DEFERRING RELIEF TO ALLOW TIME FOR A LEGISLATIVE RESPONSE

Rt Hon Sir Ivor Richardson

The paper focuses on two questions. First, in what circumstances have New Zealand courts exercising statutory powers deferred final judgment so as to allow time for the Legislature to enact any modifying legislation and how have the Executive and Legislature responded? Second, where the focus is on the courts, on what principled bases do the courts and should the courts exercise their statutory powers? Decisions under the Human Rights Act 1993, the Declaratory Judgments Act 1908 and the Judicature Amendment Act 1972 and analogous situations are discussed.

I INTRODUCTION

This paper focuses on one aspect of the co-operative functioning of the three branches of government. It does so by discussing areas of the law where courts in exercising statutory powers leave scope for remedial legislation. First, the Human Rights Act 1993 actually specifies the course to be followed by the respective branches of Government in unlawful discrimination cases.¹ Next, the Declaratory Judgments Act 1908² and the Judicature Amendment Act 1972 are key statutes and the 1972 Act expressly provides for rulings affecting the proposed exercise of

---

¹ More precisely s 92J Human Rights Act 1993 provides for a declaration of inconsistency as the only remedy available when the Human Rights Review Tribunal finds relevant unlawful discrimination by Government and related persons; and s 92K goes on to specify the steps which follow.

² The Declaratory Judgments Act 1908 s 3 provides: "Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute ... such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity ...”. By s 9 a declaratory judgment or order may be given or made "by way of anticipation" of any act or event which has not yet happened and s 10 states that the jurisdiction "shall be discretionary".

* Distinguished Fellow, Law Faculty, Victoria University of Wellington.

The author thanks those who contributed to the discussion of the draft of this paper at the VUW Law Faculty Staff Seminar on 28 July 2011.
statutory powers. In the course of discussing their provisions and relevant cases, other examples of allowing time for legislative consideration will be noted.

In Coburn v Human Rights Commission\(^3\) the Declaratory Judgments Act was applied flexibly to limit the operation of the orders made and give them prospective effect, so as to allow for any governmental response. Baragwanath J, writing as President of the New Zealand Law Commission in the Preface to Human Rights Law and Practice, characterised Coburn as:\(^4\)

... providing the first purely prospective judgment in English and New Zealand legal history of which I am aware. This was necessary to avoid destroying the settled expectation and security of those who were party to existing [superannuation] schemes and yet give full effect to the new policy expressed by Parliament.

In considering each subject area in turn, it will become apparent that this paper does not review cases in other common law jurisdictions or the jurisprudential and constitutional considerations which may be raised. To do so would have been a major undertaking. The lengthy review in In re Spectrum Plus Ltd (in liquidation),\(^5\) including a brief survey of the approaches in other common law jurisdictions, is not comprehensive yet runs to over 50 pages as does the discussion in R v Hines.\(^6\) To sharpen the focus, this paper confines itself to a straightforward account of the New Zealand cases. Reviewing the experience in other jurisdictions and jurisprudential and constitutional considerations which may be considered applicable in New Zealand could be the subject of a subsequent study.\(^7\)

II DECLARATIONS OF INCONSISTENCY UNDER THE HUMAN RIGHTS ACT

As enacted in 1993, the Human Rights Act\(^8\) exempted the Government and its agencies from compliance with the statute's human rights standards until 31

---

\(^3\) Coburn v Human Rights Commission [1994] 3 NZLR 323.
\(^4\) Baragwanath "Preface: Insurance and the Human Rights Act 1993" (1998) 4 Human Rights Law and Practice 4 at 6; Under the Judicature Amendment Act 1972 judicial review of the exercise of statutory power is a discretionary remedy. It extends to the proposed exercise of statutory powers of decision (s 4(1)). It allows for interim orders and declarations to be made for the purpose of preserving the position of the applicant before the final decision of an application for review (s 8). Clearly the statute allows for orders and declarations for prospective relief suspended to enable the Government to consider corrective action, including enacting remedial legislation.
\(^5\) In re Spectrum Plus Ltd (in liquidation) [2005] 2 AC 680.
\(^6\) R v Hines [1997] 3 NZLR 529.
\(^7\) See below pp 383–387.
\(^8\) Human Rights Act 1993, ss 151–152.
December 1999. The report from the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001 explained the position in this way:9

The Human Rights Act left the State relatively free to discriminate while stipulating a very high standard of non-discrimination for private individuals. However, section 151, the sunset provision in the Human Rights Act [providing for expiry of that protection, which by then had been further extended to 31 December 2001] was expected to put public and private sectors on the same footing. It assumed that during those years since 1993 the State would have been able to examine all its practices and have modified them or achieved specific legislation to preserve them, so that it could be subject to the same anti-discrimination burdens as private individuals and bodies.

For reasons not explained in the debates on the 2001 Bill or in the Select Committee report, that was not done.10 It seems that the declaration of inconsistency provisions importing the New Zealand Bill of Rights Act 1990 (BORA) standards was seen as a half-way house response to the problem.

The Human Rights Amendment Bill 2001 made various major changes to the 1993 Act and was further amended following extended debates before, during and after consideration by the Justice and Electoral Committee.

The amending legislation was opposed by National Party members on four grounds summarised by the Hon Dr Wayne Mapp:11 (1) For shifting the focus of the Human Rights Act from dealing primarily with individual complaints of discrimination to an educative role; (2) For shifting to dealing with group rights; (3) For merging the Office of Race Relations Conciliator with the Human Rights Commission; and (4) For the major constitutional change involved in empowering the Human Rights Review Tribunal to grant declarations of inconsistency.

The approach taken under the 2001 Amendment Act in proceedings before the Human Rights Review Tribunal, provided for under the new Part 4, as expressed in s 20I is:

... that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act

---

10 Ibid.
11 (8 November 2001) 596 NZPD 12990 and 13724.
1990 is in breach of this Part if the act or omission is that of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990.

Additionally, s 20J (1) "applies only in relation to an act or omission of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990, namely:"

(a) the legislative, executive, or judicial branch of the Government of New Zealand; or

(b) a person or body in the performance of any public function, power, or duty conferred or imposed on the person or body by or pursuant to law.

Section 20L(2) goes on to provide that an act or omission is inconsistent with s 19 of BORA if it "(a) limits the right to freedom from discrimination affirmed by that section; and (b) is not under s 5 of BORA a justified limitation on that right." Additionally, s 21A(1) confines unlawful discrimination under Part 2 by those governmental and public sector bodies and persons "which relate to discrimination in employment matters, racial disharmony, and social and racial harassment and victimisation".

Finally, ss 92J and 92K in Part 3 specify details of any declarations for breach of Part 1A and the effect of the declarations. If the declaration is not overturned on appeal or the time for lodging an appeal expires, s 92K(2) requires the Minister to present to the House of Representatives "(a) a report bringing the declaration to the attention of the House of Representatives; and (b) a report containing advice on the Government’s response to the declaration."

