBORA is unnecessary and also perhaps dangerous (as it may lead a court to say that its non-appearance as a specific limit means it does not apply).

The UK has adopted a more assertive and ‘legislative function’ approach, for example in *Ghaidan*.¹⁵³

As to ACT, Chief Justice Helen Murrell said in 2014 that the “the ACT Supreme Court has rejected the *Ghaidan* approach and the High Court has implied that such an approach is unconstitutional”.¹⁵⁴

Victoria’s approach is exemplified in *Momcilovic*, where a majority of the High Court of Australia held the task imposed by section 32(1) of the Charter is not outside the scope of

¹⁵⁰ *Human Rights Act 1998* (UK), ss 6(1) and 8(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 38(1) and 39(1); *Human Rights Act 2004* (ACT), ss 40B(1) (as amended in 2008) and 40C(4). The Australian charters also require public authorities to give “proper consideration” to human rights.

¹⁵¹ McLean [2008] NZ L Rev 377; Wilberg (2013) 25 NZULR 866; Geiringer (2013) 11 NZJPIL 123; Geiringer (2014) 45 VUWLR 367 at 383; Wilberg [2016] NZ L Rev 591–599.

¹⁵² *R v Iyer* [2016] NZDC 23957 at [59] per Judge Doherty. The *Government Communications Security Bureau Act 2003* s 8D(1)(a) says the Bureau acts in accordance with “all human rights standards recognised by New Zealand law, except to the extent that they are, in relation to national security, modified by an enactment”. Compare *Intelligence and Security Act 2017* s 3(c)(i) (obligations “recognised by New Zealand law”).

¹⁵³ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (HL). See also Sales “Modern Statutory Interpretation” (2016) Stat LR (“Duxbury [in *Elements of Legislation* (CUP, 2013) at 234–40] observes that the open-textured nature of statutory interpretation under section 3 of the Human Rights Act means that the distinction between legislation and judge-made law is less straightforward than it was. He points to a resemblance with modes of interpretive reasoning in the 16th and 17th centuries, to produce where possible statutory meanings judged to be consonant with judge-based conceptions of reason and justice, provided that such proposed meanings do not go against ‘the grain of the legislation’.”).

¹⁵⁴ Chief Justice Helen Murrell, “ACT Human Rights Act – A Judicial Perspective” (Conference on the Tenth Anniversary of ACT Human Rights Act – 1 July 2014) at 7–11, citing especially *Re Application for Bail by Isa Islam* (2010) 4 ACTLR 235 at [122]–[135] per Penfold J: <http://regnet.anu.edu.au/sites/default/files/uploads/2015-06/Chief%20Justice%20Helen%20Murrell.pdf>.

ordinary principles of statutory interpretation and does not confer a legislative function on courts.¹⁵⁵ However, the *2015 Review of the Charter* has recommended s 32 of the Charter be amended to set out the steps for interpreting statutory provisions compatibly with human rights, to ensure clarity and accessibility.¹⁵⁶ The reviewer, Michael Brett Young, says Parliament's s 32 direction is to interpret (not legislate) for rights-consistency, and so it is a stronger rule of interpretation than the principle of legality ('clear statement' rule), and must enable departures from literal or grammatical meanings. He adds:

Parliament should clarify the meaning of section 32(1). Interpretation of legislation is not something that is done only by courts and tribunals: public officials must also interpret the statutory provisions with which they work; members of the public need to understand laws that apply to them; and lawyers should be able to advise on the meaning of a provision. Everyone involved in interpreting legislation needs clear guidance from the Charter to give effect to Parliament's direction that laws are to be interpreted compatibly with human rights.¹⁵⁷

As the late great George Tanner QC said: "This is too important a subject for any lack of clarity."¹⁵⁸ Whatever its other merits or demerits, the *Evidence Act 2006* (NZ), s 30, has at least fixed (made clear and certain) the analytical framework for exclusion of improperly-obtained evidence: it must be excluded if the Judge determines (using the balancing process and optional criteria under s 30(2)(b) and (3)) that its exclusion is proportionate to the impropriety.¹⁵⁹

¹⁵⁵ *Momcilovic v The Queen* (2011) 245 CLR 1, [51] (French CJ), [146(vi)] (Gummow J, Hayne J agreeing at [280]), [545], [566] (Crennan and Kiefel JJ), [683]-[684] (Bell J). See also Michael Brett Young *From commitment to culture – The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* at 141: https://myviews.justice.vic.gov.au/application/files/4514/5567/8566/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf

¹⁵⁶ *The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* at 137–148.

¹⁵⁷ *Ibid.* at 144.

¹⁵⁸ George Tanner QC in Finn and Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington, 2008) at 87:

Drafters deal with Bill of Rights compliance issues all the time. They and their advisers could be forgiven for thinking that 17 years after the Act was passed there is still no hard consensus about how to approach a Bill of Rights analysis. Perhaps that is an inherent problem with open-textured law.

Bullock "The wane of s 5 of the New Zealand Bill of Rights Act 1990" [2017] NZLJ 164 argues the NZCA in 3 decisions follows more Elias CJ in *Hansen*, emphasising s 6 not s 5 – the 3 cases are *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2016] 2 NZLR 602, *Harrison v R* [2016] 2 NZLR 602, and *Electoral Commission v Watson* [2017] 2 NZLR 63. Bullock says:

This article takes no position on the merits of the different approaches. However, the ongoing flux regarding core questions about the application of the *Bill of Rights Act* is unsatisfactory. The time has come from the Supreme Court to re-examine and clarify the approach to ss 4, 5, and 6 of the Bill of Rights Act, in particular the place of s 5 and its proportionality analysis.

¹⁵⁹ *Marwood v Commissioner of Police* [2016] NZSC 139; *Hamed v R* [2011] NZSC 101; *R v Williams* [2007] 3 NZLR 207 (CA); and *R v Shaheed* [2002] 2 NZLR 377 (CA). See also M Downs (general editor) *Cross on Evidence* (online loose-leaf ed, LexisNexis) at EVA30.12 and (NZLC R127, 2013) at [2.65] ("in *Fan v R* [2012] 3 NZLR 29 (CA)), the Court used s 12 to seek to revive what it considers to be a useful pre-

Relief for inconsistency – Taylor and text

NZ – NZBoRA 1990	UK – HRA 1998	ACT – HRA 2004	Victoria – CHRRA 2006
<i>Taylor v A-G</i> (Compare HRA 1993, ss 92J, 92K)	HRA ss 4, 10, Sch 2	HRA s 32, 33	CHRRA ss 36, 37 ¹⁶⁰

New Zealand differs from the UK, ACT, and Victoria in lacking an express provision about remedies, including declarations of inconsistency or incompatibility, and any related remedial orders.

However, as already mentioned, the High Court in 2015 made a declaration of inconsistency (DoI). It declared the prisoner voting ban in the *Electoral Act 1993* s 80 inconsistent with the right to vote.¹⁶¹

The Attorney-General appealed to the NZCA. A full court (5 judges) heard the appeal in October 2016, and dismissed it on 26 May 2017, upholding DoI jurisdiction (under common law, NZBoRA, or both).¹⁶²

A DoI has no reporting or remedial consequences (like *Human Rights Act 1998* (UK) remedial orders).¹⁶³ The Attorney-General has leave to appeal.¹⁶⁴ The NZSC hearing was to be on 21 and 22 November 2017.¹⁶⁵ However, on 16 November 2017, the NZSC indicated the hearing of the appeal was adjourned until 6 and 7 March 2018. The appeal was heard on those dates. The NZSC has reserved its decision.

On 26 February 2018, Cabinet earlier approved in principle an amendment to NZBORA to provide a statutory power for the senior courts to make declarations on inconsistency under the Act, and to require Parliament to respond. On 27 February 2018, Mr Speaker (Hon

existing rule”). The next 5-yearly review report under s 202(1) of the Evidence Act 2006 will fall due, at the latest, by February 2019:
<http://www.lawcom.govt.nz/sites/default/files/projectAttachments/SECOND%20STATUTORY%20REVIEW%20OF%20THE%20EVIDENCE%20ACT%202006%20-%20TERMS%20OF%20REFERENCE.pdf>.

¹⁶⁰ The power in s 36 was found by the High Court of Australia in *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34 to confer something other than judicial power and, although found valid by a majority (French CJ, Kiefel, Crennan and Bell JJ), is therefore not a power exercisable in federal jurisdiction. A declaration of inconsistent interpretation, being non-judicial and not incidental to judicial power, said French CJ at [101], cannot be characterised as a judgment, decree, order or sentence of the Supreme Court falling within the appellate jurisdiction conferred upon the High Court of Australia by s 73 of the Australian Constitution.

¹⁶¹ *Taylor v Attorney-General* [2015] 3 NZLR 791 (HC).

¹⁶² *Attorney-General v Taylor* [2017] NZCA 215 (reissued on 16 June 2017 to correct an error in *Hansen* and re-adopted, see addendum, (“This correction does not alter the Court’s [26 May 2017] reasons for judgment.”)).

¹⁶³ These orders are discussed, for example, by Shona Wilson Stark (2017) 133 LQR 631.

