Armed Forces Law Reform Bill

23 February 2007

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
ARMED FORCES LAW REFORM BILL

1. Further to our letter of 13 February 2007, indicating that no provision in the Armed Forces Law Reform Bill (PCO 6759/13) (the "Bill") appeared to be inconsistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"), we now provide detailed advice on a number of proposals in the Bill that appear to raise issues of consistency with the rights and freedoms protected in the Bill of Rights Act. As mentioned in our letter, the late receipt of the final version of the Bill meant that we were not in a position to provide detailed advice to you on these matters at that time. We understand that the Bill was considered by Cabinet on Monday, 19 February 2007 and approved for introduction.

2. The Bill seeks to reform the military justice system, which has not been substantially altered since 1983, to take account of developments in human rights law, both domestically (particularly through the enactment of the Bill of Rights Act) and internationally. This reform has resulted in proposed amendments to the Armed Forces Discipline Act 1971, the Courts Martial Appeals Act 1953, and the Defence Act 1990.

3. In our view, the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of consistency with sections 9, 14, 15, 19(1), 21, 22, 24(b), 24(c), 24(e), 25(a), (c), (d) and (f), and 27(3) of that Act.

4. The following provides you with:

- a brief overview of the contents of the Bill;

- a note of the provisions of the Bill which appear to raise issues under the sections of the Bill of Rights Act; and

- our conclusion as to the Bill's consistency with the Bill of Rights Acts.

5. This summary is followed by a fuller analysis which discusses each of the issues raised under the Bill of Rights Act noting, where relevant, the justificatory material in each instance.

SUMMARY

6. The Bill seeks to reform the military justice system taking account, amongst other things, recent developments in human rights law.

Section 9

7. Clause 33 of the Bill deals with disposal of property taken in search and amends section 99 of the Armed Forces Discipline Act. This clause does not infringe upon the right not to be subjected to disproportionately severe treatment or punishment because the treatment is not so excessive as to outrage standards of decency.

Section 14

8. New section 70(1)(f)(i) of the Armed Forces Discipline Act makes it an offence to wilfully publish any statement that without foundation states or implies that the court is not acting impartially. The limitation of freedom of expression imposed by this provision is necessary because the Courts can only uphold the rule of law if they command the respect of the public.

Sections 14 and 25(a)

9. New sections 138 and 144ZH of the Armed Forces Discipline Act allow the Summary Appeal Court and the Court Marital to forbid publication of some material. We have concluded that this is a justified limitation on freedom of expression and the right to a fair trial. The Court can only make such orders when publication would be harmful to New Zealand, or is required by the interests of justice, or to protect public morality or the reputation of a victim of an alleged sexual offence or extortion.

Sections 15 and 19(1)

10. A number of provisions in the Bill require a person to take an oath if they are privy to proceedings under the Bill. To the extent that this could be inconsistent with freedom of religion or freedom from discrimination these provisions are justified because of the availability of affirmation as an alternative.

Section 19(1)

11. New section 117Y(4) of the Armed Forces Discipline Act requires a disciplinary officer to seek the approval of a superior commander before imposing a sentence of detention on a person who was under 18 at the time of the offence. This provision acts as a safeguard for young members of the Armed Forces and does not give rise to discrimination under section 19(1) of the Bill of Rights Act.

12. Several provisions of the Bill set mandatory retirement ages for Judges. These provisions appear to be justified because Judges may only be removed from office for misbehaviour or incapacity, and mandatory retirement age helps ensure that issues of incapacity rarely arise.

Section 21

13. We have considered whether changes to the forfeiture regime in new section 99 of the Armed Forces Discipline Act infringes upon the right to be secure against unreasonable search and seizure. It is reasonable to forfeit the assets of those seeking to benefit from criminal activity.

14. The Bill empowers enforcement officers to enter any premise to arrest an individual who has absconded or breached a bail condition. This power is consistent with the right to be secure against unreasonable search because it is in the interests of justice that offenders be brought before a court.

15. Under new section 150C of the Armed Forces Discipline Act, a person may be compelled to provide documents. This power is consistent with the right to be secure against unreasonable search because it is necessary for the performance of the judicial function.

Section 22

16. Clause 34 of the Bill amends sub-sections 101(4) to (7) of the Armed Forces Discipline Act by establishing a new procedure to manage any delay in dealing with a person after arrest. We consider that the new procedure could not be interpreted as authorising "arbitrary detentions" and, thus, is not inconsistent with Section 22 of the Bill of Rights Act.

Section 24(b)

17. The Bill provides that, on appeal, the onus to show cause for granting bail rests with the defendant. We consider that this is a justified limitation on section 24(b) of the Bill of Rights Act. In reaching this decision, we have taken account of the fact that reversing the onus of proof for defendants who have been convicted and are seeking an appeal ensures the legitimate objective of combating recidivism and protecting public safety. We note that the onus is not reversed for defendants awaiting trial.

Sections 24(c) and 25(a)

18. New sections 117ZB and 117ZD of the Armed Forces Discipline Act provide that if the accused elects summary trial, the accused is deemed to have waived the rights to legal representation and trial by an independent court, which are protected by sections 24(c) and 25(a) of the Bill of Rights Act respectively. We have concluded that the election process with its accompanying safeguards set out in the Bill is reasonable.

Section 25(a)

19. The Bill establishes a permanent Court Marital of New Zealand which consists of serving military members. As these members are within the chain of command there exists potential dangers concerning their levels of impartiality. The Bill includes a number of safeguards that should ensure the proportionality of any limitation that the Court Marital regime places on the right to a hearing by an independent and impartial tribunal.

20. The Bill retains the procedure whereby sentences of imprisonment or detention are reviewed by a Reconsidering Authority consisting of a Judge and 2 or more superior commanders. Taking into account the jurisprudence of the House of Lords and the European Court of Human Rights, as well as the various safeguards contained in the Bill (such as the fact that the Authority may not increase the sentence), we do not consider that the retention of the Authority is likely to impact on the independence of Court Martial.

21. During the summary disposal process, the accused will be provided with a defending officer to assist him or her in the preparation of his or her case. The Bill provides that the defending officer may be changed if the disciplinary officer considers that it is necessary to do so,

having regard to the exigencies of the service. While we recognise that exigencies do arise in the Armed Forces, we consider this factor must not impact on the accused's right to a fair trial. In any case, following section 6 of the Bill of Rights this provision would be interpreted as only authorising the change of defending officer in circumstances that do not impact on the right protected by section 25(a) of the Bill of Rights Act.

Section 25(c)

22. We consider that the two strict liability offences contained in the Bill are justifiable under section 5 of the Bill of Rights Act. However, in reaching this decision, we note that a penalty of imprisonment over one year (which is provided in new section 45A of the Armed Forces Discipline Act) is usually associated with indictable offences and generally requires the prosecution to prove all the elements of the offence beyond reasonable doubt. Accordingly, we consider the maximum penalty for failing to answer bail to be close to the limit of what can be justified.

Section 25(d)

23. The Bill makes it an offence for a witness to refuse to answer any question that a military tribunal or court of inquiry has lawfully required the person to answer. Similarly, it is an offence for a person to refuse to produce any papers, documents, records, or things in that person's possession or under that person's control that a military court of inquiry has lawfully required the person to produce. Taking account of section 6 of the Bill of Rights Act, we consider that unless an evidentiary requirement explicitly overrode the right against self-incrimination, the accused would be allowed to refuse to answer a question or otherwise produce information that may incriminate him or her.

Section 25(f)

24. New section 117M of Armed Forces Discipline Act provides that a written statement of a person's evidence is admissible as evidence instead of calling that person to give his or her evidence orally. Given that such evidence may only be admitted with the consent of the accused, we consider that this feature effectively constitutes a waiver of the right to cross-examine the witnesses for the prosecution, which is protected by section 25(f). This provision is therefore not inconsistent with the Bill of Rights Act.

