IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-4141

UNDER	The New Zealand Bill of Rights Act 1990, the Judicature Amendment Act 1972, Part 30 of the High Court Rules
IN THE MATTER	of a declaration of inconsistency
BETWEEN	**ARTHUR WILLIAM TAYLOR**
	First Applicant
AND	**HINEMANU NGARONOA, SANDRA WILDE, KIRSTY OLIVIA FENSOM AND CLAIRE THRUPP**
	Second, Third, Fourth and Fifth Applicants
AND	**THE ATTORNEY-GENERAL OF NEW ZEALAND**
	First Respondent
AND	**THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS**
	Second Respondent

FIRST APPLICANT'S SYNOPSIS OF SUBMISSIONS
April 2015

Next event date: Friday 10 April 2015 (substantive hearing)
Judicial Officer: Heath J

Filed by the First Applicant in Person.

MAY IT PLEASE THE COURT:

1.0 BACKGROUND

1.1 The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 ("the 2010 Amendment") came into force on 16 December 2010. As from that date, all sentenced prisoners serving sentences of 3 years or less lost their pre-existing right to vote for the government of their country.[1]

1.2 The 2010 Amendment was not a Government measure. It had its genesis in a private member's bill introduced by Paul Quinn. In its Select Committee stage it was considered by the Law and Order Committee instead of by the Justice and Electoral Committee which normally considers electoral matters.[2]

1.3 The 2010 Amendment was opposed by New Zealand Labour (42), the Green Party (9), the Māori Party (5), Progressive (1) and United Future (1). It was supported by New Zealand National (58) and ACT New Zealand (5). It therefore passed into law by 63 votes to 58.

1.4 The First Applicant ("I") and others have taken various proceedings in relation to the disenfranchisement of prisoners brought about by the 2010 Act.[3] At present the electoral petition I brought concerning the Helensville electorate remains reserved.

1.5 I adopt and support Mr Francois' submissions relating to other jurisdictions.[4]

2.0 ISSUES BEFORE THE COURT

2.1 The two issues before this Court are:

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1 Prior to this, only sentenced prisoners serving sentences of more than 3 years were denied the right to vote.

2 *Taylor v Attorney-General* [2014] NZHC 2225 at [4], n 3.

3 Submissions of Counsel for the Second to Fifth Applicants (16 February 2015) (Applicants' Submissions) at [2.1]-[2.42].

4 Applicants' Submissions at [4.1]-[5.32].

2.1.1 Does the High Court have jurisdiction to declare legislation inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA) where the Attorney-General has reported to Parliament by way of s 7 that the legislation appears to be inconsistent with NZBORA, and cannot be justified?

2.1.2 If the High Court has jurisdiction as above [2.1.1], then is the disenfranchisement of prisoners under s 80(1)(d) of the Electoral Act 1993 inconsistent with the right of every New Zealand citizen over the age of 18 to vote pursuant to s 12 of NZBORA?[5]

2.2 The primary issue before the Court is that in 2.1.2. However, there is a secondary issue in that the s 12 NZBORA right is not absolute. As explained by the Supreme Court in *R v Hansen*,[6] NZBORA requires the interpreter to adopt an interpretation that does not limit rights in an unjustified manner.[7]

2.3 That secondary issue must be determined by the Court because, as I understand it, the Respondents do not concede that the 2010 Amendment breaches the s 12 NZBORA right insofar as it disenfranchises prisoners serving sentences of 3 years or more. That is, they consider that is a justified limitation in terms of s 5 of NZBORA.

2.4 That is not accepted. My position (as, I understand, is Mr Francois') is that while the s 12 NZBORA right may have reasonable restrictions imposed on it,[8] disenfranchising prisoners who have completed the punitive/deterrent part of their sentence is an unreasonable restriction.

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5 New Zealand Bill of Rights Act 1990 [NZBORA], s 12:**Electoral rights**
Every New Zealand citizen who is of or over the age of 18 years—
(a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
(b) is qualified for membership of the House of Representatives.

6 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (TAB 23).

7 See also Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 (TAB 35).

2.5 In *A v New Zealand Parole Board*, Simon France J said:[9]

> [3] A sentence can be viewed as having two components:
>
> a) the penal or punishment part, which represents the amount of time that must be served as "just deserts" for the offending. Once an offender has served this part of a sentence he or she becomes "parole eligible"; whether they are released is up to the Parole Board;
>
> b) the balance of the sentence, which represents the period from parole eligibility date to the last day of the sentence. This portion might be served if it is assessed by the Parole Board to be inappropriate, or unsafe, to release the prisoner following completion of the punishment component.
>
> [4] It has always been the case that Parliament says how much the punishment part of a sentence will be. It does that by setting a basic rule applicable to all sentences. Over the years that rule has changed but the amounts have been either 1/3, 1/2 or 2/3 of a sentence.

2.6 In the electoral context, the European Court of Human Rights held in *Hirst v United Kingdom (No 2)* that:[10]

> The Court notes that the Chamber found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and **could no longer be said to serve the aim of punishing the applicant once his tariff (that period**

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8 NZBORA, s 5; International Covenant on Civil and Political Rights [ICCPR] 999 UNTS 171 (opened for signature 9 December 1966, entered into force 23 March 1976), art 25.

9 *A v New Zealand Parole Board* [2008] NZAR 703 (HC) at [3]-[4].

10 *Hirst v United Kingdom (No 2)* [2005] ECHR 681, (2006) 42 EHRR 41 at [76].

> **representing retribution and deterrence) had expired**. (emphasis added)

2.7 I am serving total sentences in excess of 3 years but completed the non-parole part of my sentences in 2012.[11] The question as to whether the 2010 Amendment unreasonably restricts my right to vote is therefore very much a live one. It is not "abstract" or "stand-alone". The Court needs to consider my circumstances and conduct the s 5 NZBORA interpretative exercise as explained in *Hansen* to determine the matter.[12]

3.0 DECLARATIONS OF INCONSISTENCY – JURISDICTION

3.1 The starting point is *Simpson v Attorney-General* (*Baigent's case*), where a Court of 5 (Gault J dissenting) held that the NZBORA implied that effective remedies should be available for its breach.[13] Cooke P and Casey J observed that the absence of an express remedies provision in NZBORA is not a valid ground for distinguishing it from constitutions in other countries which contain express remedies clauses.[14]

Application of NZBORA Remedies

3.2 Section 3(a) of NZBORA expressly subjects judicial acts to its provisions. As well, Judges and Courts would be covered by s 3(b) as persons or bodies with a public function pursuant to law. It is submitted that the implications of this are twofold:

3.2.1 Judicial actions ought to conform to NZBORA; and

3.2.2 The common law as declared by judges ought to conform to NZBORA.

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11 Affidavit of Arthur William Taylor (29 August 2013).

12 *Hansen*, above n 6, at [120]-[124] per Tipping J.

13 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] at 669.