¹⁶⁴ *Attorney-General v Taylor* [2017] NZSC 131 (30 August 2017). The approved questions are whether: (i) The Court of Appeal was correct to make a declaration of inconsistency; and (ii) Mr Taylor has standing. The NZSC has also granted the Human Rights Commission intervener status for the appeal.

¹⁶⁵ <http://www.courtsofnz.govt.nz/going-to-court/calendar/supreme-court/SCNov2017fixtures.pdf>

Trevor Mallard) determined a related general question of privilege arises, and should be referred to the Privileges Committee for consideration.¹⁶⁶

The *Human Rights Act 1993* (NZ) ss 20L, 92J, 92K have, since 2002, enabled the Human Rights Review Tribunal (HRRT) to make a declaration that an enactment is in breach of Part 1A of that Act (because the enactment is inconsistent with the right to freedom from discrimination in s 19 of NZBORA).¹⁶⁷ The Act requires the Minister for the time being responsible for the administration of the enactment, within 120 days of the declaration becoming final, to present to the House of Representatives—(a) a report bringing the declaration to the attention of the House of Representatives; and (b) a report containing advice on the Government’s response to the declaration. An instructive example is the interpretation and (in)consistency of New Zealand’s *Adoption Act 1955*.

In *Re Application by AMM and KJO to adopt a child*,¹⁶⁸ the question was whether “spouses” in the *Adoption Act 1955*, s 3 (“An adoption order may be made on the application of 2 spouses jointly in respect of a child.”), could be interpreted so as to include a man and a woman who are unmarried but in a stable and committed marriage-like relationship. The High Court (Wild and Simon France JJ) held that s 6 of the NZBORA required them to alleviate immediately unjustified discrimination (s 19 – freedom from discrimination on marital status) against a different sex *de facto* couple by giving “spouses” in s 3 of the *Adoption Act* a meaning that includes a man and a woman who are unmarried but in a stable and committed relationship (despite the history and statute-book-wide drafting showing that “spouses” means a married couple only).

To some, this result strains the language in context beyond a viable meaning.¹⁶⁹

Parliamentary inaction to reform adoption law was held to be *not enough* to activate s 4 of the NZBORA. Parliament had sometimes defined “spouse” to cover, by extension, different sex *de facto* partners. This meant a “‘non-ordinary’, but available, rights-consistent meaning” of “spouse” was that it extends to a different sex *de facto* couple. As Professor Rishworth says, this case shows the scope for interpretive arguments despite, and after, *Hansen*; “We have not heard the last word on strained meanings”.¹⁷⁰ Parliament perhaps did not appreciate it in 1990 (when it enacted NZBORA) or even in 2005 (when it amended all of the statute book, apart from the *Adoption Act 1955*, to rationalise references to spouses, civil union partners, and *de facto* partners), but, by enacting NZBORA in 1990,

¹⁶⁶ *CALC Newsletter* March 2018 pages 9 to 11.

¹⁶⁷ Hindle [2008] *NZ L Rev* 213 at 219–220 (“the value of a declaration lies in whatever it might stimulate the New Zealand Government to do in response”). See also Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (2013) at 12.11.7 (Declarations or findings of inconsistency with protected rights).

¹⁶⁸ [2010] NZFLR 629 (HC).

¹⁶⁹ Carter [2010] *NZLJ* 271.

¹⁷⁰ Rishworth [2012] *NZ Law Rev* 321 at 338–340.

it in effect in 2010 amended the *Adoption Act* to extend eligibility to adopt jointly (beyond the different sex spouses eligible in 1955).

The High Court in 2010 in *Re AMM and KJO* left open the question – “can same sex *de facto* couples (civil union or de facto partners) adopt?” It made passing comments (at [39]) that seem contrary to NZBORA s 19 itself, on “the traditional family unit”. It is valid under NZBORA s 6, to prefer a meaning that is not in every respect, but is more (than the enactment’s ordinary meaning), “consistent with this Bill of Rights”.¹⁷¹ But s 6 doesn’t permit a reading down of NZBORA s 19. As David Turner, analysing *Re AMM and KJO*, said in 2011:

It is unknown whether the Attorney-General would be willing to make a similar concession¹⁷² that the discrimination [*against different sex de facto couples*] was unjustified if the issue concerned a same-sex couple: some might consider that such discrimination still constitutes a justified limitation under s 5 of the NZBORA. Yet if the Court is truly committed to an approach which assesses adoption suitability on the basis of stability, safety, and the promotion the welfare and best interests of the child rather than basing it on the (prohibited) grounds of marital status or sexual orientation, then it is hard to see how the Court could find discrimination against same-sex couples any more justified than against *de facto* couples. There is no evidence or research to show that same-sex relationships are any more unstable, or detrimental to a child’s welfare and development, than different-sex relationships, and courts overseas have given short shrift to the presentation of prejudice as empirical evidence that same-sex couples are qualitatively different from heterosexual couples.¹⁷³

The position after *Re AMM and KJO* was as follows:

¹⁷¹ *R v Poumako* [2000] 2 NZLR 695 (CA) at [37]. Compare *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2015] 2 NZLR 437 (CA) at [212]–[214] per French J: “Section 6 [of NZBORA] thus only applies where on one interpretation of a provision, the provision is inconsistent with a protected right or freedom.... Terranova’s interpretation does not mean that the Act breaches s 19 but simply that the scope of the protection it provides may be narrower than the scope of the protection provided by s 19. And there is nothing in the Bill of Rights requiring courts to read all other statutes as positively replicating the extent of the protection in the Bill of Rights itself... it follows that s 6 is not engaged because there can be no initial finding that Parliament’s intended meaning is inconsistent with a relevant right or freedom.” Leave declined: [2014] NZSC 196.

¹⁷² “What [this case] is not about is whether ‘spouses’ can be interpreted to cover any other type of relationship such as a same sex couple... the answer ...for those other couples will have to await another day. The Attorney-General’s concession is specifically limited to de facto couples of the opposite sex. Here the appellants are only concerned about their situation and we are of the view the case can be approached in that limited way.”: *Re AMM and KJO* [2010] NZFLR 629 (HC) at [11], [19], and [39]. In *Adoption Action*, the HRRT was advised from the bar by counsel that this 2010 concession “applied also to same sex de facto couples”, but also said “It is not clear whether the same concessions are made in the present case. Because of the absence of clarity we proceed on the basis they are not.”: [2016] NZHRRT 9 at [146]–[147]. On concessions wrong in law not being accepted or binding, see, for example, *R v Montila* [2004] 1 WLR 3141 (HL) at [31]–[40].

¹⁷³ Turner “Righting wrong or writing wrong?” [2011] NZLJ 364 at 368.

- married couples (opposite sex) were within s 3 of the *Adoption Act* and could adopt.
- couples (opposite and same sex) in a civil union could not adopt because they were not included in s 3 and faced “formidable barriers” in having s 6 NZBORA deployed in their favour so as to permit entry to s 3.
- de facto opposite sex couples could adopt as the effect of s 6 of the NZBORA was that they were “spouses” for the purpose of s 3.
- *de facto* same sex couples were not addressed by the High Court and their position was left unresolved. *Prima facie* they fell outside s 3.¹⁷⁴

After *Re AMM and KJO* was decided, Parliament enacted the *Marriage (Definition of Marriage) Amendment Act 2013*, which amended the *Marriage Act 1955* to enable persons of the same sex to marry. Section 2 of the *Adoption Act* was also amended to provide that an adoptive parent means

any person who adopts a child in accordance with an adoption order; and, in the case of an order made in favour of a married couple on their joint application, means both the spouses...

On 30 October 2015 the Family Court in *Re Pierney* accepted that, following the 2013 same sex marriage amendments, the word “spouses” in s 3 does not prevent the Court from making adoption orders in respect of same-sex *de facto* relationships, whether male or female. The Court considered that discrimination on the grounds of sexual orientation would occur if the Courts were to continue to interpret the word “spouse” to simply include opposite sex de facto couples.¹⁷⁵

On 7 March 2016, the Human Rights Review Tribunal (HRRT), in *Adoption Action Incorporated v Attorney-General* [2016] NZHRRT 9, held “spouses”, in the *Adoption Act 1955* s 3(2), could *not*, under NZBORA ss 6 and 19, by analogy with *AMM & KJO* (the High Court authority about *different sex* de facto partners) or as in *Re Pierney* (the Family Court decision about *same sex* de facto partners), be read as including civil union partners or *same sex* de facto partners (so making them eligible to apply jointly to adopt a child).

The HRRT regarded itself as bound by the High Court’s decision in *AMM & KJO*, but also saw it as *not* determining the eligibility to adopt jointly of civil union partners or *same sex*

¹⁷⁴ As summarised by the HRRT in *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113.

