

# Human Rights and Legislative Wrongs: How about a widened declaration of inconsistency jurisdiction?<sup>1</sup>

“Some matters are too important to be left to majority vote”<sup>2</sup>

## **Introduction**

- [1] When I agreed to contribute to this conference, I thought only to make the suggestion that the Constitutional Advisory Panel should investigate, and consider recommending the adoption of, an ‘across the board’ declaration of inconsistency jurisdiction to apply to all of the rights that are protected by the New Zealand Bill of Rights Act 1990<sup>3</sup> and not just the anti-discrimination right. That would, I think, be an advance for the protection of human rights that is both feasible and desirable.
- [2] Recent legislation in the form of a new s.70 in the New Zealand Public Health and Disability Act now demands attention as well.
- [3] The conference organisers have asked for an opinion piece. That is what this is. Although of necessity I refer to legislation, case law and commentary, this is not an academic work.<sup>4</sup> It is just my two-cents worth.
- [4] I should say, however, that for the decade from 2002 to 2011 I was the Chair of the Human Rights Review Tribunal<sup>5</sup>. My appointment coincided almost exactly with the coming into force of the Human Rights Amendment Act 2001, which conferred the Part 1A declaration of inconsistency jurisdiction on that Tribunal. It was my privilege to have presided over the first cases in New Zealand in which parties have asked the Tribunal to exercise that jurisdiction. I do not pretend to have the broad academic

---

<sup>1</sup> Opinion piece prepared for the New Zealand Centre for Human Rights Law, Policy and Practice Symposium, 7-8 June 2013 by Royden Hindle, Arbitrator and Barrister, Bankside Chambers, Auckland. This paper is a draft and should not be quoted without my permission, please.

<sup>2</sup> I am sure there are many iterations of this idea – I take this as attributed to Grano, *Judicial Review and a Written Constitution in a Democratic Society* 28 Wayne L Rev 1, 7 (1981) writing of the limits of judicial review in the context of the US Constitution (as quoted in E Cherminsky, *The Price of asking the wrong question: An essay on Constitutional Scholarship and Judicial Review* 62 Texas Law Review 1207 (1984)).

<sup>3</sup> ‘NZBORA’.

<sup>4</sup> I have not, for example, even begun to work on a comparative analysis of relevant regimes outside New Zealand. Time has not permitted, as it is a big job. It is not just a question of looking at other jurisdictions (e.g., the UK) with a wide declaration of inconsistency, but a proper survey should also consider the ways in which legislation in jurisdictions with ‘hard’ bills of rights (e.g., Canada) have softened the jurisdiction with clauses that effectively limit (perhaps a better word is ‘manage’ the effects of an inconsistency finding.

<sup>5</sup> ‘The Tribunal’.

overview of human rights scholars, but I do have some experience at the coalface in dealing with the issues raised.

### **What have we got? The Tribunal's Part 1A jurisdiction**

- [5] Part 1A of the Human Rights Act 1993<sup>6</sup> was inserted to that enactment by the Human Rights Amendment Act 2001. It took effect from 1 January 2002. It is made up of four deceptively short sections, although there are important consequential amendments elsewhere in the HRA as well.<sup>7</sup>
- [6] Part 1A of the HRA applies to the acts and omissions of the legislative, executive or judicial branches of the New Zealand government, or of any person or body in the performance of any public function, power or duty imposed by law.<sup>8</sup> The operative provision is section 20L, which provides that an act or omission to which Part 1A of the HRA applies is in breach of that part if it is inconsistent with section 19 of NZBORA. Section 20L(2) then explains that for those purposes, an act or omission is inconsistent with section 19 of NZBORA if it limits the right to freedom from discrimination affirmed by that section *and* it is not a justified limitation of that right under section 5 of NZBORA.
- [7] The legislative structure can be a bit distracting. The fact that Part 1A is placed in the HRA, and depends on the HRA for the list of grounds on which discrimination is unlawful, rather obscures the reality that Part 1A has a much more direct and substantive connection to NZBORA than it does to the HRA itself. The net result, however, is clear. Any public function or duty – including but not limited to the function of legislating itself – is to be subject to the anti-discrimination provisions of NZBORA.
- [8] I have written elsewhere about the history behind this set of provisions.<sup>9</sup> I do not repeat that, but it is relevant to what follows to remember that the legislation was not introduced as an act of selfless altruism by the Legislature. Far from it. The reason

---

<sup>6</sup> 'The HRA'.

