IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY **Civ 2005-485-2140**

UNDER **The Human Rights Act 1993**

BETWEEN **THE ATTORNEY-GENERAL**

Appellant

AND **CHILD POVERTY ACTION GROUP INCORPORATED**

Respondent

LEGAL SUBMISSIONS BY RESPONDENT

Dated 27 February 2006

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1 INTRODUCTION

1.1 The respondent accepts in general terms the introductory statements in paras 1-6 of the appellant's submissions but submits in respect of para 3 and para 6 respectively:

(1) the words "*complaint*" and "*complainant*" are not limited in the manner suggested at para 3 for the purposes of s 76(2) and s 92B of the Human Rights Act 1993 (the HRA) so as to restrict the jurisdiction of the Human Rights Review Tribunal (the Tribunal) in respect of proceedings, or the standing of any party, to complaints made by persons who are themselves affected by the alleged discrimination OR acting on behalf of such persons; and

(2) the jurisdiction of the Tribunal is also not limited in the manner suggested at para 6, namely that the Tribunal is unable to consider legislation which although enacted is not yet in force. (It is noted that this point on appeal will be redundant following 1 April 2006 as the legislation at issue (section KD 2AAA(1)(e) of the Income Tax Act 2004 which was enacted by section 14 of the Taxation (Working For Families) Act 2004 comes into force on that date.)

Background

1.2 The respondent agrees in general terms with paras 7-13 of the appellant's submissions under the heading Background. However, the respondent says further:

(1) As well as: "*to promote awareness of the causes and consequences of child poverty*" the respondent's objects also include: "*to promote better policies for children and young people with the primary focus on the right of every child and young person to security, food, shelter, education and healthcare and opportunities for development*".

(2) The respondent made two separate complaints to the Human Rights Commission (the Commission) in relation to the Child Tax Credit (CTC) and the In-Work Payment (IWP) in October 2002 and October 2004 respectively, both of which complaints were received and assessed by the Commission as required by s 76(2)(a) HRA **[refer Bundle]**.

(3) Both the CTC and IWP are now provided for in the Income Tax Act 2004 (the latter from 1 April 2006).

(4) The Commission accepted the first complaint relating to the CTC as coming within jurisdiction of Part 1A HRA and notified the Crown Law Office of the complaint **[refer Bundle]**.

(5) The Commission closed its file relating to the second complaint concerning the IWP without notifying the Crown Law Office. It recognised this complaint had the same implications as the first complaint, that the earlier complaint had not been able to be mediated through the Commission's dispute resolution processes, and it was now with the Office of Human Rights Proceedings **[refer Bundle]**.

(6) In terms of the requirements of s 76(2)(a) the two complaints by the respondent, alleging a breach of Part 1A of the HRA, were clearly received and assessed by the Commission.

(7) This appeal in essence seeks a reading down of the ordinary words used in s 76(2) HRA, in particular "*complaint*" for the purpose of s 76(2)(**a**) and "*complainant*" for the purpose of s 76(2)(**d**), so as to limit jurisdiction or standing under the HRA as particularised at para 3 of the appellant's submissions. (See para 1.1(1) above.)

Tribunal's decision

1.3 The respondent agrees with paras 14-16 of the appellant's submissions.

Summary of respondent's submissions

1.4 Referring to paras 17-19 appellant's submissions the respondent submits:

(1) Jurisdiction, or standing to bring proceedings, under the HRA is a question of statutory interpretation of the terms "*complaint*" and "*complainant*" in s 76(2).

(2) The term "*complaint*" for the purposes of s 76(2)(a) is not limited to a complaint brought by an actual aggrieved person (or persons) OR to someone acting on behalf of an actual aggrieved person (or persons).

(3) In relation to complaints made to the Commission the right of an aggrieved person to make complaints is separately provided for, refer s 76(2)(**d**). Therefore it cannot have been intended that the term "*complainant*" for the purpose of s 76(2)(d) would also mean an aggrieved person.

(4) Further, Part 3 of the earlier Human Rights Commission Act 1977 (now repealed) only provided for an aggrieved person to make complaints. The addition of the term "*complainant*" to the HRA in 1993 was clearly intended to expand the category of those who could make complaints to the Commission. The terms "*complainant*" and "*aggrieved person*" are used disjunctively in s 76(2)(d).

(5) There is nothing in the text (including the terminology used in the text), legislative scheme or purpose of the HRA which supports an interpretation of a "*complaint*" under s 76(2)(a) where this is made by a "*complainant*" (refer s 76(2)(**d**) meaning persons other than an aggrieved person) being limited to, or read down to restrict jurisdiction or standing under the HRA to, complaints made on a person acting on behalf of an aggrieved person (or persons).

(6) The ordinary meaning and general nature of the terms "*complaint*" and "*complainant*" within the HRA are reinforced by a comparison with the use of these terms elsewhere, including in other legislation in New Zealand, as well as legislation from other jurisdictions and international treaties. Some of these specifically limit these general terms which our Parliament could also have done if it had intended this result.

1.5 If the Court considers the terms "*complaint*" and "*complainant*" do not have an obvious ordinary and general meaning the principles of interpretation specifically applicable to human rights legislation require these to be given a broad, purposive and enabling interpretation which best achieves the purposes of the HRA including s 6 of the New Zealand Bill of Rights Act 1990 (NZBORA). The purposes of the HRA include providing wide access to the Tribunal and appellate Courts to challenge allegedly discriminatory policy and legislation as is specifically envisaged by the new Part 1A of the HRA and so as to provide wide protection from discrimination.

1.6 Referring to para 20 of the appellant's submissions: it is not accepted that the respondent's complaints are appropriately described as general concerns. The claimed demarcation between Part 1 and Part 3 of the HRA as relating to general/public concerns and individual concerns respectively (argued for at a later point in the appellant's submissions) is not accepted. As well, the respondent has raised specific issues involving allegedly discriminatory legislation. Legislation which raises discrimination issues is clearly intended to be the subject of complaints and proceedings under Part 1A of the HRA.

1.7 Further, the mere existence of other means of addressing general concerns of unaffected persons in Part 1 HRA (for example an enquiry by the Commission) does not in the absence of any specific exclusions with the HRA indicate limiting the plain and general meaning of the terms "*complaint*" and "*complainant*" for the purpose of Part 3, specifically s 76(2). These terms raise an issue of statutory interpretation relating to the jurisdiction or standing and therefore who can bring proceedings in the Tribunal pursuant to s 92B(1) HRA.

1.8 Further, the other issues raised under the heading Policy Reasons etc (at p 11 of the appellant's submissions) do not assist the Court with what is essentially an exercise of statutory interpretation except by way of comparison or analogy. For example, if the limited interpretation argued for by the appellant is upheld by this Court, access to the Tribunal and the

appellate Courts would be more restricted than at common law which allows standing to responsible public interest groups to bring proceedings raising significant issues of public interest.

1.9 Paras 21 and 22 appellant's submissions are both disputed. (Refer above including para 1.1 (1) and (2) above.)

2 THE HUMAN RIGHTS ACT 1993

2.1 Referring to paras 23-26 of the appellant's submissions: these are generally agreed. However the claim at para 25.3 is disputed. If by this the appellant is intending to contrast Part 1 functions with complaints and proceedings under Part 3 as being involved, respectively with general/public concerns and individual concerns, it is noted that an analysis of the text of the HRA and relevant case law shows this assertion to be incorrect.

Commission's functions and powers under Part 1

2.2 Referring to paras 27-28 appellant's submissions: s 5 in Part 1 of the HRA sets out the primary functions of the Commission (s 5(1)) followed by the functions (s 5(2)) the Commission has to carry out its primary functions. The list provided in para 28 of the appellant's submissions is not complete. At first instance the appellant submitted that these Part 1 functions were limited to general/public interest concerns and that such concerns needed to be dealt with exclusively by the Commission or in other words not as the subject of complaints by groups such as the respondent.

2.3 Setting aside the issue of whether the respondent's complaint is appropriately categorised as raising a general concern only (refer para 25.3 appellant's submissions), which is disputed, the appellant has not pointed to anything in Part 1 itself which supports the view that Part 1 functions are limited to dealing with general/public concerns. In particular s 5(2)(o) includes reference to other functions the Commission has under the HRA which must include for example the functions in Part 3 relating to complaints. The list in s 5 is not limited to general/public concerns by way of contrast to the specific complaints function in Part 3 but is rather a summary of all the Commission's functions even though in respect of some of these inclusion is by way of general reference only.

