The Attorney General’s Obligation to Report Breaches of Rights in Proposed Legislation: How the Canadian and New Zealand Reporting Cultures Differ

by

Julia Rendell

A thesis submitted in conformity with the requirements for the degree of Master of Laws
Graduate Department of the Faculty of Law
University of Toronto

© Copyright by Julia Rendell (2011)
The Attorney General’s Obligation to Report Breaches of Rights in Proposed Legislation: How the Canadian and New Zealand Reporting Cultures Differ

Julia Rendell

Master of Laws

Graduate Department of the Faculty of Law
University of Toronto

2011

Abstract

This paper examines the Attorney General’s obligation, in Canada and New Zealand, to report on inconsistencies in proposed legislation with the Canadian Charter of Rights and Freedoms and the New Zealand Bill of Rights Act 1990. Although the obligations are similar, the Canadian and New Zealand Attorneys General have developed very different reporting cultures. The Canadian Attorney General has never issued a report; the New Zealand Attorney General has issued many. This paper’s thesis is that the different reporting cultures are attributable to the different constitutional structure in each jurisdiction and different understandings of the independence of the Attorney General. Under this analysis, the usefulness of comparative analysis between the two jurisdictions is limited: constitutional differences cannot be ignored. The paper evaluates proposed changes to the reporting obligation in each jurisdiction in light of this analysis.
# Table of Contents

Chapter 1 Introduction .................................................................................................................... 1

Chapter 2 The Attorney General’s Reporting Obligation............................................................... 7

1 Background .................................................................................................................................. 7

2 Independence of the Attorney General .................................................................................. 11

3 Obligation in practice .............................................................................................................. 14

3.1 Canada ................................................................................................................................... 14

3.2 New Zealand ....................................................................................................................... 16

3.3 Criticism of the exercise of the obligation ........................................................................... 18

Chapter 3 Case Studies ................................................................................................................. 22

1 Introduction ................................................................................................................................ 22

2 Sauvé case study ...................................................................................................................... 22

2.1 Sauvé (No 1) ....................................................................................................................... 22

2.2 New legislation .................................................................................................................... 22

2.3 Sauvé (No 2) ....................................................................................................................... 24

3 Prisoner disqualification in New Zealand .............................................................................. 26

3.1 Attorney General’s report ................................................................................................. 26

3.2 Process through Parliament ............................................................................................... 27

4 Extended supervision orders .................................................................................................. 29

4.1 Attorney General’s report ................................................................................................. 29

4.2 Process through Parliament ............................................................................................... 30

4.3 Court decision ................................................................................................................... 32

4.4 Second report and process through Parliament ............................................................... 34

5 Evaluation of the case studies ................................................................................................. 36

Chapter 4 Difference between the Roles in Canada and New Zealand .................................... 39
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Introduction</td>
<td>39</td>
</tr>
<tr>
<td>2</td>
<td>Canada</td>
<td>39</td>
</tr>
<tr>
<td>2.1</td>
<td>Description</td>
<td>39</td>
</tr>
<tr>
<td>2.2</td>
<td>Effect</td>
<td>41</td>
</tr>
<tr>
<td>3</td>
<td>New Zealand</td>
<td>42</td>
</tr>
<tr>
<td>3.1</td>
<td>Description</td>
<td>42</td>
</tr>
<tr>
<td>3.2</td>
<td>Effect</td>
<td>45</td>
</tr>
<tr>
<td>4</td>
<td>Why the different approach to the role?</td>
<td>47</td>
</tr>
<tr>
<td>4.1</td>
<td>Constitutional structure</td>
<td>47</td>
</tr>
<tr>
<td>4.2</td>
<td>Understanding of independence of the Attorney General</td>
<td>49</td>
</tr>
<tr>
<td>5</td>
<td>Conclusion on the different approaches</td>
<td>51</td>
</tr>
</tbody>
</table>

Chapter 5 Changes to the Reporting Obligation | 52 |
| 1 | Introduction | 52 |
| 2 | Threshold for reports | 52 |
| 3 | Political advice | 57 |
| 4 | Transparency of advice | 58 |
| 5 | Changes to the office of Attorney General | 61 |
| 5.1 | Member of Cabinet | 61 |
| 5.2 | Minister of Justice | 62 |
| 5.3 | Abstaining | 63 |
| 6 | Removing the reporting obligation from the Attorney General | 64 |
| 6.1 | A political actor | 64 |
| 6.2 | A parliamentary actor | 65 |

Chapter 6 Conclusion | 67 |

Bibliography | 69 |
| 1 | Primary sources | 69 |
1.1 Cases ..................................................................................................................... 69
1.2 Legislation............................................................................................................. 69
1.3 Parliamentary or government documents ............................................................. 70

2 Secondary sources............................................................................................................. 72
2.1 Articles and speeches ............................................................................................ 72
2.2 Books .................................................................................................................... 75
2.3 Newspaper articles and blogs ................................................................................ 76
Chapter 1
Introduction

The typical mechanism for ensuring legislative compliance with fundamental rights is allowing
the judiciary to enforce those rights. But, it is also possible to use mechanisms to encourage the
executive and the legislature to comply with rights in developing policy and legislation.¹ These
can operate in addition to, or instead of, the traditional judicial mechanisms for enforcement.
Both Canada and New Zealand have such a mechanism in the form of a requirement that the
Attorney General scrutinize proposed legislation for compliance with the Canadian Charter of
Rights and Freedoms (Charter)² or the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).³
These reporting obligations are designed to ensure that the executive considers rights issues
when drafting legislation and that Parliament is likewise aware of rights issues when enacting
legislation. However, despite the similar requirement, each country has taken a different
approach to its application. The Canadian Attorney General has yet to issue a report of
inconsistency. The New Zealand Attorney General issues such reports on a frequent basis.
These reports are often ignored by the government.

At the very least, the application of the reporting obligations reveals a different reporting culture
in Canada and New Zealand. It also raises questions about whether the Canadian Attorney
General is neglecting the obligation, whether the New Zealand government and Parliament are
disregarding rights issues, or the New Zealand Attorney General is over-reporting rights
breaches. Indeed, in both jurisdictions, there are debates about whether the reporting obligation
is being used appropriately by the Attorney General.⁴

¹ Janet L Hiebert, “Rights-Vetting in New Zealand and Canada: Similar Idea and Different Outcomes” (2005) 3 NZJPIL 63 at 63 (“Rights-Vetting in New Zealand and Canada”) at 63-64.
This paper considers the role of the Attorney General in exercising the reporting obligation. It asks how these obligations are executed differently in each jurisdiction and considers why this is the case. This discussion is illustrated by case studies from Canada and New Zealand. The first case study relates to disqualification of prisoners from voting in Canada. Obviously, it is impossible to offer a Canadian case study where the Attorney General issued a report of inconsistency. But, this case is interesting because it reveals the Attorney General and Parliament’s response to a contentious Charter issue. The Bill in question responded to the Supreme Court’s findings, in Sauvé v Canada (Sauvé (No 1)), that a blanket ban on prisoners’ voting was unconstitutional. Instead, the Bill provided that prisoners who were sentenced for more than two years’ imprisonment were disqualified from voting. Clearly, the Charter was at issue, but the Attorney General issued no report. Unsurprisingly, litigation followed and, in Sauvé v Canada (Sauvé (No 2)), the Supreme Court found that the new section breached the Charter, although the strong dissent of four reveals the extent to which this issue was contentious.

Two New Zealand case studies illustrate New Zealand’s different reporting culture. The first serves as a direct comparison to the Sauvé case study as it considers the progress of the Electoral (Disqualification of Convicted Prisoners) Amendment Bill, which extended the disqualification from voting applicable to prisoners serving a sentence of more than three years to cover all offenders serving a sentence of imprisonment. Unlike his Canadian counterpart, the New Zealand Attorney General issued a report on the Private Member’s Bill, indicating that in his view the Bill breached the right to vote in section 12 of the Bill of Rights Act. Although the Bill was enacted into law, analysis of the parliamentary debates on this issue reveals robust

---

7 Canada Elections Act, RSC 1985, c E-2, s 51(e). By the time of the judgment, this provision had been re-enacted in section 4(c) of the Canada Elections Act, SC 2000, c 9.
9 Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 (NZ), 117-1; The name of which was changed to the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill 2010 (NZ), 117-3.
debate on whether the limitation was justified. There has not been any litigation on the legislation since its passage into law in 2010. This is probably influenced by the fact that, in New Zealand, the courts cannot strike down legislation that they find to be inconsistent with the *Bill of Rights Act*, although they are directed to prefer a *Bill of Rights Act* consistent interpretation.

The second New Zealand case study relates to the passage of the extended supervision order regime into law. This case study has a number of interesting features. The Attorney General indicated in her report that the Bill violated the *Bill of Rights Act*. This led to considerable debate in Parliament on rights issues, and the issue was considered by the Select Committee.

This case study also offers one of the few examples of a Bill subject to a section 7 report that was subsequently litigated. This allows insight into how the courts treat the report. Although, the Court agreed that the *Bill of Rights Act* was engaged, the Attorney General’s report had limited impact on the decision. In part, this is a consequence of the New Zealand courts’ inability to strike down legislation that is inconsistent with the *Bill of Rights Act*. However, in this case the effect was even more limited because the Court never addressed whether the limitation on the right was justified under section 5 of the *Bill of Rights Act*. The Court of Appeal’s decision that they could not make a declaration of inconsistency was based on jurisdictional issues. These related to whether the matter was raised at first instance and whether declarations could be made in relation to criminal proceedings. This decision is somewhat confused by the fact that, in a short decision declining leave to appeal, the Supreme Court agreed that declaration of inconsistency was inappropriate, but also challenged the reasoning of

---

15 *Parole (Extended Supervision) and Sentencing Amendment Bill 2003* (NZ), 88-2, (Select Committee Report) at 4 and 5.
16 *Belcher v Chief Executive of the Department of Corrections*, [2007] 1 NZLR 507 (CA) [*Belcher* (CA No 1)].
17 *Belcher v Chief Executive of the Department of Corrections*, [2007] NZCA 174 [*Belcher* (CA No 2)].
the Court of Appeal for this decision.\textsuperscript{18} Regardless of the reasons for the decision, the Attorney General’s report played a limited role in the proceedings.

In 2007, the Government introduced a Bill that amended this regime without addressing any of the concerns raised by the Attorney General and the Court.\textsuperscript{19} This caused the Attorney General to issue another section 7 report.\textsuperscript{20} However, the Bill was passed with limited discussion on the Bill of Rights issues and the issue has not returned to the courts.

In light of the case studies, the paper’s main thesis is that the Canadian and New Zealand Attorneys General are performing different functions in exercising their reporting obligation. The Canadian Attorney General’s reporting obligation is litigation focused. The priority is assessing whether the legislation can be defended in subsequent litigation.\textsuperscript{21} The approach is integrated within the government, which allows political and the legal considerations to play a role in the final decision on whether to proceed with the legislation. The focus on litigation encourages the executive to comply with the Attorney General’s analysis of \textit{Charter} risks and whether there is a credible argument, but this does not mean that the government necessarily complies with the \textit{Charter} itself. The focus also encourages a secretive approach where discussion on rights issues is not released by the Attorney General in advance of litigation. This undermines the ability of Parliament and Parliamentary Committees to effectively debate \textit{Charter} issues.

In contrast, the New Zealand Attorney General exercises the power as an independent review, where the Attorney General undertakes the analysis that might occur in court. The review is seen, by the Attorney General, the government, and Parliament as being independent from the government and the Attorney General’s role as a Cabinet Minister and member of caucus. This concept of independence means that the government can distance itself from the Attorney General’s approach; it does not facilitate executive compliance. However, this approach allows the Attorney General to proactively release reports, and legal advice where no report is made.

\textsuperscript{18} \textit{Belcher v Chief Executive of the Department of Corrections}, [2007] NZSC 54 [\textit{Belcher (SC)}].
\textsuperscript{19} \textit{Parole (Extended Supervision Orders) Amendment Bill 2009 (NZ)}, 24-1.
\textsuperscript{21} See \textit{Charter Conflicts: What is Parliament’s Role?}, supra note 4, at 8 and 10.
This enables debate on these issues, although the debate in Parliament and Select Committees does not always tackle rights issues in a systematic and comprehensive manner.

The different approach is explained by the different constitutional structure in New Zealand and Canada. The New Zealand courts cannot strike down inconsistent legislation; the Canadian courts can and do. In Canada, it is virtually certain that controversial Bills will be litigated. The government can rely on the courts to strike down legislation that is found to be inconsistent. In New Zealand, there is a low chance of the issue being litigated. In many cases, the Attorney General’s analysis will be the only examination of the Bill of that nature. This means the Attorney General in New Zealand has freedom to raise Bill of Rights Act issues at an early stage, which then influence parliamentary debates and the Select Committee, without being afraid that it will prejudice litigation and knowing that this is likely the only time the issues will be discussed.

It is also facilitated by different understanding of the role of the Attorney General and his or her independence, even though in both jurisdictions the Attorney General has the independence of being the senior law officer. Canada sees the Attorney General’s review as being integrated within the government and more advisory in nature. But, under the Canadian understanding of independence, there is a high price to pay if the government disagrees. In this situation, it is suggested that the Attorney General must resign to retain independence.

The New Zealand understanding is that an analysis that is completely independent from the government (and with which the government is free to disagree) maintains the Attorney General’s independence. The Attorney General compartmentalises the role as Attorney General as separate from the role as a Cabinet Minister and member of a political Party. The present Attorney General, the Hon Christopher Finlayson, has recently indicated that he sees no contradiction with this approach. His concerns, as expressed in a section 7 report, are therefore

23 Canadian Charter of Rights and Freedoms, s 32.
“formally those of the Attorney-General, rather than his personally as a National MP and minister ‘sticking it to the National Party’”.

The performance of these obligations in Canada and New Zealand has led to changes being suggested. These reforms relate to the threshold used by the Attorney General, whether the analysis should be political, the transparency of the process, the nature of the office of the Attorney General, and whether other actors should be involved in the process. This paper evaluates these reforms in light of the style of analysis that has been adopted in New Zealand and Canada. The different constitutional structures limit the ability to rely on comparative analysis. An approach that works in Canada may not be consistent with the constitutional realities in New Zealand and the fact that the reporting obligation may be the only instance where these issues are fully considered. Similarly, New Zealand practices may not work in Canada because they do not recognise the significance of the prospect of litigation. The paper concludes that changes to the Canadian structure that do not sufficiently address the fact that the judiciary can strike down inconsistent legislation and the fears that the government is likely to have about this are unlikely to succeed. In New Zealand, proposals that do not recognise the importance of an independent style of review in light of the New Zealand constitutional structure are unlikely to succeed.

---

27 Ibid.

Chapter 2
The Attorney General’s Reporting Obligation

1 Background

Both the Charter and the New Zealand Bill of Rights Act have been described as “hybrid model” bills of rights, because the legislature, not the judiciary, has the final say on rights issues. This model has developed in Commonwealth jurisdictions and can also be seen in bills of rights in the United Kingdom and states of Australia. The hybrid models are in contrast with the model of constitutional supremacy, which is seen in the United States, where the Constitution is supreme and the court has the final say of the constitutionality of legislation.

Although in both Canada and New Zealand the legislature has the final say, in reality, these models are quite different. The Charter is very close to full judicial supremacy. The legislative override contained in section 33 of the Charter is rarely used. The use of this section has proved to be politically difficult. Therefore, the Charter has evolved into a document with strong-form judicial review similar to that in the United States.

The New Zealand Bill of Rights Act, in contrast, is closer to a system of parliamentary supremacy. The judiciary cannot strike down inconsistent legislation. The Bill of Rights Act does provide that the legislation should be interpreted consistently with the rights where possible. Much of the litigation on the Bill of Rights Act relates to this issue. The Court of Appeal has indicated that they have a power to make declarations of inconsistency stating that rights have been breached. However, the judiciary has never issued such a report, preferring to

---

34 See, for example, R v Hansen, [2007] NZSC 7, [2007] 3 NZLR 1; Moonen v Film and Literature Board of Review, [2000] 2 NZLR 9 (CA).
35 Moonen v Film and Literature Board of Review, supra note 34, at para 19.
make informal findings of inconsistency,\textsuperscript{36} and has backed away from the use of such a declaration.\textsuperscript{37} It seems unlikely that a court will make a declaration of inconsistency in the near future, if ever.