<sup>7</sup> See for example sections 21A to 21B (as to the applicability of Parts 1A & 2 of the HRA), section 79 (as to how different complaints are to be received, and dealt with, by the Human Rights Commission, and sections 92I (governing remedies, in particular section 92J of the HRA regarding declarations of inconsistency).

<sup>8</sup> See HRA section 20J(1). There are specific sections set out in section 20J(2), namely in relation to employment, exciting racial disharmony, sexual and racial harassment and victimisation. I note that Parts 1A & 2 of the HRA are mutually exclusive – if one applies the other does not (sections 20J(3) & 21B(1)).

<sup>9</sup> See '*Rights Against Legislative Discrimination: A Sleeping Giant? Part 1A of the Human Rights Act 1993*' [2008] New Zealand Law Review 213.

that Part 1A was introduced was because New Zealand was obliged to introduce it in consequence of its (New Zealand's) international treaty commitments.

[9] Specifically, Art. 2(1) of the United Nations International Covenant on Civil and Political Rights<sup>10</sup> obliges state parties to:

*'...respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'*

[10] According to article 2(3) of the ICCPR, state parties particularly undertook:<sup>11</sup>

*'(a) To ensure that any person whose rights or freedoms as here recognised are violated **shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.***

*'(b) To ensure that any person claiming such a remedy shall have his right fairly determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy...'* (my emphasis)

[11] Part 1A contemplates two quite separate categories of remedy when an unjustified infringement from the right to freedom from discrimination is found. For all functions other than the legislative function (including but by no means limited to the setting of Government policy) there is a wide range of remedies available in s. 92I, namely:

- a declaration that the defendant has committed a breach;
- an order restraining the defendant from continuing or repeating the breach;
- damages;
- orders to remedy and to declare (e.g, a contract) illegal (and relief under the Illegal Contracts Act)
- orders for education;

---

<sup>10</sup> 'ICCPR'.

<sup>11</sup> Article 26 of the ICCPR deals with discrimination as well, and affirms that all person are equal before the law, which must prohibit discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- anything else the Tribunal thinks fit.

[12] By contrast, if what is at issue is an Act of Parliament, then there is only one remedy that can be granted. It is the declaration of inconsistency that is provided for in section 92J:

**‘92J Remedy for enactments in breach of Part 1A**

- (1) If, in proceedings before the Human Rights Review Tribunal, the Tribunal finds that an enactment is in breach of Part 1A, the only remedy that the Tribunal may grant is the declaration referred to in subsection (2).
- (2) The declaration that may be granted by the Tribunal, if subsection (1) applies, is a declaration that the enactment that is the subject of the finding is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.
- (3) The Tribunal may not grant a declaration under subsection (2) unless that decision has the support of all or a majority of the members of the Tribunal.<sup>12</sup>
- (4) Nothing in this section affects the New Zealand Bill of Rights Act 1990.’

[13] When a legislative measure is found to be inconsistent:

**‘92K Effect of declaration**

- (1) A declaration under section 92J does not—
  - (a) affect the validity, application, or enforcement of the enactment in respect of which it is given; or
  - (b) prevent the continuation of the act, omission, policy, or activity that was the subject of the complaint.
- (2) If a declaration is made under section 92J and that declaration is not overturned on appeal or the time for lodging an appeal expires, the Minister for the time being responsible for the administration of the enactment must present to the House of Representatives—
  - (a) a report bringing the declaration to the attention of the House of Representatives; and
  - (b) a report containing advice on the Government's response to the declaration.
- (3) The Minister referred to in subsection (2) must carry out the duties imposed on the Minister by that subsection within 120 days of the date of disposal of all appeals against the granting of the declaration or, if no appeal is lodged, the date when the time for lodging an appeal expires.’

---

<sup>12</sup> The Tribunal sits as a panel of three. I have never been sure why this sub-section was thought necessary.

## **Some Observations**

[14] The power to declare public functions generally to be inconsistent with the right to freedom from discrimination is important enough, but the power to declare legislation to be at odds with the anti-discrimination right is of undoubted constitutional significance.