Section 27(3)

25. New section 150A provides that no civil proceedings may be brought against a military tribunal or court of inquiry and any of their members for anything done or omitted to be done in good faith in the exercise of their functions. This is consistent with the rights of individuals in civil proceedings with the Crown under section 27(3) of the Bill of Rights Act. Section 27(3) is a procedural right and does not extend to the substantive liability of the Crown.

PURPOSE OF THE BILL

26. To fully understand the proposals set out in the Bill, it is necessary to first explain the need for a separate military justice system, identify the major concerns of this system in terms of the Bill of Rights Act, and briefly discuss the measures that are being proposed to address these concerns.

A Separate Military Justice System

27. The Bill notes that an effective and fair military justice system is essential to the maintenance of discipline in the Armed Forces in peace and war, whether in New Zealand or overseas. In order to be effective, the system must comply with the following elements:

- maintenance of discipline (this helps develop the particular state of mind necessary for an effective fighting force);

- consistency in all strategic environments (to be effective, the same standards of discipline need to apply in times of peace and war);

- portability (the system must be capable of being employed by any force or combination of forces in any environment in any part of the world);

- expedition (breaches of discipline must be dealt with expeditiously, otherwise the maintenance of discipline may be undermined);

- fairness (this avoids dissatisfaction amongst service personnel which in turn may undermine morale and the maintenance of discipline);

- efficiency (this helps prevent undue delay, which may adversely impact on the maintenance of discipline); and

- simplicity (this enables the portability of the system and again helps avoid unnecessary delays in the administration of discipline).

28. New Zealand has a military justice system that is in most respects separate from the criminal justice system. The legislative basis for the military justice system is the Armed Forces Discipline Act 1971, the Courts Martial Appeals Act 1953, and subordinate legislation made under those two Acts. The military justice system consists of summary disposals by officers in command, courts-martial, various review and appellate structures, and associated processes. In an average year, approximately 1,000 summary disposals are conducted as compared with around 10 courts-martial. The vast majority of summary disposals relate to matters that are relatively minor.

Main concerns of the current military justice system

29. The Bill identifies a number of aspects of the current military justice system that appear to be inconsistent with the Bill of Rights Act or raise issues of similar concern. These are as follows:

Summary disposal system

- there is a different summary disposal system for the Navy than for the Army and Air Force, which is overly complex, and does not provide consistency in all strategic environments;

- as summary disposals are conducted by officers in command rather than courts, it is not contemplated that the accused be legally represented, and there is no appeal from a finding or punishment to a higher court; and

- there is no ability to deal summarily with minor charges against senior officers: the resulting requirement to convene a general court martial to try those officers for minor offences is considered inefficient and an unwarranted expenditure of public resources.

Courts martial system

- Courts martial are currently convened by senior officers in command who approve the charges and also appoint the prosecutor and the members of the court (i.e. military officers who perform a similar function to a jury, directed on the law by a judge advocate). This structure raises doubts about the independence of the court given the status of the convening officer as a member of the Executive, combined with their responsibility for the prosecution and the appointment of the court members;

- the efficiency and effectiveness of the military justice system is affected by the fact that judge advocates (military judges) have no power to:

- determine evidential and procedural matters in an interlocutory proceeding before a Court Martial assembles; or

- grant bail to a member of the Armed Forces who is in custody awaiting trial, or serving a custodial sentence pending an appeal;

- the current system of administrative reviews of the convictions and sentences of Courts Martial arguably undermines the independence of those Courts Martial.

Miscellaneous Features

- due to the absence of specific offences to deal with such behaviour, certain disciplinary violations (such as unauthorised discharges) may be charged under provisions that do not properly reflect the nature of the offending, or not be charged at all;

- the current legislation requires that the pay of a member of the Armed Forces suspended from duty or held in service custody before trial be withheld and forfeited;

- the natural justice rights prescribed by the Armed Forces Discipline Rules of Procedure 1983 only apply to persons subject to military law, and legal representation is expressly excluded from courts of inquiry in all cases; and

- there is no legal aid for persons subject to military law who are being questioned or held in custody in connection with a suspected offence against the Armed Forces Discipline Act.

These features are considered to be unfair and inconsistent with best practice in other comparable Armed Forces.

Proposed Changes to the Military Justice System

30. The Bill will for the first time in New Zealand military law, provide for a common system of summary discipline that is more efficient than the status quo, while complying with the Bill of Rights Act, and combining the best elements of the current disciplinary regimes of the Navy, Army, and Air Force.

31. The proposed disciplinary system will maximise efficiencies in the trial process while complying with the Bill of Rights Act and will promote measures that should enhance public confidence in the administration of military justice.

32. The Bill will also establish a permanent Court Martial of New Zealand to replace the current ad hoc courts-martial. The Court Martial will try those cases that are too serious for summary trial.

33. Finally, the Bill will make a number of miscellaneous reforms to military law that will:

- improve the compliance of courts of inquiry with commonly understood principles of justice;
- close gaps in the application of military law to modern operational circumstances; and
- produce a modern military justice system that is, in all respects, efficient, effective, and fair to the New Zealanders who serve in the armed forces.

ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT

34. The Bill has been drafted to ensure it is consistent with the Bill of Rights Act and there are many features of the new system which positively reflect these rights. For example, the Bill ensures that a person convicted of an offence by either a summary trial or Court Martial has the right to appeal to a higher court against the conviction and/or sentence. Such a right is protected by section 25(i) of the Bill of Rights Act.

35. We have nonetheless identified some features which appear to raise issues of inconsistency with the rights and freedoms protected by the Bill of Rights Act. However, where an issue arises a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a "reasonable limit" that is "justifiable" in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.[1]

36. We note, however, that in *Jack v R*[2], the Court Martial Appeal Court recognised that while the New Zealand military justice system needed to comply with the Bill of Rights Act, the application of section 5 in the military content was different from its application in the non-military context. This means that the rights and freedoms contained in the Bill of Rights Act may be subject to such reasonable limits that can be demonstrably justified to maintain the efficient and disciplined operation of the armed forces.

37. The difference in approach between the military and non-military justice system recognises that the administration of the military justice system is not the core activity of the armed services. As the US Supreme Court noted in *United States ex rel Toth v Quarles*:

It is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise… To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served […].[3]

Section 9: Cruel, degrading or disproportionately severe treatment or punishment

38. Clause 33 of the Bill deals with disposal of property taken in search and amends section 99 of the Armed Forces Discipline Act 1971. Section 99(1)(b) of that Act allows the court to order the forfeiture of property which was found to be used in the commission of an offence.

39. Section 9 of the Bill of Rights Act provides for the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

40. The application of section 9 to economic or other non-liberty affecting penalties such as forfeiture of property has not been the subject of detailed judicial consideration in New Zealand. However, in *Lyall* v *Solicitor-General*[4] the Court of Appeal appears to have proceeded on the assumption that section 9 was applicable to a determination of whether tainted property should be forfeited to the Crown under the Proceeds of Crime Act 1991.

41. In the United States it has been held that forfeiture statutes (and individual decisions under them) can be challenged for inconsistency with the Eighth Amendment prohibition on cruel and unusual punishments.[5]

42. Similarly, in challenges to regimes for the forfeiture of proceeds of crime (including the instruments of crime) under the Canadian Charter of Rights and Freedoms, the Courts have proceeded on the basis that forfeiture can be considered "punishment".

43. In *Turner v Manitoba*[6] the Court was asked to consider a Charter challenge to the provisions of the Wildlife Act that provided for the mandatory forfeiture of items used in the commission of offences under that Act. In concluding that forfeiture was not cruel and unusual punishment under section 12 of the Charter, the Court cited with approval the conclusions reached in *R v Porter.*[7] In that case, the Court held that while forfeiture could be considered punishment, it was not cruel and unusual. The Court did observe that the thrust of ‘cruel and unusual’ was directed to physical and emotional constraints of the person and not the individual’s financial or property loss.