2.4 One clear difference between Part 1 and Part 3 is that many of the s 5 functions can be exercised in respect of the gamut of human rights issues (refer preamble) whereas Part 3 is by its terms limited to discrimination issues only.

2.5 For example, the primary functions of the Commission outlined in s 5 (Part 1) include a general reference in terms of advocacy by the Commission to "*human rights in New Zealand society*" (s 5(1)(a)). There is specific reference to "*individuals*" as well as "*groups*" in s 5(1)(b). The word "*individuals*" was inserted by the select committee considering the Human Rights Amendment Bill in 2001. There was a concern that individuals

needed to be recognised in the Commission's primary functions. (Refer *Human Rights Amendment Bill as reported back from the Justice and Electoral Committee* at p 6 – **Bundle**).

2.6 Other functions of the Commission under s 5 refer to "*human rights*" generally in s 5(1)(a), "*any matter affecting human rights*" in s 5(2)(c), s 5(2)(f) and s 5(2)(k). Compare the function in s 5(2)(l) which is specifically limited to "*any group*".

2.7 The function contained in s 5(2)(i) relating to the Commission appearing or bringing proceedings including in the Tribunal (under s 92B) as well as other courts (under s 92H) is expressed in general terms and cannot sensibly be said to exclude proceedings concerning individuals. This is particularly so when read in conjunction with the primary functions in s 5(1)(b).

2.8 The recent *Zaoui* litigation in which the Commission intervened using its s 5 powers is an example of it being involved in proceedings which concerned alleged breaches of one individual's rights. Counsel for the appellant are well aware of the Commission's role in that litigation.

2.9 Clearly the Commission can use its s 5 functions in respect of both general/ public concerns and individual concerns.

Part 3: Resolution of disputes about compliance with Part 1A and Part 2

Part 3 does not only address individual concerns

2.10 Where individuals raise discrimination issues under Part 3 the outcome can also have a wider or public interest impact. This was recognised in *Transportation Auckland Corporation Ltd v Proceedings Commissioner* (1998) 4 HRNZ 442, 455. Robertson J said in relation to a case brought under Part 3 of the HRA by a man alleging political opinion discrimination against him (alone) in his workplace:

> ….an important part of the spirit and letter of Human Rights Act is its educative aspect and the creation of preventive measures in respect of any future human rights breaches. …..the discrimination provisions under the Employment Contracts Act 1991 are oriented towards a fair resolution of an individual grievance. There is a wider perspective under the human rights legislation.

2.11 As well as individual cases under Part 3 HRA having a wider impact than simply settling individual disputes, cases under this Part are clearly not limited to individual concerns. The *Hosking v Wellington City Transport Ltd (t/a Stagecoach Wellington)* (1995) 1 HRNZ 542 case is an example of this.

2.12 This decision related to an application for interim relief. The substantive proceeding was never heard by the Tribunal for reasons not relevant to the present proceedings. The decision records that the proceedings (under Part 3) were brought by the Proceedings Commissioner on behalf of a class of persons described as "*all potential users of the Defendant's public transport*

service who are or will be prevented or impeded, by reason of disability, from utilising those services" (at p 544).

Functions of the Director of Human Rights Proceedings supports use of Part 3 for wider public interest claims

2.13 Part 3 (now) also contains provisions relating to the functions of the Director of Human Rights Proceedings (the Director). One criterion which must be considered by the Director in deciding whether to provide legal representation for proceedings in the Tribunal is whether resolution of the complaint would affect a large group of persons (s 92(2)(b)). Another criterion the Director must consider when making such decisions is whether or not it is in the public interest to provide representation (s 92(2)(h)).

2.14 These criteria apply to all applications received by the Director (both from individual persons, bodies such as the present respondent, as well as the Commission) and indicate to him that cases which have these characteristics must be given some priority in terms of his provision of legal representation services.

2.15 Clearly, these provisions anticipate that proceedings initiated by applications to his office (under Part 3) may involve wider or general public interest issues affecting more than one individual.

Part 1A

2.16 The nature of Part 1A complaints including the justification defence in s 20L HRA (referring to s 5 NZBORA) will often involve issues of wider public interest. It is clear that the Director is able to provide legal representation for Part 1A cases.

2.17 As well, it is not at all clear on the face of Part 1A itself that such cases can only be the subject of complaints brought by, or settled, or the subject of proceedings by, affected individuals or aggrieved persons.

2.18 Paras 29-35 and 37-39 of the appellant's submissions are generally agreed.

Person aggrieved for the purpose of s 92B not relevant

2.19 Referring to para 36 of the appellant's submissions: the term "*person aggrieved*" in s 92B(1) does not assist the argument that the term "*complainant*" is limited in the way suggested. Both terms are clearly alternatives within s 92B(1). Nor do either of the cases referred to by the appellant assist the Court with the interpretation issue before it. The question is what do the words "*complaint*" and "*complainant*" mean for the purposes of s 76(2). What these terms mean for the purposes of s 76(2)(a) will determine what they mean for the purposes of s 92B(1), not the reverse.

2.20 Clearly "*complainant*" means someone other than an aggrieved or affected person (refer s 76(2)(**d**) and see further concerning the legislative history

below). No specific limits to this or to the term "*complaint*" (subsection 76(2)(**a**)) are provided in the HRA itself.

3 INTERPRETATION OF "COMPLAINT" AND "COMPLAINANT"

3.1 As a preliminary point it is noted the respondent understands that the appellant accepts that these terms can include groups or legal persons such as an incorporated society (which the respondent is). Also refer reg 6 Human Rights Review Tribunal Regulations 2004 which refers to "*a person or body*" bringing proceedings.

3.2 Referring to para 40 of the appellant's submissions: the respondent agrees only that the terms "*complaint*" and "*complainant*" must mean the same for the purposes of both s 76(2) (s 76(2)(**a**) and s 76(2)(**d**) respectively) and s 92B(1). As well, the meaning of these terms for the purposes of the former determines the meanings of these for the latter.

3.3 Referring to para 41 of the appellant's submissions: it is noted that contrary to the statement in that paragraph, there is a reference to the term "*aggrieved person*" in s 76(2)(**d**).

3.4 It is noted that s 76(2)(a) does not use either of the words "*complainant*" or "*aggrieved person*". It refers only to a "*complaint*". However, s 76(2)(**d**) refers to [the Commission] taking action in relation to **the** complaint if "*the complainant or aggrieved person wishes to proceed with it…*". It is accepted therefore that a "*complaint*" for the purposes of s 76(2)(a) must be a "*complaint*" made by a "*complainant*" OR an "*aggrieved person*". However, by the use of the disjunctive "*or*" between the two terms they are clearly alternatives. No link between these two alternatives is made anywhere in the text.

3.5 Referring to para 41 of the appellant's submissions: it is agreed that a "*complainant*" can be the aggrieved person and that a "*complainant*" may be someone other than the aggrieved person. However, the submission in para 42 that it is apparent from the wording of s 92B that a complaint under s 76(2)(a) must involve an aggrieved person does not logically follow. Nor has the appellant pointed to anything in the text of either provision which supports this conclusion. In both provisions the two categories of persons who can make complaints and thus bring proceedings are referred to disjunctively.

3.6 Before moving to consider para 43 and following of the appellant's submissions the principles relating to the interpretation of human rights legislation are set out below.

Principles of statutory interpretation

Interpretation Act 1999

3.7 Section 5(1) of the Interpretation Act 1999 requires that the meaning of an enactment be ascertained from its text and purpose.

3.8 It is clear that relevant parts of the text of the HRA (in particular s 76(2)(**d**) and s 92B(1) HRA) provide "*complainant*" and "*aggrieved person*" (or "*person aggrieved*") as alternatives. Nowhere in the HRA are these two concepts linked other than (as discussed above) in recognising that an aggrieved person can be a complainant (see for example s 92B(1)). The appellant has not pointed to any word or provision in the HRA which supports the argument that a complainant (if not the aggrieved person) must be linked to an aggrieved or affected person in a representational capacity or as the appellant has described this: acting on behalf of an aggrieved person.

