Te Tari Ture o te Karauna
Crown Law

2 March 2020

Attorney-General

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

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

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

Background

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

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

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

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

The Bill

Amendments to the New Zealand Bill of Rights Act 1990

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

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

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

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

Amendments to the Human Rights Act 1993

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

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

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

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

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

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

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

Analysis

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

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

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

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

4 Clause 4

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

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

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

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

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

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

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

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

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

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

8 Section 10 of Human Rights Act 1998.

Review of this advice

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

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Noted

Hon David Parker
Attorney-General
9 / 3 /2020