

From Toupee to Tooth Decay: Recent Bill of Rights cases in New Zealand

Supreme and Federal Courts Judges' Conference Hobart 2019

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Introduction

[1] Tihei Mauri Ora! E nga mana, e nga reo, e rau rangitira ma. Tena koutou, tena koutou, tena koutou katoa.

[2] As ever, it is a pleasure to be in Australia and particularly here in Hobart with friends and colleagues. Today I'm going to share with you some recent cases that have considered and applied the New Zealand Bill of Rights Act. The legislation, which I will refer to simply as the Bill of Rights, was enacted in 1990 – almost 30 years ago.

[3] Some of you might have children of a similar age to that. I do. You might agree with me that by their late twenties they tend to exhibit a blend of youthful spirit with some long-awaited maturity.

[4] I see some similarities with our Bill of Rights. The theme of this address is that, while the Bill of Rights may not have reached full maturity and may not yet have achieved the lofty ideals some had for it, it is showing some encouraging signs. It has a very practical impact on the lives of New Zealanders in a variety of ways. Over the past three years there have been several high-profile cases reaching all levels of our senior courts.

[5] Some have constitutional significance and others have centered around the application of fundamental rights to some rather unusual facts. I am grateful for the latter because it will hopefully make capturing your interest over this session a little easier.

[6] The cases include the discussion of the rights of a terminally ill person, a prisoner and his fight to keep his custom-made toupee, a mainstream newspaper that

decided to publish cartoons deeply insulting to our Maori and Pasifika communities, and an anti-fluoridation group who argued that raising the fluoride levels in drinking water amounted to forced medical treatment of the masses.

[7] There is another reason why I focus on decisions from the past three years. In 2015, Sir Geoffrey Palmer, the Minister responsible for the introduction and passage of the Bill of Rights, delivered an address entitled “What the New Zealand Bill of Rights Act aimed to do, why it did not succeed and how it can be repaired”. In it he voiced his opinion that the courts were not being bold enough in applying the Bill of Rights and that it should be given greater weight.¹

[8] The speech was made to mark the 25th anniversary of the legislation. Sir Geoffrey said that the way in which the courts approached interpreting the Bill of Rights in the 1990s had initially breathed life into the statute, particularly the Court of Appeal under the presidency of Sir Robin Cooke.

[9] However, he then said:²

The use of the NZ Bill of Rights Act since Sir Robin’s time has been marked by considerable caution. It is not too much to say the courts have been leery of it. ... the courts have failed to develop the jurisprudence comprehensively over the past 25 years.

[10] I suggest that the recent decisions show that the senior courts of New Zealand are not shying away from addressing fundamental and, at times, challenging questions posed by the Bill of Rights. Only last year the Supreme Court confirmed in *Attorney-General v Taylor* that senior courts have the power to formally declare that a statutory provision is inconsistent with the Bill of Rights.³ I will also discuss that decision in more detail later.

¹ Geoffrey Palmer “What the New Zealand Bill of Rights Act Aimed To Do, Why It Did Not Succeed And How It Can be Repaired” (2016) 14 NZJPIL 169.

² At 175.

³ *Attorney-General v Taylor* [2018] NZSC 104.

A brief background on the Bill of Rights

[11] But first, it may be helpful to provide some context and give a brief background and description of our Bill of Rights.

[12] By 1985, the Fourth Labour Government had become concerned that New Zealand, with its one-chamber Parliament, required greater protection from rash legislation and the corresponding risk of erosion to fundamental rights. This was before New Zealand had MMP.

[13] Sir Geoffrey, the then Minister of Justice, proposed a Bill of Rights in the form of supreme law.

[14] The rights and freedoms proposed were based on those contained in the International Covenant on Civil and Political Rights (ICCPR), and were also influenced by the Canadian Charter.

[15] But the proposed bill encountered a rough passage through Parliament. It was seen by many as transferring too much power to judges and as introducing too much uncertainty in the law. Ultimately the Select Committee also recommended, in response to Maori opposition, that the Treaty of Waitangi not be included or referenced.

[16] The result was that the Bill of Rights was enacted as an ordinary statute. Parliament retained the ability to legislate in contravention of fundamental rights.⁴ As Sir Geoffrey explained:⁵

Trimming the sails was politically necessary in order to pass the measure.

