IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 47**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 024/2012
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**IHC NEW ZEALAND INCORPORATED**
	PLAINTIFF
AND	**ATTORNEY-GENERAL**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms K Anderson, Member
Ms GJ Goodwin, Member

REPRESENTATION:
Ms F Joychild QC for plaintiff
Ms M Coleman and Mr S Humphrey for defendant

DATE OF HEARING: **23 and 24 February 2015 and 30 March 2015**

DATE OF DECISION: **11 December 2020**

DECISION OF TRIBUNAL DISMISSING STRIKE-OUT APPLICATION BY ATTORNEY-GENERAL[1]

INTRODUCTION

Delay

[1] The long delay in the delivery of this decision is both acknowledged and regretted. The reasons for the delay are explained in the *Minute* dated 21 August 2019. Given the length of the delay the parties have been given opportunity to update their evidence and submissions. Both have declined the invitation.

[1] [This decision is to be cited as *IHC New Zealand v Attorney-General (Strike-Out Application)* [2020] NZHRRT 47.]

The context of the claim

[2] IHC is a community-based organisation providing support and advocacy for people with an intellectual disability and their families. It is the largest disability advocacy and service provider organisation in New Zealand and a leader in the disability sector. It advocates for the rights, inclusion and welfare of over 50,000 people in New Zealand with an intellectual disability.

[3] IHC has a long history in education advocacy and was an integral part of the lobby to ensure disabled children have the same rights to enrol, attend and receive education at State schools as students who do not have special education needs (Education Act 1989, s 8 and Education and Training Act 2020, s 34). IHC believes that education is not only a fundamental human right but a basic necessity for disabled people to be able to participate and flourish in the community and the economy. Its vision for education is that people with an intellectual disability will have access to life-long inclusive learning environments.

The claim

[4] The IHC case, as set out in the second amended statement of claim at para 32, is that significant proportions of students attending New Zealand primary and secondary State schools and who have special educational needs and/or disabilities requiring accommodations to learn are being discriminated against in their access to education in breach of s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA), by reason of their disabilities.

[5] Details of the alleged discrimination are thereafter set out in the balance of the claim from paras 33 to 55.

[6] The Attorney-General is sued in respect of the Minister of Education, the Ministry of Education and the Secretary for Education.

[7] The Attorney-General now asks the Tribunal to strike out paras 36 to 39 and 41 to 44. Broadly expressed the grounds are lack of jurisdiction and non-justiciability:

> **[7.1]** The jurisdiction challenge relates to paras 36 to 39 and 41 to 44.
>
> **[7.2]** The justiciability challenge relates to paras 39, 41 and 43.

[8] By application dated 19 November 2014 IHC has applied for an order that two further defendants be joined to the proceedings, namely the Chief Review Officer and the New Zealand Teachers Council. Both of the proposed additional defendants by notice of opposition dated 5 December 2014 oppose the application.

[9] On 5 February 2015 the parties filed a joint memorandum in which it was agreed the preliminary issues for determination are:

> **Jurisdiction**
>
> **[9.1]** Does the Tribunal have jurisdiction to hear paragraphs 36, 37 (first and second), 38, 39, 41, 42, 43 and 44 of the second amended statement of claim in view of s 92B(1)(a) of the Human Rights Act 1993 (HRA)?

[9.2] If the Tribunal does have jurisdiction to hear any of these paragraphs but only in part, what are the parts over which it has jurisdiction?

Justiciability

[9.3] Are paragraphs 39, 41 and 43 of the second amended statement of claim alleging (either in whole or in part) inadequate funding and/or resourcing of the SE 2000 framework?

[9.4] If so, are those allegations of inadequate funding and/or resourcing justiciable?

[9.5] If yes, can they be brought against the present defendants? If not who, is the proper defendant?

Joinder

[9.6] Taking into account s 92B(1)(a) of the Human Rights Act, does the Tribunal have jurisdiction to join the Education Review Office and/or the New Zealand Teachers Council as parties to the proceeding?

[9.7] If so, should either or both be joined?

