NEW ZEALAND LAW SOCIETY

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New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020

07/08/2020

Submission on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (the **Bill**).

1.2 The Bill establishes a mechanism for the Executive and the House of Representatives to consider, and, if they think fit, respond to, a declaration of inconsistency made under the New Zealand Bill of Rights Act 1990 (the **Bill of Rights**) or the Human Rights Act 1993 (the **Human Rights Act**).

1.3 The Law Society supports the Bill.

1.4 In summary, the Law Society submits that:

(a) As set out in the Explanatory Note, the Bill seeks to provide "a mechanism for the Executive and the House of Representatives to consider, and if they think fit, respond to, a declaration of inconsistency" made under the Bill of Rights or the Human Rights Act. The Bill does not purport to empower or affirm the making of declarations of inconsistency by the courts. This narrow mission is appropriate and justified. It will be for the courts to determine whether a declaration should be made and, if so, ensure that the fact a declaration has been made is clear so that the Attorney-General is able to comply with the obligation to notify the House of Representatives.

(b) The Bill's proposals for notification, including the associated modalities, are appropriate. In particular, it is desirable for responses to declarations of inconsistency made under the High Court's inherent power and the statutory power conferred by section 92J of the Human Rights Act to be aligned. It is also appropriate for the House of Representatives to take the lead on any response once it has been notified that such a declaration has been made. However, we recommend the Bill should be amended to include a *legislative* requirement that, within an appropriate timeframe, the Executive prepare a written response to a resolution by the House of Representatives in respect of the appropriate response to a declaration of inconsistency.

(c) The mechanism in the Bill will operate together with proposed changes to the Standing Orders, as contemplated by the Explanatory Note. The Law Society recommends the Standing Orders Committee consider including several requirements when amending the Standing Orders (discussed in more detail at paragraph 5.2 below).

(d) The package contemplated by the Bill and proposed changes to Standing Orders is important because it facilitates New Zealand's ability to ensure that those whose

rights are violated have an effective remedy, as required by Article 2(3) of the International Covenant on Civil and Political Rights (the **ICCPR**).[1]

1.5 The Law Society would welcome the opportunity to be heard in relation to this submission.

2 The Bill

2.1 The Bill must be understood in the light of the Supreme Court's decision in *Attorney-General v Taylor* and the statutory framework set out in the Bill of Rights.[2]

2.2 In *Taylor*, the Supreme Court held (by a majority) that the High Court has the power to make a formal declaration that legislation is inconsistent with a right or freedom affirmed in the Bill of Rights.

2.3 Section 4 of the Bill of Rights makes it clear that any legislation declared "inconsistent" by the courts remains valid and enforceable.

2.4 The Bill does not purport to empower or affirm the making of declarations of inconsistency by the courts. Rather, the Bill's purpose, as stated in the Explanatory Note, is to "provide a mechanism for the Executive and the House of Representatives to consider, and if they think fit, respond to, a declaration of inconsistency" made under the Bill of Rights or the Human Rights Act.

2.5 The Bill will amend:

(a) the Bill of Rights through the introduction of a new section 7A placing a duty on the Attorney-General to notify the House of Representatives when a declaration of inconsistency has been made by the senior courts;[3] and

(b) section 92K of the Human Rights Act by placing a similar duty on the Attorney-General to notify the House of Representatives when a declaration of inconsistency has been made by the Human Rights Review Tribunal (or by senior courts on appeal) under section 92J of the Human Rights Act.[4]

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1 International Covenant on Civil and Political Rights, 999 UNTS 171, Art 2(3). The majority of the Supreme Court similarly considered *the courts'* ability to make a declaration of inconsistency as important for this reason. *Attorney-General v Taylor* [2019] 1 NZLR 213*,* at paragraph [41].

2 *Attorney-General v Taylor* [2019] 1 NZLR 213.

3 The *Taylor* case did not address whether a declaration of inconsistency may be made by the District Court as that question was not before it. The Bill if enacted will determine what is to happen only when a "senior court" makes a declaration of inconsistency (proposed new s 7A(1)). It does not speak to any declarations that may be made by a District Court. Whether the District Court has the power to make a declaration of inconsistency is a question of law for future resolution by the courts. The Law Society considers that it is appropriate to: (*a*) leave questions about the development of the courts' remedial jurisdiction in this area to the courts; and (*b*) limit the particular *mechanism* introduced by proposed new section 7A(1) to the "senior courts" on the basis that this appropriately recognises the respective roles of the senior courts and the District Court.