[17] There are several key features of the Bill of Rights: it has broad application: it applies to the acts of legislature, executive and judiciary, or any person or body performing a public function;⁶ while other enactments are unaffected, the rights and freedoms provided are subject only to such reasonable limits as can be justified in a

⁴ New Zealand Bill of Rights Act 1990, s 4.

⁵ Palmer, above n 1, at 174.

⁶ Section 3.

free and democratic society;⁷ and s 6 provides a direction to prefer a Bill of Rights consistent meaning whenever possible in preference to any other meaning.⁸

[18] One final point to note is that the Bill of Rights does not explicitly provide for remedies if a right or freedom is breached. However, it has been settled law for quite some time that courts may award public law damages in such event, although such damages are generally modest.⁹

The right to life and assisted dying

[19] Moving then, to the cases. The first decision I wish to discuss, *Seales v Attorney-General*, concerned a lawyer in her early 40s who was diagnosed with a brain tumour.¹⁰ Ms Seales' health began to deteriorate rapidly and she grew concerned that she would experience a slow, painful and undignified death.

[20] She sought declarations from the High Court that her doctor would not be committing murder if she administered a fatal drug to Ms Seales or would not be assisting in her suicide if she, the doctor, provided Ms Seales with a fatal drug to use by herself.

[21] The case attracted a lot of media and public attention. It came on for hearing urgently. Ms Seales attended the hearing, even though by that point she was receiving hospice care and was partially paralysed. The evidence in the case brought to the public attention some distressing facts. Evidence suggested that between three and eight per cent of suicides in New Zealand during the last century were by persons who were rational, competent and suffering a terminal illness.¹¹ The expert evidence in the case also revealed a deep divide within the medical profession concerning the ethics of assisted suicide.

⁷ Section 5.

⁸ Section 6.

⁹ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [Baigent].

¹⁰ *Seales v Attorney-General* [2015] NZHC 1239, (2015) 10 HRNZ 418.

¹¹ At [51].

[22] Ms Seale's primary argument, in broad terms, was that if it was lawful for her to commit suicide in anticipation of an undignified death, it should also be lawful for her doctor to assist her to die when she no longer had quality of life. As she said:

It seems incomprehensible to me that I can exercise a choice to end my life when I am able, and still have quality of life, but can't get any help to do at a later point when my life no longer has any quality for me. I want to live as long as I can but I want to have a voice in my death and be able to say "enough".

[23] Collins J held that Ms Seales' doctor would be acting unlawfully if she assisted her to commit suicide. The Court could not make the declarations sought. In reaching this conclusion, he relied on fundamental criminal law principles. It is no defence to a charge of murder to say the victim consented to being killed. Ms Seales could not consent to her doctor intentionally causing her death. Her doctor could not administer aid in dying to accelerate Ms Seale's death with the intention of causing it, or with the intention of assisting Ms Seales to commit suicide.

[24] Alternatively, however, and more relevant for our present discussion, Ms Seales asked the Court to issue declarations that the homicide and assisted suicide provisions of the Crimes Act were inconsistent with two rights guaranteed under the Bill of Rights.

[25] Ms Seales relied upon the right not to be deprived of life, and the right not to be subjected to cruel, degrading or disproportionately severe treatment.¹²

[26] As the Judge observed, Ms Seales' reliance on the right not to be deprived of life might seem counterintuitive. After all, she was seeking assistance to die. Ms Seales' argument, however, was that the Crimes Act provisions that prevented her doctor from assisting in her death might also have the effect of forcing her to take her own life prematurely.

[27] Collins J agreed that the right to life was engaged in Ms Seale's case. The right involved three components, the right to life, exceptions established by law, and consistency with principles of fundamental justice. Collins J held s 8 does not

¹² Sections 8 and 9, respectively.

guarantee the state will never deprive a person of life. Rather it guarantees the state will only do so on grounds established by law. The right to life under s 8 did not require the government to preserve all human life in all circumstances. The judge noted, for example, that it is lawful for doctors to withdraw futile medical services to patients in circumstances where it is known the patient will die without those services.

[28] Collins J held that the provisions of the Crimes Act were consistent with the principles of fundamental justice, and therefore not in breach of the right to life. In doing so, the judge distinguished the decision of the Canadian Supreme Court in *Carter v Canada (Attorney General)* where the Court had held the prohibition against aiding suicide breached the “overbreadth” component of the principles of fundamental justice. By contrast, Collins J considered the relevant provision of the Crimes Act were not arbitrary, overly broad or grossly disproportionate having regard to New Zealand’s different legislative framework relating to suicide.¹³ The purpose of the statutory provisions was to protect all human life, especially those who were vulnerable.