[10] Each issue will be addressed in turn on the law as it stood in March 2015.

JURISDICTION

The Attorney-General's argument – summary

[11] The submission by the Attorney-General on jurisdiction is that when the complaint made by IHC to the Human Rights Commission is compared with the complaint as now articulated in the second amended statement of claim there are significant differences. Where there is no congruence or overlap, the extraneous pleading in the second amended statement of claim must be struck out. In simple terms, the argument is that if a complainant lodges with the Commission a complaint about circumstance A, he or she cannot thereafter file a proceeding in the Tribunal complaining about both A and circumstance B. It is submitted the jurisdictional difficulties in the present case result from a failure by the initial complaint to the Commission to raise the range of issues IHC now wishes to litigate before the Tribunal and from its failure to make its allegations against the proper defendants. The complaint procedure in HRA, Part 3 does not permit the scope of a claim to expand over time.

[12] This submission attaches particular significance to the role of HRA, s 81(4) in the dispute resolution procedures set out in Part 3 of the Act. This section provides that before gathering information about a complaint the Commission must inform the person against whom the complaint is made of the details of the complaint.

[13] The narrow point taken by the Attorney-General is that thereafter the complainant is bound by the complaint so notified unless and until the Commission notifies any alteration to the person complained against. Consequently:

[13.1] Material which has been conveyed to the other party prior to complaining to the Commission but which is not expressly referred to or included in the complaint does not form part of the complaint.

[13.2] Material provided by the complainant to the other party, but not to the Commission, following the making of the complaint does not form part of the complaint.

[13.3] Vague and generalised references cannot be relied on to assist defining the scope of the complaint.

[13.4] This means there can only be one complaint, being that which has been reduced in writing either by the complainant or by the Commission. The parties can meet to discuss and clarify the issues raised but if the outcome of the meeting goes beyond merely confirming what is already recorded as part of the complaint and extends to the parties realising the complaint is actually broader or different, there is a duty on the complainant to reduce the amended complaint to writing (with the assistance of the Commission if required) and to lodge it with the Commission for formal notification to the person complained against.

[13.5] If a different complaint to that first raised is pleaded before the Tribunal, the Tribunal may be required to refer the complaint back to the Commission under HRA, s 92D.

The complaint notified to the Attorney-General

[14] In the present case the complaint was notified by the Commission to the Attorney-General by letter dated 8 April 2009. The substance of the complaint, as summarised in this letter, is in broad terms and the annexures provide extensive details and particulars:

> Dear Jan
>
> Complaint of disability discrimination from IHC Advocacy against the Ministry of Education
>
> On 10 December 2008, IHC Advocacy confirmed that it wished to have the complaint it first brought to the Human Rights Commission in August 2008 progressed under Part 3 of the Human Rights Act 1993 (the Act).
>
> The substance of the complaint is that students with disabilities experience discrimination because they are unable to access the school curriculum in the same way as students without disabilities. IHC Advocacy claims that the problem is longstanding and systemic and can be attributed to inadequate resourcing by Government. IHC also considers that the ORRS policy is itself discriminatory because schools are not provided with sufficient resources to adequately meet the needs of those students who meet the ORRS criteria. They believe that the situation amounts to discrimination in terms of P1A of the Act.
>
> In the introduction to their complaint, IHC Advocacy identify the complaint as being made against, '…*acts and omissions of government that prevent students with disabilities fully accessing the curriculum at their local mainstream school by reason of disability...*'. The complainants write, *'The complaint is aimed at government policy that impacts negatively on access to education for students with disabilities after parents have exercised or have attempted to exercise the right to enrol their sons or daughters at schools that operate within a mainstream setting. The complaint is concerned with access to education for all disabled students, regardless of type of impairment*…'.
>
> Subsequent to making its complaint, IHC has written, as follows:
>
> *… IHC has collected a significant amount of evidence from families, school principals and others in support of the view that disabled students face discrimination when attempting to access equal learning opportunities at their local school. We are continuing to invite further participation to ensure that as many examples of the difficulties people face are provided, including from school principals and boards of trustees. The involvement of schools and boards of trustees telling their stories is essential to support one of the arguments around why responsibility for the*

discrimination sits squarely with government. There appears to be significant agreement, perhaps even widespread agreement, between parents, schools, the education and disability sectors and academics that the difficulties are clearly attributable to government policy.