[15] When the same kind of jurisdiction was enacted in the United Kingdom, that significance did not escape the attention of the commentators and academics. There is a very great deal written about whether and to what extent the introduction of the Human Rights Act 1998 in the United Kingdom affected the constitutional balance of powers between executive, legislature and judiciary. Some sense of the tone of that discussion may be conveyed by the observations of Professor Klug writing in 2003:<sup>13</sup>

*'The quest to re-establish appropriate boundaries between the judiciary and executive/legislature drove the debate which preceded incorporation of the [European Convention on Human Rights] into [United Kingdom] law. There was a concern across the political spectrum and in judicial as well as academic circles, that incorporating broad human rights standards into law would lead to the demise of the British system of Parliamentary supremacy (or sovereignty) over the courts without the transparency that preceded such constitutional earthquakes in other jurisdictions...'*

After referring to the Canadian and New Zealand models:

*The [UK HRA] – and in particular the intersection of sections 3 & 4 – was deliberately and carefully crafted to differ from both of these models. The issues of judicial deference to the legislature was settled through the intersection of those two sections. If they are applied as intended no further doctrine of judicial deference to the legislature (or legislation) is required.'*<sup>14</sup>

[16] An important idea behind the jurisdiction is that of a constitutional dialogue. Speaking of the comparable jurisdiction in the United Kingdom, Professor Hickman has written:<sup>15</sup>

*'...On the face of the [UK HRA], section 4 presents itself as an engine for dialogue between the branches of government. It provides the courts with a voice to inform the executive that despite having considered its arguments to the contrary they consider primary legislation to be incompatible with the [ECHR]. This in turn triggers a power to amend the legislation by a fast track process which has governmental impetus but which also requires parliamentary approval. It is a process that involves input from each body at different junctures and appears to take a conversational form. For this reason section 4 is at the centre of the views of those who present [the UK HRA] in dialogic terms...'*

---

<sup>13</sup> Klug, *Judicial Deference under the Human Rights Act 1998* (2003) 2 *EHLR* 125.

<sup>14</sup> This piece was written of NZBORA as it stood before amendment in 2001.

<sup>15</sup> Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, [2005] PL306.

- [17] The extent of reform in New Zealand in 2001 was, of course, very much more limited. The only NZBORA right in respect of which the declaration of inconsistency jurisdiction is available is the anti-discrimination right. Even so, one would have thought it significant. Nonetheless, for reasons that are not altogether clear to me, the establishment of the jurisdiction does not seem to have not caught the attention of commentators and academics in New Zealand in anything like the way that those corresponding reforms in the United Kingdom did. Perhaps one reason is that the jurisdiction was placed at the lowest level within our judicial hierarchy, in a Tribunal presided over by jobbing adjudicators not sworn Judges. I have no doubt that if the same jurisdiction had been vested in (say) the High Court, a very great deal would have been written about it by now.
- [18] In contrast, much has been written in the decade since Part 1A of the HRA came into force as to whether or not the High Court has inherent power to declare inconsistency.<sup>16</sup> Such a jurisdiction - if it exists at all - is of necessity self-appointed<sup>17</sup> and the consequences of any such declaration remain speculative. I do think that the bird we have had in the hand deserved at least as much attention – at least, from a constitutional perspective – as the birds that are (for now) still in the bushes.<sup>18</sup>
- [19] In any event, as it seems to me, the great advantage of a declaration of inconsistency jurisdiction (as opposed to the introduction of a ‘supreme’ Bill of Rights) is that it deflects discussion away from the essentially political question as to whether or not Parliament should be sovereign in all respects and at all times, or whether there are circumstances in which judicial determinations should take priority. Part 1A provides an opportunity for policy – even policy already enshrined in legislation – to be subjected to scrutiny for compliance with the anti-discrimination right. As Miller J said in *Attorney-General v Human Rights Review Tribunal & Child Poverty Action Group*:<sup>19</sup>

*‘It is true that CPAG’s claim is essentially political in nature and ultimately can be resolved only by political means; it must be balanced against other claims on the public purse, resolution of which is the province of politicians, who are accountable to the electorate for such decisions, and the legislature has provided that the only remedy available before the Tribunal is a declaration of inconsistency. Further, the proposition that the Courts have no business adjudicating upon claims that have*

---

<sup>16</sup> For a comparatively recent review of that debate, see Geiringer, *On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act* (2009) 40 VUWLR 613.

<sup>17</sup> Unlike the Tribunal’s power, it certainly has not been conferred by the Legislature.

<sup>18</sup> Perhaps one silver lining in the dark clouds of the budget night changes to the Public Health and Disability Act this year may be that commentators are beginning to engage in discussion about Part 1A.

<sup>19</sup> *Attorney-General v Human Rights Review Tribunal & Child Poverty Action Group* [2006] NZHC 1661; (2006) 18 PRNZ 295.

