IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-4141
[2015] NZHC 1706

BETWEEN	ARTHUR WILLIAM TAYLOR First Applicant
	HINEMANU NGARONOA, SANDRA WILDE, KIRSTY OLIVIA FENSOM and CLAIRE THRUPP Second, Third, Fourth and Fifth Applicants
AND	ATTORNEY-GENERAL OF NEW ZEALAND First Respondent
	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent

Hearing:	10 April 2015
Counsel:	A W Taylor, in person, First Applicant R K Francois for Second, Third, Fourth and Fifth Applicants D J Perkins and E J Devine for Respondents
Judgment:	24 July 2015

JUDGMENT OF HEATH J

This judgment was delivered by me on 24 July 2015 at 12.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Warren Simpson, Auckland
Crown Law Office, Wellington
Counsel:
R K Francois, Auckland
Copy to:
A W Taylor (Plaintiff)

Contents

The application

[1] Section 12 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) deals with electoral rights:

> **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.

[2] A democracy is built around the idea that a state is governed by elected members of a legislative body. For that reason, the right to vote is arguably the most important civic right in a free and democratic society. Affirmation of the importance of that right is apparent from the terms in which both s 12(a) of the Bill of Rights and art 25(b) of the International Covenant on Civil and Political Rights (the International Covenant) are expressed.[1]

[3] As a result of an amendment made to the Electoral Act 1993 (the 1993 Act) in 2010,[2] all prisoners incarcerated as a result of a sentence imposed after 16 December 2010 are barred from voting in a General Election.[3] In this proceeding, five serving prisoners seek a formal declaration from this Court that the prohibition is

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1 See the Long Title to the New Zealand Bill of Rights Act 1990. See also para [5] below.
2 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010; see paras [10]–[15] below.
3 See para [10] below.

inconsistent with s 12(a) of the Bill of Rights. While one of them, Mr Taylor, is not subject to the present form of the prisoner voting ban,[4] no question about his standing has been raised. The remaining prisoners – Ms Ngaronoa, Ms Wilde, Ms Fensom and Ms Thrupp – come within its ambit. Accordingly, each of them has a genuine interest in obtaining declaratory relief from the Court.

[4] History is replete with stories about the struggle for equal and universal suffrage, whether on grounds of race, gender or otherwise. This case raises two questions of constitutional significance. The first is whether Parliament has passed legislation to deny serving prisoners the right to vote in a manner inconsistent with the Bill of Rights, and not justifiable in a free and democratic society. If so, the second is whether this Court should formally declare that to be so.

The purposes of the Bill of Rights

[5] The purposes of the Bill of Rights are two-fold. The first is "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand". The second is "to affirm New Zealand's commitment" to the International Covenant. To achieve those goals, s 2 substantively affirms the rights and freedoms set out in the Bill of Rights, most of which mirror those contained in the International Covenant.

[6] The initial proposal for a Bill of Rights was contained in a White Paper presented to the House of Representatives (the White Paper) by the then Minister of Justice, Hon Geoffrey Palmer MP.[5] The draft legislation set out in the White Paper was premised on the Bill of Rights operating as "supreme law". If the Bill of Rights had been enacted in that form, the Courts would have had the power to declare legislation as "of no effect" for inconsistency with its terms.[6] Those draconian consequences were alleviated by a proposal that rights-limiting legislation should, nevertheless, be regarded as valid if "demonstrably justified in a free and democratic society".[7] Although the Bill of Rights was not enacted as supreme law against which

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4 See *Taylor v Key* [2015] NZHC 722 at paras [63]–[65].
5 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at 21–24.
6 Ibid at 10, setting out draft Bill of Rights, cl 1.
7 Ibid, cl 3.

the validity of other legislation was to be measured, the "justified limitation" provision was retained.[8]

[7] Although s 12(a)[9] of the Bill of Rights expresses the right to vote in unequivocal terms, Parliament has an undoubted power to make a policy decision to modify, or even nullify, its effect.[10] No Court is entitled to declare legislation invalid by reason only that it is inconsistent with any provision in the Bill of Rights.[11]

[8] The Attorney-General has a statutory duty to "bring to the attention of the House of Representatives any provision in [a] Bill that appears to be inconsistent with any of the rights and freedoms" set out in the Bill of Rights.[12] After the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill was introduced, the Attorney-General, Hon Christopher Finlayson QC, reported that it appeared to be inconsistent with s 12(a).[13]

[9] Notwithstanding his report, the present application is opposed by the Attorney, on both jurisdictional and discretionary grounds. There are good constitutional reasons for the differing stances that he has taken. A distinction must be drawn between the Attorney's roles in reporting to the Legislature (on the one hand) and representing the legislative branch of Government on a private citizen's application to the judicial branch to make a formal declaration of inconsistency (on the other).

The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010

[10] When the 1993 Act came into force, s 80(1)(d) (the original s 80(1)(d)) operated to bar from voting all persons who were detained in a penal institution under a sentence of imprisonment of three years or more. Following enactment of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the

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8 New Zealand Bill of Rights Act 1990, s 5, set out at para [38] below.

9 Section 12 is set out at para [1] above.

10 Subject to the need for a 75% majority of the House if an amendment were made to, or a repeal proposed of, s 74 of the Electoral Act 1993. That is a "reserved" provision by virtue of s 268(1)(e) of the Electoral Act 1993.

11 New Zealand Bill of Rights Act 1990, s 4, set out at para [38] below.

12 New Zealand Bill of Rights Act 1990, s 7. The section is set out in full at para [12] below.

13 See paras [12], [13] and [27]–[29] below.

Disqualification Act), s 80(1)(d) was amended (the present s 80(1)(d)) so that all persons serving sentences of imprisonment imposed after 16 December 2010 were prohibited from voting in a General Election. Only the present s 80(1)(d) is in issue in this proceeding.

[11] The Electoral (Disqualification of Sentenced Prisoners) Amendment Bill was introduced into Parliament in late 2010. It was promoted by Mr Paul Quinn MP, as a Private Member's Bill. Mr Quinn's intention was to persuade Parliament to change the law, to prevent all serving prisoners from voting in a General Election.

