

16 Years of the New Zealand Bill of Rights

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These are interesting times for human rights law in Australia. Recently, the Australian Capital Territory celebrated the two year anniversary of its ACT Human Rights Act 2004 (“ACT HRA”) and on 25 July 2006 the Victorian Charter of Human Rights and Responsibilities (“Victorian Charter”) became law. There is talk that other states will follow the lead of the ACT and Victoria and look to enact human rights statutes. Across the ditch the New Zealand Bill of Rights Act 1990 (“BORA”) celebrated its 15 year anniversary last year. The framers of both the ACT HRA and the Victorian Charter paid significant regard to New Zealand's experience under BORA (and the Human Rights Act 1998 (UK) (“UK HRA”) and adopted a central feature of BORA: namely preferring a parliamentary bill of rights model rather than a constitutional one.³

The United Nations Human Rights Committee in its concluding comments to New Zealand's 4th Periodic Report under the International Covenant on Civil and Political Rights criticised New Zealand for the lack of the New Zealand courts' power to strike down BORA inconsistent legislation, ie the fact that New Zealand does not have a constitutional bill of rights.⁴ However, just because under a parliamentary bill of rights the courts cannot strike down legislation does not mean that judges cannot undertake a type of constitutional review: after all under a statutory bill of rights judges are typically empowered to interpret enactments in a bill of rights consistent way or can make declarations of inconsistency if the enactment unjustifiably trenches on fundamental rights (and cannot be read down to achieve consistency) or can grant remedies for rights violations.⁵ In short, courts can form the judgements that courts operating under supreme bill of rights can – the only substantial constraint is what they can do in respect of some situations where a rights inconsistency is identified (viz. those where the inconsistency cannot be interpreted away).

Against that background this paper discusses four issues related to BORA:

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³ BORA, s 4 states that “No court shall, in relation to any enactment....(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; ...or (b) Decline to apply any provision of the enactment- by reason only that the provision is inconsistent with any provision of this Bill of Rights.” BORA, s 6 urges the courts to give an enactment a meaning that is consistent with the rights and freedoms contained in BORA. Section 30 of the ACT HRA and s 32(1) of the Victorian Charter mirror s 6 BORA. Under the ACT HRA and the Victorian Charter the courts have the possibility if they find a law to be inconsistent with the ACT HRA to issue a declaration of inconsistency, however, like s 4 BORA stipulates they cannot invalidate inconsistent laws (s 32 ACT HRA, s 36 Victorian Charter).

⁴ UN Human Rights Committee, *Concluding observations of the Human Rights Committee: New Zealand. 07/08/2002* (CCPR/CO/75/NZL) comment 8.

⁵ S Gardbaum “The New Commonwealth Model of Constitutionalism” (2001) 49 *AJCompL* 707, 741; P Rishworth “The Inevitability of Judicial Review under ‘Interpretive’ Bills of Rights” (2004) 23 *SCLR* 233, 266; P Joseph “Constitutional Review Now” [1998] *NZLRev* 85.

1. The impact of BORA on policy and legislation.
2. The extent to which New Zealand courts have been judicially active and usurped “power” they should not have.
3. Whether a dialogue between Parliament and the Judiciary has developed in New Zealand.
4. What contribution has BORA made to the development of a human rights culture within New Zealand?

I. The Impact of BORA on Policy and Legislation

The twin purposes of BORA are set out in its Long Title:

An Act

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

When introducing the New Zealand Bill of Rights Bill 1989, Geoffrey Palmer stated that its enactment would introduce two levels of human rights protection. First, the Attorney-General’s reporting process (s 7 BORA)⁶ would necessitate a careful examination of all Government Bills before introduction, thereby bolstering the law-making process. Secondly, the courts would be able, in the case of actions inconsistent with those rights, to enforce them in different ways in different contexts. In regard to the first point Geoffrey Palmer, in his foreword to the White Paper, concluded that:⁷

In practical terms the Bill of Rights is a most important set of messages to the machinery of Government itself. It points to the fact that certain sorts of laws should not be passed, that certain actions should not be engaged in. In that way a Bill of Rights provides a set of navigation lights for the whole process of Government to observe.

Since the coming into force of BORA the Government has taken a number of practical steps to further BORA compliance within governmental process. In recent years (since the first graduates who studied in a BORA environment have entered the workforce) the Government has proactively provided guidance and BORA education. In the Cabinet Office *Step-by-Step Guide to Cabinet and Cabinet Committee Processes*⁸ the policy development process required by Cabinet is set out.⁹ One of the

⁶ Section 7 BORA provides:

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights—
Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention 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.

⁷ G Palmer, “Introduction” in *A Bill of Rights for New Zealand- A White Paper* (Government Printer, Wellington, 1985) 6.

⁸ Wellington, Cabinet Office, 2001.

⁹ *Step-by-Step Guide to Cabinet and Cabinet Committee Processes* (Cabinet Office, Wellington, 2001) ch 3.

processes required by Cabinet concerns “human rights implications.”¹⁰ Summarising, Cabinet requires that consideration be given to consistency with BORA and the Human Rights Act 1993 (“HRA”, New Zealand’s anti-discrimination law) of all policy proposals and further requires that a comment on that consistency be included in all relevant Cabinet papers. In particular, Cabinet papers must include a paragraph which states the nature of any potential inconsistencies with BORA and HRA identified (or states that there are no such inconsistencies), notes the steps to be taken to address those issues or includes information on any justification for the policy infringing a right or freedom.

In 2004, to assist Government departments with addressing BORA issues in Cabinet papers, the Ministry of Justice issued a Handbook on BORA aimed at policy advisors to assist them “with the development of policies and practices that are consistent with human rights standards.”¹¹ The purpose of the Handbook is to alert policy advisors to potential BORA issues and to suggest ways of carrying out activities consistently with BORA in light of the case law developed under BORA.¹² The Handbook and the Guidelines help in formulating BORA consistent policies and avoid introducing BORA inconsistent legislation into Parliament, or, at least alert the Government to potentially BORA inconsistent policies and legislation early on. Government departments can further draw on the Legislation Advisory Committee Guidelines in evaluating BORA issues.¹³

Furthermore, since 2003 legal advice provided by government lawyers to the Attorney-General to assist him or her in performing the vetting function under s 7 BORA is made available on the Ministry of Justice web-site.¹⁴

In summary, in New Zealand law-making processes have been adapted to accommodate the s 7 BORA reporting obligation, and ensure a broader consideration of human rights implications by Cabinet.

However, the question needs to be asked whether BORA has succeeded in providing navigation lights for the Government in a substantive sense? Some commentators have noted that in the last 15 years some 36 s 7 reports have been made to Parliament in respect of Bills said to be inconsistent with BORA. 18 of those bills were Government bills. It has been suggested that this is a significant number and shows that Governments have not been that successful in abiding by their own human rights commitments. However, in defence of the position of successive Governments it has to be said that in a good number of cases, the s 7 report was a marginal call and in one sense one could say the Government played it safe by preferring to make a s 7 Report. Indeed, some commentators have queried whether those calls were made correctly at

¹⁰ Step-by-Step Guide to Cabinet and Cabinet Committee Processes (Cabinet Office, Wellington, 2001) paras 3.53-3.60.

