

# JUDICIAL INNOVATION UNDER THE NEW ZEALAND BILL OF RIGHTS ACT - LESSONS FOR QUEENSLAND?

ANDREW GEDDIS\* AND M B RODRIGUEZ FERRERE\*\*

## I INTRODUCTION

In June 2016, the Legal Affairs and Community Safety Committee of Queensland's Parliament issued a split report on its 'Inquiry into a possible Human Rights Act for Queensland'.<sup>1</sup> Division occurred along largely predictable party lines: Government members of the Committee recommended that such a measure be legislated into existence;<sup>2</sup> Opposition members decried it as unnecessary and likely to be harmful. The inquiry's genesis in a post-election deal permitting a minority Labor Party Government to form meant a party line divide was not overly surprising. Underpinning these partisan positions, however, were differing accounts as to how such an instrument might come to be used in the courts. For the Opposition minority, the proposal threatens to transfer significant policy making powers away from elected politicians to the judiciary, leading them to approvingly quote from the submission of Professor James Allan:

You either have a process where you count everyone equally and they vote for representatives who decide or you have a process where seven or nine top judges decide things by purporting to be moral experts or philosopher kings of some sense.<sup>3</sup>

The Government majority was somewhat more sanguine, preferring the views of Professor George Williams:

My view is that the courts do have a role, a complementary role; if you like, quite a weak role as compared to anything like the US Bill of Rights, for example. However, it is a complementary role that comes in after the human rights act has properly shaped debate within those more democratic institutions. If that happens, you do not need to get to the courts.<sup>4</sup>

The disagreement between Committee members was thus at least in part based on competing predictions as to what Queensland courts would (or would not) do should such an instrument be enacted.

Of course, predictions ultimately are empirical claims, and such claims may be assessed in the light of similar happenings elsewhere. Consequently, in the course of its deliberations the Committee looked<sup>5</sup> at the operation of the New Zealand Bill of

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\* Professor, Faculty of Law, University of Otago.

\*\* Lecturer, Faculty of Law, University of Otago. Our joint thanks to Grant Huscroft, Léonid Sirota and John Smillie for their comments on a draft version of this article, and to Timothy Shiels for assistance with editing. The usual disclaimer applies to the final product.

<sup>1</sup> Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a possible Human Rights Act for Queensland* (2016).

<sup>2</sup> *Ibid* xx.

<sup>3</sup> *Ibid* xiv.

<sup>4</sup> *Ibid* xxxviii.

<sup>5</sup> *Ibid* 18-21.

Rights Act ('NZBORA'),<sup>6</sup> as well as to other jurisdictions that have adopted statutory rights instruments. This is not the first time that Australia has considered whether New Zealand's experience might be relevant in a cross-Tasman context.<sup>7</sup> Indeed, the NZBORA already has been acknowledged<sup>8</sup> as the template for the rights instruments adopted in both Victoria and the Australian Capital Territory.<sup>9</sup> Given this demonstrated interest, our purpose in this article is to provide for a Queensland audience an account of the NZBORA's central features, how these came to be, what the instrument was thought likely to do, and the way that the judiciary has applied it since first entering into force. Our explanation is situated within New Zealand's wider historical, political and legal framework. Noting Mark Tushnet's warning that 'differences in constitutional cultures complicate the task of doing comparative constitutional law',<sup>10</sup> we supply the contextual background that will allow readers unfamiliar with New Zealand to draw meaningful lessons from its experiences.<sup>11</sup> Furthermore, we think that the adoption and subsequent 26 year development of the NZBORA forms a unified story that requires telling in full. The instrument was enacted as the result of a watered-down political 'compromise'<sup>12</sup> after proposals for a stronger form, higher law Bill of Rights were rejected. This origin story then allows commentators to discern in the NZBORA what they want to see: either the seed of a powerful guarantor of individual rights requiring only a sprinkling of judicial boldness to bring it to flower; or a 'window dressing'<sup>13</sup> measure that was never meant to deliver any significant change at all.

Our own view is that while neither of these polar versions of the NZBORA has been fully realised, the circumstances of the original legislative compromise nevertheless have continued to flow through the instrument's subsequent history in ways that complicate any simple account of its application in practice. Although New Zealand does not have an established constitutional tradition of originalist interpretation in the vein of the United States, those charged with construing and applying the NZBORA have been, and continue to be, profoundly influenced by the

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<sup>6</sup> *New Zealand Bill of Rights Act 1990* (NZ).

<sup>7</sup> See, eg, Jerome B Elkind, 'New Zealand's Experience with a Non-Entrenched Bill of Rights' in Phillip Alston, *Towards an Australian Bill of Rights* (Centre for International and Public Law, Human Rights and Equal Opportunity Commission, 1994); Julie Taylor, 'Human Rights Protection in Australia – Interpretation Provisions and Parliamentary Sovereignty' (2004) 32 *Federal Law Review* 57, 70-71; Simon Evans, 'Improving Human Rights Analysis In The Legislative And Policy Processes' (2005) 29 *Melbourne University Law Review* 665, 691-93; Suri Ratnapala, 'Bills of Rights in Functioning Parliamentary Democracies: Kantian, Consequentialist And Institutional Scepticisms' (2010) 34 *Melbourne University Law Review* 592, 592-93.

<sup>8</sup> George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 881.

<sup>9</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>10</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009) 5.

<sup>11</sup> See Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in Mark Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 54, 66-67. See also David Erdos, 'Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand' (2009) 34 *Law and Society Inquiry* 95, 96-97.

<sup>12</sup> See Claudia Geiringer, 'What's the Story?: The Instability of the Australasian Bills of Rights' (2016) 14 *International Journal of Constitutional Law* 156, 170 (hereafter Geiringer, *What's the Story?*) (Describing the NZBORA as 'an unstable and under-explored compromise, erected on uncertain constitutional terrain').

<sup>13</sup> (17 July 1990) 508 NZPD 2803, (RJS Munro).

conditions of its creation.<sup>14</sup> This experience then provides a lesson for Queensland when deciding whether to adopt a NZBORA-like instrument: you cannot readily predict what you will get with such a measure because (1) its very purpose is open to different interpretations; and (2) it is not self-applying in that it requires considerable judicial interpretation and application.<sup>15</sup> That interpretation and application may then vary markedly, depending on the subsequent judicial view of its purpose. So it is not so much that you cannot always get what you want when adopting a measure like the NZBORA, more that you do not always know what you will get.

We explore these matters as follows. For readers unfamiliar with the NZBORA, we outline its central features in part 2. In part 3 we examine how it came to be enacted, noting that the original proposal was for a ‘higher law’ instrument that would permit judicial override of legislation. That proposal’s eventual political defeat and the subsequent adoption into law of a weaker, ‘ordinary law’ rights instrument created a deep uncertainty over what, if anything, this new measure was meant to do. This uncertainty was manifest in differing views as to how the judiciary should enforce the rights and freedoms contained in the NZBORA. In part 4 we examine how active the courts have been in crafting and applying remedies for individuals whose guaranteed rights are breached. Our view is that judicial practice has varied over time in ways that reflect differing underlying assumptions about the NZBORA’s basic constitutional importance. We then conclude in part 5 with some comments on how New Zealand’s experience is relevant to Queensland’s decision whether to follow in its Antipodean cousin’s footsteps.

## II THE NZBORA’S CENTRAL FEATURES

The NZBORA is an ordinary enactment of the New Zealand parliament. It is not formally superior to any other legislation that body passes (or has passed) into law; indeed, as shall be seen, it occupies something of a conceptually *inferior* position vis-à-vis competing enactments. Furthermore, the NZBORA’s ordinary statute status permits a bare parliamentary majority to amend or repeal it. Despite this un-entrenched, ‘ordinary law’ status, however, the NZBORA’s preamble espouses lofty goals, stating that it is:

An Act —

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights.<sup>16</sup>

It purports to do so by positively recognising a range of civil and political rights and freedoms,<sup>17</sup> but not so-called ‘social and economic’ rights such as the right to an adequate

<sup>14</sup> See Paul Rishworth, ‘Reflections on the Bill of Rights After *Quilter v Attorney-General*’ [1998] *New Zealand Law Review* 683, 688-89 (hereafter Rishworth, ‘*Reflections on the Bill of Rights*’); Janet McLean, ‘The New Zealand Bill of Rights and Constitutional Propriety’ (2013) 11 *New Zealand Journal of Public and International Law* 19, 21 (hereafter McLean, ‘*The NZBORA and Constitutional Propriety*’); Paul Rishworth, ‘The Supreme Court and the Bill of Rights’ in Andrew Stockley & Michael Littlewood (eds), *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, 2015) 169, 172 (hereafter Rishworth, ‘*Supreme Court*’); Geiringer, *What’s the Story?*, above n 12, 163-164.

<sup>15</sup> Richard Ekins, ‘Human Rights and the Separation of Powers’ (2015) 34 *Queensland Law Journal* 217, 224-228.

<sup>16</sup> *New Zealand Bill of Rights Act 1990* (NZ) preamble.

<sup>17</sup> *Ibid* ss 8–27.

standard of living, housing or health care. A duty to respect these guaranteed rights applies to the legislative, executive and judicial branches of government,<sup>18</sup> as well as to any person or body acting ‘in the performance of any public function, power or duty imposed by law’.<sup>19</sup> That duty’s precise nature depends upon the identity of the actor in question and the basis for its action. The NZBORA does not contain a higher law set of constitutional fundamentals that legally constrains the actions of *all* public actors. Rather, it provides a legislative guarantee of rights intended to authorise judicial restraints on public power in *some* circumstances, but allows political actors to determine the outcome to rights questions in others.

Understanding just how the NZBORA strikes this balance requires recognition of New Zealand’s now unique constitutional commitment to a Diceyan concept of parliamentary sovereignty.<sup>20</sup> That is to say, enactments of the New Zealand Parliament remain the nation’s highest form of law and no individual or other institution (including the nation’s courts) may invalidate or refuse to apply such legislation.<sup>21</sup> From this *Grundnorm* proposition certain NZBORA consequences automatically proceed. Where the executive branch or some person or body performing a public function, power or duty acts in a way that limits one of the NZBORA guaranteed rights, and that limit cannot be ‘demonstrably justified in a free and democratic society’,<sup>22</sup> the action is *prima facie* unlawful due to inconsistency with a parliamentary enactment.<sup>23</sup> In such cases the courts may intervene by way of applying standard administrative law remedies for unlawful public action.<sup>24</sup> By the same token, the judiciary itself is bound to respect the rights contained in the NZBORA when carrying out its various functions, including (to a still contested extent) developing the common law.<sup>25</sup> These aspects of the NZBORA’s application largely mirror other jurisdictions with entrenched, higher-law rights instruments in place.<sup>26</sup>

The NZBORA differs from such instruments, however, in that it does not take precedence over any other legislation enacted by Parliament. An obvious question of priority then arises where a competing legislative provision apparently authorises, or even requires, a public actor to act in ways that unjustifiably limit the rights guaranteed by the NZBORA. The so-called ‘operative provisions’ contained in sections 4-6 provide the answer. Section 4 explicitly precludes the courts invalidating or refusing to apply any other enactment—

<sup>18</sup> Ibid s 3(a).

<sup>19</sup> Ibid s 3(b). See also *Ransfield v The Radio Network* [2005] 1 NZLR 233 (HC).

<sup>20</sup> Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar, 2014) 41 (describing New Zealand as ‘the only [constitutional] system that remains committed in theory to parliamentary sovereignty’).

<sup>21</sup> See Andrew Geddis, ‘Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change’ (2016) 14 *International Journal of Constitutional Law* 99, 101-102; 110 (hereafter Geddis, ‘*Parliamentary Government in New Zealand*’).

<sup>22</sup> *New Zealand Bill of Rights Act 1990* (NZ) s 5.

<sup>23</sup> But see below n 27 and accompanying text.

<sup>24</sup> See, eg, *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA); *Manga v Attorney General* [2000] 2 NZLR 65 (HC), 126-133; *Drew v Attorney General* [2002] 1 NZLR 58 (CA); *Wilding v Attorney General* [2003] 3 NZLR 787 (CA), 14; *Television New Zealand Limited v Attorney-General* 8 HRNZ 45 (2004) (CA); *Schubert v Wanganui District Council* [2011] NZAR 233 (HC); *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016; *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227; *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477; *B v Waitemata District Health Board* [2016] NZCA 184.

<sup>25</sup> See *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1; Andrew Geddis, ‘The Horizontal Effects of the New Zealand Bill of Rights Act as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 700.

<sup>26</sup> See Grant Huscroft and Paul Rishworth, ‘You Say You Want a Revolution? Bills of Rights in the Age of Human Rights’, in D Dyzenhaus, M Hunt, G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 123, 127-129.

regardless of when it was enacted—because of inconsistency with the instrument’s rights guarantees. For this reason the NZBORA may be described as a form of *inferior* legislation: its rights guarantees may be overridden by any other legislation parliament enacts in the future, *or has enacted in the past*.<sup>27</sup> Section 5 is subject to section 4, and prescribes that the rights and freedoms contained in the NZBORA shall be subject only to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Consequently, the NZBORA does not purport to protect rights absolutely, but instead forms what Paul Rishworth has termed a ‘bill of reasonable rights’<sup>28</sup> that mandates overt judgements as to the justification for any limits to its guarantees. Section 6 requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the NZBORA, that meaning shall be preferred. This instruction gives the courts a role in harmonising the statute books with the fundamental idea that all people possess certain important rights that the state should not limit unjustifiably.

