

**The Impact  
of the Human Rights Act:  
Lessons from Canada and  
New Zealand**

May 1999

£8.00



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## Executive Summary

- The Human Rights Act will impact on all branches and levels of government. While the impact on the courts and parliament has been well rehearsed, the impact on central government and public authorities is less well known.
- Canada and New Zealand introduced human rights legislation in 1982 and 1990 respectively. Rather than representing a major shift of power from parliament to the courts, the effect was to impose new legal, human rights constraints on the policy development process and create an important role for legislative scrutiny.
- Human rights implications will need to be considered at the earliest stages of policy development. The need to ensure human rights compliance has led to a more central role in Canada for the Ministry for Justice and in New Zealand for the Attorney General. A central agency for co-ordinating legal advice and human rights policy will need to emerge in the UK.
- Effective preparation for the Human Rights Act requires all levels of government to be aware of the scope of the human rights legislation and the rights which it protects, through adequate training and to have access to expert legal advice on human rights issues. Effective compliance with human rights legislation means that public authorities adopt policies and procedures which operate within the legal constraints of the Act, and have the protection and promotion of the values in the Act as a key objective in policy development.
- The areas in which the Human Rights Act will undoubtedly impact include the sphere of criminal procedure and the admissibility of evidence in criminal trials. However the Human Rights Act will also require changes to administrative investigations and the behaviour of public authorities. The right to a fair determination of civil rights, will focus attention on the composition of local tribunals and administrative decision making bodies as well as the procedures they employ. Broad discretionary powers are likely to be cut down. Authorities must be aware, not only of their obligation not to infringe certain rights, but also of their obligations to take measures, through the provision of services, to protect certain rights such as privacy, dignity and the family home.
- If departments, agencies and public authorities have not overhauled their procedures in advance to comply with the Act, and then face adverse court rulings, the financial consequences can be severe. In New Zealand and particularly in Canada, rulings concerning the rights of detainees to counsel when giving a breathalyzer test, and the rights of asylum applicants to oral hearings led to hundreds of cases being dismissed and to millions of dollars being spent on meeting the requisite standards. Financial costs will also be incurred where awards of damages are granted as compensation for behaviour which contravenes the Act.
- Acting in conformity with the Human Rights Act means that public authorities will be held accountable under the test of proportionality. Any restrictions on human rights

must be shown to be necessary in a democratic society and proportionate to the policy aim being pursued. Public authorities will need to consider the importance of the right which may be infringed, the degree to which the right is likely to be infringed, the importance of the public policy being pursued and the effectiveness of the offending measure in advancing that policy.

## Introduction

The Human Rights Act 1998 introduces for the first time into modern British Constitutional Law a rights based framework within which the relationships between the courts, parliament, and the citizen will function. The rights and freedoms to which the Act is intended to give further effect, are those of the European Convention on Human Rights by which the UK has already been bound for over 45 years. The 'patriation' of those rights and freedoms through the Act has the potential to create a seminal change in the way in which public policy and administration throughout the UK is formulated and implemented. The long term impact of the Act will depend on how it, and its values, take root across government and public authorities and not just in the courts. In Canada in 1982, as part of a constitutional reform package, the Canadian Charter of Rights and Freedoms (the *Charter*) was introduced giving Canadian courts the power to strike down legislation which was incompatible with the *Charter*. In 1990 the Bill of Rights Act (*BORA*) was introduced into New Zealand requiring all legislation to be interpreted, in so far as possible, as compatible with the rights in the Bill. Both countries, with similar common law doctrines, have therefore experienced the impact which a domestic Bill of Rights can render on the legal and political process. Their experience can inform the UK as to what to expect from the enactment of the Human Rights Act of 1998.

The Human Rights Act will have an impact on all three branches of government: the executive, the legislature and the judiciary. Its effective implementation requires a coordinated approach by all three branches of government. The changes required in the courts and in parliament are reasonably well known. Much less well studied is the impact on the executive, on central government, local government and the on the major public services. The purpose of this briefing is to draw on the Canadian and New Zealand experience to evaluate what lessons may be learned for public administration, the development of public policy and the delivery of public services.

The briefing is broken into three sections. The first section is a brief review of each of the rights protected in the legislation and the mechanisms established for securing the rights through the Courts and parliament. The second is an evaluation of the impact on public policy and administration which the *Charter* has had in Canada and *BORA* has had in New Zealand. The third section seeks to evaluate what lessons each experience may have for the future of UK constitutional developments under the Human Rights Act.

# Human Rights Legislation

## Canadian Charter of Rights and Freedoms 1982

In 1982 the Canadian Charter of Rights and Freedoms was adopted, providing Canada with an entrenched Bill of Rights. In 1960, as a piece of ordinary legislation, a Bill of Rights had been introduced at federal level. The Bill of Rights had a colourless existence, with the judiciary reluctant to treat a mere statute as a mandate to be active in the defence of individual rights. The Bill of Rights was also restricted to affecting the laws of Canada, leaving untouched provincial legislation. The Supreme Court did on one occasion strike down legislation for contravening the Bill of Rights<sup>1</sup>, giving rise to debate about the legitimacy of such a role for the judiciary. The Bill also required the Federal Minister of Justice to review all proposed federal statutes and regulations for inconsistency with the Bill of Rights and to report any inconsistency to the House of Commons. By the beginning of the 1980s ground support for a constitutionally based Bill of Rights had grown. Several factors contributed to marshalling public opinion behind the movement for a constitutional bill of rights. One was the growing consensus amongst domestic rights movements, particularly group rights movements, that there was a need for such a document. Another was the strengthening of the secessionist movement in Quebec, and therefore a desire to counterbalance the separatist pressure by uniting around a Charter which would provide common values.<sup>2</sup> A third influence was the increase in international human rights obligations: the *Charter* draws heavily on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and even the European Convention on Human Rights. The *Charter* was introduced following wide consultation which generated widespread popular support. Polls showed that the *Charter* had the support of 72% of the population: it has been described as having been created in a 'democratic crucible'.

The *Charter* guarantees a six different categories of rights:

- Fundamental freedoms: the right to freedom of conscience, religion and belief, expression, assembly and association (s. 2)
- Democratic Rights (s. 3)
- Mobility Rights (s. 6)

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<sup>1</sup> In *R v Drybones* [1970] Supreme Court Reports (S.C.R.) 282, the Supreme Court struck down a section of the *Indian Act* R.S.C. 1970 c. I-6, s. 94 (b)..

<sup>2</sup> Penner, Roland, *The Canadian Experience with the Charter*, *Public Law* [1996] Spring 104 - 125, 106.

- Legal rights: the right to life, liberty and security, protection from unreasonable search and seizure, protection from arbitrary detention, right to a fair trial, protection from cruel and unusual treatment (ss. 7-14)
- Equality rights (s. 15)
- Minority Language Educational Rights (s. 23).

The Constitution Act which introduced the *Charter* into Canadian law grants courts the power to hold legislation null and void where it is inconsistent with the *Charter*.<sup>3</sup> Section 24 (1) empowers the courts to grant a remedy which is appropriate and just in the circumstances to victims whose rights and freedoms have been infringed or denied. While the *Charter* applies to the Parliament and government of Canada as well as to the legislatures and governments of each province, it is silent on the obligation on Ministers to ensure that they comply with the *Charter* when proposing legislation. However the obligation on the Federal Minister of Justice to scrutinise legislation for consistency with the 1960 Bill of Rights was extended to include compliance with the *Charter* in 1985.<sup>4</sup> On the other hand the federal parliament and the parliaments and legislatures of the provinces are permitted, by virtue of section 33 of the *Charter*, to pass legislation or to confirm the validity of existing legislation 'notwithstanding' the rights in the *Charter* protected by sections 2 or 7 through 15.

### **New Zealand Bill of Rights Act 1990**

In New Zealand, the calls for a Bill of Rights also commenced in 1960, but it was not until August 1963 that a Bill of Rights, based on its 1960 Canadian counterpart, was introduced by the then National Government. In 1964 the Constitutional Reform Committee recommended that the Bill lapse. *BORA* in its current form began life in the mid-1980s as a White Paper proposal for an entrenched Bill of Rights.<sup>5</sup> Its long title announced an intention to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights but in practice it owed more to the *Charter*, though that had in turn been influenced by the Covenant. The proposal for an entrenched Bill was too ambitious, and eventually withdrawn. The opposition was mainly to vesting power in judges to review and strike down legislation for inconsistency.<sup>6</sup> Narrower wording was also given to some of the rights in the draft Bill than existed in their counterparts in the *Charter* as a compromise to those

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<sup>3</sup> Constitution Act 1982 . 52 (1).

<sup>4</sup> *Department of Justice Act*, R.S.C. 1985 c. J-2 and *Statutory Instruments Act* R.S. 1985 c. S-22 as amended by the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act* R.S. 1985 (1st Supp.), c. 31, ss. 93 - 94.

<sup>5</sup> See the White Paper: *A Bill of Rights for New Zealand* (Government Printer, Wellington, 1985).

<sup>6</sup> Paul Rishworth, *The Birth and Rebirth of the Bill of Rights*, in *Rights and Freedoms*, Grant Huscroft and Paul Rishworth (eds.), p. 15.

who feared that the judiciary would have too much power to craft extensive rights protection under the Bill of Rights. The areas of equality rights and the right in the *Charter* to liberty and security of person were considered to be spheres which offered the judiciary too much scope for interference with the realm of the legislature.<sup>7</sup> Following a recommendation by the Select Committee on Justice and Law Reform in its final report on the White Paper in October 1988, which concluded that there was little public support for a 'higher' law Bill of Rights, the Bill of Rights proceeded as an ordinary non-entrenched statute. The Bill was introduced in 1989 with a new clause four which provided that the Bill had no power of implied repeal over existing legislation, and it became law in 1990. In contrast to the Canadian experience, the Bill of Rights Act 'came into effect with almost no notice and what notice there was, was derisive.'<sup>8</sup>

The rights protected by the Bill are similar to those of the *Charter*

- Life and Security of the person, including the right to life, protection from torture, the right to refuse medical treatment (ss. 8 - 11)
- Democratic rights ( s. 12)
- Fundamental freedoms including the freedom of religion and belief, expression, association, assembly and movement (ss. 13 - 18)
- Non discrimination and minority rights (ss. 19 - 20)
- Rights relating to search, arrest and detention (ss. 21 - 24)
- Right to a fair trial (s. 25)
- Prohibition of retroactive penalties and double jeopardy (s. 26)
- Right to justice (s. 27)

The non-entrenched status of the Bill is made explicit in section 4, which prohibits any court from holding any enactment invalid, ineffective, impliedly revoked or repealed by reason only that it is inconsistent with *BORA*. However where an enactment can be given a meaning that is consistent with the Bill this meaning is to be preferred to any other (section 6). *BORA* does not contain any 'remedial' clause akin to section 24 of the Charter, but the courts have fashioned remedies to provide redress where violations of the Bill have occurred. Section 7 of *BORA*, in a provision modeled on the earlier 1960 Canadian approach, requires the Attorney-General to bring to the attention of the House of Representatives any provision of a Bill that appears to be inconsistent with any of the rights

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<sup>7</sup> *ibid.* p. 17.

<sup>8</sup> Hon Justice Kenneth Keith, New Zealand Court of Appeal, *Bill of Rights and the Common Law: The Non Entrenched New Zealand Model*, paper given at the Society for the Reform of Criminal Law, London, 1 August 1997, p. 7.

and freedoms in the Act. Parliament may of course proceed with legislation notwithstanding the Attorney General's report and on occasion has done so<sup>9</sup>.

## **United Kingdom Human Rights Act 1998**

The United Kingdom ratified the European Convention on Human Rights (the Convention) on 8 March 1951, and it entered into force in September 1953. The Convention was a product of post world war II efforts to establish a new democratic culture based on human rights and the rule of law. Almost half a century old, the Convention has been ratified by 40 countries including Russia and most of central and eastern Europe. While States Party under Article 1 undertake to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, there is no obligation on them to incorporate the Convention into their domestic systems, although the European Court of Human Rights has indicated that to do so is the most faithful manner in which to guarantee the Convention rights.<sup>10</sup> Attempts to incorporate the Convention, and more ambitious plans for a British Bill of Rights, have a significant history in the UK Parliament. In 1993 both the Labour Party and the Liberal Democrats published policy papers in which their commitment to incorporation was set out.<sup>11</sup> Incorporation of the Convention also formed one of the Labour Party's commitments in its 1997 election manifesto. The method of incorporation had been outlined in a 1996 consultation document, and was then refined in the 1997 White Paper "Rights brought Home: The Human Rights Bill".<sup>12</sup> It would allow courts wide powers to apply the Convention rights and interpret legislation in accordance with them, but would not allow the courts to strike down any primary legislation. In this respect the interpretative approach of the New Zealand Bill of Rights was influential.<sup>13</sup> The Lord Chancellor acknowledged that the government had looked "at the models of Canada, New Zealand, Hong Kong and elsewhere and taking account of the arguments in favour of each."

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<sup>9</sup> In one case the Attorney General, basing himself on Canadian precedents, reported that s. 17 of the Transport and Safety Bill appeared to be inconsistent with ss 21 and 22 of the Bill of Rights. The Select Committee disagreed with the assessment of the Attorney General and the Bill was passed.

<sup>10</sup> *Ireland v United Kingdom*, Judgment of 18 January 1978, Series A No. 25 (1978).

<sup>11</sup> The Labour Party, *A New Agenda for Democracy*, September 1993, The Liberal Democrats, *Here We Stand*, September 1993.

<sup>12</sup> CM 3782, The Stationary Office, October 1997.

<sup>13</sup> Lord Lester Q.C. , First Steps Towards a Constitutional Bill of Rights, [1997] *European Human Rights Law Review* 124, 126.