The \textit{Charter} and the \textit{Bill of Rights Act}, therefore, fall at opposite ends of the spectrum of hybrid bills of rights. This can be contrasted with the United Kingdom \textit{Human Rights Act 1998} which falls somewhere in the middle. Unlike Canada, the United Kingdom courts cannot strike down legislation. But the courts do have a formal power to make declarations of incompatibility in relation to inconsistent legislation.\textsuperscript{38}

The Attorney General’s reporting obligation as found in the \textit{Charter} and the \textit{Bill of Rights Act} had its origins in the \textit{Canadian Bill of Rights Act, 1960}, which was a statutory bill of rights similar to that of New Zealand. Section 3 of the \textit{Canadian Bill of Rights Act} requires the Minister of Justice to examine Bills for compliance with rights. The Minister must make a report of inconsistency to the House of Commons if rights are breached.\textsuperscript{39} Driedger described this as “an administrative ‘policing’ provision”.\textsuperscript{40} Although the Act is similar in form to the New Zealand \textit{Bill of Rights Act}, the practice in relation to section 3 is closer to that seen under the \textit{Charter}: only one report has ever been made.\textsuperscript{41} This 1975 report was on the \textit{Feeds Act}, and occurred after the Senate introduced an amendment presuming guilt. On the Bill’s return to the House of Commons, the Minister of Justice reported the inconsistency and it was deleted. This scenario is not one where the government was advancing policy that breached rights.

The \textit{Charter} itself does not contain any requirement that the Attorney General assess legislation for consistency. On the enactment of the \textit{Charter}, no obligation existed in Canada. However, in 1985, a requirement to do so, in relation to federal legislation, was included in the \textit{Department of Justice Act}. Section 4.1(1) of the \textit{Department of Justice Act} provides:

\textsuperscript{36} See, for example, \textit{R v Hansen}, supra note 34.
\textsuperscript{38} \textit{Human Rights Act 1998} (UK), c 42 , s 4.
\textsuperscript{39} \textit{Canadian Bill of Rights}, SC 1960, c 44, s 3.
\textsuperscript{41} Driedger, supra note 40, at 306.
Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine... every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

The Act provides that the Minister of Justice is “ex officio Her Majesty’s Attorney General of Canada”. 42 This paper refers to the obligation being that of the Attorney General because the duties that attach to the Attorney General as a law officer are engaged. As Huscroft explains: 43

Although, in theory, the duties and conventions apply historically to the Attorney General rather than the Minister of Justice, it would be artificial to suggest that the Attorney General is not required to observe those duties and conventions when wearing the Justice hat in performing the reporting duty.

In New Zealand, the Attorney General’s reporting obligation was not suggested in the White Paper on the Bill of Rights, which recommended a bill of rights more similar to the Charter with judicial review of legislation.44 A bill of rights of this nature did not gain sufficient political and public support.45 As the Justice and Law Reform Select Committee, which considered the White Paper, noted, New Zealand was not “yet ready, if it ever will be, for a fully fledged bill of rights”.46 Accordingly, a statutory bill of rights was enacted, which contained the Attorney General’s requirement to report on inconsistent Bills. Section 7 provides that:

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

The Standing Orders provide more detail as to how this is to be exercised. Where section 7 applies, the Attorney General must indicate to the House of Representatives what the provision is and how it is inconsistent with the Bill of Rights Act by the presentation of a paper to the House.47 If amendments are introduced post-introduction, they are not subject to a Bill of Rights Act vet.48 The Attorney General makes the report on the advice of officials from the Ministry of Justice, or, in the case of Bills developed by the Ministry of Justice, on the advice of the Crown

42 Department of Justice Act, RSC 1985, c J-2, s 2(2).
43 “Reconciling Duty and Discretion”, supra note 4, at 775, footnote 4.
47 Standing Orders of the House of Representatives 2008 (NZ), SO 261.
48 See the cases R v Pounako, [2000] 2 NZLR 695 (CA) and R v Pora, [2000] NZCA 403, [2001] 2 NZLR 37 as examples of inconsistent amendments made to Bills after their introduction into Parliament.
Law Office (the organization responsible for providing legal advice and representation to the government). In the event that no report is made, since 2003, the advice to the Attorney General is published on the Ministry of Justice website.\(^{49}\)

A number of other bills of rights from the commonwealth have included similar provisions. For example, section 19 of the United Kingdom \textit{Human Rights Act} requires the Minister responsible to make a statement about the Bill’s compliance with the \textit{Human Rights Act} on its introduction to Parliament. Similarly, the Victorian \textit{Charter of Human Rights and Responsibilities 2006} requires a Member of Parliament who introduces a Bill to make a statement of compatibility.\(^{50}\) In the Australian Capital Territory, under the \textit{Human Rights Act} 2004, the Attorney General must make a statement of consistency in relation to government Bills.\(^{51}\) Although these obligations are similar, a significant difference is that the United Kingdom and Victorian models require the Minister or Member of Parliament responsible for the Bill to make a report, rather than the Attorney General. This is significant because, as discussed below, the independence of the Attorney General is relevant to how the role is performed. The use of different actors to perform this function will be explored in chapter 5.

The obvious purpose of the reporting obligations throughout the Commonwealth is as an additional mechanism to ensure compliance with human rights. This is of particular significance to the extent that these models depart from supreme law constitutions with strong-form judicial review. Ensuring legislation complies with the bill of rights, lessens the need to have recourse to judicial enforcement mechanisms.

There are two facets to this role. On the one hand, it encourages executive compliance with human rights when developing policy and legislation. This is achieved by giving the executive the incentive of avoiding a report which says that the legislation breaches human rights and thus avoiding embarrassment and criticism.\(^{52}\)


\(^{50}\) \textit{Charter of Human Rights and Responsibilities Act 2006} (Vic), s 28.

\(^{51}\) \textit{Human Rights Act 2004} (ACT), s 37.

On the other hand, it is also designed to encourage parliamentary compliance with human rights issues. This is achieved by making Parliament aware of human rights issues and thus enabling parliamentary discussion in the Houses of Parliament and in committees. The concern is that the absence of a report (or any reasoning) deprives the legislature of “important ‘navigation lights’ necessary during the passage of legislation”. Connected to this is the idea that the public should be informed about Parliament’s approach to rights issues. According to Butler, the public also has a “keen interest in understanding why, in particular instances, the view has been taken that a legislative measure is consistent with the Bill of Rights”.

2 Independence of the Attorney General

To fully introduce the obligation to report inconsistent legislation, it is useful to explain aspects of the role of the Attorney General. The traditional independence of the Attorney General has significance in relation to this role in New Zealand and Canada. The Attorney General’s role has a long history as the senior law officer of the government in the United Kingdom where the Attorney General is not a part of the Cabinet. This role requires the Attorney General to be the legal advisor to the government as a whole, and to assume responsibility for litigation, prosecutions, and the public interest generally. While there may be a political aspect to the Attorney General’s role; the basic requirement of the United Kingdom constitution is that “however much of a political animal he may be when he is dealing with political matters, he must not allow political considerations to affect his actions in those matters in which he has to act in an impartial and even quasi-judicial way”.

The role of the Canadian and New Zealand Attorneys General derives from the office in the United Kingdom. There is, however, one significant difference, the Canadian and New Zealand Attorneys General are members of Cabinet. In the case, of the Canadian Attorney General, the

---

53 See, for example, “Parliament and the Human Rights Act”, supra note 28, at 13; “Reconciling Duty and Discretion”, supra note 4, at 776; Butler & Butler, supra note 52, at 198.
54 Archer, supra note 4, at 321.
55 Butler, supra note 52, at 145-146.
58 Ibid at 50.
Minister of Justice is *ex officio* the Attorney General.\(^{59}\) In New Zealand, according to the Cabinet Office Manual, the Attorney General is almost always a minister.\(^{60}\) According to Philip Joseph, the New Zealand Attorney General is “usually” also the Minister of Justice.\(^{61}\) However, it has become increasingly common under the Mixed Member Proportional electoral system (MMP), which was first used in 1996, “to split the portfolios”.\(^{62}\) This means that since the introduction of the *Bill of Rights Act*, the Attorney General has generally not been the Minister of Justice.

Both Canada and New Zealand preserve the independence of the Attorney General. Some Canadians argue that the independence of the Attorney General does not extend beyond prosecutorial independence. For example, according to Kelly:\(^{63}\)

> While the Canadian minister of justice does possess attorney general independence, it has been limited to prosecutorial freedom and has yet to emerge in the context of the *Charter* through section 4.1(1) of the *Department of Justice Act*.

It appears that Kelly makes this statement because the Attorney General has never yet exercised the power under section 4.1 of the *Department of Justice Act* in a way that is clearly independent from government.

However, other Canadians are of the opinion that the independence equally applies to the policy-making activity of the Attorney General.\(^{64}\) It is acknowledged that the independence may be more limited in this area because of the nature of policy-making as opposed to prosecutorial decisions. As Lori Sterling and Heather Mackay explain, the Attorney General “will likely never reach the level enjoyed in the criminal sphere” because the Attorney General acts as an “advisor not as a decision-maker”.\(^{65}\)

In New Zealand, the obligation under section 7 of the *Bill of Rights Act* is understood as being part of the Attorney General’s law officer obligations and being covered by the Attorney

---

\(^{59}\) *Department of Justice Act*, RSC 1985, c J-2, s 2(2).
\(^{62}\) *Ibid* at 1135, footnote 698.
\(^{63}\) “Legislative Activism and Parliamentary Bills of Rights”, *supra* note 28, at 96.
\(^{65}\) Sterling & Mackay, *supra* note 24, at 894.
General’s independence. The Cabinet Office Manual provides that when exercising the role of the law officer, by convention, “the Attorney-General is not influenced by party political considerations, and should avoid appearing to be so influenced”.67

There is a different understanding, in Canada and New Zealand, about how the Attorney General should act when his or her opinion is different from that of Cabinet. In Canada, there is authority suggesting that the Attorney General must resign.68 In New Zealand, this is not the case, and the independence is preserved in other ways. This issue will be explored in greater in chapter 4.

The independence in Canada and New Zealand is qualified by the Attorney General’s membership in Cabinet and in the party that is in government. This has an effect on how the Attorney General can conduct himself or herself within the government and within Parliament. King explains that an Attorney General who is a Cabinet minister:69

[He]as, beyond the political responsibilities of a ministerial portfolio of the same nature as the responsibilities of other ministers, a special responsibility for the rule of law and the integrity of the legal system which transcends, and may at times be in conflict with, political exigencies. The Attorney-General has the unique role in government of being the political guardian of the administration of justice. It is the special role of the Attorney-General to be the voice within government and to the public which articulates, and insists upon observance of, the enduring principles of legal justice, and upon respect for the judicial and other legal institutions through which they are applied.

The reporting obligation may require the Attorney General to disagree with ministerial colleague on rights issues. But this position is not remarkable: “Attorneys General have always had legal duties that set them apart from other members of Cabinet, duties that require them to act independently in a variety of contexts”.70

However, ultimately, the Attorney General is bound by the convention of collective ministerial responsibility. This can create tension between being independent and being a member of Cabinet. In New Zealand, because the role of the Attorney General has (in recent years) been separate from the Minister of Justice, the tension is relieved somewhat. According to Kelly, this “has reduced the tension between partisanship and legality that has undermined the reporting

67 Cabinet Office, supra note 60, at para 4.4.
70 “Reconciling Duty and Discretion”, supra note 4, at 777. See too Edwards, supra note 25, at 52.
function in Canada”. Even if the approach in Canada does not actually lessen the independence of the actions of the Attorney General, it may give the appearance of being influenced by partisan concerns.

It should also be remembered that the Attorney General is a member of caucus. This has particular significance in New Zealand, where the Attorney General frequently reports that Bills are inconsistent with the *Bill of Rights Act*, but acts as a member of caucus in Parliament. In New Zealand, all votes in the House (except for conscience issues) are subject to the whip and it is uncommon for Members of Parliament to vote against their party. Certainly, Attorneys General have voted with their party even where the Bill in question has been subject to a report under section 7 of the *Bill of Rights Act*. In Canada, because the Attorney General never finds the legislation to be unconstitutional, the position of the Attorney General as a member of caucus has not assumed a great significance.

### 3 Obligation in practice

The Canadian and New Zealand obligations are worded similarly. The Canadian section requires a report where is an inconsistency. The New Zealand requires a report on an apparent inconsistency. However, the approach in Canada and New Zealand has been very different. This section sets out a preliminary summary of how the role has been performed to date. The practice in New Zealand and Canada will be explored in detail below in relation to case studies. The section finishes by setting out academic commentary and criticism of the exercise of the reporting obligation in Canada and New Zealand.

#### 3.1 Canada

As the Attorney General in Canada has never issued a report of inconsistency, there is very little, on which to judge how section 4.1 has operated in practice. There is limited explanation as to why the Attorney General has never issued a report.

---

71 “Legislative Activism and Parliamentary Bills of Rights”, *supra* note 28, at 96.
The government has developed processes within the bureaucracy to ensure executive compliance with the Charter. Patrick J Monahan and Marie Finkelstein claim that the Charter has “permanently changed the way in which policy proposals make their way to the Cabinet table”. These changes have included the increased presence of lawyers earlier in the process and the Department of Justice becoming a central agency of government. Kelly describes this as a Cabinet-centred model where the main responsibility in ensuring constitutionality of statutes falls on the Cabinet and the Department of Justice.

The method of analysis used by the Attorney General seems likely to weigh in favour of Bills being found consistent with the Charter. The Attorney General is focused on risk-assessment of the “degree of difficulty in justifying legislation under the Charter”. Hiebert explains that the threshold used by the Attorney General for making a report under this risk analysis is high: that is, no report will be made if there is a credible Charter argument. But the Cabinet is often willing to proceed with Bills that “will likely lead to litigation and where guarantees cannot be provided that the legislation will be successfully defended”. The nature of Charter issues means that there is generally some argument in favour of legislation being consistent with the Charter. This means that, first, it is unlikely that this high threshold would be met, particularly given the bureaucratic developments outlined above. Secondly, if the Attorney General did find that there is no credible Charter argument it is unlikely that the government would be prepared to proceed given the damning nature of such a report. As Hiebert notes, “the prevailing assumption is that government should not pursue legislation that is considered to be so patently inconsistent with the Charter that it would require the justice minister to report to Parliament”.

---


74 Monahan & Finkelstein, supra note 73, at 504.

75 Ibid at 512; see too Petter, supra note 73, 34.

76 Governing with the Charter, supra note 73, at 55.

77 Charter Conflicts: What is Parliament’s Role?, supra note 4, at 8; See too Sterling, supra note 73, at 147.

78 “Rights-Vetting in New Zealand and Canada”, supra note 1 at 72.

79 Ibid at 72.

Parliamentary scrutiny in Canada on rights issue is often limited. As Hiebert explains, “Parliament has generally been ignored as a forum for evaluating the merits of legislative decisions in light of their Charter implications”. A lack of information and the secrecy surrounding the scrutiny of legislation by the government is likely to contribute to this limited debate. As noted, there are no reports of inconsistency or advice to which Members of Parliament can refer. This secretive environment is “protected by confidentiality requirements of lawyers working within the Department of Justice, by a lack of public access to the relevant paper trails, and by cabinet secrecy”.

3.2 New Zealand

In New Zealand, the Attorney General has issued these reports relatively frequently, with 58 reports since the Bill of Rights Act’s enactment. Slightly under half of these have been made in respect of government Bills. The number of reports has been high in recent years with nine reports in 2010. Sometimes the reports result in changes to the Bill, but often the legislation is passed into law without altering the offending provision. In a speech in 2010, the Minister of Justice, the Hon Simon Power noted that out of the then 51 reports (he excluded those that were before Parliament), 21 were withdrawn or defeated, 10 were amended to address the inconsistency and 20 were enacted unchanged. In his analysis of section 7 reports, Huscroft explains that section 7 reports are more likely to have an effect on non-government Bills (of course, these Bills are in general more likely to fail), but the reports have had less impact on government Bills. A report on a government Bill is likely to have a negligible impact, because

83 See Charter Conflicts: What is Parliament’s Role?, supra note 4, at 8; For a pre-2003 New Zealand perspective on the lack of transparency see Butler, supra note 52, at 146.
84 Charter Conflicts: What is Parliament’s Role?, supra note 4, at 8.
87 Hon Simon Power, Minister of Justice, Address (Speech delivered at the Bill of Rights Act Symposium, Wellington, 11 November 2010) [unpublished] online: Beehive <www.beehive.govt.nz>.
the “government already has committed substantial policy resources and political capital by introducing it into the House, so has a vested interest in pushing it through to enactment.”

