

Policing Bill

12 December 2007

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: POLICING BILL

1. We have assessed whether the Policing Bill (PCO 8297/13) ('the Bill') is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is to be considered by the Cabinet Legislation Committee at its meeting on Thursday 13 December 2007.

2. We have concluded that 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 inconsistencies with sections 14, 16, 17, 18, 21, 22, 25(c), and 27(1) of the Bill of Rights Act.

3. The following summary 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 Bill of Rights Act; and
- Our conclusion as to the Bill's consistency with the Bill of Rights Act.

4. 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 OF THE BILL OF RIGHTS ACT ISSUES

5. The stated purpose of this Bill is to provide for policing services in New Zealand, and to state the functions and provide for the governance and administration of the New Zealand Police.

6. Generally, the Bill contains provisions relating to the functioning of the Police as a national force. Broadly, the Bill covers the:

- roles of Commissioner, Deputy Commissioners, constables, authorised officers, Police jailer and escort, Police guard, Police specialist crime investigator, Police transport safety enforcement officer, and other Police staff;
- employment relationships and industrial relations of Police employees;

- use of biometric information for pre-employment vetting and crime scene elimination;
- various offence provisions;
- ability to take identifying details of a person in certain circumstances;
- powers to detain intoxicated people;
- use of the term "Police";
- international policing provisions;
- regulation-making powers; and,
- use of Police dog provisions and offences.

7. A number of measures proposed by the Bill raise issues of consistency with the Bill of Rights Act.

8. We considered the provision enabling a constable to take the identifying details of persons in certain circumstances for consistency with sections 21 and 22 of the Bill of Rights Act. We concluded that this provision was consistent with the Bill of Rights Act in light of the purpose of the provision, and the use that the information will be put to.

9. Clause 34 provides that a constable may in certain circumstances temporarily close any road or any part of the road. We considered this provision in terms of consistency with sections 14 and 18 of the Bill of Rights Act. Taking into account the need for the Police to maintain public order, the circumstances in which this power can be invoked, and section 6 of the Bill of Rights Act, we concluded that this clause appears consistent with the Bill of Rights Act.

10. The Bill contains a provision authorising the detention of intoxicated persons where they are incapable of protecting themselves from physical harm, or are likely to cause physical harm to another person or significant damage to any property. We concluded that this clause does not create an arbitrary detention for the purposes of section 22 of the Bill of Rights Act.

11. The Bill contains a number of provisions empowering searches of people in custody. We consider that these provisions are consistent with section 21 of the Bill of Rights Act.

12. The Bill regulates the use of the word "Police" in an operating name, and prohibits the use of Police uniforms and related articles in circumstances likely to lead any person to believe that the user is a Police employee. However, we consider that these provisions are justified in terms of section 5 of the Bill of Rights Act.

13. Clauses 67 and 77 appear to place limits on section 17, the right to freedom of association, however we consider that these limits are justified in terms of section 5 of the Bill of Rights Act.

14. Clause 68 provides that a strike by or lockout of, any number of constables is unlawful. The provision is said to preserve trust and confidence in Police, and provide comfort to members of the public and the government of the day. The provision applies only to constables and thus ensures that essential policing services will continue irrespective of the outcome of negotiations on employment conditions. The Bill also provides an arbitration process in the event of disputes, and for these reasons we considered the restrictions to be justified in terms of section 5 of the Bill of Rights Act.

15. The Bill enables the Commissioner of Police to at any time remove any Police employee. Although this appears to raise an issue with the right to natural justice, we are satisfied that any decision made by the Commissioner under this provision will need to be made in a manner consistent with the principles of natural justice.

16. The Bill establishes a regime to take biometric information relating to prospective and current Police employees. One purpose for taking this data is pre-employment vetting. The second purpose is to eliminate existing staff or Police associates from being considered in the investigation of a crime. We considered these provisions for consistency with the right to be free from unreasonable search and seizure.

17. There are a number of safeguards in place for the use of the biometric information. With the use of biometric information for elimination purposes, there are comprehensive protections against use other than elimination. For pre-employment vetting, it is reasonable that given the need for public confidence and the fact that no-one is compelled to apply to join, the Police can require DNA checks against outstanding offences for prospective employees; and if an outstanding offence is found, that can then be pursued. We therefore considered these provisions are not inconsistent with protections against unreasonable search and seizure under section 21 of the Bill of Rights Act.

18. The Bill contains several provisions that appear to contain reverse onus offences, thereby raising an issue of *prima facie* inconsistency under section 25(c) (right to be presumed innocent until proved guilty). We have concluded that these provisions are, on balance, justifiable under section 5. In reaching this conclusion we have considered the objectives of the offence provisions, and particularly the penalty levels. Although some of the penalties are not at the lower end of the scale and allow for the imposition of a sentence of imprisonment, we consider them acceptable in view of the seriousness of the offences concerned and the importance of the objective at which these offences are aimed.

19. Clause 100 allows regulations to be made regulating the involvement of Police employees in any political activity connected with elections. For completeness we note that any regulations made under this clause may be struck down as *ultra vires* if they are found to be inconsistent with the Bill of Rights Act.

20. On balance, we have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT

21. Where a provision limits the rights and freedoms protected in the Bill of Rights Act, such limitations may be consistent with that Act if it can be considered "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]

Identifying details

22. 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 and seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

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

24. The Courts have said that a detention is arbitrary if it is "capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."^[2]

25. Clause 32(1) of the Bill provides that a constable may take the identifying details of any person in the lawful custody of the Police. In addition, clause 32(2) creates a significant new power where a constable who has good cause to suspect a person of committing an offence may detain that person at any place for the purpose of taking identifying details. The purpose of the taking of details in both cases is to enable the commencement of a prosecution.^[3] A constable may use reasonable force to secure the person's identifying details. It is an offence, after being cautioned, to fail to comply with any reasonable demand or direction for taking identifying details.