*serious resource allocation implications has a very respectable pedigree. The proposition was eloquently framed by Professor J A G Griffith in *The Political Constitution* (1979) 42 MLR 1. He contended that such claims reflect social conflict over resources that can only be resolved by political means; to address them in litigation is to disguise them as questions of law, and as unqualified rights that a Court may remedy, when in reality they are merely claims upon the community.*

*By admitting claims of discrimination in respect of enactments, however, Parliament has made available a cause of action and a forum in which such claims may be publicised and to some degree vindicated, if not actually remedied. Armed with a declaration, the plaintiff may press its case for a remedy in the community and in the legislature. In other words, the legislation manifestly admits claims having a political purpose.'*

[20] This is not a question about interpreting statutes in a rights protecting way, but actually grappling with the complex problem of applying general legislative provisions in specific cases.

[21] As I have written elsewhere<sup>20</sup>, adopting such a jurisdiction draws discussion away from the well-worn exchanges about parliamentary sovereignty on the one hand, and legalism on the other, and allows the effort to be focussed on finding solutions to particular problems thrown up in the practical application of governmental activity (including the activity of legislating) as it impacts on the anti-discrimination right. It is a far more productive thing to be doing.

### ***Does it work?***

[22] Yes, if it is allowed to.<sup>21</sup>

[23] There has been only one declaration of inconsistency made in relation to primary legislation, in the case of *Howard v Attorney General*.<sup>22</sup> Remarkably, it was a case brought by a litigant in person, without legal assistance.

[24] Mr Howard challenged the legislation under which people aged over 65 were no longer eligible for consideration for vocational rehabilitation after suffering personal injury.<sup>23</sup>

---

<sup>20</sup> See note 9 above.

<sup>21</sup> Since I was Chair of the Tribunal for the period during which all of the cases mentioned below were dealt with, I must accept that observers might say 'Of course he would say that'.

<sup>22</sup> *Howard v Attorney General* (No.3) (2008) 8 HRNZ 378.

<sup>23</sup> More specifically, the plaintiff has applied for a declaration that cl.52 of the First Schedule to the Injury Prevention, Rehabilitation, and Compensation Act 2001 was inconsistent with the right to freedom from discrimination affirmed by s.19 of NZBORA. In their essentials, the effect of the relevant legislative provisions were that eligibility for support by way of vocational rehabilitation after personal injury was more restricted for those who are near 65 and older, than it was for younger people.

[25] With reference to the fact that Mr Howard was representing himself, the Tribunal said<sup>24</sup>:

*'The matter has some significance, not least because it is the first time that a claim under Part 1A of the Human Rights Act 1993 ('the HRA') has reached the stage of a hearing on the substantive issues. Inevitably the matter has raised issues that are novel and, at points, complex.*

*The plaintiff was not represented by counsel. That is not a criticism; to the contrary, we regard the case as exemplifying the very thing was intended by Parliament when Part 1A was introduced to the HRA by the Human Rights Amendment Act 2001, and the power to make declarations of inconsistency was given to a Tribunal so as to be accessible to lay litigants: see (for example) s.92C(1)(a) of the HRA. ... '*

[26] After analysing the arguments, the Tribunal concluded<sup>25</sup>:

*Even acknowledging all due deference that needs be allowed, and notwithstanding all of the other matters raised by Crown counsel, we have not been persuaded that the prima facie age-related discrimination that we have identified in s.85 and Cl.52 IPRCA is justified under s.5 NZBORA, when there is no material additional cost to the ACC scheme in removing it, and no other adverse social or economic consequences that could possibly be said to follow if the age limit on eligibility were removed. In our assessment, the limiting measures no longer serve a purpose that is sufficiently important to justify curtailment of the right to freedom from discrimination by reason of age (if they ever did).*

*We therefore conclude that s.85 and cl.52 are inconsistent with the right to freedom from discrimination as affirmed by s.19 NZBORA. In our view the plaintiff is entitled to have a declaration accordingly.*

[27] Although Mr Howard succeeded on the inconsistency point, is fair to say that he advanced other points which did not succeed – for example, a claim that cl.52 amounted to disproportionately severe treatment and punishment, and was thus at odds with s.9 of NZBORA, had earlier been struck out on the basis that it was outside jurisdiction.<sup>26</sup> Furthermore, even at the hearing in the Tribunal the matter had an air of mootness about it, since it was clear that the legislation was in the process of being amended to ameliorate the ageist exclusion of people over 65 from consideration for vocational rehabilitation.

---

<sup>24</sup> Para's [3] to [5] of the Tribunal's decision. The point that Parliament intended that claims of this kind should be open to lay litigants was later endorsed by the Chief Human Rights Commissioner Rosslyn Noonan: *"It is absolutely people like Mr Howard who claim their rights and stand up and insist that they be respected ... it's a message to ordinary New Zealanders the laws are there to protect you and not to be used against you."* (as quoted in *'Injured man beats ACC in ageism fight'* NZ Herald online 20 May 2008.

