

**Presented at the Legal Research Foundation Conference, Auckland, 25
September 2015.**

**Parliament, the Courts and the NZBORA: the cases of aid in
dying and prisoner voting**

Andrew Geddis*

Introduction

As is so well known as really not to need saying, the finally enacted New Zealand Bill of Rights Act 1990 (NZBORA) retains Parliament's sovereign power to make law. Section 4 was inserted into the draft legislation precisely to make that intention clear. However, beyond that important point, much of the debate around the NZBORA's meaning for the legislature and judiciary's intertwined roles was left unresolved. The fact that Parliament has given explicit recognition to the enumerated rights in Part 2 of the legislation, its authorisation of a "rights friendly" interpretative power under s 6 and establishment of an overtly policy-oriented balancing test in s 5 mean that *something* new had occurred. Yet the background context to the NZBORA's enactment clearly constrained the extent of that change. As Lord Bingham has opined in response to musings by some members of the (then) House of Lords in *Jackson v Attorney-General*¹ that the judiciary may be able to invalidate particularly invidious enactments of the UK Parliament;

The British people have not repelled the extraneous power of the papacy in spiritual matters and the pretensions of royal power in temporal in order to subject themselves to the unchallengeable rulings of unelected judges. A constitution should reflect the will of a clear majority of the people, and a constitutional change of the kind here contemplated should be made in accordance with that will, or not at all.²

* Professor, Faculty of Law, University of Otago. Email me at andrew.geddis@otago.ac.nz.

¹ 2005] UKHL 56 [2006] 1AC 262

² Lord Bingham of Cornhill, "The Rule of Law and the Sovereignty of Parliament" (2008) 19 King's Law Journal 223, at 232.

Similarly, the New Zealand public's strongly negative response to proposals that the judiciary be given power to strike down rights inconsistent legislation inevitably limited the space in which the courts legitimately may operate under the new NZBORA.

Given this uncertainty, it is unsurprising that spirited discussion over just what the NZBORA should mean for the parliamentary-judicial relationship commenced very shortly after its enactment. For example, only a month after it entered onto the statute books David Paciocco already was noting that whilst the NZBORA had been "sapped of its vitality" by Parliament's decision to downgrade it to an ordinary statute, it still "could have almost as much impact as the [Canadian] Charter".³ He explicitly noted that the courts would have to effect this change: "they can imbue it with a vitality that few have predicted. In essence, they can effect a curial cure for the debilitated Bill."⁴ The absence of a remedies provision in the NZBORA was not a barrier to judicial action as the recognition of rights gives the implicit power to remedy their breaches and "[b]ecause the power to remedy breaches of the rights and freedoms contained in the Bill is implicit, it is unlikely that New Zealand courts will waste any time in deciding whether to remedy breaches."⁵ Prescribing an approach of "aggressive" purposive interpretation that would only allow for breaches of the rights contained in the NZBORA if it was the manifest intent of Parliament, Paciocco argued that it is possible to rejuvenate the statute. Its vitality "is in the hands of the judiciary. It is theirs to embrace or embalm."⁶

As things transpired, Paciocco's manifesto did not provide a blueprint for judicial action over the next twenty-five years. The courts never *quite* dressed Clark Kent in Superman's tights and cape, despite claims to the contrary.⁷ But Paciocco's argument proved prescient in at least two respects. First of all, the meaning of the NZBORA predominantly (although by no means solely) lies in the hands of the judiciary. Second, this meaning is created through the decision on what, if any, remedy to provide to those who bring claims before the courts. This process is obvious in such

³ David M Paciocco, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" (1990) NZ Recent Law Review 353 at 353.

⁴ *Ibid.*

⁵ *Ibid.* at 365.

⁶ *Ibid.* at 381.

⁷ Compare with James Allan, "Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990" (2000) 9 Otago Law Review 613.

headline cases as *Simpson v Attorney General [Baigant's case]*,⁸ *R v Butcher*⁹ and *Martin v Tauranga District Court*.¹⁰ Each of these recognised (or, if you prefer, invented) specific remedies as responses to breaches of the NZBORA. Beyond these examples, the judiciary's meaning defining role also emerges in cases such as *R v Hansen*,¹¹ affirming the courts' responsibility for independently assessing Parliament's purported justification for limiting rights as a necessary part of interpreting legislation using s 6; as well as *Drew v Attorney General*¹² defining the NZBORA's role as a limit on executive action.

At the same time as new remedial ground was being staked out under the NZBORA, however, the courts have *constrained* the legislation's meaning by placing significant restrictions on when and how these powers will be deployed. *Baigant* damages are available only where no other remedy will suffice,¹³ are to be relatively modest in amount¹⁴ and cannot be obtained at all for judicial breaches of the NZBORA.¹⁵ Stays of proceeding are very much the last option, to be given only 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."¹⁶ Evidence obtained in breach of the NZBORA is excluded only after balancing its probative value and seriousness of the alleged offending against the nature of the rights breach.¹⁷ And the interpretative power given to the courts by s 6 is restricted by the ongoing requirement to respect Parliament's chosen text and purpose, thereby permitting only "reasonable"¹⁸ meanings that "the

⁸ [1994] 3 NZLR 667 (CA) (recognising that monetary damages may be given for the specific public law wrong of breaching the NZBORA.)

⁹ [1992] 2 NZLR 257 (CA) (recognising that breaches of the criminal procedure rights contained in the NZBORA may be remedied by the exclusion of tainted evidence thereby obtained.)

¹⁰ [1995] 2 NZLR 419 (CA) (recognising that judicial proceedings may be stayed in response to a breach of the right to be tried without undue delay.)

¹¹ [2007] NZSC 7; [2007] 3 NZLR 1.

¹² [2001] NZCA 207; [2002] 1 NZLR 58

¹³ *Taunoa v Attorney General* [2008] 1 NZLR 429.

¹⁴ *Ibid.* See also Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, Oxford, 2015) at 515.

¹⁵ *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

¹⁶ *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 at [18]

¹⁷ *R v Shaheed* [2002] 2 NZLR 377 (CA); *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. See also Evidence Act 2006, s.30

¹⁸ *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272 (CA) Cooke P

language being interpreted will bear”.¹⁹ Where such a rights consistent meaning is *not* available, an enactment must be applied irrespective of its consequences. So the twenty-five years since the NZBORA’s enactment has been a story of take and give, in which the judiciary has sought to find the Goldilocks zone of sufficient remedial power 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 make good *every single* rights breach committed by those wielding public power.

Throughout this process, one aspect of the judiciary’s remedial powers remained (and perhaps still remains) somewhat uncertain. What of situations where Parliament has enacted legislation that the judiciary—having completed an independent analysis of the justifications for the measure—considers to be inconsistent with the NZBORA, using language that admits of no other possible interpretation? Not only has Parliament undoubtedly passed such laws in the pre-NZBORA era, it remains formally free to do so today despite the NZBORA’s purported rights guarantees.²⁰ Where Parliament authors such an enactment, s 4 explicitly prevents the courts from invalidating or refusing to apply it by reason only of any inconsistency with the NZBORA. However, can the courts nevertheless register judicial concern over the law’s consequences by way of a formal declaration that Parliament’s chosen measure is inconsistent with the NZBORA? On this question opinion has been, and still is, quite divided. Tom Hickman recently expressed grave doubts that the courts legitimately could take such a step,²¹ whilst further warning that it would be an undesirable power for the judiciary to assume in the New Zealand context.²² Petra Butler sees such declarations in a more benign light, denying that they would represent any particular problem for New Zealand’s constitutional arrangements.²³ Stephen Gardbaum goes further and characterises formal declarations as being a necessary component of the “New Commonwealth Model of Constitutionalism” that he sees emerging in New Zealand, the United Kingdom, Canada and some Australian States.²⁴

¹⁹ *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1, at [237] McGrath J. See generally Andrew Geddis & Bridget Fenton “Which Is to Be Master - Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom” 25 *Arizona Journal of International & Comparative Law* 733, at 749-54 (2008).

²⁰ Claudia Geiringer, “The Dead Hand of the Bill of Rights?” (2007) 11 OLR 389, 414.

²¹ Tom Hickman, “Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility” [2015] NZ L Rev 36, 41-42.

²² *Ibid*, at 68-70.

²³ Petra Butler, “Bill of Rights”, in Mary Rose Russell and Matthew Barber, *The Supreme Court of New Zealand 2004-2013* (Thomson Reuters, Wellington, 2015) 255, 263-264.

²⁴ Stephen Gardbaum, “A Comparative Perspective on Reforming the New Zealand Bill of Rights Act” (2014) 10 *Policy Quarterly* 33, 37.

