Hon David Parker BCom, LLB

Attorney-General
Minister for the Environment
Minister for Trade and Export Growth

Associate Minister of Finance

10 AUG 2020

BAW Russell
By email: fyi-request-13159-edaa24f0@requests.fyi.org.nz

Dear BAW Russell

Advice received on responding to declarations of inconsistency issued by the courts in relation to the Bill of Rights Act

I write in response to your email of 26 June 2020, in which you requested, under the Official Information Act 1982 (**OIA**):

> all advice you have received on responding to declarations of inconsistency issued by the courts in relation to the Bill of Rights Act.

As Attorney-General I am not subject to the OIA when acting as Law Officer.[1] Advice was provided to me in relation to declarations of inconsistency in my role as Law Officer and as such is not covered by the OIA. However, a number of documents that fall within the scope of your request have already been released and I provide them with this letter:

1) the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (28 May 2020);

2) New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Consistency with the New Zealand Bill of Rights Act 1990 (2 March 2020);

3) Post-Cabinet Press Conference (26 February 2018);

4) Cabinet paper: Declarations of Inconsistency with the New Zealand Bill of Rights Act (19 February 2018); and

5) Briefing to the Minister of Justice – Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990 (13 December 2017).

I also provide Bill of Rights Act advice on the Human Rights Amendment Bill, dated 8 August 2001.

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1 OIA, s 2, definition of "official information", paragraph (a). See also Ombudsman, "Request for information relating to the trial of George Gwaze" (30 May 2013), ref 336060 at [18].

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Some redactions have been made to the documents provided on the basis that the information is outside the scope of your request, or that the information was earlier withheld under s 9(2)(a) and (f)(iv) of the OIA, as it is necessary to protect the privacy of natural persons and to maintain the confidentiality of advice tendered by Ministers of the Crown and officials.

In accordance with s 19 of the OIA, I advise you have a right to seek a review of this decision by way of complaint to an Ombudsman under s 28(3) of the OIA.

Yours sincerely

Hon David Parker
Attorney-General

Hon Andrew Little
Minister of Justice

Proactive release – The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill

Date of issue: 28 May 2020

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	**Response Mechanism for Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990** *Cabinet paper* Office of the Minister of Justice Office of the Attorney-General 19 February 2020	Some information has been withheld in accordance with section 9(2)(f)(iv) of the OIA to protect the confidentiality of advice tendered by Ministers of the Crown and officials, and section 9(2)(h) to maintain legal professional privilege. No public interest has been identified that would outweigh the reasons for withholding it.
2	**Response Mechanism for Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990** *Cabinet Minute: SWC-20-MIN-0004* Cabinet Office Meeting date: 19 February 2020	Some information has been withheld in accordance with section 9(2)(f)(iv) of the OIA to protect the confidentiality of advice tendered by Ministers of the Crown and officials. No public interest has been identified that would outweigh the reasons for withholding it.
3	**New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill: Approval for Introduction** *Cabinet paper* Office of the Minister of Justice 10 March 2020	Some information has been withheld in accordance with section 9(2)(f)(iv) of the OIA to protect the confidentiality of advice tendered by Ministers of the Crown and officials, and section 9(2)(h) to maintain legal professional privilege. No public interest has been identified that would outweigh the reasons for withholding it. *The copy of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill provided to Ministers with this paper has been withheld in accordance with section 61 of the Legislation Act 2012 and section 9(2)(h) of the OIA to maintain legal professional privilege. Legislative instruments are publicly available at www.legislation.govt.nz.* *The departmental disclosure statement attached to the paper is publicly available at http://disclosure.legislation.govt.nz/*
4	**New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill: Approval for Introduction** *Cabinet Minute: LEG-20-MIN-0032* Cabinet Office Meeting date: 10 March 2020	Some information has been withheld in accordance with section 9(2)(h) of the OIA to maintain legal professional privilege. No public interest has been identified that would outweigh the reasons for withholding it.

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 Courts[1] 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.

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

2 [2018] NZSC 104.

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.

18. 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)(iv) [redacted]

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. s9(2)(h) [redacted]

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

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.

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;

8. s9(2)(f)(iv) [redacted]

9. s9(2)(f)(iv) [redacted]

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

SWC-20-MIN-0004

Cabinet Social Wellbeing Committee

Minute of Decision

Response Mechanism for Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990

Portfolios **Justice / Attorney-General**

On 19 February 2020, the Cabinet Social Wellbeing Committee:

1 **noted** that in February 2018, the Cabinet Social Wellbeing Committee agreed in principle, subject to the Minister of Justice submitting a detailed policy proposal, 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];

2 **noted** 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 **agreed** 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 **agreed** to amend the Human Rights Act 1993 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 **noted** 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 **noted** 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 **noted** that the 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;

8 s9(2)(f)(iv) [redacted]

9 s9(2)(f)(iv) [redacted]

10 **invited** the Minister of Justice to issue drafting instructions to Parliamentary Counsel Office to give effect to the decision.

Vivien Meek
Committee Secretary

Present:
Rt Hon Jacinda Ardern
Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Andrew Little
Hon Carmel Sepuloni (Chair)
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Jenny Salesa
Hon Kris Faafoi
Hon Tracey Martin
Hon Willie Jackson
Hon Aupito William Sio
Hon Poto Williams
Hon Julie Anne Genter
Jan Logie, MP

Officials present from:
Office of the Prime Minister
Officials Committee for SWC
Office of the Chair of SWC

Hard-copy distribution:
Minister of Justice
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 Act[1], 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) [redacted]

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) [redacted]

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. s9(2)(h) [redacted]

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

LEG-20-MIN-0032

Cabinet Legislation Committee

Minute of Decision

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

Portfolio **Justice**

On 10 March 2020, the Cabinet Legislation Committee:

1 **noted** that on 19 February 2020, the Cabinet Social Wellbeing Committee:

1.1 noted 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 1990 and confirmed the power of the Senior Courts to issue declarations of inconsistency;

1.2 agreed 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;

1.3 agreed to amend the Human Rights Act 1993 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;

[SWC-20-MIN-0004]

2 **noted** that the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill gives effect to the above decisions, s9(2)(h) [redacted]

3 **approved** for introduction the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill [PCO 21110/1.15], subject to the final approval of the government caucuses and sufficient support in the House of Representatives;

4 **agreed** that the Bill be introduced on 17 March 2020;

5 **agreed** that the government propose that the Bill be:

5.1 referred to the Privileges Committee for consideration for a period of three months;

5.2 enacted by July 2020.

