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# A Bill of Rights for New Zealand

A White Paper

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# A Bill of Rights for New Zealand

A White Paper

*Presented to the House of Representatives by Leave by the Hon. Geoffrey Palmer Minister of Justice*

NCJRS

FEB 10 1988

ACQUISITIONS

BY AUTHORITY: V. R. WARD
GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1985

*Price $7.95*

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## 1. Introduction by the Minister of Justice the Hon. Geoffrey Palmer M.P.

It is the policy of the Government to introduce a Bill of Rights for New Zealand. Such a step is a big change in New Zealand's system of Government. It cannot be hurried. There needs to emerge a general consensus among the public before progress on the issue can be made. The publication of a draft Bill of Rights for New Zealand together with a commentary on its implications is the first step in the process.

The issues surrounding a Bill of Rights are not simple. But they need to be understood by as many people as possible. This White Paper aims to provide in a convenient form all the material necessary to background the issues. Every effort has been made to ensure the issues can be understood by all interested people. But, in addition, enough material has been added to deal with the technical legal issues which inevitably arise in an exercise of this kind.

A Bill of Rights for New Zealand is based on the idea that New Zealand's system of government is in need of improvement. We have no second House of Parliament. And we have a small Parliament. We are lacking in most of the safeguards which many other countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multicultural society.

The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will provide a source of education and inspiration about the importance of fundamental freedoms in a democratic society. It will provide a remedy to those individuals who have suffered under a law or conduct which breaches the standards laid down in the Bill of Rights. It will provide a set of minimum standards to which public decision making must conform. In that sense a Bill of Rights is a mechanism by which governments are made more accountable by being held to a set of standards.

The standards defined in the Bill of Rights need to be above alteration by a simple majority in Parliament. That is why a Bill of Rights must be a form of supreme law. Under the proposals in this paper the Bill of Rights will not be able to be repealed or altered by an ordinary Act of Parliament passed by a simple majority. Amendments would require the support of 75 percent of the members of Parliament or a majority at a referendum of electors.

The draft Bill of Rights in this paper recognises that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. This is why the Bill provides that the rights and freedoms enshrined in the Bill of Rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." It is a provision drawn from Canada's Charter of Rights.

The draft Bill of Rights involves giving more power to the Courts. Where any Act of Parliament, common law rule or official action is contrary to the Bill of Rights it can be declared invalid by a court. This element of the Bill of Rights is the key change in New Zealand's constitutional law. It is an important change but too much should not be made of it. Courts will only infrequently declare provisions in Acts of Parliament contrary to the Bill of Rights. In practical terms the Bill of Rights is a most important set of messages to the machinery of Government itself. It points to the fact that certain sorts of laws should not be passed, that certain actions should not be engaged in by Government. In that way a Bill of Rights provides a set of navigation lights for the whole process of Government to observe. And in the end I believe that will be the greatest contribution a Bill of Rights will make to improving our system of government.

No supreme law for New Zealand can be contemplated unless it contains appropriate recognition of the Maori as tangata whenua o Aotearoa. It is for this reason that the Bill of Rights recognises and affirms the Treaty of Waitangi as part of the supreme law of New Zealand. And the paper contains extensive discussion on the implications of that step. Because the whole issue is of greatest moment to the Maori this entire document is being translated into Maori and will be published in Maori as well as English.

It is important for people to understand how progress on the Bill of Rights issue will be made. This paper will be tabled in the House of Representatives. It should lie on the table for a reasonably lengthy period to allow people to study and absorb the implications of the document and to discuss it. Later in 1985 the document can be referred to a Parliamentary Select Committee representative of all political parties in Parliament. The Committee will be able to travel around the country holding hearings on the issues and make recommendations. No decisions will be taken by Government until this lengthy process of consultation is complete.

Everyone involved in this issue must understand that the Government has no particular commitment to any particular provision in this Bill of Rights. The purpose of the draft Bill is to engender debate and provide a focus for the issues. Nothing has

been set in concrete. I have approached the matter in this way in the expectation that the public debate can be constructive and non-partisan. A public debate about a Bill of Rights for New Zealand should concentrate on what New Zealanders have in common with each other, not on what divides them.

Geoffrey Palmer,
Minister of Justice, 1985.

## 2. Draft New Zealand Bill of Rights

### New Zealand Bill of Rights

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## New Zealand Bill of Rights

**An Act to institute as the supreme law of New Zealand a Bill of Rights in order to affirm, protect and promote human rights and fundamental freedoms in New Zealand, and to recognise and affirm the Treaty of Waitangi.**

*WHEREAS*

(1) New Zealand is a democratic society based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person;

(2) New Zealand in 1978 ratified the International Covenant on Civil and Political Rights;

(3) The Maori people, as tangata whenua o Aotearoa, and the Crown entered in 1840 into a solemn compact, known as Te Tiriti o Waitangi or the Treaty of Waitangi, and it is desirable to recognise and affirm the Treaty as part of the supreme law of New Zealand;

(4) It is desirable to affirm the human rights and fundamental freedoms of all the people of New Zealand without discrimination and to ensure their recognition and observance as part of the supreme law of New Zealand by the Parliament and Government of New Zealand.

*BE IT THEREFORE ENACTED* by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

PART I

*General*

**1. New Zealand Bill of Rights supreme law**

This Bill of Rights is the supreme law of New Zealand, and accordingly any law (including existing law) inconsistent with this Bill shall, to the extent of the inconsistency, be of no effect.

**2. Guarantee of rights and freedoms**

This Bill of Rights guarantees the rights and freedoms contained in it against acts done

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

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

**3. Justified limitations**

The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

## PART II

*The Treaty of Waitangi*

**4. The Treaty of Waitangi**

(1) The rights of the Maori people under the Treaty of Waitangi are hereby recognised and affirmed.

(2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.

(3) The Treaty of Waitangi means the Treaty as set out in English and Maori in the Schedule to this Bill of Rights.

## PART III

*Democratic and Civil Rights*

**5. Electoral rights**

Every New Zealand citizen who is of or over the age of 18 years

(a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and

(b) is qualified for membership of the House of Representatives.

**6. Freedom of thought, conscience and religion**

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

**7. Freedom of expression**

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

**8. Manifestation of religion and belief**

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

**9. Freedom of peaceful assembly**

Everyone has the right to freedom of peaceful assembly.

**10. Freedom of association**

(1) Everyone has the right to freedom of association.

(2) This right includes the right of every person to form and join trade unions for the protection of that person's interests consistently with legislative measures enacted to ensure effective trade union representation and to encourage orderly industrial relations.

**11. Freedom of movement**

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

## PART IV

*Non-Discrimination and Minority Rights*

**12. Freedom from discrimination**

Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, or religious or ethical belief.

**13. Rights of minorities**

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

## PART V

*Life and Liberty of the Individual, and Legal Process*

**14. Right to life**

No one shall be deprived of life except on such grounds, and, where applicable, in accordance with such procedures, as are

established by law and are consistent with the principles of fundamental justice.

**15. Liberty of the person**

(1) Everyone has the right not to be arbitrarily arrested or detained.

(2) Everyone who is arrested or detained shall

(a) be informed at the time of the arrest or detention of the reason for it;

(b) have the right to consult and instruct a lawyer without delay and to be informed of that right;

(c) have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

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

**16. Rights on arrest**

Everyone who is arrested for an offence has the right

(a) to be charged promptly or to be released;

(b) to refrain from making any statement and to be informed of that right;

(c) to be brought promptly before a court or competent tribunal;

(d) to be released on reasonable terms and conditions unless there is just cause for continued detention.

**17. Minimum standards of criminal justice**

(1) Everyone charged with an offence has the right

(a) to a fair and public hearing by a competent, independent, and impartial court;

(b) to be presumed innocent until proved guilty according to law;

(c) if convicted of the offence and the punishment has been varied between the commission of the offence and sentencing, to the benefit of the lesser punishment;

(d) if convicted of the offence to appeal to a higher court against the conviction and any sentence according to law.

(2) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(3) No one who has been finally acquitted, convicted of, or pardoned for, an offence shall be tried or punished for it again.

**18. Rights of persons charged**

Every person charged with an offence has the right

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

(b) to have adequate time and facilities to prepare the defence;

(c) to consult and instruct a lawyer;

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

(e) to be tried without undue delay;

(f) to be present at the trial and to present a defence;

(g) except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the maximum punishment for the offence is imprisonment for more than three months;

(h) to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;

(i) to have the free assistance of an interpreter if the person cannot understand or speak the language used in court;

(j) not to be compelled to be a witness against that person or to confess guilt;

(k) in the case of a child, to be dealt with in a manner which takes account of the child's age.

**19. Search and seizure**

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

**20. No torture or cruel treatment**

(1) Everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

(2) Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

(3) Everyone has the right to refuse to undergo any medical treatment.

**21. Right to justice**

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply to the High Court, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

## PART VI

*Application, Enforcement and Entrenchment*

### 22. Other rights and freedoms not affected

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not guaranteed or is guaranteed to a lesser extent by this Bill of Rights.

### 23. Interpretation of legislation

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

### 24. Application to legal persons

The provisions of this Bill of Rights apply so far as practicable and unless they otherwise provide for the benefit of all legal persons.

### 25. Enforcement of guaranteed rights and freedoms

Anyone whose rights or freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

### 26. Reference to Waitangi Tribunal

Where in any proceeding before any court, any question arises whether any enactment or rule of law, or any act or policy, is consistent with the Treaty of Waitangi, the court may on the application of any party to the proceeding or of its own motion refer that question to the Waitangi Tribunal for a report and opinion, and the court shall have regard to that report and opinion.

**27. Intervention by Attorney-General**

(1) The Attorney-General shall be given the opportunity to appear and participate in any legal proceedings as a party if in the opinion of the judge or other officer presiding in those proceedings there is a serious question to be argued about the violation of the provisions of this Bill of Rights.

(2) Paragraph (1) shall not apply if the Attorney-General or any officer or agency of the Crown is a party to the proceedings.

**28. Entrenchment**

No provision of this Bill of Rights shall be repealed or amended or in any way affected unless the proposal—

(a) is passed by a majority of 75 percent of all the members of the House of Representatives and contains an express declaration that it repeals, amends, or affects this Bill of Rights; or

(b) has been carried by a majority of the valid votes cast at a poll of the electors for the House of Representatives;

and, in either case, the Act making the change recites that the required majority has been obtained.

**29. Short title and commencement**

(1) This Act may be cited as the New Zealand Bill of Rights 1986.

(2) The New Zealand Bill of Rights 1986 shall come into force on the . . . . . . day of . . . . . . . . . . . . 198 . . . .

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SCHEDULE Article 4 (3)

THE TREATY OF WAITANGI

(THE TEXT IN ENGLISH)

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of

Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

### Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

### Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

### Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. Hobson Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter

into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

*[Here follow signatures, dates, etc.]*

---

(THE TEXT IN MAORI)

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me Nga Hapu o Nu Tirani, i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te ata noho hoki, kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga tangata maori o Nu Tirani. Kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini, ki nga wahi katoa o te wenua nei me nga motu. Na te mea hoki he tokomaha ke nga tangata o tona iwi kua noho ki tenei wenua, a e haere mai nei.

Na, ko te Kuini e hiahia ana kia wakaritea te Kawanatanga, kia kaua ai nga kino e puta mai ki te tangata maori ki te pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau, a WIREMU HOPIHONA, he Kapitana i te Roiara Nawa, hei Kawana mo nga wahi katoa o Nu Tirani, e tukua aianei amua atu ki te Kuini; e mea atu ana ia ki nga Rangatira o te Wakaminenga o nga Hapu o Nu Tirani, me era Rangatira atu, enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te Wakaminenga, me nga Rangatira katoa hoki, kihai i uru ki taua Wakaminenga, ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou wenua.

KO TE TUATORU

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira, ki nga Hapu, ki nga tangata katoa o Nu Tirani, te tino Rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga, me nga Rangatira katoa atu, ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua, ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini. Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant-Governor.

Na, ko matou, ko nga Rangatira o te Wakaminenga o nga Hapu o Nu Tirani, ka huihui nei ki Waitangi. Ko matou hoki ko nga Rangatira o Nu Tirani, ka kite nei i te ritenga o enei kupu, ka tangohia, ka wakaaetia katoatia e matou. Koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi, i te ono o nga ra o Pepuere, i te tau kotahi mano, e waru rau, e wa tekau, o to tatou Ariki.

## 3. What Would the Bill of Rights do?

*A statement of fundamental rights of New Zealanders . . .*

3.1 The Bill would state fundamental rights and freedoms of New Zealanders. The proposed statement is founded and builds on our strong and diverse heritage.

3.2 The text accordingly runs back to the great guarantees, in the Magna Carta of 1215 and the Bill of Rights of 1689, of such matters as the right of the citizen to justice in the courts and the right not to be subjected to cruel and unusual punishment. It reaffirms the long-established constitutional principle that the Government is under the law. It reaffirms other more specific rights declared by our common law courts such as the right to be free from unreasonable search and seizures and the privilege against self-incrimination.

3.3 The Bill would emphasise our nation's origins by recognising and protecting the rights of the Maori under the Treaty of Waitangi.

3.4 The proposed Bill draws as well on the wider experience and conscience of the international community—a conscience reawakened and developed by the horrific denials of human rights 40 to 50 years ago and later put into binding international legal form—especially in the International Covenants on Human Rights. New Zealand continues to play a significant part in that international endeavour and in 1978 ratified the International Covenants. That wider experience now also includes the working out over the last 20 years or so of Bills of Rights in many Commonwealth countries, particularly, in the most recent period, Canada.

3.5 And, once again looking to the New Zealand scene, the Bill would declare the rights of individuals to fair treatment in their dealings with the State with its huge and growing powers. In that, the Bill would further strengthen developments towards accountable and open government such as the Ombudsmen Act 1975 (originally enacted in 1962), the Official Information Act 1982, and the increasing efforts of the courts, assisted by Parliament, to ensure the fair and reasonable exercise of public power.

3.6 The rights and freedoms included in the Bill are almost all firmly based on the existing law, common law or statute. The Bill reflects widely accepted public policy. And in several areas the Bill sets a minimum standard, leaving Parliament and the courts the opportunity as appropriate to give greater protection.

*. . . protected against the power of the State . . .*

3.7 The Bill would guarantee the rights and freedoms against the State, especially Parliament and the Executive. The guarantee would

extend to other bodies exercising public power, such as a local authority which makes a bylaw infringing freedom of speech or peaceful assembly.

**3.8** Such a declaration of rights, without more, is incomplete. For Jeremy Bentham declarations of rights were nonsense upon sticks (see his *Works* (ed. Bowring), vol. 2, pp. 497, 501). For Albert Venn Dicey, writing exactly 100 years ago:

> "... there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation ... the Englishmen whose labours gradually framed the ... Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights ... than upon any declaration of the Rights of Man .... The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."

**3.9** It is important to note that Dicey immediately admitted that this English insistence on the connection between rights and remedies is not inconsistent with the existence of constitutional declarations of rights. United States' experience denied that. "The rule of law is as marked a feature of the United States as of England." (*Law of the Constitution* (10th ed. (1960) 199–200).

### *... enforced by the courts as supreme law ...*

**3.10** How then is the Bill of Rights to be enforced? What are the practical procedures? Under the proposed Bill the courts would have the major role in enforcing the guarantees set out in it against the agencies of the State. In this they would be exercising, in part in an enhanced way, their historic constitutional role of protecting the individual, especially the weak, the disadvantaged, the member of the unpopular minority, against the State.

**3.11** This enhancement in the role, considered more fully in section 6 of this paper, arises from the status of the proposed Bill: it would be supreme law, and accordingly legislation enacted by Parliament which was inconsistent with it would be of no effect. Infringing administrative action taken by public authorities would similarly fall in the face of the Bill. As we shall see, the Bill and the courts' interpretation of it would not necessarily be immutable; for one thing the Bill could be amended, but only following a more complex process than that allowed for an ordinary Act of Parliament. For another, it is the historical experience that courts can in their interpretation of such documents take account of fundamental changes in social attitudes.

**3.12** That power of protection by the courts does not of course mean that in some sense the views of the individuals or the minorities protected by the Bill will be foisted on the majority. What would be guaranteed and protected is, for instance, their freedom of religious practice, their freedom of expression, and accordingly their power to attempt to persuade others to their point of view.

**3.13** A reaffirmation and careful extension of basic freedoms, a recognition of our origins as a nation in the Treaty of Waitangi, a guarantee against the arbitrary exercise of public power, and enhanced power in the courts to enforce that guarantee and to protect individual freedom. The Bill would have those characteristics.

### *... and intended to be durable.*

**3.14** Another characteristic is durability. The Bill should capture and protect the continuing essence of our constitutional and political system—the essence, that is, of the relations between the individual and the State. It should not however attempt to capture (or more accurately to impose) a temporarily popular view of policy. For the most part the Bill would leave to the unfolding operation of that constitutional and political system the selection and resolution of the debates in society about substantive values, especially in the economic area. Accordingly, the Bill does not include major economic, social and cultural rights.

**3.15** Durability affects as well the methods for making changes and amendments to this basic document. Those methods would be difficult to satisfy—a special majority of members of the House of Representatives (in the normal case involving agreement between the major political parties) or support by a majority of the people in a referendum. And they should be rarely employed. Thus the original amendments to the United States Constitution comprising its Bill of Rights have in essence been added to only six times since they were adopted in 1791; and the relevant guarantees in the Constitution of Western Samoa (to take a constitution for which New Zealand had some responsibility) have been amended not at all since their adoption in 1960. As appears later, these various characteristics of the Bill also affect the way in which it should be adopted.

## 4. Why does New Zealand need a Bill of Rights?

4.1 Debates in New Zealand, other Commonwealth countries and the United States especially in the past 20 or 30 years have identified a range of arguments supporting and opposing the introduction of a Bill of Rights enforced by the courts. This section of the paper identifies principal areas of that argument. In large part it can be seen as, a consideration of, and response to, the reasons which prevailed 20 years ago when Parliament last considered this matter and rejected a proposal for a Bill of Rights. Even more it takes account of the growth in experience and changes in attitude over the last 20 years—in the United Kingdom, Canada and New Zealand, and more broadly through the Commonwealth. The argument as well takes account of the content and emphasis of the proposed Bill. It must be made in that concrete context and must take account of the fact that the draft Bill is different in basic ways from the 1963 proposal just as the 1982 Canadian Charter of Rights and Freedoms is essentially different from the 1960 Canadian Bill.

### The extensive powers of Parliament and the Government

4.2 Parliament has supreme law-making powers. Doubts have recently been cast on that broad proposition by senior judges—one indication among others incidentally of their perception of a wider role for the courts in controlling public power. Even with those possible limits, however, the powers are formidable. The powers are moreover exercised by a single house, the House of Representatives, which the Executive almost invariably controls, and by the Governor-General, who in all but the most extraordinary of situations is obliged by convention to assent to Bills passed by the House and presented to him by the Executive for assent. Furthermore, the powers can be exercised overnight: the law requires no particular notice to be given or a period of time to pass before legislation, even of the most drastic kind, is approved by the House.

4.3 That is to say, the law and convention of the constitution gives the Executive, through Parliament, very wide powers, possibly unrestrained by law, to take away our most precious rights and freedoms, rights and freedoms which have been won, enlarged, and affirmed over long centuries. This is so of those rights—such as personal liberty—which are recognised and protected by the common law and by the courts, and are not the subject of any special law conferring or guaranteeing them. It is also true of those rights, such as the right to vote, to be a parliamentary candidate, and to participate in periodical elections which are created by Parliament.

**The limited controls on the exercise of the powers**

**4.4** That last reference helps widen the argument. The relevant law is not all that should be considered. It is plainly the case that the Government, through Parliament, is in practice restrained by many considerations. It does not, for instance, lightly initiate or even consider initiating legislation which extends the term of Parliament, or limits the suffrage, or suspends the writ of *habeas corpus*. . . . It does not do these things because of its commitment to the relevant rights and values, or because of its concern for the political costs of such actions, or because there may in fact be constitutional restraints, in a broader sense, on the action. We must from the outset understand the essence of the message which a great American judge has given us—even if we do not follow it to its full extent. Judge Learned Hand declared:

> "What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it." (The Spirit of Liberty (1944) in Dilliard (ed.) the *Spirit of Liberty: Papers and addresses of Learned Hand* (1953).)

**4.5** American constitutional history shows that this is an overstatement. Indeed one eminent commentator there says that Learned Hand's view is a triumph of logic over life (Eugene V. Rostow, *The Democratic Character of Judicial Review* (1952) 66 Harv. L. Rev. 193, 205). But it does remind us that a formal constitutional arrangement can never be seen apart from its social setting. As the New Zealand representative before the United Nations Human Rights Committee said a year ago, "the conscience of the people, including those who wield power, is the ultimate guarantee of the protection of human rights" (Ministry of Foreign Affairs: Information Bulletin No. 6 (Jan 1984) *Human Rights in New Zealand* p.7). The statement also alerts us to the danger of succumbing to the temptation that disputes about the proper extent of laws infringing on the freedom of the individual are to be left to the courts once a Bill of Rights is in place. The courts will have a role. It will be a crucial one but it will not be an exclusive one. The Bill of Rights should be thought of as providing a floor. The life of the state can and should rise far above it.

**4.6** Matters of principle, political judgment, and public reaction (actual or predicted) already control raw legal power. That will continue. So too will the power of the courts to interpret legislation—

a power which can be, and often is, exercised so as to protect basic human rights. There is in the cases the suggestion of a broader power in the courts. And there are untested questions about the role of the Governor-General, particularly in the case of legislation affecting those central provisions of the Electoral Act which are entrenched and which are to be amended only by a three-quarters vote of the members of Parliament or with the support of a referendum of voters.

**4.7** The basic point remains however. The power of the Government, alone and through Parliament, without the restraint or even the delay which would come from a second chamber, is enormous. In some senses it can be compared with the power, claimed as well as actual, of the Stuart Kings before the revolution of the seventeenth century. The basic difference between then and now is of course the electorate. But the electorate's role cannot, in the usual case, be focused on a precise issue. A general election is a blunt instrument. It cannot give judgment on particular issues. That very process is moreover at some legal risk. Political processes of a less formal kind are also a central part of our system and can be more focused, but they can ride roughshod over minority interests, and they too are subject to possible threat from the great powers of the State. And both sets of processes—the formal election and the less formal political activity—are of no, or of only, limited value to the individual whose rights are being threatened or infringed by those great powers. The courts, to revert to a point made at the preceding part, continue to play their historical role of protecting the individual, particularly the individual who is a member of a minority, against the illegal or arbitrary exercise of those powers. But, once again, that judicial authority might itself be subject to state power.

## The danger of erosion

**4.8** No Government and no Parliament we are likely to have in New Zealand in the foreseeable future are going to attempt to sweep away basic rights.

**4.9** That is not the real point.

**4.10** What is in point is the continual danger—the constant temptation for a zealous Executive—of making small erosions of these rights. In some instances there may be a plausible argument based on expediency. But each small step makes the next small step easier and more seductive. For many years the needs, or alleged needs, of implementing a host of policies—or still worse of administrative convenience—have pressed against personal rights and freedoms.

4.11 The purpose of such policies may be legitimate or even meritorious. In any event, their merits lie within the proper competence of governments and Parliament, and with a very few quite basic exceptions the Bill of Rights would not control matters of substance. It is another matter if they are pursued beyond necessity and beyond their proper importance at the expense of individual rights and freedoms, or fair judicial procedures.

4.12 This is what a Bill of Rights can control, and ought to safeguard against.

4.13 But what, it might be asked, is the entitlement of the present Government or the present Parliament or even, for that matter, the present members of the New Zealand community to place new controls on future governments, future parliaments, and future generations which choose those governments and elect those parliaments? Is not the whole process of adopting a Bill of Rights which restrains future generations and future parliaments antidemocratic? The answer to the questions requires some attention to the principal contents of the proposed Bill. The answer provides as well a further reason for the Bill.