There has been less focus than in Canada on the bureaucratic compliance with the Bill of Rights Act. There is no centralized provision of legal advice. Rather, the line department provides the initial legal support for its own Bills. This should involve analysis of Bill of Rights Act issues. The Legislation Advisory Committee Guidelines, which are designed to assist departments to develop policy and write drafting instructions, contain a chapter on compliance with the Bill of Rights Act. The Cabinet Office Manual requires that the responsible Minister, when obtaining Cabinet approval for a Bill, must state any inconsistencies with the Bill of Rights Act. After this, the Bill is drafted by Parliamentary Counsel Office and sent to either the Ministry of Justice or the Crown Law Office for the formal Bill of Rights Act analysis. The Bill of Rights Act analysis occurs rather late in the process and is somewhat removed from the ordinary policy-making process. According to his experience as Crown Counsel, Andrew Butler claims that, in practice, problems are often resolved informally once identified. Although some commentators have asserted that the Bill of Rights has led to beneficial effects in the development of law and policy, it does not appear that there have been any quantitative studies on this issue.

In contrast, attention is given to the idea of parliamentary compliance. It was initially proposed, that a dedicated select committee consider Bill of Rights Act issues in Parliament. This was never implemented. Nevertheless, when the Attorney General issues a report this is often used in parliamentary debate and select committees, although the level of attention given to the report in varies according to the Bill. In New Zealand, it has been acknowledged that situations where there are Bill of Rights Act issues but the Attorney General does not report put Parliament in a difficult situation when considering rights issues and when these issues are raised at the Select

---

89 Geddis, supra note 32, at 477.
91 Cabinet Office, supra note 60, at para 7.60.
92 Butler, supra note 52, at 145.
93 Palmer and Palmer, supra note 72, at 326.
94 See Geddis, supra note 32, at 472.
95 Butler & Butler, supra note 52, at 207 citing NZ, Hansard, (10 October 1989) 502 NZPD at 13040 (Geoffrey Palmer MP), 13051 (Richard Northey MP); NZ, Hansard, (17 July 1990) 509 NZPD at 13051 (Richard Northey MP); NZ, Hansard, (14 August 1990) 510 NZPD at 3450 (Geoffrey Palmer MP), 3463 (Richard Northey MP).
96 See Geddis, supra note 32.
Committee stage. Writing in 1999, Butler criticised the lack of transparency, which means that it is necessary to rely on assurances from people “working within the process”. The government enhanced the possibility of parliamentary debates on rights issues by releasing the advice to the Attorney General from 2003 by publishing it on the Ministry of Justice’s website. This has contributed to the ability of Parliament to effectively debate proposed legislation.

In New Zealand, it is constitutionally appropriate for the Attorney General to make a report of inconsistency and then vote with his party in support of the Bill. The present Attorney General, the Hon Christopher Finlayson, has recently indicated that he sees no contradiction with this approach.

Because the New Zealand judiciary is not empowered to strike down legislation under the *Bill of Rights Act*, relative to Canada there is less litigation in relation to the potentially inconsistent provisions. Litigation on legislation often centres on interpretive issues. Access to the report or the advice can be useful for the courts in interpreting provisions in accordance with section 6 of the New Zealand Bill of Rights Act, which provides that the courts must prefer a Bill of Rights consistent interpretation. This was the case in a recent New Zealand Supreme Court case, *R v Hansen*, where the Court relied on the Attorney General’s advice to interpret the provision and ascertain Parliament’s intention.

### 3.3 Criticism of the exercise of the obligation

There has been some criticism of the approach to the reporting obligation in Canada and New Zealand. This section briefly sets the nature of this criticism. These proposals will be considered in more detail in chapter 5.

---

97 Archer, *supra* note 4, at 322.
98 Butler, *supra* note 52, at 145.
102 But see, *Belcher* (CA No 1), *supra* note 16.
103 See, for example, *R v Hansen*, *supra* note 34; *Moonen v Film and Literature Board Review*, *supra* note 34.
104 Butler, *supra* note 52, at 146.
The overall concern, in Canada and New Zealand, is that the reporting obligation is used (or not used) in a way that undermines the value of the obligation and prevents it from achieving its objectives of encouraging executive and parliamentary compliance. In Canada, the failure of the reporting obligation to secure these goals generally centres on the fact that section 4.1 of the Department of Justice Act is never actively used. For example, Roach is of the opinion that the current practice “runs the risk of eroding the credibility of the pre-enactment scrutiny of legislation for compliance with the Charter”. In New Zealand, commentators are divided on whether the failure of section 7 is because it is used too much, or not enough. In addition, concern is expressed that even when the reporting obligation is used in New Zealand, it does not necessarily result in parliamentary compliance with the Bill of Rights.

Possible reforms in Canada and New Zealand focus on the threshold for making a report, whether the report is sufficiently political, the need to develop a more transparent process, possible changes to the nature of the role of the Attorney General, and changes which look more broadly at the government and Parliament in order to find ways to encourage compliance with the rights beyond using the Attorney General.

In relation to the change in threshold, the arguments centre on the nature of the judgment being made by the Attorney General. The main problem identified with the current threshold is that they do not allow for sufficient recognition of room for disagreement on rights issues. There are suggestions that the review should be more of a flagging mechanism that rights are at issue or there is a risk that rights are breached, than a definitive decision that rights have been breached.

In New Zealand, it has also been argued that there should be a move from legal to a more political analysis. Similarly to the threshold argument, this would allow for more recognition of diverse views on rights issues.

---

106 “Not Just the Government’s Lawyer”, supra note 4, at 603-604.  
108 Fitzgerald, supra note 4, at 138-139; Archer, supra note 4.  
109 See Geddis, supra note 32, at 476-479.  
111 “Rights-Vetting in New Zealand and Canada”, supra note 1, at 101; Geddis, supra note 32, at 475.  
Arguments for greater transparency are a feature of Canadian debate, and were a feature of New Zealand debate before the advice of the Attorney General began to be released. The idea of these changes is that a transparent process can facilitate parliamentary debate. It is also seen by some as enhancing the independence and accountability of the Attorney General and government lawyers.

Other arguments have focused on the need to reconsider the role of the Attorney General. Kelly also critiques the approach to the obligation. But instead suggests structural changes to how the government and the Attorney General’s position to enable the provision to be used more effectively. For example, he recommends the separation of the Department of Justice and Attorney General’s Department and a separate Minister of Justice and Attorney General.

Hiebert notes that there is a tension in the reporting responsibilities because of the dual roles of Minister of Justice and Attorney General. This is because of “a potential conflict the minister may face in guarding the public interest and serving in cabinet – that is, the cabinet may be committed to a course of action that may conflict with the public interest”. This can be contrasted with Fitzgerald, in the New Zealand context, who argues that the fact that the Ministry of Justice, Crown Law Office and Parliamentary Counsel Office are separate can lead to inadvertent breaches of the Bill of Rights Act. Others have explored whether the Attorney General should be a Cabinet Minister.

One simple proposed change is to require the Attorney General to report on amendments to Bills after they are introduced into parliament. This would avoid the situation that occurred in New Zealand where a retrospective penal provision was introduced in Parliament, sparking two court cases. The case for this amendment is not controversial. It is clearly contrary to the
intent of the reporting obligation to allow such changes to slip in unreported in this way. Therefore, the paper does not discuss this proposal further.

Finally, some proposed structural changes would involve other actors in the process. For example, Canada and New Zealand could adopt the model used in the United Kingdom for scrutiny of proposed legislation.\footnote{See “Parliament and the Human Rights Act”, supra note 28; Anthony Lester QC, “Parliamentary Scrutiny of Legislation under the Human Rights Act 1998” (2002) 33 VUWLR 1.} Under this model, the responsible Minister, not the Attorney General, reports on the consistency of the proposed legislation and a dedicated parliamentary committee considers rights issues in Parliament.
1 Introduction

Case studies provide a useful illustration of the issues set out above and an example of how the reporting obligation operates in practice in Canada and New Zealand. For this purpose, three case studies have been selected. The first, the Sauvé case study, is a Canadian example, of a situation where the reporting obligation could have been exercised by the Attorney General. The second two, which relate to disqualification of prisoners from voting and extended supervision orders, provide New Zealand examples of how section 7 is used by the Attorney General.

2 Sauvé case study

2.1 Sauvé (No 1)

Section 51(e) of the Canada Elections Act originally contained a blanket ban on prisoners voting in federal elections. In 1993, in very short unanimous decision, the Supreme Court of Canada held that this violated section 3 of the Charter. Section 3 provides that “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly”. The Court held that section 51(e) “is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s 1 jurisprudence of the Court.”

2.2 New legislation

Prior to the Supreme Court’s decision in Sauvé (No 1), the Royal Commission on Electoral Reform and Party Financing had considered this issue. The Commission recommended a balance that offered greater protection to the rights of prisoners by providing that “persons

---

126 Canada Elections Act, RSC 1985, c E-2, s 51(e).
127 Sauvé v Canada (Attorney General), supra note 6.
128 Ibid at para 2.
convicted of an offence punishable by a maximum of life imprisonment and sentenced for 10 years or more be disqualified from voting during the time that they are in prison”.  

However, the Government, in revising the disqualification of prisoners from voting, rejected this approach. The legislature’s response to the Supreme Court’s decision was to enact a new provision that provided that prisoners who were sentenced for more than two years imprisonment were disqualified from voting. This new provision qualified the blanket ban on prisoners voting. However, this still raised Charter issues. Section 3 of the Charter provides an absolute right to vote. The new provision, therefore, clearly fell within the ambit of section 3, requiring consideration of whether the provision was justified under section 1 of the Charter. The potential conflict was obvious given the decision in Sauvé (No 1).

The Attorney General did not issue a report on this Bill. The implication of this might be that the Attorney General thought that the provision was consistent with the Charter and justified under section 1. However, because the threshold for making a report in Canada is whether there is an arguable Charter argument, it could be that the Attorney General thought that it would be possible to mount a credible defence of the provision if litigation ensued.

This matter was debated in Parliament. Most members who spoke opposed the Bill. The arguments advanced in support of the provision were limited, with only two members speaking in favour of the limitation and no ministers speaking in support of the Bill. As Kent Roach notes “[t]he government was not required, as it was in court, to marshal its arguments about its precise objectives in limiting the votes of prisoners”. A motion to amend the provision to give prisoners the right to vote was defeated. Although the Charter was raised on both sides of the debate, there was no detailed discussion of why it did or did not apply.

130 Canada Elections Act, RSC 1985, c E-2, s 51(e). By the time of the judgment, this provision had been re-enacted in section 4(c) Canada Elections Act, SC 2000, c 9.
131 Sauvé v Canada (Attorney General), supra note 6.
The *Canada Elections Act* was enacted in 2000 and section 4(c) substantially re-enacted section 51(e).\(^{134}\) Despite the potential *Charter* issue, still no report was issued by the Attorney General and the matter does not appear to have been discussed at all in Parliament.

### 2.3 *Sauvé* (No 2)

The new section 51(e) of the *Canada Elections Act* returned to the courts in the 2002 case of *Sauvé* (No 2).\(^{135}\) The Attorney General conceded that the provision breached section 3 of the *Charter*, but advanced an argument under section 1 of the *Charter*. A majority of five judges found that the provision unjustifiably limited section 3 of the *Charter*; however, a strong dissent of four held that the limitation was justified under section 1 of the *Charter*.

The difference of opinion between the majority and the minority centred on the appropriate deference to be granted to the legislature. McLachlin J for the majority stated that:\(^{136}\)

> The right to vote is fundamental to our democracy and the rule of law and cannot be set lightly aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court’s philosophical preference for that of the legislature, but of ensuring that the legislature’s proffered justification is supported by logic and common sense.

In her view, “[d]eference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights”\(^{137}\).

The Government advanced two objectives for the denial of the right:\(^{138}\)

1. To enhance civic responsibility and respect for the rule of law; and
2. To provide additional punishment or enhance the general purpose of criminal sanction.

The majority criticized the “rhetorical nature” of the Government’s objectives.\(^{139}\) In its view, the Government “failed to identify particular problems that require denying the right to vote, making it hard to say that the denial is directed at a pressing and substantial purpose”.\(^{140}\) Nevertheless, the majority proceeded to the proportionality analysis. On the majority’s analysis, the provision was not rationally connected to either the educative or the punitive objective.

---

\(^{134}\) *Canada Elections Act*, SC 2000, c 9, s 4(c).

\(^{135}\) *Sauvé v Canada (Chief Electoral Officer)*, supra note 8.


\(^{138}\) *Ibid* at para 21.

\(^{139}\) *Ibid* at para 24.

\(^{140}\) *Ibid* at para 26.
advanced by the Government.\textsuperscript{141} In applying to all prisoners serving sentences of more than two years, the provision was too broad. It could not be saved “by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise”.\textsuperscript{142} It was difficult to substantiate that the two-year term was a “reasonable means of identifying those who have committed ‘serious’, as opposed to ‘minor’, offences”.\textsuperscript{143} In addition, the fact that the disenfranchisement ends when the sentence ends did not ameliorate its effect.\textsuperscript{144} Lastly, the “negative effects of denying citizens the right to vote would greatly outweigh the tenuous benefits that might ensue”.\textsuperscript{145} In particular, section 51(e) has a disproportionate effect on the Aboriginal population.\textsuperscript{146}

Gonthier J, writing for the minority, advanced the opinion that this case required the Court to look at different “social or political philosophies” and that, in this situation, “it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive Charter scrutiny”.\textsuperscript{147} In the view of the minority, there were two possible views. There is the majority view, which prefers an “inclusive approach to democratic participation for serious criminal offenders incarcerated for two years or more”.\textsuperscript{148} Alternatively, the view adopted by Parliament considers that “the temporary suspension of the prisoner’s right to vote, in fact, enhances the general purposes of the criminal sanction… by underlining the importance of civic responsibility and the rule of law”.\textsuperscript{149} These views depend on accepting political or social philosophies about the nature or content of the right to vote. On this issue, the minority took a deferential approach to the decisions of Parliament. The minority noted the importance of the idea of dialogue and the idea “neither the courts nor Parliament hold a monopoly on the determination of values”.\textsuperscript{150} The approach taken by Parliament should be respected because the justification is based on a rational and reasonable social or political philosophy. In addition, Canada’s approach is moderate in the context of international approaches to this issue.\textsuperscript{151}

\textsuperscript{141} Ibid at para 53.  
\textsuperscript{142} Ibid at para 55.  
\textsuperscript{143} Ibid at para 55.  
\textsuperscript{144} Ibid at para 56.  
\textsuperscript{145} Ibid at para 57.  
\textsuperscript{146} Ibid at para 60.  
\textsuperscript{147} Ibid at para 67.  
\textsuperscript{148} Ibid at para 92.  
\textsuperscript{149} Ibid at para 92.  
\textsuperscript{150} Ibid at para 104.  
\textsuperscript{151} Ibid at para 134.
In the minority’s view, the objectives were pressing and substantial.\textsuperscript{152} There is a rational connection because as “the objectives are largely symbolic, common sense dictates that social condemnation of criminal activity and a desire to promote civic responsibility are reflected in disenfranchisement of those who have committed serious crimes”.\textsuperscript{153} The minority was of the opinion that the provision minimally impaired the right. In its view, they should show deference to Parliament in this area. This was particularly the case because the decision involved differing social and political philosophies.\textsuperscript{154} Finally, the minority stated that:\textsuperscript{155}

When the objectives and salutary effects are viewed in the totality of the context, they outweigh the temporary disenfranchisement of the serious criminal offender which mirrors the fact of his or her incarceration.

