

Hon Andrew Little

Minister of Justice

Minister for Courts

Minister for Treaty of Waitangi Negotiations

Minister Responsible for the NZSIS

Minister Responsible for the GCSB

Minister Responsible for Pike River Re-entry



James Watson

fyi-request-12480-0e7780ea@requests.fyi.org.nz

30 JUL 2020

Dear Mr Watson

Official Information Act request: Declarations of Inconsistency

Thank you for your email of 19 March 2020 requesting, under the Official Information Act 1982 (the Act), information about declarations of inconsistency. On 26 March 2020, you agreed to narrow the scope of your request to:

"all briefings, aides memoires and reports about declarations of inconsistency provided to the Minister of Justice since the current Government was sworn in on 26 October 2017."

On 30 March 2020, the Ministry of Justice transferred your request to me to respond. Under section 15A of the Act, I extended the deadline to respond to your request until 30 July 2020 due to an inability to search files remotely during the COVID-19 Alert Level 4 and 3 restrictions.

Attached is a table containing a list of the documents relating to your request. Some documents have been withheld in full or part, or refused in full, under the following sections of the Act:

- section 9(2)(a) to protect privacy of natural persons
- section 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions,
- section 9(2)(h) to maintain professional legal privilege,
- section 9(2)(f)(iv) to maintain the constitutional conventions that protect confidentiality of advice tendered by Ministers and officials, and
- section 18(d) as the information is publicly available.

I am satisfied there are no other public interest considerations that render it desirable to make the information withheld under section 9 available.

If you are not satisfied with my response to your request, you have the right to complain to the Ombudsman under section 28(3) of the Act. The Ombudsman may be contacted at: info@ombudsman.parliament.nz

Yours sincerely

A handwritten signature in blue ink, appearing to be 'A Little', written over a light blue horizontal line.

Hon Andrew Little
Minister of Justice

Appendix – List of Documents

Doc #	Date	Type	Description	Status
<i>Weekly reports</i>				
1	24 November 2017	Weekly report	Weekly report for the Minister of Justice and Minister for Courts - 24 November 2017	Some information has been withheld as out of scope or under section 9(2)(a)
2	19 January 2018	Weekly report	Weekly report for the Minister of Justice and Minister for Courts - 19 January 2018	Some information has been withheld as out of scope or under section 9(2)(a). Please note the aide memoire referred to in this item is document 13.
3	26 January 2018	Weekly report	Weekly report for the Minister of Justice and Minister for Courts - 26 January 2018	Some information has been withheld as out of scope or under section 9(2)(a)
4	7 December 2018	Weekly report	Weekly report for the Minister of Justice and Minister for Courts - 7 December 2018	Some information has been withheld as out of scope or under section 9(2)(a). Please note that the aide memoire referred to in the Declarations entry in this report is that dated 14 February 2018.
<i>Cabinet papers</i>				
5	February 2018	Cabinet paper	Declarations of inconsistency with the New Zealand Bill of Rights Act	Some information has been withheld under section 9(2)(g)(i)
6	February 2020	Cabinet paper	Response Mechanism for Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990	Some information has been withheld under section 9(2)(f)(iv)
7	July 2020	Cabinet paper	New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill: Approval for Introduction	Some information has been withheld under section 9(2)(f)(iv)

Cabinet Minutes and Cabinet paper summaries

8	19 February 2018	Cabinet paper summary	Declarations of Inconsistency with the New Zealand Bill of Rights Act SWC-18-SUB-0006	Released in full
9	21 February 2018	Cabinet minute	Declarations of Inconsistency with the New Zealand Bill of Rights Act Cabinet Minute: SWC-18-MIN-0006	Released in full
10	27 February 2018	Cabinet minute	Cabinet Minute: CAB-18-MIN-0057	Some information has been withheld as it is out of scope
11	19 February 2020	Cabinet minute	Response Mechanism for Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990 SWC-20 -MIN-0004	Refused under section 18(d) as the information requested is publicly available at: www.justice.govt.nz/assets/Documents/Publications/9172-9293-Declarations-of-Inconsistency-Redacted-v2.pdf
12	10 March 2020	Cabinet minute	New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill: Approval for Introduction Cabinet Minute: LEG-20-MIN-0032	Refused under section 18(d) as the information requested is publicly available at: www.justice.govt.nz/assets/Documents/Publications/9172-9293-Declarations-of-Inconsistency-Redacted-v2.pdf

Aides memoire

13	14 February 2018	Aide memoire	Declarations of inconsistency with the NZ Bill of Rights Act 1990	Withheld in full under section 9(2)(g)(i)
14	21 February 2018	Aide memoire	Declarations of Inconsistency with the NZ Bill of Rights 1990	Withheld in full under section 9(2)(g)(i)
15	9 November 2018	Aide memoire	Declarations of inconsistency – Supreme Court judgment Attorney-General v Taylor [2018] NZSC 104	Released in full
16	17 December 2018	Aide memoire	Declarations of inconsistency – information for meeting with Justice officials	Released in full

17	6 April 2018	Aide memoire	Declarations of Inconsistency – preliminary discussions with key experts	Released in full
18	4 April 2019	Aide memoire	Declarations of inconsistency with the NZ Bill of Rights Act – A-G correspondence on draft joint Cabinet paper	Withheld in full under section 9(2)(g)(i)
19	7 October 2019	Aide memoire	Aide memoire: Declarations of Inconsistency with the NZ Bill of Rights Act	Withheld in full under section 9(2)(g)(i)
20	19 February 2020	Aide memoire	Aide memoire: Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990	Some information has been withheld under section 9(2)(f)(iv)
<i>Briefings</i>				
21	13 December 2017	Briefing	Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990	Some information has been withheld under sections 9(2)(a), 9(2)(f)(iv) and 9(2)(h)
22	12 February 2019	Briefing	Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990	Some information has been withheld under section 9(2)(f)(iv)
23	26 August 2019	Briefing	Outstanding policy questions for declarations of inconsistency	Some information has been withheld under sections 9(2)(f)(iv) and 9(2)(g)(i)



Weekly Report

For Minister of Justice and Minister for Courts

24 November 2017

IN CONFIDENCE

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Out of Scope

Declarations of inconsistency

24. We are preparing advice about declarations of inconsistency under the New Zealand Bill of Rights Act 1990. That advice will outline the issues in the *Taylor* case. Mr Taylor sought a declaration that a blanket ban on prisoner voting breached the right to vote set out in the New Zealand Bill of Rights Act 1990. The Court of Appeal confirmed that the ban did breach the Bill of Rights and that the Court did have the power to issue such a declaration. The Supreme Court will consider the *Taylor* case in March 2018, and the policy options available in respect of declarations of inconsistency. We are working closely with Crown Law to make sure we factor in any considerations relevant to the pending appeal.

Contact: Hayden Kerr, Policy Manager, Civil Law and Human Rights, s9(2)(a)
Ruth Fairhall, Deputy Secretary, Policy.

Out of Scope



Weekly Report

For Minister of Justice and Minister for Courts
19 January 2018

IN CONFIDENCE

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Out of Scope

Declarations of Inconsistency

39. We recommend that you take an oral item to Cabinet on 30 January 2018, to:
- a) inform your colleagues about the upcoming appeal to the Supreme Court in *Attorney-General v Taylor* in respect of declarations of inconsistency with the New Zealand Bill of Rights Act 1990, and
 - b) seek your colleagues' agreement that Crown Law can indicate to the Supreme Court that the Government is actively considering policy options to address declarations of inconsistency.
40. We will be providing you with an aide memoire for this purpose. You may wish to consult with the Attorney-General about this matter in advance of discussing it with Cabinet.

Contact: Hayden Kerr, Policy Manager, Civil Law and Human Rights. s9(2)(a)

Ruth Fairhall, Deputy Secretary, Policy. s9(2)(a)

Out of Scope



Weekly Report

For Minister of Justice and Minister for Courts

26 January 2018

IN CONFIDENCE

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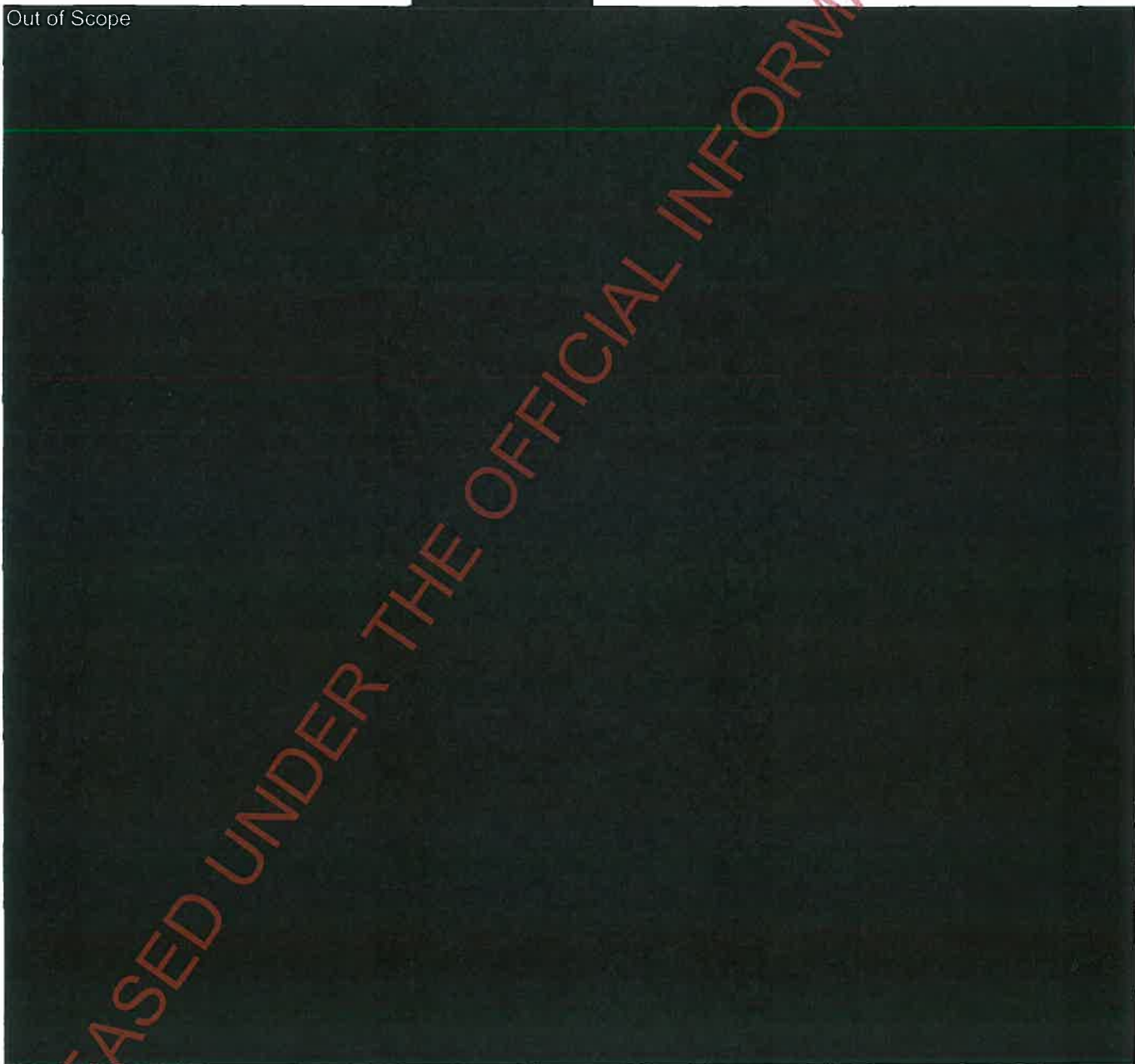
Declarations of Inconsistency

17. We recommend that you take an oral item to Cabinet on 19 February 2018 to:
- a. inform your colleagues about the upcoming appeal to the Supreme Court in *Attorney-General v Taylor* in respect of declarations of inconsistency with the New Zealand Bill of Rights Act 1990, and
 - b. seek your colleagues' agreement that Crown Law can indicate to the Supreme Court that the Government is actively considering policy options to address declarations of inconsistency.
18. We will be providing you with an aide memoire for this purpose. You may wish to consult the Attorney-General about this matter in advance of discussing it with Cabinet.

Contact: Hayden Kerr, Policy Manager, Civil Law and Human Rights. s9(2)(a)

Ruth Fairhall, Deputy Secretary, Policy. s9(2)(a)

Out of Scope



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In confidence – free and frank

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Weekly Report

For Minister of Justice and Minister for Courts
7 December 2018

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Justice Portfolio

Out of Scope

Declarations of inconsistency update

3. Following the release of the Supreme Court's decision in *Attorney-General v Taylor* on 9 November 2018, you have indicated that declarations of inconsistency are a key priority and that legislation should be passed in 2019, if possible (category 3 on the Legislation Programme).
4. In February 2018, Cabinet agreed, in principle, to provide a statutory foundation for declarations of inconsistency. Since then the Ministry has been working to develop legislative proposals. This work has been informed by discussions with key experts (including the Crown Law Office, the Office of the Clerk of the House of Representatives, the Parliamentary Counsel Office, the New Zealand Law Society and academics from university law schools) and, more recently, by the Supreme Court's decision.
5. The Ministry will continue to engage with key experts as we finalise legislative proposals and prior to the introduction of legislative amendments. We are holding a workshop on 10 December 2018 with officials from the Crown Law Office and Parliamentary Counsel Office to discuss proposals.
6. To assist with meeting timeframes, we will brief you on the legislative proposals at the officials meeting on 17 December 2018 and confirm your preferred approach. We will provide your office with an aide memoire ahead of this meeting.
7. We are also working with your office to prepare a response to a request from Parliament's Privileges Committee for an update on how the work on declarations of inconsistency is progressing.

Contact: Chris Kerr, Policy Manager Civil Law and Human Rights, s9(2)(a)

Rajesh Chhana, Deputy Secretary, Policy, s9(2)(a)

Out of Scope

In Confidence

Office of the Minister of Justice

Office of the Attorney-General

Chair, Cabinet

DECLARATIONS OF INCONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT

Proposal

- 1 This paper proposes that Cabinet agree, in principle, to amend the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act') to provide a statutory foundation for the senior courts to make declarations of inconsistency under that Act.