**Enhancing accountable and democratic government**

4.14 That answer is that the Bill would in large measure promote the accountability of government and the quality of democracy. For the most part it would not control the *substance* of the law and of the policy which would continue to be elaborated in, and administered by, present and future parliaments and governments. Thus the Bill would reaffirm and strengthen the fundamental procedural rights in the political and social spheres—rights such as the vote, the right to regular elections, freedom of speech, freedom of peaceful assembly, and freedom of association. These rights in a substantive sense can—in terms for instance of economic and social policy—be seen as value free. So they do not attempt to freeze into a special constitutional status particular substantive economic and social policies. The American experience is that attempts by the courts as well as by constitutional documents to do that have been ill-fated, normally resulting in repeal, either officially (as for example with the liquor prohibition amendment) or by interpretation (as with the rejection in 1937 of the power of the courts to strike down social and economic regulation by reference to ideas of substantive due process).

4.15 The Bill would have a second set of procedural provisions—provisions requiring fair treatment by the State in its dealings with individual New Zealanders.

**4.16** The provisions in those two procedural groupings also incorporate important basic values of our society and our political and constitutional system such as the freedom of speech and the privilege against self-incrimination. And the proposed text does of course set out some of the most basic substantive rights—the right to life, the right to be free from torture, the right to be free from discrimination on grounds such as race or sex, and the right to be free from cruel or degrading treatment or punishment. These are freedoms about which there is no real dispute (although their exact extent might of course be argued). They are truly fundamental. A Bill of Rights should put them beyond amendment or abrogation by the ordinary legislative process.

**4.17** The draft Bill recognises the force of democratic principle and process in two other general ways. First it recognises that the rights are not absolute. They can be subjected to limits. The limits must be reasonable. They must be prescribed by law. And they must be such as can be demonstrably justified in a free and democratic society. In general these limits are going to be written by Parliament. Those provisions are discussed in the commentary to Article 3. For the moment it is enough to note; (a) the requirements that "limits" be "prescribed"—that is that the lawmaker, usually the Legislature, should lay down particular requirements, and (b) that the provision set a test involving democratic standards.

**4.18** The other general recognition of democratic principle and process is in the provision for amendment of, or derogation from, the Bill. The Bill is not immutable. It can be changed by political processes. The formal process for change is one that puts the power back in the hands of the people (by a majority in a referendum) or their representatives (if there is broad agreement for change or derogation in Parliament).

**The growing and very extensive role of the State**

**4.19** So far the case for the Bill has been put in terms of the great legal power of the State (and in practice, of the Ministry), the limited and fragile character of the controls over that power, and the need to enhance accountability and our system of democracy. But might it not be said that these arguments have been available for some time? Thus the first of them has been available ever since the establishment of the Cabinet system. There is something in that argument but not very much. The controls are now seen as being even more fragile. There is a growing popular concern about the failure of accountability and of democracy. And all of these arguments become the stronger because of the growing and very extensive role of the State in the community. When the State in the 19th century was limited in its functions to protecting itself from

foreign aggression and maintaining some semblance of domestic order and tranquility the lack of controls over its powers could be countenanced—particularly if the informal controls were operating satisfactorily. Now, however, we face a state which has enormous powers over our lives, over the economy, over all of our day to day activities. The large, intrusive State which regulates the economy and provides extensive welfare services, which undertakes massive public works and provides education, which is heavily involved in health services and in subsidising or supporting a great range of private activity is a very different sort of State. The need for additional constitutional controls is increasingly recognised. It has been seen in some of the measures mentioned earlier. But those measures do not deal with the final case in which the Government through its control of Parliament has enacted laws which derogate from important individual freedoms. They do not provide insurance in that case. The likelihood of derogation is now the greater because of the relative weakness of informal controls, and the massive and growing role of the State. This latter consideration indeed makes it possible that some derogations could occur without any particular intention of a malevolent kind. A community which is subject to an extensive body of law can find that in some area, not anticipated, Parliament has gone too far in imposing limits on fundamental freedoms.

**The recognition and protection of rights under the Treaty of Waitangi**

**4.20** This important feature of the proposed Bill is the subject of the next section of this paper.

**The implementation of New Zealand's international obligations**

**4.21** New Zealand ratified the International Covenant on Civil and Political Rights in 1978. As the New Zealand Government's report and presentation to the United Nations Human Rights Committee indicates, the Government was of the opinion, with the exceptions marked by the formal reservations attached to the instrument of ratification, that New Zealand law and administrative practice conformed with the Covenants. At the same time that presentation recognised that there can be a legitimate difference of opinion about the adequacy of the protection afforded to the human rights set out in the Covenant in the absence of a basic or supreme law which guarantees those rights. In a formal legal sense there is no guarantee that the relevant law will not be changed and that Parliament will not invade the rights that New Zealand is internationally bound to observe. The representative then went on to refer to the argument mentioned earlier: that there are other informal restraints guaranteeing individual liberty.

4.22 The Bill would provide that greater guarantee of compliance with those important international obligations that comes from the superior status of the Bill. It would as well give a legal significance, a significance, that is, that can be asserted in court proceedings, to the informal restraints on which we place such very large reliance at the moment.

4.23 As will appear from the Commentary on the draft Bill, many of its provisions do in fact relate closely to those of the Covenant. There are some differences. Some provisions of the Covenant do not appear in the draft. The Bill would include rights not included in the Covenant. And the detail of the drafting differs.

## The danger of waiting

4.24 Some would discount some of the dangers which are suggested above in our present fragile system. They would say that there has been no sufficient threat and that until there is a need we should not put constitutional systems in place. Even if that view of our recent history is accepted, and this paper certainly does not accept it, there is a sufficient answer. It is that advantage should be taken of times when safe systems can be put in place. It is much better not to wait for a flood before we build the dam. The planning and building should take account of the threat by careful thought and execution in advance. An example of legislation in advance of any imperative need to redress the balance between the citizen and the State is provided by the establishment of the office of Ombudsman in 1962. Once again that change was seen by some as not being required to meet any overwhelming need. There was on the other hand at that time a very widely held feeling (which was also manifested in changes to the law and practice relating to subordinate legislation, and in the introduction into the House of a proposed Bill of Rights) that the power of the State had grown quickly, that this growth was dangerous in its potential, and that greater control should be introduced. Part of the concern was perhaps about the cumulation of small erosions. It was thought that the citizens' complaints mechanism would meet a real need. And so of course it has proved.

4.25 If an example is wanted in the area of Bills of Rights, Canada, with its Bill in 1960 and its Charter (a much more satisfactory document) in 1982, will serve. That community, like ours, faces real external and domestic pressures. With the major exception of the issues which arise from the relationship between its two principal European cultures, its legal, constitutional and political system is not so different from ours. Once again many would not have seen any great threat or danger to civil liberties. But once again there was a

concern about the growing powers of the State and the dangers of that development. Again it was thought that an appropriate response was a Bill of Rights or a Charter of Rights with enhanced constitutional status.

### The example of others

**4.26** When this matter was last seriously debated in New Zealand there was a rather comfortable argument that our tradition was opposed to declarations of rights. The Canadian Bill of 1960 was seen as not significant in practical terms (a correct judgment, as it turns out) and something of an aberration. At about that time, however, the attitudes and practice were starting to change dramatically (Professor Stanley de Smith caught the change very well in his *The New Commonwealth and its Constitutions* (1964), ch.2). The United Kingdom was preparing Bills of Rights for many new Commonwealth countries, institutions which have continued to operate in the Caribbean and the Pacific. A year or two later it accepted that its inhabitants could petition the European Commission of Human Rights and recognised the jurisdiction of the European Court of Human Rights. That European connection has fuelled strong calls for a domestic Bill of Rights as well. Canada has adopted its Charter. The independent countries in the Pacific are building up relevant experience. And the international element has had a growing influence on practice and opinion. The actions taken elsewhere are the more significant for New Zealand for the reason that our constitutional arrangements are much simpler and the Government as a consequence has more extensive power. It is not controlled, as in the United Kingdom, by a second chamber or the increasingly important body of law coming from the European Human Rights Court and Commission and the Economic Community. It is not restrained as are Canada and Australia by a federal system. Those states also of course have second chambers in their principal Parliaments. If the force of the argument has been recognised in those countries there is the greater reason for it to be recognised and acted on in New Zealand.

**4.27** The foregoing discussion attempts to deal with some of the major arguments which are made against a Bill of Rights—(1) that it is unnecessary since our present law and practice protect fundamental rights; (2) that it protects only some rights and does not cover for example economic rights; (3) that it will crystallise an order of values that may not be appropriate in the future; and (4) that it will place too much power in the hands of the judges.

**4.28** The answer to the first is to be seen in the limited character and fragility of our present system of controls and the danger of

their erosion (paragraphs 4.4–4.13 above), and to the second and third in the emphasis placed by the draft Bill on enhancing accountability and democracy in government (paragraphs 4.14–4.18 above). The growing power of the State and the actions and changes of attitude elsewhere are relevant as well. The particular thrust of the Bill also provides part of the answer to the fourth argument: The courts will continue to be concerned, as they have been historically, with the processes of government (in the capacious sense involved say in freedom of speech and the suffrage and the focused sense of criminal process), and with protecting the rights of citizens against the State. That is not to deny, of course, that their task will be different. It will be enhanced. Some of those matters are further considered in section 6. So too will the argument that the Bill will create uncertainty.

## 5. The Bill of Rights and the Treaty of Waitangi

**5.1** The consensus that is necessary if we are to have an effective Bill of Rights must embrace the Maori also.

**5.2** The Government believes that the time is overdue to remedy the past failure to honour fully the Treaty of Waitangi as part of our law and indeed as one of its foundations. We see the Bill of Rights as an appropriate and unique opportunity to do this in a manner that will accord with the sentiments of the Maori.

**5.3** The Maori attach a profound significance to the Treaty of Waitangi. Much of the criticism that has been heard in recent years is not that the Treaty is bad but essentially that it has not been honoured. No law or document that refused to give proper recognition to it could fairly claim to be a Bill of Rights for all New Zealanders.

### Why the Bill deals with the Treaty

**5.4** The general rights and freedoms that the Bill of Rights will protect belong to *all* the people of New Zealand, Maori and Pakeha alike. They are basic to any society that upholds the dignity and worth of the human person and that has respect for the law. So that rights such as freedom of religion, freedom from arbitrary arrest, freedom of speech and of assembly are no less cherished by Maori New Zealanders than by others.

**5.5** But to protect these rights is not enough. This will be a Bill of Rights for New Zealand and it must take into account our own special characteristics, special values and special institutions. For the Maori the Treaty of Waitangi holds a unique place. Many of them see the Treaty as symbolising their rights as Maoris and as providing a basis for the recognition and protection of those rights. As a resolution of the Turangawaewae hui in September 1984 declares, the Treaty of Waitangi is a document which articulates the status of the Maori as tangata whenua o Aotearoa. It is a symbol which reflects te mana Maori motuhake (the distinction of being specially Maori). A Bill of Rights that ignored this would be at best an incomplete document. It could well be seen as simply one more Pakeha law, irrelevant to the deepest concerns of the Maori.

**5.6** Even worse, by declaring that certain rights were the supreme law of New Zealand and saying nothing about the Treaty, a Bill of Rights could be seen as relegating the Treaty and the rights of the Maori under it to a second class status.

**5.7** Nonetheless, it is for the Maori themselves to indicate if they want the Treaty of Waitangi to be dealt with in the Bill of Rights and in what way. The Labour Party's policy on this is specific.

"The Bill of Rights will incorporate the provisions of the Treaty of Waitangi following full discussion with the Maori people about the best way in which this can be brought about."

**5.8** The Government has been encouraged by views expressed at the hui both at Turangawaewae in September 1984 and Waitangi in February 1985. One of the resolutions carried at the Turangawaewae hui was that a law should be introduced to require all proposed legislation to be consistent with the Treaty of Waitangi. At the Waitangi hui a recurrent theme was that the Treaty should not be incorporated into ordinary statute law but should be entrenched in constitutional law as the only, or at least the principal, basis of our constitution.

**5.9** And a resolution of the Maori Economic Development Summit Conference asserted that "measures to safeguard by constitutional means the inherent right of the Maori including the terms of the Treaty of Waitangi are long overdue".

**5.10** These and other expressions of opinion have led us to include provisions in the draft Bill of Rights relating to the Treaty. We want these to be considered thoroughly and deeply by the Maori and also by the Pakeha.

### The Treaty and the Pakeha

**5.11** For the Treaty of Waitangi is more than just a document of importance only to the Maori. It is part of the essential inheritance of the Pakeha New Zealander also.

**5.12** What did the Treaty do? The Waitangi Tribunal said in its Motunui report in 1983 that—

"The Treaty represents the gift [by the Maori] of the right to make laws in return for the promise to do so so as to acknowledge and protect the interests of the indigenous inhabitants.... That then was the exchange of gifts that the Treaty represented. The gift of the right to make laws, and the promise to do so so as to accord the Maori interest an appropriate priority."

**5.13** The Kaupapa of the New Zealand Maori Council, issued in February 1983, pointed out that each of the two parties to the Treaty saw it as concerned with the exercise of power:

"The Maori expected his 'Rangatiratanga' to be protected; the Crown expected to gain sovereignty over New Zealand. The purpose of the Treaty, therefore, was to secure an exchange of sovereignty for protection of rangatiratanga." (p. 4)

5.14 Thus in one sense our right as a nation to legislate, to govern and to dispense justice can be said to spring from the compact between the Crown and the Maori in 1840. It gives legitimacy to the presence of the Pakeha, not as a conqueror or interloper, but as a New Zealander, part of a new tangata whenua.

## The provisions of the Bill

5.15 What does the Bill of Rights say about the Treaty? First, to recognise and affirm the Treaty of Waitangi is one of the twin objects set out in the long title. Second, it recites in the preamble the fact that the Maori and the Crown entered into a solemn agreement—the Treaty of Waitangi—and that this Treaty ought to be recognised and affirmed as part of the supreme law of New Zealand.

5.16 Article 4 of the Bill carries this into effect and formally recognises the rights of the Maori under the Treaty of Waitangi. If the Bill of Rights is enacted Governments, courts and Parliament will no longer be able to claim that these rights are only moral rights and have no substance in law, or that they can be overridden, expressly or impliedly, by the ordinary process of legislation.

5.17 One consequence will be that under Article 23 all legislation must be interpreted as far as it can so as to make it consistent with the Treaty. But if it is impossible to reconcile any particular legislation with the rights of the Maori under the Treaty the legislation will under Article 1 be to that extent set aside as being of no effect. This is subject only to the limits allowed in Article 3—limits that can be demonstrably justified in a free and democratic society.

## The effect of the Bill

5.18 These provisions in the Bill of Rights are not a substitute for the Treaty of Waitangi. They will leave the Treaty unimpaired. They do not re-enact it or replace it. Far from superseding the Treaty, the Bill on the contrary will recognise it and give it a special constitutional status that accords with its mana with the Maori.

5.19 The Treaty of Waitangi so recognised must not be seen as a dead piece of paper. Its recognition in the Bill of Rights will not mean going back and restoring the situation as it was in 1840. Accordingly, paragraph (2) of Article 4 declares that the Treaty of Waitangi is to be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.

5.20 This reflects what the Waitangi Tribunal said in its Motunui report:

"The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract." (p. 61)

5.21 This should help to put to rest any fears that to affirm the Treaty would put the clock back to 1840 or any other date. The Treaty must be applied in accordance with its spirit to the facts of the 1980's and beyond.

5.22 Existing legislation and policies will henceforth be judged in the light of the rights protected by the Treaty of Waitangi. Future legislation and policies will have to conform with them. But the Bill of Rights will not require the reopening of past transactions or disturb in any way lawfully acquired rights and interests.

**The Waitangi Tribunal and the Bill**

5.23 The Bill of Rights will not do away with or adversely affect the Waitangi Tribunal. In its recent history the Tribunal has won the confidence of the Maori to a very great degree. The Government wishes to build on that confidence. The need for the Tribunal, and its functions, will remain. The Bill of Rights will enhance its status and role.

5.24 The Bill of Rights looks forward to the future. It is concerned with the effect and application of existing and future laws and policies. The Waitangi Tribunal can also look to the past. With its jurisdiction widened in the Treaty of Waitangi Amendment Bill it will be able to reopen and examine past grievances. A Bill of Rights cannot do this. The Tribunal is an investigating body with responsibility for making recommendations rather than binding decisions. Its findings may require positive legislative or administrative action to carry them out. This is not the sort of thing that the courts can effectively do.

5.25 On the other hand the Tribunal cannot be the final interpreter of the Treaty. Ultimately there can be only one voice to declare the law of New Zealand, and that voice must be that of the Privy Council, or, if appeals to the Privy Council are done away with, the Court of Appeal. But the voice of the Tribunal on this issue ought to be listened to with respect. Accordingly, Article 26 of the Bill of Rights will enable any court, confronted with a claim that particular legislation or particular policies or practices are an infringement of the rights of the Maori under the Treaty of Waitangi, to refer the matter to the Waitangi Tribunal for advice. The Court must have regard to the advice it receives from the Tribunal.

**5.26** And finally, the Bill of Rights will need to be supplemented by other affirmative measures to promote the rights of the Maori. These will be adopted as ordinary statutes or administrative action, as circumstances require.

## 6. How Would the Bill of Rights Operate in Practice?

**6.1** The earlier sections of this paper have considered the reasons why New Zealand needs a Bill of Rights, and the types of rights that might be incorporated into such a Bill. It has also been suggested that in order to be effective, a Bill of Rights must be protected against amendment by Parliament through its ordinary processes. The following section of the paper considers how that might be done. This section asks: just what will happen in the courts and more generally in the legal and constitutional system? How would such a Bill of Rights operate in practice?

### A new role for the courts; judicial review of legislation

**6.2** A Bill of Rights will provide a standard against which all existing and future laws will be judged. As supreme law, it will provide a limit on the power of Parliament to legislate on certain matters. That means that a body other than Parliament must be given the power to say when the Bill of Rights has been infringed. Under our constitutional system, it is the role of the courts to declare what the law is. The Bill of Rights will not change that. What it will mean, however, is that in enforcing a Bill of Rights the courts will be called upon to rule that a law which is inconsistent with the Bill of Rights is invalid. It would be invalid because it was not lawful for Parliament to pass it. This is what is meant by judicial review of legislation.

**6.3** It has hitherto been asserted that the courts have no power to strike down an Act of Parliament. Some people argue that it is not appropriate to give the courts power to strike down legislation passed by Parliament. Parliament is comprised of people who are democratically elected and who must submit themselves to the electorate every three years. Judges are appointed by the Governor-General on the advice of the appropriate Minister. They cannot be removed from office except for misbehaviour, and hold office until they retire. To give the judges power to strike down legislation, they say, would result in a fundamental redistribution of political power from the elected representatives of the people to the hands of the unelected and unrepresentative judiciary, and is undemocratic. Further, they say that the judges are simply not suited by background, training or experience to the task. Aspects of these arguments are considered in the preceding section of this paper. That section looked to the particular character of the proposed Bill. In this section we examine the present and developing role of the judges.

**6.4** There is no denying that to give the judges power to declare an Act of Parliament invalid does constitute a fundamental change

in our constitutional arrangements. Indeed that is what this whole exercise is about. Is the task proposed by the Bill an appropriate one for judges?

**6.5** The fact is that the task of measuring the laws against the standards enshrined in a Bill of Rights is entrusted to the judiciary in many other countries with Bills of Rights. The American courts have had the power for over 200 years. The power is given to the judiciary under many of the constitutions adopted by former British colonies as they became independent. The experience from overseas is that the courts vested with the power to enforce a Bill of Rights do act responsibly. In general, they do not thwart the wishes of the people's elected representatives by striking down legislation without very good reason. In fact they rarely exercise the power.

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

**6.7** Judicial decision-making is not simply a question of applying a predetermined set of rules to the given facts and reaching a decision. Judges, or at least those in the higher courts, are required to make decisions which from time to time are undoubtedly political in the broadest sense of the word. This has not led to political appointments to the bench, and there is no justification whatever for supposing that giving power to the judges to interpret a Bill of Rights would do so either.

### The present judicial role

**6.8** While it is true that judges will be invested with a power in Bills of Rights cases which is novel, the change needs to be kept in perspective. It is not the case that the new role is an entirely unfamiliar one. It is increasingly common for New Zealand judges to be called upon to adjudicate on controversial public issues. As Sir Ronald Davison, the present Chief Justice has pointed out (*The Role of the Courts in Modern Society* (1979) 4 Otago Law Review 277) the role of the courts in modern society is a changing role. The Chief Justice explained the change as follows:

> "The changing pattern will show a move away from the role which the Supreme Court (High Court) played up until the middle of this century when it dealt largely with the *enforcement* of the criminal law, the adjudication upon the rights of citizens inter se in the civil field, and a limited involvement with administrative action in the government and local government fields.

The move will be more to what I might term for comparison—public law. The law affecting the interests of the individual in his dealings with government, with local government, and tribunals; the impact of social policies upon the community with rights and controls in the environmental fields of preservation, conservation and permitted activities; the impact of energy policies on resources, exploration and developmental activities...The more a society moves towards policies of collective benefit as distinct from policies upholding the rights of the individual the greater is the need for the courts to keep a proper balance between executive action on the part of governments and administrative action in its various fields on the one hand, and the rights of the individual on the other. Certain individual rights may need to be limited or curtailed for the benefit of the community. The courts must be vigilant to see that such rights are never extinguished." (p. 283)

**6.9** He concluded his lecture by stating;

"The role of the courts in modern society is a changing role. It is now changing more rapidly than at any stage in our judicial history.
In the constitution of the state it has been accepted by constitutional lawyers that the powers of the state are reposed in the executive, the legislature and the judiciary. It is for the judiciary to ensure that the powers of the executive and the legislature are contained within their respective spheres and that the rights of the citizens are not overborne by the powers of the state." (p. 285)

**6.10** Recent examples of New Zealand cases on controversial subjects which are covered in the Bill of Rights include *Wybrow* v. *Chief Electoral Officer* [1980] 1 NZLR 147 (method of marking ballot papers in parliamentary elections), *Taylor* v. *Attorney-General* [1975] 2 NZLR 675 (contempt of court, freedom of expression), *Auckland Medical Aid Trust* v. *Taylor* [1975] 1 NZLR 728 (search and seizure), *Templeton* v. *Jones* [1984] 1 NZLR 448 (defamation, freedom of expression), *Chiu* v. *Richardson* [1983] NZLR 513, *Minister of Foreign Affairs* v. *Benipal* [1984] 1 NZLR 758 (immigration, freedom of movement), *Air New Zealand* v. *Mahon* [1983] NZLR 662 (right to a fair hearing in conformity with the principles of natural justice), *King-Ansell* v. *Police* [1979] 2 NZLR 531 (interpretation of legislation for protection of ethnic minorites).

**6.11** The judges have, as well, a rapidly growing experience in controlling administrative action taken by the Government. Thus in recent years they have considered challenges to regulations and orders made under the Economic Stabilisation Act 1948 and the

National Development Act 1979 made on the grounds that they are outside the bounds of the power conferred by the empowering legislation, e.g., *Combined State Unions* v. *State Services Co-ordinating Committee* [1982] 1 NZLR 742, *CREEDNZ Inc* v. *Governor-General* [1981] 1 NZLR 172. And for centuries the courts have developed and applied a set of principles which require fairness in official decision-making in the form of the rules of natural justice. Several New Zealand judges have had direct experience of Bills of Rights cases in sitting as members of the Privy Council and the courts of appeal of Fiji, Western Samoa and the Cook Islands.

### Judicial lawmaking

**6.12** The New Zealand cases cited above underline the fact that, while the primary role of the courts is to decide cases which are brought to court by litigants, in the course of rendering decisions in these concrete situations the courts make their determinations of what the law actually is. There was once a theory that in the course of doing so judges did not make law but only declared it. The popularity of that theory has declined markedly over time and it is no longer regarded as tenable. Lord Reid, a Scottish Law Lord, has said:

> "We must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it."
> (*The Judge as Lawmaker* (1972) 12 J.S.P.T.L. 22.)

**6.13** It is important also to remember that, as Professor Jaffe has said,

> "...the judicial function is not a single, unchanging, universal concept. In any one habitat it differs from era to era... .We know, though we are not always aware of its relevance, that not only the sum of Governmental power but its distribution is constantly changing. The powers of the executive and the legislature wax and wane at the expense of each other...These are platitudes, but it does not occur to us as often as it might that the judiciary also is, or at least can be, one of the great branches of the tree of Government. I mean by this to make a number of points; first, that it is part of the Government, and second, that its power, too, waxes and wanes. The conditions which act upon the executive and the legislature to determine the character of their powers act upon the judiciary; and the shape of the other branches of the great tree of state are functions of the shape of the judiciary": *English and American Judges as Lawmakers* (1969) 10–11.