[29] The second right on which Ms Seales relied was the right not to be subjected to cruel, degrading or disproportionately severe treatment. Her counsel argued that the Crimes Act provisions deprived her of an opportunity to bring her suffering to an end, with the effect that the state was therefore subjecting her to cruel, degrading or disproportionately severe treatment.

[30] Collins J held that the right was not engaged. Ms Seales’ distressing circumstances were a direct consequence of her tumour, not her treatment, and the treatment she was receiving was designed to alleviate her suffering as much as possible. The Judge agreed with UK jurisprudence that the concept of cruel, degrading or disproportionately severe treatment was inapt to convey the idea that the state must guarantee a person in Ms Seale’s circumstances the right to die with deliberate assistance from her doctor.

[31] Collins J noted he was not unsympathetic to Ms Seales’ plight. He acknowledged that the law against assisted suicide was having an extremely

¹³ *Seales v Attorney-General*, above n 10, at [16].

distressing effect on her and that she was suffering because the law did not accommodate her right to dignity and personal autonomy. But he concluded that the complex legal, philosophical, moral and clinical issues raised by Ms Seales' case could only be addressed by Parliament passing legislation to amend the Crimes Act. As he explained:¹⁴

... the fact that Parliament has not been willing to address the issues raised by Ms Seales' proceeding does not provide me with a licence to depart from the constitutional role of Judges in New Zealand.

Freedom of expression and the prisoner's toupee

[32] The next case, *Attorney-General v Smith*, makes for quite a break from that of Ms Seales, given its unusual facts.¹⁵

[33] Phillip Smith was sentenced to life imprisonment for murder, paedophile and related offending in 1996, with a minimum non-parole period of 13 years. He had served 17 years when, in 2013, the Department of Corrections began releasing him temporarily into the community. By that time, he was assessed as being of low risk, and the purpose of the temporary release was to prepare him for life in the community in the event he was granted parole.

[34] Unknown to Corrections, however, Mr Smith had managed to obtain a new passport while in prison. When he was granted temporarily release again on November 2014, he promptly boarded a plane and flew to Santiago and from there to Brazil. He checked into a hostel in Rio de Janeiro, but the manager had seen his image in the news and called the local police. He was ultimately deported to New Zealand.

[35] As you might imagine, this captured the attention of the public, but for more reasons than just the escape. You see, Mr Smith had gone bald whilst in prison. In 2012, he asked the manager of Auckland Prison for permission to wear a custom-made toupee. He told the manager that he had ongoing issues with self-esteem and confidence and that the toupee would improve how he felt about himself, which was

¹⁴ At [211].

¹⁵ *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704; *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899.

important for his rehabilitation. A departmental psychologist supported his application. Mr Smith also said that the toupee would protect his scalp from sun exposure and prevent heat loss from his head in the winter. The manager granted Mr Smith permission to wear the toupee.

[36] However, when Mr Smith was returned to prison, the manager rather peremptorily withdrew permission for Mr Smith to wear his toupee. One of the immediate consequences was that, when Mr Smith appeared in court in relation to his escape, there was a lot of media scrutiny of his exposed baldness. Images of him with and without his toupee appeared on all major television news channels and in major newspapers.

[37] Mr Smith sought to judicially review the prison manager's decision. He argued, among other things, that the manager had not considered whether taking his toupee away would breach his right to freedom of expression.¹⁶ Mr Smith argued that the manager should be required to make the decision again after considering that right.

[38] The High Court agreed. Wylie J held that the right to freedom of expression should be interpreted expansively, and so was not confined to things said or the expression of opinions. It could extend to physical acts, provided those acts had expressive content.

[39] In the Judge's view, Mr Smith had been exercising his right to freedom of expression. Wylie J explained:

... Mr Smith was endeavouring to present himself to others in a way with which he was comfortable. The wearing of a hairpiece was a physical act by which Mr Smith sought to promote his self-confidence and self-esteem. Mr Smith was trying to say – this is who I am and this is how I want to look. He was trying to affect the perception that others would have of him. His action in wearing a hairpiece had expressive content.

¹⁶ New Zealand Bill of Rights Act 1990, s 14.

[40] Because Mr Smith’s right to freedom of expression had been engaged, and because the prison manager had not considered this right, the High Court quashed the decision and remitted it back to the Department to consider matters afresh.

