A Taylor-Made Declaration? Attorney-General v Taylor *and Declarations of Inconsistency*

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I INTRODUCTION

> 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. It cannot be justified under s 5 of that Act.
>
> —Heath J in *Taylor v Attorney-General*[1]

In 2015, Heath J made history in *Taylor v Attorney-General* by issuing New Zealand's first declaration of inconsistency: a formal declaration that Parliament had legislated inconsistently with the New Zealand Bill of Rights Act 1990 (Bill of Rights).[2] The High Court declared that a blanket ban on prisoner voting was an unjustified limitation on the right to vote.[3] In November 2018, the Supreme Court, by a 3–2 majority, upheld the Court of Appeal's finding and affirmed the power of the higher courts to make declarations of inconsistency.[4] This was a landmark decision — in other jurisdictions, the power of a court to make declarations of inconsistency is explicitly granted by statute.[5]

First, to contextualise *Taylor*, this case note outlines the facts and procedural history of the case, and defines "declaration of inconsistency". Secondly, this case note analyses the finding of the Supreme Court majority that the power of higher courts to make declarations of inconsistency derives from the text and purpose of the Bill of Rights. This decision continues the courts' tradition of using the common law and Bill of Rights together to fashion remedies.[6] Thirdly, this note scrutinises the purpose of declarations of inconsistency. It will specifically focus on how the *Taylor* majority framed the purpose of declarations as vindicating rights rather than signalling to Parliament to reconsider legislation. Finally, this case note offers some

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1 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 [*Taylor* (HC)] at [79].

2 At [79].

3 At [79].

4 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [*Taylor* (SC)] at [65].

5 Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 566. See for example Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36 ("declaration of inconsistent interpretation"); and Human Rights Act 1998 (UK), s 4(2) ("declaration of … incompatability").

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

concluding remarks on the government's response to *Taylor* and the future of declarations of inconsistency.

II BACKGROUND

Facts

Taylor concerned the prisoner voting ban. Section 12(a) of the Bill of Rights provides that every New Zealand citizen over the age of 18 has the right to vote. However in 2010, s 4 of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the Amendment Act) amended s 80(1)(d) of the Electoral Act 1993 to prohibit all prisoners from voting. Previously, this prohibition had only applied to prisoners serving sentences of three years or more.[7] When the Bill for the Amendment Act was introduced, the Attorney-General issued a report under s 7 of the Bill of Rights stating that the Bill was unjustifiably inconsistent with s 12 of the Bill of Rights.[8] Nevertheless, Parliament passed the Bill.

Procedural History

Serial litigant Arthur Taylor, and four other prisoners, brought proceedings in the High Court against the Crown. They sought a declaration that the Amendment Act was inconsistent with the Bill of Rights.[9] Heath J granted a declaration that s 80(1)(d) of the Electoral Act was unjustifiably inconsistent with the right to vote in s 12(a) of the Bill of Rights.[10] As courts have been cautious with declarations of inconsistency, it is no coincidence that the only declaration of inconsistency granted to date concerns a fundamental democratic right — the right to vote.[11] The Attorney-General did not attempt to claim that there was no inconsistency nor justify the inconsistency.[12] Arguably, it would not even be open to the Attorney-General to take such a step after having previously reported under s 7 that the inconsistency was unjustified.[13]

The Attorney-General appealed the decision to the Court of Appeal on three issues: whether the higher courts had the power to make declarations of inconsistency; the source of the power; and the ambit of the power.[14] The

7 Electoral Act 1993, s 80(1)(d) prior to the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

8 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* (March 2010) at [1].

9 *Taylor* (HC), above n 1, at [3].

10 At [79].

11 Claudia Geiringer and Paul Rishworth "Magna Carta's Legacy? Ideas of Liberty and Due Process in the New Zealand Bill of Rights Act" [2017] 4 NZ L Rev 597 at 625.

12 *Taylor* (SC), above n 4, at [84].

13 Finlayson, above n 8; and *Taylor* (HC), above n 1, at [29].

14 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [*Taylor* (CA)] at [4].