**The likely approach to interpretation**

**6.14** While there are similarities between the role of the courts in interpreting and applying ordinary statutes, and in enforcing a Bill of Rights, the courts appreciate that a Bill of Rights cannot be treated as if it were an ordinary statute. The Supreme Court of Canada has said as much in approaching the interpretation of the Canadian Charter of Rights.

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political, and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the constitution like a last will and testament lest it become one"."
>
> (Dickson J. in *Hunter et al.* v. *Southam Inc.* (1984) (as yet unreported) pp. 13–14.)

**6.15** It is very likely that the New Zealand courts would adopt a similar approach to the interpretation of a New Zealand Bill of Rights. Such an approach has also been very eloquently stated by Lord Wilberforce in a Privy Council judgment on Bills of Rights, *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319, in a passage frequently quoted by courts throughout the Commonwealth, where he states that a constitution is a document "*sui generis* calling for principles of interpretation of its own, suitable to its character," and as such calls for:

> ". . . a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." (p. 329)

**6.16** It is important to appreciate also that the power given to the courts under a Bill of Rights is limited to that contained in the Bill of Rights itself. It will be limited to that power which the public through the processes considered in the next section of this paper agree that the courts should properly have. The courts will only be

enforcing the will of the people themselves. That is why it is so important for there to be a broad consensus amongst the public for this measure.

**6.17** The Bill of Rights contains a provision (Article 3) which allows Parliament to impose reasonable restrictions on the rights and freedoms guaranteed thereby when these can be demonstrably justified in a free and democratic society. In a great many cases where controversial issues arise for determination, there is no "right" answer. The action taken by the Government of the day will depend upon its own political persuasions, and its assessment as to where the balance of the public interest lies. It is the very essence of democracy that it allows for people to hold differing views on controversial issues, and for the democratically elected Government of the day to adopt a standpoint thereon but for which of course it must take responsibility in the normal way at the next election. The basic test stated in Article 3 of the Bill of Rights means that in most cases the courts will leave it to Parliament to define the public interest, and to enact legislation encapsulating its decision.

### Intolerable uncertainty?

**6.18** Another argument raised by the opponents of a Bill of Rights which is enforced by the judiciary is that it would create uncertainty in the law. That contention is that it will lead to unending and expensive litigation in order to determine what the law is. The level of generality at which Bills of Rights are drafted means that one will never be certain whether a law complies with a Bill of Rights until the courts have ruled on it.

**6.19** It is obvious that the courts must interpret a law before they can apply it. Some laws require more interpretation than others because they are written in different ways. A very specific law will usually require little interpretation before its meaning is clear. A more general law leaves greater scope for interpretation. It is not possible to draft a Bill of Rights in very specific terms. The nature of the rights included does not generally allow that to be done. The statement of rights in a Bill of Rights is usually fairly general. This means that when the courts turn their mind to whether any particular law passed by Parliament infringes the Bill of Rights, there may often be some scope for interpretation in that task. It may mean that a court takes a different view from Parliament on the extent of Parliament's powers to enact a certain law.

**6.20** The proponents of the uncertainty argument have a point. It is of course impossible to be sure that any law will be totally free from uncertainty and will not need to be interpreted by the courts at some stage. But the force of the argument is not very great in

New Zealand. This is because in 1978 New Zealand ratified the International Covenant on Civil and Political Rights. New Zealand became a signatory to the Covenant in 1968, but before this country ratified the Covenant it went through an extensive exercise to check whether its laws were consistent with the Covenant. In a few cases they were not, and the laws were amended to ensure compliance. Some new laws had to be passed. In some cases reservations were entered to the Covenant because the Government felt unable to guarantee compliance with a particular provision. What is the relevance of this to the proposed Bill of Rights?

**6.21** While the proposed Bill of Rights does not follow closely the International Covenant, it is thought that the Bill's provisions are consistent with those of the Covenant. Since New Zealand law complies with the Covenant, it can be asserted with some confidence that for the most part New Zealand law at present would be found to comply with the draft Bill of Rights.

**The Bill of Rights and administrative action**

**6.22** We have seen that an entrenched Bill of Rights would impose limits on the powers of Parliament to enact legislation. Statutes passed by Parliament which were contrary to the Bill of Rights would be liable to be struck down by the courts. However, it is not just statute law to which the Bill of Rights applies. The common law, which is the law developed and applied by the Courts over many centuries, might also infringe basic rights and freedoms. There are other types of law too. Regulations passed by the Governor-General in Council are an example. So too are by-laws made by local authorities. The Bill of Rights will apply to all these types of law, and all will have to be measured against the standards which it sets up.

**6.23** In fact, the Bill of Rights will apply not just to laws. All public officials and public bodies, and any action which is carried out pursuant to any statutory authority by any body or person performing a public function will also be covered. In practice this area gives rise to more challenges. In this way, the Bill of Rights will be directed against "official" action. All actions of public officials, and persons or bodies performing public functions, will be subject to scrutiny under the Bill of Rights. The Bill of Rights will apply across the whole spectrum of government—from the actions of Ministers of the Crown right down to the lowest levels of the Public Service. It will apply to the police and other law enforcement officers, and to local authorities and their officials. It will apply to bodies which are essentially private in nature, but in which have been vested

certain public functions. Examples would include the New Zealand Law Society, and other professional bodies which exercise statutory disciplinary powers over their members in the public interest.

**6.24** For the courts to exercise the power of scrutiny over such bodies is of course really nothing new. The rules of natural justice, which in essence require fairness in decision-making by public bodies, have been developed and applied by the courts over many years. Indeed Article 21 of the Bill of Rights recognises this, and enhances the constitutional status of the rules of natural justice. The courts have for many centuries been astute to protect the rights and freedoms of the individual against the actions of law enforcement authorities and to provide a check against arbitrary and capricious action. Many of the rights and safeguards which the Bill of Rights contains in the area of criminal law and procedure are based on principles developed by the courts through the mechanism of the common law. The right to refrain from making any statement, the presumption of innocence, and the privilege against self incrimination, to take just a few examples, are all rights developed by the courts through the mechanism of the common law. The Bill of Rights adopts these and other rights as minimum standards which must be applied in the enforcement of the law.

**6.25** A Bill of Rights will mean that the courts may on occasions strike down legislation on the ground that it infringes the rights and freedoms guaranteed by the Bill of Rights. Persons who have suffered through the actions of any public body or by any person or body carrying out a public function will have a judicial remedy where that action breaches their fundamental rights. The full range of remedies which are already available to persons who have been the victim of illegal action by the State will continue to be available under the Bill of Rights. In addition, the Bill contains a provision (Article 25) which will allow any person, whose rights or freedoms as guaranteed by the Bill have been infringed or denied, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the cirumstances. This means that if a court finds that a person's rights or freedoms under the Bill have been infringed, but there is no existing or adequate remedy available, the court will be able to grant any remedy which it considers appropriate and just in the circumstances. For example, it may mean an award of damages against the State for an infringement of someone's rights and freedoms where no such damages would be payable at present.

**6.26** We move to consider a little more closely how this will work in practice.

**Courts' control over litigation**

**6.27** Some have suggested that the courts will be overwhelmed with cases involving alleged breaches of the Bill of Rights. While the Canadian experience indicates that there will indeed be a substantial relevant volume of litigation, particularly in the early stages when the principles of constitutional adjudication are not yet settled, the courts have a number of control mechanisms to ensure that they are not overrun by unmeritorious claims.

**6.28** The first point to note is that in many, probably most, of the Canadian cases it is a defendant in criminal proceedings who raises the issue. That is to say the Charter has not increased the volume of litigation. Rather, it has added one more weapon to the arsenal of defence counsel, a weapon which in practice is often easily repelled. It is a weapon moreover often aimed at administrative action and not at legislation. Courts there have also made it clear that separate pre-trial proceedings to have evidence excluded from criminal trials will not be countenanced: those matters are to be raised at the trial.

**6.29** Secondly, the courts have a wide range of powers to control proceedings which are initiated by someone complaining of a breach of the Bill of Rights:

***(a) Frivolous or vexatious proceedings***

The court has an inherent power to prevent misuse of its procedure. It is exercised in cases where a claim is frivolous or vexatious and does not disclose any arguable cause of action. The Court of Appeal discussed this power in *Lucas & Son (Nelson Mail) Ltd* v. *O'Brien* [1978] 2 NZLR 289.

***(b) Abuse of process***

In *New Zealand Social Credit Political League Inc* v. *O'Brien* [1984] 1 NZLR 84, the plaintiff's case was struck out on the footing that the proceedings, which related to events in 1972 which had already been the subject of extensive litigation in other cases, amounted to an abuse of process. See also *Reid* v. *N.Z. Trotting Conference* [1984] 1 NZLR 8 C.A.

The new set of High Court Rules contain provisions consistent with the above cases.

The Bill of Rights would not in any way limit this established control by the court of its own processes. On the contrary, the language of Article 25 confirms the traditional powers of the court by providing that a court may grant "such remedy as the court considers appropriate and just in the circumstances". Plainly

if the court regards the claim as totally groundless it will refuse to grant any relief and order the proceedings to be stayed.

***(c) Delay***

All courts of law and equity have long recognised the dangers of stale claims and under the doctrine of laches have insisted that claims be advanced with reasonable expedition. Thus the courts have held that where the delay is such as to preclude the merits of the case being decided because of the loss of witnesses or evidence, the court may consider it inequitable or unjust to permit the proceedings to continue. This is particularly true where the rights of third parties are involved. Parliament has also recognised the dangers of delay by enacting the Limitation Act 1950.

In addition, to the extent that regular administrative law remedies are invoked, such as the application for review or the declaration, the courts have always retained the ability to dismiss claims if they have been too long delayed.

***(d) Standing***

Rules concerning standing are another control mechanism employed by the courts. Except in cases where a statute delineates the range of individuals who are entitled to bring or participate in legal proceedings, the courts have applied their own rules to determine which litigants are entitled to access to the courts. These principles are together known as the law of standing and they are somewhat complex. They were canvassed in the report presented to the Minister of Justice in March 1978 on *Standing in Administrative Law* (11th Report of the Public and Administrative Law Reform Committee). They involve the striking of a balance between two interests: the broad interest that the Government or other public body comply with the law and the more particular interests of the individual or group challenging the Government action. To the extent that the broad interest is emphasised, the standing requirement is relaxed.

***(e) The discretion to grant a remedy***

Article 25, like the other public law remedies, gives the court a discretion whether any remedy should be granted and, if so, what kind of remedy. It allows the courts to give the remedy they consider "appropriate and just in the circumstances". Even where there has been a breach of one of the rules of "natural justice", it is a matter for the court's discretion whether or not a remedy will be granted: *Wislang* v. *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29; *Reid* v. *Rowley* [1977] 2 NZLR 472; *Evans* v. *Bradford* [1982] 1 NZLR 638."

*(f) Costs of litigation*

Would-be applicants in general will need a lawyer and must face the prospect of paying their lawyer's costs. The applicants must also face the possibility of an award against them of party and party costs should they lose. Of course legal aid will be available in some cases.

**6.30** The discussion so far relates to the courts' general powers to control proceedings before them. Courts have also developed powers and practices relevant to constitutional litigation. These practices are among the reasons why the number of cases in which governmental action has been invalidated for breach of guaranteed rights is low. Thus the Privy Council, which has heard many human rights appeals from Commonwealth countries in the last 25 years, has declared statutes void in only a few cases. In Canada since the Charter of Rights was enacted in 1982, the success rate has also been low. This is no doubt due to the tradition of judicial restraint in constitutional cases which is a common feature of constitutional litigation in most jurisdictions.

**6.31** The most famous statement of that policy is that made by Justice Brandeis of the United States Supreme Court in *Ashwander* v. *Tennessee Valley Authority* (1936) 297 US 288, 346-348:

> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
>
> 1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an enquiry as to the constitutionality of the legislative act.' . . .
> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . .
> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' . . .
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds,

one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. . . .

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . .
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . .
7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the questions may be avoided.' . . ."

**6.32** Most, if not all, of these propositions are explicitly recognised in the Bill of Rights, particularly in Articles 23 and 25.

### Existing protections for human rights and the Bill of Rights

**6.33** The court is not the only place where rights are protected. We in New Zealand already have a number of institutions which provide safeguards against the abuse of power by the State. The office of Ombudsman was established in 1962, and since then there have been added the Race Relations Conciliator and the Human Rights Commission. All these bodies perform an important role in holding the Government to account for its actions and in providing a check against infringement of the citizen's basic rights and freedoms by the State. So too the Official Information Act, enacted in 1982, seeks to make the Government more accountable by requiring it to disclose information so that the citizen can know what the Government is doing.

**6.34** A Bill of Rights guaranteeing fundamental rights and freedoms and which is enforceable in the courts will constitute a legal safeguard of those rights and freedoms. But it will not replace or in any way diminish the role of these institutions. A person with a complaint that certain adminstrative action by some governmental body has been to his or her detriment will still be able to seek an investigation by an Ombudsman into that action. A person who complains that he or she has been discriminated against by the Government will be able to lodge a complaint with the Human Rights Commission. In many ways it will be appropriate for persons to pursue these existing remedies before approaching the courts with a claim that their rights under the Bill of Rights have been infringed. The procedures which these bodies adopt in seeking to resolve disputes

between the citizen and the State are in many ways preferable to court action. Thus where one of these existing institutions has jurisdiction to consider a complaint involving the infringement of a right or freedom included in the Bill of Rights, then it can be expected that people will continue to make use of that avenue of redress.

## 7. How Would The Bill of Rights Be Adopted?

**7.1** The way in which Parliament enacts, amends, and repeals statutes, or alters the common law, in New Zealand is very straightforward. With one exception, which will be discussed shortly, all New Zealand statutes can be amended or repealed in the same way that they were enacted, that is, by another Act of Parliament passed by a simple majority of the members of Parliament then present and voting. The common law can be altered in the same way. Moveover, one Act of Parliament can effectively amend another Act without any express provision that it does so. The general rule is that the most recent legislative expression of Parliament's intention prevails over any earlier legislation. If two Acts of Parliament cannot be reconciled one with the other, then the Act later in time prevails. The earlier Act is, to the extent of the inconsistency, impliedly repealed.

**7.2** Of course the courts will not readily find that an Act is impliedly repealed, and will strive to reconcile any apparent inconsistency if that is possible. However, if, at the end of the day, no such reconciliation is possible, the courts have no alternative but to find the earlier Act impliedy repealed. This is the case no matter what the status or importance of the earlier Act.

**7.3** If a Bill of Rights were to be enacted as an ordinary Act of Parliament, then, legally speaking, there would be nothing to prevent it being repealed or amended like any other statute. It could be expressly amended or repealed by a bare majority of members of Parliament, and would be overridden by any later inconsistent legislation.

**7.4** To enact a Bill of Rights which can be overridden, either expressly or impliedly, by a simple majority of the Government's parliamentary supporters would be no real advance on our present situation with respect to the protection of our basic rights and freedoms.

**7.5** It would be possible to give the Bill of Rights a certain measure of protection by following the device adopted in Canada. There, the Charter of Rights prevails over all legislation unless Parliament or a provincial legislature in the case of certain provisions expressly declares in an Act that the Act or a provision thereof shall operate notwithstanding a particular provision of the Charter. Any such Act can have effect for only five years, but it may be re-enacted. (Canadian Charter s. 33)

**7.6** The advantage of such a clause is that any attempt to override the Charter must be done openly, and any proposal for amendment will be subject to public scrutiny and debate in the legislature and

by the public at large. Moreover, that process must be repeated every five years. However, it is no protection against a Government intent on using its parliamentary majority to force through legislation amending the Charter.

**7.7** Countries which have Bills of Rights usually have them as part of a written constitution. The constitution itself sets up the Legislature and defines its powers, which will of course be subject to the guaranteed rights and freedoms contained in the Bill of Rights. In such countries any proposal to alter the constitution, which means also any Bill of Rights contained in it, will normally be required to be passed by a special majority in the Legislature, or carried by a majority of electors at a referendum. The question arises, however, as to whether the New Zealand Parliament, which is not subject to any of the constraints set out in a written constitution, can enact a Bill of Rights which is protected against alteration by ordinary statute.

**7.8** With one partial exception, there is no legislation in New Zealand at the present time which is protected from amendment except by a special parliamentary procedure. That exception is the Electoral Act 1956 which contains a provision, s. 189, which states that certain of that Act's provisions such as those dealing with the voting age and method of voting can be amended only by a proposal which receives the votes of 75 percent of all the members of the House of Representatives, or which is approved by a majority of the voters at a referendum. However, the amendment or repeal of s. 189 does not itself require that procedure. As a matter of law there is nothing to prevent Parliament from repealing s. 189 by a simple majority and then amending the other provisions in the same way. In other words, s. 189 is not itself protected in any way.

**7.9** This was not an oversight. When s. 189 of the Electoral Act was enacted, most constitutional lawyers were of the view that if Parliament passed an Act which purported to make it more difficult for future Parliaments to legislate on a certain matter, then that Act was ineffective. It was said that Parliament could not bind its successors. The theory is that a sovereign Parliament, that is a Parliament which has power to enact any legislation it wishes, cannot bind itself as to the content or the form of its future legislation. In other words, a sovereign Parliament cannot limit its sovereignty. Any Act of Parliament can be amended or repealed by another Act passed by a simple majority, despite what that earlier Act says. To avoid the appearance of promising more than could be achieved, there was no attempt in 1956 to entrench s. 189 itself, so that s. 189 is not, even on the face of it, fully entrenched.

**7.10** Could a Bill of Rights now be effectively entrenched? The balance of opinion has now swung the other way. Many constitutional lawyers now believe that full entrenchment can be legally effective in New Zealand. What has brought about this change of opinion?

**7.11** Over the past 35 years, leading courts in the Commonwealth, including the Privy Council, have decided that provisions of a basic constitutional document can control future Parliaments: *Harris* v. *Minister of the Interior* 1952 (2) S.A. 428; *Bribery Commissioner* v. *Ranasinghe* [1965] A.C. 172, J.C.; *Liyanage* v. *The Queen* [1967] A.C. 259; see also *Attorney-General for New South Wales* v. *Trethowen* [1932] A.C. 533, J.C. (affirming the majority decision of the High Court of Australia; see especially Dixon J (1931) 44 C.L.R. 394, 426). The courts have held that the relevant Parliament is bound by provisions which require its two Houses to sit together, which require that a matter be approved by a referendum, or which require a special majority (say of two-thirds or three-quarters) of the members of the House of Parliament.

**7.12** These cases do not dispute the proposition that Parliament cannot bind itself as to the content of future legislation, but a distinction is drawn between a law which purports to say that Parliament cannot enact certain laws, and a law which says that Parliament can enact certain laws only if it follows a certain procedure or if it is composed in a special way. On this view the current rule that an Act of Parliament is to be passed through the House of Representatives only by a simple majority is a rule of law which Parliament can change, because Parliament's power to change the law includes the power to change the law affecting itself. In requiring a special procedure for enacting or repealing a statute, Parliament is not binding its successors, but only redefining "Parliament" or laying down a new procedure for a certain purpose.

**7.13** The courts have made it clear that no question of sovereignty arises from such decisions;

> "A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon [the Constitution in issue in the case] to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of

Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority."
(*Bribery Commissioner* v. *Ranasinghe* [1965] A.C.172, 200)

**7.14** The cases all concern provisions restraining lawmaking which were included in the original constitutional document which created the parliament or (in the *Trethowen* case) a colonial legislature. They are therefore not directly in point. Much of their reasoning does, however, apply. They are highly persuasive.

**7.15** These cases have been critical in inducing a change in general legal opinion. Important too have been the changes in the attitude of English lawyers with the growing recognition that Britain's connections with Europe (both within the Economic Community and in the European Commission and Court of Human Rights) bring with them changes in the constitutional position of the Parliament at Westminster. Much Scottish legal opinion has never accepted the absolute sovereignty of Parliament (in that view the Act of Union of 1707 imposes restraints). The practice in the long series of statutes conferring independence on parts of the contracting Empire of limiting or disclaiming any future legislative power for that newly independent state raises further doubts about the absolute character of any principle of parliamentary sovereignty.

**7.16** In New Zealand, Parliament too has passed legislation of a kind just mentioned (eg, Cook Islands Constitution Act 1964). And senior judges have indicated both in judgments and other writings that they consider that the powers of Parliament may indeed be limited: thus the right of citizens to go to court to assert their rights, basic elements of the relationships between the Parliament and the Executive and between Parliament and the courts, and the more basic of human rights (such as the right not to be tortured) may be impregnable: *Taylor* v. *N.Z. Poultry Board* [1984] 1 NZLR 394, 398.

**7.17** The matters mentioned in the last two paragraphs go beyond law which redefines Parliament and the process of lawmaking, to law which puts restraints on the possible content of legislation. They are therefore not directly in point. But they do contribute to the growing legal opinion that it is possible to restrain future Parliaments in the ways indicated.

**7.18** The courts then are likely to hold, if the matter is raised with them, that a provision in the Bill of Rights protecting its guarantees from abrogation and encroachment except following the support of a referendum or a three-quarters majority in the House would be effective. Future Parliaments would have to comply with it. Such a provision could be seen as an effective exercise of the full power of constitutional amendment which the New Zealand Parliament has had since at least 1947. That statement is, however, subject to two

important comments. The first is that since the matter is not clear, the process for the adoption of the Bill of Rights may be critical in legal terms. Thus one member of the Court of Appeal has recently stressed the importance for entrenchment of giving the Bill "practical sanctity":

> "That is why proponents of a Bill of Rights talk of a referendum or a fully representative constitutional conference; or a travelling select committee of the House of Representatives; or a virtually unanimous vote of the House.
>
> The truth is that, in the end, whether guaranteed rights are really fundamental—able to be overridden only by a special parliamentary majority or a referendum—does not depend on legal logic. It depends on a value judgment by the courts, based on their view of the will of the people."
>
> (Sir Robin Cooke: *Practicalities of a Bill of Rights* F. S. Dethridge Memorial Address to the Maritime Law Association of Australia and New Zealand, 1984, reprinted in (1984) 112 *Council Brief* 4.).

**7.19** That comment highlights the point that full entrenchment without more may not be enough legally. It is the courts which have the ultimate task of determining what the law is. It is they who would have to rule on the validity of a statute which purported to amend an entrenched provision but which had not been passed in the prescribed manner. While there are strong grounds for believing that the courts would accept entrenchment of something as important as a Bill of Rights, they would probably not accept one which was forced through Parliament by a simple majority. An entrenched Bill of Rights would be a new constitutional departure in New Zealand both in terms of what it says about the nature of rights and freedoms in New Zealand, and the manner in which it seeks to protect them. A statute of this nature is of such major significance that there needs to be a general consensus amongst the public, both that it is needed and on its content. If this consensus exists, it is far more likely that the courts will rule in favour of effective entrenchment of a Bill of Rights.

**7.20** The second comment goes to the conventional position, that is the way in which the political process should operate in such a case. It is essentially the same comment, that such a basic change in the constitutional system should not be made unless it has that "practical sanctity". If there is legal power to take that important action, broad support for it should first be obtained. The operation of such a constraining convention is to be seen in the way in which changes have—and have not—been made to the protected provisions in the Electoral Act 1956. In no case have proposals for amendment been carried through without general support in Parliament (that is,

agreement between the Government and Opposition parties); this has been so notwithstanding the availability of the legal power to repeal the entrenching provision.

7.21 One thing must be clearly understood. To protect a Bill of Rights by entrenchment is not an attempt to write our contemporary political and constitutional understandings indelibly on the future. That would display a foolish arrogance that assumes that what *we* regard as wisdom will hold true for all future generations. History demonstrates quite clearly the falseness of that assumption. To be sure the Bill of Rights is meant to be durable and it should not be easy to change it. To obtain the proposed majority of members of Parliament will normally involve some sort of agreement between the major political parties. Nor in the usual course will it be easy to obtain the support of the majority of electors in a referendum. All this reflects, however, what the proposed Bill of Rights seeks to do. It seeks to enshrine basic rights and freedoms, those things which the great majority of people in our present society see as fundamental. They represent the common understandings of society in this context. Clear support from the public will be essential if the Bill of Rights is to succeed. By the same measure, if it is sought to change those understandings, then those changes too should only be made if there is a similar measure of support in society.