The Act incorporates the Convention rights under Articles 2 through to 12, Article 14, and the Articles in Protocols 1 and 6 of the Convention. Protocol 6 of the Convention abolishes the death penalty. The other 'Convention rights' in the Act are:

- the right to life (A. 2),
- freedom from torture, inhuman and degrading treatment (A. 3),
- freedom from slave labour (A. 4),
- the right to liberty and security of the person (A. 5),
- the right to a fair trial (A. 6),
- freedom from punishment without law and retroactive penalties (A. 7),
- the right to private and family life (A. 8),
- the right to freedom of thought, conscience and religion (A. 9),
- the right to freedom of expression (A. 10),
- the right to freedom of association (A. 11),
- the right to marry (A. 12),
- freedom from discrimination in the enjoyment of those rights (A. 14)
- the right to peaceful enjoyment of property (A. 1 Protocol 1)
- the right to education (A. 2 Protocol 1)
- the right to free elections (A. 3 Protocol 1).

Article 13, the right to an effective remedy, has not been incorporated by the Act. Few of the rights in the Convention are absolute and the majority may be restricted where they come into conflict with other rights in the Convention. It is expressly permitted to restrict the rights under Articles 8 - 11 for specified purposes where the restrictions are prescribed by law and necessary in a democratic society.

The Act, while preserving the supremacy of primary legislation, obliges courts to give effect to legislation in so far as is possible in a manner compatible with Convention rights (Section 3). Where there is an incompatibility between primary legislation and Convention rights, the Act empowers the higher courts to grant a declaration of incompatibility (Section 4). Such a declaration could lead a Minister to exercise the power under section 10 to amend legislation by order with the aim of removing the incompatibility. With all new legislation, each Minister responsible for a piece of legislation is obliged to make a statement as to whether the Bill is compatible with the Human Rights Act, and if it is not, that he nevertheless wishes Parliament to proceed with the Bill (Section 19).

The Human Rights Act is binding on all public authorities, a definition which includes all courts and tribunals (Section 6). Moreover the devolved Assemblies in Wales and Northern Ireland and the Scottish Parliament can only pass legislation which complies with the Act.

Courts are also empowered to grant such relief or remedy within their powers as they consider just and appropriate (Section 8). Such a remedy may include damages and the court is obliged to take into account the principles applied by the European Court of Human Rights in relation to the award of compensation.

The enactment of the Human Rights Act does not interfere with an individual's right to apply to the European Court of Human Rights if they consider that their rights have not been vindicated before the UK courts. As of 1 January 1999 282 cases were pending before the European Court of Human Rights against the UK.

## Conclusion

The three pieces of human rights legislation under review share many similarities, but also differ in significant ways.<sup>14</sup> The differences in the statutes will be important for learning lessons with respect to which sectors of the public service are likely to be most susceptible to enforced change by virtue of the Human Rights Act. For example the European Convention on Human Rights is the only one of the three human rights statutes to provide for a positive right to respect for privacy, home and family life (Article 8). Such a provision has implications for the exercise of powers by social services to interfere in 'family' matters and to place children with carers outside of their family. The prohibition in the *Charter* and *BORA* on unreasonable searches does not extend this far. The Convention is also the only one of the three to provide for a right to marry (Article 12). On the other hand the *Charter* and *BORA* contain a general right to equality which is absent from the European Convention, as is provision for language rights<sup>15</sup> or minority rights.<sup>16</sup> There are also differences in the range of bodies subject to compliance with the human rights legislation. For example in Canada 'governmental action' has been given a narrow interpretation, limiting the number of bodies against whom *Charter* claims can be made.<sup>17</sup> The Human Rights Act definition of 'public authority' to include 'any person certain of whose functions are functions of a public nature'<sup>18</sup> should lead to a wider spectrum of bodies being subject to Convention standards. There is also scope for the Convention standards to be enforced between private actors in certain circumstances.<sup>19</sup>

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<sup>14</sup> Comparative charts of the rights and provisions contained the Acts are provided in Annexes 1 and 2 of this briefing.

<sup>15</sup> *Canadian Charter of Rights and Freedoms* 1982 s.23.

<sup>16</sup> *New Zealand Bill of Rights Act* 1990 s.20.

<sup>17</sup> See *RWDSU v Dolphin Deliveries Ltd.* [1986] 2 S.C.R. 573, and *McKinney v University of Guelph* [1990] 3 S.C.R. 229, 265-266 where the Supreme Court held that universities were not subject to the *Charter*. Under the Human Rights Act universities will be considered as public authorities.

<sup>18</sup> Human Rights Act 1998 s.6.

<sup>19</sup> This is what is known as the 'horizontal effect' of the Convention. See further Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act, Autumn [1998] *Public Law* 423.

The result of such differences mean that the application of certain legislation and powers will on occasion fall to be evaluated against different standards in the UK than in either Canada or New Zealand. However the fact that the boundaries to each Act vary does not fundamentally change the impact which the human rights legislation has on the manner in which policy is developed and the structures which administrative authorities need to put in place to ensure that the human rights standards are met. This impact is evaluated in the following section.

# The impact of human rights legislation in Canada and New Zealand

## Introduction

### *The Charter*

The Canadian Charter of Rights and Freedoms was not introduced into a vacuum. For over 20 years the Canadian courts had the power to adjudicate on rights issues which arose under the Bill of Rights of 1960. Under the Bill of Rights, the courts had consistently exhibited deference to governmental autonomy rendering the Bill, in the eyes of many, ineffectual. The constitutional status enjoyed by the *Charter* however set it apart from the Bill of Rights, and gave it the potential to have a dramatic impact on Canadian legal and political life. The Supreme Court of Canada did not hesitate to recognise the fundamental change which the *Charter* meant for the role of the judiciary. Ruling for the first time on a *Charter* argument the Court stated,

“ We are here engaged in a new task.... The Charter comes from neither level of the legislative branches of government, but from the Constitution itself, it is part of the fabric of Canadian law... With the Constitution Act of 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights...”<sup>20</sup>

Fifteen years after that observation, the widespread opinion is that the *Charter* has fundamentally changed the legal and political landscape of Canada. Its impact goes beyond the realm of the courts, but includes changing the way in which policy proposals are formulated, amending the conduct of public authorities, altering the manner in which administrative investigations are conducted, modifying the strategy used by pressure groups to advocate social change and readjusting the arena within which political controversies are resolved. Likewise giving full effect to the *Charter* has engaged more actors than just the judiciary, but engages all levels of government and public authorities as well as the wider public. The relationship between judicial activism and the reaction of government departments and public bodies is significant, with a consensus that when the courts indicated that they were going to take the *Charter* seriously, the governmental bodies recognised that they too would need to take the *Charter* seriously.

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<sup>20</sup> *Law Society of Upper Canada v Skapinker* , [1984] 1 S.C.R. 357, 365-367. The Court unanimously rejected the argument.

### *The New Zealand Bill of Rights Act*

The Bill of Rights Act with its explicit instruction in section four that the courts have no power to disapply any provision of an enactment meant that the dynamics which could be created between the courts and the public administration in New Zealand, was potentially different to that between the courts and the public administration in Canada. Nevertheless the courts were not inhibited in applying the Bill in a manner appropriate to a constitutional document. In its first *BORA* decision, the Court of Appeal stated that *BORA*,

“ .... is to be construed generously in the manner recommended by the Privy Council in *Minister of Home Affairs v Fisher*... in a manner... ‘as suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’”<sup>21</sup>

In early 1997, one of New Zealand’s leading experts and commentators on *BORA*, Paul Rishworth, noted that a human rights practice and culture were emerging within new legal structures in New Zealand. He observed,

“Progress has been generally ‘from the top’ and occasionally unforeseen and has revealed the subtle inter-relationship between law, practice and culture in what was once a ‘Westminster-style’ democracy.”<sup>22</sup>

The differences, in status and the rights defined, between the *Charter* and *BORA* have not led to a wide disparity in the experience of New Zealand compared with Canada. On the other hand the experiences are not identical either. Factors such as difference in size between the two countries, the co-existence of other human rights legislation in both jurisdictions, as well as the entrenched status of the *Charter* when compared with *BORA*, will all influence the lessons to be drawn from the study.<sup>23</sup>

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<sup>21</sup> *Flickinger v Crown Colony of Hong Kong* [1991] 1 New Zealand Law Reports (N.Z.L.R.) 439, 440.

<sup>22</sup> Paul Rishworth, Human Rights - From the Top, *The Political Quarterly*, Vol. 68, p.171, 171.

<sup>23</sup> In particular the federal structures in Canada mean that there is a vast amount of case law and material which emanates from particular provinces rather than from federal bodies. Many public services also fall within the scope of provincial agencies rather than under the responsibility of the federal government. In addition each of the Provinces of Canada have their own Human Rights Commission or a similar body and many also have their own human rights legislation, e.g. the Quebec Charter. The impact of such legislation is in itself considerable however any detailed study of such impact is beyond the scope of this briefing.

## Preparation

### *In Canada*

Although the introduction of the Canadian Charter did not initially bring with it any sweeping difference in the manner in which policy was formulated,<sup>24</sup> there was nevertheless a sense of awareness across government and public servants that a dramatic shift in the discourse of constitutional law and politics had taken place. There was also a legitimate expectation that there would be a great deal of constitutional litigation. This prompted two main areas of activity: a review of legislation to make it 'Charter proof', and the education and training of the legal profession.

At both the federal and provincial level, efforts were made by the Department of Justice to bring existing legislation in line with the Charter. Between 1982 and 1985 the Canadian government annually introduced three omnibus Bills designed to make pre - 1982 legislation Charter proof.

In Ontario, in the mid - 1980s the government initiated a review of all existing legislation to introduce an omnibus bill that would bring Ontario Statutes in conformity with the *Charter*, and it was hoped reduce the incidence of *Charter* challenges.<sup>25</sup> Ian Scott, Attorney General at the time, described the undertaking as involving a major allocation of legal staff and elaborate negotiations with some 30 Ministries. Despite some bureaucratic resistance, in 1985 Bill 7 was introduced which amended several pieces of legislation to ensure that they would conform with the *Charter*.<sup>26</sup> Those changes included amending powers of entry and inspection or search to require authorisation either by a warrant or on 'reasonable grounds', and equality rights were provided for by substituting 'spouse' for the expression 'husband, wife' in a number of statutes and reducing the minimum age from 21 to 18 in a range of laws. The Bill was considered to be a practical success, saving much litigation and ensuring that policy changes were made by the legislature and not by the courts. Its success meant that a second process designed to bring all Ontario regulations into compliance with the *Charter* was undertaken. However it was also recognised that many quarters felt hostile to the *Charter* interfering with their practices in what was perceived to be a 'high-handed'

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<sup>24</sup> P. Monahan and M. Finkelstein, *The Charter of Rights and Public Policy*, in *The impact of the Charter on the Public Policy*, P. Monahan and M. Finkelstein (eds.), York University Center of Public Law and Public Policy, Canada, 1993.

<sup>25</sup> Ian Scott, *The Charter and Public Policy*, in Monahan and Finkelstein, *ibid.* p. 61.

<sup>26</sup> *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act* R.S. 1985 (1st Supp.), c. 31. This was the same Bill which extended the requirement that the Minister for Justice review all bills for consistency with the 1960 Bill of Rights to include review for consistency with the *Charter* (see footnote 3).

manner. One key factor which became apparent in the early stages of the review was the lack of experience within ministries of assessing whether a provision in conflict with the *Charter* could be saved as a justified limitation under section 1. There was also an absence of guidance from the courts at this stage on how a limitation should be tested for 'justification'. In New Zealand the Human Rights Commission identified that inexperienced Ministries faced comparable difficulties in applying a similar test when a review of legislation was undertaken there (see below).

In Saskatchewan a new Constitutional Law Branch of the Department of the Attorney General was established with a mandate for the director to develop policy and procedure for managing the Government's response to both its law-making and litigation functions.<sup>27</sup> The Government ordered a review of all existing legislation for compliance with the *Charter*. The review terminated with a report from the Branch in six months. The review was sent to all line departments in the government who were asked to comment on its conclusions with reference to whether the law could be repealed or amended without harming the social benefit which the department might wish to preserve. An omnibus Bill was then presented amending and repealing the relevant laws. Again the benefits lay in heading off unnecessary *Charter* litigation and in having the legislature decide on the balance to strike between government's policy aims and the *Charter* requirements. The changes which were introduced for developing post *Charter* policy and formulating legislation are considered below.

The education and training of the legal profession was instituted by a wave of seminars and workshops for both counsel and the judiciary. The judiciary attended training courses organised by academic and professional groups and in-house by the courts. While it was clear throughout the preparation, that most practical guidance to the judiciary would need to come from the Supreme Court when it made its first rulings on *Charter* issues, the reality was that the Supreme Court would have the opportunity to exercise that function only when cases reached Ottawa. At this stage the lower courts would already have made determinations on the *Charter*, therefore training for the judiciary, particularly at the lower levels was essential.

The Supreme Court would also give guidance to the governments and departments, who were in the process of conducting legislative reviews and who needed to be able to have some indicators as to the exact scope and nature of some of the *Charter* provisions so that pre-emptive action could be taken to avoid potentially expensive *Charter* challenges. A 'risk evaluation' would be part of future policy development processes, as policy proposals would need to be considered in terms of how likely it was that a successful *Charter*

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<sup>27</sup> On July 1 1982 Hon. Justice JC MacPherson took up the position as Director.

challenge could be mounted to any new legislation. The risk factor, if any, would then have to be weighed along with other policy concerns to determine which policy strategy would be followed. How the courts dealt with the *Charter* was therefore crucial.

### *In New Zealand*

In New Zealand by contrast, there was a less systematic response to the expected impact of the Bill of Rights Act. In 1991 the Attorney General issued a memorandum to all ministries setting out the procedure which should be followed so that all new legislation would be vetted by the Ministry of Justice for compliance with *BORA*. The Cabinet Office Manual also required those responsible for drafting legislative proposals to address whether the draft complied with *BORA*.