Gerrard Carter
Committee Secretary

Present:
Hon Chris Hipkins (Chair)
Hon Andrew Little
Hon Carmel Sepuloni
Hon David Parker
Hon Jenny Salesa
Hon Julie Ann Genter
Hon Eugenie Sage
Michael Wood MP (Senior Government Whip)

Officials present from:
Office of the Prime Minister
Officials Committee for LEG

Hard-copy distribution:
Minister of Justice

Te Tari Ture o te Karauna
Crown Law

2 March 2020

Attorney-General

New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Consistency with New Zealand Bill of Rights Act 1990
Our Ref: ATT395/311

1. I have considered the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill[1] ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act").

2. In my opinion the Bill is not inconsistent with any of the rights and freedoms that are affirmed by the Bill of Rights Act.

Background

3. A declaration of inconsistency is a formal statement by a court or tribunal that an Act is inconsistent with one or more of the rights and freedoms affirmed by the Bill of Rights.

4. In November 2018, the Supreme Court in *Attorney-General v Taylor*[2] determined that the senior courts have the power to issue declarations of inconsistency under the Bill of Rights Act.

5. The Bill of Rights Act currently contains no procedural mechanism by which declared inconsistencies can be reported to Parliament in order that Parliament may consider amending the relevant enactment. This Bill establishes such a procedure.

6. In contrast, the Human Rights Act 1993 does contain provisions for the Government to report a declared inconsistency with s 19 of the Bill of Rights Act to the House of Representatives. This Bill amends the Human Rights Act to bring the process of reporting declarations in line with the new process for reporting declarations under the Bill of Rights Act.

The Bill

Amendments to the New Zealand Bill of Rights Act 1990

7. The Bill inserts a new s 7A into the Bill of Rights Act that requires the Attorney-General to report a declaration of inconsistency that has been made by a

[1] Version (21110/1.14).
[2] [2018] NZSC 104.

senior court[3] to the House of Representatives within six sitting days of the declaration becoming final.[4]

8. The Bill does not introduce a requirement for the House to amend the enactment in question, nor does it prescribe the process by which the House is to consider the declaration once the Attorney-General's report is received.[5]

Amendments to the Human Rights Act 1993

9. Section 92J of the Human Rights Act already empowers the Human Rights Review Tribunal ("Tribunal") to declare an Act to be inconsistent with the right to be free from discrimination affirmed by s 19 of the Bill of Rights Act.

10. The current s 92K (3) requires the Minister who is responsible for the enactment to present a report bringing the declaration to the attention of the House and also a report containing advice on the Government's response to the declaration.

11. The new s 92K (3) would:

11.1 place the obligation upon the Attorney-General to report on the declaration;

11.2 reduce the timeframe in which this report must be lodged from 120 days to 6 sitting days; and

11.3 remove the requirement for the Government to report on its response to the declaration.

12. Again, the Bill does not introduce a requirement for the House to amend the enactment in question, nor does it prescribe the process by which the House is to consider the declaration once the Attorney-General's report is received.

Analysis

13. There is currently no statutory mechanism for informing Parliament of declarations of inconsistency made under the Bill of Rights Act. By introducing such a requirement, the Bill arguably strengthens the protections of the rights and freedoms affirmed by that Act.

14. However, in removing the obligation upon the Government to present the House with its response to a declaration of inconsistency made by the Tribunal, it may be argued that the Bill slightly weakens the existing procedural protections for s 19. Although it might also be argued that a Government response is neither necessary (since it is Parliament who must ultimately determine whether or not to amend the enactment) nor desirable (since a Government response may make it more likely that the issue becomes politicised).

15. The jurisprudence of other jurisdictions suggests that the affirmation of certain rights may require not only substantive protection but also certain procedural protections.[6]

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3 As defined in s 4(2) of the Senior Courts Act 2016.

4 Clause 4

5 The Bill's Explanatory Note indicates that the Minister of Justice will propose that the Standing Order Committee consider potential changes to the standing orders to enable the Parliament to respond to consider and respond to reports [page 2].

It is therefore possible that a statute which removes essential procedural protections for one or more of the rights and freedoms affirmed under the Bill of Rights Act might be said to be inconsistent with those rights and freedoms.

16. It may be arguable (although there is no domestic or international jurisprudence on the point) that some procedure to enable the legislative remediation of declared breaches is an inherent feature of some or all human rights guarantees. However, even if this were so, I see no basis to suggest that such procedure must include a specific requirement that the government provide the legislature with reports setting out its response to a judicial finding of inconsistency.

17. The International Covenant on Civil and Political Rights ('ICCPR') imposes on its members an obligation to take '*the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*' (Article 2(2) of the ICCPR). It also requires member states to provide an effective remedy for a breach of the rights guaranteed by the covenant (Article 2(3)). However, it does not prescribe the method by which states are to meet those obligations. Still less does it impose a specific obligation on governments to lay before the legislature its responses to judicial declarations or findings of inconsistency.

18. The legislation of other jurisdictions provides different mechanisms for the remediation of legislation that is inconsistent with their respective human rights guarantees. In Australia the relevant legislation of both Victoria and the Australian Capital Territory contain mandatory provisions requiring ministers to place before the legislature their responses to declarations of incompatibility.[7] In contrast, the United Kingdom's Human Rights Act 1998 imposes no equivalent obligation but instead provides the government with a discretionary power which enables ministers to place before Parliament 'remedial orders' through which primary legislation may be amended.[8]

19. I therefore conclude that the calibration of the mechanism for reporting declared breaches to Parliament is a matter of choice for Parliament and may be modified without those modifications being inconsistent with the right to be free from discrimination.

20. Further, insofar as the Bill does reduce the protection for s 19, it only does so in order to bring it in line with the protections that the Bill establishes for other rights and freedoms. Under the Bill of Rights Act, the right to freedom from discrimination does not require special procedural protections above and beyond those which are required for other rights and freedoms.