Howard v Attorney-General\textsuperscript{12} and Atkinson v Ministry of Health\textsuperscript{13} are the only instances of declarations granted under those provisions.

A Howard v Attorney-General

Mr Howard injured his hand in 1989 when he was in work. In November 2004, when he turned 65, he became entitled to New Zealand Superannuation and in terms of s 85 of the Injury Prevention and Compensation Act 2001 and clause 52 of Schedule 1 of the Act his entitlement to weekly compensation ended.\textsuperscript{14} He claimed that the cessation of entitlement to vocational rehabilitation assistance, which was


\textsuperscript{14} Injury Prevention and Compensation Act 2001 was renamed the Accident Compensation Act 2001 by s 5(1)(a) of the 2010 Amendment Act.
linked to weekly compensation under those provisions, discriminated against him on the grounds of age.

On 15 January 2008, the Tribunal granted a declaration. At the second reading of the Injury Prevention and Compensation Amendment Bill on 17 June 2008 the Minister foreshadowed amendments at the Committee stage, including what became a new s 52(2) removing the upper age limit for vocational rehabilitation assistance.\textsuperscript{15} The Amendment Act came into force on 1 October 2008.

\textbf{B Atkinson v Ministry of Health}

In \textit{Atkinson}, where nine plaintiffs are listed, the Tribunal, comprising Judge JE Ryan, Dr WI McKean and Mr S Solomon, granted a declaration on 8 January 2010 that the Ministry's practice and/or policy of excluding specified family members from payment for the provision of funded disability support services was inconsistent with s 19 of BORA in that it limited the right to freedom from discrimination, both directly and indirectly, on the grounds of family status and was not, under s 5 of that Act, a justified limitation.\textsuperscript{16}

The crucial issue for the Tribunal was whether parents, spouses and resident family members of qualifying disabled persons are entitled to payment for providing disability support services, contrary to longstanding policy and/or practice of the Ministry.\textsuperscript{17} Ministry policy is that support services provided by such family members are regarded as "natural supports" which do not attract payment but when the same services are provided by others they are treated as disability support services for which payment can be made.

Following an 18 day hearing, the Tribunal reviewed the material tendered, submissions of counsel and all the resulting questions for determination. The Tribunal summarised its findings in this way:\textsuperscript{18}

\begin{enumerate}
\item We do not accept that such support by family members given to heavily dependent persons, particularly when they reach adolescence and adulthood, can be considered as "natural" support. The NASC [needs assessment and service coordination] model should acknowledge the difference between the
\end{enumerate}

\begin{footnotes}
\item\textsuperscript{15} (17 June 2008) 647 NZPD 16635.
\item\textsuperscript{16} \textit{Atkinson v Ministry of Health}, above n 13, at [232].
\item\textsuperscript{17} Ibid, at [6].
\item\textsuperscript{18} Ibid, at [230].
\end{footnotes}
natural support families can provide, as distinct from the disability support
needed by disabled persons.

(2) Additionally, we do not find the argument that this support should be given as
part of a "social contract" is supportable – we are not convinced that there is an
unwritten contract in New Zealand of sufficient force to justify this policy
position, particularly when there are numerous instances, as set out, whereby
the state has offered financial assistance to families, precisely because of
family status.

(3) As to a "rational connection to its purpose", we do not believe it is justified
because it does not appear to promote equality of outcomes, encourage the
independence of disabled persons or support the development of family
relationships in the same way as for non-disabled people – in fact, it could
have the opposite effect on these grounds.

(4) Nor do we accept the argument that it is rational because it avoids
professionalising or commercialising family relationships when, as we point
out, numerous such arrangements already exist and have existed for
generations. We question why persons with disabilities should be excluded
from such relationships, because they are disabled.

(5) We do accept that there is a risk that such payments may discourage disabled
family members from leaving home because of the financial repercussions, but
note that such risks can be mitigated by careful monitoring and counselling.

(6) We agree with the need to ensure that carers do not undertake unsustainable
care burdens and become socially isolated. We see the risk of this as likely to
be greater where care is rendered by family members outside of Ministry
assessment and funding practices. The Ministry monitors these concerns and
has policies in place to alleviate these risks.

(7) As to the important issue that such a policy is needed for reason of financial
sustainability; we have found no evidence to show, convincingly and
unarguably, that the financial impact of a policy to pay family members
currently excluded by the policy would not be sustainable. Certainly, a detailed
assessment does not appear to have been undertaken when the policy was first
formulated and in subsequent years, to date. The analyses carried out for this
hearing by expert witnesses for the parties, do not clarify the potential impact
of a policy change, to the extent that a precise or even approximate financial
impact could be stated with any confidence.

Our own intuitive view is that the impact is not likely to be great within the
disability sector.
Finally, significant policy decisions in the disability sector should seek to apply the objectives of the NZ Disability Strategy, and as noted, the application of the policy to exclude certain family members from paid care, acts against several objectives of the strategy.

The Minister’s appeal against the decision was dismissed by the High Court. The High Court’s conclusions are well-summarised in the head note which, omitting case and paragraph references, reads:

1. The Tribunal was correct in its conclusion that the appropriate group against which the discriminatory impact of the policy was to be assessed was all persons ‘able and willing’ to provide support services to the Ministry, without further qualification. Such a comparator exercise indicated that the policy was prima facie discriminatory.

2. While not every distinction was discriminatory, evaluation of the different treatment of like persons or groups was best considered when determining under s 5 NZBORA whether a ‘justified limitation’ on the rights under s 19 existed. The structure of ss 20L(2) and 21 Human rights Act 1993 (‘HRA’), and the evolution of s 19 NZBORA indicated that the New Zealand legislation did not contemplate an evaluation of the quality and nature of discrimination when a prima facie breach was established. There was also no justification for treating ‘family status’ differently from the other grounds of discrimination listed in s 21 HRA.

3. The court was satisfied that the respondents had been distinguished and disadvantaged by the Ministry from those in comparable circumstances due to a prohibited ground of discrimination. Both the respondent parents, who were barred from paid care giving when willing and able to do so, and the respondent children, whose choice of carer was more limited than others in comparable circumstances, had their rights to freedom from discrimination under s 19 NZBORA infringed.

4. Although the Ministry’s definition of eligible carers clearly excluded the respondents as family members, the extent of the excluded group was unclear. The history, and the lack of precise definition, demonstrated a lack of any developed exclusion policy. However, the court accepted the existence of an ill-defined practice to exclude family members from providing any of the

---

19 Ministry of Health v Atkinson (2010) 9 HRNZ 1 (Asher J, JJ Grant and P Davies) at [293].
relevant services, and that those allocating contracts in the Ministry would regard such a practice as a policy to be recognised, although some exceptions were allowed.