[41] The Attorney-General appealed on behalf of the Corrections Department. By the time the case came before the Court of Appeal, the appeal was effectively moot. The prison manager had by then decided to allow Mr Smith to wear his toupee again. Nevertheless, the Court of Appeal decided to hear the appeal because the question was important and had potential application to other cases.

[42] The Court of Appeal accepted that the right to freedom of expression protected symbolic conduct as well as speech. However, while a broad conception was appropriate, the right applied with greater ease to freedom of speech, rather than the broader concept of freedom of expression. Nevertheless, freedom of expression is valuable in its own right as a matter of human self-fulfillment. Emotional and intellectual development is facilitated by all types of communicative expression.

[43] The Court identified the issue for it was whether Mr Smith’s wearing of a wig was “expression” for the purposes of s 14. It supported the limit on protected “expression” imposed in overseas jurisprudence for the following reasons. First, in order to engage the right, the expression must involve an attempt to convey meaning to another. Next, it is unnecessary to engage s 14 to protect behavior devoid of meaningful content. Bill of Rights is not a complete statement of all the rights recognised in New Zealand. Finally, imposing a s 14 rights overlay provided little meaningful protection. Kós P put it this way:¹⁷

... Acts whose rewards are confined to the actor’s own ego may well enhance self-fulfillment, but they are not expression, or the expression protected by s 14.

[44] The Court emphasized that the idea or information expressed must be meaningful.¹⁸ In the Court’s view, Mr Smith’s desire to wear a wig did not convey or attempt to convey a meaning to others. As Kós P explained:¹⁹

¹⁷ *Attorney-General v Smith* [2018] NZCA 24 at [45].

¹⁸ At [50].

¹⁹ At [51].

[Mr Smith] does not like being bald, being seen bald or the reaction he perceives other people have to being bald. It is the baldness that is distinctive, and which he dislikes. His assumption of a wig is calculated to make him less distinctive and more ordinary in appearance. This makes him feel better, but it is the antithesis of protected expression. ... Wearing a wig for that purpose does not convey meaning, does not attempt to convey meaning, and does not engage s 14.

[45] The case has generated quite some academic comment.

Freedom of expression and insulting cartoons

[46] The next case, *Wall v Fairfax New Zealand Ltd* also concerned the right to freedom of expression, but in this case the question was how far it could be limited by statutory prohibitions on hate speech.²⁰

[47] The political context is that, in 2013, the Government announced that it would expand a program that provided breakfasts to children in low decile schools. The anticipated cost to taxpayers was said to be \$9.5 million over five years.

[48] On the days following the announcement, two newspapers owned at the time by Fairfax Media published cartoons by a cartoonist Al Nisbet in their opinion pages. The cartoons depicted Maori and Pasifika parents as negligent parents pre-occupied with alcohol, cigarettes and gambling at the expense of their children's welfare.

[49] The newspapers, *The Press* in Christchurch and the *Marlborough Express* are mainstream newspapers, not dissimilar to *The Age* or *The Advertiser*. Circulations of the cartoons, both in print and online, was extensive.

[50] Louisa Wall, at the time a Member of Parliament, but in the then opposition Labour Party, complained to the Human Rights Review Tribunal that the cartoons breached s61 of the Human Rights Act 1993 as they promoted racial disharmony.²¹ She argued that the cartoons were likely to bring Maori or Pasifika into contempt or excite hostility against them.

²⁰ *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, (2018) 11 HRNZ 373.

²¹ Human Rights Act 1993, s 61.

[51] The Tribunal found that the cartoons were insulting, but did not meet the threshold required to be “likely to excite hostility against or bring into contempt any group of persons” under the section. Ms Wall appealed to the High Court. On such appeals two lay members sit with a High Court Judge.

[52] The High Court considered the Tribunal was correct to conclude that the case did not present a “classic” conflict of rights. The racially offensive speech was by the publisher, Fairfax, a private company not within either of the limbs of s 3 of the Bill of Rights. The Court saw the case as better framed as a conflict between Fairfax’s *right* to freedom of speech under s 14 of the Bill of Rights and the Government’s *interest* in protecting its citizens from harmful speech and discrimination.