Background

- 2 In *Taylor v Attorney-General*¹ the High Court declared a provision of the Electoral Act 1993 that disqualifies all sentenced prisoners from registering to vote to be inconsistent with voting rights affirmed by section 12(a) of the Bill of Rights Act. The Crown appealed to the Court of Appeal, arguing that a court cannot issue a declaration of inconsistency in the absence of a statutory power conferred by Parliament.
- 3 The Court of Appeal dismissed the appeal on the basis that the power to issue declarations derives from the common law jurisdiction to consider questions of law, including inconsistencies between statutes.² The Crown has been granted leave to appeal to the Supreme Court. That appeal will be heard in March 2018.
- 4 A declaration of inconsistency is a formal statement, granted by a court as a remedy, that an Act of Parliament is inconsistent with fundamental human rights. There is no explicit power in the Bill of Rights Act to issue declarations of inconsistency where a court considers an Act of Parliament is inconsistent with fundamental rights. The Human Rights Review Tribunal can make declarations of inconsistency in cases involving the right to be free from discrimination. Where that declaration relates to an Act, the declaration does not affect the validity of that Act of Parliament or anything done lawfully under that Act.

Declarations of inconsistency can perform an important constitution function

- 5 In New Zealand, Parliament is the final arbiter of what constitutes a justified limitation on fundamental rights and freedoms (not the courts). Declarations of inconsistency can perform an important function by informing Parliament that the senior courts consider an Act to be inconsistent with the fundamental human rights affirmed in the Bill of Rights Act. Parliament may disagree but its deliberations will have the benefit of the expert opinion of the judicial branch of government.

Declarations of inconsistency need a statutory basis

- 6 We recommend that the Bill of Rights Act be amended to provide a statutory basis for the senior courts to issue declarations of inconsistency under the Bill of Rights Act. The Crown's position in the *Taylor* case is that the senior courts could exercise such a power but only if it is conferred on them by Parliament.

¹ [2015] NZHC 1706

² *Attorney-General v Taylor* [215] NZCA 2017

- 7 Providing a legislative basis for declarations also supports the principle of comity by encouraging an ongoing conversation between Parliament and the Judiciary about justified limitations on fundamental rights in New Zealand society. The principle of comity requires the legislative and judicial branches of government each recognise the other's proper sphere of influence and privileges, with the mutual respect and restraint that is essential to their constitutional relationship.

Comparable jurisdictions have declarations of inconsistency with a statutory basis

- 8 Comparable overseas jurisdictions provide for declarations of inconsistency or equivalents in legislation. In the United Kingdom, the Human Rights Act 1998 empowers superior courts to issue declarations of legislative incompatibility with the European Convention on Human Rights. A declaration of incompatibility does not affect the validity, operation, or enforcement of the law. The Act empowers the Government to make a remedial order addressing the violation (essentially, amending the inconsistent provisions through delegated legislation) but there is no domestic legal obligation to make such an order.
- 9 In the Australian Capital Territory (ACT), the Human Rights Act 2004 empowers the courts to make a declaration of incompatibility in respect of a Territory law. In Victoria (Australia), the Victorian Charter of Human Rights and Responsibilities Act 2006 confers a similar power on the Victorian courts. A declaration by the court does not affect the validity, operation, or enforcement of the law, but does require a Parliamentary response from the Attorney-General in ACT and the responsible Minister in Victoria.
- 10 In Canada, the Supreme Court can strike down legislation that is inconsistent with the Canadian Charter of Rights and Freedoms. However, the Charter allows Parliament or provincial legislatures to expressly declare an Act to be valid for a time-limited period 'notwithstanding' most provisions of the Charter (democratic rights and freedom of movement are excluded).

There is public support for a balanced approach

- 11 In the absence of a statutory basis, the courts are likely to continue to issue declarations of inconsistency following the precedent set in the *Taylor* case (unless that precedent is overturned by the Supreme Court). In our view, it is better that these powers be given by Parliament rather than taken by the courts. Declarations of themselves provide no remedy and do not trigger any parliamentary response. Legislative machinery is needed to ensure that Parliament responds to a declaration even if the response is to let an inconsistent law stand. In this respect declarations differ from other remedies because they require legislative 'machinery' to make them operate properly.
- 12 The Constitutional Advisory Panel was appointed in August 2011 to listen to and record New Zealanders' views on constitutional issues. The Panel considered amendments to the Bill of Rights Act as part of its extensive public consultation process in 2012 and 2013. In its final report, published in November 2013, the Panel recommended the Government explore options for improving the effectiveness of the Bill of Rights Act, including giving the judiciary powers to assess legislation for consistency with that Act.
- 13 Participants acknowledged New Zealand's relatively positive human rights record, but also thought the current arrangements might be vulnerable. Parliament's ability to amend the Bill of Rights Act or to pass legislation contrary to the Act with the support of a simple majority of Parliament was of particular concern. The three approaches raised most commonly to address that concern were:
- enable the courts to declare legislation inconsistent with the Bill of Rights Act (it would remain in force) and require the Government to report to Parliament in response (for

instance, the courts could propose draft remedial legislation, which could be voted down);

- empower the courts to 'strike down' legislation or the part of it that is inconsistent with the Bill of Rights Act; and
- allow the courts to strike down legislation while preserving Parliament's power to enact legislation 'notwithstanding' any inconsistency.

14 The Panel found that granting courts the power to strike down legislation had some support but was explicitly rejected by a significant number of participants. It did find support for exploring increased judicial powers that preserve parliamentary sovereignty.

15 In our view, declarations of inconsistency strike the correct balance. The first option at paragraph 13 preserves parliamentary sovereignty but also enables Parliament to reflect on the wisdom of legislation which is inconsistent with the Bill of Rights Act. Upon reflection Parliament will sometimes adopt a remedial Bill which achieves its public policy objective in a way which is not inconsistent with the Bill of Rights. On other occasions Parliament may decide to vote down the remedial legislation thereby sticking with its view of the appropriate balance. In this way, the sovereignty of Parliament will be preserved while compliance with the Bill of Rights is improved.

Supreme Court could be informed about Government position

16 The Supreme Court will hear the *Taylor* appeal in March 2018. We recommend Crown Law be authorised to indicate in submissions that the Government has agreed, in principle, to provide a statutory foundation for declarations of inconsistency. This could be viewed favourably by the Supreme Court (obviating the need for the courts to confirm they have such an inherent power) and could be relevant to the Court's deliberations.

Proposed timing for further policy work

17 This paper seeks agreement in principle, but further policy work and consultation is required to determine the process to follow after a declaration of inconsistency is made by the courts. For example, section 92K of the Human Rights Act requires the Government to respond to declarations under that Act by informing Parliament about the declaration and provide advice about the Government's response. The Bill of Rights Act could duplicate these provisions or take approaches similar to the United Kingdom or Canada.

18 More detailed policy decisions should follow the Supreme Court decision in *Taylor* so the Government has the benefit of the opinion of New Zealand's most senior judges. In the meantime, we intend to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society). Subject to the timing of the Supreme Court judgment, we anticipate seeking final policy decisions in late 2018, s9(2)(g)(i)

Consultation

19 The Ministry of Justice and Crown Law have consulted the Department of the Prime Minister and Cabinet about the proposals in this paper. They have not consulted more widely at this stage given the focus of this paper on agreeing an 'in principle' position primarily for the purposes of the current litigation. The Ministry of Justice and Crown Law will consult broadly within the public sector on more detailed policy proposals. Relevant Ministers and Government support partners will also be consulted on early on more detailed policy proposals.

Financial Implications

- 20 There are no financial implications arising directly out of this paper. The financial implications of declarations of inconsistency will be part of more detailed policy advice.

Human Rights

- 21 The proposals in this paper are consistent with the Bill of Rights Act and the Human Rights Act. Declarations of inconsistency support the rights affirmed in the Bill of Rights Act by providing a mechanism for inconsistencies to be recognised and acknowledged.

Legislative Implications

- 22 There are no legislative implications arising directly out of this paper but a statutory basis for declarations of inconsistency will require an amendment to the Bill of Rights Act.

Regulatory Impact Analysis

- 23 A regulatory impact statement will accompany final policy advice.

Gender Implications

- 24 There are no specific gender implications arising out of this paper. However, freedom from discrimination on the basis of sex is one of the rights affirmed in the Bill of Rights Act to which declarations of inconsistency under that Act would apply.

Disability Perspective

- 25 There are no specific disability implications arising out of this paper. However, freedom from discrimination on the basis of disability is one of the rights affirmed in the Bill of Rights Act to which declarations of inconsistency under that Act would apply.

Publicity

- 26 No publicity is proposed at this stage but we recommend Crown Law be permitted to inform the Supreme Court about the Government position. That may be published in any media reports on the court proceedings. We also propose to initiate preliminary discussions with key experts before the Supreme Court releases its judgment to develop the detail of the policy proposed in this paper.

Recommendations

- 27 The Minister of Justice and the Attorney-General recommend that Cabinet:
- 1 **Note** that, in March 2018, the Supreme Court will consider a Crown appeal in *Attorney-General v Taylor*, which relates to the ability of senior courts to declare an enactment is inconsistent with one or more of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990;
 - 2 **Agree**, in principle, that the New Zealand Bill of Rights Act should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in that Act;
 - 3 **Agree** that Crown Law can inform the Supreme Court, as part of its submissions in *Attorney-General v Taylor*, that the Government intends to introduce legislation amending the New Zealand Bill of Rights Act to provide a statutory foundation for declarations of inconsistency;

- 4 **Invite** the Minister of Justice to submit a detailed policy proposal to Cabinet, following the decision of the Supreme Court in *Attorney-General v Taylor*, and
- 5 **Note** the Minister of Justice will direct officials to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society) as they develop more detailed policy advice.

Authorised for lodgement

Hon Andrew Little
Minister of Justice

Hon David Parker
Attorney-General

In Confidence

Office of the Minister of Justice
Office of the Attorney-General

Chair, Cabinet Social Wellbeing Committee

RESPONSE MECHANISM FOR DECLARATIONS OF INCONSISTENCY UNDER THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Proposal

1. This paper sets out a proposal for how the Executive and the House of Representatives should respond when the Senior Courts¹ declare an Act to be inconsistent with one or more of the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

Executive Summary

2. A declaration of inconsistency is a formal statement by a court or tribunal that an Act is inconsistent with a plaintiff's fundamental human rights protected by the Bill of Rights Act. When the Senior Courts make such a declaration, there is currently no mechanism to bring the matter to the attention of the House of Representatives. This means lawmakers may not have full regard for the declaration and breaches of rights might go unaddressed.
3. We propose to amend the Bill of Rights Act to require the Attorney-General to present the declaration to the House of Representatives within six sitting days after the declaration becomes final (i.e. all appeals have been dealt with or the time for an appeal has expired). This will enable Parliament to consider whether it wishes to repeal, amend, or affirm the provision in question. We also propose the Human Rights Act 1993 be amended so the response to a declaration of inconsistency by the Human Rights Review Tribunal is the same as the response to a declaration under the Bill of Rights Act.
4. We do not propose a statutory requirement for the House of Representatives to respond to declarations of inconsistency. Instead, how the House of Representatives responds should be left for it to determine under its Standing Orders. We envisage this will be similar to the existing requirement to refer reports of the Attorney-General about proposed legislation to the relevant select committee. If the timing of the Bill does not align with the review of Standing Orders, or if the Standing Orders Committee is unable to come to agreement then the process could be set out in a sessional order.

¹ High Court, Court of Appeal, and Supreme Court (refer section 4 of the Senior Courts Act 2016).

Background

5. A declaration of inconsistency is a formal statement by a court or tribunal that an enactment is inconsistent with a plaintiff's fundamental human rights protected by the Bill of Rights Act. A declaration does not affect the validity of an Act, or anything done lawfully under that Act. However, it does signal that the court or tribunal considers an Act to infringe fundamental human rights in a way that cannot be justified in a free and democratic society.
6. The Human Rights Act 1993 empowers the Human Rights Review Tribunal to declare an Act to be inconsistent with the right to be free from discrimination affirmed in section 19 of the Bill of Rights Act. However, until recently, it has been less clear whether the courts can make declarations of inconsistency in respect of other rights affirmed in the Bill of Rights Act. This was settled in November 2018 when the Supreme Court, in *Attorney-General v Taylor*, determined that Senior Courts have the power to issue a declaration of inconsistency under the Bill of Rights Act.²
7. This decision raises the question of what should happen after the Senior Courts issue a declaration of inconsistency under the Bill of Rights Act. In February 2018, following decisions by the High Court and Court of Appeal in *Taylor*, Cabinet agreed, in principle, to amend the Bill of Rights Act to provide for declarations of inconsistency made by the Senior Courts [SWC-18-MIN-0006; CAB-18-MIN-0057 refers]. At that time, Cabinet invited the Minister of Justice to submit a detailed policy proposal following the release of the Supreme Court's decision in *Taylor*.

Proposed statutory response mechanism for declarations of inconsistency

8. We propose amending the Bill of Rights Act to provide a statutory response mechanism when the Senior Courts issue a declaration of inconsistency under the Bill of Rights Act for the reasons outlined below. The proposal does not amend or alter the power of the Senior Courts to grant relief, including making declarations of inconsistency under the Bill of Rights Act.

Reasons for a statutory response mechanism

9. Currently, there are two provisions of the Bill of Rights Act that can address inconsistencies with that Act. First, section 7 requires the Attorney-General to draw to the attention of the House of Representatives any provision of a Bill that appears to be inconsistent with the Bill of Rights Act. This gives Parliament the opportunity to address the inconsistency before the Bill is passed into law. However, Parliament may reach a different conclusion from that of the Attorney-General and choose to enact the legislation unchanged.

² [2018] NZSC 104.