21. It is therefore my opinion that the Bill is not inconsistent with any of the fundamental rights and freedoms that are affirmed by the Bill of Rights Act.

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6 For example, the European Court of Human Rights has held that Article 4 of the European Convention on Human Rights (the right to freedom from slavery) requires the state to ensure that breaches of the right are criminalised, effectively prosecuted and that the victims have access to a range of legal protections (*Rantsev v Cyprus and Russia* (Application No 25965/04) (unreported) given 7 January 2010). Similar procedural protections have been held to be built into Article 3 (see *Jabari v. Turkey*, Admissibility Decision of 11 July 2000, Appl. No. 40035/98, para. 41).

7 The relevant provision of the law of Victoria is s 37 of the Charter of Human Rights and Responsibilities Act 2006. The relevant provision in the Australian Capital Territory is s 33 of the Human Rights Act 2004.

8 Section 10 of Human Rights Act 1998.

Review of this advice

22. In accordance with Crown Law's policies, this advice has been peer reviewed by Crown Counsel, Vicki McCall.

Daniel Jones
Crown Counsel
027 213 8751

Noted

Hon David Parker
Attorney-General
7 / 3 /2020

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26 February 2018

POST-CABINET PRESS CONFERENCE: MONDAY, 26 FEBRUARY 2018

PM: Afternoon, everyone. All right, before discussing an item of Cabinet's agenda, I'll just walk you through a few events for the busy week ahead. Tonight, I'll be opening Te Auaha, the New Zealand Institute of Creativity, which combines the creative courses of Weltec and Whitireia and a new training institution dedicated to digital media, performing and visual arts, writing, Māori carving and weaving. On Tuesday, I'll be giving a foreign policy speech at the New Zealand Institute of International Affairs breakfast, my first foreign policy speech, and attending a Chinese New Year function at Parliament that evening. Some other stuff I think is happening on Tuesday as well.

Wednesday, I'll be revealing the Back Bencher's new puppet of myself. Thursday—I haven't had a preview, for anyone who's interested; I'd be interested if you have. Thursday, I'll be attending Bill English's valedictory speech before heading to Sydney for the annual Australia New Zealand leaders meeting and leadership forum. I'll be accompanied by eight Ministers and a delegation of business leaders, as is the practice for the Australia New Zealand leaders meeting and forum. Then on Sunday we'll be departing for the Pacific Mission.

The announcement I would like to refer to today pertains to the work done by both the Attorney-General and Minister of Justice and relates to declarations of inconsistency. Cabinet has approved today in principle a move to amend the New Zealand Bill of Rights Act 1990, to provide a statutory power for the senior courts to make declarations of inconsistency under the Bill of Rights Act. Now, this is important because, as Parliament passes laws, from time to time, there may be occasions where they are deemed to be inconsistent with the Bill of Rights. As you know, the Act promotes human rights and fundamental freedoms in New Zealand, and is an incredibly important piece of law. However, there is no mechanism for Parliament to be challenged formally on any piece of legislation that may be deemed to be inconsistent. We will, however, be making sure that we retain Parliament's sovereign right to legislate whilst allowing a feedback loop from the most senior courts.

I will hand over to our Ministers to brief you a little further on that decision in principle. As I say, it is a decision in principle so there will be further work coming to Cabinet. But because it's of interest now, because of work being done by the courts, I'll hand over to the two Ministers to give some further explanation.

Hon Andrew Little: Thank you, Prime Minister. So this issue arises for one of two reasons—or, in fact, two reasons. One is that there is litigation in the courts at the moment. It goes to the Supreme Court in a week or two's time. That's one of the Arthur Taylor cases, to do with the right of prisoners to vote. That has worked its way through the court system. The courts at every level so far have confirmed their view that they have the right to declare laws passed by Parliament inconsistent with the Bill of Rights.

What the Supreme Court does is, of course, a matter for them. What we wish to do is indicate not only to the court but, actually, to New Zealand at large that we think that it is right, as a further check and balance on the exercise by MPs of their rights as parliamentarians, to make sure that laws passed by Parliament are not inconsistent with the Bill of Rights, where that can possibly be avoided. There is already the section 7 process that the Attorney-General goes through to indicate whether or not a piece of legislation is inconsistent with the Bill of Rights.

The proposed law that Cabinet has agreed in principle to goes beyond just confirming that courts will have the right to declare laws inconsistent with the Bill of Rights. But it also triggers a process that will require Parliament to review and reconsider a law that is

declared to be inconsistent. So the process will be that if a court—let's say the Supreme Court—declares a law to be inconsistent, then Parliament would then, in a timely fashion, have to reconsider it and decide either to affirm the piece of legislation—and say that we made a political judgment and, therefore, we're going to stand by the law, or to amend it to make it consistent with the Bill of Rights, or to repeal it in its entirety. So those options will be there. Have you got anything, Mr Attorney-General?

Hon David Parker: No, I think you've well described that. The only thing I would say is that we're doing it in a way that preserves the sovereignty of Parliament in the end to have the final word but creates the opportunity for Parliament to review whether it's gone too far at times. We've got a wonderfully flexible system in New Zealand. We're not encumbered by a written constitution or complicated by upper and lower Houses of Parliament. The risk is that when you have a system like that, which serves New Zealand very, very well—we're at the forefront of recognising human rights and civil liberties around the world—nevertheless, the risk is there that at times we can just be a bit peremptory in Parliament, and with a rush of blood can authorise legislation which is inconsistent with the Bill of Rights. This provides a mechanism for Parliament to reconsider that. It was recommended for consideration by the Constitutional Review Committee a couple of years ago, and we're picking up that recommendation, which will be achieved by a combination of amendment to the Bill of Rights to confer the statutory jurisdiction on the courts to make declarations of inconsistency, plus some provisions inside the Standing Orders so that we achieve that outcome, which is reconsideration of the underlying issue.

Media: Will it be retrospective in any way?

Parker: No.

Media: Can either of you give us an example of where this has occurred?

Little: Well, you've got the case that's going to the Supreme Court now, which is the law that now prohibits prisoners from exercising the right to vote. Before that law, prisoners had a right to vote. They were subject to a sentence, custodial sentence, of less than 3 years, and the underlying principle at least there was that upon their release they were going to go back into the community and have a stake in whatever the Government of the day was doing. So there is that, and there have been other findings of inconsistency, if not from the courts then certainly from the Human Rights Review Tribunal.