The complaint is attached in its entirety in the document titled, *Complaint to Human Rights Commission under P1A of the Human Rights Act 1993*, dated 31 July 2008. It includes, as appendices, '*IHC briefing on disabled students*' *access to education*', dated February 2008 and a letter to IHC Advocacy dated 14 April 2008 from Nicholas Pole, Deputy Secretary - Special Education.

The Commission considers that this complaint comes within the scope of Part 1A of the Human Rights Act 1993 (the Act) in that it raises an arguable issue of disability discrimination relating to application of the Education Act 1989. That is not to say that the Commission has formed a view as to whether or not the complaint amounts to discrimination; rather, on the face of it, it is able to be received as a complaint to be progressed further.

It is the Commission's role to seek to mediate fair and effective resolution of complaints at the earliest opportunity. Its dispute resolution process is focused on mediation: it has no investigation or opinion-forming role in considering complaints of unlawful discrimination. The process is flexible and confidential to the parties involved. Should resolution not be achieved, or at any time during the mediation process, a party to the complaint could choose to commence proceedings with the Human Rights Review Tribunal.

The Commission is obliged by the Act to inform the Attorney General of any Part 1A complaint and for this reason, a copy of this letter has been forwarded to Martha Coleman, Crown Counsel, at the Crown Law Office.

We look forward to discussing with you how this complaint might be progressed.

Yours sincerely

[Italics in original]

[15] In an affidavit sworn on 19 February 2015 Ms Trish Grant, Director of Advocacy, IHC deposed that it is her belief the government has for some time been on notice of the claims as set out in the second amended statement of claim and exhibited a large number of documents to support that belief. She also detailed a number of meetings from February 2008 with officials from the Ministry of Education as well as the Minister of Education in which the substance of the complaint in the second amended statement of claim had been communicated.

[16] Ms Grant further detailed a post-complaint meeting which took place on 29 March 2010 attended by Ms P Walker, a mediator from the Commission, Dr Andrew Butler on behalf of IHC and Ms Grant and Ms L O'Donovan from IHC. Those attending for the Ministry of Education were Ms M Coleman and Ms V Casey (Crown Counsel) together with Ms J Bond and Ms S Prowse from the Ministry of Education.

[17] As to this meeting the view taken in advance by Crown Counsel was that this was a "listening meeting" with the aim of allowing IHC to explain their claim. Consequently, prior to the commencement of the meeting they made it clear to Ms Walker that they did not see the meeting as a mediation and were not intending the Ministry to provide any response. Nor did they see that the meeting was privileged, confidential or off record. Crown Counsel recorded that those representing IHC at the meeting were in that respect in broad agreement. The file note made by Ms Casey subsequent to the meeting and which is annexed to the affidavit of Ms MA Brown sworn on 23 February 2015 states:

1. Before the meeting commenced we spoke with Pele [Walker] (who arrived in advance of the IHC contingent). We confirmed that our view that this was a listening meeting, with the aim of allowing IHC to explain their claim in a way that made more sense in terms of the discrimination or framework, in light of our written response to the HRC. We did not see this

as a mediation, we were not intending for the Ministry to provide any response today and we did not see that this was privileged or confidential or off record.

2. Pele [Walker] spoke with the IHC contingent when they arrived, and that was broadly agreed.

[18] The terms of the file note notwithstanding, the Attorney-General submitted that what was said at the meeting on behalf of IHC and any document provided to Crown Counsel was inadmissible before the Tribunal as a consequence of the confidentiality provisions in HRA, s 85:

> **85 Confidentiality of information disclosed at dispute resolution meeting**
>
> (1) Except with the consent of the parties or the relevant party, persons referred to in subsection (2) must keep confidential—
> (a) a statement, admission, or document created or made for the purposes of a dispute resolution meeting; and
> (b) information that is disclosed orally for the purposes of, and in the course of, a dispute resolution meeting.
> (2) Subsection (1) applies to every person who—
> (a) is a mediator for a dispute resolution meeting; or
> (b) attends a dispute resolution meeting; or
> (c) is a person employed or engaged by the Commission; or
> (d) is a person who assists either a mediator at a dispute resolution meeting or a person who attends a dispute resolution meeting.