¹¹ Attorney-General Margaret Wilson “Foreword” *The Handbook of the New Zealand Bill of Rights Act 1990* (Wellington, 2004) 5. The Handbook is a shorter version of the Ministry of Justice *Guidelines to the New Zealand Bill of Rights Act* which contain a fuller discussion on the legal application of individual sections of BORA, see: www.justice.govt.nz (last accessed 17 Sept 2006).

¹² *The Handbook of the New Zealand Bill of Rights Act 1990* (Wellington, 2004) 6.

¹³ www.justice.govt.nz (last accessed 21 Sept 2006). The Legislation Advisory Committee consists of lawyers from within Government and the wider legal community. It provides independent advice to Government on proposed legislation.

¹⁴ See <http://www.justice.govt.nz/bill-of-rights/> (last accessed 22 Sept 2006).

all.¹⁵ Furthermore, a number of bills focused on sexual orientation discrimination,¹⁶ an area where the Government had decided to pursue reform based upon a systematic review of existing discriminatory legislation, rather than dealing with the issue in a piecemeal fashion.¹⁷ Lastly, BORA is subordinate to other statutes. It was accepted that Governments might introduce, and Parliament approve, bills that might be BORA-inconsistent.

II. BORA and Judicial Activism in New Zealand Courts

In 1985 when a supreme law bill of rights was proposed as a possibility in a Government White Paper, significant concern was expressed about the risk of judicial activism and the judicialisation of politics. Once, however, the supreme law status was dropped, and BORA was to be enacted as an ordinary statute, doubts were expressed about what purpose BORA might serve: judges would be rendered inactive, so what was the point?! Accordingly, at the time of its enactment 16 years ago judicial activism was not perceived to be a likely product of BORA.

Over the course of the last 16 years or so, however, some commentators have expressed concern that BORA has resulted in an unwelcome level of judicial activism. Is that charge accurate?

For the purpose of this paper judicial activism is understood as “(a) not applying all and only such relevant, existing, clear, positive law as is available, and (b) making such decisions by drawing on his or her moral, political or religious views a[s] to what the content of the law should be.”¹⁸

Analysis of two issues can help to get a measure whether the New Zealand courts have been judicially activist in regard to human rights over the last sixteen years. First, have the courts thought they have the mandate under BORA to fill gaps left in legislation? Second, how have the courts interpreted statutes, including the relationship between earlier and later legislation in light of the enactment of BORA.

1. *Filling the Gaps*

One of the most apparent gaps appeared in BORA itself: it did not provide for any remedies should the court find an infringement of BORA. The Court of Appeal very early on in its BORA jurisprudence found that it had the mandate to develop remedies such as the inadmissibility of evidence and the stay of proceedings where

¹⁵ See, for example, P Rishworth et al *The New Zealand Bill of Rights* (Melbourne, OUP, 2003) 214-216. Examples of s 7 Reports that have been challenged by commentators include the reports on the Transport Safety Bill 1991, the Films, Videos, and Publications Classifications Bill 1992 and the Sale of Liquor (Health Warnings) Amendment Bill 2000.

¹⁶ See, for example, the Social Security (Residence of Spouses) Amendment Bill 2001, Income Tax Bill 2002, Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill 2003, Future Directions (Working for Families) Bill 2004.

¹⁷ See the Relationships (Statutory References) Act 2005 which amends a raft of legislation so as to remove discrimination based on sexual orientation.

¹⁸ T Campbell “Judicial Activism-Justice or Treason?” (2003) Otago LRev 308, 312.

infringements were found to have occurred.¹⁹ While some commentators criticised these developments,²⁰ to the extent that remedies of these types were available pre-BORA the extension post-BORA can be regarded as interstitial rather than radical.

a. Baigent's case: BORA compensation

The first big allegation of “judicial activism” arose when the Court of Appeal created a public law compensatory remedy in the case of *Simpson v Attorney-General (Baigent's case)*.²¹ In this case the Court not only created²² a new remedy, but also engaged in a difficult balancing act when undertaking statutory interpretation.

In that case the plaintiffs sought damages arising out of the obtaining and execution of a search warrant in respect of their residence. The plaintiffs pleaded that the police had obtained a search warrant to search their residence relying on incorrect information from an informant, and that when it was pointed out to them (when they came to execute the warrant), the police nonetheless continued with the search, with one of the officers allegedly saying “we often get it wrong, but while we are here we will have a look around anyway.”²³ The plaintiffs pleaded that in entering, remaining on, or searching the property in all of those circumstances, the officers had unlawfully procured the search warrant, had been negligent, had committed a tort of trespass and also had violated the right of the plaintiffs to be secure against unreasonable search and seizure as protected by s 21 BORA.

The Crown submitted that the courts had no jurisdiction to award damages for a violation of BORA since BORA did not provide any remedial power to judges in cases of violation. Secondly, the Crown submitted that even if the courts had jurisdiction to award damages for breach of BORA rights and freedoms, in the instant case such a proceeding was barred by the terms of s 6(5) of the Crown Proceedings Act 1950, s 39 of the Police Act 1958 and ss 26(3) and 27 of the Crimes Act 1961.²⁴

It would have been open for the Court to state Parliament’s intention in light of s 6(5) of the Crown Proceedings Act 1950, s 39 of the Police Act 1958, and ss 26(3) and 27 of the Crimes Act 1961 as being that the Crown and individual police officers were immune against civil proceedings if the police acted in good faith on a warrant or according to a process issued by judicial authority. As to any action under BORA an additional argument for the view that Parliament did not intend to allow the Crown to be held liable in such situations was that the draft Bill in the 1985 White Paper had provided for a remedies clause, but this was not proceeded with in BORA as

¹⁹ See for example: *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA), *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA), see pre-BORA in regard to exclusion of evidence: *R v Kirifi* [1992] 2 NZLR 8,12 (CA) (per Cooke P).

²⁰ J Smillie “‘Fundamental Rights’, Parliamentary Supremacy and the New Zealand Court of Appeal” (1995) 111 LQR 209.

²¹ *Simpson v Attorney-General [Baigent's Case]* (1994) 1 HRNZ 42 (CA).

²² For an explicit acknowledgement that the Court of Appeal was engaged in creation see *Attorney-General v PF Sugrue* (2003) 7 HRNZ 137, 156 [70].

²³ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667, (1994) 1 HRNZ 42, 44 (CA).

²⁴ Crown Proceedings Act 1950 reads: “No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibility of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.”

enacted.²⁵ This argument received support in the partly dissenting judgment of Gault J (as he then was). In his judgment his Honour found that the existing law provided effective remedies for persons whose rights and freedoms were infringed or denied since the immunity provisions should be given reasonably narrow effect.²⁶

However, the majority of the Court took another approach. They held that the immunities provided for did not apply in an action based on BORA since this was an action in public law and not in tort at which the immunities were aimed.²⁷ The Court also did not find itself deterred from creating a new public law remedy. As Casey J put it:²⁸

I do not regard the absence of a remedies provision in the Act as an impediment to the Court's ability to 'develop the possibilities of judicial remedy' as envisaged in art 2(3)(b) [of the International Covenant on Civil and Political Rights].