PM: If you're looking for international examples, though, Barry, my understanding is that Australia, one of their states allows such a mechanism. Canada goes further than us on this, though—it has a mechanism as well.

Media: What's the likely impact on the Taylor case of this announcement?

Parker: That will be a matter for the courts. The Crown will be bringing to the attention of the court that we are proposing this amendment to the New Zealand law, but how the court reacts to that is a matter for them. We're not trying to control the outcome, although it is relevant to their decision.

PM: I think the point to make, though, is that this is a change more broadly because of the importance of our interaction with the Bill of Rights Act, and giving some footing to declarations of inconsistency. So it isn't being triggered necessarily by one particular example or case.

Media: But it does enable you to avoid an embarrassing situation downstream if the Supreme Court did find this was inconsistent with BORA. You would at least not be playing catch-up.

Parker: Well, actually, I think the more important thing here is it provides a remedy. A declaration doesn't change anything. What needs to happen is where these instances of inconsistency are identified, that we take a breath in Parliament and reconsider it, and, as the Prime Minister and Andrew Little have already indicated, at times Parliament is quite

within its rights to say, "No, we believe this to be justified." But on other occasions it is likely to say, "Well, actually, upon reconsideration, we think that position should be modified."

Media: Do you think it will mean that bills that currently don't pass their Bill of Rights Act vet are less likely to be passed through the Parliament?

PM: Not necessarily. Not necessarily, no. I mean, the standard, the bar for this is still reasonably high. A declaration of inconsistency requires the senior courts to make that declaration. So, no, I don't think that would necessarily—of course, we should always give considerations to whether or not a bill passes or fails the Bill of Rights vet. That's the point of that mechanism, but this is a secondary measure to that.

Media: For this to be triggered, does someone have to take a case to the court? So this potentially won't happen for some years after a bill is passed?

Little: Correct. The court has to make their declaration of inconsistency to trigger the process. What it might do, as the Prime Minister has suggested, is that as parliamentarians are considering a law, there might be a slightly more considered view taken given that a certificate from the Attorney-General saying it's inconsistent with the Bill of Rights, might or would be relevant evidence at a subsequent hearing for somebody who is seeking that declaration of inconsistency.

Media: But in the select committee process—I mean, you already have the Attorney-General section 7 process, and then you have the ability at select committee—I've been in many select committees where judges themselves have submitted as a collective on legislation and said, "This doesn't sit right with us in the Bill of Rights." I just—I don't see—is that not that enough? I don't really see the point when—

Parker: Well, the distance of time, I think, can sometimes be beneficial. I think when a number of—as you point out, quite often these things unfold over a number of years, and when the court, in a very considered way, because our courts are very considered in these matters, presents their reasoning some time later, when the heat may've gone out of the argument anyway, it enables Parliament to just take a breath and reconsider it.

Media: But aren't you also relying on someone taking—you know, actually having put themselves through the expense of taking a case to court?

PM: But the alternative is the status quo, in which case someone can go through the expense of the court and there be a declaration of inconsistency that leads to nought. This at least allows for there to be a valve, which means it comes back to Parliament for further consideration, and that is far better than the status quo.

Media: David Parker, is there actually anything at present preventing the courts from declaring that a law is inconsistent with the Bill of Rights Act?

Parker: That is a moot point that is being discussed through the courts at the moment in the Taylor case that Andrew Little referred to.

Media: But surely courts can declare anything they want, really, if there's no particular action required?

Parker: I think that, given that that case is before the courts, it would be inappropriate for me to express a firm view on that. The Court of Appeal judgment, which is the latest law on that, sets out the arguments that were made in favour and against that proposition.

Media: Did the previous Government consider doing this, or was it not put to them?

Little: It appeared in the Constitutional Advisory Panel's report a few years ago as a recommendation, and it wasn't taken up.

Media: Isn't that also a path—the sort of inconsistency with the Bill of Rights Act that some of the pay equity claimants have taken through the courts as well?

PM: Some of those were Human Rights Act, which has a different—my understanding is some of those were Human Rights Act claims, and there is an existing mechanism for

them, which does allow a mechanism for redress that doesn't exist for BORA. That's at least my understanding

Little: The Human Rights Act has a specific provision to allow the Human Rights Review Tribunal to declare a law in breach of human rights.

Media: Can you name a couple of bills that this would affect at the moment that we're looking at?

PM: Yes, as the Minister said, there's been rare cases. The one that's currently before the courts is probably the most recent, but there haven't been many.

Parker: We haven't introduced any piece of legislation that we're proposing to vote for that has got a negative Bill of Rights vet in the current Government.

Media: Well, you voted—actually, I think you voted last week for a bill that had a negative—

Parker: Which one was that?

Media: Well, that's the teacher's registration bill—it's a former Tracey Martin one, now it's Jenny Marcroft. It didn't pass the Bill of Rights Act vet, and you guys voted for it.

PM: The member's bill that's just about to go before select committee?

Media: Yes.

PM: Yeah, I mean, that's obviously—has a process before it. But as I've said, there will be cases where there will be vets. Of course, we take Bill of Rights vets seriously. There will be cases from time to time where there may be a negative Bill of Rights vet, but we must make sure that when that happens, that is a very considered view. What we're providing for is another mechanism by which the public or individuals can challenge us through the courts and we are forced to reconsider again. And so that's currently a mechanism that does not exist that we believe has a place.

Media: Can you think of any examples of what specifically you're trying to avoid happening? You know, are there any sort of cases in the past maybe the previous Government—

Parker: One of the criticisms that's made of New Zealand's constitutional settings is that Parliament holds all of the cards. Now, there are good arguments in favour of that. It's worked pretty well for New Zealand for the last couple of hundred years. But it's also true that, at times, it would be good if there was a mechanism to give effect to where things go a wee bit skew-whiff in breach of the Bill of Rights. Now, this provides a mechanism to address those that doesn't currently exist, and I think you'll find that most of the civil libertarians in the land will see this as significant progress towards giving better effect to the Bill of Rights without compromising the sovereignty of Parliament.