[19] Subsequent to the meeting IHC provided Crown Counsel and the Ministry with a detailed explanation of that part of the complaint to the Commission which related to discrimination in the context of the ORS policy (Ongoing resourcing scheme). The Attorney-General accepts this document which is exhibit T to Ms Grant's affidavit is properly included in the IHC complaint.

Discussion

[20] The submissions for the Attorney-General are based on a rigidly formalistic interpretation and application of the HRA, Part 3 dispute resolution process. Were the submissions to be accepted they would impose on Part 3 a regime not only analogous to that found in civil litigation, but arguably a regime even more rigid and procedure-bound. In the result, Crown Counsel having expressly recorded that the 29 March 2010 meeting was (from the perspective of the Ministry and its legal advisors) not a mediation, not privileged, not confidential and not off the record but only a listening meeting, the Attorney-General nevertheless asserts:

> **[20.1]** It is not permissible in these proceedings for IHC to produce in evidence or rely on what was said at the meeting (HRA, s 85).
>
> **[20.2]** Material conveyed to the Ministry and its legal advisers prior to the filing of the complaint with the Commission did not form part of the IHC complaint unless expressly referred to in the complaint.
>
> **[20.3]** Material provided directly by IHC to the Ministry of Education, but not to the Commission following the filing of the complaint, does not form part of the complaint.
>
> **[20.4]** If the outcome of any meeting (such as that held on 29 March 2010) goes beyond merely confirming what has already been recorded as part of the complaint, the complainant must reduce the "amended" complaint to writing and lodge it with the Commission for formal notification to the defendant.

[21] In our view there are two reasons why the submission by the Attorney-General cannot be sustained:

[21.1] It is based on a mistaken interpretation of Part 3 of the Act.

[21.2] It is in any event not supported by the facts.

The interpretation of Part 3

[22] The primary principle of interpretation is contained in s 5 of the Interpretation Act 1999. The focus is on text, context and purpose:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[23] The Long Title of the Human Rights Act makes reference to the "better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights".

[24] It follows that wherever possible the provisions of Part 3 must be interpreted in a manner which will provide such better protection of human rights particularly the right to non-discrimination recognised in Part 1A and Part 2 of the Human Rights Act and s 19 of NZBORA. The principle that the special character of human rights legislation must be recognised is well-established. See for example *Coburn v Human Rights Commissioner* [1994] 3 NZLR 323 at 333-335 and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [33] to [42]. At [108] the Court noted that the authorities make it clear that a broad and purposive approach to constitutional rights such as NZBORA, s 19 is to be adopted. In *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [48] the phrase used was "a purposive and untechnical approach". Although the Court was there addressing the approach to the comparator, the context shows that the sentiment has wider application.

[25] It is of particular significance that HRA, Part 3 has its own purpose clause in s 75. Each purpose promotes the special human rights character of the dispute resolution process in Part 3. Of the six characteristics listed as being essential to the procedures under Part 3, no fewer than three have as their focus the need for disputes to be resolved quickly and informally by the parties themselves (s 75(b)), the need for the procedures to be flexible (s 75(d)) and the importance of the absence of "strict procedural requirements" (s 75(e)):

> **75 Object of this Part**
>
> The object of this Part is to establish procedures that—
> (a) facilitate the provision of information to members of the public who have questions about discrimination; and
> (b) recognise that disputes about compliance with Part 1A or Part 2 are more likely to be successfully resolved if those disputes can be resolved promptly by the parties themselves; and

(c) recognise that, if disputes about compliance with Part 1A or Part 2 are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available to the parties to those disputes; and
(d) recognise that the procedures for dispute resolution under this Part need to be flexible; and
(e) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
(f) recognise that difficult issues of law may need to be determined by higher courts.