26. The Bill defines identifying details at clause 32(5):

a) the person's biographical information (for example, the person's name, address, date of birth);

b) the person's photograph or visual image;

c) details of the person's fingerprints, palm prints, footprints, height, scars, marks, and tattoos; and

d) any other physical details relevant to the offence that the person is suspected of committing.

27. We understand that the mischief meant to be addressed is the practice of individuals giving incorrect identifying details when asked by the Police.^[4] This results in the wrong person appearing on a summons or even serving another person's time in prison.

28. The Police advises that key thing is to know the person named in the information is indeed the person appearing on the charge.

29. We consider the purpose of clause 32 is to take only the details of a person which are necessary to identify the individual lawfully detained by Police.^[5] It is not the purpose of clause 32 to use the recorded information against a person in criminal proceedings.^[6] Based on the purpose of clause 32, we do not consider the right not to be a witness or to confess guilt to be engaged.

30. Similarly, we do not consider that a clause 32 demand for details triggers section 23 of the Bill of Rights (rights of person arrested or detained).^[7] A person may voluntarily give their details to the Police. Otherwise, once a person is detained under clause 32, they must be cautioned. Section 23 Bill of Rights Act requires that a person arrested or detained^[8] under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right.^[9] More particularly, clause 32 does not empower Police to engage in inhumane searches or treatment^[10] of an individual to collect details on a person's scars, marks, and tattoos and any other physical details relevant to the offence that the person is suspected of committing.

31. We note that much of clause 32 is not a new power. Clause 32 continues the powers of section 57 of the current Police Act 1958. In addition, the Land Transport Act 1998 empowers an enforcement officer to:

"Direct a person on a road (whether or not in charge of a vehicle) to give the person's name and address and date of birth, or such of those particulars as the enforcement officer may specify, and give any other particulars required as to the person's identity."^[11]

32. The fact that the power contained in clause 32 partially exists in current legislation does not prevent it from being subject to vetting under the Bill of Rights Act. What is new, however, is the wide definition of identifying details and the significant ability to detain someone to be able to take those details without an actual arrest (but in circumstances where there are grounds to arrest the person).

33. Sections 39(1) of the Summary Offences Act 1981 and 315(2)(b) of the Crimes Act 1961 also create a power for a constable to arrest an individual without a warrant where they have good cause to suspect^[12] a person of committing certain offences. Clause 32(2) contains a similar precondition before details may be taken.^[13]

34. We consider the taking of identifying details to be *prima facie* inconsistent with protection from unreasonable search and seizure because of the lack of a warrant or judicial oversight^[14] combined with the wide definition of identifying details.

35. Similarly, the wide definition of identifying details would raise concerns about section 22 liberty rights. As an identifying detail includes scars, marks, tattoos and any other physical

details relevant to the offence the person is suspected of committing, persons may be detained and reasonable force used to secure details about the person's body at any place for a period necessary to take those details. We consider this provision to be *prima facie* inconsistent with the liberty of the person.

Is this justified under section 5 of the Bill of Rights Act?

36. At the outset, it is important to address the use that the information gathered under this provision will be put to. Clause 32 provides that the information will only be used to identify someone to enable the commencement of a prosecution against that person. If the Police take details that are not necessary for the commencement of a prosecution against the individual lawfully detained, then the Police will have exceeded their authority under this clause and will be acting unlawfully.

37. The inclusion of the phrase "commencement of a prosecution against that person" and the cases considering section 57 of the Police Act determine the narrow use of the compelled information. The purpose of this provision is to ensure that the person that was lawfully detained when this power was exercised is the same person that is appearing in court on that summons or charge. The Crown still bears the burden of proving the necessary elements of the alleged crime itself. The Crown cannot rely on the contents of an information as evidence of those identifying details.[\[15\]](#)

38. We particularly note that the purpose of this provision must be scrupulously respected for the power under clause 32 to be consistent the Bill of Rights Act.

39. We, therefore, consider the above purpose to be a significant and important objective in relation to the *prima facie* inconsistencies triggered by clause 32.

40. In accepting the limited objective of this clause – only the details of a person which are necessary to identify the individual lawfully detained by Police – we now consider whether the means chosen to implement this objective are rationally connected and proportionate to the limitations on an individual's rights.

41. The Police states that taking identifying details is not always as simple as a name, age, address, photo and fingerprints. The Bill, however, allows Police to take only those identifying details necessary to identify the person lawfully detained. The more invasive identifying features may only be recorded where necessary.[\[16\]](#)

42. Under the Bill, biographical information is not limited to name, address and date of birth. The Police advises that certain other information is sometimes necessary to identify an individual. In cases where aliases are used, misspelling of names, or there are multiple names and addresses for an individual, there is a need for further biographical information.

43. We are further advised that customarily taken details (name, date of birth, weight, height, photos, eye colour) create different degrees of certainty, fingerprints, palm prints and footprints usually to a very high degree of certainty (depending on the nature of people's hands and feet). Clause 32(2)(a) would therefore preclude the taking of any other

identifying details where it is not necessary for the reasonable identification of the detained individual.

44. The purpose of clauses 32(5)(c) and 32(5)(d) is only for rare situations where recording the identity of the individual lawfully detained by Police cannot be done with a degree of certainty using the other defined details.[\[17\]](#)

45. The Police advises that the reasonable force provision is a technical use of force to cover the contact required for taking prints.

