IN THE COURT OF APPEAL OF NEW ZEALAND

CA 433/2008

UNDER	**Part 1 of the Judicature Amendment Act 1972**
AND UNDER	**The Declaratory Judgments Act 1908**
IN THE MATTER OF	**The Electoral Finance Act 2007**
AND	**The New Zealand Bill Of Rights Act 1990**
BETWEEN:	**JOHN SPENCER BOSCAWEN** **First Appellant**
AND	**GARTH NEIL MCVICAR** **Second Appellant**
AND	**RODNEY PHILIP HIDE** **Third Appellant**
AND	**THE ATTORNEY GENERAL OF NEW ZEALAND** **Respondent**

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May it please the Court –

1. SUMMARY

1.1 This is an appeal against the decision of Clifford J in the High Court in which he granted orders striking out the appellants' amended statement of claim ("ASOC"). The appeal raises questions of constitutional importance, which have not been the subject of consideration by this Court before. Its core issue is the extent to which the Courts are obliged to warn Parliament about any inconsistencies with rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"), appearing in draft or enacted legislation.

1.2 In the High Court proceeding, the appellants sought declarations that provisions in the Electoral Finance Act 2007 ("EF Act") were inconsistent with fundamental civil and political rights affirmed by the Bill of Rights Act. As the offending provisions in the EF Act germinated from the original Electoral Finance Bill ("EF Bill"), the appellants also claimed that the Attorney General should have drawn them to the attention of the House of Representatives during the legislative process. The appellants sought declarations that the Attorney breached his statutory duty under s.7 by failing to do so.

1.3 The Attorney General applied for orders striking out the appellants' ASOC on the grounds that:

(a) There was no settled view as to the availability of declarations of inconsistency in New Zealand, nor should the Courts take an advisory role in a proceeding without a specific factual context or a *lis* between the parties.

(b) An occasion of privilege arose which precluded the Court from receiving a copy of Hansard or the Bills, or from adjudicating on the EF Act itself.

1.4 The appellants argued that the issues raised by the Crown had to be properly balanced alongside two other important constitutional principles; namely, the role of the Court in:

(a) ensuring proper accountability of the executive under the rule of law; and

(b) upholding fundamental rights and freedoms under the Bill of Rights.

Moreover, there was no principled basis for recognising an occasion of privilege over the s.7 certification process, as judicial review of the statutory duty would

not interfere with Parliament's right to control its own proceedings or otherwise cause tension between the two tranches of government.

1.5 Clifford J in the High Court granted the Crown's application and struck out the ASOC in its entirety. Clifford J expressed reluctance to make declarations of inconsistency, particularly on an abstract basis, without clear jurisdictional guidance from this Court[1]. He also followed the 1994 High Court decision of *Mangawaro Enterprises Limited* v *Attorney General* ("Mangawaro")[2], and obiter dicta comments from McGrath J in *Awatere Huata* v *Prebble* ("*Awatere Huata*")[3] and found the Attorney General's exercise of statutory power under s.7 to be non-justiciable.

1.6 The appellants seek the following relief:

(a) an order that the amended statement of claim be reinstated to allow the appellants' application for declarations of inconsistency under the Bill of Rights Act in respect of the EF Act[4]; and/or

(b) an order that the amended statement of claim be reinstated to allow the appellants' application for declarations that the Attorney breached his statutory duty under s.7 of the Bill of Rights Act by not alerting the House to any Bill of Rights inconsistencies apparent in the EF Bill during the legislative process.

2. BACKGROUND

The Parties[5]

2.1 The first appellant is a candidate and former fundraiser for the Act New Zealand Party ("Act Party"). The second appellant is the spokesman for the Sensible Sentencing Trust, an interest group which promotes and advocates for the rights of victims of crime. The third appellant is a member of the House and the elected representative for the Epsom electorate. He is also the leader of the Act Party.

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1 Decision of Clifford J dated 20 June 2008 ("High Court decision"), para [58]

2 *Mangawaro Enterprises Limited* v *Attorney General* [1994] 2 NZLR 451 (HC)

3 *Awatere Huata* v *Prebble* [2004] 3 NZLR 382 (CA), at para [55]

4 It is conceded that minor amendments to the amended statement of claim would be needed to seek relief under the Bill of Rights Act rather than the Declaratory Judgments Act 1908, as currently pleaded.

5 In the High Court proceeding, Graham Stairmand was named as third applicant. Mr Stairmand passed away shortly after the strike-out hearing earlier this year. Until his death, he was the President of Grey Power New Zealand, an interest group which promotes and advocates for the rights of people over the age of 50.

2.2 The Attorney General is a member of the executive branch of government and is New Zealand's principal law officer. Although a member of Parliament and (usually) of Cabinet, the Attorney General is required to act independently, devoid of political partiality.[6] At all material times, Dr Michael Cullen has held the office of Attorney General. Dr Cullen is also the Minister of Finance and Deputy Prime Minister,

History of the Electoral Finance legislation

2.3 On 23 July 2007, the EF Bill was introduced to the House. It was a Government Bill. At that stage, the Attorney General did not report any issues of compatibility between the EF Bill and the Bill of Rights Act to the House.

2.4 On 26 July 2007, the EF Bill was read for the first time and referred to the Justice and Electoral Select Committee ("Select Committee"). The Select Committee received over 600 submissions on the EF Bill, the majority of which opposed all or some of the provisions of the EF Bill for reasons of inconsistency with rights and freedoms guaranteed by the Bill of Rights Act.

2.5 During the course of its deliberations, the Select Committee wrote to the Attorney General asking that advisers from the Crown Law Office be made available to appear before it and provide advice on the consistency of the EF Bill with the Bill of Rights Act. On 11 September 2007, the Attorney advised the Select Committee that he saw little point in having Crown Law Office officials appear to assist it.[7]

2.6 During the legislative process, the EF Bill was significantly amended. However despite the changes, there were residual concerns that the draft legislation continued to violate protected rights in ways that could not be justified in a free and democratic society.

2.7 The Attorney General did not report any apparent inconsistencies with the Bill of Rights to the House at any stage during the legislative process.

2.8 The EF Bill was enacted and the Act received assent on 19 December 2007. As 2008 is an election year, the EF Act's most prevalent regulations took effect from 1 January 2008; just 14 days after it became law. The regulated period will last until Election day, which is set for 8 November 2008.