[26] These prescribed procedural objects reflect not only the special character of the Human Rights Act but also the fact that complainants are most often self-represented. The complexities inherent in the interpretation advanced by the Attorney-General would inevitably act as a barrier to complainants accessing the mandated flexible and non-technical process intended by HRA, Part 3 including ss 76(1)(b) and 77(2)(d). The Tribunal should not lightly adopt an interpretation of procedural provisions which will hinder rather than promote access to justice.

[27] The interpretation exercise must also take into account the enactment of HRA, Part 1A from 1 January 2002. That amendment substantially expanded the acts or omissions which can be the subject of challenge and as the present claim itself has been brought under Part 1A it is necessary to recognise the broad purpose of Part 1A as set out in section 20I:

20I Purpose of this Part

The purpose of this Part is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990 is in breach of this Part if the act or omission is that of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990.

[28] The broad sweep of challenges now possible under the HRA is illustrated by such cases as *Child Poverty Action Group Inc v Attorney-General*, *Attorney-General v IDEA Services* [2012] NZHC 3229, [2013] 2 NZLR 512 and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

[29] As the successive amendments to the Human Rights Act show, anti-discrimination law is a dynamic and expanding project. A discrimination claim against government, related persons and bodies ought not to be excluded or defeated at an early stage on account of the apparent novelty of the claim. Experience also shows it is not always possible at the initial Commission stage for complex claims to be articulated with the precision required of formal pleadings. In addition the complaining party will not have access to a formal discovery or disclosure regime. The overarching point is that on a strike-out application it is well-established particular care is required in areas where the law is confused or developing. See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J. To similar effect see *Couch v Attorney-General (No. 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [35] per Elias CJ.

[30] The interpretation we favour is also supported by the duty of a State Party under Article 2(3) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) to ensure "an effective remedy". In *Faure v Australia (1036/01)* (31 October 2005) at [7.2] to [7.4] the Human Rights Committee found that States Parties must not only provide remedies for violations of the ICCPR under art 2(3) but must also provide fora in which one can pursue arguable even if ultimately unsuccessful claims of violations of the ICCPR. Such fora do not have to be provided for utterly unmeritorious claims, but people should have an opportunity to seek a remedy for an arguable case. See further Joseph and Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and*

Commentary (3rd ed, Oxford University Press, 2013) at [25.01] to [25.09]. As noted by Elias CJ in *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [1] the principle that rights are vindicated through a remedy for breach is fundamental to the rule of law. A right without a remedy is "a vain thing to imagine". In a later passage in her judgment Elias CJ made explicit reference to ICCPR, art 2(3):

> [26] The New Zealand Bill of Rights Act contains no specific enforcement provisions. Judicial vindication of rights was however foreshadowed by the White Paper that preceded enactment of the Bill of Rights Act. Its proposals for remedy, including by way of judicial review of legislation, were not adopted in the legislation as enacted. But the policy of judicial enforcement, subject only to the strictures provided by ss 4 and 5, remains implicit in the Act in a number of ways: through its confirmation of "rights" (for which the rule of law requires remedy); in its explicit subjection of the actions of the judicial branch of government to the Act (which includes the discharge of its remedial responsibilities); and in the purposes described in the long title, which include both the promotion, as well as the affirmation and protection, of human rights and fundamental freedoms, and affirmation of "New Zealand's commitment to the International Covenant on Civil and Political Rights" (which requires States party to the Covenant to provide "effective remedies" for breaches of rights). More generally, vindication of right in a society based on the rule of law must ultimately be able to be achieved by claim of right to the courts. [Footnote citations omitted]

[31] In *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 Cooke P at 676 warned of the danger of giving lip service only to human rights:

> 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.

[32] We conclude that when ascertaining the nature and content of the "complaint" for the purpose of HRA, ss 76(2)(a) and 92B a purposive and untechnical approach is required bearing in mind:

> **[32.1]** The stated purpose of the Act is to better protect human rights in New Zealand. That purpose must be read together with the expressly stated purpose of Part 3 itself.
>
> **[32.2]** The Part 3 procedure must promote, not frustrate the prompt and informal resolution of the complaint by the parties themselves, must be flexible and not inhibited by strict procedural requirements. Difficult issues of law are for resolution by the senior courts.

