SOME OPERATIONAL ASPECTS OF THE BILL OF RIGHTS

Mr D.A.R. Williams
Barrister and Solicitor, Auckland

SOME OPERATIONAL ASPECTS OF THE BILL OF RIGHTS

by D.A.R. Williams

INTRODUCTION

In his Introduction to the White Paper on "A Bill of Rights for New Zealand" the Minister of Justice expressed a desire for a constructive and non-partisan debate about the desirability of a Bill of Rights. It is a vast topic and it would be impossible to deal with all the issues in the course of this Seminar, let alone in my relatively short paper.

Other speakers will consider some of the lofty political and constitutional questions which must be confronted in this debate and will no doubt present the competing arguments as to the necessity or desirability of a Bill of Rights. I propose to concentrate primarily upon some aspects of the proposed Bill of Rights which bear upon the question of whether a Bill of Rights in New Zealand would be a manageable and workable innovation. In doing so I hope to identify some of the changes which the judiciary, the legal profession, and other groups would have to make to adjust successfully to the revolutionary constitutional reorganisation that would flow from the adoption of a Bill of Rights.

THE RANGE AND SCOPE OF THE PROVISIONS OF THE DRAFT BILL OF RIGHTS

It is desirable to commence by analysing those areas that the Bill encompasses and those which it does not. This is

relevant in considering whether judges and lawyers will be able to cope with the issues arising under the Bill or whether they would be so novel and unfamiliar as to create operational difficulties.

The Bill is divided into six separate parts as follows:

PART I

General

1. New Zealand Bill of Rights supreme law
2. Guarantee of rights and freedoms
3. Justified limitations

PART II

The Treaty of Waitangi

4. The Treaty of Waitangi

PART III

Democratic and Civil Rights

5. Electoral rights
6. Freedom of thought, conscience and religion
7. Freedom of expression
8. Manifestation of religion and belief
9. Freedom of peaceful assembly
10. Freedom of association
11. Freedom of movement

PART IV

Non-Discrimination and Minority Rights

12. Freedom from discrimination
13. Rights of minorities

PART V

Life and Liberty of the Individual, and Legal Process

14. Right to life
15. Liberty of the person
16. Rights on arrest
17. Minimum standards of criminal justice
18. Rights of persons charged
19. Search and seizure
20. No torture or cruel treatment
21. Right to justice

PART VI

Application, Enforcement and Entrenchment

22. Other rights and freedoms not affected
23. Interpretation of legislation
24. Application to legal persons
25. Enforcement of guaranteed rights and freedoms
26. Reference to Waitangi Tribunal
27. Intervention by Attorney-General
28. Entrenchment
29. Short Title and commencement

Schedule

It can be seen that the Bill largely divides itself into two categories of rights. The first category, encompassed by Part III, deals with democratic and civil rights and is designed to preserve opportunities to participate in the political process. The second, contained in Parts IV and V deals with the protection of fundamental liberties and matters relating to fair procedures ("due process"). The Treaty of Waitangi is in a separate and a rather special category. It may be seen as perhaps the only area where substantive rights are protected, even though indirectly.

In my view there is a sound theoretical basis for an approach, adopted in the draft, which concentrates on procedural as opposed to substantive rights. It has been articulated persuasively by Professor Ely of Harvard in his book Democracy and Distrust: A Theory of Judicial Review[1]. He points out[2] that the few American attempts to freeze substantive values by designating them for special protection in the US Constitution have been ill-fated, normally resulting in repeal, either officially or by interpretive pretence. The classic illustration was the Eighteenth Amendment which was introduced in 1919 to enshrine the substantive value of temperance. It was repealed in 1933 and as Ely says,[3] "in 1919 temperance obviously seemed like a fundamental value; in 1937 it obviously did not...As a charter of government a constitution must prescribe legitimate processes not legitimate outcomes, if...it is to serve many generations through changing times."

Professor Ely goes on to argue that a written constitution should appropriately concern itself only with a set of procedural protections involving first the protection of fundamental liberties and secondly provisions designed to ensure the preservation of opportunities to participate in the political process in which the substantive decisions are made. Consequently, in the context of American constitutional law, he argues[4] for a "participation granting", "representation reinforcing" approach to judicial review, one where the Courts as far as possible leave the selection and preservation of specific substantive values entirely to the political process. Such an approach leaves the constitutional document "overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large - with ensuring broad participation in the process and distributions of government"[5].