[12] After the Bill was introduced into the House of Representatives, the Attorney-General provided a report under s 7 of the Bill of Rights. Section 7 provides:

> **7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights**
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> Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—
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> (a) In the case of a Government Bill, on the introduction of that Bill; or
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> (b) In any other case, as soon as practicable after the introduction of the Bill,—
>
> bring to the attention of the House of Representatives any provision in the Bill that *appears to be inconsistent* with any of the rights and freedoms contained in this Bill of Rights.
>
> (emphasis added)

[13] The Attorney expressed the view that the Bill appeared to be inconsistent with s 12(a). He considered that a "blanket ban on prisoner voting [was] both under and over inclusive", with the consequence that the "disenfranchising provisions of [the] Bill will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or to the conduct of the prisoners whose voting rights are taken away". Mr Finlayson opined that those "irrational effects" meant that the Bill would be "disproportionate to its objective". As a result, he concluded

"that the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 … and … cannot be justified under s 5" of the Bill of Rights.[14]

[14] Unusually, the Bill was referred to the Law and Order Committee. Typically, the Justice and Electoral Committee is the select committee that considers proposed changes to electoral laws. When the Bill was reported back to the House, it was supported by two parties, New Zealand National and ACT New Zealand. The remaining parties – New Zealand Labour, the Green Party, the Maori Party, the Progressive Party and United Future – opposed enactment. Ultimately, it was passed into law by a majority of 63 votes to 58.[15]

[15] The transitional provision of the Disqualification Act makes it clear that the present s 80(1)(d) applies only to persons serving sentences of imprisonment imposed after it came into force. Prisoners who were incarcerated earlier continue to be subject to the original s 80(1)(d).[16]

History of prisoner disenfranchisement legislation in New Zealand[17]

[16] Disenfranchisement of serving prisoners has its origins in the concept of "civil death".[18] That notion was prominent in both ancient Greece and Rome as a

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[14] Christopher Finlayson *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). The report was presented to the House of Representatives pursuant to s 7 of the Bill of Rights and Standing Order 261 of the Standing Orders of the House of Representatives. The full text of this part of the report is set out at para [29] below.

[15] In other proceedings, Mr Taylor has raised a separate issue of some importance. It is whether the present s 80(1)(d) is invalid because it has the effect of amending s 74 of the Electoral Act 1993, a "reserved" provision that cannot be amended or repealed without a 75% majority of the House of Representatives: Electoral Act 1993, s 268(1)(e). The point was argued shortly before the September 2014 General Election on an application for interim relief. Interim orders were declined: *Taylor v Attorney-General* [2014] NZHC 2225, (2014) 10 HRNZ 31 (Ellis J). An attempt to have that decision afforded priority to ensure determination before the General Election failed: *Taylor v Attorney-General* CA509/2014, 16 September 2014 (Minute of Ellen France P) at para [5]. The effect of those decisions was that the 2014 General Election proceeded on the basis of the present s 80(1)(d). The substantive proceeding has not yet been heard. The point was also argued (but not determined) in an election petition heard earlier this year. No inquiry into the merits of the argument was made because this Court found that Mr Taylor had no standing to bring the petition: *Taylor v Key* [2015] NZHC 722.

[16] Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, s 6. See also *Taylor v Key* [2015] NZHC 722 at paras [79]–[82].

[17] This segment is an expanded version of the discussion in *Taylor v Key* [2015] NZHC 722 at paras [59]–[62].

[18] Sometimes called "civic death": see, for example, *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR) at paras [22], [53] and [O-115].

mark of "infamy".[19] Infamy "was bestowed upon those guilty of heinous and treasonous crimes involving moral depravity, and resulted in the forfeiture of rights such as voting and holding certain public offices". Infamy was one of the grounds on which the original form of prisoner disqualification from voting was based in New Zealand.[20]

[17] The underlying idea was that disenfranchisement of some classes of prisoners was a necessary part of the punishment to be imposed. Early limitations on the extent of prisoner voting tended to link the removal of the civic right to the perceived gravity of particular crimes committed against the community. For example, William Blackstone reported that, in England, "civil death" applied "as a consequence of banishment, abjuration (swearing an oath to leave the country) or when a man entered the monastery". In such cases, "the subject was deemed *civiliter mortuus*, or dead in law".[21] The concept has not been applied in New Zealand on a consistent basis.

[18] The first form of prisoner disenfranchisement in New Zealand appeared in the New Zealand Constitution Act 1852, a statute enacted by the Imperial Parliament. Section 8 of that Act prohibited prisoners incarcerated for "any treason, felony, or infamous offence within any part of Her Majesty's dominions" from voting.[22] Later, s 2(4) of the Qualification of Electors Act 1879 extended the New Zealand prohibition by rendering qualifying prisoners ineligible for electoral registration for a period of 12 months after their sentence was completed.

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19 Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 166. I acknowledge the scholarship of Mr Robins' article, on which I have drawn extensively to provide my summary of the history of prisoner voting rights. See also, Mirjan R Damaska "Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study" (1968) 59(3) J Crim LC & PS 347.

20 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict, s 8. See para [18] below.

21 William Blackstone *Commentaries on the Laws of England* (vol 1, Clarendon Press, Oxford, 1765); *Commentaries on the Laws of England* (vol 4, Clarendon Press, Oxford, 1769). Another circumstance in which a person forfeited rights available to other citizens was if the crime of perjury had been committed. That was regarded as a direct attack on the administration of justice.

22 The Parliament of the United Kingdom departed from this particular formulation, in 1870, when it proscribed the right to vote of those people held in prisons within the United Kingdom who had been sentenced to death, penal servitude, hard labour, or a period of imprisonment exceeding 14 months: Forfeiture Act 1870 (UK), s 2. That legislation followed the abolition of penalties of attainder and forfeiture for treason and felony, by which those found guilty of such offences remained citizens of the State in law and "no longer civilly dead": generally, see Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 167.

[19] Section 29(1) of the Electoral Act 1905 modified the prohibition in two respects. First, it repealed the extended version of the prohibition enacted by s 2(4) of the Qualification of Electors Act 1879. Second, it broadened the class of offences in respect of which the prohibition applied. In addition to the disenfranchisement of prisoners serving a sentence for "any treason, felony, or infamous offence", all prisoners who had been sentenced to death or to a sentence of imprisonment of one year or more were barred from voting.[23]

[20] The Electoral Act 1956 introduced, for the first time, a complete ban on prisoner voting. Any person detained in a penal institution pursuant to a conviction was disqualified.[24] Remand prisoners (to whom the presumption of innocence applied) retained the right to vote. If a prisoner were released on parole, the right to vote was restored. That was because he or she was no longer detained.

[21] Between 1975 and 1977, disenfranchisement of prisoners was removed completely.[25] In 1977, the prohibition on any serving prisoner from voting in an election was reintroduced.[26]

[22] The 1993 Act was passed "to reform the electoral system", in anticipation of the acceptance of a proposal for a mixed member proportional voting system.[27] An opportunity was taken to update various aspects of electoral law. The original s 80(1)(d) reduced the scope of the disqualification to serving prisoners who were being detained under a sentence of life imprisonment, preventive detention, or a term of imprisonment of three years or more.