7.22 The proposals for a Bill of Rights are being issued in the form of a White Paper and a draft Bill in order to invite and promote public discussion and debate on this important issue. That debate will be facilitated by the reference of the draft bill to a special parliamentary select committee, which will travel around New Zealand hearing submissions from interested groups and individuals. It is also the Government's hope that interested groups and individuals will play a part in engendering that debate.

7.23 The Government is not committed to any particular provision in the draft Bill. Proposals for inclusion in a Government Bill to be introduced into Parliament will be prepared only after the process of consultation and debate described above has taken place.

7.24 This proposed course of action will ensure that all New Zealanders will be given the opportunity to say whether they want a Bill of Rights, and if so, what they want to see incorporated in it. It will provide a means of judging whether there exists in the community the required degree of consensus and commitment to a Bill of Rights. This will be essential if it is to succeed, both as a legal restraint on the powers of the Government and Parliament, and as a symbol of national commitment to basic rights and freedoms.

## 8. Appeals

**8.1** The introduction of the Bill of Rights will make it necessary to decide whether the Judicial Committee of the Privy Council should be the final appeal authority in cases that come before the courts under the Bill. The draft Bill contains no provision relating to this.

**8.2** A right of appeal now exists from decisions of the Court of Appeal to the Judicial Committee of the Privy Council. Briefly, in civil cases where the matter in dispute or the value of the claim amounts to $5,000 or more, this appeal is of right. The Court of Appeal may grant leave to appeal in other civil proceedings if the court considers it proper to do so because of the importance of the issues or otherwise. In other cases, including criminal cases, the Privy Council itself may grant leave to appeal. Leave is seldom given in criminal cases, but there have been a few such appeals in recent years.

**8.3** By way of exception a few statutes provide on their face that the decision of a New Zealand court is to be final. They include the Family Proceedings Act 1980 s. 175 (6), and (significantly in the present context) s. 168 of the Electoral Act 1956 which makes decisions of the High Court on an election petition final and without appeal.

**8.4** There has been no modern decision on whether provisions of this nature are effective to prevent the Privy Council granting leave to appeal. In *Nunns* v. *Licensing Control Commission* [1968] NZLR 67 McCarthy J. expressly left the question open. But it is certainly within the competence of the New Zealand Parliament by express language to abolish appeals.

**8.5** Unless that is done, however, a decision of the Court of Appeal on the effect of the Bill of Rights would be subject to appeal (either as of right or by leave) to the Privy Council.

**8.6** Almost all other independent Commonwealth countries have abolished appeals to the Privy Council. The principal exceptions are Singapore, some of the Caribbean islands, and a few other small countries.

**8.7** The Government's 1984 Justice Policy states—

> "(Labour will) retain the right of appeal to the Privy Council for the time being in order to provide a second step or tier to appeal jurisdiction while recognising the need for a practical and modern alternative."

**8.8** In relation to the Bill of Rights two sorts of issues might be involved in an appeal—

1. Whether a New Zealand Act of Parliament restricting the rights that the Bill guarantees is, in terms of Article 3, "demonstrably justified in a free and democratic society".

2. Whether the New Zealand Parliament can by ordinary legislation, that is, by a bare majority, override the protections given by the Bill of Rights.

**8.9** If the answer to (2) is "no" the decision of any final court of appeal could be reversed or nullified only by the special procedure set out in Article 28. This requires approval by referendum or the passing of overriding legislation by a 75 percent majority in Parliament. The latter course would require in all ordinary circumstances the agreement of the principal Opposition party. If on the other hand the answer to (2) is "yes" then the court has effectively struck down the Bill of Rights as an Act of a special character and deprived the guarantees it purports to give of their effect.

**8.10** In answering (1) the courts are likely to have to make important value judgments with considerable consequences. In considering whether inconsistent legislation is justified in terms of Article 3, they will have to balance the rights contained in the Bill of Rights against other important social and other interests.

**8.11** The Government doubts whether any tribunal outside New Zealand ought to be able to hold that an Act passed by the New Zealand Parliament is without effect, or decide whether or not the New Zealand Parliament can effectively guarantee human rights and fundamental freedoms.

**8.12** This is not in any way to disparage the eminence or ability of the judges who make up the Judicial Committee of the Privy Council. Nor is it to suggest for a moment that our Court of Appeal is or ought to be amenable to influence by the Executive Government or anyone else. But the proper determination of the sort of issues that can arise under the Bill of Rights demands a knowledge of the full background, and an understanding of the priority New Zealanders attach to different and sometimes competing values. Our priorities are not always the same as those of other countries. Not even the most perceptive outside tribunal can be expected to have this knowledge and understanding to the same extent. It is not a question of influence but of an appreciation of the total environment of a case and of the implications of a particular decision.

**8.13** We therefore consider that the decision of the New Zealand Court of Appeal ought to be final in litigation involving the Bill of Rights.

**8.14** Theoretically it would be possible to do away with appeals to the Privy Council only in cases where the interpretation of the Bill of Rights was in question, leaving the right of appeal in other cases. In practice, however, this would give rise to serious problems and anomalies. A question involving the Bill of Rights could arise

potentially in any criminal case and in many civil cases, either as a principal or as a secondary issue. Such questions could be inextricably interwoven with other legal issues.

**8.15** Accordingly an investigation of the "practical and modern alternative" envisaged in our election policy has already begun and will be speeded up.

## 9. A Wider Role for the Bill of Rights

**9.1** A Bill of Rights will provide a set of minimum standards to which the actions of the State must conform. Those minimum standards would be enforceable by the courts, and persons whose rights and freedoms as guaranteed by the Bill have been infringed will have the right to seek a remedy. But the Bill of Rights will be more than a legally enforceable catalogue of fundamental rights and freedoms. It will be an important means of educating people about the significance of their fundamental rights and freedoms in New Zealand society. Citizens will have a readily accessible set of principles by which to measure the performance of the Government and to exert an influence on policy-making. An awareness of basic human rights and fundamental freedoms amongst citizens and a desire to uphold them is as powerful a weapon as any against any Government which seeks to infringe them. In this way too, the Bill of Rights will be a powerful influence on the Government, its officials and agencies.

**9.2** As Sir Robin Cooke has said:

> "There is a wider or deeper argument. An instantly available, familiar, easily remembered and quoted constitution can play a major part in building up a sense of national identity. If Magna Carta means anything in the South Pacific in the twentieth century, it is not much. . . . In New Zealand we badly need something that can grip the imagination."
>
> (Dethridge Memorial Address p. 26: see para. 7.18)

# 10. Draft New Zealand Bill of Rights (with commentary)

## Introductory Note

**10.1** The Canadian Charter of Rights and Freedoms (enacted as part of the Constitution Act 1982) and the International Covenant on Civil and Political Rights of 1966 are of major importance in the drafting as well as the substance of the Bill. As appropriate, they are referred to in the particular annotations as the Canadian Charter (or Charter) and the International Covenant (or Covenant). The full texts in English of these documents are included in the Apppendices to this paper. The annotations also refer to the relevant passages of the Report made by the New Zealand Government in 1982 to the United Nations Human Rights Committee on the International Covenant on Civil and Political Rights. That Report sets out the measures which the Government had at that time taken to give effect to the rights recognised in the Covenant. It accordingly contains much detailed information on the relevant New Zealand law and practice. The Report was published as U.N. Document CCPR/C/10/Add.6 of 29 January 1982 and republished by the Ministry of Foreign Affairs (along with the statements made by the representative of the New Zealand Government in support of the report in November 1983) in Information Bulletin No. 6, *Human Rights in New Zealand* (1984). In the annotations it is referred to as Report.

**10.2** It will be seen that many provisions of the draft Bill are closely based on the Canadian text. This will be of major practical importance for New Zealand lawyers and courts will be able to draw on the rich and developing jurisprudence from Canada.

**10.3** There will also be helpful precedents from other Commonwealth countries which have judicial review. Nevertheless, in the end the courts will be required to reach as best they can a solution which is appropriate to New Zealand society. Decisions of the courts of Canada may be persuasive but it is expected that the New Zealand courts will seek to develop their own constitutional tradition in response to their assessment of current values in New Zealand society as reflected in the Bill of Rights.

**10.4** Quite extensive references are made to Canadian cases in the commentaries. The references are to be read subject to the point just made. The cases are, however, valuable as indicating the kinds of issues that are likely to be raised and the ways in which they might be dealt with.

**10.5** A drafting practice in the Bill might be explained here. The pronoun which is generally used is "everyone", and in one case

"anyone" (Article 25). (In some cases of course a more limited group is identified: Articles 4 (1), 5, 11 (1), (2) and (4), 13 and 18 (k).)

**10.6** In a few cases in which a negative formulation is used the term is "no one": Articles 11 (4), 14, 17 (2) and (3). In those cases in which there is a reflexive element in the sentence "every person" is used: Articles 8, 10 (2), 13 ("a person"), 18 (d), (i), (j), 20 (2) and 21.

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## New Zealand Bill of Rights

**An Act to institute as the supreme law of New Zealand a Bill of Rights in order to affirm, protect and promote human rights and fundamental freedoms in New Zealand, and to recognise and affirm the Treaty of Waitangi.**

***WHEREAS***

**(1) New Zealand is a democratic society based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person;**

**(2) New Zealand in 1978 ratified the International Covenant on Civil and Political Rights;**

**(3) The Maori, as tangata whenua o Aotearoa, and the Crown entered in 1840 into a solemn compact, known as Te Tiriti o Waitangi or the Treaty of Waitangi, and it is desirable to recognise and affirm the Treaty as part of the supreme law of New Zealand;**

**(4) It is desirable to affirm the human rights and fundamental freedoms of all the people of New Zealand without discrimination and to ensure their recognition and observance as part of the supreme law of New Zealand by the Parliament and Government of New Zealand.** ...

### *COMMENT*

**10.7** The preamble will be part of the Bill of Rights and can be used by the courts as an aid to its construction. Accordingly, in any matter of doubt as to the interpretation or application of the Bill of Rights, the courts will be able to look at the preamble to help them ascertain the intention of Parliament.

**10.8** The use of a preamble, although rare in modern New Zealand public Acts, is not unknown. One example is the Treaty of Waitangi

Act 1975. The Statute of Westminster 1931 of the United Kingdom Parliament has an extensive preamble. The unique character of the Bill of Rights is thought to call for a short preamble.

**10.9** Recitals 1 and 3 set out the twin thrusts of the Bill in accordance with the purposes declared by the long title.

**10.10** Recital 2 refers to New Zealand's ratification of the International Covenant on Civil and Political Rights. This is the only reference to the Covenant in the Bill. The Bill of Rights does not incorporate or enact the Covenant but its provisions are consistent with it.

**10.11** Although the Covenant is and will continue to be binding on New Zealand under international law, it does not alter the domestic law of the land which the courts apply. The enactment of the Bill of Rights will not change this. However, in ratifying the Covenant in 1978 the Government of the day was satisfied that with a few minor exceptions (as to which reservations were made) our law complied with the obligations of the Covenant.

**10.12** Generally, the text of the Bill departs considerably from that of the Covenant both in phraseology and arrangement. In some respects the language of the Covenant appears too detailed or unsuited to a New Zealand statute. It was fashioned to meet the varying circumstances of all countries that participated in drawing it up. A number of its provisions have little relevance to the situation in New Zealand. Consequently, many of the Articles of the Covenant have no corresponding provision in the Bill of Rights. A few of the Articles of the Bill, e.g., 21 (3)—right to bring civil proceedings against the Crown—have no equivalent in the Covenant.

**10.13** The reference to the International Covenant in the preamble will open the way for the courts to refer to the Covenant in interpreting and applying the Bill. For example, they may be expected to be assisted by the Covenant in considering what restrictions on the rights conferred by the Bill are justified in a free and democratic society: see Article 3.

**10.14** The first part of recital 4 indicates the desire to affirm rights and freedoms without discrimination.

**10.15** This does not conflict with the provisions of specific articles that confer rights on particular groups, e.g., Articles 5 and 11 (2) (New Zealand citizens) or protect against discrimination on particular grounds (Articles 12 and 13). These rights are limited of their nature, or the limitation reflects basic principles of our law—for instance the right to enter and remain in a country is limited to its citizens. But within the right so conferred no distinction or discrimination will be permitted, e.g., between New Zealand citizens or particular ethnic groups.

**10.16** The second part of recital 4 anticipates and reinforces Article 2. It makes it clear that the Bill of Rights is directed against Government actions (in the widest sense) and not against the actions of private citizens. This is more fully explained and analysed in the comments on Article 2.

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***BE IT THEREFORE ENACTED BY*** **the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:**

## PART I

### *General*

**1. New Zealand Bill of Rights supreme law**

**This Bill of Rights is the supreme law of New Zealand, and accordingly any law (including existing law) inconsistent with this Bill shall, to the extent of the inconsistency, be of no effect.**

*COMMENT*

Cf. Canadian Charter, s.52.

**10.17** As discussed in sections 3 and 4 of the White Paper, it is of the essence of the Bill that it have supreme status in the legal system. The supremacy is in relation to Parliament in its ordinary lawmaking capacity and to other lawmaking bodies. Accordingly, any law made by these bodies which is inconsistent with the Bill will, to the extent of the inconsistency, be of no effect. The supremacy is limited in an important way by the text of the Bill itself: the Bill can be amended if the amending process set out in Article 28 is complied with. The Bill is not immutable. That process is, however, a difficult one to satisfy. It would not be expected that it would be often used. The courts might also over a period give the Bill a changing interpretation reflecting the movement of basic attitudes in a community. The Privy Council, in a Canadian case, used an apt metaphor, speaking of the Canadian constitution as "a living tree capable of growth and expansion within its natural limits", *Edwards* v. *Attorney-General of Canada* [1930] A.C. 124, 136. See further paragraphs 6.14–6.17.

**10.18** The provision, and accordingly the Bill, would apply to law in existence when it comes into force as well as to law made in the future, and to relevant parts of the common law as well as to legislation. The common law is included because it is a result of state action: it is formulated by the courts. And it is capable of restricting fundamental rights and freedoms.

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**2. Guarantee of rights and freedoms**

**This Bill of Rights guarantees the rights and freedoms contained in it against acts done**

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

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

***COMMENT***

Cf. Canadian Charter, s. 32 (1).

**10.19** It is already implicit in Article 1 that Parliament is limited by the Bill. Those bodies it authorises to act are accordingly also limited. But the Bill in terms of its basic purposes and the preamble is to apply generally to public and governmental action. Article 2 is designed to make that point and accordingly to draw the appropriate line between public action and other action—at least in the first instance.

**10.20** In a broad sense, Bills of Rights are thought of as documents which restrain the great powers of the State. They are not seen as extending to private actions. Such actions are rather to be controlled by the general law of the land; that law will be adequate to deal with private action or can be made so. By contrast the restraints of a Bill with supreme status are appropriate only for those bodies—public bodies—which make and administer the law. Accordingly, much of the United States Bill of Rights is written in terms of restraints on State or public power: Congress shall make no law abridging . . . ; nor shall any State deprive . . . nor deny; the right . . . shall not be denied . . . by the United States or by any State. It is true that some rights are not worded in that state specific way but they are rights which in practice would only be asserted against state power: e.g., protection against unreasonable search and seizure, double jeopardy, self-incrimination, and cruel and unusual punishment. The broad proposition about State action appears for example in a leading judgment (which will be further mentioned later) about a racially discriminatory covenant restraining the sale of land. The Supreme Court there affirmed that the Fourteenth Amendment, with its demand that no State deny to any person the equal protection of the laws, "erects no shield against merely private conduct, however discriminatory or wrongful" (*Shelley* v. *Kraemer* (1948) 334 U.S. 1, 13). Similarly, the Canadian Charter provides that it applies to the federal and provincial legislatures and governments in Canada. How is the line between public and other actions to be drawn? Consider the following situations—

(a) legislation which itself requires discrimination on grounds of race (e.g., Old-age Pensions Act 1898, ss. 64–65);
(b) legislation which permits public authorities such as the police to discriminate on grounds of race (eg. Dangerous Drugs Act 1927, s. 11 proviso);
(c) policies or practices of public agencies which discriminate on grounds of race even although the relevant law itself might not be discriminatory (e.g., *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356);
(d) practices of courts which discriminate on grounds of race;
(e) the issue by a court of an injunction to enforce a racially restrictive covenant to which only private individuals are parties (*Shelley* v. *Kraemer*);
(f) racially discriminatory practices of a private company which might be seen as having a public character—if for instance it owns a town (cf. *Marsh* v. *Alabama* (1946) 326 U.S. 501) or provides a basic service such as electricity (cf. *Jackson* v. *Metro. Edison* (1974) 419 U.S. 345) or acts in that discriminatory way against the background of a custom having the force of law (eg. *Adickes* v. *Kress and Co.* (1970) 398 U.S. 144);
(g) enforcement by a court of the common law of defamation (e.g., *New York Times* v. *Sullivan* (1964) 376 U.S. 254);
(h) private racially discriminatory practices taken in compliance with a restrictive covenant between private individuals (compare (e) above); the freedom to take those actions might be *recognised* by a court rather than enforced.

**10.21** There are several variables in the above cases:
(i) the *actor* is sometimes a public body: Parliament (a and b), the Executive or a related body (b and c), the courts (d, e, g and h);
(ii) the *action* can be seen as having a public character in some substantive sense even although the actor is not a public body (f);
(iii) the action—especially of courts—might be seen as *coercive* and accordingly involving the State in enforcing questionable private actions by contrast with a passive and recognising judicial role (compare e and g with h);
(iv) the action might be directly based on authority from Parliament; consider the case of professional disciplinary authorities acting under statutory powers; even in the defamation case the *source* of authority is state law which the court enforces (iii above).

**10.22** It is by reference to such considerations that the United States courts have attempted to draw the line between public and private action.

**10.23** The provisions of Article 2 can only be a first step in the drawing of the line between public action, which would be caught by the Bill, and private action, which would not be.

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**3. Justified limitations**

**The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

***COMMENT***

Cf. Canadian Charter, s.1.

**10.24** The rights stated in and guaranteed by the Bill are not absolute. Thus freedom of expression (Article 6) does not carry with it the right to incite violence, or to defame others, or to engage in commercial fraud. The freedom has limits. In some cases the limit may indeed arise from another freedom included in the Bill: thus the right to freedom of expression would scarcely justify the release of prejudicial evidence prior to a trial inconsistently with the right to a fair hearing (Article 17 (1) (a)).

**10.25** Existing models suggest three ways of drafting the possible limits to the freedoms. The first is to include in each provision stating a freedom a separate statement of the permitted limits. This is in general the approach of the International Covenant. Consider, for freedom of expression, the formulation in Article 19(3). That approach appears as well in a number of Commonwealth constitutions, particularly those influenced by the drafting of the European Convention on Human Rights. A second approach, at the other extreme, is to state no express limits at all. The United States Constitution provides a good example: Congress shall make no law . . . abridging the freedom of speech. . . . The courts do of course have to work out limits either by determining the scope of "speech" or by reading in balancing and limiting factors.

**10.26** Article 3 adopts an intermediate model, setting out a single limitation provision which is to be applied as appropriate to each of the separate freedoms. It is based closely on section 1 of the Canadian Charter. Among the reasons for choosing that limitation formula rather than the other approaches are the following:

(a) The Bill should recognise explicitly that there *are* limits on its freedoms. It is misleading (and could be thought irresponsible) to suggest otherwise.

(b) The practice of courts under the different regimes suggests that the apparently greater precision resulting from the greater elaboration of detail in the Covenant and European models

is just that—apparent. The particular judgment to be made remains essentially the same. Consider for example a dispute about the appropriate scope of the law of sedition. The Covenant would set this question: are the restrictions provided by the law necessary to protect national security or public order (ordre public). Under Article 3 the question would be: is that limit a reasonable one prescribed by law and such that it can be justified in a free and democratic society? Indeed, as is indicated later, the proposed formula in some ways gives a better regulated direction to the courts.

(c) There would be a danger that too much significance would be given to differences between different limitation provisions—differences which in the case of the Covenant can sometimes be the result of the accidents of drafting over the long period that that text was elaborated in the General Assembly of the United Nations.

(d) So far as possible the Bill should be couched in short, simple, elegant and inspiring language. A long series of detailed exception provisions makes that impossible.

(e) New Zealand courts will be able, in this respect as in others, to take advantage of the developing jurisprudence of the Canadian courts.

**10.27** It is already possible to take advantage of that body of law in considering the principal features of Article 3 and indeed of several of the other provisions of the Bill. The first point to note about it is that it comes into play only when one of the guaranteed freedoms has been presumptively abridged. Thus censorship legislation does restrict freedom of expression. The next question is whether the legislation can be justified in terms of Article 3.

**10.28** The second point is the requirement that there must be "limits prescribed by law". The "law" would not have to be an Act of Parliament; it could be subordinate legislation or common law. An important decision of the European Court of Human Rights on almost identical language makes it clear, however, that the law must be adequately accessible to the public and that the law must be formulated with sufficient precision to enable those subject to it to regulate their conduct: they must be able, if need be with appropriate advice, to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail: *Sunday Times Case* (1979) 58 Int. L. Reps 491, 524. The Privy Council has ruled similarly in *Attorney-General* v. *Ryan* [1980] A.C. 718, and the Ontario Court of Appeal has held that film censorship legislation which did not supply standards to control the censor failed: because of the vagueness and breadth of the discretion of the Board, its powers were not "prescribed by law", *Re Ontario Film and Video Appreciation*

*Society* (1983) 41 Ont. Reps (2d) 583, 592, affirmed (1984) 45 Ont. Reps (2d) 80. United States courts employ long developed void for vagueness doctrines, especially in respect of legislation which restricts freedom of expression, e.g., *Winters* v. *New York* (1948) 333 U.S. 507. It is important to note that this position, which is consistent with basic principles of the certainty of the criminal law and the denial by the Rule of Law of unfettered discretion, does not stand in a legislature's way. It does not say that a censorship law cannot be passed. Rather in essence it sends the matter back to the legislature. The legislature has not yet done *its* job which is to make law, to prescribe limits. It is that that the court is asking it to do.

**10.29** The third important feature of the provision is that it puts the burden of persuading a court that the provision justifies a law or other government action which is presumptively in breach of a right in the Bill on the Government or the other party relying on the law or action. That party must persuade the court that the limit is reasonable and can be justified in a free and democratic society. *Re Federal Republic of Germany and Rauca* (1982) 41 Ont. Reps (2d) 225, 241.

**10.30** The fourth and central feature of the provision is the substantive test: is the limit a reasonable one? Can it be demonstrably justified in a free and democratic society? These questions present the courts with a difficult and important task trenching in some cases on matters of policy. The task is limited in one way by the Bill: it arises in respect only of the rights carefully stated in the body of the Bill. And it is limited as well, in a practical sense, by the material available in litigation.

**10.31** The mass of relevant cases from the Commonwealth, the European Human Rights Court, and the United States suggests some tentative views about how this task might be carried out. The *Sunday Times* case is again a valuable source. The European Court there held the English law of contempt of court as applied to the Sunday Times (which wished to publish stories about litigation brought by thalidomide victims against the manufacturer of the drug) to be in breach of the European Convention (58 Int. L. Reps at 529–537). The reason for this holding involved as a first step the recognition that freedom of expression "constitutes one of the essential foundations of a democratic society". Any limit could, in terms of the European Convention, be regarded as "necessary in a democratic society" only if there was a pressing social need for the restriction. The United Kingdom was allowed a "margin of appreciation" in establishing that need. But, even with that deference, the interest in the fair administration of justice did not correspond to a social need sufficiently pressing to outweigh the public interest

in freedom of expression. In broad terms, what is involved is not just a careful reading of the precise words of Article 3. Rather the courts will be weighing (1) the importance of the right infringed, (2) the nature of the infringement, and (3) the importance of the interest put forward to justify the limit. The European Court, in weighing such matters, has developed a principle of proportionality: is the restraint (2 above) proportionate to the legitimate aim pursued (3 above)? Obviously there would also have to be a rational connection between the restraint and the aim.