(5) The court concurred with the Tribunal that the Ministry had not established its alleged 'social contract'. The plaintiffs' circumstances showed a clear distinction between 'orthodox' parental duties and those undertaken by the parents of severely disabled children, which lay outside the boundaries of any reasonable 'duty of care'. The lack of material justifying such a contract, a division of opinion within the Ministry itself, and the relevant case law convinced the court that there was no reasonable basis for using the 'social contract' model to justify the policy.

(6) At the first stage of its inquiry the court would examine the Ministry's stated objectives for the policy on a stand-alone basis, considering whether they represented genuine concerns and were sufficiently important in themselves to warrant curtailing the right to freedom from discrimination. When the 'social contract' and focus on 'equality of outcomes' for disabled people were excluded, the court differed from the Tribunal in finding the remaining objectives to be important, genuine and credible concerns in a free and democratic society. The objectives were arguably insufficient in themselves. However, collectively they substantiated the policy as serving purposes of sufficient importance to justify curtailing the right to freedom from discrimination, given the public importance of sustainably administering funds available for disabled persons in New Zealand.

(7) The 'social contract' had no rational connection with the policy, which went further than was necessary to support the family ties of 'normal' families, or with that of achieving 'equality of outcomes' for disabled persons. However, not paying family members had at least a rational connection to the objectives of avoiding financial reliance by families, avoiding interference in and commercialisation of family relationships, avoiding unsustainable care burdens, ensuring proper controls, and promoting fiscal responsibility.

(8) Family status, and in particular, being a family member of a disabled person, did not carry the history of disadvantage associated with some other grounds of discrimination, and the court accepted the policy did not result from caprice or social prejudice. However, it was not unambiguously endorsed or clearly articulated within the Ministry. Although the ACC payment system for family caregivers of disabled persons had problematic aspects and was more short-term, it suggested how the Ministry's objectives could be managed. The Ministry had not demonstrated that it could not address the concerns raised by
the objectives through appropriate vetting, training and monitoring of family caregivers. It had provided little financial data on the likely take-up rate of a paid family care-giving option among disabled persons to justify its claim of excessive cost. Accordingly the court was not satisfied that a blanket prohibition on employing family caregivers was ‘no more than necessary’ to achieve its purpose or proportionate to the importance of its objectives.

(9) The Ministry had failed to demonstrate that the infringement on the right to freedom from discrimination constituted by its policy was justified in a free and democratic society under s 5 NZBORA. The rigidity of the policy was also at odds with the flexible objectives of the New Zealand Disability Strategy and the emphasis on assistance to families in the United Nations Convention on the Rights of Persons with Disabilities. Although the court considered the Tribunal’s conclusions on the importance of the objectives and their rational connection with the policy were more appropriately addressed in terms of minimum impairment and proportionality, it agreed with its broad approach and conclusion. The Tribunal's declaration would stand and any remedies, which should give the Ministry time to finalise a considered policy, were a matter for the next hearing.

On 11 March 2011, Asher J granted leave to appeal to the Court of Appeal on particular questions of law arising in the proceedings and that appeal is to be heard in 2012. Final resolution is a long way off. This account of the case may give some flavour of the untidy facts and the difficulties facing parties, counsel and judges in grappling with the policy-laden questions.

III PROSPECTIVE RELIEF UNDER THE DECLARATORY JUDGMENTS ACT

Three relatively recent decisions in unrelated areas of the law bring out the breadth of prospective relief under the Act.

A Coburn v Human Rights Commission

In Coburn the application by Mr Coburn and the other trustees of the BHP NZ Steel Ltd superannuation scheme sought declarations as to any changes required by the Human Rights Act 1993 to the superannuation scheme and, in particular, in

---

21 Coburn v Human Rights Commission, above n 3.
relation to the Act's prohibition against using marital status, sexual orientation or age as bases for determining the availability of superannuation benefits.

Thorp J noted that the determination of those questions affected some 100 other superannuation schemes, which between them administered net assets having a total value of the order of $8 billion, approximately half the total assets held by registered superannuation schemes. Further, the determination of the principal issue, the lawfulness of providing benefits to the surviving spouses of members of superannuation schemes, was a matter of direct and major significance to tens and possibly hundreds of thousands of members and spouses of members of the schemes; and in the context of the New Zealand economy the latter would principally be the wives of employee members and former members.

And, the Judge continued, the application raised interesting and important issues concerning the development of human rights law in New Zealand and its search for equality of opportunity for all citizens and the elimination of wrongful discrimination.

The particular BHP NZ Steel scheme was a voluntary one providing benefits on the basis of members' final pay at the time of retirement for a minimum of 5 years (primary pensions); and on the death of a member within that period, to the surviving spouse or deceased's estate for the balance of the 5 years. After the initial 5 year period, the surviving spouse was entitled to receive benefits at the rate of half of the member's primary pension for the remainder of the spouse's life.

Thorp J concluded that the scheme came within the Human Rights Act; that superannuation was an aspect of employee member's remuneration and therefore the automatic provision of spousal pensions constituted an unlawful discrimination on the basis of marital status, and a contravention of the Act; that the exemption under s 73(1) of the Act to encourage positive discrimination, could not be applied to justify the unlawful discrimination arising from the spousal pension arrangements; the use of age qualifications for establishing death or redundancy benefits did not constitute breaches of the age discrimination provisions of the Act; and, given the irreconcilable inconsistency between the protection given to trust deeds by the Superannuation Schemes Act 1989 and the requirements of the Human Rights Act 1993 to amend non-complying deeds, the latter prevailed and the plaintiffs would be obliged to amend the trust deed to ensure compliance with the 1993 Act.

22 Ibid, at 327.
For the reasons he gave, Thorp J quickly concluded that the Court had jurisdiction under s 3 Declaratory Judgments Act to answer the questions raised in the proceedings and that the Court should not decline to do so under the discretion conferred by s 10 empowering the Court "on any grounds which it deems sufficient" to "refuse to give or make any such judgment or order".

The more difficult questions were whether the Court had power to declare the law prospectively and, if so, how the discretion should be exercised in the present case. The Judge concluded that a court had power to exercise its jurisdiction in a flexible way and, if need be, to limit the effect of its declaratory order, relying on Wybrow v Chief Electoral Officer23 and Glubb v Campbell24 where Gresson J, concerned that other officers of the Public Service not before the Court could be affected by a broad declaration, confined the declaration to the plaintiff’s personal rights.

The crucial question in Coburn was whether the Court should limit the effect of its finding that the scheme’s provision for spousal pensions breached the marital status principles. Thorp J reviewed, at some length, the similar criteria applied by the United States Supreme Court and the European Court of Justice for the purposes of deciding whether judgments should be limited in their temporal effect:25 namely (1) whether the question at issue and the ramifications of its resolution had been clearly foreshadowed; (2) whether retrospectivity would cause serious problems or impose inequitable results; (3) whether there was an issue of good faith or legitimate expectation; and (4) whether a retroactive declaration would assist or retard the operation of the legislation in relation to the principles of unlawful discrimination.