Consistently with Professor Ely's analysis the draft Bill of Rights emphasises upon fundamental procedural rights and, as noted in paragraph 3.14 of the White Paper, it deliberately avoids rights reflecting specific economic or social objectives or standards. It may be contrasted in this respect with the Universal Declaration of Human Rights passed and proclaimed by the General Assembly in 1948. This declaration is much longer than the declarations published in America and France in the

18th century. In the first group of articles, the language is that of Locke, Jefferson and Lafayette. The basic rights to life, liberty and justice are spelled out in intelligible form. The Declaration does not, however, confine itself to the elaboration of these straightforward and compelling assertions.

The Declaration includes a further set of articles, covering what are described as "economic and social rights", and specifying human rights to such things as social security, an adequate standard of living, medical care, rest, leisure and even "periodic holidays with pay." It appears that these rights were inserted in the Declaration under pressure from some countries which could hardly pretend to uphold the individual's right to liberty and property, but could fairly claim to ensure - or to be trying to ensure - social security, medical services and holidays with pay for most people under their control.

Recently, Professor Cranston[6] made the valid point that the introduction of substantive economic or social rights in a Constitution or Bill of Rights will weaken the importance of fundamental procedural rights.

> "Such things are admirable as ideals, but an ideal belongs to a wholly different logical category from a right. If rights are to be reduced to the status of ideals, the whole enterprise of protecting human rights will be sabotaged. A human right by definition, is something that no one, anywhere, may be deprived of without a grave affront to justice. There are certain actions that are never permissible, certain freedoms that should never be invaded, certain things are sacred. If a declaration of human rights is to be what it purports to be, a declaration of universal moral rights, it must be confined to this sphere of discourse. If rights of a

different order are introduced, everything is immediately slackened: the sharp, clear imperative becomes a vague wish."[7]

Professor Lon Fuller expressed the same viewpoint some years ago when he said:-

> "In the United States the basic character of the law making process is found in a written constitution .... We should resist the temptation to clutter up that document with amendments relating to substantive matters .... Such attempts involve the obvious unwisdom of trying to solve tomorrows problems today. But the more insidious danger lies in the weakening effect they would have on the moral force on the constitution itself.[8]

It may be noted in passing that the restriction of the enumerated rights to the two broad areas I have mentioned also helps to overcome one of the major constitutional objections to the Bill of Rights. This is that the Bill of Rights is undemocratic in the sense that it would reduce the sovereign power of Parliament and place a separate responsibility in the hands of the judges. The argument in rebuttal has been most persuasively advanced by a distinguished U.S. Federal Judge, Judge J. Skelly Wright, in a paper entitled "A Bill of Rights: Shield or Shackle or Sham" delivered in London last month at the American Bar Association Conference. His views warrant extensive citation. In discussing the possible desirability of a Bill of Rights in the United Kingdom he said[9]:-

> "Perhaps what matters for Britain is not the degree of entrenchment but the basic decision to reduce guarantees of liberty to unambiguous words. As I see it, though, the core purpose of a bill of rights is to place basic liberties wholly beyond the politics of the day. Thus I propose to push a little further. I first raise the possibility that the guarantee in Britain of at least some rights found in America's Bill of Rights is

> essential to the fair and accurate functioning of the representational process on which Parliament's legitimacy is staked. I also suggest, albeit tentatively, that to the extent that a bill of rights is incompatible with the premise of parliamentary sovereignty, perhaps some conditions conducive to a rethinking are emergent.
>
> No one can doubt that the rights to speak freely, to associate for common purposes, to assemble, to petition government for redress of grievances, to vote, and to have that vote count for as much as the vote of any other citizen are at the core of self-government. The process of representation requires clear channels of communication between the people and their representatives. The electorate must have the means to inform itself and to make its views known to its representatives. Constitutional guarantees of free expression and association and of political equality ensure that the process of democratic decision-making works. If the legitimacy of parliamentary supremacy rests on the belief that Parliament's actions do accurately reflect the will of the people, then the argument is, it seems to me, compelling that Parliament's power should not reach so far as to permit infringement of rights essential to self-government.
>
> This argument, of course, embraces only some guarantees commonly associated with a bill of rights. Any attempt to entrench other rights--fair trial rights, privacy and autonomy rights, and the like--requires a different justification. I see some signs that the theory and practice of British government today might be hospitable to the idea of entrenching such rights. Recent scholarship has demonstrated that the idea of absolute parliamentary supremacy was in some measure a superimposition of the Nineteenth Century thinkers Bentham, Dicy and Austin, and that certain traditional common law limits on Parliament have existed at least since the time of Sir Edward Coke. Also, to my mind, the U.K.'s decisions to accede, at least somewhat, to authorities higher than Parliament by recognizing the European Convention on Human Rights and joining the European Economic Community signal that the authority of Parliament is now viewed as less than "illimitable".