[53] The Court referred to two earlier decisions, first of a Full Court of the Court of Appeal in *Moonen v Film and Literature Board of Review* and second, of the Supreme Court in *Hansen v R* and accepted that where the language such as that used under s 61 was “conceptually elastic” (insulting, hostility, contempt) there was good reason to adopt the Moonen framework which involved a number of steps.²² First, determine the scope of the right, next identify the different interpretations of the words of the other Act. If more than one meaning is open, identify the meaning that constitutes the least possible limitation on the right in question. Then identify the extent to which the meaning limits the relevant right and consider whether any such limitation can be demonstrably justified in a free and democratic society. If justified, no inconsistency with s 5 arises, but if not justified, there is an inconsistency with s 5 and the Court may declare this, albeit bound to give effect to the limitation in terms of s 4.

[54] The Court considered that s 61 of the Human Rights Act 1993 prohibited only “relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in the group being despised”.

[55] That test under s 61 was established to allow for “the broad space required in a free and democratic society to be able to express views which may offend, shock or disturb”. At [56]:

²² *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, and *Hansen v R* [2007] NZSC 7.

It is only, in our view, publications at the serious end of the spectrum which meet this legislative objective because, although lesser forms of delegitimising expression may be offensive or insulting, they are not likely to incite disharmony between New Zealand's racial groups. We also consider that this interpretation aligns with art 4 of ICERD, which requires due regard to be had to freedom of speech and by implication only targets behaviour at the serious end of the spectrum.

[56] The Court was also influenced by context. The cartoons were editorial cartoons. Cartoons in liberal democracies enjoy a special license to make exaggerated and comic criticisms of public figures and policies. The Court also noted the French courts response to challenges by Muslims to the Charlie Hebdo cartoons.

[57] Ultimately, the High Court held that while objectively offensive, the cartoons did not reach the high threshold required by the racial disharmony provision. The Court did suggest its view should be a cause for reflection by the newspaper's editorial teams and concluded its judgment by citing Thomas J in *Awa*:²³

The law's limits do not define community standards or civic responsibility. I would be disappointed if anything which this Court might say could be taken as indicative of what people of one race may feel at liberty to say and which people of the other are expected to brook.

The right to refuse medical treatment and fluoridated water

[58] The next case, *New Health New Zealand Inc v South Taranaki District Council and Attorney-General* emerged from a generally quiet part of New Zealand, on the west coast of the North Island, when in 2012 the district council decided to fluoridate the water supplies in two small towns, Patea and Waverley.²⁴ The decision was taken for public health purposes to improve poor dental health in those towns.

[59] Just over half of the New Zealand population receives fluoridated water. It is an issue that has been controversial in New Zealand for many decades, and was even the subject of a Commission of Inquiry in the 1950s.

[60] *New Health New Zealand Inc*, an incorporated society that opposes fluoridation of water, sought to judicially review the council's decision. It argued that

²³ *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 (CA) at 598.

²⁴ *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

the fluoridation of water constituted compulsory medical treatment and breached s 11 of the Bill of Rights, namely the right of the towns' inhabitants to refuse to undergo medical treatment.²⁵

[61] The High Court and the Court of Appeal held that the fluoridation of water was not medical treatment. It was the equivalent of pasteurizing milk, adding iodine to salt, or adding folic acid to bread. The right to refuse medical treatment was engaged only if the treatment was to take place in the context of a therapeutic relationship in which medical services would be provided to an individual. It did not extend to public health measures. As Rodney Hansen J explained in the High Court:²⁶

To the extent that public health measures may lead to therapeutic outcomes and constitute medical treatment in the broad sense, an individual has no right to refuse, at least not so as to produce outcomes that will deny others the benefit of such measures.

[62] A majority of the Supreme Court overruled the courts below on that point and held that the right to refuse medical treatment applied to public health measures, including the fluoridation of water.²⁷ The Chief Justice also considered that s 11 applied to all medical treatment and it was irrelevant that the medium through which the fluoride was delivered was water supply.

[63] While O'Regan and Ellen France JJ considered that to accept s 11 applied was a "generous" interpretation of the s 11 right, it was one that did not overshoot its purpose. The treatment was effectively compulsory because the towns' inhabitants had no practical option but to ingest the fluoride. Ellen France and O'Regan JJ said that:²⁸

While drinking water from a tap is not an activity that would normally be classified as undergoing medical treatment, we do not consider that ingesting fluoride added to water can be said to be qualitatively different from ingesting a fluoride tablet provided by a health practitioner.

²⁵ New Zealand Bill of Rights Act 1990, s 11.

²⁶ *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834 at [89].

²⁷ O'Regan, Ellen France, and Glazebrook JJ.

²⁸ At [99].