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6 Paul East, *The Role of the Attorney-General* in P Joseph (ed) Essays on the Constitution, Brookers 1995

7 Commentary to the Electoral Finance Bill as reported from the Justice and Electoral Committee (National Party minority view) pp 27 and 28

History of the Proceeding

2.9 In November 2007, the appellants applied to the High Court for review of the Attorney General's failure to warn the House of Representatives about Bill of Rights Act inconsistencies appearing in the original EF Bill[8]. They claimed that the Attorney had erred in law and as a consequence, breached his duty under s.7 of the Bill of Rights Act. The original claim sought declaratory relief to give effect to the certification process in s.7, which is designed to safeguard protected rights by ensuring that the House receives early warning of any Bill of Rights inconsistencies apparent in draft legislation.

2.10 The appellants also applied for urgency so that the claim could be determined before the EF Bill was passed[9].

2.11 The Attorney General opposed the application for urgency[10] and applied to strike-out the claim on the grounds that an occasion of privilege arose which precluded the Court from considering it[11]. The High Court initially agreed to hear the Crown's application under urgency and it was set it down for hearing on 27 November 2007. However, on 22 November 2007, Clifford J directed that this hearing be vacated after deciding that there were no grounds for affording it urgency after all.[12]

2.12 The EF Act was passed on 19 December 2007. On 30 January 2008, the appellants amended their claim to include declarations that provisions in the EF Act were inconsistent with s.5 of the Bill of Rights Act because they placed unjustifiable limitations on rights guaranteed under sections 12 and 14 of the Bill of Rights Act.[13] The alleged contraventions can be summarised as follows:

(a) **The sheer complexity of the regulatory régime:** The EF Act establishes an intrinsically convoluted set of rules which in of itself unjustifiably obstructs the freedom to participate in parliamentary democracy and political speech.

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8 Statement of claim dated 1 November 2007: **CB p.41**

9 Notice of interlocutory application seeking urgency: **CB p.48**; memorandum of counsel for applicants dated 1 November 2007: **CB p.53**; memorandum of counsel for applicants dated 19 November 2007: **CB p.64**

10 Notice of opposition dated 5 November 2007: **CB p.53**; memorandum of counsel for respondent dated 7 November 2007: **CB p.56**; memorandum of counsel for respondent dated 21 November 2007: **CB p.73**

11 Respondent's application for orders striking out the applicants statement of claim dated 12 November 2007: **CB p.58**; Notice of opposition to application dated 19 November 2007: **CB p.61**

12 Minute of Clifford J dated 21 November 2007: **CB p.71**; Ruling of Clifford J dated 22 November 2007: **CB p. 77**

13 Amended statement of claim dated 30 January 2008: **CB p.5**

(b) **The threat of prosecution:** The EF Act creates offences for non-compliance with a regulatory régime that is complicated, confusing, and uncertain. A fear of the consequences of inadvertent non-compliance inhibits free political expression even beyond what is or is not permitted under the EF Act (known as the "chilling effect").

(c) **Monetary limits:** The EF Act sets limits on the amount of money that private New Zealand citizens can spend in relation to political advocacy and public debate. These limits are unfair, arbitrary and disproportionate to any desired social objective.

(d) **The duration of the "regulated period":** all restrictions on participation in parliamentary democracy and political speech in the EF Act last from 1 January in any election year until the close of polling day (in 2008, this will total more than 10 months). Previously, any restrictions had been confined to the three months leading up to polling day. The duration of this period is not rationally connected to any social objective and the effects of the limitation are disproportionate to the seriousness of any perceived harm.

(e) **Incumbency advantage:** The EF Act, when read with the Appropriation (Continuation of Interim Meaning of Funding for Parliamentary Purposes) Act 2007 and the Parliamentary Service Act 2000, has the effect of unduly advantaging candidates who are incumbent members of Parliament over candidates who are not incumbent members of Parliament. This is an unjustifiable limit on the (equal) right to qualify for membership of the House of Representatives.

2.13 The appellants continued their challenge of the Attorney General's failure to report under s.7, because any inconsistencies in the enacted legislation stemmed from his original diagnostic failure. Also, the case highlighted wider concerns about the future performance of this duty. However since the legislative process had ended, they amended the relief to a request for declarations that the Attorney General breached the statutory duty under s.7 by not alerting the House to Bill of Rights inconsistencies that were apparent in the EF Bill. They also included a claim that the duty under s.7 was a continuous one which the Attorney could (and should) have exercised at any time during the legislative process.

2.14 The Attorney General applied to strike out the ASOC[14] and this application was heard in May 2008. On 20 June 2008, Clifford J delivered a reserved judgment in which he granted the Attorney's application and ordered that the whole of the appellants' ASOC be struck out[15].

Section 7 of the Bill of Rights Act

2.15 The Bill of Rights Act is a parliamentary bill of rights; it is not entrenched and does not entitle the Courts to strike-down or otherwise invalidate contravening legislation. However, while Parliament is free to enact legislation that contravenes fundamental rights and freedoms, it is expected that it will only do so consciously and with care. In *R* v *Secretary of State for the Home Department; ex parte Simms*[16] Lord Hoffman said:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But **the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.** [emphasis added]

2.16 The Long Title to the Bill of Rights Act provides that it is an Act:

> (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

2.17 Section 7 reads:

> **Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights**
>
> 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 to the House of Representatives any provision of the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

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14 Respondent's application for orders striking out the applicants amended statement of claim dated 14 February 2008: **CB p.17**; Notice of opposition dated 5 March 2008: **CB p.19**

15 Reserved judgment of Clifford J dated 20 June 2008: **CB p.23**

16 *R* v *Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115, 131 (HL)

2.18 The original White Paper Bill of Rights would have established the Bill of Rights as supreme law and given the courts power to judicially review and invalidate legislation that was inconsistent with any of the protected rights. When the Bill of Rights was diluted to a statutory-based one, two levels of scrutiny were introduced (at the front and back ends of the legislative process) so as to give the Act enough "teeth" to meet international obligations.

2.19 One of the front-end measures was the certification process set out in s.7, which requires the Attorney General to give a legal opinion to the House whenever draft legislation was contrary to the Bill of Rights. Another front-end proposal, which never eventuated, was for the creation of a special bi-partisan parliamentary committee that would be dedicated to considering human rights issues.

