

**ORDER PROHIBITING PUBLICATION OF PLAINTIFF’S NAME AND
IDENTITY TO PROTECT HIS FAIR TRIAL RIGHTS IN A SEPARATE
PROCEEDING.**

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2025-485-224
[2026] NZHC 2179**

IN THE MATTER OF	the New Zealand Bill of Rights Act 1990 and the Declaratory Judgments Act 1908
BETWEEN	B Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing:	30 September 2025
Appearances:	C J Nicholls for Plaintiff A M Powell and L E Sinclair for Defendant
Judgment:	30 July 2026

JUDGMENT OF GWYN J

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Introduction

[1] Mr B seeks a declaration that s 7 of the Gangs Act 2024, the prohibition on the display of gang insignia in public places, is inconsistent with the right to freedom of expression as affirmed by s 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) and art 19(2) of the International Covenant on Civil and Political Rights (ICCPR).

[2] The Attorney-General accepts that s 7 limits the right to freedom of expression and the limitation is not justified under s 5 of the Bill of Rights, but says the Court should use its discretion to decline to make a declaration of inconsistency. The Attorney also submits that there is no jurisdiction to make a declaration of inconsistency with the ICCPR.

Background

Mr B's position

[3] In December 2024 Mr B was convicted and discharged of an offence against the Gangs Act in the District Court. He is a patched member of a New Zealand gang, which is a specified gang under sch 2 of the Gangs Act.¹

[4] At 3.00 pm on Saturday 7 December 2024, Mr B was sighted via CCTV on the footpath outside a restaurant in the Wellington region, wearing a black cap displaying wording in coloured writing with a coloured border. Mr B said the hat displayed a family member's name in the gang's writing and colours. This constituted prohibited gang insignia under the Gangs Act, as one of the words and the colours used are commonly used to refer to the gang in question.² Mr B was arrested after local council staff, who were monitoring CCTV footage, reported it to Police.

[5] Mr B unsuccessfully appealed the conviction to the High Court. In the judgment dismissing the appeal, the Judge observed that in appropriate cases, it was

¹ Gangs Act 2024, s 4 definition of "gang" and sch 2, item 24.

² Section 4 definition of "gang insignia" and sch 2, item 24.

open to a party in Mr B's situation to seek a declaration of inconsistency. He now does so.

[6] My decision in this application is concerned solely with the declarations sought by Mr B. It is not an appeal from the decision of the High Court upholding Mr B's conviction and will have no effect on that conviction.

Legislative history

[7] The Gangs Act resulted from the passing of the Gangs Legislation Amendment Bill, which was introduced into the House on 7 March 2024. It passed its First Reading on 7 March 2024 and was reported back from the Justice Committee on 3 July 2024. The Gangs Act was given royal assent on 23 September 2024 and came into force on 21 November 2024.

Attorney-General's s 7 report

[8] On 26 February 2024, the Attorney-General issued a report under s 7 of the Bill of Rights in respect of the Gangs Legislation Amendment Bill.³

[9] At the outset, I record that the Court has had regard to the s 7 report and the passage of the legislation only for the purpose of noting that the s 7 report was lodged when the Bill was before the House, thus bringing the inconsistency to the attention of the House.

[10] The Attorney-General's s 7 report concluded that, whilst expressing identity as a gang member was "expression of low value",⁴ the extent of the ban was disproportionate because the legitimate social objective of eliminating the fear and intimidation caused by displays of gang insignia could have been achieved by something less than an outright ban that operated at all times, whether or not other people are present. The report concluded that the limitation on the right to freedom of expression contained in s 7 of the Gangs Act had not been justified.

³ Judith Collins *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Gangs Legislation Amendment Bill* (26 February 2024) [section 7 report].

⁴ At [25].

[11] The Attorney-General’s s 7 report was discussed in the House during debates on the Bill.⁵

Relevant provisions of the Gangs Act

[12] The purpose of the Gangs Act is set out at s 3:

3 Purpose

The purpose of this Act is to reduce the ability of gangs to operate and cause fear, intimidation, and disruption to the public by—

- (a) prohibiting the display of gang insignia in public places:
- (b) providing for the issue of dispersal notices to stop gang members from gathering in public places:
- (c) providing for the making of non-consorting orders to prevent specified gang offenders from associating or communicating with each other for 3 years.

[13] “Gang” is defined:⁶

gang means any organisation, association, or group of persons that is specified by a name that is the same as, or substantially similar to, that of any organisation, association, or group of persons identified in Schedule 2

[14] Schedule 2 sets out a list of 35 identified gangs.

[15] “Gang insignia” is defined:⁷

gang insignia—

- (a) means a sign, symbol, or representation commonly displayed to denote membership of, or an affiliation with, a gang, not being a tattoo; and
- (b) includes any item or thing to which a sign, symbol, or representation referred to in paragraph (a) is attached or affixed (for example, clothing or a vehicle)

[16] “Public place” is defined:⁸

⁵ See, for example, (7 March 2024) 774 NZPD (Gangs Legislation Amendment Bill – First Reading, Duncan Webb and Helen White).

⁶ Gangs Act, s 4 definition of “gang”.

⁷ Section 4 definition of “gang insignia”.

⁸ Section 4 definition of “public place”.

public place has the meaning given by section 2(1) and (2) of the Summary Offences Act 1981, but does not include—

- (a) any publicly accessible online place (for example, an internet site or an online application or similar);
- (b) for the purposes of Part 2 or subpart 1 of Part 3, the parliamentary precincts (within the meaning of section 5 of the Parliament Act 2025)

Bill of Rights analysis

[17] The Bill of Rights applies to acts done by the legislative, executive, or judicial branches of the Government of New Zealand and by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.⁹ The Bill of Rights also includes the process under which the Attorney-General must bring to the attention of Parliament any provision in any Bill introduced into Parliament that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.¹⁰

[18] The first task for the Court in an application for a declaration of inconsistency is to interpret the legislation in question in accordance with the Bill of Rights interpretive framework.¹¹

[19] The second step in the exercise is as described by the majority of the Supreme Court in *Attorney-General v Chisnall*:¹²

[85] If, on the interpretation settled upon by the court, it is satisfied that there is a limitation on rights, the court then proceeds to assess, under s 5, whether that limitation is a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society. This is also called the “proportionality” assessment. At each stage the court may well require evidence to provide necessary context to assist it in assessing the existence, nature and extent of any limitation of rights.

Is s 7 a restriction on the right to freedom of expression?

[20] Section 7 of the Gangs Act establishes that it is an offence for any person to knowingly display gang insignia at any time in a public place.

⁹ New Zealand Bill of Rights Act 1990 [Bill of Rights], s 3.

¹⁰ Section 7.

¹¹ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [84].

¹² At [85].

[21] Mr B's complaint (advanced on his behalf by Mr Nicholls) is that s 7 is inconsistent with the right to freedom of expression guaranteed by s 14 of the Bill of Rights.

[22] Section 7 of the Gangs Act provides:

7 Prohibition on display of gang insignia in public place

- (1) A person commits an offence if the person knowingly, and without reasonable excuse, displays gang insignia at any time in a public place.
- (2) A person who commits an offence against subsection (1) is liable on conviction to a term of imprisonment not exceeding 6 months or a fine not exceeding \$5,000.
- (3) If a person pleads guilty to, or is convicted of, an offence against subsection (1), the gang insignia concerned—
 - (a) is forfeited to the Crown; and
 - (b) may be destroyed or otherwise disposed of as the court, either at the time of the conviction for the offence or on a subsequent application, directs.

