Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the *Criminal Procedure (Reform and Modernisation)* Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 261 of the Standing Orders of the House of Representatives

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990. I conclude it appears to be inconsistent with the rights affirmed by s 25 of the New Zealand Bill of Rights Act 1990.

The Bill

2. The Criminal Procedure (Reform and Modernisation) Bill will replace the current laws that govern the process of criminal justice, from the time the defendant is charged with an offence through to their conviction or acquittal and the determination of any subsequent appeal.

3. The current law is divided between the Summary Proceedings Act 1957, which governs the procedure for hearing summary offences and the processing of indictable offences up to the point where the defendant is committed for trial, and the Crimes Act 1961, which governs indictable offences from the time the accused is committed for trial.

4. The Bill proposes to dispense with the distinction between summary and indictable offences and instead proposes four categories of offence. Category 1 offences are those which are not punishable by imprisonment. Category 2 consists of criminal offences for which the maximum penalty is three years imprisonment or less. For both category 1 and 2 cases any hearing will take place in the District Court without a jury. Category 3 offences are those punishable by more than three years imprisonment, and for which the person charged may elect to be tried by a judge and jury and the trial may take place in the District Court. Category 4 offences are listed in a schedule to the Bill and comprise the most serious offences including murder and manslaughter and for which the trial must take place before a judge and jury in the High Court.

5. One of the aims of the Bill is to improve efficiency in the criminal process and reduce delays, thereby reducing the anxiety and disruption to those who become involved in it through no fault of their own, and lessening the financial burden on the community.

6. The right of an accused person to minimum standards of criminal procedure is a fundamental human right recognised by article 14 of the International Covenant on Civil and Political Rights (ICCPR) and affirmed in s 25 of the New Zealand Bill of Rights Act 1990.

7. In three respects I have concluded that the Criminal Procedure (Reform and Modernisation) Bill is inconsistent with the rights guaranteed by s 25 of the Bill of Rights Act 1990.

8. I have also considered a number of other elements of the Bill that raised issues of potential inconsistency with the Bill of Rights Act but concluded that they are not inconsistent. Although s 7 of the Bill of Rights Act and Standing Order 261 do not require me to report on provisions that are not inconsistent with the Bill of Rights Act, I will set out those conclusions in this report as well, because they provide a useful comparison to those that I have found to be inconsistent and the various reforms are best seen together.

9. I have provided a separate report on one important element of this Bill: the proposal to amend the New Zealand Bill of Rights Act 1990 itself.

ASPECTS OF THE BILL THAT ARE INCONSISTENT WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Trials in the absence of the defendant

10. Section 25(e) of the Bill of Rights Act specifically recognises the right of a person charged to be present during the trial, and to present a defence.

11. The New Zealand Court of Appeal and other courts in the Commonwealth have had to consider how far this protection should extend when the person charged does not attend the trial, and in what circumstances, if any, the trial, and possibly sentencing, can proceed in their absence.

12. In *R v Jones*,[1] the House of Lords held that the right to be present was only engaged if the person charged asserted it. If they were aware that the trial was to occur, and chose to absent themselves, they had either waived the right, or at least consciously failed to assert it. It was consistent with fair trial rights for the Judge to commence or continue the trial in their absence, although it was a discretion to be exercised with the utmost care. Their Lordships confined their decision to the defendant who voluntarily absconded. In the words of Lord Bingham of Cornhill:

> If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin.[2]

13. The New Zealand Court of Appeal followed *R v Jones* in *R v van Yzendoorn*[3] and repeated the caution that the Judge should not commence or continue the trial if there was a real risk that a fair trial would not result.

14. The European Court of Human Rights has also confirmed that a trial in the absence of the defendant is not necessarily incompatible with the equivalent article 6 of the European Convention on Human Rights. In *Poitrimol v France* [4] the court stated:

> Proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact. It is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself, but at all events such a waiver must, if it is to be effective for

---

1 *R v Jones* [2002] 2 All ER 113 (HL).

2 *R v Jones* at 121.

3 *R v van Yzendoorn* [2002] 3 NZLR 758 (CA).

4 *Poitrimol v France* (1993) 18 EHRR 130 (ECHR) at [31].

> Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.

15. Decisions of the United Nations Human Rights Committee suggest that waiver or non-exercise of the right to be present may not be confined to defendants whom the Court believes to have intentionally evaded their trial. It may also include those who provide no explanation for the absence[5] or provide only a weak explanation.[6]

16. Australian common law recognises that an accused has the right to be present during the course of his or her trial, but that right can be waived. The human rights statutes in the Australian Capital Territory and Victoria also guarantee the right to be tried in person, and to defend oneself personally, or through legal assistance.[7]

17. The cases establish that a judge has a discretion as to whether to continue a trial where an accused has voluntarily absented himself or herself by escaping. The Australian cases generally seem to approach this as a situation of waiver rather than non-exercise of a right.[8]

18. The common theme of all of these cases is that the right to be present at trial, protected in New Zealand by s 25(e) of the Bill of Rights Act, subsists unless the person charged waives it, or consciously refrains from exercising it. The right would be limited by any decision by a Judge to proceed with the trial in the absence of the defendant unless the Judge is satisfied that the defendant was aware that the trial was taking place and that there is no satisfactory explanation for their absence or where the defendant has consented to the trial proceeding without them.

19. Full recognition of the right requires that there be a fresh consideration remedy for any person who is convicted in their absence but who can establish that their failure to appear at trial was not a conscious one.

This bill limits the right affirmed by s 25(e)

20. I consider that the Bill limits the right of the person charged to be present and to present a defence in the following respects:

    20.1 In clause 124(1) it reaffirms the right of the person charged to be present at the hearing but recognises an exception where the defendant interrupts the

---

5 *Benhadj v Algeria* Comm No 1173/2003, 20 July 2007 (HRC).

6 For example, stating that they were on a "holiday", but providing no explanation of why it was impossible to return (*Kool v the Netherlands* Comm No 1569/2007, 1 April 2008).

7 Human Rights Act 2004 (ACT), s 22(2)(d), and Charter of Human Rights and Responsibilities Act 2006 (VIC), s 25(2)(d).

8 For example *R v McHardie* [1983] 2 NSWLR 733; *R v Jones* [1998] SASC 7021; *R v Serrano (ruling No 5)* [2007] VSC 209.

hearing to such an extent that it is impracticable to continue in the defendant's presence.[9]

20.2 Clause 128 provides that where a defendant who has pleaded not guilty to a Category 2, 3 or 4 offence does not appear for trial but the prosecutor is ready to proceed, the Court:

20.2.1 may proceed with the hearing if satisfied that the defendant has a reasonable excuse for not attending; but

20.2.2 must proceed with the hearing if not satisfied that the defendant has a reasonable excuse for not attending.

21. I have also considered clause 126 which provides that where a defendant charged with a category 1 offence does not appear, the Court may proceed with the hearing in his or her absence. I do not consider that the power to proceed in the absence of the defendant in the case of a category 1 offence limits the right to be present because the Court there is left with a discretion whether to continue or not, and I am satisfied that judges will exercise it in a manner that does not limit s 25(e) of the Bill of Rights Act.[10]

Removing the disruptive defendant

22. The right to be present subsists unless the defendant waives it or consciously elects not to exercise it. The defendant who interrupts the trial to the extent that it is impracticable to continue is abusing their right to be present but it could not be said that they have thereby waived the right to be there or chosen not to assert it. Indeed, most defendants removed in those circumstances will be removed against their wishes. The exception in clause 124(2) therefore constitutes a limit on the right.

23. It is appropriate to look at whether it is a demonstrably justifiable limit. If a defendant interrupts the proceedings to the extent that it is impracticable to continue, and does so having received a warning from the Judge that they will be removed if their behaviour continues, they can be said to have abused their right such that a fair hearing cannot proceed and it is demonstrably justifiable for the court to limit the right to be present for so long as that behaviour continues. The courts are effectively left with a discretion to exclude the defendant and I am satisfied that judges will exercise that discretion in a rights-consistent way. I do not think that the exception created by clause 124(2) is inconsistent with s 25(e).