The interplay between sections 4, 5, and 6 is further discussed below.<sup>29</sup> For the present, however, two points are important. First, when considering competing legislation that appears to authorise (or even require) an exercise of public power that unjustifiably limits NZBORA guaranteed rights, New Zealand’s courts are restricted to seeing if they ‘can’ interpret the statutory language in a way that does not authorise (or even require) such actions. If unable to do so, the courts are obligated to apply the competing legislation irrespective of any rights consequences that may follow.<sup>30</sup> Therefore, and this is the second important point, Parliament retains the final word on exactly what the guaranteed rights mean, as well as the justifiability of any particular limit on those rights. As the next part outlines, the NZBORA as finally enacted was expressly intended to leave elected representatives formally free to continue to legislate as they think best. Any constraints that the NZBORA imposes upon that institution exist as a matter of pure political morality: it may be argued that parliament *should not* legislate inconsistently with that rights instrument, but not that it *cannot* do so.<sup>31</sup>

When described in this abbreviated and simplified fashion, the NZBORA might appear to form a carefully crafted, theoretically grounded constitutional development.<sup>32</sup> In reality, however, it came into being in a somewhat messy fashion as the result of an overtly political compromise between those agitating for stronger-form, higher law constitutional protection for individual rights and those who objected to creating any sort of new rights protections at all. The NZBORA was, in that sense, almost no-one’s first choice form of rights instrument. In the next section we turn to explore how this compromise came into being, before examining why the circumstances of the NZBORA’s creation are of relevance to its development over the subsequent 26 years.

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<sup>27</sup> As a consequence, the standard interpretative doctrine of ‘implied repeal’ — the presumption that where two statutes cannot be read consistently, the later in time statute prevails — does not apply to the NZBORA. See Ross Carter, *Burrows and Carter: Statute Law in New Zealand* (LexisNexis, 5<sup>th</sup> ed, 2015).

<sup>28</sup> Paul Rishworth, ‘Interpreting and Invalidating Enactments Under a Bill of Rights’ in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, 2004) 251, 277.

<sup>29</sup> See below part 4(c).

<sup>30</sup> Consequently, any acts by the executive branch (or other person or body performing a public function, power or duty) that impose an unjustified limit on one of the NZBORA rights, but which are authorised by competing legislation, are *lawful* regardless of their apparent inconsistency with the NZBORA. For the possible remedial options available to the courts in such cases see below part 4(d).

<sup>31</sup> Claudia Geiringer, ‘The Dead Hand of the Bill of Rights?’ (2007) 11 *Otago Law Review* 389, 412-415.

<sup>32</sup> Stephen Gardbaum argues that the NZBORA and similar instruments form a distinct ‘commonwealth model’ of constitutionalism; see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

### III THE NZBORA'S ORIGIN STORY AND ITS CONSEQUENCES

#### A *A birth amidst political disagreement*

Although the NZBORA's 'pre-history'<sup>33</sup> stretches back at least to 1960, its immediate genesis lay in the extent of governmental overreach that characterised the 1975-1984 administration of Sir Robert Muldoon.<sup>34</sup> Experience of that government informed what became a seminal text on New Zealand's constitutional and government practices, *Unbridled Power?*<sup>35</sup> Its author, Geoffrey Palmer, argued strongly that certain freedoms are fundamental to a free society and that a bill of rights could withdraw them from the realm of political controversy: '[t]hey would be higher values embodied in a higher law to which all other law would conform'.<sup>36</sup> His was not a lone voice; in particular, key members of the judiciary echoed his views. In the year of *Unbridled Power?*'s publication — and its author's first election as a member of parliament — Justice Owen Woodhouse opined extra-judicially that the 'nebulous conventions' protecting New Zealanders' basic rights 'should be given constitutional form which could not easily be repealed or amended and which would then receive the effective supervision of the Courts'.<sup>37</sup> Also in 1979, Justice Robin Cooke delivered the first of a series of judgments in which he made obiter comments supporting the existence of a 'common law bill of rights' that imposed substantive constraints on parliamentary lawmaking powers.<sup>38</sup> These views reached a crescendo in *Taylor v New Zealand Poultry Board*: 'Some common law rights presumably lie so deep that even Parliament could not override them'.<sup>39</sup>

This zenith of speculative judicial rights-talk was mirrored by legislative action. Following the 1984 general election, a new Labour Party Government took office with Palmer as its Minister of Justice. Under his stewardship, the NZBORA began its life as two draft bills with a public consultation document (the 'White Paper')<sup>40</sup> tabled in Parliament in April of 1985. Inspired by Canada's adoption in 1982 of the entrenched,

<sup>33</sup> Justice Susan Glazebrook, *The New Zealand Bill of Rights Act 1990: its operation and effectiveness*, speech delivered to the South Australian State Legal Convention on 22 July, 2004, [2], footnote 3, available at <<https://www.courtsfnz.govt.nz/speechpapers/Speech22-07-2004.pdf>>.

<sup>34</sup> David Erdos describes the Muldoon administration as providing an 'aversive' trigger for the NZBORA's adoption; see David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010) 94. See also Paul Rishworth, 'The Birth and Rebirth of the Bill of Rights' in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms* (Brooker's, 1995) 1, 9–13 (hereafter Rishworth, 'The Birth and Rebirth of the Bill of Rights'); K.J. Keith, 'The New Zealand Bill of Rights Act 1990 — An Account of Its Preparation' (2013) 11 *New Zealand Journal of Public and International Law* 1, 8.

<sup>35</sup> Geoffrey W R Palmer, *Unbridled Power?: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, 1<sup>st</sup> ed, 1979).

<sup>36</sup> *Ibid* 131.

<sup>37</sup> Owen Woodhouse, *Government Under the Law: The JC Beaglehole Memorial Lecture*, (New Zealand Council for Civil Liberties, 1979), 17.

<sup>38</sup> *L v M* [1979] 2 NZLR 519, 527 (CA); *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78 (CA); *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 (CA); *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (CA). See also Paul Rishworth, 'Writing Things Unwritten: Common Law in New Zealand's Constitution' (2016) 14 *International Journal of Constitutional Law* 137, 143–5.

<sup>39</sup> [1984] 1 NZLR 394, 398 (CA). See also Sir Robin Cooke, 'Fundamentals' [1988] *New Zealand Law Journal* 158, 163–65.

<sup>40</sup> Geoffrey Palmer, 'A Bill of Rights for New Zealand: A White Paper' [1984-1985] I AJHR A6.

higher law Canadian Charter of Rights and Freedoms, the White Paper proposed a similar Bill of Rights for New Zealand to guarantee a range of civil and political rights and empower the judiciary to declare invalid any parliamentary enactment that imposed unjustifiable limits upon them. An extended period of deliberation on this proposal by the Justice and Law Reform Select Committee ('the Committee') meant it did not provide even an interim report back to Parliament until 1987,<sup>41</sup> permitting Palmer (who was by this point the nation's Deputy Prime Minister and Attorney-General) to put his defense of the White Paper into the second edition of *Unbridled Power* (now with a confident absence of a question mark in the title).<sup>42</sup> By this point, however, discussion surrounding the proposed Bill of Rights was not limited to Palmer and a few jurists. Rather, a host of voices articulated a range of hopes and fears vis-à-vis the White Paper model.<sup>43</sup>

In this debate, optimism over the proposed change was dwarfed by the myriad anxieties associated with such major constitutional reform.<sup>44</sup> Indeed, Sir Robin Cooke noted that: 'Opposition stems from so many quarters and invokes so many different reasons that there is one obvious inference. The White Paper must have got the balance about right. A Bill of Rights that favours no one interest group cannot be all bad'.<sup>45</sup> Nevertheless, despite such confident claims regarding the measure's utility, opponents of the White Paper model won the day.<sup>46</sup> Where the Committee's interim report had expressed hope regarding the proposal's passage, its final report in 1988 accepted defeat.<sup>47</sup> Although grumpily complaining that there was 'limited public understanding' of the Bill's impact, the Committee concluded that 'New Zealand is not yet ready, if it ever will be, for a fully fledged bill of rights along the lines of the White Paper draft'.<sup>48</sup> A majority of the Committee nevertheless saw merit in a rights instrument that was neither supreme law nor entrenched, as it 'can provide valuable checks on the actions of the Executive' as well as having 'great educational and moral value', and thus recommended the introduction of a bill of rights as an ordinary statute.<sup>49</sup>

While these recommendations did not bind the Government, they reflected a political judgment that the original White Paper model was unachievable. Consequently, the NZBORA in its current form was introduced as a new Bill on 9

<sup>41</sup> Justice and Law Reform Committee 'Interim Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand' [1986-1987] X AJHR I.8A.

<sup>42</sup> Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, 2<sup>nd</sup> ed, 1987) 219ff.

<sup>43</sup> See, eg, Andrew Sharp, 'An Historical and Philosophical Perspective on the Proposal for A Bill of Rights for New Zealand' in Andrew Sharp (ed) *A Bill of Rights for New Zealand* (Legal Research Foundation, 1985) 6; K J Keith, 'A Bill of Rights for New Zealand? Judicial Review versus Democracy' in *ibid* 49; B V Harris, 'Bill of Rights: Redistribution of Power' [1985] *New Zealand Law Journal* 49; Guy Brougham Chapman, 'A Bill of Wrongs: The Argument Against the Proposed Bill of Rights' [1985] *New Zealand Law Journal* 226; Paul East, 'The Proposed Bill of Rights' [1985] *New Zealand Law Journal* 368; K J Keith, 'The Bill of Rights: Reply to a Criticism' [1985] *New Zealand Law Journal* 370; J A Smillie, 'F W Guest Memorial Lecture: A Bill of Rights for New Zealand? An Alternative Proposal' (1985) 6 *Otago Law Review* 175; Jerome B Elkind & Antony Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (Oxford University Press, 1986).

<sup>44</sup> See Erdos, above n 34, 100-101.

<sup>45</sup> Sir Robin Cooke, 'A Standard for Justice' [1986] *New Zealand Law Journal* 149.

<sup>46</sup> Indeed, as David Erdos notes, most of Palmer's colleagues in the Labour Government were themselves disinclined to support the White Paper model as it threatened to restrict their powers now that they had won office; see Erdos, above n 34 at 97.

<sup>47</sup> Justice and Law Reform Committee 'Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand' [1987-1990] XVII AJHR I.8C.

<sup>48</sup> *Ibid* 3.

<sup>49</sup> *Ibid*.

October 1989, again moved by its architect and, by this stage, New Zealand's Prime Minister.<sup>50</sup> The Government adopted the Committee's recommendation that the new Bill should only have ordinary law status. The White Paper's proposed remedies provision — allowing the Court to award 'just and appropriate' remedies for breaches of rights — also was absent. Indeed, Palmer was at pains to reassure Parliament that 'the Bill creates no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue'.<sup>51</sup> However, despite now promoting a much-weakened facsimile of his White Paper proposal, Palmer was of the view that it still was a valuable measure. Doug Graham, opposition spokesperson for Justice, was not of the same opinion, and questioned the lack of clarity surrounding the amount of judicial power bestowed by the Bill:

[...] under clause 4 of the Bill, the courts do have some power to interpret the restrictions on the rights set out in the Bill. Clause 4, entitled 'Justified limitations', provides: 'The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. What does that mean? Does it mean that the courts have a great deal of power, or that they do not have very much power at all?<sup>52</sup>

The Bill received its final reading on August 21, 1990, two weeks before Palmer would resign as Prime Minister and two months before the Labour Government would suffer its largest electoral defeat since 1935. Palmer attested that, while not the outcome he would have preferred, '[t]he result is that we now have an extraordinarily useful addition to the constitutional structure ...'.<sup>53</sup> Palmer omitted to mention the Bill's new clause 3A (which would become section 4 of the NZBORA) and the emphasis on parliamentary sovereignty it represents. He left that job to his colleague, Richard Northey, who, to assuage opposition concerns, described its effect as follows: '[In Clause 3A], the Government is specifically telling the courts that that is the way the laws that have been set down in Parliament are to be interpreted. That has been made even clearer — it is the very opposite to handing sovereignty over'.<sup>54</sup>

Thus, upon the enactment of the NZBORA a week later on August 28, 1990 by way of a bare majority vote cast along party lines, the hopes and fears that were so vividly and thoroughly communicated when debating the White Paper were both apparently dashed and calmed respectively.<sup>55</sup> The hopes that the NZBORA would impose an effective restraint on all forms of public power through strong-form judicial review were sunk, but the fears that the NZBORA would represent a dangerous and unnecessary transfer of sovereignty were assuaged. Instead, there were new predictions: that the courts would possess 'no new legal remedies' and would not act in excess of their powers when confronted with a clear legislative pronouncement. However, the compromise nature of the newly enacted rights instrument served only to paper over the original schism in views. Upon its coming into force, these once again emerged into full sight.

<sup>50</sup> (10 October 1989) 502 NZPD 13039.

<sup>51</sup> (14 August 1990) 509 NZPD 3450.

<sup>52</sup> (10 October 1989) 502 NZPD 13045.

<sup>53</sup> (21 August 1990) 50 NZPD 3760.

<sup>54</sup> (21 August 1990) 50 NZPD 3763-4.

<sup>55</sup> See Claudia Geiringer, 'Inaugural Lecture: Mr Bulwark and the Protection of Human Rights' (2014) 45 *Victoria University of Wellington Law Review* 367, 370 (describing the NZBORA as 'a document born from compromise and thwarted ambition').