46. We therefore consider that the *prima facie* inconsistencies with the Bill of Rights Act are rationally linked to the objective of clause 32.

47. In considering the proportionality, we consider broadly whether the limits place on sections 21 and 22 of the Bill of Rights are reasonably proportionate to the objective of clause 32.

48. The Court of Appeal in *Moulton v Police* stated that[\[18\]](#)

"Of course it does not follow that, in the guise of asking for particulars, the police may delve into a person's past. In a sense, details of a person's schooling, employment record, successive addresses, family background, friendships, medical history, financial position, hobbies, leisure interests and beliefs, all serve to single him out from the rest of the population. But to allow the collection of information of that kind under pain of legal penalty for non-disclosure would constitute a substantial intrusion on personal privacy; and to allow for inquiry into a man's past might, in some cases, require him to incriminate himself. It could never have been contemplated by Parliament that s 57 would be taken to empower the police to compile a dossier of that kind on any individual in temporary custody."[\[19\]](#)

49. The Court of Appeal goes on to state:

"the apparent object of the section is to allow the police to record those particulars of him which at that time, in the aggregate, serve to single him out from the rest of the population."[\[20\]](#)

50. Constable considering the exercise of their discretion to take identifying details must also give appropriate consideration to the values of individual liberty and public order which are necessarily involved in the decision.[\[21\]](#)

51. We consider the limits placed on an individual's right to be free from unreasonable search and seizure are proportionate. We do so in reliance of the:

- stated purpose by the Police for clause 32;
- trigger for being able to take identifying details is to already be in lawful custody or for a constable to have good cause to suspect a person of committing an offence;

- only those details necessary to identify the person may be taken;
- absolute prohibition on the use of a strip search;[\[22\]](#)
- findings by the Court of Appeal in *Moulton* that the power to take identifying details is not designed to help the Police to gather further evidence in support of the charge in respect of which the person is detained;
- general search power under clause 37 is not available to Police in respect of people detained under clause 32(2); and
- requirement that the Police must consider individual liberty values when exercising the discretion to take details.

52. With respect to liberty rights, we consider the limits on the right not to be arbitrarily detained are proportionate. This is based on the above justifications and the requirement that the detention only be for the period reasonably necessary to secure the person's identifying details where the person is not already in the lawful custody of the Police.

Temporary closing of roads

53. 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 and in any form."

54. The right to freedom of expression extends to all forms of communication, including conduct,[\[23\]](#) that attempt to express an idea or meaning.[\[24\]](#) Even commercial expression is capable of protection.[\[25\]](#)

55. Section 18(1) of the Bill of Rights provides that "Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand."

56. Clause 34 provides that under certain conditions, a constable may temporarily close any part of a road (including a motorway, private road or private way) to all traffic, including pedestrian traffic.

57. A constable may temporarily close a road if he or she has reasonable cause to believe:

"(a) public disorder exists or is imminent at or near that place; or

(b) danger to a member of the public exists or may reasonably be expected at or near that place; or

(c) an indictable offence not triable summarily under section 6 of the Summary Proceedings Act 1957 has been committed or discovered at or near that place."

58. Section 18(1) of the Bill of Rights Act recognises the right of people in New Zealand to roam at will. We consider that clause 34 is *prima facie* inconsistent with this right.

59. We also consider that clause 34, in the context of protests or other activity seeking to impart meaning on or adjacent to a road, would be *prima facie* inconsistent with section 14 (freedom of expression) of the Bill of Rights Act.

Is this justified under section 5 of the Bill of Rights Act?

60. The objective of clause 34 is for the protection of the public and public order and for the investigation of serious offences. We consider these objectives to be significant and important for both freedom of movement and expression issues. We now turn to whether the means chosen to implement this objective are rationally connected and proportionate to the limitations on an individual's rights.

61. While the *prima facie* inconsistency of clause 34 and the freedom of movement and expression may overlap, we would divide the activities that may raise issues into those activities that may seek to convey a meaning and those that do not.

62. Preventing activities that do not seek to convey a meaning, such as stopping an unremarkable drive from Auckland to Wellington along State Highway One, would engage section 18 of the Bill of Rights Act. Both sections 14 and 18 would be engaged in stopping a protest or a hīkoi along the same route.

63. We consider that the need for Police to maintain public order, protect the public and investigate serious offences is rationally linked to closing roads.

64. In addressing the proportionality of the *prima facie* inconsistency, the benefits of the objectives must outweigh the deleterious effects of temporarily circumscribing a person's right to use a public or private road.

65. There are, however, numerous instances where the state circumscribes the use of roads. Judge Ryan in *Kerr v Attorney-General* noted that:

"It must be observed that if s 18 is concerned with freedom to use the roads then it must be one of the most qualified of the rights and freedoms affirmed by the Act for it is subject to the provisions of the Transport Act 1962, the Traffic Regulations 1976, and myriad other statutory provisions regulating, prohibiting, qualifying and directing the use of the roads and activities in public places."[\[26\]](#)

66. While the standard is lower for justifying limits to non-expressive movement, clause 34 is meets this standard in that:

- the power is only temporary;
- it does not explicitly allow for detention of individuals; and

- it is concerned only with dealing with public disorder, protection of the public or investigation of serious offences.

67. Therefore, we consider that clause 34 is rationally and proportionally linked to its objectives and is justified under section 5 of the Bill of Rights in relation to freedom of movement.

68. The *prima facie* inconsistency with section 14 of the Bill of Rights Act arises in the context of an activity that seeks to impart meaning. We have used the examples of a protest or a hīkoi.