2.20 When moving the third reading of what became the Bill of Rights Act, Geoffrey Palmer said of the s. 7 certification process:

> [The Attorney General's] certificate means that when a Bill is going through the executive process it is likely to be held, stopped, or rejected altogether if it infringes the Bill of Rights. Nevertheless, if the Government wants to persist with the provision although it is contrary to the Bill of Rights it has to introduce that Bill to the House with a certificate from the Attorney General – a legal opinion that it is contrary to the Bill of Rights. It will then be for the Parliament to make up its mind and to decide whether it should pass a provision to do that, but it will have cause to pause, to reflect, and to make members of the public aware that their rights are being whittled away.[17]

2.21 In other words, an early warning would mitigate any risk of "Nelsonian blindness" when Parliament enacted laws which impacted on protected rights[18]. There was also an acceptance that the Attorney General had an independent judicial responsibility to act in a judicial way.[19]

2.22 Although the primary purpose of s.7 was to alert the House to any inconsistencies, the reporting duty was also intended to have a practical impact on the policy development and legislative drafting processes.[20] This is now

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17 510 NZPD 3760 (21 August 1990) per G Palmer

18 Lord Scott of Fosscote explained the concept of Nelsonian blindness in *Manifest Shipping Company Limited* v *Uni-Polaris Shipping Company Limited and Others* [2001] 1 All ER 743:

> Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground - and if it is not, it should be - that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence.

19 510 NZPD 3463 (14 August 1990); 510 NZPD 3764 (21 August 1990) per R Northey

20 502 NZPD 13039 (10 October 1989) per G Palmer

reflected in Cabinet rules which stipulate that responsible Ministers must vet proposed legislation for human rights implications. The rules also require government departments to seek advice from either the Ministry of Justice or Crown Law Office.

2.23 The Supreme Court decision in *R* v *Hanson*[21] set out an analytical framework for justifying the imposition of any limits on protected rights (s.5). This decision clarifies the role of the Courts and legal advisers in this process and has particular relevance to the Attorney's exercise of the s.7 duty. The delineated responsibilities (political, executive and legal) in respect of s.5 are set out as a schedule to these submissions.

Strike-out principles

2.24 The principles relating to strike-out were summarised by this Court in *Attorney-General* v *Prince and Gardner*[22]:

(a) assume the facts pleaded are true and that amendment to the pleadings cannot rectify the deficiencies;

(b) the causes of action must be so clearly untenable they cannot possibly succeed;

(c) the jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied that it has the requisite material before it; and

(d) difficult questions of law requiring extensive argument do not preclude a strike-out .

2.25 The Court is also entitled to assume for the purpose of this strike-out application, that:

(a) the EF Act does contain provisions which are inconsistent with the Bill of Rights Act;

(b) inconsistencies were also apparent in the original EF Bill and subsequent drafts; and

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21 *R* v *Hanson* [2007] 3 NZLR 1

22 *Attorney-General* v *Prince and Gardner* [1998] 1 NZLR 262, 267

(c) the Attorney General did not report any apparent inconsistencies with the Bill of Rights to the House at any stage during the legislative process.

3. ISSUES

3.1 Clifford J struck out the ASOC on jurisdictional grounds and made the following findings:

(a) The Court had no jurisdiction to make declarations of inconsistency, at least on an abstract basis.

(b) The Attorney General's actions in responding to the s.7 duty fell under the non-justiciable and privileged category of internal parliamentary proceedings.

(c) The duty under s.7 was a non-continuous one.

3.2 The appellants challenge all three findings.

(a) Can NZ Courts make Declarations of Inconsistency?

Introduction

3.3 Declarations of inconsistency (or incompatibility) are recognised in human rights jurisprudence. Professor Joseph has described them as a form of judicial/political dialogue:[23] -

> Declarations of incompatibility promote dialogue … and are a constitutional responsibility of the higher judiciary… The remedy allows courts to communicate directly with the political branch, while leaving to the democratic element the decision whether to enact remedial legislation. A declaration informs Parliament and the political executive when determining the appropriate political response. Declarations identify the legislative departure from the rights-standards and provide a voice to raise arguments of fundamental principle.

3.4 Clifford J was not satisfied that the remedies were available in this case. His reasons were[24]:

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23 PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed 2007), para 20.5 (p.771)

24 High Court Decision, para [58]

(a) Declarations of inconsistency had only been accepted in other jurisdictions after receiving the blessing of Parliament, through express statutory powers.

(b) This Court elected not to make such a declaration in *R* v *Poumako*.

(c) In the ASOC, the appellants sought the declarations under the Declaratory Judgments Act 1908 and not through the Bill of Rights Act itself.

(d) The questions raised in the proceeding were abstract in nature. [25]

Does the relief need to be sanctioned by Parliament?

3.5 Section 92J of the Human Rights Act 1993 ("HR Act") empowers the Human Rights Review Tribunal to declare an enactment inconsistent with the right to discrimination under s.19 of the Bill of Rights Act. Under s.92K, responsible Ministers are required to report a declaration under s92K of the HR Act to the House, along with the Government's response to it.

3.6 Admittedly, the Bill of Rights Act has no parallel provision to s.92 J of the HR Act. However, since *Baigent's* case, it has been accepted that the absence of any express remedial jurisdiction in the Bill of Rights Act does not preclude the Courts from granting relief in appropriate cases[26]. The long title to the Bill of Rights Act, affirming New Zealand's commitment to the International Covenant on Civil and Political Rights ("Covenant"), permits the courts to draw on article 2.3 of the Covenant, which requires that citizens have the right to avail themselves of an effective remedy in the event that their protected rights are unjustifiably violated.[27]

3.7 Similarly, under article 2.2 of the Covenant, there is an expectation that laws or measures will be adopted where necessary, so as to give effect to the

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25 *R* v *Poumako* [2000] 2 NZLR 695

26 *Simpson* v *Attorney General (Baigent's case)* [1994] 3 NZLR 667 (CA)

27 Article 2.3 reads:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognised 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.

protected rights[28]. Arguably, this would include measures designed not just to protect the rights themselves, but also those aimed at preserving the integrity of any other safeguards.

3.8 Accordingly, it is open for the Courts to develop declarations of inconsistency as a form of relief without the need for empowering legislation.

Have the Courts ruled out the possibility of such relief?

3.9 While no New Zealand court has yet to capture the words "declaration of inconsistency" in a formal ruling, there have been strong indications that such a remedy is available in New Zealand.

3.10 In *Moonen* v *Film and Literature Board of Review*[29], Tipping J was of the view that advisory indications from the judiciary would be of social value:

> [The purpose of s.5 of the Bill of Rights Act] necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right of freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s.5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.