3 Prisoner disqualification in New Zealand

3.1 Attorney General’s report

The New Zealand Parliament has also addressed the issue of whether prisoners are entitled to vote. This offers an interesting comparison to the Sauvé case study. The Private Member’s Bill, \textit{Electoral (Disqualification of Convicted Sentenced Prisoners) Amendment Bill} was introduced into Parliament in 2010 by a member of the National Party, the party in Government. The Bill extended the disqualification from voting in the \textit{Electoral Act 1993} from all prisoners serving a sentence of more than three years to cover all offenders serving a sentence of imprisonment.\textsuperscript{156}

As with the Sauvé case study, this legislation was on its face inconsistent with the right to vote contained in section 12 of the \textit{Bill of Rights Act}. Section 12 is framed in terms that are similar to section 3 of the \textit{Charter}.

The Attorney General issued a report under section 7 of the \textit{Bill of Rights Act}.\textsuperscript{157} In light of New Zealand law, Sauvé (No 1), and a decision by the European Court of Human Rights, the Attorney General found that there was an apparent inconsistency with section 12 of the \textit{Bill of Rights Act}.

\begin{thebibliography}{9}
\bibitem{152} Ibid at para 148.
\bibitem{153} Ibid at para 159.
\bibitem{154} Ibid at para 174.
\bibitem{155} Ibid at para 188.
\bibitem{156} See \textit{Electoral Act 1993} (NZ), 1993/87, s 80(1)(d).
\end{thebibliography}
Proceeding to the question of whether the provision was justified under section 5 of the Bill of Rights Act, the Attorney General assumed that the objective of the Bill was that “person convicted for serious crimes against the community should forfeit the right to vote as part of their punishment”.

However, he did not think that the provision was proportionate. First, he thought that it was “questionable that every person serving a sentence of imprisonment is necessarily a serious offender”. Secondly, it was inconsistent with the disqualification of persons who are detained in a hospital or secure facility having have been found by a court, on conviction of any offence, to be mentally impaired, for a period exceeding three years. Finally, the provision was under and over inclusive. It was under inclusive because the voting rights of serious violent offenders who are imprisoned for two and a half years between elections were unaffected. It was over inclusive because a person imprisoned for a week over the election period would be disenfranchised. As the Attorney General stated, “the disenfranchising provisions of this Bill will depend entirely on the date of sentencing which bears no relationship either to the objective of the Bill or to the conduct of prisoners whose voting rights are taken away”.

3.2 Process through Parliament

The issues raised by the Attorney General were debated in Parliament and addressed in the Select Committee on the Bill. Although the Bill was a Private Members Bill, it was supported by the National Party. Neither of the Ministers responsible for this area of the law (that is the Minister of Justice or the Minister of Corrections) spoke on the Bill. The only Minister to speak in favour of the Bill was the Minister of Defence.

The debate centered on the extent and nature of the right to vote. Some of those who were opposed to the Bill expressly relied on the Attorney General’s analysis or raised issues also raised by the Attorney General; in particular, they claimed that imprisonment alone was not a

---

158 Ibid at paras 7-9 citing Re Bennet, (1993) 2 HRNZ 358 (HC), Sauvé v Canada (Attorney General), supra note 6, and Hirst v the United Kingdom (No 2), [2005] ECHR 681.
160 Ibid at para 12.
161 Ibid at para 13, see Electoral Act 1993 (NZ), 1993/87, s 80(1)(c)(ii).
162 Ibid at para 15.
163 NZ, Hansard, (8 December 2010) 669 NZPD at 15974 (Hon Wayne Mapp MP).
reliable method of determining seriousness of offending.\textsuperscript{164} Others raised new reasons that showed that the limitation was not justified. These included concerns that the Bill could not achieve any benefits for the criminal justice system,\textsuperscript{165} and that it would further marginalize vulnerable members of society (particularly those from Māori and Pacific communities) who would then be unlikely to reenrol on the electoral roll.\textsuperscript{166} The other side of the debate exhibited a different philosophy to whether a limitation on the right to vote was justified. These Members of Parliament relied on arguments that, as law-breakers, those who are imprisoned have broken a social contract, and that imprisonment is necessarily connected with serious offending.\textsuperscript{167}

The Bill was sent to the Law and Order Committee. This was controversial as it was thought by some Members of Parliament that, as a Bill amending electoral law, the Justice and Electoral Committee was a better fit.\textsuperscript{168} Being sent to the Law and Order Committee meant that the advisers on the Bill were officials from the Department of Corrections, rather than experts on electoral law from the Ministry of Justice. The Chair of the Law and Order Committee refused a request to allow the Ministry of Justice to advise on the Bill. The majority of the Committee did not expressly address the concerns raised by the Attorney General in its report. The closest it came to touching on these issues was its consideration of concerns about the fact that the Bill required deregistration, meaning that it would likely be difficult to ensure that former prisoners were re-registered after serving their sentence.\textsuperscript{169} *Bill of Rights Act* issues were expressly addressed by a minority Labour Party view and a minority Green Party view. The Attorney

\textsuperscript{164} NZ, *Hansard*, (21 April 2010) 622 NZPD at 10341 (Lianne Dalziel MP), 10343 (Charles Chauvel MP); NZ, *Hansard*, (20 October 2010) 667 NZPD at 14685 (Lianne Dalziel MP); NZ, *Hansard*, (10 November 2010) 668 NZPD at 15185 (Lianne Dalziel), 15198 (Grant Robertson MP), 15200 (Raymond Huo MP).

\textsuperscript{165} NZ, *Hansard*, (21 April 2010) 622 NZPD at 10344-5 (David Clendon MP); NZ, *Hansard*, (20 October 2010) 667 NZPD at 148683 (Clayton Cosgrove MP), 14686 (David Clendon MP), 14691 (Grant Robertson MP); NZ, *Hansard*, (10 November 2010) 668 NZPD at 15189 (Stuart Nash MP), 15193 (Grant Robertson MP), 15203 (Carole Beaumont MP); NZ, *Hansard*, (8 December 2010) 669 NZPD at 15973 (Grant Robertson MP).

\textsuperscript{166} NZ, *Hansard*, (21 April 2010) 622 NZPD at 10344 (David Clendon MP), 10340-1 (Lianne Dalziel MP), 10345 (Hone Harawira MP); NZ, *Hansard*, (20 October 2010) 667 NZPD at 14687 (David Clendon MP), 14688-9 (Hone Harawira MP); NZ, *Hansard*, (10 November 2010) 668 NZPD at 15187 (Jo Goodhew MP), 15190-1 (Simon Bridges MP), 15195 (Paul Quinn MP); NZ, *Hansard*, (8 December 2010) 669 NZPD at 15974 (Hon Wayne Mapp MP), 15977-8 (Jonathan Young MP).

\textsuperscript{167} NZ, *Hansard*, (21 April 2010) 622 NZPD at 10345 (Lianne Dalziel MP); 10350 (Paul Quinn MP); NZ, *Hansard*, (20 October 2010) 667 NZPD at 14683 (Jo Goodhew MP), 14689-70 (Jonathan Young MP), 14692 (Cam Calder MP); NZ, *Hansard*, (10 November 2010) 668 NZPD at 15186 (Cam Calder MP), 15190-1 (Simon Bridges MP), 15195 (Paul Quinn MP); NZ, *Hansard*, (8 December 2010) 669 NZPD at 15961 (Paul Quinn MP), 15974 (Hon Wayne Mapp MP), 15977-8 (Jonathan Young MP).

\textsuperscript{168} See NZ, *Hansard*, (20 October 2010) 667 NZPD at 15684 (Lianne Dalziel MP) and 14690 (Grant Robertson MP).

\textsuperscript{169} *Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010* (NZ), 117-2 (Select Committee Report), at 2-3.
General’s report was cited as a reason for the opposition to the Bill by the Labour and Green MPs on the Committee.\(^{170}\)

Nevertheless, the Bill was enacted without amendment in December 2010. The Act has not been subject to a judicial challenge and, in the absence of ambiguous language where an interpretation favourable to the *Bill of Rights* could be given,\(^{171}\) it is probably unlikely that it will be challenged.

### 4 Extended supervision orders

#### 4.1 Attorney General’s report

The *Parole (Extended Supervision) and Sentencing Amendment Bill* was introduced to Parliament in 2002. The Bill set out an extended supervision order (ESO) regime for child sex offenders. The Attorney General issued a report under section 7 of the *Bill of Rights Act* stating that the Bill was inconsistent with sections 21 (unreasonable search and seizure) and 26(2) (double jeopardy and retrospective penalties) and that these limitations were not justified under section 5 of the *Bill of Rights Act*.\(^{172}\)

Section 26(2) of the *Bill of Rights Act* provides “No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again”. Under the ESO scheme, restrictions could be imposed on offenders after they had served their sentence. This was made more controversial because it applied not only to offenders who were convicted and sentenced after the Bill came into force. It also applied to offenders who were convicted and sentenced before the Bill came into force and were either still in prison or subject to release condition, or in certain circumstances, were no longer in prison or subject to release conditions, but were living unsupervised in the community.\(^{173}\)

This presented two main issues: whether the ESO was “punishment” and whether the limitation was justified under section 5 of the *Bill of Rights Act*. The Attorney General concluded that the

---

\(^{170}\) *Ibid* at 3-7.


\(^{173}\) *Parole (Extended Supervision) and Sentencing Amendment Bill 2003* (NZ), 88-1, cl 10; *ibid* at para 3.2.
ESO were punishment because it clearly places the “regime within the rubric of the criminal justice and penal system”.174 Because of the significant restrictions on liberty, the Attorney General did not think that this limitation could not be justified under section 5 of the Bill of Rights Act, although she provided limited discussion on this issue and did not undertake a detailed proportionality analysis.175

The Attorney General also decided that provisions in the Bill which enabled, the Parole Board to subject an offender to 24-hour electronic monitoring as a condition of release, were an invasion of privacy and violated section 21 of the Bill of Rights Act, the right not to be subject to unreasonable search or seizure.

4.2 Process through Parliament

On the first reading of the Bill, the Minister of Justice indicated that despite the report of the Attorney General, he was of the view that the limitation was justified on the grounds of protecting children:176

Crown Law has indicated that this may constitute a breach of the New Zealand Bill of Rights Act. However, I believe that the right of children to be protected in these instances must come before the right to total freedom of a child sex offender released from prison who is deemed likely to offend again. Children are the most vulnerable group in our community and they warrant special protection. In these circumstances, I believe that a breach can be justified.

Other Members of Parliament also referred to the report. Nandor Tanczos from the Green Party indicated that the concerns raised by the Attorney General meant that the Bill of Rights Act issues should be given serious consideration by the Select Committee.177 In his view, it was the job of the Select Committee to work through whether the Bill achieved an appropriate balance between rights of the offenders and the safety of the community.178 Another Member of Parliament agreed with the idea that the limitations are justified.179 One Member of Parliament, Muriel Newman, indicated that her party, the ACT Party, did not support retrospective provisions.180

175 Ibid at para 14.
176 NZ, Hansard, (19 November 2003) 613 NZPD at 10195 (Hon Phil Goff MP).
177 Ibid.
179 Ibid.
The Bill was referred to the Justice and Electoral Select Committee. The Select Committee acknowledged the Attorney General’s report, but appeared to be of the view that the legislation was consistent with the *Bill of Rights Act*. However, the reasoning adopted by the Select Committee on this issue is not clear. First, the Committee indicated that it believed the limitation to be justified:\(^{181}\)

> We consider the risk of further offending against children justifies retrospective application of the extended supervision regime to those high-risk child sex offenders currently in the criminal justice system. We note that the Bill only imposes eligibility status; this does not mean an extended supervision order will be imposed.

But, it then indicated that it did not believe that the activity in question was “punishment” under section 26(2) of the *Bill of Rights Act*:\(^{182}\)

> It is possible to consider retrospective application of the extended supervision regime not to be “punishment”. Some eligible offenders may welcome the protection afforded by an extended supervision order. They may recognise that the intensive monitoring will assist them to remain in the community, and provide an element of self-protection. They may consider the restrictive conditions of an order to be rehabilitative rather than punitive.

While Committee may have been covering both limbs of the Attorney General’s report, this is not clear from the discussion. The impression is that the Committee may not have fully understood the nature of the *Bill of Rights Act* issues. The Committee made an amendment in relation to the electronic monitoring, which was designed to address the concerns in relation to unreasonable search.\(^{183}\)

On its return to Parliament, there was further debate on the *Bill of Rights Act* issue, even though the Bill was generally well supported. Those who supported the Bill and mentioned the Attorney General’s report or the *Bill of Rights Act* concerns generally justified the departure from the Attorney General’s reasoning on the basis that they thought the limitation was justified under the *Bill of Rights Act*. For example, Richard Worth thought that this was “one of those cases where it is justifiable to overlook those provisions, because of greater societal interests”.\(^{184}\) Nandor Tanczos considered that the balance to be struck was the need to protect “some important principles of justice with the compelling need to protect children from sexual offenders”.\(^{185}\) The implication of these debates, although this was not expressly noted by the

---

\(^{181}\) *Parole (Extended Supervision) and Sentencing Amendment Bill 2003* (NZ), 88-2, (Select Committee Report) at 4.

\(^{182}\) *Ibid* at 5.

\(^{183}\) *Ibid* at 5.

\(^{184}\) *NZ, Hansard*, (29 June 2004) 618 NZPD at 14143 (Richard Worth MP).

\(^{185}\) *NZ, Hansard*, (29 June 2004) 618 NZPD at 14147 (Nandor Tanczos MP).
Members of Parliament, was that the Members were giving a different weight to the importance of the objective than that which was given by the Attorney General.

One Member of Parliament took an alternative view: that ESOs were not punishment and thus did not offend the *Bill of Rights Act*.\(^\text{186}\) It is perhaps surprising that this argument received so little attention in Parliament as it was relied on (at least in part) by the Select Committee. While it might be argued that this shows that the Select Committee was better equipped to deal with these complex legal issues, the fact that it is not clear on what basis the Select Committee made its decision undermines this argument. It is possible that the other Members of Parliament outside the Select Committee were persuaded by the Attorney General’s arguments that an ESO was punishment. For example, Nandor Tanczos argued that claiming it was not a punishment was “a semantic device to get around the problem. I do not see how we can say that adding restrictions to a person against his or her will is not a punishment of some form”.\(^\text{187}\)

The one Member of Parliament who spoke against the Bill was of the opinion that as the Attorney General had said that the Bill offended the *Bill of Rights Act*, “there is absolutely no reason why Parliament should go ahead”.\(^\text{188}\)

### 4.3 Court decision

Subsequently, Joseph Robert Belcher appealed an ESO made against him under section 107I of the *Parole Act 2002* (as amended by the ESO Bill) to the Court of Appeal.\(^\text{189}\) Belcher was an eligible offender because according to sections 107C and 107Y, he had not ceased to be subject to imprisonment or release conditions before 11 November 2003. His release conditions continued until 13 November 2003. He appealed the order on the basis that it the legislation was contrary to the *Bill of Rights Act*, and on the basis that the evidence did not warrant making an order. The first ground, is discussed below.

In making its decision on the *Bill of Rights Act* issue, the Court considered the evolution of the ESO legislation and its passage through Parliament.\(^\text{190}\) The Court cited passages of the Ministry

\(^{186}\) See NZ, *Hansard*, (29 June 2004) 618 NZPD at 14190 (Lianne Dalziel MP).


\(^{188}\) NZ, *Hansard*, (29 June 2004) 618 NZPD at 14194 (Keith Locke MP).


\(^{190}\) *Ibid* at paras 30-34.
of Justice policy paper, which developed the scheme, to show that the Ministry was aware of Bill of Rights Act concerns in respect of extended monitoring of offenders and the retrospective application. The level of these concerns was thought to depend on how the legislation was drafted. The Court then cited passages of the Attorney General’s report in relation to the retrospective application of the Bill. Finally, the Court cited the discussion of the Bill of Rights Act by the Justice and the Electoral Committee. The Court comments that although the Select Committee report:

[S]uggested that there was scope for debate as to the correctness of the Attorney-General’s conclusion that the retrospective implementation of the ESO scheme was in breach of s 26(2) of NZBORA, the drift of what was said in the course of later parliamentary debate indicates that the enactment of the ESO legislation with retrospective effect proceeded on the basis that the legislation was justified on public policy grounds.

