Section 7 of the Bill of Rights: an Attorney General’s perspective
Remarks to NZ Centre for Human Rights Law, Policy and Practice: Parliament and the Protection of Human Rights - Pre-Legislative Scrutiny and the Role of S 7 of the Bill of Rights

Introduction

The Attorney-General’s job is one of the most interesting in government. As is well known, the Attorney-General is a minister of the Crown and also a law officer. One of the most interesting and, on occasion, challenging aspects of the law officer role is the necessity to scrutinise legislation to determine whether or not Bill of Rights issues are raised.

As everyone here will know, section 7 of the New Zealand Bill of Rights Act 1990 requires that:

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—
(a) in the case of a Government Bill, on the introduction of that Bill; or
(b) in any other case, as soon as practicable after the introduction of the Bill,—
bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

A little parliamentary history of section 7 is instructive. On introducing the bill, Prime Minister Geoffrey Palmer said:¹

The significance of the Attorney-General’s reporting requirement is that it will necessitate a careful examination of all Government Bills before introduction, in the light of the rights contained in the Bill of Rights. That scrutiny will bolster the present law-making processes... The possibility of an adverse report by the Attorney-General will, I think, have a salutary effect on those involved in the legislative process. It will send a clear message that legislative proposals must be consistent with those basic principles before a Bill is introduced.

Several members of the opposition were sceptical. The then-MP for Rotorua, Paul East, said:²

There is no remedy at all if the Attorney-General does not certify the legislation, or if he certifies the legislation as complying with the Bill of Rights when it demonstrably should not comply... If the Attorney-General does not even bother to certify a Bill at all... [if he] is not concentrating on the job in hand and does not certify the legislation that comes before Parliament there is nothing that Parliament or anybody can do about it. That is why it is absolutely toothless... [It] is a Clayton’s Bill of Rights Bill that does nothing.

¹ 502 NZPD 1989 at 13039.
² 510 NZPD 1990 at 3762.
Mr East did not quite have this point right. The Bill of Rights Act does not require an Attorney-General to certify the compliance of a piece of legislation with the Bill of Rights, only report to the House if he or she saw an inconsistency.

Labour MP Richard Northey made a rousing defence of the Attorney-General:

Within the conventions of Parliament the Attorney-General is accepted as having an individual, independent judicial responsibility to act in a judicial way, and to report on matters even when there may be political pressures not to notice that particular matter. Most of the people who have been appointed in the past to the position of Attorney-General are of such a calibre that they would rather resign than fail to carry out their legislative responsibilities in a particular way.

Attorneys-General have brought 62 Bills to the attention of the House under section 7 since 1990, covering 30 Government Bills and 32 Non-Government Bills. Of these:

- 22 Bills were not enacted, including one Government Bill;
- 36 Bills were enacted; and
- 4 Bills are still before the house.

There have been some notable exceptions. No section 7 report was ever presented on the Foreshore and Seabed Act 2004 or the Electoral Finance Act 2007. The longer I am Attorney-General, the more I am shocked by those decisions. I do not see how an Attorney-General acting impartially as senior law officer could not have produced a section 7 report on those two bills, both thankfully now repealed.

Since I became Attorney I have presented 17 section 7 reports on bills covering matters from lobbying to prisoner voting, extended supervision orders to a proposed referendum on the Head of State.

I am encouraged by the evident interest in section 7 of the Bill of Rights Act and in the constitutional role I discharge under that Act. My view, however, is very much an inside-view. These reports are my duty as senior law officer. To prepare for this address I studied the perspectives of a number of commentators, including Professors Hiebert and Geddis,

The Attorney-General’s Perspective

I do not agree with everything the commentators have to say. From Professor Geddis’ past papers, I have discovered that section 7 is irrelevant at least once a Bill is introduced and that parliamentary debate fails to engage adequately with Bill of Rights Act issues; from Professor Hiebert, I have found that the role of section 7 has resonance during the development of policy but that it was unclear whether it influences Parliament; from

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3 510 NZPD 1990 at Second Reading Debate, 3463.
Professor Stephen Gardbaum, that New Zealand Attorneys-General issue too many section 7 reports and from other commentators that they issue too few.