3.11 In *Hansen*[30], the Supreme Court went a step further. It considered that the Courts had not just jurisdiction, but also a responsibility to draw Parliament and the Executive's attention to breaches of protected rights. McGrath J said[31]:

> While the courts' power to read down another provision so that it accords with the Bill of Rights, or to fill identified gaps in a statute, is accordingly limited by its function of interpretation, a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered

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28 Article 2.2 reads:

> 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 laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

29 *Moonen* v *Film and Literature Board of Review* [2000] 2 NZLR 9, paras [19] and [20]

30 *R* v *Hanson* [2007] 3 NZLR 1

31 *Hanson*, paras [253] to [254] and [259]

> is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights consistent interpretation, that none could be found, and that it has been necessary for the court to revert to s 4 of the Bill of Rights Act and uphold the ordinary meaning of the other statute. Normally that will be sufficiently apparent from the court's statement of its reasoning.
>
> Articulating that reasoning serves the important function of bringing to the attention of the executive branch of government that the court is of the view that there is a measure on the statute book which infringes protected rights and freedoms, which the court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the court's finding. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.

3.12 Similarly, Anderson J said[32]:

> [Some cases] may involve a finding by a court that Parliament has enacted legislation that cannot be demonstrably justified in a free and democratic society. Although such legislation cannot be struck down, the court's opinion will have a social value in bringing to notice an enactment which is inconsistent with fundamental rights and freedoms. It is indicative of the strength of our democratic institutions that Parliament, although not countenancing its being overruled, has, by the terms of the Bill of Rights Act, accepted the prospect of judicial assessment of the consistency of its enactments with affirmed rights and freedoms.
>
> …In any event, the courts should not be diffident about calling attention to encroachment on fundamental rights and freedoms.

3.13 There are already precedents to support the making of declarations of inconsistency in New Zealand. However, as the remedy is not binding or enforceable, it tends to manifest in the form of an advisory opinion. Like the certification process under s.7 of the Bill of Rights, independent legal opinions provide social value by supporting all branches of government to meet their obligations under the Bill of Rights Act. They also serve to educate and inform the wider populace.

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32 *Hanson*, paras [267] to [268]

Relief under the Bill of Rights Act

3.14 It is accepted that the relief may be more appropriately sought under the Bill of Rights Act than under the Declaratory Judgments Act 1908. However, before striking-out a proceeding the Court must be first satisfied that "*the causes of action [are] so clearly untenable that they cannot possibly succeed*"[33]. As it would involve only minor changes to the appellants' pleading to remedy the expressed concern, it is respectfully submitted that this was not a valid reason to strike out the cause of action.

Abstract review

3.15 The key issue that arises in the present case is whether the courts can give an advisory opinion in the absence of a specific factual context or a *lis* between the parties.

3.16 Courts in other jurisdictions can and do provide advisory opinions after an abstract review of legislation.

(a) Germany

3.17 Article 93 No 2 Basic Law (GG) vests jurisdiction in the Constitutional Court to examine whether or not a law or an act stemming from Parliament's legislative function is consistent with the GG. Applicants can be members of the Executive or 1/3 of members of Parliament. The Constitutional Court will strike down the incompatible provisions but generally will give Parliament a grace period to amend the legislation. The reason behind the jurisdiction of the Court in these cases is to safeguard the GG by trying to avoid the enactment of legislation which is inconsistent with the GG.

(b) South Africa

3.18 Similar to Germany, South Africa vests jurisdiction in its Constitutional Court to decide whether a statute is compliant with its Constitution. The referral procedure is seen as an early-warning alert system designed to ensure that the protection and vindication of constitutional rights and other aspects of the constitutional Grundnorm are not threatened by a zealous legislative majority.

3.19 In its 12th report dated 2 September 1993, the Technical Committee on Constitutional Issues stated at para [13]:

> The Constitutional Court as part of the judiciary should not be involved in the legislative process as such, but it should be

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33 *Attorney General* v *Prince & Gardner* [1998] 1 NZLR 262, 267

> empowered as a guardian of the Constitution to prevent the enactment of unconstitutional legislation.

(c) State of Rhode Island

3.20 The Rhode Island Supreme Court can be asked to give an advisory opinion at any stage in the legislative process in regard to the constitutionality of proposed or enacted legislation. Article X section 3 of the Rhode Island State Constitution reads:

> **Advisory opinions by Supreme Court**
>
> The judges of the Supreme Court shall give their written opinion upon any question of law whenever requested by the Governor or by either House of the General Assembly.

3.21 The Courts in Germany, South Africa and Rhode Island also have the ability to issue advisory opinions during the legislative process, but often elect to wait until after the legislation is enacted. This decision is not because of a fundamental principle of law, but for the pragmatic reason that because they have the power to strike-down any non-complying legislation, it is more expedient to wait until the end of the legislative process.

3.22 There is no compelling reason why the New Zealand courts should be precluded from reviewing legislation on an abstract basis. In many cases, the Courts can provide a useful advisory opinion without the need for a set of facts or legal dispute. For example, the Supreme Court in *Hanson* could have delivered the same judgments even if was not considering s.6(6) of the Misuse of Drugs Act in the context of a criminal appeal. A lack of concreteness may be used as a reason for declining relief in individual cases, but should not be the basis for denying jurisdiction altogether[34].

(b) Is s.7 non-justiciable?

General Overview of Parliamentary Privilege

3.23 Parliamentary privilege is one of the bedrocks of a democratic society. During the heady constitutional reform days in the 17th century, the privileges helped to breathe life into the doctrines of parliamentary sovereignty and the separation of powers, by shielding members from the arbitrary power of the Stuart monarchs and Kings Bench.

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[34] *re Advisory Opinion to the House of Representatives (Casion II)* Supreme Court No 2005-134-MP; refer also to *Hansen* para [267], per Anderson J

3.24 Due to the wide extent of its immunities, parliamentary privilege can, and frequently has, come head-to-head with other democratic tenets; most often the responsibility of the courts for the administration of justice. In these cases it is for the Courts to determine the exact scope of any privilege claimed; and to ensure that the tension between the legislature and judiciary remains a dynamic one. In *Buchanan* v *Jennings*, Keith J said: [35]

> Plainly the Courts must be respectful of Parliament's fundamental privileges, privileges required by its essential functions. They must as well, when the issue arises for decision, determine what they understand to be the limits of those privileges, as they have in many cases in many jurisdictions over the centuries.

3.25 The tensions at play in the present case are between the right of Parliament to regulate its own affairs and the duties of the courts in scrutinising the lawful exercise of executive power and in its role as guardian of fundamental rights and freedoms.

3.26 For centuries, the scope of parliamentary privilege was determined by reference to a statement of Blackstone (apparently quoting Sir Edward Coke)[36] that:

> … the whole of the law and custom of parliament has its original from this one maxim, 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates and not elsewhere'.