The issue of declarations of inconsistency took center stage in two high profile High Court cases decided earlier this year. Each involved a matter of some social controversy; the ability of terminally ill, suffering individuals to receive “aid in dying” so as to end their lives at a time and in a manner of their own choosing, and the right of sentenced prisoners to take part in New Zealand’s parliamentary elections. In each, the High Court was asked to issue a formal finding that Parliament’s chosen legislative response to the issue at hand was inconsistent with the NZBORA, in that it limits some individual’s right in a way that cannot be demonstrably justified in a free and democratic society. As shall be seen, the first of these claims failed whilst the second met with success. This paper first briefly sets out the background history to the issue of declarations of inconsistency in New Zealand. It then critically examines the courts’ rulings in the two cases, *Seales v Attorney-General* and *Taylor v Attorney-General*. The concluding section advances some thoughts on why the cases resulted in different outcomes, primarily focusing on the nature of the issue involved and the judiciary’s assessment of how well Parliament has dealt, and may yet deal, with it.

Judging Parliament: Declarations of Inconsistency

The availability of a declaratory remedy under the NZBORA was mooted quite soon after the legislation first entered into force.²⁵ Unlike the United Kingdom’s Human Rights Act 1998, the NZBORA does not expressly empower the judiciary to issue a declaration of inconsistency. Any such remedy instead must be sourced in the legislation’s nature and purpose. In particular, the inclusion of s 5—the “justified limitations” provision—is argued to require that the courts independently assess the rights impact of parliamentary legislation when determining its meaning and effect.²⁶ As noted above, section 4 explicitly prevents the courts invalidating or refusing to apply any rights-limiting enactment that cannot be interpreted and applied in a way that meets this justification test. However, the statute is silent as to what else can be done with judicial conclusions reached during the evaluative exercise. Writing for a five member Court of Appeal in 2000, Tipping J was of the opinion that

²⁵ F M Brookfield “Constitutional Law” [1992] NZ Recent Law 231, 239; *Temese v Police* (1992) 9 CRNZ 425, 427 (CA) Cooke P.

²⁶ Paul Rishworth, “The Inevitability of Judicial Review under ‘Interpretive’ Bills of Rights: Canada’s Legacy to New Zealand and Commonwealth Constitutionalism?”, in Grant Huscroft and Ian Brodie (eds) *Constitutionalism in the Charter Era* (Toronto: Lexis Nexis Canada, 2004) 233. See also Hanna Wilberg, “Resisting the Siren Song of the Hansen Sequence: The State of Supreme Court Authority on the Sections 5 and 6 Conundrum” 26 *Public Law Review* 39-60 (2015).

“[the] purpose [of s 5] necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. ... In the light of the presence of s 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.”²⁷

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”;²⁸ while in a later case his Honour delivered a minority decision in which he argued for issuing a declaration of inconsistency upon the facts before the court.²⁹

However, in spite of these judicial statements regarding the consequences of applying s 5 to legislation, no court had issued a formal declaration of inconsistency. Indeed, it almost seemed as though judges were determined to find reasons to avoid doing so. As Claudia Geiringer has noted,

“[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.”³⁰

Not only did the courts considerably narrow the range of cases where a declaration is an available remedy, but they also developed a novel way of “indicating” that legislation is inconsistent with the NZBORA without formally declaring it to be so. In *R v Hansen*³¹ the Supreme Court concluded that a reverse onus provision in the Misuse of Drugs Act 1975 limited the right to be presumed innocent under the NZBORA in a manner that could not be demonstrably justified under s 5, but as no other “reasonable” interpretation of the legislation was available under s 6 it nevertheless had to be applied by virtue of s 4. Rather than then formally declare the existence of an inconsistency with the NZBORA, the *Hansen* Court instead preferred to allow its reasoning to speak for itself, confident that;

²⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20] Tipping J.

²⁸ *Quilter v Attorney-General* [1998] 1 NZLR 523, 554 (CA) per Thomas J.

²⁹ *R v Poumako* [2000] 2 NZLR 695 (CA) at [86]-[107] per Thomas J.

³⁰ 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.

³¹ [2007] 3 NZLR 1 (NZSC).

“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 concerning which there is general consensus in New Zealand society and there are international obligations to affirm.”³²

This *sotto voce* “showing” the nature of a legislative inconsistency in the course of the judgment rather than explicitly “telling” of its existence by way of a formal judicial order avoided having to construct a basis for a full declaratory remedy not explicitly provided for in the statute.

For despite the judiciary’s claims regarding the necessary implication of s 5, the Crown consistently denied that the courts possess jurisdiction to make declaratory orders under the NZBORA.³³ Opposition is couched in terms of the courts overstepping their appropriate constitutional role:

“the making of a declaration of invalidity (*sic*) and issuing and sealing a judgment effecting the finding is a determination by a Court that in enacting a particular statutory provision Parliament had created circumstances in which the executive would be acting contrary to law and had itself acted unlawfully. To do so, [the Crown argues], would bring the Court into conflict with Parliament contrary to the fundamental principle of comity.

On a more narrow footing [the Crown argues] that the Court would be enjoined to call into question a proceeding in Parliament in breach of article 9 of the Bill of Rights in a matter clearly beyond that contemplated by the House via the enactment of s 5 of NZBORA.”³⁴

This determined resistance to the courts formally declaring that a parliamentary enactment contains unjustified limits on individual rights reflects an ongoing Diceyan understanding of Parliament’s role in New Zealand’s constitutional order.³⁵ The view that Parliament should be able to make law as it sees fit without question from other branches of the government was exemplified by Deputy Prime Minister Michael Cullen’s rejoinder to what he saw as unwarranted judicial challenges to that power; “New Zealand is a sovereign state in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed, and the

³² *R v Hansen* [2007] 3 NZLR 1 (NZSC) at [254] McGrath J. This confidence was somewhat misplaced; not only does the provision remain in place today, but Parliament has applied it to a number of new substances since 2007. See Andrew Geddis, “The Comparative Irrelevance of the NZBORA to Legislative Practice” (2009) 43 *New Zealand Universities Law Review* 465; Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, Cambridge, 2015) at 123-159.

³³ See, e.g., *R v Poumako* [2000] 2 NZLR 695 (CA) at [91]; *Zaoui v Attorney General* [2004] 2 NZLR 339 (HC); *Mangawhai Ratepayers’ and Residents Association v Kaipara District Council (No 3)* [2014] 3 NZLR 85 (HC) at [34]; *Taylor v Attorney-General* [2014] NZHC 1630 (hereafter *Taylor (Strike-out)*).

³⁴ *Taylor (Strike-out)* [2014] NZHC 1630 at [40]-[41].

³⁵ See Andrew Geddis, “Parliamentary Government in New Zealand: Lines of Continuity and Change”, (2015) 13 *International Journal of Constitutional Law* (forthcoming).

body to which the Government of the day is accountable.”³⁶ In the face of such vigorous opposition from the nation’s political actors to an expanded judicial role, New Zealand’s judiciary apparently preferred not to press the matter by actually exercising any theoretical declaratory jurisdiction.

At least, that was the position as at the start of 2015. This year has seen two significant cases come before the High Court asking it to exercise a declaratory power. The first of these related to the issue of “aid in dying”; that is, where a doctor provides a terminally ill, suffering patient with assistance in ending his or her own life at a time of his or her own choosing. The second involved sentenced prisoners who had been deprived of the right to vote at parliamentary elections by legislation enacted in 2010. Each of these cases is discussed in turn.

Aid in dying under the NZBORA

Lecretia Seales was a lawyer with an extensive background in New Zealand law reform matters.³⁷ In 2011, Ms Seales was diagnosed with an advanced form of brain cancer. Despite an initial prognosis of death within weeks, treatment successfully extended Ms Seales’ life by another four years. However, in late 2014 it became clear that her treatment options were failing and death had become imminent. Ms Seales’ attention then turned to her end of life circumstances. In particular, she was concerned to avoid the possibility that she would:

“be forced to experience a death that is in no way consistent with the person that I am and the way that I have lived my life. For me a slow and undignified death that does not reflect the life that I have led would be a terrible way for my good life to have to end.”³⁸

Accordingly, Ms Seales sought to gain an element of choice over her end of life circumstances by commencing legal action.

With the assistance of counsel working *pro bono*, Ms Seales filed papers in the High Court seeking two declaratory orders. The first related to the interpretation of the Crimes Act 1961 and asked the Court to declare that, in the circumstances of Ms

³⁶ Hon Michael Cullen “Parliamentary Sovereignty and the Courts” [2004] *New Zealand Law Journal* 243, 243. See also Hon Michael Cullen, “Parliament: Supremacy Over Fundamental Norms?” (2005) 3 *New Zealand Journal of Public and International Law* 1.