44. While the application of section 9 of the Bill of Rights Act to "treatment" or "punishment" which does not impact on bodily integrity has not been considered in detail in New Zealand, the courts in the United States and Canada have been proceeded on the basis that forfeiture does constitute punishment and is accordingly subject to scrutiny against constitutional protections.

45. For the purposes of the military justice system, this discussion, while interesting, may be academic as new section 99(2)(a) explicitly provides that an order for forfeiture must be treated as a punishment imposed on the offender.

46. We consider that impact of forfeiture orders is not such as to constitute "disproportionately severe" punishment. In *Puli’uvea* v *Removal Review Authority*[8] the Court of Appeal acknowledged that the appellant’s removal from the country would cause "considerable distress, sadness and difficulties". However, it did not consider that it attained "the high threshold" required before the prohibition on disproportionately severe treatment was breached. In that regard, the Court referred approvingly to the view that treatment had to be "so excessive as to outrage standards of decency" to amount to disproportionately severe.[9]

47. We do not consider that the making of a forfeiture order in relation to property that has been used to facilitate the commission of an offence would be considered "so excessive as to outrage standards of decency".

Section 14: Right to freedom of expression

48. Section 14 of the Bill of Rights Act provides:

"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"

Scandalising the Court

49. New section 70(1)(f)(i) of the Armed Forces Discipline Act makes it an offence to wilfully publish any statement in respect of the proceedings before a military tribunal or court of inquiry that without foundation states or implies that the military tribunal or court of inquiry has not acted or is not acting impartially, or is likely to interfere with the proper administration of justice".

50. This provision appears to codify the common law offence of scandalising the Court, which is a type of contempt of court. The offence is traditionally seen as protecting the interest of the public at large to have a strong independent judiciary.[10]

51. The prohibition on scandalising the Court, however, raises a *prima facie* issue of inconsistency with the right to freedom of expression under section 14 of the Bill of Rights Act. This issue arises as the right to freedom of expression, as protected by section 14, includes the freedom to seek, receive, and impart information and opinions of any kind in any form. Clearly, a prohibition on the ability to criticise the apparent impartiality of the Court infringes on the freedoms protected by this right. Similarly, the prohibition would impact on the freedom to seek and receive this information.

52. We note that in *Solicitor-General v Smith*[11] the High Court concluded that the offence of scandalising the Court was a justifiable limit on free expression. It was the Courts' function to uphold the rule of law (thereby guaranteeing all the rights and freedoms set out in the Bill of Rights Act) which the Courts can only do if they command the authority and respect of the public.[12]

53. We further note that inclusion of the words "without foundation" ensures the proportionality of the offence as a person will not be found in contempt of the court for producing "appropriately phrased allegations of judicial bias, corruption, or other improper conduct for which a factual basis is established."[13] Thus one can still speak out about the impartially of a Court providing their statements are 'appropriately phrased' and are founded upon a 'factual basis'.

54. We therefore consider that new section 70(1)(f)(i) of the Bill is justifiable under s 5 of the Bill of Rights Act.

Sections 14 and 25(a): The right to a public hearing and freedom of expression

The use of sensitive information

55. The right to a public hearing is protected in new sections 136 and 144ZF of the Armed Forces Discipline Act, which require the Summary Appeals Court, and all Courts Martial to sit in open court. Similarly, section 17 of the Court Martial Appeals Act provides for open appeal proceedings: however, this provision is not being amended in the Bill.

56. This right to a public hearing is a cornerstone of the right to a fair trial. Holding a hearing in public means that the hearing is open to scrutiny by members of the public and the press. In turn, public scrutiny is a powerful deterrent to abuses of power or improper behaviour by the prosecuting authorities and/or the Judge. The corollary of this right is that the media must be given the ability to report on court proceedings, as this allows members of the public to acquire an understanding and form independent and informed views of the manner in which justice is administered on their behalf.[14]

57. In *Police v O'Connor*, Thomas J discussed the public nature of a trial in some detail. He said:

"The conduct of proceedings in open Court, to which I would add the freedom of reporting such trials, provides an assurance to the wider public that justice is being administered openly and under public scrutiny... In a real sense, the fact that the Courts are open to the public, and that proceedings may be freely reported in the media, is the method by which Judges remain answerable to the public."[15]

58. There are occasions where restrictions on the media or the public's ability to gain access to the Courts, or information before the Courts, is necessary to facilitate a fair trial. As Thomas J pointed out, "the principle of open justice must be balanced against the objective of doing justice."[16]

59. New sections 138 and 144ZH of the Armed Forces Discipline Act allow the Summary Appeal Court and the Court Martial respectively to make a range of orders where:

- a statement may be made or other evidence admitted that might disclose information that would or might be directly or indirectly useful to the enemy or any foreign country, or be otherwise harmful to New Zealand; or

- the interests of justice or of public morality, or of the reputation of a victim of an alleged sexual offence or offence of extortion so require,

The permitted orders can: (1) forbid publication of any report or account of the evidence adduced or submissions made; (2) forbid publication of the name or details allowing for the identification of any person connected to the proceedings; and (3) exclude members of the public from the courtroom.

60. We consider that all of the situations in new section 138 and 144ZH meet Thomas J's threshold of balancing the right to open Court against the "objective of doing justice" as therefore the limitations of rights contained within sections 25 (a) and 14 of the Bill of Rights Act can be justified under section 5 of that Act. We note, however, that in any particular

case the grounds invoked in support of a decision to suppress publication or to exclude the public will have to meet the standards of proportionality demanded by section 5.

Sections 15 and 19(1): Potential impact on freedom of religion

61. A number of provisions in the Bill require a person to take an oath if they are privy to proceedings under the Bill. For example, new section 144ZO of the Armed Forces Discipline Act requires that an oath in the prescribed form must be administered to:

- every military member:
- every officer under instruction in the Court Martial:
- every person responsible for recording or transcribing the proceedings in the Court:
- every interpreter attending the Court.

Further, every witness before the Court must be examined on oath administered in the prescribed form.

62. The Bill provides an alternative option for any person not wishing to swear an oath. The Bill allows any person who objects to being sworn or where it is not reasonably practicable to administer an oath to that person in a manner appropriate to his or her religious belief, to make a solemn affirmation instead of swearing an oath.

63. We note, however, that the inclusion of oaths and the ceremonies or practices of other religious beliefs might be argued as giving rise to issues of inconsistency with the Bill of Rights Act (as being discriminatory under section 19 or as impacting on the right to manifest religious beliefs under section 15).

64. In *R v Anderson*[17], the Manitoba Provincial Court considered a challenge to the constitutionality of certain provisions of the Manitoba Evidence Act. Under these provisions a Court may administer to every witness an oath or affirmation or some alternative administrative ceremony which the witness considers binding. In particular, the presence of the option of swearing an oath on the Bible was challenged on the basis that it infringed the right to freedom of religion, conscience and belief protected by s 2(a) of the Charter of Rights and Freedoms.

65. The Court held that the inclusiveness of the legislation (i.e. the availability of affirmation or other ceremonies to bind the witness):

"…need to be seen as an attempt by the government to ensure that the provisions in the Act which were designed to ensure truth telling were also reconcilable with the pluralistic values that underlie the Charter."

66. The Court did not consider that the purpose of the impugned provisions was religious; rather, their objective was ensuring, as far as possible, that witnesses testifying in Court will tell the truth.

67. A further challenge to the same provisions of the Manitoba Evidence Act was considered in *R v Robinson*[18]. In that case, counsel for the accused argued that religious privacy was at stake. In other words, it was not the availability of swearing an oath on the Bible that was offensive per se, but rather, the fact that a witness was effectively required to reveal his or her conscience.

68. The Court in *Robinson* concluded that there is no requirement for a witness to demonstrate any kind of religious practice in order to testify, and nor is a witness compelled to make any religious statements or reveal his or her conscience in order to give evidence. It also held that the provisions in question did not breach the equality rights protected by section 15 of the Charter.