Judge Wright had other valid points to make in support of the possibility of a Bill of Rights in the United Kingdom and these too have relevance in New Zealand. He mentioned "the increasingly pluralistic nature of British society - a

political recognition of regional and ethnic diversity" and went on to say[10]:-

> "The American experience illustrates the link between pluralism and the need for a bill of rights in a democratic society. When a society is relatively homogenous, the notion that a government will treat all people fairly, and that a legislation will represent all constituents adequately, is far more plausible. Consensus emerges more readily, and government officials are less likely to oppress those with whose interests they can identify closely. When, however, those in power are less readily able to empathize with certain groups in society, government becomes less reluctant to trench on the freedoms of those groups. The paramount example in my nation is of course the government's refusal to recognise blacks as citizens. But other examples abound. Constitutional protection of expression became increasingly important as the government sought to squelch political views it found dangerous, and these views often spread in the first decades of the 20th Century among newly arrived immigrant populations. Anthony Lester has made this point most perceptively in the British context:
>
> > "The best conditions for the working of the system were those of Victorian society: a society self-conscious in its homogenity and insularity, that overshadowed its professed ideals of tolerance and fair play; a society rejoicing in its abundant wealth, the fruits of early industrialization and exploitation of a vast empire; a society of laissez-faire in which there was minimal legislative intervention ...."
>
> The basic point, I think, is that Benthamite political theory premised on homogenity of individual interest--however valid it might once have been--may no longer serve as society becomes increasingly diverse.
>
> A third development is the growth in recent decades of the bureaucratic state. This brings up two points. First, the modern state's capabilities for intrusion into personal privacy far exceed any that could have been imagined even a century ago when the premise of trust in government was in full flower. I do not mean to conjure up an Orwellian spectre, but I think it fair to say that the limits of technology that de facto protected privacy in the past no longer constrain government's ability to

peek, to probe, to monitor. Second, as government takes on the role of provider, a firm due process guarantee against adminstrative caprice may be essential".

THE CONTENT STYLE, AND STRUCTURE OF THE ENUMERATED RIGHTS

As noted in paragraph 3.6 of the White Paper "the rights and freedoms included in the Bill are almost all firmly based on the existing law, common law or statutes. In ... several areas the Bill sets a minimum standard, leaving Parliament and the Courts the opportunity as appropriate to give greater protection." The avoidance of an equal protection clause which the American experience shows is an elusive and problematic kind of right,[12] is probably a wise move. Nor is there any protection of "property" per se and no reference to "due process of law". Under American constitutional law the latter phrase provided the basis for highly suspect invalidations of worker protection statutes which enshrouded the Supreme Court in controversy.[12a]

The end result is that most of the basic rights contained in the Bill are familiar and in my view contain judicially manageable procedural requirements. Judges may not be experts in economics or public policy but they are the special guardians of legal procedures, of the standards of decency and fair play that should be the counterpoise to the extensive powers of government. Furthermore, as the White Paper correctly points out, the Courts are already dealing with many of the controversial and difficult subjects which are covered in the Bill of Rights.

To return to the draft Bill of Rights, a word should be said about its style and its structure. The Draft has an appealing brevity, simplicity, and lucidity. It compares favourably in this respect with other recent constitutional documents, for example the Cook Islands Constitutional Amendments of 1980-81 which were subjected to criticism by the Cook Islands Court of Appeal.[13] It also avoids the complex structure and language of the International Covenant on Civil and Political Rights.[14] In many respects it follows the style and form of Canadian Charter. As noted in 10.2 of the White Paper "it will be seen that many provisions of the draft bill are closely based on the Canadian text. This will be of major practical importance for New Zealand lawyers and courts will be able to draw on the rich and developing jurisprudence of Canada." This will vastly simplify and reduce the burdens on the Courts and the legal profession if the Bill is introduced.