Proceeding without an absent defendant

24. Clause 128 is potentially applicable to defendants in a range of circumstances.

---

9 Clause 124 of the Bill.

10 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [6] and [25]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [91]–[92]; *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

25. The imperative to proceed is triggered by the absence of a reasonable explanation. The lack of a reasonable explanation may be the result of any of the following situations:

25.1 The defendant has no credible explanation for their absence such that the Court may safely infer a conscious decision not to be present.

25.2 The defendant has a credible explanation that the Court accepts as genuinely held but does not find to be reasonable.

25.3 The defendant has a reasonable explanation (for example not having been told of the trial date) but is not there to offer it to the Court, in person or through counsel.

26. The discretion to proceed is triggered by the defendant having been found to have a reasonable explanation.

27. Of the examples just given, only the defendant described in paragraph 25.1 could be said to have consciously elected not to exercise the right to be present. In each of the other examples, the defendant has not waived or failed to exercise the right to be present and yet the Bill contemplates that the trial either must or may proceed in their absence. That amounts to a clear limit on the right.

28. The power to proceed in the absence of the defendant is qualified by four important provisions:

28.1 The Judge must not proceed with the hearing if to do so would be contrary to the interests of justice.

28.2 The defendant's lawyer may continue to represent an absent defendant.

28.3 The defendant, if liable to imprisonment, cannot be sentenced in their absence.

28.4 Clause 131 provides a fresh consideration remedy by way of a right to apply for a re-trial, as well as the usual right of appeal.

29. I have considered whether the qualifications to the clause 128 power to proceed with a hearing in the absence of the defendant are sufficient to enable full recognition of the right.

30. The Judge is required to refrain from continuing if it would not be in the interests of justice, but I am not satisfied that this will enable the Court to apply the power in a way that is consistent with the right. The considerations that the Court must take into account when considering what is in the interests of justice do not include any that direct the Judge's consideration back to the defendant's right to be present.

31. While these mandatory considerations are not expressed to be exhaustive of the court's discretion, the structure of clause 128(5) would not appear to allow a Judge to imply s 25(e) as a paramount consideration that trumps the four mandatory criteria.

32. The continued participation of the defendant's lawyer, if that lawyer considers that they are able to continue, will ameliorate some of the risk of unfairness in the trial itself, but it does not address the limitation of the right of the defendant to be at the hearing themselves.

33. The fresh consideration remedy that applies to category 2, 3 and 4 cases is subject to a significant proviso. Even if the defendant was absent through not being made aware of the trial date, they do not have an unqualified right to a fresh determination of their case on the merits.[11] The right to a re-trial is subject to the defendant satisfying the Judge that they have a defence that would have had a reasonable prospect of success had they been present. Criminal justice rights safeguards apply for the protection of the guilty as well as the innocent.[12] This proviso weakens the protection that the fresh consideration remedy offers and does not enable the Court to restore the right to all those who are entitled to its protection.

34. I do not believe that the qualifications on the power to proceed in the absence of the defendant are sufficient to negate the limit that clause 128 places on the right.

The limit is not demonstrably justified

35. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be 'demonstrably justified in a free and democratic society' under s 5 of the Act.

36. Following the guidance of the New Zealand Supreme Court decision of *R v Hansen*, the s 5 inquiry involves consideration of the following:[13]

    36.1 whether the limitation of the s 25(e) right serves a significant and important objective;

    36.2 whether the limit is rationally connected to the objective;

    36.3 whether the limiting measure impairs the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose; and

    36.4 whether the limit is proportionate to the importance of the objective.

37. The relevant objectives in this instance are to reduce the anxiety, distress and inconvenience caused to innocent participants in the criminal justice process and to improve the efficiency of the Courts. These are important social objectives. Reduced delay in the disposal of criminal proceedings is in the interests of all

---

11 This may be compared with the re-trial provision that applies to Category 1 (minor) offences which must be allowed if the Court is satisfied that the defendant did not receive a summons and was not aware that one had been issued.

12 See, in respect of the fair trial right, *Randall v R* [2002] UKPC 19, [2002] 2 Cr App R 17 at [28].

13 See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [70], [123], [203]-[204] and [271].

participants in the process, including defendants, who also have a protected right to trial without undue delay. [14]

38. The proposed limit on the right is rationally connected with that objective in the sense that the result of it being implemented is that fewer cases will require last minute adjournment because of a failure of the defendant to turn up to Court.

39. The crucial issue is whether the Bill limits the right no more than is reasonably necessary to achieve that purpose. I have reached the view that the enactment of the provisions in this Bill, which allow trial of the defendant in his or her absence where they have not consciously elected to refrain from exercising their right to be present fails this test.

40. The right for the defendant to be present at the trial is an important one. Even the guilty defendant is entitled to know that the process that brought about their conviction and punishment was conducted fairly, and there is no substitute for their being present in Court to witness it. The defendant's presence serves a public purpose as well. Our criminal justice system achieves justice through an adversarial process. The defendant's presence is necessary to supply instructions to their lawyer, to assist in the effective cross-examination of witnesses and to evaluate whether they ought to call or give evidence themselves. Public confidence in the verdicts of the criminal courts is enhanced by knowledge that the defendant was afforded the facilities and opportunity to defend themselves.

41. Ameliorating the anxiety and distress to victims and witnesses in particular is a highly desirable feature of criminal justice procedures, but it does not justify limiting the right of an accused person to be present at their trial. In particular I consider that these objectives could have been sufficiently achieved in rights-consistent fashion through provision of a bare discretion for the Judge to proceed with the trial when the defendant does not appear, as is contemplated for category 1 offences.

Re-trial of acquitted defendants

42. 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 should be tried or punished for it again."

43. This section, which is based upon on art 14(7) of the ICCPR, affirms what the law has long recognised as the double jeopardy rule. This rule has an important constitutional purpose in protecting citizens from misuse by the state of its prosecutorial resources. It requires the state to accept the verdict of the jury and not subject any person to the oppression of having to defend themselves repeatedly. It is one of the basic safeguards of civil liberty. Recognition of the rule is also in the community's interest because it reflects important values of finality in criminal proceedings and respect for the authority of the courts.

---

[14] Bill of Rights Act. s 25(b).

44. In clauses 151 and 154 this Bill provides for two exceptions to the double jeopardy rule.

45. First, if a person is acquitted of an offence punishable by imprisonment and is later convicted of an administration of justice offence that taints their acquittal, the High Court may order that person to be tried again.

46. The administration of justice offences are all in the Crimes Act 1961; bribery of a judicial officer (s 101); corruption and bribery of law enforcement officers (s 104); perjury (ss 109); fabricating evidence (s 113); conspiracy to defeat justice (s 116); and corrupting juries and witnesses (s 117).

47. Before it can order a re-trial the High Court must be satisfied that it is more likely than not that the administration of justice offence was a significant contributing factor in the previous acquittal, and that no appeal or other application to set aside the administration of justice conviction remains to be disposed of. Finally, the Court must be satisfied that a re-trial would be in the interests of justice.

48. The second exception applies only to offences for which the penalty is 14 years imprisonment or more. The Court of Appeal may, on the application of the Solicitor General, order a re-trial of a person acquitted of such an offence, if there is new and compelling evidence of their guilt. The Court must again do so only where it would be in the interests of justice.

49. Both exceptions clearly limit the right of persons acquitted not to be tried again for the same offence. The question is whether that limitation is demonstrably justified in a free and democratic society. While the double jeopardy rule is of fundamental importance there are important competing values. When a defendant can plainly be seen to have been obtained an acquittal by perverting the course of justice, public confidence in the administration of justice is undermined. To a lesser degree it may be undermined when the defendant seems to have profited from being tried without compelling evidence of guilt that has only emerged after the trial. The sense of injustice that results will be felt most keenly by any victim of the offending.

50. The provisions allowing for re-trial of an acquitted defendant that this Bill proposes are in all meaningful respects identical to those that are set out in the Crimes Act 1961 ss 378A to F which were introduced by the Crimes Amendment Act (No 2) 2008. The Bill that introduced that amendment was subject to a report to the House under s 7 by the then Attorney General dated 22 June 2004.[15] The Report advised the House that the provisions allowing for re-trial where the acquittal is tainted by an administration of justice offence were demonstrably justified and therefore not inconsistent with the Bill of Rights Act. However, the provisions allowing for re-trial where there was new and compelling evidence were said to be not justified and thus inconsistent with the Bill of Rights Act.