Court unanimously found that the higher courts do have the power to make declarations of inconsistency; that the power "derives from the power of the higher courts to answer questions of law"; and that the power is discretionary.[15]

The Attorney-General again appealed the decision to the Supreme Court on two issues: whether the Court of Appeal was correct to uphold the High Court's declaration of inconsistency, and whether Arthur Taylor had standing.[16] The majority consisted of judgments by Ellen France J (writing on behalf of herself and Glazebrook J) and Elias CJ, who dismissed the appeal and found that the High Court did have the power to make a declaration of inconsistency.[17] The minority judgment of O'Regan J (writing on behalf of himself and William Young J) found that the courts had no common law power to make declarations of inconsistency.[18]

Declaration of Inconsistency

Declarations of inconsistency are distinguishable from a judge merely commenting that a statute is inconsistent with a right. Declarations are a formal, non-binding indication that a legislative provision poses an unjustified limitation on a right contained in the Bill of Rights.[19] The Court of Appeal has commented that the term "'declaration of incompatibility'" would be more appropriate, but "'declaration of inconsistency' has become a term of art in New Zealand".[20] Declarations of inconsistency are also a discretionary remedy rather than a declaration of legal rights — not every incompatibility will automatically justify a declaration of inconsistency.[21]

Parliament frequently passes legislation that is inconsistent with rights. In the nearly 30 years in which the Bill of Rights has been in effect, the Attorney-General has made 80 reports stating that proposed legislation is inconsistent with a right.[22] Consequently, courts frequently apply s 4 of the Bill of Rights to give effect to a rights-inconsistent provision, despite finding that it cannot be read consistently with a specific right. For example, in *R v Hansen*, the Supreme Court found that s 6(6) of the Misuse of Drugs Act 1975 was inconsistent with s 25(c) of the Bill of Rights. Yet, the Court did not make a declaration of inconsistency.[23] Anthony Mason argues that the label "'declaration of inconsistency'" is misleading as it does not determine rights between parties and therefore has no more effect than an informal statement

15 At [187].
16 *Attorney-General v Taylor* [2017] NZSC 131.
17 *Taylor* (SC), above n 4, at [65] and [121].
18 At [122].
19 Geiringer, above n 5, at 552.
20 *Taylor* (CA), above n 14, at [6].
21 At [168]–[170]; and *Taylor* (SC), above n 4, at [70]. As an aside, it is well established that there is no power to make declarations of inconsistency in criminal proceedings: see *Miller v The New Zealand Parole Board* [2010] NZCA 600 at [18] and Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (2011) 9 NZJPIL 1 at 14.
22 Ministry of Justice "Section 7 reports" (12 July 2018) <www.justice.govt.nz>.
23 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [290].

(such as was made in *Hansen*).[24] However, accepting Mason's argument would be to ignore the judge's *explicit* intention and the significant reasons why the judge did or did not make a formal declaration.

Standing

The issue of standing arose properly in the Supreme Court. Without hearing submissions, the Court of Appeal ruled that Arthur Taylor did not have standing (although the other prisoners did) as he was not directly affected by the issue. The previous version of the Electoral Act already prohibited him from voting.[25] In the Supreme Court, Ellen France, Glazebrook, O'Regan and William Young JJ found instead that Arthur Taylor had standing because the provision continued to prohibit him from voting.[26] Elias CJ found that he had standing because declarations of inconsistency are to be issued in respect of a rights-inconsistent statute, rather than any particular respondent.[27] In future cases, it is unlikely that interested (but unaffected) persons or organisations will be able to apply for declarations of inconsistency. This is problematic as the existence of a rights-inconsistent statute should be sufficient to warrant a declaration of inconsistency; a person's rights should not be unreasonably limited because they lack the ability to bring litigation. However, the majority's finding is logical, especially when taken together with its findings that a declaration of inconsistency is primarily intended to vindicate the applicant's rights, rather than indicate that legislation is problematic.

