

Introduction

The New Zealand Bill of Rights had an awkward start in life from which it has never wholly recovered. That is why I have titled the address this evening “The New Zealand Bill of Rights: Experience and Potential”.

I would like to begin by explaining the background to the statute as eventually enacted on 28 August 1990, how that led to a narrow focus on criminal justice and why it has only recently begun to be applied across the range of common law and statute. That history contrasts with the United Kingdom experience which drew on and learnt from our difficulties when enacting and implementing the Human Rights Act 1998. I will then outline the key features of the New Zealand statute, including the responsibility of the courts as the judicial branch of government to interpret and apply the common law and other legislation and exercise statutory discretion in compliance with the Bill of Rights.

That will lead on to a necessarily brief summary of the impact of the Bill of Rights in criminal processes and a pointer to its as yet largely unrealised impact in the civil justice system. To facilitate consideration the text of the Bill of Rights and a schedule commenting further on the criminal processes experience and listing a range of civil justice questions have been provided.

Inauspicious beginnings

Two factors significantly affected the early history of the Bill of Rights. First, the statute was not the product of a constitutional settlement or cataclysmic event and there was significant public and political opposition to its enactment. The Labour Government, elected in 1984, had included a promise of constitutional reform in its election manifesto. In April 1985 it released a White Paper proposing and detailing a bill of rights as supreme law for New Zealand. Extended hearings before a Select Committee of Parliament demonstrated a high level of opposition to that proposal. It was seen as undemocratic, as transferring political power to unelected judges and as introducing unacceptable uncertainty into the law. Far from a groundswell of support, there was no particular constituency in favour. The New Zealand Law Society was strongly opposed, as were many political and public and special interests, including Maori who objected to having the Treaty of Waitangi brought into the legal system in that way. The Select

Committee concluded that the Bill should not proceed in that form but that a modified set of provisions should be passed as an ordinary statute. The other major political party, the National Party, opposed any Bill of Rights but the modified Bill was passed in the dying stages of the Labour Government after a vote in the House of Representatives which divided along party lines.

Even so, the Bill of Rights quickly became a significant part of the workload of the Court of Appeal and there were 577 appeals raising Bill of Rights issues in the first 13 years. But, and this is the second factor affecting its early history in the courts, the subject content of those appeals was limited. Until recently, cases were almost wholly focussed on criminal justice (including prison administration), but with free expression cases notable exceptions. That narrow focus was due in part to a failure to provide an adequate education program at the outset for judges, lawyers and officials to develop an understanding of the reach of a Bill of Rights across the board.

When the United Kingdom came to enact the Human Rights Act 1998 implementing as domestic legislation the European Convention on Human Rights, those directly concerned in developing their legislation had been made aware of that pitfall and, also, in some respects drew from our statute. Importantly they allowed two years following its enactment before it came into force and during that period a concerted education program for judges, lawyers and officers of public authorities gave early understanding of the wide reach of their statute. That is reflected in the United Kingdom experience since the 1998 Act came into force in 2000. A recent Lexis search of United Kingdom Law Journals for the Human Rights Act 1998 yielded 1818 hits including 519 articles and comments on the interaction of the 1998 Act and the common law.

Lord Irvine, as Lord Chancellor, reviewed the respective roles of Parliament, the Executive and the Courts in his Durham lecture published in [2003] Public Law 308 under the title “The Impact of the Human Rights Act Two Years On”.

At p.309 he said:

“Parliament has two principal interests in the Human Rights Act. The first is to defend its legislation and its right to legislate – if it wishes – in spite of the Act; that is to maintain Parliamentary sovereignty. The second is Parliament’s role in scrutinising legislation. The former

shapes Parliament's relationship with the Courts, the latter with the Executive."

Next, at p.323 he said:

"...the Executive must continue to build Convention standards into decision-making at all levels, so that decisions are proportionate, rational and respectful of fundamental rights. And it means it must be robust in the face of human rights challenges, so that it can vigorously demonstrate and defend the merits of its decisions. After all, contested cases are sometimes necessary to help develop the rights-based culture we want."

Then, as to the role of the Courts, at pp 315 and 316 he said:

"In examining what impact the Act has had on the Courts, and on our system of law, the overriding theme that emerges is balance: balance between scrutiny and deference; between the individual and the community; and between interpretation and declarations of incompatibility."