He went on to assess the relevance of considerations of fairness to those concerned which were emphasised in Secretary of State for Social Security v Tunnicliffe26 and L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd27 and concluded:28

---

23 Wybrow v Chief Electoral Officer [1980] 1 NZLR 147; discussed later in this paper.
28 Coburn v Human Rights Commission, above n 3, at 357.
... in this case there is no solution which does not involve some unfairness, and in the context of the decisions just reviewed it is in my view a case where a balance of unfairness lies against full retrospectivity, which would fall most severely on innocent parties whose expectations have been genuine and legitimate.

His judgment concluded with a summary of findings. The following are of particular relevance:29

(2) If no temporal limit were placed upon it, that finding [that the spousal provisions of the superannuation scheme breached the 1993 Act] would impact harshly upon existing members of the Scheme ... Spousal pensions would have to be reduced from 50 per cent to 35 per cent of primary pensions in order to provide equivalent benefits to unmarried members without increasing contributions. The losers in that rearrangement would predominantly be the wives of current Scheme members. Many would not now be able to make good their losses;

(4) To reduce its impact on Scheme members, and in accordance with some overseas precedent, the judgment holds that the 1993 Act shall only operate on contributions paid on or after 1 February 1994, when the Act came into effect. That will still require a major review of the Scheme by its trustees, and continuing uncertainty until it is completed;

(8) While the Court must respond to calls for interpretation of new legislation, it notes that the present application deals only with one of many schemes, each of which may need separate attention. The final determination of all those issues by the Courts would be a long and expensive business. Further, if the present judgment stands, fund managers will need time to rearrange their schemes and to consult with and explain their new positions to their members, a need which the Courts may not have the power to accommodate. In my view, all those factors suggest that legislative rather than judicial determination of at least the central issues would be the more appropriate course.

The Legislature responded promptly to that plea in enacting the Human Rights Amendment Act 1994 which provided expansive protection for affected superannuation schemes. Sections 2(1) and (3) of the Act are of particular significance in relation to the spousal benefit provisions on which Thorp J focussed. Section 2(1) provides:

... nothing in section 22 or section 44 or section 70 shall prevent or be taken ever to have prevented the provisions of a superannuation scheme or the trustees ... from

providing on the death of a member ... a benefit for the spouse of the member or a
person with whom that member was living in a relationship of marriage, without
providing a similar or corresponding or equivalent benefit on the death of other
members of the scheme.

By subs (3) the section applies "notwithstanding any judgment, decree or order of any Court... given or made before or after the commencement of this Act in proceedings commenced before the commencement of this Act." Thus, expanding the protection which Thorp J had accorded the BHP NZ Steel scheme.

B Auckland Area Health Board v Attorney-General

The second case is Auckland Area Health Board v Attorney-General.30 Mr L was suffering from an extreme case of Guillain-Barré syndrome and had been connected to an artificial ventilator on which he was completely dependent for over a year. With the support of Mrs L, the senior doctors involved at Auckland and the Board sought a declaration that the life-support system could be withdrawn without any of those responsible bearing responsibility for the ensuing death of the patient.

Following an extended hearing and submissions on the law Thomas J made the following declaratory order:31

If: (i) the doctors responsible for the care of Mr L, taking into account a responsible body of medical opinion, conclude that there is no reasonable possibility of Mr L ever recovering from his present clinical condition; (ii) there is no therapeutic or medical benefit to be gained by continuing to maintain Mr L on artificial ventilator support, and to withdraw that support accords with good medical practice, as recognised and approved within the medical profession; and (iii) Mrs L and the ethics committee of the Auckland Area Health Board concur with the decision to withdraw the artificial ventilator support; then, ss 151 and /or 164 of the Crimes Act will not apply, and the withdrawal of the artificial ventilator support for Mr L will not constitute culpable homicide for the purposes of that Act.

Thomas J's decision was discussed at some length by the Court of Appeal in Shortland v Northland Health Ltd32 where the Court dismissed an appeal from the dismissal of an application for judicial review of a decision to refuse dialysis treatment to a patient.

31 Ibid, at 255.
The Court noted that in the course of his judgment Thomas J had indicated "that before good medical practice would be held to have been demonstrated for the purpose of the issue before him various things had to be established" – as reflected in the declaration – but added that it did not follow that the Auckland criteria, which were framed for one situation, were necessarily applicable in their entirety to a different situation and the Court pointed particularly to the matter of consultation with appropriate medical specialists and the medical profession's recognised ethical body and having the fully-informed consent of the patient's family. 33 These difficult questions are helpfully discussed by Dr David Collins in "Prescribing Limits to life-prolonging treatment" 34 and by Professor PDG Skegg in "Omissions to Provide Life-Prolonging Treatment" 35 and Skegg and Patterson Medical Law in New Zealand. 36

C Hutt District Health Board v B

The most recent case is Hutt District Health Board v B 37 concerning a 7 year old child with a terminal genetic condition where the tube providing hydration and nutrition had become dislodged. Mallon J held that the acts/omissions of the health professionals involved in not reinserting the tube would not constitute culpable homicide under ss 151 and 164 of the Crimes Act 1961. 38

D Shortland v Northland Health Ltd

The Shortland case was also a striking example of response to the expressed urgency of obtaining the Court's decision. 39 The High Court's decision was announced in Whangarei on the morning of 10 October 1997, the appeal papers were lodged early in the afternoon, the Court of Appeal began the hearing shortly after 5 pm, heard extensive submissions from counsel and announced the decision dismissing the appeal shortly before midnight. Mr Shortland died the next morning.

33 Ibid, at 441.
35 PDG Skegg "Omissions to Provide Life-Prolonging Treatment" (1994) 8 Otago LR 205.
36 Skegg and Patterson Medical Law in New Zealand (Brookers, Wellington, 2006) at [19.3]–[19.7].
38 Ibid, at [3].
39 Shortland v Northland Health Ltd, above n 32.
E Wybrow v Chief Electoral Officer

Wybrow is the third illustration of the breadth of the jurisdiction under the Declaratory Judgments Act. Commonly known at the time as the "ticks and crosses" case, it turned on ss 106 and 115 of the Electoral Act 1956 governing the voting for members of the House of Representatives. Section 106 prescribed the method of voting and s 115 the method of counting the votes.

Section 106(1) provided that an elector "shall ... exercise his vote by marking his ballot paper by striking out the name of every candidate except the one for whom he wishes to vote". Section 115(2)(a)(ii) required a returning officer to reject as informal:

... any ballot paper that does not clearly indicate the candidate for whom the voter desired to vote: Provided that no ballot paper shall be rejected as informal by reason only of some informality in the manner in which it has been dealt with by the voter if it is otherwise regular and if, in the opinion of the Returning Officer the intention of the voter in voting is clearly indicated.

