New Zealand – Prisoners' voting rights, declarations of inconsistency and legal enforceability of manner-and-form entrenchment – *Attorney-General v Taylor* [2018] NZSC 104 – *Ngaronoa v Attorney-General* [2018] NZSC 123

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The Supreme Court of New Zealand was called on to address two long-standing and important constitutional issues last year when determining appeals in a series of litigation contesting legislation disenfranchising prisoners: first, the jurisdiction to issue declarations of inconsistency under the New Zealand Bill of Rights Act 1990 and, secondly, the legal enforceability of manner-and-form entrenchment under the Electoral Act 1993. In *Attorney-General v Taylor,* the court confirmed the power to issue declarations of inconsistency but, in *Ngaronoa v Attorney-General,* the court dodged questions about the legal effect of entrenchment.[1]

The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (Disqualification Act) stripped all sentenced prisoners in custody on election day of the right to vote, when previously only those serving more than three years were disenfranchised. The amendment was introduced as a Member's Bill by a backbench government MP. The Attorney-General reported that the Bill unjustifiably breached the right to vote protected by s 12 of the NZ Bill of Rights Act. However, the Bill was still passed by a majority of 63 votes to 58, with the support of most government parties in Parliament.

Taylor—a notorious prisoner litigant—and some other prisoners sought a formal declaration of inconsistency on the basis that the Disqualification Act breached their right to vote. The NZ Bill of Rights is an ordinary statute, not

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1 *Attorney-General v Taylor* [2018] NZSC 104; [2019] 1 NZLR 213; *Ngaronoa v Attorney-General* [2018] NZSC 123; [2019] 1 NZLR 289.

superior law, so the courts have no power to invalidate inconsistent statutes—a point explicitly reflected by s 4. However, for decades, the courts have toyed with the idea of granting declarations of inconsistency, especially as the text of the NZ Bill of Rights Act does not address remedies.[2] In a constitutional first, the lower courts granted a formal declaration of inconsistency.[3] The Attorney-General appealed on behalf of the Crown, contesting the courts' jurisdiction to grant such a declaration, as well as the discretion to do so in this case (but not defending the assessment of unjustified inconsistency per se). In many respects, the Crown's position was difficult to maintain for two reasons. First, a week prior to the hearing, the government announced it would be moving to codify the power to grant declarations of inconsistency.[4] Secondly, the Crown accepted that the courts could *indicate* an unjustified inconsistency in the course of otherwise resolving interpretative questions under the NZ Bill of Rights Act. Thus, unable to seriously object to the competency of judges to make declarations, the essence of the Crown's objection was only to the judicial *invention* of a declaratory remedy through the common law.

The Supreme Court in *Taylor* ruled, by a 3-2 majority, that the courts have the power to issue declarations of inconsistency and went on to formally declare that the Disqualification Act unjustifiably breached the rights of prisoners to vote.[5] The need for effective judicial remedies weighed heavy on the mind of the majority. The text and purpose of the NZ Bill of Rights Act, they ruled, supported 'the court exercising its usual range of remedies of which a declaration is a part';[6] and granting formal declarations of law was 'consistent with the usual function of the courts'.[7] In contrast, the minority doubted whether these declarations

2 Andrew S Butler, 'Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?' [2000] NZ L Rev 43; Claudia Geiringer, 'On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act' (2009) 40 VUWLR 613; Andrew Geddis, 'New Zealand: prisoner voting and consistency with the New Zealand Bill of Rights Act 1990' [2016] PL 352; Claudia Geringer, 'The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives From *Attorney-General v Taylor*' (2017) 48 VUWLR 547

3 *Taylor v Attorney-General* [2015] NZHC 1706; [2015] 3 NZLR 791; *Attorney-General v Taylor* [2017] NZCA 215; [2017] 3 NZLR 24

4 Andrew Little and David Parker, 'Government to provide greater protection of rights under the NZ Bill of Rights Act 1990' (Media Release, 26 February 2018); Cabinet Paper, 'Declarations of Inconsistency with the New Zealand Bill of Rights Act' (19 February 2018) SWC-18-SUB-6.

5 *Taylor (SC)*, at [71].

6 *Taylor (SC)*, at [50] (Glazebrook and Ellen France JJ; and [74] (Elias CJ (in agreement, writing separately)).

7 *Taylor (SC)*, at [53].

amounted to an effective 'remedy' and were concerned by the judicial creation of the remedy.[8]

Taylor, along with other prisoners, also challenged the validity of the Disqualification Act, arguing it amended one of the handful of 'reserved provisions' entrenched by s 268 of the Electoral Act 1993 and was not passed by the stipulated 75 per cent majority (or sanctioned by a majority in a public referendum). Taylor and other prisoners, including Ngaronoa, also challenged the validity of the Disqualification Act in separate proceedings. They argued the Disqualification Act amended one of the handful of 'reserved provisions' entrenched by s 268 of the Electoral Act 1993 and was not passed by the stipulated 75 per cent majority (or sanctioned by a majority in a public referendum).

The Supreme Court in *Ngaronoa* ruled, by a 4-1 majority, that the Disqualification Act did not touch any reserved provisions: only the minimum voting age was entrenched, not the qualification of electors generally.[9] Thus, the court found it unnecessary to express a view on whether the Disqualification Act could be declared invalid if it *had* purported to amend entrenched provisions without being passed by the necessary enhanced majority. However, the Solicitor-General conceded the point in argument:[10]

> The Crown's position is that if the manner and form provision interpreted by this Court has not been met, then the consequence is that the [Disqualification] Act has been invalidly enacted, and has no effect.

And, while the Court preferred to resolve the point after full argument, it acknowledged that it seemed 'the pendulum has swung in favour of [legal] enforceability'.[11]

Looking forward, it will be interesting to see how the government and Parliament responds to the declaration of inconsistency. The government initially signalled that addressing the inconsistency was 'not that much of a priority',[12] which is perhaps more a reflection of coalition dynamics and the understanding that one of the minor parties within government is not supportive of change. And work continues on the codification project, with few details emerging so far.

8 *Taylor (SC)*, at [122] (William Young and O'Regan JJ).

9 *Ngaronoa*, at [70] (William Young, Glazebrook, O'Regan and Ellen France JJ; Elias CJ dissenting).

10 *Ngaronoa v Attorney-General* (NZSC 102/2017; [2018] NZSC Trans 6) at 55.

11 *Ngaranoa*, at [70], referring to *Re Hunua Election Petition* [1979] 1 NZLR 251 (SC); *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) and *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC), along with *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262; *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (PC); and *R v Mercure* [1988] 1 SCR 234.

12 'Prisoners' right to vote currently not a priority for Parliament – Little' (RNZ, 9 November 2018) <www.rnz.co.nz>

While mandating the judiciary to issue declarations is pretty straightforward, providing a framework for legislative response is somewhat tricky, given the strong continuing commitment to parliamentary supremacy in New Zealand.