51. I have reviewed that report and the developments in the law that have occurred since it was written. The only significant development since then is the decision

---

[15] Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure Bill. 22 June 2004.

of the Court of Appeal for England and Wales in *R v Dunlop*,[16] the first occasion in which s 77 of the Criminal Justice Act 2003 (the United Kingdom equivalent of the proposed clause 154) has been invoked on the ground of new and compelling evidence.

52. The defendant in that case was acquitted of murder when the Crown offered no evidence after two hung juries. He subsequently confessed to the murder and admitted lying at his trial. He was convicted of perjury. The Director of Public Prosecutions sought his re-trial on the basis of both his conviction for perjury and new and compelling evidence (his confessions). In allowing the application for a re-trial the Court of Appeal emphasised that it was the seriousness of the specified offences that provided the justification for the exception to the double jeopardy rule, noting that the strongest justification was likely to hold for the crime of murder.[17]

53. I have reached the same view of the re-trial provisions as that which is set out in the Attorney General's Report of 2004, and largely for the reasons that are set out in that report. I do not consider *Dunlop* to have affected the force of that reasoning and, indeed, it is perfectly consistent with it.

54. The objective of the new and compelling evidence exception is forcefully set out in the report of the United Kingdom Law Commission[18] that led to the enactment of their legislation:

> 'There is, further, the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrongful convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself.

55. The defining difference between what this Bill proposes in order to meet that objective and what was enacted in the United Kingdom is that the definition of a specified serious offence does not confine it to the most serious offences. The threshold of 14 years imprisonment extends its application to a greater number of offences than is necessary to meet the objective. The limit it imposes on s 26(2) therefore cannot be justified under s 5 of the Bill of Rights Act.

Reverse Onus of Proof

56. Section 25(c) of the Bill of Rights Act guarantees the right to every person charged with an offence to be presumed innocent until proven guilty according to law.

---

16 *R v Dunlop* [2006] EWCA Crim 1354, [2007] 1 All ER 593.

17 At [43] – [44].

18 Law Comm no 267 at 36, [4.5].

57. In order to give full recognition to this right, which is also a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and disproving any potentially available defence, must remain on the prosecution.[19]

58. Any offence provision that shifts the onus of proof on to the defendant, will limit this important right.[20]

59. Section 67(8) of the Summary Proceedings Act 1957 does just that. It is a generic provision, applying to any summary offence. It provides:

> Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section 17 of this Act, need not be negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant.[21]

60. This section applies only to summary offences but it has very wide application. The Bill proposes that it will be repealed. In its place the Bill contains amendments to offence provisions in twelve statutes that will place a burden of proof on the defendant to establish an exception, exemption, proviso, excuse, or qualification.

The right to be presumed innocent may be subject to demonstrably justified limitation

61. In *R v Hansen* the Supreme Court Elias CJ[22] and Anderson J[23] opined that the right is an absolute one that cannot survive any justified limitation, but that was not the view of the majority of the Supreme Court in that case.[24] Other jurisdictions have also taken the view that the right may be limited.[25]

62. Following *Hansen* the imposition of a reverse onus of proof may be demonstrably justified, but any evaluation under s 5 must begin by recognising, as all the members of the Supreme Court did in that case, how important the right is.

---

19 The presumption of innocence was described as a "golden thread" running through the web of English criminal law: *Woolmington v DPP* [1935] AC 462 (HL) at 481 per Viscount Sankey LC.

20 *R v Hansen* at [38] – [39] per Elias CJ. [202] per McGrath J. [269] per Anderson J.

21 Section 17 is the section that requires the information to contain sufficient particulars.

22 *R v Hansen* at [38].

23 *R v Hansen* at [264]; while not as forceful on this point as the Chief Justice. Anderson J noted that it was "fairly arguable" that s 25(c) was incapable of justified limitation.

24 *R v Hansen* at [65] and [66] per Blanchard J; McGrath J's reasoning at [193]-[199] (while also emphasising the "very high level of importance that our society attaches to the presumption of innocence") and Tipping J's reasoning at [88]-[94], particularly fn 135.

25 See for example *Salabiaku v France* (1988) 13 EHRR 379 (ECHR), particularly at [28] and *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264; [2005] 1 All ER 237 at [21] per Lord Bingham and [80] per Lord Carswell.

63. The scope for demonstrable justification will be greater for administrative or regulatory offences. Where minimum standards of public behaviour have to be maintained in order to protect important public values (such as bio-security, sustainable management of resources, fair collection of public revenue, the security of our borders) there will often be a statute regulating that which includes provisions making it an offence to fail to comply with those minimum standards.

64. Some such statutes have very wide application (for example the Tax Administration Act 1994 and the Resource Management Act 1992) while others are confined to voluntary participants in a particular activity (such as the Arms Act 1983 or Fisheries Act 1996).

65. In order to be demonstrably justified, any reverse onus provision would have to meet the standard described in *R v Hansen* and referred to earlier in this report.[26]

66. For example, a reverse onus provision may be justifiable where:

66.1 the defendant is voluntarily involved in a regulated activity;

66.2 the offence would apply in very limited circumstances; and

66.3 the element to be proven is within the knowledge of the person concerned and proof of it would not impose an undue burden on the defendant.[27]

The Fisheries Act 1996, s 113A

67. The Bill proposes that a reverse onus be added to 6 of the offences under the Fisheries Act 1996. I have found that all but one of them is demonstrably justified and they are dealt with later in this report.[28] I am not satisfied that the reverse onus proposed for s 113A is justified.

68. Section 113A requires New Zealanders and all persons on board a New Zealand flagged vessel in a foreign fisheries jurisdiction, to only take fish in accordance with the laws of that jurisdiction. It does so in the following terms:

> (1) No New Zealand national, and no person using a ship that is registered under the Ship Registration Act 1992 or that flies the New Zealand flag, may take or transport fish, aquatic life, or seaweed in the national fisheries jurisdiction of a foreign country unless the fish, aquatic life, or seaweed is taken or transported under, and in accordance with, the laws of that jurisdiction.
>
> (2) Every person who contravenes subsection (1) commits an offence and is liable to the penalty set out in section 252(3)

---

26 See paragraph 36 of the text above.

27 See, for example, *R v Wholesale Travel Group* [1991] 3 SCR 154 (Supreme Court of Canada). The point was noted with possible approval but not decided in *Hansen* at [43], [66] and [227].

28 See paragraph 147 of the text below.

69. The Bill proposes that there be a reverse onus of proof for offence so that the defendant who is proved to have taken or transported fish caught in another country must prove that they did so in accordance with the laws that applied in that country.

70. This is an extra-territorial offence, which appears to have been enacted to reflect New Zealand's commitment to the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2001 and the Fishstocks Agreement 2001.[29]

71. It is highly likely that the only persons that would be charged with this offence are commercial fishers, but the definition of the offence is not confined in that way, so potentially it could be applied to a recreational fisher.

72. The proviso that enables the defendant to escape liability requires the proof that the fishery law that applied in that foreign country permitted the defendant to act as he or she did. That is not a matter that upon which the defendant would be expected to be in a better position to provide proof than the prosecuting authority. Indeed, where prosecutions occur they are likely to involve co-operation between the Ministry of Fisheries and their counterparts in the other jurisdiction.

73. The burden placed on the defendant is a significant one. Once the prosecution has proved that fish, aquatic life or seaweed was taken, and where it was taken from, it would fall to the defendant to prove their innocence.

74. I am not satisfied that this limit on the presumption of innocence is demonstrably justified. There is therefore an apparent inconsistency between that part of Schedule 6 of the Bill (where the amendment to s113A of the Fisheries Act 1996 is proposed) and s 25(c) of the Bill of Rights Act.

The Civil Aviation Act 1990, section 53A(4A)

75. The Bill proposes a reverse onus in new subsection (4A) which would require the operator or pilot-in-command of an aircraft to which the section applies, and which is being flown over a foreign country or territory, and who knowingly fails to comply with a direction from the relevant foreign aeronautical authority, to prove that the lives or safety of persons on board that aircraft would have been endangered in order to excuse the failure to comply.