[23] Enactment of the original s 80(1)(d) was preceded by a reconsideration of the question of prisoner disenfranchisement, in light of the recently enacted Bill of Rights. In a report that promoted limiting prisoner voting disqualification to those serving sentences of three years or more, the Department of Justice cited two sources.[28] The first was a recommendation of the Royal Commission on the

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23 Electoral Act 1905, s 29(1).
24 Electoral Act 1956, s 42(1)(b).
25 Electoral Amendment Act 1975, s 18(2).
26 Electoral Amendment Act 1977, s 5.
27 Electoral Act 1993, Long Title.
28 Department of Justice *Electoral Reform Bill: Report of the Department of Justice* (Department

Electoral System.[29] The second was an opinion of then Solicitor-General, Mr John McGrath QC, from whom the Department of Justice had sought advice about whether absolute prisoner disenfranchisement was a justified limitation on the right to vote.[30] Both the Royal Commission and the Solicitor-General favoured a three-year imprisonment limit. That took account of the triennial election cycle and minimised the possibility of arbitrary application.[31]

[24] The original s 80(1)(d) remained in force until 2010, when the Disqualification Act was passed. That statute, which came into force on 16 December 2010,[32] enlarged the disqualification to all prisoners, regardless of the offence they had committed, for the duration of their detention in prison. Under the current legislation, only remand prisoners have the right to vote, although those prisoners who have been released on parole have their right to vote restored.

[25] Shifts in the underlying policy have been based on both principled and pragmatic grounds.[33] The notion of a "social contract" has been invoked as a principle that supports the view that (at least some) serving prisoners should be disenfranchised. On one occasion, that was expressed as those "who infringe the laws of society to the extent that they are put into penal institutions should not be entitled to exercise a vote in a general election".[34] A principled view to the contrary

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of Justice, Wellington, 3 May 1993) at 57.

29 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, December 1986) at [9.21] and recommendation 42.

30 A letter from J J McGrath QC, Solicitor-General, to W A Moore, Secretary for Justice "Rights of Prisoners to Vote: Bill of Rights" (17 November 1992), cited in Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 170. A summary of the opinion can be found in Department of Justice *Electoral Reform Bill: Report of the Department of Justice* (Department of Justice, Wellington, 3 May 1993) at 57. The question of justifiable limitation was considered by reference to s 5 of the New Zealand Bill of Rights Act 1990.

31 The notion of "arbitrary application" reflects the "proportionality" approach evidenced in the decision of the European Court of Human Rights in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR) at [45], [62], [68] and [73]. See also *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1 (ECHR) at [52].

32 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, s 2.

33 Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 167–171.

34 Taken from a speech in the House of Representatives by an Opposition Member of Parliament when the Government of the day moved to remove the ban on prisoner voting in 1975: J R Harrison MP (20 August 1975) 400 NZPD 3785. The "social contract" view was also put forward to support enactment of the Disqualification Act: for example, see Hon Dr Wayne Mapp MP and Jonathan Young MP (8 December 2010) 669 NZPD 15974 and 15977–15978

is that a sentence of imprisonment should not deprive a person of civil rights, beyond those inherent in the sentence, namely freedom of movement and association.[35]

[26] Pragmatic considerations have also held sway. For example, a prisoner (particularly one who is serving a long sentence) may have few remaining links to his or her former electorate of residence. It was once suggested that a ban avoids the disproportionate concentration of prisoner voting in districts in which prisons are located.[36]

The Attorney-General's report

[27] When the Attorney-General presented his s 7 report[37] to Parliament, he concluded "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".[38] In considering the question of inconsistency, the Attorney said:

> 5. The right to vote is not an absolute right. The Electoral Act disqualifies certain persons for registration as an elector. Electors must meet residency requirements. Electors must not be on the Corrupt Practices List or detained for a period exceeding three years in a hospital or secure facility in the context of a criminal process. The Act also disqualifies as an elector a person who is being detained in a prison under a sentence of imprisonment for life, preventive detention or for a term of three years or more.
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> 6. Section 12 of the Bill of Rights Act affirms article 25 of the International Covenant on Civil and Political Rights. Article 25 recognises the right of citizens to vote in genuine periodic elections without unreasonable restrictions. The comments on article 25 provide that convicted persons may have their voting rights suspended on objective and reasonable grounds that are proportionate to the offence and the sentence.

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respectively.

35 This was the view put forward in favour of abolition of the prisoner disqualification rules in 1975: Hon Dr A M Finlay QC (17 June 1975) 398 NZPD 2167–2168. To similar effect, see Electoral Act Committee "Final Report" [1975] IV AJHR I 15 at 20. Freedom of association and movement are rights affirmed by ss 17 and 18 of the Bill of Rights, respectively.

36 For example, see Rt Hon R D Muldoon (3 November 1977) 415 NZPD 4159 and (7 December 1977) 416 NZPD 5150. See also, Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 169. This linkage is discussed, in the context of standing to bring an election petition, in *Taylor v Key* [2015] NZHC 722 at paras [30]–[54].

37 Section 7 is set out at para [12] above.

38 Christopher Finlayson *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) at para 16.

7. *Re Bennett* [(1993) 2 HRNZ 358 (HC)] considered s 12 and prisoner voting. The High Court found that there was a clear conflict between the blanket ban on prisoner voting in place at the time and the Bill of Rights Act. The Court did not, however, consider whether the ban was justified under s 5 of the Bill of Rights Act.

8. Both the Supreme Court of Canada [*Sauvé v Canada (Attorney-General)* [1993] 2 SCR 438] and the European Court of Human Rights [*Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41] have held that a blanket ban on prisoner voting is inconsistent with electoral rights.

9. I consider that a blanket ban on prisoner voting raises an apparent inconsistency with s 12 of the Bill of Rights Act.

(footnotes omitted)

[28] The Attorney-General also considered, by reference to s 5 of the Bill of Rights, whether this apparent inconsistency could be justified "in a free and democratic society".[39] In considering that question, he applied the two-stage approach articulated by the Supreme Court in *R v Hansen*.[40] The first step is to determine whether the provision serves an important and significant objective. The second is to ascertain whether there is a rational and proportionate connection between the provision and that objective.

[29] Dealing with the s 5 issue, the Attorney reported:[41]

11. The Bill proposes a blanket voting ban on any convicted prisoner who is incarcerated on election day regardless of their offence. The explanatory note to the Bill appears to suggest that anyone sentenced to any period of imprisonment is a serious offender. The objective of the Bill appears to be that a person convicted for serious crimes against the community should forfeit the right to vote as part of their punishment. I will assume, without expressing an opinion, that temporarily disenfranchising serious offenders as a part of their punishment would be a significant and important objective.

12. The objective of the Bill is not rationally linked to the blanket ban on prisoner voting. It is questionable that every person serving a sentence of imprisonment is necessarily a serious offender. People who are not serious offenders will be disenfranchised. Fine defaulters may be sentenced to imprisonment as an alternative

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39 Section 5 is set out at para [38] below.

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

41 Christopher Finlayson *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).

sentence. I doubt that this group of people can be characterised as serious offenders such that they should forfeit their right to vote.