### B *The NZBORA's fundamentally unstable meaning*

Rather than reconciling the competing perspectives on the original White Paper proposal in a unifying synthesis, the NZBORA's passage instead left open this 'constitutional enigma's' ultimate meaning.<sup>56</sup> Since it contained sufficient ambiguity and vagueness about its intentions and possible effects, both proponents and opponents of proposed change were able to read into it what they wished to see. Claudia Geiringer describes this fundamental normative uncertainty regarding the legislation's *raison d'être* in the following terms:

there are two competing narratives about the significance of the [NZBORA], neither of which has achieved ascendancy. According to the first 'constitutional' narrative, the Act 'occupies ... the same space that higher law bills of rights occupy in other countries — with only such differences as are demanded by its explicit preservation of an ultimate parliamentary supremacy in s 4'. Conversely, the second narrative emphasises the document's status as part of ordinary law and regards the instrument as fundamentally different in kind from fully constitutionalised bills of rights.<sup>57</sup>

We agree that the circumstances of the NZBORA's birth inevitably spawned such diverging interpretations. We also agree that no singular narrative has yet achieved orthodox status, much less hegemony, within New Zealand's constitutional theory and practice. However, we prefer to frame the matter in terms of competing *inflationary* and *deflationary* accounts of the NZBORA's point and purpose. That is to say, although the NZBORA may never have been able to replicate entirely the original White Paper model, emphasising its fundamentally constitutional nature and the normative importance of the rights that it guarantees can help to move the final instrument closer to that initial vision. By contrast, the fact that the White Paper proposal was roundly rejected by the people's elected representatives in Parliament, and specific steps were taken to constrain the judiciary's reach, might justify permitting the NZBORA only the most minimalist application. Following the NZBORA's passage into law, various commentators quickly deployed these claims as they sought to predict what the new rights instrument would mean for the nation's constitutional practices.<sup>58</sup>

Thus, from its earliest days the NZBORA has attracted both inflationary and deflationary predictions as to its probable effects on New Zealand's law and governance. These competing inflationary and deflationary accounts set the backdrop for the NZBORA's ultimate application. The judiciary faced interrelated questions over when it could examine the exercise of public power to determine if it imposed an unjustified limit on rights, as well as what remedies ought to be available in those cases where an unjustifiable rights breach was found. How it answered these questions

<sup>56</sup> Anna Adams, 'Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal' [1996] *New Zealand Law Review* 368, 368.

<sup>57</sup> Geiringer, *What's the Story?*, above n 12, 163 (internal citations omitted).

<sup>58</sup> See eg, David M Paciocco, 'The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill' [1990] *New Zealand Recent Law Review* 353, 353; Paul Rishworth, 'The Potential of the New Zealand Bill of Rights' [1990] *New Zealand Law Journal* 68; Anthony Shaw and Andrew Butler, 'The Bill of Rights Comes Alive (1)' [1991] *New Zealand Law Journal* 400; Jerome B. Elkind, 'On the Limited Applicability of section 4, Bill of Rights Act' [1993] *New Zealand Law Journal* 111; Michael Luis Principe, 'The Demise of Parliamentary Supremacy? Canadian and American Influences Upon the New Zealand Judiciary's Interpretation of the Bill of Rights Act of 1990' (1993) 16 *Loyola of Los Angeles International and Comparative Law Journal* 16.

ultimately would determine the NZBORA's disciplinary reach over the various branches of the New Zealand government. In the following section we trace the judicial response and explain how this reflects the broader conceptual disagreement over what the NZBORA was intended to be and thus what it may be used to achieve.

#### IV JUDICIAL RESPONSES TO THE NZBORA

As noted above, the removal of the White Paper's original proposal to empower the courts to grant "just and appropriate" remedies meant the NZBORA's finally enacted text largely was silent on this matter. This legislative void meant that the judiciary had primary responsibility for determining what consequences (if any) should follow from its application. Section 4 did rule out one potential outcome by specifically prohibiting the courts from invalidating or refusing to apply parliamentary enactments they consider inconsistent with the NZBORA. Other remedies applied simply as a matter of already established legal principles: persons or organisations covered by the NZBORA that unjustifiably limit a guaranteed right act in breach of a parliamentary enactment. Consequently, that rights-limiting action is unlawful, and the courts were able to declare it as such (as well as make other existing administrative law orders prohibiting further such action).<sup>59</sup> Beyond such relatively uncontroversial propositions, however, lay a host of more difficult challenges. When can a court examine an exercise of public power for consistency with the NZBORA, especially where it appears to be authorised by a clear and unambiguous provision in a competing parliamentary enactment? And, if the courts find an exercise of public power is inconsistent with the rights instrument, are there any NZBORA-specific remedies that it may grant? And, if there are some such remedies available, when and on what basis will they be given? Answering such questions has produced significant remedial give and take, with the judiciary searching for an elusive Goldilocks zone: the courts must have sufficient capability to make good the legislative promise to 'guarantee' the affirmed rights whilst not supercharging the legislation by turning it into a vehicle for the courts to provide relief for each and every rights breach committed by those exercising public power. The various twists and turns of that search then reflect the ongoing uncertainty about the NZBORA's status in New Zealand's constitutional arrangements, with the courts variously adopting inflationary and deflationary views of the legislation's point and purpose.

In this section, we outline the development of judicial practice with reference to four specific remedial responses. The first set of remedies relates to breaches of the NZBORA's various criminal process rights. Where evidence against a person later charged with a criminal offence is obtained in a way that unjustifiably limits such rights, what should the courts do with it? Equally, what should the judicial response be where holding a criminal trial at all would breach a person's NZBORA guaranteed rights? The second remedy applies beyond the specific area of criminal process. If a breach of a NZBORA guaranteed right occurs, should a remedy of monetary damages be available to vindicate that rights breach? If so, when and how ought the courts to grant it? The third remedy relates to situations where a competing parliamentary enactment appears to authorise an exercise of public power that is inconsistent with the NZBORA. To what extent should judges seek to rework parliament's apparent intent so as to avoid a NZBORA inconsistent outcome? Finally, the last remedial issue arises in situations where the courts have determined that a parliamentary enactment cannot be applied consistently with the NZBORA. Can the judiciary make a formal

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<sup>59</sup> Unless, that is, a competing Act of Parliament authorises or even requires the action in question. In such cases, section 4 means that the rights limiting action is *not* unlawful; see below part 4(c).

declaration of that fact, specifically designed to pressure parliament to revisit the matter?

#### *A Criminal justice remedies*

The NZBORA's initial, and subsequently greatest, impact occurred in relation to the practices of law enforcement and prosecution authorities. A number of reasons account for that fact. The interaction between public officials and individuals is at its most fraught where the state's coercive powers are deployed to forcibly restrain, condemn and deprive a person of their property or liberty. Such interactions also occur frequently in the criminal justice sector, increasing the potential opportunities for an individual's rights to be unjustifiably limited. Broad statutory provisions and common law powers govern criminal procedure, providing ample legal space for the judiciary to insert new rights-based constraints. Finally, the judiciary already had significant pre-NZBORA experience with monitoring the behaviour of law enforcement and prosecutorial authorities in relation to matters such as the admissibility of unfairly obtained evidence<sup>60</sup> or the like. For these various reasons, the courts moved quickly to develop two new remedial responses for unjustified breaches of the NZBORA's various guaranteed criminal procedure rights.<sup>61</sup>

The first such remedy applied where evidence was obtained in breach of these rights. In the years immediately following the NZBORA's enactment, the courts gave the rights in question an expansive reading; deciding (for example) that the section 23(1)(b) right to obtain legal counsel is engaged by a requirement to take a breath test for alcohol-impaired driving,<sup>62</sup> while the section 21 right against unreasonable search and seizure was interpreted widely to protect 'those values or interests which make up the concept of privacy'.<sup>63</sup> The judiciary also fashioned a prima facie exclusion remedy for evidence obtained in breach of these broadly interpreted guarantees, whereby any such 'tainted evidence'<sup>64</sup> could not be used at trial except in specific limited circumstances.<sup>65</sup> This judicial approach to both the ambit of the particular rights and the consequences of a breach displayed an inflationary view of the NZBORA, in which the courts had a special responsibility for 'vindicating rights'<sup>66</sup> by visiting appropriately severe remedial consequences should law enforcement officials unjustifiably limit them. The fundamental importance of these individual rights was taken to require a commensurate response on the part of the institution charged with their oversight in individual cases.

The judiciary's initial enthusiasm for the NZBORA's transformative potential did not last, however. By 1998, commentators were even suggesting that the rights instrument was in 'mortal peril'.<sup>67</sup> New Zealand's Court of Appeal, which was at that

<sup>60</sup> See, eg, *R v Coombs* [1985] 1 NZLR 318, 321 (CA).

<sup>61</sup> *New Zealand Bill of Rights Act 1990* (NZ) ss 21-24.

<sup>62</sup> *Noort* [1992] 3 NZLR 260.

<sup>63</sup> *R v Jefferies* [1994] 1 NZLR 290, 319 (CA).

<sup>64</sup> Richard Mahoney, 'Exclusion of Evidence' in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds), *The New Zealand Bill of Rights* (Oxford University Press, 2003) 770.

<sup>65</sup> *R v Kirifi* [1992] 2 NZLR 8 (CA); *R v Butcher* [1992] 2 NZLR 257 (CA); *R v Goodwin* [1993] 2 NZLR 153 (CA). For a discussion of the development of this remedy see *Marwood v Commissioner of Police* [2016] NZSC 139 at [23]-[27].

<sup>66</sup> *Goodwin* [1993] 2 NZLR 153, 194; *R v Te Kira* [1993] 3 NZLR 257 (CA); Richard Mahoney, 'Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights' in Grant Huscroft & Paul Rishworth (eds) *Rights and Freedoms* (Brooker's, 1995).

<sup>67</sup> Hart Schwartz, 'The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act' [1998] *New Zealand Law Review* 259, 260.

time the nation's highest domestically-based court,<sup>68</sup> began to reassess its earlier inflationary methodology by stating that it was more appropriate to approach the NZBORA in a 'common sense way, commensurate with proper public expectation.'<sup>69</sup> Of particular significance was the case of *R v Grayson and Taylor*,<sup>70</sup> reversing earlier precedent that held significant unlawful conduct by the Police compelled a finding that a search or seizure was 'unreasonable' (and thus a breach of section 21 of the NZBORA). The Court then proceeded to weaken the remedial consequences for breaching criminal procedure rights in *R v Shaheed*,<sup>71</sup> where six of a full seven-member bench agreed that the existing *prima facie* exclusion of tainted evidence should be replaced with a balancing test to determine if that remedial response is proportionate to a particular rights breach. The explicit justification for this remedial recalibration was that the previous bright-line approach risked overvaluing the rights in question:

A system of justice will not command the respect of the community if each and every substantial breach of an accused's rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime. The vindication will probably be seen as unbalanced and disproportionate to the circumstances of the breach.<sup>72</sup>

Consequently, contravention — even *deliberate* contravention — of one of the NZBORA's criminal procedure rights is now only a factor for the court to consider when deciding whether to exclude the tainted evidence.<sup>73</sup> Set against this consideration is a non-exhaustive range of factors, including the nature and quality of the evidence obtained,<sup>74</sup> the centrality of the evidence to the prosecution's case<sup>75</sup> and the seriousness of the alleged crime.<sup>76</sup> A court must then determine in the individual circumstances of the case whether the balance favours protecting the right in question by excluding the tainted evidence.

Chief Justice Elias's dissent in *Shaheed* criticised her colleagues' dilution of the NZBORA's guarantees and argued that the new balancing approach could incentivise rights breaches by law enforcement officials.<sup>77</sup> A prominent criminal lawyer echoed these sentiments, accusing the Court of Appeal majority of paying mere 'lip service' to the NZBORA out of embarrassment that the instrument could 'help criminals'.<sup>78</sup> Subsequent commentary also deplored the somewhat *ad hoc* nature of resulting judicial decisions on excluding tainted evidence and the uncertainty produced by such outcomes.<sup>79</sup> Nevertheless, Parliament chose to codify the new 'balancing' approach in the Evidence Act 2006.<sup>80</sup> We may see a more deflationary understanding of the

<sup>68</sup> Until January 1, 2004, the Privy Council (based in London) sat at the apex of New Zealand's curial hierarchy. From that date a New Zealand-based Supreme Court replaced it; see *Supreme Court Act 2003* (NZ) s2.

<sup>69</sup> *R v Elliot* (1997) 4 HRNZ 648, 649 (CA).

<sup>70</sup> [1997] 1 NZLR 399 (CA).

<sup>71</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA).

<sup>72</sup> *Ibid* [143] (Blanchard J).

<sup>73</sup> *Ibid* [147]-[148] (Blanchard J).

<sup>74</sup> *Ibid* [151] (Blanchard J).

<sup>75</sup> *Ibid* [152] (Blanchard J).

<sup>76</sup> *Ibid*. See *Underwood v R* [2016] NZCA 312.

<sup>77</sup> *R v Shaheed* [2002] 2 NZLR 377, [19] (Elias CJ).

<sup>78</sup> Robert Lithgow, 'When Ignorance is Bliss' [2002] *New Zealand Law Journal* 151, 151.

<sup>79</sup> See Scott Optican, '*R v Shaheed*: The Demise of the Prima Facie Exclusion Rule' [2003] *New Zealand Law Journal* 103; Scott Optican and Peter Sankoff, 'The New Exclusionary Rule: A Preliminary Assessment of *R v Shaheed*' [2003] *New Zealand Law Review* 1, 18-41.

<sup>80</sup> *Evidence Act 2006* (NZ), s 30.

NZBORA reflected in these combined judicial and legislative actions. While the instrument's criminal procedure guarantees remain *somewhat* important considerations, they should not automatically trump other weighty matters in the justice system. In particular, the wider societal interest in holding individuals to account for serious criminal offending still should, in appropriate cases, override even flagrant breaches of individual rights. The job of the courts is thus not to act as enforcers of a paramount set of protections against all failures to respect individual rights, but rather to ensure that the criminal justice system functions in a manner that shows *enough* respect to individual rights.