III SOURCE OF POWER TO MAKE A DECLARATION OF INCONSISTENCY

No Statutory Power

There is no statute authorising courts to make declarations of inconsistency. In the Supreme Court, O'Regan and William Young JJ, dissenting, commented that if a power "exists, it flows from the Bill of Rights", but absent an express provision, the courts do not have the power to make declarations of inconsistency.[28] However, Elias CJ and Ellen France and Glazebrook JJ found that the power of higher courts to make declarations of inconsistency does not depend on legislation.[29] Most notably, Ellen France J commented that "the absence of the mechanics does not mean the absence of a power".[30] The majority justified the power to make declarations of inconsistency under

24 Mason, above n 21, at 11.
25 *Taylor* (CA), above n 14, at [177].
26 *Taylor* (SC), above n 4, at [69] and [145].
27 At [120].
28 *Taylor* (SC), above n 4, at [122].
29 At [51] and [118].
30 At [51].

New Zealand's unique constitutional arrangements — specifically, the Bill of Rights.[31]

The Bill of Rights

The majority judgments establish that the power to make declarations of inconsistency derives from the text and purpose of the Bill of Rights, for three central reasons: the Act applies to the legislature; there is no other effective remedy for a breach of the Act; and a declaration of inconsistency is part of the usual range of remedies for breaches.

First, Elias CJ and Ellen France and Glazebrook JJ emphasised that pursuant to s 3, the Act applies to all three branches of government.[32] Therefore, Parliament had breached the Bill of Rights by passing the Amendment Act.[33] The Attorney-General argued that s 4 of the Bill of Rights contemplates inconsistent statutes[34] and, consequently, the Amendment Act instead changed the scope of the right to vote.[35] O'Regan and William Young JJ accepted that s 4 contemplates that Parliament will pass inconsistent legislation.[36] However, Elias CJ and Ellen France and Glazebrook JJ found that s 4 instead leaves open the option for courts to make declarations of inconsistency.[37] Additionally, Elias CJ held that the Bill of Rights is a "constitutional" statute, and therefore Parliament must directly amend the Bill of Rights to modify a right.[38] This finding appears to affirm *Thoburn v Sunderland City Council*, which established that "constitutional" statutes are immune from implied repeal.[39]

Secondly, Ellen France and Glazebrook JJ stated that there is no other effective remedy for a breach of the Bill of Rights.[40] The language of an "effective remedy" comes from the International Covenant on Civil and Political Rights (ICCPR), which requires states to have an "effective remedy" for any person whose rights are violated.[41] A purpose of the Bill of Rights is to affirm New Zealand's commitment to the ICCPR.[42] There is a presumption that New Zealand law should be construed consistently with international obligations.[43] O'Regan and William Young JJ doubted that a declaration of

31 At [63] and [94].
32 At [43] and [118].
33 New Zealand Bill of Rights Act 1990, s 12(a). See also s 5.
34 *Taylor* (SC), above n 4, at [25].
35 At [45].
36 At [133].
37 At [38] and [106]. See for example *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA); and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20].
38 *Taylor* (SC), above n 4, at [102]–[103]. Elias CJ cites Cabinet Office *Cabinet Manual 2017* at 2. See also *Taylor* (CA), above n 14, at [79].
39 Philip A Joseph "Declarations of Inconsistency Under the New Zealand Bill of Rights Act 1990" (2019) 30 PLR 7 at 10; and *Thoburn v Sunderland City Council* [2003] QB 151 at [63].
40 *Taylor* (SC), above n 4, at [41].
41 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 2(3)(a).
42 Bill of Rights Act, long title.
43 See for example *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [4] as cited in *Taylor* (CA), above n 14, at [86].

inconsistency would be an effective remedy,[44] given that it would limit the applicant's ability to complain to the Human Rights Committee about a breach of a right where they have not received domestic redress.[45] However, effectiveness should not be limited to tangible effects. The constitutional importance of vindicating rights and sending a statement about legislation makes declarations of inconsistency an effective remedy.