A review of existing legislation, regulations, practices and policy did not take place until 1993 and even then it was not for compliance with *BORA*. In 1993 the New Zealand Human Rights Act was introduced. Unlike the Bill of Rights Act 1990, the New Zealand Human Rights Act is not a piece of general human rights legislation, but was enacted to consolidate and amend the New Zealand Race Relations Act 1971 and the Human Rights Commission Act 1977. It sets out the grounds on which discrimination is unlawful and the means by which a complaint of unlawful discrimination can be brought under the terms of the Act. The Act applies to both the private sector and government, however the Act also provides that government is exempt from the application of the Act until the 1 January 2000. During the period of the exemption the New Zealand Human Rights Commission was required by section 5 of the Act to conduct a review of the legislation, regulations, practice and policy of government for conformity with the Act. The Commission was to present a report on the results of the examination carried out to the Minister of Justice by 31 December 1998. There would then be one year for the government to amend its legislation and practices where necessary before the 1 January 2000. The project became known as 'Consistency 2000'.<sup>28</sup> Although the review conducted was not for compliance with *BORA* the manner in which the Commission conducted the review is informative.

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<sup>28</sup> In July 1997 the New Zealand Cabinet decided that this so-called 'Consistency 2000' project should be curtailed, a decision which effectively terminated the work of the Commission. In May 1998 the government announced that rather than introducing permanent exemptions for the government, its policies would be required to comply with the Human Rights Act unless expressly excepted. Legislation and regulations would be considered for any inconsistencies *as they come up for review*. In 1998 the Cabinet introduced an Amendment Bill to the New Zealand Human Rights Act to give effect to these changes. The Commission however, in line with its statutory obligation, did publish its report in December 1998, commencing with the line, "This is the report that the government did not want". See Consistency 2000 Report, Report to the Minister of Justice pursuant to section 5 (1) (k) of the Human Rights Act 1993, Part A, para. 5.2, available on [www.justice.govt.nz](http://www.justice.govt.nz).

In conducting the review the Commission provided two days training to each department on how to audit its own legislation, practice and regulations in accordance with the Act. The Commission established a central database into which the departmental reports identifying areas of conflict with the Act, or infringements of the spirit or intention of the Act were entered. The internal audits were then reviewed by the Commission and the Commissioners made provisional determinations on whether an instance of conflict or infringement did exist. These provisional determinations were returned to departments on a database so that account could be taken of changes and amendments which may have been implemented. The updated material was due to be returned to the Commission in the second half of 1998, in order for the Commission to draft its report to the Minister. The officials from the departments had a manual on the Act, ongoing support and the opportunity for any further training if needed. Each department had a contact person in the Commission, and regular contact between the Ministry of Justice and the Commission were maintained.

The central management of the project by the Human Rights Commission and the self audit approach was designed to provide a number of advantages:

- the provision of a comprehensive and consistent approach by all departments;
- the opportunity to provide human rights education in the public sector;
- the employment of the departments themselves in the process rather than having an outside body audit the work of departments;
- the training of personnel in how to review work for human rights compliance should lead to greater regard being given to human rights when formulating and developing *new* policy and legislation.

The role of the Human Rights Commission in co-ordinating the review and providing expertise advice was central to a successful review. Only one department operated outside the framework established by the Commission, and the results of the departmental review illustrate the problems which can arise where there is an absence of human rights expertise. The Department of Social Services had been instructed by a Cabinet directive to report direct to the Cabinet by 31 December 1996. The Department of Social Services did not attend the training seminars provided by the Commission nor did it benefit from input by the Commission before it reported to the Cabinet. Moreover the social services department went further than the Commission in so far as it included in its report 'solutions' to the areas of conflict and infringement which it had identified. The Human Rights Commission concluded:

"The result appears to be that ministers were advised prematurely by officials not expert in human rights matters, about risks to social welfare programmes that may not

have been real, and had options proposed to them that were not well founded in human rights terms."<sup>29</sup>

The role of the Commission as an external body to government was however not without its difficulty. Particularly in the early stages there was an element of antagonism in the relationship between government departments and the Commission, as the departments were cautious of the demands which the Commission was making on them with regard to reviewing policy. An initial reaction to respond to the Commission's requests by stating that all policy and procedures complied with the New Zealand Human Rights Act was not uncommon. The relationship did however improve as familiarity with and understanding of the Act, its scope and purpose, developed. This reflects the experience of the Attorney General's office in the Ontario government in Canada under the *Charter*.

Similarly, as had been the experience in Canada with section 1 of the *Charter*, staff found it difficult to evaluate which limitations on the Act's provisions could be justified. The Commission considered that this contributed to an alarmed reaction from the Cabinet as to the scope of the review project and the likely changes which it would require. It was this reaction which led to the Cabinet's decision to terminate the 'Consistency 2000' project.

In New Zealand unlike Canada there were no judicial training programmes on the Bill of Rights Act provided for either the legal profession or the judiciary itself. This lack of training is one of the factors which was identified as contributing to the difficulties experienced by the lower courts in the early years of *BORA* cases. As in Canada, the Appeal Court in New Zealand had to set the guidelines for the lower courts.

### **The Charter, BORA and the Courts**

The initial signals from the Canadian Supreme Court were that it would give the *Charter* a large and liberal interpretation. There is little doubt that the decisions of the Supreme Court and the higher provincial courts in *Charter* cases have had substantial impact on many areas of policy, an impact which has often had a hefty price tag. The same may be said of the New Zealand Court of Appeal. In one of their most significant decisions they held that there was a civil cause of action for a breach of *BORA*, notwithstanding that the legislative history of the Bill specifically had excluded the provision of judicial remedies.<sup>30</sup> In so finding the Court of Appeal relied on jurisprudence from other jurisdictions where the courts were applying constitutionally entrenched legislation. A dynamic approach from the courts is therefore a central factor in determining where the impact of human rights

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<sup>29</sup> 'Consistency 2000' Report, Part A, paragraph 4.7.

<sup>30</sup> *Simpson v Attorney General [Baigent's Case]* [1994] 3 N.Z.L.R. 667

legislation will be felt and how far. The interplay between the courts and the authorities depends on a number of factors:

- The areas of activity which are challenged
- Whether the challenges are to legislation or to administrative actions

#### *Areas of litigation*

The area of law where the *Charter* and *BORA* created the most case law has been in the field of criminal procedure. This factor was mentioned in the Explanatory and Financial Memorandum to the UK Human Rights Bill. In the first two years of the *Charter* up to 90% of the cases involved legal rights, i.e. the rights protected under sections 7- 14 of the *Charter* concerning the right to life, liberty and security, protection from unreasonable search and seizure, protection from arbitrary detention, the right to a fair trial and protection from cruel and unusual treatment. Out of the first 100 Supreme Court decisions on the *Charter*, 74 cases concerned rights defined as legal rights under the *Charter*.<sup>31</sup> From 1982 to 1986, some 74% of the *Charter* litigation involved criminal law enforcement, and *Charter* applicants enjoyed a 31% success rate. Eleven percent of all *Charter* cases involved challenges to breathalyser tests and “check stop” operations and 81% of those involved the right to be informed of the right to counsel upon arrest or detention.<sup>32</sup> At the Supreme Court level estimates are that currently 25% of all appeals heard by the Supreme Court are still criminal *Charter* cases, while in the lower trial courts criminal *Charter* issues continue to have the greatest impact. In New Zealand the percentage of *BORA* cases which fall into the area of criminal law is similarly estimated to be 90%.

Many of the issues which arose before the courts in both countries, arose due to the fact that many police powers and rules governing detention and arrest procedures had not been codified. The courts were therefore faced with the task of clarifying the limits of police powers and the rights of detainees as determined by the human rights legislation. The leading issues before the courts were:

#### *Rights of detained persons*

- When exactly a person is under detention for the purposes of section 10 of the *Charter*, and when therefore the right to be informed of the right to instruct legal counsel arose, was

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<sup>31</sup> F.L. Morton, P. H. Russell, M. J. Withey, *The Supreme Court's First One Hundred Charter of Rights Decisions; A Statistical Analysis*, Vol. 30 No. 1 *Osgoode Hall Law Journal*, 1992, and Peter Russell, *The Supreme Court in the 1980's: A commentary on the Supreme Court Statistics*, Vol. 30 No. 4 *Osgoode Hall Law Journal*, 1992.

<sup>32</sup> F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms*, 20 (1) *Canadian Journal of Political Science* 31, 37 (1987)..

one of the key questions which the Canadian courts have had to struggle with. In New Zealand the rights of persons arrested or detained, only arise when this takes place under an enactment, and much of the courts' time has been concerned with determining what defines being detained under an enactment. This was the question to be resolved by the Court of Appeal in *R v Goodwin*.<sup>33</sup>

#### *Search and Seizure*

- For both jurisdictions the provisions on search and seizure provided much litigation. The courts were required to define what exactly was meant by 'search and seizure', and to set limits on when such action was reasonable. In the cases of *Taylor*, *Jefferies*, *Laugalis* and *Davis*<sup>34</sup> the New Zealand Court of Appeal held that although a search may be unlawful, it did not mean that it was unreasonable for the purposes of BORA.

#### *Exclusion of evidence*

- In Canada the courts are required to exclude evidence under section 24 (2) of the *Charter*, when it would be in the interests of justice to do so. In *R v Kirift*<sup>35</sup> and *R v Butcher*<sup>36</sup> the New Zealand Court of Appeal articulated and affirmed the 'prima facie rule of evidence exclusion' where there had been a breach of BORA. The high rate of reliance by criminal defendants on exclusionary rules has led the courts to tighten the manner in which the rules are applied.

The determination of these matters clearly has implications foremost for the police and for the criminal prosecution services. Whilst the courts were resolving the boundaries of the issues raised above, the police were required to be constantly alert of the need to amend their procedures at short notice, to amend the warnings provided to suspects as the case law developed, to change some of their investigative techniques, such as the use of surveillance and recording equipment, and to ensure that the appropriate facilities for effective legal representation were offered to detained persons.

The domination of criminal procedure cases has gradually given way to broader issues of concern. In Canada the second issue emerging as a lead area for the Supreme Court is the guarantee of equality. Section 15 of the *Charter* guarantees equality before and under law and equal protection and benefit of law. In the early days, section 15 cases flooded the lower courts with litigation, but cases were slow to reach the Supreme Court. However by the end of the 1990s the Chief Justice Lamer indicated that one of the prime concerns of the Supreme Court was the question of equality. Gender-equality issues in the context of

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<sup>33</sup> [1992] 9 Criminal Reports New Zealand (CRNZ) 1.

<sup>34</sup> [1993] 10 CRNZ 393, 202, 350, 327 respectively.

<sup>35</sup> [1992] 2 N.Z.L.R. 8.

<sup>36</sup> [1992] 2 N.Z.L.R. 257.

employment rights, which at the time of writing are awaiting decision, could carry significant financial implications. Other cases have been in the area of immigration, aboriginal rights, the fairness of trials conducted under military law and electoral rights (e.g. prisoner voting rights<sup>37</sup>, issues of proper representation, and the ability of third parties to contribute to election spending). The Supreme Court has however feared to tread on many fields of broad social policy virtually reading out, for example, trade union rights from the concept of freedom of association. At the same time, on occasion, judicial pronouncements have at least partially resolved dilemmas which the legislature could not handle, such as rights relating to abortion and sexual orientation. The Court has also been willing to strike down legislation to achieve this. Acts which were judged to have got the balance wrong between conflicting rights, like the 'rape shield' laws which protect the alleged victims of rape from questioning about their sexual history, and tobacco advertising restrictions, were struck down alongside those statutes which did not involve such fine balances.

In New Zealand the courts have had to address arguments based on *BORA* in the areas of health policy and patient rights to refuse treatment, freedom of expression and deportation proceedings. The Court of Appeal has had to face several cases in which the subject of the challenge was an aspect of social policy. The most prominent of these cases is the *Quilter*<sup>38</sup> a case in which the courts were requested to interpret the legislation governing marriage in a manner to permit the marriage of same sex couples. It was argued that another interpretation would render the legislation discriminatory to same sex couples and therefore incompatible with *BORA*. The Appeal Court declined to interpret the legislation as the applicants sought nor did the majority conclude that the legislation was incompatible with *BORA*.<sup>39</sup> In one case concerning the provision of publicly funded medical treatment, specifically the right to dialysis treatment, the Court had to address whether the right to life included a duty not to deny access to medical treatment.<sup>40</sup> The Court, following South African precedent,<sup>41</sup> acknowledged that a rights analysis could not lead to courts ordering hospitals to provide the most expensive and improbable procedures, resulting in a diversion of scarce resources from other claimants. The Court held that in the circumstances the denial of treatment did not breach *BORA*.

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<sup>37</sup> E.g. *Jolivet v Canada* (1983) 48 British Columbia Law Reports (B.C. S.C.)

<sup>38</sup> Court of Appeal Decision 200/96, 17 December 1997, [1998] 1 N.Z.L.R. 523.

<sup>39</sup> There was one dissenter, Thomas J.

<sup>40</sup> *Shortland v Northland Health Ltd.* (No.2) (HC Whangarei, M 75/97, 6 November 1997)..

<sup>41</sup> *Soobramoney v Minister of Health, Kwazulu- Natal* (1998) 1 SA 765 (CC).

### *Target of challenges*

Overall the target of *Charter* challenges is more often the administrative branch of Government than the legislature.<sup>42</sup> In the early years this was particularly true even in the Supreme Court, where up to the end of 1985 two thirds of *Charter* cases involved challenges to administrative action. However by the end of the first 100 cases in the Supreme Court, half of all challenges were challenges to administrative action and half were to legislation. Likewise in 1997, 12 of the Supreme Court's decisions involved challenges to administrative conduct, but 10 involved the validity of legislation.<sup>43</sup> It should however be borne in mind that challenges to legislation, where the result may be to declare a piece of legislation null and void, are more likely to reach the Supreme Court, where as challenges to administrative action will often be resolved in the lower courts. The number and proportion of challenges to administrative action in the lower courts is therefore higher than in the Supreme Court. In the lower courts the challenges are also predominantly to actions of the police.

