Supreme Court clarification of the Bill of Rights approach to other enactments: *Hansen*
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On 20 February this year, the Supreme Court delivered its decision in *Hansen v R* [2007] NZSC 7. The decision contains the Court’s first comprehensive treatment of a number of basic questions about the approach to the New Zealand Bill of Rights Act 1990 (the Bill of Rights) which surprisingly and inconveniently remained unresolved as the Bill of Rights neared the end of its 16th year on the statute book. With the Supreme Court’s welcome clarifications, perhaps the Bill of Rights can now live up to its “sweet 16” age – but you have to work hard for this: each of the five members of the Court has written full reasons, and points of agreement between them are often not expressly indicated at all and never in prominent positions. The result is a daunting 290 paragraphs or (in the unreported version) 123 pages of reading.

**ISSUE AND DECISION ON FACTS**
The issue raised in *Hansen* was whether the reverse onus provision in s 6(6) of the Misuse of Drugs Act 1975 (the Act) was in breach of the right under s 25(c) of the Bill of Rights to be presumed innocent until proved guilty, and whether s 6(6) could be read down so as to avoid the breach. Section 6(6) provides that a person found in possession of more than a specified amount of a controlled drug shall “until the contrary is proved” be deemed to be in possession for the purpose of supply. The Court’s answers to these issues may be summed up in two brief paragraphs (for more detailed discussion, see Bernard Robertson [2007] NZLJ [p?]; also Student Companion, Petra Butler [2007] NZLJ [p?]).

First, by a majority of three (Tipping, McGrath and Anderson JJ), the Court held that the reverse onus provision was not only in breach of s 25(c) as such, but moreover could not be justified in terms of s 5. While some limits on the presumption of innocence could be justified, the majority was not persuaded that a legal onus on the accused triggered by possession of the currently set amount of the drug was a proportionate response to the admitted difficulty of prosecuting street dealers. Blanchard J dissented on this specific point, while on the Chief Justice’s approach (see below) this question did not arise.

The second aspect of the decision on s 6(6) of the Act was that although in the majority’s view the reverse onus provision was not a justified limit, the court was unanimous in holding that s 6(6) of the Act could not be read down to avoid this breach. The provision clearly imposed on an accused a legal onus of proof on the balance of probabilities. It was not capable of bearing the appellant’s proposed more limited meaning, according to which the burden placed on an accused was merely an evidentiary one.

In the result, Mr Hansen’s challenge to his conviction failed. He was convicted by a jury who was directed to apply the reverse onus in s 6(6) of the Act, and the Supreme Court unanimously agreed that the direction was correct. However, Mr Hansen’s challenge succeeded in the secondary sense (of limited use to him personally) that he persuaded a majority of three Judges of the Court that s 6(6) as it stands is in breach of the Bill of Rights.
APPROACH TO BILL OF RIGHTS CASES INVOLVING OTHER ENACTMENTS

The Hansen decision, however, has significance well beyond its disposal of the reverse onus question. A series of issues concerning the approach to be adopted to Bill of Rights cases involving other enactments remained unresolved until now, and the Supreme Court’s decision includes further authoritative guidance on all of the main items on that list of issues. The remainder of this article takes these issues in turn, summarising the Supreme Court’s position and raising issues which remain outstanding.

The relationship between sections 4, 5 and 6 and the role of section 5

Probably the most vexing issue concerning the approach to the Bill of Rights has been where s 5 of the Bill of Rights fits into the Bill of Rights analysis in cases involving other enactments, that is its role relative to sections 4 and 6 of the Bill of Rights. In Hansen, a majority of four (Elias CJ dissenting) came down firmly in favour of the position which most commentators had long argued (Rishworth et al, The New Zealand Bill of Rights (2003), pp 133-36; Butler & Butler, The New Zealand Bill of Rights Act: A Commentary (2005), pp 161, 193-94; also Solicitor-General’s submission recorded in Moonen v Film and Literature Board of Review (No 2) [2002] 2 NZLR 754 (CA), para 12). Essentially, before using s 6 to attempt to read an empowering statute consistently with the relevant right, it is necessary to use s 5 to determine whether the challenged limit to the right can be justified: the place of s 5 in the analysis is before that of section 6 (Blanchard paras 57-60, Tipping paras 89-92, McGrath J paras 191-92). Tipping J set out a new six step approach (para 92; see Student Companion at [39-40?]) and McGrath J a more helpfully stream-lined five step approach (para 192). To put it differently (and more accurately, as I will argue shortly), the “consistent” meaning required by s 6 to be adopted if possible is a meaning that is consistent with the right subject to any limits that can be justified under s 5, not a meaning consistent with the absolute version of the right as set out in part 2 (Blanchard J para 59, McGrath J para 186).