14 At 676, 691-692.

3.3 In *Attorney-General v Chapman*, Her Honour Elias CJ stated:[15]

> In summary, and for the reasons more fully developed in what follows, I consider that it would be contrary to the scheme and purpose of the New Zealand Bill of Rights Act if those deprived of rights through judicial action are denied the opportunity to obtain damages from the State, where an award of damages is necessary to provide effective remedy. **Under the Act, all branches of the government, including the judicial branch, are bound to observe and protect the rights affirmed**. A gap in remedy for judicial breach is contrary to the obligation of the State to provide effective remedy in domestic law. Excluding remedy for judicial breaches would leave a large remedial hole because many of the rights affirmed in the Act are afforded principally within judicial process through discharge of judicial function. They include in particular the "[m]inimum standards of criminal procedure" contained in s 25 and the "[r]ight to justice" contained in s 27. If breaches through judicial act are irremediable, such rights are undermined. (emphasis added).

3.4 The declaration of common law can be conceived as a judicial act (it clearly not being a legislative or executive act). It follows that NZBORA therefore controls the development and articulation of the common law so that, where required, common law must be modified or developed so as to be consistent with NZBORA.

3.5 In *Quilter v Attorney-General*, Kerr J observed that "some tenets of the common law may require modification to give effect to s 5 of the Bill of Rights".[16]

3.6 In the defamation case of *Lange v Atkinson*, Elias J held that the NZBORA protections are to be given effect by the Court in applying the common law.[17] Her Honour relied on s 14 of NZBORA (freedom of

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15 *Attorney-General v Chapman* [2011] NZSC 110 at [8].

16 *Quilter v Attorney-General* (1996) 3 HRNZ 1 (HC) at 21.

17 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 32.

expression) to rule in favour of the existence of a defence of "political expression". This was upheld by the Court of Appeal.[18]

3.7 Cooke P noted in *Baigent's case*:[19]

> First, although the New Zealand Act contains no express provision about remedies, this is probably not of much consequence. Subject to ss 4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. **The ordinary range of remedies will be available for their enforcement and protection.** Secondly, the long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, **the Act requires development of the law when necessary.** Such a measure is not to be approached as if it did no more than preserve the status quo. (emphasis added)

3.8 Cooke P further noted:[20]

> It is argued for the Crown that the absence of a remedies clause in the Bill of Rights Act is significant, particularly by contrast with the inclusion of one in the draft Bill in the White Paper "A Bill of Rights for New Zealand" of 1985, which was not proceeded with. As indicated in *Noort*, I do not attach weight to this argument. By its long title the Act is "(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand". The words "protect" and "promote" are as strong as the word "vindicate" which, as the case law cited in the judgment to be delivered by Hardie Boys J shows, has influenced the Irish Courts in granting a compensation remedy despite the absence of a remedies clause. The New Zealand Act is "(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". By art 2(3) of the Covenant each state party has undertaken inter alia to ensure an effective remedy for violation (those are equally strong words) and to develop the possibilities of judicial

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18 *Lange v Atkinson* [1998] 3 NZLR 424 (CA).

19 *Baigent's Case*, above n 13, at 676.

20 At 676.

> remedy. Article 17 includes the right not to be subjected to arbitrary or unlawful interference with privacy and home.
>
> Section 3 of the New Zealand Bill of Rights Act makes it clear that the Act binds the Crown in respect of functions of the executive government and its agencies. It "otherwise specially provides" within the meaning of s 5(k) of the Acts Interpretation Act 1924. Section 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed. In a case such as the present the only effective remedy is compensation. A mere declaration would be toothless. In other cases a mandatory remedy such as an injunction or an order for return of property might be appropriate: compare *Magana v Zaire* (1983) 2 Selected Decisions of the Human Rights Committee (under the Optional Protocol) (Communication No 90/1981) 124, 126.
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> It is necessary to be alert in New Zealand to the danger that both the Courts and Parliament at times may give, or at least be asked to give, lip service to human rights in high-sounding language, but little or no real service in terms of actual decisions. If so, it is a natural tendency or temptation for those adjusting to Bill of Rights concepts, perhaps excusable on that account but still to be guarded against.

3.9 His Honour also noted the Explanatory Note to the 1989 Bill which led to the Act:[21]

> And, to the extent that extrinsic materials may help in interpreting the 1990 Act, the most cogent is the Explanatory Note to the 1989 Bill which led to the Act. The note includes "Action that violates those rights and freedoms will be unlawful. **The Courts might enforce those rights in different ways in different contexts.**" A similar statement was made by the Prime Minister in moving the introduction of the Bill in the

21 At 677.

> House of Representatives (502 *New Zealand Parliamentary Debates* 13039-13040). (emphasis added)

3.10 The Court restated the firmly established principle that if there is a right, there must be a remedy for its breach. This was comprehensively explained by McKay J:[22]

> The statute contains no express provision for the enforcement of the rights which it declares, or providing remedies for their infringement. The Attorney-General, in his motion to strike out, asserts that breach of the New Zealand Bill of Rights Act does not give rise to any civil remedy sounding in damages against the Crown.
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> The Solicitor-General referred in argument to art 25 of the Bill of Rights White Paper "A Bill of Rights for New Zealand" (1985) which contained an express provision for a remedy where the rights and freedoms guaranteed by the Bill of Rights were infringed or denied. The person aggrieved was to be entitled to apply to the **Court "to obtain such remedy as the Court considers appropriate and just in the circumstances".** That clause was deleted from the draft Bill as reported back to Parliament by the Select committee. It was submitted that to allow a remedy in the present case would be to treat the Act as if that clause had not been deleted. It was submitted that before a statute can give rise to an actionable duty for its breach, it must be clear that Parliament intended such a right to be available. Reliance was placed on the decision of the House of Lords in *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733.
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> The proposition that a right of action for breach of a statutory duty depends on the intention of the legislature is well established. The statute may make breach of the duty an offence, and may contemplate that the only means of enforcement is to be by prosecution. In other cases breach will not constitute an offence, but will confer a personal right of action on the person whose right is infringed. In some cases the

22 At 717-718.

intention is to provide both for prosecution and for civil remedies. The Machinery Act 1950 is a familiar example in the last category, although the civil remedies have been overtaken by the Accident Rehabilitation and Compensation Insurance Act 1992.

What is more difficult to comprehend, however, is that Parliament should solemnly confer certain rights which are not intended to be enforceable either by prosecution or civil remedy, and can therefore be denied or infringed with impunity. Such a right would exist only in name, but it would be a misnomer to call it a right, as it would be without substance. The maxim ubi jus ibi remedium, where there is a right there is a remedy, has a long history. According to *Broom's Legal Maxims* (10th ed, 1939) 118-119 it led to the invention of the action on the case, which was affirmed by the Statute of Westminster II in 1285 (UK). The same principle is referred to in *3 Blackstone's Commentaries on the Laws of England* (16th ed, 1825) 123. As was said by Holt CJ as long ago as 1703 in *Ashby v White* (1703) 2 Ld Raym 938 at pp 953-954:

> 2. If the plaintiff has a right, **he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; [a] want of right and want of remedy are reciprocal**... Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him.