[23] Section 14 of the Bill of Rights states:

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[24] As recorded above, the Attorney-General accepts that s 7 of the Gangs Act limits the exercise of the freedom guaranteed by s 14 of the Bill of Rights, insofar as it prohibits the public display of gang insignia, and concludes that this limitation is not demonstrably justified under s 5 of the Bill of Rights.

[25] However, it is still necessary for this Court to be satisfied that the right to freedom of expression is restricted, and whether any such restriction can be demonstrably justified, before moving to the question of whether it is appropriate to issue a declaration of inconsistency.

[26] The s 14 right to freedom of expression extends to all non-violent forms of communication that attempt to convey an idea or meaning.¹³ Importantly, it includes not only verbal and written speech, but also non-verbal conduct and “symbolic speech”.¹⁴

[27] As Sir Stephen Sedley said, famously, describing the concept of freedom of speech in *Redmond-Bate v DPP*:¹⁵

... Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers’ Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear.

[28] Expressive activity may be protected as speech under s 14. In the New Zealand context, free speech has been held to include obscene texts referring to sex acts that (if they occurred) would be illegal,¹⁶ and a noisy protest outside a police officer’s home that repeatedly named the officer and referred to “bogus warrants” and “malicious prosecutions”.¹⁷

[29] The question whether the wearing of gang insignia may be protected as speech under s 14 of the Bill of Rights has previously been considered in this Court. In *Schubert v Wanganui District Council*, Clifford J concluded that a bylaw that prohibited display of gang insignia in specified public places restricted the right to freedom of expression, although observing that “intimidatory expression” may be given little value under s 14.¹⁸

[30] The display of gang insignia is necessarily an expression by a citizen of their support for the particular gang and is thus an expression within the terms of s 14 of

¹³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].

¹⁴ *Hopkinson v Police* [2004] 3 NZLR 704 (HC) at 708 and 711; endorsed by the Court of Appeal in *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [33]. In *Hopkinson*, the right to freedom of expression was engaged when the law criminalised the act of flag burning.

¹⁵ *Redmond-Bate v DPP* [1999] Crim LR 998 (QB) at [20]; cited in *Taueki v Police* [2013] NZHC 1710 at [19]; and in *Pointon v Police* [2012] NZHC 3208 at [34].

¹⁶ *Moonen*, above n 13.

¹⁷ *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

¹⁸ *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [97].

the Bill of Rights. As in *Schubert*, there is no doubt in my mind that s 7 of the Gangs Act effectively restricts the freedom of expression of those who would otherwise communicate their membership of, and commitment to, a gang organisation — such as Mr B’s membership of a particular gang.

Rights-consistent interpretation?

[31] In *Chisnall*, the Supreme Court noted that a declaration of inconsistency is only appropriate where the court had concluded that the legislation cannot be interpreted in a rights-consistent manner.¹⁹ This requires consideration of both ss 5 and 6 of the Bill of Rights and of whether the relevant powers can be kept within Bill of Rights bounds.²⁰ Section 6 provides that:

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.

[32] However, as in *Chisnall*, no s 6 pathway to rights consistency has been articulated or pleaded by the Attorney-General in this case.²¹ As John Ip writes, in *Attorney-General v Taylor* (the first Supreme Court decision granting a declaration) the Court did not require a litigant to first argue for a plausible rights-consistent meaning; “the litigation was premised on such an interpretation being impossible.”²² In *Taylor*, the relevant Act restricted the right to vote for prisoners; this plainly engaged the right to vote under s 12 of the Bill of Rights.²³ Similarly, there is no plausible way to interpret the Gangs Act such that it does not limit the right to freedom of expression.²⁴

¹⁹ *Chisnall*, above n 11, at [84].

²⁰ At [99].

²¹ At [99].

²² John Ip “*Attorney-General v Taylor*: A Constitutional Milestone?” [2020] NZ L Rev 35 at 52.

²³ *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [*Taylor* (SC)].

²⁴ In Tim Conder and Dr Jarrod Gilbert “A patch by any other name” [2025] NZLJ 327, Conder and Gilbert argue that it is reasonably possible to interpret the Gangs Act in a way that is consistent with the right to freedom of expression, by limiting the meaning of “gang insignia”. But, as stated, the issue of rights-consistent interpretation is not raised in this application. I also agree with Ross Carter’s observation that “adventurous s 6 interpretations are arguably much more political and controversial” than making a declaration — Ross Carter “Statutory interpretation new style revisited” [2024] NZLJ 232 at 237.

Reasonable limit?

[33] The right of freedom of expression is not unqualified. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights if the inconsistency is considered to be a reasonable limit that is justifiable under s 5 of the Act. A limit on a right can be justified in terms of s 5 where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective (the “proportionality” assessment).²⁵

[34] As is apparent from the Attorney-General’s s 7 report, the Attorney does not seek to justify the limitation imposed by s 7 of the Gangs Act on the Bill of Rights right to freedom of expression. Although the onus is on the Crown to justify the limitation, for completeness I consider this aspect of the exercise.

Consideration of parliamentary materials

[35] Undertaking the justificatory exercise requires some consideration of parliamentary materials. There are some constraints on that exercise.

[36] Article 9 of the Bill of Rights 1688 enshrines the principle of parliamentary privilege:

the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament

[37] The main purpose of pt 2 of the Parliament Act 2025 is to “reaffirm and clarify the nature, scope, and extent of” parliamentary privilege.²⁶ Sections 18 and 19 of the Act prohibit the production of argument or evidence about proceedings in Parliament if done for a number of enumerated purposes. In *Chisnall*, the Supreme Court noted (in relation to the equivalent provisions of the Act’s predecessor, the Parliamentary

²⁵ See *Moonen*, above n 13, and *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1, at [70], [123], [203]–[204] and [271].

²⁶ Parliament Act 2025, s 10(1)(a).

Privileges Act 2014)²⁷ that these purposes are broadly drawn, as is the definition of “proceedings in Parliament”.²⁸

[38] However, s 20 of the Parliament Act provides that ss 18 and 19 do not prevent or restrict a court from admitting such evidence or hearing submissions for the purpose of ascertaining the meaning to be given to any enactment. As Doogue J observed in *Staples v Claims Resolution Services Ltd* (in relation to the Parliamentary Privilege Act): “Parliamentary proceedings can be considered and commented on in court for the purpose of establishing a relevant historical event of other fact. The embargo is only triggered if the parliamentary proceedings are impeached or questioned”.²⁹

[39] In *Chisnall*, the Court concluded that an application for a declaration of inconsistency falls within the carve-out under s 13 of the Parliamentary Privilege Act (now s 20 of the Parliament Act), in that it entails proceedings for the purpose of ascertaining the meaning of, or the meaning to be given to, an enactment.³⁰ As Lord Nicholls said (writing in the United Kingdom context):³¹

What is important is to recognise there are occasions when courts may properly have regard to ministerial and other statements made in Parliament ... without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone.

Importance of Act’s objective

[40] The objective of the Gangs Act is to reduce the ability of gangs to operate and cause fear, intimidation, and disruption to the public.³² The explanatory note to the Bill recorded that the purpose of the Bill is to reduce the harmful behaviours engaged in by gangs and to disincentivise gang membership and records that:³³

²⁷ There are some minor editorial changes between ss 18 and 19 of the Parliament Act 2025 and ss 12 and 13 of the Parliamentary Privilege Act 2014, but they are otherwise direct substitutes.

²⁸ *Chisnall*, above n 11, at [187]–[189].

²⁹ *Staples v Freeman* [2021] NZHC 3237 at [74], citing Mary Harris and David Wilson (eds) *McGee: Parliamentary Practice in New Zealand* (4th ed, Oratia, Auckland, 2017) at 738.

³⁰ *Chisnall*, above n 11, at [189]. See also *Staples* at [74]; and more recent discussion of comity and parliamentary privilege in *Kapa-Kingi v Tamihere* [2026] NZHC 1200.