His Honour also pointed out that it would be strange that Parliament must be taken as contemplating that New Zealand citizens could go to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights but could not obtain redress against human rights abuses under the domestic law implementing the Covenant, BORA.²⁹

Hardie Boys J summarised the majority's view on what Parliament had intended by enacting BORA as follows:³⁰

The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the Government exercise its functions, powers, and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant no reason to think that this should depend on the terms of a written constitution.

b. Moonen: declarations of inconsistency

Post-*Baigent* the Court of Appeal has gone even further. In an obiter dictum in *Moonen v Film and Literature Board of Review* the Court stated that it had the power to make an indication of statutory inconsistency if it found that a statutory provision constituted an unreasonable limitation on a right "guaranteed" in BORA (that is, a limit that cannot be demonstrably justified in a free and democratic society). The Court thought this valuable if the matter came to be examined by the UN Human Rights Committee or in case the issue arose in Parliament.³¹ A more detailed analysis

²⁵ See argument for the Crown as reported by Cooke P *Baigent's Case* (1994) 1 HRNZ 42, 57. Art 25 of the draft bill read "Anyone whose rights or freedoms as guaranteed by this Bill of Rights have infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

²⁶ *Baigent's Case* (1994) 1 HRNZ 42, 96, 100 (per Gault J).

²⁷ *Baigent's Case* (1994) 1 HRNZ 42, 58 (per Cooke P); 74-75 (per Casey J); 80, 83-85 (per Hardie Boys J).

²⁸ *Baigent's Case* (1994) 1 HRNZ 42, 73; see also Cooke P 57.

²⁹ *Baigent's Case* (1994) 1 HRNZ 42, 74.

³⁰ *Baigent's Case* (1994) 1 HRNZ 42, 86.

³¹ *Moonen v Film and Literature Board of Review* (1999) 5 HRNZ 224, 234 [20]; Parliament took up the idea of the courts issuing declarations of incompatibility in section 92I of the Human Rights 1993 (as amended in 2001) in regard to section 19 of the Bill of Rights Act.

as to why such a declaration of incompatibility would not infringe parliamentary sovereignty followed one year later.

In his dissenting judgment in *R v Poumako* Thomas J would have issued a formal declaration of incompatibility in regard to s 2(4) of the Criminal Justice Amendment Act 1999. He held that section inconsistent with s 25(g) of BORA and article 15(1) of the International Covenant on Civil and Political Rights.³² His Honour stated six reasons why a declaration of incompatibility was a valid remedy under BORA. Firstly he argued that a declaration is in line with the purpose of the Act as stated in its Long Title. Furthermore, s 6 of BORA directed the courts to give priority to human rights whenever possible and “thus recognising that the Courts are necessarily the guardians of the norms underlying those rights”.³³ To fulfil its function the Court needed to be able to declare legislation incompatible with BORA. Thirdly, a declaration could also be seen as supplementing the reporting process as stipulated in s 7 BORA since amendments to legislation did not fall under the reporting process. Further, to give s 5 a meaningful role within the framework proposed by BORA courts must be able to declare legislation incompatible. Thomas J also pointed out that since Parliament and the courts share the same commitment to fundamental human rights Parliament would want to have an indication from the courts whether legislation was human rights compliant. Finally, by making a declaration the Court did not infringe the doctrine of parliamentary sovereignty since a declaration does not invalidate the statute nor does it mean that Parliament cannot pass legislation to overrule the courts. Only a judiciary which impartially and “fearlessly” exercises its role can fulfil its constitutional function.³⁴

Even though the Court’s decisions in *Baigent’s case*³⁵ and *Moonen* have been criticised and could be seen as examples of judicial activism, the Government certainly did not object.

Baigent’s case prompted the question of whether the subject of monetary remedies under BORA should be left to be further developed judicially, or whether legislative clarification or reform might be desirable. Accordingly, the Government asked the New Zealand Law Commission to consider *Baigent’s case*. The Law Commission endorsed the approach taken by the Court of Appeal, and concluded that no legislation should be introduced to remove the general remedy for breach of BORA established by this case.³⁶ The Government has acted upon the Law Commission’s advice and has not enacted any legislation curtailing *Baigent* damages, leaving it to the courts to develop public law compensation further.

Next, the Court’s idea of issuing declarations of inconsistency was taken up by Parliament when amending the HRA. Since the Human Rights Amendment Act 2001 came into force, the Human Rights Review Tribunal and, on appeal, courts can issue

³² *R v Poumako* (2000) 5 HRNZ, 652, 683.

³³ *R v Poumako* (2000) 5 HRNZ, 652, 679 (per Thomas J).

³⁴ *R v Poumako* (2000) 5 HRNZ, 652, 679[94]- 682[103] (per Thomas J).

³⁵ J A Smillie “Fundamental” rights, parliamentary supremacy and the New Zealand Court of Appeal” (1995) 111 NZLQR 209; J Allan “Speaking with the Tongues of Angels: The Bill of Rights, Simpson and the Court of Appeal” [1994] BRB 2

³⁶ Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent’s Case and Harvey v Derrick*, NZLC R37 (Wellington, 1997) 26-29.

declarations of inconsistency in regard to s 19 BORA (discrimination).³⁷ It can be said then that through its judgments on BORA remedies, the Court of Appeal has developed responses to human rights breaches that ultimately Government and Parliament have, it seems, willingly accepted.

In our view, the question is not whether the Court could create these remedies (since courts have created causes of action and remedies throughout history)³⁸ but whether it was legitimate for the Court to seize the initiative to create the remedies bearing in mind the history of BORA. In our view, the manner in which New Zealand courts have filled the gap in regard to remedies in BORA is an example of how the various branches of government can coexist. It is not an example of judicial activism. The courts have not intruded on parliamentary sovereignty; instead they have complemented Parliament by offering practical solutions to problems Parliament might have overlooked when enacting legislation or deliberately left open since it felt that the arm of government which had more practical experience with the matter was better suited to dealing with the issue. In regard to remedies the Court carefully extended existing common law remedies in regard to exclusion of evidence and stay of proceedings.³⁹ Further, as regards *Baigent* compensation not only were damages known under the Human Rights Commission Act 1977 and the Race Relations Act 1971 for the breach of non-discrimination rights⁴⁰ but the Court also had the benefit that *Baigent* style public law damages were known in other jurisdictions.⁴¹

And in regard to declarations of inconsistencies not only, as Thomas J pointed out in his judgment, are they the logical extension of s 5 BORA but the Court had also the advantage of s 4 of the UK HRA as a model – an Act closely modelled on the New Zealand BORA.

In sum then the Court of Appeal has been “activist” in the limited sense of seizing the opportunities, when they came, to create remedies; however, the Court was careful with what it did with its opportunity. The Court did not create anything adventurously new. It applied ideas which had been around and tested before. And as Philip Joseph pointed out, by doing that it can be said that the Court of Appeal was merely asserting “the final authority simply by virtue of the judicial function”⁴² and, therefore did not need to shy away from taking the opportunities.

2. *Statutory Interpretation*

Section 6 of BORA requires that an enactment be given a meaning which is consistent with BORA wherever such a meaning can be given. Have New Zealand courts relied

³⁷ Human Rights Act 1993, s 92J. According to s 92K of the Act the Minister responsible for the legislation has to bring the declaration to the attention of Parliament and has to bring before Parliament a response about the declaration.