[33] Having determined the submissions for the Attorney-General on the law cannot be accepted, it is possible to address the question whether, as a matter of fact, paras 36 to 39 and 41 to 44 of the second amended statement of claim plead issues which were included in the IHC complaint to the Commission.

The facts: Whether challenged paragraphs in statement of claim included in the complaint

[34] In response to the submission that the matters pleaded in paras 36 to 39 and 41 to 44 of the second amended statement of claim had not formed part of the IHC complaint to the Commission, IHC produced a table comparing the content of each of the challenged paragraphs with a quote or extract from one or more of the exhibits annexed to Ms Grant's affidavit. The purpose was to show that each allegation in the particular challenged paragraph was supported by a particular sentence, phrase or word in a specific exhibit or document.

[35] The Attorney-General countered with a similar table arguing that the particular reference relied on by IHC either did not support the corresponding pleading or was irrelevant or extracted from a document inadmissible as a consequence of the confidentiality provisions in HRA, s 85.

[36] In its reply IHC produced a further table designed to show that even were the comparison exercise to exclude all documents to which the Attorney-General objected under HRA, s 85, it could still be shown each of the challenged pleadings was based on what the Attorney-General conceded was within the "complaint", being (at least) exhibits A, B, D, F and T to Ms Grant's affidavit.

[37] In our view the granular examination involving the fine sifting and comparison of words and phrases exemplified by the parties' submissions is the antithesis of what is intended by the Act, particularly Part 3 and illustrates why a purposive and untechnical approach is mandated.

[38] Nevertheless, excluding the documents to which objection has been taken by the Attorney-General under HRA, s 85, our assessment is that it is clear from the further table produced by IHC that at the Commission stage the Ministry of Education did in fact have fair notice of the issues later pleaded in the second amended statement of claim. That is all the earlier decisions of the Tribunal in *Peters v Wellington Combined Shuttles Ltd (Application by Defendant that Jurisdiction be Declined)* [2013] NZHRRT 21, *Brown v Otago Polytechnic (Strike-Out Application)* [2014] NZHRRT 22 and *Simmons v Board of Trustees of Newlands College (Strike-Out Application)* [2014] NZHRRT 60 require.

[39] The complaint having been fairly notified to the Ministry it is difficult to see what prejudice there will be to allow the challenged paragraphs to stand. All the Attorney-General will lose is the temporary forensic advantage of peremptorily terminating some of the claims by IHC but the prejudice to IHC in not being able to advance these aspects of its claim without starting again at the Commission will be substantial. If the Attorney-General does in fact need more information to respond to the challenged paragraphs he can in this Tribunal apply for particulars and for discovery. A strike-out application can follow if justified. He is not without efficacious procedural remedies.

[40] Our conclusion is that the challenge to jurisdiction is based on an arid conception of the dispute resolution process, is unsupported by the statutory provisions and is in any event answered by the documents which the Attorney-General concedes properly form part of the complaint. The challenge is dismissed. The Tribunal finds it has jurisdiction over the entire second amended statement of claim, including paras 36 to 39 and 41 to 44.

JUSTICIABILITY

Submissions for the Attorney-General

[41] In the submission of the Attorney-General paras 39, 41 and 43 of the second amended statement of claim complain of:

> **[41.1]** Disabled students being unable to access the specialist education support they need to participate and to access the curriculum.
>
> **[41.2]** Insufficient resourcing to cover the accommodations needed by approximately half of all disabled students.

[41.3] Inadequacy of funding for students with moderate disabilities.

[42] It is submitted these paragraphs are, in substance, allegations that the Crown has allocated insufficient resources in the Appropriation (2014/15 Estimates) Act 2014 and in previous Appropriation Acts.