³⁷ Ms Seales’ story is recounted in Rebecca Macfie, “Dying Wishes”, *NZ Listener*, 8 January 2015 <<http://www.listener.co.nz/current-affairs/health-current-affairs/dying-wishes/>>

³⁸ *Seales v Attorney-General* [2015] NZHC 1239 at [29].

Seales' condition,³⁹ it would not be a breach of either s 160 ("culpable homicide") or s 179 ("assisting suicide") for a doctor to provide her with aid in dying. (Ms Seales' General Practitioner had agreed that, should the Court issue such a declaration, she would be prepared to supply Ms Seales' with aid in dying.) In the alternative, Ms Seales asked that if the Court was unable to interpret the Crimes Act as requested, it instead declare the resulting legislative prohibition on providing aid in dying in the circumstances of Ms Seales' condition to be inconsistent with the NZBORA.

While expressed in the alternative, these two declarations were in fact closely linked by virtue of the NZBORA's application. Ms Seales' claim was that the Crimes Act's facial prohibition on a doctor providing her with aid in dying breached her NZBORA rights: specifically, her right not to be deprived of life under s 8; and not to be subject to cruel, degrading, or disproportionately severe treatment under s 9. If that is the case, s 6 directs that the court, provided it can do so,⁴⁰ must interpret the Crimes Act provisions consistently with those rights by declaring that the provisions do *not* in fact prohibit providing her with aid in dying. Alternatively, if a rights-consistent interpretation of the relevant provisions is not available, then Ms Seales argued that the court ought to formally declare the existence of an inconsistency between the effect of Crimes Act provisions and her legislatively guaranteed rights contained in the NZBORA.

In the end, both of Ms Seales' applications were declined. With respect to interpreting the Crimes Act, Collins J concluded:

"The criminal law declarations 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. I would be trespassing on the role of Parliament and departing from the constitutional role of Judges in New Zealand if I were to issue the criminal law declarations sought by Ms Seales."⁴¹

While I suggested prior to trial that the Crimes Act could be interpreted so as to permit Ms Seales to access aid in dying,⁴² I now accept that this was a mistake. Any judicial reading of the provisions to permit a doctor to provide a patient with such assistance would involve the creation of something akin to a legislative code. The sorts of patient

³⁹ These circumstances were specified as being that Ms Seales was "a competent adult who: (i) clearly consents ...; and (ii) has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness" *Seales v Attorney-General* [2015] NZHC 1239 at [8].

⁴⁰ Andrew Geddis & Bridget Fenton "Which Is to Be Master - Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25 *Arizona Journal of International & Comparative Law* 733, at 749-54.

⁴¹ *Seales v Attorney-General* [2015] NZHC 1239 at [13].

⁴² Kathryn Tucker and Andrew Geddis, "Litigating for the right to die", [2015] NZLJ 172.

that lawfully may receive such assistance, the necessary precautions to ensure that end of life decision is consensual and even the means that may be used to bring about death would all have to be specified by a court. That takes the matter well beyond simply saying what the words in an enactment mean and instead involves “decisions for which [the courts] are not equipped. There may be several ways of making [the Crimes Act rights consistent], and the choice may involve issues calling for legislative deliberation.”⁴³ So as regards this aspect of the case, I accept that Collins J reached the right interpretative conclusion (even if the way that his Honour conducted the exercise was perhaps a little perfunctory). The harder question is whether the *consequences* of this necessary reading of the Crimes Act are consistent with the rights guarantees contained in the NZBORA.

The NZBORA declaration refusal in Seales v AG

Having concluded that the Crimes Act cannot be read in a manner that permits aid in dying, Collins J turned to consider Ms Seales’ request for a formal declaration that the effect of that legislation is inconsistent with the NZBORA. For this remedy to be available, Ms Seales had to establish that the Crimes Act’s prohibition on aid in dying unjustifiably limited one of her guaranteed rights under the NZBORA. Finding an applicable NZBORA right then poses something of a challenge as the legislation’s drafters deliberately took a deflationary approach to the affirmed rights and freedoms. No equivalent of Article 8 of the European Convention on Human Rights was included in the text, so the failure to allow Ms Seales to access aid in dying cannot be claimed to limit a guaranteed right to respect for private life.⁴⁴ This exclusion is in spite of the right also appearing in the International Covenant of Civil and Political Rights, Article 17, to which the preamble to the NZBORA confirms New Zealand’s commitment. Equally, the Canadian Charter’s s 7 guarantee of “liberty and security of the person” deliberately was left out of the NZBORA, as was any version of the US Constitution’s 14th Amendment protection of due process.⁴⁵ Commentators on the NZBORA have

⁴³ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [33]. It is notable that even the Canadian Supreme Court recognised this fact by staying its ruling in *Carter v Canada* [2015] SCC 5 for 12 months to permit Parliament to place rules around how aid in dying may be provided.

⁴⁴ Compare with *Pretty v United Kingdom* (2002) 35 EHRR 1 at [67]; *Haas v Switzerland* (2011) 53 EHRR 33, at [51]; *Koch v Germany* (2013) 56 EHRR 6, at [46] and [51]; *Gross v Switzerland* (2014) 58 EHRR 7, at [60]; *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38.

⁴⁵ The asserted basis for a right to access aid in dying in *Washington v Glucksberg* 521 U.S. 702 and *Vacco v Quill* 526 U.S. 793.

interpreted this drafting decision as representing a conscious attempt to cabin the range of interests that the legislation protects in favour of a targeted safeguarding of the “*physical integrity of the person*”.⁴⁶ As a result, Ms Seales had to base her NZBORA claim on two enumerated rights that may at first blush appear to have little application to the matter at hand: the s.8 right not to be “deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice”; and the s 9 right “not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.”

As foreshadowed above, Collins J found that the Crimes Act’s failure to permit Ms Seales access to aid in dying did not unjustifiably limit either of these rights. With respect to the s 9 right not to be subjected to cruel, degrading or disproportionately severe treatment, I largely agree with his Honour’s conclusion. The cause of Ms Seales’ suffering was her underlying medical condition,⁴⁷ with the only “treatment” provided to her intended to alleviate that suffering.⁴⁸ Thus, the State did not undertake any *positive* action that inflicts cruel, degrading or disproportionately severe outcomes on Ms Seales, which is all that s 9 protects against.⁴⁹ In my opinion, Collins J was quite right to follow the approach of United Kingdom,⁵⁰ European⁵¹ and Canadian⁵² Courts by finding that the NZBORA, s 9 right simply is not engaged by the Crimes Act’s general prohibition on aid in dying as there is no relevant “treatment” by the State.⁵³

However, I would respectfully disagree with his Honour’s conclusion that the Crimes Act’s blanket prohibition on providing aid in dying is not inconsistent with the s 8 right not to be deprived of life. That statement may seem contradictory, given that Ms Seales was (in the vernacular) arguing for a right to die on her own terms. In the words of the European Court of Human Rights, a right to life:

“cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self determination in the sense of conferring on an individual the entitlement to

⁴⁶ Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Melbourne, OUP, 2003) at 219 (emphasis in the original). See also Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (Wellington, LexisNexis NZ, 2005) at 211-212.

⁴⁷ *Seales v Attorney-General* [2015] NZHC 1239 at [205].

⁴⁸ *Seales v Attorney-General* [2015] NZHC 1239 at [206].

⁴⁹ *Seales v Attorney-General* [2015] NZHC 1239 at [207]. See also *Neville v Attorney-General* [2015] NZHC 1946 at [70].

⁵⁰ *R (Pretty) v Department of Public Prosecutions* [2002] 1 AC 800 (HL).

⁵¹ *Pretty v United Kingdom* (2002) 35 EHRR 1 at [52], [56].

⁵² *Roderiguez v British Columbia (Attorney General)* [1993] 3 SCR 519 at 612.