The success rate of challenges to legislation in the Canadian Supreme Court has tended to be higher than that of challenges to administrative action. In the 1990s whilst the level of successful challenges to the conduct of public officials has fluctuated from year to year, between 9.5% to 42%, the success rate of challenges to legislation has never been lower than 27%, reaching 60% in 1997. The effect of arguments under section 1 of the *Charter*, that limitations are justifiable in a free and democratic society, has also varied. From 1984 through to 1987 the Court rejected all but one of the eleven section 1 defences presented by the Crown. In 1988 and 1989 it accepted eight out of 14. In 1992, 32% of cases were saved by section 1, and in 1996 48% were saved. By contrast in 1997, none of the legislative sections which were deemed to infringe the *Charter* were saved by section 1.

The difference in the powers entrusted to the courts under the *Charter* and *BORA* clearly makes a difference here. In New Zealand the absence of a mechanism for granting declarations of incompatibility, means that challenges to legislation arise when the courts are required to interpret legislation as compatible with *BORA* and are unable to do so. Moreover, in contrast to the Canadian Supreme Court, the courts have been slow to hold that legislation is incompatible with *BORA* but to apply it not withstanding. Instead the courts have found that legislation, even where it offends *BORA*, imposes only reasonable

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<sup>42</sup> Russel, 1992, *op.cit.*.

<sup>43</sup> Professor P. J. Monahan, *Data on 1997 Constitutional Cases*, paper presented on April 17 1998, at the Osgoode Hall Law School.

restrictions.<sup>44</sup> This does show a marked contrast to the approach of the Canadian Supreme Court, where the Court often rejects the defence that restrictions are reasonable.

One common feature of both systems is that the genre of legislation or actions most often found to be in violation of human rights provisions are of a procedural nature. Often the case is that a particular process, be it of detention, conducting a search, or processing an application fails to comply with the required standard of respect for a particular right. The fairly high success rates of challenges to Canadian legislation should be seen in this light, as procedural regulation is the area in which the courts may be considered to have expertise, and are willing to exercise their judicial muscles to ensure full compliance.

#### *Impact on the working patterns of the courts*

The effects on the courts themselves of the legislation has in many ways been fundamental. Addressing arguments which are raised under the *Charter* and *BORA* requires the courts to ask a different set of questions than those when conducting traditional judicial review. Judges have reported that the type of evaluation that *Charter* and *BORA* issues requires, usually involves resort to comparable material from abroad. Judges believe that they are required to be more policy orientated in decisions.

It also increases the work load on the courts, particularly trial courts. In Canada criminal trials have several days dedicated to pre-trial motions, all of which are *Charter* motions. These would be typical of any judge in almost any criminal court in Canada.<sup>45</sup> Provincial courts in Canada required an injection of resources to deal with the increased workload of criminal cases. There was a need for more judges, more court staff and more accommodation. The effects varied according to the population characteristics. Urban areas, ports and districts located nearby airports were the worst affected.<sup>46</sup>

#### *Conclusion*

A pattern is emerging from the Supreme Court in Canada and the High Court in New Zealand with different stages of human rights litigation becoming apparent. The first stage is the 'settling in' period of the legislation resulting in a series of cases where there was a need for a lead to be given from the higher courts as to the exact scope of rights, particularly in the most immediate area of criminal procedure. The period is marked with

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<sup>44</sup> See for example, *TV3 Network Services Ltd v R*, [1993] 3 N.Z.L.R. 421, 423, and *Brocanov v Moss* [1996] 1 N.Z.L.R. 445. See also reasoning in *Quilter v Attorney-General op.cit.*.

<sup>45</sup> Hon Justice J C Mac Pherson, *The Impact of the Canadian Charter of Rights and Freedoms on Executive and Judicial Behaviour*, Paper presented at: Conference on Rights and Democracy in Canada and the United Kingdom, University of Warwick, 1997.

<sup>46</sup> Justice Beverley McLachlin of the Supreme Court of Canada in a communication to the Lord Chancellor's Department.

high levels of claimant success, unanimity amongst the judges and a predominance of attacks against administrative action. As the boundaries to the scope of rights crystallised through the case law, the second stage of litigation reflects a more restrained approach by the courts to cases. The success rate of claimants also begins to fall, as public authorities amend their procedures to be in compliance with the standards demanded by the courts. In the third phase of litigation there is a growth away from criminal procedure to broader social issues, and in Canada and New Zealand that manifested itself in the areas such as equality rights and minority rights. After the initial 'settling in' of the legislation, issues which fail to be solved in the political arena, begin to come for adjudication before the courts, with interest groups changing their strategy to litigation as well as political lobbying and campaigning. This also means that as the direct impact of the litigation is felt most by the police and the criminal prosecution services, such departments can find their reaction to the human rights legislation initially case driven. They also learn that failure to adapt to the required human rights standards can be expensive. Crafting new provisions, particularly defining the powers of the police, which comply with the requisite standards becomes a priority.

## Policy development

“ Although it is impossible to measure, it is sage to assume that much of the *Charter's* influence has been brought to bear since 1982 without recourse to the Court. This has arisen through administrative procedures being modified, on the advice of government lawyers, so as to conform to the *Charter*. In many jurisdictions, existing legislation has been subjected to an internal review within governments, and remedial amendments have been adopted to make it conform with the *Charter*.”<sup>47</sup>

This was the view of a Federal Court judge in 1988, and reflects a change from the early days of the *Charter*, when one commentator observed that policy planners went so far as to wish the *Charter* away.<sup>48</sup> The inevitable lack of certainty about its application made policy development in compliance with the *Charter* difficult. In 1992, a study of senior officials in Canada concluded that the *Charter* had permanently changed the way in which policy proposals made their way to the Cabinet table.<sup>49</sup> The senior officials concluded that not just procedure but policy outcomes had been significantly affected by the *Charter*, and that 'Charter values' had been deeply and permanently integrated into the attitudes of government decision makers across the country.

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<sup>47</sup> B L Strayer, *Life under the Canadian Charter; Adjusting the Balance Between Legislatures and Court*, *Public Law* [1988] 347.

<sup>48</sup> Mary Dawson, *The Impact of the Charter on the Public Policy Process and the Department of Justice*, in Monahan and Finkelstein *op. cit.* p. 51.

<sup>49</sup> See Monahan and Finkelstein *op.cit.*.

In New Zealand, it is arguable that the revolution is still underway. The impact *BORA* is felt primarily via the role of the Attorney General and the Ministry of Justice, whilst individual departments have been preoccupied with concerns under the New Zealand Human Rights Act rather than *BORA*. Nevertheless the authorities such as the police have clearly been hit hard as the area of criminal procedure is constantly refined, and the police have had to adapt procedures and improve and update training programmes to ensure that a good practice in compliance with *BORA* is maintained, for fear of evidence being excluded. The manual for the New Zealand Police and the training programme handbook sets out clearly the scope of *BORA* on the basis of the courts' rulings, and how their operations should be conducted to ensure compliance. Extracts from the manuals are provided at Annex 4.

In developing policy in Canada, representatives from the Justice Department, or lawyers seconded to Ministries are now a regular part of the initial policy team working on a new policy proposal. Deputy ministers are advised to take advice about *Charter* implications at the earliest stages of policy formulation. In the Ontario government the Constitutional Law and Policy Division under an Assistant Deputy Attorney General, with a staff of approximately 20 lawyers, was given a mandate to provide a central clearing house for all *Charter* concerns with respect to either policy or litigation. This unit as well as handling litigation develops a government wide constitutional and *Charter* policy. The Ministry of the Attorney General is given regular briefings on policy proposals which are being formulated in other ministries.

The involvement of government lawyers at the earliest possible stage in policy making is recognised as a key contributing factor to the success of developing a coherent, integrated and principled approach to *Charter* issues. The later in the day *Charter* issues are introduced, the harder it is to make changes to policy. In particular by the time a proposal comes to Cabinet, departmental positions will have been taken and deals will have been struck, which results in restricted room for manoeuvre. In Canada, it is now practice that "... serious *Charter* issues are resolved by officials before policy proposals are submitted to Cabinet".<sup>50</sup>

The conclusion that the Ministry of Justice or the Attorney General's office has become so powerful as to rival the Treasury has been drawn at all levels of government in Canada - federal and provincial. *Charter* issues have been described as one of the two touchstones of public policy - the other being fiscal restraint. Mary Dawson, Associate Deputy Minister in the Department of Justice in 1992, observed a growing recognition that the Department of Justice would operate more like a central agency of government more like the Canadian

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<sup>50</sup> Mary Dawson in Monahan and Finkelstein *op.cit.*.

Privy Council Office (equivalent to the UK Cabinet Office) or Treasury Board (equivalent to the Civil Service Department). Significantly, she states that:

“The *Charter* has involved the Department of Justice in the policy-development process of its client departments to an extent that would previously have been considered unnecessary and inappropriate.”<sup>51</sup>

This brings with it an increase in the status, visibility and political power of lawyers and legal values within government. This is how the ‘legalising’ impact of the *Charter* on government takes effect, rather than the feared consequence that too much power would be transferred to an unelected judiciary. This role is most evident where there is an absence of relevant case law and lawyers are required to speculate and anticipate the *Charter* implications of new policy or legislation. In this context any perception that government lawyers’ only role is to act as counsel to ‘client’ departments where there are *Charter* cases to litigate, can lead to defensive policy making, and to an *ad hoc* approach to the development of *Charter* principles. This can be counter-productive. In Ontario the experience was that the Criminal Law Division which was responsible for all criminal prosecutions in the province was unsympathetic to the criminal law provisions of the *Charter*. To balance this steps were taken to centralise policy making on constitutional and *Charter* issues so that any significant constitutional or *Charter* question would be examined centrally from a government wide perspective. The experience of the federal government and the largest provincial governments point to the conclusion that a successful *Charter* strategy requires:

- An integrated response to *Charter* issues at bureaucratic and political level;
- Consistent efforts to estimate not only the cost of programme goals, but also the cost of the judicial ramifications of those goals stipulated by the courts’ view of the *Charter*;
- An Attorney General and a central agency Ministry trained in and sensitive to policy considerations, who can develop a principled response to the *Charter*. Otherwise policy formulation can become too defensive.

Such changes are labour intensive, and require reformulation of perceptions of lawyers and interface between lawyers and non-legal personnel involved in policy development.

In New Zealand the primary pre-legislative mechanism to ensure that the values and rights enshrined in *BORA* are brought to bear on the policy and legislative process, exists in the provisions of the Cabinet Office Manual. The Manual requires all legislative proposals which go before the Cabinet Legislation Committee to mention any *BORA* implications. In

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<sup>51</sup> *ibid.*

addition the Legislation Advisory Committee (comprised of judges, lawyers and legal academics) will often draw attention to *BORA* problems, either because a question is referred to it by the Cabinet Committee, or because it has examined the legislation on its own initiative. The Legislative Advisory Committee has produced guidelines for developing legislation, which include addressing whether the legislation complies with *BORA*. In so far as *BORA* gives greater detail to basic principles underpinning the constitutional system of New Zealand, the guidelines state that *BORA* should have impact at the stage of the formulation of policy before it is developed into legislation.

## Drafting legislation

### *Canada*

Section 33 of the *Charter* permits the provincial and federal legislatures in Canada to pass legislation which may conflict with the *Charter*. To do so they must pass the legislation with a 'notwithstanding' clause, i.e. a clause stating that the legislation is valid 'notwithstanding' that it conflicts with the *Charter*. Although the clause has been the subject of much criticism, in practice the 'notwithstanding' clause has never been used by the federal parliament. A previous government of Quebec on one occasion used section 33 in a grand and sweeping gesture in an attempt to ensure that all its provincial legislation should be applied notwithstanding any *Charter* inconsistencies and sought to employ the section to overturn an unwelcomed decision of the Supreme Court.<sup>52</sup> However apart from four other minor instances in Quebec, and one premature, and in the event unnecessary, use by another provincial administration (Saskatchewan), section 33 has simply not been used.

Instead of a combative approach to the *Charter*, an inclusive and conciliatory approach is taken by almost all the legislatures, as is reflected in the adaptations which have been made to policy development procedures outlined above. Throughout Canada, at federal and provincial level, formal procedures have been put in place for the development of new legislation so that the whole process is characterised by high levels of *Charter* proofing, where *Charter* scrutiny and concerns are raised at the earliest stages of the policy making and legislative process. By statute the Department of Justice is required examine all regulations and government bills for *Charter* consistency. In order to fulfill this duty, the Department established a Human Rights section. Within each government department there are Department of Justice lawyers responsible for legal advice including about *Charter* problems. These structural changes are repeated throughout the provinces. Legislative

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<sup>52</sup> Following the decision of the Supreme Court of Canada in *Ford v Quebec* 2 S.C.R. 712 striking down Quebec legislation prohibiting the use of any language other than French on exterior commercial signs, the National Assembly in Quebec re-enacted the same legislation with a notwithstanding clause.

proposals are scrutinised by the Departments of Justice in draft form so that *Charter* issues can be addressed before they reach the cabinet table.

The response of the legislatures to the judgments of the courts is also informative. Parliament has amended legislation invalidated on *Charter* review to bring it into line with the court's concerns. The courts themselves have invoked a procedure under which they may grant declarations of invalidity, suspending the effect of a decision to allow the legislature to take appropriate action. This was devised in the landmark case of *Schachter v Canada*<sup>53</sup> where the Supreme Court declared that a disparity in benefits between natural and adoptive parents was discriminatory. In an survey conducted by Peter Hogg and Alison A Bushell of 65 cases where legislation was invalidated for a breach of the *Charter*, they found that in 44 cases the competent legislative body amended the impugned law.<sup>54</sup> In most cases, relatively minor amendments were all that was needed to respect the *Charter*, without compromising the objective of the original legislation. The conclusion drawn is that the *Charter* has engineered a dialogue between judiciary and legislature, rather than effected the usurpation of power by the judiciary.