69. To the extent that any issues of inconsistency with the Bill of Rights Act arise due to the inclusion of oaths but not the ceremonies or practices of other religious beliefs, these are justified limitations on the rights concerned because of the availability of affirmation as an alternative to swearing an oath.

Section 19(1): Freedom from discrimination

70. We have considered whether a number of the proposed amendments in the Bill could give rise to various issues of discrimination under section 19 of the Bill of Rights Act, which provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include, *inter alia*, age.

71. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:

i Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?

ii Does the distinction involve disadvantage to one or more classes of individuals?

72. If these questions are answered in the affirmative, we consider that the legislation gives rise to a prima facie issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of that Act.

Applying detention to those under the age of 17 years

73. Under new Schedule 4 of the Armed Forces Discipline Act, a disciplinary officer has the power to sentence an offender to a period of detention not exceeding 28 days (or 60 days where the offence was committed on active service or sea service). New section 117Y(4) of that Act governs the imposition of the punishment of detention on members of the armed forces who were under the age of 18 at the time the offence was committed. This provision requires a disciplinary officer during a summary disposal process to seek the prior approval of a superior commander before imposing a sentence of detention on such persons.

74. Although the requirement to seek the prior approval of a superior commander is not applied to offenders 18 years or older, we do not consider that this distinction creates a disadvantage that would entail a breach of section 19(1) of the Bill of Rights Act. Given the coercive environment of the military, this provision merely acts as a safeguard to ensure that

the maturity and vulnerability of young members of the Armed Forces are independently assessed. It also protects against such service personnel misunderstanding, when they elect to have the charges heard by way of summary trial, the significance of waiving their rights to legal representation and a hearing by an independent tribunal.

75. We do not consider that service personnel 18 years or older because of their maturity and experience are in a comparable or similar position to their younger counterparts. They are unlikely to suffer from the same sort of disadvantage that warrants the independent assessment of a sentence of detention, particularly those who have served in the armed forces for a number of years. It therefore cannot be said that the provision somehow outrages the human dignity of such persons. In any case, we note that older service personnel who are unhappy with a decision of a disciplinary officer to sentence them to a period of detention may appeal this decision before the Summary Appeals Court, who has the power to quash or vary that punishment if the Court considers that the sentence was too severe.

Mandatory retirement ages of the Judiciary

76. We note that a number of provisions of the Bill set mandatory retirement ages for the Judiciary. In particular:

- new section 144L(1) of the Armed Forces Discipline Act requires each Judge of the Court Martial, except the Chief Judge, to retire from office on attaining the age of 70 years; new section 144L(2) provides that the Chief Judge of the Court Martial must retire from office on attaining the age of 75 years.

- new section 203(2A) of the Armed Forces Discipline Act requires the Judge Advocate General to retire from office on attaining the age of 75 years; new section 203A(2A) provides that the Deputy Judge Advocate General must retire from office on attaining the age of 70 years.

- new section 3(2A)(b) of the Courts Martial Appeal Act provides that an appointed Judge of the Courts Martial Appeal Court ceases to hold office when he or she reaches the age of 75 years.

77. Mandatory retirement ages amount to *prima facie* age discrimination contrary to section 19(1) of the Bill of Rights Act. The issue that arises is whether the age of 70 and in some cases 75 can be considered a reasonable limit of the right to be free from discrimination under section 5 of the Bill of Rights Act.

78. The purpose of the mandatory retirement age is to help secure the integrity of the of the armed forces disciplinary system, which we consider to be a significant and important objective. The mandatory retirement age is rationally connected to that objective because Judges may only be removed from office for misbehaviour or incapacity. Security of tenure is a cardinal feature of judicial independence in the most common law jurisdictions; however, it means that a mandatory retirement age is considered necessary to ensure the continuing effectiveness of the judiciary. A mandatory retirement age helps to ensure that issues of incapacity rarely arise.

79. A retirement age of 70 is also consistent with the retirement age proposed in the Judicial Retirement Age Bill which is currently before the House of Representatives. The New

Zealand Defence Force has advised us that the higher retirement age of 75 is needed for the Chief Judge, as that position is usually filled by a retired High Court Judge.

80. Accordingly, we have concluded that mandatory retirement ages set out in the Bill can be justified under section 5 of the Bill of Rights Act.

Section 21: Right to be secure against unreasonable search and seizure

81. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

82. In *Jack v R*[19], the Court Martial Appeal Court accepted that, in principle, section 21 of the Bill of Rights Act applied to search and seizure in the military context. However, the circumstances in which a search might be held to be unreasonable in the civilian context may not necessarily be the same in the context of service of the armed forces. This means that, while each case and incident will be dependent upon its own facts, it would not be appropriate to uplift similar fact cases reported in the civilian Courts and seek to apply those to service circumstances, for the purpose of assessing reasonableness.

Forfeiture of property

83. We have considered whether the proposed changes to the forfeiture regime set out in section 99 of the Armed Forces Discipline Act (see clause 33 of the Bill) give rise to an issue of consistency with section 21 of the Bill of Rights Act.

84. On a straightforward reading, section 21 appears to be engaged as it guarantees protection against "unreasonable ... seizure ... of property." An interference with a person's possessory interest in property falls relatively easily within that plain language. However, we note that the Court of Appeal has referred to the "touchstone" in section 21 of the Bill of Rights Act being "the protection of reasonable expectations of privacy."[20]

85. However, the New Zealand jurisprudence has been somewhat inconsistent in the application of this concept to particular fact situations. In the early case of *Alwen Industries* v *Comptroller of Customs*[21] Blanchard J had to consider the interpretation of section 284 of the Customs Act 1966. He took the view that section 21 was relevant to the interpretation of the provision in circumstances involving what might be described as a simple interference with property, devoid of any liberty or privacy concerns.

86. The High Court in *Wilson* v *New Zealand Customs Service*[22] (involving a seizure of an innocent third party purchaser's motor vehicle as part of a customs investigation) held that on the facts it could not be said that section 21 was being invoked "purely for property protection purposes." In the Court's view there were privacy issues for the first plaintiff inextricably bound up in the seizure and continued deprivation of her car: "deprivation of a person's right to use their property or the reduction of their property rights to a right to apply for its return, might amount to a detrimental effect on the owner's privacy interest in that property". Williams J regarded the Canadian cases as unhelpful to the proper interpretation of section 21 of the Bill of Rights Act because section 8 of the Charter does not contain a specific reference to "property", unlike our section 21.

87. In *McGlone* v *Ministry of Fisheries*[23], Wild J held that there was no "seizure" for the purposes of section 21 of the Bill of Rights Act when, by operation of provisions in the Fisheries Act, a commercial fisher who had failed to make returns required by that Act was liable to have his fishing vessel forfeited upon conviction.

88. In *Westco Lagan Limited* v *Attorney-General*[24], McGechan J considered the content of sections 21 to 25 of the Bill of Rights Act and observed that, "it would be distinctly odd if the legislature had plonked a provision intended to deal in a general way with seizure of property without compensation into such a matrix", and concluded "there is a very strong likelihood the legislature did not so intend." Moreover, McGechan J noted that stand-alone property-protection guarantees are well enough known in constitutional instruments; the absence of such a direct provision, in line with a similar absence in the Canadian Charter, "points to a decision to omit such rights altogether."

89. Canadian decisions under section 8 of the Charter (the equivalent provision of section 21 of the Bill of Rights Act) have consistently held that forfeiture of property is not a "seizure" within the meaning of section 8.[25] In *Quebec (Attorney-General) v Laroche*[26], the Supreme Court of Canada held that a restraint order, made in conjunction with a special seizure warrant, did involve a seizure to which section 8 applied, notwithstanding the fact that a restraint order under the Criminal Code of Canada does not involve the removal of the property in question from the custody of the person subject to the order (rather, such an order simply "restrains" that person from alienating the property while the order is in force). However, the Court viewed the restraint order as "intended to supplement seizures that are taking place contemporaneously, and that they place property under the control of the justice system … whether for the purpose of a criminal investigation or for the punishment of crimes that fall within Part XI of the Criminal Code". Further, the finding that a restraint order was a "seizure" was not determinative; the case was decided on the basis that the evidence did not support the making of a restraint order.