⁵³ See also *Neville v Attorney-General* [2015] NZHC 1946 at [70]-[78].

choose death rather than life.”⁵⁴

Nevertheless, the Canadian Supreme Court, in a unanimous decision issued under the name of the Court, recently ruled in *Carter v Canada* that a total prohibition on aid in dying breached the right to life guaranteed in the *Canadian Charter* because the demonstrated effect of that prohibition was to cause some terminally ill people to end their lives sooner than they otherwise would choose to, thus depriving them of a “quantum” of life.⁵⁵ Furthermore, that deprivation of life was inconsistent with the “principles of fundamental justice” as it was not necessary to visit this consequence on competent, consenting adults in an end-of-life setting in order to protect generally the lives of vulnerable members of society.⁵⁶ Thus, the criminal law prohibition on assisting all forms of suicide was overly broad in its effect, making it inconsistent with *Charter* rights and so invalid as it applies to competent, consenting adults seeking facilitated aid in dying.⁵⁷

The right not to be deprived of life guaranteed in s. 8 of the NZBORA is expressed in exactly the same language as the *Canadian Charter*. This fact is not coincidental; New Zealand’s statutory instrument deliberately replicates the Canadian model. Consequently, a New Zealand judge considering the same right in a very similar cultural and social context will regard a decision by Canada’s Supreme Court, while not technically binding under the curial hierarchy, nevertheless as being of extremely persuasive authority. And so it was that Collins J accepted that a prohibition on aid in dying produces the same potential outcomes in New Zealand:

“[T]he offence provisions of the Crimes Act ... may have the effect of forcing Ms Seales to take her own life prematurely, for fear that she will be incapable of doing so when her condition deteriorates further. Accordingly, the right to life provision of s 8 of the NZBORA is engaged in the circumstances of this case.”⁵⁸

However, his Honour then went on to find that—unlike Canada—this consequence was *not* an unjustified infringement of Ms Seales’ s 8 right as she (and others who may end their lives early because of the prohibition on aid in dying) was being deprived of life “on such grounds as ... are consistent with the principles of fundamental justice.” While Canada has adopted laws against aiding people to commit suicide in order to protect only the vulnerable, New Zealand has such laws to protect the sanctity of *all*

⁵⁴ *Pretty v United Kingdom* (2002) 35 EHRR 1 at [39].

⁵⁵ *Carter v Canada* [2015] SCC 5 at [57]-[58].

⁵⁶ *Carter v Canada* [2015] SCC 5 at [85]-[87].

⁵⁷ *Carter v Canada* [2015] SCC 5 at [147]. The Supreme Court also found that Canada’s prohibition on aid in dying limited the right to liberty and security guaranteed by s.7. However, this finding was additional and separate to the Court’s conclusion on the right to life; see *Carter v Canada* [2015] SCC 5 at [64]-[69].

⁵⁸ *Seales v Attorney-General* [2015] NZHC 1239 at [166].

life.⁵⁹ And so because New Zealand is more concerned than Canada is with stopping *anyone* from committing “suicide”, the principles of fundamental justice permit a law in this country that has the incidental effect of causing people like Ms Seales to end their lives.

This claim strikes me as somewhat implausible for two reasons. First of all, with respect, Collins J’s reasons for distinguishing New Zealand’s alleged broad legislative intent from Canada’s more limited legislative intent are problematic. Both countries have exactly the same common law heritages. Both made the decision to decriminalise attempted suicide around the same time: NZ in 1961, Canada in 1972. The legislative history to Canada’s prohibition on assisting suicide, as outlined by Sopinka J in *Roderiguez v British Columbia (Attorney General)*,⁶⁰ is not appreciably different from New Zealand’s as described by Collins J in *Seales v Attorney General*.⁶¹ Admittedly, there are two superficial differences between Canada’s Criminal Code and New Zealand’s Crimes Act, which Collins J believed demonstrated that New Zealand’s Parliament intended to maintain a broader policy of preserving the sanctity of all life even as it decriminalised attempted suicide. The Crimes Act 1961, s 180 creates a separate offence of participating in a suicide pact, while s 41 recognises a defence for anyone who uses reasonable force to prevent someone from committing suicide. Canada’s Criminal Code contains neither provision.

However, this slight difference in the content of each country’s criminal statutes provides minimal support for the claim that they exhibit different legislative intents; or, rather, a finding that New Zealand’s legislative intent is broader in scope than Canada’s. The purpose of s 180 actually is to *reduce* the potential punishment faced by those who take part in a (failed) suicide pact in New Zealand. In comparison, the survivor of a pact in Canada could face a charge of murder (if they kill the other person in the pact) or counseling, aiding or abetting a suicide (if the other person killed themselves). Both of these offences carry a far higher potential punishment than the five-year maximum jail sentence imposed by s 180.⁶² If anything, therefore, the lack of an equivalent to s 180 in Canada’s law indicates that its legislature is *more* concerned to prevent people from entering into such pacts and thus has a *greater* intent to protect

⁵⁹ *Seales v Attorney-General* [2015] NZHC 1239 at [132].

⁶⁰ [1993] 3 S.C.R. 519.

⁶¹ *Seales v Attorney-General* [2015] NZHC 1239 at [118]-[131].

⁶² In both Canada and New Zealand, murder and manslaughter are punishable by a potential term of life imprisonment, while assisting suicide is punishable by up to 14 years imprisonment. See Criminal Code (R.S.C., 1985, c. C-46), ss. 235, 236, 241; Crimes Act 1961, ss. 172, 177, 179.

the sanctity of all life.

Furthermore, while it is true that Canada does not grant an express legislative defence to a person who uses reasonable force to stop someone from committing suicide, such a defence still remains available in Canadian law. Section 8(3) of the Canadian Criminal Code retains “every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge.” And under Canadian Criminal Law, the common law defence of “necessity” clearly encompasses the actions of a person intending to prevent another from committing suicide. As the Canadian Supreme Court noted in *R v. Goltz*:

“The doctrine exists as an excusing defence, operating in very limited circumstances, when conduct that would otherwise be illegal and sanctionable is excused and made unsanctionable because it is properly seen as the result of a “morally involuntary” decision, to do an act which in the eyes of society is thought to have positive social value outweighing the detrimental effect of the contravention. It only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril, and where there are no reasonable legal alternatives to the conduct pursued.”⁶³

Hence, a Canadian bystander who pulls someone off the rail of a bridge or a Canadian nurse who restrains a patient trying to cut his wrists could claim the protection of this “necessity” defence against any possible charge of assault or similar, just as such a person in New Zealand can claim the protection of s 41 of the Crimes Act for the same actions. In practice, therefore, there is no appreciable difference between how the criminal law operates as between Canada and New Zealand. A claim that New Zealand's Crimes Act evinces a broader purpose of protecting the sanctity of all life, while Canada's Criminal Code is concerned only with the lives of the vulnerable, is difficult to sustain.

The second problem with Collins J's claim that New Zealand's supposedly wider purpose for the statutory prohibition on assisting suicide makes the deprivation of life consistent with “the principles of fundamental justice” is that it fails to heed the Canadian Supreme Court's warning in *Carter*:

“[D]efining the object of the prohibition on physician-assisted dying as the preservation of life has the potential to short-circuit the analysis [of whether life is being deprived consistently with the principles of fundamental justice]. In *RJR-MacDonald*, this Court warned against stating the object of a law “too broadly” in the s.1 analysis, lest the resulting objective immunize the law from challenge under the Charter (para. 144). The same applies to assessing whether the principles of fundamental justice are breached under s.7. *If the object of the prohibition is stated broadly as “the preservation of life”, it becomes difficult to say that the means used to further it are overbroad or grossly*

⁶³ [1991] 3 SCR 485.

disproportionate. The outcome is to this extent foreordained."⁶⁴

Similarly, Sopinika J issued this caution in the earlier case of *Roderiguez v British Columbia (Attorney General)*:

"It is not sufficient, however, merely to conduct a historical review and conclude that because neither Parliament nor the various medical associations had ever expressed a view that assisted suicide should be decriminalized, that to prohibit it could not be said to be contrary to the principles of fundamental justice. Such an approach would be problematic for two reasons. First, a strictly historical analysis will always lead to the conclusion in a case such as this that the deprivation is in accordance with fundamental justice as the legislation will not have kept pace with advances in medical technology. *Second, such reasoning is somewhat circular, in that it relies on the continuing existence of the prohibition to find the prohibition to be fundamentally just.*"⁶⁵

According to the Canadian Supreme Court, the State ought not to be able to claim that the reason for its prohibition on assisted suicide is a generic intention to protect all life that always has been a part of the law. The State instead has to show exactly *what* lives it wants to protect and *why* it wishes to continue to do so; in particular, why if the State has said that a person's individual choice to end their life is no longer a matter of criminal concern should the State nevertheless be entitled to impose criminal law sanctions that have the effect of interfering with that choice when exercised by a competent, consenting adult with a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness? Because without the State providing such tailored reasons for imposing the interference, the court is unable to meaningfully judge whether those reasons justify the consequence for someone in Ms Seales' circumstances: she may well die at a point in time sooner than she otherwise would if the interference did not occur.