76. Subsection (1) provides that the section applies to:

    76.1 an aircraft that is registered (or required to be registered) in New Zealand; or

    76.2 any other aircraft that is operated by a permanent resident of New Zealand or a person whose principal place of business is in New Zealand.

77. In my view, this limit on the presumption of innocence is not demonstrably justified. In particular, as the test is objective and the provision is widely drafted

---

[29] The international law background to s 113A is discussed by Judge Broadmore in *Ministry of Fisheries v Tukunga* DC Wellington CRI-2005-085-6992. 30 March 2007.

it cannot be assumed that the evidence required to establish the proviso is peculiarly within the knowledge of the defendant. Further, it is also not obviously the case that this evidence is more likely to be available to the defendant than it is to the prosecution.

78. There is therefore an apparent inconsistency between that part of Schedule 6 of the Bill (where the new s 53A(4A) of the Civil Aviation Act 1990 is proposed) and s 25(c) of the Bill of Rights Act.

ASPECTS OF THE BILL THAT LIMIT RIGHTS GUARANTEED BY THE NEW ZEALAND BILL OF RIGHTS ACT 1990 BUT WHICH ARE DEMONSTRABLY JUSTIFIED

Clearing the Court

79. Section 25(a) of the Bill of Rights Act guarantees that every person charged with an offence will have:

> The right to a fair and public hearing by an independent and impartial court.

80. The importance of open justice was emphasised by Richardson J in a pre- Bill of Rights case, *Broadcasting Corporation of New Zealand v Attorney General:*[30]

> One of the essential qualities of a Court of justice is that it conducts its proceedings in public. There are evidentiary advantages in that course for access of the public and the news media to the Courts tends to enhance the quality of testimony and at times, too, to secure the testimony of those who realise from what they learn of the particular case, usually through news media reporting of proceedings, that they have a contribution to make. However, the constitutional reasons go far deeper. Their concern is with the administration of justice both in the particular case and in the generality of cases, and the associated basic need to preserve confidence in the judicial system. Open justice imposes a certain self discipline on all who are engaged in the adjudicatory process - parties, witnesses, counsel, Court officers and Judges. This is particularly so in the criminal processes: where individual liberty is at stake the knowledge that trials are subject to contemporaneous review in the forum of public opinion is a restraint on the conduct of all who are involved. The regular conduct of trials in open Court also provides an assurance to the wider public that justice is being administered openly and under public scrutiny.

81. Although defendants often waive their right to a public hearing by seeking name suppression, open justice is for their benefit also. In particular they benefit from the restraint that open scrutiny places on those who prosecute, judge, or give evidence against them, and that is what s 25(a) protects.

82. The Bill begins with the proposition that every hearing is open to the public (clause 200). Clause 201 then allows for the court, in any proceedings, to make an order requiring everybody to leave the courtroom, with the exception of the Judge and jury; the prosecutor; the defendant; any lawyer engaged in the proceedings; officers of the court; and Police. The court must be cleared when the complainant in cases of a sexual nature gives evidence.[31] In making provision for

---

30 *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120 at 132 (CA).

31 Clause 203.

this power the Bill re-enacts statutory powers that are currently supplied by the Criminal Justice Act 1985.

83. Empowering a Judge to hold any part of a criminal trial in camera is a clear limit on the defendant's right to a public hearing.

84. In *R v Hansen* a majority of the Supreme Court described the right protected by s 25(a) to be illimitable,[32] but the majority was referring to the fairness of the trial rather than the fact that it must be conducted in public. The text of article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), which states the right to which s 25(a) gives effect, confirms that the right to have a hearing in public may be subject to demonstrably justified limits.[33]

The power to clear the courtroom is a justifiable limit

85. There is from time to time a pressing need to depart from the principle of open justice and to limit the right of the defendant to a public hearing where it is necessary to ensure that a trial is conducted fairly, or to give effect to other important public interests.[34] In New Zealand these include the maintenance of the law; protecting national security and defence;[35] and the need to protect particularly vulnerable complainants from the unnecessary distress of having to give their evidence in public.[36] Self-evidently, a Judge must also be able to prevent any disturbance from the public gallery having an effect on the proceedings.

86. The circumstances set out in clause 201(2) in which the courtroom may be cleared are appropriately confined to those where the order can be said to be necessary, and importantly, unless the reason for clearing the Court is to avoid prejudice to the security or defence of New Zealand, members of the media are permitted by clause 202 to remain. Further, the power is discretionary and therefore it must be exercised in a manner that is consistent with s 25(a) of the Bill of Rights Act.

87. Accordingly I am satisfied that the provisions conferring on judges the power to clear a courtroom are not inconsistent with the Bill of Rights Act.[37]

---

32 *R v Hansen* at [65] per Blanchard J, [90] per Tipping J and [264] per Anderson J.

33 Article 14(1) of the ICCPR provides: All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

34 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL) at 450 per Lord Diplock.

35 Clause 201.

36 Clause 203.

37 Unlike the Criminal Justice Act 1985, s 138, the power to clear the court conferred by this Bill does not carry with it any automatic suppression of publication of what takes place when the court is cleared. If such orders are

Suppression Orders

88. Section 14 of the Bill of Rights Act preserves the right to freedom of expression in the following terms:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

89. The reporting of criminal proceedings to the public is a highly valuable exercise of the right to freedom of expression. It is another element of the principle of open justice described by Richardson J in *Broadcasting Corporation of New Zealand v Attorney General*.[38]

90. The public's legitimate interest in observing the conduct of criminal trials cannot be fully recognised only by holding the hearing in public. The predominant means by which the public receive their knowledge of what occurs in court is through the published reports of the media representatives who attend. Any power to suppress that publication is a clear limit on the right.

91. This Bill re-enacts and modifies the suppression powers currently set out in the Criminal Justice Act 1985. Judges are given power to make suppression orders affecting any one or more of: the identity of the defendant; the identity of any witness or victim; and the particulars of any evidence or submissions that are given in court.[39]

92. The power to suppress the identity of the defendant is discretionary but can only be exercised if one or more of eight criteria in clause 204(2) are established. The Court must be satisfied that publication would create a real risk of prejudice to a fair trial; cause undue hardship to any victim (as defined in s 4 of the Victims' Rights Act 2002); cause extreme hardship to the person charged, convicted or acquitted, or any person connected with them; endanger the safety of any person; lead to the identification of another person whose name has been suppressed; prejudice the maintenance of the law; prejudice the security or defence of New Zealand; or cast suspicion on another person that may cause undue hardship to that person. Extreme hardship is not defined, but the Bill specifically excludes from extreme hardship the fact that the defendant is well known.[40]

93. In the case of proceedings for sexual offences against either ss 130 (incest) or 131 (sexual conduct with dependant family member) of the Crimes Act 1961 name suppression is automatic. However this protection is expressly for the benefit of the victims of the offence, who may, if adult, apply to have the suppression lifted.

---

required they will be made under the provisions allowing for suppression. It is not necessary therefore to consider the consistency of the power to clear the Court with s 14 of the Bill of Rights Act (freedom of expression).

[38] See paragraph 80 of the text above.

[39] These are set out in clauses 204 to 208. Important provisions affecting the suppression power, some of which are referred to in this report, are set out in clauses 210 to 216.

[40] See clause 204(3) of the Bill.

94. The Court also has a discretionary power in clause 206 to suppress the identity of any witness, victim, or person connected with the defendant. This power is constrained in a similar manner to the power to suppress the name of the defendant.

95. In the case of serious sexual offending, suppression of the identity of the victim is automatic, but a victim aged 18 years or older may apply to a Court for permission to be given for the publication of their name.

96. Suppression is also automatic for any child witness or victim, unless the child victim has died as a result of the offence. Upon attaining the age of 18, the subject of a suppression order made under this power may apply to the Court for an order permitting publication of their name.

97. The Court may also make an order for the suppression of evidence or submissions for a broadly similar range of reasons as that which govern the other suppression orders.