10. Secondly, where a provision of an Act is capable of more than one interpretation, section 6 of the Bill of Rights Act instructs the courts to prefer an interpretation that is consistent with that Act over any other interpretation. This gives the courts some discretion to avoid breaches of fundamental rights arising from enacted legislation.
11. However, sometimes the courts find that it is not possible to interpret an Act in a way that is consistent with the Bill of Rights Act. A declaration of inconsistency provides an additional safeguard by enabling the Senior Courts to make a formal statement that the Act is inconsistent with the Bill of Rights Act. Currently, the Bill of Rights Act lacks a mechanism to draw a declaration of inconsistency to the attention of the House of Representatives.
12. A statutory response mechanism would provide greater transparency by:
- drawing the opinion of the Court that the legislation breaches fundamental rights to the attention of lawmakers and the public; and
 - enabling Parliament to reconsider the legislation, and decide whether it wishes to repeal, amend, or affirm the provision in question.

Key features of a statutory response mechanism

13. We propose that the Bill of Rights Act require the Attorney-General to bring a declaration of inconsistency to the attention of the House of Representatives. This would need to occur within six days after the conclusion of all court proceedings relating to the declaration, including the time available for appeals. This is the approach taken in the Australian Capital Territory (ACT) and Queensland, which have similar legislation. It ensures the House of Representatives receives the declaration promptly but without being unduly burdensome on the Executive.
14. When the Human Rights Review Tribunal issues a declaration of inconsistency under the Human Rights Act, there is a statutory requirement for the Government to present its response at the same time as the declaration. We do not propose that the Bill of Rights Act include the same requirement. In our view, requiring a Government response at this stage could pre-empt the deliberations of the House of Representatives and unnecessarily politicise the issue. A finding by a Court that an Act is inconsistent with the Bill of Rights Act is a significant matter and must be properly considered by Parliament in an unhurried manner.
15. The legislation will not prescribe the process the House of Representatives must embark on, as that is a matter properly for Parliament. How, and when, the House of Representatives responds will be for it to determine under Standing Orders.

16. For example, when the Attorney-General presents a report under section 7 of the Bill of Rights Act that a Bill is inconsistent with that Act, Standing Orders require that report be referred to a select committee for consideration.³ We envisage a similar "automatic" process when the Executive draws a declaration of inconsistency to the attention of the House of Representatives.
17. The Minister of Justice will propose that the Standing Orders Committee considers potential changes to the Standing Orders, including:
- A referral to a select committee, and
 - Report back to the House on recommendations, and
 - A debate in the House on the Select Committee's report, and
 - A vote on whether to accept the Select Committee's report.

s9(2)(f)(iv)

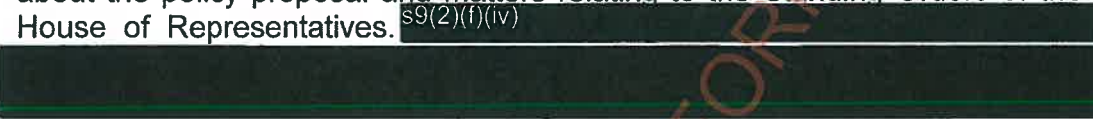


Declarations of inconsistency under the Human Rights Act 1993

19. We propose that declarations of inconsistency under the Human Rights Act be treated the same way as declarations under the Bill of Rights Act. Declarations under both Acts are about the consistency of legislation with the Bill of Rights Act and should have the same result.
20. This will provide greater certainty for plaintiffs about the response to a declaration of inconsistency issued by the Tribunal or the Senior Courts (either directly or on appeal from the Tribunal). It will also avoid a situation where a plaintiff may need to seek a declaration of inconsistency from the High Court rather than the Tribunal to ensure a more fulsome response.
21. This will require an amendment to the Human Rights Act 1993 to: a) remove the statutory requirement for a Government response; and b) shorten the time available for presenting the declaration (it is currently 120 days, reflecting the time needed to prepare a response).
22. Instead, any change to Standing Orders providing for the House of Representatives to consider declarations of inconsistency under the Bill of Rights Act would also apply to declarations under the Human Rights Act.

³ Standing Order 265, *Standing Orders of the House of Representatives 2017*.

Consultation

23. The Ministry of Justice has engaged with key organisations and experts including: Crown Law, Parliamentary Counsel Office, Office of the Clerk of the House of Representatives, the Legislation Design and Advisory Committee, the New Zealand Law Society, faculty members of university law schools, and other constitutional and human rights law experts.
24. The Ministry of Justice has also consulted the Treasury, the State Services Commission, the Human Rights Commission, and the Department of Prime Minister and Cabinet about the proposals in this paper.
25. The Minister of Justice met with the Speaker of the House of Representatives about the policy proposal and matters relating to the Standing Orders of the House of Representatives. s9(2)(f)(v)

26. Following Cabinet, the Minister of Justice intends to inform the Chief Justice and the Chair of the Human Rights Review Tribunal of these policy decisions.

Financial Implications

27. The costs associated with the policy proposal are expected to be minor and will be met from agency baselines. The proposal will not affect how the Senior Courts make declarations of inconsistency. However, providing for a formal response by the Executive and the House of Representatives may strengthen the incentive for individuals to seek a declaration of inconsistency. Based on previous case volumes,⁴ the Ministry of Justice expects the number of applications for declarations of inconsistency to be small. It is unlikely that the proposal will, therefore, have operational and financial implications for the Senior Courts and the Human Rights Review Tribunal that cannot be absorbed within baseline.

Legislative Implications

28. This proposal will require amendments to the New Zealand Bill of Rights Act 1990. The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill is on the 2019 Legislation Programme and currently has a priority category of three (enacted in the year).

Impact Analysis

29. The Treasury Regulatory Quality Team has determined that the regulatory decisions sought in this paper are exempt from the Regulatory Impact Analysis

⁴ Since 2007, there have been eight applications for declarations of inconsistency under the Bill of Rights Act to the High Court, which has only issued one. For additional comparison, since 2002, the Human Rights Review Tribunal has only received four applications and made three declarations of inconsistency under the Human Rights Act.

requirements as they have no or only minor impacts on businesses, individuals or not-for-profit entities.

Human Rights

30. The proposals in this paper are consistent with the Bill of Rights Act and the Human Rights Act. Declarations of inconsistency support the rights affirmed in the Bill of Rights Act by providing a mechanism for the courts to express a view about the consistency of legislation with that Act.

Gender Implications

31. There are no specific gender implications arising out of this paper. However, freedom from discrimination on the basis of sex is a right affirmed in the Bill of Rights Act to which declarations of inconsistency would apply.

Disability Perspective

32. There are no specific disability implications arising out of this paper. However, freedom from discrimination on the basis of disability is a right affirmed in the Bill of Rights Act to which declarations of inconsistency would apply.

Publicity

33. We propose to release a media statement announcing policy decisions after the Minister of Justice has informed the Chief Justice and the Chair of the Human Rights Review Tribunal.

Proactive Release

34. We propose to release this paper proactively 30 business days after final Cabinet decisions. The Minister of Justice will notify the Chief Justice and Chair of the Human Rights Review Tribunal prior to release.

Recommendations

35. The Minister of Justice and the Attorney-General recommend that the Committee:
 1. **note** that in February 2018, Cabinet agreed in principle to amend the New Zealand Bill of Rights Act 1990 to provide for declarations of inconsistency made by the Senior Courts under this Act [SWC-18-MIN-0006; CAB-18-MIN-0057 refers];
 2. **note** that in November 2018, the Supreme Court in *Attorney-General v Taylor* upheld an earlier High Court decision to issue a declaration of inconsistency under the New Zealand Bill of Rights Act and confirmed the power of the Senior Courts to issue declarations of inconsistency;
 3. **agree** to amend the New Zealand Bill of Rights Act to require the Attorney-General to bring a declaration of inconsistency to the attention of the House of Representatives within six days after the conclusion of

all court proceedings relating to the declaration, including the time available for appeals;

4. **agree** to amend the Human Rights Act to replace the existing response mechanism for declarations of inconsistency made under that Act with the same requirements proposed for inclusion in the New Zealand Bill of Rights Act;
5. **note** that it is not proposed to amend or alter the power of the Senior Courts to grant relief, including making declarations of inconsistency under the New Zealand Bill of Rights Act;
6. **note** any requirement for the House of Representatives to respond to a declaration issued by the Senior Courts under the New Zealand Bill of Rights Act would be left to it to determine under the Standing Orders of the House of Representatives;
7. **note** that the proposed changes to the Standing Orders could include a referral to a select committee, a report back to the House with recommendations, a debate in the House on the Select Committee's report, and a vote on whether to accept the Select Committee's report;

s9(2)(f)(iv)



10. **invite** the Minister of Justice to issue drafting instructions to Parliamentary Counsel Office to give effect to the policy proposal.

Authorised for lodgement

Hon Andrew Little
Minister of Justice

Hon David Parker
Attorney-General

In Confidence

Office of the Minister of Justice
Chair, Cabinet Legislation Committee

New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill: Approval for Introduction

Proposal

1. I seek approval for the introduction of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (the Bill).

Policy

Background

2. In February 2018, following decisions by the High Court and Court of Appeal in *Attorney-General v Taylor* determining that Senior Courts have the power to issue a declaration of inconsistency under the Bill of Rights Act¹, Cabinet agreed, in principle, to amend the New Zealand Bill of Rights Act 1990 to provide for declarations of inconsistency made by the Senior Courts under this Act [SWC-18-MIN-0006; CAB-18-MIN-0057 refers].
3. A declaration of inconsistency is a formal statement by a court or tribunal that an enactment is inconsistent with a plaintiff's fundamental human rights protected by the New Zealand Bill of Rights Act. A declaration does not affect the validity of an Act, or anything done lawfully under that Act. However, it does signal that the court or tribunal considers an Act to infringe fundamental human rights in a way that cannot be justified in a free and democratic society.
4. The Bill requires the Attorney-General to bring a declaration of inconsistency to the attention of the House of Representatives within six days of the conclusion of all court proceedings relating to the declaration, including the time available for appeals.

Why the Bill is needed

5. When the Senior Courts make a declaration of inconsistency, there is currently no mechanism to bring the matter to the attention of the House of Representatives. This means lawmakers may not have full regard for the declaration and breaches of rights might go unaddressed. The Bill addresses this problem by requiring a formal report to be presented to the House of Representatives once a declaration becomes final.
6. A statutory response mechanism would provide greater transparency by:

¹ [2018] NZSC 104.

- 6.1. drawing the opinion of the Court that the legislation breaches fundamental rights to the attention of lawmakers and the public, and
- 6.2. enabling Parliament to reconsider the legislation, and decide whether it wishes to repeal, amend, or affirm the provision in question.

Key changes in the Bill

Attorney-General to present the declaration to the House of Representatives

7. The Bill will amend the New Zealand Bill of Rights Act to require the Attorney-General to bring a declaration of inconsistency to the attention of the House of Representatives within six sitting days after the declaration becomes final (i.e. all appeals have been dealt with or the time for an appeal has expired). This is the approach taken in the Australian Capital Territory and Queensland, which have similar legislation. It will enable Parliament to consider whether it wishes to repeal, amend, or affirm the provision in question.

Amendments to the Human Rights Act 1993

8. The Bill also amends the Human Rights Act 1993 so that the response to a declaration of inconsistency by the Human Rights Review Tribunal is the same as the response to a declaration under the New Zealand Bill of Rights Act. Declarations under both Acts are about the consistency of legislation with the New Zealand Bill of Rights Act and should have the same result.
9. The amendment will:
 - 9.1. remove the statutory requirement for a Government response; and
 - 9.2. shorten the time available for presenting the declaration to six days (it is currently 120 days, reflecting the time needed to prepare a response).

No statutory requirement to respond

10. The Bill does not propose a statutory requirement for the House of Representatives to respond to declarations of inconsistency. Instead, how the House of Representatives responds will be left for it to determine under its Standing Orders. This is expected to be similar to the existing requirement to refer reports of the Attorney-General about proposed legislation to the relevant select committee.

11. s9(2)(f)(iv)

Impact analysis

12. The Treasury Regulatory Quality Team has determined that the regulatory decisions sought in this paper are exempt from the Regulatory Impact Analysis requirements as they have no or only minor impacts on businesses, individuals, or not-for-profit entities.

Compliance

13. The Bill complies with the following:
 - 13.1. the principles of the Treaty of Waitangi;
 - 13.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 13.3. the disclosure statement requirements (a disclosure statement prepared by the Ministry of Justice is attached);
 - 13.4. the principles and guidelines set out in the Privacy Act 1993;
 - 13.5. relevant international standards and obligations; and
 - 13.6. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

14. The following departments, agencies and individuals have been consulted on the proposals in this paper: the Department of the Prime Minister and Cabinet, the Treasury, the State Services Commission, Crown Law, the Parliamentary Counsel Office, the Office of the Clerk of the House of Representatives, the Legislation Design and Advisory Committee, the Human Rights Commission, the New Zealand Law Society, faculty members of university law schools, and other constitutional and human rights law experts.

15. s9(2)(f)(iv)

Binding on the Crown

16. Cabinet Circular (02) 4: *Acts Binding the Crown: Procedures for Cabinet Decision* notes that bills that are amending existing Acts will generally follow the position of the principal Act on whether the Act is binding on the Crown.
17. The New Zealand Bill of Rights Act 1990 does not explicitly bind the Crown but section 3 states that it applies to acts done by:
 - 17.1. the legislative, executive, or judicial branches of the Government of New Zealand; or
 - 17.2. by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.
18. We propose that this Bill will follow that position and the Bill will not explicitly bind the Crown.

Allocation of decision-making powers

19. The Bill does not in itself involve the allocation of decision-making powers between the executive, the courts, and tribunals. The Bill provides for a Parliamentary response to a judicial declaration of inconsistency.

Associated regulations

20. No regulations will be required to bring the Bill into operation.

Other instruments

21. The Bill does not include any provision empowering the making of other instruments deemed to be legislative instruments or disallowable instruments.

Definition of Minister/department

22. The Bill does not contain a definition of Minister, department, or equivalent government agency, or chief executive or equivalent position.