<sup>25</sup> At para's [86] and [87].

<sup>26</sup> *Howard v Attorney General* [2006] NZHRRT 46. It is difficult to see how the claim that Mr Howard was effectively being tortured by the legislation and/or the ACC would have succeeded in any event.

- [28] One might have hoped that the Crown would have accepted the outcome, given that nothing really turned on it. But it did not. An appeal was commenced, but out of time. That then gave rise to a series of arguments in the High Court and the Court of Appeal about the rules relating to appeals from the Tribunal to the High Court. In the end it was decided that the High Court did not have power to deal with the appeal, since informalities in the way it had purportedly been commenced could not be cured.<sup>27</sup>
- [29] Realistically, if *Howard* is an access to justice success story, it is probably only because both the Director of Human Rights Proceedings and the Human Rights Commission swung into action after the Tribunal's decision to take up the issues on Mr Howard's behalf. It is hard to imagine that Mr Howard would have been able to cope on his own with the technical arguments about procedure that followed.
- [30] A related observation about the case has to do with the lengths that the Crown was willing to go to in order to challenge the Tribunal's declaration after it had been made. As noted, by the time the matter finally reached the Court of Appeal the legislation at issue had long since been changed to remove the offending restrictions. Quite what value the Crown saw in expending so much effort and cost to have a chance to challenge a declaration that was no longer really going to make any difference, is not clear. Certainly the decision has some modest historic value as the first such declaration in New Zealand, but the Tribunal's decision would have had limited precedent value, and could not possibly have prevented the Crown from taking any of the points that were subsequently explored in detail in cases like *Child Poverty Action Group Inc v Attorney-General*<sup>28</sup>, *Atkinson & Ors v Ministry of Health*<sup>29</sup>, *Idea Services v Attorney General*<sup>30</sup> and even (although not a Part 1A case) *Winthur v Housing Corporation of New Zealand*.<sup>31</sup>
- [31] It would be unfortunate if the appeal-related litigation in *Howard* was all just to keep the Crown's 'slate clean'. Certainly it is hard to imagine that the same steps would have been taken had the case been litigated in the United Kingdom, where the

---

<sup>27</sup> *Attorney General v Howard* [2010] NZCA 58.

<sup>28</sup> *Child Poverty Action Group Inc v Attorney-General* [2008] NZHRRT 31.

<sup>29</sup> *Atkinson & Ors v Ministry of Health* (2010) HRNZ 902.

<sup>30</sup> *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11; and in the High Court, *Attorney General v Idea Services Limited* [2012] NZHC 3229 (3 December 2012).

<sup>31</sup> *Winthur v Housing Corporation of New Zealand* [2011] NZHRRT 18.

underlying idea of a constructive ‘dialogue’ between the legislature and the courts has matured, and declarations are, for the most part, respected and acted on.<sup>32</sup>

[32] When writing about these things as recently as March this year<sup>33</sup>, I ended this part of my paper with this note:

*‘In fairness, every case under Part 1A will come with a particular context, and single out the acts or omissions of a particular Government agency for scrutiny. Generalisations may not be appropriate. It was probably also inevitable that early cases under the legislation were going to involve a good deal of legal analysis, and reflect a legitimate effort on behalf Crown Counsel to ensure that the legislation is properly understood. But as the case law settles down, and the parameters of what is expected of Government in the Part 1A era become easier to identify<sup>34</sup>, it is to be hoped that Crown agencies will feel more comfortable about accepting a finding of inconsistency, and responding by working to solve the underlying problem (as opposed to arguing about the application of Part 1A). Certainly the idea that Part 1A is aimed to encourage a dialogue between the judicial and legislative arms of government will not flourish unless the relevant government agencies are willing to engage in a solution-centred consideration of the issues.’*

[33] I was trying to be nice about it. It never occurred to me that Government might be willing to act as it subsequently has in respect of the ‘parents as caregivers’ litigation (*Atkinson v Ministry of Health*<sup>35</sup>), of which more below. But that is why I say that the jurisdiction will work, *if it is allowed to*. I worry that the Crown’s ‘defeat the declaration at all costs’ attitude in *Howard*, and the ‘legislate if you can’t win’ approach in *Atkinson*, indicate an unwillingness on the part of the executive and legislative branches of Government to let Part 1A work.

### **Extending the jurisdiction to other rights?**

[34] Before getting to that, however, I want to advance the central proposition that I would offer the Constitutional Advisory Panel.