Unfortunately, none of the Judges in the majority on this point actually overruled Moonen v Film and Literature Review Board (No 1) [2000] 2 NZLR 9 (CA). That was the previous leading case on the point which had adopted essentially the contrary approach: first use s 6 to adopt the meaning which constitutes the least possible limit on the right (which is what s 6, “aided by s 5”, requires), then use s 5 to determine whether the remaining limit is justified (paras 17-19). The Supreme Court offered some reasons as to why the different approach set out in Moonen (No 1) may have been appropriate for that case, and reiterated the assurance in Moonen (No 2) (para 15) that statements of approach are not intended to be prescriptive (Blanchard J para 61, Tipping J para 91). McGrath J somewhat puzzlingly appeared to consider that Moonen (No 1) set out the same approach as that now adopted in Hansen, and accordingly declared it correct (paras 184, 186). While Rishworth has argued that Moonen (No 1) can be read as setting out an approach similar to the one now adopted in Hansen, that was only after making some fairly significant adjustments to the approach as set out in the case itself (Rishworth et al, pp 134-36). For the sake of certainty and simplicity it might have been desirable to finally lay the ghost of Moonen to rest.

But the persistence in refusing to prescribe the new approach to the order in which sections 4, 5 and 6 are to be applied does have some justification. The only point that is truly crucial and that can be stated without any qualification is the second
formulation of the Hansen position above: the “consistent” meaning required by s 6 to be adopted if possible is a meaning consistent with the limited version of the right that results from the application of any s 5 justified limits. Section 5 has a necessary role to play in the rights-consistent interpretation of other enactments. That point is in fact stated unequivocally in Hansen, regardless of the equivocation over Moonen (No 1).

When we move from that basic principle to the more practical question as to the order in which sections 5 and 6 are to be applied, it may well not be necessary to be prescriptive. The formulation of the approach adopted in Hansen on closer consideration turns out not to be entirely accurate, or at least not entirely comprehensive. It will usually not be sufficient to consider s 5 just once before moving on to s 6. In a case like Moonen where the impugned provision was capable of a range of more or less rights-restricting meanings (depending on what was taken to satisfy the test of “promoting or encouraging” the sexual exploitation of children), the court’s task under sections 5 and 6, properly understood, is somewhat more involved than those simple two steps. The role of s 5 is not spent once the justification for the challenged limit has been determined. It has further work to do as part of the next step, namely the interpretation exercise that is required once a challenged limit has been found not justified. If that interpretation exercise is to result in choosing the most appropriate meaning from among the available range, then I suggest the court needs to apply not only s 6, but s 5 and s 6 alongside each other in a bid to find a meaning that satisfies both tests if possible:

a. a meaning which the enactment can be given, as called for by s 6,

b. and which involves a lesser limit on the right, being one that ideally can be justified under s 5 or at least one that is more justified than the challenged limit.

This approach must be what Butler & Butler mean when they say it is necessary to “shuttle” between sections 5 and 6 at the interpretation stage (p 194). It means that s 5 is used to assess the justification not only for the challenged limit but also for the remaining limit represented by any proposed reading down. The reason why this was not necessary in Hansen is not merely because there was only one distinct alternative meaning for s 6(6) of the Act (Tipping J para 91), but more importantly because it was quite clear that that alternative meaning was not one which s 6(6) could be given in terms of s 6. If the meaning had been available, it would still have been appropriate to go on to consider whether it represented a justified limit in terms of s 5.