13. Under the Bill, the Electoral Act would continue to disqualify electors being detained for a period exceeding three years in a hospital or secure facility in the context of a criminal process. An example of this is where a person has been found by a Court on conviction to be mentally impaired and is detained under an order made by the Court for a period exceeding three years. If the mentally impaired person was detained for less than three years, the Bill would not disqualify the person from registering as an elector. The Bill would therefore introduce irrational inconsistencies in the law where mentally impaired prisoners detained in a hospital or secure facility for less than three years could vote while all prisoners serving sentences less than three years in prisons would be disenfranchised.

14. The blanket ban on prisoner voting is both under and over inclusive. It is under inclusive because a prisoner convicted of a serious violent offence who serves a two and a half year sentence in prison between general elections will be able to vote. It is over inclusive because someone convicted and given a one-week sentence that coincided with a general election would be unable to vote. The provision does not impair the right to vote as minimally as reasonably possible as it disenfranchises in an irrational and irregular manner.

15. The disenfranchising provisions of this Bill will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or to the conduct of the prisoners whose voting rights are taken away. The irrational effects of the Bill also cause it to be disproportionate to its objective.

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.

(footnotes omitted)

Analysis

(a) Introductory comments

[30] In a case of this type, it is important for a Court to express its decision and the reasons for it with clarity. If I were to make a declaration of inconsistency, its primary purpose would be to inform the public of New Zealand that the High Court has made a solemn finding that the Disqualification Act is inconsistent with the right to vote affirmed by s 12(a) of the Bill of Rights. Transparency of approach and reasoning is necessary to achieve that goal.

[31] In dealing with the issues, counsel have helpfully surveyed a wide range of judicial authorities and academic literature. However, I have decided not to review in detail the submissions put before me by counsel and Mr Taylor (who appeared on his own behalf). In taking that approach, I intend no disrespect to the arguments presented by Mr Perkins, for the Attorney-General, and Mr Francois, for the four female prisoners; nor, indeed, to the helpful submissions made by Mr Taylor. I am grateful for the assistance I have received from them.

(b) The inconsistency

[32] Mr Perkins argued the application on the basis of the jurisdiction of the Court to make a declaration of inconsistency and whether, if jurisdiction were to exist, it was appropriate for one to be made. He informed me that the Attorney did not resile from the view expressed in his s 7 report that the present s 80(1)(d) appeared to be inconsistent with s 12 of the Bill of Rights, and could not be justified under s 5.[42]

[33] I have considered independently the reasons given by the Attorney for reaching that conclusion, and, subject to one addition, I respectfully agree with them.

[34] I consider that there is also an inconsistency in the application of the Disqualification Act to those who are sentenced to home detention, as opposed to imprisonment. A person is not eligible to be sentenced to home detention unless he or she would otherwise have been sentenced to a term of imprisonment of two years or less.[43] Whether the term of imprisonment that would *prima facie* be imposed is commuted to home detention depends on a judicial evaluation of a broad range of factors; not just the seriousness of the crime committed.[44] The fact that a person has been sentenced to imprisonment does not necessarily demonstrate that his or her offending is more serious than someone sentenced to home detention.

[35] Two co-offenders with equal culpability may receive different types of sentences to respond to the same offending. When one is sentenced to home

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42 Christopher Finlayson *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) at para [16], set out at para [29] above.

43 Generally, see *Graham v R* [2014] NZSC 55.

44 See *Doolan v R* [2011] NZCA 542 at paras [35]–[38].

detention and the other is imprisoned, that will often be because one does not have a suitable address at which home detention can be served.[45] The consequence of the disparity in sentencing is that the offender who is sentenced to imprisonment loses his or her right to vote, whereas the home detainee does not. That is an arbitrary outcome.

(c) Is there jurisdiction to make a declaration of inconsistency?

[36] The Attorney-General's primary submission is that this Court has no jurisdiction to make a declaration of inconsistency in a case where its interpretive function is not engaged. Mr Perkins points out that there have been no cases in which a declaration of inconsistency has been sought as the sole remedy; nor in circumstances where no serious issue arises over the interpretation of the legislation said to be inconsistent with a guaranteed right or freedom. Indeed, as he correctly states, there has been no case to date in which a formal declaration of inconsistency has been made. Despite the issue having been raised in a number of appellate authorities, only one Judge, in dissent, has stated unequivocally that he would have made a declaration of inconsistency.[46]

[37] Mr Taylor's and Mr Francois' response to those submissions is to rely on the ability of the Court to fashion an appropriate remedy to vindicate the right that the prisoners claim has been violated by the blanket ban on prisoner voting. They contend that there is no jurisdictional bar to prevent the Court from granting the relief they seek. Further, it is said that there is no basis on which the remedy could properly be refused on discretionary grounds.

[38] Three sections of the Bill of Rights assume prominence when considering this issue. Sections 4, 5 and 6 provide:

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45 Sentencing Act 2002, s 80A(2).

46 *R v Poumako* [2000] 2 NZLR 695 (CA) at paras [86]–[107]. In that case, Thomas J was of the view that "nothing less than a formal declaration will suffice to maintain the constitutional integrity of the Bill of Rights". Among other points, he emphasised that the Bill of Rights was of constitutional significance and casts the Courts in a supervisory role; that Parliament had left the question of remedies under the Bill of Rights to the Courts to develop; and that without a jurisdiction to make a declaration of inconsistency, s 5 was largely redundant.

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[39] Because the Bill of Rights is not supreme law, Mr Perkins argues that these provisions can be used only to determine whether there is a "rights-consistent" meaning to the legislation that is being considered by the Court, in this case the Disqualification Act. Section 6 requires that an enactment should be given a meaning consistent with the Bill of Rights, if that were possible. *R v Hansen*[47] explains the approach to be taken when undertaking an interpretive exercise of that type. On the submission advanced by Mr Perkins, that would be the only legitimate use of ss 4, 5 and 6 of the Bill of Rights.

[40] I consider first the boundaries within which it remains open for this Court to determine whether a declaration of inconsistency should be made. Some circumstances have been expressly excluded as a result of appellate judgments:

(a) A District Court does not have jurisdiction to make a declaration of inconsistency. The District Court is a creature of statute and there is

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[47] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at para [92].

no specific jurisdiction conferred on the District Court to grant a declaration as a remedy.[48]

(b) There is no jurisdiction to make a declaration of inconsistency in the course of a criminal trial in either the District Court or the High Court. The primary objection is that "it is unheard of for the courts hearing criminal cases to grant what is truly civil relief", namely a declaration.[49]

[41] In one of the more recent appellate decisions, *Boscawen v Attorney-General (No 2)*,[50] the Court of Appeal did not distinguish, when leaving open the availability of a declaration, between cases where there were disputes between the parties over the interpretation of legislation and those in which a proceeding had been "commenced for the purpose of seeking the declaration as a stand-alone remedy".[51]

[42] In *Moonen v Film and Literature Board of Review*,[52] Tipping J, for the Court of Appeal,[53] said that the incorporation of a provision in the form of s 5 into a Bill of Rights that was not supreme law suggested that the Court had "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 the sense that "it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society".[54]

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48 *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at para [14]. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary* (LexisNexis, Wellington, 2005) at para 28.7.2.