As such, I respectfully would demur from Collins J's conclusion that the prohibition on aid in dying under New Zealand law is consistent with the NZBORA, s 8, because the prohibition on aid in dying is "consistent with the principles of fundamental justice." If the approach of the Canadian Supreme Court to this right is accepted as being correct—which his Honour appears to do—then there is no sound basis for distinguishing between its application in Canada and New Zealand. Therefore, Collins J ought to have found at least that the effect of the Crimes Act, s 179 is inconsistent with the NZBORA, insofar as it prohibits Ms Seales from accessing facilitated aid in dying. Whether that finding would have translated into the sought formal declaration of inconsistency is another matter. Such a remedy, even if available

⁶⁴ *Carter v Canada* [2015] SCC 5 at [77] (emphasis mine).

⁶⁵ [1993] 3 S.C.R. at 519 at ??? (emphasis mine).

in theory, remains very much discretionary. Collins J may well then have found reasons similar to those adopted by Lord Neuburger, Lord Mance and Lord Wilson in *R. (on the application of Nicklinson) v Ministry of Justice* for deciding a declaration was not appropriate in the present case,⁶⁶ preferring instead to rely upon parliamentary processes to respond to the issue. Unfortunately, his Honour's mistaken reasoning as regards the application of the s 8 right meant that this issue was not ever considered.

Prisoner voting and the NZBORA

New Zealand's Parliament removed all sentenced prisoners' right to enrol to vote in 2010, by way of a members Bill introduced by a National Party backbench MP that proposed amending s 80(1)(d) of the Electoral Act 1993.⁶⁷ When the Bill first was introduced into the House of Representatives, the Attorney-General attached a notice under s 7 of the NZBORA stating his view that it limited the right to vote contained in s 12(a) of the NZBORA in a way that could not be demonstrably justified under s 5. In particular,⁶⁸

[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 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.

In spite of this warning, the Bill passed through the legislative process with only a minimal amount of debate; for instance, the select committee majority report recommending support for the measure did not mention the Attorney-General's notice and provided literally no reasons for its conclusion that the measure should become law.⁶⁹ Some 3000 additional individuals then became ineligible to vote at the 2011 and subsequent elections once the Bill was enacted on a 63-58 party-line vote.

Matters may have rested there but for the intervention of a long-term prisoner and jailhouse lawyer, Mr Arthur Taylor. He gathered a group of serving prisoners and launched a series of separate court challenges to the amended s 80(1)(d). One action

⁶⁶ [2014] UKSC 38; [2014] W.L.R. 200 at [115]-[118].

⁶⁷ This provision originally disqualified from enrolling to vote any prisoner who was serving a sentence of three or more years.

⁶⁸ 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* (J4, published by Order of the House of Representatives, 2010) at [15].

⁶⁹ Andrew Geddis, "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] N Z Law Rev 443, 463-464.

sought to injunct the Electoral Commission from proceeding with the election unless prisoners were permitted to enrol to vote. This claim failed as

“[h]owever constitutionally objectionable s 80(1)(d) might be, Parliament has (for now) spoken. And what Parliament has said is that no prisoner who is serving a sentence of imprisonment and who happens to be incarcerated on 20 September 2014 may vote in this year’s general election. The applicants therefore have no position to preserve and the Court is unable to intervene. The application is dismissed accordingly.”⁷⁰

A second challenge took the form of an election petition questioning the return of the country’s Prime Minister to Parliament on the basis that a failure to allow prisoners to vote constituted an “unlawful election”. It also failed, as Mr Taylor did not possess the standing necessary to bring the petition.⁷¹ Third, the prisoners’ asked the High Court to formally declare s 80(1)(d) inconsistent with the NZBORA. This last action is the focus of this paper.⁷²

It seems to me that the prisoners’ application for a declaration represents something of a “put-up-or-shut-up” moment for the judiciary. If the courts did not provide the relief sought in *this* case, then it is hard to see when it ever would do so. From a procedural perspective, the prisoners’ claim avoided the problems that had caused courts to reject earlier applications. It took the form of a civil action, rather than being raised in the course of a criminal trial.⁷³ The legislation directly affected the applicants rather than a court being asked to examine the law’s impact in the abstract.⁷⁴ Finally, a declaration of inconsistency was the only realistic remedy available to the applicants. Parliament’s clear intention when enacting the bar on prisoners enrolling to vote allowed for only one reading of the relevant provision; that sentenced prisoners may not vote whilst they remain behind bars.⁷⁵ Absent a serious issue of statutory interpretation, a court could not take the *Hansen* approach and quietly indicate NZBORA inconsistency in the course of determining the legislation’s proper meaning. And because the limitation on rights was expressly authorised by

⁷⁰ *Taylor v Attorney General* [2014] NZHC 2225 at [80] (hereafter *Taylor (Injunction)*).

⁷¹ *Taylor v Key* [2015] NZHC 722 at [83]-[93] (hereafter *Taylor (Electoral Petition)*).

⁷² There is yet another court action still underway. Mr Taylor is seeking to have the High Court declare the 2010 Act invalid, on the grounds that it was enacted inconsistently with s.268 of the Electoral Act 1993. I think this claim is unlikely to succeed, for reasons similar to those espoused by Ellis J in *Taylor (Injunction)* [2014] NZHC 2225 at [62]-[78].

⁷³ *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [16]; *R v Exley* [2007] NZCA 393 at [18]; *McDonnell v Department of Corrections* [2009] NZCA 352 at [123].

⁷⁴ *Boscawen v Attorney-General (No 2)* [2009] 2 NZLR 229 at [53]-[54].

⁷⁵ *Taylor (Injunction)* [2014] NZHC 2225 at [26]-[31]. See also *Taylor (Electoral Petition)* [2015] NZHC 722 at [72]-[78].

primary legislation, a monetary remedy in the form of *Baigent* damages for breach of the NZBORA almost certainly would not be available.⁷⁶

The substance of the prisoners' claim also provided compelling grounds for issuing a declaration. There was no argument over whether the ban on all prisoners voting is in fact inconsistent with the NZBORA. Not only had the Attorney-General certified this to be the case when the legislation first was considered by the House of Representatives, but the Crown did not resile from that conclusion following its passage into law.⁷⁷ As such, there was no issue as to whether the legislation in fact limited the applicants' affirmed rights⁷⁸ or whether any such limitation could be justified by s 5.⁷⁹ Second, the right involved was very important and the limitation extensive in nature. The 2010 amendment to s 80(1)(d) completely removed several thousand individuals' right to participate in the foundational moment of a democratic nation's government. 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, as Danny Nicol suggests has in fact occurred in the United Kingdom,⁸⁰ that manifestly was not the case in New Zealand.⁸¹

The NZBORA declaration in Taylor v Attorney-General

The High Court considered the prisoners' claim for declaratory relief on two occasions. The Crown initially sought to have the action struck out on the basis that the courts lacked jurisdiction to provide the remedy sought.⁸² As noted above, the Crown's position was that issuing a formal declaration of inconsistency represents an improper judicial intervention into the legislative arena. At most, courts may follow the *Hansen* approach of making *obiter* comments that draw attention to the fact s 4 requires some

⁷⁶ Andrew Butler & Petra Butler, *The New Zealand Bill of Rights: A Commentary* (2nd ed, LexisNexis NZ, Wellington, 2015) at 1551-1552.

⁷⁷ *Taylor (Declaration)* [2015] NZHC 1706 at [32].

⁷⁸ Compare with *Miller v The New Zealand Parole Board* [2010] NZCA 600; *Seales v Attorney-General* [2015] NZHC 1239 at [151]-[209].

⁷⁹ Compare with *Mangawhai Ratepayers' and Residents Association v Kaipara District Council (No 3)* [2014] 3 NZLR 85 (HC) at [95]-[111].

⁸⁰ Danny Nicol, "The Legitimacy of the Commons debate on prisoner voting" [2011] PL 681.

⁸¹ Andrew Geddis, "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] N Z Law Rev 443, 462-667.

⁸² *Taylor (Strike-out)* [2014] NZHC 1630.

legislative provision be applied in a NZBORA inconsistent fashion. To do anything more than this would invent a novel judicial power that directly impugns the parliamentary law making process. As such, the courts simply cannot do what the applicants asked.