The Court concluded that the provision constituted a penalty. Its view was that “the imposition through the criminal justice system of significant restrictions (including detention) on offenders in response to criminal behaviour amounts to punishment” under sections 25 and 26 of the Bill of Rights Act. It did not expressly rely on the Attorney General’s opinion. But the reasoning that the provision was clearly connected to the criminal justice system, was similar, if fuller, than that of the Attorney General. The Crown, without conceding that the retrospectivity complained of lies outside section 5, did not seek to justify the retrospective under section 5. The Court therefore approached the interpretation issues on the basis that the limitation was not justified and found that it was nevertheless clear that the legislation was intended to have a retrospective effect.

However, the Court reserved its judgment on whether the limitation was justified under section 5 and a declaration of inconsistency should be made. By the time the second hearing took place, a significant decision on when courts have jurisdiction to make declarations of

---

192 Belcher (CA No 1), supra note 16, at para 30 citing Ministry of Justice, supra note 191, at paras 38.
194 Ibid at para 33.
195 Ibid at para 34.
196 Ibid at para 49.
197 Ibid at para 49.
198 Ibid at para 50.
200 Belcher (CA No 1), supra 16, at para 50.
201 Ibid at paras 51, 52 and 56.
202 Ibid at para 59.
inconsistency had been made by the Supreme Court. The hearing was therefore confined to jurisdictional issues. The Court of Appeal found that this was not a situation where a declaration of inconsistency could be made because the declaration of inconsistency was not sought at first instance, and there was no jurisdiction to make declarations of inconsistency in criminal proceedings. The Supreme Court declined leave to appeal confirming that a declaration of inconsistency was unnecessary in this situation particularly as there had been no section 5 arguments. However, the Supreme Court indicated that the Court of Appeal was incorrect in its finding that a declaration of inconsistency must be sought at first instance.

This case does not show any particular prejudicial effect of an Attorney General’s report on litigation. However, caution must be exercised in extending this observation more broadly, and, in particular, relying on it in Canadian context. The case was unusual, as through a combination of factors a section 5 argument was never made. If such an argument had been made, it is unclear whether the Attorney General’s report would have had a greater influence as most of the Attorney General’s argument was based on whether the provision constituted punishment. However, had an argument been made, the Court may have made an informal finding of inconsistency or, even, the Supreme Court may have considered a declaration of inconsistency appropriate (although given the general reluctance of the courts to do so this is probably unlikely). Even if a finding or a declaration of inconsistency were made, because of New Zealand’s constitutional structure, the Court could not strike down the law, meaning that the decision would still have a limited impact. The fact that the Attorney General has made a report will never contribute to a situation where a law is overturned. The same cannot be said in Canada.

4.4 Second report and process through Parliament

In 2009, the Government introduced the Parole (Extended Supervision Orders) Amendment Bill which amended the ESO regime to remedy some “loopholes” created by the original regime.

---

202 *Taunoa v Attorney General*, supra note 37.
203 *Belcher* (CA No 2), *supra* note 17, at para 4.
207 *NZ, Hansard*, (2 April 2009) 653 NZPD at 2377 (Simon Power MP).
The changes did not in any way address the *Bill of Rights* Act concerns and were not a response to the previous Attorney General’s report or the Court decision.

The Attorney General issued another report under section 7 of the *Bill of Rights Act* that stated that this Bill appeared to be inconsistent with the rights against retroactive penalties and double jeopardy (section 26), and arbitrary detention (section 22).  

In relation to section 26, the Attorney General noted the previous report on the 2003 legislation and the decision in *Belcher*. In addition, the Attorney thought that the nature of the amendments, and, in particular, the inclusion of a power of long term detention, “would tip the balance of the argument in favour of characterising this regime as penal, even if it is not so regarded in its present form”.

However, the Bill was passed under urgency and was not referred to a Select Committee. The short debate on the Bill reveals some limited discussion on the *Bill of Rights Act* and the Attorney General’s report. This discussion would have been hampered by the fact that, due to the truncated process, the Attorney General’s report had only been tabled in Parliament immediately before the Bill was passed. Nevertheless, two Members of Parliament (out of the six that spoke on the Bill) discussed the report. Keith Locke MP from the Green Party expressed concern that, in light of the number of persons subject to ESO who reoffend, and the Attorney General’s report on the matter, more people than necessary are subject to these orders. In contrast, David Garrett MP took a different view. In his view, this report was merely evidence of the diligence of the current Attorney General and the cavalier attitude of the previous Government to section 7 reports. Having not had the chance to read the Attorney General’s report he indicated that he thought it likely that the report would simply be asserting that legislation may be inconsistent with the *Bill of Rights Act* and was not that “devastating”. Even if he were wrong on this, he indicated a lack of care for the rights of child sex offenders.

The other Members, including the Minister of Justice, did not mention the report. The Bill was passed and there has been no further litigation on the issue.

---

210 NZ, *Hansard*, (2 April 2009) 653 NZPD at 2377, 2380 (Keith Locke MP), 2381 (David Garrett MP).
211 NZ, *Hansard*, (2 April 2009) 653 NZPD at 2380.
5 Evaluation of the case studies

The case studies show that the reporting obligation is being exercised in a very different way in Canada and New Zealand. This is despite similar foundations and a similar goal to protect rights through executive and legislative compliance. These differences will be explored in detail in chapter 4, but this section summarises the main differences evident from the case studies. In short, the Canadian process is focused on litigation and whether the legislation can be defended. The New Zealand process is not driven by such concerns and is focused on providing an independent assessment of rights issues.

The Sauvé case study provides an example of strong arguments on both sides as to whether the restriction on voting for those who were imprisoned for more than two years was constitutional. This is clearly illustrated in the divided decision of the Supreme Court in Sauvé (No 2) and the vigorous defence of the legislation led by the Attorney General. Based on this defence and the fact that the Attorney General compiled a section 1 file to defend the litigation, it is safe to assume that the Attorney General thought that there was a plausible argument to defend the legislation in litigation when deciding not to make a report. However, the fact that the Charter was engaged, and that it was clear that there was some risk that the courts would find the revised legislation unconstitutional, shows that the Attorney General adopts a high threshold for making a report. In light of the litigation focus, the advice of the Attorney General remains confidential. The Attorney General saves the arguments to advance them in future litigation.

Also, the case study shows that, the Attorney General’s reliance on confidentiality and the refusal to make a report, can compromise the ability of Parliament to debate the issue comprehensively. In the debates, although the Members of Parliament were in general aware of Charter issues, there was limited discussion on these issues. The Government did not feel compelled to defend its position.

In addition, because neither the Attorney General’s advice nor a report was released, these were could not be relied upon in litigation by the opposing parties or the Court. This meant that the Attorney General’s arguments in favour of justification were aired for the first time in court.

---

215 Sauvé v Canada (Chief Electoral Officer), supra note 8.
216 See “Not Just the Government’s Lawyer”, supra note 4, at 635.
The New Zealand case studies paint a rather different picture. The Bill of Rights Act issues are clearly articulated by the Attorney General. The Attorney General is comfortable in taking a position that is different from his or her party in relation to government and Private Members Bills. The government disregarding the Attorney General’s report is not a cause for debate. It is also considered acceptable for the Attorney General to vote with his or her party in support of Bills that he or she has reported as being contrary to the Bill of Rights Act.

The New Zealand case studies also show that the presence of a report can facilitate parliamentary debate. In both case studies, the Attorney General’s report was referred to in parliamentary debates and in the Select Committee. However, debate did not equate with Parliament or the Select Committee accepting the Attorney General’s opinion on the matter. The quality of the debate in both Parliament and the Select Committees varied. Parliament does not consistently or systematically address all the issues raised by the Attorney General and often introduces new considerations on whether the limitation is or is not justified.

As the Select Committee is advised by officials and receives submissions from other interested parties, its debate on rights issues might be expected to be more sophisticated. However, in the two reports considered, this did not appear to be the case. The majority opinion of the Select Committee, which considered the disqualification of prisoners from voting, did not mention rights issues, although they were discussed in minority opinions. The absence of debate potentially could be influenced by the fact that the Bill was sent to the Law and Order Committee, rather than the Justice and Electoral Committee, and, thus had departmental advisors who were not experts in electoral law. The Select Committee on ESOs did consider rights issues and the arguments of the Attorney General, but it was unclear from the discussion on what basis the Committee decided that the Bill did not breach section 26 of the Bill of Rights Act.

The New Zealand Attorney General’s report was also shown to have a role in litigation. The report was referred to, and the Court adopted a similar position. It is unclear to what extent the Court relied on the report, but the Court did not appear to be critical of the Government for

---

218 Parole (Extended Supervision) and Sentencing Amendment Bill 2003 (NZ), 88-2, (Select Committee Report) at 4 and 5.
219 Belcher (CA No 1), supra 16.
adopting a different stance to the Attorney General. Because of the limited nature of the *Bill of Rights Act*, this had limited impact on the Government: no ruling of the court could strike down the law.

These case studies, therefore, provide an interesting starting point for further debate on the Attorney General’s reporting obligation.
Chapter 4
Difference between the Roles in Canada and New Zealand

1 Introduction

The similar framing of the obligations contained in section 4.1 of the Department of Justice Act and section 7 of the Bill of Rights Act creates an expectation that the approach to these sections would be similar in Canada and New Zealand. As shown above, this is not the case. The Canadian and New Zealand Attorneys General take dramatically different approaches. This chapter analyses the nature and effect of these differences and the reasons for them.

2 Canada

2.1 Description

The role being performed by the Canadian Attorney General is difficult to analyse because much of it occurs behind the scenes. Despite this lack of evidence, the context suggests that the Attorney General of Canada is performing an analysis of legislation that is focused on the prospect of litigation. In particular, the Attorney General considers whether the government will be able to make an argument of constitutionality if the legislation is challenged. This review is integrated into the government’s decision-making process. The high threshold and advisory nature of the analysis, gives room for political considerations (as well as legal) when deciding how to proceed with legislation.

This analysis is supported by a number of factors. As noted above, academic commentary on this issue indicates that the Attorney General undertakes a risk analysis of the proposed legislation and advises the government accordingly.\(^\text{220}\) The threshold for making a decision is whether a credible Charter argument can be made.\(^\text{221}\) The very essence of a risk analysis is that is based on the assumption that litigation is a likely possibility. It is designed to assess whether the legislation can be defended in litigation.

\(^{220}\) See “Rights-Vetting in New Zealand and Canada”, supra note 1, at 72; Sterling, supra note 73, at 147.
\(^{221}\) “Rights-Vetting in New Zealand and Canada”, supra note 1, at 72.
The analysis is confirmed by the *Sauvé* case study. Information that reveals the inner deliberations of the Attorney General and officials is not freely available. Nevertheless, a picture of the role can develop from examining the available information. In the case study, the Attorney General did not make a report that the provision was unconstitutional but, rather vigorously argued that the legislation was consistent with the Charter in *Sauvé* (No 2). This argument was sufficiently persuasive that four of the judges accepted that the legislation was constitutional. These factors suggest that, before the Bill was introduced into Parliament, the Attorney General evaluated the ability to mount a credible defence of the provision and decided that it was sufficient to proceed. However, the fact that the Attorney General took steps to build a section 1 file, suggests that the Attorney General was of the opinion that the risk of litigation was still high.

The review of the legislation is integrated into the executive decision-making process. The Attorney General appears to exercise an advisory role as to the risk posed by the legislation as opposed to having final decision making power in this area. The nature of the risk assessment is more fluid and less final, than a definite decision about constitutionality. This means that in making final decisions, the government can consider political and legal issues and there is more flexibility about whether to proceed with the legislation. According to Hiebert, in deciding whether a Bill is reasonable, lawyers’ assessments “do not replace political judgment”. This advisory approach contradicts the wording of section 4.1 of the *Department of Justice Act* which indicates the Attorney General should independently assess constitutionality. However, if the risk was such that no credible Charter argument could be made, but Cabinet did not accept the advice, it seems likely that the Attorney General would be forced to take independent action.

Another factor to consider is the extent to which the Attorney General exercises the reporting obligation by considering political factors. The ability to defend legislation is highly likely to be focussed on legal matters. But, Hiebert indicates, that in her view, the nature of the risk assessment is such that it has “political and subjective elements and thus may vary depending on the Minister of Justice’s philosophical views of the role of the state or the relationship between

---

222 See *Sauvé v Canada (Chief Electoral Officer)*, supra note 8, at para 21.
223 Sterling & Mackay, *supra* note 24, at 907.
224 “Rights-Vetting in New Zealand and Canada”, *supra* note 1, at 92.
Parliament and the judiciary”. The fact that the Attorney General is also the Minister of Justice impacts on this assessment. It can lead to confusion between the roles because it is not clear to what extent he or she is acting as a political actor or as a law officer. This confusion is enhanced because the function expressly belongs to the Minister of Justice, even though he or she cannot escape the conventions that apply to the Attorney General. This, as well as the focus on litigation and the integration into the political decision-making process, suggests that overall the nature of the analysis performed by the Attorney General allows for the consideration of political, as well as, legal elements.

This explanation of the Attorney General’s role supports the lack of transparency in the process. Focusing on litigation, leads the Attorney General to be reluctant to release the advice because it would be prejudicial to any future litigation (although this assertion is open to debate and will be discussed in detail below). The Attorney General’s defence in Sauvé (No 2) suggests that the Attorney General was aware of the arguments in relation to constitutionality but chose not to disclose them for fear of prejudicing the litigation. Concerns about the lack of transparency and the impact it has on the parliamentary debates will be discussed in detail below.

2.2 Effect

As discussed in the preliminary explanation of the operation of the reporting obligation in chapter 2, Canada seems to have devoted considerable effort to encourage executive compliance with the Charter. The reporting obligation is also connected to executive compliance. The Sauvé case study shows that the Attorney General’s role is integrated within the executive. The Attorney General has more of an advisory function as to the risk posed by the legislation. The risk of not being able to defend the law, if the Attorney’s advice is not heeded, encourages executive to rely on with the level of risk suggested by the Attorney General.

However, the focus on complying with the analysis undertaken by the Attorney General is not the same as complying with the Charter itself. Rather, as the Sauvé case study suggests, the

---

225 Ibid at 72.
227 See “Reconciling Duty and Discretion”, supra note 4, at 775, footnote 4.
228 See Sauvé v Canada (Chief Electoral Officer), supra note 8, at para 21.
229 See Governing with the Charter, supra note 73; Monahan & Finkelstein, supra note 73; Petter, supra note 73; Sterling, supra note 73.
Attorney General is determining whether there is a credible Charter argument and the executive is encouraged to comply with that analysis. Of course, even if the Attorney General were reporting on whether he or she believed there was an inconsistency with the Charter, it would still be possible for courts to take a different position. But, the nature of a risk analysis and the credible Charter argument threshold, suggests that it is expected that a court may likely take a different approach. Certainly, this was the case in the Sauvé (No 2) (although as the discussion has shown this was a highly contestable issue). Therefore, the Canadian approach focuses on executive compliance with the Attorney General’s litigation focused analysis of the Charter, not simply on executive compliance with the Charter.

Secondly, in contrast, the lack of a report or advice, in Canada, means that effective debate on rights issues is limited (although there are some exceptions). This is because reports are unlikely to be made and the advice is not released, providing no information on which Parliament can base its discussion. This can be seen in the discussion in the case study on Sauvé, where there was limited parliamentary debate on the Charter issues. Decisions are made at the executive level without explaining them to Parliament. However, this has consequences:

Parliament may find itself in the untenable position of passing legislation yet not knowing about the seriousness of the risk that the legislation will subsequently be found unconstitutional. Parliament also lacks the information needed to assess whether the government has been overly cautious.

Although Bills are examined by a standing committee in each House, these committees often have inadequate time and resources to consider Charter issues in detail. They are not assisted by the Attorney General’s advice which remains confidential.