Little: We are unusual in the Westminster system in that we have a single—well, a unicameral Parliament, whereas Australia, Canada, the UK, obviously, and many other Parliaments have two Houses. So there is a kind of a check on it and a bit of an opportunity for a senior House to reflect on a piece of legislation and make recommendations to a lower House. We don't have that. So this is just a further mechanism to ensure that when our Parliament is passing laws that infringe upon human rights, we think very carefully before passing that law.

PM: I'll just take another—yes, so obviously this is an "in principle" decision, so we still have a process to go through, Barry. James.

Media: So on the retrospectivity issue, can someone take a piece of old legislation—old law, something that's already been passed—to the courts and challenge whether it fits in with the Bill of Rights?

Parker: I would envisage, after this amendment to the Bill of Rights Act is passed, that that would be possible, yes.

Media: So it is retrospective?

Parker: Well—

PM: But that's not retrospective. If you take a current case, that's not retrospective.

Media: But you can take a case of an old law—

PM: Any law, technically, from the day it passes is old law, in that sense.

Media: And if the goal is to have this oversight, why rely on someone taking it to the courts in the first place? Can't you just make that process automatic so that they look over it and make sure that it fits in with the Bill of Rights, before—

PM: Well, that's our Bill of Rights vet. Obviously, though, that then comes down to a decision of Parliament. This adds a level of oversight that's external to Parliament.

Little: We still want to maintain the separation of powers between the legislature and the judiciary. That's the proper thing to do. But this is allowing, or giving, Parliament the opportunity to respond to a finding by our courts that a law that Parliament has passed is inconsistent with the Bill of Rights.

Media: I mean, one of the concerns that people have is the tendency for Government itself to resort to "Henry VIII" powers? Is this mechanism likely to put a brake on the tendency for Government to use "Henry VIII" clauses to further its agenda?

Little: It wouldn't so much do that; it's really focused on the Bill of Rights issues and the human rights contained in the Bill of Rights. Where there is a law passed by this Parliament that on the face of it is inconsistent with the Bill of Rights and citizens' human rights, then that is when it comes into play. Just the exercise of powers by the executive wouldn't necessarily meet that test.

Media: If the exercise of those powers is in conflict with BORA, presumably that would then click in as a potential route.

Little: Arguably yes.

Media: Mr Parker, can I ask while we've got you here: have you made any progress on the *Hit & Run* investigation?

Parker: We're getting closer to a decision, but we haven't yet taken one.

Media: When do you think that will be?

PM: I would say within a month.

Media: Just getting back to BORA, though, there are a lot of people who would like the courts to have the power to strike down laws of Parliament. Can you give us a commitment that any Government you lead will not give the courts that power?

PM: Yeah, no, that is not what Cabinet agreed in principle to today.

Media: Yeah, what about the future?

PM: Well, Cabinet today didn't agree to that so I wouldn't see us doing that in the future.

Media: It's just that some people will see this as a halfway house, or the thin end of the wedge to give, you know, the courts a lot more power than they have.

PM: No, I would see it, as I say, as a way of making sure that there's an additional mechanism, which still retains the sovereignty of the New Zealand Parliament.

Media: So is there any legislation at the moment that you think could be affected by this, where there's been a declaration of conflict and where—

PM: That would require us to anticipate what someone might choose to take before the courts. I don't know that we're in a position to do that.

Little: It often arises—of course it arises in Government legislation, but I think it more frequently arises on a per capita basis with private member's bills, because not every MP has access to the drafting skills and knowledge that Government Ministers have. The legislation that is presently before the Supreme Court exactly comes from that stable.

Media: But there must have been legislation where the vetting process alerted everyone that this is a problem. Could this trigger the use of this legislation there?

Parker: Well, although—look, the vet is the attorney's opinion. Parliament can have a different opinion sometimes, and it is possible that sometimes Parliament is right and the attorney is wrong.

PM: Not that you're suggesting that for a moment.

Parker: Ha, ha! Prior attorney. Ha, ha! No, I'm not suggesting that at all. But—look, the courts will be wise in their use of this power, and where, in their wisdom, they think that Parliament's gone too far, we're now creating a mechanism for Parliament to reconsider it. We're not promising that we'll agree with the courts, but we're creating a vehicle for that reconsideration and for the wisdom of both arms in these divisions of power to listen to each other, and at times modify the outcome, which I think would be a good thing.

Media: Is there any exemption intended for security intelligence - type issues? Presumably, the courts won't have full access to those, and a complainant may feel that their BORA rights have been infringed by the security and intelligence agencies. How is—

PM: This is about legislation, not individual operational cases. Yep. All right. I'm heartened by the level of interest in this subject matter, greatly. And, look, if I could add the final word on it: you know, as a Government we made a commitment to operating as a Government differently to try to enable there to be greater faith built in the way that we operated as a Government. I see this as one mechanism by which we can do that, allowing ourselves to be challenged while still maintaining the important sovereignty of Parliament and fulfilling some of the work that was done some years ago by that constitutional committee. I'll leave the Ministers with me here just in case you have anything additional. But otherwise, any other questions for today?

Media: Prime Minister, just on the *60 Minutes* interview that aired last night in Australia, how did you feel when he asked you about a conception date?

PM: Well, look, I have to say I haven't had a chance, obviously, to watch the show. It aired in Australia last night. It's fair to say that actually I couldn't recall their being anything from the interview that I found that particularly stood out for me, and had to be reminded of that question. And you're assuming that I haven't been asked by New Zealand media that question before, as well.

Media: Have New Zealand media asked you what date you conceived your baby?

PM: They asked a question that in a round-about way implied that, yes.

Media: So you were comfortable—generally you were comfortable—

PM: Oh, look nothing stood out for me. Look, at the time, certainly, I think that question threw me a little bit, but it would be going a bit far to say I was somehow offended by it. I wasn't it. It's one I think is put under the heading of "too much information".

Media: What about him calling you attractive?

PM: Again, the implication there is that I've never had an interview where that's been done or raised or in some way implied before. I have. Again, I wasn't particularly offended or phased by the interview as a whole.

Media: Did you find it sexist or insulting at all?