I have also learned from Dr Petra Butler that I have been a participant in a “tango” with various judges including the Supreme Court bench. This was something of which I was not previously aware.

My own perspective has developed over my five years in office and is necessarily more practical in nature. My involvement with section 7 of the Bill of Rights Act was first as a member of parliament and then as Attorney-General since 2009. In the former capacity, I paid considerable attention to the advice given or accepted by each successive Attorney-General in respect of Bills, on several occasions finding serious fault with that advice, most notably in the Electoral Finance and Foreshore and Seabed bills.

In discharging my duties under section 7, I recognise that the assessment of consistency with the Bill of Rights Act is a matter for my own independent judgment. As Attorney-General, my exercise of that judgment is not subject to direction by Cabinet, caucus, the House or the courts.

Nor is it a question simply of following judicial precedent or my own officials’ advice. As I have said in the House and as is evident from, for example, my own opinion on 2012 legislation dealing with public protection orders, I make, and am obliged to make, an independent legal judgment on each occasion.

It is not the duty of the Attorney-General mindlessly to sign the advice put before him by officials. It is my duty as senior law officer to consider advice but ultimately make up his own mind on a section 7 report, independent of any considerations other than a strict legal analysis.

My experience as Attorney-General has been that the provision of that independent legal view, whether by making a report, accepting and releasing advice or preparing my own legal opinion, has practical consequences at each stage of the legislative process. It follows that, while I do not doubt the statistics advanced by Professor Geddis and others in support of a more sceptical view, I think those conclusions drawn rather miss the point. I also do not accept the occasional assertions (at least in respect of those Bills for which I have been responsible as Attorney-General) that the legal judgments as made and expressed are somehow inherently deficient.

Both views mistake the nature and, particularly, the wider context of the section 7 procedure. In response, I have three related points to make.

**Legal Analysis versus Policy**

My first point, which I will touch on only briefly, is that the section 7 procedure requires the making of independent and reasoned judgments about consistency with the Bill of

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7 P Butler “It Takes Two to Tango – Have They Learned their Steps?” in Evans/Knopf (eds) Judicial Supremacy or Inter-institutional Dialogue? Political Responses to Judicial Review (2011) 1.
Rights Act. It is not a question of the overall policy content of the particular Bill. While both the section 7 assessment and the underlying policy are both matters for debate, there is a basic distinction between the two. A section 7 report is an exercise in legal analysis, not in determining what is good or bad policy.

For example, I echo Dr Matthew Palmer’s recent comments on whether it was correct to describe the recent Government Communications Security Bureau amendments as breaching the rule of law, a comment often made during the disappointing public debate on that legislation. There may be common factual issues between the policy and rights analyses, but there is a basic difference between reasoned Bill of Rights objections and objections to the relevant policy. It is difficult to see what purpose was served by submissions that criticised the Bill of Rights Act assessment of the legislation but did not engage with the reasoning of that assessment to any great degree.

A Parliamentary Bill of Rights?

My second point is that I agree the section 7 procedure forms part of what Professor Hiebert and others have termed a parliamentary Bill of Rights. This may seem an obvious point but some commentary often misses the fundamental starting point that the New Zealand Bill of Rights Act does not have the status of a supreme or higher law.

To the contrary, successive parliaments have made a conscious choice first to adopt and then to retain the Bill of Rights Act as a normal piece of law, no more or less special than the now repealed Military Manoeuvres Act 1915. Calls for change to the status of the Bill of Rights Act have not, to date, been taken up.

I think it is wrong to suggest that proposals to make the Bill of Rights Act some form of ‘supreme law’ are the only way forward, as we see in, for example, Stephen Gardbaum’s analysis of the Bill of Rights Act and similar instruments as a new, and perhaps more effective, “Commonwealth model” of rights promotion or in Jeremy Waldron’s scepticism over judicial rights review.