90. Despite finding that a restraint order made in such circumstances was a "seizure" the Court in *Laroche* did say that:

"The prohibition against unreasonable search and seizure is designed to promote privacy interests and not property rights…. Specifically, where property is taken by governmental action for reasons other than administrative or criminal investigation a "seizure" under the Charter has not occurred…. A detention of property, in itself, does not amount to a seizure for the Charter purposes – there must be a superadded impact upon privacy rights occurring in the context of administrative or criminal investigation."

91. Given the unsettled state of New Zealand law in this area, we have placed considerable reliance on the Canadian position. Certainly, the emphasis of the Canadian courts on privacy as lying at the heart of the protection against unreasonable search and seizure is consistent with the New Zealand Court of Appeal's view of what section 21 of the Bill of Rights Act seeks to protect.

92. Accordingly, we take the view that it is arguable that forfeiture orders do not engage section 21 as there is no element of privacy involved in the taking of such property.

93. Even if section 21 does apply, in our view it is reasonable to freeze and forfeit the assets of those seeking to benefit from criminal activity. In reaching this view, we note the observations of the European Court of Human Rights (the "European Court") in *Welch v*

United Kingdom[27] and in *Phillips v United Kingdom*[28] in relation to the objectives underlying legislation providing for the forfeiture of proceeds of crime in the United Kingdom. In *Phillips* the Court noted that confiscation orders were "conferred on the courts as a weapon in the fight against the scourge of drug trafficking." After taking into account the importance of the aim pursued, the Court concluded that the interference suffered by the applicant was not disproportionate.

94. In our view, to the extent that section 21 is engaged by the making of forfeiture orders under section 99 of the Armed Forces Discipline Act (and we consider that the better view is that it is not), any seizure is "reasonable" in terms of section 21 bearing in mind the objectives pursued by this provision.

Entering property

95. New sections 101B and 144ZU of the Armed Forces Discipline Act and new section 20B of the Court Martial Appeals Act provide designated enforcement officers (a provost officer, a person lawfully exercising authority under or on behalf of a provost officer, or a member of the police) the power to enter any premise to arrest an individual who has absconded or breached a bail condition.

96. We consider that the search powers set out in these provisions are reasonable. It is in the interests of justice that offenders be brought before a court, especially those who may be a risk of flight or may have breached their bail conditions. Further, there are various safeguards to ensure that the search power is not abused. The enforcement officer may only carry out the search under warrant, and although he or she may enter any premise, the officer must have reasonable grounds to believe that the person against whom the warrant is issued is on those premises. Moreover, the officer must have the warrant with him or her and produce it on initial entry and, if requested, at any subsequent time; and if the officer is not in uniform, produce evidence that he or she is one of the persons referred to on the warrant.

Production of documents

97. Under new section 150C of the Armed Forces Discipline Act a disciplinary officer, or a Judge or Registrar of either the Court Martial or Summary Appeal Court may compel a person to provide papers, documents, records or things in that person's possession that it requires. A failure to comply is an offence and could lead to a term of imprisonment not exceeding 6 months (if the person is not subject to the Armed Forces Discipline Act) or a term of imprisonment not exceeding 1 month or a fine not exceeding $1,000 (if the person is not subject to the Act). A requirement to produce documents is likely to be considered a search for the purposes of section 21, especially where failure to provide the documents results in possible sanction.[29]

98. The Canadian courts have taken the view that a proper balance between the interests of the individual and the state can be struck if the requirement to produce documents is subject to appropriate terms and conditions, including those designed to protect the interests of the person compelled to provide the documents.[30]

99. We have concluded that this power appears to be consistent with the right to be secure against unreasonable search and seizure. In reaching this conclusion we note that the ability

to require documents is consistent with the judicial function of a military tribunal or court of inquiry and that the power must be exercised reasonably.

Section 22: Right not to be arbitrarily detained

100. Section 22 of the Bill of Rights Act provides that "everyone has the right not to be arbitrarily arrested or detained."

101. Clause 34 of the Bill amends sub-sections 101(4) to (7) of the Armed Forces Discipline Act by establishing a new procedure to manage any delay in dealing with a person after arrest. Under this procedure, if a person remains in service custody for 4 days after his or her arrest without the alleged offence being referred to the Director of Military Prosecutions for trial by the Court Martial, or without him or her being tried summarily, or otherwise dealt with, his or her commanding officer must make a report in writing to the Judge Advocate General (JAG) stating the reasons for the delay. If the delay in dealing with the person continues, the commanding officer must make a subsequent report to the JAG every eight days.

102. We have considered whether the new procedure to manage any delay in dealing with a person after arrest could be interpreted as authorising "arbitrary detentions", particularly given that the continued detention of a person is not contingent on there being good reasons as to why the delay has occurred.

103. The Courts have said that a detention is arbitrary if is it "capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."[31] For this reason, arbitrariness should not be equated with "against the law", but should be interpreted more broadly to include elements or inappropriateness, injustice and lack of predictability.

104. This means, amongst other things, that an initially valid power to detain may be abused by unwarranted delays in the treatment of the person detained.[32] An initially lawful detention may become arbitrary where there has been an unwarranted delay in commencing the procedure for which a detention was conducted.[33]

105. Applying these standards to the present case, we do not consider that the provision could be interpreted as authorising "arbitrary detentions". New sub-sections 101(4) and (5) provide a safeguard to persons arrested that the JAG will examine both the legality of the arrest and the person's eligibility for bail after the person has been arrested for four days and thereafter every eight days. If this continued detention were to continue, the JAG must order release of the accused or grant bail unless there is just cause for holding the person. In determining whether there is just cause for continued detention, the court must take into account the considerations set out in section 8 of the Bail Act 2000 (new clause 101A(4)).

106. On a related point, we note that the right not to be arbitrarily detained is supplemented by section 23 of the Bill of Rights Act which sets out the rights of persons arrested or detained. These include the rights to be charged promptly or be released (section 23(2)) and to be brought as soon as possible before a court (section 23(3)).

107. We note that the procedure for dealing with an alleged offender immediately after he or she has been arrested is set out in Part 4 of the Armed Forces Discipline Act. We have

not considered whether this procedure is consistent with the rights protected by section 23, as only minor, mainly technical amendments are being made to that procedure.

Section 24(b): Reverse onus in bail proceedings

108. Section 24(b) of the Bill of Rights Act provides that every person who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention.

109. New section 101A of the Armed Forces Discipline Act deals with the granting of bail pending trial. A person dealt with under this section is not entitled to bail as of right. Further, the JAG must not grant bail unless satisfied on the balance of probabilities that it would be in the interests of justice to do so.

110. New section 144ZQ of the Armed Forces Discipline Act sets out the procedure for granting bail to an accused pending appeal. It is similar to section 101A but expressly places the onus to show cause for granting bail on the defendant (on the balance of probabilities). Clause 106 inserts a new section 20A into the Courts Martial Appeals Act giving similar power to Judges of the Court Martial Appeal Court.

111. We consider that a defendant who is not bailable as of right is still entitled to have their application for bail heard and determined in a manner consistent with section 24(b) of the Bill of Rights Act. This interpretation is supported by section 7(5) of the Bail Act. A person dealt with under that Act who is not entitled to bail of as right must still be released unless there is just cause for not granting bail.