98. The power to make suppression orders is subject to various controls. The court must give reasons, although in exceptional circumstances it may withhold all or any of the facts, reasons or other considerations that were taken into account. Suppression orders may be permanent, and will be unless a time period is specified, but they are susceptible to review by the court at any time. Members of the media who are subject to a code of ethics and either the Broadcasting Standards Authority or Press Council complaints procedures have standing to be heard on any application for a suppression order.

99. Publication in breach of a suppression order is an offence punishable by up to six months imprisonment or in the case of a body corporate, a fine of up to $100,000. Specific exemption is made for Internet Service Providers who innocently facilitate publication, unless they fail to remove it as soon as possible after being made aware of the order.[41]

The power to make suppression orders is demonstrably justified

100. In all but two circumstances the making of a suppression order is discretionary, subject to one or more of the expressed criteria being present. I am satisfied that judges who exercise that discretion will do so in a manner that is consistent with s 14 of the Bill of Rights Act. Further, any exercise of the power is subject to review and appeal, and members of the media who are subject to professional ethical constraints are confirmed to have standing to be heard. Other than in exceptional circumstances, reasons for the suppression must be given.

101. The two circumstances where suppression orders are automatic rather than discretionary concern the protection of particularly vulnerable victims and witnesses. I am satisfied that these limitations of s 14 of the Bill of Rights Act are demonstrably justified. Ensuring the privacy of vulnerable victims and witnesses is necessary not only because it behoves any civilised and humane society to

---

[41] Breach of a suppression order has always been an offence, but under this Bill the penalties are considerably increased. Under the Criminal Justice Act 1985, s 140, the maximum penalty for breaching a suppression order is a fine of $1,000.

protect them, but also in order to encourage future victims and witnesses to come forward and report serious offending that may otherwise go undetected.

102. For completeness, I have considered whether the provision of a criminal sanction for breaching a suppression order that includes imprisonment or a substantial fine could make the limit on the right to freedom of expression disproportionate, given the chilling effect that those penalties are likely to have.

103. I have concluded that it is does not. The decision whether to make a suppression order is where the limit on the freedom of expression is resolved, and there is appropriate opportunity for interested persons to be heard. Once an order is made the transcendent value, essential to any civilised society, is respect for the authority of the courts. In protecting that value it is sometimes necessary to resort to imprisonment to punish and deter flagrant challenges to that authority.

104. I conclude that the provisions dealing with suppression are a demonstrably justified limit on freedom of expression and therefore are not inconsistent with the Bill of Rights Act.

Trials of Category 3 and 4 offences by Judge alone

105. Section 24(e) of the Bill of Rights Act protects the right of every person charged with an offence punishable by three months imprisonment or more, to be tried by a judge and jury. This Bill also proposes an amendment to the Bill of Rights Act, which I have reported on separately, to raise that threshold to three years imprisonment.[42]

106. Any enactment that interferes with the defendant's right to be tried by a judge and jury will limit the right protected by s 24(e).

107. The new criminal procedure contemplated by this Bill is largely consistent with that requirement. Offences punishable by three years imprisonment or more are either Category 3 or Category 4 offences. Those in Category 4 are to be tried before a judge and jury in the High Court. Those in Category 3 may be tried by a judge and jury in the District Court or, on application, the High Court, but the defendant may instead elect to be tried by a judge alone.

108. Clauses 102 and 103 of the Bill propose a power for a judge to order trial by a judge alone in two circumstances, notwithstanding that the defendant is otherwise entitled to a trial by judge and jury. They re-enact ss 361D and 361E of the Crimes Act 1961.

109. The first circumstance in which a judge alone trial may be ordered concerns only offences that are punishable by less than 14 years imprisonment, and allows a judge to order a judge alone trial where the case is likely to be long and complex. The Judge must be satisfied that with all reasonable steps taken to shorten the

---

[42] As s 24(e) currently stands, the definition of Category 2 offences in clause 4(1)(h) as any offences punishable by up to 3 years imprisonment, and clause 73, which determines that Category 2 offences are to be tried by judge alone in the District Court, would limit the right. I have prepared this report in anticipation of the proposed amendment to s 24(e).

hearing it is still likely to exceed 20 sitting days and that the jury is unlikely to be able to perform their duties effectively.

110. Clause 103 applies to any offences that may be tried by a jury, where the Judge is satisfied that there are reasonable grounds to believe that there has been or may be intimidation of jurors, which can only be avoided by making an order for a trial by Judge alone.

111. Patently, both clauses limit the right to trial by jury.

The powers to order a judge alone trial for Category 3 and 4 offences are demonstrably justifiable

112. The primary objective of clause 102 is not the efficient use of resources or avoiding inconvenience to members of the public who are called to serve on juries. While those are valid objectives, they would not justify a reduction of a protected right. The objective is to avoid the risk that jurors will not be able to perform their duties effectively. In some cases the length and/or complexity of a trial may be such that jurors are unable to apply proper consideration to a verdict, even with the assistance of the Judge's summing up. That is an issue going directly to the fairness of the trial.

113. The section that clause 102 will replace (Crimes Act s 361D) was considered by the Court of Appeal in *R v Wenzel*.[43] The Court said:

> [35] We consider that the limit placed by ss 361D and 361E on the right to trial by jury can be justified. Normally in a s 5 case, the Crown will provide material to the Court to establish that the relevant limitation on the right is "demonstrably justified". In the present case, however, s 361D was enacted after the Law Commission had carried out a research project into juries, and it and s 361E were among the changes that the Commission recommended (see NZLC R69, "Juries in Criminal Trials", 2001, ch 3). For the reasons given by the Commission, we consider that the limit placed by those sections on the right to trial by jury can be justified. The scope of s 361D is by its terms confined in application and requires a judicial assessment of the circumstances that the prosecution contends bring the case within the section. Section 361D is directed at promoting fair trial outcomes, which could be compromised if a jury were presented with highly complex evidence that it could not reasonably be expected to understand so as to be able to assess and evaluate.

114. I agree with the observations of the Court. The limit proposed by clause 102 is demonstrably justified.

115. The objective of clause 103 is to avoid public confidence in the administration of justice being undermined as would inevitably occur if a hung jury resulted from one or more members of the jury being intimidated.

116. The means of achieving this objective is to give a power to the Judge to dispense with a jury trial, only where the Judge is satisfied that no other measure will be effective to avoid it. I am satisfied that in the rare cases where the possibility of juror intimidation is raised Judges will exercise the discretion in a rights-

---

43 *R v Wenzel* [2009] 3 NZLR 47 (CA and SC (leave only)).

consistent manner. Certainly, clause 103's treatment of the power to limit the right to a jury trial as a remedy of last resort and satisfies me that the clause impairs the right no more than is reasonably necessary to achieve its purpose.

117. I am further fortified in my conclusions by the Supreme Court's decision refusing leave to appeal in *Wenzel v R*. There, the Court observed that the ss 361 D and E Crimes Act powers to order a Judge-alone trial in long and complex cases, or in cases involving juror intimidation, prescribed bases for departure from s 24(e) of the Bill of Rights Act that constituted justified limits on the right.[44]

Reverse Onus provisions

118. General comments about reverse onus provisions are set out earlier in this report. Such provisions necessarily limit the right of all persons charged to be presumed innocent. I have considered whether, in the case of the following specific reverse onus provisions proposed by the Bill, that limit is demonstrably justified.

Animal Welfare Act 1999

119. The Bill proposes that a new section be added to the Animal Welfare Act to provide that for the offences described by ss 14, 21, 22, 23, 34, 35, 36, 54, and 130 the burden of proving that the defendant had a reasonable excuse falls on the defendant.

120. Broadly speaking, these offences, which cover a range of incidents of mistreatment or neglect of animals, involve an animal being in a particular condition due to the actions or neglect of the defendant where the defendant had assumed an obligation to care for it. The offence will be proven unless the defendant had a reasonable excuse for actions or neglect. Under the proposed amendment it will be for the defendant to prove that they had a reasonable excuse.

121. These offences are part of a regime of offences that include more serious offences involving wilfulness or recklessness to which the reverse onus provision will not apply.

The proposed reverse onuses are demonstrably justified

122. Due to the high incidence of domestic pet ownership and farming in New Zealand, these offence provisions could not be said to be confined to a small section of the population, but ownership or care of animals is still a voluntary activity. The high incidence of animal ownership means that the humane treatment of animals is a matter of considerable social importance.