This strike out application failed. Justice Brown rejected outright the Crown's contention that issuing a declaration of inconsistency would involve a questioning of parliamentary proceedings in breach of Article 9 of the Bill of Rights 1688. Once Parliament has enacted a statute, it is for the courts to say what it means.⁸³ And if courts may *indicate* their conclusion that some statute must be applied in a manner inconsistent with the NZBORA, as occurred in *Hansen*, "then it is difficult to see how the making of a declaration of inconsistency could amount to a contravention of article 9."⁸⁴ Furthermore, his Honour considered that the principle of comity did not prevent the courts from issuing such declarations. With regards concerns that a declaration might constrain Parliament's law making powers, Brown J claimed "it is now recognised that it is no longer correct to say that Parliament's freedom to legislate admits of no qualification whatever."⁸⁵ While the courts may be reluctant to *in practice* expressly declare a parliamentary enactment to be an unjustifiable limit on individual rights, nothing in New Zealand's constitutional order says that they can *never* do so.⁸⁶ However, Brown J also warned the applicants that their success "could be a Pyrrhic victory" in light of his Honour's "view of the Court's current jurisdiction to grant declarations of inconsistency is: in theory 'yes' but in practice 'no'."⁸⁷ In addition to Brown J's general concerns about the courts being seen to interfere in areas traditionally viewed as Parliament's domain, his Honour specifically warned that "in a case such as the present where the Attorney-General has presented a report specifically on the issue and Parliament has remained unmoved, I consider that a Court would be particularly hesitant to consider the grant of a declaration...."⁸⁸

This pessimistic view of the prisoners' ultimate chance of success proved ill-founded. In the substantive ruling on the application for a declaration of inconsistency, Heath J not only echoed Brown J's finding that the High Court has jurisdiction to provide such relief but also exercised his discretion to grant it. On the jurisdictional

⁸³ *Taylor (Strike-out)* [2014] NZHC 1630 at [57].

⁸⁴ *Taylor (Strike-out)* [2014] NZHC 1630 at [59].

⁸⁵ *Taylor (Strike-out)* [2014] NZHC 1630 at [73].

⁸⁶ *Taylor (Strike-out)* [2014] NZHC 1630 at [79]-[82].

⁸⁷ *Taylor (Strike-out)* [2014] NZHC 1630 at [83].

⁸⁸ *Taylor (Strike-out)* [2014] NZHC 1630 at [86].

point, Heath J extrapolated from the Court of Appeal's decision in *Baigant's Case*. Drawing on that decision and later Supreme Court rulings,⁸⁹ Heath J concluded that

“[t]he general principle is that where there has been a breach of the Bill of Rights 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’.”⁹⁰

Reinforcing the conclusion that declarations of inconsistency are an available judicial remedy, his Honour noted that in 2002 Parliament decided to empower the Human Rights Review Tribunal to declare legislation inconsistent with the NZBORA's s 19 right to be free from discrimination.⁹¹ It would, opined Heath J, be odd for an inferior Tribunal to be able to make such declarations in respect of one particular right under the NZBORA while the superior courts were unable to do so for all the other rights it guarantees.⁹²

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. It is clear that there is no *right* to obtain a declaration whenever the Court concludes that legislation is inconsistent with the NZBORA.⁹³ However, 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.”⁹⁴ In contrast to Brown J, his Honour did not regard the Attorney-General's earlier notification of the proposed legislation's inconsistency with the NZBORA as providing any reason to be “hesitant” when issuing a declaration.⁹⁵ Justice Heath saw a declaration of inconsistency as being of a quite different nature to the Attorney-General's advice 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.”⁹⁶ Therefore, the principle of comity should not dissuade the Court

⁸⁹ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

⁹⁰ *Taylor (Declaration)* [2015] NZHC 1706 at [61].

⁹¹ See, e.g., *Howard v Attorney General (No.3)* (2008) 8 HRNZ 378.

⁹² *Taylor (Declaration)* [2015] NZHC 1706 at [64].

⁹³ *Taylor (Declaration)* [2015] NZHC 1706 at [76].

⁹⁴ *Taylor (Declaration)* [2015] NZHC 1706 at [67] (emphasis mine).

⁹⁵ *Taylor (Declaration)* [2015] NZHC 1706 at [71].

⁹⁶ *Taylor (Declaration)* [2015] NZHC 1706 at [77(d)]. See also Tipping J's statement in *R v Hansen* [2007] 3 NZLR 1 (NZSC) at [109]: “Clearly the courts are not bound by the Attorney-General's assessment or by Parliament's concurrence...”

from issuing a declaration as it is not an attempt to intervene in or directly influence any parliamentary proceeding.⁹⁷

Having concluded that a declaration was an available remedy and that nothing prevented him exercising his discretion to issue one, Heath J 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.”⁹⁸ By issuing this declaration, the Court then intentionally sends a message to the New Zealand public regarding the nature of the law that governs them.⁹⁹ 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.”¹⁰⁰

Seales, Taylor, the Courts and Parliament

Although producing different immediate outcomes, the decisions in *Seales* and *Taylor* support one common conclusion. Subject to the fairly important caveat that the higher courts are yet to have their say,¹⁰¹ the two cases appear to establish that the declaration of inconsistency remedy is now a viable option for litigants. Mr Taylor got what he wanted from the Court. While Ms Seales did not, it appears that Collins J was prepared to seriously consider granting a declaration; his Honour moved straight into considering the substantive rights consistency of the Crimes Act ban on aid in dying without any hesitation as to whether the court ought to engage with that issue. We can thus at least conclude that his Honour was not convinced by the Crown’s submission that the absence of any serious issue of statutory interpretation leaves no room for the NZBORA to operate with respect to competing legislation. Instead, Collins J embarked on his own independent assessment of the rights consistency of the Crimes Act provisions; a road for the court only if a declaration of inconsistency represents a possible destination. As such, always subject to the above caveat, it looks like judicial

⁹⁷ *Taylor (Declaration)* [2015] NZHC 1706 at [69].

⁹⁸ *Taylor (Declaration)* [2015] NZHC 1706 at [77(a)].

⁹⁹ *Taylor (Declaration)* [2015] NZHC 1706 at [30]; [77(d)].

¹⁰⁰ *Taylor (Declaration)* [2015] NZHC 1706 at [70].

¹⁰¹ The Crown has appealed the award of a declaration of inconsistency in *Taylor* to the Court of Appeal. In addition, the Court of Appeal granted the Attorney-General intervener status to argue that declarations of inconsistency are not an available remedy in *Mangawhai Ratepayers & Residents Association Inc v Kaipara District Council* [2015] NZCA 328.

declarations of inconsistency are now a part of New Zealand's constitutional environment. The question then is, what do the two cases at hand tell us about when we may see such remedies being granted in the future?

In beginning to sketch a tentative answer to this question, it must be noted that *Seales* and *Taylor* do not provide us with perfectly matched comparisons. Obviously the finding in *Seales* that no rights inconsistency existed obviated the need for deciding whether a formal declaration was required. Nevertheless, I think it is possible to discern a significant tonal difference in the *Seales* and *Taylor* judgments. The decision in the former case exhibits a more cautious approach that gives greater deference to Parliament's judgment on the issues involved than is demonstrated the latter. In concluding that the Crimes Act prohibition on aid in dying is consistent with the NZBORA, Collins J essentially accepts Parliament's underlying legislative intention—to protect the “sanctity of life”—at face value and then leaves the matter for it to reconsider when necessary. There seems little doubt about what Collins J personally thinks Parliament *ought* to do with regards the issue: “I fully acknowledge that the consequences of the law against assisting suicide as it currently stands are extremely distressing for Ms Seales and that she is suffering because that law does not accommodate her right to dignity and personal autonomy.”¹⁰² But his Honour's own view of the matter does not then extend to extend to impugning Parliament's chosen rationale for prohibiting aid in dying; “The complex legal, philosophical, moral and clinical issues raised by Ms Seales' proceedings can only be addressed by Parliament passing legislation to amend the effect of the Crimes Act.”¹⁰³ In contrast, the judgment in *Taylor* essentially tells Parliament that it has acted unconscionably when legislating away prisoners right to vote. The fact the enactment imposing that consequence is only five years old and was passed with full knowledge of the potential NZBORA problems does not prevent this explicit message from being sent. What, then, might account for this different tone to each judgment?

A first possible explanation can be dispensed with quite quickly. It may be suggested that the identity of each individual judge accounts for the differing judicial attitudes shown. However, I think attempts to reduce legal reasoning to alleged personal proclivities are unhelpful. For example, the same Heath J who issued the declaration in *Taylor* was quite solicitous of Parliament's decision to retrospectively validate unlawful action taken by a local authority, thereby overriding residents'

¹⁰² *Seales v Attorney-General* [2015] NZHC 1239 at [192].

¹⁰³ *Seales v Attorney-General* [2015] NZHC 1239 at [211].