3.9 The purposes of the HRA are stated in the preamble. These include: to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on human rights. Better protection must mean effective and wide protection from discrimination (refer case law below). This must include providing wide access to the Tribunal and appellate Courts to challenge allegedly discriminatory policy and legislation as is specifically envisaged by the new Part 1A of the HRA.

3.10 The respondent submits that a key purpose of Part 1A HRA is to allow Governmental action to be assessed as to any discriminatory effect. Limiting or restricting those who can make complaints or bring proceedings under the Act (whether as a matter of jurisdiction or standing) is not consistent with this purpose. Applying a limited interpretation to the terms "*complaint*" and "*complainant*", as well as being inconsistent with the above principles, could lessen the likelihood of discrimination issues being raised in the Tribunal and appellate Courts. This is not seen as desirable at common law (discussed further below).

Human rights legislation to be given large, liberal and enabling interpretation

3.11 It is widely accepted that human rights legislation should be given a fair, large and liberal interpretation. In *King-Ansell v Police* [1979] 2 NZLR 531, 537 Woodhouse J stated that the language in the Race Relations Act 1971 (now repealed) is "*probably deliberately flexible*" and "*to give effect to its important **purpose** of making every form of racial discrimination unlawful I am satisfied that the language must not be interpreted in any confined or restricted way but broadly and in terms of common sense*" (emphasis added).

3.12 In *Coburn v Human Rights Commission* (1994) 1 HRNZ 120, 137 the High Court reiterated the principle that given the "*special character of human rights legislation*" there is a need to accord it a fair, large and liberal

interpretation rather than a literal or technical one. This principle was later approved in *New Zealand Van Lines Ltd v Proceedings Commissioner* [1995] 1 NZLR 100, 103 and by the Court of Appeal in *The Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* (2002) 6 HRNZ 713, 719–720.

3.13 In the latter case the Court of Appeal described the HRA as "*no ordinary statute*" (para [21]) and as having "*special status*" (para [22]) including because of its link with s 19 of the NZBORA and the fact that it gives effect to New Zealand's obligations under international human rights covenants.

3.14 In terms of the interpretation exercise in the *Thoroughbred Racing Inc* case the Court of Appeal took the view that the preferred interpretation was that which was "*more consistent with the **broad reach** of the antidiscrimination provisions*" in the HRA (emphasis added) (para [23]).

New Zealand Bill of Rights Act

3.15 The requirement in s 6 NZBORA to wherever possible (where more than one meaning is reasonably available) give legislation an interpretation consistent with the rights and freedoms in that Act (relevant to the present case is s 19: the right to be free from discrimination) is also relevant to the interpretation exercise in the present case. Section 6 supports the principle that human rights legislation be given a broad and enabling interpretation. This point is discussed further below in the order dealt with in the appellant's submissions.

Textual meaning

3.16 Referring to para 43 of the appellant's submissions: it is noted that the Concise Oxford English Dictionary (10th edition, 1999) defines the term "*complaint*" (ignoring the medical meaning of the term) as:

> An act or the action of complaining … A reason for dissatisfaction … The plaintiff's reasons for proceeding in a civil action.

3.17 "*Complainant*" is defined in the Concise Oxford Dictionary as:

> A plaintiff in certain lawsuits.

3.18 Neither definition suggests the ordinary meaning of either term is confined to, or even more appropriately used in respect of, aggrieved persons who are actually affected or harmed by the subject matter of a complaint.

3.19 Referring to para 44 of the appellant's submissions: it is not clear in what way precisely the appellant considers that it is apparent from the context that the complaint must necessarily be brought in respect of discrimination suffered by an actual aggrieved person and must be brought by that person or a person who has brought the complaint on the aggrieved person's behalf.

3.20 Referring to para 45 of the appellant's submissions: it is not at all clear why the term "*complainant*" in s 92B has the meaning advocated by the appellant. The appellant has not specified what in the context of s 92B supports the appellant's view.

Nature of Part 3

3.21 Following a failure to identify any indications within the text of the HRA itself the appellant submits (at para 46 and following of the appellant's submissions) that it is the nature of Part 3 HRA which requires that complaints under s 76(2)(a) be about discrimination suffered by an actual aggrieved person. The points raised under this head appear to be a mix of text focussed and purpose related issues. These are dealt with in the order raised by the appellant.

3.22 Para 47 of the appellant's submissions is agreed although accommodating all complaints does not mean that all provisions in the HRA relating to complaints and proceedings will relate to all complaints. For example the range of remedies available will not all be appropriate in all cases.

"Busy bodies"

3.23 Referring to para 48 of the appellant's submissions: the appellant mentions the concept of a busy body implying that a broad interpretation of the terms "*complainant*" and "*complaint*" would allow such persons to bring proceedings before the Tribunal and also implying that this is undesirable. In the case *Moxon v Casino Control Authority* (unreported, High Court, Fisher J, M324/99) (discussed in detail further below) Fisher J suggests that if a plaintiff is a busy body this weighs against being granted standing at common law.

3.24 The generality of the terms used to circumscribe jurisdiction and/or standing under the HRA may have the result that busy bodies can make complaints and bring proceedings. The Tribunal's decision allows for this possibility. As undesirable as this is the appellant has not provided any authority for the proposition that such a risk can override the plain and general meaning of the words used in the HRA (ie "*complaint*" and "*complainant*") nor the accepted principles of interpretation of human rights legislation.

3.25 Nor, it is noted, has the appellant pointed to any evidence that the present respondent can be considered a busy body.

Mediation, settlement and remedies under HRA do not support limiting jurisdiction or standing

3.26 Referring to paras 49-50 of the appellant's submissions: mediation and settlement are concepts which apply equally to any party to a dispute whether the party is directly affected or not by the subject matter in dispute. See for example the Environment Court jurisdiction where responsible public interest groups have standing to bring proceedings. Is the appellant

suggesting that both parties in the *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 case (discussed further below) could not have mediated or settled that case even though one of them was a responsible public interest group made up of unaffected individuals.

3.27 Further, the HRA provides a range of remedies. In every case a plaintiff needs to consider which are appropriate to his/her/its case. Not all remedies are appropriate to all cases, including for reason of the nature of the claim (for example damages are not available under the HRA in respect of a claim about legislation) as well as because of the nature of the plaintiff (contrast the remedy of monetary compensation which properly relates only to persons actually aggrieved or harmed as a result of discrimination with the remedy which applies in respect of legislation: the declaration of inconsistency which does not require quantification by reference to actual harm or loss).

Appropriate factual context

3.28 Referring to para 51 of the appellant's submissions: the present case will be considered in an appropriate factual context. This point is expanded upon below in answer to a suggestion that this case is hypothetical or abstract.

3.29 This case concerns specific allegations of discriminatory effect of two particular provisions in the Income Tax Act 2004. It is the type of case clearly contemplated by the as yet untested Part 1A. It is accepted that this case is likely to require some evidence from affected individuals, however this does not mean that such cases can only be brought by affected individuals or those acting on their behalf. Such possible evidential concerns do not justify limiting jurisdiction and/or standing.

3.30 Referring to para 52 of the appellant's submissions. This point has been addressed earlier. However, at this point the appellant raises this concern again and refers specifically to s 81(2)(a) and s 89 as supporting the view that the HRA requires an aggrieved person to be involved (or as suggested by the appellant instigated and pursued as a plaintiff) in a complaint.

3.31 The former provision (s 81(2)(a)) relates to a requirement that the Commission inform parties if it undertakes a particular part of its dispute resolution process (information gathering). The list of those to be informed includes "*the complainant (if any)*" and "*the person alleged to be aggrieved (if not the complainant)*". This provision does not sit entirely comfortably with the possibility that Part 1A cases will include cases which allege discrimination potentially affecting large groups nor with the specific reference to class actions in s 92B(2). It is not sensible to suggest that in such cases the Commission could not undertake information gathering unless it complied with s 81(2) and inform all persons who are possibly affected or aggrieved by any alleged discrimination. The reality of limited resources and logistical difficulties in identifying all affected persons would make this extremely difficult if not impossible. Limiting the term

"*complainant*" as the appellant's submissions suggests would not avoid this situation. Section 81(2)(a) would still require any other aggrieved person to be notified before information gathering could occur. This could obstruct the dispute resolution process in respect of complaints potentially affecting large numbers of people and cannot have been the intention of Parliament.