The common sense of that decision applies equally to the New Zealand Bill of Rights Act. That Act is described in its long title as:

> An Act—
>
> (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

One cannot see how rights can be protected and promoted if they are merely affirmed, **but there is no remedy for their breach, and no other legal consequence**. The legislative intention is clear that the rights affirmed by the New Zealand Bill of Rights Act are intended to have substance and to be effective. The second part of the long title states the further purpose of the Act to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights**. One of the obligations which the International Covenant places on the states parties is to ensure that an effective remedy is given to persons whose rights are violated: art 2(3). The declared purpose of the New Zealand bill of Rights Act must be considered in interpreting the Act, as is required by s 5(j) of the Acts Interpretation Act 1924. It is impossible to interpret the Act as simply making a pious declaration of so called rights which could be infringed with impunity and would confer no remedy for their breach.** The omission of art 25 of the White Paper draft does not show an intention that there should be no remedy, **but rather that Parliament was content to leave it to the Courts to provide the remedy**. The inclusion of a statement to that effect in the Act was unnecessary.

It does not follow that the remedy will in every case be an action for damages or monetary compensation. **That will depend on the nature of the right and of the particular infringement, and the consequences of the infringement**. Where evidence has been obtained for the purposes of a criminal prosecution in a manner which infringes the rights of an accused person under the Act, the effective remedy is the prima facie exclusion of that evidence: *R v Kirifi* [1992] 2 NZLR 8. In the case of breaches which involve deprivation of liberty or invasion of privacy, monetary compensation is likely to be the appropriate remedy. In most such cases there may well be a right to damages for false imprisonment or trespass, but that does not preclude a separate ground of claim based on breach of the statute. The same damages may be recoverable by either route.

3.11 In *Chapman*, Elias CJ approved of the reasoning in *Baigent's case*:[23]

> The redress of human rights was said by Cooke P in *Baigent* to be in "a field of its own". The courts, he thought, would "fail in our duty" to protect and promote human rights and fundamental freedoms in New Zealand if they failed to provide "an effective remedy", including in appropriate cases a compensation remedy. Although the affirmation of human rights "as part of the fabric of New Zealand law" **meant (subject to ss 4 and 5) that "[t]he ordinary range of remedies will be available for their enforcement and protection"**, the Act was not properly treated "as if it did no more than preserve the status quo": **it required "development of the law when necessary"**. The remedy developed in *Baigent*, in explicit application by the majority of the Court of Appeal of the approach taken by the Privy Council in *Maharaj*, was not a form of vicarious liability for tort or other private law wrong. The other Judges in the majority in *Baigent,* Casey, Hardie Boys and McKay JJ, expressed similar views to Cooke P. **All pointed to the fact that Parliament, in enacting s 3, had made it clear that the judicial branch of government was bound to observe the rights and freedoms contained in the Bill of Rights Act**. All took the view that the public law remedy of damages was one against the Crown. And all relied explicitly on the reasoning of the Privy Council in *Maharaj* as applicable to the approach to vindication of rights under the New Zealand Bill of Rights Act.

3.12 Her Honour explains that the foremost principle to be followed by the Courts is the remedying of wrongs:[24]

> I consider that these arguments of policy for limiting the application of *Baigent* and extending the immunity do not displace the principle that **has "first claim" upon the courts: that wrongs are to be remedied**. Observance of

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23 *Chapman*, above n 15, at [29].

24 At [62].

> that general principle is axiomatic where the wrong in issue is breach of the rights and freedoms contained in the New Zealand Bill of Rights Act. **Provision of effective remedy is essential to discharge of the obligations imposed on the courts by s 3(a).** In that context there is no occasion to create a new immunity for the State on the basis of the policies behind judicial immunity. They are not directly engaged. And none are sufficient in themselves or as combined to place a remedy in damages beyond the remedial jurisdiction of the courts when rights are breached.

3.13 This echoes the House of Lords in *Darker v Chief Constable of the West Midlands Police*,[25] which referred to the principle that a wrong must have a remedy as "[t]he predominant requirement of public policy".

3.14 Elias CJ explains that rights require effective remedies:[26]

> [1] A right without a remedy is "a vain thing to imagine", as Holt CJ recognised in 1704.[27] That rights are vindicated through remedy for breach is fundamental to the rule of law. Since enactment of the New Zealand Bill of Rights Act 1990, the provision of effective remedy for breach of the "human rights and fundamental freedoms" affirmed in the Act has been the responsibility of the courts.[28] At issue in the present case is whether New Zealand domestic law prevents damages being awarded, when they would afford effective remedy, if the breach of rights is caused by judicial action.

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25 *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 45 (HL), referred to in *Chapman*, above n 15, at [57].

26 *Chapman*, above n 15, at [1]-[2].

27 *Ashby v White* [1790] EngR 55; (1703) 2 Ld Raym 938 at 953, [1790] EngR 55; 92 ER 126 at 136 (KB).

28 See *R v Goodwin* [1993] 2 NZLR 153 (CA) at 191 per Richardson J; also "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 22–23.

> [2] **What is effective remedy for Bill of Rights breach differs according to the particular breach and its circumstances.** To date, the remedies ordered in New Zealand have included exclusion of evidence,[29] stay of proceedings,[30] directions to administrative and judicial bodies,[31] **development of the common law to achieve consistency with the Bill of Rights Act,**[32] and damages.[33] In large part such remedies have been adapted for the enforcement and protection of rights from "[t]he ordinary range of remedies".[34] But the courts have recognised that **the Act requires "development of the law when necessary" by the courts if they are not to fail in the duty to give a remedy where rights have been infringed.**[35]

3.15 Her Honour considers that an effective remedy must be tailored to the circumstances:[36]

> The approach suggested on behalf of the Attorney-General limits and distorts remedial options by permitting the correction of judicial breach only through the judicial process in which it occurs (as through appeal) or through established collateral challenge (as in judicial review of inferior courts), while excluding a remedy in damages. **That is contrary to the approach taken to date in New Zealand case law, which has preferred to look to the full range of remedies in tailoring a**

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29 See, for example, *R v Te Kira* [1993] 3 NZLR 257 (CA).

30 See, for example, *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA).

31 As in *Bakker v District Court at Te Awamutu* HC Hamilton CP35/99, 6 August 1999 per Tompkins J.

32 See *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [111] per Gault P and Blanchard J and at [229] per Tipping J.

33 See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

34 *Simpson v Attorney-General* [*Baigent's case*] [1994] 3 NZLR 667 (CA) at 676.

35 At 676.

36 *Chapman*, above n 15, at [12].