69. Like freedom of movement, we consider that the need for Police to maintain public order, protect the public and investigate serious offences is rationally linked to closing roads. We also consider it proportionate to temporarily close a road to vehicles or pedestrians where there is a danger to the public or there is an investigation of a serious offence.

70. In relation to public disorder, the right to express ones self, individually or as a group, is not absolute. Article 19 of the International Covenant on Civil and Political Rights provides that rights may be subject to certain restrictions, as set out in law, and are necessary for the protection of public order.

71. The Supreme Court in *Brooker v Police* addressed the issue of where protest moves from protected expression to impinging on public order. The Court considered expression under the Bill of Rights Act and Brooker's conviction for disorderly behaviour.[\[27\]](#)

72. Elias CJ set a standard for disorderly behaviour as

"...behaviour which amounts to intimidation, victimisation, or bullying is disruptive of public order even if no violence is reasonably in prospect. Such behaviour is likely to alarm or be seen as threatening by those present. It is likely to cause others to withdraw from or avoid the area and it is behaviour which inhibits normal public use of the place."[\[28\]](#)

73. Tipping J noted that the standard may also shift in the context of freedom of expression:

"Where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case."[\[29\]](#)

74. The Supreme Court discussion of public disorder set a high standard to close a road because of an existing or imminent expressive public disorder.

75. We also expect that the Police will define public disorder pursuant to the common law. Clause 34 will therefore be approached in light of section 6 of the Bill of Rights Act. This means that clause 34 is to be given a meaning that is consistent with the guarantee of freedom of expression under the Bill of Rights Act.

Powers relating to the care and protection of intoxicated people

76. Generally, the Bill contains provisions authorising the detention of intoxicated persons where they are incapable of protecting themselves from physical harm, likely to cause physical harm to another person or significant damage to any property. There are two 12 hour periods of detention authorised, each with different tests for detention. The detention will not be for the purposes of bringing criminal charges or prosecutions. We consider that such detentions raise issues under section 22 (liberty of the person).

77. The right not to be arbitrarily detained was discussed above in the context of identifying details.

78. Clause 35 does not authorise any treatment that would raise issues under section 23 (rights of persons arrested or detained).^[30] In particular, section 23(5) of the Bill of Rights would not be engaged where Police use reasonable force to protect an intoxicated person from self-harm.^[31] It is only where conduct by the Police veers into inhumane treatment that section 23(5) would be infringed.^[32] If such treatment did result from the detention under this provision, it would be unlawful.

79. Clause 35 takes an existing power at section 37A of the Alcoholism and Drug Addiction Act 1966 allowing Police to detain intoxicated persons for 12 hours as a last resort. The person may only be detained where they are intoxicated and where they are incapable of protecting themselves from physical harm, likely to cause physical harm to another person or significant damage to any property. It is a last resort because the Police must first be satisfied that it is not reasonably practicable to provide for the person's care and protection by taking the person to their residence or to a temporary shelter.^[33]

80. The Bill extends this power an additional 12 hours. Clause 35(3) provides that the decision to recommend the exercise of this power is independent from the Police:

"A health practitioner must not recommend the further detention of a person detained under subsection (1) [the power to detain an intoxicated person for the first 12 hours] unless the health practitioner satisfies himself or herself that—

(a) the person remains intoxicated and is incapable of protecting himself or herself from physical harm; and

(b) the person does not have health needs that may require medical attention; and

(c) it is not reasonably practicable to provide for the person's continuing care and protection by—

(i) taking the person to his or her place of residence; or

(ii) taking the person to a temporary shelter."

81. A person will be as detained where there is physical deprivation of a person's liberty.^[34] It is apparent that a person detained pursuant to this provision, for a period up to 24 hours, is detained for the purposes of sections 22 of the Bill of Rights Act.

82. We must now consider whether the continued detention of an individual after the initial 12 hours is arbitrary. In assessing this, we may ask whether the detention is made without reference to an adequate determining principle.^[35]

83. The High Court in *Fleming v Police* stated that the purpose of the section 37A of the Alcoholism and Drug Addiction Act 1966 is to ensure the safety of an intoxicated person with the least possible encroachment on that person's civil rights.^[36] Section 37A creates a system whereby detention at a police station is a last resort. The Police must first attempt removal to a residence or a temporary shelter or detoxification centre and may only detain where this is not immediately practicable.

84. Clause 35 provides for an additional 12 hour period of detention. As is set out above, the additional period of detention will only take place on the independent recommendation of a health practitioner considering the criteria at clause 35(3).

85. In addition, during both the initial and second 12 hour period of detention, if the detained person ceases to be intoxicated there is no basis to detain the person. The Police have advised us, that in such circumstances, the person would be released immediately.

86. We note that the second 12 hour detention period follows from the independent opinion of a health practitioner. The test is also narrower than the first 12 hour period in that the focus is on harm just to oneself rather than oneself, others or property. Through the involvement of a health practitioner, there is an explicit requirement that the intoxicated person not remain in detention where they have health needs that may require them to go to a hospital. Detention by Police also remains the last resort in the second 12 hour period of detention.

87. We consider that clause 35 does not create an arbitrary detention for the purposes of section 22 of the Bill of Rights Act.

Search of people in custody

88. Clause 37 empowers Police to search people and take the property on his or her possession while in custody. The Bill provides this power where a person:

"(a) has been taken into lawful custody; and

(b) is—

(i) at a Police station; or

(ii) in other premises, or in a vehicle, being used for Police purposes; and

(c) is to be detained securely (whether pending a first appearance in Court or a decision as to bail under section 21 of the Bail Act 2000, or for the taking of identifying details under section 32(1) of this Act)."