3.27 In 1998 and 1999 a Joint Committee of the House of Lords and House of Commons chaired by Lord Nicholls of Birkenhead ("Joint Committee"), undertook a comprehensive review of parliamentary privilege to ensure its relevance in a modern democracy.[37] In the executive summary to its final report, the Joint Committee stated:

> In order to carry out [its] public duties without fear or favour, Parliament and its members and officers need certain rights and immunities. Parliament needs the right to regulate its own affairs, free from intervention by the government or the courts. Members need to be able to speak freely, uninhibited by possible defamation claims. These rights and immunities, rooted in this country's constitutional history, are known as parliamentary privilege.
>
> Despite its ancient origins, parliamentary privilege must meet the current needs of Parliament, and must do so in a way acceptable

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35 Refer to *Buchanan* v *Jennings* [2002] 3 NZLR 145 (CA), paras [19] to [22]

36 *Buchanan* v *Jennings*, at para [54]

37 Report of the Joint Committee on Parliamentary Privilege (UK), 30 March 1999 (Session 1998-1999, HL Paper 43-I, HC 214-I) ("Joint Committee Report"); executive summary, p.1

> today as fair and reasonable… The touchstone applied by the Joint Committee was that Parliament should be vigilant to retain necessary rights and immunities, and equally rigorous in discarding all others.

3.28 Significantly, the Joint Committee revisited the Blackstone principle and found it to be "*too wide and sweeping*".[38] Keith J repeated this criticism in *Buchanan* v *Jennings*.[39] In his view, when determining whether an occasion of privilege arises, the distinction between what does or does not constitute a proceeding in Parliament should come down to "*the corporate character of the privilege and its function*". [40] In other words, there should be principled basis for applying privilege in every case.

Findings in the High Court

3.29 Clifford J held that the Attorney General's reporting duty fell within the non-justiciable and privileged internal proceedings of Parliament. In particular, he found that:

(a) When exercising the s.7 duty, the AG acted in a parliamentary and not an executive capacity.

(b) Section 7 is an intra-Parliamentary procedure provision which does not have the capacity to affect the rights of people outside the House.

(c) The privilege afforded by Article 9 of the Bill of Rights 1688 precluded the Courts from reviewing the Attorney General's actions under s.7.

(d) The principle of non-interference also precluded the Courts from reviewing the Attorney General's actions under s.7.

(e) There was a risk that any consequential relief could impede or usurp Parliament's sovereignty as a legislative and deliberative assembly.

What hat does the Attorney General wear when exercising the s.7 duty?

3.30 The Joint Committee was of the view that parliamentary privilege should not be used if the effect would be to shield the executive branch of government from judicial review. The Privy Council has since agreed. In *Toussaint v Attorney-General of Saint Vincent and the Grenadines ("Touissant")*, Lord

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38 Joint Committee report, para [42]

39 *Buchanan* v *Jennings*, at para [23]

40 *Buchanan* v *Jennings*, at para [31]

Mance said[41] that it could lead to "bizarre" outcomes if the privilege were applied too liberally to Ministerial statements in the House as -

> A source of protection of the legislature against the executive and the courts would be converted into a source of protection of the executive from the courts and the rule of law.

3.31 Clifford J did not have to consider *Toussaint* because he found instead that when exercising the s.7 duty, the Attorney General acted in a parliamentary, and not an executive, capacity.[42]

3.32 It is difficult to find a legal basis for this conclusion. The Attorney General is clearly a member of the executive; in fact, he was one of the original three members of the Executive Council when New Zealand was first colonised.[43]

3.33 When providing what is, in essence, a legal opinion to the House under s.7, the Attorney General acts as the principal law officer. As recently confirmed by the House of Lords in *R (Corner House Research and Campaign against Arms Trade)* v *Director of the Serious Fraud Office ("Corner Research")*, actions and decisions of law officers are susceptible to judicial review.[44] When exercising the s.7 duty, the Attorney General also receives advice from public officials whose actions would clearly be subject to the Courts' scrutiny, were they in the frame. The fact that s.7 relates to all bills, not just government ones, does not materially alter the nature of this process.

3.34 The Attorney General also cannot claim to be a Parliamentary officer. Officers of Parliament include the Controller and Auditor General, the Ombudsman, and the Parliamentary Commissioner for the Environment. They are appointed by a special parliamentary select committee, are funded out of Vote Parliament and subject to audit by the House.[45] In any event, while parliamentary privilege

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41 *Toussaint v Attorney-General of Saint Vincent and the Grenadines* [2007] 1 WLR 2825, at para [29]

42 High Court Decision, para [36]

43 P East: *The Role of the Attorney General* (cited above), at p.185

44 *R (Corner House Research and Campaign against Arms Trade)* v *Director of the Serious Fraud Office* [2008] 3 WLR 568 (HL)

45 Standing Order 386 provides:

> **Functions of Officers of Parliament Committee**
>
> (1) The Officers of Parliament Committee considers and recommends to the House,—
>
> (a) in respect of each Office of Parliament, an estimate of appropriations for inclusion as a Vote in an Appropriation Bill, and any alteration to such a Vote:
>
> (b) an auditor to be appointed by the House to audit the financial statements of each Office of Parliament:
>
> (c) any proposal referred to it by a Minister for the creation of an Officer of Parliament:
>
> (d) the appointment of persons as Officers of Parliament.

will generally apply to any proceedings conducted by these officers, the Courts retain a limited supervisory role over their actions, including on grounds of lack of jurisdiction[46] or acting in bad faith.[47]

3.35 In summary, when exercising the statutory power under s.7, the Attorney General clearly acts in an executive capacity. Following *Touissant and Corner Research*, this fact alone should allow his actions and decisions to be the subject of judicial scrutiny.

Does s.7 affect rights?

3.36 Clifford J found that s.7 had no capacity to affect the rights of other persons independently of the House[48].

3.37 Certainly, the immediate intention of s.7 is to act as an early warning alert system to the House. However, its ultimate purpose is to safeguard rights and freedoms. It does this by ensuring that no legislation is enacted in breach of the Bill of Rights unless the House is fully informed of the implications and is prepared to accept the political consequences of passing such a law.

3.38 All the appellants enjoy rights and freedoms under the Bill of Rights Act that they claim have been curtailed by the EF Act. They were entitled to expect that s.7 would operate as an effective safeguard of their protected rights. So that, before the draft legislation was debated and/or decisions made in respect of it, members of the House would have received independent legal advice alerting them to any limitations on protected rights which did not appear to be justified in terms of s.5 of the Bill of Rights Act. While this may not have prevented Parliament from enacting the legislation, its members and the general public would have been left in no doubt about the ramifications of doing so.