¹⁷⁵ *Re Pierney* [2015] NZFC 9404, [2016] NZFLR 53 (FC), as discussed by Stewart Dalley “Adoption law change for same-sex de facto couples” (26 February 2016) 882 *LawTalk* 32 <https://www.lawsociety.org.nz/lawtalk/issue-882/adoption-law-change-for-same-sex-de-facto-couples>. See also Dalley “Section 6 NZBORA — in the eye of the beholder?” [2016] NZLJ 273.

de facto partners.¹⁷⁶ The HRRT did not cite, and so may not have been aware, or made aware, of *Re Pierney*.¹⁷⁷

The HRRT declared 6 provisions of the *Adoption Act 1955* and one provision of the *Adult Adoption Information Act 1985* to be inconsistent with the right to be free from discrimination in NZBORA s 19.

The HRRT rejected the case for the Crown¹⁷⁸ that the *Adoption Act 1955* s 3 should be interpreted consistently, as far as it is possible to do so, with fundamental NZBORA rights, New Zealand's international obligations and in an ambulatory manner, consistent with changing social mores and attitudes, with the result that (in line with NZBORA s 19) "spouse" must mean "married couples, civil union couples and couples in committed *de facto* relationships, either heterosexual or homosexual".

As to ambulatory or dynamic interpretation consistent with changing social mores and attitudes, the *Interpretation Act 1999* s 6 provides:

6 Enactments apply to circumstances as they arise

An enactment applies to circumstances as they arise.

The HRRT said that "Exactly when the court will apply an ambulatory approach and when an historical one, is far from clearly defined".¹⁷⁹ The HRRT stressed that an ambulatory or updating reading (under the *Interpretation Act 1999*, s 6) is dependent not only on purpose, but on the words concerned being able to bear the meaning attributed to them. The HRRT also weighed the key consideration of whether "any expansion in the scope of the legislation is more appropriately left to parliamentary amendment than judicial interpretation".

On 3 August 2016, the Government presented to the House the Government response to the declarations of inconsistency by the HRRT in *Adoption Action Incorporated v Attorney-*

¹⁷⁶ [2016] NZHRRT 9 at [139]:

For *Adoption Action* it was submitted the correctness of Application by AMM and KJO has yet to be determined by the Court of Appeal and Supreme Court and might not even be followed in the High Court. Be that as it may, the Tribunal is bound by the decision.":

At a Law Commission 30th Anniversary seminar in 2016, Supreme Court Justice Ellen France suggested the High Court's decision in *AMM & KJO* might be taken to determine the position also for civil union partners and *same sex de facto* partners.

¹⁷⁷ [2016] NZHRRT 9 at [78]:

The Crown's submissions on an ambulatory or updated reading of the *Adoption Act* made frequent reference to decisions of the Family Court said to exemplify such reading. We have not found these decisions helpful. They are usually fact specific but more importantly in none did the Family Court consider the question now before the Tribunal, namely whether the relevant provisions of the *Adoption Act* are inconsistent with the right to freedom from discrimination affirmed by s 19 of the Bill of Rights.

¹⁷⁸ [2016] NZHRRT 9 at [33.2.1] (OVERVIEW OF THE CASE FOR THE ATTORNEY-GENERAL).

¹⁷⁹ [2016] NZHRRT 9 at [77.4]. See also [77.1.1], [77.1.2], and 77.3]. See also Meagher (2017) 38 Stat LR 98 and *Interpretation Act 1888* (52 VICT 1888 No 15) (NZ) s 5(3) (Act deemed always speaking in the present).

General.¹⁸⁰ The Government Response, citing *Re AMM & KJO* and *Re Pierney*, said the Government did not agree with the HRRT's findings that 2 “spouses” provisions – ss 3(2) and 7(2)(b) of the Adoption Act – are inconsistent with the right to freedom from discrimination affirmed by section 19 of the NZBORA. The Government Response also said (at [7] and [10]):

Current practice by MSD recognises same-sex *de facto* couples as legitimate adoptive parents by continuing to place both civil union and *de facto* couples in the adoption pool. It is for MSD and, ultimately, the Courts to continue to apply the Adoption Act in a way that reflects modern legal and social contexts, and that, in practice, results in rights-consistent application. ... In time, a review of adoption legislation may be beneficial to ensure it is framed in a way that reflects modern society. Currently, the Government is satisfied that in practice, the provisions of the *Adoption Act* are interpreted in a rights-consistent manner. As a result, the Government considers that the matters identified by the Tribunal do not significantly impact on adoptions, and therefore do not represent a situation that would move the Government to undertake large scale reform of the Adoption Act at the present time.

So the *Adoption Act* s 3 has a rights-consistent meaning and operation, but not rights-consistent text!

A chairperson of the HRRT, Rodger Haines QC, speaking at Victoria University of Wellington's law school on 20 September 2017, noted the HRRT had, to that date, issued DoIs in these 3 cases —and with these 3, perhaps unimpressive, responses:

1. *Howard v Attorney-General* [2008] NZHRRT 10 (15 May 2008) — no report in response as required by s 92K, but remedial legislation removes declared age discrimination inconsistency;
2. *Heads v Attorney-General* [2015] NZHRRT 12 (17 April 2015) — report as required by s 92K, but no actual or proposed remedial legislation to remove declared age discrimination inconsistency;
3. *Adoption Action Incorporated v Attorney-General* [2016] NZHRRT 9 (7 March 2016) — report as required by s 92K, but that report disagrees with HRRT's assessment (despite HRRT's decision not being appealed to NZHC) and indicates remedial legislation was not a priority for the Government.

¹⁸⁰ <http://www.justice.govt.nz/assets/Documents/Publications/govt-response-declarations-inconsistency-hrrt.pdf> and https://www.parliament.nz/en/pb/papers-presented/current-papers/document/51DBHOH_PAP69658_1

Conclusion – “You are always on my mind” – weaving human rights into the whole of our laws

Statutory Bills of Rights, like many other Westminster system constitutional laws and conventions, involve what Professor Timothy Endicott calls “extravagant open-endedness”.¹⁸¹

Richard Ekins has argued human rights law with uncertain definitions, uncertain justified limitations, and a loose and unclear ‘fit’ or (in)consistency with other law, is a failure of law making craft:

some vague general proposition is subject in turn to provision for limitation . . . whatever the intention of the framers of these bills of rights . . . the understanding of many judges, and most human rights lawyers, is that the rights guarantee whatever should be guaranteed . . . This conflation of human rights law with human rights . . . is an abandonment of legislative craft, of the demands of the rule of law, which require clear promulgation.¹⁸²

Considering NZBORA in 2015, the Chief Justice¹⁸³ noted that Sir Robin Cooke said in the early 1990s that NZBORA “does not merely repeat the old law” and that it is intended to be woven into the fabric of the whole of New Zealand law.¹⁸⁴ But the more generally held view was that the Act was intended to reflect existing law and to be “evolutionary”.¹⁸⁵

New Zealand’s NZBORA surely does, to some extent, recognise and affirm (“repeat”) the old law.¹⁸⁶

¹⁸¹ "Lawful Power" (Robin Cooke Lecture 2016, Victoria University of Wellington Faculty of Law, 15 December 2016) <https://vstream.victoria.ac.nz/ess/echo/presentation/c206634e-1521-4b85-8e7f-518b66579ec7>. See also “Parliament and the Prerogative: From the Case of Proclamations to *Miller*” (1 December 2016, Policy Exchange, Westminster) <https://policyexchange.org.uk/video-parliament-and-the-prerogative-from-the-case-of-proclamations-to-miller/> and T. Endicott, ‘A Treaty of Paramount Importance’, U.K. Const. L. Blog (26th Jan 2017) <https://ukconstitutionallaw.org/2017/01/26/timothy-endicott-a-treaty-of-paramount-importance/>. *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and the European Union (Notification of Withdrawal) Bill introduced 26 January 2017 (Bill 132) and assented to 16 March 2017. See also Greenberg (2017) 38 *Stat LR* v-vi, and Sedley LRB 16 Feb 2017 www.lrb.co.uk/v39/n04/stephen-sedley/the-judges-verdicts and LRB 2 March 2017 www.lrb.co.uk/v39/n05/stephen-sedley/short-cuts

¹⁸² Ekins (2015) 34(2) *Univ of Queensland LJ* 217 at 224–225. See also Meagher (2017) 38 *Stat LR* 98 at 99: “The courts must recognize that Parliament (and parliamentary counsel) can only ‘squarely confront’ those fundamental rights the existence and content of which was known at the time of legislating.”

¹⁸³ Dame Sian Elias CJ - Bill of Rights Conference – Address (20 August 2015): <http://www.courtsofnz.govt.nz/from/speeches-and-papers>

¹⁸⁴ *R v Te Kira* [1993] 3 NZLR 257 (CA) at 262; *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 and 171.

¹⁸⁵ *R v Jefferies* [1994] 1 NZLR 290 (CA) at 299 per Richardson J.