**10.32** Such a judicial role will mean that the court will have to be told of the purpose of the restrictive legislation. How is it evolved? What is its rationale? Changing attitudes to the use of legislative history and related practices relevant to challenges to the validity of regulations will assist in finding the answers to those questions: (*Re Simpson* [1984] 1 NZLR 733, 747; *Brader* v. *Ministry of Transport* [1981] 1 NZLR 73).

**10.33** Counsel and the courts will also draw on economic, statistical and social information relevant to the matters listed in the preceding paragraph.

**10.34** Another category of extrinsic evidence will be useful: information about the state of law in other countries. The fact that a law similar to that under attack exists in the United Kingdom, the United States, Canada, Australia or Western Europe would tend to show that the law could be justified in a free and democratic society, e.g., *Re USA and Smith* (1984) 44 Ont. Reps (2d) 705, 722–727; cf. also *King-Ansell* v. *Police* [1979] 2 NZLR 531, 540–1. This evidence would not of course be decisive. A judgment is to be made of the New Zealand situation and of the particular reason which gives rise to the legislation, but the comparative material would often be suggestive.

**10.35** The Bill, unlike the Covenant (Article 4), does not deal expressly with emergency situations and the derogations from rights and freedoms that might be required. Such derogations would be dealt with in one of two ways—either by the derogations being tested against Article 3 or by legislation being enacted in accordance with the more onerous procedures of Article 28.

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## PART II

*The Treaty of Waitangi*

### 4. The Treaty of Waitangi

**(1) The rights of the Maori under the Treaty of Waitangi are hereby recognised and affirmed.**

**(2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.**

**(3) The Treaty of Waitangi means the Treaty as set out in English and Maori in the Schedule to this Bill of Rights.**

***COMMENT***

Cf. Canadian Charter, s. 35.

**10.36** The first paragraph of this Article together with Article 1 give effect to the third recital of the preamble—that it is desirable to recognise and affirm the Treaty of Waitangi as part of the supreme law of New Zealand. The paragraph recognises and affirms the rights of the Maori under the Treaty without attempting the inherently impossible task of defining precisely what they are. This impossibility arises from the concept of the Treaty as living and organic. In the words of the Waitangi Tribunal in the *Motunui* report (p. 61):

> "The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract."

**10.37** Article 4 will put the Treaty, and the rights that it conferred, on an entirely different plane from the traditional view of its effect. This view was first clearly stated in the judgment of Prendergast C. J. in *Wi Parata* v. *Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) S.C. 72. He held, first, that the Treaty of Waitangi was a nullity in so far as it purported to cede the sovereignty of New Zealand, and, second, that it had no effect in domestic law, and conferred no legal rights against the Crown. The first view is now widely rejected, and was at variance with well established practices and assumptions even then. The second proposition was confirmed by statute in the Native Lands Act 1909 insofar as Maori land was concerned, but no such action was taken in respect of other rights embraced in the Maori phrase "ratou taonga katoa" (things prized by them).

**10.38** A recent writer, P. G. McHugh, has argued that (subject of course to legislation) the common law recognised Maori property rights even in the absence of the Treaty, which was to that extent unnecessary: See (1984) 14 VUWLR 247.

**10.39** This Bill will put it beyond challenge that, henceforth, not only is the Treaty of Waitangi part of our law but that it has a superior status to general legislation. The rights that it recognises will prevail over inconsistent legislation (existing and future) by virtue

of Article 1, and will be subject to alteration only by the special process prescribed in Article 28, or to limitation where that is permitted by Article 3.

**10.40** But like the other rights protected by the Bill of Rights, this provision will not have retrospective force. It will not authorise, for example, reopening transactions already concluded or deprive persons of rights and interests lawfully acquired as the law then stood.

**10.41** Paragraph 2 declares that the Treaty of Waitangi is to be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent. Its language is based on s. 5 (d) of the Acts Interpretation Act 1924.

**10.42** This reflects the concept of the Treaty stated in the passage from the Waitangi Tribunal already quoted. The *application* of the Treaty's principles must be considered in the light of the whole ambience—social, economic and so on—at the time the question arises.

**10.43** Since the Treaty is not itself enacted, but is recognised and affirmed, and since this will be done in a constitutional statute, the courts may confidently be expected, in cases arising under the Bill of Rights, to follow the approach of the House of Lords in *James Buchanan & Co Ltd.* v. *Babco Forwarding and Shipping Ltd.* [1978] AC 141:

> "The correct approach in construing a United Kingdom statute which incorporates and gives effect to a European convention is to interpret the English text as set out in the statute in the normal manner appropriate for the interpretation of an international convention, unconstrained by technical rules of English law or by legal precedent but on broad principles of general acceptation."

**10.44** Moreover, this would seem to accord with what the Waitangi Tribunal said in its *Motunui* report (p. 55) about the Maori way of looking at the Treaty.

> "A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place."

**10.45** In other words it is the principles of the Treaty that will be important rather than a literal dissection of the provisions.

**10.46** Paragraph 3 defines the operative text of the English and Maori versions of the Treaty as those set out in the Schedule to the Bill of Rights. These texts are identical with those in the Treaty of

Waitangi Act 1975, with the Maori text modified as proposed in the Treaty of Waitangi Amendment Bill now before Parliament. A history of the various versions of the Treaty is given in an article by Ruth Ross: *Te Tiriti o Waitangi—Texts and Translations* 1972 N.Z. Journal of History 6; 129. There is also a discussion by David V. Williams in *He Korero o Waitangi* 1984 p. 161.

**10.47** In view of the differences between the English and Maori versions, the courts may be faced with the need to choose between two meanings. (This need will of course be diminished by the injunction to give effect to its spirit and true intent.) Neither the Bill of Rights nor the Treaty of Waitangi Act gives either Maori or English versions precedence. In the ordinary course, therefore, both texts would be regarded as of equal authority. However, having regard to the historical circumstances, the Maori version may be considered the primary one: see the submission of the Department of Maori Affairs quoted at p. 57 of the *Motunui* report.

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## PART III

### *Democratic and Civil Rights*

**5. Electoral rights**

**Every New Zealand citizen who is of or over the age of 18 years**

**(a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and**

**(b) is qualified for membership of the House of Representatives.**

***COMMENT***

Cf. Canadian Charter, ss. 3, 4; International Covenant, Article 25 (b); Report, paras. 313–321.

**10.48** This Article is concerned with basic principles and is not designed to entrench the present law in its details. Thus it guarantees the right to vote to New Zealand citizens only, whereas the present law (Electoral Act 1956 s. 39) gives the franchise also to all permanent residents of New Zealand who have lived continuously in New Zealand for one year. That provision will not be affected, and will remain in force unless Parliament decides to change it. Nor does the Article attempt to regulate the term of Parliament, a matter which is now under consideration by the Royal Commission on the Electoral System. It merely requires "genuine periodic elections"

leaving it to Parliament itself to determine their frequency. The present maximum term of three years is contained in s. 12 of the Electoral Act which is a "reserved provision" under s. 189.

**10.49** The Bill contains no provison corresponding to s. 4 (3) of the Canadian Charter requiring a sitting of Parliament at least once in every 12 months.

**10.50** The voting age of 18 is also a reserved provision by virtue of s. 189 (e) of the Electoral Act and thus partly entrenched.

**10.51** "Equal suffrage" does not require an exact equality of population for electorates. The present 10 percent differentiation allowed under the Electoral Act s. 17 (itself a "reserved provision") is already one of the narrowest in Western democracies. Only if the permitted discrepancies in the populations of electorates were gross might a court hold that this Article had been infringed.

**10.52** Permissible limitations under Article 3 would doubtless include such usual requirements as voter registration and reasonable residence tests. These are commonplace provisions in democratic societies. Again, their detailed regulation is properly left to Parliament in the ordinary way.

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### 6. Freedom of thought, conscience and religion

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

*COMMENT*

Cf. Canadian Charter, s. 2 (a) and (b); International Covenant, Articles 18 and 19 (1); Report, paras. 233–239.

**10.53** This is the first of a set of three provisions dealing with the basic liberal freedoms of thought, conscience, opinion, religion and expression. This provision is essentially concerned with the internal, subjective element. The next two relate to the external manifestations of that element, for instance in religious worship and speech.

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### 7. Freedom of expression

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

*COMMENT*

Cf. Canadian Charter, s. 2 (b); International Covenant, Article 19 (see also Article 20); Report, paras. 240–260.

**10.54** This provision is of central importance in a democratic state. That fact, the positioning of this provision at this point in the draft, and the general thrust of this Bill are the reasons that this annotation is fuller than those which follow. The parallel provisions in other countries have often been debated in terms of their purposes, purposes which take us back to such discussions of those of John Milton in *Areopagitica* (1644) and John Stuart Mill *On Liberty* (1859). A recent American discussion identifies four "grand purposes":

(1) *Individual fulfilment through self expression.* For Justice Brandeis, "the final end of the State (is) to make men free to develop their faculties", *Whitney* v. *California* (1927) 274 U.S. 357, 375.

(2) *Democratic self government.* For a Canadian judge, parliamentary government was "ultimately government by the free public opinion of an open society": it demanded the conditions of a virtually unobstructed access to and diffusion of ideas: *Switzman* v. *Ebling* [1957] S.C.R. 285, 306. Consider too the argument of a New Zealand judge in a wartime censorship case—

> "Circumstances might easily arise, particularly in time of war, where considerations of public safety would require that the conduct of those in authority should be challenged.... Suppression of criticism of public affairs might tend to prejudice the public safety and to promote distrust and discontent, thus creating an actual public danger." *Billens* v *Long* [1944] NZLR 710, 732.

(3) *To advance knowledge and reveal truth.* For Mill, the suppression of opinion was wrong because it is only by "the collision of adverse opinions" that truth is discovered or confirmed. Justice Oliver Wendell Holmes' metaphor was that "the best test of truth is the power of the thought to get itself accepted in the competition of the market". *Abrams* v. *United States* (1919) 250 U.S. 616, 630.

(4) *To achieve a more adaptable and hence a more stable community.* For a leading theorist of the United States First Amendment, the purpose is maintaining the precarious balance between healthy cleavage and necessary consensus: Emerson, *The System of Freedom of Expression* (1970) 7. See generally Dorsen and Gora in Blasi (ed.), *The Burger Court* (1983) Ch. 2.

**10.55** The freedom, while basic and of broad scope (extending for instance to forms of expression beyond the written word), is obviously subject to important limits imposed by the law. Consider for example the various *means of limitation*—by censorship in advance, by injunctive relief in advance, by civil or criminal proceedings after the event, or by other processes of mediation or conciliation usually also after the event. Expression might also be regulated in advance, as with permits for parades or meetings.

**10.56** That last reference points to the various forms which freedom of expression might take and the places in which it might be exercised—written, oral, newspapers, television, radio, meetings, parades and the great range of public activity that can be seen when any major issue grips public attention. Obviously, the law regulates those varying forms of expression in varying ways. Some come into greater conflict with other important values.

**10.57** In that regulation and more broadly, the law has regard to a range of public and private interests separate from, and possibly conflicting with, freedom of speech. Consider, for example, the laws relating to incitement to commit crimes, the various libels which are unlawful (defamatory, seditious, blasphemous), spying and the unlawful release of official information. Those laws anticipate a threat to some other interest (such as in personal reputation), and control speech for that reason. Those threats obviously vary according to the character and occasion of the expression. Justice Holmes made the point neatly with his example of the person maliciously crying "Fire!" in a crowded theatre. Or consider laws controlling advertising, limiting election expenditure, or regulating financial advertising.

**10.58** If such law is challenged, the court will first have to consider whether freedom of expression is infringed. If it is, the next question is that presented by Article 3: is the limit a reasonable one which is demonstrably justifiable in a free and democratic society? For the most part in respect of existing law, there would be no doubt that the answer would be yes. But in some cases, as Canadian experience is starting to show, the matter will not be clear. That experience and United States and Commonwealth cases show that the courts will be concerned to weigh the value of the particular speech (moving from political and social speech, to commercial speech, to pornography and to other forms of expression through conduct), the degree and type of intrusion, the precision of the restraint (the vaguer the direction, the more "chilling" and suspect it is), and, of course, the particular interest which the restraint is designed to protect. The more general discussion in the commentary to Article 3 of this process of judgment should be recalled.

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## 8. Manifestation of religion and belief

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

*COMMENT*

Cf. Canadian Charter, s. 2 (a); International Covenant, Article 18 (3); Report, paras. 233–239.

**10.59** As with Article 7 this provision is concerned with the external manifestation of freedoms included in Article 6. It extends beyond religion to belief.

**10.60** The provision is to be distinguished from the First Amendment to the United States Constitution which includes as well a prohibition on the establishment of religion. That provision was designed to prevent the creation of a state or official religion. That does not appear to be a real question to address in New Zealand. The American provision moreover has been used to deny state aid to religious schools—a practice long followed in New Zealand—and even voluntary prayers or bible readings in schools. The Covenant and Canadian Charter contain no such prohibition. Accordingly, it has not been included in the above text.

**10.61** Once again there are relevant limits in our law which might as appropriate have to be tested against the above provisions and Article 3. One important question which has arisen in Canada is about the effect of the guarantee on Sunday trading legislation. Such legislation does not prevent those whose holy day is on another day practising the religion in issue. Moreover the practical result of the legislation, whatever its original purpose, can be seen as secular and financial. It does, however, exact a financial penalty if those people are unable to work on both Sunday and their own holy day, and its fundamental purpose can be seen as religious. For those reasons a divided provincial court of appeal has held that the legislation infringes freedom of religion. The matter is before the Supreme Court of Canada: *R* v. *Big M Drug Mart* (1983) 5 D.L.R. (4th) 121. No doubt many other relevant existing limits—such as on polygamy—would be upheld without difficulty against arguments based on religious freedom.

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**9. Freedom of peaceful assembly**

**Everyone has the right to freedom of peaceful assembly.**

*COMMENT*

Cf. Canadian Charter, s. 2 (c); International Covenant, Article 21; Report, paras. 261–265.

**10.62** The word "peaceful" limits the provision even without resort to Article 3. Compare, for example the prohibition in the Summary Offences Act 1981, s. 3, of inciting disorder. Obviously in many cases a balance has to be struck between the freedom—an important one—

and other interests, such as those of the public to pass through the streets unimpeded, or of the wider community in the prevention of disorder (although the question can arise then whether it is the speaker or the heckler who should be controlled).

**10.63** This is an area in which the power of local authorities to make and administer bylaws may be critical. Unfettered powers to prevent meetings or processions might be questioned because of the lack of "limits prescribed by law" in terms of Article 3. It may also be that in some cases the interest to be protected cannot be seen as justifying the interference with an important freedom.

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**10. Freedom of association**

**(1) Everyone has the right to freedom of association.**

**(2) This right includes the right of every person to form and join trade unions for the protection of that person's interests consistently with legislative measures enacted to ensure effective trade union representation and to encourage orderly industrial relations.**

*COMMENT*

Cf. Canadian Charter, s. 2 (d); International Covenant, Article 22; Report, paras. 266–285.

**10.64** Again this is an important right with application in a wide range of situations. A law which prohibits the formation of political parties is an obvious example of something which infringes this provision. Again it has to be reconciled with or weighed against important competing interests. Consider for instance the law relating to restrictive trade practices, or criminal or tortious conspiracy.

**10.65** There are also issues involving trade union law. Consider for instance legislation which gives pre-eminence to an existing union in a particular industrial area and prohibits new unions, or which gives Ministers powers to dissolve unions, or restrains their bargaining powers and activities, or enables membership of the relevant union to be made compulsory by agreement or by provisions in the award (with the exception of those with a conscientious objection to that). There are also professional organisations with compulsory membership.

**10.66** In 1978, at the time New Zealand ratified the International Covenant and, in particular, accepted the provisions of Article 22 with its guarantee of the right of individuals to form and join trade unions for the protection of their interests, the above features were to be found in the New Zealand statute book. It was not clear whether they were fully compatible with the provisions of Article 22 (and

with the closely related provision of Article 8 of the International Covenant on Economic, Social and Cultural Rights). Accordingly on ratification, the New Zealand Government entered a reservation. It reserved:

> the right not to apply Article 22 (or Article 8) as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that Article.

**10.67** It will be noted that the wording of that reservation has been included in the body of paragraph (2) of Article 10 above.

**10.68** The text of the reservation indicates doubts whether the New Zealand law did in fact fail to comply with the provisions of the Covenant. Its tentative wording ("*may* not be fully compatible") suggests that it was included out of an abundance of caution. So too does the New Zealand Government report made in January 1982 to the United Nations Human Rights Committee. That report stated that the various legislative restrictions, briefly indicated above, were considered necessary to guarantee "public order (ordre public)" or to protect other interests "as permitted by Article 22 (2) of the Covenant". (It will be recalled that the Covenant contains limitation provisions as appropriate to each particular Article, whereas this Bill contains just the one which is to have general application: see Article 3 and the commentary to it.) The report having discussed the particular restrictions concluded that while they "can be seen as permissible in terms of Article 22 (2)" New Zealand nevertheless made the reservation in the terms indicated (Report, paras. 272–284).

**10.69** The New Zealand representative, in presenting the report to the United Nations Committee in November 1983, further emphasised the point. The restrictions in New Zealand's view, he said, were permissible in terms of Article 22 (2). In case that was wrong, New Zealand had made the reservation in the terms indicated (Ministry of Foreign Affairs, Information Bulletin No. 6, 21).

**10.70** The issues, especially those relating to forms of compulsory unionism, have been often considered within the International Labour Organisation (to the relevant Conventions of which the Covenant provisions are related) and by courts in Europe and the Commonwealth. (Some of the other questions have also started to arise in Canada, e.g. *Re Service Employees International Union and Broadway Manor* (1983) 44 Ont. Reps (2d) 392.) The issues are of considerable complexity. The discussions and decisions show that the so called "negative freedom"—the freedom not to join a union—is not necessarily implied in the guarantee of the freedom to form

and join unions. An important case is the decision of the European Court of Human Rights that British Rail's dismissal of employees who had been engaged before the closed shop agreement was concluded, and who had refused to join the union, violated the employees' trade union freedom: *Young, James and Webster* case (1981) 62 Int. L. Reps 359. The court did not, however, find it necessary to make a general ruling on the negative freedom. It accordingly did not have to rule on the consequence of the deliberate exclusion by the drafters of the European Convention of the provision of the Universal Declaration of Human Rights that "no one may be compelled to belong to an association". They rather focussed on the particular effect of the United Kingdom system on the employees (pp. 377–380). The court certainly did not see the negative aspect of freedom of association as falling completely outside the protection of the Convention. Also significant is an opinion of the Freedom of Association Committee of the International Labour Organisation. In discussing union security arrangements, it draws a line between legislation which makes union membership compulsory and that which *permits* such arrangements, either formally or by reason of the fact that no legislation on the matter exists at all (*Freedom of Association* (2d ed, International Labour Office 1976) p.19, para.41).

**10.71** Further relevant factors are the extent, procedures, and actual operation of the conscientious objection provisions. If they provide broad grounds for exemption, the limit on the "negative freedom" is the less. Legal restraints on the use of a particular member's funds for political purposes will also be important.

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**11. Freedom of movement**

**(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.**

**(2) Every New Zealand citizen has the right to enter New Zealand.**

**(3) Everyone has the right to leave New Zealand.**

**(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.**

***COMMENT***

Cf. Canadian Charter, s.6; International Covenant, Articles 12 and 13; Report, paras. 147–169.

**10.72** These rights are subject to certain limits (in terms of Article 3). Some of the limits are generally applicable. Thus the law of trespass, which protects private property, restricts freedom of

movement within New Zealand. Other limits are particular, and, for example, may prevent convicted persons from moving around the country

**10.73** Paragraph (3) is reflected for New Zealand citizens in the provisions of the Passports Act 1980.

**10.74** Paragraph (4) is to be read with the natural justice guarantees set out in Article 21(1). It is reflected in the 1978 amendments to the Immigration Act 1964, which provide individuals subject to deportation with a right of appeal to the Deportation Review Tribunal and the High Court.

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## PART IV

### *Non-Discrimination and Minority Rights*

**12. Freedom from discrimination**

**Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, or religious or ethical belief.**

*COMMENT*

Cf. Canadian Charter ss. 15, 28; International Covenant, Articles 2 (1), 3, 26; Report, paras. 19–43, 49–54, 327–329.

**10.75** The rights encapsulated in this Article, unlike most of those protected by the Bill, are not derived from the common law. They are the offspring of the profound movement of ideas and opinions during the last 50 years, which have found their principal legislative expression in New Zealand in the Race Relations Act 1971 and the Human Rights Commission Act 1977. Reference may also be made to the strong and long-standing emphasis on equality in New Zealand social and political thinking, reflected in the phrase in the first recital to the preamble: New Zealand is a democratic society based on . . . principles of freedom, *equality* . . . . This stress on equality as a central and paramount value can be traced far back in our modern history and indeed can be discerned in the Treaty of Waitangi itself. But it is only in recent times that many of the implications of this equality have been appreciated.

**10.76** The Article does not attempt to prohibit all grounds of discrimination. In two respects it does not go as far as the Human Rights Commission Act 1977 does. First, it applies only to governmental action in the wide sense and not to private action. (But it does extend to the courts, and it may be expected that the courts would refuse to uphold or enforce discriminatory provisions

in a contract or other document: cf *Shelley* v. *Kraemer* (1948) 334 U.S. 1. Second, it does not refer to discrimination on the ground of marital status.

**10.77** The protections given by the Human Rights Commission Act and the Race Relations Act will of course remain unimpaired by the enactment of a Bill of Rights. They will be subject to legislative development in the ordinary way.

**10.78** The word "discrimination" in this Article can be understood in two senses—an entirely neutral sense, synonymous with "distinction", or in an invidious sense with the implication of something unjustified, unreasonable or irrelevant. However, the result would seem to be much the same on either interpretation, because of the application of Article 3 which authorises reasonable limitations prescribed by law on the rights guaranteed by the Bill.

**10.79** In any event "affirmative action" laws and programmes to overcome existing disadvantages would be valid. They are unlikely to be seen as discrimination at all. This is why, unlike the Canadian Charter, the Bill contains no specific exception in favour of affirmative action.

**10.80** Apart from this, prohibiting discrimination on the grounds specified in this Article does not mean that persons within the categories in respect of which the prohibition applies, e.g., men and women, must be treated identically in every respect. The sort of exceptions now contained in the Human Rights Commission Act would doubtless continue to be valid. What is different is that if challenged, the justification for any distinction will have to be shown.

**10.81** The phrase "equality before the law" as a right is not used in this Article, or anywhere in the Bill of Rights. Although commonly appearing in national and international instruments (including the Canadian Charter), its meaning is elusive and its significance difficult to discern. However, the general notion is implicit in the preambular reference to New Zealand being founded on the rule of law.

**10.82** Nor is the phrase "the equal protection of the law" included. This is because of its openness and the uncertainty of its application. In particular, on the basis of American experience under the Fourteenth Amendment, it would enable the courts to enter into many areas which would be seen in New Zealand as ones of substantive policy. A multitude of statutes treat different categories of persons in different ways. The equal protection provision in the United States has been interpreted as giving the courts power to decide whether there is a "rational basis" for any particular legislative classification or distinction, although it is true that in practice they are quick to discern such a rational basis. Of the Canadian provision one commentator, Professor Peter Hogg, in a forthcoming second

edition of his book *Constitutional Law in Canada*, says that it has the potential to be the most intrusive provision of the Charter and that it is very difficult to give a confident opinion whether any given law would be secure.

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### 13. Rights of minorities

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

*COMMENT*

Cf. International Covenant, Article 27; Report, paras 330–342.

**10.83** What Article 13 is aimed at is oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which go to the heart of their very identity—their language, culture, and religion. It should be noted too, that Article 13 together with Article 8 not only guarantee the right of members of a minority group to practice etc. their religion, or belief individually and in private, but also in community with other members of the group and in public.

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## PART V

## *Life and Liberty of the Individual, and Legal Process*

### 14. Right to life

**No one shall be deprived of life except on such grounds, and, where applicable, in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice.**

*COMMENT*

Cf. Canadian Charter, s. 7; International Covenant, Article 6 (1); Report, paras. 70–81.