---

<sup>32</sup> <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> (last accessed 8/3/2013). I commented on this data when writing in 2008: see note 9 above. .More recently, see also <http://www.justice.gov.uk/downloads/publications/moj/2010/responding-human-rights-judgements-2009-2010.pdf> (accessed 8/3/2013).

<sup>33</sup> *The Human Rights Review Tribunal: Problems and Possibilities*, a paper prepared for the Legal Research Foundation Conference ‘Access to Justice in an Age of Austerity’ at Auckland 11 March 2013.

<sup>34</sup> Which, I submit, has now been achieved for all practical purposes by the High Court’s very thorough decision in the *Idea Services* case: *Attorney-General v Idea Services* [2012] NZHC 3229. I hope I may be allowed to respectfully disagree with some of the conclusions (although none of them affect the end result), but the Court’s systematic approach to the issues now provides a practical and comprehensive template for analysing Part 1A matters.

<sup>35</sup> *Supra* note 29.

- [35] I submit that the declaration of inconsistency model has a valuable role to play in protection of human rights in New Zealand, and in our constitutional arrangements generally, that consideration should be given to extending it so as to make it available in respect of some (perhaps all) of the other rights in NZBORA. Indeed I suggest that is far more likely to be a productive discussion than simply spinning the wheel again on the old debate about whether we should have a supreme Bill of Rights or not.<sup>36</sup>
- [36] Of course there will be some practical difficulties to be grappled with.
- [37] One of the more obvious problems has to do with synchronising any declaration of inconsistency process that may be allowed for in a criminal matter with the trial process itself. As the *R v Hansen* case demonstrates<sup>37</sup> there are situations in which NZBORA issues inevitably have to be determined in the context of an unfolding criminal trial. Any procedure for a declaration of inconsistency would either have to be available to the trial court or, if vested in some other independent authority, then there will have to be procedures to see that the issue can be taken up, dealt with and remitted back to the trial court in a timely way.
- [38] Furthermore, it is wholly unacceptable that the adjudicators of these kinds of fundamental rights do not presently have the independence that comes with full judicial tenure.<sup>38</sup>
- [39] Perhaps the greatest difficulty, however, will be to ensure that the procedures by which the remedy of a declaration of inconsistency can be accessed are set up in such a way that they are accessible to self-representing lay litigants. Access to justice was, after all, the primary reason why the limited declaration of inconsistency jurisdiction we do have in New Zealand was conferred on the Tribunal in 2001 (i.e., as opposed to the courts). At the same time, it has to be accepted that when large issues are at stake, the procedures need to be sufficiently robust to ensure that the subject matter is properly prepared for hearing.

---

<sup>36</sup> The reference to spinning the wheel echoes the title of Dame Sian Elias' 2003 paper '*Sovereignty in the 21<sup>st</sup> century: Another spin on the merry-go-round*' (2003) 4 Public L Rev 148. As for the improbability that debate about a supreme bill of rights will actually achieve one, any excitement about that at the start of the present Constitutional Arrangements review process was flattened by hearing the Prime Minister, Professor Geddes and Professor Joseph all expressing doubts that much actual change (at least, on the written constitution topic) is likely to come of the Review (all interviewed on Radio New Zealand Morning Report, 8.42 am Tuesday 5 March 2013).

<sup>37</sup> *R v Hansen* [citation]

<sup>38</sup> Refer to the paper I did for the last conference in March 2013.

[40] My present preference is to suggest the establishment of an independent constitutional court with a wide declaration of inconsistency power. If that sounds grandiose, well, perhaps. But surely it is a more productive focus of attention than yet another iteration of the ‘Should we have a supreme Bill of Rights’ argument which, if past experience teaches anything, is doomed to fail.

[41] The essential idea involves establishing a court of properly appointed judges, with particular experience in dealing with NZBORA issues (and Treaty of Waitangi issues?) to consider and, where appropriate, declare inconsistency with any or all of the rights in the NZBORA.<sup>39</sup> As with the Tribunal’s present jurisdiction, the remedy for inconsistency between a legislative measure and NZBORA should properly be limited to that of declaration; but where there is some other function involved then I see no reason not to give the court the same scope of powers as apply in the Tribunal’s jurisdiction to all other public functions.

### ***An unexpected headwind***

[42] All of this discussion depends, of course, on the notion that the Legislature is willing to engage in dialogue with the courts over rights issues. Until about a month ago, there was no reason to doubt that it would. But the events of Budget Night this year now cast a shadow over all of this discussion.