One of the useful aspects of the early leading decision in Ministry of Transport v Noort [1992] 3 NZLR 260 (CA) was that the majority judgments illustrated just that sort of process, although they did not spell it out in those terms. Having decided that the challenged blanket denial of the right to a lawyer for those subject to evidential breath or blood alcohol testing under sections 58B and 58C of the Transport Act 1962 was not a justified limit on the right in s 23(1)(b) of the Bill of Rights, the Court considered a range of lesser limits. Its conclusion was that the Transport Act provisions should be interpreted as permitting recourse to a lawyer, but only by telephone and only so long as a lawyer could be contacted without undue delay, because that was a reading which was consistent with the scheme of the Transport Act as well as representing a justified limit on the right.

If all of this is correct, then Moonen (No 1) was not wrong in including consideration of s 5 alongside and after s 6; but it was still wrong in omitting consideration of s 5 to assess the justification for the challenged limit before turning to considering alternative meanings pursuant to s 6. Consistent with the new position
in *Hansen*, the expanded approach proposed above still starts with a consideration of s 5 before s 6 is reached at all. The most obvious advantage is that this avoids unnecessary consideration of s 6 in cases where the interpretative issue does not arise because the limit on the right resulting from the natural meaning is one which can be justified under s 5 and thus involves no breach (Blanchard J para 60, Tipping J paras 90 - 92). More importantly, it also avoids excessive reading down of an enactment contrary to Parliament’s legitimate intention of imposing a justified limit on the right (Tipping J, paras 90 – 91). This point could have been put right more unequivocally by the Supreme Court in *Hansen*. But as already noted, although it declined to criticise *Moonen (No 1)* the Supreme Court did put the more fundamental point beyond doubt: s 6 calls for a meaning that is consistent with the limited version of the right that results from the application of any s 5 justified limits. That necessarily means that s 6 cannot be considered and applied before any consideration has been given to s 5.

The main surprise in *Hansen* is that the Chief Justice in the sole dissent on this issue disagreed with precisely that fundamental point, and decided to return to a position favoured in the early days by Cooke P and Gault J in *Noort* (pp 271-73, 295) but long since virtually universally abandoned. She took the view that s 5 has no role to play at all in judicial applications of the Bill of Rights to other enactments. When considering whether an enactment can be read down under s 6 so as to be consistent with the Bill of Rights or whether instead its inconsistent meaning must prevail by virtue of s 4, according to the Chief Justice courts must use the full and unqualified version of the right as it appears in part 2, subject only to limits expressed as part of the statements of the rights themselves, and to limits necessary to avoid clashes between different part 2 rights (paras 6-7, 15-24). It will be interesting to see whether the Chief Justice’s detailed defence of that position (paras 15 – 24) succeeds in provoking fresh debate on this point.

**Test for justification under s 5**

Section 5 raises questions not only in terms of its role and place in relation to the other operative provisions, but also as to the test to be used to determine whether a limit on a right is “reasonable” and “demonstrably justified in a free and democratic society” as required by s 5 itself. It has always been agreed that the test for justification must be one of proportionality, but details remained somewhat uncertain.

In *Hansen*, all five Judges returned to the *Oakes* test (from *R v Oakes* [1986] 1 SCR 103) for justification under the Canadian equivalent of s 5 which was first adopted for New Zealand in *Noort*, or to more recent restatements of that test (Elias CJ para 42, Blanchard J para 64, Tipping J paras 103-4, McGrath J paras 203-4, Anderson paras 269, 272). As is well known, that test considers first the importance of the objective pursued by the limit, and secondly the proportionality of the means chosen to advance the objective. The second stage comprises three steps or aspects, namely rational connection between means and objective, minimal impairment of the right, and proportionality of the limit to the objective.