Thirdly, Elias CJ and Ellen France and Glazebrook JJ affirmed the Court of Appeal's finding that a declaration of inconsistency is part of the usual range of remedies available to the courts.[46] Elias CJ emphasised that the ability to make declarations is part of the inherent jurisdiction of the High Court, as s 11 of the Declaratory Judgments Act 1908 empowers the Court to make a declaratory judgment where no other remedy is available.[47] The Human Rights Review Tribunal's statutory power to make declarations of inconsistency further supports that declarations are a judicial function.[48] In *Simpson v Attorney-General* (*Baigent's Case*), Cooke P commented that the ordinary range of remedies is available under the Bill of Rights, but that the Bill of Rights "requires development of the law when necessary".[49] The majority rely on *Baigent's Case* on this point.[50] There is a slight fallacy in their finding that a declaration of inconsistency is part of the usual range of remedies. While general declaratory relief is a usual remedy, a formal declaration of inconsistency is absolutely a new remedy. Claudia Geiringer pertinently comments that New Zealand has a "common law-fuelled" Bill of Rights, meaning that the common law and the Bill of Rights evolve together.[51] This is clear from the majority's reliance on and reasoning from the Bill of Rights. Therefore, the power of the courts to make declarations of inconsistency should not be viewed solely as a common law power, but instead as a common law product of the Bill of Rights.

IV PURPOSE OF DECLARATIONS OF INCONSISTENCY

The Court of Appeal established that a declaration of inconsistency may be made for two reasons: to vindicate a right or to signify that Parliament should reconsider legislation.[52] However, the Supreme Court majority departed from this position by finding that the primary purpose of a declaration of inconsistency was to vindicate rights.[53] Disagreeing that a purpose of such a

44 *Taylor* (SC), above n 4, at [139].
45 At [139]; and *Taylor* (CA), above n 14, at [88].
46 *Taylor* (SC), above n 4, at [30] and [104].
47 At [97]–[100].
48 Human Rights Act 1993, s 92J; and *Taylor* (SC), above n 4, at [47]. But see O'Regan and William Young JJ dissenting at [137]–[138].
49 *Baigent's Case*, above n 6, at 676 as cited in *Taylor* (SC), above n 4, at [30].
50 *Taylor* (SC), above n 4, at [30], [40] and [104].
51 Geiringer, above n 5, at 564 and 568.
52 *Taylor* (CA), above n 14, at [155] and [157].
53 *Taylor* (SC), above n 4, at [107]

declaration was to signify that Parliament should reconsider legislation,[54] Elias CJ and Ellen France and Glazebrook JJ framed declarations of inconsistency as a remedy for a person whose rights have been affected.[55] This seems to be a step backwards from rights protection. Courts have historically been reluctant to make declarations of inconsistency for fear of pressuring Parliament to change the law.[56] A declaration of inconsistency is a strong statement about rights-inconsistent legislation; it may therefore be seen as gratuitously criticising Parliament, whether or not judges intend it. However, as Cooke P stated, even if "the [c]ourt could be seen by some to be gratuitously criticising Parliament … possibly that price ought to be paid".[57]

O'Regan and William Young JJ suggest that if there was such a power to issue declarations of inconsistency, they should only be made where there are tangible consequences, such as forcing local or public authorities to act.[58] However, this position is undesirable. It overlooks that the legislature should not unjustifiably breach people's rights as a matter of law. This view also conflates the issues of whether declarations of inconsistency *can* be made and whether they *should* be made, as part of the broader argument that courts should not make declarations of inconsistency because they have no practical effect.[59]