After the 1978 general election, two High Court decisions on election petitions had adopted a narrower approach than other reported decisions on election petitions. The Court of Appeal in Wybrow held that s 168, providing that the decision of the High Court on election petitions "shall be final and conclusive ... and shall not be questioned in any way", did "not fetter the Court's jurisdiction to consider questions of interpretation of the Act in other proceedings." As there had been a conflict between reported cases on a question that was purely one of law, the Court of Appeal should exercise its discretion under s 10 Declaratory Judgments Act and answer the question in issue. Turning to s 106 Electoral Act the Court said:

Compliance by voters will greatly simplify the counting of votes. It is a reasonable inference, borne out by affidavit evidence before the Court, that the great majority of voters will comply. But inevitably a small minority will not. In most cases non-compliance will probably be unintentional and through human frailty. In some cases

---

40 Wybrow v Chief Electoral Officer, above n 23.
41 Re Hunua Election Petition [1979] 1 NZLR 251; and Re Kapiti Election Petition (M 41/79 Wellington Registry, 14 May 1979).
42 Wybrow v Chief Electoral Officer, above n 23, at 147.
43 Ibid, at 153.
it may even be deliberate. At all events there will always be some voters who for one reason or another fail to mark their papers in accordance with s 106. Whether their votes are to be disallowed is a question with which s 106 does not deal. The scheme of the Act is to leave that question to the sections governing the counting of votes, more particularly s 115.

Considering that, the Court went on to say:44

It can have been no accident that the section relating to the counting of votes of votes contrasts in its wording with the section relating to the method of voting. So obviously does s 115 state a wider test that the point cannot have been overlooked by the draftsman. We are satisfied that the only reasonable inference is that the contrast was deliberate. There was no need to insert in s 115 any such words as "notwithstanding the provisions of s 106 of this Act". Although naturally wishing to bring about uniformity in voting procedure as far as possible, Parliament has manifestly decided that at the count, which is the crucial stage, the only test of the validity of a vote so far as the intention of the voter to vote for a candidate is concerned is whether that intention is clearly indicated. That does not mean that s 106 is ignored at the counting stage. Votes complying with s 106, which as already mentioned will be the great majority, will automatically clearly indicate the intention of the voter. All non-complying papers will be at risk of rejection. But a paper will escape rejection on the ground of informal marking by the voter, in whatever way, if it succeeds in conveying the intention of the voter clearly. This we hold to be the true interpretation of the Act.

The Court rejected suggested glosses or limitations on that test.45 They emphasised that the ultimate object of the democratic system embodied in the Electoral Act is that elections shall be determined by the wishes of voters recorded at secret ballots and uniformity is not an end in itself; and the function of the provisos to s 115(2)(a) was to ensure that some votes which might possibly have been rejected under the main part of subs (2)(a) shall nevertheless be allowed.

The declaration made by the Court in Wybrow, effectively over-ruling Hunua and Kapiti,46 was wholly prospective in its operation and the Legislature was content to leave the legislation unamended for the next general election in 1981.

44 Ibid.
46 Re Hunua Election Petition and Re Kapiti Election Petition, above n 41.
IV PROSPECTIVE RELIEF UNDER THE JUDICATURE AMENDMENT ACT

Judicial review as a discretionary remedy extending to the proposed exercise of statutory powers of decision allows for declarations suspended to enable the Government to consider corrective action, including enacting remedial legislation.

Philip A Joseph characterises prospective-only relief as an untapped option in judicial review. He goes on to say:

Public law remedies commend themselves to the temporal flexibility that prospective-only relief offers ... In constitutional adjudication, it is an established, albeit exceptional recourse for final appellate courts to suspend the operation of a declaration of unconstitutionality to allow for the enactment of corrective legislation before the declaration takes effect.

Fitzgerald v Muldoon is the classic authority. Another prime example of prospective relief leaving scope for mediating legislation is New Zealand Maori Council v Attorney-General. R v Hughes and R v Hines and their respective legislative aftermaths illustrate the working out of the Legislature's response.

A Fitzgerald v Muldoon

In this case Wild CJ made a declaration that a press statement made by the incoming Prime Minister following the 1975 General Election, announcing the abolition of the superannuation scheme established under the previous government pursuant to the New Zealand Superannuation Act 1974, constituted the exercise of a pretended power of suspending laws in breach of s 1 of the Bill of Rights Act 1688. The Chief Justice ended his judgment in this way:

There can be no doubt as to the government's intention to introduce the legislation indicated in the Prime Minister's public announcement. There can be little doubt that the legislation will be enacted. The evidence is that Parliament is summoned to

---

48 Fitzgerald v Muldoon [1976] 2 NZLR 615.
50 R v Hughes [1996] 2 NZLR 129.
51 R v Hines, above n 6.
52 Fitzgerald v Muldoon, above n 48, at 623.
assemble on 22 June. In that situation, and in the light of the facts earlier mentioned, it would be an altogether unwarranted step to require the machinery of the New Zealand Superannuation 1974 now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months.

In my opinion, the law and authority of parliament will be vindicated by the making of the declaration I have indicated, and the appropriate course is to adjourn all other matters in issue for six months from this date [11 June 1976].

Professor JF Burrows had made a similar point in the course of a case-note, headed "Judicial anticipation of statutes", on R v O'Brien, which was decided seven months before Fitzgerald v Muldoon. In O'Brien the statute, passed but not yet in force reduced the maximum penalty for the particular offending and the Court of Appeal took account of the reduction as a discretionary factor in allowing the appeal and reducing the sentence.

Professor Burrows went on to discuss Re Parker (deceased) as an illustration of his general proposition that:

... if the court has fairly sure knowledge that a bill is going to be passed and will upset the result of what it decides and thus render a lengthy hearing a waste of time and money, it may be inclined to let such a consideration influence it. The law must be tempered by a degree of realism and pragmatism.

In Parker the Court of Appeal granted an opposed application for adjournment of a Family Protection Act appeal given that legislation was in prospect to cure retrospectively a possible defect in the adoption of two of the applicants. The legislation had apparently not reached the Bill stage, but had been proposed by the Law Revision Committee. The Court of Appeal decided that it would be just to grant an adjournment until the next sittings of the Court of Appeal:

If the Court were now to proceed and hear and determine the appeals, and the Legislature forthwith passed the proposed legislation, much time and money would probably have been wasted. A petition to Parliament to re-open the litigation would be a likely result.

53 JF Burrows "Judicial Anticipation of Statutes" (1976) 7 NZULR 169.
56 Burrows, above n 53, at 171-172.
57 Re Parker, above n 55.
Professor Burrows continued: "However, no doubt a reasonable certainty of legislation would be required before such a result could be reached".  