49 *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at para [13]. Nevertheless, there may be cases in which Courts exercising criminal jurisdiction at all levels of the hierarchy may be required either to make a finding of inconsistency or to assume such, for example where the Crown has chosen not to develop an evidential basis for a s 5 justification: *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at para [15]. By contrast, Courts in the United Kingdom have jurisdiction to make declarations of incompatibility in criminal proceedings, under s 4 of the Human Rights Act 1998 (UK). See r 17.28 of the Criminal Procedure Rules (UK) as in force on 2 February 2015. For further discussion of this issue, see Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 626–630.

50 *Boscawen v Attorney-General (No 2)* [2009] NZCA 12, [2009] 2 NZLR 229.

51 Ibid, at para [56].

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

53 Elias CJ, Richardson P, Keith, Blanchard and Tipping JJ. Apart from Richardson P, who had retired, the members of the Court were four of the five Judges appointed when the Supreme Court came into being in 2004.

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

[43] While the view that the function of s 5 should be limited to interpretation is based on the way in which s 4 has been expressed, I do not consider that the broader role suggested for s 5 in *Moonen* conflicts with the policy underlying s 4. Whether s 5 is viewed solely as an interpretive provision or as one which can also be used in determining whether to make a declaration of inconsistency, the Court is required to take into account quasi-political considerations, to determine whether an inconsistency is "demonstrably justified in a free and democratic society". That is not the type of analysis in which the Courts of this country could legitimately indulge before the Bill of Rights came into force. The power to do so was conferred by Parliament, when s 5 was enacted. Whether engagement in that task is for the purpose of interpretation or part of the analysis required to determine inconsistency is beside the point. On either approach, there is no conflict with s 4, a provision that states in unequivocal terms that the Court cannot declare a statute invalid or ineffective by reason only that a relevant provision is inconsistent with a right guaranteed or affirmed by the Bill of Rights.

[44] A distinction was drawn by Mr Perkins between an "indication" and a "formal declaration" of inconsistency. He submitted that the former was permissible but the latter not. That submission draws on some of the language employed by Tipping J in *Moonen*,[55] as well as observations made by McGrath J, in the Supreme Court, in *R v Hansen*.[56]

[45] In *Hansen*, McGrath J postulated a case where a rights-consistent interpretation would prove impossible on ordinary interpretive principles. McGrath J emphasised that "a New Zealand Court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights-consistent interpretation, that none could be found, and that it has been necessary for the Court to revert to s 4 of the Bill of Rights and uphold

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with the way in which cl 3 of the draft Bill of Rights was intended to operate as part of a "supreme law": see para [7] above.

55 Ibid, at paras [19] and [20].

56 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at para [253].

the ordinary meaning of the other statute". However, he added: "Normally that will be sufficiently apparent from the Court's statement of its reasoning".[57]

[46] The initial suggestion that a remedy might be available in the form of a declaration of inconsistency was made by the late Professor F M (Jock) Brookfield in an article written in 1992, two years after the Bill of Rights came into force.[58] Professor Brookfield asked whether there was a role for the Courts in relation to s 5 of the Bill of Rights. He wrote:[59]

> The very precise wording of s 4 leaves it open – and indeed the Bill as a whole arguably requires – that a Court should, at least in a case of serious infringement where a provision in an enactment is found to be inconsistent "with *any provision* of this *Bill of Rights*" – that is, including s 5 itself, as well as the rights and freedoms in Part II – formally declare that inconsistency even though it can go no further than that. Of course the provision may be saved under s 5, as imposing a justified limitation on the right or freedom, in which case the Court should so declare. There is also the consideration that, as Rishworth has pointed out ("The First Fifteen Months", in Essays on the New Zealand Bill of Rights Act 1990 7, 22), a government might well prefer to minimize its reliance on s 4 and wish to argue the justified limitation. It should have the opportunity so to argue. The essential point is that it is assumed, in the prohibition directed to the courts in s 4, that they may hear argument not only about the nature and definition of the rights and freedoms in Part II but also about justified limitations under s 5. If an infringing meaning is put forward as a justified limitation under that section, rather than as a negation under s 4, the Court should decide the point.

[47] Professor Paul Rishworth QC revisited the point,[60] by reference to the judgment of the Court of Appeal in *Quilter v Attorney-General*.[61] That was a case involving the Marriage Act 1955. The question was whether the inability of three lesbian couples to obtain marriage licences breached the right to be free from discrimination, in terms of s 19 of the Bill of Rights.[62] Professor Rishworth considered whether a declaration of inconsistency was an appropriate remedy by

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57 Ibid.

58 F M Brookfield "Constitutional Law" [1992] NZ Recent Law Review 231.

59 Ibid, at 239.

60 Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] New Zealand Law Review 683.

61 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

62 The particular issue involving declarations of inconsistency where s 19 is engaged is now governed by the Human Rights Act 1993, s 92J. See further, para [62] below.

reference to Professor Brookfield's initial offering on the topic.[63] Professor Rishworth said:[64]

> The country rejected a higher law Bill of Rights with an enhanced judicial role. Parliament enacted instead a Bill of Rights with s 4 in it. That section precludes judges from doing numerous things in response to inconsistency. But one thing it does not do is preclude comment and proclamation. The question is whether the offering of judicial opinions on Bill of Rights consistency is now to be seen as something implicitly ruled out by the legislative history and nature of our Bill of Rights (together with general principles of the constitution relating to the judicial role), or whether (as Thomas J holds [in *Quilter*]) judicial opinions should instead be seen as positively required by the Bill of Rights. Perhaps (he might have added) declarations are even pointedly reserved as a possibility by s 4. To take up an earlier point, once again *there is room for judicial choice as to where our Bill of Rights should be located on the spectrum of constitutional significance*.
>
> (emphasis added; footnotes omitted)

[48] The possibility that a Court may have a "duty" to make a declaration was discussed by Professor Claudia Geiringer, in an article published in 2009.[65] Her article explored contemporary case law "touching on the suggestion that the New Zealand courts have an implied power to formally declare that legislation is inconsistent with the rights and freedoms contained" in the Bill of Rights. The author's conclusion was that "the prospects for the development of a formal declaratory jurisdiction of this kind in New Zealand are, if anything, receding".[66] In reaching that conclusion, Professor Geiringer referred to *Moonen v Film and Literature Board of Review*,[67] *R v Hansen*[68] and *Taunoa v Attorney-General*.[69]

[49] Having regard to the uncertain nature of the jurisdiction, I propose to consider the issue as one of first impression, guided by the observations made in the appellate decisions[70] and the academic writings[71] to which I have been referred. I do

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63 Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] New Zealand Law Review 683 at 693. Professor Rishworth referred to the type of declaration suggested by his academic colleague as a "Brookfield declaration", in recognition of its intellectual origins.