Commencement of legislation

23. The Bill will come into force the day after the date of Royal assent.

Parliamentary stages

24. I intend to seek a shortened period of three months for Select Committee consideration. I propose that the Bill should be introduced to the House on 17 March 2020 and be enacted in July 2020.
25. I propose the Bill be referred to the Privileges Committee.

Proactive release

26. I propose to release this Cabinet paper, and related Minute, with any necessary redactions, following the introduction of the Bill.

Recommendations

27. The Minister of Justice recommends that the Committee:

1. **note** that the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill holds a category 3 priority on the 2020 Legislation Programme;
2. **note** that the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill amends the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. It provides a process for Parliament to consider, and, if it thinks fit, respond to, a declaration of inconsistency made under the New Zealand Bill of Rights Act 1990, to give effect to Cabinet decisions [CAB-18-MIN-0057];
3. **approve** the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
4. **agree** that the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill be introduced on 17 March 2020; and
5. **agree** that the government propose that the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill be:
 - 5.1. referred to the Privileges Committee for consideration;
 - 5.2. enacted by July 2020.

Authorised for lodgement

Hon Andrew Little
Minister of Justice



Cabinet Social Wellbeing Committee

Summary

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Declarations of Inconsistency with the New Zealand Bill of Rights Act

Portfolios Justice / Attorney-General

Purpose This paper seeks agreement to the amendment of the New Zealand Bill of Rights Act 1990 (the Act) to allow for senior courts to make declarations of inconsistency under the Act.

Previous Consideration None.

Summary In the *Taylor v Attorney-General* case, the High Court declared that a provision of the Electoral Act 1993 that disqualifies sentenced prisoners from registering to vote was inconsistent with voting rights in the Act. This set a precedent for the issuing of declarations of inconsistency.

A declaration of inconsistency is a formal statement that an Act of Parliament is inconsistent with fundamental human rights. Legislative machinery is needed to ensure that Parliament responds to a declaration, even if the response is to let an inconsistent law stand.

The Crown's position in the *Taylor* case is that the senior courts can exercise this power only if it is conferred on them by Parliament. Agreement is sought to amend the Act to provide a statutory basis for senior courts to issue declarations of inconsistency under the Act. This would require the government to report to Parliament in response. Comparable jurisdictions also provide for declarations of inconsistency or equivalents in legislation.

The Constitutional Advisory Panel records New Zealander's views on constitutional issues. The Panel considered amendments to the Act in its consultation process in 2012 and 2013, and in its final report recommended that the government explore options to improve the effectiveness of the Act, including giving the judiciary powers to assess legislation for consistency with the Act (discussed in paragraphs 13-15).

Further work and consultation is required to determine the process to follow after a declaration of inconsistency is made by the courts. The Minister of Justice expects to seek final policy decisions in late 2018.

Regulatory Impact Analysis

Not applicable.

Baseline Implications	None from this paper.
Legislative Implications	A statutory basis for declarations of inconsistency will require an amendment to the Act.
Timing Issues	The Minister of Justice intends to seek agreement to policy decisions following the decision of the Supreme Court to the Crown's appeal of <i>Taylor v Attorney-General</i> , which will be heard by the Supreme Court in March 2018.
Announcement	None proposed. Crown Law will inform the Supreme Court about the government position.
Proactive Release	None proposed.
Consultation	Paper prepared by MoJ and Crown Law. DPMC was consulted. The Minister of Justice and the Attorney-General indicate that New Zealand First and the Green Party were consulted.

The Minister of Justice and the Attorney-General recommend that the Committee:

- 1 note that, in March 2018, the Supreme Court will consider a Crown appeal in *Attorney-General v Taylor*, which relates to the ability of senior courts to declare an enactment is inconsistent with one or more of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Act);
- 2 agree in principle, subject to the report-back referred to in paragraph 4 below, that the Act should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in that Act;
- 3 agree that Crown Law can inform the Supreme Court, as part of its submissions in *Attorney-General v Taylor*, that the government intends to introduce legislation amending the Act to provide a statutory foundation for declarations of inconsistency;
- 4 invite the Minister of Justice to submit a detailed policy proposal to Cabinet, following the decision of the Supreme Court in *Attorney-General v Taylor*;
- 5 note that the Minister of Justice will direct officials to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society) as they develop more detailed policy advice.

Jenny Vickers
Committee Secretary

Hard copy distribution:
Cabinet Social Wellbeing Committee
Office of the Prime Minister
Deputy Chief Executive, Policy, DPMC
Attorney-General

IN CONFIDENCE

SWC-18-MIN-0006



Cabinet Social Wellbeing Committee

Minute of Decision

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Declarations of Inconsistency with the New Zealand Bill of Rights Act

Portfolios Justice / Attorney-General

On 21 February 2018, the Cabinet Social Wellbeing Committee:

- 1 **noted** that, in March 2018, the Supreme Court will consider a Crown appeal in *Attorney-General v Taylor*, which relates to the ability of senior courts to declare an enactment is inconsistent with one or more of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Act);
- 2 **agreed in principle**, subject to the report-back referred to in paragraph 4 below, that the Act should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in that Act;
- 3 **agreed** that Crown Law can inform the Supreme Court, as part of its submissions in *Attorney-General v Taylor*, that the government intends to introduce legislation amending the Act to provide a statutory foundation for declarations of inconsistency;
- 4 **invited** the Minister of Justice to submit a detailed policy proposal to Cabinet, following the decision of the Supreme Court in *Attorney-General v Taylor*;
- 5 **noted** that the Minister of Justice will direct officials to initiate preliminary discussions with key experts (e.g. the Clerk of the House and the New Zealand Law Society) as they develop more detailed policy advice.

Jenny Vickers
Committee Secretary

Hard-copy distribution: (see over)

Present:

Rt Hon Winston Peters
Hon Kelvin Davis
Hon Chris Hipkins
Hon Andrew Little
Hon Carmel Sepuloni (Chair)
Hon Dr David Clark (part of item)
Hon David Parker
Hon Nanaia Mahuta
Hon Damien O'Connor
Hon Tracey Martin
Hon Peeni Henare
Hon Aupito William Sio
Hon Julie Anne Genter
Michael Wood, MP
Jan Logie, MP

Hard-copy distribution:

Minister of Justice
Attorney-General

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet
Officials Committee for SWC

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Cabinet

Minute of Decision

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Report of the Cabinet Social Wellbeing Committee: Period Ended 23 February 2018

On 26 February 2018, Cabinet made the following decisions on the work of the Cabinet Social Wellbeing Committee for the period ended 23 February 2018:

Out of Scope



SWC-18-MIN-0006	Declarations of Inconsistency with the New Zealand Bill of Rights Act Portfolios: Justice / Attorney-General	CONFIRMED
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Out of Scope



Michael Webster
Secretary of the Cabinet

Hard-copy distribution:
Cabinet Social Wellbeing Committee



**Declarations of inconsistency – Supreme Court judgment
Attorney-General v Taylor [2018] NZSC 104**

Hon Andrew Little, Minister of Justice
9 November 2018

1. This note provides information on the Supreme Court decision on declarations of inconsistency.

Summary

2. On 9 November, a 3:2 majority confirmed the Court of Appeal judgment that the senior courts have jurisdiction to make declarations of inconsistency of legislation with the Bill of Rights Act (BORA).
3. Mr Taylor won his cross-appeal meaning that, contrary to the Court of Appeal's view, he does have standing.

Majority opinion (including additional points made by the Chief Justice)

4. Declarations of inconsistency flow from the requirement to have effective remedies for BORA breaches.
5. The text and purpose of the BORA overall supports the court exercising its usual range of remedies of which a declaration is a part.
6. BORA also affirms the rights under the International Covenant on Civil and Political Rights which expressly requires effective remedies.
7. The Chief Justice states: No statutory conferral of power to declare the law is required because such powers of declaration are within the inherent jurisdiction of the High Court.
8. She states declarations are a judicial response to those whose rights have been affected, rather than one to assist Parliament with its functions (as was suggested by the Court of Appeal). France and Glazebrook JJ were inclined to agree with her.
9. There is utility in granting declarations:
 - the importance of the rights enshrined and the ICCPR obligations suggest that there should be a remedy, and
 - there are no other effective remedies in cases like the present
10. Declarations do not affect Parliament's ability to legislate inconsistently with the BORA.
11. Note that the Supreme Court did not exercise discretion because this was not the argument before it. It deferred to the lower courts' decision on appropriateness of the declaration.

Dissenting opinion (Justices William Young and O'Regan)

12. In the absence of a power conferred by statute, courts do not have jurisdiction to make declarations of inconsistency.
13. While such a declaration would fall within judicial functions, a declaration would not be an effective remedy since it is not binding and has no impact on the 'victim's' position.

Approved by: Chris Kerr, Manager Civil Law and Human Rights
File number: HUM 09 01 14



Declarations of inconsistency – information for meeting with Justice officials

Hon Andrew Little, Minister of Justice
17 December 2018

Purpose

1. Ministry of Justice officials will meet with you on Monday 17 December 2018 to discuss declarations of inconsistency and seek your views and direction on the following matters to advance policy work:
 - a) options for legislative change (set out in more detail in attached Appendix):
 - i) Option 1 – Executive tables declaration and its response in House
 - ii) Option 2 – Option 1 plus Executive introduces bill to confirm, amend or repeal
 - iii) Option 3 – Option 1 plus House refers declaration and response to a committee.
 - b) other options we have considered:
 - i) Executive refers declaration to Law Commission for consideration and advice
 - ii) Executive refers secondary legislation that amends primary legislation to House to affirm or disallow
 - iii) Executive tables Government notice of motion in House for a debate.
 - c) other related matters:
 - i) relationship with the Human Rights Review Tribunal's declaration power
 - ii) statutory intervention rights for Attorney-General and Human Rights Commission.

Update on Ministry's work to date

2. Since Cabinet agreed, in February 2018, to provide a statutory foundation for declarations of inconsistency and a response mechanism, we have been working on legislative proposals. You have indicated that declarations of inconsistency are a key priority and legislation should be introduced in May 2019 and passed in 2019, if possible (category 3). However, if Treasury requires a Regulatory Impact Assessment, introduction of legislation might need to be sought in the third quarter rather than the second quarter of 2019.
3. To assist with legislative design, we have held discussions with several key experts including Crown Law, Office of the Clerk of House of Representatives, Parliamentary Counsel Office, New Zealand Law Society and academics from university law schools.
4. The design of the response mechanism attracted the most interest. Key feedback was that any mechanism should promote meaningful consideration of the issue by those in power without presupposing any particular outcome.
5. This feedback along with the Supreme Court's decision in *Attorney-General v Taylor* has informed the development of options. We have also noted your previously expressed preference for Parliament to respond to a declaration of inconsistency by confirming, amending or repealing inconsistent legislation.

Options for legislative change

6. The Ministry has developed options for legislative change, which are set out in the Appendix to this note. We seek direction about which option you prefer.

Approved by: David Croke, Chief Advisor, Civil and Constitutional
File number: HUM 09 01 14

7. The options focus on the response mechanism for declarations of inconsistency, rather than when or how the senior courts make a declaration. In terms of the senior courts' power to make a declaration, the Ministry does not propose anything different in substance from that confirmed by the Supreme Court in *Taylor*.

Other options we considered

8. In addition to the options set out in the Appendix, we have considered and do not favour the following options based on analysis and stakeholder feedback:
- a) *Executive refers declaration to Law Commission* – automatic referral to the Law Commission would provide the Government with a considered view about how to address the inconsistency identified by the Courts. However, there was limited support for this option among people we spoke to because it could create resourcing implications and delay a response.
 - b) *Executive refers secondary legislation to House to affirm or disallow* – this option would be similar to the remedial order process in the United Kingdom to address declarations of incompatibility where secondary legislation is used to amend primary legislation. It would enable a quick response to human rights issues identified by the Court. However, the use of so-called "Henry VIII clauses" is likely to have limited support. For example, in 2007, an inquiry by Parliament's Regulations Review Committee into affirmative resolution procedure concluded the procedure should not be used in conjunction with Henry VIII clauses.
 - c) *Executive tables Government notice of motion to force a debate in House* – this option would require the House to turn its mind to the declaration and the Government response. However, the House would do so without access to any other information, so this option does not appear to offer any material advantage over the option discussed below to refer the matter to a Select Committee (other than saving some time).

Other matters

9. In developing options, the Ministry has also considered related matters including the Human Rights Review Tribunal's declarations power and intervention rights in proceedings.
10. In discussions with experts, the Ministry encountered differing views on managing the Tribunal's power and response mechanism in the Human Rights Act 1993 alongside the new senior courts' power and response mechanism in the New Zealand Bill of Rights Act 1990. This included retaining the existing Tribunal power, aligning the response mechanisms in both Acts, or removing the Tribunal's power.
11. Any changes to the Tribunal's power would require changes to the Human Rights Act. The Ministry proposes the Tribunal's declarations power be considered as part of targeted changes to this Act. This will avoid piecemeal changes to this Act and not hinder progress of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill.
12. The Human Rights Act enables the Attorney-General and Human Rights Commission to intervene in proceedings under that Act. In other civil proceedings, the ability for the Crown to intervene is determined by provisions in the Crown Proceedings Act 1950 and High Court Rules. The advantage of including specific provisions in the Bill is it may provide greater certainty for prospective parties to proceedings. We seek your views on whether the Bill should provide a right to intervene or whether it is left to existing procedure.