[43] The *Atkinson* case<sup>40</sup> concerned claims by a number of people who have care of adult disabled children.<sup>41</sup> They asked to be paid for the work done in that capacity, just as they would have been if they were not family members but had been employed at arms-length to care for the disabled persons in question. The Tribunal upheld the claim.<sup>42</sup> An appeal to the High Court failed.<sup>43</sup> An appeal to the Court of Appeal also failed.<sup>44</sup> The net result was a clear message from the judicial branch of government that the policy which prevents parents and family members from being paid as

---

<sup>39</sup> I am aware, of course, that there is also a debate as to whether the rights in NZBORA should be extended to include (for example) property or cultural rights. I am not engaging in that discussion here, not because it is not important, but because the idea of a constitutional court would embrace all of the rights in the NZBORA.

<sup>40</sup> *Supra*, note

<sup>41</sup> This is an opinion piece, and readers are entitled to know that I am the father of a young man who has profound developmental delays and autism.

<sup>42</sup> Reference. Note that although the discussion is about declarations of inconsistency, the claim related to policy not legislation - so the range of remedies went well beyond simply declaring inconsistency, and included the possibility of damages.

<sup>43</sup> reference

<sup>44</sup> reference

caregivers was inconsistent with the right to freedom from discrimination, and in a way that was not justified.

[44] Undoubtedly the Government saw a prospect of a significant financial liability. Whether and to what extent that was ever true will probably now never be known. It will certainly not be tested in the Tribunal/Courts. Parliament was not prepared to let those processes unfold. Instead it chose to deal with the problem by enacting s.70 of the New Zealand Public Health and Disability Act (as amended by the New Zealand Public Health and Disability Amendment Act 2013). The legislation was enacted as part of the Budget night legislation, with no chance for any scrutiny by Select Committee, and in circumstances in which the Government's coalition partners were unable to take an independent view since this was part of confidence and supply.

[45] I do not discuss the question as to whether and to what extent the provisions of the Act will meet the concerns of the affected class. Of present concern are the provisions of s.70E which provides:

***'70E Claims of unlawful discrimination in respect of this Act or family care policy precluded***

(1) *In this section, **specified allegation** means any assertion to the effect that a person's right to freedom from discrimination on 1 or more of the grounds stated in section 21(1)(b), (h), (i), and (l) of the Human Rights Act 1993, being the right affirmed by section 19 of the New Zealand Bill of Rights Act 1990, has been breached—*

*(a) by this Part; or*

*(b) by a family care policy; or*

*(c) by anything done or omitted to be done in compliance, or intended compliance, with this Part or in compliance, or intended compliance, with a family care policy.*

(2) *On and after the commencement of this Part, no complaint based in whole or in part on a specified allegation may be made to the Human Rights Commission, and no proceedings based in whole or in part on a specified allegation may be commenced or continued in any court or tribunal.*

(3) *On and after the commencement of this Part, the Human Rights Commission must not take any action or any further action in relation to a complaint that—*

*(a) was made after 15 May 2013; and*

*(b) is, in whole or in part, based on a specified allegation.*

(4) *On and after the commencement of this Part, neither the Human Rights Review Tribunal nor any court may hear, or continue to hear, or determine*

any civil proceedings that arise out of a complaint described in subsection (3).

(5) Nothing in this section or in section 70D affects—

(a) a complaint that is, in whole or in part, based on a specified allegation but that has been lodged with the Human Rights Commission or any court before 16 May 2013; or

(b) the jurisdiction of the Human Rights Review Tribunal or of a court to hear and determine proceedings that arise out of a complaint described in paragraph (a).

(6) Despite subsection (5)(b), if in proceedings to which that subsection applies the Human Rights Review Tribunal or a court finds that a specified allegation has been proved, the Human Rights Review Tribunal or the court may grant no remedy other than the declaration described in subsection (7).

(7) The declaration that may be granted by the Human Rights Review Tribunal or the court in proceedings to which subsection (5)(b) applies is a declaration that the policy to which the finding relates is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.