64 Ibid. Compare with remarks of Cooke P in *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.

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

66 Ibid, summary of the article.

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

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

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

70 See, for example, *R v Manawatu* (2006) 23 CRNZ 833 (CA) at para [13] (leave to appeal to the

so on the basis of the "judicial choice" to which Professor Rishworth referred in his article.[72]

[50] My starting point is the fulsome jurisprudence that has developed on the topic of remedies for breach of rights affirmed by the Bill of Rights. In one of the early decisions of the Court of Appeal, *Simpson v Attorney-General [Baigent's Case]*,[73] the Court of Appeal considered whether a remedy (either in addition to, or instead of, evidence being ruled inadmissible in a criminal proceeding) in the form of compensatory damages could be awarded to respond to a breach of the right to be secure against unreasonable search or seizure.[74] The question arose in the context of a breach caused by the actions of the executive branch of Government.

[51] In *Baigent*, counsel for the Crown had argued that the absence of a remedies provision in the Bill of Rights militated against the availability of compensatory damages against the Crown for breach of a guaranteed right. None of the Judges accepted that proposition. Five judgments were delivered, each dealing with the question whether there was a basis on which such a remedy could be ordered.

[52] Although the draft Bill of Rights in the White Paper did include a clause dealing with remedies, Cooke P, expressing himself broadly, took the view that weight should not be attached to the absence of such a provision in the enacted Bill of Rights. He said:[75]

> By its long title the [Bill of Rights] is "(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand". The words

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Supreme Court refused in [2007] NZSC 13); *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at paras [16] and [17] (a similar opinion being expressed by the Supreme Court when refusing leave to appeal in [2007] NZSC 54 at paras [6]–[8]); *R v Chatha (No 2)* [2008] NZCA 466; *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at para [123]; *Miller v New Zealand Parole Board* [2010] NZCA 600 at para [75].

71 In addition to those to which I have already referred, I have drawn on Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 and Peter W Hogg and Allison A Bushell "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35(1) Osgoode Hall LJ 75. The latter concerns the Canadian Charter of Rights which, in contrast to the New Zealand Bill of Rights Act 1990, is supreme law.

72 Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] New Zealand Law Review 683 at 693, set out at para [47] above.

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

74 New Zealand Bill of Rights Act 1990, s 21.

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

> "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 remedy. Article 17 includes the right not to be subjected to arbitrary or unlawful interference with privacy and home.

[53] The other members of the Court also placed emphasis on art 2(3) of the International Covenant.[76] Casey J buttressed his reliance on that provision by reference to the First Optional Protocol to the International Covenant, of 26 August 1989. In adopting that Protocol, New Zealand accepted individual access by its citizens to the United Nations Human Rights Committee "for violation of rights under the [International] Covenant, where they have been unable to obtain a domestic remedy".

[54] Casey J pointed out that the Bill of Rights reflected rights identified in the International Covenant, adding that "it would be a strange thing if Parliament, which passed [the Bill of Rights] one year later, must be taken as contemplating that New Zealand citizens could go to the United Nations Committee in New York for appropriate redress, but could not obtain it from our own Courts".[77]

[55] Hardie Boys J referred to a number of decisions from the Republic of Ireland. They accepted jurisdiction to grant remedies for breach of guaranteed fundamental rights in the Irish Constitution, notwithstanding the absence of a remedies provision. The Judge observed that the absence of such a section had "not prevented the [Irish] Courts from developing remedies, including the award of damages, not only against individuals guilty of infringement, but against the state itself".[78] Hardie Boys J quoted (what he called) a "resounding passage" from *The State (At the Prosecution of Quinn) v Ryan*, in which ó Dálaigh CJ said:[79]

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[76] Ibid, at 690–691 (Casey J), 699 (Hardie Boys J), 703–704 (Gault J) and 718 (McKay J).

[77] Ibid, at 691. The relationship between s 12(a) and art 25(b) of the International Covenant, both dealing with voting rights, is explained at para [5] above.

[78] Ibid, at 701.

[79] *The State (At the Prosecution of Quinn) v Ryan* [1965] IR 70 at 122. To similar effect, see also *Byrne v Ireland* [1972] IR 241 (Walsh J) and *Kearney v Minister for Justice* [1986] IR 116 at 122 (Costello J).

> It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires.

[56] Gault J adopted what had been said by Richardson J, in *R v Goodwin*:[80] a "statement of fundamental human rights would be a hollow shell and the enactment of a Bill of Rights an elaborate charade if remedies were not available for breach".[81] Gault J also expressed agreement with what Cooke P had said in *Ministry of Transport v Noort*:[82] "The ordinary range of remedies will be available for [the] enforcement and protection" of such rights.

[57] In dealing with the various ways in which the existing law protects guaranteed rights, Gault J referred,[83] in the context of the right to vote, to *Ashby v White*,[84] in which the ability of a person to maintain an action against a returning officer for refusing to admit a rightful vote was discussed. However, on my reading of that judgment, a majority of the Court, Gould, Powell and Powys JJ, declined to allow such a remedy. Holt CJ took a different view.

[58] McKay J also referred to *Ashby v White*,[85] but only in relation to a statement of principle as to remedies. He quoted from the judgment of Holt CJ:[86] "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it …". Adopting that general approach, McKay J concluded:[87]

> 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.

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80 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 191.
81 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 706.
82 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 266.
83 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 710.
84 *Ashby v White* (1703) 2 Ld Raym 938.
85 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 717.
86 *Ashby v White* (1703) 2 Ld Raym 938 at 953–954.
87 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 717.

[59] In more recent times, the Supreme Court has had the opportunity to reconsider the availability of *Baigent* damages as a remedy for breaches of provisions of the Bill of Rights. However, in none of those cases did the Attorney-General ask the Supreme Court to reconsider *Baigent*. Rather, its applicability was questioned on the facts of the particular case. In *Taunoa v Attorney-General*,[88] the issues were framed by counsel for the Attorney-General as: what is the proper role of public law compensation and can it be regarded as indistinguishable from private law damages in tort?[89] In *Attorney-General v Chapman*[90] the question was whether the remedy could be available in respect of acts of the judicial branch of Government.