Appendix: Declarations of Inconsistency – options for legislative change

Option	Who has the obligation?	What is the obligation?	How is obligation set out?	Advantages / Disadvantages
Option 1	Executive	<p>Must table in House of Representatives:</p> <ul style="list-style-type: none"> • declaration of inconsistency, and • report containing Government response. <p><i>Timeframe</i> Within 120 days from disposal of all appeals or expiry of appeal period.</p>	In legislation	<p><i>Advantages</i></p> <ul style="list-style-type: none"> • Simple. Not overly prescribed and based on existing process for Government response where Human Rights Review Tribunal makes declaration of inconsistency (section 92K of Human Rights Act 1993). • Executive required to consider matter. • Brings matter to Parliament's attention. <p><i>Disadvantages</i></p> <ul style="list-style-type: none"> • No requirement for Parliament to respond (this is left to parliamentary procedure). • No requirement for Parliament to refer to committee, which limits public participation.
Option 2	Executive	<p>Same requirement as Option 1 AND Must introduce Government bill.</p> <p><i>Timeframe:</i> (Tabling declaration and response) same as Option 1. (Introducing Government bill) no statutory timeframe, however, Executive has statutory obligation to report annually on progress until introduction.</p>	<p>In legislation OR In legislation (tabling declaration and response only) and Standing Orders (introducing Government bill only)</p>	<p><i>Advantages</i></p> <ul style="list-style-type: none"> • Executive required to consider matter and provide a substantive response. • Brings matter to Parliament's attention and, indirectly, requires Parliament to respond. • Option best reflects ministerial preference to require Parliament to confirm, amend or repeal inconsistent legislation without infringing Parliamentary sovereignty. • Public participation through select committee process on Bill. • Requirement to report back keeps matter "live" and ensures greater accountability for addressing inconsistency. <p><i>Disadvantages</i></p> <ul style="list-style-type: none"> • Imposes an obligation on the Government to divert resources onto developing legislation even if it does not consider the matter to be a high priority. • Could create perverse incentive to introduce legislation 'confirming' the inconsistency to dispose of the obligation as soon as possible. • (If requirement to introduce bill in Standing Orders) potentially less effective as Parliamentary response dependent on amending Standing Orders (essentially Option 1 with potential for changes to Standing Orders).
Option 3	Executive AND House of Representatives	<p>(For Executive) Same as Option 1 AND (For House) Must refer declaration of inconsistency and Government response to a committee for consideration</p> <p><i>Timeframe:</i> (Tabling declaration and response) same as Option 1. (Referral to committee and committee report back) No statutory timeframe.</p>	<p>In legislation OR In legislation (tabling declaration and response only) and Standing Orders (referral to committee only)</p>	<p><i>Advantages</i></p> <ul style="list-style-type: none"> • Executive required to consider matter. • Brings matter to Parliament's attention. • Public participation through select committee process. • (If requirement to refer to committee in legislation) enables more active consideration by Parliament. <p><i>Disadvantages</i></p> <ul style="list-style-type: none"> • While parliamentary committee would consider declaration of inconsistency, there is no requirement to confirm, amend or repeal legislation. • (If requirement to refer to committee in Standing Orders) potentially less effective as Parliamentary response dependent on amending Standing Orders (essentially Option 1 with potential for changes to Standing Orders).



Declarations of inconsistency – preliminary discussions with key experts

Hon Andrew Little, Minister of Justice
6 April 2018

1. This note is to let you know the Ministry's proposed approach to preliminary discussions with key experts as part of further policy work on declarations of inconsistency.

Cabinet decision on declarations of inconsistency

2. On 26 February 2018, Cabinet agreed, in principle, that the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) should be amended to empower the senior courts to grant, as a remedy, declarations of inconsistency with one or more of the rights and freedoms affirmed in the Bill of Rights Act.
3. This decision preceded the Supreme Court hearing the Crown's appeal in *Attorney-General v Taylor*, which related to the ability of senior courts to declare an enactment is inconsistent with the Bill of Rights Act. The appeal was heard in early March 2018 and we expect the Court will release its decision later this year.
4. In the meantime, the Ministry plans to undertake further policy work to enable you to submit a detailed policy proposal to Cabinet once the decision of the Supreme Court is known. You have directed officials to initiate preliminary discussions with key experts.

Proposed discussions key experts

5. We have identified key experts with whom we propose to engage in preliminary discussions. We plan to have relatively informal conversations, as opposed to formal consultation, given the purpose is to help identify any technical issues for declarations of inconsistency while we await the Supreme Court judgment.
6. We propose that the discussions take place under "Chatham House rules" so, while we will report-back on the issues discussed, we will not attribute opinions to individuals. This enables a free and frank discussion to take place. If it is desirable to attribute something said by a participant, then we will seek the permission of that person before doing so.

Organisations and individuals

7. We do not plan to engage in general public consultation, given the purpose of the discussion is to develop the technical detail of the proposal. We will meet with a small number of organisations and individuals who can provide insights into the practical implications of a power to make declarations of inconsistency.
8. The organisations we plan to approach about a meeting include:
 - New Zealand Law Society
 - Human Rights Commission
 - Human Rights Foundation
 - New Zealand Council for Civil Liberties
 - Office of the Clerk

9. We propose to approach a small number of individuals with expertise in constitutional and human rights law. It could include the following individuals:
- Rt Hon Sir Geoffrey Palmer, constitutional expert and former Prime Minister, as well as the architect of the Bill of Rights Act
 - Andrew Butler, expert in human rights law (Dr Butler was involved in the *Taylor* litigation but, given submission have now concluded, we consider it appropriate to meet with him given his particular expertise in this area)
 - David McGee and Mary Harris, former Clerks of the House, given their strong grasp of Parliamentary proceedings, and
 - Rodger Haines QC in his capacity as Chair of the Human Rights Review Tribunal, given that the proposed changes to the Bill of Rights Act could have implications for the existing power under the Human Rights Act 1993.

Academic discussions

10. We plan to talk to academics who have expertise in constitutional and human rights law. We will approach the Deans of the five law schools (Auckland, Waikato, Victoria, Canterbury, and Otago) about meeting with faculty members. We will be guided by the Deans as to which faculty members we should meet.

Comparable jurisdictions

11. We plan to contact officials from comparable jurisdictions that have declarations of inconsistency or a similar mechanism. These include Australia (Victoria and Australian Capital Territory), the United Kingdom and Canada. This will help us understand how declarations of inconsistency operate in these jurisdictions.

Possible issues for discussion

12. We have developed some possible discussion points for preliminary discussions with key experts. It is also likely that other discussion points may arise. Therefore, the following list of possible discussion points is not exhaustive:
- what kind of response, if any, could be required in or from Parliament to declarations of inconsistency
 - a right to intervene for the Attorney-General and Human Rights Commission
 - application, if any, of declarations to non-legislative acts (i.e. policies and practices of Government agencies)
 - relationship of the proposed power to make declarations to the existing power in the Human Rights Act, and
 - relationship to the other procedural provisions of the Bill of Rights Act.

Timeframes and next steps

13. We intend to start informal discussions during April and, depending on availability of participants, expect them to run over the next two or three months. The discussions will inform our advice prior to final policy decisions and we will also keep you informed about any particular issues of note as they arise.



Aide Memoire: Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990
Hon Andrew Little, Minister of Justice
19 February 2020

Purpose

1. This note provides information about the joint Cabinet paper (with the Attorney-General) being considered by the Social Wellbeing Committee (SWC) on 12 February 2020.
2. The paper outlines how the Executive and the House of Representatives should respond when the Senior Courts declare an Act to be inconsistent with one or more of the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990.
3. You are seeking agreement to issue drafting instructions for a Bill giving effect to final policy decisions about declarations of inconsistency.

Summary of proposals in paper

The Attorney-General will present declarations to the House

4. The paper proposes to amend the Bill of Rights Act to require the Attorney-General to present the declaration to the House of Representatives within six sitting days after the declaration becomes final. This will enable Parliament to consider whether it wishes to repeal, amend, or affirm the provision in question.

The Government would not be required to respond at that stage

5. The paper does not propose that the Government present a response at the same time as the declaration of inconsistency, which is required under the current provisions in the Human Rights Act. Requiring a Government response at this stage could pre-empt the deliberations of the House of Representatives and unnecessarily politicise the issue. A finding by a Court that an act is inconsistent with the Bill of Rights Act is a significant matter and must be properly considered by Parliament in an unhurried manner.

Standing Orders will set out the process for the House to follow

6. The process for how the House of Representatives responds to a declaration of inconsistency will be set out in Standing Orders rather than the Bill of Rights Act. This will give the House flexibility about how to respond.
7. The paper proposes that the Standing Orders Committee considers potential changes to the Standing Orders, including:
 - a referral to a select committee, and
 - report back to the House with recommendations, and
 - a debate in the House about the Select Committee's report, and
 - a vote on whether to accept the Select Committee's report.

8.

s9(2)(f)(iv)

9. To support the statutory response mechanism, it is preferable that any relevant changes to Standing Orders would commence at the same time as the amendment to the Bill of Rights Act.

Declarations under the Human Rights Act 1993 will be treated the same way

10. The paper proposes that declarations of inconsistency by the Human Rights Review Tribunal under the Human Rights Act be treated the same way as declarations under the Bill of Rights Act. Declarations under both Acts are about the consistency of legislation with the Bill of Rights Act and should have the same result.
11. This will require an amendment to the Human Rights Act to:
 - a) remove the statutory requirement for a Government response; and
 - b) shorten the time available for presenting the declaration to six days. It is currently 120 days, reflecting the time needed to prepare a response.

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Hon Andrew Little, Minister of Justice

Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990

Date	13 December 2017	File reference	HUM 09 01 07
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Action sought

Timeframe

<p>Indicate your preferred option for recognising and responding to declarations of inconsistency.</p> <p>s9(2)(f)(iv)</p> <p>[Redacted]</p> <p>Forward a copy of this briefing to and discuss this matter with Hon David Parker, the Attorney-General, and indicate if you wish to take an item to Cabinet (as an oral item) in the new year on the matter of declarations of inconsistency.</p>	<p>22 December 2017</p>
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Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Ruth Fairhall	Deputy Secretary, Policy	04 498 2399	s9(2)(a)	<input type="checkbox"/>
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	[Redacted]	<input checked="" type="checkbox"/>
David Crooke	Chief Advisor, Civil and Constitutional	04 494 9912	[Redacted]	<input type="checkbox"/>

Minister's office to complete

- Noted
 Approved
 Overtaken by events
 Referred to: _____
 Seen
 Withdrawn
 Not seen by Minister

Minister's office's comments

[Redacted]

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Purpose

1. The purpose of this briefing is to provide you with:
 - 1.1. an overview of the approach of New Zealand's senior courts to making declarations of inconsistency under the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), and
 - 1.2. options for the Government's policy approach to declarations of inconsistency.
2. This briefing does not address the substantive issue of prisoner voting rights discussed in *Attorney-General v Taylor*¹ or provide advice about how the Government should respond to the declaration of inconsistency issued by the High Court in that case.

Executive Summary

3. In 2015, in *Taylor v Attorney-General*², the High Court made a declaration that a provision of the Electoral Act 1993 is inconsistent with the Bill of Rights Act. The Crown argued the senior courts do not have the power to make such a declaration in the absence of explicit statutory authority conferred by Parliament. The High Court rejected that argument and so did the Court of Appeal earlier this year. The Supreme Court will hear an appeal in March 2018.
4. In *Taylor*, the Court of Appeal stated that the senior courts have an inherent common law power to issue declarations of inconsistency, which is confirmed by the Bill of Rights Act. This raises an important constitutional question about the appropriate roles of the Judiciary and Parliament.
5. Declarations of inconsistency could play an important constitutional function by providing a remedy for legislative breaches of the Bill of Rights Act. This would enhance the legitimacy of the system by making Parliament more accountable for meeting fundamental human rights norms. The senior courts could exercise such a power to make declarations if that power were conferred on them by Parliament. This is the approach taken in comparable overseas jurisdictions.
6. We have identified three options for the Government's policy approach to declarations of inconsistency:
 - 6.1. maintain the status quo (i.e. neither provide a mechanism for recognising declarations nor clarify the senior courts do not have the ability to make a declaration)
 - 6.2. introduce legislation to provide for making and responding to declarations of inconsistency
 - 6.3. introduce legislation to clarify the senior courts do not have the ability to make declarations of inconsistency.
7. s9(2)(f)(iv)

¹ *Taylor v Attorney-General* [2015] NZHC 1706.

² *Attorney-General v Taylor* [2017] NZCA 215.

What is a Declaration of Inconsistency?

8. A declaration of inconsistency is a formal statement, granted by a court as a remedy, that legislation is inconsistent with the plaintiff's fundamental human rights protected by the Bill of Rights Act. The declaration informs the public and Parliament that an Act is inconsistent with fundamental human rights. It does not affect the validity of the Act or anything done lawfully under the Act.
9. Section 92J of the Human Rights Act 1993 (as amended in 2001) empowers the Human Rights Review Tribunal to issue declarations of inconsistency, stating legislation is inconsistent with the right to be free from discrimination affirmed in section 19(1) of the Bill of Rights Act. In the case of a breach authorised by legislation, the only remedy permitted by the Human Rights Act is a declaration that the legislation is inconsistent with section 19(1) of the Bill of Rights Act.
10. Section 92K of the Human Rights Act requires the Minister responsible for administering the inconsistent legislation to inform Parliament about the declaration and provide the Government response. The most recent Government response to a declaration under the Human Rights Act was in 2016 in respect of *Adoption Action Inc v Attorney-General*.³
11. There is no explicit power in legislation to issue declarations of inconsistency in respect of other rights affirmed in the Bill of Rights Act or by jurisdictions other than the Human Rights Review Tribunal.

Why are Declarations of Inconsistency an issue now?

12. The question of whether the courts can issue declarations of inconsistency under the Bill of Rights Act has been the subject of debate for some time. It has become an issue now because the High Court issued one for the first time in *Taylor v Attorney-General*, which the Court of Appeal upheld. In that case, five prisoners, including Mr Arthur Taylor, brought proceedings in the High Court seeking a declaration that the 2010 amendment to the Electoral Act 1993 prohibiting all prisoners from voting is inconsistent with their electoral rights under section 12 of the Bill of Rights Act.⁴ The correct interpretation of the Electoral Act, or the fact that the relevant provision is inconsistent with the Bill of Rights Act, was not in dispute.
13. The High Court agreed that the 2010 amendment was inconsistent with the Bill of Rights Act and could not be justified. It issued a formal declaration of inconsistency as a remedy for the plaintiffs. The Crown appealed to the Court of Appeal and argued declarations of inconsistency were not part of the senior courts' inherent judicial function, and jurisdiction could only be conferred by Parliament through legislation. The Court of Appeal dismissed the appeal unanimously. It concluded that the power to issue declarations derives from the common law jurisdiction to consider questions of law, including inconsistencies between statutes. The Crown appealed to the Supreme Court, which will hear the appeal in March 2018.