There are also helpful precedents in the Privy Council cases arising from other Commonwealth countries which have judicial review. Sir Robin Cooke has discussed the leading Privy Council cases and a selection of the Canadian decisions in a recent lecture and concludes that the number of cases in which governmental action has been invalidated is comparatively few.[16]

The stylistic and structural simplicity of the Bill should also overcome the fear that it will "freeze" 1985 values and impede our constitutional, political, and social development. On this point the views of Mr Justice Cardozo[15] are compelling:-

> "The content of constitutional immunities is not constant, but varies from age to age. "The needs of successive generations may make restrictions imperative today, which were vain and capricious to the vision of times past". "We must never forget", in Marshall's mighty phrase, "that it is a constitution we are expounding." Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change. In such cases, the meaning, once construed, tends legitimately to stereotype itself in the form first cast. A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens. While it is true to its function, it maintains its power of adaption, its suppleness, its play."

INTERPRETING AND APPLYING THE BILL OF RIGHTS: CONSTITUTIONAL INTERPRETATION

Accepting that the enumerated rights are broadly familiar to the New Zealand legal system the next question for judges and practitioners alike would be how to interpret and apply them as constitutionally embedded principles.

The first point that will need to be stressed and repeated until it becomes second nature to all concerned is that the Bill of Rights would be the supreme constitutional law of New Zealand. There would be a need for the Courts to develop certain distinctive principles of constitutional interpretation appropriate to expounding the supreme law of New Zealand[17] and to avoid any tendency to a narrow or legalistic interpretation of the right in question.[18] In this respect, the Canadian Supreme Court has stressed that it ought not be assumed that when a provision of the Bill of Rights is analogous to a common law principle the common law principle

has been adopted. As Lord Wilberforce pointed out in Minister for Home Affairs v. Fisher[19] constitutions are sui generis, calling for principles of interpretation of their own without necessary acceptance of all the presumptions which are relevant to ordinary legislation or private law.[20]

In formulating for New Zealand a basic approach the Canadian experience will again be helpful. The Supreme Court of Canada has already established its basic approach to the interpretation of the Canadian Charter and its views which will no doubt be considered carefully by our Courts should the Bill of Rights be introduced. In R v. Big M Drug Mart[21] Dickson J. delivering the judgment of the Court said:-

> "This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In Lawson A.W. Hunter v. Southan Inc. (Decision rendered September 17, 1984) this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision

> in Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161, illustrates, to be placed in its proper inguistic, philosophic and historical contexts."[22]

The purposive approach is now firmly entrenched in the field of statutory interpretation in England and New Zealand.[23] Such a familiar concept should not cause undue difficulty for judges or lawyers in New Zealand especially when there will be ample Canadian and other overseas precedents to illuminate the task of constitutional interpretation.

JUSTIFIED LIMITATIONS

In the application of the Bill of Rights Article 3, "Justified Limitations", will be of pervasive importance. Sir Robin Cooke has said that "this qualification can be seen as a masterstroke against rigidity."[24] It provides that "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". On the face of it it looks like a recipe for confusion and uncertainty but the Canadian and European Convention experience would seem to be reassuring. Let us first consider the nature and purpose of Article 3. It is very clearly stated in the White Paper.[25]

> "10.24 The rights stated in and guaranteed by the Bill are not absolute. Thus freedom of expression (Article 6) does not carry with it the right to incite violence, or to defame others, or to engage in commercial fraud. The freedom has limits. In some cases the limit may indeed arise from another freedom included in the Bill: thus the right to freedom of expression would scarely justify the release of prejudicial evidence prior to a trial inconsistently with the right to a fair hearing (Article 17(1)(a)).

10.25 Existing models suggest three ways of drafting the possible limits to the freedoms. The first is to include in each provision stating a freedom a separate statement of the permitted limits. This is in general the approach of the International Covenant. Consider, for freedom of expression, the formulation in Article 19(3). That approach appears as well in a number of Commonwealth constitutions, particularly those influenced by the drafting of the European Convention on Human Rights. A second approach, at the other extreme, is to state no express limits at all. The United States Constitution provides a good example: Congress shall make no law ..... abridging the freedom of speech ..... The courts do of course have to work out limits either by determining the scope of "speech" or by reading in balancing and limiting factors.