3 New Zealand

3.1 Description

In New Zealand, the Attorney General’s review is very different to that in Canada. It is independent from government in the sense that the Attorney General does not feel compelled to adopt the view of the government on the matter. It is also court-centered, not in the sense that

---

230 Sauvé v Canada (Chief Electoral Officer), supra note 8.
232 Ibid at 8.
the Attorney General is focused on litigation in the way of the Canadian Attorney General, but rather that the Attorney General is performing the type of analysis that a court might perform. Further, he or she provides reasoned evidence on how the decision was made against which the legislature can assess the provision for themselves. Finally, it is a legal analysis, in the sense that the Attorney General distances his or her opinion from political arguments. There are several arguments that support this description of the role.

First, the Attorney General in performing this role is considered to be distanced from the government. This is seen in the fact that the Attorney General and the government feel comfortable disagreeing with one another. Neither sees this as comprising their roles. Although the Attorney General is a member of Cabinet, he or she is seen as non-partisan when acting as the Attorney General. This is enhanced by the trend after the introduction of MMP for the Attorney General no longer also to be the Minister of Justice at the same time.234 This means that for most of the existence of the Bill of Rights Act and the reporting obligation, the Attorney General has not been acting as the Minister of Justice.

Secondly, the reports discussed in the case studies show that the advice is based on a court-centred analysis. According to Geoffrey and Matthew Palmer, the obligation “must be done on proper professional legal advice: it is not a matter of political judgment, but of formal legal opinion”.235 The Attorney General adopts a legalistic stance and relies on judicial decisions from New Zealand, other jurisdictions, and international fora.236 The Attorney General follows the courts and uses a modified version of the Oakes test to assess whether the limitation on the rights is proportional.237 In addition, legal reasons for the decision are publicly released (whether or not a report is made). This is similar to the way a court would release its decisions. Because most legislation, even where it attracts a report under section 7 of the Bill of Rights Act, is not litigated, this review may be the only occasion where the legislation is considered in this way.

Thirdly, the case studies show that Parliament and, in particular, parties not in government, can be comfortable relying on the Attorney General’s report despite the fact that the Attorney General is a member of Cabinet. Indeed the case studies show that it is members of the

---

234 Joseph, supra note 61, at 1135.
235 Palmer & Palmer, supra note 72, at 325.
236 See “Rights-Vetting in New Zealand and Canada”, supra note 1, at 92.
237 R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200; Moonen v Film and Literature Board Review, supra note 34.
government that often purport to disagree with the Attorney General on his or her assessment of rights. There are certainly issues about the fact that the opposition and support of the Attorney General’s report divides neatly down party lines. But, this does show that parties outside the government feel comfortable relying on the Attorney General’s report as independent.

Finally, the evidence that the New Zealand Attorney General performs an independent review function is supported by the response to the Attorney General’s actions where it is perceived that the Attorney General is influenced by partisan considerations. While these examples reveal instances where the Attorney General was perceived to be acting in a partisan way, the negative response to this perception indicates that the Attorney General is generally perceived as acting independently. In both of these examples, the legislation has subsequently been repealed. The first example is the passing of the controversial Foreshore and Seabed Act 2004, under which the Labour Government acted to extinguish Māori customary title in the foreshore and seabed. This case was notable because the Attorney General did not release the advice given to her on the Bill. Instead, she released her own opinion that found the Act to be consistent with the *Bill of Rights Act*. The implication was that she disagreed with the advice given to her by the Ministry of Justice. Certainly, it is within the rights of the Attorney General to do so, as a lawyer, the Hon Margaret Wilson was qualified to make such an assessment. But in acting this way in relation to a highly controversial Bill, where there was much opposition to the Government actions (including within the Government’s own ranks), gave the impression that the Attorney General was acting in a partisan way and opened the Government and the Attorney General up to criticism.

The second example is the Electoral Finance Bill. This Bill was another highly controversial initiative of the Labour Government, which arguably contained breaches of the right to vote and the right to freedom of expression. In this case, the Attorney General relied on the advice of Crown Law and did not issue a report that the Bill breached the *Bill of Rights Act*. However, the Select Committee, nevertheless was required to grapple with the issue of whether the Act

---

238 See, for example, *Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010* (NZ), 117-2 (Select Committee Report), at 3-7.
239 Hon Margaret Wilson, Attorney General “Foreshore and Seabed Bill” (6 May 2004).
240 See “Reconciling Duty and Discretion”, *supra* note 4, at 793, footnote 56.
was consistent with the *Bill of Rights Act* because of a number of submissions to the Select Committee raised this as an issue.\(^{244}\) The absence of the Attorney General’s report gave a perception that the Attorney General was again influenced by partisan considerations.\(^{245}\) This led to the Attorney General’s decision being challenged in the Court of Appeal on the ground that he had not properly discharged his duty.\(^{246}\) The Court held that the reporting obligation could not be judicially reviewed.\(^{247}\) Nevertheless, unhappiness with the Bill remained and it was repealed by a new Government.\(^{248}\)

### 3.2 Effect

In New Zealand, the independent and legalistic review performed by the Attorney General means that it is removed from political judgments and is not as integrated into the general executive decision-making process. An independent review, even when performed by a person of the standing of the Attorney General provides no guarantee that the government will follow this advice. Indeed, the nature of the review means that the government is able to distance itself from the Attorney General’s report and take a different view on the matter. In both case studies, the Government supported a Bill that was inconsistent with the Attorney General’s report. However, the New Zealand government’s understanding of the Attorney General’s role meant that it was possible for this to occur without putting the Attorney General in a difficult position or suggesting that the Attorney General should resign.

The approach does facilitate parliamentary debate on rights. The New Zealand review provides unbiased information on legal issues in a transparent way to Parliament. The Attorney General’s review is perceived as independent, because of “the expertise and independent-mindedness the Chief Law Officer brings to the task, which adds mightily to the moral persuasiveness of those views on the House”.\(^{249}\) This limits the effect of party politics on the Attorney General’s assessment. This can be used by Parliament to help it consider whether rights have been breached. Indeed, both of the case studies show members of Parties in opposition relying on the

\(^{244}\) *Electoral Finance Bill* (NZ), 130-2, (Select Committee Report), at paras 6-8.

\(^{245}\) See, for example, “Finlayson ‘Just Doing my Duty’ on Crime Bills”, *supra* note 26.


\(^{247}\) *Ibid*.

\(^{248}\) See *Power*, *supra* note 87.

Attorney General’s report to dispute the government’s stance on a Bill of Rights Act issue.\textsuperscript{250} These factors combine to provide a better basis for informed debate on rights issues by Parliament and Select Committees.

In addition, if the Attorney General does not report, the advice on which he or she relied is released. This allows Parliament and the Select Committee to identify the possible rights issues. For example, in relation to the two instances discussed above, where there was criticism of the lack of a report: of the \textit{Electoral (Finance) Bill} and the \textit{Foreshore and Seabed Bill}, the Select Committees had access to the Attorney General’s advice, in addition to the assistance of submissions. In both instances, the Select Committees considered rights concerns.\textsuperscript{251} The advice allows the Committee to see what rights might be engaged, even though the Attorney General has ultimately concluded that they are not breached.

However, in New Zealand, the level and quality of debates on rights issues varies.\textsuperscript{252} This can be seen in the two New Zealand case studies, where the opposition on rights issues seems to be tactical and drawn on party lines and the consideration of the \textit{Bill of Rights Act} by Select Committees was far from systematic.\textsuperscript{253} As Geddis notes, “there is no universal response – certainly, no universal negative response – on the part of parliamentarians to the Attorney-General’s flagging of an NZBORA inconsistency”.\textsuperscript{254} This suggests that the New Zealand approach is not sufficient on its own to ensure that debate in Parliament or Select Committees will occur in a systematic way.

\textsuperscript{250} See, for example, NZ, \textit{Hansard}, (21 April 2010) 622 NZPD at 10341 (Lianne Dalziel MP), 10343 (Charles Chauvel MP); NZ, \textit{Hansard}, (20 October 2010) 667 NZPD at 14685 (Lianne Dalziel MP); NZ, \textit{Hansard}, (10 November 2010) 668 NZPD at 15185 (Lianne Dalziel), 15198 (Grant Robertson MP), 15200 (Raymond Huo MP); NZ, \textit{Hansard}, (29 June 2004) 618 NZPD at 14194 (Keith Locke MP).

\textsuperscript{251} \textit{Electoral Finance Bill 2007} (NZ), 130-2 (Select Committee Report) at 2, 3, 27-28; \textit{Foreshore and Seabed Bill 2004} (NZ), 129-1 (Select Committee Report) at 6-7.

\textsuperscript{252} Geddis, \textit{supra} note 32, at 476-479.

\textsuperscript{253} \textit{Parole (Extended Supervision) and Sentencing Amendment Bill 2003}(NZ), 88-2, (Select Committee Report); \textit{Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010} (NZ), 117-2 (Select Committee Report).

\textsuperscript{254} Geddis, \textit{supra} note 32, at 476.
4 Why the different approach to the role?

4.1 Constitutional structure

One explanation for the different approach in Canada and New Zealand is each jurisdiction’s different constitutional structure. Because the Canadian courts can strike down legislation this creates different imperatives for the government and the Attorney General in relation to legislation. The prospect of *Charter* litigation is foremost on their mind. In New Zealand, there is more scope for the Attorney General to make independent reports on legislation. The government is not as constrained by the fear of litigation.

The threshold used by the Attorney General in Canada centres on whether the legislation could be defended if it were litigated: that is, whether there is a credible *Charter* argument. This means, in cases such as the *Sauvé* case study, where there is an arguable case on either side as to whether the provision is *Charter* consistent or not (as is clear from the majority and dissent in the Supreme Court) the Attorney General’s decision falls in favour of an arguable *Charter* argument. The Attorney General directs his or her attention to defending the legislation in court rather than on the debate at the parliamentary level. With this threshold in mind, if the Attorney General issued a report, it would be damning from the perspective of future *Charter* litigation, which would inevitably ensue.

In New Zealand, litigation in this situation is uncommon because the judiciary cannot strike down legislation. This gives the Attorney General freedom to issue reports and release advice without fear that it will be used against the government in court proceedings. The case study on ESOs shows that, even where litigation ensues, the presence of a report is not heavily relied on by the courts. Even if the Attorney General’s report is relied on by courts, the application of section 4 of the *Bill of Rights Act* means that this has a limited consequence.

Because of this structure, the Attorney General’s report takes on a significance that it would not otherwise have. The Attorney General is performing the type of analysis that a court would perform if the issue came before them. In many cases, this is the only instance that these issues

---

256 *Belcher* (CA No 1), supra note 16
will be aired, given the limited chance of litigation. If the New Zealand courts became more proactive in making declarations of inconsistency, this might alter the executive and parliamentary approach to the *Bill of Rights Act* and the Attorney General’s role. At the moment, the likelihood of the court making a formal declaration of inconsistency is low.\(^{257}\)

The different approach is also consistent with the different views in Canada and New Zealand as to whether the executive and legislature are required to comply with fundamental rights. It is accepted that this is the case in Canada, where section 32 of the *Charter* provides that the *Charter* applies to the Parliament and government of Canada and the legislature and government of each province.\(^{258}\) The executive and legislature are not expected to propose or enact inconsistent legislation.

The proposition is more controversial in New Zealand. In a recent article, Geiringer explains the strong and weak accounts of the *Bill of Rights Act*.\(^{259}\) The strong account sees the legislature as being bound to enact legislation that is consistent with the Bill of Rights (although there is no judicial mechanism to enforce this). In contrast, the weak account sees the Bill of Rights as containing “a set of explicit criteria against which the morality, or propriety, or advisability, or perhaps even ‘constitutionality’ of legislation can be managed”.\(^{260}\) The ultimate constraint on enacting inconsistent legislation is “political rather than legal”.\(^{261}\) In her view, the practice relating to enacting provisions that arguably infringe the *Bill of Rights Act*, the text of the *Bill of Rights Act* and its legislative history favour the weak account.\(^{262}\) As Geddis says, the provisions of the *Bill of Rights Act* “impose no more than a politico-moral, not legal, constraint on Parliament’s power to make law”.\(^{263}\) The fact that the Attorney General issues reports which are then ignored by the government and legislature is consistent with this interpretation.

Although the constitutional differences provide an explanation for the different behaviour, this is not the whole picture. This is particularly the case because the Canadian Attorney General

\(^{257}\) See Belcher (CA No 2), supra note 17; Taunoa v Attorney-General, supra note 37; McDonnell v Chief Executive of the Department of Corrections, supra note 37; Geiringer, supra note 37.

\(^{258}\) See, for example, Governing with the Charter, supra note 73; Brian Slattery “A Theory of the Charter” (1987) 25 Osgoode Hall LJ 714.


\(^{260}\) Ibid at 390.

\(^{261}\) Ibid at 390.

\(^{262}\) Ibid at 415.

\(^{263}\) Geddis, supra note 32, at 470.
exercises the a similar approach under the *Canadian Bill of Rights Act, 1960*, even though this Act is only a statutory Bill of Rights like the *New Zealand Bill of Rights Act*.\(^{264}\) Only one report has been issued under the *Canadian Bill of Rights* and that was in a situation where the Senate had made an amendment to the legislation which the Attorney General considered to be contrary to the Act.\(^{265}\)

### 4.2 Understanding of independence of the Attorney General

Another explanation is that New Zealand and Canada have different attitudes to the role of the Attorney General and his or her independence. Structurally the role is similar. Both New Zealand and Canada recognise the importance of the independence of the Attorney General in acting as the chief the law officer even though he or she is also a member of Cabinet. However, there are different understandings of what that independence means.

New Zealand sees independence of the Attorney General being shown through the Attorney General independently assessing *Bill of Rights Act* issues. The independence of the Attorney General is understood to encompass activities under section 7 of the *Bill of Rights Act*.\(^{266}\) This understanding is generally accepted: it is not controversial. It leads to the Attorney General’s independent court-centred approach that is not integrated within the executive. The Attorney General is not directly advising the government, but making an independent legal decision on whether to issue a report. This report is designed to persuade the government or Parliament to follow the Attorney General’s approach, but the Attorney General’s independence is not dependent on the government accepting his or her view.

The New Zealand Attorney General compartmentalises the different aspects of the role of the Attorney General as an independent legal adviser, member of Cabinet and caucus.\(^{267}\) This allows the Attorney General to remain loyal to his or her Party. As the case studies show, both political Parties have been comfortable with the Attorney General finding inconsistencies with the *Bill of Rights Act* and then voting for the Bill in line with his or her Party. But, the fact that the government feels free to disagree with this advice may undermine the status of the Attorney

---


\(^{265}\) Driedger, *supra* note 40, at 306.

\(^{266}\) See Butler & Butler, *supra* note 52, at 199.

\(^{267}\) See, for example, “Finlayson ‘Just Doing my Duty’ on Crime Bills”, *supra* note 26.
General. Likewise, Parliament disregarding or rejecting the Attorney General’s reports has been described as an “undignified sight”.268

In Canada, the Attorney General’s independence is more complex and there is less of a uniform approach. First, the Canadian Attorney General acts, in relation to the Charter, in a way that is integrated within the executive. The role is more advisory than the New Zealand approach.

Secondly, some would argue that the Attorney General’s independence does not extend beyond prosecutorial independence.269 This is an interesting approach given that prosecutorial decisions comprise a small part of the Attorney General’s work.270 However, others support the understanding that the Attorney General’s independence extends to policy work and the analysis of the constitutionality of Bills.271

Finally, there is a view that if the government went ahead with a Bill that was inconsistent with the constitution, the Attorney General would feel compelled to resign. As Edwards said in 1987, the Attorney General is “entitled to oppose the policy of his ministerial colleagues at every stage of its formulation and implementation”.272 But, “[f]or the government to reject the Attorney General’s advice would be quite exceptional and, in my view, should lead the Attorney General to question seriously his commitment to serve the Government as its chief legal adviser”.273 Likewise, Hiebert says that “if the government is intent on pursuing a course of action for which the justice minister concludes that no credible Charter argument can be made, the minister will likely feel compelled to resign”.274 Under this view, the Attorney General can take an approach to these issues that is more advisory and integrated within government, provided that, if the government refuses to accept the advice at all, the Attorney General will resign.