3.32 Section 89 does not assist the appellant as the concepts of complainant and aggrieved person are used disjunctively as alternatives.

3.33 Referring to para 53 of the appellant's submissions: the respondent notes that no such requirement appears to exist elsewhere including at common law where responsible public interest groups are allowed to bring proceedings raising important public interest issues affecting unidentified affected persons. (See *Environmental Defence Society*.)

Legislative history does not support aggrieved person requirement

3.34 Referring to paras 54 and 55 of the appellant's submissions: it is agreed that the Human Rights Commission Act 1977 (now repealed) referred only to "*the person alleged to be aggrieved*" (s 35(1)) and the "*aggrieved person*" (s 38(4)) in relation to those who could make complaints under that Act. Otherwise the relevant provisions of that Act refer only to the complaint or collectively to the parties.

3.35 The use of the term "*complainant*" as an alternative option for who could make complaints to the Commission, as well as take civil proceedings in the then Complaints Review Tribunal (now replaced by the Human Rights Review Tribunal), was introduced into the HRA in 1993. The two alternatives of "*complainant*" and aggrieved person were not altered by the 2001 amendments to the HRA.

3.36 Clearly there was an intention in 1993 to widen the categories of those who could make complaints under the HRA from those who were themselves aggrieved by alleged breaches of the Act to others who were not themselves aggrieved by the alleged discrimination.

3.37 The appellant has not pointed to anything in the legislative history which suggests that a "*complainant*" must be linked in a representative capacity to an aggrieved person (or persons) for the purposes of jurisdiction or standing. In particular it is not at all clear that the 2001 amendment process involved consideration of, or a decision that, an aggrieved person is still essential (as the appellant claims) for these purposes including in respect of Part 1A cases.

3.38 It is important to consider the legislative history (along with the text and purpose of the HRA) in the context of the way in which the terms "*complaint*" and "*complainant*" are used in other New Zealand legislation as well as in overseas legislation which provides for complaints processes for human rights issues. As will be discussed below, if Parliament had

intended the HRA to be limited in the manner the appellant has suggested, there were many examples of ways available to do so, for it to choose from.

Other New Zealand legislation

3.39 It is useful to compare the general language used in the HRA in terms of who can make a complaint to the Commission (ie either a "*complainant*" or an aggrieved person) with use of the term "*complainant*" in other New Zealand legislation.

3.40 The term "*complainant*" is used in approximately 30 statutes in New Zealand. Although in respect of most of these the term, as with the HRA, is not defined.

3.41 However, some of these statutes provide some specific limits on who can make complaints. An example is the Corrections Act 2004 which at s 2 defines "*complainant*" as "*a person who makes a complaint under subpart 6 of Part 2*" of that Act. In subpart 6, s 152(1)(b) refers specifically to "*all persons under control or supervision ….*". Clearly under this Act complainants are limited to affected persons.

3.42 Both the Privacy Act 1993 (the Privacy Act) and the Private Investigators and Security Guards Act 1974 (the PISGA) specify that "*any person*" can make a complaint (s 67(1) and s 53(2) respectively). However, the Privacy Commissioner and the Registrar of Private Investigators and Security Guards, can or shall respectively, decline to deal with the complaint if the complainant does not have a "*personal interest in the subject matter of the complaint*" (s 71(1)(e) and both s 53(3) and s 59(3) respectively). Clearly those who do not have a personal interest in the subject matter of the complaint are still regarded as complainants in the first instance, although under the Privacy Act a discretion is provided in this circumstance as to whether to take further action regarding the complaint, and under the PISGA the complaint must be declined.

3.43 The Law Practitioners Act 1982 is the only example located by research which specifies that a complaint can be made "*by or on behalf of a complainant*" (s 97(1) of that Act relating to Lay Observers and complaints about the conduct of practitioners).

3.44 It was open to Parliament, as has been done in the above examples, to qualify the term "*complainant*" in the HRA if it intended this be limited in any manner including in the way which the appellant suggests. Parliament did not and it is submitted there is nothing which the defendant has referred to which supports reading in such a qualification or limitation.

International practice

3.45 It is also useful to note the requirements of the Optional Protocol to the International Covenant on Civil and Political Rights (the Optional Protocol) as well as legislation from other jurisdictions in terms of jurisdiction or

standing to bring complaints/proceedings. It is noted that the Optional Protocol is discussed at a later point in the appellant's submissions but is also relevant at this point.

3.46 The Optional Protocol provides a complaints process for complaints of breaches of the particular human rights recognised in the International Covenant of Civil and Political Rights (ICCPR) which includes discrimination under article 26. Complaints (called Communications) are considered by the United Nations Human Rights Committee.

3.47 Referring to para 64 of the appellant's submissions: it is agreed that the Optional Protocol limits jurisdiction to bring a Communication to the Human Rights Committee to those who themselves "*claim to be victims of*" human rights violations (article 1). Unlike the HRA or the NZBORA (which are both statutory means used to incorporate New Zealand's international obligations under the ICCPR into domestic law) this limitation is specified in the instrument. Further, Parliament would have been aware of this limitation when enacting both the HRA and the NZBORA and apparently chose not to include it in either statute.

3.48 This limit is also specified in instruments/legislation relating to human rights complaints processes in other jurisdictions. Examples are:

(1) s 7(1) Human Rights Act 1998 (UK) (UKHRA) limits proceedings in a court or tribunal to: "*only if he is (or would be) a victim of the unlawful act*".

(2) article 25 of the European Convention on Human Rights limits petitions to being brought by those who are: "*the victim of a violation*".

(3) clause 24(1) of the Canadian Charter of Rights and Freedoms (the Canadian Charter) allows proceedings to be brought by: "*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied….*".

(4) s 46P Human Rights and Equal Opportunity Commission Act 1986 (Australian Commonwealth) which provides:

> Lodging a complaint
>
> (1) A written complaint may be lodged with the Commission, alleging unlawful discrimination.
> (2) The complaint may be lodged:
> (a) by a person aggrieved by the alleged unlawful discrimination:
> (i) on that person's own behalf; or
> (ii) on behalf of that person and one or more other persons who are also aggrieved by the alleged unlawful discrimination; or
> (b) by 2 or more persons aggrieved by the alleged unlawful discrimination:
> (i) on their own behalf; or

(ii) on behalf of themselves and one or more other persons who are also aggrieved by the alleged unlawful discrimination; or

(c) by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.

(3) A person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter.

3.49 Concerning the limit on standing in the UKHRA the plaintiff notes the comments in Clayton and Tomlinson *The Law of Human Rights* (Oxford University Press, 2000, paras 3.84 – 3.86). The authors say that during the passage of the United Kingdom Human Rights Bill: "*there was considerable disquiet about the restrictive definition of standing*". They suggest that limiting standing to victims is appropriate in relation to a supra-national court (the European Court of Human Rights) as the latter should not interfere in domestic decision making unless the complainant is directly affected (para 3.84). The respondent suggests that this argument applies equally to the Optional Protocol which the appellant relies on.

3.50 Clayton and Tomlinson go on to say: "*This principle has no direct application to a domestic human rights instrument*". The authors compare the restricted definition on standing in the UKHRA with the wider test available in respect of judicial review. They note that the courts have given standing in the latter area: "*a generous interpretation*". The authors discuss possible undesirable consequences of this difference including that: "*It may also provide insufficient access to justice to meet the basic objectives of the Human Rights Act*" (citing J Miles *Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication* [2000] 59 Cam LJ 133).

3.51 Clayton and Tomlinson also note that during the third reading of the Bill the United Kingdom Government declined to support an amendment to the Bill (which it appears would have widened standing) which had been proposed by Lord Lester and supported by Lord Slynn, Lord Simon and Lord Ackner.

3.52 The key difference between New Zealand's HRA (and the NZBORA) and the instruments and legislation discussed above is that these all specify some form of limitation on who can complain and/or bring proceedings. Given the number of examples from overseas where this occurs it is surprising that s 76(2)(a) was not specifically limited in some manner as part of the 2001 amendments which brought in Part 1A, including in the way the appellant wishes the words to now be interpreted, if this was Parliament's intention.