112. Applying section 6 of the Bill of Rights Act, the remaining provisions relating to bail can be interpreted in a manner that is consistent with the Bill of Rights Act. The wording of section 24(b) indicates that, in general, it is for the prosecution to demonstrate why a defendant's detention must be continued. In certain circumstances, however, a reversal of that onus can be justifiable. Canadian case law indicates that a reverse onus is justifiable if it operates in a narrow set of circumstances, is necessary to promote the proper functioning of the bail system, and is not taken for a purpose extraneous to the bail system.[34]

113. The reversal of the onus of proof is only placed on defendants who have been convicted and are seeking an appeal. Reversing the onus in bail proceedings on appeal ensures the legitimate objective of combating recidivism[35] and protecting public safety.[36] Further, the sort of information that is relevant to a decision to release is the sort of information that convicted persons are most capable of providing.[37]

114. Significantly, there is no equivalent provision in new section 101A which deals with pre-trial bail. This suggests that, although the court must be satisfied on the balance of probabilities, that burden does not rest on the defendant.

115. We note that the court is required to take into account the criteria set out in section 8 of the Bail Act 2000 and may grant bail if it is in the interest of justice in a particular case. The interests of justice in a particular case will include proper consideration of the rights of the accused under section 24(b) of the Bill of Rights Act. Accordingly, the bail provisions contained in the Bill appear to be justifiable under section 5 of that Act.

Section 24(e): Right to trial by jury

116. The structure of a court martial, where serving military officers preside over the trial, represents an exception to the general right to trial by jury guaranteed by section 25(e) of the Bill of Rights Act. We note that that provision guarantees the right to trial by jury in any case where the offence carries a maximum punishment of more than three months' imprisonment, but does not apply "in the case of an offence under military law tried before a military tribunal". While juries are a key component of the criminal justice system, they are not suited to the circumstances of and philosophy underpinning the military justice system.

Sections 24(c) and 25(a): Legal representation and hearing by an independent court

117. Under the proposed summary trial regime an accused will be given the right to elect trial in the Court Martial if the disciplinary officer decides that, if he or she finds the accused guilty or if the accused pleads guilty, he or she will probably impose a true penal consequence (detention, reduction in rank or a fine exceeding seven days pay).

118. New sections 117ZB and 117ZD of the Armed Forces Discipline Act provide that if the accused elects summary trial, the accused is deemed to have waived the rights to legal representation and trial by an independent court, which are protected by sections 24(c) and 25(a) of the Bill of Rights Act respectively.

119. Given that this is an explicit statutory override of the rights protected by the Bill of Rights Act, we have considered whether the limitations that the election process places on the rights to legal representation and trial by an independent court can be justified in terms of section 5 of that Act.

120. In determining whether the waiver of the rights to legal representation and trial by an independent court is consistent with section 5, we note that the election process recognises the need for breaches of discipline to be dealt with expeditiously. The New Zealand Defence Force has advised that a delay in dealing with an infraction of military law may be interpreted both by the alleged offender and his or her comrades as either informal condonation of the offence or weakness on the part of the commander. Either perception has the potential to deleteriously affect the maintenance of discipline in the unit.

121. The election process also recognises the needs for efficiency and simplicity. As stated in paragraph 27 above, an efficient and simple military justice system ensures that undue delay in disposal of charges does not occur, which may adversely impact on the maintenance of discipline.

122. Finally, the election process acknowledges the realities of the New Zealand Armed Forces, which is small in size and, thus, there would be great difficulties appointing disciplinary officers who do not know the accused or have local knowledge of any matters relevant to the charge. It also recognises that the officer investigating, trying or dealing summarily with the case may invariably lack formal qualifications in law.

123. We further note that some of the rights and freedoms protected by the Bill of Rights Act may be waived by the individual holding those rights. The jurisprudence of the European Court, for instance, has identified four conditions which must be satisfied in order for waiver to be established[38], namely:

- the election must be voluntary and not constrained;

- the defendant must be aware that he or she has the protection of the human rights which is to be waived;

- the waiver must not fundamentally disadvantage the accused; and

- the right must be capable of being waived: that is, it cannot be an absolute right.

124. We consider that the rights to legal representation and trial by an independent court are capable of being waived and note that the following safeguards are built into the election process:

- the implications of the election must be explained to the accused by his or her defending officer (new section 117ZC(1));

- the accused must be given a reasonable time and not less than 24 hours to consider his or her decision, if he or she wishes it (new section 117ZM(2));

- the accused must be given the opportunity to consult a lawyer in respect of the right of election if it is reasonably practicable to so (new section 117M(1)(c)); and

- the decision of the accused must be recorded in writing (new section 117ZC(3)).

125. In light of these factors and safeguards, we consider that the election process set out in the Bill is reasonable and, consequently, is not *prima facie* inconsistent with the rights and freedoms protected by the Bill of Rights Act.

Section 25(a): Independence and impartiality

The military members of the Court Martial

126. The Bill establishes a permanent Court Martial of New Zealand (new section 144 of the Armed Forces Discipline Act). The Court Martial will comprise the Chief Judge and at least 6 other Judges (new section 144C). For the purpose of any trial in the Court Martial, the Court must consist of one Judge and either:

- five military members if the proceedings relate to an offence for which the maximum punishment for the offence is life imprisonment or a term of imprisonment of 20 years or more; or

- three military members in any other case (new section 144P).

127. The Registrar will independently select the members from the pool of officers and warrant officers who are suitably qualified to sit on the Court (new section 144P(4)).

128. We note that the military members of the Court Martial are within the chain of command and, consequently, there exists a real danger that they may be influenced in making their decision concerning the accused by factors such as their personal promotion prospects. We have therefore considered whether the inclusion of military members in the

Court Martial is consistent with the right to a hearing by an independent and impartial tribunal, as protected by section 25(a) of the Bill of Rights Act.

129. In a series of cases, the European Court has also considered the issue of whether the military justice systems of a number of member States are compatible with the equivalent provision of the European Convention on Human Rights (article 6(1)).

130. In *Findlay v United Kingdom*[39], the European Court upheld a challenge to the independence of a general court–martial in relation to the central, but multiple, roles played by the "convening officer". We note that the position of convening officer, which is currently found in the Armed Forces Discipline Act, is being removed.

131. In the latter case of *Morris v United Kingdom*[40], the European Court had to consider the compatibility of the reformed courts-martial system which was introduced to address the concerns raised in *Findlay*. The Court held that the new system did not fully comply with article 6(1) of the Convention. The Court considered that the two military officers who were appointed to the Court Martial were not the subject of sufficient safeguards as to their independence. In particular, their lack of legal training; the fact they remained subject to army discipline and report; and the absence of statutory prohibition on their being subject to external army influence while sitting on a case, meant there was a risk of outside pressure being brought to bear on junior officers.

132. In *R v Spear*[41] the House of Lords refused to follow *Morris.* It held that the European Court had not been as fully informed as to the extent of the safeguards in place to protect the military officers from outside interference. Amongst other matters, Their Lordships noted that (1) anyone who attempted to apply pressure on any member of a Court Martial committed a serious offence; (2) instructions issued to junior officers prohibited them from talking about the case with anyone other than fellow members of the Court Martial; and (3) instructions required officers not to associate with personnel in the accused's unit or functions.

133. We note that, in *R v Genereux*,[42] the Canadian Supreme Court commented that in the military justice system there cannot ever be a truly independent military judiciary. Nonetheless, we consider that the Bill includes a number of safeguards that should ensure the proportionality of any limitation that the Court Martial regime places on the right to a hearing by an independent and impartial tribunal. In particular, we note that:

- the military members are appointed by the Registrar: a procedure that should avoid the perception that the decision makers have been selected by a commander with a stake in the outcome of the trial (new section 144P(4));

- the Registrar must not assign persons who are all from the same ship or unit as the accused or from one ship or unit (new section 144S(3)(c))

- a person is disqualified from sitting as a military member, amongst other matters, if he or she has been the commanding officer of the accused at any time between the date on which the accused was charged and the date of the trial (new section 144R);

- the accused may object to the Registrar about the assignment of any person as a military member on the ground that the person might not act, or is not in a position to act, impartially, or is not suitably qualified (new section 144V); and

- the military members must not disclose any opinion of a member of the Court Martial or how that member voted on the finding or sentence, or both (new section 144Z(2)(c)).