[64] William Young J was the only Supreme Court Judge who held that the fluoridation of water was not medical treatment. This was because the towns' water naturally contained fluoride and the fluoridation simply increased its level, and because the purpose of the water supply was to hydrate the towns' inhabitants, not to treat them. The therapeutic purposes of addressing tooth decay was incidental. Further, the Judge said that those in the towns were not compelled to drink the water because they could filter out the fluoride or arrange for an alternative water supply. In his opinion, s 11 was not engaged.

[65] However, ultimately the appeal was dismissed. O'Regan and Ellen France JJ held that fluoridation of water was not inconsistent with the right to refuse medical treatment.²⁹ They held that for the purposes of s 5 of the Bill of Rights the provisions authorising the fluoridation of drinking water limited the s 11 right only to the extent demonstrably justified in a free and democratic society. Fluoridation of the water limited the right no more than was reasonably necessary. It was proportional to the objective of preventing and reducing tooth decay which was sufficiently important, and there was a rational connection between fluoridation and the prevention of dental decay. Notably, O'Regan and France JJ acknowledged that the scientific evidence relating to fluoridation was contentious. However, it was not the Court's role to attempt a definitive ruling on the scientific and political issues.³⁰ Instead the Court's role was to engage in a broad assessment to determine whether the evidence provided a proper basis to conclude that the limitation on the right was justified.

[66] The appellant had argued that there were less intrusive means to achieve the aim of improving dental health, such as fluoridated toothpaste or fluoridating salt in fast foods and in sugary drinks. The Court acknowledged these measures would be more consistent with the Bill of Rights, but would be less effective because they were not compulsory. The fluoridation of water was a reasonable alternative.³¹

²⁹ O'Regan J, Ellen France and William Young JJ.

³⁰ At [121].

³¹ At [134].

[67] When taken with William Young J's opinion, the finding of O'Regan and France JJ was sufficient to dismiss the appeal. Further, while Glazebrook J chose not to comment on the s 5 analysis, she also agreed the appeal should be dismissed.

[68] Importantly, in her dissenting judgment the Chief Justice took the opportunity to emphasize the transformative effect of the Bill of Rights. The Act does not merely repeat the old law. Section 4 provides additional reason not to limit rights as Parliament can always limit them expressly where it considers it appropriate to do so.

A footnote. Prior to the Supreme Court case, the previous Government had introduced legislation to Parliament to transfer the decision making from local councils and to allow district health boards to direct local authorities to fluoridate water supplies in their areas. The Bill is still before Parliament.

The right to vote and the “irrational” amendment

[69] The latest word from our Supreme Court on the Bill of Rights came in November last year, when the Court released its decision on whether a blanket ban on prisoners voting breached the right to vote under s12(a) of the Bill of Rights.³²

[70] The case is significant, because it goes some way to answer the criticism of Sir Geoffrey Palmer that I referred to earlier, namely that the use of the Bill of Rights since Sir Robin Cooke's time as President of the Court of Appeal has been marked by considerable caution by the Courts.

[71] The focus and main application of the Bill of Rights during that initial period was, as one might expect, on criminal procedural rights. A few examples suffice to make the point. In *Ministry of Transport v Noort*, Mr Noort and another had been detained for processing under blood alcohol legislation.³³ They were not told of their right under s 23(1)(b) of the Bill of Rights to consult and instruct a lawyer without delay. The Court was unanimous in confirming the right but was split on its reasoning. The majority applied s 5. Having applied s 5, there was no need to invoke s 6.

³² *Attorney-General v Taylor* [2018] NZSC 104.

³³ *Ministry of Transport v Noort* [1992] 3 NZLR 260.

[72] Next, in *R v Te Kira*, the Court of Appeal gave effect to the right under s 23(3) for every person arrested to be brought before a Court as soon as possible.³⁴ I have earlier referred to *Simpson v Attorney-General (Baigent's case)* where the Court confirmed that in an appropriate case, public law damages could be awarded for a breach of the Bill of Rights.³⁵ Finally, in *Martin v District Court at Tauranga*, the Court of Appeal granted a stay where there had been undue delay in prosecuting Martin's case, in breach of s 25(b).³⁶

[73] Back to the prisoner's rights case. In 2010, Parliament amended the Electoral Act 1993 with the effect that all prisoners sentenced to imprisonment from then on became ineligible to vote in general elections. Only remand prisoners retained the right to vote. The amendment was a marked departure from the prior law, which had limited the disenfranchisement to prisoners who were serving sentences of three years or more.