4 The only declarations of inconsistency possible under section 92J are declarations of inconsistency with section 19 of the Bill of Rights (the right to freedom from discrimination). Declarations in relation to other rights and freedoms can be made only by senior courts by dint of the power affirmed in the *Taylor* case.

3 The need for clarity as to when a declaration of inconsistency has been made

3.1 As a practical matter, it will be important to know when a declaration has been made so that the Attorney-General – who will be represented in the litigation – is able to comply with the obligation to notify the House of Representatives.[5]

3.2 There are only two cases to date where a declaration of inconsistency has been made under the Bill of Rights (as opposed to declarations made under section 92J of the Human Rights Act). They are the *Taylor* case and *Chief Executive of the Department of Corrections v Chisnall*.[6] In each the High Court's declaration was clear and unequivocal. However, in both cases: (a) the claims were brought by way of a civil proceeding in the High Court; and (b) a declaration was the only remedy sought.

3.3 The need for clarity arises because of the approach adopted by the Supreme Court in *Hansen v the Queen*, which was an appeal against a criminal conviction.[7] In that case, a majority of the Supreme Court found legislation to be inconsistent with a provision in the Bill of Rights, but made no formal declaration to that effect. Instead, the Supreme Court: (*a*) articulated the identified inconsistency; and (*b*) held that it was not able to be avoided by preferring a Bill of Rights-consistent meaning.[8] The result was that the appellant failed in his appeal against conviction. No formal "declaration of inconsistency" was made. Nor was any reason given for not making such a declaration.[9]

3.4 *Taylor* has now affirmed the ability of the courts to make "declarations" of inconsistency. But it leaves apparently untouched the possibility that courts could, in certain circumstances adopt a similar approach to that adopted in *Hansen*: that is, identify that there is an inconsistency between legislation and a provision in the Bill of Rights as a necessary step in the court's reasoning, but not make a formal declaration of the inconsistency.

3.5 The Bill reflects an assumption that the courts will have made it clear when they are making a declaration of inconsistency, presumably by pronouncing it as a formal remedy in the proceeding rather than leaving it to be inferred from the courts' reasoning in any given case.

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5 When the Human Rights Review Tribunal makes a declaration of inconsistency under section 92J of the Human Rights Act the declaration is a statutory remedy that will have been sought in the proceeding. The four declarations made under section 92J are set out in **Appendix A** for reference

6 *Chief Executive of the Department of Corrections v Chisnall* [2020] 2 NZLR 110 (currently on appeal).

7 *Hansen v the Queen* [2007] 3 NZLR 1.

8 Courts and legal commentators have subsequently described *Hansen* as involving an "indication" of inconsistency (as opposed to a "declaration"). That term alludes to the earlier case of *Moonen v Board of Film and Literature Review* [2000] 2 NZLR 9 in which the Court of Appeal used the terms "declaration" and "indication" interchangeably to describe possible judicial responses to inconsistencies between the Bill of Rights and other legislation. No inconsistency was declared in that case and nor was an "indication" of inconsistency made. That imprecision in terminology was among the issues discussed in argument in the *Taylor* case.

9 Whether a declaration of inconsistency is an available remedy in criminal proceedings has not been finally determined by the courts. See, for example the recent observations of the Court of Appeal in *Fitzgerald v R* [2020] NZCA 292 where the Court indicated, in the context of a criminal appeal, that it would be "desirable for a full court of this Court to hear and determine an appeal which squarely raises the question whether a declaration of inconsistency can be sought in the context of an appeal under pt 6 of the [Criminal Procedure Act 2011]" (at [88]).

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3.6 The Law Society:

(a) **Agrees** this assumption is justified in the circumstances. It will be for the courts to determine whether to make a declaration and, in doing so, ensure that the position is made clear.

(b) **Considers** that the continuance of the suggested distinction between an "indication" of inconsistency (made in the course of deciding a case) and a "declaration" of inconsistency (as the result of the case) would be unfortunate. But it is not something that can or need be addressed by this Bill. The Bill does not seek to empower declarations of inconsistency but simply responds to the fact that the courts have recognised them as an available remedy where legislation is inconsistent with the Bill of Rights. It is not appropriate to suggest amendments to clarify the extent of the judicial power to make declarations of inconsistency, and the sorts of proceedings in which the power should be exercised. While it would not be impossible for legislation to do that, this Bill does not do so and any attempt to provide such clarification would require consultation and careful policy consideration.