[43] In these circumstances it is further submitted the claims are inherently unsuitable for adjudication under Part 1A because IHC is complaining not about a specific aspect of the policy at issue, but rather the level of resourcing for the provision of special education support services. Given "constitutional difficulties" the Tribunal would need to take judicial notice of the fact that the Appropriation (2014/15 Estimates) Act 2014 represents the Government's view of an appropriate allocation of resources for special education given the available funds and competing demands for funding and would have to defer to that view. Cited in support is (inter alia) *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [22] to [27].

Submissions for IHC

[44] The submissions for IHC stress there is no challenge to the Budget allocation or to the manner in which resources are allocated by the various Appropriation Acts. Rather, the challenge by IHC is to the framework used by the Ministry of Education to allocate the resources made available to it and how it allocates its budget allocation. That is, this is not a claim simply alleging that the Government must pay more money for students with disabilities. Rather IHC asks the government to properly review and adjust policy and resourcing frameworks so as to remove the discrimination and inequities in funding. At para 50 of the second amended statement of claim IHC alleges the following steps could have been taken to ensure students with disabilities and who require accommodation to learn and achieve are free from discrimination:

> (vi) Reviewing and adjusting the policy and resource framework to ensure the major inequities in funding schools to provide accommodations to students with moderate disabilities requiring accommodations to learn are removed.
> (vii) Reviewing and adjusting the resource framework to remove the discrimination by addressing the denial of reasonable accommodation to the group of approximately 4 to 6 % of the student population (30,400 to 45,600 students) who are not currently provided with reasonable accommodations to enable them to learn and achieve.

[45] The orders sought by IHC in relation to the above have yet to be formally added to the second amended statement of claim but the argument before the Tribunal proceeded on the basis that the amendments intended to be added by IHC will be in the following terms:

> 2 An order further to s 92I(3)(d) or 92I(3)(f) of the Human Rights Act that the Defendant:
>
> (ix) Review and adjust the policy and resource framework to ensure that the resource framework responds to the actual numbers of disabled children who require accommodations to leam and ensure that the current major inequities in funding schools to provide accommodations to students with moderate disabilities requiring accommodations to learn are reduced to the maximum extent possible.
>
> (x) Review the policy and resourcing framework to address the needs of students with high and moderate needs who currently receive untimely, little or no reasonable accommodations to enable them to access their right to an education on an equal basis with others.

[46] It is submitted the issue for the Tribunal will be whether the Ministry has reviewed and adjusted policy and resource frameworks so as to remove major inequities and

discrimination. Determination of that issue will not require a challenge to the Budget allocation in any of the Appropriation Acts.

[47] Responding to the submission by the Attorney-General that constitutional conventions preclude the Tribunal having jurisdiction over the three paragraphs in question, IHC points out:

> **[47.1]** Under Part 1A of the HRA in a case which relates to an act or omission of the executive, a full range of remedies is potentially available. Where (as here) the challenge is to systemic issues HRA, s 92I(3)(f) and (g) enable the Tribunal to order a defendant to implement any specified policy or programme to assist or enable the defendant to comply with the provisions of the HRA. The discretion conferred by HRA, s 92O and 92P to defer or modify remedies makes it clear that resource issues can properly be considered by the Tribunal. In particular s 92P makes specific reference to the financial and social implications of any remedy.
>
> **[47.2]** These provisions anticipate and envisage claims about resource allocations. The submissions for IHC also draw attention to the fact that justiciability arguments similar to those advanced in the present case have not found favour in other discrimination cases.

Discussion

[48] We accept that the principle of the separation of powers generally confers matters of social and economic policy on the legislature and the executive, rather than the judiciary.

[49] But in the New Zealand context HRA, Part 1A confers jurisdiction on the Tribunal and senior courts to determine whether an act or omission of (inter alia) the legislative, executive or judicial branch of the Government of New Zealand is inconsistent with the right to freedom from discrimination affirmed in NZBORA, s 19. See HRA, ss 20I to 20L. That such determination can relate to resourcing issues is recognised both by the nature of the challenge permitted and by the provisions relating to remedies, especially HRA, ss 92O and 92P. See particularly s 92P(2):

> (2) If the Tribunal finds that an act or omission is in breach of Part 1A or that an act or omission by a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990 is in breach of Part 2, in determining whether to take 1 or more of the actions referred to in section 92O, the Tribunal must, in addition to the matters specified in subsection (1), take account of—
>
> (a) the requirements of fair public administration; and
>
> (b) the obligation of the Government to balance competing demands for the expenditure of public money.