3.53 The appellant is asking for a limitation to be read into the HRA although it has not provided any examples of any similar limitations being read into human rights legislation.

3.54 Practice internationally is not consistent regarding jurisdiction/standing to make complaints and/or bring proceedings relating to human rights breaches. Some examples of legislation which does specify the particular limitation being argued for by the appellant have been referred to above. By

contrast there are examples in overseas jurisdictions where wider categories of persons are specified as being able to make complaints and bring proceedings.

3.55 One example is the Canadian Human Rights Act (consolidated in 1985). Similarly to New Zealand's HRA, this Act sets up and provides functions for the Canadian Human Rights Commission, provides for a complaints process limited to discrimination complaints and sets up the Canadian Human Rights Tribunal. It also provides that Tribunal with the power to hold inquiries which are similar to proceedings before the New Zealand Tribunal in that it decides whether complaints are substantiated and it can impose remedies.

3.56 The jurisdiction provision equivalent to our s 76(2)(a) is s 40.

3.57 Relevantly, s 40 provides the jurisdiction for the Canadian Commission to accept complaints. This is not limited to persons who have themselves suffered a violation of their rights. Rather, s 40(1) provides that "*any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint …*".

3.58 Pursuant to s 40(2) the Commission may refuse to deal with a complaint if it is "*made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates …*" unless the victim consents. In other words if the relevant victim consents the Commission must deal with the complaint (but note that the victim is not required to make a complaint themselves or substitute for the non-affected complainant). As well, if the victim does not consent the Commission still has a discretion to decide to deal with the complaint. This ensures important issues are not excluded from the process because of narrow jurisdiction/standing requirements.

3.59 Once complaints have been accepted by the Canadian Commission these complaints can (subject to first going through the Canadian Commission's processes) be heard by the Tribunal. The equivalent of our s 92B(1) is s 49. Although it is noted that this provision provides the Canadian Tribunal with a wide discretion as to whether or not to commence an inquiry into a complaint.

3.60 The Constitution of the Republic of South Africa provides in s 38 (which is contained in the Bill of Rights section of the Constitution) the widest provision (that the respondent's research has located) relating to who is entitled to enforce rights under that Constitution:

> Enforcement of rights
>
> 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

a. anyone acting in their own interest;
b. anyone acting on behalf of another person who cannot act in their own name;
c. anyone acting as a member of, or in the interest of, a group or class of persons;
d. anyone acting in the public interest; and
e. an association acting in the interest of its members.

3.61 As can be seen from the various overseas examples discussed above practice varies internationally as to who can make complaints and/or bring proceedings about human rights breaches. It is submitted that this Court should interpret s 76(2)(a) HRA by reference to its text and purpose and in line with the accepted principles of interpretation of human rights legislation in New Zealand and that international practice, because it varies, provides little assistance. Also, as shown by the examples discussed above Parliament could have easily and restricted jurisdiction or standing under the HRA if it had intended to do so.

3.62 Another reason the terms "*complaint*" and "*complainant*" should not be read down so as to restrict the category of those able to make complaints and bring proceedings under the HRA is that such a limit does not apply at common law. The wide tests applying at common law are discussed in detail below.

3.63 Further, the terms "*complaint*" and "*complainant*" should not be read down because the NZBORA, upon which Part 1A HRA is largely based, does not contrary to the appellant's submissions, contain such a limit. This point is also discussed in detail below.

Policy reasons for Courts limiting who may bring proceedings

3.64 Referring to para 56 and following of the appellant's submissions: the policy reasons discussed for Courts limiting proceedings are overstated. As well, the appellant has not provided any authority for reading down legislation on the basis of such policy considerations rather than interpreting the words "*complaint*" and "*complainant*" in accordance with s 5(1) Interpretation Act (ie by reference to the text and purpose of the legislation) as well as the accepted principles relating to interpretation of human rights legislation. However, these policy reasons are now discussed in turn.

Courts providing advisory role

3.65 Referring to para 56 of the appellant's submissions: in *Auckland City Council v Attorney-General* [1995] 1 NZLR 219 the High Court considered the circumstances of being asked to provide what was in effect an advisory opinion relating to certain statutory provisions which related to the disposition of properties by the Council which it might in the future deem to be surplus lands (pp 222-223).

3.66 The High Court referred to a decision *Re Chase* [1989] 1 NZLR 325, 343 in which Henry J had referred to a decision of the House of Lords in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448 in which Lord Dunedin said: "*The question must be*

real and not a theoretical question". The substantive proceeding in the present case does not involve an abstract question but a real question as to whether particular legislative provisions are discriminatory in terms of the legal tests under Part 1A HRA. It is not theoretical. Part 1A anticipates these types of cases.

3.67 Lord Dunedin also referred to a "*proper contradictor*" (mentioned by the appellant at para 56) as being "*some one presently existing who has a true interest to oppose the declaration sought*".

3.68 It is submitted this criterion is met in the present case by the Attorney-General representing a Government department who administers the legislation under which the alleged discrimination operates.

3.69 Further this is what was envisaged by the 2001 amendments which made the Attorney-General responsible for Part 1A claims relating to legislation (s 92B(1)(b)).

3.70 The second case referred to by the appellant: *Gazley v Attorney-General* (1995) 8 PRNZ 313 concerns a case which raised "*purely academic*" and "*hypothetical*" questions with "*no factual setting*" (pp 315, 317-318). As discussed further below, the present case is not in this category.

3.71 The court was also concerned in the *Gazley* case that the proceedings were an attempt to re-litigate a separate proceeding (pp 315-319). This is not the situation in the present case.

Standing at common law

3.72 Referring to para 57 of the appellant's submissions: it is agreed that Courts can allow standing to persons who do not have an interest in the outcome as aggrieved or affected persons. It is not accepted that any of the authorities referred to support the proposition that this will be permitted only in rare cases although the authorities do advise caution when doing so.

3.73 To clarify, the respondent is not seeking standing at common law. Standing in the present case (or jurisdiction) will be decided on the basis of whether the respondent is a "*complainant*" who has made a "*complaint*" under s 76(2) and is thus entitled to bring proceedings under s 92B(1).

3.74 However, the cases referred to at para 57 of the appellant's submissions show that the common law allows responsible public interest groups to bring proceedings involving important public interest issues. The interpretation of the HRA argued for by the appellant would have the result that the HRA would be more restricted than the common law in permitting important issues of public interest to be aired before the Courts. This cannot be correct without a specific and clear indication within the HRA itself.

3.75 Further, the cases referred to by the appellant provide good policy reasons for allowing wide access to litigants under the HRA.

3.76 It is noted that in the *Moxon* case Fisher J decided that all plaintiffs had standing.

3.77 Fisher J listed factors which would weigh against granting standing (para [99]). These were where proceedings were:

- "*unnecessary*"; or
- "*unwarranted*"; or
- lying "*on the fringes of justiciability due to the political or philosophical character" of the proceedings*" (note Part 1A makes clear that legislation is justiciable in the Tribunal where discrimination allegations are involved); or
- being taken by "*busybodies*"; or
- a case where the plaintiff seeks to be added as an "*additional party*" where the issues would be adequately traversed by others and which would fruitlessly add to cost and delay.

3.78 Para 59 of the appellant's submissions contains the extract from *Moxon* which mentions these factors. Although the appellant's submissions do not suggest that any of these factors apply to the present case.

3.79 However, as well as recognising the limits which need to apply to granting standing at common law, Fisher J also recognises: "*There is also a public interest in judicial intervention to prevent or remedy unlawful actions affecting the community at large*". And further because standing is ultimately procedural rather than substantive even in "*marginal cases*" standing should be favoured and important public interests not be allowed to be passed over without proper consideration (paragraph [100]).

3.80 Another relevant case not referred to by the appellant which is referred to by Fisher J in *Moxon* is *Murray v Whakatane District Council* [1999] 3 NZLR 276. In that decision Elias J (as she then was) said: "*Any person able to point to a breach of the law by a public authority has access to the courts to raise the concern*" (at p 307). It is noted that Part 1A HRA under which the present case is brought concerns actions of public authorities.