3.39 The third appellant is a member of Parliament and in this capacity has a particular interest in receiving reliable, independent legal advice from the Attorney General if it appears that draft legislation may impose an unjustifiable limit on a protected right. Such information enables him to fulfil his own parliamentary duties and responsibilities.

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(2) The committee may develop or review a code of practice applicable to any or all Officers of Parliament.

46 See for example, s.25 Ombudsmen Act 1975

47 See for example, s.22A Environment Act 1986

48 High Court Decision, para [41]

3.40 The normal liberality shown to the issue of standing in public interest litigation is also of relevance.

How applicable is Article 9 of the Bill of Rights 1688?

3.41 Article 9 forms part of New Zealand law because of s 242 of the Legislature Act 1908 and the Imperial Laws Application Act 1988. It is a one of a number of parliamentary privileges recognised by the Courts.

3.42 Article 9 reads (in semi-plain English):

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

3.43 The corporate character of this privilege, and its function, is to protect freedom of expression. The Joint Committee said[49]:

> The modern interpretation is now well established: that article 9 and the constitutional principle it encapsulates protect members of both Houses from being subjected to any penalty, civil or criminal, in any court or tribunal for what they have said in the course of proceedings in Parliament. (para 37)

3.44 When applied to the Attorney General's certification process, it becomes clear that article 9 has no relevance in this case:

(a) When exercising the s.7 duty, the Attorney General was not acting in the capacity of a member of the House, but as a member of the executive. The fact that this review might involve the Court examining draft legislation only arose because Parliament did not itself retain responsibility for such scrutiny, but instead vested it with the executive.

(b) The purpose of the review would be to determine whether the Attorney General erred in law. This would not require the Court to consider the propriety of anything that the Attorney General may have said in Parliament. Errors of law affect the jurisdiction of statutory powers, and are properly matters for the Courts to determine.

(c) No member of the House would be subject to any penalty, civil or criminal, for what they have said in the course of proceedings in Parliament.

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[49] Joint Committee report, para [39]; *Prebble* v *Television New Zealand* [1994] 3 NZLR 1 (PC)

(d) In fact, no member of the House would be subject to legal liability at all. Judicial review proceedings are concerned with the proper exercise of statutory powers; they do not determine the legal liability of any person for acts done or omitted.

(e) Judicial review would not negatively impair the integrity of the House's collective process as this depended not on the Attorney's ability to speak freely and frankly, but on the accuracy of the legal advice proffered.

(f) Judicial review would not otherwise hamper the free discussion necessary for the proper conduct of the House's business. If anything, it would promote a more informed discussion by ensuring that all members were properly advised of any Bill of Rights implications.

3.45 Initially, Clifford J acknowledged the corporate character of article 9 and expressed some scepticism about its relevance in this case. He said:[50]

> Article 9 can from that perspective therefore be seen as a protection for individual members against criminal or civil proceedings that would infringe on them personally. This is a consequence which this application for judicial review would not – at least so obviously – have on the respondent.

3.46 However, His Honour then proceeded to consider the question of whether the s.7 process was in fact a "proceeding" in Parliament. Having decided that it was an intra-Parliament procedure, he felt compelled to apply article 9, notwithstanding his earlier reservations. With respect, this was the very approach that the Joint Committee and Keith J in *Buchanan* v *Jennings* warned against: by not addressing the question on a principled basis, with reference to the corporate character and function of the article 9 privilege, His Honour gave it too wide a scope. The consequence is that important executive actions, with implications for the protection of human rights in New Zealand, become unnecessarily immunised from judicial scrutiny.

3.47 In summary, while the privilege afforded by article 9 still remains an important one, it has no relevance to the Attorney General's exercise of the statutory power under s.7.

To what extent does the principle of non-interference apply?

3.48 The principle of exclusive cognisance, also known as non-interference by the Courts in parliamentary proceedings[51], relates to the right of the House to

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50 High Court Decision, para [19]

regulate its own proceedings. The privilege emanates from a general principle of comity, whereby the legislature and judiciary mutually respect and refrain from interfering in each other's constitutional sphere of responsibility. The Joint Committee said of the principle[52]:

> Here, as elsewhere, the purpose of parliamentary privilege is to ensure that Parliament can discharge its functions as a legislative and deliberative assembly without let or hindrance.

3.49 However, it also added:

> This heading of privilege best serves Parliament if not carried to extreme lengths.

3.50 The scope of the non-interference privilege is believed to extend to the application of statute law governing internal parliamentary proceedings. The authority for this rule derives from the decision of *Bradlaugh* v *Gossett*[53].

3.51 The facts in *Bradlaugh* v *Gossett* were unusual. In 1883, Mr Bradlaugh was democratically elected to the House of Commons, but was prohibited by the Speaker from taking an oath which would have allowed him to take his seat in the House. The reason being that Mr Bradlaugh was a known atheist, who the House did not believe should be entitled to swear an oath. The House further resolved to have the Sergeant at Arms exclude Mr Bradlaugh from the House (if necessary, with force) to prevent him from taking his seat. Mr Bradlaugh challenged these resolutions and sought to restrain the Sergeant at Arms on the grounds that the House had exceeded its jurisdiction by preventing him from swearing an oath which he had the right to take under the Parliamentary Oaths Act.

3.52 The Court's dilemma was that an interpretation of the Parliamentary Oaths Act in Mr Bradlaugh's favour would effectively undermine both the House's resolution prohibiting him from taking the oath, and its consequential decision to exclude him. This caused Stephen J to make his famous remark:[54]

> I think the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings...

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51 *Te Runanga O Wharekauri Rekohu Inc* v *Attorney General* [1993] 2 NZLR 301 (CA), at pp 307-308

52 Joint Committee Report, at para 247

53 *Bradlaugh* v *Gossett* (1884) 12 QBD 271, 278

54 *Bradlaugh* v *Gossett*, p.278

3.53 Relying on Blackstone's wide definition of the scope of privilege, he then provided the following justification for declining to give any opinion at all on the proper interpretation of the Parliamentary Oaths Act:[55]

> …Apply the [non-interference] principle thus stated to the present case. We are asked to declare an order of the House of Commons to be void, and to prevent its execution in the only way in which it can be executed, on the ground that it constitutes an infringement of the Parliamentary Oaths Act. This Act requires the plaintiff to take a certain oath. The House of Commons have resolved that he shall not be permitted to take it. Grant, for the purposes of argument, that the resolution of the House and the Parliamentary Oaths Act contradict each other; how can we interfere without violating the principle just referred to?