¹⁸⁶ See, for example, *A Bill of Rights for New Zealand – A White Paper* (1985) AJHR A.6 at [10.114]: “This right [(to be presumed innocent until proved guilty according to law (ultimately enacted in NZBORA s 25(c)))] already exists under common law.” Equally the *White Paper* at [10.122] and [10.124] recognised the variation of penalty and appeal rights ultimately enacted in NZBORA s 25(g) and (h) were already provided for or stated as part of our law in the *Criminal Justice Act 1954* s 43B(1) and (2) (enacted by s 22 of the

But NZBORA has also been not only “evolutionary”. An example is in the expansion of the specified prohibited grounds of discrimination for the right to freedom from discrimination (NZBORA new s 19, as replaced, on 1 February 1994, by the *Human Rights Act 1993* s 145). In NZBORA as first enacted, s 19 was designedly drafted narrowly, specifying grounds (not yet including sexual orientation), and excluding very general “equality before the law” and “the equal protection of the law”. However, as suggested by Sir Kenneth Keith, using the example of same-sex civil unions and marriages:

Even the narrower provision, once enacted [and as expanded in 1994], has presented major challenges, notably in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA). The parliamentary responses to the challenge presented in that particular case now include the *Civil Union Act 2004* and the *Marriage (Definition of Marriage) Amendment Act 2013*.¹⁸⁷

NZBORA (s 28) expressly does not abrogate or restrict existing rights or freedoms not included in, or included only in part in, NZBORA. So fundamental values to be kept in

Criminal Justice Amendment Act 1980). See, for example, *R v Mist* [2006] 3 NZLR 145 (SC), per Keith J. In *Siemer v Solicitor-General* [2010] 3 NZLR 767 (SC) at [21] and [52] fn 52 per McGrath J:

It may have been decided on when the *Bill of Rights Act* [s 24(e)] was enacted simply to reflect the existing provision for the right to trial by jury in the *Summary Proceedings Act 1957* [s 66], which continues to apply under that Act. ...Section 66(1) of the *Summary Proceedings Act 1957* was in its present form when the Bill of Rights Act was enacted and is consistent with s 24(e). It provides that a person charged under Part 2 of that Act (someone who has been proceeded against summarily) with an offence which is punishable by imprisonment for a term exceeding three months is entitled, before the charge is gone into but not afterwards, to elect to be tried by a jury. An exception is made, however, by s 43 of the *Summary Offences Act 1981* by virtue of which s 66 does not apply to offences under ss 9 and 10 of the *Summary Offences Act*, namely common assault or assault on a constable, prison officer or traffic officer acting in the execution of duty. Those two offences carry maximum penalties of six months' imprisonment (or a fine)."

See, now, *Criminal Procedure Act 2011* s 50. See also *Wright v Bhosale and Attorney-General* [2016] NZCA 593 at [30] per Whata J: “Section 24(a) [of NZBORA] mirrors the now repealed s 17 of the *Summary Proceedings Act 1957* and s 329 of the *Crimes Act 1961*”.

¹⁸⁷ Keith (2013) 11 NZJPIL 1 at 9. The Hon Michael Kirby AC CMG (2016) 22 *Auckland U L Rev* 11 at 21 notes an individual communication to the UN Human Rights Committee, and invoking *Toonen v Australia* (1994) 1(3) IHRR 97 (Human Rights Committee Communication No 488/1992), argued unsuccessfully that New Zealand breached the ICCPR by refusing or failing to provide the facility of marriage to same-sex partners: *Joslin v New Zealand* Communication No 902/2002, A/57/40 (2002), discussed in the [Report of the Australian Senate Select Committee on the Exposure Draft of the Marriage Amendment \(Same-Sex Marriage\) Bill](#) at pp xiv and 74–77. Michael Kirby also says (at 20) of *Quilter*: “Looking back now, I can see that Thomas J, and to some extent Tipping J, were the only judges in the case who approached the matter as it should have been approached: as a human rights question.” Related are amnesty laws to pardon men cautioned or convicted under historical legislation that outlawed homosexual acts, for example, [Policing and Crime Act 2017](#) ss 164 to 172: <https://www.gov.uk/government/collections/policing-and-crime-bill> See also Hon Amy Adams [Historical homosexual convictions eligible to be wiped](#) (9 February 2017). K J Keith in Dyson, Lee, and Wilson Stark (eds) *Fifty Years of The Law Commissions – The Dynamics of Law Reform* (Hart, 2016) at 404 to 405 suggests the major actor in UK and New Zealand equality initiatives has been the legislator, which can be contrasted with courts' role in the United States, for example, in *Obergefell v Hodges* 576 (US, No 14-556, 26 June 2015).

mind are surely also to be found elsewhere, both in other statutes, and in common law rights and principles.¹⁸⁸

In *Ririnui v Landcorp Farming Ltd*, New Zealand’s Chief Justice referred to a common law principle of equal treatment (treating like cases alike, to avoid irrationality and arbitrariness), and said:

Parliament has not enacted a general principle of equality as part of the rights recognised in the New Zealand *Bill of Rights Act 1990*. The *White Paper* that preceded the legislation referred to such a specific right as unnecessary because the principle of equal treatment is part of the rule of law. Rather, the New Zealand *Bill of Rights Act* contains a more specific prohibition on discrimination on specified grounds. Both rule of law considerations and the need for rationality in public decisions mean that consistency of treatment has a role to play in judicial review when issues of arbitrariness or unreasonableness are raised.¹⁸⁹

Later in 2016, the Chief Justice also mentioned signs of “constitutional repositioning” of the basis of judicial review, in both the UK and New Zealand, away from *ultra vires* and around values derived from the common law, ancient statutes and charters, and modern enacted statements of human rights.¹⁹⁰

So, we conclude as we began, and as the Pet Shop Boys sang:

Little things I should have said and done

¹⁸⁸ For example, Interpretation Act 1999 s 7: “An enactment does not have retrospective effect.”

¹⁸⁹ [2016] 1 NZLR 1056 (SC) at [94]–[95], citing *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 109 per Lord Hoffmann, referring in turn to Professor Jowell’s article “Is Equality a Constitutional Principle?” (1994) CLP 1 at 12–14. But mistake was also relevant: Wilberg [2016] NZ Law Rev 578–580. In *Pora v Attorney-General* [2017] NZHC 2081 at [121], Ellis J said “Treating like cases alike, is the bedrock of rationality and the very reason for the Guidelines’ [for eligibility and quantum of ex gratia payments to people wrongly imprisoned] existence.” A placeholder notice of appeal has been lodged:
<http://www.radionz.co.nz/news/national/340209/crown-considers-appealing-teina-pora-compensation-decision>

¹⁹⁰ “The Unity of Public Law” (Public Law Conference, Cambridge University, England, 13 Sept 2016) at 13: <http://www.courtsofnz.govt.nz/publications/speeches-and-papers>, citing *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 “where members of the Court went out of their way to emphasise fundamental values of the common law”. See also Lady Hale “UK Constitutionalism on the March?” [2014] JR 201 (“there is emerging a renewed emphasis on the common law and distinctively UK constitutional principles as a source of legal inspiration”) and Stephen Sedley *Lions under the Throne – Essays on the History of English Public Law* (CUP, 2015) at 207 (“the common law has now developed the confidence to fill the spaces without requiring a prescriptive tabulation of rights”). See also Danny Friedman QC [2016] 4 EHRLR 378 at 396 (“although the Human Rights Act [1998 (UK)] has been invaluable for the progress of individual rights protection in this country, it cannot be the limit of what ought to be possible in enabling individuals and groups to prosper in terms of respect, well-being and happiness”) and Sales “Modern Statutory Interpretation” (2016) Stat LR (“we now regularly use the concept of fundamental common law rights[. See for example, *Kennedy v. The Charity Commission* [2014] UKSC 20 [(importance of openness of proceedings and reasoning)].”). See also *R (UNISON) v Lord Chancellor* [2017] UKSC 51, where a Fees Order was held unlawful as the prescribed fees interfered unjustifiably with the right of access to justice at common law.

I never took the time
You were always on my mind
You were always on my mind

Drafting with human rights (in)consistency in mind certainly enables us, however, to weave human rights into the fabric of the whole of our laws.¹⁹¹ Bystanding is not a real option. John Lahr has written,

As social unrest began to rumble through America in the early 1960s...[singer Nina] Simone became a race champion. In the mid-1960s Vernon Jordan,¹⁹² the head of the Urban League, asked her how come she wasn't 'more active in civil rights'. 'Motherfucker, I am civil rights,' she replied.¹⁹³

Speaking in 2015, New Zealand's Attorney-General, Hon Christopher Finlayson QC, said:

... the fundamental starting point [is] that the New Zealand *Bill of Rights Act* does not have the status of a supreme or higher law. . . Calls for change to the status of the Bill of Rights Act have not, to date, been taken up. I think it wrong to suggest that proposals to make the *Bill of Rights Act* some form of 'supreme law' are the only way forward. ... Parliament should make laws that are consistent with the Bill of Rights Act. That aim is best achieved by enhancing consideration of human rights within the legislative process rather than ex post facto review.¹⁹⁴

Rights-consistent legislation helps achieve NZBORA's purpose, which, if stated expressly (in line with current New Zealand legislative drafting practice), and retro-fitted to NZBORA, might be as follows:¹⁹⁵

¹⁹¹ Human rights laws (for example, NZBORA and the *Human Rights Act 1993*) can be woven expressly into our laws, as shown, for example, by the *Evidence Act 2006* s 6(b) (Act's purpose – to help secure the just determination of proceedings by ... (b) providing rules of evidence that recognise the importance of NZBORA-affirmed rights) and s 30(5)(a) (definition of evidence that is "improperly-obtained"). In *K v The Queen* [2017] NZCA 51, Williams J noted NZBORA influenced the *Policing Act 2008* s 8(a) and (d).