10.26 Article 3 adopts an intermediate model, setting out a single limitation provision which is to be applied as appropriate to each of the separate freedoms. It is based closely on section 1 of the Canadian Charter. Among the reasons for choosing that limitation formula rather than the other approaches are the following:

(a) The Bill should recognise explicitly that there <u>are</u> limits on its freedoms. It is misleading (and could be thought irresponsible) to suggest otherwise.

(b) The practice of courts under the different regimes suggests that the apparently greater precision resulting from the greater elaboration of detail in the Covenant and European models is just that - apparent. The particular judgment to be made remains essentially the same. Consider for example a dispute about the appropriate scope of the law of sedition. The Covenant would set this question: are the restrictions provided by the law necessary to protect national security or public order (ordre public). Under Article 3 the question would be: is that limit a reasonable one prescribed by law and such that it can be justified in a free and democratic society? Indeed, as is indicated later, the proposed formula in some ways gives a better regulated direction to the courts.

(c) There would be a danger that too much significance would be given to differences between different limitation provisions - differences which in the case of the Covenant

can sometimes be the result of the accidents of drafting over the long period that that text was elaborated in the General Assembly of the United Nations.

(d) So far as possble the Bill should be couched in short, simple, elegant and inspiring language. A long series of detailed exception provisions makes that impossible.

(e) New Zealand courts will be able, in this respect as in others, to take advantage of the developing jurisprudence of the Canadian courts."

In Canada there is now an extensive caselaw on Articles 3[26] and its meaning is reasonably settled. The following analysis may be offered.[27]

"Reasonable Limits"

Any limit upon guaranteed rights must be rationally connected to the attainment of a legitimate governmental objective. Furthermore, any limit on rights must not be a more excessive limitation than is necessary to attain a legitimate state objective. The Court will ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.

"Prescribed by Law"

The phrase "prescribed by law" will encompass four types of restrictive directives emanating from the organs of the state: statutes, regulations, decisions of administrative tribunals, guidelines of administrative tribunals and rules of the common law. Guidance on this phrase can be obtained by reference to

the decision of the European Court of Human Rights in the Sunday Times Case.[28] The Court expressed the following opinion:

> "The court observes that the word "law" and the expression "prescribed by law" covers not only statutes but also written law. In the court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, that a law must be adequately assessable: the citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".

In the result the court found that the applicants were able to reasonably foresee that publication of the article in question would render them liable in contempt under prevailing English principles of the law of contempt.

"As can be demonstrably justified"

At this stage it is convenient to note that four questions will arise under Article 3 which may be expressed as follows:-

1. Is the impugned Governmental action a limitation of a guaranteed right or freedom?

2. Is the impugned restriction a law?

3. Is the law a reasonable limit?

4. Is the reasonable limit demonstrably justified in a free and democratic society?

The litigant asserting an infringement of the Bill of Rights will have the duty to adduce evidence to answer the first question. Thereafter, the onus will shift to the Attorney-General to convince the court of positive answers to the remaining questions.[29] Proof on the balance of probabilities will suffice.[30]

It is clear that the courts will be called upon to make choices between competing policy arguments in determining whether particular limits can be demonstrably justified in a free and democratic society. Counsel will no doubt need to adduce evidence to document the evolution and rationale of legislation under consideration.[31] A wide range of extrinsic evidence would be admissible including Governmental papers, Governmental statistics, and the expert opinions of social scientists including economists.[32] Much more so than in ordinary litigation reference will be permissible to Hansard, not to construe and apply the provisions of the Bill of Rights, but to ascertain the purpose of the law in question.[33] This is already becoming the approach in New Zealand.[34]

"In a Free and Democratic Society"

No doubt reference to the position in other western democracies such as the United Kingdom, United States, Australia and Canada and the countries of western Europe will be appropriate, as

will reference to standards expressed in international conventions.[35]

ADAPTING AND ORGANISING TO PREPARE FOR THE NEW ROLE

It cannot be doubted that the entrenchment of fundamental rights and freedoms in the Bill of Rights would involve a new role for the judiciary and for lawyers advising on constitutional matters and arguing Bill of Rights issues before the courts. It would certainly call for a new and much more imaginative style or advocacy and may well accentuate the increasing emphasis on written argument by counsel. While oral argument is an absolutely indispensable ingredient of appellate advocacy the complexity of some constitutional issues will be such that extensive written submissions, more like U.S. briefs, may be the only efficient way to present the relevant materials to the Court for consideration. However, I hope that the foregoing analysis has demonstrated that the task, while very challenging, would not be beyond our ability and resources.