³ *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.

⁴ At the time the 2010 amendments were progressing through Parliament, the inconsistency with the Bill of Rights Act was brought to the attention of Parliament through the Attorney-General's report under section 7 of the Bill of Rights Act.

14. Prior to *Taylor*, the courts had not issued formal declarations of inconsistency but had identified inconsistent legislation by what is referred to as a *Hansen* indication. The key difference between a *Hansen* indication and a declaration of inconsistency is that a *Hansen* indication is not granted as a remedy for a plaintiff. It means only that, as part of its reasoning in a case, a court has concluded a provision of an Act is inconsistent with the Bill of Rights Act. In *R v Hansen*⁵, the Supreme Court found that a provision of the Misuse of Drugs Act 1975 was inconsistent with the presumption of innocence affirmed in section 25(c) of the Bill of Rights Act. However, the main issue before the Supreme Court was the correct interpretation of the Misuse of Drugs Act (in light of the Bill of Rights Act). The conclusion that the Misuse of Drugs Act could not be interpreted in a way that is consistent with the Bill of Rights Act was ancillary to that purpose.

s9(2)(h)

The Crown's position accepts that the senior courts could, in principle, exercise such a power but only if it is conferred on them by Parliament.

Declarations could play an important constitutional function

18. Declarations of inconsistency can enhance the legitimacy of the system by making Parliament more accountable for meeting fundamental human rights norms. If Parliament makes a law that the senior courts consider to be inconsistent with the fundamental human rights affirmed in the Bill of Rights Act, it serves a useful public policy function to bring it to the attention of the public.
19. Declarations of inconsistency also provide a mechanism for bringing unintentional breaches of the Bill of Rights Act to the attention of Parliament. For example, legislation enacted in good faith might later be found to be inconsistent with fundamental human rights when it is interpreted and applied in practice. In this way, Parliament can benefit from the expert opinion of the Judiciary and decide to amend the law accordingly.

⁵ *R v Hansen* [2007] NZSC 7.

20. A judicial power to make declarations of inconsistency would augment section 7 of the Bill of Rights Act. Section 7 requires the Attorney-General to inform Parliament about any provision in a Bill that appears to be inconsistent with any of the rights and freedoms affirmed in the Bill of Rights Act. Parliament is the final arbiter of what constitutes a justifiable limit on fundamental rights and freedoms. The purpose of section 7 is to ensure Parliament's decision is informed by expert opinion. The power to make declarations of inconsistency would also provide an additional incentive for Parliament to consider section 7 reports carefully before enacting legislation that might be contrary to the Bill of Rights Act.

Comparable jurisdictions have declarations of inconsistency but with a statutory basis

21. There are comparable jurisdictions that provide for declarations of inconsistency or equivalents in legislation, notably the United Kingdom, and Victoria and the Australian Capital Territory (ACT) in Australia. In Canada, the Supreme Court has a stronger power but Parliament remains the final decision-maker. We are not aware of any similar jurisdictions where the courts have issued declarations of inconsistency with a human rights statute without a statutory basis.
22. In the United Kingdom, the Human Rights Act 1998 empowers superior courts to issue formal declarations of legislative incompatibility with the rights found in the European Convention on Human Rights. A declaration of incompatibility does not affect the validity, operation, or enforcement of the law. The Act empowers the Government to make a remedial order addressing the violation (essentially, amending the inconsistent provisions) but there is no domestic legal obligation to make such an order.
23. In the ACT, the Human Rights Act 2004 empowers the courts to make a declaration of incompatibility in respect of a Territory law. In Victoria, the Victorian Charter of Human Rights and Responsibilities Act 2006 empowers Victorian courts to issue a declaration of inconsistent interpretation that operates in the same manner. A declaration by the court does not affect the validity, operation, or enforcement of the law, but does require a Parliamentary response from the Attorney-General in ACT and the responsible Minister in Victoria. Before the court makes any such declaration, the Attorney-General and the Human Rights Commission must be given an opportunity to intervene. In the ACT, only eight cases have considered the declaration of incompatibility mechanism since 2004.
24. In Canada, the Supreme Court can strike down legislation that is inconsistent with the Canadian Charter of Rights and Freedoms, but the Charter allows Parliament or provincial legislatures to override certain portions of the Charter. Cases in which the striking down of legislation is sought are far more common in Canada than declaration of inconsistency cases in United Kingdom or Australia. The power to override the Charter has been used by the Canadian Parliament only very sparingly.

The operational implications are likely to be small

25. We have considered whether conferring a formal power on the senior courts to make declarations of inconsistency would create an incentive to bring litigation against the Crown. This could have operational implications for the senior courts, and increase applications for legal aid. It is not possible to predict precisely the possible number of applications for declarations of inconsistency, but the existing power of the Human Rights Review Tribunal provides some basis for comparison.

26. Since 2002, we understand the Tribunal has received only four applications (not counting one that was struck out) seeking a declaration that legislation is inconsistent with the right to be free from discrimination affirmed in section 19(1) of the Bill of Rights Act. The Tribunal has issued three declarations. Since 2007, and prior to *Taylor*, there were eight applications to the High Court for declarations of inconsistency under the Bill of Rights Act. None resulted in a declaration being granted.
27. Based on these volumes, it seems likely that only a small number of applications for declarations of inconsistency under the Bill of Rights Act may arise in any given year.

Options for the Government's policy approach to Declarations of Inconsistency

28. We have identified three options for the Government's policy approach to declarations of inconsistency. These are summarised below.
- 28.1. The decision in *Taylor* does not require any action from the Government so it could choose to maintain the status quo (i.e. neither provide a mechanism for recognising declarations nor clarify the senior courts do not have an ability to make declarations).
- 28.2. If the Government accepts the senior courts should be able to issue declarations of inconsistency, it could introduce legislation to provide for making and responding to declarations in a way that respects the relationship between the Judiciary and Parliament.
- 28.3. If the Government does not accept the senior courts should have the power to issue declarations of inconsistency as a remedy, then the Government could introduce legislation to clarify the senior courts do not have the ability to make declarations.
29. We also considered the option of the Government recognising declarations of inconsistency through a non-legislative response mechanism such as a Cabinet Office Circular or by proposing an amendment to the Standing Orders of the House of Representatives.
30. However, these non-legislative options would not address a fundamental problem with declarations raised by the Crown in the *Taylor* case when it argued that the power to make declarations must be conferred by Parliament. Essentially, the precedent set in *Taylor* would remain the basis for issuing the declaration with the circular or standing order forming the basis for the Government response. This would be particularly problematic in the case of a Cabinet Office Circular because there would not be even tacit acknowledgment by Parliament of the power to make declarations. Also, non-legislative mechanisms would not have the same status as legislation and might not be as enduring. For these reasons, we do not consider non-legislative options to be viable.

Maintain the status quo

31. This option accepts the senior courts can make declarations (subject to the outcome of the Supreme Court case). It does not provide any formal mechanism to require the Government to acknowledge and respond to the declaration. This would provide flexibility about whether and how to respond to a declaration depending on the circumstances. It would not involve any interference with the existing jurisdiction of the courts (i.e. overruling *Taylor*) or any extension of that jurisdiction.

32. This option could create uncertainty about the nature of the remedy available and whether it is effective. Without the clarity of a legislative or operational mechanism, it is possible there could be confusion about whether a court has issued a declaration or a *Hansen* indication.
33. This option would be inconsistent with the existing power for the Human Rights Review Tribunal to issue declarations under the Human Rights Act. The current ability for a lower court to make declarations in respect of one provision of the Bill of Rights Act raises the question of why the senior courts cannot do the same for a broader range of rights. There does not appear to be any principled basis for drawing such a distinction.

34. s9(2)(h)

Create a legislative mechanism to make declarations effective

35. The option to legislate for declarations of inconsistency would be consistent with the Crown's position in *Taylor*, that the senior courts' power to make declarations should be conferred by Parliament. This could take the form of provisions similar to those in the Human Rights Act in respect of declarations issued by the Human Rights Review Tribunal. It could also be a similar approach to comparable jurisdictions such as the United Kingdom and Australia, which provide a statutory basis for declarations of inconsistency (see paragraphs 21 to 23).
36. In other words, the provision could:
- 36.1. empower the senior courts to declare that legislation is inconsistent with the rights of an individual plaintiff
 - 36.2. specify that where any unjustified limitation of an individual's rights was authorised or required by legislation, the only remedy available is a declaration that the legislation is inconsistent with the Bill of Rights Act, and
 - 36.3. require the Government to bring the declaration to the attention of Parliament and provide advice about the Government's response.
37. In addition to the general advantages outlined earlier in this briefing, this option would make declarations of inconsistency a more effective remedy for legislation that is inconsistent with the Bill of Rights Act. As it currently stands, the senior courts can make declarations but they cannot require the matter to be brought to Parliament's attention. In this respect declarations differ from other types of remedies because they require additional 'machinery' to make them operate properly.
38. This option could also give individuals greater assurance that limitations of their rights will be recognised and addressed. This could enhance the legitimacy of processes and public confidence by making Parliament more accountable. The appropriate legislative vehicle for such a provision would be an amendment to the Bill of Rights Act.


Legislate to remove power to make declarations

39. This option would clarify that the senior courts do not have the power to issue a declaration on the basis that it is the role of Parliament to determine the appropriate limits of fundamental human rights.
40. It could be controversial, given that the courts have only just declared this remedy to be available. Excluding the power to make declarations would rule out the only possible remedy for inconsistent legislation. There would be no means of testing whether legislation was inconsistent with an individual's rights and, if it was inconsistent, there would be no means of legally challenging the legislation.
41. Removing the remedy from future legal actions could be perceived as an attempt to shield Parliament's law from scrutiny by the courts. In this way, it would alter the balance of power between the three branches of state, tilting it towards Parliament and the Executive, and away from the Judiciary. New Zealand's constitution depends on a balance of power between the three branches. If any one branch becomes too weak or too strong, the constitutional checks and balances may not work as effectively. This could undermine legitimacy of the law-making system.

s9(2)(f)(iv)



Consultation

45. The Ministry of Justice consulted Crown Law about this briefing. The Supreme Court will hear the appeal in the *Taylor* case in March 2018. s9(2)(h)

46. Due to the relevance of the policy options to the impending appeal in the *Taylor* case, you may wish to discuss this matter, and share this paper, with the Attorney-General.

Next steps and Timeframes


Next steps on policy options

47. The Ministry can provide further advice about the process to implement your preferred option for the Government's policy approach to declarations of inconsistency.
48. Depending on your preferred option, you might wish to conduct public consultation to test the consensus for change. The Ministry can also provide further advice about consultation options.
49. We will also prepare a legislation bid, by 26 January 2018, on the basis of your preferred option. Due to the timing for legislation bids, we are seeking confirmation of your preferred option by 22 December 2017.

Implications for Supreme Court proceedings

50. In March 2018, the Supreme Court will hear the Crown's appeal in the *Taylor* case. Crown Law could indicate in its submissions to the Supreme Court that the Government is considering this matter. This would require a decision by the Government that could be publicly announced by mid-February 2018.
51. That decision would not need to be a final policy decision but merely an indication that the Government is undertaking work in this area. This could be achieved by seeking Cabinet agreement (possibly as an oral item) in the new year. The Ministry can provide your office with supporting material for you to take such an item to Cabinet.

Recommendations

52. It is recommended that you:
 1. **Indicate** your preferred option for recognising and responding to declarations of inconsistency:
 - 1.1. maintain the status quo (no legislation and no Government policy response) YES / NO
 - 1.2. create a legislative mechanism for making and responding to declarations of inconsistency YES / NO
 - 1.3. legislate to clarify the senior courts do not have the ability to make declarations YES / NO
 2. **Indicate** if you wish the Ministry of Justice to provide you with further advice on conducting public consultation on this matter YES / NO
 3. **s9(2)(f)(iv)** 
 4. **Forward** a copy of this briefing to and discuss this matter with Hon David Parker, the Attorney-General YES / NO

5. **Indicate** if you wish to take an item to Cabinet (as an oral item) in YES / NO the new year on the matter of declarations of inconsistency.



Ruth Fairhall

Deputy Secretary, Policy

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister of Justice

Date / /

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Hon Andrew Little, Minister of Justice

Declarations of inconsistency with the New Zealand Bill of Rights Act 1990

Date	12 February 2019	File reference	HUM 09 01 07
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Action sought	Timeframe
Indicate your preferred option for the House of Representatives' response to declarations of inconsistencies	18 February 2019
Indicate (subject to your preferred option) if you agree to amend the Human Rights Act 1993 to align with proposed changes to the New Zealand Bill of Rights Act 1990	
Direct the Ministry of Justice to undertake departmental consultation	

Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	<input type="checkbox"/>
Chris Kerr	Policy Manager, Civil Law and Human Rights	04 466 4003		<input checked="" type="checkbox"/>
Adriana Nickless	Policy Advisor, Civil Law and Human Rights	04 495 5928		<input type="checkbox"/>

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
<i>Minister's office's comments</i>		

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Purpose

1. The purpose of this briefing is to:
 - provide you with two draft Cabinet papers that contain options for the House of Representatives' (the House) response to a declaration of inconsistency under the New Zealand Bill of Rights Act (the Bill of Rights Act). These options are:
 - Option A – Statutory requirement for House to respond (green highlighted text)
 - Option B – Requirement for House to respond in Standing Orders only (orange highlighted text).
 - seek confirmation of your preferred option for the House's response
 - seek your agreement to the Ministry of Justice undertaking departmental consultation on the draft Cabinet paper, containing your preferred option
 - support any conversations you may wish to have with the Speaker of the House and the Attorney-General about the policy proposal in the Cabinet paper, and assist you to undertake ministerial consultation.