¹⁹² https://en.wikipedia.org/wiki/Vernon_Jordan

¹⁹³ John Lahr, "Backlash Blues", London Review of Books, 16 June 2016 - <http://www.lrb.co.uk/v38/n12/john-lahr/backlash-blues>

¹⁹⁴ Hon Christopher Finlayson QC "Section 7 of the Bill of Rights" (Speech to Transparency International New Zealand, 7 October 2015): <http://www.chrisfinlayson.co.nz/section-7-of-the-bill-of-rights/>

¹⁹⁵ An express purpose provision of this kind (a) would replace the Title, which would be repealed; and (b) would need amending if NZBORA were amended to recognise expressly declarations of inconsistency and to provide expressly for remedial orders removing inconsistency ("a post-declaration legislative mechanism for review of the state of legislative inconsistency which confers a discretion on the relevant Minister to take remedial steps where the Minister considers that there are compelling reasons for doing so": *Taylor v Attorney-General of New Zealand* [2014] NZHC 1630 at [81] per Brown J).

"Although in its terms s 6 is directed to interpretation, it serves the collateral purpose of encouraging explicitness if Parliament wishes to enact a provision which is inconsistent with a right or freedom contained in the Bill of Rights": *R v Hansen* [2007] 3 NZLR 1 (SCNZ) at [88] and n 132 per Tipping J.

1A Main purpose of this Act, and how it is achieved

Main purpose

- (1) This Act's main purpose is to—
- (a) affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
 - (b) affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

How main purpose achieved

- (2) This Act achieves its main purpose by—
- Rights affirmed, protected, and promoted (sections 3 to 5, and 8 to 29)*
- (a) setting out the rights and freedoms affirmed, and to be protected and promoted; and

Rights-consistent interpretation (section 6)

- (b) ensuring, wherever an enactment can be given a meaning consistent with the rights and freedoms contained in this Bill of Rights, that meaning is preferred to any other meaning; and

Reporting to Parliament Bills that appear inconsistent (section 7)

- (c) requiring reports of inconsistency with affirmed rights and freedoms to be made for all Bills introduced into the House of Representatives.

Consistency with New Zealand's other international legal obligations

- (3) This Act does not limit or affect any other law under which an enactment is required or presumed to be interpreted and applied in line with New Zealand's obligations under international law.¹⁹⁶

Compare: *Charter of Human Rights and Responsibilities Act 2006* s 1 (Vict)

¹⁹⁶ K J Keith in Dyson, Lee, and Wilson Stark (eds) *Fifty Years of The Law Commissions – The Dynamics of Law Reform* (Hart: Oxford, 2016) at 408 to 409 (The law of interpretation) reminds that the British Law Commissions in 1969 recommended, to date unsuccessfully, a provision calling for interpretation consistent with international obligations: *The Interpretation of Statutes* (LC 21 and SLC 11, 1969, HMSO, reprinted 1974) at 48 to 51, draft cl 2(b):

The following shall be included among the principles to be applied in the interpretation of Acts, namely— . . . (b) that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not.

See also above n. 14 (presumption of interpretation in line with international obligations).

Book Reviews

Legal Usage – A Modern Style Guide

Peter Butt, published by Lexis Nexis Butterworths Australia 2018

Reviewed by Don Colagiuri¹

The title of Peter Butt's latest book struggles to encompass its content.

Turning to the back page of this 699-page book you find it is advertised as a style guide for legal writers in common law countries to encourage a modern legal style that is clear, concise, elegant, reader-friendly and legally effective. While the advertising is accurate, it is much more than that. Under one title it is part dictionary, part plain language guide, part book on grammar, part law text-book and part writing style-guide.

This book is organized alphabetically by word, phrase and subject matter, with extensive cross-referencing to related topics. The author cites hundreds of usage examples from leading judges in common law jurisdictions and offers simple plain-language alternatives for numerous technical terms and foreign language phrases with supporting examples from judgments and legal texts.

One of the book's most helpful features is suggested alternative usage for archaic or other deficient legal usage. The author is able to provide legally effective plain language alternatives for foreign and ancient words and phrases that have littered legal texts over the years, particularly in relation to property law. He also provides examples of usage drawn from most of the jurisdictions from which CALC draws its members - England, Scotland, Ireland, Australia, New Zealand, Singapore, Hong Kong and South Africa.

The book is a work of great scholarship, drawing on the author's extensive knowledge and experience as a professor of property law at Sydney University, a foundation director of the Centre of Plain Legal Language at that University, a past President of Clarity, an editor of legal dictionaries and a distinguished legal writer.

The book should be an essential reference publication that legislative counsel and other legal writers (young and old) keep on their desks along with a standard English dictionary. It might be considered old-fashioned these days to use books rather than search for information electronically, and of course bookcases are no longer part of the office furniture for lawyers. However, the wealth of information contained in this book and the care and thought that has gone into making the information easy to access will encourage legislative counsel and other legal writers to seek and obtain assistance in their writing. One can be discouraged from searching the electronic repositories that are now available when it can take a long time for many who are not law librarians to find the information they seek among the dross that is delivered to their screens, provided of course that they can remember

¹ SC, Barrister and Consultant Legislative Counsel, NSW, Australia.

the ever-changing passwords and different operating instructions for the various electronic repositories and systems.

I found the discussion about the proper use of “that” and “which” to convey a restrictive or non-restrictive meaning a little disconcerting. He makes a plea for legal writers to choose the appropriate word to avoid misunderstanding but laments that, with few people applying or understanding the distinction, it would be unrealistic to hope that legal writers will observe the distinction. I remain hopeful that legislative counsel and other legal writers will always aim for the highest standard of legal writing and maintain the momentum for clear, concise and reader-friendly legal language. Peter Butt’s book provides them with an invaluable resource in that quest.

Legal and Legislative Drafting, 2nd ed.

Paul Salembier, published by Lexis Nexis (Canada), 2018

Reviewed by Lionel Levert²

LexisNexis recently published a second edition of Paul Salembier's book on *Legal and Legislative Drafting*. A new publication on legal and legislative drafting is always warmly welcomed by the legal and legislative community. After all, this is not a daily occurrence, to say the least!

Readers may recall that the 1st edition of Paul's book was published in December 2009. I had then written a review that was published in the August 2010 *Loophole*. I obviously do not intend to repeat here everything I wrote back, but I believe it might be helpful to provide a reminder of some of the key elements contained in my previous review as they relate to issues that are still discussed in the second edition. I will then focus on some of the key differences between the two editions and of course say a few words about the new features contained in the 2nd edition.

Mr. Salembier is a former General Counsel with the Canadian Department of Justice, with more than three decades in government, largely spent drafting bills and regulations. He has also taught regulatory law and statutory interpretation, and currently teaches legislative drafting at the Faculty of Law of Queen's University. In addition to authoring both editions of the book being reviewed, he is also the author of *Regulatory Law and Practice*, 2nd ed. (LexisNexis Canada, 2015) and has published articles on aboriginal law, regulatory law, legislative drafting and statutory interpretation. His broad experience is reflected in the maturity with which he discusses and analyzes complex drafting issues and problems, as well as possible solutions, in the 2nd edition of *Legal and Legislative Drafting*.

An interesting feature of this book is that it deals with both legal drafting generally and legislative drafting in particular. Because so many elements are common to the drafting of legal instruments generally and to legislative drafting in particular, it makes perfect sense to deal with both in the same book, as long as the author, clearly identifies the differences and particularities of each. And this is something Mr. Salembier does very well, so much so that the readers who may be interested in only one of these disciplines may at times feel they are provided with too much information on a discipline that is not really theirs, but it is virtually impossible to do otherwise.

This is a remarkably well-researched and well-documented book. Its sources are drawn from legislation (both primary and subordinate), jurisprudence, textbooks, articles, conference papers, drafting manuals, originating from a multiplicity of Commonwealth countries (for

² Consultant, Legislative Services. Former Chief Legislative Counsel of Canada and former President of CALC (2005-2007).

example, Australia, Bangladesh, Canada, India, Malaysia, New Zealand, Singapore, the United Kingdom), as well as from other countries such as Ireland and the United States.

Another interesting feature is that the author provides hundreds of examples to illustrate and explain the principles, rules and drafting problems, as well as possible solutions, that are discussed in the book and which, more often than not, are rather complex in nature and would otherwise be difficult to understand without the examples that are generously provided. And what is just as important is that Mr. Salembier goes beyond simply providing examples of what might constitute a bad draft in given circumstances and what would be a much better draft. He also explains why a certain way of drafting a particular provision would be bad drafting and why a proposed redraft would achieve its objectives much more effectively. Not only that, but he takes the time to walk the reader through the process of moving from a draft provision that is not particularly effective to a redraft that achieves its objective. A good illustration of this is how, in his chapter on reducing complexity, he starts off with a complex provision and gradually moves towards a greatly simplified version of the provision, providing explanations at each step of the process leading to a simplified version.