Performing that role in individual cases reopens the question of how much respect is 'enough'. Whenever the remedy of excluding tainted evidence arises, a court must explicitly determine what 'weight'<sup>81</sup> to give the factors on each side of the scale. For example, when the New Zealand Supreme Court gave its most thorough consideration to date of the matter in the NZBORA context,<sup>82</sup> the five members split 3-2 on whether various forms of tainted evidence should be excluded from trial.<sup>83</sup> As Scott Optican notes:

Those Justices favouring the full admissibility of the tainted but highly probative [evidence] ... emphasised the seriousness of the offending together with facts suggesting that, while acting illegally, police were concerned to prevent crimes of significant violence, had no effective investigative alternative, and did not proceed in bad faith. Those Justices generally advocating the opposite ... considered that the gravity of the crimes charged, or the seriousness of any criminal conduct suspected at the time of the unlawful [law enforcement activity], was outweighed by the knowing or reckless nature of police investigative improprieties, together with the significant police breach of the accused's rights under 21 of the Bill of Rights. For [the final judge] — who, to one extent or another, agreed with both of these opposing perspectives — the deciding factor in admitting some but not all of the improperly obtained evidence was the overall seriousness of the offending faced by each individual defendant in the case.<sup>84</sup>

Consequently, differing assumptions about how much the rights in question *matter* when placed alongside other socially important considerations led the judges to differing conclusions on whether the evidence in question should be admitted at trial. That process in turn reflects conflicting judicial perceptions of the NZBORA's place in the nation's constitutional order. Is it a statement of fundamental constraints on state power such that unjustified breaches of its rights ought to override virtually all other considerations, or instead a recitation of only somewhat-important matters of social policy that are potentially subordinate to other relevant concerns?

Unsurprisingly, the second remedial development in this area largely replicates the trajectory of the exclusion of evidence remedy. In *Martin v Tauranga District Court*,<sup>85</sup> the Court of Appeal held that an NZBORA inconsistent failure to try an accused without undue delay<sup>86</sup> could be remedied by a 'stay of proceeding' preventing

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<sup>81</sup> Ibid s 30(2)(b).

<sup>82</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. See also *R v Chetty* [2016] NZSC 68; *Marwood v Commissioner of Police* [2016] NZSC 139, [50]–[52].

<sup>83</sup> For discussion, see Scott Optican, 'Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s 30 of the Evidence Act 2006' [2012] *New Zealand Law Review* 605 (hereafter Optican, 'Hamed, Williams').

<sup>84</sup> Optican, *Hamed, Williams*, *ibid* 621 (internal citations omitted).

<sup>85</sup> [1995] 2 NZLR 419 (CA).

<sup>86</sup> *New Zealand Bill of Rights Act 1990* (NZ) s 25(b).

further prosecutorial action. The functional, even if not formal, effect of a stay is equivalent to a full acquittal. Its application in the NZBORA context went beyond the traditional common law protection against an abuse of process threatening a trial's fundamental fairness<sup>87</sup> to instead address the 'affront to human dignity caused by drawn-out legal process'.<sup>88</sup> Once again, this remedial development was justified by a need to fully vindicate the right in question, as it had 'been affirmed by the New Zealand Parliament in accordance with this country's international obligations, and it must be given due meaning and effect in the New Zealand context'.<sup>89</sup> To do so, the Court took guidance from the Canadian Supreme Court's approach under its higher law, entrenched Charter.<sup>90</sup> However, the bench then divided on whether a stay of proceeding should automatically issue in cases of undue delay: one member believed it should,<sup>91</sup> three believed it was but one of a range of possible remedial responses,<sup>92</sup> while the final offered no opinion.<sup>93</sup>

However, subsequent concern that the stay remedy had become too readily available in cases of delayed trials led New Zealand's Supreme Court to significantly reign it back. In *Williams v R*,<sup>94</sup> a unanimous bench first narrowed the reach of the right by emphasising that it is not determined by temporal factors alone, rather its application 'is a function of time, cause and circumstance'.<sup>95</sup> It also distinguished between a breach of the accused's NZBORA right to be tried without undue delay and the right to a fair trial.<sup>96</sup> Where a trial cannot be conducted in a 'fair' manner for any reason (including delay), a stay of proceeding automatically issues on the basis that it is inimical to the justice system to convict a person using such a process.<sup>97</sup> However, the Supreme Court indicated that where a fair trial is possible, stays of proceeding ought only to issue where 'a delay [in trial] has been egregious, or there has been prosecutorial misconduct or a sanction is required against a prosecutor who does not proceed promptly to trial after being directed by a court to do so'.<sup>98</sup> In respect of the immediate case, the Court accepted that a gap of some five years between arrest and final trial constituted an undue delay. Nevertheless, the appellant was lucky to even receive a diminution in his final sentence in response, while seven co-accused who had been granted stays in proceedings for lesser offending 'should also regard themselves as fortunate in avoiding trial and the consequent risk of conviction and sentence'.<sup>99</sup> The Court simply did not see the rights guarantee involved as being important enough to justify this outcome in any except the most 'egregious' cases.<sup>100</sup> If the courts were to allow the rights instrument to result in large numbers of accused individuals evading trial, they would be improperly exaggerating its importance in New Zealand's legal

<sup>87</sup> See, eg, *Moewao v Department of Labour* [1980] 1 NZLR 464, 481-2.

<sup>88</sup> *Martin* [1995] 2 NZLR 419, 429 (Casey J).

<sup>89</sup> *Ibid* 430 (Hardie Boys J).

<sup>90</sup> See *R v Morin* [1992] 1 SCR 771, adopted at *Martin* [1995] 2 NZLR 419, 420, 422 (Cooke P), at 433 (McKay J).

<sup>91</sup> *Martin* [1995] 2 NZLR 419, 425 (Cooke P).

<sup>92</sup> *Ibid* 432 (Hardie Boys J), at 430 (Casey J), at 434 (McKay J).

<sup>93</sup> *Ibid* 427 (Richardson J).

<sup>94</sup> [2009] NZSC 41, [2009] 2 NZLR 750.

<sup>95</sup> *Ibid* [12].

<sup>96</sup> *Ibid* [11].

<sup>97</sup> See *R v Vaihu* [2010] NZCA 145, [34]; *Police v McGrath (No 2)* [2012] NZHC 1018, [28]; *Wilson v R* [2015] NZSC 71, [119].

<sup>98</sup> *Williams* [2009] 2 NZLR 750, [18].

<sup>99</sup> *Ibid* [22].

<sup>100</sup> A message received and acted on by lower courts since; see *Vaihu* [2010] NZCA 145, [25]-[34]; *Miller v R* [2010] NZCA 380.

order.<sup>101</sup> So as with the issue of exclusion of tainted evidence, the desire to give the NZBORA some, but only *enough*, importance underpinned the judiciary's recalibration of the stay of proceeding remedy.

### B Damages for breaching the NZBORA

Commentators at the time of the NZBORA's enactment had suggested that potential remedies for infringement could include non-tort based monetary awards.<sup>102</sup> Telling against such a development, however, was the fact that the legislation did not expressly authorise such damages; indeed, a general "just and appropriate" remedies power had been removed from the original proposal. Furthermore, both individual public actors and the Crown generally appeared to possess a statutory immunity from liability for many kinds of NZBORA inconsistent actions.<sup>103</sup> Consequently, awarding damages as a remedy for NZBORA inconsistent actions necessarily would involve a considerable degree of judicial innovation. Some three years after the legislation's passage, a majority of the Court of Appeal was prepared to take this step in *Simpson v Attorney-General* ('*Baigent's Case*'),<sup>104</sup> a decision that arguably still represents a high water mark of the inflationary approach to the NZBORA.<sup>105</sup>

*Baigent's Case* was a pre-trial strike out application by the Crown against a claim for damages after the Police allegedly continued to conduct a warranted search after being alerted to the fact they were at the wrong address. The Crown's position was that even if all the plaintiff's claimed facts were proven, thus establishing the search was 'unreasonable' in terms of section 21 of the NZBORA, the Court could not grant a monetary remedy. The Court of Appeal rejected this argument by a 4-1 majority, ruling that damages were available for breach of the NZBORA and none of the various statutory immunities from suit enjoyed by the Crown precluded its application in the immediate case.<sup>106</sup> The rationale for doing so was an avowedly inflationary understanding of the NZBORA's purpose. Various members of the majority declared it was 'essential to [the NZBORA's] worth, that the Courts are ... able to grant appropriate and effective remedies where rights have been infringed';<sup>107</sup> that '[the courts] would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed';<sup>108</sup> and that it is 'impossible to interpret the [NZBORA] as simply making a pious declaration of so called rights which could be infringed with impunity and would confer no remedy for their breach'.<sup>109</sup> Consequently, the Court recognised a stand-alone, public law remedy of damages for breaching the NZBORA that lies against the Crown independently of and alongside any pre-existing private law causes of action that a plaintiff may possess.<sup>110</sup>

The Court's remedial innovation in *Baigent's Case* drew decidedly mixed responses. Critics decried both the inflated influence that they believed the new

<sup>101</sup> See *Vaihu*, *ibid* [51]-[55] (emphasising the countervailing 'strong public interest' in seeing serious criminal offences brought to trial).

<sup>102</sup> See above, n 58.

<sup>103</sup> See especially *Crown Proceedings Act 1950* (NZ) s 6(5).

<sup>104</sup> [1994] 3 NZLR 667 (CA). See also *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA).

<sup>105</sup> See Grant Huscroft, 'Civil Remedies for the Breach of Rights' in Rishworth, et al (eds), above n 64, 811, 814.

<sup>106</sup> For a discussion of the decision, see Lisa Tortell, *Monetary Remedies for Breach of Human Rights: A Comparative Study* (Hart Publishing, 2006) 59-61.

<sup>107</sup> *Baigent's Case* [1994] 3 NZLR 667, 702 (Hardie Boys J).

<sup>108</sup> *Ibid* 676 (Cooke P).

<sup>109</sup> *Ibid* 718 (McKay J).

<sup>110</sup> *Ibid* 677 (Cooke P). ' n ' " m "

remedy would bestow on the NZBORA<sup>111</sup> and the judicial reasoning deployed to justify its existence.<sup>112</sup> By contrast, others took a more sanguine view of the Court of Appeal's action and the purpose it accorded the NZBORA. In an analysis of the rights instrument's first five years, Paul Rishworth argued that a judiciary that adopted a more deflationary approach than that displayed in *Baigent's Case* 'would run the risk of trivialising [these rights and freedoms] while simultaneously bringing itself into disrepute'.<sup>113</sup> Rishworth's argument thus was that Court of Appeal's decision merely actualised the NZBORA's lofty objectives: it might be an ordinary statute, but the rights it guaranteed required the sort of generous and purposive approach that produced outcomes such as *Baigent's Case*. Consequently, labels of judicial activism were inapt if only because the agency such descriptions required was absent; the very nature of the NZBORA left the courts with no other option as to how to proceed.

Rishworth's conclusion was echoed in a review of *Baigent's Case* requested by the Government from the New Zealand Law Commission. It recommended acceptance of the damages remedy's existence and no legislative override of the judicial innovation.<sup>114</sup> This counsel was followed and the Crown subsequently acknowledged the courts' general power to grant monetary awards for breach of the NZBORA.<sup>115</sup> However, what remained unresolved was just how widely available and generous such remedial awards should be. In answering those matters, the courts adopted a markedly more deflationary view than was evident in *Baigent's Case* itself. Whilst the constitutionally significant, rights-affirming status of the NZBORA may have provided support for the damages remedy *in theory*, when it came to deploying the remedy *in practice* the judiciary accorded the instrument a far less important role.<sup>116</sup>

The first limitation the courts imposed on the damages remedy was to emphasise its discretionary nature. Even in *Baigent's Case* itself the majority acknowledged that there is no right to obtain damages for any given breach of the NZBORA.<sup>117</sup> The Supreme Court, in its leading decision on the availability and quantum of NZBORA damages, *Taunoa v Attorney General*, held that the judicial task is 'to find an overall remedy or set of remedies which is sufficient to deter any repetition by agents of the state and to vindicate the breach of the right in question'.<sup>118</sup> Consequently, a monetary award is a last resort; only available where a court believes no other remedial response will adequately vindicate the plaintiff's rights.<sup>119</sup> Following that approach, the courts have been notably reluctant to conclude that achieving this end requires that the Crown pay damages. Indeed, the Court of Appeal recently noted that:

<sup>111</sup> John A Smillie, 'The Allure of "Rights Talk": *Baigent's Case* in the Court of Appeal' (1993) 8 *Otago Law Review* 188, 204; John A Smillie, '"Fundamental Rights", Parliamentary Supremacy and the New Zealand Court of Appeal' (1995) 111 *Law Quarterly Review* 209, 216.

<sup>112</sup> James Allan, 'Speaking with the Tongues of Angels' (1994) 1 *Bill of Rights Bulletin* 2, 5.

<sup>113</sup> Rishworth, *The Birth and Rebirth of the Bill of Rights*, above n 34, 29.

<sup>114</sup> New Zealand Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R37, 1997) 2. See also Geoff McLay, 'Damages for Breach of the New Zealand Bill of Rights Act —Why Aren't They a Sufficient Remedy?' [2008] *New Zealand Law Review* 333, 339-340.

<sup>115</sup> *Taunoa v Attorney General* [2007] NZSC 70; [2008] 1 NZLR 429, [4].

<sup>116</sup> Juliet Phillpot, 'Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990' (2007) 5 *New Zealand Journal of Public and International Law* 211, 227; McLay, above n 114, at 334; Jason N E Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) 222-225.