Moreover, the comparatively narrow focus of the Bill of Rights and the familiar territory in which it would operate would reduce or eliminate the risk of the kinds of judicial excesses which have attracted justified criticism in the United States.[36] Government by the judiciary I do not think would materialise and national policy would continue to evolve through the political process.

However, it does seems to me that a number of matters would need attention if such a great experiment was to be successfully launched. First, a massive educational effort would have to be made to ensure the successful introduction and operation of the Bill of Rights. In Canada, the Canadian Institute for the Administration of Justice under the Chairmanship of Mr Justice Matas of the Manitoba Court of Appeal conducted seminars for Judges in many cities in Canada and here too I believe that the judges would also have to "go back to school". Such wide ranging seminars on the Bill of Rights would be required since only a few of our judges have had any experience in constitutional adjudication. As to the legal profession The Law Society would, of course, have a key role in arranging travelling seminars which would need to cover the country.

Secondly, the University Law Schools would have to introduce new or expanded courses on the Bill of Rights and its comparative aspects. Fortunately, as today's seminar demonstrates, the law faculties already have teachers highly knowledgable and expert in such matters.

Thirdly, the media would need to devote much greater attention to articles and commentaries on Bill of Rights issues. Compared to other countries there are few, if any, writers or commentators who are capable of reducing complex legal issues into language that is both understandable and interesting. Such skills would become essential in a post Bill of Rights era. Commentaries on Bill of Rights decisions would need to

become commonplace in daily newspapers so that the public could be adequately informed of the nature and scope of the decisions being made.

Fourthly, I believe that certain important procedural aspects of our existing judicial framework would need attention. While the availability of Canadian and other precedents and other limiting factors should ensure that the courts are not overwhelmed with new constitutional cases it may be wise to examine in advance the ability of our judicial system to handle the increased litigation. With respect to criminal cases the White Paper makes the valid point[37] that "in many, probably most, of the Canadian cases it is a defendant in criminal proceedings who raises the issue. That is to say the Charter has not increased the volume of litigation. Rather, it has added one more weapon to the arsenal of defence counsel, a weapon which in practice is often easily repelled. It is a weapon moreover often aimed at administrative action and not at legislation. Courts there have also made it clear that separate pre-trial proceedings to have evidence excluded from criminal trials will not be countenanced: those matters are to be raised at the trial."

The White Paper also lists[38] the various powers of the court to control and limit proceedings which are initiated by someone complaining of a breach of the Bill of Rights. These powers are primarily employed in Courts of first instance.

It is at the appellate level that the greatest pressure is likely to be felt and in my view the question of controlling appeals to the Court of Appeal inevitably arises. This possibility was mentioned in 1981 by Richardson J. who said[39]:-

> "From 1957 to 1977 the Court of Appeal had only three permanent judges. Now there are five. What of the future? I think there are considerable advantages in staying at five. If our workload continues to expand, serious consideration will have to be given to the development of a screening mechanism leading to the granting or refusing of leave to appeal in more classes of case rather than erode the collegiate character and possibly the public standing of the Court by an indefinite expansion of our numbers."

The U.S. Supreme Court has long possessed a discretionary jurisdiction in most appeals[40] and since 1975 the Supreme Court of Canada has possessed the same power to restrict appeals.[41] Prior to 1975 the Supreme Court of Canada was required to hear any civil case that involved $10,000 if the losing party in the Court of Appeal wished to go on. The Court had become badly overloaded. It is now able to exclude cases that a brief preliminary hearing indicates are not worthy of attention[42]. Such a power must surely be ripe for consideration in New Zealand at least in civil cases, if not in all aspects of the Court's jurisdiction. Such a power would mean, for example, that if the Court of Appeal considered a High Court ruling on a Bill of Rights question to be entirely sound and not deserving of further consideration it could refuse leave to appeal. In addition the untrammelled ability of the High Court to remove a case into the Court of Appeal[43] without the concurrence of the Court of Appeal may also need reconsideration. The paramount importance of unhurried

decision making in sensitive constitutional appeals cannot be overstated. Justice Frankfurter of the U.S. Supreme Court put the matter in these words:-

> "The judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions. It is therefore imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication."[44]

It is also worthy of note that in the United States, by means of a Federal statute, a Federal district court of three judges is necessary before the operation of either a federal or state statute may be enjoined on the ground of its unconstitutionality.[45] Some such provision, which would recognise the very great care and restraint to be observed before finding a statute of no effect under Article 1, might also be worthy of consideration.