The requirement to advise Parliament of any inconsistency with protected rights does not operate as a prelude to subsequent court challenge. It has been suggested that that renders the requirement inconsequential. I think that is wrong. On the contrary, it is because there is not such scope for subsequent challenge that the respective tasks of the Attorney-General and of the House of Representatives are more important than they would be otherwise.

The positive effect of section 7 on the executive is often contained in the threat of a section 7 report

My third point concerns the effect of section 7 on policy development. Before I say too much about this, I want to pause and say something about the way bills are 'vetted' by the Justice and Crown Law officials who provide me with section 7 advice. I do not think this work is particularly well-known or understood.

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The Ministry of Justice provides advice to the Attorney-General on the consistency of all bills with the Bill of Rights Act, except for appropriation Bills and bills in the name of a Justice Minister (including Courts and Treaty Negotiations). Advice on Justice bills is provided by the Crown Law Office.

The Ministry and Crown Law must provide their advice to me one week before the bill is considered by the Cabinet Legislation Committee or other Cabinet committee. Government agencies must provide the ministry or Crown Law with the final version of a bill at least two weeks before the bill is considered by that committee.

In practice, the government agencies responsible for the legislation consult the Ministry of Justice during the policy development and legislation drafting phases. This enables the agency, the Ministry and the Parliamentary Counsel Office to:

- find ways to eliminate or mitigate limitations on right and freedoms; and
- establish the justifications for remaining limitation on rights and freedoms.

This happens constantly.

In contrast to supreme rights instruments that are judicially applied and interpreted, the section 7 procedure and the policy and parliamentary steps that precede and follow it cannot correctly be understood as some form of judicial pronouncement. Section 7 reports and advice are legal assessments, but they do not operate as an injunction to the House of Representatives. Rather, they are a legal component of a wider policy and parliamentary process.

I do not think the way we do things is worse or better than in any other western country. But it must be understood on its own terms. I think the section 7 procedure fits in well with the way policy development and parliamentary debate occur in this country.

I think the influence exerted by the section 7 procedure can be seen at each stage of policy development and parliamentary debate. The provision of independent advice at the introduction of each Bill influences the preparation of bills and the drafting of policies. My experience is that each stage regularly identifies ways in which policy aims can be amended or achieved in a different way that complies with the Bill of Rights Act, where it is possible to do so.

In order to understand how rights are given effect at the policy development stage, it is necessary to understand, as the Canadian commentator Professor James Kelly has observed, that New Zealand has a system of legislative development and legislative review that is highly transparent and, for the most part, highly formalised and participatory relative to comparable jurisdictions.

The simple fact that policy papers are routinely disclosed in the New Zealand system remains uncommon elsewhere. Similarly, the requirements not only for published

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opinions under section 7 but also for regulatory impact statements and published departmental reports have few or more limited parallels in other jurisdictions.

In that context, there is scope for rights issues to be raised and resolved, sometimes at a very early point and sometimes at the last minute. Where contentious legislation contains detailed provision for human rights matters, those will almost always be the product of preliminary work done with the section 7 procedure in mind. Further, and to take the recent example of my section 7 report on the Land Transport Amendment Bill, even the making of a formal report can give occasion to identify how a Bill could be amended.

The second stage, that of Cabinet consideration of legislative proposals, is also influenced by the section 7 procedure. As a matter of New Zealand constitutional practice, the Attorney-General is both a member of Cabinet and an independent senior law officer.

The responsibility of the Attorney-General under section 7 reflects that dual role: it enables me both to participate in Cabinet discussion of proposed legislation and then to give my independent view on that legislation to the House. That dual character may invite scepticism but again allows the Bill of Rights Act system to make use of the longstanding principle of Attorney-General independence as a means of ensuring that Cabinet does engage with material rights issues.

The third stage, that of parliamentary consideration, is the most obvious point at which the section 7 procedure can take effect. The provision of an independent view by the Attorney-General to the House, whether in the form of a section 7 report or by the provision of a legal opinion, means the House has an express statement of the Bill of Rights Act issues in respect of each bill.