PM: No, no. Again, as I say, the interview didn't particularly stand out for me in a way that made sense when I saw some of the headlines that followed on. I had to look back and remind myself of what the questions might have been.

Media: Do you think the guy's been picked on because he's an older white male?

PM: No. I haven't spent a lot of time analysing it. Yeah—maybe I've lost all my sensitivity. Maybe it's just that I'm from Morrinsville. I don't know, but I wasn't particularly phased by any of it.

Media: Regarding the Russell McVeagh allegations, just following on from an MP's comments in select committee last week that she had concerns around Government departments using the firm, are you aware of any directives to Government departments to review their relationship?

PM: No, no. I've obviously seen the reporting, as others have, and think it's entirely appropriate that there be further investigations undertaken based on what's been reported by Russell McVeagh, but beyond that, no, I've had no conversations with any Ministers or anyone who may have contracts with Russell McVeagh as to the nature of their arrangements.

Media: The firm does quite a lot of sensitive work for people like ACC, rape cases, the Human Rights Commission. Is it appropriate that they're undertaking that work?

PM: I think every member of the public would have an expectation after seeing some of those stories that those firms undertake their own internal processes to respond to what are some significant allegations, but beyond that I've had no conversations with anyone from Government departments about any flow-on effects for them.

Media: So you're comfortable with Russell McVeagh working—

PM: I think they need to undertake that work for themselves, but at this point I'm not having any conversations with Government departments about repercussions, in any way.

Media: Can we put that question to the Attorney-General and the Minister of Justice in terms of, is there any work being done in considering the procurement policies—around sexual harassment or—

Parker: Well, I'm aware that Russell McVeagh are on the panel of lawyers who are, from time to time, engaged by Government. I'm also aware that they're active in those roles currently. The Government procurement rules include appropriate requirements of good conduct, but I'm not aware of the Government procurement agency—and I'm responsible for it; it's MBIE—currently, actively, on the basis of the investigations, trying to strike them off the list of approved providers.

Media: But should they?

Parker: I wouldn't jump to that conclusion.

Media: Sorry—can you just step up to the mike if you're going to talk? Sorry.

Parker: I wouldn't jump to that conclusion, but I—as the Prime Minister's already indicated—you know, there's more work that needs to be done by Russell McVeagh.

Media: So Julie Anne Genter said last week that Jan Logie was looking at the Government's policies around sexual harassment. Could procurement be part of those options?

PM: I would need to ask Jan Logie what was covered by the work that she's likely to do. But I think it's fair to say that, as there has been for some time, there's a real awareness of making sure that our workplaces are safe and respectful places. And she's undertaking a piece of work to ensure that that's the case. I cannot tell you at this point whether or not anything she's doing would then have any crossover impact with anything we've seen reported.

Media: What about individual lawyers? Should the Law Society, if the organisation decides, you know [*Inaudible*] that lawyers have to—

PM: Yeah, I mean, and that's a—yeah, and that's a question I think worthy of asking the Law Society, and I would be interested to hear what they would say to that.

Media: You're heading to Australia this week.

PM: Yes.

Media: The relationship's been rocky over the past couple of years. Are you—what are you going to do to try and, I guess, heal some of that?

PM: Again, maybe I just have no sensitivity. I think our relationship is absolutely fine. My expectation is that we will continue on what has been some really constructive bilaterals and informal meetings to date—continuing to talk about the strength of our relationship with a particular focus on where to take CER next for Australia and New Zealand. There is no other country that has a relationship like ours with Australia. They are our closest ally. But, really, for us it's about the next step. How can we make sure that we continue to see economic gains from that relationship for the likes of our small and medium sized enterprises, for instance?

Media: Malcolm Turnbull, meeting with Donald Trump last week, said America was Australia's best mate.

PM: Ha, ha!

Media: You've just said that Australia's our closest friend.

PM: Yeah, by definition. I mean, our economic relationship, the freedom of movement—by definition, they absolutely are. We have no relationship that mirrors the one we have with Australia. I'm not particularly concerned by whether or not—where we rank in the hierarchy of besties.

Media: On this foreign policy topic, you've got this keynote address tomorrow—a big foreign policy speech. What are you going to be saying?

PM: I never called it big, but thank you. So tomorrow, I'll be highlighting some of the areas where this Government wants to place emphasis on international relations and the way that New Zealand conducts itself—referencing some of the things that we're known for, but also the importance for us of rules-based mechanisms, but also placing emphasis on some of the current challenges that we're facing in the international environment. So that's a general overview. I wouldn't want to ruin your reason for coming by giving away too much.

Media: The ANZ Business Confidence numbers are out later this week. Are you expecting to see optimism bounce back?

PM: Oh, look, I think these things sometimes are a bit of a slow burn. So I don't have high expectations for us to see immediate jumps. That's something that this Government will be working diligently on over time, regardless, actually, of what the numbers say.

Media: What sort of things have you been doing to try and restore that confidence?

PM: For us it's about making sure that there is reassurance about our future agenda and the involvement we anticipate having with business. We want to work collaboratively on some of the issues that we're looking at, going forward. There are real opportunities within our housing area, within the areas around environmental sustainability, regional growth. We want to maximise those by partnering and working closely with business, and on employment law. For those larger pieces of work, we are going to take a tripartite approach, and we've been talking to business about that, as well.

Media: Prime Minister, just some questions from *Newshub Nation's* Mike Wesley-Smith.

PM: Yes.

Media: Do you believe that compensation averaging $20,000 is fair and reasonable for people who were repeatedly sexually abused as children in State care?

PM: Certainly, as spokesperson who had a lot to do with people who went through the claims process, I've seen a huge variance in the range of compensation that people have received. That's one of the reasons we do want to allow, within the royal commission, the ability of people to talk openly and for them to refer back to us a view on the compensation and claims process as a whole. So without commenting on individual cases, I anticipate that they will have something to say to us about that.

Media: But $20,000 doesn't seem that fair and reasonable for someone who was sexually abused in State care.

PM: Yeah, I've seen cases that were lower than that too. So, as I say, we want to create a mechanism for people to be able to feed back on their experience going through the process. In some cases, that will have been via the courts, which adds a whole layer of additional experience for those victims. Sometimes it'll be through the historic claims unit. Either way, we want that royal commission to be able to report to us on whether they think that is working well and adequately.