However, another test also made a brief appearance in *Hansen*. In *Noort*, Richardson J after quoting the *Oakes* test went on to state a different test of his own, which has been much less referred to than the *Oakes* test (pp 283-84). It was a matter of weighing four factors, namely “(1) the significance in the particular case of the values underlying the Bill of Rights Act; (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act; (3) the limits sought to be placed on the application of the Act provision [sic] in the particular case;
and (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.” Blanchard J in Hansen quoted that test and then went on to quote a version of the Oakes test (para 64). Neither Richardson J in Noort nor Blanchard J in Hansen offered any real discussion of the relationship between the two tests, nor are the somewhat cryptic terms of Richardson J’s test further explained. I will return to this. For now suffice to say that not only was the Oakes test unanimously adopted by the Court, but three of their Honours (Blanchard, Tipping and McGrath JJ) also went on to carefully apply that test step by step. That sets a welcome precedent, as application of the test has often tended to be rather truncated.

However, it is a little disappointing that with one exception, the Supreme Court has not made any attempt to elucidate just how this test relates to the statutory criteria of “demonstrably justified in a free and democratic society”. The one exception is Tipping J’s discussion of deference (see below). Arguably the statutory criteria should play a greater part in the application of the test itself (Butler & Butler, pp 139-41).

Indeed the original Oakes test expressly required the objective pursued by the limit to “relate to concerns which are pressing and substantial in a free and democratic society”. It also called for that standard to be used to judge not only the importance of the objective but also more fundamentally its validity and legitimacy: an objective discordant with the principles of a free and democratic society will not enjoy protection (see Tipping J para 103, McGrath J para 203). These aspects of the test have not received much attention in New Zealand cases. I suggest they should. McGrath J touches on the latter point in commenting that it would be rare for the courts to decide that a legislative objective was not legitimate (para 207). No doubt that is so, but surely such rare lapses may still occur and should be provided for.

One of the main difficulties with the Oakes test concerns the “least possible limit” or “minimal impairment” requirement, which has been widely criticised as too strict. A more appropriate formulation would be to require that the limit should be no greater than is reasonably necessary for attaining the objective (Huscroft in Rishworth et al, pp 179-80, 185; Butler & Butler, pp 141). In Hansen, two Judges expressly adopted that qualification (Blanchard J para 79, Tipping J para 126.). This would have been very welcome clarification, if it were not for the other two majority Judges stating the original test without qualification (McGrath J paras 204, 217, Anderson J para 272).

The overall structure of the Oakes test also received some attention in the judgments. Anderson J preferred that consideration of the importance of the objective should not occur until the final proportionality test, rather than as part of the first stage (270). However, presumably it will not make too much difference whether importance is considered at the outset or not, so long as it is again considered as part of the balance in the final proportionality assessment. The basic point of the initial step must be to identify the objective. Tipping J suggested, based on English thinking, that the first two steps (objective and rational connection) may be best understood as threshold questions (para 121). Both Tipping and McGrath JJ continued their analysis on to the final step (proportionality) although they found the penultimate test (minimal impairment) not satisfied (paras 130, 224). This suggests that the minimal impairment test (whether qualified as above or not) is not a hurdle which must be passed but rather a factor that feeds into the final proportionality assessment. Indeed McGrath J expressly concluded by “taking the three indicators of proportionality together” (para 233).
All of this tends to confirm that the crux of the *Oakes* test is the overall proportionality assessment at the final step. It would be very helpful indeed if courts were to spell out in more detail what is involved at that final step, beyond the vivid metaphor in *Moonen (No 1)* para 18 that a sledgehammer should not be used to crack a nut. While the *Hansen* opinions do not oblige with any statements of that nature, it is instructive to consider what factors were in fact taken into account when their Honours came to apply the final step of the test.

Tipping J proceeded by weighing the severity of the limit on the right, the objective, and the effectiveness of the limit in serving that objective as compared with the effectiveness of available alternatives (para 132). Blanchard J considered the same three factors, albeit he dealt with the last one as part of the previous step (paras 79-82). McGrath J covered only the first of these three factors (severity of limit), but in addition considered the importance of the particular right in this type of case (225-28). If these factors were all taken together, the result would be a list of factors bearing a significant resemblance to Richardson J’s four factors set out in *Noort*.