[50] In *Child Poverty Action Group Inc v Attorney-General* it was explicitly recognised that on the facts of that case the justified limitation analysis under NZBORA, s 5 involved "the complex interaction of a range of social, economic, and fiscal policies as well as taxation measures":

> **[91]** The effect of these authorities is therefore, that in approaching the s 5 analysis, some latitude or leeway is given to the legislature or the decision maker particularly in a case like the present which involves the complex interaction of a range of social, economic, and fiscal policies as well as taxation measures. In addition, those policy factors relate to the overall social assistance measures with various tiers of benefits for the relief of poverty, as well as incentives to encourage beneficiaries to move into employment. That latitude or leeway to the legislature

> does not however alter the fact that the onus is on the Crown to justify the limit on the right. The justification has to be "demonstrable".
>
> **[92]** It must also be kept in mind that the effect of the Human Rights Act and the Bill of Rights is that when a measure is prima facie discriminatory the courts have to decide whether or not the measure meets the s 5 threshold. As Lord Scott said in *A v Secretary of State for the Home Department*, the function of measuring compliance with human rights norms is not one "that the courts have sought for themselves" but it is nonetheless a function that has been "thrust" on the courts by the Human Rights Act and the Bill of Rights. In that context, the term "deference" as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away from or shirk that task. Rather, it is a question of recognising the respective roles of the courts and the decision maker, here, the legislature.
>
> [Footnote citations omitted]

[51] In the present case counsel for IHC has expressly stated there is no challenge to the Appropriation Acts or to the appropriation made by the legislature to Vote Education. Rather IHC asks the government to review and adjust policy and resourcing frameworks so as to remove the discrimination and inequities in funding. The orders sought do not seek to tell the Attorney-General how to do this.

[52] The statutory provisions referred to as well as the statement by counsel for IHC answer the constitutional objection raised by the Attorney-General.

[53] For these reasons the objection to paras 39, 41 and 43 of the second amended statement of claim is dismissed.

JOINDER

[54] By application dated 18 November 2014 IHC applied to join as two additional defendants the New Zealand Teachers Council and the Chief Review Officer.

[55] However, on the third day (30 March 2015) of the preliminary hearing the Tribunal was told:

> **[55.1]** The application relating to the New Zealand Teachers Council was not pursued as the Council had been replaced by the Education Council of Aotearoa New Zealand following the enactment of the Education Amendment Act 2015. The statement of claim would have to be re-pleaded to take these changes into account. There was also the possibility that joinder of the new entity would not in fact be necessary.
>
> **[55.2]** There was no need to join the Education Review Officer as a party as it was more appropriate that that officer be added to the list of entities on whose behalf the Attorney-General is being sued. That list is to be found in para 4 of the second amended statement of claim.

[56] As the joinder application was not pursued the application is treated as withdrawn.

OVERALL CONCLUSION

[57] The findings of the Tribunal in relation to the three agreed preliminary issues are:

[57.1] The Tribunal has jurisdiction in relation to paras 36 to 39 and 41 to 44 of the second amended statement of claim.

[57.2] The justiciability challenge to paras 39, 41 and 43 of the second amended statement of claim is dismissed.

[57.3] The joinder application is treated as withdrawn.

Costs

[58] Costs are reserved.

Further case management

[59] The Case Manager is directed to convene a teleconference as soon as possible so that case management directions can be given for the future conduct of these proceedings. The parties are to file and exchange memoranda two clear days prior to the teleconference date setting out their proposals for the next steps to be taken.

.....	.....	.....
Mr RPG Haines ONZM QC	**Ms K Anderson**	**Ms GJ Goodwin**
Chairperson	**Member**	**Member**