<sup>117</sup> *Baigent's Case* [1994] 3 NZLR 667, 692 (Casey J), at 703 (Hardie Boys J), at 718 (McKay J). See also *Link Technology 2000 Ltd v Attorney General* [2006] 1 NZLR 1 (CA).

<sup>118</sup> *Taunoa* [2008] 1 NZLR 429, [253] (Blanchard J). See also at [372] (McGrath J).

<sup>119</sup> *Attorney General v Udempun* [2005] 3 NZLR 204, 241 (CA, Glazebrook J).

in most cases in which damages are eventually awarded, the conduct concerned has involved physical restraint, direct infliction of physical harm, or a prolonged or significant deprivation of liberty. These cases span in seriousness from physical detention, handcuffing, to inappropriate solitary confinement and physical violence in prison similar situations. ... Conversely there are very few cases in which [NZBORA] damages have been awarded where no physical damage or interference with liberty has occurred. Where damages have been awarded in such cases, this has typically been to reflect equivalence with tortious claims, or on the basis of clear pecuniary loss arising directly from the breach of the right itself.<sup>120</sup>

In addition to viewing awards of monetary damages as only infrequently necessary to vindicate a rights breach, the courts also have emphasised that the quantum of any damages award should not be ‘extravagant’.<sup>121</sup> The amounts awarded by the courts only rarely have crept into the low five-figure range,<sup>122</sup> with the higher courts repeatedly reducing (and never increasing) the sums given at trial.<sup>123</sup> In *Taunoa*, for example, a majority of the Supreme Court cut the amounts awarded to several prisoners who had been subjected to unlawful punishments (including solitary confinement under extremely restrictive conditions) in breach of the NZBORA.<sup>124</sup> For one prisoner who had experienced some 32 months of mistreatment, damages were cut from NZ\$65,000 to NZ\$35,000 (which still remains the largest final award granted by a New Zealand court). The limited quantum of damages available in the few cases where a court accepts an award is necessary have caused some to cast doubt on the remedy’s basic utility.<sup>125</sup> Consequently, the inflationary view of the NZBORA underpinning the creation of a damages remedy has not carried over into that remedy’s application.<sup>126</sup> Rather, the courts have treated the availability of public law damages primarily as a gloss on common law protections already in existence at the time of the NZBORA’s enactment.<sup>127</sup>

A final judicial retreat from the ruling in *Baigent’s Case* brought the conflict between inflationary and deflationary accounts of the NZBORA to the fore. In *Attorney-General v Chapman*,<sup>128</sup> the Supreme Court was required to decide if damages for breaching the NZBORA could be awarded where the judiciary was responsible for the rights breach. The case arose out of the Court of Appeal’s practice of dismissing criminal appeals (including Mr Chapman’s) on an ex parte basis, which in turn breached the appellants’ NZBORA right to an appeal<sup>129</sup> and natural justice.<sup>130</sup> After

<sup>120</sup> *Attorney General v Van Essen* [2015] NZCA 22, [106]–[107] (internal citations omitted). See also the collated synopsis of cases in *Attorney General v Van Essen* [2015] NZCA 22, appendix 1; *Wright v Bhosale* [2016] NZAR 335, 354–355 (HC); Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2<sup>nd</sup> ed, 2014) 1600–1606.

<sup>121</sup> *Baigent’s Case* [1994] 3 NZLR 667, 678 (Cooke P); *Taunoa* [2008] 1 NZLR 429, [107] (Elias CJ).

<sup>122</sup> See the sources cited above, n 120.

<sup>123</sup> See, eg, *Dunlea v Attorney General* [2000] 3 NZLR 136 (CA); *Attorney-General v P F Sugrue Ltd* [2004] 1 NZLR 220 (CA); *Udompun* [2005] 3 NZLR 204; *Van Essen* [2015] NZCA 22.

<sup>124</sup> *Taunoa* [2008] 1 NZLR 429.

<sup>125</sup> See Philpott, above n 116, at 233. See also *Wright* [2016] NZAR 335, [93].

<sup>126</sup> See McLay, above n 114, 335.

<sup>127</sup> See *Wilding v Attorney-General* [2003] 3 NZLR 787, [14] (CA). See also Andrew Butler and Petra Butler, ‘Protecting Rights’ in Caroline Morris, Jonathan Boston & Petra Butler (eds) *Reconstituting the Constitution* (Springer, 2011) 157, 170; Philpott, *supra* n 106, at 219–224; McLay, *supra* n 114, at 345–350.

<sup>128</sup> [2011] NZSC 110, [2012] 1 NZLR 462.

<sup>129</sup> *New Zealand Bill of Rights Act 1990* (NZ) s 25(h).

<sup>130</sup> *Ibid* s 27(2).

this procedure was declared unlawful,<sup>131</sup> Mr Chapman obtained a new appeal hearing that quashed his conviction and his subsequent retrial was abandoned, resulting in the dismissal of the original charges against him. However, as Mr Chapman already had served his prison sentence and been released by the time his conviction was quashed, he sought damages to fully vindicate the breach of his NZBORA rights. The Crown in turn defended the claim on the basis that a monetary remedy should not be available where the judicial branch is responsible for a NZBORA breach.

The Supreme Court denied Mr. Chapman's claim and accepted the Crown's argument by a 3-2 majority. For the minority, the inflationary reasoning underpinning *Baigent's Case* was directly applicable:

it would be contrary to the scheme and purpose of the New Zealand Bill of Rights Act if those deprived of rights through judicial action are denied the opportunity to obtain damages from the State, where an award of damages is necessary to provide effective remedy.<sup>132</sup>

As damages then were the *only* remedy of any real utility to Mr Chapman, the courts ought to countenance them to ensure proper vindication of a rights breach.<sup>133</sup> The overriding importance of the NZBORA and the rights it guarantees justifies any concerns about the effect that awarding public law damages may have on traditional, common law concepts of judicial immunity.<sup>134</sup> Simply put, the duties created by the NZBORA's adoption apply equally to *all* branches of government and override pre-existing notions about the importance of insulating judicial processes from forms of collateral challenge.

For the majority, however, *Baigent's Case* and the reasoning underpinning that decision was not determinative: 'the reality is that [*Chapman*] also turns on a policy judgment [in relation] to systemic public interest considerations, the most important of which is judicial independence'.<sup>135</sup> In other words, the need to ensure adequate remedies for NZBORA breaches is but one matter of social policy to be taken into account alongside other, equally important considerations. The majority held three such matters — 'the desirability of achieving finality, promoting judicial independence and the availability of existing remedies for breach, including through the appellate process'<sup>136</sup> — meant that monetary damages awards for judicial breaches of the NZBORA were neither necessary nor desirable. Permitting them 'would be destructive of the administration of justice in New Zealand and ultimately judicial protection of human rights in our justice system'.<sup>137</sup> Accordingly, in the words of the Chief Justice, the majority chose to create 'a new immunity for the State, fashioned by reference to judicial immunity' from the consequences of breaching the NZBORA.<sup>138</sup>

The history of the remedy of damages for breaches of the NZBORA reflects the instrument's uncertain place in New Zealand's constitutional arrangements. The remedy came into existence through the strongest expression yet of the NZBORA's inflationary potential. The Court of Appeal in *Baigent's Case* crafted it out of little more than the general principle that the NZBORA rights possess such importance that

<sup>131</sup> See *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

<sup>132</sup> *Chapman* [2012] 1 NZLR 462, [8] (per Elias CJ). See also at [216] (per Anderson J).

<sup>133</sup> *Ibid* [52] (Elias CJ).

<sup>134</sup> *Ibid* [59].

<sup>135</sup> *Ibid* [97] (McGrath and William Young JJ). See also at [211]-[215] (Gault J).

<sup>136</sup> *Ibid* [180] (McGrath and William Young JJ).

<sup>137</sup> *Ibid* [205].

<sup>138</sup> *Ibid* [56] (Elias CJ). This immunity has since been extended to court registrars (see *Siemer v Attorney General* [2014] NZHC 3175, [127]-[131]) and to judicial breaches of the s 22 right not to be arbitrarily arrested or detained (see *Thompson v Attorney-General* [2016] NZSC 134).

*some* form of effective judicial response *must* be available to vindicate a breach. The Court also was prepared to engage in some quite inventive statutory interpretation to ensure that an existing immunity provision crafted by parliament did not preclude the remedy's application to the case at hand. However, judicial application of the remedy in subsequent cases has been markedly more deflationary. Damages are only rarely considered necessary to vindicate a rights breach, are relatively modest in amount and most often do not exceed what a plaintiff can claim under other private law causes of action. Furthermore, by 2011 the apparently fundamental principle justifying the remedy's invention in *Baigent's Case* was no longer considered strong enough to underpin its application to rights breaches by the judicial branch. Instead, competing matters of social importance took priority over the NZBORA's rights guarantees,<sup>139</sup> potentially leaving individuals whose rights are infringed by the judiciary without any effective remedy.

### *C Rights Consistent Statutory Interpretation*

As noted above,<sup>140</sup> section 6 of the NZBORA contains the general direction 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'. However, this statutory requirement follows two other provisions. Section 4 states that 'no court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights)' invalidate or refuse to apply that enactment's provisions 'by reason only that the provision is inconsistent with any provision of this Bill of Rights'. Consequently, courts must continue to give full effect to legislation that *cannot* be given a meaning consistent with the NZBORA's various substantive rights guarantees. Section 5, which is subject to section 4, states that the rights in the NZBORA may be subject only to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Taken together, these three provisions (or, as they have been pejoratively termed, 'unholy trinity')<sup>141</sup> regulate the relationship between the NZBORA and other parliamentary enactments. The obvious question is just how they do so. In particular, two issues generated considerable confusion, which has not entirely dissipated today. First, how does section 5 fit into the process of statutory interpretation mandated by the NZBORA? Does it require the courts to independently consider the 'justifiability' of any limits that competing parliamentary enactments appear to impose on the NZBORA's rights?<sup>142</sup> Second, how strong is the section 6 licence to repurpose competing parliamentary enactments in order to avoid inconsistency with the NZBORA's rights? Or, to put the same question in a different way, how much does section 4 constrain the courts from intervening in a legislative choice they believe to be inconsistent with the NZBORA's rights? As with the other possible remedial responses available to the courts, the judiciary's answer to these matters has been strongly influenced by its views on the instrument's basic purpose.

Uncertainty over the role (if any) that section 5 was to play when interpreting competing enactments permeated early judicial decisions. In some cases, such as *R v*

<sup>139</sup> Varuhas, above n. 116 at 419 ('... courts, under the umbrella of balancing approaches, have nearly completely subordinated interests in redress to countervailing public concerns').

<sup>140</sup> See above, nn 27-28 and accompanying text.

<sup>141</sup> James Allan, 'The Operative Provisions of the Bill of Rights: An Unholy Trinity' (1995) 5 *Bill of Rights Bulletin* 79.

<sup>142</sup> Claudia Geiringer describes this question as lying 'at the heart of [the methodological] instability' she perceives as pervading the NZBORA; see Geiringer, *What's the Story?*, above n 12 at 159.

*Phillips*<sup>143</sup> and *Re Bennett*,<sup>144</sup> the courts considered that as only one plausible interpretation existed for the statutory wording in question, the NZBORA had no relevance at all. The courts simply applied that clear meaning (as required by section 4) without further comment. Even in those cases where a section 5 analysis was referenced during the interpretative exercise, it was only in a cursory fashion.<sup>145</sup> Most notably, the question of section 5's role divided the Court of Appeal in the jointly decided cases of *Ministry of Transport v Noort* and *Police v Curran*.<sup>146</sup> A minority considered that section 5 had no function when considering whether competing legislation 'can' be given a meaning under section 6 consistent with NZBORA rights (or, instead, an inconsistent meaning must be applied as per section 4).<sup>147</sup> The majority, however, believed that section 5 should be applied *prior* to commencing the interpretation exercise under section 6, 'as a mechanism to ensure recognition of the Act's rights and freedoms to the fullest extent that is reasonable and practicable in a specific statutory context'.<sup>148</sup>

Eventually, the courts came to adopt that latter, inflationary view of the NZBORA's demands when considering parliament's intended purpose for other parliamentary enactments. In *Moonen v Film and Literature Board of Review*,<sup>149</sup> a unanimous Court of Appeal indicated that the appropriate approach to interpreting legislation that *prima facie* limits a NZBORA right is to first consider whether the legislative constraint is 'demonstrably justified', as per section 5.<sup>150</sup> Only if a court considers that the limit is *not* justified does it need to go on to consider if it 'can' adopt an alternative, rights consistent meaning (under section 6), or if it instead is required to apply the original, rights inconsistent meaning (under section 4).<sup>151</sup> Consequently, the NZBORA was seen as obliging the judiciary to conduct an independent policy analysis<sup>152</sup> of the parliament's reasons for choosing to limit rights in order to decide whether it is necessary to engage in 'rights friendly'<sup>153</sup> interpretation of a statute. A majority in the Supreme Court subsequently endorsed this view of the NZBORA in *Hansen v R*,<sup>154</sup> with three members of the bench approving an interpretative approach that requires the court to engage with a section 5 analysis.<sup>155</sup> Hanna Wilberg summarises the majority's methodology as follows:

first determin[e] the natural and intended meaning of the applicable statutory provision, and then ask[] whether that meaning is apparently inconsistent with a protected right; whether the limit on the right is justifiable in terms of s 5; and if so, whether another more rights-consistent meaning can reasonably be

<sup>143</sup> [1991] 3 NZLR 175 (CA).

<sup>144</sup> [1993] 2 HRNZ 358 (HC).

<sup>145</sup> See, eg, *Reille v Police* [1993] 1 NZLR 587, 591 (HC).

<sup>146</sup> [1992] 3 NZLR 260.

<sup>147</sup> *Ibid* 273 (Cooke P); at 295 (Gault J).