However, the idea that the Attorney General must resign if his or her advice is ignored is not universally held. Others have taken a more moderate approach to this issue. They suggest that it is not necessary for the Attorney General to resign and that independence can be preserved in

---

268 Taggart, supra note 249, at 272.
269 See “Legislative Activism and Parliamentary Bills of Rights”, supra note 28, at 96.
270 Scott, supra note 64, at 111-112.
271 See, for example, Sterling & Mackay, supra note 24, at 894; Ibid at 112; “Not Just the Government’s Lawyer”, supra note 4.
272 Edwards, supra note 25, at 52.
273 Ibid at 53.
other ways. Roach has suggested that if Cabinet decides to reject the Attorney General’s advice the government “may still have an obligation to acknowledge this advice by taking special measures to respect the Charter.” 275 Roach suggests that these alternatives include building a section 1 file, which is what the Government did in the relation to the second Sauvé case, directing a reference to the courts, allowing the Attorney General to issue a report and release the advice, or using the override clause. 276 Outside the criminal sphere, Scott indicates that he thinks that practically the Attorney General can avoid creating a situation where it would be necessary to resign. 277 In his view:

Timely advice to our government colleagues, assistance in the development, in government or elsewhere, of a consciousness of the values that inform our constitution, and the provision of quality lawyering services to the government will all enhance compliance and minimize conflict.

These alternative views, and the fact that no Attorney General is known to have resigned from office due to issues of this nature, challenge the view of independence under which the Attorney General must resign. Limitations on the effectiveness of the Attorney General’s reporting obligation based on the understanding of independence are susceptible to being challenged.

5 Conclusion on the different approaches

The different approaches adopted in Canada and New Zealand can be attributed to the different constitutional structure, as well as a different understanding of the independence of the Attorney General. This is useful from the point of view of comparative analysis because it can help to explain to what extent Canada and New Zealand can learn from each other’s practices under the ostensibly similar reporting obligations. Ultimately, the fact that these differences rest in part on fundamental constitutional differences means that the ability for New Zealand practice to influence Canada and vice versa is limited. Neither country is likely to undertake constitutional change to improve the functioning of the reporting obligation. However, the different understanding of the independence of the Attorney General is more subtle and there is more room for this role to evolve.

275 “Not Just the Government’s Lawyer”, supra note 4, at 634.
276 Ibid at 635.
278 Scott, supra note 64, at 126.
Chapter 5
Changes to the Reporting Obligation

1 Introduction

In light of the different approaches in Canada and New Zealand and the reasons for them, this chapter analyses possible changes to the Attorney General’s reporting obligation in Canada and New Zealand. Its thesis is that changes that challenge the constitutional rationales for the approach to the reporting obligation are unlikely to be successful. In this situation, the different constitutional structures limit the usefulness of comparison between the two jurisdictions. In contrast, there is more scope for challenging understanding of the role of the Attorney General.

The possible changes discussed, are those raised in chapter 2. They relate to the threshold used by the Attorney General or provided for in the legislation, whether the Attorney General should perform a more political role, the transparency of the process, the nature of the office of the Attorney General, and whether other actors should be involved.

2 Threshold for reports

There have been suggestions that the threshold for making reports should be changed. In both Canada and New Zealand, the threshold used by the Attorney General is not necessarily that prescribed by the legislation. Arguments for change relate to both the threshold used in practice and that provided by law. They suggest that a new threshold should be provided for in legislation. In Canada, the legislation requires a report where the Bill is inconsistent with the Charter, but, in practice, the Attorney General assesses this question on the basis of the risk posed by the Bill in relation litigation. The threshold that the Attorney General appears to use is whether a credible Charter argument can be made. This is not what is actually required by the legislation. Both the statutory threshold and the threshold used in practice are quite high. However, the statutory threshold is closer to that used in practice in New Zealand and has potential to allow for more reports. In contrast, the threshold used in practice in Canada makes a report very unlikely.

---

279 For example, see “Rights-Vetting in New Zealand and Canada”, supra note 1, at 102.
280 Sterling & Mackay, supra note 24, at 901.
281 “Rights-Vetting in New Zealand and Canada”, supra note 1, at 72.
In New Zealand, the Attorney General is required to report apparent inconsistencies. But, the Attorney General’s reports tend to be made when he or she believes the legislation is inconsistent. However, recent reports by the current Attorney General show a tendency towards more tentative language, for example, speaking of an “apparent inconsistency”, rather than simply an “inconsistency”.

There are several reasons for suggesting a change to the threshold. In Canada, the main rationale for changing the threshold used in practice, that is, whether there is a credible Charter argument, is that a lower threshold would result in more reports. These reports would allow Parliament to assess effectively the Charter issues within the legislation. As explained above, this is a shortcoming with the current application of the reporting obligation. Making a report only where there is no credible Charter argument, in practice, results in no reports. Indeed the Sauvé case study offers the example of a case where Charter issues were clearly engaged, but no report was made.

A second rationale is that a threshold, which requires the Attorney General to report if legislation is inconsistent with rights, does not sufficiently acknowledge the room for diverse views on rights issues. This type of threshold is prescribed by section 4.1 of the Department of Justice Act (although it is not used in practice) and is the threshold that is often used in New Zealand. In contrast, the threshold of a credible Charter argument recognizes the potential for the courts to take a different view. As discussed above, this threshold limits reporting on rights. Likewise, when the Attorney General in New Zealand looks for “apparent inconsistencies” this recognises the potential for disagreement. However, because this is a lower threshold, it does not limit the number of reports.

It is rare for these issues to be obviously constitutional or unconstitutional. They frequently depend on the application of section 1 of the Charter or section 5 of the Bill of Rights Act, that is, whether the limitation is justified. As Huscroft says, the decisions on these types of issues are not matters of fact: “there is often room for reasoned disagreement about the operation of the Bill of Rights, in particular whether limits on rights are reasonable and demonstrably justified in

---

282 See Butler & Butler, supra note 52, at 199.
284 See ibid.
a free and democratic society”. A clear example of this is the analysis of disqualification of prisoners from voting. As the case studies show, in Canada and New Zealand, diverse views on how to strike the balance have been expressed by royal commissions, legislatures, the Attorney General of New Zealand, and the Canadian judiciary. This room for disagreement suggests that it is difficult for the Attorney General to provide a definitive opinion on whether legislation is constitutional or not.

Further, court decisions on rights issues, and on whether a limitation is justified, frequently draw on scientific or social science evidence. The Attorney General may not have access to this type of evidence when making the decision about whether to make a report. The Attorney General’s role in this respect is different from the role in relation to prosecutions where the Attorney General exercises final decision-making power on how the government is to proceed. The nature of these types of issues suggests that the threshold should reflect the fact that there are likely to be various interpretations of the rights issue.

An option to address these problems is to consider the reporting obligation as providing a warning of a possible breach of rights, rather than a definitive statement of inconsistency. This recognizes room for disagreement, without setting the threshold at a level where reports are unlikely. For example, Hiebert has said, in relation to the Canadian obligation, that its intent:

> [W]ould be improved if it were interpreted to compel the Minister of Justice to alert Parliament where the government is proceeding with a Bill that incurs a substantial Charter risk, even if the Minister of Justice believes that the Bill has a credible chance of surviving litigation.

Alternatively, it could require the Attorney General to report any potential Charter issue. In New Zealand, Geddis notes disagreement about the threshold under the Bill of Rights Act. The issue is: “should it be a red flag raised whenever any possibly NZBORA inconsistent matter comes before the House; or should it be a backstop warning mechanism utilized only when there is no possible justification for the measure?” As noted above, there is a trend for the Attorney General to recognise “apparent inconsistencies”. This is closer to a warning mechanism. It

---

286 Sterling & Mackay, supra note 24, at 907.
287 “Rights-Vetting in New Zealand and Canada”, supra note 1, at 101.
288 Geddis, supra note 32, at 474-475.
recognizes that there are other considerations that the government and Parliament can consider when making their own determination.

In Canada, there are impediments to this type of change in threshold that relate to both the constitutional structure and the understanding of independence of the Attorney General. First, in relation to the constitutional structure, the litigation focused review is likely to mean that Canada would be reluctant to accept an approach with a lower threshold for a report because of the risk that disclosing this information will prejudice litigation. This is because those who wish to challenge the legislation will have access to an opinion of the Attorney General that suggests that there is a risk that the legislation breaches the Charter. In addition, the courts will have access to this information when making the decision.

However, there are arguments that suggest that releasing this type of report would not prejudice litigation. It is a lower threshold than a determination that the Charter has been breached. Thus, it should have less prejudicial effect. The fact that there is not significant litigation on laws in New Zealand that have been subject to a report, is not persuasive, given the different constitutional structure. Most contentious Charter issues will be litigated, whether or not such a report is made, as evidenced by the currently high levels of litigation. It does not seem likely that the report will increase the chance of litigation. As to whether the report will be relied on in court, the New Zealand experience suggests that the court will come to its own decision, although it may refer to the report. This occurs in a different constitutional structure, but there does not appear to be any reason to consider that the courts will be less independent in Canada. A possible safeguard would be a provision that the report may not be relied on in litigation by the parties or the courts. The difficulty with this is that a publicly released report is likely to influence, even if it is not directly relied on.

In addition, there would be some benefits to pre-emptively raising these issues. This would provide an opportunity for the government to state why they consider that the legislation is constitutional, notwithstanding the Attorney General’s report. Releasing such a report will aid effective parliamentary debate on the issue. It will also expose the issues to the public. These

290 Belcher (CA No 1), supra note 16.
factors can contribute to the enactment of law that is more robust and well-considered. This can head off some of the criticism that would be advanced once the law is passed.

Secondly, this proposal would require some adjustment of the view of independence of the Attorney General in Canada. This is because certain understandings of the role of the Attorney General suggest that he or she would have to resign if a report was made. The new threshold would make reports more likely. However, the lower threshold is less prejudicial than the current threshold. Legislation that attracts this type of risk would currently be advanced without comment by the Attorney General (as was the case in the Sauvé case study). This suggests that the Attorney General should be able to make this type of report without having to resign. Further, this understanding of independence is not universally accepted in Canada. Therefore, this is not a major impediment to this change being made.

In New Zealand, the constitutional structure and the understanding of the Attorney General’s independence do not provide major challenges to a lower a threshold. Indeed, this appears to be the threshold used when the Attorney General talks of an “apparent inconsistency”. However, in relation to the reporting obligation’s role in a system of parliamentary supremacy, there is a risk that the lower threshold may undermine the report. As noted, the report has particular significance, as it will often be the only occasion where there is recognition of a breach of rights. A less definitive report may increase the political ability for the government and Parliament to ignore the report. This type of attitude is seen in the legislative debate on the second ESO Bill, where one Member of Parliament expressed his view that the Attorney General was only raising a possible breach and it was perfectly reasonable to take a different approach. While it certainly is true that Parliament and government can depart from Attorney General’s report, it would be concerning if a lower threshold encouraged this.

In contrast, in New Zealand, this type of approach may enhance the independence of the Attorney General. A threshold, which emphasises the fact that there is an apparent inconsistency, rather than a definite inconsistency, means the position of the Attorney General as member of the government which supports the Bill is less compromised.

---

293 See Edwards, supra note 25, at 53; Charter Conflicts: What is Parliament’s Role?, supra note 4, at 10.
294 Not Just the Government’s Lawyer”, supra note 4, at 634-635; Scott, supra note 64, at 126.
295 NZ, Hansard, (2 April 2009) 653 NZPD at 2381 David Garrett MP.
To conclude, there are reasons to change the threshold in Canada and New Zealand. A lower threshold would recognise that the Attorney General is offering an opinion in areas where often several views are possible. This should result in more reports in Canada. In New Zealand, it probably would not alter the number of reports but it would more accurately reflect the nature and effect of an Attorney General’s report. However, in reality, the risk that a lower threshold would influence litigation means that this is unlikely to be enacted in Canada, even though there are arguments to rebut these fears.

3 Political advice

There is also discussion in New Zealand about whether the reporting obligation should be a political or legal judgment. Section 7 of the *Bill of Rights Act* has been interpreted as requiring legal analysis.²⁹⁶ However, this has come under some criticism. Hiebert claims that in recognising the “normative and discretionary elements of determining whether a Bill is consistent with a free and democratic society”, the Attorney General should recognise that “lawyers’ assessments may not be the only reasonable judgment on this issue”.²⁹⁷ Similarly, Huscroft expresses concerns about the policy process becoming dominated by lawyers.²⁹⁸ Allowing more recognition of political issues in the performance of the reporting obligation in New Zealand, suggests an approach that is more integrated with the government, in the manner of the Canadian analysis.

The first problem with this argument is that does not acknowledge the unique position of the reporting obligation in New Zealand’s constitutional structure. The independent, court-centered review assumes a particular significance because there is no power to judicially review legislation for consistency with the *Bill of Rights Act*. The review by the Attorney General will often be the only occasion where this type of review takes place. This gives the independent review a particular significance. Further, a more political review does not seem necessary in the New Zealand context to avoid prejudicing future litigation. Litigation on these issues is infrequent. In addition, in the *Belcher* case, where a provision subject to a report was litigated,

²⁹⁶ Palmer & Palmer, *supra* note 72, at 325.
²⁹⁷ “Rights-Vetting in New Zealand and Canada”, *supra* note 1, at 101.
the Court took its own view on the matter. While it referred to the Attorney General’s report, the Court did not seem to be overly influenced by its existence. The limitations posed by section 4 of the Bill of Rights Act mean that a court decision will have limited impact in any event.

The second problem is that this proposal challenges the New Zealand concept of independence of the Attorney General. If the Attorney General were more integrated within the government, this would jeopardise the parliamentary debate, because Members of Parliament may be less inclined to rely on such a report. It may also mean that fewer reports are released (although this would not jeopardise debate provided that the advice continued to be released). While this concept of the Attorney General’s independence, may not be the only view of independence, in this situation there does not seem to be a good reason to alter it.

4 Transparency of advice

It has been suggested that Canada should follow the lead of New Zealand and adopt a more transparent approach to the exercise of the obligation. In New Zealand, the Attorney General and the government have taken the position of pre-emptively disclosing the advice to facilitate Parliament’s analysis of rights issues. This occurs, even though the Attorney General’s reports in New Zealand are covered by the Official Information Act 1982, which governs the release of government information. Even if it were covered by the Official Information Act, it would possibly be exempt from release by virtue of being covered by legal professional privilege.

Canada, has not taken steps to follow New Zealand’s lead. This appears to be due to concerns about legal professional privilege. However, it remains open to the government to waive the privilege. The reality is that the government is concerned about doing so because of the difference in Canada’s constitutional structure. The government is concerned that the release of this information may prejudice its position in future litigation.

299 Belcher (CA No 1), supra note 16.
300 See, for example, Dodek, supra note 28, at 41; Charter Conflicts: What is Parliament’s Role?, supra note 4, at 8.
302 Official Information Act 1982 (NZ), 1982/156, s 9(2)(h); But see Fitzgerald, supra note 4, at 144-5; Archer, supra note 4, at 320.
303 Dodek, supra note 28, at 41.
304 Archer, supra note 4, at 320.
There are compelling reasons to waive legal professional privilege in relation to rights issues. Also, there are reasons why this approach will not prejudice the government in future litigation, but rather benefit it. First, in comparison to a report, the advice is less prejudicial because it illustrates why a report does not need to be made. Of course, this depends on the threshold used. For example, if the current threshold of no credible Charter argument is used, then the advice may disclose a very high Charter risk. If a lower threshold is used, the advice will only reveal that there is no Charter risk, or a very low one.

Secondly, the negative effects of releasing the advice will be limited. As with the argument related to the threshold, releasing advice is not likely to increase litigation: for contentious Charter issues, it is already expected. Likewise, Canadian judges can be expected to perform their own independent analysis. Dodek notes that “governments in other countries routinely disclose legal advice with no demonstrable negative impacts on the operation of government”.

In support of this, he cites the New Zealand example in relation to advice under section 7 of the Bill of Rights Act. The problem with this, as we have explored above, is the constitutional realities are very different in New Zealand and Canada. Nevertheless, Dodek also cites the practice in the United States, where the release of legal advice does not appear to have had a “chilling effect” on “candid legal advice”.