123. The prosecutor for any of the affected offences still shoulders the greater burden of proving the condition of the animal, the extent and nature of the defendant's conduct or neglect and the causal relationship between them.

124. The scope for reasonable excuses that might exculpate conduct that falls below the threshold in each section is unlikely to be great, and to the extent that there is

---

44 *Wenzel v R* [2009] NZSC 58, [2009] 3 NZLR 56 at [5].

any qualifying fact, it will be a matter that is within the defendant's knowledge and capacity to prove.

125. The assessment of whether what is proffered by the defendant amounts to an excuse, which may include a mistaken fact or mistaken belief, amounts to a reasonable excuse will be for the Court to determine, against the circumstances of the case.[45] It is unlikely to place an undue burden on the defendant.

126. I consider that the proposed amendment to the Animal Welfare Act 1999 is not inconsistent with the Bill of Rights Act.

Securities Act 1978

127. The Bill proposes that the a reverse onus be preserved for s 59 of the Securities Act 1979 which makes it an offence for the issuer, any principal officer of an issuer, and any promoter who offers or allots securities to the public in contravention of the Act.

128. Section 59(2) provides two potential defences:

> No person shall be convicted under subsection (1) of this section for any such contravention if—
>
> (a)The contravention was in respect of matters which in the opinion of the Court dealing with the case were immaterial, or was otherwise such as, in the opinion of the Court having regard to all the circumstances of the case, ought reasonably to be excused; or
>
> (b) In the case of a person other than the issuer, in the opinion of the Court dealing with the case, the contravention did not take place with his [or her] knowledge and consent.

129. The Bill proposes that the onus of proving the facts to establish these defences will fall on the defendant.

130. The objective of the Securities Act, and the connected objective of its offence provisions, was set out by the Court of Appeal in *Re AIC Merchant Finance*. There, Richardson J said:[46]

> The pattern of the Securities Act and the sanctions it imposes make it plain that the broad statutory goal is to facilitate the raising of capital by securing the timely disclosure of relevant information to prospective subscribers for securities. In that way the Act is aimed at the protection of investors. That aim is achieved by regulating the conduct of issuers of securities and by providing sanctions for infringement by those issuers and their officers.

The proposed reverse onus is demonstrably justified

131. The reach of s 59 of the Securities Act is confined to voluntary participants in the commercial activity of offering securities to the public. Given the importance of

---

45 *Streeton v Police* HC Auckland CRI 2006-404-147. 8 December 2006 at [9].

46 *Re AIC Merchant Finance* [1990] 2 NZLR 385 (CA) at 391 per Richardson J.

disclosure of information to those who are considering investment in securities, the Act sets high standards of disclosure for those who involve themselves in this activity.

132. The imposition of strict liability offences for contravention of the Act reinforces the diligence required of participants and gives greater assurance to members of the public of the reliability of the information that they are given.

133. Those involved with the offering, distribution or allotment of securities are more likely to be in possession of information that would be relevant to the defences of immateriality or reasonable excuse.

134. Absence of knowledge or consent, a defence that does not avail the issuer of the securities, is unlikely to impose a significant burden on the defendant who asserts it. Although the legal burden is on the defendant, the absence of knowledge or consent is most likely to be a matter of an assertion by the defendant, which the Court would be likely to accept unless challenged by the production of correspondence, meeting records or public statements that negate it.

135. Finally, the offence under s 59 is punishable by fine only. The more serious offences under s 58 (Criminal liability for misstatement in advertisement or registered prospectus) carries a maximum sentence of five years imprisonment. The onus of proof for that offence remains on the prosecution.

136. I am satisfied that the proposed reverse onus for s 59 of the Securities Act 1978 is not inconsistent with s 25(c) of the Bill of Rights Act.

Takeovers Act 1993

137. The Takeovers Panel has responsibility for ensuring compliance with the Takeovers Code which is fulfils the objective of maintaining the integrity of New Zealand's takeovers market and increasing confidence, more generally, for investors in New Zealand's securities markets (since they will be investing in New Zealand securities knowing that they may be the object of a well-regulated takeover offer).

138. The Panel has an investigative function and is empowered to inspect documents and require persons to appear before it and give evidence.[47]

139. It is an offence under s 44 of the Act to furnish documents known to contain false or misleading statements, to attempt to deceive or knowingly mislead the Panel or any member or officer of the Panel, or to fail or refuse to co-operate with a summons to give evidence to the Panel.

140. Section 44A provides defences for any contravention that was immaterial to the Panel or which out reasonably to be excused. Directors of companies may not be convicted in respect of the any culpable action by their companies if it was done without their knowledge or consent.

---

[47] Takeovers Act 1993, ss 31A and 31N.

141. The Bill proposes that the defendant who relies upon any of the defences in section 44A will bear the onus of proving them.

The proposed reverse onus is demonstrably justified

142. Whilst any person who had relevant evidence may be summoned to appear before the Panel, or be required to furnish documents to it, it is unlikely that there would be any person prosecuted under the Takeovers Act who was not engaged for reward either directly or indirectly in corporate commercial activity.

143. Public confidence in the integrity of company takeovers is an important community value, and the sanction of a strict liability offence is an appropriate discouragement to person inclined to mislead the Takeovers Panel. The offence is punishable by a financial penalty only.

144. The assertion of a reasonable excuse would be much easier for the defendant to prove than it would be for the prosecutor to negate. The same cannot be said for the defence based upon immateriality since it would be the Panel rather than the defendant who was best placed to provide evidence as to what was material to its enquiry. However, the test of materiality is clearly an objective one so the forensic burden on the defendant would not be significant.

145. The defence of absence of knowledge or consent will arise in a similar way to that which I have described in relation to s 59 of the Securities Act.[48]

146. I am satisfied that the proposed reverse onus for the Takeovers Act 1993 is not inconsistent with s 25(c) of the Bill of Rights Act.

Fisheries Act 1996

147. I have already concluded that the proposed reverse onus for s 113A of the Fisheries Act 1996 is inconsistent with s 25(c) of the Bill of Rights Act. The Bill proposes reverse onus for four other fisheries offences, all of which apply to commercial fishing or fish farming. They are: s 105 (Fish carriers must be registered); s113 (Possession of fish, etc, by vessels that are not New Zealand ships); s 191 (Disposal of fish by commercial fishers); s 192A (Restriction on acquisition of fish, aquatic life, and seaweed by fish farmers).

148. Each of ss 105, 113 and 192A starts with a proposition that possession, transporting of sale of fish is unlawful unless it is shown that it was caught lawfully in New Zealand, or in the case of s 113(1)(a), caught outside of New Zealand. The reverse onus of proof will require the defendant to prove that the fish was lawfully taken or taken outside New Zealand.

149. Section 191 applies to the disposal of fish caught by a commercial fisher. An offence is committed if the fish is sold to anyone other than a licensed fish receiver, unless it is less than the prescribed quantities that are set out in s 191(2). The reverse onus will require the fisher to prove that their sale to anyone other than a licensed fish receiver came within the prescribed maximum quantities.

---

[48] See paragraph 134 of the text above.

150. Our fishery resources are of considerable economic, and cultural importance to New Zealand. Maintaining the integrity of the quota management system is essential to their sustainable utilisation and the conservation of the marine environment. As a result, commercial fishing is a heavily regulated and invigilated activity.

151. The penalties for these offences are financial, only, but they are accompanied by additional consequences of forfeiture of vessels, quota and fishing equipment.

152. The burden of proving that fish was lawfully caught or sold may appear to be a significant one, but the quota management system involves a comprehensive regime of reporting fishing activity, from which the necessary proof could be reconstructed with comparative ease.

153. In the circumstances I am satisfied that the proposal for these reverse onuses in the Fisheries Act 1996 is not inconsistent with s 25(c) of the Bill of Rights Act.

Civil Aviation Act 1990

154. Schedule 6 amends the Civil Aviation Act 1990 by introducing a number of reverse onus provisions (specifically new sections 65AA,[49] 65I(1A), 80H(4)) and thereby limit the right to the presumption of innocence affirmed by s 25(c) of the Bill of Rights Act.