Media: And will it have teeth, those recommendations? Will those people who have already received, you know, 10 grand in compensation be able to go back to the Crown and say, "Actually, I want more?"

PM: Look, for those cases, I imagine probably what's happened, if they've been settled through the court, probably their right of redress there is probably somewhat limited. But that shouldn't stop them being able to come and make the case that we should look more broadly at what's happening in that space. And by all means, of course, the Government has undertaken this work because we believe it's important to hear from them.

Media: Just under the last Labour Government, Crown lawyers argued in court in 2007 that sexual abuse of a child in State care hasn't caused any long-term mental health problems to people. Does that represent the official position of your Government?

PM: No. No, it does not. What I would say as well is that we have asked specifically to make sure that our terms of reference that allow people who have had an experience where the Crown may not have acted as a responsible litigant to also share their experience.

Media: Ms Ardern, are you proud of the actions of your two Labour MPs in select committee last week, who refused to shake the hands of the Iranian delegation?

PM: Look, I obviously wasn't in the room, but my personal perspective on these matters is that we will often encounter people from a range of different backgrounds and ethnicities, cultural beliefs, and religious beliefs. We won't always know the protocols that they're likely to be most comfortable to engage with, but my personal practice has always been to observe those and be respectful of them.

Media: But are you happy with the actions that those two Labour MPs took?

PM: Again, I'm not going to pass judgment without knowing the context for them. You know, I've been situations where I may have inadvertently caused offence without intending to, and without knowing all of the ins and outs. I'm not going to pass judgment on their actions, but, certainly, my personal belief is that where someone is particularly observing their religious beliefs, that for me is something that I am totally happy and willing to respect.

Media: Just on the foreign policy side, the Communist Party has decided to remove the term limits for President Xi Jinping. Are you concerned or surprised about that, given the concerns human rights groups and others have about his crackdown on dissidents and the like?

PM: No. That is a matter solely for the Chinese Government. Of course, regardless of any of those matters, regardless of terms of power, we've always taken our opportunity to raise individual human rights issues where they exist, and that wouldn't change.

Media: And also on China, but just a bit different: a top US defence official—it might have been in the same speech where they said they were best mates with Australia—said that

they are hoping to ask for help with the freedom of navigation in the South China Sea. They said that the tensions have risen. Are you seeing that? Will you talk about that with Malcolm Turnbull, and do you expect any request to be made—

PM: Yeah, look, I think the South China Sea issue has been an ongoing one for quite some time now. I don't see that necessarily changing. In fact, the only thing that probably has overtaken it in recent times has been discussion around the response to North Korea. New Zealand's view has always remained consistent on the South China Sea. We want rules-based institutions that are followed. We want open access. We want to ensure consistency in the application of those rules. None of that has changed for us, so I don't imagine that issue will come off the table any time soon. OK. Oh, last question?

Media: Prime Minister, just quickly, it is the eve of the new National Party leader. Who is your pick?

PM: So you're asking who I want to spike in the last moments of their campaign. I haven't made any picks throughout this contest for the National Party. It's an internal matter. I don't intend to now, either. Right.

Media: Is that because you don't care or—

PM: No. Obviously I take an interest, but, no, it's just not a matter for me, and probably I'm reflecting of my own trauma of being involved in these in the past. All right. Thanks, everyone.

conclusion of press conference

(4)

Document 5

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.

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[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, which will allow the Government to introduce legislation early in 2019.

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

(5)

MINISTRY OF JUSTICE
Tāhū o te Ture

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

Action sought	**Timeframe**
Indicate your preferred option for recognising and responding to declarations of inconsistency.	22 December 2017
[redacted]	s9(2)(f)(iv)
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.	

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Ruth Fairhall	Deputy Secretary, Policy	04 498 2399	[redacted]	☐
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584		☒
David Crooke	Chief Advisor, Civil and Constitutional	04 494 9912		☐

s9(2)(a)

Minister's office to complete

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

Minister's office's comments

In Confidence

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.

s9(2)(f)(iv)

[redacted]

[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.

Should the Courts be able to issue Declarations of Inconsistency?

The Crown's position is the Court only has the power if conferred by Parliament s9(2)(h)

[redacted]

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. [redacted]

Create a legislative mechanism to make declarations effective s9(2)(h)

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.

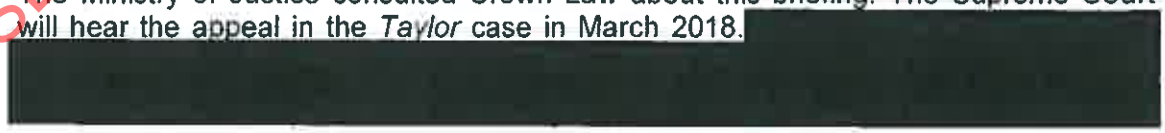
40. It could be controversial, given that the courts have only just declared this remedy to be available. Excluding the power to make declarations would rule out the only possible remedy for inconsistent legislation. There would be no means of testing whether legislation was inconsistent with an individual's 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

s9(2)(f)(iv) [redacted]

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 the new year on the matter of declarations of inconsistency. YES / NO

Ruth Fairhall

Deputy Secretary, Policy

APPROVED SEEN NOT AGREED

Hon Andrew Little

Minister of Justice

Date / /

6

NEW ZEALAND

CROWN LAW OFFICE

8 August 2001

Attorney-General

Vetting: Human Rights Amendment Bill PCO4066B/9
Our Ref: ATT114/1048(9)

Introduction

1. I have vetted the Bill for compliance with s 7 of the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). My conclusion is that the Bill is not inconsistent with the rights and freedoms in the Bill of Rights.

2. It may be helpful to indicate the reasons for my conclusion.

Background

3. The Bill deals largely with procedural, jurisdictional and institutional issues. The various Parts cover matters such as the composition of the Human Rights Commission, how governmental discrimination is to be assessed and how complaints and breaches are to be dealt with. It also amends a number of other Acts, with emphasis on eliminating discrimination, and in particular sexual orientation discrimination.

4. The Bill addresses the expiry of s 151 of the Human Rights Act 1993 ("HRA"), which currently exempts statutes, regulations and certain government actions from the HRA until the end of 2001. Under the Bill, it is proposed that almost all governmental actions, including enactments, will be subject to the HRA complaints procedure.