Overview of previous decisions

2. Since Cabinet agreed in February 2018 to provide a statutory foundation for declarations of inconsistency and a response mechanism, the Ministry of Justice has been working on legislative proposals. You have indicated that declarations of inconsistency are a key priority and legislation should be introduced in May 2019 and passed in 2019, if possible.
3. On 19 December 2018, you indicated that your preferred option is to amend the Bill of Rights Act to require the Executive to respond to a declaration of inconsistency under this Act. Your preferred option also includes a requirement for the House to respond.
4. We have drafted the attached Cabinet papers, which contain policy proposal options for recognising and responding to declarations of inconsistency that reflects your preferences.

Scope of the policy proposal

Recognising the Senior Courts' power to make declarations of inconsistency

5. Both draft Cabinet papers indicate that the proposed changes to the Bill of Rights Act will not affect the Senior Courts' power to make declarations of inconsistency (as confirmed by the Supreme Court). The legislation would simply recognise this power and not amend or alter it.
6. The scope of the policy proposal is limited to providing a statutory response mechanism when the Senior Courts make a declaration of inconsistency under the Bill of Rights Act. The proposal does not extend to other matters under the Bill of Rights Act and does not affect other remedies the court may grant under the Bill of Rights Act or other

enactments (e.g. the Declaratory Judgments Act 1908). The limited scope is also necessary to avoid any delays in progressing legislative changes by the end of 2019.

Executive's requirement to respond to declarations of inconsistency

7. Both draft Cabinet papers set out the proposed statutory requirement for the Executive to respond when the Senior Courts make a declaration of inconsistency under the Bill of Rights Act. This would be for the Executive to table the declaration of inconsistency and the Government's response in the House 120 days after the disposal of all court proceedings relating to the declaration of inconsistency.
8. The proposal is similar to the existing statutory requirement in the Human Rights Act 1993. This is where the Executive must respond when the Human Rights Review Tribunal (the Tribunal) declares an enactment is inconsistent with the right to be free from discrimination affirmed by section 19 of the Bill of Rights Act. For reference, the relevant provisions in the Human Rights Act are included in an appendix to this briefing.

House of Representatives' requirement to respond to declarations of inconsistency

9. A requirement for the Executive to table a declaration of inconsistency and the Government's response in the House alone would not require a response from the House. This would require an additional mechanism. Each draft Cabinet paper contains an option for this additional mechanism, specifically:
 - Option A – Statutory requirement for House to respond, or
 - Option B – Requirement for House to respond in Standing Orders only.
10. We have set out below what each option would entail including advantages and implications.

Option A – Statutory requirement for House of Representatives to respond

11. Option A proposes a statutory requirement for the House to respond by referring a declaration of inconsistency and the Government's response to a Parliamentary select committee for consideration.
12. The proposed statutory requirement would be limited to the action of referral to a select committee. It will not prescribe how (in what way) and when (by what timeframe) the select committee must consider and report on the declaration of inconsistency and the Government's response. Instead, the select committee would be guided by Standing Orders for determining how and when it will address the declaration and Government's response.

Advantages

13. A statutory requirement for the House to refer the matter to a select committee may be perceived as a stronger and more effective way to require lawmakers to address inconsistent legislation that breaches fundamental human rights.
14. This is because the requirement itself is likely to be more visible, especially for the public, and more enduring (compared with, for example, specifying in Standing Orders). It is also likely to be transparent as the process for amending legislation (to provide for

such a requirement) is subject to greater checks and balances and allows for public participation.

Disadvantages

15. A statutory requirement could have implications for parliamentary privilege. Specifically, it would affect the House's authority to control its internal procedures and affairs without external interference. For example, a statutory requirement or duty would be subject to interpretation by the courts whereas a requirement in Standing Orders would be subject to interpretation by the Speaker of the House.
16. As you will be aware, the Privileges Committee has enquired about declarations of inconsistency under the Bill of Rights Act and will likely have a strong interest in whether the proposal will affect matters of parliamentary privilege.

Existing statutory requirements for the House

17. While rare, statutory requirements for the House to undertake certain actions have been enacted before. For example, section 264 of the Electoral Act 1993 and section 37 of the Returning Offenders (Management and Information) Act 2015 contain requirements for the House to appoint select committees to undertake reviews, albeit one-off rather than recurring, of provisions under these Acts and report back to the House within specific timeframes. The relevant provisions in these Acts are included in an appendix to this briefing.
18. There is a difference between these existing provisions and the proposed statutory requirement. With the existing provisions, the House can anticipate when the reviews would occur. Whereas, it is not possible for the House to anticipate when a declaration of inconsistency is brought to its attention. However, compared with the existing provisions, the proposed statutory requirement does not specify statutory timeframes for the committee to report back or what it must report on. This means the House would have more flexibility and control over specific procedures and timeframes in responding to a declaration of inconsistency.

Corresponding changes to Standing Orders

19. As there will be minimal procedural requirements in legislation for the House to respond, it may be desirable for the House to amend Standing Orders to provide guidance for how the select committee will consider a declaration of inconsistency. Corresponding changes to Standing Orders may encourage greater engagement by the House and potentially strengthen the effectiveness of the statutory requirement. Further detail about amending Standing Orders is covered below under Option B.

Effect of Option A on the Human Rights Act

20. A statutory requirement for both the Executive and the House to respond to a declaration of inconsistency under the Bill of Rights Act differs from the existing statutory response mechanism for a declaration of inconsistency under the Human Rights Act. Currently, when the Human Rights Review Tribunal makes a declaration of inconsistency under the Human Rights Act, there is only a statutory requirement for the Executive to respond.
21. A disparity in the statutory response mechanism depending on where proceedings started could lead to procedural and access to justice issues for parties. For example,

where the Tribunal declares an enactment is inconsistent with section 19 of the Bill of Rights Act. This declaration may be appealed to and upheld by the High Court ("declaration A"). At the same time, a separate application may be made to the High Court seeking a declaration that an enactment is inconsistent with section 19, which the High Court subsequently issues ("declaration B"). Even though the High Court issues a decision in both proceedings, the House would only have a statutory requirement to respond to declaration B.

22. If Option A is your preferred option, to avoid the implications noted above and provide greater certainty for plaintiffs, we suggest amending the Human Rights Act to align the response to a declaration of inconsistency issued by the Tribunal with a declaration issued by the Senior Courts. Amending the Human Rights Act may lead to calls for changes to other parts of that Act. There will need to be clear messaging that the proposed change is narrow in scope and consequential on the proposed changes to the Bill of Rights Act. For this reason and also to avoid delays in progressing legislative changes, any other substantive changes to the Human Rights Act would be out of scope.

23. s9(2)(f)(iv)

24. If the House makes corresponding changes to Standing Orders to support Option A, it would be desirable that these changes would also apply to a declaration of inconsistency under the Human Rights Act. This would also ensure a consistent response by the House to a declaration of inconsistency, regardless of whether it is issued by the Tribunal or the Senior Courts.

Option B – Requirement for House of Representatives to respond in Standing Orders only

25. Option B proposes only specifying in Standing Orders the requirement for the House to refer a declaration of inconsistency and the Government's response to a select committee.
26. This could be a similar process to that in Standing Order 265 where the Attorney-General's report on an inconsistent bill under section 7 of the Bill of Rights Act stands referred to a select committee for consideration. For reference, Standing Order 265 is included in the appendix to this briefing.

Advantages

27. A requirement in Standing Orders could mitigate the concerns relating to parliamentary privilege noted above under Option A. This is because it would provide the House with greater flexibility to determine the procedure for addressing declarations of inconsistency and the Government's response.

Disadvantages

28. A requirement in Standing Orders may be less visible and enduring (compared with a statutory requirement).
29. Amending Standing Orders to coincide with the enactment of statutory requirements for the Executive's response may be difficult. It would also rely on the House including

specific procedure in Standing Orders that would enable referral to a select committee in the first instance.

30. A change to Standing Orders may need to wait until the next general review of Standing Orders by the Standing Orders Committee, which occurs during each parliamentary term. The last review concluded in 2017 and it is like that the next review will occur in 2019/2020. Otherwise, it may be possible to amend Standing Orders through a sessional order in the current session of Parliament.
31. The House will not usually amend Standing Orders until the Standing Orders Committee has examined and provided a report on the proposed changes. When examining and reporting on proposed changes, the Standing Orders Committee will usually seek to reach a consensus among members and put forward proposals that will receive wide support from the House.¹

32. s9(2)(f)(iv)

Effect of Option B on the Human Rights Act

33. A requirement for the House to respond in Standing Orders only would not require any changes to the Human Rights Act. However, to ensure consistency, it would be desirable that any changes to Standing Orders for declarations of inconsistency under the Bill of Rights Act would also apply to declarations of inconsistency under the Human Rights Act.

Consultation

Discussions with key experts

34. Following Cabinet decisions in mid-2018, the Ministry of Justice engaged with key organisations and experts to assist with the development of policy proposals on the design of the response mechanism. These experts included the Crown Law Office, Parliamentary Counsel Office (PCO), Office of the Clerk of the House of Representatives, Legislation Design and Advisory Committee, New Zealand Law Society, faculty members of university law schools, and other constitutional and human rights law experts.
35. The design of the response mechanism for declarations of inconsistency attracted the most interest. Key feedback was that any mechanism should promote meaningful consideration of the issue by those in power without presupposing any particular outcome.
36. Through discussions with key experts and consultation with Crown Law and PCO, alternative legislative vehicles have been discussed. This included feedback that any mechanism should be simple and to avoid specifying detailed procedure in the Bill of Rights Act and instead including this elsewhere. For example, the Senior Courts Act 2016. The Ministry's view is that the Bill of Rights Act is still the most appropriate legislative vehicle on the basis that the proposals would avoid prescribing detailed procedure.

¹McGee *Parliamentary Practice in New Zealand*. p. 13-14.

37. The Ministry anticipates undertaking further consultation with the organisations and experts noted above prior to introduction of legislative changes.

Departmental consultation

38. The Ministry has continued to consult with Crown Law and PCO, including initial consultation on the contents of the attached draft Cabinet papers.
39. Following you indicating your preferences, we will consult with the Treasury, Department of Prime Minister and Cabinet, and State Services Commission.

Consultation with judiciary

40. We also propose that following Cabinet, you write to both the Chief Justice and Chair of the Human Rights Review Tribunal to inform them about final policy decisions. We can provide your office with draft letters for you to review and send.

Next steps and timeframes

41. The Ministry of Justice understands that you are planning to meet with the Speaker of the House and the Attorney-General during the week of 18 February 2019 to discuss the policy proposal.
42. You may also wish to engage with the Standing Orders Committee and Privileges Committee on the policy proposal including matters relating to Standing Orders and parliamentary privilege.
43. Subject to your discussions with the Speaker and the Attorney-General and ministerial consultation, you may wish to take this matter to the Cabinet Social Wellbeing Committee on 20 March 2019.
44. Subject to Cabinet approval and other Government priorities, the proposed timeline for the progress of legislative amendments is:
- March to April 2019 – drafting of legislative amendments
 - Early-May 2019 – Cabinet Legislation Committee and Cabinet approval to introduce legislative amendments
 - Early-May 2019 – introduction of New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill to House of Representatives
 - December 2019 – (subject to parliamentary process) enactment of Amendment Bill.

Recommendations

45. It is recommended that you:

1. **Indicate** your preferred option for the House of Representatives' response to declarations of inconsistency:
 - Option A – Statutory requirement in New Zealand Bill of Rights Act for House of Representatives' response YES / NO
 - Option B – Requirement for House of Representatives' response in the Standing Orders of the House of Representatives only; YES / NO
2. **Indicate** (if you prefer Option A above) whether you agree to amend the Human Rights Act 1993 to align the statutory response to declarations of inconsistency under this Act with the proposed statutory response under the New Zealand Bill of Rights Act; YES / NO
3. **Direct** the Ministry of Justice to undertake departmental consultation on the draft Cabinet paper containing your preferred option for the House of Representatives' response. YES / NO



Chris Kerr
Policy Manager, Civil Law and Human Rights

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister of Justice

Date / /

Attachments: draft Cabinet papers *Declarations of inconsistency with the New Zealand Bill of Rights Act 1990*

Appendix

Declarations of inconsistency under the Human Rights Act 1993

Section 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.
- 4) Nothing in this section affects the New Zealand Bill of Rights Act 1990.

Section 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.

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.

Legislative requirements for House of Representatives

Section 264 (Review by select committee) of Electoral Act 1993

- 1) The House of Representatives shall, as soon as practicable after 1 April 2000, appoint a select committee to consider the following matters:
 - a) the effect of sections 35 and 36 on the operation of the electoral system;
 - b) the provisions of this Act dealing with Maori representation;
 - c) whether there should be a further referendum on changes to the electoral system.
- 2) The select committee appointed under subsection (1) shall report to the House of Representatives before 1 June 2002 and shall include in its report a statement indicating—
 - a) whether, in its view, there should be changes to sections 35 and 36; and
 - b) whether, in its view, there should be changes to the provisions of this Act dealing with Maori representation; and
 - c) whether in its view there should be a further referendum on changes to the electoral system, and, if so, the nature of the proposals to be put to voters and the timing of such a referendum.

Section 37 (Review by select committee) of the Returning Offenders (Management and Information) Act 2015

A select committee to be determined by the Clerk of the House of Representatives must, 18 months after the commencement of this Act, review the operation of this Act and prepare a report on that review.

Standing Orders of the House of Representatives

Standing Order 265 – New Zealand Bill of Rights

- 1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney-General must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.
- 2) An indication by the Attorney-General to the House concerning the New Zealand Bill of Rights Act 1990 is made by the presentation of a paper,—
 - a) in the case of a Government bill, on the introduction of that bill, or
 - b) in any other case, as soon as practicable after the introduction of the bill.
- 3) Where the House has accorded urgency to the introduction of a bill, the Attorney-General may, on the bill's introduction, present a paper under this Standing Order in the House.
- 4) A paper presented under this Standing Order is published under the authority of the House.
- 5) When a paper is presented under this Standing Order, it stands referred to a select committee for consideration. The paper is allocated by the Clerk to the most appropriate select committee.



