ATTACKS ON JUSTICE – NEW ZEALAND

Highlights

Separation of powers in New Zealand is generally effective and respected in practice. Both the judiciary and the legal profession fulfil their duties in an ethical manner free from interference. This provides the public with effective access to justice. However, changes to the legislation regulating judges and lawyers proposed in June 2003 will require careful consideration in order to safeguard independence and to maintain standards of conduct. While New Zealand has had a domestic bill of rights since 1990, its present constitutional status does not prevent Parliament from passing laws that are inconsistent with enumerated fundamental freedoms, for instance in recent counter-terrorism legislation.

BACKGROUND

While **New Zealand's 1990 Bill of Rights Act** affirms most civil and political rights and freedoms and can be used to challenge public sector activity through the courts, some argue that it is rendered practically ineffective by its lack of constitutional or special status and it has been the subject of domestic and international criticism. Specifically, Section 4 provides that the *Act* does not override other legislation in the event of inconsistency – meaning that statutes that are in direct conflict with fundamental human rights will continue to have full force and effect. While the **Attorney-General** is obliged to report to the **House of Representatives** on any inconsistency between the terms of the *Act* and any provision of a new bill introduced to the legislature pursuant to Section 7 of the *Bill of Rights Act*, **Parliament** is not bound to change offending statutes as a result and this does not occur in practice. However, while the act lacks constitutional entrenchment, it should be noted that the courts have developed a substantial jurisprudence as a consequence of challenges brought to executive action using the *Act*'s protections and mechanisms.

The recent counter-terrorism legislation trend includes the *Terrorism Suppression Act* **2002**, certain sections of the *Immigration Act* **1987** and the six acts that the *Counter Terrorism Bill* became upon its passage **–** the *Crimes Amendment Act* **2003**, the *Terrorism Suppression Amendment Act* **2003**, the *Misuse of Drugs Amendment Act (No. 2)* **2003**, the *New Zealand Security Intelligence Service Amendment Act* **2003**, the *Sentencing Amendment Act* **2003** and the *Summary Proceedings Amendment Act* **2003** (see **http://www.legislation.govt.nz/act/browse.aspx**). These laws created a number of new offences, including the crimes of harbouring terrorists, dealing with nuclear materials and unmarked plastic explosives, threatening harm to persons or property and offences whose definition aims at protecting the natural environment from contamination or infection. The amendments also extended the investigative powers of customs officers and the police concerning search, seizure and the use of tracking devices, and made terrorism an aggravating factor for sentencing purposes.

JUDICIARY

New Supreme Court

In **2003**, New Zealand established its own **court of final appeal** by enacting the *Supreme Court Act* (http://www.legislation.govt.nz/act/public/2003/0053/latest/DLM214028.html). The **Supreme Court** was due to begin proceedings in **July 2004**, replacing the previous right of appeal to the **Judicial Committee of the Privy Council**, based in London. The purpose of this restructuring of the appellate system, according to the **April 2002** "Report of the Advisory Group to the Attorney-General and Associate Minister of Justice" (http://www.crownlaw.govt.nz/artman/docs/cat_index_6.asp), was to improve accessibility to New Zealand's highest court, to increase the range of matters it considers and to improve the understanding of local conditions by judges on its bench.

Appeals to the **Supreme Court** will be by special leave, determined in accordance with the criteria set out in section 13 of the act, which provides that in order to grant leave, the court must determine that it is necessary in the interests of justice for the court to hear and determine the proposed appeal. Leave will be granted where the appeal involves a matter of general or public importance, where a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard, or where the appeal concerns a matter of general commercial significance. A significant issue relating to the *Treaty of Waitangi*, the 1840 treaty of cession between the British government and Maori leaders, is deemed to be a matter of general or public importance.

Reform proposals for court and tribunal systems

In **March 2004**, the **New Zealand Law Reform Commission** released Report 85, "Delivering Justice For All – A Vision for New Zealand Courts and Tribunals" (http://www.lawcom.govt.nz/). The report recommends a number of reforms relating to the existing system of courts and tribunals. One of the report's proposals is that tribunals should be integrated into a principled and coherent system, and that future tribunals should be set up in accordance with this structure. Further, as certain tribunals share offices with and are funded by the government departments that are directly affected by their decisions, the commission recommended that the **Ministry of Justice** should administer all tribunals to ensure that they are truly independent.

The most significant of the court system reforms proposed by the commission is the introduction of a new general court, the **Community Court**, to deal with the high volume of less serious civil and criminal cases currently managed by **District Courts**. The existing **Disputes Tribunal** and **Tenancy Tribunal** would no longer operate independently, but would become divisions of the Community Court.

The Government's response to the report indicates that the major proposals will be considered as part of a baseline review of the funding for courts (see www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all/index.html).

Judicial conduct

The *Judicial Matters Bill* was passed by Parliament on **14 May 2004** (**http://www.legislation.govt.nz/act/browse.aspx**). It codifies procedures for the investigation of grievances concerning the conduct of judges and establishes an office

of **Judicial Conduct Commissioner**, who will manage the complaints process. The law also protects judicial independence by expressly preserving the immunity of all judges from suit in the exercise of their professional duties.

Complaints concerning less serious matters may be dealt with by the judge in charge of the relevant court. However, where the commissioner takes the view that a complaint warrants a full inquiry, he/she will recommend that the Attorney/General convene a **Judicial Conduct Panel** – comprised of a lay person, a sitting judge and a retired judge – to conduct an investigation. The panel's hearings shall be public, unless it is in the public interest for them to be closed. Upon concluding its inquiry, the panel must advise the Attorney-General whether the matter justifies considering the removal of the judge from office in accordance with the provisions of the *Constitution*. It is required to give reasons for its decision and its findings are subject to judicial review. The panel is also free to investigate matters that come to its attention during the course of the inquiry.

The New Zealand government and international organizations believe that creating an independent commissioner's office will enhance public perception of judicial accountability. However, the bill was vigorously opposed by the legal profession. In its **November 2003** "Submissions on the Judicial Matters Bill" (http://www.nz-lawsoc.org.nz/hmsubmissions.asp), the **New Zealand Law Society** argued that the relatively small number of complaints made about judges did not warrant the introduction of a statutory disciplinary process. Further, the society contended that the system posed a serious threat to independence by placing a statutory officer in a superior position to judges and empowering him/her to investigate and recommend their suspension or removal in serious cases – a state of affairs that conflicts with the pre-requisites for an independent judiciary set out in Principle 2 of the *UN Basic Principles on the Independence of the Judiciary* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm).

In addition, while the *Judicial Matters Act* affords due process rights to judges under inquiry, it does not provide for the initial investigation to be conducted confidentially in accordance with Principle 17 of the *UN Basic Principles on the Independence of the Judiciary* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm).

Judicial appointment

Ongoing reforms to the system of judicial appointments to the High Court and Court of Appeal, begun in **1999**, have resulted in a more transparent and consultative process. Prospective candidates are now sought through the regular publication of advertisements and by approaching a wide range of legal and community groups for formal nominations in order to create an extensive list. The 1999 booklet "High Court Judges' Appointments", published by the Ministry of Justice, sets out the criteria under which applicants for judicial appointment are assessed. These are legal ability, qualities of character, personal technical skills and "reflection of society", described in the booklet as "the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society".

The listing process was initially managed by the **Judicial Appointment Unit** of the Ministry of Justice. However, following investigations into various aspects of judicial administration during 2002, the government decided in **March 2003** to establish a

new **Judicial Appointments and Liaison Office** (JALO), located in the Crown Law Office under the overall responsibility of the Solicitor-General, to have responsibility for administrative matters concerning the appointment of all judicial officers, with the exception of the Chief Justice and members of the Maori Land Court. JALO was expected to start operations in **mid-2004**.

While the appointments system is intended to be broad-based and inclusive, the bench is still criticized for failing to reflect the composition of society. In the course of establishing a domestic court of last resort (the Supreme Court) in 2002, it was proposed by the **Attorney-General's Advisory Committee** (http://www.crownlaw.govt.nz/artman/docs/cat_index_6.asp) that a convention should be established requiring that at least one member of the **Supreme Court** be well versed in Maori customary law, given the constitutional importance of the *Treaty of Waitangi*, and that the Maori people be included in the consultative process for appointments.

LEGAL PROFESSION

Lawyers and Conveyancers Bill

The current legislation regulating the legal profession in New Zealand is the *Law Practitioners Act* **1982** (LPA) (http://www.legislation.govt.nz/act/public/1982/0123/latest/DLM62320.html?search=qs_act_Law+Practitioners&p=2&sr=1). However, on **24 June 2003** the *Lawyers and Conveyancers Bill* (LCB) (http://www.nz-lawsoc.org.nz/lawyersconveyancers.asp) was introduced to Parliament. The *LCB* proposes that only limited areas of work be reserved to lawyers and creates a new occupation of licensed conveyancers (non-lawyers who may conduct land transactions). In its **2003** submissions to government concerning the draft law, the legal profession expressed concern regarding the level of qualification and regulation required for licensed conveyancers and the possibility of public confusion.

The *LCB* also proposes amendments to the complaints handling system, including the introduction of an office of **Legal Complaints Review Officer** (LCRO), appointed by the Minister for Justice. The LCRO will promote the resolution of complaints made by members of the public against legal practitioners and conveyancers, using mediation and conciliation. This intervention will take place before the start of traditional disciplinary proceedings. The LCRO will also be empowered to lay charges, which will be heard by a new tribunal established to adjudicate on complaints against both lawyers and conveyancers.