[46] There is so much that is wrong about this legislation that is hard to know where to begin. Sir Geoffrey Palmer has described it as ‘unconstitutional’ and ‘against the rule of law’.<sup>45</sup> Professor Geddes commented ‘*I think National just broke our constitution*’.<sup>46</sup> The Law Society has written to the Attorney-General pointing out that preventing the courts from reviewing decisions made in the exercise of legislative functions and refusing to provide reasons for doing so ‘... is quite alien to the expectations we have of our parliamentary system.’<sup>47</sup> Dame Anne Salmond has written:

*‘How low can you go? These [the plaintiffs in Atkinson and the group they represent] are people whose family members are disabled and need care, and who seek to give it to them, and want the same support from the State as paid carers from outside the family. Denying them the legal rights to which they are entitled is a shabby piece of legislation, as the New Zealand Herald says, and shoving it through under urgency is a disgrace’*<sup>48</sup>

[47] There can be no doubt that the legislation discriminates, and even the Attorney-General’s very short s.7 report expressed the view that the discrimination is not justified.<sup>49</sup>

<sup>45</sup> As reported in the Waikato Times [www.stuff.co.nz/waikato-times/news/8700775/](http://www.stuff.co.nz/waikato-times/news/8700775/) (accessed 1/6/13).

<sup>46</sup> [www.pundit.co.nz/content/i-think-national-just-broke-our-constitution](http://www.pundit.co.nz/content/i-think-national-just-broke-our-constitution) (accessed 28/5/13).

<sup>47</sup> Limits imposed by new law alarming’ [www.lawsociety.org.nz/home/for-the-public/for-the-media/latest-news](http://www.lawsociety.org.nz/home/for-the-public/for-the-media/latest-news) (accessed 30/5/13).

<sup>48</sup> [www.pundit.co.nz/content/government-or-playground-bully](http://www.pundit.co.nz/content/government-or-playground-bully) (accessed 28/5/13). The NZ Herald editorial referred to was that for 28 May 2013.

<sup>49</sup>

## Some notes

[48] I am sure that there is a great deal of water yet to go under the bridge on this issue. For what they are worth, I add these points (not in any order of importance):

[a] There should be significant concern about the way in which the Regulatory Impact Statement that was made available to Parliament on budget night has been redacted in the version that has subsequently been issued publicly.<sup>50</sup> The reason given is that the information that is withheld is 'legally privileged'. That means that we the public cannot know what other options for solving the problem thought to have been created by the *Atkinson* litigation were considered by parliament. Legally privileged? How so? We are, after all, talking about information that was disclosed to our elected representatives before they voted on primary legislation. There is an issue of constitutional importance in this alone,<sup>51</sup>

[b] I wonder if the Human Rights Commission/Director of Human Rights Proceedings will give consideration to the question of whether this legislation should be challenged using the vehicle for such a challenge that was enacted by Parliament for this very purpose in 2001, i.e., under Part 1A? I suggest that they should. The Attorney-General's report tells us that the legislation is an unjustified limitation of rights – and, unlike the rest of us, he presumably saw the Regulatory Impact Statement in an unedited form. If nothing else, proceedings under Part 1A should at least winkle out of Government what it saw as the alternatives to passing the legislation.

[c] Another avenue that should be given careful consideration relates to the possibility of taking the issue up with the United Nations Committee on Human Rights. After all, the explicitly stated objective of this legislation is to deny a class of people who suffer

---

<sup>50</sup> Regulatory Impact Statement – Government Response to the Family Carers Case 15 March 2013.

<sup>51</sup> We should not think this is an isolated event in the context of human rights issues. Something similar happened when the Child Poverty Action Group case was dealt with by the Tribunal. See para's 78 & 79:

*“During the hearing there was at least a suggestion that the fact of the plaintiff's complaint, and the possibility that the issues thus raised might in due course be the subject of litigation, meant that whatever work was done by or for the Crown in these respects was covered by litigation privilege. Perhaps so. Nonetheless we were left wondering about the tension between a claim to litigation privilege in the circumstances, as against the underlying objective of s.7 NZBORA. The issues were, after all, being raised in the context of proposed legislation that was before the House of Representatives for consideration. The issues of prima facie discrimination and justification are topics the House might have expected to be dealt with.*

*The evidence we heard does not allow us to say why the issues raised in this case were not mentioned in the s.7 Report, or what work (i.e., of the kind foreshadowed by the WFF Cabinet Paper) was done to provide any justifications, or what the Crown might have considered the justification(s) to be, before the relevant legislation was considered by the House and passed into law. We can only say that we think it was unfortunate that the issues we have had to deal with are not mentioned in the s.7 Report at all.”*

discrimination any effective judicial remedy. That seems to be a florid violation of New Zealand's obligations under ICCPR.

[49] In the meantime, I hope the Constitutional Advisory Panel will not be discouraged by this unfortunate turn of events from considering the possibility of a widened declaration of inconsistency jurisdiction. I still think that to be a desirable advance in our constitutional arrangements. Nor is it really a very dramatic a suggestion. Adopting such a jurisdiction would, after all, only bring us into line with the United Kingdom – the country from which much of our constitutional heritage derives.