The Reconsidering Authority

134. Clause 45 of the Bill repeals and substitutes a new Part 8, which deals with the reconsideration of sentences of imprisonment or detention. Currently, if a Court Martial convicts a person of an offence against the Armed Forces Discipline Act 1971, the record of proceedings of the Court Martial must be transmitted to a reviewing authority. The reviewing authority examines the record to consider the legality and propriety of the conviction and sentence (if any) of the Court Martial.[43] The reviewing authority must then either direct that the conviction and the sentence (if any) should stand or carry out the review in accordance with the provisions of that Act.

135. Under the new regime, a service prisoner or detainee may lodge a petition against his or her sentence with the Reconsidering Authority (new section 153(1)), which shall consist of a Judge and 2 or more superior commanders (new section 151(2)). The service prisoner or detainee may request a hearing before the Authority and be legally represented at the hearing (new section 155(2)). If the service prisoner or detainee does not request a hearing in the above manner, the Authority must conduct the reconsideration of the sentence by way of a hearing on the papers (new section 155(4)).

136. The New Zealand Defence Force has advised that the president and members of the Court Martial will most likely be subordinate in rank to members of the Reconsidering Authority. We have therefore considered whether the retention of the Authority may impact on both the actual and perceived independence of the Court Martial and, hence, give rise to an issue of inconsistency with section 25(a) of the Bill of Rights Act.

137. We note that the independence of the equivalent body in the British military justice system has also been the subject of a series of cases by the House of Lords and the European Court. These cases indicate that, although the reviewing authority is considered anomalous, its presence is not inconsistent with article 6(1) of the European Convention.

138. Although the European Court raised serious misgivings about the independence of the reviewing authority in *Morris v United Kingdom*[44], this finding was rejected in two subsequent cases. In *R v Spear*[45], the House of Lords considered that the reviewing authority could be regarded as affecting the independence or impartiality of a court-martial because:

- the reviewing authority operates purely for the benefit of the accused (as it cannot substitute conviction of a more serious offence, nor substitute a more severe sentence) and provides a quick and simple means of correcting a mistaken decision by a court-martial;

- the final say on conviction and sentence rests with the Court Martial Appeals Court (CMAC) and the rights of the accused to appeal to the CMAC are in no way affected by the reviewing authority.

139. In *Cooper v United Kingdom*[46], the European Court re-considered its position in *Morris* on the reviewing authority. In a majority decision, the Grand Chamber held that because the CMAC was able to hear all matters arising from a Court Martial and any decision

made by the reviewing authority, the role of the reviewing authority did not undermine the independence or impartiality of a Court Martial.

140. While the opinions of these Courts are not binding on New Zealand courts, we believe they have strong persuasive value and suggest that –given that the safeguards highlighted in *Spear* and *Cooper* are present in the Bill – any challenge of Reviewing Authority under the Bill of Rights Act will likely not succeed. Therefore, on balance, we consider that the retention of the Authority is unlikely, in itself, to result in a breach of sections 25(a) of the Bill of Rights Act.

Section 25(a): Right to a fair hearing

141. During the summary disposal process, the accused will be provided with a defending officer to assist him or her in the preparation and presentation of his or her case, and to act on behalf of the accused (new section 114 of the Armed Forces Discipline Act). If the accused is not happy with the assistance provided, he or she has the right to request that the defending officer be changed (new section 114(4)(a)). The defending officer may also be changed if the disciplinary officer considers that it is necessary to do so, having regard to the exigencies of the service (new section 114(4)(b)).

142. We have considered whether this feature of the summary trial process is consistent with the right to a fair hearing, which is protected by section 25(a) of the Bill of Rights Act.

143. Key aspects of the right to a fair trial include, amongst other matters, the right to legal representation, the right to have adequate time and facilities to prepare a defence, and the right to be tried without delay. We note that the issue of whether a trial is fair is to be assessed by reference to its "overall fairness". In determining the overall fairness of a trial, prejudice to the accused in the conduct of his or her defence will be a key concern.[47]

144. Here the risks involved in allowing the disciplinary officer to change a defending officer during a case include: it could (1) delay the hearing of the charge, and (2) impact on the ability of the accused to receive adequate advice particularly when the new defending officer does not have the equivalent expertise as his or her predecessor.

145. While recognising that exigencies do arise in the Armed Forces and service personnel are frequently deployed overseas at short notice, we consider that these factors must not impact on the accused's right to a fair trial.

146. Nonetheless, we are of the view that this provision does not authorise the disciplinary officer to change the defending officer if changing the defending officer would create a risk that the accused will not receive a fair hearing.

147. Section 6 of the Bill of Rights Act requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning must be preferred to any other meaning. Therefore, new section 114(4)(b) would be interpreted as only authorising the change of defending officer in circumstances that do not impact on the right protected by section 25(a) of the Bill of Rights Act.

Section 25(c): Presumption of innocence

148. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proven guilty according to law. In *R v Wholesale Travel Group*[48], the Supreme Court of Canada held that the right to be presumed innocent until proven guilty requires at a minimum that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.

149. In strict liability offences, once the Crown has proved the *actus reus*, the defendant can only escape liability by proving, on the balance of probabilities, either the common law defence of total absence of fault, or a statutory defence that embodies that defence. In general, defendants should not be convicted of strict liability offences where an absence of fault or a "reasonable excuse" exists.

150. A statutory defence reverses the usual burden of proof by requiring the defendant to prove, on the balance of probabilities, the elements of the defence. Because the burden of proof is reversed, a defendant who is able to raise doubt as to his or her fault but is not able to prove absence of fault or a reasonable excuse to the standard of the balance of probabilities would be convicted. We consider, therefore, that where the defendant is required to prove something in order to escape liability, the use of strict liability offences is contrary to the presumption of innocence protection contained by section 25(c) of the Bill of Rights Act.

Strict Liability Offences contained in the Bill

151. The Bill contains the following strict liability offences

- new section 45A of the Armed Forces Discipline Act (failure, without reasonable excuse, to answer bail) – liable to a maximum term of imprisonment of 1 year

- new section 144ZA (failure for a military member of a Court Martial, without reasonable excuse, to attend all the sittings of a Court Martial or perform their functions or duties) – liable to a maximum term of imprisonment of 21 days or a fine not exceeding $1,000

152. We have considered whether the offences amount to a reasonable limit on the right to be presumed innocent in terms of section 5 of the Bill of Rights Act.

153. The purpose of the strict liability offences is to ensure the proper running of the military justice system and maintain public confidence in the administration of justice. In our view, this is a significant and important objective. We also consider that these offences could be described as regulatory in nature, and note that the information that can exonerate the defendant (the reasons why the defendant has failed to answer bail or, in the case of a military member of a Court Martial, failed to carry out the functions or duties expected of them) is information that is particularly in the realm of the defendant.

154. While we consider that the strict liability offences exhibit a rational connection with the objective, we have closely examined the proportionality of the proposed penalties. We note that as a general principle, strict liability offences should carry penalties at the lower end of the scale. A fine not exceeding $1000 is consistent with this principle; however, we note that both strict liability offences set out in the Bill provide for a term of imprisonment.

155. The Canadian Supreme Court has considered the question of imprisonment for public welfare regulatory offences and concluded that it can be justified as the stigma associated with imprisonment for such offences is less than that for truly criminal offences.[49] However, while an offence that reverses the burden of proof and contains a penalty of a term of imprisonment may, in limited situations, be justifiable, the penalty must be clearly associated with the seriousness of the offence and the importance of the objective at which the offence is aimed. The objective of the offences in this Bill is to preserve public confidence in the administration of justice by dealing with challenges to the authority of the court. This is an important objective and it may be possible to justify a term of imprisonment in the most serious cases.

156. On balance, we have concluded that the strict liability offences contained in the Bill are justifiable under section 5 of the Bill of Rights Act. Nevertheless, a penalty of imprisonment over one year is usually associated with indictable offences and generally requires the prosecution to prove all the elements of the offence beyond reasonable doubt. Accordingly, we consider the maximum penalty for failing to answer bail to be close to the limit of what can be justified.