> **response to give effective and appropriate remedy in the circumstances**. (emphasis added)

3.16 Where remedies are excluded, this limits the Courts' ability to tailor an effective remedy:[37]

> "**Effective remedy" is remedy tailored to the particular case. Consideration of the full range of responses is appropriate in identifying effective remedy. Exclusion of the possibility of a remedy** in damages against the State for judicial breach **means that the courts are hampered in response for one type of case**. The options that Richardson J was able to contemplate would then be limited in respect of breach by the judicial branch of government. As a result, the courts may be pushed to alternative remedies, such as exclusion of evidence or stay of proceedings, in cases where damages would be the more appropriate vindication of right. (emphasis added)

3.17 Elias CJ further emphasises these statements regarding the range of remedies available by quoting the Canadian case of *R v Germain*,[38] which refers to monetary compensation as being "part of the armory of remedies that may be just and appropriate when there has been an infringement of a right guaranteed by the Charter".[39]

3.18 The Chief Justice's interpretation of *Baigent's case* and the importance of effective remedies was shared by McGrath and William Young JJ:[40]

> [118] The line of reasoning in each of [the majority *Baigent* judgments] reflected a common and consistent approach to remedies. First, the Judges emphasised the importance of the long title as a guide to interpretation of the Bill of Rights Act's provisions affirming rights and freedoms. The long title said it was an Act "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand". While it naturally

37 At [49].

38 *R v Germain* (1984) 53 AR 264 (ABQB).

39 *Chapman*, above n 15, at [37].

40 At [118]-[121].

followed that ordinary judicial remedies were available for the enforcement and protection of rights, the strength of this expression of the Act's purpose required that the courts develop the current law where necessary rather than simply preserve the status quo.

[119] The long title also said it was an Act "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Each of the Judges in the majority in that respect referred to art 2(3) in which:

> Each State Party to the present Covenant undertakes:
>
> > (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> >
> > (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> >
> > (c) To ensure that the competent authorities shall enforce such remedies when granted.

The strength of the expression of this international obligation, in particular its reference to ensuring effective remedies and the right to development of judicial remedies, was emphasised by each Judge.

[120] The second common feature in the reasoning of each majority judgment was the central provision in the Bill of Rights Act for its application:

> **3 Application**
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> This Bill of Rights applies only to acts done—

> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) 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.

The common approach of the majority to what this provision required was expressed by Cooke P:

> Section 3 of the New Zealand Act makes it clear that the Act binds the Crown in respect of functions of the executive government and its agencies. It "otherwise specially provides" within the meaning of s 5(k) of the Acts Interpretation Act 1924. Section 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed. In a case such as the present the only effective remedy is compensation. A mere declaration would be toothless.

[121] **Hardie Boys J saw s 3(a) as a commitment by the Crown that the three branches of government exercising its functions, powers and duties would observe the rights that the Bill affirms. He said it was both implicit in and essential to that commitment that the courts would comply with protected rights in discharging their duties and, in doing so, were able to give effective remedies where rights were infringed**. McKay J also saw s 3 as relevant to the issue of remedies for breach and said:

> It is the Crown, as the legal embodiment of the state, which is bound by the International Covenant to ensure an **effective remedy for the violation of fundamental rights. Parliament has affirmed those rights in order to affirm New Zealand's commitment to the International Covenant**, but by a statute which applies only to acts by the legislative, executive or judicial branches of the government, or by any person or body in the performance of a public

> function, power or duty: s 3. **Where a right is infringed by a branch of government or a public functionary, the remedy under the Act must be against the Crown.**

3.19 In *Baigent's case*, according to McGrath and William Young JJ, the necessity of effective remedies compelled the availability of compensation:[41]

> In *Baigent*, the majority held that it was implicit from the Bill of Rights Act's purpose of affirmation and promotion of rights and freedoms that New Zealand courts would develop the remedies for breach of rights to the extent necessary. The courts were bound to give effective remedies for breaches and, in the context of *Baigent*, that required compensation.

3.20 In *Chapman*, by contrast, McGrath and William Young JJ considered that *Baigent* damages for judicial breach of NZBORA were unavailable because other effective remedies were available:[42]

> We are satisfied that, in the context of the facts assumed in *Baigent*, the judgments of Cooke P, Casey and Hardie Boys JJ cannot be read as holding that the Crown's liability extends to all infringements by those bound to comply with the Act under s 3. The Court of Appeal considered that our interpretation would be contrary to s 3(a) as it would require the partial exclusion of the judicial branch of government from the overall operation and application of the Act. But Cooke P saw the effect of s 3(a) as being to require the Court to give remedies that were effective to vindicate infringed rights. On this approach, the judiciary's obligations under the Bill of Rights Act are not lessened as **there are extensive remedies, within the justice system, available for judicial breach and we shall later explain how they are effective in vindicating rights under the Bill of Rights Act**. Nor does the dissenting judgment of Gault J (who did not accept that the Act impliedly created a

41 At [203].

42 At [129].

> new cause of action) support the wider liability proposition. McKay J's judgment is obiter on the point and the view of a single judge. (emphasis added)

3.21 In their view, the availability of alternative effective remedies distinguished *Chapman* from *Baigent's case*:[43]

> In *Baigent*, Cooke P and Hardie Boys J emphasised that the obligation that s 3(a) of the Bill of Rights Act imposed on the judiciary was to give an effective remedy to those whose rights were infringed. That was not so in the case of Mrs Baigent where there was no question of exclusion of evidence and a declaration would be "toothless". But in the present case, there are extensive remedies in the judicial process, including, at the present time, remedies by way of appellate review of the judgments of the Court of Appeal. **This is not to say that such remedies will invariably be effective**. There can be situations where wrongly convicted persons may have inadequate remedies because of high public policy considerations. But, in deciding whether the *Baigent* cause of action should be extended to judicial breaches of rights, the high degree of general effectiveness of remedies in the justice system is highly relevant. Also relevant is the possibility that the effectiveness of existing remedies in the appellate process may be reduced if the rules of trial fairness must also be used to determine entitlements to compensation. There could be changes in judicial practice that disadvantage criminal appellants.

3.22 While the effectiveness of some remedies (ex gratia payments) in the judicial context might be limited, McGrath and William Young JJ noted that these were subject to an express reservation to the ICCPR by the New Zealand government:[44]

> **As the Law Commission has pointed out, it is fundamental to the rule of law that determinations of rights are made by the judiciary, not the executive**. The ex gratia scheme of

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43 At [198].

44 At [201].

> compensation by government decision for those wrongfully convicted accordingly does not fill gaps left in the criminal justice system by the limits of available remedies. That area is, however, addressed by the government's reservation to art 14(6). While it may be said that the provision is concerned with compensation for wrongful convictions rather than with effective remedies for breaches of rights, there is clearly significant overlap between the two concepts. Importantly, art 14(6) also covers the position of those whose convictions have been reversed. The reservation confines the scope of the international obligation and limits the extent to which that provision in the Covenant can clarify the scope of the public law action under the Bill of Rights Act.

3.23 McGrath and William Young JJ also noted comments of Richardson J in *Harvey v Derrick*,[45] discussing public policy considerations for judicial immunity in tort:[46]

> In observing that judicial conduct is "amenable to the Bill of Rights guarantees" he is pointing out that judges are bound by the Bill of Rights Act which, of course, s 3(a) clearly stipulates.