³⁸ For example, *Donaghue v Stevenson* [1932] AC 562; *Mareva* injunction, Anton Piller order.

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⁴⁰ Human Rights Commission Act 1977, ss 38, 40, 42; Race Relations Act 1971, ss 17, 21, 22.

⁴¹ Cases mentioned in the judgment are, for example: *Maharaj v A-G of Trinidad and Tobago (No 2)* [1979] AC 385, *Nilabati Behera v State of Orissa* 1993 Cri LJ 2899; *The State (At the Prosecution of Quinn) v Ryan* [1965] IR 70, 122.

⁴² P Joseph “Parliament, The Courts and The Collaborative Enterprise” Society of Legal Scholars Annual Conference (Oxford, September 2003) 10.

on this injunction to rewrite legislation through the back door in a judicially active way?

a. Quilter: same-sex marriage

From 1993, s 19 of BORA prohibited discrimination on the grounds of sexual orientation. In *Quilter v Attorney-General*⁴³ the Court of Appeal had to decide whether the Marriage Act 1955 could and should be interpreted to embrace same-sex couples as a result of s 19. The Court was very clear that it could not rewrite the law contrary to Parliament's wish. An interpretation of the Marriage Act 1955 to include same-sex couples would assume the role of the lawmaker.⁴⁴ Section 4 of BORA says that Parliament has reserved to itself all legislative functions.⁴⁵ Tipping J pointed out that on its enactment the Marriage Act was clear beyond doubt in the meaning which it attributed to the concept of marriage. The legislation passed after the enactment of BORA supports that initial meaning. There was no basis therefore upon which the Marriage Act could (in terms of s 6) be interpreted as permitting same-sex marriage. "In addition to those points, it is highly unlikely that Parliament would have intended to make such a substantial change to one of society's fundamental institutions by the indirect route of s 19 and s 6 of BORA."⁴⁶

The *Quilter* case would have been an excellent chance for the Court of Appeal to show real "judicial activism". Countries like Denmark had already legalised same-sex marriages and a considerable amount of academic writing existed suggesting that same-sex couples should be able to legalise their relationship.⁴⁷ The Court could have given the Marriage 1955 a 1997 reinterpretation arguing that Parliament's intent as shown by s 6 BORA in 1990 meant that the word "marriage" in the Act should include same-sex couples. Tipping J acknowledged in his judgment that the Marriage Act 1955 used gender neutral language throughout the Act and "marriage" is not defined in the Act. His Honour used s 15 in the Second Schedule to the Act and the time of the enactment to deduce Parliament's intent.⁴⁸ The wording in the Second Schedule would not have prevented the Court from finding that the Act covered same-sex couples. And it could have overcome Parliament's intention by emphasising Parliament's intention in 1990 when enacting s 6 BORA that legislation should be read in a BORA-compliant way. However, the Court felt that this was a decision for Parliament; in so holding it placed great emphasis on the limits of judicial decision-making.

That, however, was not the end of the story.

b. Moonen: child pornography

⁴³ (1997) 4 HRNZ 170 (CA).

⁴⁴ *Quilter v Attorney-General* (1997) 4 HRNZ 170, 178 (Gault J), 223 (Tipping J).

⁴⁵ *Quilter v Attorney-General* (1997) 4 HRNZ 170, 223 (Tipping J).

⁴⁶ *Quilter v Attorney-General* (1997) 4 HRNZ 170, 232 (Tipping J), see also at 206 (Keith J).

⁴⁷ Danish Registered Partnership Act 1989, Act on Registered Partnership 1996 (Iceland), Swedish and Norwegian Registered Partnership Acts 1994; J Trosino "American Wedding: Same-Sex Marriage and the Miscegenation Analogy" (1993) 73 BULRev 93. It also needs to be noted that subsequent Canadian decisions found in favour of same-sex marriages.

⁴⁸ *Quilter v Attorney-General* (1997) 4 HRNZ 170, 228 (Tipping J).

Two years after *Quilter* the Court of Appeal was asked to interpret a provision in another sensitive area. In *Moonen v Film and Literature Board of Review*,⁴⁹ the issue was whether the censorship board had correctly interpreted and applied the words “promotes or supports” in s 3(2) of the Films, Videos, and Publications Classification Act 1993 when banning alleged child pornography. The Court held that in considering the correct meaning of those words a BORA-consistent approach was required.⁵⁰ The application of ss 5 and 6 BORA meant that any interpretation of the words “promotes or supports” should impinge as little as possible on freedom of expression. The Court held that the concepts of promotion and support are concerned with “the effect of the publication, not with the purpose or the intent of the person who creates or possesses it.”⁵¹ The result was that the censors' decision was quashed.

In *Moonen* the Court of Appeal had more scope than the Court in *Quilter* since the legislative history of the phrase in question had not been documented. The Court endeavoured to find a definition which infringed freedom of expression the least and shifted the definition from a subjective one to an objective test. Now what is important is the effect that the publication has; not what the author actually wanted to communicate. The subsequent inquiry of the Government Administration Committee into the Operation of the Films, Videos, and Publications Classification Act 1993 and related issues found that the Court of Appeal's interpretation of “promotes and supports” adequately carried out the intent of Parliament in that it took account of s 14 BORA.⁵²

c. *The doctrine of implied repeal*

The doctrine of implied repeal states that Parliament's latest intention prevails over previous ones. This doctrine is well established by English,⁵³ Australian,⁵⁴ and New Zealand⁵⁵ authority from the first half of the last century. How does it apply in a human rights context?

The Canadian courts have stated that where there is an irreconcilable conflict between human rights legislation and other legislation, human rights legislation will prevail unless Parliament gave a clear indication in the inconsistent legislation that the legislation should prevail despite its inconsistency.⁵⁶ Moreover, the House of Lords regarded European Community legislation as overriding later domestic legislation, by virtue of the principle of pre-eminence found in Community case law and required to be given effect to by s 2 of the European Communities Act 1972. The Court carefully considered whether the overriding status of Community law had been Parliament's

⁴⁹ (1999) 5 HRNZ 224 (CA).

⁵⁰ *Moonen v Film and Literature Board of Review* (1999) 5 HRNZ 224, 236 [27].

⁵¹ *Moonen v Film and Literature Board of Review* (1999) 5 HRNZ 224, 236 [29]. Neither in the Report of the Internal Affairs and Local Government Committee on the Films, Videos and Publications Classification Bill nor in its 3rd reading is the meaning of “promotes and supports” discussed.

⁵² Government Administration Committee “Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and related issues” (Wellington, March 2003) 25-27.

⁵³ *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (CA).

⁵⁴ *South Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 (HC).

⁵⁵ *Patterson's Freehold Gold-dredging Co Ltd v Harvey* (1909) 28 NZLR 1008 (SC).