Section 25(d): Right against self–incrimination

157. The Bill makes it an offence for a witness to refuse to answer any question that a military tribunal or court of inquiry has lawfully required the person to answer (see new sub-sections 70(1)(d) and 150E(1)(d)). Similarly, it is an offence for a person to refuse to produce any papers, documents, records, or things in that person's possession or under that person's control that a military court of inquiry has *lawfully required* the person to produce (see new sub-sections 70(1)(c) and 150E(1)(c)).

158. We have considered whether these provisions impact on the privilege against self-incrimination, which is protected by section 25(d) of the Bill of Rights Act.

159. Taking account of section 6 of the Bill of Rights Act, we consider that the provisions would be interpreted as allowing the accused to refuse to answer a question or otherwise produce information that may incriminate him or her. However, if the provisions requiring the production of evidence explicitly overrode the right against self-incrimination, the accused would be lawfully required to produce that evidence and the failure to do so would constitute an offence.

Section 25(f): Right to examine witnesses for the prosecution

160. New section 117M of Armed Forces Discipline Act provides that a written statement of a person's evidence is admissible as evidence instead of calling that person to give his or her evidence orally.

161. This provision impacts on section 25(f) of the Bill of Rights Act, which provides that

"Everyone who is charged with an offence has, in relation to the determination of the charge, the right to examine witnesses for the prosecution"

162. The right to cross-examine the witnesses for the prosecution is considered an important ingredient of a fair trial as it provides the defence and the court with an

opportunity to test the veracity of the witnesses' evidence, particularly where the witnesses' evidence is crucial to the prosecution's case.

163. We note that the provision states that the accused must give his or her consent before written evidence may be admitted. This effectively constitutes a waiver of the right to cross-examine the witnesses for the prosecution. We consider that the right protected by section 25(f) is capable of being waived and, therefore, new section 117M is not *prima facie* inconsistent with the rights and freedoms protected by the Bill of Rights Act. In reaching this decision, we have also taken into account the exigencies of the Armed Forces and the need to ensure the efficiency and simplicity of the military justice system.

Section 27(3): Rights of individual in civil proceedings with Crown

164. Proposed new section 150A provides that no civil proceedings may be brought against a military tribunal or court of inquiry and any of their members for anything done or omitted to be done in good faith in the exercise of their functions. It could be argued that this proposed new section raises an issue of consistency with section 27(3) of the Bill of Rights Act, which provides:

"Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."

165. We do not consider that there is any inconsistency with the rights of individuals in civil proceedings with the Crown. We have reached this conclusion after considering the scope of section 27(3), which can be interpreted in two ways. It could be argued that section 27(3) goes to substantive liability and so impacts on Parliament's ability to determine that the Crown shall not be liable for conduct which, without the exclusion, could create liability. Alternatively, it could be said that section 27(3) was only procedural in effect, and means simply that the procedure to be adopted in any proceedings against the Crown will be the same as that applicable in litigation between private parties.

166. In *Matthews v Ministry of Defence*[50], the House of Lords had to consider whether section 10 of the Crown Proceedings Act 1947 (UK), which exempted the Crown from liability in tort for injury suffered by members of the armed forces in certain circumstances, was compatible with Article 6(1) of the European Convention. Their Lordships held that the Crown's exemption from liability in tort was a matter of substantive law, so that the claimant had no "civil right" to which Article 6(1) might apply. Their Lordships treated the limitation on liability in section 10 as going to the substantive claim (i.e. it did not exist), rather than creating a procedural bar. Article 6(1) was, in principle, concerned with procedural fairness and the integrity of a State's judicial system, and not with the substantive content of its national law.

167. The analysis in Their Lordships' speeches is consistent with the view that the new section 150A does not infringe section 27(3). This conclusion is supported by the history of Crown liability in New Zealand and the many provisions which afford protection to officials acting in the course of their duties in good faith and, in some instances, without negligence.

Conclusion

168. For the reasons given above, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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Footnotes

1 See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9 and *R v Oakes* (1986) 26 DLR (4th).

2 (1999) 5 HRNZ 301 (CMAC).

3 350 US 11, 17 (1955).

4 (1997) 15 CRNZ 1, 6-7 and 9 (CA).

5 See for example *United States* v *Busher* 817 F 2d 1409 (1987) (9th Circ).

6 (2000) MBQB 94; see also *Spence v R* [2004] NLSCTD 113 involving a similar challenge to the Wildlife Act of Newfoundland and Labrador where the Supreme Court of Newfoundland and Labrador held that the forfeiture of a seaplane used in the commission of poaching offences was not cruel and unusual punishment.

7 (1989) 26 FTR 69.

8 (1996) 2 NRNZ 510 9 (CA).

9 (1996) 2 NRNZ 510 9 (CA) at 512.

10*R v Davies* [1906] 1 KB 32, 40 (KB): noted in A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary* (2006) at 339.

11 [2004] 2 NZLR 540 (HC).

12 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) at 133.

13 *Rv Nicholls* (1911) 12 CLR 280 cited in *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA).

14 Butler, A and Butler P, at 344.

15 [1992] 1 NZLR 87, 96.

16 [1992] 1 NZLR 87, 96.

17 (2001) CanLII 20027 (MBP.C.) 2 February 2001.

18 (2004) CanLII 31391 (MBP.C.) 23 January 2004.

19 (1999) 5 HRNZ 301 (CMAC).

20 *R* v *Fraser* [1997] 2 NZLR 442, 449; (1997) 3 HRNZ 731, 739 (CA). See also *R* v *Grayson & Taylor* [1997] 1 NZLR 399, 407; (1996) 3 HRNZ 250, 260 (CA).

21 (1993) 1 HRNZ 574 (HC).

22 (1999) 5 HRNZ 134 (HC).

23 HC, Wellington CP 62/98 16 December 1998, Wild J.

24 [2001] 1 NZLR 40 (HC).

25 See for example, *Ford Credit Canada Ltd v Canada (Deputy Minister of National Revenue)* (1995) 100 BCLR (2d) 162 where the Supreme Court of British Columbia held "Section 8 is designed primarily to protect the privacy rights of individuals and affords protection to property only where that is required to uphold the protection of privacy."

26 [2002] 3 SCR 708.

27 (1995) 20 EHRR 35.

28 (41087/98) [2001] ECHR 433 (5 July 2001).

29 *NZ Stock Exchange v CIR* [1991] 3 WLR 221; [1991] 4 All ER 443 (PC); see also McKinlay Transport Ltd v R (1990) 68 DLR (4th) 568 (SCC); *Thomson Newspapers v Canada* [1990] 1 SCR 425.

30 *United Kingdom v Hrynyk* 135 DLR (4th) 693, 702.

31 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) para 34.

32 See P Rishworth & others, *The New Zealand Bill of Rights*, Oxford University Press (2003) at 521.

33 See R v Nikau (1991) 7 CRNZ 214.

34 See, for example, *R v Pearson* [1992] 3 SCR 665 (SCC).

35 See *R v Pearson* above.

36 See *R v Morales* [1992] 3 SCR 711 (SCC).

37 See *R v Pearson* above.

38 See P W Ferguson, Trial in Absence and Waiver of Human Rights, [2002] Crim. L. R. 554, at 559.

39 (1997) 24 EHRR 221 (ECtHR).

40 (2002) 34 EHRR 153 (ECtHR).

41 [2003] 1 AC 734 (HL).

42 [1992]1 SCR 259 (SCC).

43 Section 152 (2) of the Armed Forces Discipline Act 1971.

44 (2002) 34 EHRR 153 (ECtHR).

45 [2002] 3 All ER 1074.

46 ECHR Application 48843/99.

47 Butler, A and Butler P, at 900.

48 84 DLR (4th) 161, 188 citing R v Oakes [1986] 1 SCR 103.

49 *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 219.

50 [2003] 2 WLR 435.