**B Minister of Immigration v Gholami**

In *Minister of Immigration v Gholami* the High Court had ruled against the three applicants on every ground on which relief was claimed. New factors had emerged since the Minister had refused to reconsider the decisions declining their applications for residence permits.

The Court of Appeal adjourned the appeals to give the Minister an opportunity, if he desired, to reconsider without the risk of being pre-empted by the immediate exercise of any removal order in force. The judgment expressed the applicable principles in this way:

> Every Court has inherent power to regulate its own proceedings while the High Court has the authority to make any order necessary to enable it to act effectively: see *Taylor v A-G* per Richmond J. We are satisfied that the Court has inherent power to grant an adjournment in any proceeding properly before it. Whether it should do so in a particular case will depend on the circumstances which can be almost infinitely variable. An adjournment should not be granted without proper reason but that is for the Judge to assess in the exercise of his discretion. If he is wrong his decision can be appealed, but an appellate Court will not interfere with the exercise of a Judge's discretion unless he has acted on a wrong principle or is plainly wrong.

Professor FM Brookfield's discussion of *Turners and Growers Exports Ltd v Moyle* under the heading "Parliament: legislative intervention in civil proceedings" is also in point.

**C Turners and Growers Exports Ltd v Moyle**

In the *Turners and Growers* case McGechan J had anticipated the final form of the legislation before the House where, having accepted the argument that the

---

59 Burrows, above n 53, at 171.
60 Minister of Immigration v Gholami [1996] NZAR 52.
61 Ibid, at 58.
statutory regulations affecting the kiwifruit industry were invalid, he refused discretionary relief to the applicants because it was common ground that the Bill was a necessary response to the plight of the industry.

Professor Brookfield described the approach taken in Fitzgerald v Muldoon as "constitutionally far preferable" to anticipating the legislative changes as was done in the Turners and Growers decision.65

**D New Zealand Maori Council v Attorney-General**

In *New Zealand Maori Council v Attorney-General*66 the Council and its chairman, Sir Graham Latimer, applied for judicial review of the proposed exercise by Ministers of the power conferred by s 23 of the State-Owned Enterprises Act 1986 to transfer Crown land to State-owned enterprises. An important further constraint imposed under s 9 was the obligation on the Crown not to act in a manner that was inconsistent with the principles of the Treaty of Waitangi. Put broadly, the Court of Appeal concluded that the failure to institute any system to determine whether any Crown land proposed to be transferred to State-owned enterprises was subject to the risk of claims under the Treaty of Waitangi Act 1975 with a real possibility of success, was inconsistent with the principles of the Treaty and a breach of the process required to be followed in the exercise of the powers conferred under s 23; and that, in terms of outcome, for Ministers to transfer absolutely to State-owned enterprises some four or five million hectares in contemplation would be inconsistent with the principles of the Treaty and contrary to the provisions of the State-Owned Enterprises Act. The orders of the Court were:67

1. A declaration that the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

2. Directions as follows: (i) Within 21 days from the delivery of this Court's present decision [29 June 1987] the Crown is to prepare a scheme of safeguards giving reasonable assurance that lands or waters will not be transferred to State enterprises in such a way as to prejudice Maori claims that have been submitted to the Waitangi Tribunal on or after 18 December 1986 or may foreseeably be submitted to the Tribunal; (ii) The scheme is to be submitted to the New

65 Ibid, at 226.

66 *New Zealand Maori Council v Attorney-General*, above n 49.

67 Ibid, at 666; the outcome is noted at 719.
Zealand Maori Council for agreement or comment as to whether it adequately gives effect to the intention of the Court as stated in the present judgments. Such agreement or comment to be given by the Council within 21 days of receipt of the scheme; (iii) The scheme as finally proposed by the Crown having regard to the Council’s agreement or comments is then to be lodged in this Court and an early hearing will be arranged at which the question whether it should be approved will be considered.

(3) A declaration that in the meantime the Crown ought not to take any further action, affecting any of the assets referred to in the statement of claim, by way of transfer of assets or long-term agreement or arrangement, that is or would be consequential on the exercise of the statutory powers conferred by the State-Owned Enterprises Act 1986. The Crown to have leave to move for the discharge or variation of this declaration at any time.

On 8 December 1987, the Minister of Justice introduced the Treaty of Waitangi (State Enterprises) Bill68 into the House of Representatives to give effect to the agreement reached between the parties. On 9 December, the parties appeared before the Court. Subsequently, the Court delivered the Minute of the Court in the course of which it was noted that the Court had not been required to make any further ruling or to scrutinise the terms closely, adding that the broad principle appeared to be that, if land was transferred to a state-enterprise but the Waitangi Tribunal later recommended that it be returned to Maori ownership, that would be compulsory.

**E R v Hughes**

Again, in the analogous situation of pre-trial rulings under the Crimes Act 1961, where difficult problems arise, there may well be differing views as to whether the Court of Appeal should respond to a new situation as a common law development or leave it to the Legislature to make any legislative inroads. In *R v Hughes*69 the Court divided over the contention that an undercover police officer need not disclose his identity to the defence. The majority concluded that under traditional common law principles the witness must give his true name and occupation if asked by the defence. The minority took the view that the defence request could be refused by a trial judge and listed series of principles to govern the exercise of the

---

69 *R v Hughes*, above n 50.
judge's discretion. Parliament promptly legislated to allow undercover officers to give evidence.

**F R v Hines**

But, as noted in the next Court of Appeal decision of *R v Hines*, where the witness seeking anonymity was not an undercover officer but feared intimidation if obliged to disclose his true identity, and when Parliament legislated in the wake of *Hughes*, it adopted a much narrower approach than suggested by the minority judges.

Responding to *Hines* and rather than resting the Court's decision simply on the discretion of the trial judge the Evidence (Witness Anonymity) Amendment Act 1997 built in a series of protections governing its exercise. The House of Representatives extensively debated the issues particularly when considering the Report of the Justice and Law Reform Select Committee followed immediately by the third reading. Earlier, the Minister of Justice, Hon DAM Graham, moving the second reading, noted that the Bill drew very heavily on the work of the Law Commission and the Committee Report commented on the Bill at some length. The Committee noted that the Law Commission discussion paper and final report had both commented on *Hines* and had also concluded that legislation providing for witness protection was necessary and should only be granted by a High Court judge.

The 1997 Act inserted nine new sections in the Evidence Act 1908 and also provided in s 4 for review by the Ministry after three years' operation of the Act and for the Minister to present a copy of the report to the House of Representatives. Apart from omitting the review requirement those protections were carried through into the Evidence Act 2006 without material change.

*Fitzgerald v Muldoon* has been mentioned in many subsequent court decisions and discussed in numerous legal periodicals.

---

70 *R v Hines*, above n 6, at 543.

71 (9 December 1997) 565 NZPD 6179-6241.