"... The balance between intense judicial scrutiny and reasonable deference to elected decision-makers is a delicate one to strike. But the judiciary have struck it well; and I welcome that. Whilst scrutiny is undoubtedly an important aid to better governance, there are areas in which decisions are best taken by the decision-makers entrusted by Parliament to make them. This may be for reasons of democratic accountability, expertise or complexity. But we recognise that we cannot simply recite the need for 'deference' or 'self-restraint'. Rather, we must, where appropriate, argue the case for it carefully and persuasively. This often involves 'political advocacy' – the equivalent of 'Brandeis briefs' in the US Supreme Court – by which Government counsel gives the Court a thorough analysis of the policy behind legislation."

In my view those considerations are equally relevant under the New Zealand Bill of Rights.

What is required is a reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their human rights secured. Given the breadth of the language of human rights instruments, the

nature of the issues arising under a Bill of Rights and the need for balancing rights and interests, inevitably there will be a diversity of judicial views on various issues in any appellate court. And that is certainly reflected in judgments of the United Kingdom Court of Appeal and the House of Lords under the Human Rights Act 1998 as in Canada and the US, for example *R (Pro-Life Alliance) v. British Broadcasting Corporation* [2004] 1 AC 185; and in the Privy Council, *Roodal v. State of Trinidad and Tobago* [2004] 2 WLR 652.

Reverting to the New Zealand experience, there were two important early consequences of the awkward start in life of the Bill of Rights. The first was that the Bill of Rights came to be perceived by many as a rogues' charter, rather than as a balanced protection of our liberties reflected through private law and public law as well as crime. The second was that time pressures in criminal appeals, particularly given our wide pre-trial ruling regime, when some particular appeals were not comprehensively researched and argued, affected some early decisions. That was unfortunately compounded when several early cases, which set the early tone, had come up in 3 judge courts, but were later reversed or modified by 5 or 7 judge courts – to the dismay of many academics who viewed the later majority judges as dinosaurs.

In the result, we did not get off to a good start.

On a more positive note, the Bill of Rights has had a major but less publicised impact on the regular functioning of Government, and not restricted to the duty of the Attorney-General under s.7 to report to Parliament any provision in a Bill which appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights. The s.7 process thus allows the Legislature to make its own careful ultimate judgment whether to accept the Attorney-General's report and modify the provision or whether, notwithstanding that advice, to enact the provision the subject of the s.7 report. The important further point going beyond s.7 is that Governmental agencies, including local government, are required to build Bill of Rights standards into decision-making at all levels. So that wider impact affects day to day administration and policy development within Government.

That experience reflects the important reality that developing a culture of respect for human rights depends primarily and ultimately on influencing all our institutional policies and practices through a widely shared sense of

entitlement to those rights and of personal responsibility and respect for the rights of others in the society of which all New Zealanders are part. Litigation plays an important lesser part in assuring compliance with basic legal standards and challenging ways of thinking. But litigation should not lead to lawyers and judges taking over responsibility for training public authorities, for general awareness raising - and for determining the ultimate balancing of values where, as we have every reason in New Zealand for assuming is the case, the Legislature, the Executive, bodies and persons performing public functions and officials are conscientiously seeking to meet their responsibilities under the Bill of Rights.

Key features of the 1990 Act

I turn to the four key features of the 1990 Act. First, it is more limited in its express listing of particular affirmed rights than the United Kingdom Act or the Canadian Charter or the International Covenant on Civil and Political Rights. Thus, there is nothing comparable to the much utilised Article 8 in the United Kingdom expressly focussing on "... the right to respect for his private and family life, his home and his correspondence"; and the New Zealand counterpart (s.25(a) and (b)) of Article 6(1) entitling everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, is confined to criminal charges and does not extend, as Article 6 does, to the determination of civil rights and obligations. As well, the 1990 Act does not speak of equality rights or property rights or economic or social rights.

The obvious point is the clear need for care in invoking overseas decisions. And, while a similarity in various respects of the New Zealand Bill of Rights to the Canadian Charter initially prompted ready reference to Canadian Supreme Court decisions, experience led to a more cautious use of that material and greater drawing on American, international and, now, United Kingdom decisions. As well, there are obvious differences in legal and social backgrounds and in societies and cultures. Jurisprudence in other jurisdictions provides valuable insights but can never be determinative of New Zealand law.

Second, the long title states the purpose of the 1990 Act as being: "(a) To affirm, protect and promote human rights and fundamental freedoms in New

Zealand; and (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.”

Section 2 goes on to affirm the rights and freedoms contained in the Bill of Rights. The governing words in para. (a) “affirm”, “protect” and “promote” express a positive commitment to existing human rights. But they do not resolve the difficult questions of which of the specified rights require social support (see *Mendelsohn v. Attorney-General* [1999] 2 NZLR 269) and the respective roles of the Legislature, the Executive and the Courts in those assessments. One current question is whether s.8's right not to be deprived of life requires positive public health steps to reduce infant mortality and to increase life expectancy.