³¹ *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at [60], cited in *Chisnall* at [189] and n 272.

³² Gangs Act, s 3.

³³ Gangs Legislation Amendment Bill (23-1) (explanatory note).

Gang insignia displayed in public may cause some people to feel fearful or intimidated. The display of gang insignia as a status symbol may also assist gangs in marketing themselves to potential prospects and future recruits. As gang members are readily identifiable by their insignia, the display of insignia may exacerbate inter-gang rivalries that lead to gang violence in public spaces.

[41] Those objectives may be considered sufficiently important to justify some limitation on the freedoms of gang members and to indicate that the limitation is rationally connected with its objective.

[42] While the ban prevents gang members signalling their identity to other members of the public, it does not prevent them from associating or assembling. As Clifford J observed in *Schubert*, gang insignia is only one way in which gang members identify each other;³⁴ a ban on the display of gang insignia may have some effect on gang confrontations but is unlikely to stop them altogether. Similarly in relation to intimidation of the public, as Clifford J concluded, while people may be intimidated by gang members wearing gang patches, they are also intimidated by gangs because of the actions of gang members.³⁵ The extent of the effect of the ban is difficult to determine.

Limit no more than necessary to achieve objectives?

[43] The question that follows is whether the limit on freedoms imposed by s 7 is no more than is necessary to achieve its objectives.

[44] As the Supreme Court said in *Chisnall*, it is not the task of the court to check whether Parliament has made the best choice possible to address the problem the challenged legislation seeks to remedy.³⁶ The issue for the court is rather whether the limitation of rights is justified for the purposes of s 5. A consideration of alternative means by which the legislation's objective might be achieved is relevant to that justificatory exercise.

[45] "Gang insignia" covers more than gang "patches" which, as Conder and Gilbert note, is the symbol that the "average New Zealander" will immediately

³⁴ *Schubert*, above n 18, at [109].

³⁵ At [110].

³⁶ *Chisnall*, above n 11, at [248].

recognise as denoting membership of a particular group.³⁷ Further, once gang names are removed from the gang insignia, there are images (for example, fists, dogs, snakes, skulls and crossbones) that have multiple connotations; that is, they are not only gang symbols.³⁸ The prohibition on the display of gang insignia covers all public spaces at all times, rather than targeting specific places where members of the public are most likely to be. There is no requirement that other members of the public, whom the Act is intended to protect from fear and intimidation, be present. The word “display” is not defined in the Act.

[46] The Attorney-General’s s 7 report does consider whether more limited prohibitions could target places where intimidation of the public is more likely such as playgrounds, sports fields, beaches and other places of public recreation where the public are highly likely to be. The Attorney-General notes that a more limited ban in those terms could have been supplemented by giving police officers a discretionary power to direct the removal of gang insignia in any other place, if fear and intimidation is likely to occur.³⁹

[47] Section 7 imposes a broad ban on any display of any imagery that could be associated with a gang, in any public place, regardless of whether other members of the public are present or whether they would recognise the imagery as related to a gang. The Act’s stated objective may have been achieved by a more targeted approach, for example, limited to places where members of the public are highly likely to be and by defining “display”. The breadth of the provision as framed is not rationally connected to protecting the public from fear and intimidation.

[48] In the absence of a convincing reason why less intrusive measures would not achieve the social purpose before a complete ban could be justified, the limitation to the freedom of expression caused by s 7 has not been justified under s 5 of the Bill of Rights.⁴⁰

³⁷ Conder and Gilbert, above n 24. Conder and Gilbert advocate for a s 6 rights-consistent interpretation of “gang insignia”.

³⁸ Professor Kris Gledhill “The Gangs Act 2024” [2024] NZLJ 384 at 386.

³⁹ Section 7 report, above n 3, at [26].

⁴⁰ See also *Schubert*, above n 18, where a similarly broad limitation on the public display of gang insignia in public places in Whanganui was found to unjustifiably breach s 14.

[49] I am not satisfied that the limit on the right to freedom of expression, as affirmed by s 14 of the Bill of Rights, is proportionate to the aim that is sought to be achieved. I conclude that s 7 of the Gangs Act is an unjustified limitation on the right to freedom of expression.

Declarations of inconsistency in New Zealand law

[50] As early as 2000, the Court of Appeal in *Moonen v Film and Literature Board of Review* recorded the expectation that “on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified” under s 5 of the Bill of Rights.⁴¹ However, although the possibility of a formal declaration of inconsistency was discussed over the following 15 years, no such declaration was issued.⁴²

[51] The jurisdiction to make declarations of inconsistency with the Bill of Rights was first recognised in *Taylor v Attorney-General*.⁴³ Five prisoners sought a declaration that s 80(1)(d) of the Electoral Act 1993, which prohibited all prisoners serving sentences of imprisonment imposed after 16 December 2010 from voting in the General Election, was inconsistent with the right to vote enshrined in s 12 of the Bill of Rights. Heath J concluded that he had jurisdiction to make a declaration and made one to that effect.⁴⁴

[52] That finding was unsuccessfully appealed to the Court of Appeal,⁴⁵ then to the Supreme Court. By a three:two majority, the Supreme Court upheld the jurisdiction to make a declaration. Ellen France and Glazebrook JJ said that granting such declarations of inconsistency was a judicial function, referring to the analogous ability to make declarations under the Declaratory Judgments Act 1908 even when there was no lis.⁴⁶ The majority rejected the Attorney-General’s argument that the courts had no jurisdiction to issue a declaration of inconsistency as a standalone remedy (that is, the

⁴¹ *Moonen*, above n 13, at [20].

⁴² See discussion in *Taylor v Attorney-General* [2014] NZHC 1630 at [24]–[38].

⁴³ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

⁴⁴ At [79].

⁴⁵ *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [*Taylor (CA)*].

⁴⁶ *Taylor (SC)*, above n 23, at [53].

jurisdiction does not require the applicant to first argue for a plausible rights-consistent meaning).⁴⁷

[53] In *Chisnall*, the Supreme Court reiterated what it had said in *Taylor*:⁴⁸

In *Attorney-General v Taylor* [the Supreme Court] confirmed that the High Court has jurisdiction to make a declaration that an enactment is inconsistent with the Bill of Rights.⁴⁹ The majority in that case said that by doing so the Court is fulfilling its obligation to grant remedies for breaches of the Bill of Rights, and its obligation under the Declaratory Judgments Act 1908 to vindicate rights through the issue of a declaration.⁵⁰ Identifying whether the obligation of compliance has been met is a judicial function.⁵¹

Process that follows making of a declaration of inconsistency

[54] It is useful at this juncture to set out the process that would be set in train if the Court were to make a declaration of inconsistency.

[55] Following the Supreme Court's decision in *Attorney-General v Taylor*, Parliament enacted the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 (the Amendment Act). The Amendment Act inserted a new ss 7A and 7B of the Bill of Rights, which effectively recognise the jurisdiction to make a declaration of inconsistency.⁵² The House of Representatives adopted standing orders which, together with ss 7A and 7B, set out how the executive and Parliament are to respond to any such declaration.⁵³ As I will come to, the Attorney-General says this process is relevant to the exercise of the court's jurisdiction.

[56] As the Court of Appeal observed in *Wairarapa Moana ki Pouākani Incorporation v Attorney-General*, the required response to a declaration is not just procedural, but substantive. In summary:⁵⁴

⁴⁷ At [73]. See also O'Regan and William Young JJ dissenting at [125]–[126]. See also Ip, above n 22, at 52.

⁴⁸ *Chisnall*, above n 11, at [83].