Finally, the Supreme Court unanimously dismissed the Attorney-General's argument that courts do not have the power to make declarations of inconsistency because such a declaration is advisory opinion and therefore inconsistent with the judicial function.[60] O'Regan and William Young JJ caveated that a declaration would not be inconsistent with the judicial function where the power to make declarations is authorised by statute; declarations of inconsistency are accepted as advisory opinions in other jurisdictions where they are authorised by statute.[61] Elias CJ and Ellen France and Glazebrook JJ, on the other hand, framed declarations as applicant-centred tools to vindicate rights, rather than accepting they could be advisory opinions.[62] This is another step back from the Court of Appeal's decision. The Court of Appeal accepted that a declaration of inconsistency could be an advisory opinion and justified it as "dialogue" between the courts and Parliament.[63] One concern is that if Parliament ignores declarations of inconsistency framed as advisory opinions, it may underme the integrity of the judiciary.[64] However, to borrow from Cooke P again, the risk of undermining the integrity of the judiciary is perhaps the price that ought to be paid in attaining stronger rights protection.[65] Either

54 At [66] and [107].
55 At [56], [66] and [107].
56 Mason, above n 21, at 12.
57 *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.
58 *Taylor* (SC), above n 4, at [140]–[143].
59 At [134].
60 At [65], [95] and [131].
61 At [131].
62 At [107].
63 *Taylor* (CA), above n 14, at [149].
64 See *Taylor* (SC), above n 4, at [134].
65 *Temese v Police*, above n 57, at 427.

way, a parliamentary response to a declaration of inconsistency would be desirable to further validate the declaration.[66]

V FUTURE OF DECLARATIONS OF INCONSISTENCY

In February 2018, the government announced that it was looking into a statutory power to make declarations of inconsistency.[67] The important part of any statutory power to make declarations of inconsistency is requiring that the declaration be brought to Parliament's attention.[68] This type of mechanism would prevent Parliament from ignoring declarations and potentially undermining the judiciary, as well as provide parliamentary accountability and public scrutiny.[69] In *Taylor*, William Young and O'Regan JJ endorsed Mason's suggestion that the legislation could require the Attorney-General to be joined as a party who would then be required to bring the declaration to the attention of Parliament.[70] Alternatively, the legislation could follow the Human Rights Act 1993 model, in which the minister responsible for the rights-inconsistent statute would bring the declaration to the attention of Parliament.[71]

If no legislative change is made, courts will likely continue to make declarations of inconsistency. But, it is uncertain whether there will be any legislative recognition or other effects. There is yet to be any change to the blanket ban on prisoner voting. The Green Party has put forward a member's bill — Electoral (Strengthening Democracy) Amendment Bill, which would reverse the Amendment Act,[72] but Minister for Justice, Andrew Little, has commented that changing the law is not a priority.[73] While a statutory power to make declarations of inconsistency seems unlikely at this stage and may compromise the current flexibility of the courts, it would be preferable to maintaining the status quo. A statutory power would increase the legitimacy of declarations as advisory opinions, ensure that Parliament would hear the declarations, and publicly hold Parliament accountable.

Ultimately, *Taylor* is a landmark Supreme Court decision. It presents a strong argument that the power to make declarations of inconsistency comes from the common law development of the Bill of Rights. The standing requirements and the purpose of rights vindication limit the instances in which

66 Jeremy Waldron "Some Models of Dialogue Between Judges and Legislators" in Grant Huscroft and Ian Brodie (eds) *Constitutionalism in the Charter Era* (LexisNexis, Ontario, 2004) 7 at 27.

67 (27 February 2018) 727 NZPD 2145; and Andrew Little and David Parker "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990" (press release, 26 February 2018).

68 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 646–647.

69 Geiringer, above n 5, at 570.

70 Mason, above n 21, at 14; and *Taylor* (SC), above n 4, at [129]–[130].

71 Human Rights Act 1993, s 92K(2).

72 Golriz Ghahraman "Strengthening Democracy Members Bill" Green Party of Aotearoa New Zealand <www.greens.org.nz>.

73 Craig McCulloch "Prisoners' right to vote currently not a priority for Parliament – Little" (9 November 2018) Radio New Zealand <www.rnz.co.nz>.

declarations will be available, in comparison to the Court of Appeal decision. However, making a statement about legislation is inherent to a *declaration* of inconsistency. The future of declarations of inconsistency is still flexible; it will be up to future courts or legislators to determine the direction of such declarations.