155. In considering whether those limits are justifiable in terms of s 5 of the Bill of Rights Act, I note that matters of excuse in failure to comply with these provisions are likely to be peculiarly within the knowledge of the person(s) concerned[50] and, further, the offence provisions relate to civil aviation, which is itself a highly regulated activity.[51] Further, the offences will relate to failures to comply with narrowly prescribed statutory or regulatory requirements. On that basis, I conclude that the provisions are justified.

156. Finally, schedule 6 also introduces a new section 100A which provides that for any offence contained in the rules or regulations made pursuant to the Civil Aviation Act the defendant may prove (but the prosecution is not required to prove) any exception, exemption, proviso, excuse, or qualification whether it does or does not accompany the description of the offence.

157. Each instance where such proof is required on the part of a defendant will constitute a prima facie limit on the presumption of innocence. However, any such limits will be justifiable in terms of s 5 of the Bill of Rights Act because, following *Drew v Attorney-General*,[52] the regulation and rule making powers under the Civil Aviation Act only confers the power to prescribe offences which are consistent with the Bill of Rights Act.

---

[49] Section 71(1) does not describe an offence and appears to have been included by accident.

[50] See, for example, *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264.

[51] See, for example, *R v Wholesale Travel Group* [1991] 3 SCR 154 (Supreme Court of Canada). The point was noted with possible approval but not decided in *Hansen* at [43], [66] and [227].

[52] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

PROVISIONS THAT ENGAGE BUT DO NOT LIMIT RIGHTS GUARANTEED BY THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Defence obligation to identify issues in advance of the hearing

158. Under the law as it currently stands, the person charged must inform the Court in advance of the trial if he or she intends to rely on a defence of alibi,[53] and must inform the prosecutor in advance if he or she proposes to rely on any expert evidence.[54] Otherwise they may rely on what is commonly referred to as the defendant's right to silence.

159. The Bill proposes that after pleading not guilty to an offence of any category, the defendant will be called upon to identify which particular elements of the offence they contend cannot be proven against them, and any matters of defence, justification, exception, exemption, proviso or excuse they intend to rely upon.[55]

160. The consequence of failure to identify the issues in dispute is that the court may draw an inference of guilt from that failure, if it is proper to do so. It is will also potentially be an aggravating feature in sentencing because of the proposed amendment to s 9 of the Sentencing Act 2002 described later in this advice.

161. The defendant would not fail to identify the issues by placing all elements of the offence in dispute but will do if each particular element is not specified or if the disputed elements are mutually exclusive.[56]

162. The defendant does not need to identify the evidence or identify the witnesses upon whom they will rely or otherwise disclose the way in which the defence case is to be conducted at trial.

163. If the defendant fails to provide a memorandum that identifies the issues and defences in issue, that would constitute a breach of the Act for which the defendant or the defendant's lawyer are potentially liable to an award of costs. The more significant consequence lies in the ability of the prosecutor, with the leave of the Judge, to comment to the jury on the inferences that may be drawn from the defendant's failure to comply with the obligation to do so.[57]

164. Imposing an obligation on the defendant to identify issues in dispute ahead of trial is a novel step in this country, but it follows similar legislation that has been implemented in the United Kingdom[58] and in four Australian states.[59]

---

53 Criminal Disclosure Act 2008, s 22.

54 Criminal Disclosure Act 2008, s 23.

55 See clause 64 of the Bill.

56 See clause 67 of the Bill.

57 See clause 112 of the Bill.

58 Criminal Procedure and Investigations Act 1996 (UK).

59 Criminal Procedure Act 1986 (NSW), Criminal Procedure Act 2009 (Vic), Criminal Law Consolidation Act 1935 (SA), Criminal Procedure Act 2004 (WA).

165. Clayton and Tomlinson, in a footnoted reference to the United Kingdom statute, point to an "inherent contradiction between the right to silence and the obligation to prepare a defence case statement".[60] This objection requires further examination.

166. The right to silence is not a single overarching right but an amalgam of different rights.[61] Some of these rights are protected by the Bill of Rights Act and others are not. Fundamental human rights to remain silent are engaged at two points in the criminal process. The first occurs when any person is arrested or detained under any enactment, where s 23(4) of the Bill of Rights Act provides:

> Everyone who is-
>
> (a) Arrested; or
>
> (b) Detained under any enactment –
>
> for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

167. The next occurs at trial where section 25(d) affirms the right "not to be compelled to be a witness or to confess guilt". Section 25(c) also affirms the right "to be presumed innocent until proved guilty according to law".

168. The proposed disclosure regime occurs after arrest and before trial. If any protected right to remain silent is engaged, it will be one of the rights that attaches to the trial.

169. There is a substantial link between the right to silence and the presumption of innocence according to Trechsel,[62] who notes the following from *Telfner v Austria*:[63]

> the right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para 2.

170. There is also a connection to the right not to be compelled to give evidence or to incriminate oneself. Article 14(3)(g) of the ICCPR, which is analogous to s 25(d) of the Bill of Rights Act, has been applied by the United Nations Human Rights Committee to pre-trial incriminating statements.[64]

---

60 Richard Clayton QC and Hugh Tomlinson QC *The Law of Human Rights* (2nd ed. vol 1. Oxford University Press, New York. 2009) at [11.224].

61 See *R v Director of the Serious Fraud Office ex parte Smith* [1993] AC 1 (HL) at 30 per Lord Mustill.

62 Stefan Trechsel *Human Rights in Criminal Proceedings* (Oxford University Press, New York. 2005) at 348.

63 *Telfner v Austria* (2002) 34 EHRR 7 (ECHR. Third Section).

64 See for example *Cariboni v Uruguay* Comm No 159/1983. 27 October 1987 (HRC).

171. Finally, improper pressure on the defendant may affect the fairness of the trial, which is guaranteed by s 25(a) of the Bill of Rights Act.

172. Effective protection of the trial rights canvassed above necessarily requires that the right to silence subsist in some form during the pre-trial period. The exercise of these rights at trial could otherwise be undermined by illegitimate coercion occurring before the trial commences. That does not, however, translate into an absolute right for the accused person to say nothing at all.

173. Auld LJ's Review of the Criminal Courts of England and Wales warned of the risk in this context of equating "a defendant's right of silence to a right, not only to make the prosecution prove all or some of its case, but to leave it guessing until the last minute precisely what parts he requires it to prove" or a general "right of non-cooperation with the criminal justice process".[65]

174. To the extent that defendants have in the past profited from the element of surprise to take advantage at trial of curable defects in the prosecution case, they have not done so under the protection of the Bill of Rights Act. Such disclosures occurred from time to time at status hearings in the District Court and there was no impropriety in the Police adjusting their case in light of the defendant's advance notice of a technical defence.[66]

The requirement to identify issues in advance of trial does not infringe the right to a fair trial

175. A bare direction to a person charged to cooperate with the Court to the extent of identifying which of the elements of the offence it is said cannot be proved and any defences that are intended to be relied upon, could not engage the criminal trial rights in s 25 unless his or her response, or lack of response, were a matter that could be raised in the trial itself.

176. The Bill proposes that such a failure could be raised in the trial by the prosecutor, with the leave of the Judge, inviting the jury to draw an inference from the defendant's failure to properly identify the issues.[67]

177. Although, as outlined above, a number of rights in the Bill of Rights Act are potentially implicated where right to silence concerns arise, I consider that these provisions in the Bill are best assessed against the fair trial right in s 25(a). An assessment of s 25(a) compliance is not only the most fundamental inquiry into rights-consistency possible, but also allows direct comparison of the Bill against the European Court of Human Rights' developed jurisprudence on similar legislative regimes.

---

65 Auld LJ *Review of the Criminal Courts of England and Wales*. September 2001, ch 10, at [150]. These comments were made by way of refuting Professor Michael Zander's dissenting opinion at pp 221 to 223 of the 1993 Report of the Royal Commission on Criminal Justice ("Runciman Report"), which held that requiring defendants to indicate the general nature of his or her defence was wrong in principle and would cause inefficiency.

66 *Mellon v Attorney General* [2006] 1 NZLR 345 (CA) at [37] per Anderson J.