Hon Andrew Little, Minister of Justice

Outstanding policy questions for declarations of inconsistency

Date	26 August 2019	File reference	HUM 09 01 14
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Action Sought	Timeframe/Deadline
Note the four policy questions that have arisen following your meeting with the Attorney-General about declarations of inconsistency under the New Zealand Bill of Rights Act 1990.	
Indicate your preferred option for the time available to present the declaration after the disposal of all appeals.	2 September 2019
Indicate your preferred option for who presents the declaration.	2 September 2019
Indicate your preferred option for what parts of the process will be in legislation and what will be in Standing Orders.	2 September 2019
Agree to amend the Human Rights Act 1993 so that the legislative requirements under both Acts are the same.	2 September 2019

Contacts for telephone discussion (if required)

Name	Position	Telephone		1st contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	
Jenna Reid	Policy Manager, Civil Law and Human Rights	04 9188649		✓
Nicola Fowler	Policy Advisor	04 439 4032		

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
Minister's office comments		

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982


Purpose

1. This paper seeks decisions about four policy questions that have arisen following your meeting with the Attorney-General about declarations of inconsistency (declarations) under the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

Background


2. In July, you met with the Attorney-General, Hon David Parker, to discuss a draft Cabinet paper about declarations under the Bill of Rights Act. A declaration of inconsistency is a formal statement by a court that an Act is inconsistent with fundamental human rights affirmed in the Bill of Rights Act.
3. The draft Cabinet paper proposed that the Bill of Rights Act be amended to require the Government to present declarations of inconsistency to the House of Representatives along with a report containing the Government's response to the declaration. This is the same process currently found in the Human Rights Act 1993 for declarations by the Human Rights Review Tribunal.

4. s9(2)(g)(i)



5.

s9(2)(g)(i)



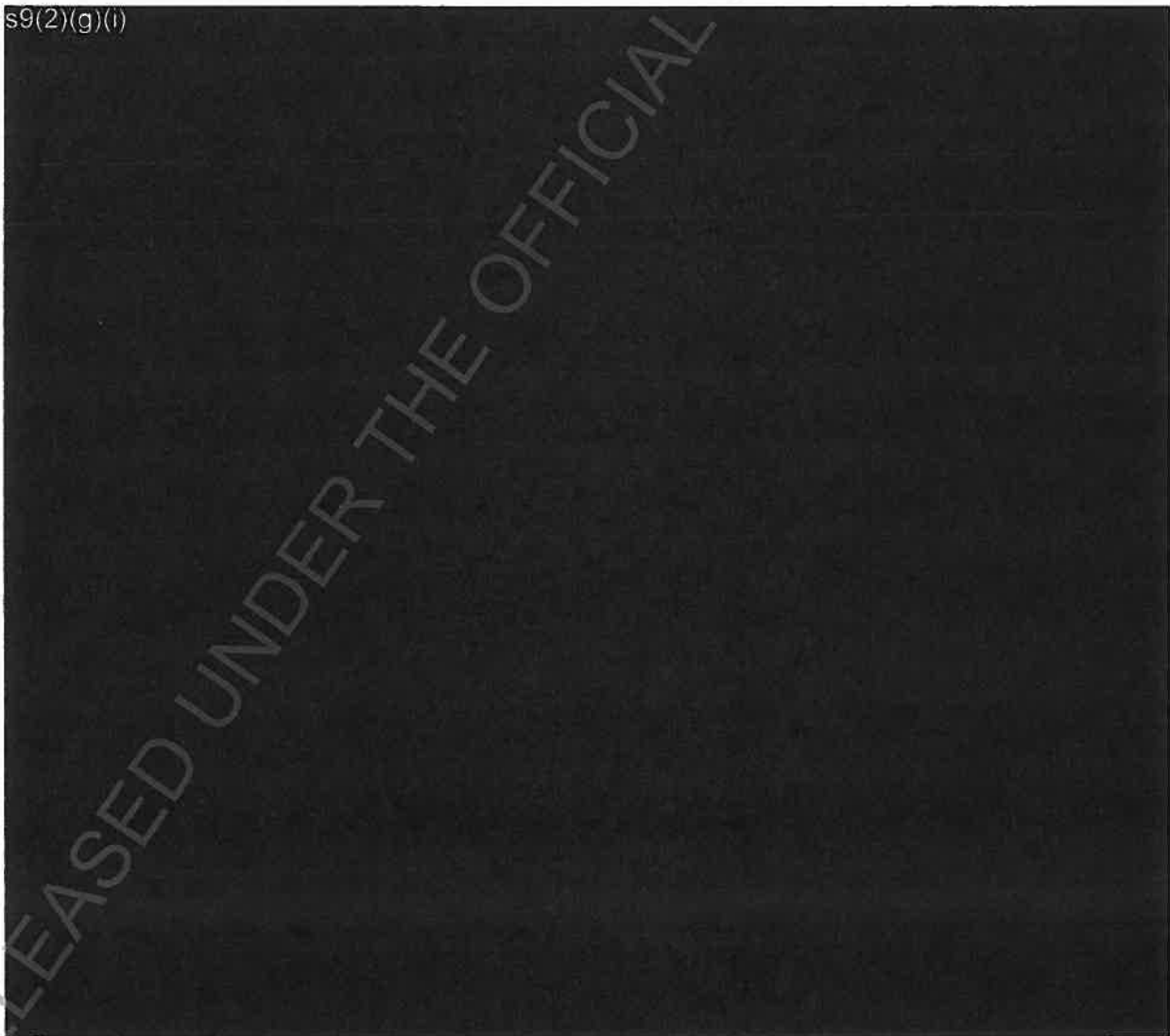
s9(2)(g)(i)

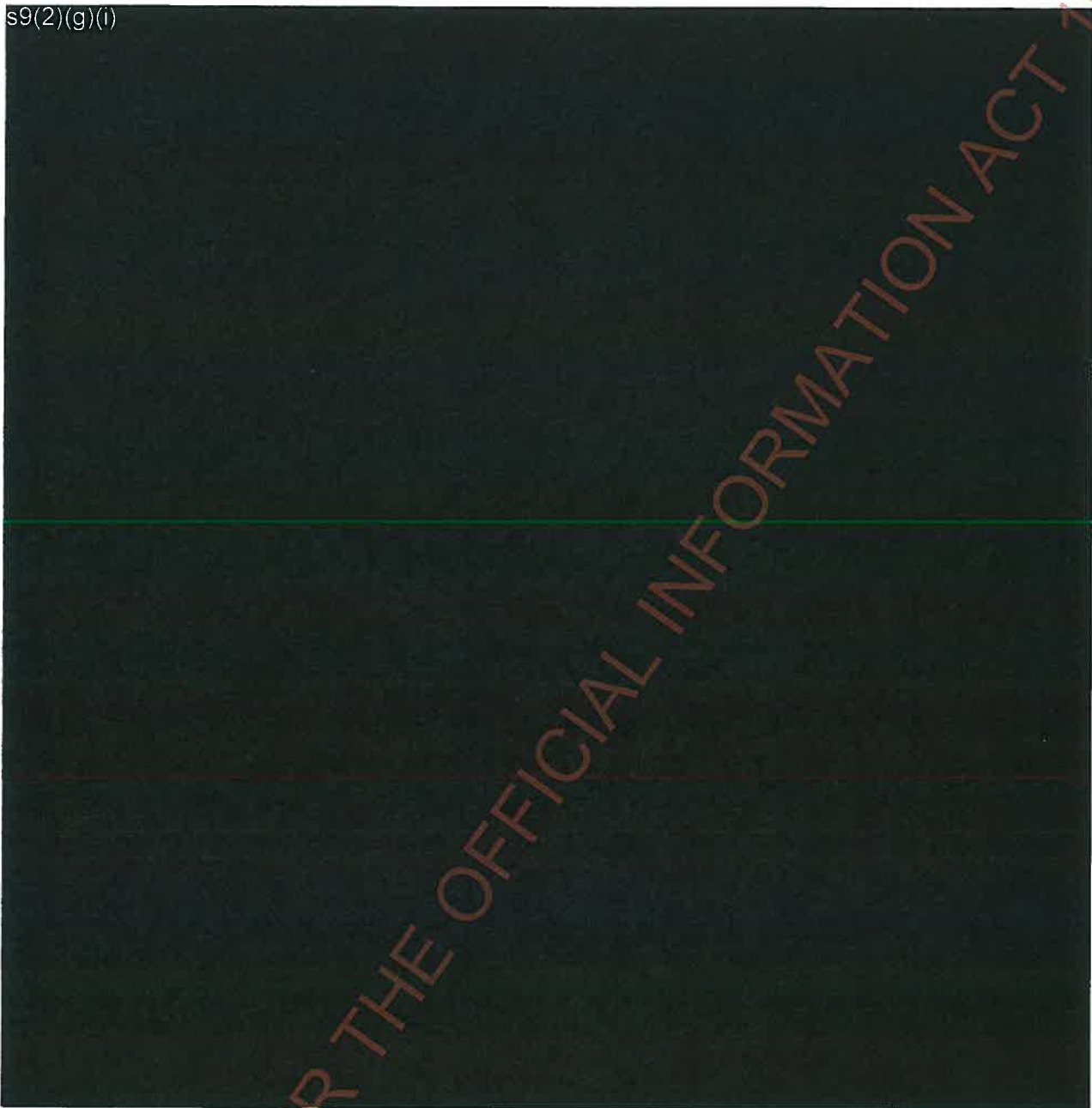


What parts of the process will be in legislation and what will be in Standing Orders?

17. In line with your conversation with the Attorney-General, the revised Cabinet paper will propose that a declaration presented to the House be referred to a select committee, which would report-back to the House after considering the declaration. We would like to confirm which parts of this process will sit in the Act and which will sit in Standing Orders.

s9(2)(g)(i)





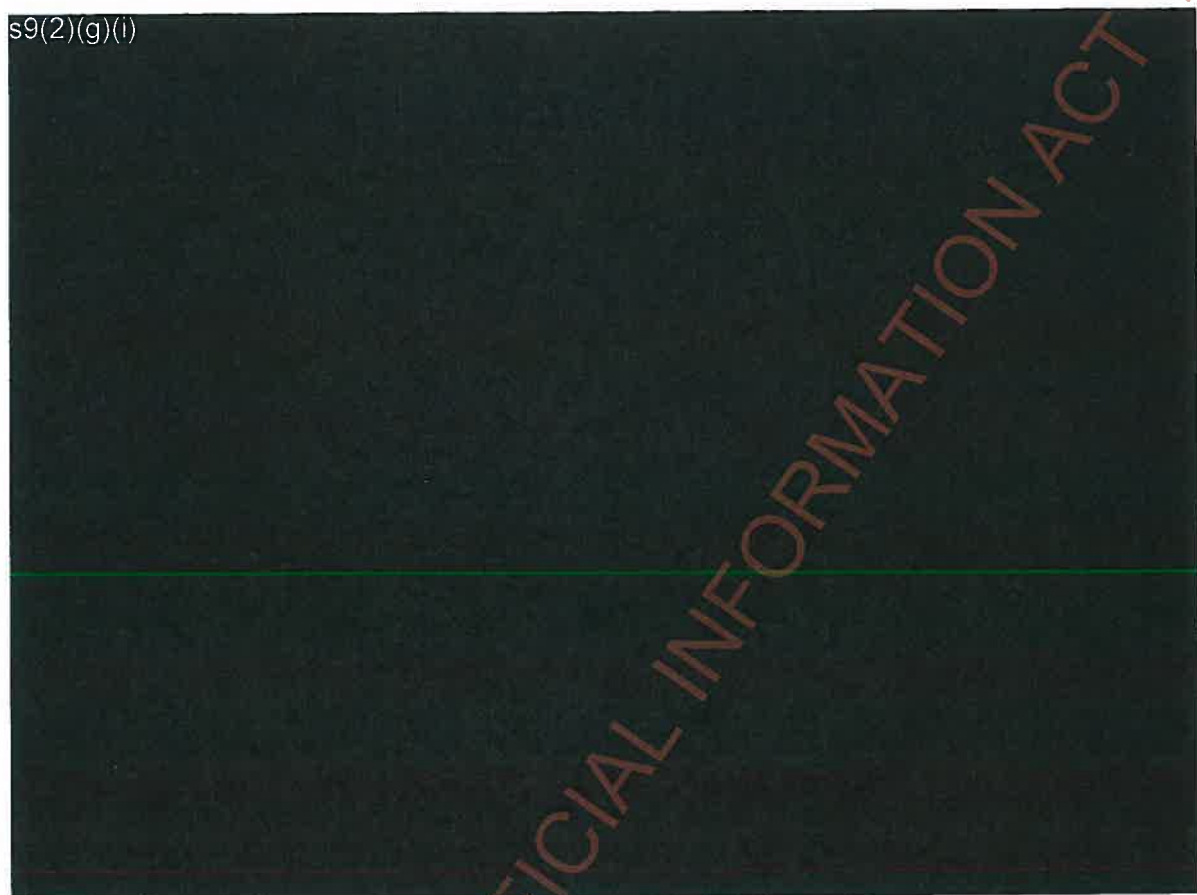
Next steps

- 28. When you have indicated your preferred approach to these four policy issues, we will send you a revised Cabinet paper proposing to amend the Bill of Rights Act to provide for a response mechanism for declarations of inconsistency.
- 29. We anticipate seeking Cabinet policy approval towards the end of September and do not expect drafting to be a lengthy process. This means it should be possible to seek Cabinet approval in October to introduce the proposed legislation.

Recommendations

- 30. It is recommended that you:
 - 1. Note the four policy questions that have arisen following your meeting with the Attorney-General about declarations of inconsistency;

s9(2)(g)(i)



5. **Agree** that the Amendment Bill amend the Human Rights Act so that **YES / NO** the legislative requirements under both Acts align.

Reid

Jenna Reid
Policy Manager, Civil Law and Human Rights, Policy Group

APPROVED / SEEN / NOT AGREED

Hon Andrew Little
Minister of Justice
Date: