IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

File No. SC 88/2025

BETWEEN	MAXWELL RICHARD ALLEN PARORE Applicant
AND	ATTORNEY-GENERAL Respondent

SUBMISSIONS OF THE NEW ZEALAND LAW SOCIETY TE KĀHUI TURE O AOTEAROA AS INTERVENER

11 March 2026

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INTERVENER'S INTEREST

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) has the functions defined by Part 4 of the Lawyers and Conveyancers Act 2006. These include assisting and promoting the reform of the law, for the purpose of upholding the rule of law and facilitating the administration of justice.[1] The thread linking each of the Law Society's submissions below is promotion of the rule of law in New Zealand. The Law Society takes no position as to the correct disposition of this appeal.

LEGAL SUBMISSIONS

No rights without remedies

2. The Law Society submits that rule of law considerations support the in-principle availability of compensatory damages (including pecuniary losses) for breach of fair trial rights.

3. Remedies for breach of the New Zealand Bill of Rights Act 1990 (**NZBORA**) have been recognised and developed by the courts. Justification for judicial development of NZBORA remedies has frequently drawn on the requirements of the rule of law.

4. The starting point is that for every right there is a remedy: this is "fundamental to the rule of law"[2] and "essential to any effective and credible system of justice."[3] This requirement of the rule of law expressly underpinned several of the judgments in *Baigent's Case*,[4] but also finds expression in the requirement that remedies be "effective".[5] Partial remedies make for partial rights.

5. Constitutional limitations inherent to a system of parliamentary supremacy prevent recourse to the full spectrum of remedies for some breaches of

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1 Lawyers and Conveyancers Act 2006, s 65(e).

2 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462, at [1] per Elias CJ.

3 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, at [63] per Elias CJ; affirmed in *Tamiefuna v R* [2025] NZSC 40, [2025] 1 NZLR 216, at [114] per Ellen France J.

4 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 697 and 717.

5 NZBORA would be an "empty statement" without *effective* remedies: *Baigent's Case* at 702 per Hardie Boys J.

right. Even so, rule of law concerns support the availability of declaratory relief in such circumstances, to avoid a "rule of law deficit".[6]

6. By their nature, human rights breaches frequently engage the ACC bar and therefore involve the assessment of remedies without compensation for physical injury or its consequences. As a result, senior courts have rarely considered the circumstances in which compensation, including pecuniary loss, may form part of an effective remedy.

7. The rule of law-consistent presumption is that the usual range of remedies are also available, in principle, to remedy breaches of NZBORA. This includes compensatory damages for pecuniary losses where appropriate, as envisaged in *Baigent*.[7] The principle was reaffirmed in *Taylor*, where Ellen France and Glazebrook JJ noted that:[8]

> … an effective remedy should be available for a breach of the Bill of Rights and the courts can draw upon the ordinary range of remedies to provide such a remedy.

8. Categorical exclusions will not normally be consistent with the rule of law – the result will be ineffective remedies, unable to be tailored to the circumstances of a particular breach. As such the obiter statements of William Young J in *Brown v Attorney-General*, rejecting damages in relation to fair trial breaches, ought not be applied by this Court.[9] While concerns about the potential for damages to distort the criminal process merit consideration, his Honour acknowledged that in rare circumstances an unfair trial may "call out for monetary relief" outside of any established principle of law[10] – in other words, a categorical rule would prevent effective

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6 *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC) at [100] and [105] per Elias CJ.

7 Cooke P listed the usual scope of special and general damages, in addition to vindicatory ends, as relevant to calculation of compensation: "… in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations …": *Baigent's Case* at 678.

8 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, at [38].

9 See *Attorney-General v Morrison* [2025] 2 NZLR 871 (CA) at [40] – [44] finding that public law damages are, as a matter of law, an available remedy to address a breach of fair trial rights.

10 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA), at [140] per William Young J.

remedies in at least some meritorious cases. This would not meet the requirements of the rule of law.[11]

Parliament has indicated damages for pecuniary loss available in principle

9. The Law Society submits that confirming the availability of the usual heads of damages would conform to Parliamentary intention and judicial practice under the Human Rights Act 1993 (**HRA**), in relation to damages for breach of s 19 NZBORA, as well as the damages methodology in the Prisoners' and Victims' Claims Act 2005 (**PVCA**). It would therefore promote consistency and certainty across New Zealand's legal system and statute book.

10. Appellant counsel have demonstrated how early caselaw assumed the availability of compensatory damages as an aspect of an effective remedy.[12] To those cases can be added *J v Attorney-General* where Tompkins J permitted a *Baigent* claim incorporating loss of earnings to proceed to trial.[13] Many leading cases engage the ACC bar or a parallel tortious claim, preventing or removing the extensive need for an assessment of compensatory loss as an aspect of a *Baigent* claim. But that does not negate the intention that courts follow a principled approach to ensuring that, in New Zealand, all human rights have fitting remedies.

11. Part 3 of the HRA, as amended by the Human Rights Amendment Act 2001,[14] permits the recovery of compensatory damages of all types for breach of s 19 NZBORA. Part 1A HRA claims are not distinct statutory torts but are

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11 As well as being rejected in the Court of Appeal judgment below (at [79]-[84]), McQueen J also regarded such awards as available in *Morrison v Financial Markets Authority* [2022] NZHC 1654 at [197]-[206].

12 Appellant submissions at para 4.8.

13 *J v Attorney-General* (1995) 2 HRNZ 311 (HC).

14 As enacted, the Human Rights Act 1993 created non-discrimination duties in relation to the provision of services and access to facilities in the private sector. Section 151 prevented application of the non-discrimination duties to any enactment or government action, but was subject to a sunset clause (s 152). Rather than letting s 152 take effect, Parliament legislated to permit two types of discrimination complaints under the Human Rights Act procedure: one for claims relating to s 3 NZBORA actors, replicating s 19 of NZBORA (Part 1A); another relating to specific domains, such as employment and the provision of accommodation, goods and services, and access to facilities (Part 2). Both kinds of claim can be pursued under the Part 3 procedure – a complaint to the Human Rights Commission and opportunity for mediation, followed by a Human Rights Review Tribunal proceeding.

simply s 19 NZBORA claims commenced by a special procedure – there is only one general non-discrimination duty applying to s 3 NZBORA actors.[15]

12. Section 92M HRA permits damages as a remedy for any Part 1A claim, which expressly includes pecuniary loss, loss of a benefit, and humiliation/injury to feelings. Such remedies, including for pecuniary loss, have been awarded against Crown defendants for discrimination in breach of s 19 NZBORA:

12.1 In *Spencer v Ministry of Health*[16] the High Court applied s 92M in awarding over $200,000 in pecuniary losses, reflecting non-employment attributable to a discriminatory government policy about family members caring for their disabled relatives found to have breached s 19 NZBORA in an earlier case.[17]

12.2 In *King v Commissioner of Police*[18] the Tribunal applied s 92M to award $45,000 in damages for humiliation, loss of dignity and injury to feelings, to a claimant with claustrophobia who was repeatedly mistreated in Police custody. The Crown submitted that damages under s 92M were to be assessed by analogy to *Baigent* caselaw.[19]

13. Section 92M is subject to ss 92O and 92P, which permit the deferral or modification of remedies for reasons such as public interest, the requirements of fair public administration, and the budgetary impact of remedies on government. These reflect a public law flavour and can support damages being reduced or foregone. They provide a basis to approach remedies as discretionary, despite the right being affirmed by statute.

14. Taken as a whole, ss 92M-92P reflect a Parliamentary endorsement of compensatory damages, including pecuniary loss, for breach of NZBORA. These provisions did not extend *Baigent* – they merely reflected it. As in

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15 See for example *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
16 *Spencer v Ministry of Health* [2016] NZHC 1650, [2016] 3 NZLR 513.
17 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
18 *King v Commissioner of Police* [2023] NZHRRT 19, (2023) 14 HRNZ 114.
19 *King* at [130].

s 92M, compensatory *Baigent* damages are available in principle. As in s 92P, discretionary factors may impact the making or the size of a damages order.

15. Section 14 PVCA also affirms the full scope of compensation envisaged by *Baigent*. While that Act requires prisoner claimants to first make reasonable use of internal and external complaints mechanisms to seek an effective remedy, it does not modify the *Baigent* approach to effective remedy. Section 14 mandates consideration of factors such as mitigation of loss and claimant contribution when determining the correct level of compensation.[20] These factors have little bearing on *vindication*; their inclusion as factors in a prisoner claims context is difficult to rationalise unless Parliament regarded quantifiable losses as recoverable.[21]

Taunoa is doubtful law

16. *Taunoa* sits uneasily with the submissions advanced above. To the extent a majority can be assembled,[22] three of five judgments express preference for vindicatory over compensatory aims when calculating *Baigent* damages, and suggest parallel tortious claims would likely exceed any public law remedy.[23] By contrast,[24] Tipping J said vindication and compensation had "an equal

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20 Sections 14(2)(a) and (c).

21 A breach of right to which PVCA applies can include a breach of the HRA or Privacy Act 2020 (s 6(2) PVCA), which each contemplates compensation for pecuniary loss (s 92M HRA; s 103 Privacy Act 2020). It would be an odd reading of s 14(2) were the factors listed therein applicable to some rights and not others; the better reading is Parliament recognised the full scope of compensatory damages was recoverable for any breach of right to which PVCA applies, subject to the discretionary factors particular to public law remedies. That was how the law stood in 2005 when the PVCA was enacted, and before *Taunoa* was decided.

22 Henry J's agreement with both Blanchard and Tipping JJ (*Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC) at [385]) has led to significant doubts as to what method of calculation was preferred by a majority of the Supreme Court, given the divergence between those two approaches noted in paragraph 16.

23 *Taunoa* at [259], [274], [373] and [385] per Blanchard, McGrath and Henry JJ. The distinction drawn between compensation under tort and vindication under *Baigent* damages seems to directly contradict Cooke P's "simple" approach of avoiding double recovery, of making "a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action" – in other words, imagining that the combined compensatory and vindicatory purpose of NZBORA remedies would often result in a *higher* award than a tort claim: *Baigent's Case* at 678.

24 Contrary to the respondent's suggestion at paras 35-39, Tipping J's reasons contain distinctly different reasoning as to the calculation of *Baigent* damages from the majority. His Honour's statement at [299] agreeing with Blanchard J "in general terms" must be read subject to subsequent *specific* terms (at [300]-[324]), which are plainly at odds with the majority.

claim for attention" in determining an effective remedy,[25] and noted that other than loss subject to the ACC bar "compensation for all loss or damage, direct or indirect" was potentially available.[26]

17. If *Taunoa* is to be read as foreclosing on recovering pecuniary loss resulting from breach of right (an issue not before the Court in that case),[27] it may be wrongly decided. The "majority" reasoning would not seem to meet rule of law requirements for effective remedies. The Court was split. The exclusive focus on vindication distinguishes the *Taunoa* majority reasons as an outlier from established caselaw, as well as Parliamentary intention as expressed in the HRA and PVCA (neither of which were considered by the majority). There has been no apparent Parliamentary reliance on the narrower approach *Taunoa* introduced. The distortion between *Baigent* claims and recent Part 1A cases like *Spencer* illustrates the wisdom of Tipping J's plea for consistency.[28] The Court may consider the conditions for departure from binding authority of an apex court ventured in *Couch (No 2)* to be engaged.[29]

Increased or indemnity costs in NZBORA litigation

18. The Law Society submits that increased or indemnity costs are available as an aspect of effective remedy in NZBORA cases, which can be awarded within the rubric of the usual costs rules and as required in a particular case.

19. Costs awards to successful plaintiffs were described 20 years ago as "an issue of real significance in the future of [NZ]BORA litigation".[30] That issue remains unresolved and was recently described by this Court as being "of constitutional complexity".[31]

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25 At [317].

26 At [322]. While Elias CJ did not expressly endorse any approach (preferring to simply affirm the High Court's approach as reasonable in the circumstances), her Honour plainly disagreed with the majority reasons for judgment (at [108]).

27 There was "no claim for specific economic loss" being advanced (at [333] per Tipping J).

28 Noting at [322] that the scope of s 92M HRA and *Baigent* damages ought to be consistent.

29 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

30 *Attorney-General v Udompun* [2005] 3 NZLR 249 at [219].

31 *Attorney-General v Chisnall* [2025] 1 NZLR 619 (SC) at [15].

20. Courts have suggested that NZBORA cases may fall outside the normal costs rules.[32] Awards to date range from standard scale costs and disbursements[33] through to full indemnity costs.[34]

21. Increased or indemnity costs are available in every senior court.[35] Indemnity costs have been posited as an element of an effective remedy in suitable cases, but without consideration of how that approach might interact with the costs rules. Each case has depended on its own facts.[36]

22. The relevant court rules envisage three levels of cost award:[37]

    22.1 Scale costs, which generally follow the event, reflecting a two-thirds contribution to the winning party's reasonable costs;[38]

    22.2 Increased costs, falling between scale and actual costs; and

    22.3 Indemnity costs, the winning party's actual costs.

23. The appellant seeks an award of indemnity costs in all courts. As a general proposition, making such awards as NZBORA remedies appears a poor fit with the costs rules. They typically reflect "exceptionally bad behaviour" by the losing party[39] and are akin to a penalty, relating to the conduct of the litigation itself rather than the underlying dispute. An expectation of indemnity costs may become counterproductive to the administration of justice, by incentivising or rewarding less than efficient practice.

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32 See for example *Wright v Attorney-General* [2019] NZHC 59 at [10]; *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 3322 at [5]; *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [186].

33 See *Kerr v Attorney-General* (1996) 4 HRNZ 270 (DC) (s 17 NZBORA); *Wilson v Attorney-General* [2009] NZAR 637 (DC) (false imprisonment and arbitrary detention); *Morrison v Financial Markets Authority* [2023] NZHC 3307.

34 See for example *Binstead v Northern Region Domestic Violence Approval Panel* [2002] NZAR 865 (HC) (concerning s 27(1) NZBORA); *Falwasser v Attorney-General* [2010] NZAR 445 (HC) (s 23(5) NZBORA); *Rochford v Attorney-General* [2008] NZAR 404 (HC) (s 21 NZBORA); *Manga v Attorney-General* [2000] 2 NZLR 65 (HC).

35 HCR 14.6; Court of Appeal (Civil) Rules 2005, r 53E; Supreme Court Rules 2004, r 44; *Bradbury v Commissioner of Inland Revenue* [2015] NZSC 80.

36 See *Taunoa v Attorney-General* [2007] NZSC 30, [2008] 1 NZLR 429 at [334] per Tipping J; *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [186]-[187]; and *Attorney-General v Van Essen* (2015) 10 HRNZ 155 (CA) at [158].

37 As discussed in *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [27]-[28].

38 HCR 14.2(1)(d).

39 HCR 14.6(4)(a)-(d); *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [28].

24. By contrast, the increased costs rule in HCR 14.6(3)[40] has been framed to include public interest considerations. It allows a court to award such costs if "the proceeding is of general importance to persons other than just the parties" and "it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected".

25. The Law Society submits that awarding increased costs to successful plaintiffs in NZBORA cases can promote the rule of law:

    25.1 It would signal that vindication of rights is a worthy end in itself, of considerable value to society as a whole.

    25.2 It would ensure effective rather than partial remedies, by encouraging rather than disincentivising the bringing of meritorious NZBORA claims,[41] and ensuring a successful plaintiff is not left out of pocket or financially penalised for pursuing a claim.[42]

    25.3 Increased costs in NZBORA cases appear to best fit the policy and purpose of the costs regime, and thus an award can be made in more cases as a matter of course. This would allow for greater predictability and certainty, which reflects both the policy of the costs regime and a desirable outcome in rule of law terms.

26. Allowing increased costs as a NZBORA remedy would be relatively simple and predictable in practice, as it can be achieved by applying a percentage uplift to scale costs. That uplift might vary from small through to near indemnity, which gives a court flexibility to tailor a costs award according to the circumstances of a case and any relevant policy considerations. The absolute nature of indemnity costs, and the degree of departure from standard practice, suggests they should be awarded only rarely in NZBORA litigation and reserved for the most serious kinds of cases.

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40 See also Court of Appeal (Civil) Rules 2005, r 53E(2)(c).

41 See *Wong v Registrar of the Auckland High Court* (2008) 19 PRNZ 32 (HC) where it was said that NZBORA claims are treated differently to other public law claims and the courts recognise that costs regimes should not discourage bona fide BORA claims from bringing their claims.

42 See *Attorney-General v Udompun* [2005] 3 NZLR 249 (CA) at [223] cautioning against watering down NZBORA by leaving persons with no incentive or an ability to bring proceedings.

27. Rather than receiving a two-thirds scale "contribution" to costs, an increased sum better reflecting the reasonable costs of the litigation could be awarded as an aspect of effective remedy. A 50% uplift, for example, would grant (as an aspect of an effective remedy) the missing one-third of "reasonable" costs that a successful party is typically expected to bear in a case lacking the inherent public interest features of human rights litigation. Claimants would remain incentivised to incur only reasonable costs, but would not risk being penalised by insufficient scale costs awards which, when combined with modest *Baigent* awards, may still leave them out of pocket.[43]

28. The Law Society notes the following considerations which are also relevant to awards of increased or indemnity costs in NZBORA litigation:

28.1 Simple scale costs may have a chilling effect on meritorious NZBORA litigation due to both the potential costs to litigants, and its impact on counsel availability.[44]

28.2 The judiciary has an obligation to "affirm, protect and promote" the provisions of NZBORA.[45] An obligation of that strength cannot always be discharged by the application of "usual" costs rules,[46] where costs are a discretionary remedy shaped by court rules and judicial decision-making – typically in a non-NZBORA context.

28.3 The importance of the right and the seriousness of the breach may be important considerations.[47]

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43 As Hammond J warned in *Attorney-General v Udompun* [2005] 3 NZLR 249 (CA) at [222].

44 As noted by Blanchard J in *Taunoa* at [264], New Zealand does not have public interest bodies to bring proceedings on behalf of victims of breaches of right. The position is as true today as it was in 2007. Instead, bearing in mind the modest *Baigent* awards available, NZBORA claims are typically brought by lawyers acting on limited funding for clients who are vulnerable or of limited means. A costs regime which does not meet reasonable costs will disincentivise lawyers and make NZBORA litigation financially untenable (see *Van Essen* at [162]).

45 New Zealand Bill of Rights Act 1990, s 3(a) and the Preamble.

46 *Attorney-General v Udompun* [2005] 3 NZLR 249 (CA) at [223].

47 While NZBORA does not prescribe a hierarchy of rights, some are recognised as being of greater significance than others (see *B v Waitemata District Health Board* [2016] 3 NZLR 569 (CA) at [63]). The right to a fair trial is absolute: *Condon v R* [2007] 1 NZLR 300 (SC) at [77].

28.4 A holistic assessment of the total remedy granted to a successful and reasonable plaintiff ought to ensure the plaintiff is not left out of pocket once costs obligations are met.

28.5 Assessing costs between parties according to their respective success on different causes of action may cause injustice, particularly in the context of modest *Baigent* damages awards.[48]

28.6 Matters relating to the litigation itself are relevant. These include whether the issues raised were of genuine public importance, whether the plaintiff was seeking no more than vindication of their rights, and the manner in which the plaintiff ran their case.[49]

29. For completeness, the Law Society endorses the authorities holding that costs will not be awarded against an unsuccessful plaintiff if the NZBORA litigation was bona fide and found to have some merit even though unsuccessful.[50] These authorities support the Law Society's position that costs in NZBORA cases should not disincentivise the bringing of claims and the upholding of the rule of law by taking public authorities to task.

11 March 2026

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48 In *Morrison v Financial Markets Authority* [2023] NZHC 3307 the splitting of costs liability between causes of action and parties led to the "unfortunately inevitable" outcome that the plaintiff – who succeeded on his NZBORA claim but not his tortious claim – was liable to the first defendant for more costs than he would receive from the Attorney-General. If separate tortious and public law causes of action arise from the same wrongful state conduct then they might appropriately be considered together for costs purposes if the NZBORA claim succeeds.

49 See *Wright v Attorney-General* [2019] NZHC 59 at [10]; *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 3322 at [8].

50 *Prescott v Police* [2019] NZHC 3376 at [113]; *Lincoln v Attorney-General* [2020] NZHC 1810 at [37] – [38]; *Dotcom v Twentieth Century Fox Film Corporation* [2018] NZHC 299 at [5].