89. We note that this power is largely carried over from the current Police Act at section 57A. The above term "detained securely" appears to replace the term "locked up" as it occurs in section 57A.

90. We consider the search of a person in custody and seizure of any money or property in his or her possession to be *prima facie* inconsistent with protection from unreasonable search and seizure because of the lack of a warrant or judicial oversight.[\[37\]](#)

Is this justified under section 5 of the Bill of Rights Act?

91. Thomas J of the Court of Appeal in *Everitt v Attorney-General* extensively considered the powers under section 57A of the Police Act:

"[S]ection [s 57A] was clearly intended to provide the police with a general right to search every person to be locked up while in police custody. The section provided the "general rule" which had been perceived to be lacking in the common law. Once the decision to lock up the arrested person had been made, the common law requirements of reason to suspect that the arrested person might have evidence on his or her person, or have something concealed which could cause injury to them or others while in custody, was no longer required. Further, the search which was authorised was not expressly circumscribed in any way. The search could be a pat-search at one end of the range or a strip-search at the other. No requirement of reasonableness as to the kind of search which could be carried out is made explicit in the section. If such a requirement is to apply, it would need to be implied by the Courts.

The need for such an implication, however, has been put beyond doubt with the enactment of the Bill of Rights. An interpretation which would exclude the requirement of reasonableness is not now open to the Courts. By virtue of s 21, everyone has the right to be secure against unreasonable search. Section 57A must be given a meaning which is consistent with that right. Consequently, the search undertaken under s 57A must be a reasonable search. Not only must the arrested person be a person to be locked up as expressly provided, but the kind of search to be undertaken must be reasonable in all the circumstances of the particular case."[\[38\]](#)

92. We consider the objective of this provision remains the same as section 57A. Clause 37 seeks to discover whether, once the decision is made to securely detain the person, the person has evidence on his or her person, or has something concealed which could cause harm to themselves or others while in custody.

93. As this provision is triggered only once a person is to be detained securely,[\[39\]](#) we consider there to be a rational link between the provision and its objective.

94. The provision proportionate given the explicit requirement that the manner in which the search is undertaken is reasonable as provided by the case law in this area and the circumstances where the power is triggered.[\[40\]](#)

95. We consider these provisions to be justified under section 5 of the Bill of Rights.

Use of the term "Police" in an operating name and unlawful use of Police uniforms and related articles

96. Clause 49 regulates the use of the word "Police" in an operating name in a manner reasonably likely to lead any person to believe the activity is endorsed or authorised by the Police or any part of the Police.

97. In addition, the Bill would prohibit the use of Police uniforms and related articles in circumstances likely to lead any person to believe that the user is a Police employee. Police articles and uniforms are defined in the Bill.

98. These provisions raise an issue of freedom of expression under section 14 of the Bill of Rights Act in relation to individual's opinions concerning the Police. Using the Police name, or an article or uniform, where the individual seeks to imply that activity is endorsed or authorised by the Police, would be expression because that person is seeking to convey an idea or meaning.

99. We, therefore, consider that the provision regulating the use of the term "Police" and the provision that this provision concerning use of Police uniforms and related articles is *prima facie* inconsistent with the Bill of Rights Act.

Is this justified under section 5 of the Bill of Rights Act?

100. It appears that the objectives of these provisions are to:

- prevent the perception by the public that the Police have endorsed or support a particular business or product; and
- prevent people from having the mistaken belief that a person using a Police uniform or article is a Police employee.

101. We consider these to be significant and important objectives.

102. In reaching this conclusion, we note that these objectives are shared by other important marks in New Zealand. For example, the Flags, Emblems, and Names Protection Act 1981 regulates the use of certain terms such as "Anzac".[\[41\]](#) The regulation of the term Anzac is in the context of its use in connection with any business, trade, or occupation. It appears that the intention is to prevent the use of Anzac for the purposes of business and trading off of the term.

103. We consider that regulating the use of the word "Police" in operating names and the use of Police uniforms and articles is rationally linked to the objectives set out above.

104. In considering whether the provisions limiting expression are proportional, we note two competing ideas: the recognition that freedom of expression is a central and fundamental political right^[42] and the significant mischief that could result from individuals wrongly believing that person is a Police employee.

105. We note that the prohibition on the use of term "Police" is strictly limited to situations where there the term is used in an operating name in a manner that would lead any person to believe that the activity is endorsed or authorised by the Police. This provision does not restrict use of the word "Police" for any expressive purposes other than an expression meant to mislead the public.

106. The use of Police uniforms and articles may raise concerns about their use for creative or political comment. We note, however, that the offence is tempered by defence of lawful excuse and that the circumstances of the use of the uniform and/or articles are to be considered. We consider that a court in hearing any case under this provision would interpret it consistent with the Bill of Rights Act protections for expression.

107. We consider these provisions to be justified under section 5 of the Bill of Rights.

Elimination from investigation and pre-employment vetting with biometric information

108. Clauses 78 to 83 of the Bill propose to take biometric information relating to prospective Police employees, Police employees, and defined Police associates. biometric information is defined as a DNA profile of the person, fingerprints or palm prints taken from the person.

109. There are two purposes for taking biometric information. The first purpose is pre-employment vetting. The biometric information would be used to determine whether a person would be a suitable employee or against other information held by the Police for the purpose of:

"(a) determining whether the person has been convicted of an offence; or

(b) if, when matched against other information held by the Police, it indicates that the person may have been involved in the commission of an offence,—

(i) investigating the offence; and

(ii) if relevant, prosecuting a person charged with committing the offence; or

(c) if the person later becomes a Police employee, eliminating the person from being considered in the investigation of a crime."