⁴⁹ *Taylor (SC)*, above n 23.

⁵⁰ At [38], [50] and [53] per Glazebrook and Ellen France JJ, and [95] and [100] per Elias CJ.

⁵¹ At [53] and [65] per Glazebrook and Ellen France JJ, and [103] per Elias CJ.

⁵² New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 [Amendment Act], s 4. See also New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (230-2) (select committee report).

⁵³ Standing Orders of the House of Representatives 2023, SO 269A and appendix F.

⁵⁴ *Wairarapa Moana ki Pouākani Inc v Attorney-General* [2026] NZCA 255 at [72].

- (a) the Attorney-General must bring the declaration to the attention of the House of Representatives;⁵⁵
- (b) the declaration is referred to the appropriate select committee for consideration;⁵⁶
- (c) that select committee must, within four months of the referral, consider the declaration and prepare a report for the House, which can include recommendations to address the declaration;⁵⁷
- (d) the select committee report on a declaration is set down as a Government order of the day;⁵⁸
- (e) the Minister for the infringing statute must present to the House a report advising of the Government's response;⁵⁹ and
- (f) there is then a debate in the House on:⁶⁰
 - (i) the declaration itself,
 - (ii) the select committee's report on the declaration, and
 - (iii) the Government's response to the declaration.

Exercise of the discretion to issue a declaration

[57] Having concluded that s 7 of the Gangs Act is an unjustified limitation on the right to freedom of expression, the remaining question for the Court is whether, in the circumstances of this case, it is appropriate to exercise the court's discretion to make a declaration of inconsistency.

[58] A survey of cases in both New Zealand and the United Kingdom reveals considerable divergence as to when the discretion to make a declaration of inconsistency (declaration of incompatibility in UK parlance), should be exercised.

New Zealand

[59] In New Zealand, the senior courts have considered the discretion on several occasions. As discussed above,⁶¹ in *Attorney-General v Taylor* the Court of Appeal

⁵⁵ Bill of Rights, s 7A(2).

⁵⁶ Standing Orders, appendix F, cl 4.

⁵⁷ Appendix F, cls 5–6.

⁵⁸ Appendix F, cl 7.

⁵⁹ Bill of Rights, s 7B(1).

⁶⁰ Standing Orders, appendix F, cl 10.

⁶¹ Above at [51]–[52].

upheld the declaration granted by Heath J in the High Court. In doing so, it considered the four arguments given before it as to why a court may make a declaration. In summary, it concluded that:

- (a) A declaration is a formal remedy, and sometimes its additional force may be needed to emphasise to the other branches of government that legislation needs reconsidering.⁶²
- (b) A declaration may be needed to vindicate the right. Although the declaration does not compensate the plaintiff or deter future conduct breaching the right, there is an important public interest in defending the right and speaking out.⁶³
- (c) A declaration may help to meet New Zealand's ICCPR commitment to provide an effective remedy. However, the Court emphasised that the effectiveness of any remedy is to be gauged by domestic considerations.⁶⁴
- (d) The fourth argument, that a declaration would make the plaintiff successful for costs purposes, was rejected as unnecessary given costs are discretionary.⁶⁵

[60] As the appeal to the Supreme Court focused only on whether the court had jurisdiction to grant a declaration at all, that Court did not discuss the exercise of the discretion or disturb the Court of Appeal's findings.⁶⁶

[61] In *Make It 16*, the applicant (a lobby group seeking to lower the minimum voting age from 18 years to 16 years) issued proceedings seeking a declaration that the provisions of the Electoral Act 1993 and the Local Electoral Act 2001 that set the minimum voting age at 18 were inconsistent with the right to freedom from age discrimination guaranteed under s 9 of the Bill of Rights. The High Court held that

⁶² *Taylor (CA)*, above n 45, at [155].

⁶³ At [157]–[159].

⁶⁴ At [160].

⁶⁵ At [161].

⁶⁶ *Taylor (SC)*, above n 23, at [70].

the limitation was justified under s 5.⁶⁷ The Court of Appeal disagreed, but declined to issue a declaration of inconsistency, finding:⁶⁸

In this case, we have decided there is no need to go any further than a finding that on the information before this Court in this case, the Attorney-General has not established that the limits on the right of 16 and 17 year olds to be free from age discrimination caused by the voting age provisions are reasonable limits that can be demonstrably justified in a free and democratic society. ... [T]he issue is very much in the public arena already. It is an intensely and quintessentially political issue involving the democratic process itself and on which there are a range of reasonable views. That being the context, we choose to exercise restraint and decline the application for declarations.

[62] When *Make It 16* came before the Supreme Court, the applicant argued that where there is an inconsistency which has not been justified, there should be a presumption (in civil cases) that a declaration will follow so that there is an effective remedy for rights infringements. The Supreme Court held it was not necessary to determine whether relief should otherwise presumptively be granted in the civil jurisdiction, noting: “We consider it is preferable to allow the jurisprudence to continue to develop on a case-by-case basis”.⁶⁹

[63] The Supreme Court was not persuaded by the Attorney-General’s argument that it would be “premature” to make a declaration.⁷⁰ It distinguished the situation before it from that in *Nicklinson*, a United Kingdom case, where the matter was due to be debated in the House of Lords in the near future.⁷¹

[64] The Supreme Court went on to consider an argument based on institutional competence and, while acknowledging the particular institutional competence of Parliament in these matters, said: “this is not a case of such complexity in terms of its resolution as to mean the Court is hampered in fulfilling its usual function”.⁷²

[65] After noting that the case involved the protection of the fundamental rights of a minority group, the Court said that:⁷³

⁶⁷ *Make It 16 Inc v Attorney-General* [2020] NZHC 2630, [2020] 3 NZLR 481.

⁶⁸ *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 at [62].

⁶⁹ *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [62].

⁷⁰ At [63] and [65].

⁷¹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

⁷² *Make It 16*, above n 69, at [66].

⁷³ At [68].

In these circumstances, we consider we should fulfil our role which is to declare the law. But in doing so it must be recognised that there may be other matters Parliament will take into account in ensuring that the position ultimately adopted has the necessary democratic legitimacy. Lady Hale SCJ made the point well in *Nicklinson* when she said:⁷⁴

“... my conclusion is not a question of ‘imposing the personal opinions of professional judges’. As already explained, we have no jurisdiction to impose anything: that is a matter for Parliament alone. We do have jurisdiction, and in some circumstances an obligation, to form a professional opinion, as judges, as to the content of the Convention rights and the compatibility of the present law with them. Our personal opinions, as human beings, ... do not come into it.”

[66] The Supreme Court accordingly granted a declaration of inconsistency.

[67] In *Chisnall*, Mr Chisnall sought declarations that Public Protection Orders (PPOs) under s 8(1) of the Public Safety (Public Protection Orders) Act 2014 and Extended Supervision Orders (ESOs) under s 107F(1) of the Parole Act 2002 were inconsistent with a number of rights affirmed by the Bill of Rights. The High Court made a declaration of inconsistency in relation to the retrospective application of the ESO regime.⁷⁵ The Court of Appeal confirmed this finding, but also declared that other aspects of the PPO and ESO regimes were inconsistent with the Bill of Rights.⁷⁶

[68] On appeal, the Supreme Court reiterated what it had said in *Taylor* as to the jurisdiction to make a declaration; that by doing so it was fulfilling its obligation to grant remedies for breaches of the Bill of Rights and that identifying compliance was a “judicial function”.⁷⁷

[69] The Supreme Court went on to say:⁷⁸

An important point to make is that if the court issues a declaration of inconsistency, it does not thereby declare the law invalid — s 4 makes that clear. Even where a declaration is issued, the statute in question remains in full force and effect. Nor is the court requiring any response from Parliament to the declaration. However, following this Court’s decision in *Taylor*, Parliament enacted ss 7A and 7B of the Bill of Rights and the House of

⁷⁴ *Nicklinson*, above n 71, at [325].