Mr. Salembier's analyses of the various drafting issues and possible solutions are consistently thorough and well balanced. One may not always necessarily agree with the views expressed or the conclusions reached by the author (and I hasten to say that I share most of his views and conclusions), but one is assured of finding the various arguments and explanations that will help them identify the best option to resolve their drafting problems.

In addition to fully discussing what I would call the *standard* issues and rules relating to legislative and legal drafting and statutory interpretation (for example, composing a legislative sentence, drafting definitions, consistency of expression), the author does not hesitate to tackle more difficult matters such as deeming provisions, Henry VIII clauses, or the highly technical issues relating to the drafting of *coordinating* or *conditional* provisions (where two or more bills before the legislature would amend the same provision).

A full chapter is dedicated to Interpretation Acts and how they can assist both legislative and legal drafters. Along the way, the author suggests various improvements that could be made to existing Interpretation Acts in order to make them even more relevant as drafting tools. This is a particularly important chapter given that some drafters tend to forget that their Interpretation Act can be not only a useful interpretation tool, but also a useful drafting tool.

The book contains a number of other chapters that I find of particular interest. Two of them deal with contemporary matters, namely plain language drafting and computer-assisted drafting. In his chapter on plain language drafting, the author discusses at great length, and in a very enlightening and balanced way, the various positions and views held by plain language promoters, the techniques that are proposed to make the laws easier to understand, as well as the benefits and risks associated with the various approaches discussed.

Mr. Salembier dedicates a full chapter to what the author calls the *logical challenge function* of the drafter. He provides a good analysis of this particular role that the drafters cannot ignore if they are to properly translate policy decisions into effective law.

One of the key features of the book in my view is Mr. Salembier's dedication of a full chapter to the topic of best practices. He has grouped together a number of useful tips that, although not all directly related to drafting *per se*, could, if implemented, make the life of a drafter much easier and could have an important impact on the quality of the documents that are drafted.

Now, as to the new elements in the 2nd edition, the 1st edition contained 13 chapters and 549 pages, but this new edition contains 17 chapters and 769 pages. The four added chapters deal with gender-neutral drafting (chapter 4), transitional and savings provisions (chapter 8), drafting in a multilingual jurisdiction (chapter 14), and drafting to limit corruption (chapter 16).

The topic of gender-neutral drafting was already discussed in the 1st edition as part of chapter 3. In this 2nd edition, given its importance in current legal and legislative drafting, the topic is dealt with as a separate chapter. The chapter contains useful suggestions on how to ensure men and women are treated equally in legal and legislative texts, but it does not specifically address the issue of multiple genders, which many drafters are now struggling with.

In chapter 8, Mr. Salembier deals with transitional and savings provisions. The chapter is short, but does provide essential information on why these provisions are needed and how they should be used in legal and legislative documents. Personally, I would have hoped the author would have taken the opportunity to shed more light on the complex issue of the retrospective or retroactive application of legislation, although I realize that such a topic is usually dealt with in textbooks on statutory interpretation.

Drafting in a bilingual or multilingual jurisdiction can be a real challenge, as the author would know through experience. Chapter 14 touches on what I would consider the main aspects associated with the requirement to produce legislation in more than one language. Even though this new chapter is one of the shortest (only 10 pages), the reader will have a much better understanding of the difficulties entailed by the drafters who have to prepare bilingual or multilingual legislation. Mr. Salembier does not directly address a few issues that in my view really need to be emphasized, and that is the importance for a bilingual drafting office using the co-drafting approach of hiring truly bilingual drafters who can both fully understand, and comment on, each other's draft. I would also like to add that, for co-drafting to work effectively, the two drafters must work together from the very outset, including developing the legislative scheme or outline of their proposed legislation together. My final comment on this chapter is that the jurilinguists that Mr. Salembier refers to as important partners in a co-drafting environment are hired not only to ensure the equivalency

of both language versions, but also (and this is just as important) to ensure the linguistic quality of each language version.

The most surprising new chapter, in my opinion, is chapter 16, which deals with ways drafters can use their expertise to help reduce corruption in their jurisdiction. I should hasten to say that I am no longer surprised to see that topic being discussed in a textbook on legal and legislative drafting after having heard Mr. Salembier deliver a paper on that topic at the last conference organized by the Commonwealth Association of Legislative Counsel and held in Melbourne, Australia, in 2017. It had never crossed my mind that drafters could play an indirect but important role in reducing the potential for corruption in their country simply by making sure they are more cautious in the way they draft provisions conferring discretionary powers. The author is of the view that

legislative counsel can make a significant contribution to determinacy in the law, and thereby reduce the potential for corruption (...) by avoiding subjectivity in rules; and (...) by limiting the conferral of discretion.

The chapter is short (only 14 pages), but is definitely an eye-opener for anyone drafting provisions dealing with the conferral of discretionary powers.

The new features contained in the 2nd edition of Mr. Salembier's book are not limited to the addition of several new chapters. There are also many new elements (resulting from recent court decisions for instance) scattered here and there throughout the chapters that already existed in the first edition. I will not deal with each single new element, but I would like to focus on a few of these.

Serial commas may not at first glance appear to be a major issue, but oddly enough, they can have a serious impact on how certain provisions are interpreted by the courts, as Mr. Salembier points out. He provides food for thought in that respect in chapter 2 of his book.

Chapter 6 has a segment on definitions to avoid. The author has fleshed out a few cases where definitions should be avoided, including an interesting discussion on the inappropriateness of creating completely new words through definitions or proposing unduly artificial definitions. One might also be interested in Mr. Salembier's discussion on whether or not to use an abbreviation as the defined term in a definition.

Using plain language in the drafting of legislation or other legal documents remains a hot topic many years after it was first proposed as an important means of facilitating access to the law. In chapter 13, which deals exclusively with plain language drafting (as chapter 11 of the 1st edition did) and happens to be the longest chapter of the book (14 pages more than in the 1st edition), the author provides a most enlightening discussion on the pros and cons of plain language drafting. This is definitely one of the best analyses of plain language drafting that has come to my attention so far.

The last new feature I would refer to is Mr. Salembier's discussion on machine translation (discussed in both chapters 14 and 15). This is a rather delicate issue. I for one feel that *machines* will never be able to capture all the nuances associated with legal translation, but Mr. Salembier does put forward a number of arguments that would in my mind justify using machine translation to assist *in some regards* with the translation of legal documents and even legislation.

Clarity for Lawyers

Mark Adler & Daphne Perry, published by Law Society Publications; London, 2017

Reviewed by Duncan Berry³

Introduction

This book is aimed at getting lawyers to write more clearly. Although specifically targeted at lawyers and law-makers in England and Wales (from judges and legislators to paralegals and law students), there is no reason I can think of why it should not have been targeted at all English-speaking lawyers and law-makers regardless of where they are from.⁴

Regrettably, lawyers have a reputation for obfuscatory writing and, although this book is designed, if not to eradicate this altogether, then at least (if read, and implemented by its target audiences) to bring about a significant improvement in the readability, intelligibility and usability of their writing. A good book on getting lawyers to write more clearly for their audiences is to be welcomed.

According to the authors, the book is designed—

- to help lawyers work more effectively and more efficiently, for their own benefit and for that of anyone affected by their work (which is all of us); and
- to make the law more transparent, so that its benefits and obligations are not lost in a tangle of verbiage.⁵

The book, which comprises over 300 pages and is divided into five parts (which in turn are subdivided into 30 chapters) and three appendices, provides an extremely comprehensive coverage of the topic. It is engagingly written and well structured. I found the book not only instructive but also entertaining, with its many pertinent examples, amusing anecdotes and cautionary tales. As the authors very sensibly realise, by far the best way to argue their case is through the use of examples.

Since the book is in its third edition, it is pertinent to ask what is new. New chapters have been added—

- suggesting a practical approach for those who want to start improving their writing at once (chapter 8: how to start);

³ Consultant Parliamentary Counsel; SJD, LL.M, MPP, GDCM; barrister-at-law, England & Wales, New Zealand, New South Wales, Tasmania and Hong Kong.

⁴ The Law Society bookshop's website will not accept orders from anyone who does not have a UK postcode. However, there is a note on the book's dedicated website <www.clarityforlawyers.com>, which has a link to Wildy's, a legal bookshop in London. The book can be purchased from Wildy's.

⁵ At the risk of being seen to be pedantic, one would have thought that legal writing was concerned with much more than making the law transparent. Surely all legal documents, and not just the law itself, should be seen to be transparent. Also, do the references to 'benefits' and 'obligations' cover the field? I think not: what about 'detriments' and 'prohibitions and restrictions' for example?

- outlining what software can do to help improve clarity (chapter 21: use of computer aids); and
- suggesting easy, achievable ways to get user feedback on documents (chapter 22: testing documents’);

Also largely new are—

- Part B (what constitutes good writing);
- Part D (how misunderstandings arise); and
- Appendix A (a legal writing workshop for teaching lawyers to write more clearly).