#### *New Zealand*

Section 7 of *BORA* explicitly requires the executive and parliament to have regard to the Act when preparing legislation. It requires the Attorney-General to 'bring to the attention of the House of Representatives any provision in ... [a] Bill that appears to be inconsistent with any of the rights and freedoms contained' therein. According to the standing orders of the House, the Attorney-General must bring the attention of the House to any apparent inconsistency on the introduction of any Government Bill. In the case of other Bills, any inconsistency must be drawn to the attention of the House as soon as possible after its introduction, and according to Standing Order 260(1) 'before a motion for the bill's second reading is moved'.<sup>55</sup>

In 1991 the Attorney General issued a memorandum to all Ministers setting out the procedure to be followed to ensure that the Department of Justice reviews all new parliamentary Bills. At drafting stage Parliamentary Counsel sends copies of all Government Bills to the Department of Justice for checking, where an officer of the Law Reform Division will review the Bill for compliance with *BORA*. If a Bill is sponsored by the Department of Justice it is sent to the Crown Law Office for checking to avoid any potential

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<sup>53</sup> [1992] 2 S.C.R. 679; 93 Dominion Law Reports (4th) [1982] 1, 27. This procedure exists by virtue of section 52 (1) of the *Constitution Act* 1982 although it is not part of the *Charter* itself.

<sup>54</sup> Peter W Hogg and Alison A Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, *Osgoode Hall Law Journal*, Vol. 35, No 1, 1997, p. 75-107, p. 80.

<sup>55</sup> Standing Orders of the House of Representatives, 1996, Order 260 (1).

conflict of interest. If the official in the Department of Justice or the Crown Law Office is of the opinion that there is no inconsistency, then that opinion is reported to the Chief Parliamentary Counsel. However if there does appear to be an inconsistency, the opinion is reported to both the Attorney-General and to the Chief Parliamentary Counsel. In the case of a non-Government Bill, the Department of Justice is required to check it as soon as possible. In 1994, the process was amended to include a formal consultation between the Department of Justice and the Crown Law Office where the Attorney General may be advised to make a report. Reports of apparent inconsistency between a Bill and BORA are publicly available documents, tabled in the House and published in the Appendices to the Journal of the House of Representatives. Where such a report is made the Standing Orders Committee of Parliament requested that the Attorney-General would include in the reports

“as much detail as possible of the reasoning behind the Certificate as this will be of value to members and other interested persons as the Bill progresses through the House.”<sup>56</sup>

The procedure adopted by the Attorney General in determining whether there is an inconsistency is first to identify whether there is a *prima facie* breach, and if there is one to apply section 5 (which authorises such reasonable limitations as are justifiable in a free and democratic society). If the provision meets the test of section 5, then there is no report produced. Where officials advise that there is no apparent inconsistency, the Attorney-General has often claimed legal professional privilege to prevent release of the advice under a request made under the Official Information Act.

There have been twelve reports tabled in the House, only five of which were government Bills. In four of the Bills, the Bills proceeded with the substance of the relevant provisions intact, and in only one were there substantive changes made. For example, in 1991 the Attorney-General tabled a report declaring that he considered the introduction of random breath testing to be a breach of the search and seizure provision of BORA and the right to liberty. After a considered review the House voted to maintain the legislation, after a considered review by the appropriate select committee on whether the tests were a ‘justified limit’. With respect to the seven non - Government Bills, the reports have had a much greater impact with all the Bills either not proceeding or requiring substantive amendment.<sup>57</sup>

The impact which section 7 of BORA has had on policy formation has not been as systemic as the impact which the *Charter* has had in Canada, notwithstanding the central role which the Ministry of Justice now plays in the process of drafting legislation. This may stem from

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<sup>56</sup> Report of the Standing Orders Committee on the Review of Standing Orders I 18 A 1995, page 51.

<sup>57</sup> See Paul Rishworth, *The Political Quarterly*, *op. cit.* p.174.

had to change. These changes have been implemented through devising integrated training programmes and a manual which updates the police force on the necessary changes.<sup>61</sup>

Often a decision with wide ranging effects on the immediate policies of a department will bring significant financial implications, sometimes in instances where no budget provisions had been made. In *R v Therens*<sup>62</sup> the Canadian Supreme Court set out the entitlement to be informed of the right to counsel before being asked to provide a breath sample. Following the decision, the Attorney General of Alberta announced that out of the 19,000 breathalyser cases which it had pending, it would only pursue those cases which had not yet come to trial and the charge would be changed to one of impaired driving.<sup>63</sup> The New Zealand equivalent was *Ministry of Transport v Noort*.<sup>64</sup> The Court of Appeal decided that drivers detained to take evidential blood and breath alcohol tests were entitled by s. 23(1)(b) BORA to seek legal advice before the test was carried out. Many thousands of pending prosecutions were discontinued.<sup>65</sup> As a result the *Legal Services Amendment Act 1994* was brought in, ensuring that a state-funded duty lawyer was available to offer advice by phone before a breath test was carried out. The Court did however make clear in *Temse v Police* that the right to counsel did not apply to roadside breath screening test.<sup>66</sup>

In *R v Askov*,<sup>67</sup> the Canadian Supreme Court ruled that the applicant had not been given a trial within a reasonable time, Justice Cory indicating that the delay was "one of the worst from the point of view of delay in the worst district not only in Canada, but so far as the studies indicate anywhere North of the Rio Grande." Following this the Ontario government decided within one month that charges against 34,000 people in Ontario would be dropped and in total over 50,000 criminal charges were withdrawn on the grounds that the trials could not be held within a reasonable time. Over \$39 million additional funds were allocated to the Ministry of the Attorney General and the Ministry of the Solicitor

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<sup>61</sup> See Annex 4.

<sup>62</sup> [1985] 1 S.C.R. 613.

<sup>63</sup> F.L. Morton, *op.cit.* note 30.

<sup>64</sup> [1992] 3 N.Z.L.R. 260.

<sup>65</sup> Rishworth, *op. cit.* p. 26

<sup>66</sup> When the Transport Amendment Act (no. 3) was being introduced in New Zealand in 1991, the Attorney-General tabled a report declaring that he considered the introduction of random breath testing under the legislation to be a breach of the search and seizure provision of BORA and the right to liberty. In providing this view he relied on the Canadian case law in particular *Therens*. However the House approved the legislation, after a considered review by the appropriate select committee on whether the tests were a 'justified limit'. Professor Sir Kenneth Keith, Chairman of the Law Commission at the time, also issued an opinion disagreeing with the Attorney General, and the New Zealand Court of Appeal subsequently upheld the validity of the legislation.

<sup>67</sup> [1990] 2 S.C.R. 1199.

General in order to reduce delays in the justice system.<sup>68</sup> In 1995 the New Zealand Court of Appeal considered s 25(b) (the right to be tried without undue delay) in *Martin v Tauranga District Council*.<sup>69</sup> Martin's trial was stayed for undue delay on the grounds of prejudice where the pre-BORA position would have been that a stay would have been ordered only if the trial had actually been rendered unfair.

### **Administrative investigations**

Section 7 of the Canadian *Charter*, requires that the principles of fundamental justice apply where the rights of life, liberty and security are at stake. This section is more limited than section 27 of BORA which grants every person 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. Section 27 is textually closer to Article 6 of the Convention. Nevertheless in the sphere in which section 7 of the *Charter* does apply, it has proved a driving force behind changes introduced into administrative law and the operation of administrative bodies to ensure that individuals have a fair hearing, particularly in fields such as immigration and parole rights. The standards required by Section 7 have also been used to develop the general principle of 'fundamental justice' as it applies to administrative law.<sup>70</sup> The landmark case was *R v Singh*<sup>71</sup> in which the Court ruled that refugee applicants are entitled to a mandatory oral hearing. This resulted in a backlog of 124, 000 refugee claimants, an amnesty for 15, 000 claimants already in Canada, \$ 179 million in additional costs, and new refugee law that some critics say is more unfair than the original one. The Immigration and Refugee Board had to quadruple its capacity to keep up with applications, allowing the Board to hire an additional 280 public servants at an additional costs of \$ 20 million. This increased the budget of the new Board to \$80 million.

Similar impact has been felt in the area of decisions on parole and disciplinary hearings.<sup>72</sup> Prisoners who come up for parole are entitled by virtue of the *Charter* to have an oral

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<sup>68</sup> Julie Jai, Policy, Politics and Law: Changing Relationships in Light of the *Charter*, Vol. 9 No. 1 December 1997 *National Journal of Constitutional Law* 1, 7.

<sup>69</sup> [1995] 12 CRNZ 509.

<sup>70</sup> In general see Vol.10 No. 2 *Queen's Law Journal* (QLJ) , special volume: Administrative Law and the Charter and Vol. 16 No. 1 QLJ [1991].

<sup>71</sup> [1985] 1 S.C.R. 177.

<sup>72</sup> See A. Wayne Mackay, Fairness After the *Charter*, 10 QLJ 263 and Fergus O'Connor, The Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada, 10 QLJ 336 . For cases see e.g. *Latham v Solicitor General of Canada* (1984) 39 C.R. (3d) 78 (Fed. T. D.), *Re Lowe v. R* (1983) 5 CCC (3d) 535 (B.C. S.C.) , *Re Mason v R* (1983) 43 OR (2d) 321 (Ont. H.C.).

hearing. In *Morgentaler*<sup>73</sup> the Court went further and signaled that structural reviews of the way that administrative boards reached their decisions might be necessary. In *Morgentaler* the Supreme Court had struck down legislation which regulated whether women could have an abortion or not. Decisions on granting access to abortion were determined by hospital's committees and hospitals had a discretion whether to establish such committees. The majority of the Court determined that the procedural defaults in allowing such wide discretion, and the effect which such a wide discretion had, offended the *Charter*. The Court in effect determined that the administrative structure was at fault, not simply the procedure. The *Charter* has also led to review of administrative procedures which consist of a combination of investigative powers with decision making powers, or a delegation of various parts of the decision making process, or combine legislative and adjudicative functions, for compliance with the requirements of independence and impartiality.<sup>74</sup> Such reviews may result in the reorganisation of bureaucratic structures and the mode of functioning of agencies,<sup>75</sup> and the imposition of obligations such as the provision of full reasons for decisions, or the application of formal rules of evidence to administrative proceedings.<sup>76</sup>

Section 27 of *BORA* is not taken to mean judicial review in the technical sense, but has a more general sense of adequate access to court<sup>77</sup> and in *Simpson v Police*<sup>78</sup> the High Court stated that natural justice should not be given a narrow meaning; however in the administrative context what it meant was that the proceedings should be 'fair'. This does not go much further than the present common law principle of natural justice already applicable in administrative cases. The Court emphasised that section 27 would not amount to guaranteeing counsel to every litigant, nor changing the rules relating to costs. Successful cases did however require changes to the procedure employed by the Removal Review Authority, the body empowered to review removal orders under immigration law. The Court held that although there was no statutory requirement to inform appellants about

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<sup>73</sup> [1988] 1 S.C.R. 30.

<sup>74</sup> See *I.W.A. v Consolidated-Bathhurst Packaging Ltd.* [1990] 1 S.C.R. 282 and *Commission des affaires sociales du Quebec v Tremblay* [1989] R.J.Q. 2053 (CA). See also R.A. Macdonald and A. Harvison Young, *Canadian Administrative Law on the Threshold of the 1990's*, 16 *Q.L.J.* 31, 58.

<sup>75</sup> See the *Tremblay* case above where the powers of the Social Affairs Commission were held to offend the *Quebec Charter*.

<sup>76</sup> Examples provided by R.A. Macdonald and A. Harvison Young *op. cit.* include *Roberval Express Ltd. v Union des Chauffeurs de camions, hommes d'entrepots et autres ouvriers* [1982] 2 S.C.R. 888 and *DeMaria v Canada (Regional Transfer Board)* [1988] 2 F.C. 480 (T.D.).

<sup>77</sup> *Burt v Governor - General* [1992] 3 N.Z.L.R. 672.

<sup>78</sup> HC Hamilton AP 58/91, 17 June 1993.

obvious omissions in their appeals, natural justice required the staff to do so as it would be procedurally fair.<sup>79</sup>

Nevertheless in practice section 27 has not had as far reaching an impact on administrative decisions as one might expect, and nothing like the impact of section 7 of the Canadian *Charter*. Instead the absence of section 27 litigation is surprising.<sup>80</sup> It is likely that under the Human Rights Act UK courts will review administrative procedures in the more robust manner of the Canadian courts.

### **Exercise of administrative discretion**

Evaluating whether a restriction is justified was one of the tasks which initially administrators and public officials found difficult to apply when reviewing legislation in Canada and New Zealand. How a restriction should be evaluated was clarified in Canada by the Supreme Court in the case of *Oakes*.<sup>81</sup> The test applies to situations where a statutory provision may restrict a fundamental right, or the exercise of a discretion may do so. A restriction must pursue an objective which relates to societal concerns that are pressing and substantial in a free and democratic society. The restriction must however also be proportionate, a test which applies equally to the exercise of discretion. The person exercising a discretion needs to show that they have acted in a fair and non-arbitrary way, that the discretion has been exercised in a manner which is rationally connected to achieving the particular policy objective, that there has been as little as possible infringement on the right, and that there is a sense of proportion between the objective being pursued and the extent to which the right is restricted. This proportionality test is of key guidance to persons in developing policy to ensure that where there is a range of policy options the one which is proportionate, even if it is not the most administratively convenient, is the one which prevails. Persons exercising discretionary powers must be able, if called to account, to demonstrate what other options to the way in which they exercised their discretion were available to them at the time and why the one that they chose meets the standards of proportionality. This test has been largely applied by the courts in New Zealand,<sup>82</sup> so that in order to exercise a discretion in compliance with *BORA* it must be proportionate. The impact of such a test is to require a more structured decision

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<sup>79</sup> *Lal v Removal Review Authority* (HC Wellington, AP 95/82, 10 March 1994, McGechan J.)