110. The second purpose is to eliminate existing staff or Police associates from being considered in the investigation of a crime.

111. The taking of bodily samples from Police employees, Police associates or prospective Police employees amounts to a search and seizure of the person.^[43] The question then

turns to whether the search and seizure is reasonable. Determination of reasonableness is necessary even if there is consent.[\[44\]](#)

112. What is reasonable will often turn on the interests being protected. The threshold for what is a proper standard would be considered in light of informational privacy interests. If there are proper standards within the Bill for authorising the search and seizure, and reasonable safeguards for the information collected, the search and seizure will be reasonable.

113. The actual physical intrusion caused by taking a DNA sample is minimal. The informational privacy interests are, however, the greater concern as individuals in a free and democratic society would wish to maintain and control from dissemination to the state the biographical core of personal information.[\[45\]](#) The Supreme Court of Canada stated:

"Without constraints on the type of information that can be extracted from bodily substances, the potential intrusiveness of a DNA analysis is virtually infinite."[\[46\]](#)

114. The use of biometric information for pre-employment vetting would have the following safeguards:

- biometric information relating to DNA is only a DNA profile and not the bodily sample itself;
- the bodily sample is to be destroyed once a profile is derived and stored;
- no one is compelled to join the Police and thereby provide biometric information;
- biometric information is to be destroyed promptly after the Commissioner decides not to employ the person; and
- written notice is given to the person promptly after the biometric information is destroyed.

115. The use of biometric information for elimination from being considered in the investigation of a crime would have the following safeguards:

- no Police employee or Police associate can be required to provide a bodily sample or biometric information for the purposes of this clause;
- biometric information relating to DNA is only a DNA profile and not the bodily sample itself;
- biometric information may be provided with a statement that the data is provided for the purposes of this clause;
- the bodily sample is to be destroyed once a profile is derived and stored;

- the Police associate definition would only apply non-Police employees whose duties may involve the risk of accidentally contaminating crime scenes or evidence;
- biometric information must be used only for matching against other information held by the Police for the purpose of eliminating him or her from being considered in the investigation of a crime;
- biometric information is not admissible in evidence in any proceedings against the person (even after the person ceases to be a Police employee or Police associate);
- biometric information is to be destroyed promptly after the person asked the Commissioner in writing to delete it;
- biometric information is to be destroyed, in any event, no later than 12 months after the person ceases to be a Police employee or Police associate; and
- written notice is given to the person promptly after the biometric information is destroyed.

116. With the use of biometric information for elimination purposes, there are comprehensive protections against use other than elimination. For pre-employment vetting, it is reasonable that given the need for public confidence and the fact that no-one is compelled to apply to join, the Police can require DNA checks against outstanding offences for prospective employees; and if an outstanding offence is found, that can then be pursued.

117. We consider that clauses 78 to 83 are not inconsistent with protections against unreasonable search and seizure under section 21 of the Bill of Rights Act.

State services superannuation schemes

118. Section 17 provides that "everyone has the right to freedom of association". This recognises that persons should be free to enter into consensual arrangements with others and to promote the common interests and objectives of the associating group. The right also extends to the right not to associate, and protects the right of individuals to decide freely whether they wish to associate with others.

119. Clause 67 provides that the Commissioner may make it a condition of employment of employees that those employees contribute to a State services superannuation scheme.

120. Compulsion to join a workplace superannuation scheme appears to infringe section 17 of the Bill of Rights Act, as freedom of association includes protection of a person's decision not to join an organisation. We must therefore consider whether this clause can be justified in terms of section 5 of the Bill of Rights Act.

Is this justified under section 5 of the Bill of Rights Act?

121. The Police advises that this provision is in line with the Government's focus on encouraging savings, and is also a hedge against corruption. We consider that these are significant and important objectives.

122. In considering whether clause 67 has a rational and proportionate connection to these objectives we note that the enabling the Commissioner to use discretion on compulsion does not diminish the capacity for bargaining on the issue with employee representatives, or for a change in approach in later years should circumstances make it appropriate.

123. For these reasons, we consider the provision to be justified in terms of section 5 of the Act.

Restriction on resignation by constable

124. Clause 77 provides that the Governor-General may, if the special circumstances require, issue a Warrant limiting the ability of constables to resign without permission.

125. This provision appears to be inconsistent with section 17 of the Bill of Rights Act as the provision would compel membership in the police organisation.

Is this justified under section 5 of the Bill of Rights Act?

126. The purpose of this measure is to assure a continuity of police services at times of national crisis or emergency. This is a significant and important objective.

127. The provision is limited as it only applies when it is in the opinion of the Governor-General that the special circumstances require that no constable resign without permission. The Warrant issued by the Governor-General to this effect will also outline conditions whereby a police constable may resign.

128. For these reasons we consider that this provision is justified in terms of section 5 of the Bill of Rights Act.

Unlawful strikes and lockouts involving constables

129. Section 16 provides that "everyone has the right to freedom of peaceful assembly".

130. Clause 68 provides that a strike by, or lockout of, any number of constables is unlawful. This provision appears to infringe sections 14, 16, and 18 of the Bill of Rights Act. We must therefore consider whether this clause can be justified in terms of section 5 of that Act.

Is this justified under section 5 of the Bill of Rights Act?

131. The Police advises that the prohibition on strikes and lockouts provides comfort to members of the public and the government of the day. The provision is said to also serve

wider interests by helping preserve public trust and confidence in Police. We consider these to be significant and important objectives.