International Covenant on Civil and Political Rights

3.24 New Zealand has ratified the Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"). This means I can complain to the United Nations Human Rights Committee ("UNHRC") based in Geneva, Switzerland, that the rights the New Zealand government has guaranteed to me in ratifying Article 25 (without reservation) have been violated.

3.25 It would be an extraordinary state of affairs if a New Zealand citizen had to go to an international body to vindicate the rights that his or her government had guaranteed to him or her in its primary human rights legislation because the Courts of his or her own country were unable to protect that right.

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45 *Harvey v Derrick* [1995] 1 NZLR 314 (CA).

46 *Chapman*, above n 15, at [134].

3.26 Her Honour Elias CH said in *Chapman*:[47]

> Those whose rights have been breached by judicial act would have a claim under the First Optional Protocol to the International Covenant on Civil and Political Rights to which New Zealand is a party. The incongruity and inconvenience of permitting an international remedy but not a domestic one was a factor in the reasoning of two of the Judges in *Baigent* in granting a remedy against the State. Although in that case the breaches were those of the executive branch of government, the incongruity would be as marked in the case of judicial breach.

3.27 McGrath and William Young J further pointed out in *Chapman* that the Law Commission has discussed the importance of remedies in the scheme of the ICCPR:[48]

> As well, the Law Commission pointed out that art 2(3) of the International Covenant on Civil and Political Rights, which ensures those whose rights have been violated have a remedy, **requires a remedy to be available within the state's constitutional processes**. It is not necessary that it be against the state party in every case. (emphasis added)

3.28 Should it be necessary for a citizen to resort to the UNHRC, it would obviously be of great value for that body to be apprised of whether the domestic Courts considered the 2010 Amendment was justified in the context of New Zealand society. Domestic courts will have a much greater understanding of the mores and acceptability/justification of the allegedly infringing legislation than an international body. With this in mind, Tipping J stated in *Moonen v Film and Literature Board of Review*:[49]

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47 At [9].

48 At [142], referring to Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's c*ase and* Harvey v Derrick (NZLC R37, 1997) at [97].

49 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20].

> It might be said that the potentially difficult and detailed process involved under s5 is somewhat academic when the provision in question is bound to be applied according to its tenor by dint of s4. Section 5 would have had more than persuasive effect if the Court had been given the power, as in Canada, to declare legislation invalid. That was deliberately not done in New Zealand and the late introduction of s4 into the Bill of Rights was not accompanied by any express recognition of the remaining point of s5. That section was, however, retained and should be regarded as serving some useful purpose, both in the present statutory context and in its other potential applications. That purpose necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. **Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder**. (emphasis added)

3.29 Mr Francois has referred to the statement of Elias CJ in *Taunoa v Attorney-General*:[50]

> That leaves the remedy of damages. Under the Covenant on Civil and Political Rights, it is the responsibility of the States Parties to provide in their domestic legal systems "effective remedy" for breaches of rights. **In the New Zealand legal system it is the responsibility of the courts to provide appropriate remedies to those whose rights and interests recognised by law have been infringed.** Without such

50 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [106], referred to in Applicants' Submissions at [3.20].

> vindication, the rights affirmed for all people in the New Zealand Bill of Rights Act would be hollow. It is for that reason that the Court of Appeal in *Baigent's Case*, undeterred by the absence of any express provision in the Act about remedies, held that an action for damages can be brought where such damages are appropriate to remedy breaches of the Act. (emphasis added)

Human Rights Act 1993

3.30 As Mr Francois submits, there is no specific exclusion of the High Court exercising jurisdiction under s 92J of the Human Rights Act 1993 ("HRA").[51] Section 92J(1) provides that the only remedy the Human Rights Review Tribunal ("HRRT") may grant is the declaration referred to in subs (2) thereof.[52] That is, the HRRT can declare that an enactment is inconsistent with s 19 of NZBORA.[53]

3.31 The concept of a judicial body declaring an enactment inconsistent with NZBORA is therefore not novel and has been introduced by the legislative body itself. In the face of s 16 of the Judicature Act 1908, which confers "all judicial jurisdiction which may be necessary to administer the laws of New Zealand",[54] it would be strange if this Court did not have jurisdiction to provide a like remedy in like circumstances (i.e. an enactment in breach of NZBORA) to what is an inferior tribunal. An important function of this Court is to exercise a supervisory jurisdiction over such inferior Courts and tribunals.

Commissioner of Police v Ombudsman

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51 Applicants' Submissions at [3.18].

52 Human Rights Act 1993, s 92J(1).

53 Human Rights Act 1993, s 92J(2).

54 Judicature Act 1908, s 16:**General jurisdiction**
The court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

3.32 *Commissioner of Police v Ombudsman*[55] dealt with powers conferred on the Ombudsmen by the Official Information Act 1982 ("OIA"), allowing them to investigate and review decisions made in relation to requests for information under that Act.[56] Section 34 of the OIA provides:[57]

> **Restriction on application for review**
>
> Where any person makes a request under this Act that official information be made available to him and a decision to which section 28(1) or section 28(2) applies is made in relation to that request, that person—
>
> > (a) shall not make an application under section 4(1) of the Judicature Amendment Act 1972 for the review of that decision; and
> >
> > (b) shall not commence any proceedings in which that decision is sought to be challenged, quashed, or called in question in any court,—
>
> unless a complaint made by that person in respect of that decision has first been determined under this Part.

3.33 The Court of Appeal held that notwithstanding the restrictions in s 34, the Courts in criminal proceedings could effectively investigate whether review decisions made under the OIA for briefs of evidence had been complied with – and make any necessary orders.

3.34 Specifically, Casey J stated:[58]

> The Act gives a right to personal information but does not confer exclusive jurisdiction on the Ombudsmen to determine whether it should be supplied. **Accordingly, as with any other legal right, the Courts must also have a concurrent**

55 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

56 Official Information Act 1982, s 28.

57 Official Information Act 1982, s 34.

58 *Commissioner of Police v Ombudsman*, above n 55.

> **jurisdiction in this field and, as part of their inherent ancilliary powers**, they can make orders requiring information to be disclosed.

3.35 There is no logical reason why this line of reasoning should not extend to this Court utilising the s 92J HRA power to declare an enactment inconsistent with the right to be free from discrimination in s 19 of NZBORA in appropriate proceedings.

3.36 Once that is realised, there is no logical reason why the Court could not declare that an enactment is inconsistent with other fundamental human rights protective provisions in NZBORA. One compelling reason why it should do so is that otherwise there would be a lacuna in its ability to provide any remedy for breaches of NZBORA by the Legislature itself.

Legislature has Bound Itself to Comply with NZBORA

3.37 By s 3(a) of NZBORA, the Legislature has bound itself to act in conformity with NZBORA:[59]

> **Application**
>
> This Bill of Rights applies only to acts done—
>
> (a) by the legislative, executive, or judicial branches of the Government of New Zealand;

3.38 The principal (if not only) relevant "act" this body performs is the enacting of legislation. Given s 4 of NZBORA, no relevant duty appears to be imposed upon the Legislature as a whole: s 4 makes it clear that legislation inconsistent with NZBORA may be enacted (whether or not there has been a report by the Attorney-General under s 7).