3.81 The points then mentioned by Fisher J which he says weigh in favour of granting standing all (with one exception) apply to the present respondent. These are:

- Standing will usually be granted where the applicant has a significant personal or private interest beyond that shared by the

public (para [103]). (It is accepted that the respondent does not have such an interest.)

- Where the applicant cannot point to any personal or private interest the fundamental question is whether standing is necessary or desirable in order to protect the public interest and there will be a strong case for standing if there is no other realistic prospect of addressing legal issues of significant public interest (para [104]). (This point is dealt with further below.)

- Responsible public interest groups representing a relevant aspect of the public interest have a strong case for standing where the decision can be expected to have community impact (para [105]). (This point is dealt with further below.)

- Different considerations apply where there are many applicants representing the same public interest (para [106]). (Note this point does not apply to the present case.)

Standing at common law: responsible public interest groups and wide community impact

3.82 The appellant recognises (at para 57 of the appellant's submissions) that at common law responsible public interest groups representing a relevant aspect of the public interest may be granted standing to bring proceedings even where they are not directly affected by the subject matter of the proceedings. In the *Environmental Defence Society* case the Court of Appeal said in respect of the appellants in that case: "*Both are bodies representing some relevant aspect of the public interest, the Environmental Defence Society being concerned with environmental matters generally, the Royal Forest and Bird Protection Society with a more limited class of such matters*" (at p 220).

3.83 There is unfortunately no reference to the type of evidence which was available to the Court in that case upon which it made this assessment. The respondent in the present case relies upon the documents contained in the **Bundle** .

3.84 The respondent, the Child Poverty Action Group (CPAG), is a responsible public interest group representing a relevant aspect of the public interest. It has been concerned with poverty issues including involving children for over 10 years. The issue at the heart of the substantive proceeding involves the poorest families being excluded pursuant to certain provisions in the Income Tax Act 2004 from eligibility for a payment targeted at other low income families to assist with raising children.

3.85 CPAG's work has included research, publications, lobbying and other involvement with issues around income and benefit levels for that lengthy period.

3.86 It is submitted that CPAG would at common law be categorised as a responsible public interest group representing a relevant aspect of the public interest to an extent at least equivalent to the appellants in the *Environmental Defence Society* case. It is noted that the appellant appears not to be disputing this point.

3.87 The Court of Appeal said further: "… *the proceedings challenge the legality of Government action … and we see no reason why it must be left to individuals directly affected to undertake the burden. In the exercise of the Court's discretion responsible public interest groups may be accepted as having sufficient standing…*" (at p 220, emphasis added). This is a particularly important point in the present case where the appellant is arguing for a "*complainant*" to need to either be, or be a representative of, an aggrieved or affected person (or persons). Such an interpretation would require affected persons taking on the burden on litigation which not only includes a monetary burden but the burden of the time and emotional energy required to provide instructions perhaps over a lengthy period of time.

3.88 The Court of Appeal cites with approval the comments of Lord Diplock in the House of Lords decision *Inland Revenue Commissioner v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, 104 and 107, that in relation to challenges against government departments or public authorities who are transgressing the law, or are about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects:

> *To revert to technical restrictions on locus standi to prevent this that were current more than thirty years ago or more would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been one of the greatest achievements of the English courts in my judicial lifetime.*

And further:

> *It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. …..officers or departments of central government …are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.* (Both quotes are from p 221 of the *Environmental Defence Society* case.)

3.89 Referring to page 221 of the *Environmental Defence Society* case, it is submitted by way of comparison that the present case involves an important issue alleging unlawful conduct by the Government which at common law would be accepted as a proper subject for scrutiny by the courts. Given the wide terms of Part 1A of the HRA such issues are clearly appropriate for scrutiny as to any discriminatory effect pursuant to the complaints and litigation processes available under the HRA.

3.90 In *Moxon* Fisher J discusses responsible public interest groups representing a relevant aspect of the public interest which he says "*have a strong case for standing*" (para [105] - emphasis added). His Honour refers to the Court of

Appeal decision in the *Environmental Defence Society* case and the decision in *Murray*. He refers to both decisions again at para [113] and says: "*I would not confine the principles referred to in those cases to resource management*".

3.91 Fisher J also says in *Moxon* that responsible public interest groups representing a relevant aspect of the public interest have a strong case for standing where the decision can be expected to have community impact (para [105]).

3.92 On this point it is noted that the issues at the heart of the substantive claim in the present case concern the ineligibility of the poorest families, including 250,000 children, for certain types of Government assistance aimed at supporting the raising of children. This figure identifying the extent of children potentially affected by the respondent's claim is sourced from the Government (*New Zealand Families Today*, Ministry of Social Development, July 2004, Table 14 at p 164.) If the respondent was seeking standing at common law it is clear that the community impact criterion would also be met.

Standing at common law: protection of the public interest and where there is no other realistic prospect of addressing legal issue of significant interest

3.93 The appellant refers in para 57 to the principle that standing may be granted to protect the public interest where there is no other realistic prospect of addressing legal issues of significant interest. If the respondent was seeking standing at common law this Court would need to consider this issue.

3.94 The appellant has not suggested that any affected individuals or the Human Rights Commission have or will make a claim concerning the same allegations of discrimination raised in the present case.

3.95 Fisher J says in the *Moxon* case there will be "*a strong case for standing if there is no other realistic prospect of addressing issues of serious public interest*" and further "*even an individual having no interest beyond the norm may sue if the public illegality would otherwise continue*". (para [104] emphasis added).

3.96 The second statement by Fisher J is consistent with the strong statements supporting access to the Courts to raise issues of public concern in the *Murray* and *Environmental Defence Society* cases.

3.97 The decision *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 (referred to at para 59 of the appellant's submissions) suggests that one factor to be considered in relation to standing under the Canadian Charter is whether there is another reasonable and effective way to bring the issue before the Court. The appellant in that case lost on this point as many refugee claimants had appealed the issues the appellant in that case wished the Court to consider and importantly because this meant that the legislation was not immunised

from challenge which the Supreme Court said was a factor in favour of granting standing (pp 255-256).

3.98 The Supreme Court of Canada also said: "*standing is not required when, on the balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant*" (p 252).

3.99 As well in the *Canadian Council of Churches* case the Supreme Court of Canada appears particularly concerned with "*marginal or redundant suits*" (p 252 and referred to by the appellant at para 59) which the appellant has not suggested applies to the present case.

3.100 Second, and importantly, the Supreme Court emphasises that the purpose of granting standing is to prevent the immunisation of legislation or public acts from challenge. Further, that following the passage of the Canadian Charter with the ability to challenge legislation (similarly to Part 1A) public interest standing principles in Canada should be given a liberal and generous interpretation (p 250 and p 253). These statements are in line with comments in the *Moxon* and *Environmental Defence Society* cases concerning the importance of access to the Courts where public interest issues are raised.

3.101 Third, the points the Canadian Supreme Court sets out as relevant to deciding whether to grant standing are (pp 253–255):

- Whether there is a serious issue raised by the substantive claim as to the validity of the legislation in question. (There is in the present case).

- If a plaintiff is not directly affected it needs to show it has a genuine interest in the validity of the legislation at issue before the court. (Note the appellant in this case was found to meet this test as did the appellants in the *Environmental Defence Society* case.)

- Whether there is another reasonable and effective means of bringing the issue before the court.

3.102 The appellant has not pointed to anything which suggests that there is another realistic prospect of addressing the legal issues which have been raised in the substantive proceeding in the present case and which are of significant public interest affecting the poorest children in our society.

3.103 The respondent is not aware of any such children or their parents making complaints to the Commission about the issue concerned in these proceedings. Therefore no alternative litigation is in contemplation. Contrary to the principles of standing at common law a restrictive interpretation of jurisdiction/standing under the HRA would mean at least a delay in any challenge to the legislation in issue (which if the respondent's claim is correct will continue to have a serious detrimental effect on a large number of families) and perhaps have the result that it is never challenged.

Both the *Canadian Council of Churches* and *Moxon* cases are authority for not allowing this to result from denial of standing.