[74] Parliament was aware when enacting the amendment that it appeared to be inconsistent with the Bill of Rights. The Attorney-General had reported to the House in accordance with his statutory duty under s 7 of the Bill of Rights that the blanket disenfranchisement appeared to be inconsistent with the right to vote and could not be justified.³⁷

[75] The Attorney-General advised Parliament that the amendment would produce "irrational effects". The purpose of the amendment was to disenfranchise those imprisoned for "serious crimes" and yet whether a prisoner was disenfranchised would depend entirely on the date of sentencing.

[76] For example, a fines defaulter who received a short sentence of imprisonment that coincided with election day would not be able to vote, whereas a serious offender who received a sentence of less than three years could still vote if his sentence fell between elections.

³⁴ *R v Te Kira* [1993] 3 NZLR 257.

³⁵ *Simpson v Attorney-General* [1994] 3 NZLR 667.

³⁶ *Martin v District Court at Tauranga* [1995] 2 NZLR 419.

³⁷ New Zealand Bill of Rights Act 1990, s 7.

[77] Five prisoners commenced proceedings in the High Court seeking to challenge the amendment. Four of the applicants were disenfranchised by the amendment. The fifth applicant was Arthur William Taylor. Mr Taylor was a long-term prisoner and could not vote under the earlier legislation. The applicants sought a formal declaration that the amendment expanding the prohibition was inconsistent with their right to vote as affirmed by the Bill of Rights.

[78] The case had constitutional significance because, although the issue of a declaration had been raised before, no Court in New Zealand had ever made a formal declaration of inconsistency.

[79] In the High Court, Heath J noted the general principle that where there has been a breach of the Bill of Rights there is a need for the Court to fashion public remedies to respond to the breach. He said that Parliament did not intend, in the Bill of Rights, to exclude the ability of the Court to make a declaration of inconsistency. He did not consider making a declaration would bring into question parliamentary processes in a way contrary to Art 9 of the Bill of Rights 1688 (Imp). He determined it was appropriate to make the declaration.

[80] The Court of Appeal concluded Mr Taylor did not have standing, but on the substantive merits of the appeal, determined it was open to the High Court to have made the declaration and the Judge was “right to do so.” The declaration was necessary to “convey the Court’s firm opinion that the legislation needs reconsidering and to vindicate the right.”

[81] The matter went on appeal to the Supreme Court. The Attorney-General did not resile from his advice to Parliament that the amendment was an unjustified limitation on the right to vote. The issue was whether the High Court had power to make a declaration that legislation is inconsistent with the provisions of the Bill of Rights. The Solicitor-General first argued that the making of such a declaration did not fit with the language and legislative history of the Bill of Rights.

[82] A majority of the Court, Glazebrook and Ellen France JJ with whom the Chief Justice agreed on this point, rejected that submission. They considered the making of

a formal declaration was a logical step. Ellen France J noted that while no declaration had previously been made, it was accepted that courts could conclude as part of their reasoning process that legislation was inconsistent with the Bill of Rights. Although not expressly provided for in the Bill of Rights, the power was required to provide an effective remedy, to vindicate important rights and thereby to meet its objectives.

[83] As a signatory to the International Covenant on Civil and Political Rights (ICCPR) New Zealand had undertaken to ensure those whose rights were violated “have an effective remedy”. Absent a declaration there was no other effective remedy.

[84] France J noted that s 3(a) expressly applied to acts of the legislative branch. Next, as s4 prevented a Court from refusing to apply the voter disqualification that of itself supported the making of a formal declaration. Such a declaration was not in conflict with Parliament’s ability to legislate inconsistently with rights.

[85] The Solicitor-General had also relied on s 92J of the Human Rights Act which authorized the making of a declaration. But such a provision was necessary as the Tribunal lacked the inherent jurisdiction of the High Court.