⁵⁶ See, for example, Supreme Court of Canada in *Re Winnipeg School Division (No 1)* (1985) DLR 4th 1, 6.

intent.⁵⁷ In a more recent judgment (also concerning the question of the pre-eminence of European Community Law), Laws LJ refined this position and the doctrine of implied repeal. His Honour chose as a starting point the common law recognition of the existence of rights which can be classified as constitutional or fundamental citing cases such as *R v Secretary of State for the Home Department, Ex p Simms*.⁵⁸ From this analysis follows, in Law LJ's view, a hierarchy of Acts of Parliament. Two categories of Acts exist namely ordinary and constitutional statutes. For a statute to be classified as constitutional it needs to "(a) [condition] the legal relationship between citizen and state in some general, overarching manner, or (b) [enlarge or diminish] the scope of what we would now regard as fundamental constitutional rights."⁵⁹ The doctrine of implied repeal needs to be modified in regard to constitutional statutes. The test should be whether "it is shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation".⁶⁰ In short, "a constitutional statute can only be repealed, or amended in a way which significantly affects its provisions towards fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute."⁶¹

Potential analysis of the types just discussed prompted the Government to amend the New Zealand Bill of Rights Bill (1989) so as to remove the ability of the courts to rely on BORA to impliedly repeal an inconsistent statutory provision. In particular, s 4 BORA provides:

"No court shall, in relation to any enactment... (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; ... or (b) Decline to apply any provision of the enactment- by reason only that the provision is inconsistent with any provision of this Bill of Rights."

Having this provision and the overseas developments on the doctrine of implied repeal in mind, the New Zealand case law on implied repeal is of particular interest.

R v Poumako was the first of two decisions (the other being *R v Pora*) dealing with the interpretation of so-called home invasion legislation passed in 1999. One element of the home invasion package enacted was a provision imposing a minimum of 13 years where murder had been committed in the course of home invasion. This provision was expressed to apply retrospectively. In *Poumako*, a majority of the Court held that it was not necessary to definitely rule on the applicability of the new mandatory non-parole period as Mr Poumako would undoubtedly have received a 13 year non-parole period under the earlier legislation. The Court did, however, expressly state its displeasure for the retrospective element of the new provision and expressed its view that it would be desirable for Parliament to reconsider the issue.⁶² The Court noted that the provision at issue was introduced late in the legislative process and was not subject to the Attorney-General's vetting process.

⁵⁷ *Ex parte Factortame Ltd et al* [1990] 2 AC 85, 152, 153 (HL).

⁵⁸ [2002] 2 AC 115, 131 (HL) (per Lord Hoffmann).

⁵⁹ *Thoburn v Sunderland City Council* [2003] QB 151 para 62.

⁶⁰ *Thoburn v Sunderland City Council* [2003] QB 151 para 63.

⁶¹ *Thoburn v Sunderland City Council* [2003] QB 151 para 63.

⁶² *R v Poumako* (2000) 5 HRNZ, 652, 665 [42], 672 [67], 683 [107] (per Richardson P, Gault, Keith, Henry, Thomas JJ).

In an obiter dictum, specifically stating that they did not need to reach a final conclusion, three of the five judges expressed the view that it could not have been Parliament's intent to afford retrospective effect to the home invasion provisions of the Crimes Act 1961 bearing in mind its inconsistency with fundamental human rights. The judges opined that the clause could be interpreted more narrowly, such that the section could be given very limited retrospective effect (back to the date on which the home invasion amendments to the Crimes Act 1961 commenced). Even though that would still conflict with the principle against higher sentences than at the time of offending, this interpretation was the most consistent with the rights and freedoms prescribed in BORA.⁶³

The dissenting judges on the other hand found that the section in question was unambiguous and certain in its retrospective effect and, therefore, s 6 BORA could not be invoked to support an interpretation which was not Parliament's intent (having had regard to the parliamentary debates).⁶⁴

In *R v Pora*⁶⁵ the Court of Appeal, consisting of a seven judge bench, had to decide whether the 1999 amendment of the Criminal Justice Act would prevail retrospectively over the Criminal Justice Act 1985. In the latter Act Parliament had declared that no court could impose a retrospective penalty. It is important to note that all judges who dealt with the issue (Richardson P did not) agreed that the interpretative problem facing the court did not relate to the meaning of either provision. Both provisions were clear in their meaning. All agreed that because the meaning of the provisions in question was clear and the provisions were irreconcilable that one had to yield over the other. The Court divided three to three on whether a fundamental right can be impliedly repealed by later legislation.⁶⁶

Three of the judges took the view that based on the long standing rule of implied repeal, the Court must apply the statute that was enacted later in time and, therefore, the 1999 amendment of the Criminal Justice Act 1985 had retrospective effect.⁶⁷ Those judges acknowledged that their interpretation of the provision in question was a serious breach of a fundamental rule of New Zealand's legal and constitutional system and New Zealand's international obligations.

On the other hand, the other three judges held that the predominant intention of Parliament may be found in the earlier statute, except where there is an express statement that the later Parliament intended to cease protecting the fundamental rights in question.⁶⁸ They also pointed out that they were following Parliament's own intention, as manifested in s 6 BORA, that "Parliament must speak clearly if it wishes to trench upon fundamental rights."⁶⁹ Thomas J explicitly stated that where the courts are confronted with a difficult provision, "the Courts make do by filling the gap, if

⁶³ *R v Poumako* (2000) 5 HRNZ, 652, 664 [36]- 665[41] (per Richardson P, Gault, Keith JJ).

⁶⁴ *R v Poumako* (2000) 5 HRNZ, 652, 670 [57]-[58], 676 [80] (per Henry, Thomas JJ).

⁶⁵ (2000) 6 HRNZ 129. See for a critical case note on *R v Pora*: see A Butler "Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand" [2001] P.L. 586.

⁶⁶ Richardson P, as he then was, reserved his decision on that issue: *R v Pora* (2000) 6 HRNZ 129, 147 [60].

⁶⁷ *R v Pora* (2000) 6 HRNZ 129, 157 [110]- 158 [114] (per Gault, Keith, McGrath JJ).

⁶⁸ *R v Pora* (2000) 6 HRNZ 129, 139 [20], 141 [29], 145 [52]-[53], 146 [56], 162 [131], 167 [151] (per Elias CJ, Tipping, Thomas JJ).

⁶⁹ *R v Pora* (2000) 6 HRNZ 129, 145 [52], 160 [120] (per Elias CJ, Tipping, Thomas JJ).

there be a gap, or by otherwise adopting an interpretation which accords with the purpose of the statute.”⁷⁰ Furthermore, they argued that through s 6 BORA Parliament had adopted a general principle of legality of the type acknowledged in a speech by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* and other overseas case law.⁷¹ In his speech (referred to by the judges) Lord Hoffman acknowledged that parliamentary sovereignty meant that Parliament could legislate contrary to human rights. However, Parliament was constrained by the principle of legality which meant that it had to “squarely confront what it is doing and accept political cost”.⁷²

On the doctrine of implied repeal there was an even split. Three judges held that it meant that the provision in the amendment prevailed. Their Honours drew their conclusion from the text and the statement of the Member of Parliament promoting it⁷³ and concluded that “Parliament’s word and purpose are, we consider, so plain that we do not think that the breach can be removed by judicial interpretation.”⁷⁴

The other three judges held that it was:⁷⁵

“inconceivable that Parliament would have acted so casually had it appreciated the implications [of the inconsistency with fundamental rights]. In the circumstances we do not accept that it is proper to draw an inference from the temporal sequence of the legislation or from the more specific terms of s 2(4) that Parliament intended it to prevail.”