<sup>148</sup> *Ibid* 287 (Hardie Boys J). See also at 284 (Richardson J); at 297 (McKay J).

<sup>149</sup> [2000] 2 NZLR 9 (CA).

<sup>150</sup> *Ibid* [16]-[17] (Tipping J).

<sup>151</sup> *Ibid*.

<sup>152</sup> Using a methodology imported wholesale from Canadian case law; see *R v Oakes* [1986] 1 SCR 103; *R v Chaulk* [1990] 3 SCR 1303, 1335-36; *Noort* [1992] 3 NZLR 260, 283-284; *Moonen* [2000] 2 NZLR 9, [18]; *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1, [64], [103]-[104], [203]-[204], [272]. See also Andrew Butler, 'Limiting Rights' (2002) 33 *Victoria University of Wellington Law Review* 537, 568-573.

<sup>153</sup> Andrew Geddis and Bridget Fenton, 'Which is to be Master?' – Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom' (2008) 25 *Arizona Journal of International and Comparative Law* 733.

<sup>154</sup> *Hansen* [2007] 3 NZLR 1.

<sup>155</sup> *Ibid* [92] (Tipping J), at [57]-[60] (Blanchard J), at [192] (McGrath J).

found pursuant to s 6. If no more consistent meaning can be found, finally the natural meaning must prevail pursuant to s 4.<sup>156</sup>

However, Elias CJ strongly dissented from this approach, arguing that:

The sequence suggested, by which consideration of justification under section 5 is a necessary step in determining whether an enactment is consistent with a right under Part 2 [of the NZBORA], would set up a soft form of judicial review of legislation which seems inconsistent with section 4 of the Act.<sup>157</sup>

Her Honour instead preferred an interpretative approach mirroring the minority in *Noort*,<sup>158</sup> under which the courts do not interrogate the parliamentary reasons for imposing a limit on one of the NZBORA's substantive rights.

Despite the Chief Justice's ongoing deflationary reservations, *Hansen* largely settles the question of section 5's role in the statutory interpretation process.<sup>159</sup> Before considering if they need to engage in rights-friendly statutory interpretation under section 6, courts must assess *for themselves* the justifications advanced for legislatively imposed limit on rights. On occasion, this leads them to reject claims of inconsistency between a statute's 'natural and intended' meaning and the NZBORA, either through selecting a natural and intended meaning that avoids any potential inconsistencies with a guaranteed right,<sup>160</sup> or accepting the reasons given for parliament's chosen rights limit.<sup>161</sup> On other occasions, however, the courts have found that that the natural and intended meaning of the words used in the statutory text impose *unjustified* limits on the rights in the NZBORA.<sup>162</sup> The case of *Hansen* itself, for example, centred on a 'reverse onus' provision contained in the Misuse of Drugs Act,<sup>163</sup> which states that a person in possession of more than a specified amount of a prohibited drug shall, 'until the contrary is proved', be deemed to possess it for the purpose of supply. The natural and intended meaning of this provision, contended by the Crown, was that the accused faces a legal onus to show on the balance of probabilities that he or she did not possess the drugs for the purpose of supply.<sup>164</sup> Such a reading *prima facie* limits an accused's right to be presumed innocent until proven guilty.<sup>165</sup> A majority of the Supreme Court then concluded that this meaning was inconsistent with the NZBORA, as it imposed

<sup>156</sup> Hanna Wilberg, 'Resisting the Siren Song of the *Hansen* Sequence: The State of Supreme Court Authority on the Sections 5 and 6 Conundrum' (2015) 26 *Public Law Review* 39, 42 (hereafter Wilberg, '*Resisting the Siren Song*').

<sup>157</sup> *Hansen* [2007] 3 NZLR 1, [6]. See also at [15]-[19].

<sup>158</sup> See above n 147.

<sup>159</sup> See Wilberg, *Resisting the Siren Song*, above n 156, 39-40.

<sup>160</sup> See, eg, *R v Harrison*; *R v Turner* [2016] NZCA 381.

<sup>161</sup> See, eg, *Hansen* [2007] 3 NZLR 1, [71]-[78] (Blanchard J); *Television New Zealand Ltd v Solicitor-General* [2008] NZCA 519; [2009] NZFLR 390, [67]-[74]; *Commerce Commission v Air New Zealand Limited* [2011] NZCA 64; [2011] 2 NZLR 194, [65]-[76]; *Attorney General v Reid* [2012] NZHC 2119; [2012] 3 NZLR 630, [37]; *Mangawhai Ratepayers and Residents Association Incorporated v Kaipara District Council* [2015] NZCA 612, affirmed [2016] NZSC 48, [11]-[13].

<sup>162</sup> See, eg, *Hopkinson v Police* [2004] 3 NZLR 704 (HC); *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507, [52] (CA); *Re Application by AMM and KJO to adopt a child* [2010] NZHC 977, [2010] NZFLR 629; *Saddle Views Estate Limited v Dunedin City Council* [2014] NZHC 2897, [106]-[111]; *R v Eruera* [2016] NZHC 532, [65], footnote 16.

<sup>163</sup> *Evidence Act 1975* (NZ) s 6(6).

<sup>164</sup> *Hansen* [2007] 3 NZLR 1, [4].

<sup>165</sup> *NZBORA 1990* (NZ), s 25(c).

limits on the relevant right that could not be demonstrably justified as per section 5.<sup>166</sup> Consequently, the Court considered whether an alternative interpretation ‘can’ be given to the provision under section 6 after making its own independent finding that the legislature’s preferred policy approach denies the accused’s right in ways that fail close and careful analysis.

It might be expected that having adopted something of an inflationary view of the NZBORA’s purpose in relation to section 5, the courts likewise would regard the interpretative direction in section 6 as mandating an expansive judicial role in seeking to cure any unjustified rights infringements contained in competing legislation. Indeed, some early obiter comments hinted at just such an approach.<sup>167</sup> However, other judicial views rejected the notion that the NZBORA demanded any particular change to previous practice, instead arguing that section 6’s effect ‘probably go[es] little further than the common law presumption of statutory interpretation that where possible statutes are not to be interpreted as abrogating common law rights of citizens’.<sup>168</sup> While there has been some deviation in judicial practice, on the whole it is the latter, deflationary view of the provision’s intended effect that has prevailed. The touchstone for New Zealand courts continues to be parliament’s sovereign right to legislate as it sees fit, with judges reluctant to be seen to be imposing their value-judgments in place of those preferred by democratically elected representatives. For example, in *Quilter v Attorney-General*<sup>169</sup> the Court of Appeal was asked to declare that the definition of ‘marriage’ in the Marriage Act,<sup>170</sup> being the ‘union of 2 people’, permitted same-sex couples to marry. The plaintiffs argued that the existing understanding of the statutory language, which restricted the practice to a man and a woman, unjustifiably breached the NZBORA’s section 19 right to freedom from discrimination. They then invited the Court to use section 6 to read the provision in a rights-consistent fashion as including any two people of any gender. Whilst the five members of the Court divided on whether the legislation’s existing application even had a discriminatory effect, much less whether any such effect was justified,<sup>171</sup> all were united in their view that the meaning sought for the statutory words simply was not available. Justice Tipping held that ‘the Bill of Rights must be given its full effect in the necessary process of interpretation, but it may not be used as a concealed legislative tool’.<sup>172</sup> Similarly, Gault J was of the opinion that:

The Marriage Act is clear and to give it such different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament. That is particularly so in an area where the law reflects social values and policy.<sup>173</sup>

<sup>166</sup> *Hansen* [2007] 3 NZLR 1, [43]-[44] (Elias CJ); [148] (Tipping J); [233]-[234] (McGrath J); [281] (Anderson J).

<sup>167</sup> See *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440 (CA); *Noort* [1992] 3 NZLR 260, 272; Paul Rishworth, ‘The New Zealand Bill of Rights Act 1990: The First Fifteen Months’ in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, 1992), 24.

<sup>168</sup> *Baigent’s Case* [1993] 3 NZLR 667, 712 (Gault J).

<sup>169</sup> [1998] 1 NZLR 523 (CA).

<sup>170</sup> *Marriage Act 1955* (NZ), s 2. Parliament subsequently amended this provision by the *Marriage (Definition of Marriage) Amendment Act 2013* (NZ) s 5 to read ‘the union of 2 people, regardless of their sex, sexual orientation, or gender identity’ (emphasis ours).

<sup>171</sup> See Grant Huscroft, ‘Discrimination, Dignity and the Limits of Equality’ (2000) 9(4) *Otago Law Review* 697, 699-702.

<sup>172</sup> *Quilter* [1998] 1 NZLR 523, 572.

<sup>173</sup> *Ibid* 526.

Even Thomas J, who regarded the exclusion of same-sex couples from marriage as an unjustifiable breach of their NZBORA rights, nevertheless concluded that it was not open to the Court to adopt a meaning for the Marriage Act so clearly contrary to parliament's intent.<sup>174</sup>

The Supreme Court subsequently underlined section 6's restrained role in remedying unjustifiable statutory limits on NZBORA rights. As earlier noted,<sup>175</sup> the Court in *Hansen* assessed the justifiability of parliament's requirement that an accused prove, on the balance of probabilities, he or she did not possess drugs for the purpose of supply. A majority then concluded that applying the reverse onus provision in this manner was an unjustified limit on the accused's right to be presumed innocent. Nonetheless, the Court unanimously held this to be the only available interpretation of the statutory wording.<sup>176</sup> As expressed by McGrath J: '[T]he basic principle of interpretation [is] that the text is the primary reference in ascertaining meaning and there is no authority to adopt meanings which go beyond those which the language being interpreted will bear'.<sup>177</sup> Consequently, in the absence of ambiguity or other indication from the statutory language, there is no justification for giving a legislative provision an artificial and unintended (albeit more rights-consistent) meaning.<sup>178</sup> Not only is NZBORA, section 6 interpretation glossed with a general criterion of 'reasonableness',<sup>179</sup> but the limits of interpretive reasonableness extend only to meanings that are 'genuinely open in light of both [the statutory] text and its purpose'.<sup>180</sup>

Section 6's constrained role in New Zealand's adjudicative process recently has led courts to refuse to read statutes to permit contentious social practices such as prisoner voting<sup>181</sup> and physician-assisted dying,<sup>182</sup> on the basis that such matters ought to remain parliament's sole preserve. Such a view of the NZBORA as authorising only minimal rights-friendly interpretative intervention in the legislature's policy choices stands in notable contrast to the 'adventurous'<sup>183</sup> (or, more pejoratively, 'aggressive'<sup>184</sup>) practices of the United Kingdom courts under its very similar Human

<sup>174</sup> Ibid 541.

<sup>175</sup> See above n 166 and accompanying text.

<sup>176</sup> *Hansen* [2007] 3 NZLR 1, [39] (Elias CJ); at [56] (Blanchard J); at [165] (Tipping J); at [256] (McGrath J); at [290] (Anderson J).

<sup>177</sup> Ibid [237]. See also at [25] (Elias CJ); at [61] (Blanchard J); at [88]–[94] (Tipping J); at [289]–[290] (Anderson J).

<sup>178</sup> See, eg, ibid [61] (Blanchard J) (claiming that the use of s 6 is confined to meanings that are 'available on the language of the text being interpreted'; that the text remains the 'primary reference in ascertaining meaning'; and that there is no authority to go beyond meanings that 'the language being interpreted will bear').

<sup>179</sup> Synonyms for which are 'intellectually defensible', 'tenable' or 'viable'. See ibid [156], [158], [232].

<sup>180</sup> Ibid [61] (Blanchard J).

<sup>181</sup> *Taylor v Attorney-General* [2014] NZHC 2225, [2015] NZAR 705, [26]–[31]. See also *Taylor v Attorney-General* [2015] NZHC 355, [108] ('In my opinion, s 6 of NZBORA does not justify a forced and fallacious interpretation of the Electoral Act. That would elevate NZBORA to being a statute superior to all other statutes').

<sup>182</sup> *Seales v Attorney-General* [2015] NZHC 1239, [13] ('The [interpretations] sought by Ms Seales invite me to change the effect of the offence provisions of the Crimes Act. The changes to the law sought by Ms Seales can only be made by Parliament').

<sup>183</sup> *Hansen* [2007] 3 NZLR 1, [156] (Tipping J).

<sup>184</sup> Hanna Wilberg, 'The Bill of Rights and Other Enactments' [2007] *New Zealand Law Journal* 112, 115.

Rights Act.<sup>185</sup> However, members of New Zealand's Supreme Court expressly disavowed following that lead on the basis that:

The constitutional debate which preceded the rejection of the proposal to give the Bill of Rights the status of supreme law also appears to be unique to New Zealand. It is an important contextual feature which New Zealand judges must bear in mind when considering how the courts of overseas jurisdictions with similarly structured legislation, in particular those of England and Wales, have seen their authority to look for meanings other than the natural meaning of a statutory provision, which potentially affect protected rights.<sup>186</sup>

In response to this deflationary understanding of what the NZBORA was intended to achieve, some argue that the judiciary's cautious approach to section 6 (as exemplified in *Hansen*) is *too* constrained.<sup>187</sup> By refusing to depart from what is seen to be parliament's clear intended purpose for a statutory provision, even where that purpose is judged to unjustifiably breach rights, the courts fail to properly accord those rights their true value.<sup>188</sup> Instead, if section 6 is to have any function in protecting individual rights, it 'may on occasion entitle the courts to adopt constructions [of legislative text] that are at odds with statutory purpose'.<sup>189</sup>

Consistent with this article's overall thesis that no hegemonic, consistently applied view of the NZBORA's purpose has yet emerged, there are instances where judicial reasoning also reflects this more inflationary understanding. For example, several members of the Court of Appeal indicated (albeit in obiter comments) that section 6 justified adopting a quite inventive understanding of the relationship between various legislative amendments to avoid the potential application of retrospective criminal penalties in two particular cases.<sup>190</sup> Courts also have relied on section 6 to adopt meanings for statutory provisions that allow political protestors to burn flags,<sup>191</sup> unmarried men and women to jointly adopt children,<sup>192</sup> and satirical singers to broadcast criticisms of political figures.<sup>193</sup> Prior to deciding *Hansen*, the Supreme Court unanimously deployed section 6 to interpret the Immigration Act as preventing government ministers from deporting refugees deemed to be a security threat where 'there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>194</sup> And in a judgment delivered just three months after *Hansen*, a majority of the Court in *Brooker*

<sup>185</sup> *Human Rights Act 1998 (UK)*, c. 42. See also John Burrows, 'Statutory Interpretation New Style' [2005] *New Zealand Law Journal* 130, 156-58; Geddis & Fenton, above n 153, 754-60.