**10.84** Bearing in mind that the Bill is directed at State action (including legislation), the main potential application of this Article is to statutes authorising and regulating such things as abortion, capital punishment, self defence and the use of deadly force to effect arrest, prevent escapes or control disorder.

**10.85** The possible application of the Article to abortion depends upon whether the courts would consider it as giving rights to a foetus. In Canada, the Saskatchewan Court of Queens Bench has held that the corresponding provision of the Canadian Charter does not: *Borowski* v. *Attorney General of Canada* (1983) 4 D.L.R. (4th) 112.

**10.86** To be lawful, any taking of life requires two conditions to be satisfied under this Article

(a) It must, where that is applicable, be in accordance with *procedures* established by law and consistent with the principles of fundamental justice.

(b) The *grounds* must likewise be established by law and consistent with the principles of fundamental justice.

**10.87** The phrase "where applicable" recognises that in some circumstances the prescription of procedures may be quite inappropriate. One instance is self defence. But in other cases (capital punishment would be in point) just procedures would be an essential element.

**10.88** Capital punishment may be imposed in New Zealand only on conviction for treason and for certain grave military offences in wartime, e.g., desertion in the face of the enemy. The abolition of the death penalty for treason is under consideration as part of the general review of the Crimes Act 1961 which the Government has instituted. Article 14 is therefore likely to have very little scope for application in this field.

**10.89** The Canadian Charter reads: "Everyone has the right . . . not to be deprived (of life) except in accordance with the principles of fundamental justice." There is uncertainty whether the phrase "fundamental justice" there refers merely to procedures or extends to substance—in other words whether it is simply a synonym for natural justice. The quite different wording of the New Zealand Article makes it clear that matters of substance as well as procedure are germane. A court could thus consider, for example, whether a power to kill in order to prevent the escape of a petty offender from custody was contrary to fundamental justice.

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### *INTRODUCTORY COMMENTARY TO ARTICLES 15–18*

**10.90** The next four Articles are concerned with various aspects of deprivation of liberty and the criminal process. Article 15 relates to all those who are deprived of personal liberty by arrest or detention. While arrest will occur in the context of the criminal law, detention may not. Detention extends to such areas as those under the Mental Health Act 1969 and the Alcoholism and Drug Addiction Act 1966. Article 16 is concerned only with those persons who are

arrested for an offence. Those persons are also protected by the next two provisions which set out basic provisions of the criminal justice system—provisions which apply to all who are subject to that system whether they are arrested or are summonsed. The scheme will require decisions to be made about its scope; what is meant by "detention" (e.g. does it extend to the actions of law enforcement agents enforcing breathalyser law?), and what is meant by an "offence" (does it extend to disciplinary proceedings brought say against police officers or members of a profession?). These questions are considered in the commentaries on Articles 15 and 17 respectively.

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**15. Liberty of the person**

**(1) Everyone has the right not to be arbitrarily arrested or detained.**

***COMMENT***

Cf. Canadian Charter, s.9; International Covenant, Article 9 (1) (2nd sentence); Report, paras 101–102.

**10.91** The crux of this provision lies in the word "arbitrarily". It is clear, particularly in the context of a document with the status of supreme law, and having regard to the Covenant provision, that it means more than "unlawfully". *R* v. *Konechny* [1984] 2 W.W.R 481, and *Re Mitchell and The Queen* (1983) 42 Ont. Reps (2d) 481; cf, however *R* v. *Randall* (1983) 123 A.P.R. 234.The absence of legal authority for a deprivation of liberty will make it invalid, but the word "arbitrarily" is intended to allow the imposition of an objective standard by which to measure the constitutional validity of any laws allowing arrest or detention. The courts will go beyond the question of legality under the legislation in issue and also concern themselves with the procedural and substantive standards contained in that law.

**10.92** Under existing law, there is a clear principle, recognised in the Crimes Act 1961, that a person can be arrested for a criminal offence only where there is reasonable and proper cause for the arrest on the facts known or suspected by the arresting officer. A law which authorised an arrest in other than those circumstances could be challenged under Article 15(1). The arbitrariness of detention could arise under mental health legislation, for example, where the courts might concern themselves with whether there were procedures for regular review as to whether a detainee was a danger to the community justifying continued detention.

**10.93** Canadian courts have considered the scope of "detention" in the Charter, in s. 9 (which prohibits arbitrary detention) and s. 10

(which gives to those detained the right to be informed of the reasons for it, to instruct counsel, and to seek *habeas corpus*). So far they have held that the following situations do *not* involve detention:

- customs searches, *R* v. *Simmonds* (1984) 7 D.L.R. (4th) 719 (Ont. C.A.).
- a penitentiary inmate charged with an offence under internal regulations, *Bolan* v. *Disciplinary Board at Joyceville Institute* (1983) 2 Admin. L.R. 107.
- a parolee called before a post suspension hearing, *Latham* v. *Solicitor-General of Canada* (1984) 5 Admin L.R. 70.
- a person being served with a summons, *R* v. *Baldinelli* (1982) 70 C.C.C. (2d) 474.

**10.94** Provincial courts of appeal have divided over the question whether drivers stopped for breath testing are detained. The most recent decisions have stressed the fundamentally different character of the Charter and called for a new "popular" interpretation; they hold that the drivers are detained. One has also held, however, in terms of the Canadian equivalent of Article 3, that the limit in the breath testing law on the right to instruct a lawyer was a reasonable limitation: *R* v *Therens* (1983) 5 C.C.C. (3d) 409, *R* v. *Talbourdet* [1984] 3 W.W.R 525 (Both Sask. C.A.); cf *R* v *Currie* (1983) 4 C.C.C. (3d) 217 (N.S.C.A.) It may be that this broader approach to Charter interpretation is closer to that since adopted by the Supreme Court of Canada in the *Skapinker* and *Southam* cases.

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**(2) Everyone who is arrested or detained shall**
**(a) be informed at the time of the arrest, or detention of the reason for it;**

***COMMENT***

Cf. Canadian Charter, s. 10 (a), International Covenant, Article 9 (2); Report, para 103.

**10.95** The right of an arrested person to be informed, at the time of the arrest, of the reason for it is already contained in s. 316 (1) of the Crimes Act 1961.

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**(b) have the right to consult and instruct a lawyer without delay and to be informed of that right;**

***COMMENT***

Cf. Canadian Charter, s.10(b).

**10.96** Like paragraph (1), the rights under paragraph (2) apply to both arrest and detention. Thus a person deprived of liberty under

the Mental Health Act 1969, for example, would have the right to have access to a lawyer.

**10.97** The right of an arrested person under Article 15(2)(b) to be informed of the right to have access to a lawyer, and to have such access, taken in conjunction with the right in Article 16(b) to refrain from making any statement and to be informed of that right, would entrench in New Zealand law the major components of the rules laid down by the Supreme Court of the United States in *Miranda* v. *Arizona* (1966) 384 U.S. 436.

**10.98** Of course, practical realities could affect the application of this right—for example, if the person is arrested in a remote place where no lawyer is readily available.

**10.99** Canadian courts have stressed that the obligation under the parallel provision of the Charter is an obligation to communicate *clearly* the right to counsel; in special circumstances the police have a duty to explain further to ensure understanding: *R* v. *Anderson* (1984) 45 Ont. Reps (2d) 225 (C.A.). This interpretation of the obligation to inform is also relevant to subparagraph (a). That case also says that if the accused wants to exercise the right to counsel, the police must provide the opportunity without delay and cease questioning until after that opportunity has been provided.

**10.100** Other aspects of the right have been considered in *R* v. *Forsberg* (1982) 1 C.C.C. (3d) 447 (lawyer already spoken to, breach of provision of no consequence), *Re R and Speid* (1983) 43 Ont. Reps. (2d) 596 (choice of counsel, conflict of interest), *R* v. *Hackett* (1982) 109 A.P.R. 590 (privacy).

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**(c) have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.**

***COMMENT***

Cf. Canadian Charter, s. 10 (c); International Covenant, Article 9 (4); Report, paras. 108–109.

**10.101** The right to have the validity of a detention determined by way of *habeas corpus* and to be released if the detention is unlawful, already exists under New Zealand law.

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

***COMMENT***

Cf. International Covenant, Article 10 (1); Report, paras. 112–129.

**10.102** There is an overlap between this provision and the prohibition on torture and cruel, degrading or disproportionately severe treatment or punishment in Article 20. It clearly has relevance to standards of police detention, prison administration, and so forth.

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## 16. Rights on arrest

### *GENERAL COMMENT*

**10.103** Article 16 generally sets out in sequence the rights which arise at various points in the process following a person's arrest. There is an overlap with Article 15, but that provision applies to both persons arrested and detained.

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**Everyone who is arrested for an offence has the right**

**(a) to be charged promptly or to be released;**

### *COMMENT*

Cf. International Covenant, Article 9 (2); Report, para 103.

**10.104** In essence, this provision requires that a person who is arrested cannot then be held in custody at the convenience of the detaining authorities, (see *Blundell* v. *A.-G.* [1968] NZLR 354), while a certain amount of time may elapse between arrest and the decision of the police whether they have enough evidence to charge the person.

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**(b) to refrain from making any statement and to be informed of that right;**

### *COMMENT*

**10.105** The arrested person must be warned of the right to remain silent and not to answer any questions. (see comment above on Article 15 (2) (b)). The right of persons (whether in custody or not), who are being questioned by the police, to remain silent is recognised in New Zealand in the Judges' Rules. These rules do not have the force of law, but are relevant in the context of the admission of confessions in criminal proceedings. They are precautions which should be observed by the police, and while a breach of them will not automatically render a statement inadmissible in law, it may justify the exclusion of a statement by the judge in the exercise of his or her discretionary power.

**10.106** Note that the Judges' Rules do not prohibit questioning *before* charging. They may, however, apply then if the charging is delayed beyond a point when reasonable grounds to charge had arisen.

**10.107** Article 16 (b) erects the right to silence to the status of a fundamental legal rule. This will bring the New Zealand position as to the time at which a caution must be administered closer to that applying in the United States under *Miranda* v. *Arizona* (1966) 384 U.S. 436.

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**(c) to be brought promptly before a court or competent tribunal;**

***COMMENT***

Cf. International Covenant, Article 9 (3); Report, para 104.

**10.108** This is the present law under the Crimes Act 1961 s. 316 (5). The essence of Article 16 (c) is that detention by a law enforcement agency subsequent to arrest is to be for as short a period as possible and a person detained must be handed over to the custody of the courts. It is for the court to decide whether further detention is warranted and on what terms. Both the Crimes Act 1961 and this provision would permit reasonable latitude so that a person who is arrested during a weekend, for example, and not released on 'police' bail or on summons, may be held in custody by the police until the Monday sitting of the court.

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**(d) to be released on reasonable terms and conditions unless there is just cause for continued detention.**

***COMMENT***

Cf. Canadian Charter s.11(e); International Covenant, Article 9 (3); Report, paras 105–107.

**10.109** The question whether a person who has been arrested for an offence and charged should be held in custody or released on conditions will arise at a number of points in the course of criminal proceedings. The first stage at which it arises is when the police have decided to charge an arrested person. They must then determine whether he or she should continue to be held in custody until the first court appearance. The question arises again on that appearance, and possibly also in the period before, during or even after the trial. Thus, the right in Article 16 (d) is a continuing right and is not restricted in its application to the initial arrest of a person for an offence.

**10.110** It should be noted that Article 16 (d) creates a presumption that an arrested person has the right to be released on reasonable terms and conditions. Continued detention is to be the exception. Just cause for continued detention could be expected to include a likelihood of absconding, interference with witnesses, or the commission of offences pending trial. The presumption is thus in favour of release, with the onus lying on the prosecution to establish grounds for continued detention. (See Criminal Law Reform Committee Report on Bail 1982.)

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## 17. Minimum standards of criminal justice

### *GENERAL COMMENT*

**10.111** The marginal note to this Article is of considerable importance as a pointer. Once the most basic principles of criminal justice are enshrined in a Bill of Rights, there is a danger that these will be seen as the only principles with which criminal law and procedure need comply. The marginal note seeks to avoid that misconception and it finds a substantive expression for the Bill as a whole in Article 22.

**10.112** The word "offence" appears in differing contexts in Articles 16, 17 and 18. It primarily means acts punishable under criminal law: Cf. Crimes Act 1961 s. 2. Does it extend beyond that to include, for example, disciplinary procedures in prisons, or against members of the police force or a profession? The Canadian courts have for the most part answered *no*, e.g., *Re Law Society of Manitoba and Savino* (1983) 1 D.L.R. (4th) 285 (Man. C.A.) and *Re Howard* (1983) 4 D.L.R. (4th) 147 (FCTD) (prison inmate), cf. *Re Lazarenko* (1983) 4 D.L.R. (4th) 389 (discipline of lawyer) (see also *Attorney-General Quebec* v. *Laurendeau* (1982) 3 C.C.C. (3d) 250 (contempt citation not a charge), *R* v *Simon (No. 2)* (1982) 69 C.C.C. (2d) 478 (NWTSC) (accusation as a dangerous offender not involving a charge)). The character and importance of the proceedings might suggest that a positive answer should be given and that people subject to such proceedings should be entitled to the protection of the provisions. It may also be that the answer will be different in different contexts. Thus the double jeopardy provision in Article 17 (3) might well be read narrowly as applying only to public offences brought in the ordinary criminal courts, e.g. *R* v. *Wigglesworth* [1984] 3 W.W.R. 289 (Sask. C.A.). Under the New Zealand Bill, the issue is less critical since it contains in Article 21 a general guarantee of natural justice—a provision not included in the Canadian Charter—and the courts in applying that to serious disciplinary matters would no doubt take account, as they do now, of the procedures followed in a criminal court.

**(1) Everyone charged with an offence has the right**

**(a) to a fair and public hearing by a competent, independent, and impartial court;**

*COMMENT*

Cf. Canadian Charter, s. 11 (d); International Covenant, Article 14 (1); Report, paras. 170–174.

**10.113** There are limited provisions under existing law for the exclusion of the public from criminal trials and for the suppression of names and details (e.g., s. 375 Crimes Act 1961, s.46 Criminal Justice Act 1954.). It is likely that such provisions would be sustained under Article 3 of the Bill.

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**(b) to be presumed innocent until proved guilty according to law;**

*COMMENT*

Cf. Canadian Charter, s. 11 (d); International Covenant, Article 14 (2); Report, paras. 175–177.

**10.114** This right already exists under common law. The onus of proving the guilt of the accused falls upon the prosecution and the accused should benefit from any doubt. Further, the Crown must discharge that onus to a standard of proof which puts the question of the accused's guilt beyond a reasonable doubt.

**10.115** The question most likely to arise under this provision will be the validity of so-called "reverse onus" provisions in existing and future legislation, that is provisions which cast the burden of proof of some matters on the accused. For example, the Misuse of Drugs Act 1975 s. 6 (6) provides that persons are deemed to be in possession of a controlled drug for the purposes of supply if they are in possession of a minimum amount of a specified drug unless they establish that they did not have possession of that substance for that particular purpose.

**10.116** The Canadian cases have distinguished between reverse onus provisions and mandatory presumptions. Both *require* the trier of fact to draw a certain conclusion if certain other facts are proved. They differ, in that reverse onus provisions require the accused to prove on a balance of probabilities that the conclusion does not exist, whereas the accused facing a mandatory presumption has only to bring evidence which raises a reasonable doubt.

**10.117** In the leading case on reverse onus provisions (*R* v. *Oakes* (1983) 145 D.L.R. (3d) 123 (Ont. C.A., now before the Supreme Court of Canada)), the Narcotic Control Act was in issue. The defendant was charged with possession of a narcotic for the purpose of

trafficking. The Act provided that once possession was proved by the Crown the onus was on the accused to establish that they were not in possession for the purpose of trafficking. That was a prima facie violation of s.11 (d) of the Charter, said the court. Could it be justified under s.1 (Article 3 of the draft Bill)? The answer to that question, the court held, depended on factors such as:

(a) The magnitude of the evil sought to be suppressed; this may be measured by the gravity of the harm and the frequency of the offence;
(b) The difficulty for the prosecution in proving the presumed fact; and
(c) The relative ease with which the accused may prove or disprove the presumed fact.

**10.118** The court stressed that great weight was to be given to the fact that Parliament had determined that the reverse onus clause was necessary. However, such a clause, even if justifiable on the above criteria, would fall in the absence of a rational connection between the proved fact and the presumed fact. It said:

> A rational connection between the proved fact and the presumed fact exists when the proved fact raises a probability that the presumed fact exists.

**10.119** The court held the provision invalid, because of a lack of rational connection between the proved fact (possession) and the presumed fact (an intention to traffic). Mere possession of a small quantity does not support an inference of the purpose to traffic. And the burden was to disprove the very essence of the offence. (The court went on to contrast situations in which the quantity and methods of packaging provided clear indications of trafficking. In such cases the common sense of the jury can ordinarily be relied on.)

**10.120** A leading case on mandatory presumptions also applied the rational connection test; *Re Boyle and The Queen* (1983) 148 D.L.R. (3d) 449 (Ont. C.A.). The statute provided that evidence of possession of a vehicle the identification number of which had been removed constituted proof (in the absence of evidence to the contrary) (1) that the vehicle was obtained by the commission of an offence, and (2) that the person in possession knew that. The first presumption was upheld. No more likely reason than criminal acquisition for the removal of the number suggested itself. The second, however, failed: it was not confined say to dealers who might check the number; nor was it limited to cases where there was evidence that the criminal act was recent. The fact of possession did not raise the legitimate inference that the current owner knew of the vehicle's criminal history.

**10.121** The Manitoba Court of Appeal has upheld the presumption of sanity; *R* v. *Godfrey* [1984] 3 W.W.R.193. That presumption was considered to be in a class of its own. The court read the Charter's statement of the presumption of innocence in the context of the living tradition in which it was to be found.

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**(c) If convicted of the offence and the punishment has been varied between the commission of the offence and sentencing, to the benefit of the lesser punishment;**

***COMMENT***

Cf. Canadian Charter, s.11(i); International Covenant, Article 15(1); Report, paras 204–205.

**10.122** It may sometimes happen that the penalty for an offence is changed between the time when a person commits an offence and the time they are sentenced for it. Article 17(1)(c) will apply to the benefit of the accused either where the penalty is increased (in which case the old penalty will apply), and where the penalty is reduced (in which case the new penalty will be applied). There is already a provision to this effect in the Criminal Justice Act 1954, s. 43B(2).

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**(d) If convicted of the offence to appeal to a higher court against the conviction and any sentence according to law.**

***COMMENT***

Cf. International Covenant, Article 14(5); Report, paras 199–200.

**10.123** Under s.383 of the Crimes Act 1961, the leave of the Court of Appeal is required in certain circumstances before a person is entitled to appeal against their conviction or sentence. The general practice of the Court of Appeal, however, is in fact to hear the appeal before determining whether to grant leave. Thus practice has modified the strict law, and since the practice rather than the law is in conformity with Article 17 (1) (d), it would appear likely that the courts would uphold the statutory provision on that basis.

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**(2) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.**

***COMMENT***

Cf. Canadian Charter, s. 11 (g); International Covenant, Article 15 (1); Report, para. 203.

**10.124** This provision prevents the state from creating offences which apply retrospectively. Section 43B (1) of the Criminal Justice Act 1954 already states that principle as part of our law. The words "by such person" in the fourth line of the paragraph will prevent a similar argument to that raised in *Department of Labour* v. *Latailakepa* [1982] 1 NZLR 632, that a penal provision can be retroactive provided it only expands the range of persons who are covered by an existing provision and does not create a new offence.

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**(3) No one who has been finally acquitted, convicted of, or pardoned for an offence shall be tried or punished for it again.**

***COMMENT***

Cf. Canadian Charter, s.11(h), International Covenant, Article 14(7); Report para 202.

**10.125** This provision enshrines the rules against double jeopardy already contained in the Crimes Act 1961 s.357.

**10.126** Canadian courts have held the similar Charter provision to be limited to public offences dealt with in a regular court of criminal jurisdiction. Accordingly, proceedings on a police disciplinary offence do not prevent an assault prosecution arising from the same events, brought under the criminal law, *R* v. *Wigglesworth* [1984] 3 W.W.R. 289, also *R* v. *Mingo* (1982) 2 C.C.C. (3d) 23.

**10.127** A second issue for the Canadian courts has been the effect of the provision on the subsequent revocation of probation or parole and the later imposition of separate penalties. Such powers have so far been seen as part of the original proceeding, *R.* v. *Linklater* (1983) 9 C.C.C.(3d) 217, *Re R v. Green* (1983) 5 C.C.C. (3d) 95.

**10.128** Legislation providing for multiple prosecutions for the same act and for deportation following conviction have been held not to violate the Canadian provision: *R* v. *Krug* (1983) 7 C.C.C. (3d) 324, *Re Gittens and R* (1982) 68 C.C.C. (2d) 438.

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## 18. Rights of persons charged

**Every person charged with an offence has the right**

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

***COMMENT***

Cf. Canadian Charter, s. 11(a); International Covenant, Article 14 (3) (a); Report, paras. 178–180.

**(e) To be tried without undue delay;**

*COMMENT*

Cf. Canadian Charter, s. 11(b); International Covenant, Article 14(3)(c); Report, para 183.

**10.131** While there is no express provision in New Zealand law requiring a person committed for trial to be tried at a particular time or within a particular time, that does not state the whole position. In *Re Arnold* [1977] 1 NZLR 327 at 334, Somers J stated that

> "The history of our constitutional development renders the proposition that a man may be kept in custody until such time as the Crown sees fit to present an indictment untenable.... There can be no doubt that an accused is entitled to expect a trial without unreasonable delay. The 29th Chapter of Magna Carta says so; "we will sell to no man, we will not deny or defer to any man either justice or right". The failure to indict and try a person committed for treason for felony is the subject of s.6 of the Habeas Corpus Act 1679 (Eng) which, in summary, provides for the release of persons so committed if they are not indicted at the latest in the second term assizes or sessions after their committal. Both those enactments are in force in New Zealand by reason of the English Laws Act 1908."

**10.132** The New Zealand Court of Appeal in *Bryant v. Collector of Customs* [1984] 1 NZLR 280 has recognised that the High Court has inherent jurisdiction to prevent abuse of its own process. This jurisdiction could be invoked at present to avoid unfairness to an accused person who is not tried within a reasonable time.

**10.133** In cases arising under the Charter, the Canadian courts, in considering whether there has been an unreasonable delay between the time when a person is charged and their trial, have held that what is a reasonable delay in a particular case will depend on a number of factors including the nature, number and complexity of the charges, the number of accused, the volume and complexity of the evidence, the availability of witnesses, the mode of trial, the diligence of the Crown and the efforts of the accused, and whether the accused is in custody on the charge. Canadian courts have differed as to the appropriate remedy where s. 11(b) of the Charter is violated. Some have held that the information must be quashed or the charge stayed. Another view is that the appropriate remedy would be a direction that the trial proceed forthwith. The latter of course would not be open where the delay has impaired the accused's ability to defend themselves, for example where a key defence witness is no longer available.

**(e) To be tried without undue delay;**

*COMMENT*

Cf. Canadian Charter, s. 11(b); International Covenant, Article 14(3)(c); Report, para 183.

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**(f) To be present at the trial and to present a defence;**

*COMMENT*

Cf. International Covenant, Article 14 (3) (d); Report, paras. 184–5

**10.134** The Crimes Act 1961 s.376, and the Summary Proceedings Act 1957 s.158 both permit the trial to be conducted in the absence of the accused if they misconduct themselves by so interrupting the proceedings as to render their continuance in their presence impracticable. Similarly, s. 61 (b) of the Summary Proceedings Act 1957 permits the court to proceed with the hearing in the absence of the defendant in certain very restricted circumstances. Both qualifications would undoubtedly be permissible under Article 3.

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**(g) Except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the maximum punishment for the offence is imprisonment for more than three months;**

*COMMENT*

Cf. Canadian Charter, s. 11 (f).