Thirdly, this type of advice does not clearly fit within the rationale for legal professional privilege. As Fitzgerald points out “the notion of legal professional privilege sits uncomfortably alongside the aims of informed public debate over Bills, better informed and focused parliamentary debate on possible inconsistencies, and ultimately, better legislation”. Dodek also argues that legal professional privilege is problematic in its application to the government. The privilege is based on an “individual client paradigm”, but in the context of government this breaks down. This is because the person who discloses the information to the lawyer, is not the person who controls the privilege (in the case of the government, a Minister or

---

305 Dodek, supra note 28, at 45-46.
306 Ibid at 46.
307 Fitzgerald, supra note 4, at 145.
309 Ibid at para 61.
Deputy Minister) and has “no autonomy, no capacity to control the privacy of her communications, and the decision regarding disclosure or waiver lies elsewhere”.  

Finally, there are likely to be advantages to releasing the advice. As with having a lower threshold, proactively releasing the advice can have the advantage of airing Charter issues earlier. It provides the opportunity for enhanced parliamentary and public debate, leading to better law. In the New Zealand context, John Guess advances the opinion that the New Zealand executive’s decision to release advice was in response to early litigation which suggested the Bill of Rights Act was “potentially more powerful than had been appreciated”.  

The advice was released because the “executive may benefit from its justificatory arguments being ‘in the field’ (even where they had not been thought to prevail)”.

Dodek also believes that there should be greater transparency in relation to the government’s legal advice, in order to improve the accountability of government lawyers.  

The other issue with Canada’s refusal to release this advice is the extent to which Canada exhibits a different understanding of the nature of the independence of the Attorney General. In Canada the Attorney General performs a more advisory role that is more integrated within the government than the New Zealand equivalent. The nature of this role suggests that it would be more difficult for the Attorney General in Canada to release the advice. In New Zealand, the advice on Bill of Rights Act issues, although provided by governmental officials, is distanced from the government’s opinion on the matter. The analysis is not political. This provides more scope for the government to release the advice without compromising its position. The government can distance itself from the Attorney General’s independent report.  

Given the differences in the New Zealand environment and understanding of the obligation, it is hard to use the New Zealand experience to show that the Canadian government should release the advice given to the Attorney General. There are persuasive reasons for the Canadian Attorney General to release the advice, but the concerns about prejudicing litigation may prove difficult to overcome.

310 Ibid at para 61.  
312 Ibid at 340.  
313 Dodek, supra note 28, at 45.
5 Changes to the office of Attorney General

As discussed in chapter 2, there are suggestions that there should be changes to the Attorney General’s position to ensure the effective exercise of this obligation. These suggestions are particularly targeted at maintaining the independence of the Attorney General. The different New Zealand and Canadian understandings of independence are particularly relevant, but the issues relating to constitutional structure are also engaged.

5.1 Member of Cabinet

One option is that the Attorney General not be in Cabinet. This is the position in the United Kingdom, where the Attorney General is a Minister outside Cabinet. The change would give a greater appearance of independence. However, the Canadian and New Zealand Attorney General is entrenched in Cabinet with conventions prescribing his or her independence. Lori Sterling and Heather MacKay recently explored this option in the Canadian context and concluded that there was “neither any political impetus to alter the current structure, not sufficient empirical evidence to conclude the structural change would enhance the rule of law”.

In Canada, where the Attorney General’s role under section 4.1 is tied to decisions in relation to Charter litigation, there is unlikely to be support for the suggestion that the Attorney General be excluded from Cabinet. As Sterling and Mackay concluded, it “may be important for the Attorney General to remain in Cabinet to serve as a policy advisor and to appreciate the larger political context of government policies”. Likewise, Peter Wilkinson, a former New Zealand Attorney General, commented that while sometimes it may be easier for the Attorney General not to be in Cabinet, “as a member of Cabinet, he is much better equipped to make assessments on matters of public interest”. Cabinet allows the Attorney General to get the “‘overview’ needed to make fully informed and properly balanced decisions”.

---

314 The Law Officers of the Crown, supra note 56, at 175; See Sterling & Mackay, supra note 24, at 927.
315 See The Law Officers of the Crown, supra note 56, 158-175; King, supra note 69; Peter Wilkinson, “Some Thoughts on Stepping Down” (1979) NZLJ 116 at 118.
316 Sterling & Mackay, supra note 24, at 927.
317 Ibid at 927.
318 Wilkinson, supra note 315, at 118.
319 Ibid at 118.
proposed legislation and future litigation suggests that the broader overview of the political context would be of great significance in Canada. In addition, if the Attorney General were no longer part of Cabinet, it would risk undermining the ability of the Attorney General to encourage executive compliance.

In New Zealand, the obligation is exercised in a way that is more distanced from political imperatives. This change would be less problematic. Nevertheless, the current understanding of the independence of the Attorney General makes this approach possible. A change may risk undermining the Attorney General’s influence over the government. Further, it remains important for the Attorney General to have access to this information for the exercise of his or her other duties, such as making prosecutorial decisions.

To conclude, there is not demand for this change and it would challenge the current arrangements.

5.2 Minister of Justice

Another proposed option for reform relates to the structure of the office of the Attorney General and the Minister of Justice. For example, Kelly suggests that the separation of the two would enhance the independence of the Canadian Attorney General and the review of the constitutionality of legislation. In addition, Kelly suggests a separate Department of Justice and Attorney General’s department to allow for independent scrutiny of Justice Bills. He relies on the position in New Zealand to support this.

In New Zealand, there is a trend away from the Attorney General also being the Minister of Justice since the introduction of MMP, but there are no laws or conventions in relation to this. Confirming this position is consistent with the style of analysis being undertaken by the New Zealand Attorney General. If the Attorney General also held a major portfolio such as that of the Minister of Justice, it would undermine the independent review because of the risk of conflicting obligations, or the appearance of conflict. This is particularly the case because often the contentious Bills with bill of rights issues are Ministry of Justice Bills.

---

322 See Joseph, supra note 61, at 1135.
There are clearly valid reasons why the Canadian Attorney General should undergo the same structural change. However, this issue is less complex in New Zealand: the Crown Law Office (the government’s legal advisor) and the Ministry of Justice are separate entities. The Attorney General has responsibility for the Crown Law Office, and the Minister of Justice for the Ministry of Justice. Because the functions of the Ministry of Justice and the Crown Law Office are merged in Canada, it would be more difficult to effect this change. In addition, the analysis of the Canadian Attorney General shows that the role is more integrated within the government. The government may not want a greater separation of the Attorney General from the political process. Therefore, the nature of the New Zealand review supports confirming the separation of the two roles, but the change in Canada would be difficult to effect.

5.3 Abstaining

Another possible change is to ensure the Attorney General does not vote on issues for which he or she has issued a negative vet. This is principally a suggestion for New Zealand, but it could also apply in Canada if the Attorney General were to start issuing reports. In New Zealand, the Attorney General, the government, and Parliament are comfortable with the idea that the Attorney General’s role in making the reports is separate from his or her role as a Minister or member of caucus. However, the Attorney General voting in support of Bills that he or she has indicated has breached (or even may breach) the Bill of Rights Act can undermine the significance of the report. A convention that the Attorney General abstains on these issues could avoid this appearance and would solidify the independent approach that has been adopted by the Attorney General.

This is consistent with the New Zealand view of the Attorney General as acting independently from government on these matters. This should not change how the Attorney General makes a report, but simply maintains the appearance of independence in Parliament. In New Zealand, the reporting obligation has not been prejudicial to the government in litigation, given the limits of the Bill of Rights Act, and such a provision would not increase the risk of this occurring. However, it is reliant on the government accepting one less vote on legislation that affects rights. Further, this change depends upon the threshold used by the Attorney General. If it is

---

clear that the Attorney General is identifying potential *Bill of Rights* issues, rather than definite breaches, there is less of a case for the Attorney General abstaining.

In Canada, if reports were made under section 4.1 of the *Department of Justice Act*, would the government accept the Attorney General’s abstention? For the Attorney General to start making reports in relation to the *Charter*, at a practical level, the threshold used needs to lower. If the threshold is merely to identify to risk, then the case for the Attorney General to abstain is weaker. However, if the Attorney General were to abstain, the government may be afraid that this would be seen as further condemning the legislation in relation to litigation. As discussed above, litigation is a likely result in Canada whenever the *Charter* is engaged, regardless of the activity of the Attorney General. Further, the courts should be capable of making up their mind on these issues without being influenced by the activity in Parliament. Nevertheless, it may be difficult to persuade the Canadian government to take the risk that this will not prejudice their chances in litigation.

6 Removing the reporting obligation from the Attorney General

This discussion raises the issue of whether the Attorney General is the appropriate actor to perform this obligation and achieve both executive compliance as well as enabling parliamentary debate.

6.1 A political actor

One option is to provide that a fully political actor perform the role. This is the case in the United Kingdom, where, under the Human Rights Act, it is the Minister responsible for the Bill who provides a statement of compatibility, rather than the Attorney General. The fact that Minister provides the analysis, combined with the existence of the Joint Parliamentary Committee on Human Rights, which has its own legal advisor, provides space for both political and legal assessments of rights.325


In Canada, the focus on litigation means that the Attorney General performs a role that is integrated within the government. This is facilitated by Canada’s understanding of the independence of the Attorney General. Providing that the responsible Minister make the report would solidify the fact that the review is political and remove confusion with the role of the Attorney General. But, would allowing a different actor to perform this obligation, facilitate the litigation focused review? Litigation is intimately connected with the Attorney General’s role. It is logical for the Attorney General in Canada to assume responsibility for the review as he or she will be responsible for any ensuing legislation. Because of the focus on litigation, a shift of the responsibility to the Minister would be unlikely to gain support.

In New Zealand, the focus of the review is to provide an independent, court-centered analysis. This is important given the lack of other reviews in New Zealand’s system of parliamentary supremacy. Members of Parliament are comfortable relying on the report. Although they do not always do so, this is generally because of their focus on political considerations, rather than due to a perceived lack of independence. The review is often the only situation where such an analysis takes place: litigation is generally not pursued. For this reason, shifting the reporting obligation to the responsible Minister would require a major reconsideration of the role. The Minister is more likely to adopt reasoning that would fit in with the government’s policy decisions (or, at least, give the impression of doing so). In contrast, the Attorney General exercises the obligation in a way that is more independent from these objectives. Given the nature of the review in New Zealand, there does not appear to be demand for a more political review.

### 6.2 A parliamentary actor

It would be possible to create a Parliamentary Committee that is responsible for this type of activity. This is the case in the United Kingdom, where the Joint Committee on Human Rights is dedicated to rights issues. The Joint Committee on Human Rights is comprises members of the House of Commons and the House of Lords and has an independent advisor. Reports on its

---

work have been favourable.\textsuperscript{329} Such a committee would be a useful addition to the New Zealand and Canadian systems to encourage more systematic consideration of rights issues.\textsuperscript{330} But, it does not impact on the need for a review at an earlier stage. The United Kingdom committee exists in addition to the Minister’s reporting obligation. The establishment of a committee does not directly impact on the role of the Attorney General.

Rights issues can already be addressed by Select Committees in both Canada and New Zealand. However, there is no provision for systematic consideration by a Committee that has independent advisors on rights issues. As the New Zealand case studies show, the quality of the consideration given to rights issues by Select Committees can vary. A dedicated Parliamentary Committee would likely be acceptable in both systems. It would not compromise the Canadian government’s position in relation to future litigation. The committee could complement the work already done by the New Zealand Attorney General. However, there are issues about whether the unitary New Zealand Parliament, or the Canadian Parliament with its weaker Senate, would be able to provide such effective analysis as the Joint Committee in the United Kingdom. Further, it is unclear whether the weak \textit{New Zealand Bill of Rights Act} would provide the same incentive for compliance as the United Kingdom system with the European Convention on Human Rights. Nevertheless, this is an additional mechanism to encourage legislative compliance in Parliament that both New Zealand and Canada should explore.

\textsuperscript{329} See “Parliament and the Human Rights Act”, \textit{supra} note 28; Lester, \textit{supra} note 125.  
\textsuperscript{330} Indeed, such a committee was proposed in New Zealand when the \textit{Bill of Rights Act} was enacted, see Butler & Butler, \textit{supra} note 52, at 207.
Chapter 6
Conclusion

This thesis has set out the development and use of the reporting obligations contained in section 4.1 of the Department of Justice Act and section 7 of the Bill of Rights Act. As the case studies show, very different reporting cultures have developed in Canada and New Zealand. In Canada, the supreme law nature of the Charter, coupled with a different understanding of the role of the Attorney General has led to a situation where the review undertaken by the Attorney General is litigation focused and integrated into the executive process. Although there is much focus on executive compliance at an early stage, in reality the Charter analysis is more focused on arguments that could be made in litigation, rather than whether the proposed legislation does, in fact, comply with the Charter. Further, this focus does not encourage the Attorney General to release reports or advice in advance of litigation. This absence of information provides no basis for parliamentary debate.

In New Zealand, the statutory Bill of Rights Act and the understanding of independence of the Attorney General, has allowed the Attorney General to perform a more independent review than the Canadian counterpart. This review is legal and based on the analysis that might take place in the courts. The review is not integrated within the government. The nature of the analysis makes it acceptable for the Attorney General to release the advice, in the event that a report is not made. This approach allows the executive to take a different view on rights issues without compromising its position; but, it also provides a better basis for parliamentary and Select Committee debate. However, the reception in both Parliament and the Select Committee is mixed. Although there is some substantive debate on rights issues in the House of Representatives and Select Committees, it is far from systematic, and the quality varies.

Because these different approaches are, at least in part, grounded in the different constitutional structure of Canada and New Zealand, the usefulness of comparative analysis is limited. A practice that works well in New Zealand, may be unacceptable in Canada due to the enhanced risk of litigation. Conversely, the Canadian approach might not succeed in New Zealand because it would obscure rights issues that may not be resolved in court given the inability of New Zealand courts to strike down inconsistent legislation. A Canadian approach in New Zealand might prevent these issues ever being considered.
In light of this finding, the paper has analysed proposed changes to the reporting obligation. Where the changes come into conflict with the constitutional structure of the country, it is unlikely that they will be enacted. For example, it is likely to be difficult to persuade the Canadian government to lower the threshold so more reports are made, or to release the advice on rights issues, given that a more open approach may prejudice litigation. In contrast, proposals which suggest that the New Zealand Attorney General should be more integrated within the government are unlikely to succeed.
Bibliography

1 Primary sources

1.1 Cases

Belcher v Chief Executive of the Department of Corrections, [2007] 1 NZLR 507.


Belcher v Chief Executive of the Department of Corrections, [2007] NZSC 54.


Hirst v the United Kingdom (No 2), [2005] ECHR 681.


Moonen v Film and Literature Board of Review, [2000] 2 NZLR 9 (CA).


R v Poumako, [2000] 2 NZLR 695 (CA).


Taunoa v Attorney-General, [2006] NZSC 95.

1.2 Legislation

Access to Information Act, RSC 1985, c A-1.


Department of Justice Act, RSC 1985, c J-2.


Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 (NZ), 117-1.

Human Rights Act 2004 (ACT).

Human Rights Act 1998 (UK), c 42.


Parole (Extended Supervision) and Sentencing Amendment Bill 2003 (NZ), 88-2.

Parole (Extended Supervision Orders) Amendment Bill 2009 (NZ), 24-1.

1.3 Parliamentary or government documents


Case Note W44062, Office of the Ombudsmen, 13th Compendium.

Case Note W41067, Office of the Ombudsmen, 12th Compendium.

*Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010* (NZ), 117-2 (Select Committee Report).

*Electoral Finance Bill 2007* (NZ), 130-2 (Select Committee Report).


*Foreshore and Seabed Bill 2004* (NZ), 129-2 (Select Committee Report).


*Parole (Extended Supervision) and Sentencing Amendment Bill* (NZ), 88-2 (Select Committee Report).


*Standing Orders of the House of Representatives 2008* (NZ).


Wilson, Hon Margaret, Attorney General, “Foreshore and Seabed Bill” (6 May 2004).
2 Secondary sources

2.1 Articles and speeches


2.2 Books


Kelly, James B, Governing with the Charter: Legislative and Judicial Activism and the Intentions of the Framers (Vancouver: University of British Columbia Press, 2005).


### 2.3 Newspaper articles and blogs