<sup>80</sup> For example in cases reported in the New Zealand Law Reports from 1990 - 1997 only four raise issues under Section 27. In one case it was held not to apply to the proceedings, in two cases the arguments were dismissed and only in one was the failure to translate documents was a breach of natural justice.

<sup>81</sup> *R v Oakes* [1986] 1 S.C.R. 103. The challenge in the case itself was to section 8 of the *Narcotic Control Act* R.S.C. 1970 and its bearing on the presumption of innocence.

<sup>82</sup> *Minister of Transport v Noort op.cit.*

making process and also a greater evidential basis for justifying particular policy choices in the exercise of a discretion.

### **Pressure groups and resolution of political controversies**

One of the key features which has been evident in Canada is that a domestic bill of rights gives pressure groups another avenue of redress and provides a new forum for interest group activity. On one level it provides public interest groups with the opportunity to articulate political claims in legal language and to develop an appropriate litigation strategy to support their political strategy. On the other hand it also provides an alternative mode of access to the decision-making process, as human rights issues are an integral part of policy development. In Canada there has been the emergence of what is known as *Charter* citizens.<sup>83</sup>

Litigation under a bill of rights may take the form of test cases, where by a case is mounted for the purpose of pursuing a political aim, or interest groups may provide a third party intervention in a case before the courts where there is an issue to which they could make a particular contribution. In Canada specific funds were established to support this form of litigation. The Court Challenge Programme which was funded by the federal government provided litigation grants to equality rights litigation. Foremost in this battle was the Women's Legal Education and Action Fund, known by the acronym LEAF. The success which groups have had in pursuing a litigation strategy has been mixed. LEAF reported that they were disappointed with the government's response, in particular the failure of the government to adopt a more proactive position with respect to the equality provisions of the *Charter*.<sup>84</sup> However as a litigant, LEAF is considered as being one of the most successful non-government interveners in *Charter* cases before the Supreme Court.<sup>85</sup>

Other pressure groups felt that using litigation was a powerful way of making the government reconsider policy issues. The Disability Rights Movement has found that litigation was an effective strategy for furthering their interests. In particular through a *Charter* litigation strategy the Movement were able to include disability as one of the grounds on which unequal treatment is prohibited.<sup>86</sup>

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<sup>83</sup> See in particular the writings of Alan C. Cairns e.g. *Disruptions: constitutional struggles, from the Charter to Meech Lake*, 1991, and *Reconfigurations: Canadian citizenship and constitutional change: selected essays* Douglas E. Williams (ed.), 1995 both published in Toronto, Ontario by McClelland & Stewart.

<sup>84</sup> Elizabeth J. Shilton, *Charter Litigation and the Public Policy Process of Government; A Public Interest Perspective*, in Monahan and Finkelstein *op.cit.*, p. 169, 172.

<sup>85</sup> F.L. Morton, *The Charter Revolution and the Court Party*, in Monahan and Finkelstein, *ibid.*, p.179, 185.

<sup>86</sup> See footnote 77, Monahan and Finkelstein *ibid.*, p.32.

The Osgoode Law School Team concluded that the government has taken the *Charter* seriously in so far as it did consider seriously the Charter and made an effort in good faith to respond to it in an appropriate manner.<sup>87</sup> Strategic use of the Bill of Rights by lobby groups has not been as evident in New Zealand, with the exception of the challenge to the exclusion of single sex couples from the legislation governing marriages.<sup>88</sup>

The power of courts to make determinations based on rights which can have far reaching social impact has meant that on occasions those decisions which the Government does not want to make, it can leave it to the courts. If the courts give a clear indication of what the likely outcome of a rights based analysis to a particular problem would be, this can resolve a problem for the government. It can also mean that the government does not have to take full political responsibility for a decision which may be unpopular, as they can rely on the defence that the court required a particular course of action to be followed. The influence of human rights arguments can be illustrated by a Canadian example contrasting the impact of the *Charter* on two Bills. On one Bill, Bill C - 81 which regulated referenda, the government accepted the argument that to impose spending limits in a national referendum campaign would be contrary to the free speech provision of the *Charter*. The Government were content to be able to use the *Charter* argument as a justification for their decision not to impose spending limits. In the case of Bill C - 49 however, the controversy revolved around defences to sexual assault charges. In this case the government, having conducted a wide consultation process in the preparation of the legislation, gave far less weight to the *Charter* arguments that rights to a fair trial may be infringed, and did not allow the arguments to change the legislative provisions.

## Conclusion

A domestic Bill of Rights can have dramatic effects on the way that government and public bodies undertake their functions. There are a number of factors which will influence the nature of the impact.

- The approach which the courts take in interpreting the rights legislation. The more 'large and liberal' the interpretation given by courts, the greater the incentive to government and public authorities to adopt a pro-active approach to complying with the rights legislation. As judicial determinations will also often provide the first clear guidance to all public authorities on how rights are to be interpreted, the level of preparation, particularly in the lower courts, is significant.
- The stage in the process of policy and legislative development which human rights concerns are considered. The Canadian experience suggests that the earlier in the policy

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<sup>87</sup> Monahan and Finkelstein *op.cit.*, p. 532.

<sup>88</sup> *Quilter v Attorney General* [1998] 1 N.Z.L.R. 523

development process human rights concerns are considered, the greater the options for resolving potential conflict. Assessment of the options available should be made on the basis of expert human rights advice, which is most effective when it comes from within the department or agency formulating the policy, rather than when it is contributed from a third department at a later stage.

- The ability of policy makers to evaluate whether a limitation on a right is a justifiable limitation. Clear guidance needs to be provided on the test for proportionality and this test needs to be integrated into all processes where policy decisions are being made and discretionary powers exercised.
- The adoption of pro-active policies by departments to address many of the anticipated areas of challenge. Agencies and departments should establish a process for amending procedures quickly, and ensuring that the changes of procedure are notified to all staff. Where broad discretionary powers exist these are likely to be subjected to tighter procedural controls. This will involve structural changes to administrative procedures, which may have far reaching financial and staffing implications.
- The disposition of grass root bodies and non-governmental organisations to employ human rights legislation as a tool in seeking to change policy.

# Lessons for the Human Rights Act

## Preparation

The experience of Canada and New Zealand tells of two different approaches to preparing for the impact of human rights legislation. The reported problems which New Zealand faced in the lower courts as a result of lack of training, are being addressed in the UK. A budget of £ 4.5 million has been earmarked for training judges, magistrates and tribunal members. Training seminars for members of the legal profession have been organised by the Bar itself, by individual chambers and solicitors firms, and by organisations such as Liberty and JUSTICE. Within Whitehall guidelines on the Act for administrators and public officials have been prepared and all departments have been requested to report on legislation for which their department is responsible, which may raise potential problems under the Act, and to identify training needs. The departments are requested to report every six months to the Cabinet Office. A Human Rights Task Force has been established which has as its terms of reference the provision of assistance to the government in implementing the Act. The challenge facing the UK includes the familiarisation of all relevant sectors with the existing case law on the Convention.

The experience from Canada in particular indicates that successful preparation requires that

- In conducting reviews of legislation, regulations, policy and practice, departments need to have clear guidance on what the Act means, and most importantly the values which it imports, not simply a definition of the rights which it contains. In particular the departments need to be provided with guidance on how to evaluate which restrictions may be justified as necessary in a democratic society.
- A complete review of legislation and procedures will be staff intensive, and will need deployment of lawyers with Convention expertise to departments in order to ensure that the reviews are effectively conducted.
- The review of legislation and regulations can be a valuable tool in diminishing the potential for adverse court decisions. However it may not be possible to proof all legislation and practice to avoid challenge.
- Departments may be reluctant to submit their jurisdictions to human rights scrutiny. However as the provision of legal advice will take on a new significance and scrutiny of policy will be more rigorous under human rights legislation this will be a practice to which departments will have to acclimatise.

## The Courts

Section 3 of the Human Rights Act requires courts to read and give effect to primary legislation and subordinate legislation so far as possible in a way which is compatible with the Convention rights. Such a strong interpretative obligation on the courts lays the ground for the courts to take the Human Rights Act seriously, and not to deal with it simply as an ordinary statute. It was the Privy Council in *Minister for Home Affairs v Fisher* that provided a source of guidance to the Canadian and New Zealand courts on the appropriate manner in which to interpret a constitutional document. It is likely that the UK courts will take the a similar lead. The attitude of the courts will provide one of the most significant catalysts for the changes which the Human Rights Act will require of the public administration.

The factors which will help to guide public will be

- The approach of the higher courts to the Human Rights Act and the method of interpretation they apply. Following the lead of the Privy Council and of the New Zealand courts, it is anticipated that the courts will treat the Human Rights Act as a constitutional document and read the rights and provisions in the Act accordingly.
- The attitude of the higher courts to the case law of the European Commission and Court of Human Rights. In contrast to New Zealand and Canada, the UK has the experience of over 30 years litigation in Strasbourg, and an extensive wealth of jurisprudence provided by the European Commission and Court on the scope and interpretation of Convention rights. The courts are required to have regard to the case-law of the Strasbourg institutions, but in interpreting the Convention rights the courts may follow the lead of the Canadian and New Zealand courts where the case-law from Strasbourg is either inconclusive or very narrow.
- The attitude of the higher courts to making declarations of incompatibility. The difference between the Canadian courts' willingness to strike down legislation, in contrast to the New Zealand courts' willingness to read restrictive provisions as consistent with *BORA*, may suggest that as the Human Rights Act is not entrenched, the courts will be inhibited from declaring legislation incompatible with it. However as a declaration of incompatibility does not involve the courts overturning Parliament's intention, but does permit the courts to render a judicial pronouncement on a dispute, the courts may in fact consider it *more* legitimate to indicate to Parliament when it has encroached unjustifiably on Convention rights, and permit Parliament to take the appropriate remedial order, than to accept dubious restrictions on rights. Legislation such as the Prevention of Terrorism Act 1989 may be vulnerable to a successful claim for a declaration of incompatibility.
- The manner in which the courts interpret the meaning of 'public authority' and the definition of 'a victim'.

heightened importance and the availability of timely and accurate legal advice will be essential. This is likely to lead, as in Canada, to the increased profile of lawyers within government departments. There will also be a need for central legal advice: this may come from the Treasury Solicitors, from the Home office or from the Lord Chancellor's Department. To be effective and conducive to pro-active policy making, the development of an understanding between the policy makers and legal advisers on Convention issues needs to be a priority so that the tasks of both are seen as complementary, and not adversarial.

The Joint Committee on Human Rights also provides a significant role for Parliament to play in the effective implementation of the Human Rights Act, a role not provided for in the same way in Canada or New Zealand. The Committee will have a role in scrutinising legislation and remedial orders for human rights compliance. As parliamentary enforcement of the Human Rights Act ultimately trumps judicial enforcement, it is of great importance that the Joint Committee's powers are strong and effective. The Committee also represents a very important *independent* scrutinising role in the implementation of the Act, as the pre-legislative scrutiny will depend on the government's internal rigour. Many more questions of human rights compliance will be raised in Parliament in general, throughout the passage of legislation, in debates and at the Committee stage.<sup>89</sup>

## **Public authorities**

All public authorities are bound by the Act under section 6, which means that all public authorities need to be aware of the obligations imposed by the Act on them. Authorities such as the prosecution services, the police, the immigration service and the prison service can expect to be the first to experience the direct impact of the Act through the Courts. It means that awareness of the Act and the Convention will be necessary, that there must be a source of legal advice on the Convention readily available, and that public authorities will need to be aware of the justification for the exercise of their discretion. Public authorities will also need to be able to adapt procedure quickly following adverse court findings and to ensure that changes in procedure are effectively and efficiently circulated to personnel.

The assault on criminal procedure in New Zealand and Canada under their human rights legislation was in many instances attributable to the unregulated manner in which detention and search and seizure provisions were effected in those jurisdictions. The Police

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<sup>89</sup> In January 1999, JUSTICE produced a set of guidelines entitled, "Legislating for Human Rights: Developing a Human Rights Approach to Parliamentary Scrutiny" which sets out a model audit process for evaluating legislation for human rights compliance. The model may be of guidance both to persons engaged in developing legislation and the Committee in conducting human rights scrutiny.

and Criminal Evidence Act 1984 does provide a framework for the conduct of police investigative work and criminal procedure which should avert some of the procedural challenges which were raised in New Zealand and Canada. Nevertheless extensive police powers under prevention of terrorism legislation of 1989 and 1998 are likely to be challenged. Similarly challenges to the admissibility of evidence can be expected where a Convention right may have been infringed in the course of procuring the evidence.<sup>90</sup> In this context the decision of the European Court in *Teixeira de Castro v Portugal*<sup>91</sup> which sets out the procedural guarantees which need to be in place when *agents provocateurs* are used in police operations will be relevant to the UK.<sup>92</sup> Complaints about breaches of fair trial form the largest single type of complaint to Strasbourg organs. This trend is likely to be repeated domestically in the UK. Challenges to deportation orders on grounds that deportation may expose the individual to inhuman and degrading treatment, and a failure to respect family life can also be expected.

Outside of the criminal law, the challenge to public authorities may arise in a number of areas. One such area will be in the conduct of administrative inquiries. Article 6 of the Convention guarantees in the determination of civil rights and obligations the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This raises a number of questions for public authorities in the manner in which tribunals and administrative boards for which they are responsible are constituted, and the procedures they employ. Administrative procedures which do not permit effective participation for the person whose 'civil' or 'private' rights will be effected by the outcome will need to be amended. As in Canada, where bodies making determinations that effect Convention rights enjoy a wide discretion, their powers are liable to be interpreted in a restrictive manner.