132. In considering whether clause 68 is a rational and proportionate measure we note that the provision only applies to constables, and does not extend to all Police employees. This ensures that essential policing services will continue irrespective of the outcome of negotiations on pay and conditions.

133. Further, the Bill sets out an arbitration process in the event that Police negotiations on pay and conditions fail to result in agreement. Therefore limiting the ability of constables to strike does not limit their right to negotiate on pay and conditions.

134. For these reasons we consider that the provision is justified in terms of section 5 of the Bill of Rights Act.

Removal of Police employees

135. Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice. One of the fundamental principles of natural justice is the right to be heard.

136. Clause 69 enables the Commissioner to remove at any time any Police employee, subject to the Policing Act and any general instructions issued under it and the conditions of employment set out in the applicable employment agreement.

137. This clause raises an issue of natural justice as it provides the Commissioner with the authority to make a decision about any Police employee's employment.

138. Clause 69 applies subject to the Policing Bill and the conditions of employment set out in any applicable employment agreement. On this basis, we are therefore satisfied that any decision made by the Commissioner under this provision will need to be made in a manner consistent with the principles of natural justice.

Reverse onus offences

139. Section 25(c) affirms the right to be presumed innocent until proven guilty according to law. In *R v Wholesale Travel Group*,^[47] 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.

140. In reverse onus 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.

141. 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 reverse onus offences is contrary to the presumption of innocence protection contained by section 25(c) of the Bill of Rights Act.

Reverse Onus Offences in the Bill

142. The following provisions appear to contain reverse onus offences:

- Clause 36 (Power to require name and address for suspected offence of killing or injuring Police dog) – liable to a fine not exceeding \$5,000.
- Clause 48 (Personation and representing vehicle etc, as Police vehicle) – liable to imprisonment for a term not exceeding 12 months, to a fine not exceeding \$15,000, or to both.
- Clause 49 (Use of term Police or New Zealand Police in operating name) – liable in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$5,000, and in the case of a body corporate, to a fine not exceeding \$20,000.
- Clause 50 (Unlawful possession of Police property) - liable to imprisonment for a term not exceeding 3 months, to a fine not exceeding \$2,000, or to both.

143. These provisions will enable defendants to claim a reasonable excuse defence.

144. Clause 36 enables a constable to require a person to state their name, address and date of birth if the constable has good cause to suspect that they have committed or is committing an offence against clause 53 of the Bill (killing or injuring Police dogs). This is a reasonable requirement upon a person who is suspected with good cause of killing or injuring a Police dog.

145. The Police advises annually, an average of 40 offences of "personating police" have been recorded over the last 10 years. In an environment of policing by consent, such offending is not trivial. Persons faced with a person claiming to be a Police officer, or who is wearing what appears to be a Police uniform, feel obliged to comply with reasonable requests or instructions given by that person. This can have serious consequences.

146. Clause 50 makes it an offence to be in unlawful possession of Police property. This carries over a similar offence from the Police Act 1958. The offence operates as a catch-all for occasions where Police property has come into the possession of other persons, for example a Police baton or a Police hat. This offence also acts as a deterrent for persons that have confidential Police documents and is a safeguard against misuse.

147. In our view these clauses have significant and important objectives. We note as a general principle that a reversal of the burden of proof is less of a concern where the penalty is relatively low and therefore has a less significant impact on the accused. As a

general principle, reverse onus offences should carry penalties at the lower end of the scale. The penalties for these clauses include provisions to imprison offenders for a maximum term of one year and are therefore not at the "lower end of the scale".

148. The Police advises that the penalties for the offences under clause 48 and 49 need to be sufficiently high to act as a deterrent, as offences under these provisions can have a very serious effect. The Police also advises that these provisions are not intended to be used in situations such as the "Undie 500" race, or against persons attending the rugby sevens in costume.

149. Further, the Police advises that none of these offences are intended as reverse onus offences, and that the *mens rea* elements of such offences have been understood in the past to be inferred. Courts have, from the context of the offences, either found the mens rea element in the actions of the defendant, or required Police to produce evidence (the Police advises to see for example *Saunders v Police*[\[48\]](#), *Keesing v Police*[\[49\]](#)). Thus, the Police advises that the onus remains on Police to prove the *men rea*, or it is obvious from the circumstances. In both the above cases the onus of proof was always with the Police.

150. The Police advises the reasonable excuse test is intended as a guide for the constable to decide if an offence has been committed, and that the nature of these offences invites the widest use of Police discretion.

151. We therefore consider that these provisions are consistent with the Bill of Rights Act.

Police involvement in elections

152. Section 12 of the Bill of Rights Act affirms the electoral rights of New Zealand citizens of or over the age of 18 years. In considering overseas developments, there appears to be both a narrow and broad interpretation of this right. Read literally, the section 12 only protects the right to vote and to stand for election to the House of Representatives. Read broadly, section 12 protects the ability of New Zealanders to participate in the electoral process.

153. We note that clause 100 allows regulations to be made regulating the involvement of Police employees in any political activity connected with elections.

154. There are already some limits placed on members of the New Zealand Police's involvement in general elections in sections 52 and 53 of the Electoral Act 1993. These provisions deal with the need to maintain constitutional separation between the Police and the executive. Any wider restrictions on participation in the broader electoral process would require significant justification to be consistent with the Bill of Rights Act. Any restrictions on participation in the electoral process would also raise issues of inconsistency with the right to freedom of expression.

155. For completeness we note that the New Zealand Court of Appeal decided in *Drew v Attorney-General* that secondary legislation that is inconsistent with the Bill of Rights can be struck down as *ultra vires* unless the empowering statute expressly or necessarily authorises the making of inconsistent regulations.[\[50\]](#) We understand that the Policing Bill will not

authorise regulations to be made that are inconsistent with the Bill of Rights. Therefore, any regulations made under this Bill once enacted may be deemed *ultra vires* the Policing Act if they are found to be inconsistent with the Bill of Rights.