Para. (b), too, necessarily affects the approach to interpretation in affirming New Zealand's commitment to international standards and norms. That linkage is reinforced by New Zealand's accession to the First Optional Protocol to the International Covenant which gives individual access to the United Nations Human Rights Committee where domestic remedies are exhausted or such remedies are not available.

Given that rights based focus it is not surprising that, although the Act lacks an express remedies provision, adequate remedies are given including, where appropriate in the absence of other remedy, public law damages for violation of rights (*Baigent's Case* [1994] 3 NZLR 667).

Third, s.3 is crucial and s.27 links with s.3(b). Section 3 works in 2 ways. First, s.3(a) requires acts of each branch of government to be Bill of Rights compliant. Second, s.3(b) requires acts of bodies and persons exercising public functions and powers to be Bill of Rights compliant.

Historically Bills of Rights were viewed as restraints on the powers of the State. But developments in the last 20 to 30 years have required reconsideration of that narrow focus. Erosion of the welfare state, the world wide trend towards privatising and contracting out various activities, the expanding strength of multi-nationals and national corporations far beyond State boundaries, mobility of capital and investment flows in the electronic age have changed the landscape and led to an increased focus on the application of the Bill of Rights to private entities.

In turn, this has led to a wider focus under s.3(a) on acts of government extending to government emanations; under s.3(b) to bodies and persons non-governmental in terms of s.3(a) but performing a public function under s.3(b); and an overlap where a private body is exercising powers under contract with the executive government. In that third situation at least two questions require consideration. First, do Bill of Rights responsibilities remain with the Executive and/or are Bill of Rights compliance standards contractually imposed on the private body explicitly or by implication? (*R (Heather) v. Leonard Cheshire Foundation* [2002] 2 All ER 936, 946). Second, can performance by a private body of regulatory obligations, or self-regulation constitute a public function?

Easier questions arise under s.3(a). Decisions of courts are acts of the judicial branch of government. Courts interpret and apply common law (including equity) or legislation. It follows that a court's act in interpreting and applying common law must be Bill of Rights compliant. A court's act in interpreting legislation and in exercising statutory discretion must be Bill of Rights compliant. In advising clients lawyers need to have in mind that ultimately the court will determine the common law and statutory interpretation answers, which will be Bill of Rights compliant even though only private parties may be involved in the dispute.

But s.3(a) is not a charter to rewrite the whole of the common law. There are two limitations. First, a court's role is confined to the common law rule engaged by a specific provision of the Bill of Rights – for example, process (s.27), defamation (s.14), discrimination (s.19), and extending to public policy assessments (s.5), for example in tort (duty of care, nuisance) and contract (restraint of trade, exclusion clauses, standard terms). In that second category (s.5), Fairgrieve, “State Liability in Tort” (Oxford, 2002) discusses the impact of the 1998 Act on the liability of public authorities in negligence and nuisance. Second, there is the general limitation, suggested by Brennan J in *Mabo v. Queensland (No 2)* (1992) 175 CLR 1,29-30 that the departure must not fracture the skeleton of principle of the particular doctrine of law.

The s.27 link with s.3(b) invites consideration of the scope and content of “the principles of natural justice” which tribunals and public authorities must observe. The White Paper, para. 101.68 noted that those “principles will have a varying application in different circumstances”. They clearly require notice of the case, opportunity to answer and an unbiased decision maker.

Difficulty arises in determining in the particular case the test for challenging a substantive decision, as distinct from a pure process challenge. Is it only for irrationality; or less stringently for *Wednesbury* unreasonableness; or, reflecting an appropriate human rights overlay, for proportionality. That, in turn, involves balancing scrutiny and deference and individual rights and other rights and interests. Where along the continuum the answer lies in the particular case has been a fertile field for debate in England and Lord Irvine's conclusion noted earlier suggests that the balance has been appropriately struck in the English cases. In New Zealand those difficult questions may be resolved through s.5, to which I shall come shortly.

Next, the focus of s.3(b) on the nature of the function or power being exercised in determining whether it is "public", raises some difficult questions. For example, some health, education, housing and welfare provision has been made historically (and for longer) by private providers, as well as by public providers. Again, what sports, media, religious, professional and trade organisations are amenable to judicial review and have their functions "conferred or imposed ... by or pursuant to law"?