NZBORA right to obtain relief by way of judicial review proceedings.¹⁰⁴ That is not the conclusion of a judicial activist determined to unseat Parliament as New Zealand's sovereign lawmaker; indeed, it is possible to ask whether his Honour's ruling in that case was *too* deferential to the views of elected MPs. By the same token, Collins J has proved willing to find against the actions of school authorities,¹⁰⁵ regional councils¹⁰⁶ and the police.¹⁰⁷ These do not strike me as the actions of a timid judge who is prone to defer to other decision makers out of a concern to avoid controversy.

A second possible explanation warrants a little more consideration. The decisions in *Taylor* and *Seales* were produced under very different circumstances of judgment. Justice Heath had the luxury of being able to craft his reasoning over a period of some three-and-a-half months, having also the benefit of Brown J's earlier decision in regards the Crown's strike out motion. In contrast, Collins J admirably produced a judgment of over 200 paragraphs in less than a week, so that Ms Seales could receive a full answer to her claim before nature took its cruel course. Furthermore, his Honour did so without any court in New Zealand having previously examined the issues he was asked to decide. As noted in the judgment itself:

"Judges [sometimes are] asked to determine complex legal issues, sometimes urgently, in a context in which philosophical, moral, ethical and clinical viewpoints are deeply divided. Ms Seales' tragic case is the epitome of this type of proceeding."¹⁰⁸

It does not seem unreasonable to suggest that it is more difficult to reach a novel, potentially far-reaching constitutional conclusion in such circumstances, as opposed to those where there is the time to fully and repeatedly consider the matter.

The above reference to issues on which "philosophical, moral, ethical and clinical viewpoints are deeply divided" points to a third possible explanation for the differing tone in each judgment. In *Taylor*, the right at hand was a "process" one—an individual's ability to participate in the electoral system—that the Crown accepted had been unjustifiably limited. There really was no substantive disagreement between the Crown and Mr Taylor over the basic status of the Electoral Act provision in regards the NZBORA. Instead, the question was what, if anything, can the courts do about the fact that it imposes unjustified limits on individual rights? Given the nature of the right at

¹⁰⁴ *Mangawhai Ratepayers' and Residents Association v Kaipara District Council (No 3)* [2014] 3 NZLR 85 (HC).

¹⁰⁵ *Battison v Melloy* [2014] NZHC 1462.

¹⁰⁶ *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191.

¹⁰⁷ *R v Antonievic* [2015] NZHC 1096.

¹⁰⁸ *Seales v Attorney-General* [2015] NZHC 1239 at [17].

hand—“arguably the most important civic right in a free and democratic society”¹⁰⁹ — and the lack of any attempt to argue that the law legitimately abrogated that right, it is relatively easy for a court to see its way clear to issuing a declaration. By doing so, Heath J joins in the triumphal march of humanity towards a commonly recognised end goal; “History is replete with stories about the struggle for equal and universal suffrage, whether on grounds of race, gender or otherwise.”¹¹⁰ And his Honour may be reassured that he is acting consistently with the original “vision” of the NZBORA, as described in the 1985 White Paper:

“For the most part [a Bill of Rights] would not control the *substance* of the law and of the policy which would continue to be elaborated in, and administered by, present and future parliaments and governments. Thus the Bill would reaffirm and strengthen the fundamental procedural rights in the political and social spheres—rights such as the vote, the right to regular elections, freedom of speech, freedom of peaceful assembly, and the freedom of association. These rights in a substantive sense can—in terms for instance of economic and social policy—be seen as value free. So they do not attempt to freeze into a special constitutional status particular substantive economic and social policies.”¹¹¹

By contrast, *Seales* asked the High Court to resolve in Ms Seales favour a fundamental social values conflict involving “ancient questions on which millions in the past have taken diametrically opposite views and still do.”¹¹² In order to do so, Collins J would not only have to find that it was the courts’ role to judge the merits of parliamentary legislation, but also rule as a *substantive* matter that parliament’s chosen answer to these question was wrong (in the sense of imposing an unjustified limit on Ms Seales’ affirmed rights). Such a ruling would be in the face of strong opposition from the Crown, backed up by evidence from a range of New Zealand and overseas experts in the field and supported by intervenors opposed to the practice of aid in dying. And had Collins J found and declared an inconsistency with the NZBORA, the message would be that Parliament, as the ultimate protector of individual rights in New Zealand’s democratic society, is at least *morally* obligated to amend the law in order to permit access to aid in dying for people in Ms Seales situation. In such circumstances it is understandable that his Honour, in finding that a ban on aid in dying was not inconsistent with Ms Seales rights, felt it necessary to defer to what he saw as Parliament’s chosen intention when regulating this area. The basis for the judiciary imposing an alternative regulatory principle is uncertain, to put it mildly.

¹⁰⁹ *Taylor (Declaration)* [2015] NZHC 1706 at [2].

¹¹⁰ *Ibid* at [4].

¹¹¹ Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 28. See also *Taylor (Declaration)* [2015] NZHC 1706 at [6].

¹¹² *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 at [54] per Lord Steyn.

The final possible explanation for the different tone to these two judgments relates to a perhaps unconscious, and certainly unvoiced, judicial assessment of parliamentary behaviour. Put simply, it may be that the two judgments reflect a differing conclusion on whether Parliament has earned the right to decide the matter at hand in the way that it has. I am straying into the realm of speculation a little here as there are very good reasons of comity why the courts will be reluctant to express direct criticism of the parliamentary processes used to pass an enactment.¹¹³ Nevertheless, I suspect that the casual, almost contemptuous way in which a bare majority of MPs stripped the right to vote from all sentenced prisoners reduced the strength of the claim that the Court ought to defer to that decision and refrain from expressing formal disagreement with it.¹¹⁴ Furthermore, High Court judges are not so insulated from the political world of Wellington that they cannot accurately assess the chances of MPs deciding to revisit the law governing prisoner voting to remedy the NZBORA inconsistency without some sort of external prompt. The rights of prisoners simply are not a matter likely to gain much traction in the current political climate, unless Parliament is given a reason to care about them.

In contrast, the fact that in the last couple of decades Parliament has twice given quite serious consideration to Bills that would permit forms of aid in dying, combined with a realistic probability that such measures will again come before the House, provides reason to leave the issue solely within the parliamentary realm. If and when such a measure does come back before the House, the courts also can be confident that the genuine merits of the matter will be discussed in an honest and engaged way. Admittedly, Collins J sounded a downbeat note about how Parliament has dealt with the matter to date: "I appreciate Parliament has shown little desire to engage in these issues. The three private members bills that have attempted to address the broad issues raised by Ms Seales proceeding gained little legislative traction."¹¹⁵ However, the issues involved in end of life situations are ones that potentially affect the entire population, rather than being relevant only to a small group viewed with hostility by the general public. MPs thus have a very strong incentive to care about the issue of aid in dying.

¹¹³ The closest that Heath J comes to openly criticising how Parliament took away the right of prisoners to vote is when his Honour notes: "Unusually, the Bill was referred to the Law and Order Committee. Typically, the Justice and Electoral Committee is the select committee that considers proposed changes to electoral laws." See *Taylor (Declaration)* [2015] NZHC 1706 at [14].

¹¹⁴ See also Andrew Geddis, "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] N Z Law Rev 443, 472-474.

¹¹⁵ *Seales v Attorney-General* [2015] NZHC 1239 at [211].

In speculating that the quality of parliamentary engagement with the issues might underlie the different approaches taken in *Taylor* and *Seales*, I have in mind Tipping J's "target" metaphor from *R v Hansen*. In the course of discussing the application of s 5 of the NZBORA and the degree of "deference" that ought to be accorded to Parliament's chosen policy response, his Honour suggested:

"The court's view may be that, in order to qualify, the limitation must fall within the bull's-eye. Parliament's appraisal of the matter has the answer lying outside the bull's-eye but still on the target. The size of the target beyond the bull's-eye will depend on the subject matter. The margin of judgment or discretion left to Parliament represents that area of the target outside the bull's-eye. Parliament's appraisal must not, of course, miss the target altogether. If that is so Parliament has exceeded its area of discretion or judgment."¹¹⁶

I would broaden this general observation to *all* the points in NZBORA analysis at which the courts are required to consider whether to impose their own view of a matter for Parliament's; while also including in it a judicial assessment of how well Parliament has performed its deliberative task when deciding what rights limiting measure to adopt, as well as the chances that Parliament may revisit the matter in the future.