67 See clause 112 of the Bill.

178. Section 34 of the Criminal Justice and Public Order Act 1994 (UK) is one such provision which has prompted consideration of the consistency of adverse inferences with the right to a fair trial. It relevantly provides:

> 1) Where, in any proceedings against a person for an offence, evidence is given that the accused–
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged, or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies ...
>
> (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

179. Cases in the European Court of Human Rights that have considered this section or equivalent enactments have held that the drawing of adverse inferences from the defendant's silence will not amount to a breach of the right to a fair trial if the only inferences drawn from the defendant remaining silent are proper ones, the defendant is not convicted solely on the basis of such inferences, and there are appropriate safeguards.[68]

180. Where juries are involved an additional required safeguard is a direction to the jury that "if it was satisfied that the applicant's silence ... could not sensibly be attributed to their having no answer or none that would stand up to cross-examination it should not draw an adverse inference."[69]

181. The Bill proposes that leave will be required before the prosecutor may invite the jury to draw adverse inferences, and there must be an enquiry by the Judge as to whether there was a failure to notify the issues, and if so whether there is a reasonable explanation for that failure.[70] Further, if there is any reference to the failure to notify issues, the Judge must direct the jury that they may draw any inference from that failure that appears to the jury to be proper in the

---

68 *Murray v United Kingdom* (1996) 22 EHRR 29 (ECHR), *Condron v United Kingdom* (2001) 31 EHRR 1 (ECHR, Third Section).

69 Harris, O'Boyle, Bates and Buckley *Law of the European Convention on Human Rights* (2nd ed. Oxford University Press, Oxford, 2009) at 261, citing *Condron v United Kingdom*.

70 See clause 112 of the Bill.

circumstances but that they must not find the defendant guilty of an offence solely on the basis of such an inference.[71]

182. A bare direction to the jury that they may draw any inference that appears to them to be proper from the defendant's failure to notify issues in dispute would be inadequate, but I am satisfied that:

182.1 Judges will exercise their discretion to decline leave where they are satisfied that no proper inference of guilt could sensibly be drawn.

182.2 Where leave is granted Judges will give directions to the jury that will go beyond merely identifying that they may draw proper inferences and will assist them in determining what inferences it would be proper to draw.

183. I believe that with these safeguards, the provisions of the Bill imposing a requirement on the defendant to identify issues in advance of the hearing, and providing for the Court to draw adverse inferences from a failure to do so, do not impinge upon the right to a fair trial. The English Court of Appeal has reached the same conclusion in respect of the even more demanding pre-trial defence statement scheme which operates in the United Kingdom.[72]

Power to dismiss appeals for procedural non-compliance

184. Section 25(h) of the Bill of Rights Act provides criminal defendants with:

> The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both.

185. The right is "intended to be an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process".[73]

186. Clause 338 of the Bill confers on appeal courts a power to dismiss an appeal where the appellant has failed to comply with timetable or other procedural orders fixed for the appeal.[74] The court may only exercise the power of dismissal where the appellant has failed to rectify the procedural non-compliance within a mandatory notice period of 10 working days.[75] Clause 339 of the Bill enables an appeal to be brought against the exercise of the dismissal power.

187. International and comparative jurisprudence confirm that reasonable procedural conditions "according to law" may be placed on the exercise of the right to appeal, provided they do not restrict access to the appeal process to the extent that

---

71 See clause 114 of the Bill.

72 *R v Essa* [2009] EWCA Crim 43 at [23], affirming the compatibility of s 11(5) Criminal Procedure and Investigation Act 1996 (which allows adverse comment and inferences where a defendant fails to comply with the Act's defence statement procedure) with the European Convention on Human Rights.

73 *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577 at [12]; *Petryszick v R* [2010] NZSC 105 at [2].

74 The dismissal power also applies to non-compliant applications for leave to appeal: cl 338(5).

75 Clause 338(2) and (3).

the essence of the appeal right is impaired.[76] Failure by an appellant to comply with such reasonable procedural conditions may, consistently with the right, permit courts to dismiss the appeal, or treat it as having been waived or abandoned.[77]

188. Recently, in *Petryszick v R*, the New Zealand Supreme Court ordered the rehearing of an appeal dismissed by the Court of Appeal on the grounds of the appellant's procedural non-compliance in that Court. Under the prevailing legal framework, the Court of Appeal was held to lack jurisdiction to effect such a dismissal. I do not, however, read *Petryszick* as authority for the proposition that the provision of a clear statutory power to dismiss for procedural non-compliance would necessarily limit s 25(h) of the Bill of Rights Act. Indeed, it was the absence of such a power that was determinative in *Petryszick*.

189. The power to dismiss an appeal in clause 338 can only be invoked where a non-compliant appellant has already failed to rectify his procedural default within the prescribed notice period. Further, the dismissal power is a discretionary one. I expect appellate courts to exercise it consistently with s 25(h), and thus not in circumstances where dismissal would amount to a restriction on the appellant's access to the appellate process to an extent infringing the essence of the appeal right. I also note that errors in the exercise of the dismissal power can be corrected on an appeal pursuant to clause 339.

190. For these reasons, I view the dismissal power in clause 338 as imposing a reasonable condition "according to law" on an appellant's exercise of his right to an appeal. Accordingly, I do not consider that clause 338 limits s 25(h) of the Bill of Rights Act.

Amendment to the Sentencing Act 2002, procedural failure as an aggravating feature in sentencing

191. The Bill proposes to amend s 9 of the Sentencing Act 2002 so as to include a further aggravating and mitigating feature that the Court must take into account when determining a sentence.[78]

192. The qualifying procedural requirements are those imposed by what will become the Criminal Procedure Act and any regulations made under that Act, and the Criminal Disclosure Act 2008.

193. Procedural failure will only aggravate the offending if it has resulted in a delay in the disposition of the hearing or had an adverse effect on a victim or witness.

---

[76] See for example *Kharkhal v Belarus* UNHRC CCPR/C/91/D/1161/2003, 15 November 2007 at [6.5]; *Poulsen v Denmark* (32092/96) Section II, ECHR 29 June 2000 at 5; *Gurepka v Ukraine* (61406/00) Section II, ECHR 6 September 2005 at [59]; *Krombach v France* (29731/96) Section III, ECHR 13 February 2001 at [96]; *Secretary for Justice v Wong Sau Fong* [1998] 2 HKLRD 254 (HKCA) at 264–265.

[77] See for example *Jodko v Lithuania* (39350/98) Section III, ECHR 7 September 1999; *Laaksonen v Finland* (36321/97) Section IV, ECHR 7 September 1999; *Manning v State* 122 P 3d 628 (Utah 2005) at [31]-[33], [42]; *S v Carter* 2007 (2) SACR 415 (SCA) at [10].

[78] See clause 431 of the Bill.

194. There are few procedural requirements placed on the defendant under either the Bill or the Criminal Disclosure Act 2008. The Bill requires the defendant to appear in Court at various hearings and to appear for trial, and there is the requirement to identify issues in advance of the hearing. Under the Criminal Disclosure Act there is an obligation to give notice to the Court of an intention to rely on an alibi and to notify the prosecution of any expert evidence that is to be adduced.

195. All of the other relevant aggravating features referred to in the Sentencing Act are connected with the offending or the circumstances of the offender. Any significant additional punishment that was added to that which was just punishment for the offending could potentially raise an issue of disproportionate punishment for the purpose of s 9 of the Bill of Rights Act, but sentencing is discretionary and while s 9 of the Sentencing Act sets out mandatory considerations, the matter of weight to be given to each on is for the sentencing Judge and sentences are subject to appeal. I am satisfied that in the rare case where the procedural failings of the defendant can be taken into account as an aggravating feature, Judges will do so in a rights-consistent manner.

196. The minimum trial rights of the defendant are also potentially engaged, but s 24 of the Sentencing Act provides for a hearing by the Judge as to any disputed aggravating facts in which those facts must be proved by the prosecutor beyond reasonable doubt.

197. I conclude that the proposed amendment to s 9 of the Sentencing Act 2002 is not inconsistent with the Bill of Rights Act.

Hon Christopher Finlayson
Attorney-General
15 November 2010