[60] Although a majority of the Supreme Court in *Chapman* held that the remedy was unavailable in respect of judicial acts (because of the doctrine of judicial immunity), the general thrust of the Supreme Court judgments appears to be captured in Blanchard J's observation in *Taunoa* that when a right has been infringed and a question of remedy arises, a Court "must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances".[91]

[61] The general principle is that where there has been a breach of the Bill of Rights there is a need for a Court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right.[92] Should the position be any different in respect of the legislative branch of Government? In my view, the answer is "no". Given the enactment of s 5 of the Bill of Rights, Parliament's undoubted intention that (in appropriate cases) the Courts engage in the type of quasi-political analysis required by that section, and the narrow scope of the prohibitions placed on the Courts by s 4 of the Bill of Rights, I consider that Parliament did not intend to exclude the ability of the Court to make a declaration of inconsistency.

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

89 Ibid, at 440, a report of the argument for the Attorney-General on his cross appeal.

90 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

91 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at para [258].

92 For example, *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at paras [107] and [108] (Elias CJ), [253]–[259] and [267] (Blanchard J), [299] and [300] (Tipping J), [366]–[372] (McGrath J) and [385] and [386] (Henry J).

[62] That conclusion is reinforced by an amendment to the Human Rights Act 1993, effective from 1 January 2002. Through that amendment, Parliament expressly authorised the Human Rights Review Tribunal to make a declaration of inconsistency, in the context of a breach of the right to be free from discrimination confirmed by s 19 of the Bill of Rights. Section 92J of the Human Rights Act 1993 provides:

> **92J Remedy for enactments in breach of Part 1A**
>
> (1) If, in proceedings before the Human Rights Review Tribunal, the Tribunal finds that an enactment is in breach of Part 1A, the only remedy that the Tribunal may grant is the declaration referred to in subsection (2).
>
> (2) The declaration that may be granted by the Tribunal, if subsection (1) applies, is a declaration that the enactment that is the subject of the finding is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.
>
> (3) The Tribunal may not grant a declaration under subsection (2) unless that decision has the support of all or a majority of the members of the Tribunal.
>
> (4) Nothing in this section affects the New Zealand Bill of Rights Act 1990.

[63] I make four observations arising out of the jurisdiction conferred on the Human Rights Review Tribunal:

(a) Section 92J(4) makes it clear that the Bill of Rights stands apart from the power conferred by s 92J(1) and (2). Parliament has not expressly excluded the ability of this Court to make a declaration of inconsistency, in a case such as this.[93]

(b) The declaration authorised by s 92J is one that can be made on a stand-alone basis.[94]

(c) There is a right of appeal to the High Court from any determination of the Human Rights Review Tribunal.[95]

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93 The power of the High Court to make such a declaration had, at the time s 92J was enacted in 2002, been discussed in some detail by the Court of Appeal in *R v Poumako* [2000] 2 NZLR 695 (CA) and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

94 Human Rights Act 1993, s 92J(1) and (2). The consequences of the making of a declaration are set out in s 92K.

95 Ibid, s 123(2)(c) and (d).

(d) By conferring power on the Human Rights Review Tribunal to make a declaration of inconsistency, Parliament has signalled that it sees no political objection to that particular remedy being granted.

[64] Although s 92J of the Human Rights Act is directed to only one aspect of the Bill of Rights (the right to be free from discrimination), it is difficult to see why Parliament would authorise an inferior tribunal to make a declaration that legislation passed by Parliament is inconsistent with s 19 of the Bill of Rights if it did not accept that the High Court, a superior Court of record with inherent jurisdiction, could not do the same in respect of other rights affirmed or guaranteed by the Bill of Rights. This view is reinforced by the fact that Parliament has conferred a right of appeal from the Human Rights Review Tribunal to the High Court when a declaration of inconsistency is either made or refused.[96] The existence of the s 92J jurisdiction points firmly to an acceptance by Parliament that it is appropriate for the Court to make declarations about the inconsistency of legislation with rights guaranteed by the Bill of Rights.

[65] I have considered the separate question whether the making of a declaration of inconsistency would bring into question parliamentary processes, in a manner contrary to art 9 of the Bill of Rights 1688 (Imp) (the 1688 Bill of Rights) or in apparent breach of the principles of comity attaching to the roles of the legislative and judicial branches of Government. On reflection, I consider they are considerations that are more relevant to the question whether it is appropriate (in any given case) to make a formal declaration.[97]

[66] Having regard to all of the considerations to which I have referred, I hold that there is jurisdiction for this Court to make a declaration of inconsistency.

(d) Should a declaration be made?

[67] The authorities emphasise the desirability of the Court speaking out to identify cases in which particular legislation is inconsistent with the Bill of Rights.

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96 See para [63](c) above.
97 See para [69] below.

Moonen v Film and Literature Board of Review[98] and *R v Hansen*[99] are illustrations of that point. In particular, Tipping J, delivering the judgment of the Court of Appeal in *Moonen*, highlighted the value of a "judicial indication" for cases that might be reviewed by the United Nations Human Rights Committee.[100] In this case, both Mr Taylor and Mr Francois have made it clear that the prisoners have brought this proceeding because of the requirement, under the Optional Protocol of the International Covenant, to exhaust all domestic remedies before submitting a complaint to the United Nations Human Rights Committee.[101] That intention provides a reason for the Court to make a declaration.

[68] In an interlocutory decision within the present proceeding, in which the Attorney sought an order that the application for a declaration of inconsistency be struck out, Brown J considered whether it might be open to the Court to make the declaration sought. In doing so, he surveyed the relevant authorities on the topic in more detail than have I.[102] The Judge did not, given the nature of the application before him, make any final determination as to the availability of the jurisdiction. Nevertheless, it seems clear that whether considered in the context of the concept of "comity" between the legislative and judicial branches of Government or otherwise, Brown J saw the issue as not so much one of jurisdiction, but of practice.[103]

[69] Courts must take care to respect the boundaries within which the three branches of Government operate, and the principle of comity that applies among them. Article 9 of the 1688 Bill of Rights provides that "the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any Court or place out of Parlyament". I agree with Brown J who, on the application to strike out the present proceeding, commented that it was difficult to see either how art 9 or the principles of comity would be contravened if the Court made a

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98 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at para [20], discussed at para [40] above.

99 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at para [253], discussed at para [42] above.

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

101 See also paras [53]–[54] above.

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

103 Ibid, at paras [69]–[83], adopting the view expressed by McGrath J in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at para [253] that any finding of inconsistency will normally be embodied in the Court's statement of its reasoning.

declaration of inconsistency, but would not if its conclusion were embodied in the reasons for judgment of the Court.[104]

[70] Like Brown J, I do not accept that the Court should be fearful about making a formal declaration of inconsistency because of the possibility that such an order might be "ignored with disdain or impunity".[105] There are two answers to that point. The first is that the judicial oath requires me to do right "without fear or favour".[106] The second is that I am not making a political statement in an endeavour to persuade Parliament to change its mind. My function is firmly grounded in the obligation of the Court to declare the true legal position. Any political consequences of my decision can be debated in the court of public opinion, or in Parliament.