Such an approach also reflects the difference in outcome between the *Atkinson v Ministry of Health* and *CPAG* cases. In *Atkinson*, the High Court accepted:

The more considered and refined the decision, the greater the deference. In carrying out this exercise the Court must consider who has been the decision-maker, and the nature of the decision. It is relevant to consider the extent to which the policy has been endorsed by Parliament or Cabinet, *and whether the policy is in fact the result of a firm and final result of a considered process*. If it is not the clearly articulated consequence of a considered process, but is rather a practice where the Government body itself has not reached a firm policy conclusion, or indeed has doubts about the practice itself, there may be less deference.¹¹⁷

The Court of Appeal upheld this approach as: "less deference should be afforded to a less well articulated policy. ... We see [this] statement as reflecting the practical reality of the situation. *As a matter of fact, it is harder to defer when the nature of the policy is unclear.*"¹¹⁸ By contrast, in the *Child Poverty Action Group* case the Court of Appeal found that while "it is possible to envisage a combination of the various options advanced ... but for us to weigh up the pros and cons of the possible combinations would be to stray beyond our role. *In an area where there are a range of legitimate policy choices, an approach has been adopted following conscientious consideration*

¹¹⁶ [2007] NZSC 7; [2007] 3 NZLR 1 at [119].

¹¹⁷ [2010] NZHC 2401; (2010) 9 HRNZ 47 at [147] (emphasis mine).

¹¹⁸ [2012] NZCA 184; [2012] 3 NZLR 456 at [149] (emphasis mine).

of those options."¹¹⁹ Unsurprisingly, given these different assessments of the quality of the process giving rise to each policy decision, the Courts declared the former to be inconsistent with the NZBORA, while the latter was given a judicial pass.

Conclusion

I finish with a few thoughts as to whether *Seales* and *Taylor* may be the harbingers of a new (or, at least, increased) wave of public interest litigation, in which individuals or groups otherwise unable to get Parliament to take action in their favour seek to use the judiciary's declaratory power to bolster their political position. After all, the fact that a declaration of inconsistency has precisely zero effect on an enactment's formal legal status means that its sole value lies in the publicity (and consequent political pressure for change) that it may engender. This point was freely admitted in the *Taylor* litigation:

[The prisoners' lawyer] frankly acknowledged that the objective in securing [declaratory] relief was to raise public awareness about the prisoners' rights to vote, making the point that there was a public interest in making known the fact that the legislature had violated prisoners' rights. He explained that the Fourth Estate had a role to play in raising that awareness and that they were more likely to take notice of something in the form of an order of the Court than of observations merely made in the course of reasons for judgment.¹²⁰

Now that declarations of inconsistency appear to be "a thing", as the kids apparently say, might we expect to see a rush of excited litigants beating a path to the High Court in pursuit of this shiny new remedy?

I think such an outcome is unlikely for a number of reasons. The first has to do with the practicalities of bringing a claim for a declaration before the High Court. In this regard, the plaintiffs in *Seales* and *Taylor* were somewhat unusual. Ms Seales was the recipient of extensive pro bono assistance from one of New Zealand's leading law firms, with no less than three counsel representing her interests in court without her having to pay a cent. Mr Taylor (who really drove the prisoners' claim for a declaration) is a *sui generis* figure; combining quite respectable self-taught legal skills, an independent source of income from property investments and the extensive free-time afforded to a prisoner serving a lengthy jail sentence. It is questionable whether many other potential plaintiffs will enjoy similar advantages. Instead, they will find themselves having to fully fund a claim in the High Court—an exercise that likely will set them back

¹¹⁹[2013] NZCA 402 at [129] (emphasis mine).

¹²⁰ *Taylor (Strike-out)* [2014] NZHC 1630 at [46].

some tens-of-thousands of dollars—simply to have a judge issue her or his considered opinion that some statute is inconsistent with the NZBORA. Tom Hickman recently has suggested that as such an outcome “is little more than a constitutional custard pie”,¹²¹ and rhetorically notes that “[potential plaintiffs] will be advised that, even if they win, the legislation will remain in full force and effect, and the judgment will not be binding. Can it really be expected that they would bring a claim to the courts for a declaration [of inconsistency]?”¹²²

The question whether court action is worth it then points to a second issue with the new declaratory remedy. If it is to be in any way successful, then it needs to be at least capable of triggering a political response. The assumed mechanism for doing so is public attention; a formal declaration will garner media attention that informs the general public of the Court’s view, who in turn will demand that elected representatives act to undo the unjustified rights infringement. Such a claim is, of course, an empirical one that may or may not be borne out in practice. And the immediate response to the issuing of a declaration in *Taylor* is not promising. Certainly there was *some* media attention paid to the matter, if only to note the novel constitutional nature of Heath J’s ruling.¹²³ That media attention also was far, far greater than that paid to the Supreme Court’s *sotto voce* indication of NZBORA inconsistency in *R v Hansen*.¹²⁴ Nevertheless, the media’s interest had dissipated within a week, even before the Crown decided to appeal the decision to the Court of Appeal. Nor did it appear to spark any great public outcry for a change to the Electoral Act to undo the NZBORA inconsistency. Indeed, there was no discernible public response to the ruling at all.

Ironically perhaps, Ms Seales unsuccessful bid for a declaration of inconsistency appears to have produced the opposite outcome. Despite being a technical loss, Ms Seales’ case placed the issue of aid in dying firmly on the public (and hence the parliamentary) radar. Media coverage of Ms Seales’ claim was ubiquitous and almost entirely sympathetic towards her position. Public sentiment in

¹²¹ Tom Hickman, “Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model” [2015] NZ Law Rev 35, 43.

¹²² *ibid.* at 54.

¹²³ See, e.g., Aimee Gulliver, “Prisoners should be allowed to vote: High Court”, 24 July 2015, stuff.co.nz; Kate Newton, “Prisoner voting law breaches human rights – judge”, 25 July 2015, radionz.co.nz; “Editorial: Government should act on High Court Bill of Rights ruling”, 27 July 2015, *The Press*.

¹²⁴ The only media account of this decision I have been able to find is a short account in the *New Zealand Herald*, which simply noted that Mr Hansen lost his appeal and quoted from Blanchard J’s (dissenting) judgment on the evils of the drug trade. The NZBORA aspect to the case was not mentioned at all. See “Dope dealer’s appeal fails”, 21 Feb 2007, nzherald.co.nz.

favour of permitting some form of aid in dying appears to have solidified in its wake.¹²⁵ Following the receipt of a petition from the Voluntary Euthanasia Society, the House's Health Select Committee has undertaken to hold a wide-ranging inquiry into the various issues surrounding end of life choice. The Act Party's sole MP, David Seymour, has promised to introduce into the members ballot a bill permitting aid in dying. As such, the fact that Ms Seales "lost" in Court seems almost irrelevant to the response. Even if she had successfully gained a declaration from Collins J, it is hard to see what more parliamentary actors might have done as a result. Just as, we might note, parliamentary actors could hardly have done anything less in respect of revisiting the issue of prisoner voting even had Mr Taylor failed to gain a declaration from Heath J.

It is, of course, too early to draw absolutely definitive conclusions about the effectiveness of the new NZBORA declaratory remedy. However, the preliminary evidence is grounds for some pessimism for anyone who thinks it may be a useful addition to "rights dialogue" in New Zealand. And perhaps that fact is not particularly surprising. After all, Parliament has proven remarkably able to resist the assumed disciplining effects of the Attorney-General's s 7 reporting function ever since the NZBORA's enactment. As Sir Geoffrey Palmer notes in his paper for this conference;

On thirty-eight occasions parliament has passed Acts with provisions that contained in the opinion of an Attorney-General a breach of the Bill of Rights - meaning not only that a right or freedom has been breached but also that the breach cannot be justified in a free and democratic society, as required by section 5.

Given that a s 7 notice reflects a sort of legal best-guess as to what the courts may say about the NZBORA consistency of a proposed piece of legislation, enacting it in spite of that advice demonstrates a confidence to impose parliamentary views on rights over the judicial. The basis for that confidence then lies in a belief that there will not be any real political cost to doing so—the voting public simply will not mind their representatives taking this course of action. It may then be asked why we might expect things to be any different when the judiciary's views on the rights consistency of legislation are directly expressed *after* legislation is enacted, by way of a declaration of inconsistency. In which case, the advent of the declaratory remedy may well be like Macbeth's account of life itself: "Full of sound and fury, signifying nothing."

¹²⁵ An opinion poll taken in July of 2015 found some 75% of respondents answering "yes" to the question "think a person who is terminally or incurably ill should be able to request the assistance of a medical practitioner to end their life?" See Colmar Brunton, "One News Colmar Brunton Poll" 19 July 2015 available at http://www.colmarbrunton.co.nz/images/150803_ONE_News_Colmar_Brunton_Poll_report_11-15_July_2015.pdf.