<sup>186</sup> *Hansen* [2007] 3 NZLR 1, [239] (McGrath J); see also at [158] (Tipping J).

<sup>187</sup> See, eg, Claudia Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' (2008) 6 *New Zealand Journal of Public and International Law* 59 (hereafter Geiringer, 'Principle of Legality'); Kris Gledhill, 'The Interpretative Obligation: The Duty to Do What is Possible' [2008] *New Zealand Law Review* 283.

<sup>188</sup> Gledhill, above n 187, 332.

<sup>189</sup> Geiringer, *Principle of Legality*, above n 187 at 89.

<sup>190</sup> *R v Poumako* [2000] 2 NZLR 695 (CA); *R v Pora* [2001] 2 NZLR 37 (CA).

<sup>191</sup> *Hopkinson* [2004] 3 NZLR 704.

<sup>192</sup> *Re Application by AMM and KJO to Adopt a Child* [2010] NZHC 977; [2010] NZFLR 629, [72] (expressing 'the view that our task is to alleviate the discrimination now to the extent possible'). But see *Adoption Action Incorporated v Attorney-General* [2016] NZHRRT 9, [158] (Human Rights Review Tribunal refusing to extend the ruling to cover individuals in civil unions, or same sex couples living in de facto arrangements, as 'the Tribunal would pass from an aggressive application of section 6 to legislating').

<sup>193</sup> *Electoral Commission v Watson* [2016] NZCA 512.

<sup>194</sup> *Attorney-General v Zaoui* [2005] NZSC 38; [2005] 1 NZLR 577, [90]-[93].

*v Police*<sup>195</sup> was prepared to upend some twenty-five years worth of settled jurisprudence by applying a far narrower meaning to the Summary Offences Act prohibition on public ‘disorderly behaviour’ so as to protect the NZBORA’s guarantee of freedom of expression.<sup>196</sup>

Importantly, however, in both *Brooker* and the Court’s later revisiting of the issue in *R v Morse*,<sup>197</sup> the members of the Court did not purport to rely upon section 6 to justify their interpretative shift. Instead,

when it comes to deciding what kinds of behaviour [the Summary Offences Act] proscribes, the Court simply says that the relevant offence (read correctly in its statutory context) requires that behaviour result in some measure of disruption to ‘public order’. And the important point for present purposes is that this reading is presented as the correct one — the one that Parliament intended when passing the statute — without overt reliance on the interpretative command in s 6 of the Bill of Rights Act. Certainly, this reading may be *consistent* with s 6 as being one that is more protective of the rights in the Bill of Rights Act. But it is not *required* or *justified* by s 6.<sup>198</sup>

It is, perhaps, revelatory that the Supreme Court did not feel comfortable claiming that its revision of previously settled law was mandated by the NZBORA, instead portraying its interpretative task as involving more orthodox, traditional techniques for reading a statute.<sup>199</sup>

This reluctance to rely overtly upon section 6 as justification for adopting novel meanings for statutes perhaps reflects Paul Rishworth’s (somewhat cryptic) general summary of the current approach to rights-friendly interpretation under the NZBORA:

I think s[ection] 6 is best regarded as Parliament’s message to assist courts in determining the meaning of its enactments and does not contemplate a level of interpretive impact that is different from the conventional approach [to reading statutes]. On the other hand, the idea of seeking rights-consistency may enliven the conventional approach, and generate interpretive possibilities that would otherwise not be appreciated.<sup>200</sup>

It is tempting to extrapolate from Rishworth’s statement and apply it to the NZBORA as a whole: the instrument was not meant to make much of a difference to how the courts function, except in the situations that it should. However, in relation to the specific matter at hand — the use of the NZBORA to make competing legislation rights consistent — the combination of judicial consideration of section 5 with only a limited role for section 6 raises a final issue for resolution. Adopting this alternating inflationary/deflationary methodological approach makes it likely that in at least some, if not many, cases a court will reach the end of the interpretative process having found that the natural and intended meaning of the statutory wording imposes (in its opinion) an unjustified limit on rights, but that no other interpretation can be given to it. At this point section 4 of the NZBORA mandates that the court must apply the original,

<sup>195</sup> [2007] NZSC 30, [2007] 3 NZLR 91.

<sup>196</sup> *New Zealand Bill of Rights Act 1990* (NZ) s 14.

<sup>197</sup> [2011] NZSC 45, [2012] 2 NZLR 1.

<sup>198</sup> Andrew Geddis, ‘Dissent, The Bill of Rights Act and the Supreme Court’ (2011) 11 *New Zealand Journal of Public and International Law* 55, 72 (emphasis in the original) (internal citations omitted).

<sup>199</sup> *Ibid* 70-73. See also *R v Harrison*; *R v Turner* [2016] NZCA 381, [78]-[120]; *Electoral Commission v Watson* [2016] NZCA 512, [88]-[99].

<sup>200</sup> Paul Rishworth, ‘Human Rights’ [2012] *New Zealand Law Review* 321, 330-331.

unjustifiable meaning to the case at hand. That outcome was accepted in *Hansen* and no New Zealand court ever has sought to do otherwise. However, what is not resolved is whether there is any *other* action that a court may take in order to mark the resultant rights-inconsistency. That issue poses the final remedial question for the courts under the NZBORA.

#### D Declarations of Inconsistency

Where the executive branch — or other person or body exercising a public function, power or duty — acts in a way that unjustifiably limits NZBORA rights, and that limiting action is *not* authorised by a parliamentary enactment, then the traditional declaratory remedy in administrative law is at a court's disposal.<sup>201</sup> That is to say, a court may declare the action to be unlawful because of its inconsistency with the NZBORA (a parliamentary enactment), thereby formally marking government wrongdoing and preventing repetition of the conduct. The court also may, as discussed above,<sup>202</sup> award public law damages under the NZBORA if thought necessary to vindicate the rights breach. However, in circumstances where parliament has positively authorised through legislation actions that unjustifiably limit rights, and the courts cannot interpret that legislation in a rights friendly manner,<sup>203</sup> then the courts are required by section 4 to apply the statutory wording as written. Doing so takes the traditional administrative law declaratory remedy off the table, as there is, ipso facto, no unlawfulness to declare. Rather, the statutory authorisation makes the unjustified limit lawful, because parliament has said that the limit is lawful and parliament remains the nation's highest lawmaker. Are the courts then left without any remedial options in such circumstances?

Shortly after the NZBORA first entered into force, suggestions were made that where section 4 requires a court to apply a statute in a rights-inconsistent fashion, it nevertheless could mark that fact with a formal 'declaration of inconsistency'.<sup>204</sup> Section 4 prevents a declaration affecting the validity or application of the statutory provision, meaning it would function purely as a public mark of judicial disapprobation regarding the legislation's consequences. While not positively sanctioned by the NZBORA (in comparison with the United Kingdom,<sup>205</sup> Victoria<sup>206</sup> or Australian Capital Territory<sup>207</sup>), the remedy could be derived from the rights instrument's very nature and purpose. In particular, as noted in the previous section, the inclusion of section 5 has come to be seen to require that the courts independently assess the rights impact of parliamentary legislation when interpreting statutes that impose a prima facie limit on rights.<sup>208</sup> Although any rights-limiting enactment that cannot be interpreted under section 6 in a way that meets the 'demonstrably justified' test must still be applied, the NZBORA is silent as to *what else* can be done with judicial conclusions reached during the evaluative exercise. In 2000, Tipping J wrote for a five-member Court of Appeal that:

<sup>201</sup> *Declaratory Judgments Act 1908* (NZ) s 3; *Judicature Amendment Act 1972* (NZ) s 4(1).

<sup>202</sup> See above at part 4(b).

<sup>203</sup> See above at part 4(c).

<sup>204</sup> F M Brookfield, 'Constitutional Law' [1992] *New Zealand Recent Law* 231, 239; *Temese v Police*, 9 CRNZ 425, 427 (1992) (CA, Cooke P).

<sup>205</sup> *Human Rights Act 1998* (UK) c 42, s 4.

<sup>206</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

<sup>207</sup> *Human Rights Act 2004* (ACT) s 32.

<sup>208</sup> See above n 159. See also Paul Rishworth, 'The Inevitability of Judicial Review under "Interpretive" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?' in G Huscroft and I Brodie (eds), *Constitutionalism in the Charter Era* (LexisNexis, 2004) 233.

In the light of the presence of section 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.<sup>209</sup>

Justice Thomas, speaking for himself, already had gone further by proclaiming that ‘it would be a serious error not to proclaim a violation [of the NZBORA] if and when a violation is found to exist in the law’;<sup>210</sup> while in a later case he delivered a minority decision in which he argued for issuing a declaration of inconsistency in the case before the court.<sup>211</sup>

However, despite these inflationary judicial statements as to the NZBORA’s fundamental constitutional importance and the appropriate judicial role under it, no formal declarations of inconsistency were actually issued in the NZBORA’s first twenty-five years. Indeed, it appeared as though New Zealand’s judges were determined to find reasons to avoid having to do so:

[a]lthough [the courts] continue to leave open the ultimate question as to whether there is such a jurisdiction [to issue a declaration], [they] place significant hedges around its scope and the circumstances in which it might be exercised, the most significant being its restriction to civil proceedings. More generally, the tenor of this body of case law suggests that, even if a residual jurisdiction to make declarations of inconsistency does exist, it will be exercised only rarely.<sup>212</sup>

In addition to narrowing the range of cases where a declaration of inconsistency is a theoretically possible remedy, the courts also developed a novel way of ‘indicating’ legislative inconsistency with the NZBORA without making a formal declaration. Recall that in *Hansen*<sup>213</sup> a majority of the Supreme Court concluded that the Misuse of Drugs Act’s natural and intended meaning unjustifiably limited the NZBORA guaranteed right to be presumed innocent, but it nevertheless applied that meaning under section 4 because no other ‘reasonable’ interpretation was available. Rather than then formally declaring the Misuse of Drugs Act to be inconsistent with the NZBORA, the *Hansen* Court instead preferred to allow its reasoning to speak for itself, confident that:

there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms

<sup>209</sup> *Moonen* [2000] 2 NZLR 9, [20] (Tipping J).

<sup>210</sup> *Quilter* [1998] 1 NZLR 523, 554 (Thomas J).

<sup>211</sup> *Poumako* [2000] 2 NZLR 695 [86]-[107] (Thomas J).

<sup>212</sup> Claudia Geiringer, ‘On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act’ (2009) 40 *Victoria University of Wellington Law Review* 613, 623. See also *Taunoa v Attorney-General* [2006] NZSC 95, [8]; *R v Exley* [2007] NZCA 393, [20]; *Belcher v The Chief Executive of the Department of Corrections* [2007] NZCA 174, [15]-[17], affirmed [2007] NZSC 54; *McDonnell v Chief Executive of the Department of Corrections* (2009) 8 HRNZ 770, [123] (CA); *Boscawen v Attorney-General* [2009] NZCA 12 (CA), [2009] 2 NZLR 229, [55]-[56].

<sup>213</sup> [2007] 3 NZLR 1.

concerning which there is general consensus in New Zealand society and there are international obligations to affirm.<sup>214</sup>

This approach of showing the nature of a legislative inconsistency *sotto voce* rather than explicitly declaring its existence by way of a formal judicial order allowed the Court to avoid having to construct a basis for such a declaratory remedy not explicitly provided for in the NZBORA.

For despite the judiciary's inflationary claims regarding the necessary implications of conducting a section 5 analysis during the interpretative exercise, the Crown consistently has denied the existence of such a declaratory remedy.<sup>215</sup> Opposition is couched in explicitly deflationary terms, arguing that such a development would involve 'bring[ing] the Court into conflict with Parliament contrary to the fundamental principle of comity'; and 'call[ing] into question a proceeding in Parliament in breach of article 9 of the Bill of Rights [1688] in a matter clearly beyond that contemplated by the House via the enactment of s[ection] 5 of NZBORA'.<sup>216</sup> Although parliament may have intended the NZBORA to somewhat empower judicial review of *executive* branch actions, it did not mean to authorise any form of external fetter upon *its own* activities. Parliament intended to remain sovereign, in that no outside body may purport to judge how it ought to legislate. In the face of such vigorous opposition to an expanded judicial role, New Zealand's courts appeared anxious not to press the matter by actually exercising any theoretical declaratory jurisdiction.