Turning back to s.3(a), do acts of the legislative branch include resolutions and decisions relating, for example, to privilege and contempt and how far do the requirements of natural justice (s.27) extend (*Police v. Beggs* [1999] 3 NZLR 615)? Do acts of the executive branch extend to Government entities and what yardstick is applicable? And, as earlier noted s.3(b) provides a flow through to other bodies and officials.

Finally under this head, rather than assuming that the high point of the welfare state is the natural order which governs consideration of the impact of all subsequent change, I suggest we need to ask whether values are contestable in the balancing processes. Different societies arrive at different balances and at different times as between, for example, individuality and community, competition and cooperation, diversity and uniformity, economic well-being and social cohesion, efficiency and fairness, rights and responsibilities.

The fourth key to the working out of the 1990 Act is ss 4, 5 and 6. While they occur in the same part of the statute, each serves a different function. Section 6 is an interpretation provision. It requires that "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to

any other meaning.” It emphasises that a finding that another statutory provision is inconsistent with the Bill of Rights, and a possible declaration of inconsistency, is a rare and carefully considered decision. It parallels s.3 of the United Kingdom Act.

Section 5 prescribes the justification process for limiting the Bill of Rights in particular cases. Subject ultimately to s.4 it requires that the prescribed rights and freedoms “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The same test is applied as appropriate to each of the separate freedoms. The New Zealand Bill of Rights departs from the International Covenant and European Convention models under which each specific freedom provision contains a separate statement of the permitted limits. Section 5 calls for a balancing “proportionality” process (discussed in the two *Moonen* cases ([2000] 2 NZLR 9 and [2002] 2 NZLR 754)). It parallels the European Convention model processes and considerations of proportionality and democratic balancing discussed by Lord Irvine in his Durham lecture.

In passing, I note two further, as yet unexplored, questions which may arise on a s.5 assessment. What would be the impact of a binding market commitment for the efficient provision of public services, given that the contractor could be expected to have demanded a higher price had there been any risk of court-ordered non-enforcement of the contract? What would be the impact on regulatory regimes (for example, consumer credit) of a court-determined response to breach?

Section 4 bars a court from holding any statutory provision invalid for inconsistency with any provision of the Bill of Rights. It is a last resort where the interpretation and justifiable limitation processes mandated by ss 6 and 5 have still left inconsistency. The *Moonen* cases recognised the potential for resulting declarations of inconsistency and the Human Rights Act 1993, as amended in 2001, expressly allows for such declarations under s.19, the non-discrimination provision of the Bill of Rights.

The approach of the Bill of Rights and of the United Kingdom Human Rights Act points to a half-way house between extreme theories of absolute legislative power of Parliament and of judicial review striking down legislation as inconsistent with democratic values and the rule of law. Rather than theoretically anticipating confrontation, I expect that the

ordinary processes of Parliament and the Courts with ample opportunities for consideration and reconsideration will lead to cooperative dialogue between the two branches of government and will eschew unnecessary speculation about unrealistic possibilities of either branch of government taking an extremist exclusive stance.

Concluding comment on the impact of the Bill of Rights

Sections 21 to 26 are largely directed to criminal processes: s.21, unreasonable search and seizure; s.22, arbitrary arrest and detention; s.23, rights arising at various points in the process following arrest or statutory detention, including information rights and the right to consult and instruct a lawyer without delay, to be charged promptly and brought before a court or released, to refrain from making a statement and to be treated with humanity and with respect for inherent dignity; s.24, rights following charge; and s.25, minimum standards of criminal procedure essentially affirming rights reflected in the Crimes Act.

Many of the early cases concerned the right to counsel and what constitutes arrest and detention. After the jurisprudence settled down and the ground rules became understood my impression is that by and large Police practice incorporated Bill of Rights requirements. Search and seizure has proved more difficult but after numerous cases the Court of Appeal set out a list of principles to assist those working in the field, including busy trial judges, and eventually replaced the prima facie exclusion rule where evidence was obtained in breach of s.21 with a wider test weighing factors for and against admissibility. Difficult problems arise from the use of modern technology allowing off-premises recording of persons and their activities.

Overall the Bill of Rights has in my view made an important balanced contribution to the administration of criminal justice in New Zealand.

On the civil and public law side there is a developing awareness, assisted by information on the breadth of coverage under the United Kingdom Act, of the potential reach of the Bill of Rights on statutory interpretation and discretion and on the development of the common law in fields as varied as free expression, administrative law, commercial law, employment law, environmental and planning law, family law, education, health, housing and social welfare law, intellectual property and sports law.