⁷⁵ *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110.

⁷⁶ *Attorney-General v Chisnall* [2021] NZCA 616, [2021] 2 NZLR 484; and [2022] NZCA 24.

⁷⁷ *Chisnall*, above n 11, at [83] (footnotes and citations omitted).

⁷⁸ At [87] (footnotes and citations omitted).

Representatives adopted standing orders which together provide for how the executive and Parliament will respond to any such declaration.

[70] The Court said:⁷⁹

... we accept it is appropriate for the courts to acknowledge that the legislation in question has been enacted by a democratically elected body, so that a finding that it is inconsistent with the affirmed rights is not to be lightly be made [*sic*]. Beyond that point, we think the issue is better addressed as one of institutional capacity as discussed above. Ultimately, Parliament has imposed on the courts the duty to undertake the s 5 analysis, and the courts cannot shirk the responsibility to address issue of rights consistency.

[71] In response to the Attorney-General's submission that a declaration is a relief of last resort the Supreme Court said:⁸⁰ "That is correct if it is meant that, as is apparent from the structure of the Bill of Rights itself, a declaration of inconsistency should not be issued where rights consistency can be achieved through the s 6 interpretive exercise." The Court concluded that, no relevant reason having been offered as to why a declaration of inconsistency should not be issued, it was satisfied that it should. Declarations were issued which, in summary, stated that to the extent PPOs, and some special conditions under the Parole Act, are a second penalty for offences for which offenders have already been punished, they are an unjustified limit on the right protected by s 26(2) of the Bill of Rights.⁸¹

[72] In the High Court, a number of cases have addressed the discretion to make a declaration of inconsistency in the context of proposed legislation. Others relate to a declaration in respect of current legislation that is set to be altered by a Bill. Particular issues as to parliamentary privilege and comity arise in that context.⁸² As Boldt J said in *Te Rūnanga o Ngāti Whātua*, "There is no dispute that the Court may not make any order or declaration which affects the formulation, introduction or progress of legislation".⁸³ This is not such a case.

⁷⁹ At [252].

⁸⁰ At [264].

⁸¹ *Attorney-General v Chisnall* [2025] NZSC 126 at [18].

⁸² See, for example, *Te Rūnanga o Ngāti Whātua v Attorney-General* [2024] NZHC 2271, [2024] 3 NZLR 218 at [36]; *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169; *Ngāti Mutunga O Wharekauri Asset Holding v Attorney-General* [2017] NZHC 2482, [2018] NZAR 18; *Ngāti Mutunga O Wharekauri Asset Holding v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116; and *Hata v Attorney-General (No 2)* [2023] NZHC 2919.

⁸³ *Te Rūnanga* at [36].

[73] In *Bouwer v Police*, Gault J was invited to make a declaration that s 77 of the Land Transport Act 1998 is inconsistent with the right to be presumed innocent until proven guilty under s 25(c) of the Bill of Rights.⁸⁴ The Judge concluded that on then current appellate authorities, declarations of inconsistency could not be issued in criminal proceedings, but went on to consider whether, even if there was jurisdiction, a declaration should be granted.⁸⁵ The court concluded it should not, for three reasons. First, Parliament was already aware of the inconsistency given the Attorney-General's s 7 report on the Land Transport Bill in 1997.⁸⁶ Second, the inconsistency was evident.⁸⁷ Third, the appellant had accepted that inconsistency with the Bill of Rights had no effect in relation to the outcome of her appeal against conviction. In those circumstances the Judge said he considered a declaration would have no utility.⁸⁸

[74] In *Gordon v Attorney-General*, the applicants sought declarations regarding the interpretation of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHA) and its compatibility with the Bill of Rights.⁸⁹ In particular, they sought a declaration of inconsistency with the rights to refuse to undergo medical treatment, freedom from discrimination and the right not to be arbitrarily arrested or detained.

[75] Justice Cull declined to make declarations. In part, this was because she found that any limits to the applicable rights were demonstrably justified under s 5 of the Bill of Rights. However, she also referred to the general principle of comity, that the courts would not intrude into the policy discussions inherent in the law-making process. The Court noted that the government had undertaken to repeal and replace the MHA, and that at the time of hearing Cabinet papers had been prepared by the Ministry and the first round of drafting instructions for a bill had been sent to the parliamentary counsel's office.⁹⁰

⁸⁴ *Bouwer v Police* [2021] NZHC 1388.

⁸⁵ At [30]–[31].

⁸⁶ At [34].

⁸⁷ At [35].

⁸⁸ At [36].

⁸⁹ *Gordon v Attorney-General* [2023] NZHC 2332, [2023] 3 NZLR 625.

⁹⁰ At [206].

United Kingdom

[76] In the United Kingdom there has been a “broad and persistent divergence” with regards to both when a declaration of incompatibility can be made and how the discretion should be exercised.⁹¹ Mallory and Tyrell note a general trend towards a constrained approach to exercising the discretion to make declarations. They comment that this generally cautious approach has “softened the effectiveness of the declaration regime, specifically in allowing legislative incompatibility to remain on the statute books”.⁹²

[77] As a preliminary point, it is relevant to note that, prior to the United Kingdom leaving the European Union on 31 January 2020, declarations of incompatibility between UK statutes and the European Convention on Human Rights made by the UK courts had, in effect, a supranational force.⁹³ As Joseph notes, a declaration did three things: it placed the British government on notice to rectify the rights departure (all member states are bound to uphold the European Convention rights), it triggered a “fast-track” procedure to facilitate remedial legislation, and it conferred a right of petition to the European Court of Human Rights. That context may be a factor in the way in which the discretion has been exercised.

[78] Mallory and Tyrell observe that the leading advocates of the approach that the declaration mechanism exists to highlight incompatibilities for Parliament to rectify have been Lord Kerr and Lady Hale in the United Kingdom Supreme Court who, while acknowledging the discretion, have effectively read the making of a declaration as “almost mandatory” when an incompatibility is identified.⁹⁴ Lord Kerr has noted “If it is incompatible, then it is the duty of this court to say so”⁹⁵ and “it would be wrong not to have recourse to that power”.⁹⁶ Similarly, Lady Hale has viewed the

⁹¹ Conall Mallory and Helene Tyrell “Discretionary Space and Declarations of Incompatibility” (2021) 32(3) KLJ 466 at 495.

⁹² At 495. Note the differences between the UK incompatibility regime and the NZ inconsistency regime, as explained above at [77].

⁹³ Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [21.2.5].

⁹⁴ Mallory and Tyrell, above n 91, at 490, citing, for example, *R (Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32, [2020] AC 1 [Steinfeld].

⁹⁵ *Nicklinson*, above n 71, at [327].

⁹⁶ *Steinfeld*, above n 94, at [61].

evaluative process as giving rise to a “duty” to state if an Act is incompatible.⁹⁷ As Lady Hale has said, informing Parliament that they have an incompatibility on the statute books is expressly what the UK Parliament has instructed the courts to do.⁹⁸

[79] Professor Jason Varuhas points to *R (SC) v Secretary of State for Work and Pensions*, a more recent decision of the United Kingdom Supreme Court, as a comparative perspective.⁹⁹ That case concerned a review of child tax credit legislation for consistency with the right against discrimination. The Court took a “restrained” approach, analysing the different constitutional functions of Parliament and the courts, and the need for the courts to resist undue influence in the sphere of politics in order to preserve judicial legitimacy.

Arguments in this case

Remedial purpose?