[71] However, I respectfully disagree with Brown J's observation that a Court may be more "hesitant" to grant a declaration in a case where the Attorney has made a s 7 report and Parliament has chosen to enact regardless.[107] My reason for that disagreement is based on the differing functions of the Attorney and the Courts.[108] I see no reason why, having regard to those different functions, the Court should not act to reinforce the Attorney's report, rather than, as Brown J puts it, to "supplement" the role of the Attorney-General.[109] Having said that, nor should the Court hesitate to declare inconsistency when it disagrees with a s 7 report asserting that there appears to be none, and the circumstances are such that a declaration is an appropriate remedy. As it happens, in this particular case, I am not calling into question the Attorney's report. Rather, in finding inconsistency, I am reinforcing the opinion that the Attorney expressed to Parliament.

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104 *Taylor v Attorney-General* [2014] NZHC 1630 at paras [58] and [59].

105 Ibid, at para [80]. Adopting the sentiments expressed by Elias CJ in *Attorney-General v Chapman*, Brown J expressed a view with which I agree: "Her Majesty's judges are made of sterner stuff" (quoting from *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at para [66]). The Chief Justice had referred to a similar comment in respect of "Her Majesty's servants" made by Lord Reid in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1033.

106 Oaths and Declarations Act 1957, s 18.

107 *Taylor v Attorney-General* [2014] NZHC 1630 at para [86].

108 See para [77](d) below.

109 *Taylor v Attorney-General* [2014] NZHC 1630 at para [86].

[72] I deal finally with the question whether the Court should exercise a declaratory jurisdiction when there is no live controversy between the parties and a declaration would be "stand-alone" relief.

[73] That is the type of jurisdiction that has been conferred on the Human Rights Review Tribunal by s 92J of the Human Rights Act 1993.[110] As previously indicated, I take the view that the existence of this legislation manifests an acceptance by Parliament that a judicial tribunal can appropriately state, in a formal way, that legislation passed by it is inconsistent with a right affirmed or guaranteed by the Bill of Rights. I also observe that s 92J does not prohibit the making of a declaration on the grounds that the Attorney has already given advice to that effect to Parliament.

[74] Although it is doubtful that jurisdiction exists to grant a declaration of inconsistency under the Declaratory Judgments Act 1908,[111] the circumstances in which the Court might exercise jurisdiction more generally under that Act when faced with a moot or academic question is useful, by way of analogy, in determining whether a declaration should be made on a "stand-alone" basis. The Supreme Court has made it clear that, while a declaration under that Act will not ordinarily be made in that situation, the High Court retains jurisdiction to make one.[112]

[75] Outside the declaratory judgment jurisdiction, *R v Gordon-Smith (on appeal from R v King)*[113] provides a similar illustration. The Supreme Court granted leave to appeal on questions of public interest, the primary one being whether the Police could supply so-called "vetted jury lists" to the Crown to assist in deciding whether or not to challenge a prospective juror. Leave was granted even though the trial had run its course and there were no live controversies between the parties.[114]

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110 See para [63](b) above.

111 For example, see the observations made by Clifford J in *Boscawen v Attorney-General* (2008) 8 HRNZ 520 (HC) and the discussion of this point by Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 631.

112 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at para [9] (Elias CJ, with whom other members of the Supreme Court expressed agreement at para [82]). See also *Earthquake Commission v Insurance Council of New Zealand Inc* [2014] NZHC 3138, [2015] 2 NZLR 381 at paras [133] and [135].

113 *R v Gordon-Smith (on appeal from R v King)* [2008] NZSC 56, [2009] 1 NZLR 721.

114 Ibid, at paras [24] and [29].

[76] The question whether a citizen's right to vote has been removed in a manner inconsistent with the Bill of Rights is a point of such constitutional importance[115] that it justifies the Court exercising a discretion to grant relief in the form of a declaration. The interpretation of neither the present s 80(1)(d) nor s 12(a) of the Bill of Rights is in issue. There is no evidence that could add to determination of the point. The legal question is simply expressed: is the present s 80(1)(d) inconsistent with s 12(a)? The importance of the right and the nature of the inconsistency are sufficiently fundamental to demand a remedy, by way of formal declaration.

[77] In summary, my reasons for holding that a declaration should be made in this case are:

(a) The inconsistency arises in the context of the most fundamental aspect of a democracy;[116] namely, the right of all citizens to elect those who will govern on their behalf. Looking at the point solely as one of discretion, if a declaration were not made in this case, it is difficult to conceive of one in which it would. Enactment of a statutory provision that is inconsistent with that fundamental right should be marked by a formal declaration of the High Court, rather than by an observation buried in its reasons for judgment.

(b) Whether a declaration of inconsistency or an "indication" of inconsistency in reasons for judgment is provided, it is difficult to see how the making of a formal declaration of inconsistency could amount to a contravention of either art 9 of the 1688 Bill of Rights or the principles of comity. In both situations, the Court is commenting on a consequence of a legislative act.

(c) The functions of the Attorney-General and the Court are different. The Attorney advises the House on whether the Bill *appears* to be inconsistent with a right guaranteed by the Bill of Rights.[117] The

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115 See para [2] above.
116 Ibid.
117 New Zealand Bill of Rights Act 1990, s 7, set out at para [12] above.

Court's role is to determine whether the legislation *is* in breach and, if so, whether any remedy should be granted.

(d) The purpose of a formal declaration is to draw to the attention of the New Zealand public that Parliament has enacted legislation inconsistent with a fundamental right. It does so in a manner that is more accessible to them than a report to Parliament by the Attorney-General. Again, this is a matter of function. When reporting under s 7, the Attorney's responsibility is to Parliament. When determining questions of public law, this Court's responsibility is to all New Zealanders.

(e) Parliament has accepted, by enacting s 92J of the Human Rights Act 1993, that it does not regard a formal declaration as an illegitimate intrusion into parliamentary processes.[118]

[78] I make it clear that I am not making any ruling on the question whether the original s 80(1)(d) is inconsistent with s 12(a) of the Bill of Rights. There are powerful arguments that the limitations on the prohibition contained in the original s 80(1)(d) are justifiable in a free and democratic society.[119]

Result

[79] For those reasons, I make a declaration which is intended to mirror the conclusion reached by the Attorney in his report to Parliament:[120]

> Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act.

[80] Costs are reserved. If sought, memoranda shall be filed and served in support on or before 28 August 2015. Any memoranda in reply shall be filed and served on

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118 See para [62] above.
119 Generally, see paras [10] and [16]–[26] above.
120 See para 16 of the Attorney-General's report, set out at para [29] above.

or before 25 September 2015. Unless either party seeks an oral hearing and I am satisfied one is appropriate, I will deal with any application for costs on the papers.

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P R Heath J

Delivered at 12.00pm on 24 July 2015