5. Such complaints, except in relation to employment and racial and sexual harassment, will be assessed against the anti-discrimination standard in the Bill of Rights, which is incorporated into the HRA. Where enactments are found to be inconsistent with the HRA/Bill of Rights, they will remain in force but will be subject to a declaration procedure to identify such inconsistencies for the legislature.

The Bill of Rights

6. Significantly, the Bill does not limit the rights and freedoms under the Bill of Rights, and in particular s 19 of the Bill of Rights, which deals with freedom from discrimination. Proposed ss 20H (cl. 6) and 21B(2) (cl. 7) state explicitly that nothing in Parts 1A or 2 of the Bill affects s 19 of the Bill of Rights.

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7. The question then arises as to how a Bill that does not affect the rights in the Bill of Rights itself could be inconsistent with those rights. My view is that it cannot. The Bill provides alternate mechanisms to those available under the Bill of Rights for the pursuit of complaints relating to discrimination, including by government. It creates procedures and remedies, but any failure to create additional remedies does not, and cannot in my view, give rise to an inconsistency with s 19 of the Bill of Rights.

8. The Bill undoubtedly provides greater and more readily accessible remedies against government than are at present available, given the presence of s 151 HRA (and to a lesser extent s 153(3), which protects immigration enactments, policy and practices). While it affords only limited remedies in respect of discrimination that is authorised by statute, they are greater than or equivalent to those available under the HRA and the Bill of Rights.

9. The Bill of Rights does not have a specific remedies section. However under Bill of Rights case law, and in particular *Baigent's* case,[1] there is an implied right to effective remedies in case of violation. This has been seen as required by Article 2(3) of the International Covenant on Civil and Political Rights ("ICCPR") which requires effective remedies for breaches of protected rights. The limited remedies available under the HRA in respect of discrimination authorised by statute parallel the limit that arises from s 4 of the Bill of Rights.

Consideration of specific provisions

10. The remedies available in respect of breaches of Part 1A of the Bill are governed by the proposed ss 92I-92W of Clause 9 of the Bill.

11. The Bill provides a new remedy for governmental breaches of the HRA/Bill of Rights standard, namely declarations of inconsistency and the steps that follow such a declaration. However, apart from such declarations, there are no other remedies for actions taken under statutory authority.

12. Key sections for the purpose of this vetting opinion are the proposed ss 92J and 92K. Section 92J allows the Human Rights Review Tribunal to make a declaration that an enactment is inconsistent with the right to freedom from discrimination affirmed by s 19 of the Bill of Rights. Section 92K, while confirming that the declaration does not affect the validity of the enactment, requires the Minister responsible for the administration of the enactment to present a report to the House (Parliament) bringing the declaration to its notice, and a report containing advice on the Government's response to the declaration. The Minister has to act within 120 days of the disposal of all appeals against the granting of the declaration or, if no appeal is lodged, from when the time to lodge the appeal expired.

13. Such declarations, which may also be made by the High Court (proposed ss 92R-92T), are more far reaching than at present mooted under the Bill of Rights Act in

[1] *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA), 676-677, 691-692, 702-718.

Moonen, as they require specific actions by the relevant Minister.[2] While such declarations may still be considered not to be effective measures for the person whose right is violated, it is nevertheless a far reaching measure requiring reports by a Minister and presentation of the reports to Parliament. Nowak notes that a State party may adopt a wide range of remedies for the requirement in Article 2(3) of the ICCPR.[3] This view would be equally consistent for the Bill of Rights.

14. The new declaration of inconsistency remedy under the Bill is wider in effect than what might be possible under the Bill of Rights, in terms of the *Moonen* decision (above). However, I note for your information that while not a breach of the Bill of Rights in this regard, it may be noted that the United Nations Human Rights Committee (HRC) which monitors New Zealand's compliance with the ICCPR, has criticised the terms of s 4 of the Bill of Rights, and also queried s 151 HRA, on the basis that they limited the remedy available in respect of discrimination by government.[4] The proposed procedure under the Bill goes some way towards addressing this concern, but leaves the limitation under s 4 of the Bill of Rights in place.

15. The Bill also amends the Immigration Act 1987 by inserting new s 149C and s 149D into that Act. Again these provisions do not affect any rights under the Bill of Rights itself, but they do state that no complaint may be made under the HRA in respect of the content or application of the Immigration Act or any regulations under that Act or the content and application of any policy made in terms of s 13A and s 13B of that Act (proposed s 149D). The proposed s 149C confirms that s 149D recognises that immigration matters inherently involve different treatment on the basis of personal characteristics.

16. Again, while the proposed s 149D specifically envisages distinctions on the basis of personal characteristics (proposed s 149C), the Bill does not take away rights and freedoms under s 19 Bill of Rights; all it in effect does is not create new rights in this particular context.

17. The proposed ss 79(3) and 92B(7) prevent the consideration of complaints by the Commission and the bringing of proceedings in respect of complaints in relation to "an order of a court, or an act of omission of a court affecting the conduct of any proceedings". The proposed provisions prevent individual complainants from seeking a remedy under the principal Act in respect of specific actions of a court in particular proceedings.

18. However, it is implicit that a remedy for non-compliance with the right of non-discrimination under the Bill of Rights remains available by way of appeal and, in respect of inferior courts, judicial review. The proposed provisions do not appear

[2] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

[3] Nowak "UN Covenant on Civil and Political Rights: CCPR Commentary" (1993), NP Engel publisher, para 69, pp 63-65.

[4] "Human Rights In New Zealand: Report to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights", Ministry of Foreign Affairs and Trade, Information Bulletin No. 54 (June 1995) p 69 paras 11 and 12. Section 4 of the Bill of Rights protects enactments that are inconsistent with the Bill of Rights.

to limit the possibility of complaints or proceedings in respect of the general practices of a court. The effect of the proposed provisions is therefore only to prevent the complaints and proceedings mechanisms from operating as a parallel appeal structure or as an intrusion into court jurisdiction. They therefore give rise to no issue of consistency with the Bill of Rights.

Yours sincerely

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APPROVED
SEEN
I CONCUR
13/8/2021