**10.135** This provision specifies that a maximum penalty of more than three months imprisonment will carry the right to a trial by jury. At present two statutes provide for offences punishable by a maximum term of imprisonment of more than three months which do not also carry the right to trial by jury—the Summary Offences Act 1981 (common assault (s. 9) and assault on a law enforcement officer (s. 10), where the maximum penalty is six months imprisonment), and the Undesirable Immigrants Exclusion Act 1919, (where the maximum penalty is 12 months imprisonment). These two provisions are inconsistent with Article 18 (g) and it would be hard to see how they could be justified under Article 3. The Undesirable Immigrants Exclusion Act 1919 is likely to be repealed with the revision of the immigration legislation. The Summary Offences Act is rather different. The maximum penalty for these offences was raised to six months, and the right to a jury trial excluded, relatively recently. However, to lift the period specified in Article 18 (g) to more than three months imprisonment could create the danger that six months imprisonment would habitually become the threshhold, on the basis that the Bill of Rights regarded this as quite satisfactory. It seems preferable therefore to set the limit at three months imprisonment.

**10.136** Canadian courts have considered among others, the questions whether a corporation is a "person" for the purposes of

the parallel provision s. 11 (f), *Re PPG Industries Canada Ltd. and Attorney-General for Canada* (1983) 3 C.C.C. (3d) 97 (it is *not* since it could not be subjected to imprisonment), whether the committal of a juvenile delinquent to a training or industrial school is "punishment", *R* v. *S.B.* [1983] 1 W.W.R. 512 (reversed on appeal) (it is not since it is treatment), and whether the right could be waived by non appearance, *R* v. *Crate* (1983) 7 C.C.C. (3d) 127 (it could be)).

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**(h) To examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;**

*COMMENT*

Cf. International Covenant, Article 14 (3) (e); Report, para. 189.

**10.137** This ensures that the accused and the prosecution are put on an equal footing with regard to the summoning and hearing of witnesses.

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**(i) To have the free assistance of an interpreter if the person cannot understand or speak the language used in court;**

*COMMENT*

Cf. Canadian Charter, s. 14; International Covenant, Article 14 (3) (f); Report, para. 190.

**10.138** The common law recognises the right of an accused who cannot understand English properly to have an interpreter (*R* v. *Lee Kung* [1916] 1 KB 337). This right is recognised in New Zealand. See the Witnesses and Interpreters Fees Regulations 1974 (S.R. 1974/124).

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**(j) Not to be compelled to be a witness against that person or to confess guilt;**

*COMMENT*

Cf. Canadian Charter, s. 11 (c); International Covenant, Article 14 (3) (g); Report, paras. 191–192.

**10.139** Under s. 5 of the Evidence Act 1908, accused persons cannot be *compelled* to give evidence at their own trial. They are *competent* to give evidence but only for the defence and may not be called except on their own application. If they elect to testify, they may be asked any relevant question in cross-examination notwithstanding

its incriminating nature. The fact that accused persons refrain from giving evidence as witnesses may be the subject of comment only by themselves, their counsel or the judge.

**10.140** The New Zealand law relating to confessions has its basis in the common law, as qualified by s. 20 of the Evidence Act 1908. In essence, a confession is admissible in evidence providing it has been made voluntarily. Nevertheless, a voluntary confession may be excluded at the court's discretion where it was obtained by unfair means.

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**(k) In the case of a child, to be dealt with in a manner which takes account of the child's age.**

***COMMENT***

International Covenant, Article 14 (4); Report, paras 193–198.

**10.141** This provision will have its main relevance in relation to legislation which provides for special courts or special procedures for children accused of offences, as under the Children and Young Persons Act 1974. The essence of that Act is that infringements of the law by juveniles should be dealt with in a more informal way than in the ordinary courts.

**10.142** Article 18 (k) is more than a permissible exception. Although it is a flexible standard and leaves room for a wide measure of flexibility in legislation, it creates a right for children to be dealt with in special and appropriate ways.

**10.143** The term "child" has a specialised meaning under the Children and Young Persons Act, i.e., a person under the age of 14 years. However, the word "child" in this provision is not intended to be used in such a specialised way. It could cover any case and any circumstance where the youth of the person called for special protection.

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**19. Search and seizure**

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

***COMMENT***

Cf. Canadian Charter, s. 8; International Covenant, Article 17; Report, paras. 207–232.

**10.144** Freedom from unreasonable search and seizure is an aspect of the privacy of the individual. The Bill (like the Canadian Charter) gives no general guarantee of privacy. There is not in New Zealand

any general right to privacy, although specific rules of law and legislation protect some aspects of privacy. It would be inappropriate therefore to attempt to entrench a right that is not by any means fully recognised now, which is in the course of development, and whose boundaries would be uncertain and contentious.

**10.145** Protection against improper search and seizure on behalf of the State is, however, a long established common law principle. This is clearly illustrated by the great 18th century case of *Entick* v. *Carrington* (1765) 19 State Tr. 1029.

**10.146** That case involved a search by the defendants, the King's messengers, acting under a warrant from the Secretary of State ordering them to search for the plaintiff and to bring him and his books and papers to the Secretary for examination. They broke into the plaintiff's house and seized his papers. His action in trespass succeeded. The jury assessed damages at £300, Lord Camden stating the following principle:

> "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence . . . . If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of common law."

**10.147** The defendants could show no such justification and the plaintiff accordingly succeeded.

**10.148** Since 1765, Parliament has exercised its power to override the common law and has created extensive powers of entry, search, inspection and seizure in respect of a person's property. A former Chief Ombudsman, Sir Guy Powles, reported in 1976 that officers of Government and local authorities have a right to enter private property under at least 150 statutes. Statutory powers of entry were also examined by the Public and Administrative Law Reform Committee in its report of April 1983. As a result of that report, a large number of statutory rights of entry have been amended and a further Omnibus Bill, amending many others, is in preparation. The report and that practice indicate relevant principles.

**10.149** In many cases, especially where entry is required for the purpose of ascertaining whether an offence has been committed, prior authorisation is required in the form of a warrant issued by a judicial officer obtained on written application and on oath. The warrant must also describe in detail the place to be searched and the persons and things to be seized. There are of course situations where a requirement to obtain prior authorisation for a search or

seizure would be impracticable, for example in the case of extreme emergency or certain grave crimes. Outside of the criminal sphere, many provisions permit officials to enter private property and carry out an inspection in the course of administering a law which, for example, regulates some industry or other activity—what might be called routine administrative inspections.

**10.150** Article 19 will empower the courts to review legislation which grants powers of search and seizure either of the person, property, correspondence or otherwise. They will be permissible only if they are not "unreasonable". Article 19 will also apply where the manner in which a search or seizure is carried out is challenged, rather than the statutory authorisation for it.

**10.151** Unlike the Canadian Charter, Article 19 contains an express but not an exhaustive list of what is to be secure against unreasonable search or seizure. In this respect it is closer to the American Bill of Rights. The Fourth Amendment specifically refers to persons, houses, papers and effects.

**10.152** The purpose of the Bill is to apply the protection against unreasonable search or seizure not only to acts of physical trespass but to any circumstances where state intrusion on an individual's privacy in this way is unjustified. Article 19 should extend not only to the interception of mail, for example, but also to the electronic interception of private conversations, and other forms of surveillance.

**10.153** It is clear that in some circumstances a search may be reasonable even without a prior judicial warrant. Like s. 8 of the Canadian Charter, Article 19 contains no equivalent to the requirement in the Fourth Amendment to the American Bill of Rights of judicial authorisation for each search and seizure, that there be "probable cause" therefor, and particularity in respect of the place to be searched and the things to be seized. Even so, the Supreme Court of the United States has recognised a number of exceptions to the warrant requirement, including a search incident to a lawful arrest, and a search of an automobile where there is probable cause to believe that it contains contraband. Administrative inspections of commercial premises without warrant are also permissible, particularly where certain industries have a history of government oversight such that a person entering such a business can have no reasonable expectation of privacy.

**10.154** The scope of s. 8 of the Canadian Charter has been examined by the Supreme Court of Canada in *Hunter* v. *Southam* (1984) (not yet reported). The court took the view that the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick* v. *Carrington.* There is nothing in the language of the section

to restrict it to the protection of property or to associate it with the law of trespass, and thus it guarantees a broad and general right to be secure from unreasonable search and seizure.

**10.155** The court noted that the provision only protects a *reasonable* expectation of privacy. Thus:

> ". . . (A)n assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement." (pp. 21–22)

**10.156** Such assessment could be made after the search has been conducted, but the purpose of s. 8 is to protect individuals from unjustified state intrusions upon their privacy, which requires a means of *preventing* unjustified searches before they happen. The court held, therefore, that this purpose could only be accommodated by a system of prior authorisation, not one of subsequent validation.

> "A requirement of prior authorisation, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the State to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the *Charter* to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference." (p. 22)

**10.157** The court recognised that it may not be reasonable in every instance to insist on prior authorisation by judicial warrant in order to validate governmental intrusions upon an individual's expectation of privacy. However, where it is feasible to obtain prior authorisation such authorisation is a precondition for a valid search and seizure. Further, search without warrant is prima facie unreasonable and the court would require the party seeking to justify such a search to rebut this presumption of unreasonableness. This interpretation is consistent with the drafting of the American Fourth Amendment as interpreted by the American courts. A similar general approach to Article 19 by New Zealand courts is likely.

**10.158** An alternative way of drafting Article 19 would have been to provide that a search or seizure is presumed unreasonable unless prior authorisation is obtained from an impartial arbiter on a sworn showing of probable cause. This would leave those seeking to uphold the validity of a provision for search or seizure without warrant to argue that it was not unreasonable, either because there was a compelling need for search or seizure without warrant in the particular circumstances of the case, or otherwise. However, any

attempt to specify the situations where a search or seizure without warrant may be justified runs into difficulties because of the many variations of circumstance. Thus it might well be permissible for an official to carry out some administrative inspection in the course of the regulation of some business or other activity.

**10.159** In interpreting Article 19, however, the courts will have the benefit of the principles identified by the Public and Administrative Law Reform Committee in its report on statutory powers of entry.

**10.160** The Canadian courts have indeed already reflected in their judgments the principles stated there. Thus a power to search a dwellinghouse without warrant for killed wildlife was held to be of no effect: the guarantee in respect of a dwellinghouse required the issue of a warrant by an impartial arbiter, *R* v. *Sheppard*(1983) 135 A.P.R. 189 (Nfdld C.A.). And a power to issue a warrant without any requirement for the statement of reasons to believe liquor to be held unlawfully in a dwellinghouse was held to violate the provision, *MacAusland* v. *R* (1983) 135 A.P.R. 1.

**10.161** Courts have also considered whether various actions are "searches" or "seizures" in *Alberta Human Rights Commission* v. *Alberta Blue Cross Plan* [1983] 6 W.W.R. 758 (C.A.) (forced production of documents in civil proceedings *is* a seizure); cf *Attorney-General of Ontario* v. *Bear Island Foundation* (1982) 138 D.L.R. (3d) 683), *R* v. *Parton* (1983) 9 C.C.C. (3d) 295. (Seizure of person not included), *R* v. *Carter* (1982) 39 Ont Reps. (3d) 20 and *R* v. *De Coste* (1983) 128 A.P.R. 170 (taking of blood sample is seizure).

**20. No torture or cruel treatment**

**(1) Everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.**

***COMMENT***

Cf. Canadian Charter, s. 12; International Covenant, Article 7; Report, paras 82–92.

**10.162** There is a clear and obvious link between this provision and the reference to the dignity and worth of the human person in the first recital in the preamble to the Bill. Indeed the provision can be traced back to the English Bill of Rights of 1689, which declares, inter alia, that "cruel and unusual punishment" ought not to be inflicted. The provision is aimed at any form of treatment or punishment which is incompatible with the dignity and worth of the human person. The reference to "disproportionately severe"

treatment or punishment is intended to ensure not only that the courts can review any type or mode or description of punishment or treatment on the ground that it is per se cruel or degrading, but that they can also review the appropriateness of any treatment or punishment in particular circumstances. Thus they would have power to strike down a punishment imposed by Parliament on the grounds that its harshness and the severity of its consequences are manifestly excessive in relation to the offence involved. The American courts have held that this power is open to them under the equivalent provision in the American Bill of Rights (the Eighth Amendment).

**10.163** The Canadian courts have considered the compatibility of mandatory minimum sentences with the parallel provision in the Charter. They have asked whether the punishment itself went beyond rational bounds or was obviously excessive and whether it was grossly disproportionate to the offence. *R* v. *Krug* (1982) 7 C.C.C. (3d) 324 (Ont. C.A.) and *R* v. *Konechny* [1984] 2 W.W.R. 481 (B.C.C.A.), cf *R*v. Randall (1983) 123 A.P.R. 234.

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**(2) Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.**

### *COMMENT*

Cf. International Covenant, Article 7; Report, para 93.

**10.164** Article 7 of the International Covenant includes this right as a component of the larger right to freedom from cruel, inhuman, or degrading treatment or punishment, and it has been pointed out that this linkage was designed to make it clear that only experiments which come within the range of inhuman treatment are forbidden, whereas legitimate scientific or medical practices are not hindered. There seems no good reason to limit in this way the principle that all medical and scientific experiments require the subject's consent, and Article 20 (2) does not do so.

**10.165** The question of consent given on behalf of minors and others incapable of giving their consent could arise in this context. Any challenge to a law which permitted consent to be given on behalf of another to medical or scientific experimentation would certainly see the courts exercising the utmost vigilance to protect the rights of those on whose behalf that consent was sought to be given.

**(3) Everyone has the right to refuse to undergo any medical treatment.**

*COMMENT*

**10.166** This provision has no equivalent in the International Covenant, nor in any other international human rights instrument. It enacts as a general principle that everyone has the right to refuse to undergo any medical treatment. This right is of course subject to Article 3, but it is anticipated that this would permit persons to be treated against their will only where this is necessary to protect the health and safety of other persons, and not simply where their refusal of treatment will detrimentally affect their own health. Like paragraph (2), this paragraph raises the question of consents to medical treatment on minors and others who are incapable of consenting on their own behalf. The general rule under existing law is that minors are incapable of consenting to medical treatment on themselves, and the law provides that parents, guardians, and certain other persons may consent on their behalf. This means, too, that such persons can overrule a child's objections to the treatment. There are a number of exceptions to this rule which mean that children may be legally entitled to make their own decisions in this area in some circumstances, and also that parental consent to treatment on children is not always required (viz Guardianship Act 1968 ss. 25, 25A; Health Act 1956 s. 126B; Contraception, Sterilisation and Abortion Act 1977 s. 7.). Such provisions would fall to be tested under Article 3, but it is reasonably clear that they would be permissible.

**10.167** The word "medical" is used in a comprehensive sense. It would certainly include surgical, psychiatric, dental, psychological and similar forms of treatment.

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**21. Right to justice**

**(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.**

*COMMENT*

Cf. International Covenant, Article 14 (1).

**10.168** There is no comparable provision in the Canadian Charter, although see s. 1(a) of the Canadian Bill of Rights 1960. The provision recognises the pervasive nature of the powers of public authorities

and the central importance of the principles of natural justice in helping ensure that they are exercised in a fair way. It largely reflects basic principles of the common law which go back at least to the sixteenth century. On that basis the principles will have a varying application in differing circumstances, and, for example, a personal, oral hearing may not always be required. Thus, the more serious the matter (as say in disciplinary proceedings affecting police officers, or members of professions) the nearer the procedures will approximate to those in Articles 17 and 18 above, while in other cases the principles might be satisfied by a "hearing" on the papers.

**10.169** It is not envisaged that the provision will normally apply where the determination is a general one affecting persons as a class or indirectly—for example a change in local body rates. The phrase "in respect of" is designed to achieve this. An identical phrase is used for the same reason in s. 23 of the Official Information Act. Such a limit on the application of the principles of natural justice is well recognised by the courts.

**10.170** The term "tribunal" is intended to include a court. "Public authority" is a deliberately vague term. It will have to be interpreted by the courts, just as they have had to decide over the centuries which bodies—essentially public rather than private—are subject to the common law principles of natural justice.

**10.171** The last phrase "protected or recognised by law" will also continue to leave to the courts the task of determining (generally by reference to indications given by Parliament) what rights and interests are to be accorded this degree of procedural protection. The word "determination" will be subject to the same process. In a general sense the provision will not change the courts' normal and long-standing task, except to the extent that the principles will now have an enhanced status.

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**(2) Every person whose rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply to the High Court, in accordance with law, for judicial review of that determination.**

*COMMENT*

**10.172** There is no directly comparable right in the Covenant and no comparable right in the Canadian Charter. The provision, however, sets out and gives enhanced status to the basic constitutional right to go to court to challenge the legal validity of government actions. It should serve as a check to privative clauses in Acts purporting to restrict the power of judicial review.

**10.173** Although on the face of it the term tribunal" could be seen as including the High Court and the Court of Appeal, the High Court does not subject its own decisions to judicial review. It is not thought that (in this paragraph) the term would be held to include either the High Court or the Court of Appeal.

**10.174** Again in accordance with present understandings of the law, and unlike paragraph (1), the provision will apply wherever a determination affects" any person. The Courts may be expected to apply the ordinary rules as to standing to seek judicial review.

**10.175** The phrase in accordance with law" recognises that the law may regulate review proceedings, for instance in the general way that the Judicature Amendment Acts 1972 and 1977 do, or in a particular way, e.g., by imposing a time limit on the bringing of a challenge. The phrase is intended, however, to permit only the regulation of the right and not to authorise its denial. Accordingly any attempt completely to deprive the High Court of its review powers would violate the guarantee. The phrase parallels that found in Article 17 relating to the right of appeal in criminal cases.

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**(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.**

*COMMENT*

**10.176** This provision, which again does not correspond closely with any provision of the Canadian Charter or the International Covenant, is designed to give constitutional status to the core principle recognised in the Crown Proceedings Act 1950: that the individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges. This is central to the rule of law.

**10.177** In many cases the substantive powers, rights and responsibilities of the State and the individual will necessarily differ and that will affect the result of litigation. The paragraph is not designed to alter this, but with that inevitable difference (which may run over into some aspects of the procedure), the provision declares the right of the individual to take legal disputes with the Crown to court and to have the case dealt with in terms of the process to be followed essentially in the same way as in private litigation.

**10.178** Again the phrase according to law" will enable the right to be regulated by legislation (at the moment the Crown Proceedings

Act 1950) and by the common law. This could if necessary be invoked to uphold the law of public interest immunity. However, it is not thought that this law—it was formerly called Crown privilege but this is inaccurate—would in any event be affected. It relates, as its name now indicates, to the public interest in protecting certain very limited information from disclosure in court proceedings, and has no necessary connection with proceedings by or against the State.

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## PART VI

### *Application, Enforcement and Entrenchment*

**22. Other rights and freedoms not affected**

**An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not guaranteed or is guaranteed to a lesser extent by this Bill of Rights.**

*COMMENT*

Cf. Canadian Charter, s. 26; International Covenant, Article 5; Report, paras. 66–69.

**10.179** The Bill of Rights does not purport to be an exhaustive list of the fundamental rights and freedoms of New Zealanders. It is concerned almost exclusively with what are commonly called civil" and political" rights, and, indeed, not with all of those. They are the rights for which the citizen seeks protection against the Government and Government officials, rather than against intrusion by other citizens. Further, they are principally negative rights in that they impose a duty on the State to refrain from infringing them. They do not impose positive obligations on the State to do something. This arises from the fact that the rights which are contained in the Bill of Rights must be capable of being enforced in the courts. This is one reason why the Bill of Rights does not contain guarantees of economic, social, or cultural rights. They are undoubtedly important rights and indeed New Zealand has pledged itself internationally to respect them by ratifying the International Covenant on Economic Social and Cultural Rights. These rights are given effect to through other legislative and administrative action. The Bill confines its application to such civil and political rights as freedom of speech, religion and assembly. Article 22 means, however, that the specific guarantee of certain rights and freedoms in the Bill does not deny the existence of any other rights. The reference to rights guaranteed to a lesser extent also means that the fact that an existing right is only partially incorporated by the Bill does not

thereby destroy any wider ambit that that right otherwise has. There is of course nothing in the Bill of Rights that would prevent Parliament or the courts from creating or recognising new rights.

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**23. Interpretation of legislation**

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

*COMMENT*

**10.180** This provision will become significant when the courts are dealing with an argument that some enactment is inconsistent with the Bill of Rights and should therefore be struck down. It directs the courts, in interpreting any enactment, to prefer an interpretation which is consistent with the Bill of Rights. This emphasises the expectation that the striking down of legislation as contrary to the Bill of Rights would be a rare and carefully considered occurrence. It is usual for the courts to adopt such a principle in interpreting constitutional documents, but there is merit in making this explicit.

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**24. Application to legal persons**

**The provisions of this Bill of Rights apply so far as practicable and unless they otherwise provide for the benefit of all legal persons.**

*COMMENT*

**10.181** A Bill of Rights is principally about human rights. In many circumstances the provisions of the Bill of Rights can have no application to legal as opposed to natural persons, since the particular rights are peculiarly human rights—for example the right to life and the right not to be subjected to torture. And in many cases where a right would apply for the benefit of legal persons, action taken against that person in breach of that right would enable one or more natural persons to seek a remedy. For example, the outlawing of trade unions would infringe the right of natural persons to freedom of association. However, a number of rights in the Bill could be invoked on behalf of legal persons where there is not at the same time an infringement of a right guaranteed to a natural person. For example, there can be no good reason to deny corporations charged with offences the basic safeguards of a fair trial.

**10.182** The Canadian Charter contains no provision like Article 24. Whether the Charter was intended to apply to legal persons was therefore left unclear. This question has already arisen in some judicial proceedings in Canada, and the courts have said that it is a question of interpretation in each case whether a particular section of the Charter can be sensibly applied to a legal person. For example, it has been held that the reference to everyone" in s. 8 (right to be secure against unreasonable search or seizure) can include nonnatural persons: (*Southam Inc.* v. *Hunter et al*(1982) 136 D.L.R. (3d) 133, affirmed by Supreme Court of Canada (1984) (as yet unreported) without this point being raised).

**10.183** Article 24 expressly states that the Bill of Rights is intended to apply to legal persons and requires the courts to determine in each case whether a right or freedom guaranteed by the Bill can appropriately be so applied. Some provisions on their face exclude their application to legal persons—for example, the right to vote, which is limited to New Zealand citizens. There is already some jurisprudence in New Zealand as to the rights of legal persons (e.g., *In re Mannix (GJ) Ltd* [1984] 1 NZLR 309). The American courts have developed considerable jurisprudence on which rights and freedoms under the American Bill of Rights apply to legal persons. Article 24 will allow scope for flexibility in the development of the jurisprudence in this area by the New Zealand courts, while giving the general indication that the Bill is comprehensive in its coverage.

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**25. Enforcement of guaranteed rights and freedoms**

**Anyone whose rights or freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.**

***COMMENT***

Cf. Canadian Charter, s. 24 (1); International Covenant, Article 2 (3) Report, paras. 44–48.

**10.184** In the great bulk of the situations covered by this Bill, the law and the courts will be able to provide a remedy from their present armoury. Thus

- a person who is prosecuted for an offence and who successfully argues that the legislation creating the offence infringes their freedom of expression will be acquitted;
- evidence which is obtained in breach of the prohibitions on torture or unreasonable search and seizure may be excluded from the trial; a stay of proceedings might be sought;

- a person who has been subjected to arbitrary detention will be released on a writ of *habeas corpus* and can seek damages for wrongful imprisonment;
- a person whose rights have been affected by a government decision and who has not been given a hearing in accordance with natural justice can have the decision set aside;
- a person who wishes to take action forbidden by a statute claimed to be in breach of the Bill can seek a declaration.

**10.185** This is not an exhaustive list. It as well takes no account of the other remedies, the Ombudsmen, the political processes, the press . . . . But it does go to the point that the Bill will take its place in a complex set of existing institutions, procedures, and remedies.

**10.186** Article 25 accordingly has a residual role—but an important one, nonetheless. There are similar provisions in several of the Caribbean constitutions. Their value in those jurisdictions appears in cases such as *Maharaj* v. *Attorney General of Trinidad and Tobago (No. 2)* [1979] A.C. 385.

**10.187** The provision encapsulates an important principle in our law—where there is a right, there is a remedy". What Article 25 does mean is that if a court finds that a person's rights or freedoms under the Bill have been infringed, but there is no existing or adequate remedy available, the court will be able to grant any remedy which it considers appropriate and just in the circumstances. For example, it may mean an award of damages against the State for an infringement of someone's rights and freedoms where no such damages would be payable at present. Under the equivalent provision in the Canadian Charter, a court has held that where a plaintiff had been denied his right to retain and instruct counsel without delay pursuant to s. 10 (b) of the Charter, although he had suffered no actual harm, he was entitled to exemplary or punitive damages of $500 against the Crown. The judge concluded that to fail to impose some sanction would be to condone unfair and illegal conduct on the part of the police (*Crossman* v. *R* (1984) 5 Admin. L.R. 85).