3.39 However, this is not the end of the matter. It is submitted that in binding itself to act in accordance with NZBORA, the Legislature has recognised the extraordinary importance and "constitutional" status of

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59 NZBORA, s 3(a). The legislative branch of the New Zealand government is Parliament, which comprises the House of Representatives and the Sovereign in Right of New Zealand: see Constitution Act 1986, s 14.

NZBORA. It can be expected that if this Court tells it that it has acted in breach of NZBORA, that will have a salutary effect – perhaps sufficient to re-think the matter.

3.40 After all, the operative words in s 7 of NZBORA are that the Attorney-General shall bring to the attention of the House of Representatives provisions which appear to be inconsistent with NZBORA. It does not constitute a finding that the provision in question is inconsistent.

3.41 The Attorney-General in his s 7 report on the 2010 Amendment said:[60]

> 1. I have considered the Electoral (Disqualification of Convicted Prisoners) Amendment Bill for consistency with the New Zealand Bill of Rights Act 1990. **I consider** that **the Bill appears to be unjustifiably inconsistent** with the electoral rights affirmed by s 12 of the Bill of Rights Act.
>
> 2. The **apparent inconsistency** with the Bill of Rights Act arises from cl 4 of the Bill...
>
> ...
>
> 16. I conclude that the blanket disenfranchisement of prisoners **appears to be inconsistent** with s 12 of the Bill of Rights Act and that it cannot be justified under s 5 of that Act. (emphasis added)

3.42 This is a long way from a positive declaration by this Court that the 2010 Amendment is inconsistent with NZBORA. As already noted, it may be expected that such a finding would have a salutary effect on the legislature and, in view of it being bound by NZBORA, may well prompt it into rethinking the matter. In this way, the finding of this Court (as expressed in the declarations sought) would be of real value not only to the Applicants (and all other disenfranchised prisoners throughout New Zealand) but to the Legislature itself.

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60 Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill (17 March 2010) (TAB 37) at [1], [2], [16].

3.43 Writing in 2009, Geiringer expressed scepticism that the New Zealand Courts would be willing to make declarations of inconsistency even if the jurisdiction to do so was established:[61]

> None of this rules out the possibility that once such a jurisdiction has been established, certain judges might, in certain circumstances, be prepared to exercise it. The exercise of such a jurisdiction is, however, counterintuitive for most New Zealand judges, who are not comfortable with being put in the role of critic of the legislative branch, and may also be wary of the political reaction this may provoke. The bulk of New Zealand judges are unlikely to make such declarations unless they have a clear direction from the senior judiciary that it is their duty to do so in cases involving unjustified breaches of the NZ Bill of Rights. The recent offerings from the appellate courts fall far short of such a direction.
>
> In short, then, unless there is a marked change in the direction of recent case law, the prospects for an implied declaration of inconsistency power being exercised in any but the rarest of circumstances are poor.

3.44 Geiringer's scepticism may be answered well by the Chief Justice's subsequent remarks in *Chapman*:[62]

> Secondly, the argument that judges may be deflected from their duty is, as Lord Cooke pointed out in response to a similar claim in respect of the police in *Darker*, the same argument rejected by Lord Reid in *Home Office v Dorset Yacht Co Ltd* when made in respect of the liability of public servants. Lord Reid in that case expressed the conviction that **"Her Majesty's servants are made of sterner stuff". It would be a bad day for the rule of law if the same could not be said about Her Majesty's judges.**

3.45 The remarks of Anderson J in *Chapman* are also noteworthy in this regard:

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61 Geiringer, above n 7, at 640.

62 *Chapman*, above n 15, at [66].

> It is the solemn and ineluctable duty of the judicial and the executive branches of government, often exemplified, to protect judicial independence. The proposition that judicial independence might be or might seem to be compromised, if in certain extraordinary circumstances the Crown might be held liable for judicial acts, rests on assumptions of potential or seeming timidity on the part of judges and constitutional delinquency on the part of the executive. The timidity is apprehended, not because judges could be personally liable, which they cannot be, but because it might be thought that a judge could possibly be influenced in making a decision by a wish not to upset the government or out of anxiety for his or her reputation. Having for more than 40 years seen judges in action and having been a judge for more than 24 years, I have no such apprehension. The best way of maintaining confidence in the judiciary is for it to emphasise the rights affirmed by the Bill of Rights Act. As to possible delinquency on the part of the executive, I take the view that the more the rule of law and the rights affirmed by the Bill of Rights Act are proclaimed, protected and vindicated, the lesser the risk of unconstitutional conduct by any branch of government.

Comity

3.46 The judicial duty to provide an effective remedy outweighs considerations of comity in this case. In *R (Chester) v Secretary of State for Justice*, Lady Hale (Lord Kerr and Lord Hope agreeing) stated:[63]

> [88] Of course, in any modern democracy, the views of the public and Parliamentarians cannot be the end of the story. Democracy is about more than respecting the views of the majority. It is also about safeguarding the rights of minorities, including unpopular minorities. "Democracy values everyone equally even if the majority does not": *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 132. It follows that one of the

63 *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] 1 AC 271 (TAB 21 of Defendant's Authorities) at [88]-[89].

essential roles of the courts in a democracy is to protect those rights. It was for that reason that Lord Bingham took issue with the argument of a previous Attorney-General, Lord Goldsmith, in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 42:

> "I do not . . . accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. . . . But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

[89] The present Attorney General has wisely not suggested any such thing. He recognises that it is the court's task to protect the rights of citizens and others within the jurisdiction of the United Kingdom in the ways which Parliament has laid down for us in the Human Rights Act 1998. But insofar as he implied that elected Parliamentarians are uniquely qualified to determine what the franchise should be, he cannot be right. **If the current franchise unjustifiably excludes certain people from voting, it is the court's duty to say so and to give them whatever remedy is appropriate**. More fundamentally, Parliamentarians derive their authority and legitimacy from those who elected them, in other words from the current franchise, and it is to those electors that they are accountable. They have no such relationship with the disenfranchised. Indeed, in some situations, they may have a vested interest in keeping the franchise as it is. (emphasis added)

3.47 In the strikeout application, Brown J comprehensively considered whether art 9 of the Bill of Rights 1688,[64] and/or the comity between

64 Bill of Rights 1688, art 9, in force in New Zealand by virtue of the Imperial Laws Application Act 1988, s 3 and sch 1.

the Courts and Parliament were engaged.[65] His Honour obviously did not think they were, or he would have granted the Respondents' application for strikeout.

3.48 If the Respondents were correct on this comity/Art 9 point, on principle it would be beyond the power of any Court to find an enactment was inconsistent with any of the rights in NZBORA.

3.49 What is argued for in this case is the form in which the Courts can express a finding that they have already made on many occasions[66] and which the Legislature itself has empowered them to make by the enactment of s 5 of NZBORA.