I suggest that these are indeed the four factors that need to be weighed at the final step in order to determine proportionality. Richardson J’s test in *Noort* is thus best seen as fitting into the *Oakes* test at that point. To take clarification one step further, the factors to be weighed could be arranged as follows:

(a) on the one hand,
   (i) the importance of the right in the relevant context and
   (ii) the severity of the limit on the right;
(b) on the other hand,
   (i) the importance of the objective in the relevant context and
   (ii) the effectiveness of the limit in serving the objective, compared to the effectiveness of any available alternatives.

To return to an earlier point, the importance of both the right and the objective should be assessed in light of the statutory standard of a “free and democratic society”. The first of these factors ((a)(i)) is the one that tends most often to be ignored, perhaps because it is not reflected in any of the preceding steps of the *Oakes* test. Yet surely Richardson and McGrath JJ were right in giving prominence to this factor. Not all rights are equally important, and the importance of any right varies with the context. Surely those matters affect the balance to be struck under s 5. It will also be noted that the final factor ((b)(ii)) is essentially a restatement of the penultimate step in the *Oakes* test. Including this as one of the factors in the proportionality assessment is consistent with the approach followed by Tipping and McGrath JJ (see above).

Finally on s 5, Tipping J relied on the statutory standard of a “free and democratic society” as well as on UK jurisprudence to argue in favour of some deference or margin of appreciation where the challenged limit arises from another enactment (paras 105-119, 123-24; see also McGrath J para 207, Anderson J para 268). In passing the other enactment, Parliament presumably concluded that the limit on the right was justified in terms of s 5. While s 5 appoints courts to keep Parliament faithful to its own obligation not to impose unjustifiable limits on rights, Tipping J considered that courts’ function is one of review rather than substituting their own view. Courts should disagree only in suitably clear cases, although the degree of deference must vary with the subject matter and context. Such an approach might go some way towards answering the Chief Justice’s concerns about judicial interference with legislation which were among her reasons for rejecting judicial use of s 5 in relation to other enactments.
How far can s 6 interpretation be pushed?

As noted earlier, the Court in this case was unanimous in its view that the reverse onus provision in s 6(6) of the Misuse of Drugs Act could not be read down pursuant to s 6 of the Bill of Rights so as to render it consistent with the Bill of Rights. While this amounted to upholding the Court of Appeal’s decision in *R v Phillips* [1991] 3 NZLR 175, it was in clear contrast with the intervening House of Lords decision in *R v Lambert* [2002] 2 AC 545. That case concerned a very similar reverse onus provision, and the House of Lords relied on the UK equivalent of s 6 (s 3 of the UK Human Rights Act 1998) to read that provision down to impose no more than an evidentiary burden on the accused. The contrast is instructive, as expressly acknowledged by the Supreme Court.

The reverse onus decision in *R v Lambert* is merely one of a series of decisions in which the House of Lords has flexed its judicial muscle under s 3 and has asserted a very strong power to re-interpret legislation to render it rights-consistent even in the face of strong evidence of a contrary Parliamentary intent. The only limit appears to be that the re-interpretation should not be in conflict with the fundamental purpose or tenor of the legislation as a whole: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (HL). Courts in New Zealand had generally eschewed such an aggressive approach (e.g. *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA)), but there were some notable exceptions. The majority’s preferred solution to the problem in *R v Poumako* [2000] 2 NZLR 695 (CA) is perhaps the most extreme instance.

In *Hansen*, at least four members of the Supreme Court took the opportunity to make it clear that New Zealand courts will not follow the strong lead of the House of Lords on the interpretative instruction in s 6. Before turning to the Bill of Rights, courts should consider what is the natural meaning of the enactment, and s 6 could displace such a meaning only if a more rights-consistent alternative was “genuinely open” in light of the provision’s “text and its purpose” (Blanchard para 61; and see Tipping J para 150, McGrath para 252, Anderson para 290). Moreover, it was particularly important to respect Parliament’s intention where there was contemporary evidence of Parliament’s understanding of the provision at the time of enactment which supported the natural meaning in relation to the specific issue arising, as was the case here according to Blanchard J (para 61) and Tipping J (para 156). The Chief Justice disagreed at least on this latter point, considering reference to this sort of legislative intention inappropriate and taking a somewhat more expansive view of what can be done under s 6 (para 14). But of course she still agreed with the majority that s 6 did not avail the appellant in this case (para 39).