In 2015, however, the High Court finally overcame such hesitation and issued the first declaration of inconsistency under the NZBORA. The spur for this development occurred in 2010, when New Zealand's Parliament legislated to remove all sentenced prisoners' right to enrol to vote whilst they remained behind bars.<sup>217</sup> Upon the Bill's introduction into the House of Representatives, the Attorney-General attached a notice under section 7 of the NZBORA stating his view that it limited the right to vote guaranteed by section 12(a) of the NZBORA in a way that could not be demonstrably justified under section 5.<sup>218</sup> In particular,

[t]he disenfranchising provisions of this Bill will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or

<sup>214</sup> *Hansen* [2007] 3 NZLR 1, [254] (McGrath J). This confidence was somewhat misplaced, as not only does the inconsistent legislative provision remain in place today, but also parliament subsequently twice extended its application to new substances. See Janet Hiebert & James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, 2015) 128-159.

<sup>215</sup> See, eg, *Mangawhai Ratepayers' and Residents Association v Kaipara District Council (No 3)* [2014] NZHC 1147, [2014] 3 NZLR 85, [34], affirmed *Mangawhai Ratepayers' and Residents Association v Kaipara District Council* [2015] NZCA 612; *Taylor v Attorney-General* [2014] NZHC 1630; *Harrison v R*; *Turner v R* [2016] NZCA 381, [119].

<sup>216</sup> *Taylor* [2014] NZHC 1630, [40]–[41].

<sup>217</sup> *Electoral Act 1993* (NZ) s 80(1)(d). This provision originally disqualified from enrolling to vote any prisoner who was serving a sentence of three or more years.

<sup>218</sup> Section 7 of the NZBORA reads as follows:

7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall, —

(a) in the case of a Government Bill, on the introduction of that Bill; or

(b) in any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

to the conduct of the prisoners whose voting rights are taken away. The irrational effects of the Bill also cause it to be disproportionate to its objective.<sup>219</sup>

Despite this warning, the Bill passed through the legislative process with only minimal debate; for instance, the majority select committee report recommending the measure's passage into law did not even mention the Attorney-General's notice and provided no reasons to justify its conclusion.<sup>220</sup> Following the Bill's passage on a 63-58 party-line vote, some 3000 additional individuals became ineligible to vote at the 2011 and subsequent elections.

However, a group of prisoners then sought to have the High Court declare this ban inconsistent with the NZBORA. Not only was this the only available remedy — the legislative provision only could be interpreted to mean that all sentenced prisoners may not vote whilst they remain behind bars<sup>221</sup> — but the substance of the prisoners' claim also provided compelling grounds for issuing a declaration. No argument arose as to the NZBORA consistency of banning all prisoners from voting. The Attorney-General had certified the measure as being inconsistent and the Crown did not contest that conclusion following its passage into law.<sup>222</sup> The right involved was very important and the limitation extensive in nature. Furthermore, the means by which Parliament imposed the limit did not inspire confidence that the legislation's rights-consequences had been carefully and thoughtfully addressed. While it is quite within Parliament's capacity to engage in such debates, that manifestly was not the case in New Zealand.<sup>223</sup>

The prisoners' claim for declaratory relief thus provided an ideal opportunity to adopt an inflationary view of the NZBORA and the role of the courts under it as defenders of individual rights. An initial attempt to strike out the case, on the basis there is no jurisdiction to provide the sought after remedy, failed as 'it is now recognised that it is no longer correct to say that Parliament's freedom to legislate admits of no qualification whatever'.<sup>224</sup> In his subsequent substantive ruling, Heath J not only echoed this finding that the High Court has jurisdiction to provide such declaratory relief but also exercised his discretion to grant it.<sup>225</sup> On the jurisdictional point, Heath J extrapolated from the Court of Appeal's inflationary approach to the NZBORA in *Baigent's Case*:

[t]he general principle is that where there has been a breach of the [NZBORA] there is a need for a Court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right. Should the position be any different in respect of the legislative branch of Government? In my view, the answer is 'no'.<sup>226</sup>

<sup>219</sup> Hon Chris Finlayson, *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill*, [15] (2010), available at <[https://www.parliament.nz/resource/en-NZ/49DBHOH\\_PAP19503\\_1/ac3708f32f29166772800eb9f4f694b25324e7ee](https://www.parliament.nz/resource/en-NZ/49DBHOH_PAP19503_1/ac3708f32f29166772800eb9f4f694b25324e7ee)>.

<sup>220</sup> Andrew Geddis, 'Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed' [2011] *New Zealand Law Review* 443, 463-464 (hereafter Geddis, *Prisoner Voting*).

<sup>221</sup> *Taylor v Attorney-General* [2014] NZHC 2225, [26]-[31]. See also *Taylor v Key* [2015] NZHC 722, [72]-[78].

<sup>222</sup> *Taylor v Attorney-General* [2015] NZHC 1706, [32].

<sup>223</sup> See Geddis, *Prisoner Voting*, above n 220 at 462-467; Hiebert & Kelly, above n 214, 159-170.

<sup>224</sup> *Taylor* [2014] NZHC 1630, [73].

<sup>225</sup> *Taylor v Attorney-General* [2015] NZHC 1706.

<sup>226</sup> *Taylor* [2015] NZHC 1706, [61].

Having accepted that the declaratory remedy was available in theory, Heath J then turned to consider whether it ought to be provided in the immediate case. While there is no right to obtain a declaration whenever a court concludes that legislation is inconsistent with the NZBORA,<sup>227</sup> Heath J noted that '[t]he authorities emphasise the *desirability* of the Court speaking out to identify cases in which particular legislation is inconsistent with the Bill of Rights'.<sup>228</sup> Justice Heath did not consider the Attorney-General's earlier notification of the proposed legislation's inconsistency with the NZBORA a reason to be 'hesitant' when issuing a declaration.<sup>229</sup> He instead saw a judicial declaration of inconsistency as different in nature and addressed to a quite different audience: 'When reporting under s 7, the Attorney's responsibility is to Parliament. When determining questions of public law, this Court's responsibility is to all New Zealanders'.<sup>230</sup> Therefore, respect for the principle of comity between the legislative and judicial branches should not dissuade the Court from issuing a declaration, as it is not an attempt to intervene in or directly influence any existing parliamentary proceeding.<sup>231</sup>

As a declaration was an available remedy and nothing prevented Heath J from exercising his discretion to issue one, he did so. The right at issue was so important and the limit so severe that the occasion warranted providing relief even in the absence of any live controversy between the parties; 'if a declaration were not made in this case, it is difficult to conceive of one in which it would'.<sup>232</sup> By issuing this declaration, the Court then intentionally sent a message to the New Zealand public regarding the nature of the law that governs them.<sup>233</sup> As far as Heath J was concerned, '[a]ny political consequences of my decision can be debated in the court of public opinion, or in Parliament'.<sup>234</sup> This conclusion then threw the issue back over to the political branches of government. Would they share in the Court's inflated vision of the NZBORA and treat the declaration of inconsistency as a prompt to at least seriously rethink the issue of prisoner voting in light of this judicial finding that fundamental rights have been unjustifiably limited? Or, alternatively, would they adopt a deflationary view of the NZBORA by treating the issuance of a declaration as a non-event, given that there is no formal legal requirement to abide by it (or, indeed, respond to it in any way whatsoever)?

Initial responses support the latter view. The Crown apparently does not even accept the High Court's finding that declarations of inconsistency are an available remedial option, as it immediately chose to contest the decision on that point before the Court of Appeal. The Minister of Justice also has indicated that her Government 'has no current plans to introduce legislation allowing prisoners to vote'<sup>235</sup> in the wake of the High Court's ruling. And when Parliament's Justice and Electoral Committee was invited to consider the issue as a part of its regular post-election review of processes and practices, it concluded:

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<sup>227</sup> Ibid [76].

<sup>228</sup> Ibid [67] (emphasis ours).

<sup>229</sup> Ibid [71].

<sup>230</sup> Ibid [77(d)].

<sup>231</sup> Ibid [69].

<sup>232</sup> Ibid [77(a)].

<sup>233</sup> Ibid [30], [77(d)].

<sup>234</sup> Ibid [70].

<sup>235</sup> Letter from Amy Adams (New Zealand Minister of Justice) to Marion Sanson (NZ Centre for Civil Liberties) (2 December 2015) (available at <<https://nzcl.org.nz/sites/default/files/20151202%20Amy%20Adams%20no%20change%20to%20prisoner%20voting%20letter.pdf>>).

Some of us consider that voting rights should be reinstated for prisoners serving a custodial sentence of three years or less, as was the case previously. We also note the recent High Court declaration that current prisoner voting restrictions are inconsistent with the New Zealand Bill of Rights Act 1990. Some of us also argue that the prohibition on prisoner voting hinders rehabilitation and disproportionately affects Maori. Having considered this issue, the majority of the committee recommends that the status quo should be maintained.<sup>236</sup>

Although this report engages to some extent with the High Court's views, the governing majority clearly did not consider these weighty enough to overcome its existing policy preferences.

Two somewhat interconnected reasons may explain just why that is the case. The first lies in the nature of the substantive law in question. Although the issuance of the declaration of inconsistency generated a measure of media attention, it provoked little-to-no public concern. Prisoners are not a social group that attracts much sympathy in New Zealand's current political climate. Thus, while Heath J's judgment may have been intended to convey a message to the public about the nature of a law made in their name, the public did not react in a manner that placed any particular pressure on the political branches of government to amend it. The second reason for the political branches' seeming lack of concern regarding the declared inconsistency is that it holds a different constitutional vision as to what the NZBORA is intended to accomplish. Tom Hickman refers to:

the latent ambiguity in a declaration of incompatibility model as to what model of constitutionalism it is intended to reflect. This gives rise to very practical problems about what the response of government and Parliament should be. ... Of course this ambiguity is part of the 'fudge' of the declaration of incompatibility which makes it attractive to people with very different constitutional visions. ... But ... very quickly these differences come to the fore and the fudge looks less like a sound compromise and more like a focal point for the exacerbation of underlying constitutional tensions.<sup>237</sup>

Simply put, by issuing declarations of inconsistency the judicial branch is using the NZBORA as a vehicle to explicitly critique parliamentary legislation that it believes fails to show adequate concern for individual rights, reflecting a constitutional assumption that the rights instrument should operate as a functional restraint on legislative power. The political branches, on the other hand, view the NZBORA as something to consider when legislating, but ultimately it is for *them* to determine the appropriate limits on rights irrespective of what that legislation says (or, rather, what the courts may say that legislation says).

## V WHAT LESSONS FOR QUEENSLAND?

New Zealand's experience with its statutory rights instrument provides one clear lesson for Queensland: despite valiant attempts by both supporters and detractors to claim otherwise, the actual effect of such instruments is somewhat unpredictable. In

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<sup>236</sup> Justice and Electoral Committee *Inquiry into the 2014 General Election: Report of the Justice and Electoral Committee* (April 2016) 28.

<sup>237</sup> Tom Hickman, 'Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model' [2015] *New Zealand Law Review* 35, 69.

our view, however, the explanation for such unpredictability — and the uncertainty that it leads to — is similarly clear. The availability of two alternative understandings of the constitutional place and purpose of such instruments means their effect will vary according to which understanding is adopted. An inflationary account of statutory rights instruments views them as constitutional cornerstones, intended to impose significant restraints on all branches of government, and encouraging innovative judicial action in developing those restraints. Alternatively, a deflationary account views such instruments as essentially declaratory measures: restatements of existing common law principles that are enforceable through orthodox mechanisms and requiring no further judicial innovation. The NZBORA was and is perhaps particularly susceptible to these competing understandings. Its contested origin story involves the legislative equivalent of stalemate between those who desired an entrenched higher-law rights instrument and those who wished for no rights instrument at all; its inherent vagueness and ambiguity provided the NZBORA with the capacity to effect whichever constitutional vision was projected onto it.

In its twenty-seven-year history, the branch of government tasked with determining the constitutional significance of the NZBORA has vacillated between these inflationary and deflationary approaches. That vacillation is most obviously reflected by the development of the remedies available to those who have had their rights under the instrument breached. Initial judicial enthusiasm for the availability of monetary damages and criminal justice remedies reflected an inflationary impulse, but the later tempering of the strength and availability of those remedies provide evidence of a more deflationary turn. In contrast, an initial *milquetoast* approach to interpreting other primary legislation consistently with the NZBORA gave way to a more inflationary conception, complicated sometimes by the judicial appetite to avoid using the NZBORA altogether. Debate and doubt over the jurisdiction to award declarations of inconsistency was a product of a deflationary account, but nevertheless the first declaration of inconsistency was issued in 2015. The deafening silence from the legislature in response to this hitherto theoretical remedy is either the product of the deflationary account or the particular political antipathy toward the issue it dealt with: the suffrage of prisoners. Therefore, we believe we have demonstrated how both the development and the application of remedies for breaches of the NZBORA are affected fundamentally by changing judicial views of what the instrument ought to do.

Accordingly, our account has shown that New Zealand's experience provides evidence for both supporters and detractors in the debate over whether Queensland should adopt an equivalent instrument. It is clear that such instruments are sufficiently flexible to allow the judiciary to develop different remedial approaches and the nature of such developments is not easily predictable. Such an experience may give detractors cheer: the effect of rights instruments is not a known quantity, and thus should warrant caution before adopting one. However, in New Zealand that flexibility has not led to the inflationary account achieving a knockout victory over the deflationary account. Supporters of statutory rights instruments may thus counter detractors' concerns by pointing to the fact that the New Zealand judiciary has not consistently ratcheted up the strength of the NZBORA's application over time; it has not surreptitiously turned Clark Kent into Superman.<sup>238</sup> Instead, application of the NZBORA has been less linear and more vacillating than such accounts may suggest. Accordingly, unless Queensland's judicial bench is a homogenous group with entirely lockstep views on the appropriate constitutional significance of statutory rights instruments, the New Zealand experience shows that the only certainty is that *some* judicial innovation under such instruments will occur, but just *how much* and to *what ends* is deeply uncertain.

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<sup>238</sup> James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 *Otago Law Review* 613.