Standing in proceedings against a private body

3.104 It is noted for completeness that at para 57 the appellant refers to one other New Zealand case: *Finnegan v New Zealand Rugby Football Union* [1985] 1 NZLR 159. This case involved consideration of standing to bring proceedings against a private body and thus concerns the application of the general approach in the *Environmental Defence Society* case to that particular situation. Therefore the *Finnegan* case does not assist this Court.

Efficient use of judicial resources

3.105 Referring to para 58 of the appellant's submissions: the appellant has suggested, but not put forward any evidence or analysis to support, the proposition that the present proceeding and/or similar cases would not be an efficient use of judicial resources.

3.106 Referring to para 60 of the appellant's submissions: nor is there any evidence that unacceptable delays would result if the jurisdiction of the Tribunal was wide.

3.107 Nor is this principle referred to in any of the New Zealand decisions discussed above which rather focus on the need for issues of public importance to be brought before the Courts without regard to technical points concerning standing. This point was mentioned in *Hy v Zel* [1993] 3 SCR 675 however the primary concern of the Canadian Supreme Court in that case was not possible prejudice to subsequent challenges but rather the resulting absence of facts in respect of which to consider the issues raised by the appellant in that case (p 693).

3.108 It is submitted that a more fundamental and important policy concern for this Court is to interpret the jurisdiction provisions in the HRA in a way in which ensures important public interest issues involving discrimination are able to be raised and either mediated via the Commission's dispute resolution processes or (if the former fails) litigated before the Tribunal.

Hypothetical and abstract proceedings

3.109 In the *Hy v Zel* decision the Canadian Supreme Court considered the issue of standing in the absence of a substantive hearing and thus there was an absence of concrete facts upon which to consider the legal issues raised. This was the point that was of most concern to the Court (p 693). The need for a proper factual context upon which to consider the legal issues in the substantive claim is agreed by the respondent. However, this raises an evidential and not a jurisdictional issue concerning the identity of any plaintiff. The same applies to the proposition referred to in para 62 from the Canadian decision of *Danson v Ontario (Attorney-General)* [1990] 2 SCR 1086, 1093. As well, this proposition is not as directly relevant to the

present case as the decision by our Court of Appeal in the *Environmental Defence Society* case.

3.110 If the respondent was seeking standing at common law this issue might be relevant however it is not relevant to the statutory interpretation exercise before the Court. For completeness the respondent submits that the present case is not hypothetical or abstract or a case without an appropriate factual context which the appellant has suggested and which has been discussed in brief above.

3.111 It is agreed that the substantive claim must be heard in the context of a relevant factual background and not on a hypothetical basis. What facts and evidence will be relevant will be determined by the legal tests for discrimination and justification under Part 1A.

3.112 Given that this case may be the first Part 1A case heard by the Tribunal and those legal tests have yet to be considered in the context of a discrimination case, the respondent is well aware that it will need to present a factually rich case, in order that the legal tests can be properly considered.

3.113 Concerning the legal tests which will be the subject of the substantive hearing it is expected that the appellant will agree that proving discrimination under Part 1A is likely to involve (in general terms) a plaintiff establishing three points:

(1) Does the particular legislation (in this case certain provisions of the Income Tax Act 2004) involve differentiation between, or different treatment of, one individual or group and another individual or group;

(2) Does the differentiation or different treatment arise from a prohibited ground of discrimination (in this case employment status);

(3) Does the differentiation or different treatment result in disadvantage (in this case as a result of being excluded from receiving the CTC or IWP payments).

3.114 The first two points are not expected to always involve issues of fact. In the present case the Tribunal will simply need to consider the words of the allegedly discriminatory legislation and determine whether it differentiates between one group and another on the basis of a prohibited ground of discrimination. In the present case the legislation on its face does so.

3.115 In respect of the third point it is agreed that the Tribunal will need a factual background to decide whether the differentiation in the legislation in issue results in disadvantage to those exempted from receiving the CTC or IWP. As set out in the statement of claim the respondent claims it does. Examples of evidence (anticipated at this stage) which the respondent will bring before the Tribunal to assist it to decide this point will include:

- Information from government agency websites (it is hoped more precise information will be available following discovery from the defendant) showing the levels of various benefits including the CTC up to April 2006 and the IWP up until June 2008;

- Government agency and other research showing the disadvantages suffered by children in families reliant on benefits including when compared to families earning similar levels of income by way of wages (the latter are entitled to the CTC or IWP, the former are not);

- Evidence from medical and other professionals working with impoverished families as to their observations of the effect of low incomes particularly on children;

- Evidence from academic and other witnesses concerning the difference receiving the CTC or the IWP would make in terms of living standards for affected families and their children;

- Evidence from affected persons;

- Information and research from overseas relating to the implementation of similar policies in other countries.

3.116 As can be seen there will be no factual vacuum in the substantive hearing of the present case. It is correct that the evidence in this case will not in the main relate to personal experiences as occurs in relation to most cases under Part 2 of the HRA. Rather, as is anticipated will be the case in respect of many Part 1A cases, this case will instead involve consideration by the Tribunal of social and economic research as well as a substantial component of expert evidence.

3.117 In respect of the justification defence it is expected that the appellant will provide evidence which supports the claim that the ineligibility of families reliant on benefits to receive the CTC or IWP provides for example incentives to work (see justification points listed at para 22 of the statement of defence). This may include:

- Recent policy work and/or research which was presumably completed and/or relied upon to support the continued differentiation between beneficiary families and working families in respect of the recently enacted IWP.

3.118 Thus the substantive claim is not hypothetical or abstract and nor will it be heard in a factual vacuum. Part 1A proceedings will be different in terms of the nature of evidence to be considered by the Tribunal compared to the personal experience focussed discrimination cases of the past.

Other means available under HRA to address matters of significant public interest

3.119 Referring to para 63 of the appellant's submissions: it is agreed that the HRA provides other mechanisms for the Commission to deal with human rights issues. Some of these are listed at para 28 of the appellant's submissions. These include the ability to bring proceedings before the Tribunal following an enquiry (s 92E).

3.120 However, there is nothing in the HRA which indicates that these other means are compulsory substitutes for bodies such as the present respondent making a complaint or bringing proceedings under the HRA.

3.121 As well, by way of example it is noted that in the past four years the Commission has held only one inquiry pursuant to s 5(2)(h). (See *The Accessible Journey: Report of the Inquiry into Accessible Public Land Transport* Human Rights Commission, 2005.) No criticism is made of the Commission, however this indicates that only few matters can realistically be dealt with by it under this function. A "*complainant*" who makes a "*complaint*" about discrimination should not be constrained in pursuing an issue because of decisions by the Commission as to its priorities and its available resources.

3.122 In terms of proceedings brought by the Commission involving large groups of persons the HRA specifically contemplates these being taken by the Commission "*on behalf of the class of persons affected*" (s 92B(2), emphasis added). Although pursuant to s 92B(6)(a) the Commission can only take proceedings if the complainant or aggrieved person has not brought proceedings themselves. By virtue of s 92B(6)(a) the default for proceedings is therefore in favour of complainants (or aggrieved persons) and not the Commission (as was the case to some extent via the Proceedings Commissioner model prior to the 2001 amendments).

3.123 Thus the HRA contemplates complainants or aggrieved persons, separately from the Commission (and as a default prior to the Commission being able to do so), taking proceedings relating to a class or group of persons. However, importantly s 92B(6) does not specifically limit such proceedings to being "*on behalf of the class of persons affected*" as is done in respect of the Commission's ability to take proceedings on behalf of a class under s 92B(2). The effect of these provisions is that the Commission is required to act as a representative for a class but no such limit is provided in respect of complainants.

3.124 Without a clear statement in the HRA that matters of general public concern or class-type actions are limited to proceedings brought by the Commission the alternative means of dealing with discrimination issues under the HRA cannot be interpreted as providing compulsory alternatives to making complaints and bringing proceedings under Part 3.

Conclusion: policy reasons for Courts limiting who may bring proceedings

3.125 The respondent submits that the terms "*complaint*" and "*complainant*" for the purposes of Part 3 HRA can be interpreted simply by reference to the ordinary meaning of these words together with (if necessary) a wide, purposive and enabling interpretation (in line with the recognised principles of interpretation applying to human rights legislation) to achieve the purposes of the HRA which include wide access to the Tribunal and appellate Courts to enable scrutiny of alleged discrimination including by the Government. Further, if more than one meaning is considered to be reasonably available for these terms, s 6 NZBORA requires the Court to give a wide interpretation to these words to allow wide access to the Tribunal.