Part A

The book begins with a wide-ranging review of what is wrong with much current legal writing. As the authors stress, there is a clear relationship between good, clear writing and good, clear thinking: if you don’t have one, it’s very hard to have the other. The authors then discuss what is wrong with traditional legal writing (often referred to as legalese).

The authors provide copious examples showing how legalese wastes people’s money; reduces lawyers’ earnings; holds up commerce and people’s lives; is imprecise; causes unnecessary and sometimes expensive mistakes; and frequently fails to achieve the writer’s purpose. Like the authors, I suspect that there is an additional factor: the desire of lawyers to ensure that their expertise appears even greater than it is, rendering the relevant law more inaccessible to lay persons than it really is. The authors believe (as I do) that most people, whether lawyers or not, want legal language to convey meaning from one person to others *accurately* and as *precisely* and *efficiently* as possible.

Part B

This Part deals with what constitutes ‘good writing’. The authors discuss:

- what are the legal writer’s aims;
- who says what’s right;
- what is plain language;
- lawyers’ concerns about plain language;
- the need for thought (in preparing and composing a legal document).

After a brief discussion, the authors somewhat provocatively ask ‘who says what’s right’? Their answer seems to be that people decide this over time. As they rightly in my view point out, if a language is to function satisfactorily, it requires a high degree of stability. And I would certainly agree that communication needs a great deal of consensus about grammar and the meaning of words and that stability is essential if we are to understand each other.⁶

⁶ This is crucial. Solicitors should be writing for the benefit of their clients not their colleagues!

However, some flexibility is needed if the language is to develop and adapt to changing circumstances.

The authors say, rightly in my view, that it makes no sense to say that the modern style is right and legalese wrong. I believe they are on the right track when they argue that, because they work more efficiently than legalese, the practical guidelines they give in Part C should be adopted, and so become standard.

The authors conclude this Part by providing a comprehensive discussion of what constitutes ‘plain language’ (or as some Anglophones seem to prefer ‘plain English’). They canvas various definitions of plain language coined by other writers saying what plain language is and what it isn’t.

Part C

This Part is arguably the most important part of the book. The authors convincingly demonstrate how lawyers can write more effectively. In so doing, they canvas a large range of topics relevant to producing this outcome. These topics include starting a document; ‘being human’; organising a document; formatting a document; correct punctuation; undue repetition; using definitions; ensuring consistency (of language); appropriate paragraphing; constructing sentences; choosing words; writing persuasively; editing; using computer aids; and testing documents.

In chapter 9 on ‘being human’, the authors advocate the adoption of gender-neutral wording (which I wholeheartedly support). As those lawyers who are legislative counsel like myself will be aware, many (if not most) legislative drafting offices of Anglophone countries and territories have for some time adopted a policy of avoiding the male gender specific pronoun in their legislative documents.

In chapter 10, the authors provide lawyers with sound advice on how to effectively organise their documents, such as ‘putting the main message first’. This is generally sound advice, but if a lawyer needs to set out a step-by-step process, then it seems to me more appropriate to specify the steps in the order they are likely to occur (regardless of the importance of a particular item).

One issue that the authors did not address with (but I believe should have) is that of ‘scatter’. This arises when the writer fails to keep related provisions together, so that readers are confronted with the daunting task of trying to mentally process text that is scattered over the document or perhaps over two or more documents.

The contents of chapter 11 (Format) go wider than mere formatting and I would have chosen a title like ‘Pictorial Presentation’ or ‘Document Design’. Nevertheless, the authors do offer some useful advice designed to help readers negotiate their way around legal documents. Like me, they advocate using ragged right-hand margins for text. This is because, although they may not look so neat, they do make neighbouring lines easier to

distinguish from each other and prevent odd spacings (called ‘valleys’), especially in narrow columns.

The authors also advocate the use of indented paragraphs or lists to help readers navigate their way around a document. I agree with the authors that to create a good list—

- each listed item should make good sense, in good English, when connected with the introductory words;⁷ and
- each such item should have the same grammatical (or ‘parallel’) structure.⁸

Although I agree with the authors that algebraic formulae rather than straight prose should be used for expressing complex calculations, I believe there is considerable merit in using the ‘step-by-step’ approach for calculating sums of money and the like. Other suggestions are for the inclusion in legal documents of photographs, graphs and other images⁹ and for the use of flowcharts, but, significantly in my opinion, the authors fail to mention algorithms, although the example designed to help jurors apply the law to facts looks to me suspiciously like an algorithm.

The authors then provide an instructive and wide-ranging discussion of punctuation (chapter 12). I have never understood why some lawyers have an aversion to punctuating sentences in their documents. Even in the 21st century, there are lawyers who seemingly refuse to punctuate sentences in their legal documents.

In chapter 14, the authors provide a comprehensive discussion on the use of definitions in legal documents. They suggest restricting definitions (as with all other clauses) to those that pass the purpose test: ‘what is it for?’ They also rightly urge lawyers to eschew such unhelpful expressions as ‘unless the context otherwise requires’ or ‘unless the context otherwise permits’.¹⁰

In giving excellent advice on consistency (chapter 16), the authors (appropriately) quote E.L. Piesse:

⁷ I have recently been presented with a draft lease that contained full sentences inserted into listed text that was connected to the introductory words. Worse still, the lawyer concerned refused to correct the syntax error when it was pointed out to her on the ground that the ‘lease was in standard form’!

⁸ Items are not ‘parallel’ unless they share the same grammatical structure.

⁹ If a picture is worth a thousand words, then a good concrete example is worth at least several hundred words of further definition and explanation. (J.F. Carter, Lessons in text design from an instructional design perspective, in *Designing Usable Texts*, R.E. Waller and T.M. Duffy, ed. (Academic Press: Orlando, 1985 at 93 and 95).

¹⁰ Particularly now all references can easily be checked by computer software.

... sensible drafters follow the ‘consistent terminology’ rule. Never change your language *unless* you wish to change your meaning, and always change your language *if* you wish to change your meaning.¹¹

In discussing the important topic of ‘sentences’ in legal documents (chapter 17), the authors aptly point out not only that absurdly long sentences are at the heart of legalese,¹² but also that possibly the most important single way to ease understanding of a legal document is for the writer to write short sentences. They are right to point out that, however many loopholes need to be plugged, there is no need to deal with all of them in one sentence. In fact, not only is sentence-length a problem for readers, so is the tendency of lawyers to overload a sentence by cramming as many ideas as possible into it. In this context, they quote Lady Justice Arden:

I would like to start by saying that there is something which I definitely do not find helpful [in legislative drafting], and that is the tendency of some drafters to see how many ideas and concepts they can pack into a single clause. This can lead to great loss of clarity¹³

The authors provide excellent advice on whether the active or passive voice should be preferred, generally tending towards the active voice. In this context, I suggest that writers should always opt for using the active voice, unless there is a good reason for preferring the passive.¹⁴ One of the main problems involving the use of the passive voice is the so-called ‘truncated passive’, as in ‘something must be done’. The difficulty for readers is that they are not told ‘who is responsible for ensuring that the ‘something’ is indeed done’!

The chapter concludes with a discussion of positive or negative sentence structure. As the authors argue, using a positive phrase (or clause) is generally more direct and may be shorter than the negative. However, research also shows that, in conditional sentences, two negatives are generally easier to understand than a positive condition followed by a negative main clause and negative condition followed by a positive main clause.¹⁵

Another important issue affecting readers’ ability to understand a legal document is sentence overload, where the writer compresses too many ideas into a single complex sentence. The

¹¹ E.L. Piesse, *The Elements of Drafting*, 9th ed., J.K. Aitken (Law Book Company: Brisbane, 1995). Summarised by Peter Butt, *Modern Legal Drafting*, 3rd ed., (Cambridge University Press: Cambridge, 2013) at 114.

¹² Who but a lawyer would compose an 1,100-word sentence such as the one reproduced (in Butt, 2013, p. 180) from the modern standard mortgage of a major New Zealand bank?

¹³ [Dame Mary Arden \(Arden L.J.\) “The impact of judicial interpretation on legislative drafting” \(2008\), *The Loophole 4* at 6.](#)

¹⁴ And there indeed are circumstances in which the passive voice is to be preferred.

¹⁵ P. Wright and P. Wilcox, ‘When two noes’ nearly make a yes: a study of conditional imperatives’, in *Processing of Visible Language*, P.A. Kolers, M.F. Wrolstad, and H. Bouma, ed. (Plenum Press: New York, London, 1980).

authors mention this issue only in passing.¹⁶ I think it deserves fuller treatment. Similarly, I believe the authors should have devoted some space to addressing the problems of complex conditional sentences; likewise to provisos, which is not only legalese but are inimical to clear writing.

In discussing another important topic, ‘choosing the (right) words’ (chapter 18), the authors rightly advocate the removal of what is not necessary (excessive detail). But how can ‘what is necessary’ be determined? They say this can be ascertained by applying the purpose test: Does this word (or phrase, sentence, paragraph) have a purpose? If not, leave it out. As the authors rightly maintain, many legal documents are full of redundant details and these need to be removed.