Those statements are regularly mentioned in the House and are still more frequently mentioned by and before select committees. It is unsurprising that, where Cabinet has agreed to the introduction of a Bill notwithstanding a section 7 report, the bill will very likely proceed, with or without amendment. But that is not always the case.

Parliamentary consideration is not a form of judicial procedure. In the context of human rights issues, I suggest that the robust and sometimes non-technical nature of the debate does not indicate a lack of attention or insight.

The same robust approach can also be seen in the decision of successive Parliaments to decline proposals for the establishment of a specialist select committee for human rights issues. There is some scepticism about establishing such a narrowly focussed institution in a House of Representatives in which many members take a robust interest across a range of issues.

**We are a country that likes incremental, not revolutionary, constitutional change**

My final point is to reflect on the informal and incremental character of legislative and constitutional change in New Zealand. We have only had one violent change to our constitution, and that was the mistaken abolition of the Legislative Council in 1951. Our otherwise incremental approach can be seen in a broad sense in the acceptance over the past 24 years of the constitutional status of the Bill of Rights Act.
Our constitutional law could be more tidily expressed. The Judicature (Modernisation) Bill, currently before the House, will tidy up the statutes governing the judiciary for the first time in over 100 years. I think the next step will be a single Parliament Act, incorporating relevant parts of statutes such as the Constitution Act 1986, Legislature Act 1908 and Legislation Act 2012. Then the Constitution Act could serve as an Act setting out the law governing the executive and other constitutional matters.

The informal and incremental character of constitutional change in New Zealand can be seen in the way the House approaches and resolves particular issues. That is sometimes simply a question of working to secure sufficient priority for necessary reforms. An example was the reform of the Limitation Act I shepherded through the House in 2010. It is not always easy to gain time in the House for necessary, but not politically sexy, reforms.

**Conclusion: Where to Next?**

A number of practical improvements have been suggested over the years. The fact that none of those improvements has yet been put into legislation should not be a cause of criticism. Our system works and stands up to scrutiny as it is.

That is why I expressed disappointment in January about the Law Society's comments about section 7 in its submission to the United Nations. We all know that the presentation of a report by the Attorney-General under section 7 of the Bill of Rights Act does not prevent the passage of any particular piece of legislation. If that had been intended by Parliament, it would have been stated in the law. That is why I said, and stand by my comments that, it was bizarre for the Law Society to accuse the government of undermining the rule of law on the grounds that it observes the law as it is, not as the Law Society would want it to be.

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

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

I have taken several novel steps in the last five years. In the last term of Parliament I provided a 'not a section 7 report' on the Public Safety (Public Protection Orders) Bill, setting out why it did not appear to be inconsistent with the Bill of Rights Act.

I tabled this non-report because of public interest in the issue and because the bill it provided a useful example of how early engagement on Bill of Rights issues can improve legislative proposals. As I have set out, a section 7 report is rarely an “after the event” exercise, but is almost always influential in the development of legislation.
In 2010, an acting Attorney-General examined the Marine and Coastal Area (Takutai Moana) Bill and tabled a similar ‘not a section 7 report’. I stood aside from consideration of that bill as it was one of the government’s major policy achievements in that term of Parliament and I had been heavily involved in its development. On that occasion, I thought the difficult history of the issue and my level of involvement in the bill meant it was best if I was not seen to vet it as senior law officer.

Perhaps I should do more ‘not a section 7’ reports. One could certainly have been helpful on the recent intelligence services legislation, whose Bill of Rights implications were almost completely and wilfully misunderstood by most commentators.

I am also open to more fundamental reform, although we need to tread carefully. In principle, however, I see no reason why the section 7 function must be carried out by the Attorney-General. While I have noted what I see as the benefits for legislation of my being both senior law officer and a Cabinet Minister, a section 7 report is for Parliament, not the executive. So is there any reason why counsel appointed by Parliament could not carry out the assessment?

My conclusion today is that, in assessing the operation of the Bill of Rights Act and possible improvements, it is necessary to take a broad and long view, as with other parliamentary and constitutional matters in New Zealand.