[80] Counsel for the Attorney-General acknowledges that a declaration of inconsistency does have a remedial purpose. As the majority of the Supreme Court said in *Attorney-General v Taylor*, by making a declaration of inconsistency the court is fulfilling its obligation to grant remedies for breaches of the Bill of Rights, and its obligation under the Declaratory Judgments Act 1908 to vindicate rights through the issue of a declaration.¹⁰⁰ The Court said a declaration is in itself a vindication of rights, may be of assistance to Parliament and may have implications in the context of a complaint under the Optional Protocol to the ICCPR.¹⁰¹ As Elias CJ said, the issue of a declaration is therefore important in terms of compliance with the rule of law — addressing, at least in part, the rule of law deficit that would otherwise exist in respect of the inconsistency with the right, and the absence of any justification for that inconsistency.¹⁰²

⁹⁷ *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] 1 AC 719, at [125].

⁹⁸ *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27, [2019] 1 All ER 173 at [39].

⁹⁹ Professor Jason NE Varuhas, *Declarations of Inconsistency in the Supreme Court* [2024] NZLJ 122 at 124, citing *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26.

¹⁰⁰ *Taylor (SC)*, above n 23, at [38], [50] and [53] per Glazebrook and Ellen France JJ and [95] and [100] per Elias CJ.

¹⁰¹ At [55]–[56] per Glazebrook and Ellen France JJ and [101] per Elias CJ.

¹⁰² At [105].

[81] These passages were cited by the Supreme Court when it returned to the issue of the discretion to issue a declaration in *Attorney-General v Chisnall* and reiterated the statement from Elias CJ.¹⁰³

[82] While Mr Powell, counsel for the Attorney-General, acknowledges that a declaration of inconsistency is not incompatible with Mr B's conviction, because it does not impugn the validity of the law that he was convicted of breaking, he submits that a declaration would "sit uncomfortably alongside the conviction, and to someone unfamiliar with the constitutional position, could undermine it".

[83] Counsel for the plaintiff disputes that the nature and effect of a declaration would be misunderstood. He also says there is a remedial effect for Mr B in making a declaration. Mr Nicholls' submission is that the case was right at the margins of criminal offending — Mr B was 19 years old and wearing a cap, as 19-year-olds do. Very few people would associate the cap with the gang that Mr B affiliates with. Mr Nicholls submits the behaviour was not "criminal behaviour" per se, as most people would conceive of it. A declaration of inconsistency would enable Mr B to explain that to his whānau and friends, and to future employers. More generally, Mr Nicholls also notes the importance of a declaration as a public law remedy.

[84] I accept that a declaration would serve a public remedial purpose. The inconsistency does not arise only in relation to Mr B. I also accept there may be some utility in a declaration from Mr B's personal perspective, as explained on his behalf, notwithstanding that it does not change the fact of his conviction.

[85] Nor am I persuaded that a declaration would "undermine" the constitutional position, particularly in relation to those members of the public likely to be directly affected by it, as counsel suggests. A declaration does not invalidate the law. The implementation of, and prosecution under, the Gangs Act will continue unless or until Parliament changes the law.

¹⁰³ *Chisnall*, above n 11, at [83].

Utility; comity

[86] The Attorney-General submits that the Court should decline to make a declaration of inconsistency for two, related, reasons: lack of utility and comity. In support of both grounds counsel notes, first, that the Gangs Act is recent legislation, passed in the current Parliamentary term, and, second, that the inconsistency was brought to the House's attention by the Attorney-General under s 7 of the Bill of Rights. The Attorney-General's s 7 report was discussed in the House during debates on the Bill.¹⁰⁴ The inconsistency was therefore squarely brought to the attention of Parliament before the Bill was passed into law.

[87] In those circumstances a declaration would have no utility. Counsel for the Attorney-General submits that the constitutional dialogue now specifically provided for by ss 7A and 7B points against the exercise of the discretion to make a declaration, and given the lack of utility it would not be consistent with comity to engage the other branches of government.¹⁰⁵

Judicial restraint?

[88] The question posed by the Attorney-General's submission is whether the combination of the clarity of Parliament's intention (enacting the legislation, having considered the s 7 report) and the recency of Parliament's intent (as the legislation was enacted within this legislative term) should limit the exercise of the court's discretion.

[89] As discussed above, existing guidance from the senior courts does not set out criteria to assess when a declaration will be appropriate, preferring for the law to develop on a case-by-case basis.¹⁰⁶ However, there is considerable academic commentary on the discretion to make a declaration, both in the New Zealand context and the United Kingdom and Canadian contexts.

¹⁰⁴ As discussed above at [8].

¹⁰⁵ As set out at [54]–[56] above, the making of a declaration commences a process that requires a response from the Executive (through the Attorney-General and the responsible Minister) and Parliament.

¹⁰⁶ See, for example, the Supreme Court's comment in *Make It 16*, above n 69, at [62].

[90] In the United Kingdom, Aileen Kavanagh writes in support of the idea of judicial restraint or deference to legislative decisions, including when considering a declaration of incompatibility.¹⁰⁷ Kavanagh considers how judges might exercise a constitutionally appropriate degree of restraint without ceding questions about the legality of decisions under scrutiny to the elected branches of government or, as she puts it, “how can judges uphold human rights, without straying beyond the limits of their constitutional role”.¹⁰⁸

[91] Kavanagh identifies at least four institutional reasons for judicial restraint.¹⁰⁹ First, concerns about judicial expertise (where judges do not know, or are unsure about, how a particular issue should be resolved). Second, the incrementalist and piecemeal nature of judicial law-making. Third, concerns about relative institutional legitimacy — courts sometimes exercise restraint before making a declaration of incompatibility in relation to primary legislation out of a concern that the court’s view would not be accepted by the other branches of government, due to the courts’ perceived lack of democratic legitimacy and accountability. And fourth, the reputation of the courts — judges must act in a way that preserves the reputation of the courts and inspires public confidence in them as impartial, fair decision makers.

[92] TRS Allan acknowledges that the courts must cede to Parliament and government an appropriate sphere of decision-making autonomy, protected from judicial interference, but disagrees with Kavanagh as to the boundaries of that sphere of autonomy.¹¹⁰ Allan sets out the nub of the case against due deference, being that it requires a court to set off against its own appraisal of the arguments for and against an infringement of rights a wider range of competing considerations, relating to characteristics of the decision-maker or its procedures rather than the intrinsic quality of its decision:¹¹¹

Due deference turns out, on close inspection, to be non-justiciability dressed in pastel colours. The illegitimate species of deference, involving an abdication of judicial responsibility for the protection of rights, is marked

¹⁰⁷ Aileen Kavanagh “Judicial Restraint in the Pursuit of Justice” (2010) 60 UTLJ 23; and Aileen Kavanagh “Defending Deference in Public Law and Constitutional Theory” (2010) 126 LQR 222.

¹⁰⁸ Kavanagh “Judicial Restraint” at 24.

¹⁰⁹ At 28–29.

¹¹⁰ TRS Allan “Human Rights and Judicial Review: A critique of ‘due deference’” (2006) 65(3) Cambridge LJ 671.

¹¹¹ At 688–689.

precisely by reliance on the expertise or experience or public visibility of the decision-maker as opposed to the apparent quality of the decision itself.