3.50 There can therefore be no argument on the grounds of comity or Art 9 that the Courts cannot find that an enactment (or some provision thereof) is inconsistent with one of the rights or freedoms affirmed in NZBORA. What is the difference, in principle, between finding in the course of a judgment that a statutory provision is inconsistent with a right or freedom in NZBORA or declaring that to be so?

3.51 Once we get to that point, it seems the antithesis of justice and contrary to the practice of a Court system that has a proud history of protecting human rights – sometimes against the clamour of the majority[67] – to deny to a claimant the only remedy available.[68] It should not be forgotten that if a declaration is denied, then there is no other remedy available – let alone an effective one.

3.52 I adopt what Andrew Butler said in his article "Judicial Indications of Inconsistency":[69]

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65 *Taylor v Attorney-General* [2014] NZHC 1630 at [52]-[81].

66 *R v Hansen* is an example.

67 The statement in *Chester*, above n 63, at [88] springs to mind.

68 This is particularly so in the context of the fundamental rights involved and their vital importance to any society that describes itself as "free and democratic", and where the issue amounts to a quibble over what form any findings should be expressed in.

> Accordingly, in my view, if the jurisdiction is adopted by the courts then affected persons should be able to apply as of right (but subject to the appropriate standing rules) for an indication of inconsistency, meaning that proceedings can be taken even though it is accepted that there is no potential for the application of s 6 BORA, and all that is sought to be established is that a statute places an unjustified limitation on a BORA right. **If it were otherwise, the impression could be created that the courts favour certain types of cases over others, a stance that is inconsistent with the BORA itself.**

3.53 I further gratefully adopt what Mr Butler said from p 49 ("Arguments in Favour") to the bottom of p 51. I note that at p 60, Mr Butler (then a Crown Counsel) said:[70]

> The arguments in favour and against such a jurisdiction are finely balanced, though my own view is that the arguments in favour are marginally stronger.

3.54 If Your Honour should come to the conclusion that the arguments are "finely balanced", the tradition of this Court is to come down in favour of the protection of human rights. It is hard to see how the human rights landscape in any free and democratic society would benefit from an effective finding that the Courts were unable to find/declare that a core fundamental right of a citizen had been unjustifiably nullified.

Assuming There is Jurisdiction, Should it Be Exercised?

3.55 The starting point is, as has already been submitted, that the Court has no other "weapon in its armoury" to vindicate the breach of the s 12 NZBORA right other than a declaration in appropriate terms (i.e. a declaration that it has been breached). There is no possibility of monetary damages, for example.

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69 Andrew Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Rev 43 (TAB 34) at 56.

70 At 60.

3.56 The other principal factor is the importance of the right breached. In a democracy, the right to participate in choosing the government of the country is a "vitally important" right.[71]

3.57 The fundamental importance of the right to vote is recognised in all countries New Zealand likes to compare itself to – that is, all free and democratic societies. For example, in Canada, a majority in the Supreme Court in *Sauvé v Canada* said:[72]

> The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.

3.58 The majority in *Sauvé* went on to say that:[73]

> *Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override. Thus, courts considering denials of voting rights have applied a stringent justification standard: *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.) ("*Sauvé No. 1*"), and *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.).

3.59 And further noted that:[74]

> The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select

71 *Hirst*, above n 10, at [82].

72 *Sauvé v Canada* 2002 SCC 68, [2002] 3 SCR 519 at [9], [2002] 3 RCS at 535.

73 At [14].

74 At [34]-[35].

> portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.
>
> More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in *August v. Electoral Commission*, 1999 (3) SALR 1, at para. 17, "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts." The fact that the disenfranchisement law at issue applies to a discrete group of persons should make us more, not less, wary of its potential to violate the principles of equal rights and equal membership embodied in and protected by the *Charter*.

3.60 The Constitutional Court of South Africa said in *Minister of Home Affairs v National Institute for Crime Prevention* that:[75]

> As Sachs J held in *August*:
>
> > the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.
>
> The right to vote "by its very nature imposes positive obligations upon the legislature and the executive". This was reaffirmed in *New National Party of South Africa v Government of the RSA and Others* where the "nature, ambit and importance" of the right to vote was analysed by Yacoob J. He stressed that this right **which is fundamental to democracy** requires proper arrangements to be made for its effective exercise. This is the task of the legislature and the executive which have the responsibility of providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections. (emphasis added)

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75 *Minister of Home Affairs v National Institute of Crime Prevention* 2004 (5) BCLR 445 (South Africa CC) at [28].

3.61 In *Hirst*, the European Court of Human Rights similarly described the importance of the right to vote:[76]

> [58] The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 21-22, § 45), and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law...
>
> [59] As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle.

3.62 It is submitted that if jurisdiction exists, and the Applicants have satisfied the Court – on the balance of probabilities – that their case should prevail,[77] then the Court should turn to ordinary public law principles relating to remedy.

Relief - Discretionary

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76 *Hirst*, above n 10, at [58]-[59].

77 Here, the Respondents apparently accept that the disenfranchisement of the Applicants, being general, automatic, indiscriminate (based solely on the fact they are serving prison sentences – irrespective of length) and irrespective of the nature or gravity of their offence and their individual circumstances is an unjustified nullification of their rights in a free and democratic society.

3.63 Those public law principles have been set out succinctly by the Court of Appeal in *Air Nelson v Minister of Transport*:[78]

> [59] Public law remedies are discretionary. In considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
>
> [60] Nevertheless, there must be extremely strong reasons to decline to grant relief. For example, in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL), **Lord Bingham of Cornhill described the discretion as being "very narrow" (at 608) whereas Lord Hoffmann said cases in which relief would be declined were "exceptional" (at 616)**.
>
> [61] In principle, the starting point is that where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the claimant is entitled to relief. The usual assumption is that where there is "substantial prejudice" to the claimant, a remedy should issue: *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108 at 122 (HC). This is evident from *Unison Networks Ltd v Commerce Commission* CA284/05 19 December 2006, where this Court refused to grant relief, notwithstanding a finding that the Commerce Commission had acted unlawfully, on the basis that overturning the Commission's decision would occasion considerable disruption to the electricity industry and its consumers. The majority nevertheless took note of "strong cautions against exercising the discretion not to set aside an unlawful decision": at [81]. (emphasis added)

3.64 The reasons why the Court should grant the declarations sought have been touched on above, but are:

3.64.1 The exceptional importance of the right nullified;

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78 *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [59]-[61].

3.64.2 The large number of persons detrimentally effected;

3.64.3 The necessity to signify that this Court will uphold the Rule of Law, no matter who encroaches on it, and ensure a remedy is provided;

3.64.4 The importance of the Legislature having a judicial ruling that an action it has taken is not justified in a free and democratic society. Where the Attorney-General has already alerted the Legislature that a matter may be an unjustified limitation, it can be expected that a Court ruling that the matter is an unjustified limitation will prompt further consideration from the Legislature as to whether it should have been enacted at all.