The *Pora* and *Poumako* judgments are controversial in regard to whether the Court of Appeal was “judicially activist” by interpreting the legislation in issue with a result-orientated approach. That orientation assumed more or less openly that Parliament could not have wanted to fundamentally breach human rights by either holding that the earlier provision prevailed over the later or by giving the legislation a meaning which came to the “correct” result (but was otherwise strained).

3. Conclusion

The above mentioned cases show that Parliament has not been deprived of its sovereignty by the courts. Generally, the judges in New Zealand are very aware that they are not to tread into Parliament’s arena. The courts can rather be understood as supplementing Parliament’s intention by filling gaps in legislation and defining open terms rather carefully. However, Parliament has given up some of its moral power by allowing itself to be criticised by the courts either through declarations of inconsistency or when interpreting statutes (by stating that Parliament could not have intended that meaning since it would otherwise breach BORA). Moral power can be very powerful because the body entrusted with this moral power is required to do so by reference to legal standards and thereby generating stronger expectations as to compliance. However, Parliament already has experience with this kind of symbiosis in the Treaty of Waitangi field and the recommendations of the Waitangi Tribunal.

⁷⁰ *R v Pora* (2000) 6 HRNZ 129, 160 [122].

⁷¹ *R v Pora* (2000) 6 HRNZ 129, 145 [53]- 146 [56] (per Elias CJ, Tipping J).

⁷² *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131.

⁷³ *R v Pora* (2000) 6 HRNZ 129, 157 [107] (per Gault, Keith, McGrath JJ).

⁷⁴ *R v Pora* (2000) 6 HRNZ 129, 159 [116] (per Gault, Keith, McGrath JJ).

⁷⁵ *R v Pora* (2000) 6 HRNZ 129, 145 [48] (per Elias CJ, Tipping J).

Ultimately, the view whether the courts have been “activist” depends on whether parliamentary sovereignty means that in the end Parliament has the last word and the courts are not allowed to create law contrary to a clearly stated parliamentary intention but are free to develop the law within the parameters created by the statutes.⁷⁶ The authors take the view that the latter view is New Zealand’s constitutional reality.⁷⁷ A reality which has, at least in the area of human rights, contributed to New Zealand’s compliance with the international human rights instruments.

III. Dialogue between the Courts, Parliament and Government

The ACT Bill of Rights Consultative Committee opined, when discussing the effect of the proposed ACT Human Rights Act on the interaction of the three arms of government that it would reinforce a “dialogue” or institutional interaction between the different arms of government and the community.⁷⁸ Chief Minister of ACT, Jon Stanhope, described the purposes of the ACT HRA, as his Government saw it, thus:⁷⁹

What we wanted to create was a rights consciousness that permeated public administration, a conversation between the executive and the legislature, between government and the judiciary, between the public service and the people”

Similarly, the Human Rights Consultation Committee in its report for the Victorian Government found that a “dialogue” model best reflected the wishes of the public – it would best ensure the involvement of all arms of government in the promotion of human rights.⁸⁰ The Victorian Charter of Rights and Responsibilities seeks to achieve this aim.

However, the Consultative Committee described the dialogue as not open-ended since, after debate, the legislature was assigned the last say in relation to human rights issues. To create a dialogue, the judiciary could not be able to invalidate legislation but rather be able to give its opinion that a law is incompatible with the proposed Human Rights Act. It should then be a matter for the legislature to determine whether or not to amend the legislation so that it conforms to the proposed Human Rights Act.⁸¹ In this way, the “dialogue model” would best serve the democratic process in which it is in the realm of the legislature to be the final decision maker on human rights issues but on the other hand create an active role for the judiciary in the

⁷⁶ As S Elias CJ assured the public recently “Judges, in particular in a final appellate court, were subject to the law, limited by precedent, and the need to fit a case into the existing legal order” (Dominion Post, “Dame Sian and the Supremes” 20 March 2004, A 19). See also Stephen Franks NZLJ.

⁷⁸ ACT Bill of Rights Consultative Committee, *Report of the ACT Bill of Rights Consultative Committee: Toward a ACT Human Rights Act* (Canberra, May 2003) 61 para 4.5.

⁷⁹ Chief Minister Jon Stanhope, speech at the Act Human Rights Community Forum (1 May 2006) 2.

⁸⁰ Human Rights Consultation Committee, *Rights, Responsibilities and Respect- Report of the Human Rights Consultation Committee* (Melbourne, November 2005) chapter 4.

⁸¹ Report of the ACT Bill of Rights Consultative Committee, *Toward a ACT Human Rights Act* (May 2003) 61 para 4.5.

protection of human rights since the judiciary is perceived to be less swayed by immediate political agendas.⁸²

The concept of a “dialogue” in the human rights field is not new. In 1997 Peter Hogg and Alison Bushell published the results of their research into whether there is a “dialogue” between courts and Parliament.⁸³ They showed that the argument that judicial review of legislation under the Canadian Charter of Rights and Freedoms was illegitimate (because it was undemocratic by undermining parliamentary sovereignty) was in practical terms incorrect. Charter cases nearly always could be, and often were, followed by new legislation which accomplished the same or similar objectives as the legislation that was struck down by the Supreme Court.⁸⁴ However, their analysis only concerned Canada which has a constitutional set up which gives the Supreme Court the mandate to strike down legislation. Does the dialogue model work for a parliamentary bill of rights system?

In our view the “dialogue” concept is usually just as apposite, if indeed not more so, in respect of a statutory bill of rights system precisely because each of the actors has a substantial freedom of action within its own sphere.⁸⁵ Under a supreme bill of rights system the ability of political arms to directly challenge an unfavourable court decision is difficult (for example, a constitutional amendment to undermine a court decision is usually difficult to achieve), meaning that they must either accept the decision and incorporate it into the legal regime, or seek to tinker with it at the margins. Under a parliamentary bill of rights Parliament can, if it wishes, reverse the court through the ordinary legislative processes.

Turning to the position of the judges, as commentators such as Joseph, Rishworth, Gardbaum and others have emphasised, just because under a parliamentary bill of rights the courts cannot strike down legislation does not mean that judges cannot undertake a type of constitutional review: after all under a statutory bill of rights judges are typically empowered to interpret enactments in a bill of rights consistent way or can make declarations of inconsistency where the enactment unjustifiably trenches on fundamental rights (and cannot be read down to achieve consistency) or can grant remedies for rights violations.⁸⁶ In short, courts can form the sorts of judgments that courts operating under supreme bill of rights can – the only substantial constraint is what they can do in respect of some situations where a rights inconsistency is identified (viz. those where the inconsistency cannot be interpreted away).

⁸² Report of the ACT Bill of Rights Consultative Committee, *Toward a ACT Human Rights Act* (May 2003) 61 paras 4.1. – 4.4.

⁸³ P Hogg & A Bushell “The Charter Dialogue Between the Courts and Legislature” (1997) 35 Osgoode Hall LJ 75.

⁸⁴ P Hogg & A Bushell “The Charter Dialogue Between the Courts and Legislature” (1997) 35 Osgoode Hall LJ 75, Hogg and Bushell surveyed 65 cases in which a law was struck down for a breach of the Charter. These included all of the decisions of the Supreme Court of Canada in which a law was struck down, as well as several important decisions of trial courts and courts of appeal which were never appealed to the Supreme Court of Canada.