**10.188** The application under the provision must be made to a court of competent jurisdiction. An often quoted definition of what constitutes a court of competent jurisdiction is that of Collins MR in the case of *Regina* v. *Garrett* [1907] 1 KB 881 at 885–886:

> . . . it is said that the use of the words a Court of competent jurisdiction" implies that there is a special provision made for recovery before a particular Court and therefore to the exclusion of every other Court . . . the expression Court of competent

jursidiction" seems to me to be only a compendious expression covering every possible Court which by enactment is made competent to entertain a claim for recovery of paving expenses."

**10.189** The Canadian cases show that the phrase really means a court which, independently of the Bill of Rights, is seized with jurisdiction over the claim", i.e., the subject matter, the parties and the remedy. If this approach is adopted, difficult issues such as whether the courts in their criminal jurisdiction would grant civil remedies would be avoided. The determination of the appropriate forum will depend upon an assessment of the nature and circumstances of the issues raised by, and the relief sought upon, the application.

**10.190** Unlike s. 24(1) of the Canadian Charter, Article 25 is not linked to a provision dealing with the exclusion of evidence where this has been obtained in breach of a guaranteed right or freedom. The rule under existing New Zealand law is that evidence which has been obtained illegally is not automatically inadmissible, but comes within the discretion of the judge to exclude unfairly obtained evidence .The fact that the rights contained in the New Zealand Bill of Rights will have the status of fundamental law may have an impact on how the New Zealand courts apply the *Kuruma* rule to cases involving evidence obtained in breach of the Bill.

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### 26. Reference to Waitangi Tribunal

**Where in any proceeding before any court, any question arises whether any enactment or rule of law, or any act or policy, is consistent with the Treaty of Waitangi, the court may on the application of any party to the proceeding or of its own motion refer that question to the Waitangi Tribunal for a report and opinion, and the court shall have regard to that report and opinion.**

***COMMENT***

**10.191** The Waitangi Tribunal is established by the Treaty of Waitangi Act 1975. Its principal function (ss 5 & 6) is to inquire into and make recommendations upon a claim that any legislation, policy practice or act is inconsistent with the principles of the Treaty. In its two most recent reports (*Motunui* 1983 and *Kaituna* 1984) the Tribunal has discussed these principles and their application at some length. It has already acquired expertise in matters touching upon the principles of the Treaty.

**10.192** It is appropriate and desirable that the Tribunal's knowledge and expertise should be available to assist the courts in their task of determining whether legislation or acts are inconsistent with the rights of the Maori under the Treaty. This Article provides a vehicle for doing so. A question may be referred to the Tribunal either on the application of any party or on the court's own motion. The advice of the Tribunal cannot properly bind the ordinary courts on a question of law, but the court is required to have regard to the Tribunal's view, and that view will doubtless be influential. Section 50 of the Maori Affairs Act 1953 similarly provides that the High Court can refer matters for opinion to the Maori Appellate Court.

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**27. Intervention by Attorney-General**

**(1) The Attorney-General shall be given the opportunity to appear and participate in any legal proceedings as a party if in the opinion of the judge or other officer presiding in those proceedings there is a serious question to be argued about the violation of the provisions of this Bill of Rights.**

**(2) Paragraph (1) shall not apply if the Attorney-General or any officer or agency of the Crown is a party to the proceedings.**

***COMMENT***

**10.193** The Bill of Rights will allow any person in any proceeding to raise a question whether his or her rights under the Bill of Rights have been infringed or denied. It will often be the case that such a question will be raised by the defendant as a defence in a criminal proceeding. The question may turn upon whether some action carried out by an official under a law is contrary to the Bill of Rights, or whether the law itself infringes the Bill. In many cases the Crown will be a party to such proceedings, but this may not always be so. If the raising of an infringement of the Bill of Rights is spurious, then the court will be able to deal with the matter with little argument. However, where there is a serious question to be argued about a violation of the Bill, then it is essential that the court hear full argument on the Bill of Rights issues before taking the rather drastic step of striking down legislation. In such cases, it will be appropriate for the court to ensure that the Attorney-General is given the opportunity to appear and participate in the proceedings, in order to put the arguments for the upholding of the legislation in question. Article 27 provides the mechanism for this to occur.

**28. Entrenchment**

**No provision of this Bill of Rights shall be repealed or amended or in any way affected unless the proposal**

**(a) is passed by a majority of 75 percent of all the members of the House of Representatives and contains an express declaration that it repeals, amends, or affects this Bill of Rights; or**

**(b) has been carried by a majority of the valid votes cast at a poll of the electors for the House of Representatives;**

**and, in either case, the Act making the change recites that the required majority has been obtained.**

***COMMENT***

**10.194** This provision follows closely the wording of s. 189 of the Electoral Act 1956. The reference to "no provision of this Bill of Rights" means that the entrenching provision is itself entrenched.

The effectiveness of entrenchment is discussed in some detail in section 7 of the White Paper.

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**29. Short title and commencement**

**(1) This Act may be cited as the New Zealand Bill of Rights 1986.**

**(2) The New Zealand Bill of Rights 1986 shall come into force on the . . . . . . . day of . . . . . . . . . 198..**

**SCHEDULE**

[For texts of Treaty of Waitangi in English and Maori see section 2]

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## 11. Bibliography

### 1. New Zealand

*Annual Report of the Wanganui Computer Centre Privacy Commissioner for the year ended 31 March 1977,* Wellington, 1977

Atkins, L. and McBride, T. 'Liberty and the Law, 1976–1978', *New Zealand Listener*, 25 November 1978, p. 18

Cooke, Sir Robin 'Bill of Rights: safeguard against unbridled power', The Dethridge Memorial Address, *Council Brief* 112 November 1984, p. 4

Elkind, J. B. 'Applying the Bill of Rights' [1978] *New Zealand Law Journal* 209

Elkind, J. B. 'Giving Ourselves a Bill of Rights' *New Zealand Listener*, 25 November 1978, p. 52.

*Evidence Presented to the Constitutional Reform Committee on the New Zealand Bill of Rights*, 1964 Appendices to the Journals of the House of Representatives, I.14, and reproduced in *Readings in New Zealand Government* (ed) L. Cleveland and A.D. Robinson, 1972, p. 189

Fletcher, S. S. 'New Zealand Bill of Rights' dissertation LLB (Hons), University of Auckland, 1971

Frame, A. '"Freedom of Association" and New Zealand Industrial Law' (1985) 15 *Victoria University of Wellington Law Review* 65

Human Rights Commission *Report of a Seminar on Human Rights to Celebrate the thirtieth anniversary of the adoption of the Universal Declaration of Human Rights*, 1979

Irvine, C. N. 'The New Zealand Bill of Rights' [1963] *New Zealand Law Journal* 489

Keith, K. J. 'Constitutional Change', in I. Wards (ed) *Thirteen Facets* Wellington, 1978, p. 3

Keith, K. J. 'The Courts and the Constitution' (1985) 15 *Victoria University of Wellington Law Review* 29

Levine, S. 'A Constitution and Bill of Rights for New Zealand: an idea whose time has come?' published by New Zealand Institute of Public Administration, 1981

McBride, T. *The New Zealand Civil Rights Handbook* Wellington, 1980

Ministry of Foreign Affairs 'Human Rights in New Zealand. The Presentation of New Zealand's Report under the International Covenant on Civil and Political Rights' *Information Bulletin No. 6* 1983, p. 7

*New Zealand Parliamentary Debates* (1963) Vol. 335, p. 5; Vol. 336, p. 1181

Palmer, G. 'A Bill of Rights for New Zealand', in K. J. Keith (ed), *Essays on Human Rights*, Wellington, 1968, p. 106

Palmer, G. 'A New Balance for New Zealand', *Council Brief* 108 July 1984, p. 4

Palmer, G. *Unbridled Power?* Wellington, 1979

Papers presented to the 1984 New Zealand Law Conference—principal papers published by the New Zealand Law Society, 1984.

Paterson, D. E. *First Draft, Constitution of New Zealand* (prepared for New Zealand section of the International Commission of Jurists), Wellington, 1977

Quentin-Baxter, R. Q. 'Themes of Constitutional Development: the need for a favourable climate of discussion' (1985) 15 *Victoria University of Wellington Law Review* 12

Reid, T. 'A Bill of Rights', *New Zealand Listener*, 5 November 1977, p. 10

*Report of Public Petitions M to Z Committee*, 1961, Wellington, 1962

*Report of the Chief Ombudsman for the year ended 31 March 1978*, Wellington, 1978

Report of Wanganui Computer Centre Privacy Commissioner, *Inquiry into Unauthorised Retrieval and Disclosure of Information by Police Constable—July 1977*, Wellington, 1978

Richardson, I. L. M. 'The Role of Judges as Policy Makers' (1985) 15 *Victoria University of Wellington Law Review* 46

Towner, R. 'Community law and revisions in orthodox constitutional doctrine, a bill of rights for New Zealand' (1976) 3 *Auckland University Law Review* 50

Wallington, P. and McBride, J. 'A Written Constitution and a Second Chamber' (1960) 36 *New Zealand Law Journal* 385

Wallington, P. and McBride, J. 'A Written Constitution and a Second Chamber' (1961) 37 *New Zealand Law Journal* 145

Woodhouse, Sir Owen 'Government Under the Law' J. C. Beaglehole Memorial Lecture, 1979, New Zealand Council for Civil Liberties

**2. Canada**

Abel, A. S. 'Constitutional Charter for Canada' (1978) 28 *University of Toronto Law Journal* 265

Abel, A. S. *Toward a Constitutional Charter for Canada*, Toronto, 1980

Arbess, D. J. 'Limitations on Legislative Override' (1983) 21 *Osgoode Hall Law Journal* 113

*The Canadian Charter of Rights Annotated*, Canada Law Book Inc., 1984

Canadian Senate and House of Commons, *Minutes of Special Joint Committee on the Constitution of Canada*, 1980–1981

Doherty, D. 'What's Done is Done' (1982) 26 *Criminal Reports* (3d) 121

Gibson, D. 'Charter or Chimera: A Comment on the Proposed Canadian Charter of Rights and Freedoms' (1979) 9 *Manitoba Law Journal* 363

Gibson, D. 'The Charter of Rights and the Private Sector' (1982) 12, *Manitoba Law Journal* 213

Hogg, P. W. *Canada Act 1982 Annotated*, Toronto, 1982
Hogg, P. W. *Constitutional Law of Canada* 1977, 2nd ed forthcoming
McDonald, D. C. *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources*, Toronto, 1982
McLellan, A. A. and Elman, B. P. 'The Enforcement of the Charter' (1983) 21 *Alberta Law Review* 205
Madott, D. 'Libel Law, Fiction and the Charter' (1983) 21 *Osgoode Hall Law Journal* 741
Russell, P. H. 'The Effect of a Charter of Rights on the policy-making role of Canadian Courts' (1982) 25 *Canadian Public Administration* 1
Smiley, D. V. 'The Case Against the Canadian Charter of Human Rights' (1969) 2 *Canadian Journal of Political Science* 277
Smith, L. 'Charter Equality Rights: Some General Issues and Specific Applications in British Columbia to Elections, Juries and Illegitimacy' (1984) 18 *University of British Columbia Law Review* 351
Symposia on the Canadian Charter of Rights and Freedoms (1984) 32 *American Journal of Comparative Law* 221
Symposia on the Canadian Charter of Rights and Freedoms (1983) 61 *The Canadian Bar Review*—Special edition
Symposia on the Canadian Charter of Rights and Freedoms (1983) 13 *Manitoba Law Journal* 429
Symposia on the Canadian Charter of Rights and Freedoms (1982) 8 *Queen's Law Journal* 7
Symposia on the Canadian Charter of Rights and Freedoms (1982) 4 *Supreme Court Law Review*-Special edition
Tarnopolsky, W. S. *The Canadian Bill of Rights*, Toronto, 1975
Tarnopolsky, W. S. and Beaudoin, G. A. *The Canadian Charter of Rights and Freedoms: Commentary*, Toronto, 1982
Tremblay, L. 'Section 7 of the Charter: Substantive Due Process?' (1984) 18 *University of British Columbia Law Review* 201

**3. United States**

This list is an attempt to identify some of the leading contributions to a vast and extremely rich literature. Like the other lists, it does not include the judgments of the courts. Some are referred to in the White Paper. It follows a chronological order.

Thayer, J. B. 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harv. L. Rev.* 152
Jackson, R. H. *The Struggle for Judicial Supremacy* (1941)
Rostow, E. V. 'The Democratic Character of Judicial Review' (1952) 56 *Harv. L. Rev.* 193
Jackson, R. H. *The Supreme Court in the American System of Government* (1955)
Freund, P. A. 'The Court and Fundamental Freedoms' (1957) in Levy (ed), *Judicial Review and the Supreme Court* (1967) 124 (that book also reprints the Thayer and Rostow articles)

Hand, L. *The Bill of Rights* (1958)
Wechsler, H. 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harv. L. Rev.* 1
Freund, P. A. *The Supreme Court of the United States* (1961)
Bickel, A. M. *The Least Dangerous Branch* (1962)
Chayes, A. 'The Role of the Judge in Public Law Litigation' (1972) 89 *Harv. L. Rev.* 1281
Cox, A. *The Role of the Supreme Court in American Government* (1976)
Tribe, L. H. *American Constitutional Law* (1978)
Ely, J. H. *Democracy and Distrust: A Theory of Judicial Review* (1980) (This book, like the next two, has produced a great amount of valuable commentary, e.g., Tushnet, M. 'Darkness on the Edge of Town', and Tribe, L. H. 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale L.J.* 1037 and 1063)
Bobbitt, P. *Constitutional Fate—Theory of the Constitution* (1982)
Perry, M. J. *The Constitution, the Courts and Human Rights* (1982)
Blasi, V. (ed) *The Burger Court* (1983)

**4. United Kingdom**

de Smith, S. A. *The New Commonwealth and its Constitutions* (1964) (and see the references there to earlier discussions)
Hood Phillips, O. *Reform of the Constitution* (1970)
Scarman, Lord L. *English Law—the New Dimension* (1974)
Fawcett, J. E. S. 'A Bill of Rights for the United Kingdom?' (1976) 1 *Human Rights Rev.* 57
Marshall, G. *Constitutional Theory* (1976)
Wallington, P. and McBride, J. *Civil Liberties and a Bill of Rights* (1976)
Standing Advisory Committee on Human Rights, *The Protection of Human Rights by Law in Northern Ireland,* Cmnd 7009 (1977)
Report of the Select Committee on a Bill of Rights, House of Lords Paper 176 (1978)
Mann, F. A. 'Britain's Bill of Rights' (1978) 94 *LQR* 512
Zander, M. *A Bill of Rights?* (2nd ed 1979) (this provides a useful summary of the debate and relevant literature—including contributions by leading politician-lawyers such as Lord Hailsham and Lord Gardiner)
Jaconelli, J. *Enacting a Bill of Rights: The Legal Problems* (1980)

**5. International**

This is a very selective list. There is now a vast literature on international human rights law.

Lauterpacht, H. *International Law and Human Rights* (1950)
Fawcett, J. E. S. *The Application of the European Convention on Human Rights* (1969)

Sohn, B. and Buergenthal, T. *International Protection of Human Rights* (1973)
Jacobs, F. G. *The European Convention on Human Rights* (1975)
Henkin, L. (ed) *The International Bill of Rights* (1981)
Drzemczewski, A. Z. *European Human Rights Convention in Domestic Law: A Comparative Study* (1983)

The various United Nations and regional bodies (Inter-American as well as European) have produced much relevant material. Some of the relevant European cases have been noted in the White Paper.

# 12. Appendices

*APPENDIX 1*

***Constitution Act, 1982***

as enacted by the Canada Act 1982 (U.K.) c.11
proclaimed in force April 17, 1982

PART I

## Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the Rule of Law:

*Guarantee of Rights and Freedoms*

### 1. Rights and Freedoms in Canada

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

*Fundamental Freedoms*

### 2. Fundamental freedoms

Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

*Democratic Rights*

### 3. Democratic rights of citizens

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

### 4.—(1) Maximum duration of legislative bodies

No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) **Continuation in special circumstances**

In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than onethird of the members of the House of Commons or the legislative assembly, as the case may be.

**5. Annual sitting of legislative bodies**

There shall be a sitting of Parliament and of each legislature at least once every twelve months.

*Mobility Rights*

**6.**—(1) **Mobility of citizens**

Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) **Rights to move and gain livelihood**

Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and
(b) to pursue the gaining of a livelihood in any province.

(3) **Limitation**

The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) **Affirmative action programs**

Subsections (2) and (3) do not preclude any law, program or activity that has as its objects the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

*Legal Rights*

**7. Life, liberty and security of person**

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

**8. Search or seizure**

Everyone has the right to be secure against unreasonable search or seizure.

**9. Detention or imprisonment**

Everyone has the right not to be arbitrarily detained or imprisoned.

**10. Arrest or detention**

Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

**11. Proceedings in criminal and penal matters**

Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

**12. Treatment or punishment**

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

**13. Self-crimination**

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

**14. Interpreter**

A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

*Equality Rights*

15.—(1) **Equality before and under law and equal protection and benefit of law**

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) **Affirmative action programs**

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

*Official Languages of Canada*

16.—(1) **Official languages of Canada**

English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) **Official languages of New Brunswick**

English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) **Advancement of status and use**

Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17.—(1) **Proceedings of Parliament**

Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) **Proceedings of New Brunswick legislature**

Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18.—(1) **Parliamentary statutes and records**

The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) **New Brunswick statutes and records.**

The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19.—(1) **Proceedings in courts established by Parliament**

Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) **Proceedings in New Brunswick courts**

Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20.—(1) **Communications by public with federal institutions**

Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) **Communications by public with New Brunswick institutions**

Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

**21. Continuation of existing constitutional provisions**

Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

**22. Rights and privileges preserved**

Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

*Minority Language Educational Rights*

**23.—(1) Language of instruction**

Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) **Continuity of language instruction**

Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) **Application where numbers warrant**

The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

*Enforcement*

**24.—(1) Enforcement of guaranteed rights and freedoms**

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) **Exclusion of evidence bringing administration of justice into disrepute**

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

*General*

**25. Aboriginal rights and freedoms not affected by Charter**

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

**26. Other rights and freedoms not affected by Charter**

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

**27. Multicultural heritage**

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

**28. Rights guaranteed equally to both sexes**

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

**29. Rights respecting certain schools preserved**

Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

**30. Application to territories and territorial authorities**

A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

**31. Legislative powers not extended**

Nothing in this Charter extends the legislative powers of any body or authority.

*Application of Charter*

**32.—(1) Application of Charter**

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) **Exception**

Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

**33.—(1) Exception where express declaration**

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) **Operation of exception**

An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) **Five year limitation**

A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) **Re-enactment**

Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) **Five year limitation**

Subsection (3) applies in respect of a re-enactment made under subsection (4).

*Citation*

34. **Citation**

This Part may be cited as the *Canadian Charter of Rights and Freedoms*

PART II

*Rights of the Aboriginal Peoples of Canada*

35.—(1) **Recognition of existing aboriginal and treaty rights**

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) **Definition of "aboriginal peoples of Canada"**

In this Act,"aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

. . . . . .

PART VII

*General*

52.—(1) **Primacy of Constitution of Canada**

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) **Constitution of Canada**

The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) **Amendment to Constitution of Canada**

Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

*APPENDIX 2*

## *The International Covenant on Civil and Political Rights (and Optional Protocol)*

The International Covenant on Civil and Political Rights and the Optional Protocol thereto, were adopted by the General Assembly of the United Nations on 16 December 1966.

Both instruments entered into force on 23 March 1976. The New Zealand Instrument of Ratification was deposited on 28 December 1978.

The International Covenant entered into force for New Zealand on 28 March 1979. New Zealand has not yet acceded to the Optional Protocol.

## International Covenant on Civil and Political Rights

### PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

### PART I

### ARTICLE 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## PART II

### ARTICLE 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

### ARTICLE 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

ARTICLE 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation.

ARTICLE 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

ARTICLE 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present

Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention of the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ARTICLE 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in sub-paragraph (b) normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
(iv) Any work or service which forms part of normal civil obligations.

ARTICLE 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

ARTICLE 10

1. All persons deprived of their liberty shall be treated with humanity and with respect to the inherent dignity of the human person.
2.
(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

*New Zealand entered a reservation to this Article:

"The Government of New Zealand reserves the right not to apply Article 10 (2) (b) or Article 10 (3) in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply Article 10 (3) where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned."

ARTICLE 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

ARTICLE 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

ARTICLE 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

ARTICLE 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

*New Zealand entered a reservation to this Article:

"The Government of New Zealand reserves the right not to apply Article 14 (6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice."

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

## ARTICLE 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

## ARTICLE 16

Everyone shall have the right to recognition everywhere as a person before the law.

## ARTICLE 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

ARTICLE 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

ARTICLE 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

ARTICLE 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

*New Zealand entered a reservation to this article:

"The Government of New Zealand having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or illwill against any group of persons, and having regard to the right of freedom of speech, reserves the right not to introduce further legislation with regard to Article 20."

ARTICLE 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

ARTICLE 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

*New Zealand entered a reservation to this Article:

"The Government of New Zealand reserves the right not to apply Article 22 as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that Article."

ARTICLE 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

ARTICLE 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

ARTICLE 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

ARTICLE 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ARTICLE 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

ARTICLE 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral

character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

ARTICLE 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the State Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

ARTICLE 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

ARTICLE 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

ARTICLE 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

ARTICLE 33

1. If, in the unanimous option of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

ARTICLE 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

ARTICLE 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from

United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

ARTICLE 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

ARTICLE 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

ARTICLE 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

ARTICLE 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

ARTICLE 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

ARTICLE 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law.

This shall not be the rule where the application of the remedies is unreasonably prolonged.

(d) The Committee shall hold closed meetings when examining communications under this article.

(e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

(f) In any matters referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.

(h) The Committee shall, within twelve months after the date of the receipt of notice under sub-paragraph (b), submit a report:

(i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.*

*New Zealand made a declaration under this Article:

"The Government of New Zealand declares under Article 41 of the International Covenant on Civil and Political Rights that it recognizes the competence of the Human Rights Committee to receive and consider communications from another State

party which has similarly declared under Article 41 its recognition of the Committee's competence in respect to itself except where the declaration by such a state party was made less than 12 months prior to the submission by it of a complaint relating to New Zealand."

ARTICLE 42

1.
(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the Commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized

of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned.

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached.

(c) If a solution within the terms of sub-paragraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned.

(d) If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

## ARTICLE 43

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

## ARTICLE 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and

the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

ARTICLE 45

The Committee shall submit to the General Assembly of the United Nations through the Economic and Social Council, an annual report on its activities.

## PART V

ARTICLE 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

ARTICLE 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

## PART VI

ARTICLE 48

1. The present Covenant is open for signature by any State member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

ARTICLE 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

ARTICLE 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

ARTICLE 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

ARTICLE 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

ARTICLE 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

## *Optional Protocol to the International Covenant on Civil and Political Rights*

*Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966*

ENTRY INTO FORCE: 23 March 1976, in accordance with article 9.

The States Parties to the present Protocol,

*Considering* that in order further to achieve the purposes of the Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

*Have agreed* as follows:

ARTICLE 1

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State party to the Covenant which is not a party to the present Protocol.

ARTICLE 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

ARTICLE 3

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers

to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

ARTICLE 4

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State party to the present Protocol alleged to be violating any provision of the Covenant.

2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

ARTICLE 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

ARTICLE 6

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

ARTICLE 7

Pending the achievement of the objectives of resolution 1514 (XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

ARTICLE 8

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

## ARTICLE 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

## ARTICLE 10

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

## ARTICLE 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

ARTICLE 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

ARTICLE 13

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(a) Signatures, ratifications and accessions under article 8;

(b) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;

(c) Denunciations under article 12.

ARTICLE 14

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

BY AUTHORITY:
V. R. WARD, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1985

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