73 (23 October 1997) 564 NZPD 4956.


75 *Fitzgerald v Muldoon*, above n 48.
**DEFERRING RELIEF**

381

**G Genesis Power Ltd v Environment Court**

In *Genesis Power Ltd v Environment Court*77 Ronald Young J dismissed an appeal against the decision of the Environment Court granting an adjournment of a long-scheduled hearing of resource consent applications for the major Tongariro Power Development. He concluded that "there obviously comes a time when delay in the hope of negotiations narrowing issues will be greater than the delay caused by litigating the full case."78 It seems that this date will be reached should the case be delayed beyond July next year".

Then, having mentioned *Fitzgerald v Muldoon, Turners & Growers Exports v Moyle,*79 *Ngai Tahu Trust Board v Attorney-General*80 and *Meggitt Overseas Ltd v Grdovic*81 where Mason P, President of the Court of Appeal of New South Wales had made the obvious point that a court of law cannot grant an adjournment to enable one party to gain the benefit of prospective legislation to the detriment of another party without lawful authority,82 Ronald Young J said:83

This is not one of those rare cases where legislative intervention is inevitable such that the principle that Courts should decide the case before them based on the law as it exists on the day of hearing should be set aside.

In *Unitec*84 Miller J concluded that the Associate Minister of Education's decision to suspend the processing of Unitec's application to become a university

---


77 *Genesis Power Ltd v Environment Court* [2003] NZAR 371.

78 Ibid, at 383.

79 *Turners & Growers Exports v Moyle*, above n 63.

80 *Ngai Tahu Trust Board v Attorney-General* HC Wellington CP555/87, 1 November 1989.


82 Ibid, at 531 and 536–537.

83 *Genesis Power Ltd v Environment Court*, above n 77, at 583.

84 *Unitec Institute of Technology v Attorney-General*, above n 76.
following his introduction of the Education (Limiting Number of Universities) Amendment Bill 2000 breached s 1 of the 1688 Bill of Rights. He observed: 85

Under s 16 of the Constitution Act 1986, a Bill becomes law only when it has been passed by the House of Representatives and receives the royal assent. Prospective amending or validating legislation does not qualify the obligation of the judicial branch of government to uphold existing law: Meggittt Overseas Ltd v Grdovic. 86 The Court may have regard to new legislation during the period between enactment of legislation and its coming into force, as was done in W v W 87 and Tyler v Attorney-General. 88 It has also been held that in rare cases, impending legislation, if inevitable, may justify a decision to defer judgment: Genesis Power Ltd v Environment Court. 89 In Fitzgerald v Muldoon 90 Wild CJ declined to grant relief in the nature of injunction or mandamus for that reason. In this case the Bill was to be referred to the select committee and, it cannot be assumed that the Bill would be enacted at all, or in the same form, or that its enactment was imminent. It has been held that the Court will not speculate on whether a Bill before Parliament will be passed in its present form: Willow Wren Canal Carrying Co Ltd v British Transport Commission. 91 That must be all the more so in a mixed-member proportional representation environment in which coalition or minority governments are the norm.

With respect, I suggest that Ronald Young J and Miller J set the bar too high in requiring that legislation be inevitable. Where the focus is on the respective responsibilities of the three branches of government and as a matter of public policy the Legislature has a stake in the working out of the issue before the court, the court is able to balance the public interest considerations involved and, where appropriate, suspend relief to allow opportunity for mediating remedial legislation. By that means, as the Chief Justice said in Fitzgerald v Muldoon, "the law and the authority of Parliament will be vindicated". 92 It is on that premise that the authorities discussed earlier in this paper were decided.

---

85 Ibid, at [76].
86 Meggittt Overseas Ltd v Grdovic, above n 81, at 531.
88 Tyler v Attorney-General [2000] 1 NZLR 211.
89 Genesis Power Ltd v Environment Court, above n 77.
90 Fitzgerald v Muldoon, above n 48.
91 Willow Wren Canal Carrying Co Ltd v British Transport Commission [1956] 1 All ER 567 at 569.
92 Fitzgerald v Muldoon, above n 48, at 623.
V SOME CONCLUDING COMMENTS

The narrow questions explored in this paper are in what circumstances have the courts exercising statutory powers deferred judgment to allow time for the Legislature to consider and enact any modifying legislation and how have the Executive and the Legislature responded. Where the focus is on the courts the questions are, on what principled basis do the courts and should the courts exercise statutory discretions to suspend relief.

The Human Rights Act 1993 is unusual in specifying details of any declarations which may be made by the Human Rights Review Tribunal and the steps which follow. Those provisions concern the manner of exercise of public powers\textsuperscript{93} and the statute goes on to provide for the oversight of the outcome of their exercise. If the declaration is not overturned on appeal or the time for lodging an appeal expires, s 92K(2) requires the Minister to present to the House of Representatives "(a) a report bringing the declaration to the attention of the House of Representatives; and (b) a report containing advice on the Government's response to the declaration."\textsuperscript{94}

Both the Declaratory Judgments Act 1908 and the Judicature Amendment Act 1972 have two features which bring home the breadth of the court's jurisdiction. Under both statutes the jurisdiction applies to the future exercise of public powers;\textsuperscript{95} under both the jurisdiction is discretionary.\textsuperscript{96} In short, both statutes allow for relief to be suspended enabling the other branches of Government – the Executive and the Legislature – to consider their response which may include further legislation. Whether or not characterised as institutional dialogue, that approach serves the public policies to which the three branches of Government are committed through the working out of the public interest considerations in the particular case.

In Coburn\textsuperscript{97} the concerns were the harsh impact on the spousal provisions of the particular scheme which breached the new Human Rights Act obligations and potentially also affected numerous other schemes; and the time, cost and uncertainty of working out the ramifications of the new obligations for all

\begin{itemize}
  \item Human Rights Amendment Act 2001, s 20I.
  \item Ibid, s 92K(2).
  \item Declaratory Judgments Act 1908, s 9; and the Judicature Amendment Act 1972, s 4(1).
  \item Declaratory Judgments Act 1908, s 10; and Judicature Amendment Act 1972, s 4(1); and other machinery steps follow ss 4 and 8).
  \item Coburn v Human Rights Commission, above n 3.
\end{itemize}
potentially affected schemes and any resulting legislative reconsideration. In the Auckland Area Health Board, Shortland and Hutt District Health Board cases the courts grappled with the high-end public policies involved in prospectively limiting life-prolonging treatment. In Wybrow the Court took a broader view of the interpretation of the voting and counting of votes at general elections than had been taken in the Hunua and Kapiti election petition decisions. The Court's decision was wholly prospective in its operation and the legislature was content to leave the legislation unamended for the next general election in 1981.