D.A.R. Williams

1. J.H. Ely Democracy and Distrust: A Theory of Judicial Review (1980)

2. Id at 88.

3. Id at 99, 101.

4. Id at 87.

5. Id.

6. M. Cranston What are Human Rights (1983) 112 Daedalus (Journal of the American Academy of Arts and Sciences) No.4, Fall 1983.

7. Id.

8. Fuller, American Legal Philosophy at Mid-Century (1954) 6 J. Leg. Educ. 457, 463-464.

9. At p.12.

10. At p.15.

11. White Paper para 10.82.

12. See e.g. Gunther Cases and Material on Constitutional Law (9th Ed.) 1975 at 657-665; Cox The Role of the Supreme Court in American Government (1976) Ch. III.

12a. See Ely supra note 1 at 14-21.

13. Clarke v. Karika, Judgment 14 December 1982, Cook Islands Court of Appeal (Sir Robin Cooke, Speight C.J., Keith J.).

14. Reproduced in the White Paper at 134-157.

15. Cardozo The Nature of the Judicial Process (1921) at 82-85.

16. Sir Robin Cooke Practicalities of a Bill of Rights F.S. Dethridge Memorial Address to the Maritime Law Association of Australia and New Zealand, 1984.

17. See the discussion by Dickson J. writing for the Supreme Court of Canada in R v. Big M Drug Mart (1984).

18. See Dickson J. writing for the Supreme Court of Canada in Hunter v. Southam Inc. (1984).

19. [1980] A.C. 319.

20. Id at 321.

21. Supra footnote 17.

22. Id.

23. See e.g. Stock v. Frank Jones (Tipton) Ltd [1978] 1 All ER 949, 951 (per Viscount Dilhorne); 952-953 (per Lord Simon). See also 55 Aust. L.J. 175.

24. Supra footnote 17.

25. White Paper, p71.

26. See Hogg, Canadian Constitutional Law (2nd Ed) 1985 Chapter 30.

27. See Christian, The Limitation of Liberty: A Consideration of Section 1 of the Charter (1982) UBC Law Review Charter Edition at 105.

28. (1979) 2 European Human Rights Cases Reports 245.

29. Per Dickson C.J. in Hunter v. Southam supra. See also Re Federal Republic of Germany (1982) 41 Ont Reps (2d) 225, at 241.

30. See Christian supra note 27 at 116.

31. See Law Society of Upper Canada v. Skapinker (1984) 9 DLR 4th 161 at 181, 182.

32. See the comments in the Skapinker case supra and Hogg Proof of Facts in Constitutional cases (1976) 26 U. Toronto L.J. 386.

33. See Hogg supra note 26, Chapter 15.

34. See Re Simpson [1984] 1 NZLR 733, 747.

35. See King-Ansell v. Police [1979] 2 NZLR 531, 540.

36. See e.g. R. Berger Government by Judiciary (1977); R. Neely How Courts Govern America (1981).

37. White Paper, para 6.28.

38. Id at 6.29.

39. Richardson J. The Role of an Appellate Judge (1981) 5 Otago L.R. 1, 5.

40. See generally Stern Appellate Practice in the United States (1981) and as to the method of selecting cases Stewart, How the Supreme Court Picks its Cases (1985) 71 ABA Journal 110. As to current problems with the work load on the U.S. Supreme Court see (1983) 97 Harvard Law Review 307.

41. Lederman Continuing Canadian Constitutional Dilemmas (1981) p. 182.

42. Id.

43. S.64 Judicature Act 1908.

44. Dick v. New York Life Insurance Co., 359 U.S. 437, 458-59 (1959) (Frankfurter, J., dissenting).

45. 28 USC Subsections 2282 and 2281. See The Three Judge District Court and Appellate Review (1963) 49 Virgina Law Review 538.