(c) **Submits** that the narrow mission of the Bill is appropriate and justified. The Bill provides a mechanism for communicating judicial declarations of inconsistency to the House of Representatives when they are made by the senior courts. Any uncertainty as to what counts as a declaration of inconsistency should be managed by the court that is making one. As to their availability in criminal or other proceedings in which they are not explicitly sought as a remedy, but in which a court determines that legislation is inconsistent with a provision in the Bill of Rights as part of its reasoning process, it will be for the courts to decide whether such inconsistency is "declared" (as a remedy). Any uncertainty over the types of proceedings in which declarations of inconsistency can be made is best left to judicial resolution and is not a matter that needs to be resolved by this Bill.

4 The need for consistency in the response to declarations of inconsistency made under the Bill of Rights and the Human Rights Act

4.1 At present, when a declaration of inconsistency is made under section 92J of the Human Rights Act, section 92K places an obligation on the Minister responsible for the relevant legislation to bring that declaration to the attention of the House of Representatives within 120 days, along with a report containing advice on the Government's response to the declaration.

4.2 The Bill will introduce new requirements for notifying and responding to a declaration of inconsistency under the Bill of Rights and will also amend the existing requirements under the Human Rights Act to align them with the requirements for declarations under the Bill of Rights. The Bill will do this by: (*a*) placing the duty on the Attorney-General (as opposed to the responsible Minister) to notify the House of Representatives that a declaration has been made under either the Bill of Rights or the Human Rights Act; (*b*) requiring that the House of Representatives be notified within six working days (as opposed to 120 working days[10]); and (*c*) not requiring any report on the Government's response to the declaration.

[10] The 120-day period reflects the fact that under the current section 92K, the responsible Minister is required to notify the House of Representatives *and* provide a report on the Government's response.

4.3 The most significant change proposed by the Bill is to remove the requirement under section 92K of the Human Rights Act for *the Executive* (through the responsible Minister) to report to the House of Representatives on a response. The Explanatory Note states that Parliament's mode of developing a response to a declaration of inconsistency is, in the first instance, a matter for Parliament. According to the Explanatory Note, "Once the House has been informed about, has considered, and, if it thinks fit, has responded to, a declaration of inconsistency, the Executive can then consider its approach to initiating legislative changes to remedy the inconsistency".

4.4 The Law Society agrees it is appropriate that the House of Representatives take the lead on determining whether any response is required to a judicial declaration that legislation is inconsistent with the Bill of Rights. But it does not follow that no response should be required by the Executive as to how it intends to respond to any resolution by the House of Representatives. The Bill should set out clear steps for the Executive to consider *and respond to* a resolution of the House of Representatives in relation to a declaration of inconsistency. Such a requirement is consistent with the intention expressed in the Explanatory Note and would ensure that the mechanism provided for in the Bill is robust.

4.5 It is entirely proper for legislation to prescribe aspects of the response to a declaration of inconsistency, including the steps that the *Executive* should take to inform *Parliament* of its intended response. Such a requirement is currently provided for in section 92K of the Human Rights Act. Similar requirements have also been included in the human rights legislation adopted in three Australian jurisdictions – ACT, Victoria and Queensland:

(a) Section 33(3) of the Human Rights Act 2004 (ACT) requires that notice of a declaration of inconsistency to be given six sitting days after the day on which the declaration has been notified to the Attorney-General and also requires the Attorney-General to prepare a written response and present it to ACT's Legislative Assembly not later than six months after the day upon which the declaration has been presented to the Assembly.[11]

(b) Section 37 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) requires that, within six months of the declaration having been made, the Minister responsible for the legislation that has been declared inconsistent with one or more of the rights in the Charter must present a copy of the declaration of inconsistency to both Houses of the Victorian Parliament, along with the Victorian Government's written response to the declaration; and

(c) Sections 55-57 of the Human Rights Act 2019 (QLD) require that the responsible Minister must, within six sitting days of receiving a declaration, table a copy of the declaration in Queensland's Legislative Assembly. The Legislative Assembly must refer the declaration to a portfolio committee, which must consider and report on the declaration to the Legislative Assembly within three months of the date on which the

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There appears to be no reason in principle why the notification requirement should not be separate from any requirement to advise as to the Government's response.

[11] The Departmental Disclosure Statement to the Bill notes that the requirement for the Attorney-General to present the declaration to the House within six sitting days after the conclusion of court proceedings is based on current practice in equivalent legislation in the Australian Capital Territory (ACT): see paragraph [3.7].

declaration was referred to it. The responsible Minister must, within six months of receiving the declaration, table a written response in the Legislative Assembly and in so doing, consider the portfolio committee's report.