⁸⁵ See P Butler “Human Rights and Parliamentary Sovereignty in New Zealand” (2004) 35 VUWLR 341.

⁸⁶ S Gardbaum “The New Commonwealth Model of Constitutionalism” (2001) 49 AJCompL 707, 741; P Rishworth “The Inevitability of Judicial Review under ‘Interpretive’ Bills of Rights” (2004) 23 SCLR 233, 266; P Joseph “Constitutional Review Now” [1998] NZLRev 85.

Therefore, a parliamentary bill of rights system by its nature seems to readily lend itself to a dialogue model: after all Parliament by enacting the bill of rights not only makes clear that it supports human rights, but also states that it wants the courts to be a forum in which human rights issues can be considered. However, Parliament reserves its ability to react to a court decision on human rights as it sees best, having regard to political considerations. Equally, courts can form judgements on human rights issues and through their reasoning can identify problems and resolve many (though not all).

The more interesting question that then arises is – given that a parliamentary bill of rights lends itself, in principle, to encouraging dialogue among the different arms of government – does a dialogue actually occur and, if so, what is the nature of that dialogue?

The New Zealand experience, in our view, does show that a genuine dialogue can exist. Under BORA the rights debate is not dictated solely by the courts. Parliament can disagree and has disagreed with BORA-based court decisions and has reacted by a range of measures: overruling, minimisation and so on. Equally, on other occasions the political arms have accepted judicial outcomes, even if only after a “robust debate”. And the “robust debate” is an important point: it is not that Parliament **must** accept the expression of a judicial view – rather it **chooses** to accept the judicial view. A number of the cases considered earlier provide good illustrations.

1. *Baigent's case*

The salient facts and the decision in Baigent's case have been outlined earlier.

Judgment in *Baigent* was delivered on 29 July 1994. On 24 August 1994 the Minister of Police was asked whether the Minister had reviewed BORA and the recent Court of Appeal decisions in regard to the possibility that the police could be sued for breaching BORA. The question arose in relation to the alleged compulsory participation of suspects in police line ups and identification parades. The Minister of Police answered with a simple “no”.⁸⁷ However, the exchange does show that at least one Member of Parliament was aware of the significance of the *Baigent* decision.

In November 1995 the decision was mentioned in the Select Committee Report on the Courts and Criminal Procedure (Miscellaneous Provisions) Amendment Bill:⁸⁸ “Earlier this year the Government made a number of decisions regarding the *Baigent* decision, and the Law Commission was invited to include issues relating to Crown liability under BORA in its general review of Crown liability, and to report to the Cabinet Strategy Committee by 1 March 1996.” Indeed the Law Commission⁸⁹

⁸⁷ Hansard, Questions on Notice (24.08.1994) <http://gphansard.knowledge-basket.co.nz> (last accessed 15.06.2006).

⁸⁸ A Neill, Chairperson of the Justice and Law Reform Select Committee, Hansard (28 November 1995) <http://gphansard.knowledge-basket.co.nz> (last accessed 15 June 2006).

⁸⁹ The Law Commission is an independent, government-funded organisation, established under the Law Commission Act 1985, which reviews areas of the law that need updating, reforming or developing. It makes recommendations to Parliament, and these recommendations are published in its report series. The Law Commission receives references for work from the Government but also can self-refer issues for consideration.

published its report *Crown Liability and Judicial Immunity- A Response to Baigent's Case and Harvey v Derrick* in 1997.⁹⁰ As noted earlier, the Law Commission concluded that there should be no general legislation removing or circumscribing the remedy for breach of BORA, which *Baigent's* case held to be available. The Law Commission's conclusion in turn was considered by the Ministry of Justice without any further consequences.⁹¹

Since the Court of Appeal's decision in *Baigent* the courts have awarded BORA damages on a regular basis for violations of rights such as free movement, arbitrary arrest and unreasonable search and seizure.⁹² In a small number of cases, the award of damages has been controversial. In particular, controversy has attended settlements and court awards to prisoners for various human rights related violations they have suffered. These include settlements with several inmates of Mangarua Prison who were the subject of ill treatment; a court award of \$60,000 to an inmate who was held for 252 days more in prison than he should have been;⁹³ and most controversially compensation for five maximum security prisoners who had been subjected to a Behaviour Management Regime which was held to be a violation of s 23(5) BORA.⁹⁴ The, in New Zealand terms, relatively high amount of compensation awarded (in excess of \$130,000) in the latter case (*Taunoa v Attorney-General*) resulted in a public out-cry.⁹⁵

Parliament reacted to the decision in *Taunoa* and introduced in 2004 the Prisoners and Victims' Claims Bill. The intention was to give victims priority where prisoners were awarded compensation as a result of BORA breaches whilst in detention. The Attorney-General's report under s 7 BORA stated that the bill was BORA-consistent. Under the Prisoners and Victims' Claims Act 2005 the right of prisoners to compensation for violation of his or her BORA rights while in prison is not removed; rather the Act "only" gives victims the right to "share" in the proceeds of the rights violation. The Act came into force before an appeal to the Court of Appeal was decided. The Court of Appeal, though no doubt aware that awarding prisoner compensation was critically looked upon by Parliament, did not interfere with the trial judge's assessment of compensation. The treatment of this issue illustrates dialogue at work (although not everyone may be impressed by the nature of the dialogue!).

⁹⁰ NZLCR 37 (Wellington 1997)

⁹¹ See Ministry of Justice, *Corporate Plan 1997-99 - Public Law*, <http://www.justice.govt.nz/pubs/reports> (last accessed 16 June 2006).

⁹² See, for example, *Attorney-General v Upton* (1998) 5 HRNZ 54 (CA); *Innes v Wong (No 2)* (1996) 4 HRNZ 247 (HC); see, for a full treatment, A Butler & P Butler, *The New Zealand Bill of Rights Act 1990: a commentary* (Lexis Nexis, Wellington, 2005) chapter 27.

⁹³ *Manga v Attorney-General* (1999) 5 HRNZ 177 (HC).

⁹⁴ *Taunoa v Attorney-General* [2004] BCL 968 (HC). BORA, s 23(5) states "Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person."

⁹⁵ See: The Dominion Post "Inmates accuse jail of mental torture" (21 October 2003) 4, <http://helicon.vuw.ac.nz:2177> (last accessed 22 June 2006); The Dominion Post "Mistreated prisoners claim compo of \$605,000" (26 August 2004) 4, <http://helicon.vuw.ac.nz:2177> (last accessed 22 June 2006); Tony Wall "Murderer's compo stuns widow" Sunday Star Times (5 September 2004) <http://helicon.vuw.ac.nz:2177> (last accessed 22 June 2006); The Southland Times "To the victims go the spoils" (8 September 2004) <http://helicon.vuw.ac.nz:2177> (last accessed 22 June 2006).