3.54 The High Court in *Mangawaro*[56] relied on the *Bradlaugh* v *Gossett* rule to find s.7 to be part of the statute law relating to the House's own internal proceedings and, consequently, non-justiciable. In *Awatere Huata* v *Prebble* ("*Awatere Huata*") [57], McGrath J referred in passing to the *Mangawaro* decision as being an example of the *Bradlaugh* v *Gossett* rule. He said:

> That a statutory power is being exercised does not of itself take a matter outside of internal parliamentary procedures. For instance, [s 7] imposes a duty on the Attorney General, on the introduction of a Bill to the House, to bring to its attention any provision that is inconsistent with that Act. Although that is the exercise of a statutory power by a Minister it is an internal parliamentary matter, within the area covered by privilege… **The statutory duty is of course binding on the Attorney General, but its discharge is administered by the House rather than by the Courts.** [emphasis added]

3.55 Clifford J followed both the *Mangawaro* decision and McGrath's observations in *Awatere Huata*. He held that it was for Parliament and not the Courts to scrutinise draft legislation under s.7[58]. Otherwise, he said, judicial intervention risked running into conflict with or otherwise undermining Parliament's internal mechanisms for review of the process.

3.56 Neither McGrath J nor Clifford J disputed the need for the Attorney General to be held accountable for the proper exercise of the s.7 duty. However, both worked on the assumption that Parliament would, and in fact did, carry out a supervisory role. Clifford J in particular, believed that Standing Order 266 ("SO

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55 *Bradlaugh* v *Gossett*, p.279

56 *Mangawaro Enterprises Ltd* v *Attorney General* [1994] 2 NZLR 451

57 *Awatere Huata* v *Prebble* [2004] 3 NZLR 382 (CA), at para [55]

58 High Court Decision, para [49]

266") effectively repeated s.7 so as to create a parallel reporting process that would be subject to proper internal supervision.[59]

3.57 In reality, the House currently has no effective means of holding the Attorney General accountable for the proper and lawful exercise of this duty.

3.58 The House's internal processes are controlled by standing orders and Speaker's rulings. SO 266 reads:

> **New Zealand Bill of Rights**
>
> (1) Whenever a bill contains any provision which appears to the Attorney General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney General, before a motion for the bill's first reading is moved, must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.
>
> (2) An indication by the Attorney General to the House concerning the New Zealand Bill of Rights Act 1990 is made by the presentation of a paper for publication by order of the House.
>
> (3) Where the House has accorded urgency to the introduction of a bill, the Attorney General may, on the bill's introduction, present a paper under this Standing Order and move, without notice, that the paper be published. There is no debate or amendment on the question.

3.59 SO 266 is not a mirror image of s.7. It does reiterate the requirement that the Attorney General report apparent inconsistencies to the House. And, it sets procedures which enable this to happen. However, while s.7 obliges the Attorney General to report to the House if, on an **objective** assessment it appears that draft legislation would place unjustifiable limitations on rights and freedoms contained in the Bill of Rights *(…any provision… that appears to be inconsistent…)*, SO 266 requires only that the Attorney General make a **subjective** assessment *(…any provision which appears to the Attorney General to be inconsistent…)*. The significance of this difference is that while s.7 allows for third party review, SO 266 leaves no room for another member of the House to disagree with the Attorney General's assessment.

3.60 Further restrictions on the ability of members of the House to supervise the Attorney General were set soon after the Bill of Rights Act was passed, when the Speaker made the following ruling[60]:

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59 High Court Decision, para [36]

60 516 NZPD 2968 (3 July 1991) per R Gray

> Whether a bill is inconsistent with the New Zealand Bill of Rights Act is not a matter of order or of responsibility of the House. The Attorney General has an obligation to report if any provision appears to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights. There is no obligation to report on whether a bill complies, only when it appears that a bill does not comply. The question of whether a report is to be made lies with the Attorney General, not with the House.

3.61 Moreover, Parliament lacks a specialist multi-partisan committee to consider the human rights implications of draft legislation[61].

3.62 The background to the present case also demonstrates how little power the House has to ensure that it receives independent legal advice as required under s.7. The Select Committee which considered the EF Bill tried but was unable to persuade the Attorney General to make specialist legal advisers available so as to provide advice on the extent of any Bill of Rights inconsistencies.

3.63 All of which is not intended as a criticism of Parliament and its processes. It is concerned to preserve the integrity and independence of the Attorney General, by shielding the office holder from undue political pressure. However, its self-imposed restraints around scrutiny of the Attorney General's actions do serve to highlight the advantage of vesting supervisory responsibility for the s.7 duty in the courts, rather than with politicians. Judicial review would also help to maintain the perception of political independence and enhance confidence in any legal advice provided to the House. This is particularly important when as is often the case, the office of Attorney General is held by a senior member of the Government.

3.64 It should also be noted that recent decisions have reduced the potential scope of the *Bradlaugh* v *Gossett* rule, including (perhaps somewhat paradoxically), McGrath J's decision in *Awatere Huata*.[62] In line with the move towards a more function-focused approach to parliamentary privilege generally, it would be useful for this Court to clarify the continued relevance of the *Bradlaugh* v *Gossett* rule in a 21st century era.

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61 This can be contrasted with the United Kingdom system. Although not requiring a legal opinion from the Attorney General, section 19 of the Human Rights Act 1998 ("HRA") compels a responsible Minister to issue a statement whether a bill is compliant with the HRA, or not. In other words, the Minister must certify compliance as well as non-compliance with the HRA. In addition, the UK Parliament has the Joint Committee on Human Rights. This is a specialist select committee comprising six members of the House of Commons and six members of the House of Lords. The Committee scrutinises bills and issues advisory reports on general human rights issues separate from the section 19 HRA requirement.

62 *Kalauni* v *Jackson* [2001] NZAR 1 292; see too *Robati* v *Privileges Standing Committee of the Parliament of the Cook Islands* [2001] NZAR 282; *Queen* v *the Speaker, House of Representatives* [2004] NZAR 585

Would consequential relief interfere with the legislative process?

3.65 The Courts may also refuse to have cognisance of a matter, if it perceives there to be a risk that any consequential relief could impede or usurp Parliament's sovereignty as a legislative and deliberative assembly.

3.66 In *Westco Lagan Ltd*[63], the High Court would not grant relief which prevented the Clerk of the House from presenting legislation; in *British Railways Board* v *Picken*[64], the Privy Council was not prepared to invalidate legislation no matter that it had been enacted as a result of fraud; and in *Te Runanga O Wharekauri Rekohu Inc* v *Attorney General*[65], this Court refused to grant declaratory relief which exerted pressure on a Minister to introduce draft legislation.