CONCLUSION

156. Overall, we have formed the view that the Policing 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 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) para 34.

3 This purpose is not present in the existing power under s 57 of the Police Act.

4 See: *R v Tahana* 15/11/06, Simon France J, HC Auckland CRI-2006-004-6234 [Unreported]. Interestingly, the constable formed the belief that the accused has given false details pursuant to a lawful demand after receiving information about the nature of Mr Tahana's tattoos versus those of the person he had named.

5 *Moulton v Police* [1980] 1 NZLR 443, 446.

6 See: *Matthews v Department of Labour* [1984] 2 NZLR 400, 408: concerning the sensitive subject of the use of recorded information against a person in criminal proceedings.

7 *Temese v Police* (1992) 9 CRNZ 425 (CA): section 23 of Bill of Rights has to be applied in a realistic and commonsense way in the context of furnishing particulars at a road stop.

8 In the absence of any specific statutory provision, there is no general power to detain a person against his or her will for questioning: *R v Admore* [1989] 2 NZLR 210.

9 *R v Butcher and Burgess* [1992] 2 NZLR 257; (1991) 7 CRNZ 407 (CA); see also: clause 32(3) that explicitly provides for a caution to be given by a constable before anyone may be alleged to have committed an offence by failing to comply with a reasonable demand under this clause.

10 *Taunoa v Attorney-General* [2007] NZSC 70 para 79 (Elias CJ).

11 Land Transport Act 1998 s 113(2)(a).

12 The word "suspect" requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond mere speculation as to whether an event has occurred or not: *Corporate Affairs v Guardian Investments Pty Ltd* [1984] VR 1019, cited with approval by Neazor J in *R v Thompson* (1995) 13 CRNZ 546.

13 The Supreme Court of Canada noted that taking fingerprints for the purposes of identification invades the rights of the accused less than being arrested and charged for an offence although both are available on taking a person into lawful custody: *R v Beare*; *R v Higgins* [1988] 2 SCR 387 paras 33-5.

14 Butler, Andrew and Petra *The New Zealand Bill of Rights Act: A Commentary* (Wellington: 2005) 18.25.1.

15 *R v Patterson* [2007] DCR 165 para 80.

16 *R v Patterson* [2007] DCR 165 para 33.

17 We consider that this definition would not, however, include bodily samples given the express requirements for the taking of bodily samples contained in the Criminal Investigations (Bodily Samples) Act 1995.

18 Recently referred to in context of the compelled providing identifying details and bodily samples, respectively, in *R v Patterson* [2007] DCR 165 and *A v Council of the Auckland District Law Society* [2005] 3 NZLR 550.

19 [1980] 1 NZLR 443, 446.

20 [1980] 1 NZLR 443, 447.

21 *Neilsen v Attorney-General* [2001] 3 NZLR 433 para 37 (CA).

22 Clause 31(2)(d) of the Bill.

23 *Police v Geiringer* [1990-92] 1 NZBORR 331 (DC, HC).

24 *R v Keegstra* [1990] 3 SCR 697, 729, 826

25 *Canada (Attorney General) v. JTI-Macdonald Corp* 2007 SCC 30.

26 [1996]DCR 951, 955 (DC).

27 *Brooker v Police* [2007] NZSC 30.

28 *Brooker v Police* [2007] NZSC 30 para 45 (Elias CJ).

29 *Brooker v Police* [2007] NZSC 30 para 92 (Tipping J).

30 In contrast, subs 23(2) and 23(3) is only capable of being invoked by a person "who is arrested for an offence." Subsection 23(4) only applies to those "arrested or detained under any enactment for any offence or suspected offence." Clause 26 does not create an offence.

31 *Scott v Police* (1994) 12 CRNZ 207 (HC).

32 *Taunoa v Attorney-General* [2007] NZSC 70 para 79 (Elias CJ).

33 Section 37A of the Alcoholism and Drug Addiction Act 1966 also required that the Police also attempt to take an intoxicated person to a recognised detoxification centre. This requirement is not carries over into the Bill.

34 Butlers 19.6.2; *R v Kirifi* [1992] 2 NZLR 242.

35 *Neilsen v Attorney-General* [2001] 3 NZLR 433, 441 (CA).

36 (1988) 3 CRNZ 184; see also: *Conroy v Police* (1990) 5 CRNZ 600 (HC).

37 Butlers 18.25.1

38 *Everitt v Attorney-General* [2002] 1 NZLR 82 paras 73-4.

39 *Everitt v Attorney-General* [2002] 1 NZLR 82 para 37 (Elias CJ, Richardson P and Keith J)

40 *R v Jefferies* (1993) 10 CRNZ 202 (CA); *Everitt v Attorney-General* [2002] 1 NZLR 82.

41 At section 17.

42 Butlers at 13.2.1; *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2003] 3 NZLR 570 (CA).

43 *R v Jefferies* [1994] 1NZLR 290, 300 (CA) (Richardson J); Butlers at 18.4.4, 18.11.2.

44 Butlers at 18.12.1.

45 *R v Plant* [1993] 3 S.C.R. 281, 293.

46 *R v R.C.* 2005 SCC 61 at para. 28.

47 *R v Wholesale Travel Group* 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

48 HC, Auckland AP 152-91, Aug 13 1991.

49 HC, Auckland M 1205-83, Oct 31 1983.

50 [2002] 1 NZLR 58.

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