[93] As Allan notes, “a form of deference that deflects attention from the legislative or administrative act, in order to evaluate the merits of the actor, is ill-suited to the identification of error”.¹¹² And further, “surrender of judgment is inconsistent with the rigorous scrutiny of governmental action that the protection of human rights requires.”¹¹³

[94] Also in the United Kingdom context, Elizabeth Adams has written forcefully in criticising deference or restraint. Adams writes that where courts engage in constitutional considerations and concerns as to possible political reaction to a declaration, this results in a self-imposed second filter on the right to make a declaration of incompatibility.¹¹⁴

[95] In relation to the Canadian Charter of Rights and Freedoms, Robert Leckey has also written critically about the exercise of remedial discretion.¹¹⁵

[96] Similarly, in New Zealand, Thomas Pope-Kerr has argued that declarations of inconsistency should not be a discretionary remedy: where the courts find that a legislative limit on a right in the Bill of Rights has not been justified, they should always declare it.¹¹⁶ Pope-Kerr argues that discretion does not fit with the role of declarations of inconsistency in New Zealand: “In lieu of the ability to strike down legislation, they provide what Sir Geoffrey Palmer envisioned as a ‘mechanism by which governments are made more accountable by being held to a set of standards’.”¹¹⁷

¹¹² At 689.

¹¹³ At 694.

¹¹⁴ Elizabeth Adams “Judicial Discretion and the Declaration of Incompatibility: Constitutional Considerations in Controversial Cases” [2021] PL 311.

¹¹⁵ Robert Leckey “The harms of remedial discretion” (2016) 14(3) ICON 584. It should be noted that Canadian courts have the power to declare legislation which is inconsistent with the Canadian Charter invalid — see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [28.2.1] citing s 24(1) of the Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK) and s 52(1) of the Constitution Act itself. As with United Kingdom jurisprudence and commentary, this may have played a role in the exercise of the discretion.

¹¹⁶ Thomas Pope-Kerr “Judges not politicians: Why declarations of inconsistency should not be a discretionary remedy” (2023) 21 NZJPIL 31.

¹¹⁷ At 34 citing Geoffrey Palmer “A Bill of Rights for New Zealand: A White paper” [1984-1985] 1 AJHR A6 at 5.

[97] Professor Varuhas expresses a contrary view, regarding the reasoning of the majority in *Taylor* in rationalising the declaration jurisdiction as problematic.¹¹⁸ Professor Varuhas says a declaration of inconsistency is not an “ordinary” remedy, it is inaccurate to speak of a “breach” in relation to legislation, and it is questionable to describe a declaration of inconsistency as a “remedy” — the core premise of a remedy is the existence of a legal right, but there is no legal right against Parliament and further the declaration is discretionary.¹¹⁹ “BORA rights, as they apply to the legislature are properly characterised as non-binding, non-enforceable normative standards, inconsistency with which does not affect legislation’s validity... [courts] operate in an in-between space between law and democratic politics”.¹²⁰ It follows, Professor Varuhas says, that courts need to apply a default posture of caution.¹²¹

[98] In response, Emma Moran and Thomas Pope-Kerr defend the Supreme Court’s decisions in *Taylor* and *Make It 16* as an orthodox expression of the role of the courts under the Bill of Rights. They reject Varuhas’ conceptualisation of declarations as being in the “in-between space between law and democratic politics”.¹²²

They are in the language of the law ...the judiciary’s role in DoIs [declarations of inconsistency] is deceptively simple: interpret and apply the law — just within the special constitutional context of a statute that applies to other statutes”...

...DoIs ... are an exercise of determining and declaring the relationship between the constitutional statute that is the Bill of Rights and the rights-breaching legislation. They are not built on telling other branches of government what to do, but on analysing the law and the right in the individual case. They are valuable for applicants and for the broader system of human rights accountability because of the legal nature of the courts’ analysis.

Analysis — relevance of s 7 report

[99] In this case, counsel for the Attorney-General suggests that the fact of an adverse s 7 report being before Parliament is a factor that should tell against the Court exercising its discretion.

¹¹⁸ Varuhas, above n 99, at 122.

¹¹⁹ At 123.

¹²⁰ At 124 and 128.

¹²¹ At 124.

¹²² Emma Moran and Thomas Pope-Kerr “Conceptualising Declarations of Inconsistency: A response to Professor Varuhas” [2024] NZLJ 367 at 367, 369 and 370.

[100] The relevance of a s 7 report has been addressed by the courts, but only indirectly. In *Taylor*, the Court of Appeal observed:¹²³

In such a case [if there was no s 7 report identifying the inconsistency between the legislation and the protected right] ... the court may properly assume that the other branches will respond [to a declaration of inconsistency]... On the other hand it may be that, again by way of illustration, Parliament had received a s 7 report identifying a serious inconsistency but proceeded nonetheless. If no or no adequate justification has been advanced in the litigation the court may think it necessary to make a more emphatic statement, in the form of a DoI.

[101] When *Taylor* came before the Supreme Court it said:¹²⁴

It is clear that the scheme of the Bill of Rights preserves Parliament's ability to legislate inconsistently with rights. But a formal declaration to the same effect is not in conflict with that. Rather, in this sense, the Bill of Rights remains as the standard or palimpsest albeit Parliament has exercised its power to legislate inconsistently with that standard. The fact that Parliament may have enacted legislation, concerning which the Attorney-General has reported that the measure is not a justifiable limit on a right, does not affect this analysis. The s 7 report and a formal declaration serve different purposes albeit there may be debate about the effect of an adverse s 7 report on the exercise of the discretion to grant relief.

[102] In the High Court case of *Bouwer*, Gault J noted one reason for declining to make a declaration of inconsistency (had there been jurisdiction to do so) was because Parliament was already aware of the inconsistency given the Attorney-General's s 7 report.¹²⁵ The Court did not discuss the relevance of the s 7 report beyond that.

[103] While it might be argued that a lack of a s 7 report indicates a greater need for accountability as Parliament has not been informed of the rights-inconsistency (as Pope-Kerr suggests¹²⁶), the converse does not necessarily apply. It seems to me that the important point is that, as the Supreme Court said, the s 7 report and a formal declaration from the court serve different purposes. Both mechanisms serve to uphold the standard set by the Bill of Rights but, as Moran and Pope-Kerr note, s 7 aims to bring the inconsistency to Parliament's attention so it can make an informed decision

¹²³ *Taylor (CA)*, above n 45, at [155].

¹²⁴ *Taylor (SC)*, above n 23, at [46].

¹²⁵ *Bouwer v Police*, above n 84, at [34].

¹²⁶ Pope-Kerr, above n 116, at 61.

on whether to breach rights.¹²⁷ Declarations of inconsistency exist to vindicate the rights of the plaintiff by requiring a justification after they have been breached.¹²⁸

[104] For that reason, I do not agree that the presence of a s 7 report in this case militates against making a declaration.

Analysis — restraint in anticipation of Parliament’s possible reaction

[105] Nor do I agree with the submission that the procedure introduced by the Amendment Act and now contained in ss 7A and 7B is a factor against the exercise of the discretion. Rather, as Joseph noted in anticipation of the enactment of those provisions, it “promotes the dialogical relation of Parliament and the courts”.¹²⁹ That theme is also apparent from the Hansard report of the third reading of the Amendment Bill, which indicates cross-party support for the proposed statutory mechanism which is initiated by the making of a declaration of inconsistency, as providing for a necessary and appropriate constitutional dialogue.¹³⁰ While the appropriateness of the dialogic metaphor is open to question in a system of majoritarian parliamentary supremacy,¹³¹ to the extent there is a statutory process directed at this end, it anticipates the Court initiating the process by making a declaration.

[106] As the Supreme Court has said, identifying whether the obligation of compliance with the Bill of Rights has been met is a judicial function.¹³² A declaration plays an important role in promoting compliance with the rule of law. The Court’s role is to make a legal judgement and for the matter then to be remitted to Parliament for a political decision, informed by the Court’s view of the law. Declarations of

¹²⁷ Moran and Pope-Kerr, above n 122, at 369.