[86] The majority also rejected the Solicitor-General’s second main submission that there was no jurisdiction for the Court to make the declaration as the judicial function is adjudicatory. The judges considered that making such a declaration was consistent with the usual function of the Courts. In doing so they drew support the decisions of the Supreme Court of Canada in *Manitoba Metis Federation Inc v Canada (Attorney-General)* and *Canada (Prime Minister) v Khadr*.³⁸

[87] Finally, the majority considered the decisions of the High Court of Australia in *Momcilovic v R*, and the House of Lords in *A v Secretary of State for the Home Department*.³⁹ The Attorney-General had pointed to the findings in *Momcilovic* that making a declaration of inconsistency was not within the judicial function conferred

³⁸ *Manitoba Metis Federation Inc v Canada (Attorney-General)* 2013 SCC 14; [2013] 1 SCR 623 at [143] per McLachlin CJ and Karakatsanis J (on behalf of McLachlin CJ, LeBel, Fish, Abella, Cromwell and Karakatsanis JJ); and *Canada (Prime Minister) v Khadr* 2010 SCC 3; [2010] 1 SCR 44 at [2], and see also [46]–[47].

³⁹ *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1; and *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

by Ch 111 of the Commonwealth of Australia Constitution Act 1900 (UK). The majority distinguished that case on the basis of the particular Australian constitutional law setting.

[88] Further, s 3 of the Bill of Rights had no equivalent in the Victorian charter considered in *Momcilovic*. The majority considered *A v Secretary of State* supported the approach they had taken.

[89] The Chief Justice was in general agreement with the reasoning of Ellen France and Glazebrook JJ, but differed in her emphasis on some issues. For example, she noted that in addition to the points made by Ellen France J, the Declaratory Judgments Act 1908 remained of general application. Elias CJ considered that under New Zealand's constitutional arrangements, saying whether the obligation of compliance with the Bill of Rights has been met is "inescapably" a judicial function.

[90] William Young and O'Regan JJ dissented. They held that a Senior Court only had the power to *indicate* an inconsistency, and only if it was necessary for a Court to do so in the resolution of a dispute about the interpretation of a statute.⁴⁰ The Bill of Rights did not allow for a declaration of inconsistency as a remedy in and of itself.

[91] They considered it relevant that the Bill of Rights did not provide for a Court to make formal declarations of inconsistency. There were also no mechanisms within the statute to bring such a declaration to the attention of Parliament, as there were in equivalent overseas statutes, such as the Canadian Charter.

[92] William Young and O'Regan JJ also questioned the effectiveness of such a declaration. They noted the obligation under ICCPR required an "effective remedy".⁴¹ A declaration would not bind Parliament in any way. They said:⁴²

... a declaration would simply hang in the air and possibly create some sort of moral obligation on the part of the legislature to reconsider. That in turn carries the risk that a formal order of the court may be simply ignored, with the consequential danger of the erosion of respect for the integrity of the law and the institutional standing of the judiciary.

⁴⁰ At [125].

⁴¹ At [138].

⁴² At [134].

[93] Finally, the Judges remarked that no declaration had been made in New Zealand in 28 years but that had not undermined the objective of the Bill of Rights to affirm, protect and promote human rights and fundamental freedoms.⁴³

[94] What was the effect of the declaration? Following the decision, the Justice Minister said changing the law regarding prisoner voting was not a priority for the Government.⁴⁴

[95] On the broader issue however, a month before the appeal to the Supreme Court was to be heard, the Government announced that cabinet had approved, in principle, to amend the Bill of Rights to expressly confirm that Senior Courts could make declarations of inconsistency and to require Parliament to respond.⁴⁵ A declaration of inconsistency would trigger reconsideration of the issue by Parliament. Parliament would, however retain its sovereignty. After reconsideration, Parliament could amend, repeal or leave the law as originally passed.

Conclusion

[96] Sir Geoffrey Palmer concluded his address in 2015 by warning that unless action was taken to elevate the status of the Bill of Rights to insulate Court decisions against a reversal by a simple majority of Parliament the words of Robert Maynard Hutchins from 1954 might apply:⁴⁶

The death of democracy is not likely to be an assassination from ambush. It will be a slow extinction from apathy, indifference and undernourishment.

[97] While we are still some distance from achieving Sir Geoffrey's objectives, I venture to suggest that a brief survey of recent jurisprudence in New Zealand suggests application of the Bill of Rights is at least not currently suffering from undernourishment.

⁴³ At [144].

⁴⁴ www.radionz.co.nz/news/political/375579/prisoners-right-to-vote-currently-not-a-priority-for-parliament-little

⁴⁵ www.labour.org.nz/government_to_provide_greater_protection_of_rights_under_the_nz_bill_of_rights_act_1990

⁴⁶ Robert Maynard Hutchins, Dean of the Yale Law School, then the Chancellor of the University of Chicago, said this in 1954: see Antony Jay (ed) *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) at 186.

[98] No reira, tena koutou, tena koutou, tena tatou katoa.