In all fields where public authorities exercise discretion they can expect to be subject to greater scrutiny to ensure that they are in line with the Human Rights Act. The traditional test in UK law is whether a public authority has acted 'reasonably' which meant that it had not acted in a way which no reasonable authority would do, so called '*Wednesbury* unreasonableness'. The Human Rights Act test will be whether public authorities have acted 'proportionately'. Public authorities will have to consider the importance of any right which they may infringe through their decisions, the likely degree of the infringement, the importance of the public interest which the measure causing the infringement is seeking to

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<sup>90</sup> For the extent to which arguments of this kind are already considered in the UK courts see *R v Kahn* [1996] 3 WLR 162.

<sup>91</sup> Judgment of 9 June 1998

<sup>92</sup> See F G Davies, 'The Fruit of the Poisoned Tree - Entrapment and the Human Rights Act 1998' 163 *Justice of the Peace* 30 January 1999, 84.

advance and the effectiveness of that measure in advancing the interest. They will have to consider the range of options available to them and decide which is the most proportionate. Under the Convention and the Act it will be necessary to show that reasons for a particular decision are 'relevant and sufficient' and therefore greater substantiation of decisions will be required.

Rights under the Convention require in many instances, not only that public authorities refrain from interference, but also that positive action is taken to give effect to the obligation to respect the rights. This may obligate public authorities to act in some instances to provide particular health or security services, or to ensure that a third party is not interfering with individual rights. In *Lopez Ostra v Spain*<sup>93</sup> the Court found that the failure to prevent the output from a waste treatment plant affecting the applicants' property was a violation of the applicant's rights under Article 8 of the Convention.

The experience from Canada and New Zealand illustrate that the primary impact of human rights constraints will be to effect procedural change: procedural change which ensures that the impact of actions on rights is given adequate consideration, that negative impacts are minimised and where restrictions are permitted that they are proportionate to the exigency of protecting a necessary public interest.

Finally local authorities may also be liable for damages where they have failed to protect an individual's rights. The Human Rights Act gives courts the authority to grant appropriate remedies, including damages, and wide immunities are not likely to be provided. In New Zealand the courts created a remedy for police mal administration in *Baigent*, and in *Osman v UK*<sup>94</sup> the European Court of Human Rights has already held that the immunity granted to police for failure to carry out their duties was too wide. In addition to awards of damages, public authorities will have to bear the cost of administrative change if their procedures are found wanting.

### **Pressure groups and resolving political controversies**

Section 7 of the Human Rights Act limits those able to invoke the act in proceedings to those who also qualify as victims under the terms of the Convention. *Prima facie* this prerequisite appears narrower than the standing permitted under judicial review. The 'victim' requirement, rules out the initiation of class actions, or abstract test cases being brought by pressure groups against a general policy. However, as has been the practice in Strasbourg, the standing requirement does not prevent legitimate test cases being run. Nor does the

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<sup>93</sup> [1994] 20 EHRR 277

<sup>94</sup> Case 87/1997/871/1083, Judgment of 28 October 1998.

standing rule exclude the use of third party interventions where the courts may consider such an intervention useful or in the interest of a case. This practice is also in keeping with the procedure in Strasbourg. Successful test cases will by their nature often result in a need for a wide-ranging restructuring of policy by the liable authorities, in order to comply with the courts' ruling.

Whether through litigation or otherwise the Human Rights Act, like the *Charter* in Canada, will provide an additional term of reference for non-government organisations to use in advocating political change. Many concerns and interests may now be framed in terms of judicially protected rights, rather than international law obligations. This should help to strengthen the hand of organisations and provide an alternate focus for pressure group campaigns.

The courts will inevitably be the scene for challenging many social policies. There are a number of issues which have arisen before Strasbourg which remain to be resolved in British law, for example aspects of access to court for compensation for victims of child sexual abuse<sup>95</sup> and the protection of children from parental violence.<sup>96</sup> The position of homosexuals in the armed forces<sup>97</sup>, the recognition of single sex relationships, aspects of rape laws may all come before the courts to be determined. Some of these issues a government may not wish to address as a matter of policy and the courts may now be required to resolve them as a matter of law. On the other hand the knowledge that the courts may be minded to hand down an adverse ruling may act as a stimulus to government and Parliament to introduce its own solution to the problem.

## Conclusion

Many of the detailed implications which will flow from the Human Rights Act cannot be predicted. Which areas of legislation and which practices will be the first to be affected will depend in part on the type of cases which first reach the courts and in part on the degree to which different agents take pre-emptive steps to comply with Convention standards. What is clear is that adequate preparation across government and Parliament is necessary to ensure that the values and principles which the Human Rights Act will bring to bear on public administration can be embraced effectively. The obligations of the Act will inevitably be seen by some departments as intrusive and onerous. The advance preparation can help

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<sup>95</sup> *Stubbings v UK*, 36-37/1995/542-543/628-629, Judgment 22 October 1996.

<sup>96</sup> *A v UK*, 100/1997/884/109, Judgment 23 September 1998.

<sup>97</sup> Applications Lustig-Prean (N° 31417/96) Beckett (N° 32377/96), Smith (N° 33985/96), and Grady (N° 33986/96) against the UK before the European Court of Human Rights the implementation of an absolute policy against the participation of homosexuals in the armed forces. They were all declared admissible on 23.2.99.

to minimise the disruptive effects of rapid adjustments. Practical translation of the principles set down by the courts into guidelines for public officials will be essential to ensure that the responses of authorities to the requirements of the Act are swift and apt. Development of good practice which is taught effectively and imbued into the delivery of public administration will ensure that the values of Human Rights Act are integrated into public life and do not become a matter only for judicial debate. Development of good practice at all levels of government and throughout public authorities is the practical realisation of a human rights culture.

## **Annex 1**

### **Comparative Tables of the Rights Common to All Three Human Rights Statutes**

## Rights Common to All Three Human Rights Statutes

Substantive provision	European Convention on Human Rights	New Zealand Bill of Rights Act 1990	Canadian Charter of Rights and Freedoms
<b>Right to Life</b>	A. 2. Everyone's right to life shall be protected by law, and intentional taking of life is prohibited except as the result of lawful acts of war or a sentence imposed by a court in accordance with law. Death resulting from the use of force which is no more than absolutely necessary to achieve one of the legitimate aims identified in the Article is not a violation.	S. 8. Right not to be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.	S. 7. Everyone has the right to life, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
<b>Prohibition on Torture</b>	A. 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.	S. 9. Everyone has the right not to be subjected to any cruel, degrading or disproportionately severe treatment or punishment. Section 22 (5). Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.	S. 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment .
<b>Right to liberty and security</b>	A. 5 (1) provides that everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty save in the six enumerated cases set out in the Article and in accordance with a procedure prescribed by law:	S. 22. Everyone has the right not to be arbitrarily arrested or detained.	S. 7. Everyone has the right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice Section 9. Everyone has the right not to be arbitrarily detained or imprisoned.
<b>Rights of detained persons</b>	A. 5 (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.	S. 23. (1) Everyone who is arrested or who is detained under any enactment shall be informed at the time of the reasons for it and (b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right;	S. 10. Everyone has the right on arrest or detention a) to be informed promptly of the reasons therefore and b) to retain and instruct counsel without delay and to be informed of that right
<b>Right to be promptly charged or released</b>	A. 5 (3): Everyone lawfully arrested or detained for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, preventing him committing an offence or fleeing after having done so, shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.	S. 23 Everyone who is arrested for an offence (2) has the right to be charged promptly or to be released and (3) if not released shall be brought as soon as possible before a court or competent tribunal.	

## Rights Common to All Three Human Rights Statutes

Substantive provision	European Convention on Human Rights	New Zealand Bill of Rights Act 1990	Canadian Charter of Rights and Freedoms
Habeas Corpus	A. 5 (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.	S. 24 (c) Shall 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.	S. 10. Everyone has the right on arrest or detention (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.
Right to bail	A. 5 (3) provides that a person charged with an offence is entitled to trial within a reasonable time or to release pending trial, which may be conditioned by guarantees to appear for trial.	S. 24 (b) Everyone who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention	S. 11 Any person charged with an offence has the right (e) not to be denied reasonable bail without just cause.
Right to a fair trial	A. 6 (1) In the determination ..... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.	S. 25 a - b. Everyone who is charged with an offence has, in relation to the determination of the charge has the right to a fair and public hearing by an independent and impartial court and the right to be tried without undue delay:	S. 11 (d) Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
Right to be informed promptly of the charge	A. 6 (3) (a) Everyone charged with a criminal offence the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;		S. 11 (a). Any person charged with an offence has the right to be informed without unreasonable delay of the specific offence
Right to be presumed innocent	A. 6 (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.	S. 25 (c) Everyone who is charged with an offence has, the right to be presumed innocent until proven guilty according to law	S. 11 (d) Any person charged with an offence has the right to be presumed innocent until proven guilty according to law
Right to legal assistance	A. 6 (3) (c) Everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;	S. 24 (f) Everyone who is charged with an offence shall have the right to receive legal assistance without costs if the interests of justice so require and the person does not have sufficient means to provide that assistance;	
Right to examine witnesses	A. 6 (3) (d) Everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;	S. 25 (f) Everyone who is charged with an offence has the right 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:	
Right to an interpreter	A. 6 (3) (e) Everyone charged with an criminal offence has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.	S. 24 (g) Everyone who is charged with an offence shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in Court.	S. 14. 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 an interpreter.

## Rights Common to All Three Human Rights Statutes

Substantive provision	European Convention on Human Rights	New Zealand Bill of Rights Act 1990	Canadian Charter of Rights and Freedoms
<b>Prohibition on retroactive legislation</b>	A. 7 (1) No one shall be held guilty of a criminal offence on account of an act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time it was committed. This shall not prejudice the trial and punishment of any person for an act or omission which at the time was criminal according to the general principles of law recognised by civilised nations.	S. 26. (1) 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.	S. 11. (g) Any person charged with an offence has the right 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;
<b>Right to natural justice</b>	A. 6 (1) In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.	S. 27. (1) and (2) 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 and has the right to apply, 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.	S. 7. 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.
<b>Right to privacy: protection from unreasonable search and seizure</b>	A. 8 (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.	S. 21. Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.	S. 8. Everyone has the right to be secure against unreasonable search or seizure.

## Rights Common to All Three Human Rights Statutes

Substantive provision	European Convention on Human Rights	New Zealand Bill of Rights Act 1990	Canadian Charter of Rights and Freedoms
<b>Freedom of thought, conscience and religion</b>	A. 9 (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society (hereafter n.d.s.), in the interests of public safety for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.	S. 13. Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference. S.15 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. Both sections are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (Section 5).	S. 2. Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion [and expression....],  Subject by section 1 only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
<b>Freedom of Expression</b>	A. 10 Everyone has the right to freedom of expression including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers States are not prevented from requiring the licensing of broadcasting, television or cinema enterprises. This may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and n.d.s. in the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.	S. 14. 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. Subject by section 5 only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	S. 2. Everyone has the following fundamental freedoms: b) freedom of expression, including freedom of the press and other media of communication;  Subject by section 1 only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
<b>Freedom of Association</b>	A. 11 (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. Restrictions must be prescribed by law and n.d.s. in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.	S. 16. Everyone has the right to freedom of peaceful assembly. S. 17. Everyone has the right to freedom of association.	S. 2. Everyone has the following fundamental freedoms: c) freedom of peaceful assembly; and d) freedom of association. Subject by section 1 to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

## **Annex 2**

**Procedural Provisions of the Human Rights Act, *BORA* and the *Charter***

**Procedural provisions of the HRA/BORA/ Charter**

<b>Procedural provisions</b>	<b>Human Rights Act 1998</b>	<b>New Zealand Bill of Rights Act 1990</b>	<b>Constitution Act 1982: Canadian Charter of Rights and freedoms</b>
<b>Applic-ation</b>	6. Applies to all public authorities, including the judiciary, and persons or bodies exercising a public function, but not Acts of Parliament	3. Applies to acts done by the legislative, executive, or judicial branches of the government, and by persons or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.	32. Applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament and to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
<b>Effects on passing of legislation</b>	19. A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second reading of the Bill (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights, or (B) make a statement to the effect at although h is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.	Section 7. Where any Bill is introduced into the House of Representatives, the Attorney-General shall 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.	33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament that the Act or a provision thereof shall operate notwithstanding a provision of the Charter. When such a declaration is made, the Act shall have such operation as it would have but for the provision of this Charter referred to in the declaration.....
<b>Interpretati on of legislation</b>	3. So far as is possible to do so, primary legislation and subordinate legislation, whenever passed, must be read and given effect in a way which is compatible with the Convention rights. This does not effect the validity, continuing operation or enforcement of primary legislation, or secondary legislation where the primary legislation prevents the removal of the compatibility.	6. Wherever an enactment can be given a meaning that is consistent with the Bill of Rights, that meaning shall be preferred to any other meaning. 4. No court shall, in relation to any enactment whenever passed hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or decline to apply any provision of the enactment	
<b>Protection of existing rights</b>	11. No other right or freedom conferred by or under any law or any right to make any claim or bring any proceedings beyond the Act is effected by reliance on the Act	28. An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in the Bill of Rights	26. The guarantee in the Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
<b>Right to just satisfac-tion</b>	8. In relation to any act of a public authority which the court finds unlawful, a court, which has power to award damages in civil proceedings, may grant such relief as it considers just and appropriate. the Court must be satisfied of the necessity to afford just satisfaction. In determining whether to award damages, or the amount of an award, the court must taken into account the principles applied by the European Court of Human Rights..		24. (1) Anyone whose rights or freedoms 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.
<b>Remedies for inconsistent legislation</b>	4. (2) If the court is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of that incompatibility.		s. 52 of the Constitution Act 1982 permits courts to strike down legislation, sever the offending provision, strike down or severe a provision coupled with temporary suspension of the declaration of invalidity, to read down or read in to an appropriate provision.