¹²⁸ *Taylor (SC)*, above n 23, at [56] per Glazebrook and Ellen France JJ and [102] per Elias CJ.

¹²⁹ Joseph, above n 93, at [21.2.5].

¹³⁰ (23 August 2022) 762 NZPD 11713–11729.

¹³¹ See, for example, Hannah Nathan “In Dissent of Dialogue: Why Dialogue is a Dangerous Metaphor for Conceptualising Declarations of Inconsistency in Aotearoa” (2024) 55(2) VUWLR 233. As Nathan observes, the Supreme Court in *Taylor* (unlike the Court of Appeal) did not conceive of the relationship between courts and Parliament in dialogic terms. See also Edward Willis “Judicial Abeyances in New Zealand’s Unwritten Constitution” (2021) 29 Waikato L Rev 20 at 30–31. See also Elias CJ in *Taylor (SC)*, above n 23, at [107], where she prefers to characterise the declaration as a response to those whose rights are affected, rather than one to assist Parliament in its function.

¹³² *Taylor (SC)*, above n 23, at [65] per Glazebrook and Ellen France JJ and at [103] per Elias CJ; and *Chisnall*, above n 11, at [83].

inconsistency have value and provide accountability *because* the court’s analysis is legal, not political.¹³³

[107] The exercise of the discretion does not require substantive deference to Parliament — as Edward Willis writes, respect for Parliament’s legislative sovereignty is already an embedded feature of the New Zealand constitution.¹³⁴ Deference is inherent in the fact that the court’s power is declaratory only.¹³⁵

[108] I consider there to be a great deal of force in the argument that, consistent with the courts’ legal role, it is not for judges to act strategically by, for example, anticipating political resistance to the rights issue in question, or refraining from granting declarations where they anticipate the court will be ignored or the declaration not implemented.¹³⁶ The purpose of declarations of inconsistency is undermined when courts strategically consider what the political response to a declaration might be. As Leckey observes, strategically considering the broader political context can lead to “opaque and shifting” bases for judicial decision-making.¹³⁷ Further, there is a possibility of unnecessary ambiguity if the legislation is found to be inconsistent, but no declaration is made.¹³⁸ The scope for political misinterpretation of the judgment is increased.¹³⁹

[109] In this particular case, what the respondent implicitly invites the court to do is to speculate and make essentially political judgements — for example, to assess when a sufficient period of time has elapsed since the enactment of the Gangs Act that Parliament may be ready to reconsider the issue, to speculate that Parliament’s only response will be to reinforce that its intention was to limit the s 14 right in the way the Gangs Act does, to decide that the Parliament that responds to the Court’s declaration in due course will exactly reflect and respond as the Parliament that passed the law in 2024, or even to simply wait until a hypothetical ‘better time’ to make a declaration.

¹³³ Pope-Kerr, above n 116, at 34.

¹³⁴ Willis, above n 131, at 36.

¹³⁵ Adams, above n 114, at 326, citing *Nicklinson*, above n 71, per Lady Hale at [300] and Lord Kerr at [343].

¹³⁶ At 315.

¹³⁷ Leckey, above n 115, at 597, cited in Pope-Kerr, above n 116, at 53.

¹³⁸ Adams, above n 114, at 328.

¹³⁹ At 330.

As Paul Rishworth has observed in relation to Glazebrook J's suggestion in her dissenting judgment in *Chisnall* that it would be better to wait for a Law Commission report and the Government's response before considering whether it was appropriate to make a declaration:¹⁴⁰ "[this] seems to suggest the Court has a watching brief on the law reform process that can be maintained by the timing of a decision, and this seems a new type of consideration in adjudication".¹⁴¹

[110] Parliament may take broader democratic, political and electoral considerations into account; that is not the role of the courts.

[111] Having decided that s 7 of the Gangs Act limits the right of freedom of expression provided by s 14 of the Bill of Rights, and that the limitation is not justified under s 5 of the Bill of Rights, I conclude that it is appropriate for the Court to exercise its discretion to make a declaration of inconsistency.

The ICCPR Declaration

[112] Mr B has also sought a declaration that s 7 of the Gangs Act is inconsistent with art 19(2) of the ICCPR.

[113] The Attorney-General submits that this Court has no jurisdiction to make a declaration as to the consistency or inconsistency of an enactment with an international covenant, such as the ICCPR. The Attorney also highlights that art 19(2) is incorporated into New Zealand domestic law by s 14 of the Bill of Rights and there is therefore no basis to seek a separate declaration.

[114] As recently reiterated by McQueen J in *Richards v Attorney-General*, New Zealand has a dualist system which means that obligations arising from international treaties, such as the ICCPR, are not directly enforceable in New Zealand. Instead, they are enforceable through their incorporation into domestic law.¹⁴²

¹⁴⁰ *Chisnall*, above n 11, at [274].

¹⁴¹ Paul Rishworth "Human Rights" [2025] NZ L Rev 531 at 552.

¹⁴² *Richards v Attorney-General* [2025] NZHC 2833 at [93].

[115] New Zealand ratified the ICCPR in 1979. The Bill of Rights was enacted in 1990. The Long Title to the Bill of Rights records that it was enacted:

- (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) to affirm New Zealand's commitment to the ICCPR.

[116] Article 2(3) of the ICCPR states that a judicial remedy should be available for breach of protected rights. In *Taunoa v Attorney-General*, Elias CJ noted:¹⁴³

...under the [ICCPR] it is the responsibility of the states parties to provide in their domestic legal systems “effective remedy” for breaches of rights. In the New Zealand legal system it is the responsibility of the court to provide appropriate remedies to those whose rights and interests recognised by law have been infringed. Without such vindication, the rights affirmed for all people in the New Zealand Bill of Rights Act would be hollow.

[117] Although Parliament has chosen not to include an explicit remedy in the Bill of Rights, the New Zealand courts have recognised that effective remedies should be available for breaches of the Bill of Rights, including and not limited to public law damages.¹⁴⁴ As the Supreme Court said in *Taylor*, a declaration is a vindication of rights. The development of a declaration of inconsistency has in effect been confirmed by Parliament.¹⁴⁵

[118] While no separate remedy is available to Mr B under art 19(2) of the ICCPR, I am satisfied that a declaration of inconsistency in relation to s 7 of the Gangs Act does provide him with an effective remedy.

Orders

[119] A declaration is made that s 7 of the Gangs Act 2024, which provides that a person commits an offence if the person knowingly, and without reasonable excuse, displays gang insignia at any time in a public place, is inconsistent with the right in s 14 of the New Zealand Bill of Rights Act 1990 to freedom of expression, and that

¹⁴³ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [106].

¹⁴⁴ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

¹⁴⁵ Bill of Rights, ss 7A and 7B.

this inconsistency has not been justified in terms of s 5 of the New Zealand Bill of Rights Act.

[120] I decline to make a declaration that s 7 of the Gangs Act 2024 is inconsistent with art 19(2) of the International Covenant on Civil and Political Rights.

[121] For the avoidance of doubt, and as the Supreme Court emphasised in *Chisnall*, a declaration of inconsistency does not thereby declare the law invalid. That is clear from s 4 of the Bill of Rights: “Even where a declaration is issued, the statute in question remains in full force and effect.”¹⁴⁶ As discussed above, it is entirely for Parliament and the executive to decide how to respond. Nor does the declaration affect the status of Mr B’s conviction for breach of s 7 of the Gangs Act.

[122] Costs are reserved.

Name suppression

[123] I make an order prohibiting publication of the plaintiff’s name and identifying details to protect his fair trial rights in a separate proceeding. This judgment is anonymised accordingly.

Gwyn J

Solicitors:
Crown Law, Wellington for Defendant

¹⁴⁶ *Chisnall*, above n 11, at [87].