The 2004 *Judicial Matters Bill***,** which codifies procedures for the investigation of grievances concerning the conduct of judges and establishes an office of **Judicial Conduct Commissioner**, was vigorously opposed by the legal profession, in particular in the **New Zealand Law Society**'s November 2003 submission (see above, under Judiciary, Judicial conduct).

ACCESS TO JUSTICE

Preventive detention
Pursuant to sections 87 – 90 of the *Sentencing Act* **2002** (http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html), New Zealand has established a scheme of preventive detention, whose purpose is to protect the community from those who pose a significant and ongoing risk to its safety. It applies to persons over the age of 18 years who have been convicted of certain violent or sexual offences after being afforded full rights of fair trial and appeal and results in a sentence of indefinite detention for the purpose of community protection. A minimum period of imprisonment must be ordered, which may be no less than five years. The detention is subject to compulsory annual review by an independent **Parole Board** after a minimum period of five years has expired. Decisions of the Parole Board are subject to judicial review (see below, under Cases).

Counter-terrorist measures
The new *Terrorism Suppression Act* **2002** (http://www.legislation.govt.nz/act/public/2002/0034/latest/DLM151491.html) applies to children as well as adults, and permits the detention of children from the age of 17 years (being the age when the youth justice jurisdiction ceases to apply in New Zealand). The **Advisory Council of Jurists**, a group of eminent jurists in the Asia-Pacific region, has observed that this is in breach of the "best interests of the child" principle expressed in Article 3(1) of the *UN Convention on the Rights of the Child* (http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm). Some claim that it is also in conflict with section 25(i) of the *New Zealand Bill of Rights Act* **1990**, which protects "(t)he right, in the case of a child, to be dealt with in a manner that takes account of the child's age" as one of the minimum standards of criminal procedure.

The *Immigration Act* **1987** (http://www.legislation.govt.nz/act/public/1987/0074/latest/DLM108018.html), an existing nationality security provision, has also enjoyed a revival in the "war against terror". Part IV sets out a procedure whereby the **New Zealand Security Intelligence Service** (SIS) may provide a security risk certificate to the **Minister of Immigration** in relation to a person seeking entry to New Zealand. The effect of the certificate is to suspend any immigration proceedings before a tribunal or court and to permit detention of the person as a consequence of security concerns. Although the person will be entitled to legal representation, he/she is not entitled to be told the reasons for the detention. This provision has the potential to be used as a means for detaining persons who are suspected of terrorist activity, even where there is no proof of wrongdoing (see below, under Cases).

Legal aid
Legal aid is available to eligible persons who require legal advice before the start of proceedings, even where litigation may not ultimately occur: in the **February 2004** case of *Legal Services Agency v New Zealand Law Society & Anor*, a full bench of the High Court held that civil legal aid may be granted in cases where proceedings have not yet been issued.

In addition to the national legal aid regime, the **Legal Services Agency** also administers the **Police Detention Legal Assistance Scheme** (http://www.lsa.govt.nz/03pdla.php), which gives practical effect to the right of

persons who are arrested or held for questioning by the police to contact a lawyer and receive free and private legal advice. Police stations hold a list of lawyers who have agreed to participate in the scheme and to represent those who are arrested or detained on legal aid fee scales, funded by the government.

At present, the police are not specifically obliged to inform detainees of the existence of the scheme until the detainee indicates that he or she would like to contact a lawyer but cannot afford one. This assumes a level of public awareness of the scheme which does not exist in reality, and the **Law Commission** in its **March 2004** report (http://www.lawcom.govt.nz/) recommended that the police be placed under a duty to inform detainees of the existence and availability of the scheme when they advise detainees of their rights. In response, the Government has directed the **Ministry of Justice** to lead a working group on this issue.

A pilot **Public Defence Service scheme**, managed by the **Legal Services Agency**, began operations in **May 2004** in the Auckland and Manukau areas of New Zealand (http://www.lsa.govt.nz/). The aim of the scheme is to enhance the quality of legal aid representation provided in criminal proceedings by employing salaried lawyers, who will work alongside private lawyers in accepting cases.

Cases

Preventive Detention

The **United Nations Human Rights Committee** considered the preventive detention scheme in *Rameka et al v New Zealand* in **December 2003** (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3a7e5f10cc6b9198c1256dff00370378?Opendocument). The authors of the communication claimed that the preventive detention regime was in violation of the *International Covenant on Civil and Political Rights* (ICCPR) (http://www.unhchr.ch/html/menu3/b/a_ccpr.htm). Specific reference was made to the prohibition on torture or cruel, inhuman or degrading punishment in Article 7 of the *ICCPR*, the due process rights and right to liberty in Articles 9(1), 9(4) and 10(1) and the presumption of innocence in Article 14(2). Article 10(3), which stipulates that the prison system should treat prisoners with the aim of their reformation and social rehabilitation, was also relied upon.