In other legal documents (leases for example), there is sometimes unnecessary duplication or overlap which, as the authors mention, is liable to confuse readers. Some lawyers try to fix that problem by including a catch-all generalisation intended to cover all possible circumstances, linking it to the detailed list by such phrases as ‘Without prejudice to the generality of the foregoing’ or ‘or any other ...’ But, as the authors argue, this can be not only pointless but also dangerous. They rightly maintain that a better approach is to state the general rule first, and then consider whether any particular borderline cases should be explicitly included or excluded: I agree.

The authors also criticise the use of what they call ‘buried verbs’ (which in my experience are usually described as ‘nominalisations’). These are nouns derived from verbs. Nominalisations, apart from reducing the illocutionary effect of the sentence, invariably involve using more words than if the writer had simply used the verb on its own.¹⁷

Other kinds of wordiness condemned by the authors include cases in which one or two words can replace other types of phrase with no loss of meaning¹⁸ and ‘doublets’ and ‘triplets’.¹⁹ Yet other criticisms levelled by the authors are lawyers stating the obvious; using archaic words; and phoney plurals, such as ‘monies’. A further topic on which the authors offer valuable advice relates to the proper use of the auxiliary verb ‘shall’.²⁰ They rightly maintain that this verb should be used only as a verb of command or obligation. Other useful advice deals with the proper use of abstract words, pronouns, and prepositions. The authors rightly criticise the use of clichés in legal documents and effectively show what is wrong with using them in their documents.

¹⁶ Above n. 13.

¹⁷ For example, ‘make an application for a licence’ rather than the simpler, more direct ‘apply for a licence’.

¹⁸ For example, by replacing ‘for or on behalf of’ with just ‘for’.

¹⁹ When lawyers (and others) use pairs of words of identical meaning, where one, or perhaps either, can be used instead of both. One common example is ‘null and void’.

²⁰ See Garner’s *Dictionary of Legal Usage*, 3d ed. (Oxford University Press: Oxford??, 2011) at 952.

In chapter 19 dealing with ‘persuasion’, the authors advocate that a legal document should persuade its readers that it would be a waste of their time to challenge its effect. Although I generally agree with much of the advice offered in this topic, not all legal documents are persuasive by nature. For example, a statute is normally didactic and coercive and is not usually designed to persuade its audiences. If I am correct in believing the much of the authors’ advice could apply to documents that are not necessarily meant to persuade (such as ‘use visual aids’), I think the authors should have confined their advice in this chapter to documents that are, by their nature, intended to persuade and have distributed the other advice to other relevant chapters of their book.

In their discussion of ‘editing’ (chapter 20), the authors stress how important it is for writers to check (and consequently edit) their documents before sending them to the intended recipients. As the authors rightly emphasise, our minds tend to run along rails, especially when performing familiar activities. All writers, and particularly writers of legal documents, should try to look at the documents from the audience’s perspective.

As the authors point out, the writer of a document has a tendency to become over-familiar with the document and it is therefore advisable (if not imperative) to have a ‘fresh pair of eyes to scrutinise the documents before they are sent to their recipients. In addition to having all draft legislative documents subjected to peer review, most (if not all) legislative drafting offices now have professional editors to scrutinise and edit documents leaving those offices. I would strongly urge all law firms that have not done so to employ competent editors to check and edit documents before they are sent to their recipients.

The authors rightly extoll the virtues of computer aids to help improve the readability, intelligibility and usability of legal documents. As they emphasise, even the best writers are fallible and I have no doubt that the application of computer software to draft legal documents can help, not only to identify errors, but also help to enhance the quality of those documents. It can also help to ensure consistency in the use of language. However, as the authors acknowledge, computer software does have its limitations and so writers need to be aware of these.

As a long-time advocate of usability testing for major legislative documents, I was delighted to find that the author had included chapter 22?? on this topic in their book. There are a number of methods for testing documents, some simple and some more sophisticated and complicated. The authors discuss some of them. One is peer review; another is the application of a computer-software program or a readability formula, such as the ‘Flesch Test’. But I agree with the authors that readability formulae do have shortcomings that render them of limited value. More sophisticated methods include comprehension tests, structured interviews and retrospective think-aloud protocols. But the problem with these testing methods is that, although much more effective than (say) readability formulae,

they are time consuming and costly to undertake and so can only be justified for testing the most important of legal documents, such as major new legislation.²¹

Part D

In Part D, the authors deal with the various causes of misunderstanding and demonstrate how they arise. They begin this part by discussing the closely related topics of vagueness; ambiguity; and miscuing.

Whereas vagueness is an absence of any clear meaning, ambiguity is a choice between alternative meanings. As the authors demonstrate, there is no clear boundary between the two.

One aspect of vagueness that I found of particular interest is the lawyers' love of the phrase 'and/or'. The authors single out this expression for discussion because of its exceptional contrast between vagueness and apparent simplicity and because of its malign grip on the legal mind. I agree absolutely that too often the expression is a lazy alternative for the writer who has not considered which option ('and' or 'or') is appropriate, thus transferring to readers the task of elucidating meaning from the writer's words.

In the chapter on 'miscuing' (chapter 25), the authors address the problems arising from what I call 'stacked adjectives', which arise when a noun is preceded by two or more adjectives and it is not clear whether one of the adjectives qualifies the noun or another adjective (for example, '*Japanese auto wrecker*' and '*hot oyster mushroom salad*'). When noticed, a 'miscue' draws attention to a syntactic ambiguity, as the reader realises that the writer could not have intended the reader's initial interpretation. While the authors were correct to address this issue, I was a little puzzled as to why the topic was not addressed in chapter 24 (ambiguity), bearing mind that 'miscuing' is a form of syntactic ambiguity.

It is axiomatic that writers should write their documents to match the expectations of the readers comprising their target audience. The authors demonstrate that, for a number of reasons of which writers of documents may be unaware, readers may be misled by what they read. Obviously, if readers are misled, communication will be ineffective. The authors identify these reasons and aptly show how readers can be misled. Reasons include context, suggestion and readers' own views. The authors also show what can be done to alleviate the problem.

In their chapter on the boundaries of literacy and intelligence (chapter 28), the authors address the problems of communicating written text to persons whose literacy or intelligence may be limited. In quoting the English National Literacy Trust, around 16 per cent (or 5.2 million adults) have literacy levels at or below those expected of an 11-year-old. This is always going to mean that, even if legal writers follow the advice given in the book,

²¹ See D.E. Berry, "Techniques for evaluating legislation", *The Loophole*, March 1997 at 31-47.

they are will always be facing an uphill battle in communicating the contents of even relatively simple legal documents to people who have a limited level of literacy.

The authors conclude Part D with a valuable discussion of the problems involving translating text from one language to another and relating to the interpretation of translated text (chapter 24). They end the chapter by offering useful advice on how to write to reduce the problems. They maintain that, in general, the easier the text is for the native speaker, the more likely it is to be translated accurately. I agree

Part E

In the final Part, the authors briefly discuss the rules of interpretation applicable in common law countries in so far as they are relevant to legal writing. The discussion deals with just five of these rules: the *eiusdem generis* rule (the limited class rule); the *expressio unius exclusio alterius est* rule (the exclusion rule); the *contra proferentem* rule (the principle that a provision will be construed against the party responsible for it); the *noscitur a sociis qui non cognoscitur ex se* (the associated words rule); and the *falsa demonstratio non nocet* rule (the principle that a document will not be invalidated due to an inaccurate description).

One aspect of this part surprised me though. The authors say it is a mistake to rely on the rules of interpretation when drafting. I am not sure about other legal documents, but I doubt whether many experienced legislative counsel would disregard the rules of interpretation when drafting legislation.

Appendices

The authors have also included three appendices. Appendix A provides an outline for the conduct of a clear writing workshop. The authors suggest that a half-day for the workshop should suffice. However, after reviewing the outline, I would venture to suggest that several half-day workshops would be needed to cover all of the aspects of clear writing addressed by the book.²²

Appendix B contains analyses of examples of poor legal writing, with examples showing how the writing could be improved to make it more readable, intelligible and usable.

Appendix C contains a number of useful precedents for some common legal documents, such as the lease of a flat in a multi-story building owned by a management company in which the 'tenants' hold shares. Although precedents can be useful to lawyers, particularly lawyers who are pressed for time, they should never be followed slavishly and those lawyers who use them should carefully review what is and what is not relevant to achieving the purposes of their documents and to make such modifications as may be necessary to ensure that those purposes are achieved.

²² I have conducted several series of legal writing workshops, with each series comprising some 18-20 3-hour workshops.

Bibliography and index of cases

The book contains a very comprehensive bibliography and an extremely useful index of judicial decisions relevant to the issues discussed in the book.

Conclusion

I commend this book to every lawyer who engages in any form of legal writing, whether it be writing letters to clients, drafting leases or other kinds of contracts, writing judgements or drafting legislation. Bearing in mind that relatively few university law faculties and professional law institutions conduct even optional courses on effective legal writing (let alone compulsory ones), I urge all solicitors and other lawyers engaged in legal writing not only to have this book in their libraries but also to read the book and to implement the excellent advice that it contains.

I would further venture to suggest that not just lawyers but anyone who is engaged in written communication could benefit from reading this excellent book and from practicing what it preaches.