3.64.5 Issuing a declaration can only enhance the Rule of Law and protection of human rights generally in New Zealand;

3.64.6 I adopt what Claudia Geiringer said in "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act":[79]

> More tangibly, one apparent effect of granting declaratory relief is that it reverses the result in the case. If declaratory relief is sought and gained, then the case has presumably been won rather than lost. The very fact that this is so may make a challenge to offending legislation a more attractive option for an aggrieved person. There may also be costs implications as well as implications for the availability of legal aid. In practical terms, therefore, the granting of formal relief may significantly increase the likelihood that aggrieved persons will challenge the justifiability of legislative breaches of the NZ Bill of Rights.
>
> For similar reasons, formal declaratory relief would almost certainly make it more likely that the media would report a case as a victory against the

79 Geiringer, above n 7, at 642.

> Government, thus increasing the political pressure on the Government to respond to the breach. It is interesting to note, for example, that the judicial "indication" of legislative inconsistency in *Hansen* received little or no media attention, whereas the formal declaration in *Howard* did receive some, albeit limited, media coverage.

3.64.7 It is more likely that a "dialogue" would occur between the Courts and the government concerning prisoner voting (i.e. a political response of some kind, perhaps leading to the enactment of rights-consistent legislation). The Court's concerns would be communicated effectively and in appropriate form to Parliament. Geiringer notes in her article that the HRRT had made one declaration of inconsistency.[80] Legislation that redressed the breach identified in *Howard* was enacted shortly after the HRRT handed down its decision.[81] Geiringer says that while it is not possible to attribute its enactment directly to the declaration of inconsistency, "[i]t is, of course, possible that the fact that an application for declaratory relief was on foot prompted the Government to expedite a legislative response";[82]

3.64.8 If the matter proceeds to the UNHRC, the Committee will be apprised of the view of the New Zealand Courts, particularly as to whether prisoner disenfranchisement is considered justified in the context of New Zealand societal mores and standards.

3.64.9 As McGrath J said in *Hansen*:[83]

> Articulating that reasoning serves the important function of bringing to the attention of the executive branch of government that the court is of the view that

80 *Howard v Attorney-General (No 3)* (2008) 8 HRNZ 378.

81 Injury Prevention, Rehabilitation and Compensation Amendment Act (No 2) 2008.

82 At 642.

83 *Hansen*, above n 6, at [254].

> there is a measure on the statute book which infringes protected rights and freedoms, which the court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the court's finding. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.

Anderson J also noted that:[84]

> ...the court's opinion will have a social value in bringing to notice an enactment which is inconsistent with fundamental rights and freedoms. **It is indicative of the strength of our democratic institutions that Parliament**, although not countenancing its being overruled, has, **by the terms of the Bill of Rights Act, accepted the prospect of judicial assessment** of the consistency of its enactments with affirmed rights and freedoms.

3.64.10 It only remains to add that the force and moral authority of the voice of the Court is immeasurably greater than from almost any other quarter.[85] Realistically, without it, the Applicants are unlikely to obtain any redress in the foreseeable future. It is trite law that a declaration is only as effective as the willingness of a public body to abide by a Court's statement of the law, as it is not contempt to ignore a declaration.[86]

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84 At [267].

85 Contrasted with that of politicians – who almost invariably are rated the least trusted of any profession in Readers Digest opinion polls.

4.0 ORDERS SOUGHT

4.1 For the foregoing reasons, this Honourable Court should:

4.1.1 Find and affirm that it has jurisdiction to issue a declaration as a remedy where it finds that a right or freedom contained in NZBORA has been unjustifiably limited by a body that is bound by that Bill of Rights;[87]

4.1.2 Make such a declaration in the instant case that the Applicants' rights guaranteed to them by s 12 of NZBORA have been nullified by the 2010 Amendment and that nullification cannot be demonstrably justified in a free and democratic society;

4.1.3 Find that the applicant is entitled to reasonable disbursements (being a self-represented litigant, costs are not permitted to be awarded – but disbursements are).

5.0 LIST OF AUTHORITIES

5.1 A list of authorities is attached.

6 April 2015

A W Taylor

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86 *Bocotra Construction Pte Ltd v Attorney-General* [1995] 2 SLR (R) 282 (Singapore CA) at [28]: "A declaration pronounces upon the existence or non-existence of a legal state of affairs. It does not have any coercive force as it does not contain any order which can be enforced against the defendant." See also *Webster v Southwark London Borough Council* [1983] QB 698.

87 i.e. by NZBORA, s 3(a) and (b).

Appellant in person

LIST OF AUTHORITIES

Statutes

1. Bill of Rights 1688, art 9.
2. Constitution Act 1986, s 14.
3. Electoral Act 1993, ss 60, 80(1)(d) (as in force on 15 December 2010), 80(1)(d) (as in force from 16 December 2010).
4. Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, ss 4, 6.
5. Human Rights Act 1993, s 92J.
6. Imperial Laws Application Act 1988, s 3, sch 1.
7. Injury Prevention, Rehabilitation and Compensation Amendment Act (No 2) 2008.
8. Judicature Act 1908 s 16.
9. New Zealand Bill of Rights Act 1990, ss 4, 5, 6, 12.
10. Official Information Act 1982, ss 28, 34.

International Conventions

11. International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 9 December 1966, entered into force 23 March 1976), arts 2, 25.

Cases

12. *A v New Zealand Parole Board* [2008] NZAR 703 (HC)
13. *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA).
14. *Attorney-General v Chapman* [2011] NZSC 110.
15. *Bocotra Construction Pte Ltd v Attorney-General* [1995] 2 SLR (R) 282 (Singapore CA).

16. *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

17. *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 45 (HL).

18. *Harvey v Derrick* [1995] 1 NZLR 314 (CA).

19. *Hirst v United Kingdom (No 2)* [2005] ECHR 681, (2006) 42 EHRR 41.

20. *Howard v Attorney-General (No 3)* (2008) 8 HRNZ 378.

21. *Lange v Atkinson* [1997] 2 NZLR 22 (HC).

22. *Lange v Atkinson* [1998] 3 NZLR 424 (CA).

23. *Minister of Home Affairs v National Institute of Crime Prevention* 2004 (5) BCLR 445 (South Africa CC).

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

25. *R v Germain* (1984) 53 AR 264 (ABQB).

26. *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

27. *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] 1 AC 271.

28. *Sauvé v Canada* 2002 SCC 68, [2002] 3 SCR 519 at [9], [2002] 3 RCS.

29. *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

30. *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

31. *Taylor v Attorney-General* [2014] NZHC 1630.

32. *Taylor v Attorney-General* [2014] NZHC 2225.

33. *Quilter v Attorney-General* (1996) 3 HRNZ 1 (HC).

34. *Webster v Southwark London Borough Council* [1983] QB 698.

Texts and articles

35. Andrew Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Rev 43.

36. Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

Other

37. Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's c*ase and* Harvey v Derrick (NZLC R37, 1997).

38. Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill (17 March 2010).