Fitzgerald v Muldoon is the leading constitutional authority involving, as it did, the application of the Bill of Rights Act 1688. The declaration made by the Chief Justice on 11 June 1976 that announcing the abolition of the New Zealand Superannuation Act 1974 breached s 1 (or s 1) of the 1688 Act and his decision to defer all other matters in issue until 11 December 1976 allowed the new Government time to consider the position and enact any legislation repealing the 1974 statute. The orders of the Court in New Zealand Maori Council v Attorney-General were designed to facilitate the longer term working out by the parties of the disposal of Crown lands to state-owned enterprises and the outcome was legislation which gave effect to their agreement.

The important principle affirmed in Gholami and earlier reflected in Re Parker is that a superior court has an inherent power to grant an adjournment in any proceeding before it on a principled basis.

The Hughes and Hines decisions dealt with the position of witnesses in criminal trials seeking anonymity. The majority in both cases applied the traditional common law principle that witnesses must give their true name and

98 Auckland Area Health Board v Attorney-General, above n 30.
99 Shortland v Northland Health Ltd, above n 32.
100 Hutt District Health Board v B, above n 37.
101 Wybrow v Chief Electoral Officer, above n 23.
102 Re Hunua Election Petition, above n 41.
103 Re Kapiti Election Petition, above n 41.
104 Fitzgerald v Muldoon, above n 48.
105 New Zealand Maori Council v Attorney-General, above n 49.
106 Minister of Immigration v Gholami, above n 60.
107 Re Parker (deceased) alt cit Crow v Weston, above n 55.
108 R v Hughes, above n 50.
occupation if asked by the defence and left it to the legislature to make any legislative inroads. The minority in Hughes took the view that in their discretion trial judges could decline the defence request and listed series of principles to govern the exercise of the judge's discretion. The minority in Hines, where the trial judge had ruled that the anonymous witness need not disclose his true name and occupation, would have dismissed the appeal concluding, too, that the trial had been fair. When Parliament legislated in the wake of Hughes it adopted a much narrower approach than suggested by the minority judges. It also legislated following Hines inserting nine new sections governing the exercise of the judge's discretion.

The judgment in Hines also discussed at some length major practical problems for the courts in deciding public policy litigation, noting that court processes do not allow public policy to be developed in the systematic way that is applied elsewhere in government.\textsuperscript{110} The passages contrasted the limited processes by which courts can obtain relevant information and then assess it, with the manner in which the Law Commission works by engaging in extensive research and analysis including gathering relevant facts, publishing discussion papers, evaluating responses, and then presenting final reports with draft Bills attached – which are then further subjected, as appropriate, to the general governmental and parliamentary legislative policy processes. The response of the Legislature in Hughes and Hines vindicates that cautious approach.

Summing up, as noted when critiquing Genesis Power\textsuperscript{111} and Unitec\textsuperscript{112} and reflected in all the categories of cases discussed in the paper where the focus is on the respective responsibilities of the three branches of government and as a matter of public policy the Legislature has a stake in the working out of the issue before the court, the court may balance the public interest considerations involved and, where appropriate, suspend relief to allow opportunity for enacting any remedial legislation.

Finally, unlike some other jurisdictions, the Constitution Act 1986 is silent as to the role of the courts and the inter-relationship between the three branches of Government. New Zealand's constitutional arrangements are reflected in specific statutes and conventions which delimit the respective roles of the Legislature, the

\textsuperscript{110} Ibid, at 539–540 and 548–550.
\textsuperscript{111} Genesis Power Ltd v Environment Court, above n 76.
\textsuperscript{112} Unitec Institute of Technology v Attorney-General, above n 76.
Executive and the Judiciary. The legitimacy of each institution depends to no small extent on the respect it pays to those statutory provisions, to those conventions and to the other branches of Government.\footnote{Shaw v Commissioner of Inland Revenue [1999] 3 NZLR 154 at [16].}

As regards human rights, both the New Zealand Bill of Rights Act 1990 s 3 and the Human Rights Act 1993 s 20I apply to acts done by the legislative, executive or judicial branches of Government and persons or bodies performing public functions, powers or duties. The Human Rights Amendment Act 2001 introduced a declaration of inconsistency regime imposing Bill of Rights standards and, while the New Zealand Bill of Rights Act itself is silent as to specific remedies for breach, the courts necessarily possess an implied jurisdiction under the statute to develop appropriate remedies to make effective the fundamental rights and freedoms which it is the purpose of the Act to affirm, protect and promote.\footnote{Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667; see also Boscawen v Attorney-General [2009] 2 NZLR 229.} In doing so, the courts can be expected to weigh in the balance their responsibility to the successful complainant.

Declaratory relief is the statutory remedy under the Declaratory Judgments Act and the Judicature Amendment Act where rulings affecting the proposed exercise of statutory powers or the legality of proposed conduct are sought. As a matter of principle, people, who are expected to obey the law and to order their affairs accordingly, are entitled to seek guidance from the courts. There is nothing in the scheme of the two Acts that stands in the way of declaratory relief and the courts will be slow to refuse relief in the exercise of their residual discretion because of any concerns stemming from jurisprudential and constitutional considerations possibly bearing on the exercise of their jurisdiction in some other situations.\footnote{Recent academic commentary on formal declarations of "inconsistency" as against "indications," "statements" or "findings" in Bill of Rights cases includes Claudia Geiringer "On the Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 and "Declarations of inconsistency dodged again" [2009] NZLJ 232; Andrew Geddis "The Comparative Irrelevance of the New Zealand Bill of Rights to Legislative Practice" (2009) 23 NZULR 465; and Philip A Joseph "Constitutional Law" [2009] NZ Law Review 519 at 528-531. On the subject of prospective rulings (recently discussed by Tipping J in Lai v Chamberlains [2007] 2 NZLR 7 at 56–60) see Jess Wall "Prospective overruling – it's about time" (2009) 12 Otago LR 131; and on broader constitutional relationships, see Jason NE Varuhas "Courts in the Service of Democracy: Why Courts Should Have a Constitutional (But Not Supreme) Role in Westminster Legal |Systems" [2009] NZ Law Review 481.}

\begin{footnotesize}
\begin{enumerate}
\item Shaw v Commissioner of Inland Revenue [1999] 3 NZLR 154 at [16].
\item Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667; see also Boscawen v Attorney-General [2009] 2 NZLR 229.
\end{enumerate}
\end{footnotesize}
As the then Professor Geoffrey Palmer, speaking of *Fitzgerald v Muldoon* in 1976, said:116

[The Chief Justice's] disposition of this potentially embarrassing case resolved neatly the tension between principle and expediency. On the one hand he stared in the face a frontal attack upon the sovereignty of Parliament and the rule of law. On the other side he faced the practical problem of potential administrative chaos in setting the Superannuation Act going again when everyone knew that not only was it the Government's intention to abolish the scheme but that they had the numbers in Parliament to do it. He avoided that problem by the common sense solution of adjourning the proceedings for six months.

---