3.67 Clifford J acknowledged that none of these examples typified the relief sought by the appellants in the ASOC[66]. However, he was more concerned about the nature of the relief sought in the original claim, as this had implications for future cases should review of the s.7 duty be allowed. He concluded that there were "*intrinsic dangers for the Court in embarking on judicial review of s 7 decisions*" [67] as the nature of any declaratory relief would have the Courts "*intruding in an unwise manner into the processes of the House as it passes legislation*"[68].

3.68 In the original statement of claim, the appellants sought declarations that:

(a) The respondent erred in not bringing to the attention of the House of Representatives provisions in the Electoral Finance Bill that appeared to be inconsistent with the rights and freedoms contained in the Bill of Rights.

(b) The respondent should bring to the attention of the House of Representatives all provisions in the Electoral Finance Bill that appear to be inconsistent with rights and freedoms contained in the Bill of Rights.

(c) The respondent should recommend to the House of Representatives that the Electoral Finance Bill be reintroduced so that the House of

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63 *Westco Lagan Ltd* v *Attorney General* [2001] 1 NZLR 40 (HC), at para [98]

64 *British Railways Board* v *Picken* [1974] 1 All ER 609 (HL)

65 *Te Runanga O Wharekauri Rekohu Inc* v *Attorney General* [1993] 2 NZLR 301 (CA)

66 High Court Decision, para [46]

67 High Court Decision, para [44]

68 High Court Decision, para [46]

> Representatives can debate all inconsistencies with the Bill of Rights on the first reading of the Electoral Finance Bill.

3.69 The critical concern for the House of Representatives is that the integrity of the s.7 safeguard be protected. Members need to be confident that they will not be asked to vote on draft legislation which contravenes protected rights, without first receiving an independent legal opinion alerting them to this fact. The identity of the legal adviser (Attorney General or the courts) is of secondary importance.

3.70 It is accepted that if granted, the third declaration could have overstepped the proper boundaries. However, this is not true of the other two declarations. Were the Court to declare that the Attorney General had erred by not reporting apparent inconsistencies to the House, this conclusion would be supported by reasons. In other words, the end result would be a declaration supported by an advisory opinion; an outcome which mirrors the s.7 certification process itself.

3.71 The second declaration (requiring the Attorney General to bring these inconsistencies to the attention of the House) would simply reflect the mandatory wording in s.7 itself *(… shall report…)*. It is also analogous to the requirement under s.92K of the HR Act, that responsible Ministers report any declarations of inconsistency made under a.92J of that Act to the House.

3.72 Should the Court find the s.7 statutory power to be justiciable, the question of what relief might flow from a finding of error could be usefully considered within the wider discussion about the availability of advisory forms of relief in general.

(c) Is the section 7 duty a continuous one?

3.73 The appellants claimed in the ASOC that duty under s.7 was a continuous one, which could be exercised from time to time during the legislative process.

3.74 Clifford J was unconvinced. He said:[69]

> To the extent that the applicants asserted that the respondent's role under s 7 is a continuing one, I note simply that there is not, in my judgment, any justification for that interpretation of s 7. The provision is clear: the obligation to report arises on the occasion of the introduction of a bill. It is not, in my judgment, a continuing obligation.

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69 High Court Decision, para [42]

3.75 However, His Honour did not expressly interpret s.7 purposively or in terms of s.16 of the Interpretation Act 1999, which reads:

> **Exercise of powers and duties more than once**
>
> (1) A power conferred by an enactment may be exercised from time to time.
>
> (2) A duty or function imposed by an enactment may be performed from time to time.

3.76 A purposive interpretation of s.7 would require that the House be warned at the earliest opportunity of any Bill of Rights inconsistencies in draft legislation. The need for early notification is clear from the requirement that the timing of any report is on the introduction of a government bill or, for other bills, as soon as practicable.

3.77 However, it also means that should Bill of Rights inconsistencies become apparent later in the legislative process, the Attorney General is required under s.7 to report them to the House as soon as possible.

4. CONCLUSION

4.1 This case asks important questions about the way the different tranches of government should relate to each other in a modern, 21st century democracy. A system of government can be likened to an interdependent, cooperative enterprise: each arm is responsible for its own core, constitutional business; and also for supporting the other sectors to be responsible for theirs. So, while the Courts must always respect Parliament's right to legislate, they are also obliged to warn it if it infringes fundamental rights while doing so. The critical issue is how best to balance these two imperatives.

4.2 The Supreme Court has already sanctioned the use of advisory opinions to achieve this end; non-binding declarations of inconsistency are no more than a formal mechanism to enable this form of relief to be sought and granted. The provision of advisory opinions after a more abstract review of legislation would continue to strike the right balance and has the potential to contribute significantly to the ongoing development of human rights jurisprudence in New Zealand.

4.3 If the Court has a duty to inform Parliament of inconsistencies in enacted legislation, then it is difficult to see what mischief would entail in allowing it to review the Attorney General's assessment of law under s.7. Such action would constitute a front-end, rather than back-end route to the same destination,

namely a concerted commitment to safeguarding fundamental rights and freedoms.

4.4 When considering whether an occasion of parliamentary privilege arises, the focal point is not to ask whether a matter is a proceeding of Parliament, but whether the purpose and function of the privilege requires that it be applied to the case at hand. When one begins the analysis from this starting point, it becomes clear that article 9 of the Bill of Rights 1688 has no application to the Attorney General's statutory duty under s.7 of the Bill of Rights Act.

4.5 Moreover, even if Parliament had the right to control the certification process created by s.7, it has elected not to do so. This means that unless the Courts are prepared to entertain review of the s.7 statutory duty, the Attorney General (and public officials who advise him) could not be held accountable for actions and decisions carried out in exercise of it. A finding of non-justiciability is an absolute one. It would apply even where there have been serious errors of law (as is claimed in this case). Taken to the extreme, it would also apply to cases involving allegations of bad faith. The consequences have serious implications for the rule of law.

4.6 The lack of proper, independent scrutiny also risks undermining the integrity of a mechanism designed as an essential safeguard against arbitrary law-making. Robust supervision of notification processes like s.7 is particularly vital with parliamentary Bills of Rights, where the Courts' powers to uphold fundamental rights and freedoms are already significantly curtailed.

4.7 The appellants seek an order that the amended statement of claim be reinstated in full or in part.

4.8 The appellants also seek costs, as per scale, on a 2B basis.

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Nikki Pender/Petra Butler

Counsel for the appellants

Date: 25 September 2008