2. *Martin*

Another area which is illustrative of how the three arms of government can interact with each other to avoid further BORA violations is the area of trial delay. The issue became public after the Court of Appeal in *Martin v District Court at Tauranga*⁹⁶ stayed the proceedings after a 17 months delay between the charge and the trial. Martin had been accused of three counts of sexual violation. The issue of trial delay became the subject of ministerial questions⁹⁷ and the Courts and Criminal Procedure (Miscellaneous Provisions) Amendment Act which brought about changes to the court structure to avoid further stays of proceedings. In fact the decision led to the case management system undergoing an overhaul to make criminal case management more efficient. All courts within the system scrutinised their procedure to avoid further delays. The problem of undue delay of trials resurfaced in 1997 when the increase of jury trials in the District Courts led to backlog and delay and the resulting of stay of proceedings because of it. Parliament enacted the Community Magistrates Act to ease the backlog and avoid stay of proceedings.

3. *Quilter*

We have already touched on the decision in *Quilter*. As noted, the Court of Appeal judges clearly felt that a decision of such social importance as the availability of marriage to same-sex couples should be made by the elected representatives of the people.

The case attracted some media attention.⁹⁸ For large parts of New Zealand society the result of the case was not satisfactory. The decision led to the Ministry of Justice preparing a discussion paper on the treatment of same-sex couples under the law⁹⁹ and the Law Commission publishing a study paper on similar issues.¹⁰⁰ Furthermore, from 2001, the Attorney-General – obviously herself picking up on international trends – began to report bills that did not treat equally opposite-sex and same-sex couples as being unjustified discrimination contrary to s 19 BORA.¹⁰¹ In 2004 the Civil Union Bill was introduced and passed and the companion measure (the Relationships (Statutory References) Act 2005) soon followed.

⁹⁶ (1995) 1 HRNZ 186 (CA).

⁹⁷ Hansard (8 May 1995); Phil Goff, Second Reading of the Courts and Criminal Procedure (Miscellaneous Provisions) Amendment Bill, Hansard (5 December 1995); see also Select Committee Report for the Courts and Criminal Procedure (Miscellaneous Provisions) Amendment Bill, Hansard (28 November 1995).

⁹⁸ See, for example: Vasil Anamika “Lesbians seek court ruling allowing them marital rights” *The Dominion* (26.02.1996) 3; *The Dominion* “Court rules against same-sex marriages” (29 May 1996) <http://helicon.vuw.ac.nz:2177> (last accessed 26 June 2006); *The Dominion* “Marriage campaigner hails report” (19.08.1997) <http://helicon.vuw.ac.nz:2177> (last accessed 26 June 2006); *The Evening Post* “Lesbian couples appeal gender-neutral Act” (3 September 1997) <http://helicon.vuw.ac.nz:2177> (last accessed 26 June 2006); *The Daily News* “Lesbian couples press claim to marry” (4 September 1997) <http://helicon.vuw.ac.nz:2177> (last accessed 26 June 2006); *The Dominion* “Gay lobby group; to take fight to Parliament” (18 December 1997) <http://helicon.vuw.ac.nz:2177> (last accessed 26 June 2006).

⁹⁹ Ministry of Justice, *Same-Sex Couples and the Law* (Wellington 1999).

¹⁰⁰ Law Commission, *Recognising Same Sex Relationships*, NZLC SP 4 (Wellington 1999).

¹⁰¹ See, for example, Social Security (Residence of Spouses) Amendment Bill 2001, War Pensions Amendment Bill (No 2) 2001. For full list see the table in A Butler & P Butler, *The New Zealand Bill of Rights Act 1990: a commentary* (Lexis Nexis, Wellington, 2005) 205, 206.

In sum, it took eight years from the Court of Appeal judgment in *Quilter* to the coming into force of the Civil Union Act 2004. This seems to be a long gestation period for an Act. However, remarkably the initiative was born out of a judgment that denied a part of society a “right” which large parts of society had. Led by the Ministry of Justice, a consultation process with all New Zealanders began which gave Government and Parliament the confidence to afford same-sex couples the same rights as heterosexual couples.

IV. BORA's contribution

Even 16 years out, it is hard to assess the contribution which BORA has made to the development of a human rights culture within New Zealand. For a start, a good number of people would say that human rights were already well protected and respected in New Zealand long before the enactment of BORA; BORA did not add (and has not added) much. Others would say that BORA suffers from a number of inherent weaknesses which mean that its effectiveness as a human rights protection measure is stunted. For example, the fact that BORA cannot be used to strike down inconsistent legislation means that where legislation is the cause of concern from a human rights perspective citizens are powerless to intervene. In addition, they would point to the limited range of rights which BORA protects and say that because its ambit is so restricted it often cannot reach human rights issues that matter to the wider community, such as education, privacy, and property rights.

One of the problems encountered by a bill of rights with a limited ambit, such as BORA, is that there is a danger that the public perception of what human rights are about can become skewed. In the New Zealand context the particular concern is that in the public eye BORA is seen as a type of “rogues' charter”.¹⁰² Very many of the leading BORA cases concern criminal process and prisoners' rights. So, for example, one of the earliest high profile BORA cases was *Noort v Police*, the direct result of which was that tens of thousands of drink-driving convictions were set aside due to the systemic failure of Police to accord the right to a lawyer to persons subjected to breath-alcohol/blood-alcohol. Later cases involved the quashing of convictions obtained through the use of unreasonably obtained evidence; the staying of a sexual violation prosecution for undue delay; and the award of \$135,000 to five prison inmates who had been placed on an unlawful segregation regime. These criminal process cases have rarely been balanced in the public eye by litigation which has resulted in vindication of other civil liberties with which the public is more likely to have an affinity. The Australian bills of rights deal with a broader range of subject matter than BORA, just as the European Convention on Human Rights (partly incorporated by the UK HRA) does. The UK experience is notable for the lack of a strong perception that the Convention is a rogues charter. That is probably a result of the fact that Convention jurisprudence on criminal process rights is not necessarily as exacting as that common law countries and by the fact that the Convention protects a wide range of the community can relate to.

On the other hand, BORA has brought together in a single, simply expressed statute a number of the most fundamental rights enjoyed in New Zealand. It has been the subject of litigation, which in turn has drawn publicity to it and the subject matter

¹⁰² I Richardson, “The New Zealand Bill of Rights: Experience and potential, including the implications for commerce” (2004) 10 *Canta L Rev* 259, 262.

with which it concerns itself. More and more one reads of references to BORA in the daily newspapers and hears references to it on radio and television. So there is a growing public awareness of the existence of a specific legislative measure which aims to protect and promote (some of) the rights of New Zealanders. Interestingly, in September 2004, the New Zealand Human Rights Commission published its substantial research report, *Human Rights in New Zealand Today*.¹⁰³ That report drew on a significant number of expert reports, seminars, workshops, research exercise and submissions on the state of human rights in New Zealand. One of the conclusions that Commission drew from its consultation exercise was that "most participants think that New Zealand is doing well in protecting and strengthening human rights, with reasonably comprehensive human rights legislation as well as some structures and processes for ensuring compliance with human rights standards".¹⁰⁴ To the extent that BORA is one of the more visible pieces of human rights legislation then clearly it has contributed to a public perception that New Zealand's human rights protections are good.

¹⁰³ Auckland, Human Rights Commission, 2004.

¹⁰⁴ Auckland, Human Rights Commission, 2004, at 172.