4.6 The Law Society:

(a) **agrees** that the response to declarations of inconsistency should be the same whether they are made under the High Court's inherent power or section 92J of the Human Rights Act and that the modalities for such notification should be aligned by placing the obligation on the Attorney-General to notify the House of Representatives within six working days when any such declaration has been made;

(b) **agrees** that the appropriate sequence for consideration of a declaration of inconsistency by the senior courts or the Human Rights Review Tribunal in respect of legislation is for the House of Representatives to be notified of that declaration so that it can consider and determine whether a response is necessary in the form of a resolution by the House of Representative (*see* proposed additions to the Standing Orders below); and

(c) **recommends** that the Bill include a requirement for the Executive to provide a written response to the House of Representatives as to how it intends to response to any resolution made by the House of Representatives in respect of a declaration of inconsistency. The obligation to provide that response should allow for an appropriate period from the date of the resolution (e.g., 90 days). This recommendation would entail some drafting changes to the Bill. The Law Society is available to work with officials on drafting options if that would be of assistance.

5 Proposed amendments to Standing Orders

5.1 The Explanatory Note recognises that the statutory changes will operate as part of a package alongside related changes to Standing Orders. The Minister of Justice is to propose changes to the Standing Orders to the Standing Orders Committee to facilitate consideration of declarations by the House of Representatives.

5.2 The Law Society:

(a) **agrees** that the House of Representatives should be given the opportunity to consider and, if it thinks fit, respond to a declaration that Parliament's legislation is inconsistent with a right affirmed in the Bill of Rights, whether the declaration is made by the senior courts or the Human Rights Review Tribunal;

(b) **agrees** that the Standing Orders should be revised to facilitate Parliament's ability to consider and respond to such a declaration by the courts. The proposed changes will serve to achieve the Bill's intent of parliamentary oversight whilst recognising the relationship of mutual respect between Parliament and the courts; and

(c) **recommends** that in due course the Standing Orders Committee consider including as requirements in the Standing Orders that:

(i) the Attorney-General's notification of a declaration of inconsistency stands referred to a select committee for examination;

(ii) the select committee must report to the House of Representatives on any notification referred to it along with any recommendations;

(iii) the report of the select committee is set down for debate in the House of Representatives to be addressed at the time for debating reports from the Privileges Committee;[12] and

(iv) a vote is held in the House of Representatives as to whether to accept the select committee's report and any recommendations made in it.

5.3 In conclusion, the Law Society considers that making the proposed amendments to the Bill and the Standing Orders will ensure that the Bill provides an effective mechanism for the House of Representatives and the Executive to respond to declarations of inconsistency by the senior courts and/or the Human Rights Review Tribunal. This will serve to facilitate New Zealand's ability to fulfil its commitment to provide an effective remedy for breaches of fundamental human rights, as required by Article 2(3) of the ICCPR.

Tiana Epati
President
7 August 2020

[12] *See* SOs 66(1) and 250.

Appendix A

Declarations of inconsistency under s 92J of the Human Rights Act 1993

1. There appear to have been four declarations of inconsistency made under s 92J of the Human Rights Act 1993 since the introduction of s 92J in 2001:

   (a) *Howard v Attorney-General* (2008) 8 HRNZ 378 (Human Rights Review Tribunal) – offending provision subsequently changed to remove inconsistency;

   (b) *Heads v Attorney-General* [2015] NZHRRT 12 (Human Rights Review Tribunal) - offending provision subsequently changed to remove inconsistency;

   (c) *Adoption Action v Attorney-General* [2016] NZHRRT 9 (Human Rights Review Tribunal) – no amending legislation contemplated; Government's response was that, despite the text of the legislation, discrimination does not occur in practice;

   (d) *Hennessy v Attorney-General* [2019] NZHRRT 4 (Human Rights Review Tribunal) – Government responded to say the issue is being considered as part of a three- to five-year plan to reform the welfare system.

Declarations of inconsistency under the High Court's inherent power

2. There has been one declaration of inconsistency made under the power affirmed in *Attorney-General v Taylor* – that is, the declaration made by the High Court in that case ([2015] 3 NZLR 791). Parliament has recently removed the identified inconsistency by enacting the Electoral (Registration of Sentenced Prisoners) Amendment Bill and the Electoral (Registration of Sentenced Prisoners) Amendment Bill (No. 2).

3. There is one declaration of inconsistency made under the power in *Taylor* where an appeal is still pending and the declaration of inconsistency is therefore not final: *Chief Executive of the Department of Corrections v Chisnall* [2020] 2 NZLR 110.