## **Annex 3**

### **Statistics of Challenges under the Canadian Charter**

**(Based on statistics compiled by Peter H. Russell, University of Toronto and Professor J Monahan, Osgoode Law School)**

Year	Number of Charter Challenges before the Supreme Court
1984	3
1985	12
1986	9
1987	26
1988	23
1989	36
1990	56
1991	38
1992	36
1993	41
1994	24
1995	29
1996	27
1997	19
1998 (1/1/98-31/7/98)	19

Year/	Type of Challenge	Legislation	Conduct of Public officials	Other	Total
1984		3			3
1985		5	7		12
1986		3	4	2	9
1987		13	12	1	26
1988		12	11		23
1989		13	18	5	36
1990		25	25	6	56
1991		15	17	2	38
1992		21	21	2	44
1993		23	24	2	49
1994		11	19	2	32
1995		14	18	2	34
1996		18	21	1	40
1997		11	11	0	22

**Success rate of Charter claimants**

Year	Percentage
1984	67
1985	67
1986	44
1987	27
1988	26
1989	28
1990	30
1991	26
1992	19
1993	19
1994	44
1995	24
1996	11
1997	58

## **Annex 4**

**Contents of the Guidance Manual for the New Zealand Police Force**

**and**

**Extracts from the Integrated Training Programme for 1998**

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# INTRODUCTION

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This chapter contains a brief summary of the Act and a detailed discussion of section 23. This section, which relates to the procedures the police are legally obliged to follow when arresting and detaining suspects, is the one with the most potential impact on frontline police.

The most important rules to remember are:

1. When you locate suspects and wish to question them, you may do so, but if you have already formed an intention to charge them, you must advise them of their rights as given in the usual caution (Judges' Rules).
2. If you have arrested or detained them pursuant to any enactment, you must advise them of their rights under section 23 of the Act, advising them:
  - of the reason for the arrest or detention
  - that they have the right to consult and instruct a lawyer in private and without delay
  - that they do not have to make a statement.
3. There is no right to detain a person for questioning, although a person can assist voluntarily with enquiries. If you have sufficient information to form good cause to suspect the commission of any offence punishable by imprisonment, you should arrest the person and comply with the requirements stated above.

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## SUMMARY OF THE ACT

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The New Zealand Bill of Rights Act 1990 is primarily intended to affirm, protect and promote human rights and fundamental freedoms. The Act provides:

- Protection against the increasing powers of Parliament and government agencies.
- Minimum standards for public decision-making.
- Protection for human rights and basic freedoms in the future.
- A set of principles by which electors can measure the performance of government, thus increasing accountability.

The Act is designed to be universal, containing no special provision relating to any particular culture or creed within New Zealand.

The Act gives statutory authority to many rights that have always existed but have done so only in common law. Examples include the right not to be deprived of life and the right not to be subjected to torture or cruel treatment.

**Part 1, sections 2-7**

Sections 2-7 relate to the general provisions of the Act and will have little effect on the police.

**Part 2, sections 8-20**

Sections 8-20 relate to the life and security of the person, democratic and civil rights, and minority rights. These sections affirm existing rights not previously included in statute.

**Part 2, sections 21-22**

Sections 21-22 relate to actions that the police might take while conducting investigations; for example: searching, seizing, arresting and detaining. Prior to the Act, these actions were not regulated by statute but by cases such as *Entick v Carrington* and *Blundell v Attorney-General* [1968] NZLR 341.

**Part 2, section 23**

Section 23 has the greatest potential to directly affect frontline police. This section is discussed in depth in this chapter.

**Part 2, section 24**

Section 24 applies to defendants appearing before the courts and prisoners detained in police cells after being arrested for an offence.

Paragraphs (a) and (c) reinforce rights referred to in section 23. Paragraph (b) codifies an existing obligation recognised by the police, to grant bail unless there are good reasons to refuse it, taking into account such considerations as the seriousness of the offence and interference with witnesses. Paragraphs (e)-(g) are self-explanatory.

**Part 2, sections 25-27**

Sections 25-27 relate to the administration of justice and will have little direct effect on the police.

**Part 3, sections 28-29**

Sections 28 and 29 will have no direct effect on the police.

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## DEFINITIONS

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**Objective**

Objective means based on the facts of the matter, undistorted by personal bias.

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**Perfunctorily**

Perfunctorily means superficially, in a routine manner.

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**Subjective**

Subjective means based on or influenced by personal emotions, opinions or prejudices.

# SECTION 21

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence, or otherwise.  
**Bill of Rights Act 1990 s21**

## **Unreasonable search or seizure**

An invitation to enter premises is not an invitation to search them. You must ask permission, and obtain a warrant if permission is refused (unless a search without warrant is conducted).

***Hamilton v Police* [1994] BCL 1843**

Obviously, it is not a "search" to look at a person, or to look into a vehicle from outside it, and observe something. If there are stolen goods or drugs open to observation without the need to actually search the person or vehicle, those observations do not in themselves amount to a search of that person or vehicle.

***R v Dodgson* [1996] BCL 134**

If you wish to undertake a search by consent, the person must be informed of his or her right not to be searched, or the search will be classified as unreasonable because there was not a fully informed 'waiver'.

***R v Wojcik* (1994) 11 CRNZ 463**

A search that is unlawful because of a minor irregularity may, depending on the circumstances, not be unreasonable. In such a case, the evidence obtained in the search may be admissible. See *R v Faasipa* (1995) 2 HRNZ 224, *R v T* (1995) HRNZ 50. But a search that would otherwise be reasonable is unreasonable if it is carried out in an unreasonable manner; for example, a strip search that is conducted in the street. See *R v Pratt* [1994] 3 NZLR 21. If the search is unreasonable, both the evidence and the fact of its discovery will be inadmissible unless the breach is inconsequential.

For further information about the relationship between Bill of Rights breaches and admissibility, see page 461.

## **Reasonableness and privacy**

Any evidence offered to police by a suspect's employee, employer, associate, acquaintance, accomplice, partner or the like is admissible in evidence unless the police have procured that person to obtain that evidence as a police agent. Where a person is used as an agent by the police, any material provided may be inadmissible if that information could have been seized pursuant to a warrant. Furthermore, "an employer cannot have a well founded expectation that an employee will not reveal to the authorities evidence of criminal misconduct. There is no

entitlement which the law will recognise to a reasonable expectation of privacy in this regard.”

***R v H* [1994] 2 NZLR 143**

The Privacy Act will not prevent someone from volunteering information to the police without a warrant having been first obtained. Such evidence given to the police will not have been unreasonably searched or seized under section 21.

***R v Thompson* (1995) 13 CRNZ 546**

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**Suppressing the  
identity of informers**

Details that may lead to the identification of an informer can be protected. The court can be asked not to reveal confidential information to the defence to protect an informer.

***R v McNicol* [1995] 1 NZLR 576**

It is not sufficient for a police witness to baldly state that his or her reasonable grounds to believe were based on informer information. The witness must adduce other evidence that shows that the informer's information was sufficiently credible. If that cannot be done without revealing the identity of the informer, the judge might find the search unlawful and unreasonable. Lack of detail in a search warrant application (to try and protect an informer) can have the same result.

***R v O'Brien* (unreported, High Court Wellington 6/10/93)**

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**Holding in custody  
while making  
enquiries**

A suspect arrested on one offence cannot be kept in custody for “mere convenience sake” while enquiries are made into another offence for which he or she may later be interviewed. If the suspect is eligible for bail, you must give it as soon as practicable.

***R v Rogers* [1993] BCL 2022**

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**Electronic  
surveillance**

In *R v Davis* (unreported CA 306/93, 20 July 1993), the Court of Appeal stated that “search and seizure” includes electronic surveillance, and held that:

- It is not unlawful for any participant in a conversation to record that conversation surreptitiously. Advances in information technology have to be recognised.
- The expectation of privacy is not the only consideration: legitimate State interests, including those of law enforcement, are also relevant. An absolutist position would lead to significant consequences that were contrary to the public interest.

This means that the court will balance the public interest and all relevant values when deciding whether the use of electronic surveillance is an unreasonable intrusion. In the *Davis* case, a person wanted to hire another person to kill someone. An undercover police officer posed as the hit man and taped the conversation. This was held to be a reasonable search and seizure that was undertaken for legitimate police purposes.

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New Zealand  
**POLICE**  
Nga Pirihimana O Aotearoa

## Integrated Training Programme 1998

# Arrests

# Module DUT 122

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# **AIMS AND OBJECTIVES**

## **AIMS**

This study module aims to:

- (a) assist police members to become familiar with the legislation which controls their powers of arrest;
- (b) outline appropriate strategies for dealing with particular problems which may arise in the course of making an arrest.

## **OBJECTIVES**

Police members who have completed this course of study will be able to:

1. Explain the effect of the New Zealand Bill of Rights Act on police procedures relating to arrests and detention.
2. Discuss the concept of "discretion" in the arrest decision.
3. Explain the provisions of the law relating to:
  - (a) arrests with and without warrant
  - (b) duty of persons arresting
  - (c) justification
  - (d) protection from criminal liability
  - (e) entry onto private property to arrest or prevent crime
  - (f) the use of force in relation to arrests
  - (g) the mode of arrest
  - (h) the release of innocent persons arrested
4. List the provisions of:
  - (a) Section 315, Crimes Act 1961
  - (b) Section 316, Crimes Act 1961
  - (c) Section 317, Crimes Act 1961
5. Discuss the case law in relation to specific areas of the law of arrest.
6. Implement those case law decisions in practical situations.
7. Explain the General Instruction on police use of various forms of restraint.
8. List the essential points relating to safe arrests.
9. Describe signs of possible suicide and the appropriate preventive procedures
10. Implement these points in practical situations.
11. Differentiate between correct and incorrect methods of transporting arrested persons.

# 1. NEW ZEALAND BILL OF RIGHTS ACT 1990



## OBJECTIVES

After studying this chapter, you should be able to:

- outline the purposes of the New Zealand Bill of Rights Act and main provisions affecting police (s.21-26)
- describe what is meant by detention and its implications for Bill of Rights provisions
- outline what is meant by informed consent
- describe what is meant by 'unreasonable' search and seizure
- outline the procedures needed to adhere to the Bill of Rights when detaining or arresting a person
- detail the significance of the Goodwin case for Bill of Rights procedures
- identify when evidence is likely to be inadmissible under the Bill of Rights.

In 1990, the New Zealand Bill of Rights Act passed into law. The purpose of the Bill of Rights Act was to codify, in one piece of legislation, all of the existing rights and freedoms held by a citizen of New Zealand. The Act introduces no new rights, but it is important that you understand how the Bill of Rights Act affects Police procedures relating to arrests and detention. This chapter of the study unit examines sections of the Act relating to police practice and clarifies the possible areas of confusion.

## Introduction

The New Zealand Bill of Rights 1990 identifies those basic human rights that should be enjoyed by all New Zealanders.

The Act applies to any power, duty or act of any member of the government, the judiciary or a public body that may affect an individual's basic freedoms. It also applies to any act by an individual performed pursuant to any law.

The courts are carefully monitoring the implementation of the New Zealand Bill of Rights.

Decisions in the courts indicate that the judiciary are carefully monitoring the actions of the Police. Judges are now reviewing the way police officers deal with people to ensure that their rights, specified in the New Zealand Bill of Rights, are respected.

The Bill affirms rights that already exist. However, these are now codified in a single Act in order to give:

- protection against the increasing powers of Parliament and government agencies
- minimum standards for public decision making

- protection against the erosion of these rights by legislation
- protection for these rights in the future
- a set of principles by which electors can measure the performance of government, thus increasing its accountability.

## **Freedoms and Rights**

The act is commonly referred to as the “Bill of Rights”. The 29 sections in the Act relate to the following freedoms and rights;

The Bill of Rights covers the rights:

- to life
- not to be subjected to torture or to scientific or medical experiment
- to refuse medical treatment
- to vote
- to freedom of thought, conscience, religion, expression, manifestation of religion and belief, peaceful assembly, association, and movement
- to freedom from discrimination, (with particular reference to the rights of minorities)
- to liberty of the person
- to justice
- to protection from unreasonable search and seizure
- of persons arrested, detained and charged; minimum rights regarding criminal procedure, retroactive penalties and double jeopardy
- natural justice.

## **Police Related Sections**

Four sections in the Bill of Rights have particular relevance for the police.

*Section 21* Any person and their property or correspondence should be secure against unreasonable search and seizure

*Section 22* Everyone should be protected from arbitrary or random arrest or detention

*Section 23* Persons arrested or detained under any enactment must be:

- advised at the time of the reason for it
- advised of their right to consult and instruct a lawyer without delay

**Sections 21 to 24 relate directly to police search, arrest and detention.**

- advised that they have the right to decline to make a statement
- given the opportunity to consult and instruct a lawyer

**Section 24** Person charged with an offence must be:

- advised of the nature and reasons for the charge; and
- given the opportunity to consult and instruct a lawyer

The Courts have a major role in enforcing the guarantees set out in the Bill of Rights and these decisions will provide important guidance on the application of these rights and their interpretation.

**Evidence obtained in contravention of the Bill of Rights is likely to be ruled inadmissible.**

It is extremely important that you scrupulously observe the Bill of Rights. If you have obtained evidence by ignoring the rights accorded by this Bill, the Court is likely to rule this evidence inadmissible. The consequences of breaching the Bill can be serious enough to imperil your entire case. This was highlighted by the Court of Appeal decision in *R v Crime Appeal 227/91 & 228/91*, where the defendant's statement confessing to aggravated robbery was ruled inadmissible.

## The Bill of Rights Act 1990

### Section 21. Unreasonable 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

To be free from unreasonable search of person or property and unreasonable seizure of person or property; are each a separate right. The essence of these rights were referred to in *Entick v Carrington* (1765), "An Englishman's house is his castle."

A search pursuant to a warrant or a statutory provision, or a search made with the informed consent of the person concerned does not qualify as "unreasonable".

A search may be considered unreasonable when:

- there is no lawful authority to search; or although lawful, the search was conducted in an unreasonable manner.