A majority of the committee held that the scheme was not of itself inconsistent with the *ICCPR* (http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) as there were compelling reasons for the detention and adequate provisions for regular review of the detention by an independent body. However, individual opinions were issued by nine members of the committee, five of whom criticized the preventive detention scheme on the basis that it was arbitrary. For these members, the idea of detaining an offender on the basis of "potential dangerousness" was inherently unsound, regardless of the extent of the administrative checks and balances in place. The scheme represented an illegitimate means for New Zealand to avoid its obligations to afford due process and a fair trial under Articles 14 and 15 of the *ICCPR*. One of the dissenting members, **Rajsoomer Lallah**, also expressed concern about the effectively administrative nature of the review of the detention by the Parole Board, notwithstanding the existence of a right to judicial review.

Security risk certificate procedure

In early **2004**, the **New Zealand Section of the International Commission of**

Jurists (ICJ) observed the trial of **Ahmed Zaoui**, a former parliamentarian and Algerian national seeking refugee status in New Zealand. Mr Zaoui had been detained without trial in New Zealand since **4 December 2002**. The proceedings concerned the relationship between Part IV A of the *Immigration Act* **1987** and the decisions made by the **New Zealand Refugee Status Appeals Authority** (RSAA), an independent body exercising judicial power (http://www.nzrefugeeappeals.govt.nz/Pages/Ref_Home.aspx).

Mr Zaoui was initially detained by the New Zealand immigration authorities upon arrival so that his identity and immigration status could be assessed. However, the *security risk certificate procedure* was then invoked against him by way of a certificate issued to the Minister for Immigration on **20 March 2003**. While the RSAA made a finding on 1 **August 2003** that Mr Zaoui was entitled to remain in New Zealand, his detention was continued. The national government has defended Mr Zaoui's continued detention on the basis that Part IV of the *Immigration Act* 1987 is capable of overriding a decision of the RSAA, even though the legislation is in fact silent on the issue.

Mr Zaoui applied unsuccessfully to the **High Court** to be released from the Auckland Remand Prison, where he is currently held. In rendering his **July 2004** decision, the judge accepted that the detrimental effect of detention on asylum seekers suggested that, for humane reasons, Mr Zaoui should be moved to a facility other than a prison. However, in the absence of any other form of state-operated secure accommodation, the judge held that he could not order Mr Zaoui's release, remarking that it was for **Parliament** to decide whether a purpose-built facility should be constructed for persons held under the *security risk certificate procedure*. The judge was not satisfied that the form of detention constituted a breach of Mr Zaoui's rights. In **May 2004**, the **United Nations Committee Against Torture** condemned Mr Zaoui's continued detention, warning the New Zealand government that, in its view, "over-prolonged solitary confinement of asylum seekers may amount to cruel, inhuman and degrading treatment".

In **September 2004**, the New Zealand **Court of Appeal** held Mr Zaoui's imprisonment pursuant to the *security risk certificate procedure* to be lawful and concluded that he should not be granted bail. This decision has been appealed to New Zealand's **High Court** and was heard in **November 2004** as only the second case before the country's new court of last resort. The court reserved its decision, in what **Chief Justice Dame Sian Elias** referred to as "a difficult and important case".

The use of executive powers to override the decision of the RSAA, a competent authority wielding judicial power, represents a fundamental breach of the doctrine of separation of powers. This is contrary to Principle 4 of the *UN Basic Principles on the Independence of the Judiciary* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm), which states that "(t)here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision". The situation is exacerbated by the fact that the case involves the arbitrary deprivation of liberty.

LEGAL REFORMS DURING THE PERIOD

2002: *Sentencing Act* established a scheme of preventive detention of those who pose a significant risk to community safety.

2002: *Terrorism Suppression Act*.

2003: *Supreme Court Act* created New Zealand's own court of final appeal.

March 2003: new **Judicial Appointments and Liaison Office** established.

May 2004: *Judicial Matters Act* passed, creating office of Judicial Conduct Commissioner, who will handle grievance cases against judiciary.

June 2003: *Lawyers and Conveyancers Bill* introduced, limiting areas of work reserved for lawyers.

2003: Six acts passed aimed at countering terrorism: the *Crimes Amendment Act*, the *Terrorism Suppression Amendment Act*, the *Misuse of Drugs Amendment Act (No 2)*, the *New Zealand Security Intelligence Service Amendment Act*, the *Sentencing Amendment Act and the Summary Proceedings Amendment Act* creating new offences including harbouring terrorists, dealing with nuclear materials and threatening to harm to persons or property. The amendments also extended the investigative powers of customs officers and police.