Tipping J expressly affirmed the approach in *Quilter*, and in common with McGrath J rejected the more “adventurous” approach of the House of Lords (paras 156, 158, McGrath paras 240-47). Both also rejected the notion that there was a relevant difference between s 6 of the Bill of Rights and s 3 of the Human Rights Act 1998 (UK) that could account for the difference in approach (also Elias CJ para 13, Anderson J para 287).

Such moderation is to be welcomed. It may be noted that the Charter of Human Rights and Responsibilities Act 2006 which has recently been enacted in the Australian State of Victoria and which broadly follows the statutory model of the Bill of Rights and the UK Human Rights Act expressly qualifies the interpretive instruction (the equivalent of our s 6) by insisting on interpretation of enactments “consistently with their purpose”. It would seem that following *Hansen*, the effect of our s 6 is the same, as pointed out by Andrew Butler at the Public and Administrative
Law Conference in Wellington on 21 February 2007. While the purposive limit is not spelt out, arguably it is implicit in the wording. One way of putting it is that a construction contrary to purpose may not qualify as a “meaning” at all: Evans, 'Reading Down Statutes' in R Bigwood (ed), The Statute: Making and Meaning (2003) 123.

**Declarations of inconsistency?**

Finally, another enduring issue has been whether the remedies available under the Bill of Rights include a declaration that an Act of Parliament is inconsistent with the Bill of Rights. The basic point to note is that whenever the courts insist that s 5 is to be applied in challenges to enactments, as they did in both *Moonen (No 1)* and *Hansen*, the potential for indications of inconsistency follows quite naturally. Following the *Hansen* approach, an implied finding of inconsistency emerges clearly once a court has held (as the Supreme Court did in *Hansen*) that an enactment which is apparently in breach of a right set out in part 2 can neither be justified under s 5 nor given a more rights-consistent meaning pursuant to s 6, and that accordingly the rights-infringing meaning must prevail by virtue of s 4. Echoing Tipping J in *Moonen (No 1)* para 20, McGrath J addressed the question most directly when he said that it was the court’s duty to make its finding of inconsistency explicit by stating clearly that it felt constrained to dispose of the case by using s 4 (paras 253, 259).

While the availability of declarations has been the subject of quite a bit of academic discussion (e.g. Butler & Butler chapter 28), it has always seemed to me to be essentially a question of form whether the court takes the additional step of formalising its conclusion as a declaration of inconsistency. It is of limited significance since in any case the law provides no legal consequences (except in the limited category of cases covered by s 92J of the Human Rights Act 1993, which expressly provides for a declaration and requires government to respond in a report to Parliament). The important political functions of a judicial finding of inconsistency as discussed by McGrath J (paras 254, 259; also Anderson J para 267) do not depend on the court issuing a formal declaration.

The only purpose for which the availability of a formal declaration of inconsistency really matters is for the purposes of determining a further question. That is whether such a declaration is available as a free-standing remedy which may be sought in its own right by litigants who do not seek invalidation of any official action purportedly authorized by the legislation, but rather wish to challenge the legislation as such. For example, could opponents of the Foreshore and Seabed Act 2004 file an application for a declaration of its inconsistency with various Bill of Rights provisions, or do they have to wait until the Act has been applied against them and then challenge that application as being in breach of the Bill of Rights? *Hansen* does not provide any answer to that question. Nor, incidentally, does the issue appear to arise in the forthcoming Court of Appeal hearing in *R v Belcher* (CA184/05) where the availability of a declaration is the sole remaining issue. Such a claim would raise issues of quite a different order as to the role of courts in our constitutional system and as to the limits to legal proceedings.