3.126 The policy reasons advanced by the appellant do not override this interpretation exercise. As well, much of what the appellant has argued concerns evidential issues and not jurisdictional or standing issues.

Aggrieved person requirement: New Zealand Bill of Rights Act and the International Covenant on Civil and Political Rights

3.127 Referring to para 64 of the appellant's submissions: it is accepted (as discussed above) that the Optional Protocol restricts the ability to make complaints (Communications) under the Optional Protocol to victims of a breach of the provisions of the ICCPR.

3.128 Given that the preamble of the HRA says that one of the purposes of the HRA is to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants, it is suggested that had Parliament intended that a similar restriction apply in the HRA, this would have been specified.

3.129 It is not accepted that the NZBORA supports an aggrieved person requirement in respect of complaints under Part 3 HRA. In fact s 6 NZBORA requires an interpretation most consistent with the right to be free from discrimination. This right will be best promoted by wide access to the Tribunal and appellate Courts as a result of a broad interpretation of the terms "*complaint*" and "*complainant*".

3.130 The NZBORA is relevant to some extent because Part 1A HRA is largely based upon provisions in the NZBORA, specifically s 19 and s 5.

3.131 It is noted that in *A Bill of Rights for New Zealand – A White Paper* (1985) (the White Paper) at para 10.2 it is explained that the (then draft) NZBORA is closely based on the text of the Canadian Charter.

3.132 Further, the draft NZBORA contained in the White Paper includes a provision very similar to that in s 24 of the Canadian Charter which would have limited bringing proceedings to those "*whose rights and freedoms as guaranteed by this Bill of Rights have been infringed or denied*" or in other

words affected persons. This limitation on those who could have brought proceedings does not appear in the enacted NZBORA. It can be reasonably presumed that for whatever reason this was not considered appropriate and was thus rejected.

3.133 It is submitted that it is most unlikely that the Courts would read such a limitation into the NZBORA when the point has been considered and rejected by Parliament. It is further submitted that to read such a limitation into the HRA in respect of Part 1A claims in particular would be inconsistent with this approach.

3.134 Referring to paras 67-68 of the appellant's submissions: it is not at all clear how an interpretation of the terms "*complaint*" and "*complainant*" so as to provide wide access to the Tribunal (which the respondent submits is clear in terms of the text and purpose of the HRA) will not provide effective remedies for breaches of individual rights. Conversely, a limited interpretation which limits access to the Tribunal may ensure that some issues are not raised by way of complaints and litigation and are thus not remedied at all. This must be of particular concern in the present case where those affected are likely to be some of the most vulnerable people and families in our community. As well, the present case involves the prohibited ground of discrimination of "*employment status*' which is not widely known or understood, compare for example race or sex or disability discrimination. Therefore the affected persons may not even be aware that this issue is covered by the HRA and thus can be the subject of a complaint (or proceedings).

3.135 The remedies provision in the HRA is comprehensive and provides for several effective remedies for breaches of individual rights. The declaration of inconsistency remedy is the only remedy available in respect of legislation. It is not clear how limiting jurisdiction/standing under the HRA will make more effective remedies available in respect of legislation specifically to affected persons.

3.136 Nor is it clear how the cases referred to by the appellant relating to availability of remedies (specifically damages which are not sought in the present case) under the NZBORA are relevant to the present case. The decision in *Wilding v Attorney-General* [2003] 3 NZLR 787 concerns the issue of whether NZBORA damages were barred by the availability in that case of compensation under the accident compensation legislation. In the decision in *Attorney-General v Udompun* [2005] 3 NZLR 204 the Court of Appeal considered the question considered in *Wilding* of whether NZBORA damages are available where there is another effective remedy as well as principles relating to the assessment of damages. Although both these cases were brought by affected persons the jurisdictional/standing issue in dispute in the present case was not considered. It is not clear how these cases assist determine the question of jurisdiction/standing under the HRA.

3.137 Referring to para 69 of the appellant's submissions: the defendant has not provided any authority for a general limitation as to jurisdiction or standing

applying to the NZBORA. Neither Paul Rishworth (et al) *The New Zealand Bill of Rights* (Oxford University Press, 2004) nor Phillip Joseph *Constitutional and Administrative Law in New Zealand* (2nd edition, Brookers, 2001) contain any reference to limits on jurisdiction or standing under either the NZBORA or the HRA.

3.138 The appellant refers to Rishworth's book (at p 374) as supporting the proposition that civil and political rights, in particular the right to be free from discrimination, are individual rights. It is correct that individuals are affected by breaches of human rights but in the case of all of the prohibited grounds of discrimination this is because of a personal characteristic which they share with a group of others. Rishworth recognises this point and says (at p 374): "*The right is an individual right, but claims of discrimination will often be asserted by groups or on the basis of a person's membership in a group. …..the concept of group disadvantage is relevant to the right to freedom from discrimination*". The substantive claim in the present case concerns an allegation of group disadvantage. This type of claim is recognised by Rishworth as a proper type of claim in the discrimination area.

3.139 Referring to para 70 of the appellant's submissions: the submission is made that NZBORA is limited to claims by those who are either the victim of the breach or those who are bringing the claim "at least on behalf of" the victim and an authority for this proposition is cited: *R v Bruhns* (1994) 11 CRNZ 656. This decision does not support this proposition. It concerns the criminal process protections under NZBORA and the remedy of exclusion of evidence which can be granted by the courts when an individual suspect/accused is not accorded those protections. The criminal process protections in NZBORA clearly apply only to suspects/accused persons and not to other witnesses interviewed by the police. This is clear on the face of those provisions as is not the case in relation to other provisions in NZBORA such as s 19 nor to the provisions under the HRA in dispute.

4 WHETHER THE DOCTRINE OF RIPENESS APPLIES TO THE IN-WORK PAYMENT ASPECT OF THE CLAIM

4.1 Paras 72-76 of the appellant's submissions concern the agreed fact that the legislative provisions relating to the IWP do not come into force until 1 April 2006 (now just over a month away). At this point in time the appellant's point will be redundant and of academic interest only. However, for completeness this issue will be addressed below.

4.2 The defendant's concern at this point is that, though it appears to agree that the IWP provisions have been enacted, it suggests these should not be able to be the subject of litigation before the Tribunal, until "*a breach has actually occurred*" (para 72), the enactment is "*in force*" and "*will have an impact on the rights of a person*" (paras 72 and 75), and consideration of the IWP at this stage would be "*premature and hypothetical*" (para 76).

4.3 Referring to para 73 of the appellant's submissions: the key jurisdictional provision in the HRA, s 76(2)(a), refers only to complaints alleging "*a breach of Part 1A or Part 2 or both*". Further, s 92B(1)(b) provides that proceedings in the Tribunal can include those relating to: "*a breach of Part 1A that is an enactment*" (emphasis added). This subsection simply provides that such proceedings are "*against the Attorney-General or a person or body referred to in section 3(b) of the New Zealand Bill of Rights Act 1990*".

4.4 There is no reference in the HRA to enactments needing to be in force or having operational effect before the Tribunal has jurisdiction to consider these under Part 1A. Nor has the appellant referred to any relevant authorities to support this restrictive interpretation.

4.5 It is noted that "*enactment*" is not defined in the HRA. However, enactments are clearly covered by Part 1A pursuant to s 20J(1) which provides that Part 1A applies to an "*act or omission*" of certain defined persons and bodies together with s 2 which defines "*act*" as including an "*enactment*". There is no clear statement that this term means enactments which have come into force.

4.6 The first point to note is that s 16 of the Constitution Act 1986 provides:

> "A Bill passed by the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent."

4.7 The Interpretation Act 1999 refers to enactments coming into force (for example ss 7, 10 and 11) These provide for operational aspects of the enactment to be set up prior to the enactment coming into force so that on the date the enactment comes into force it can operate effectively from that date.

4.8 The Concise Oxford Dictionary defines an "*enactment*" as:

> [A] law that has been passed.

4.9 Clearly the ordinary meaning of the word enactment is a law which has been passed and pursuant to the Constitution Act 1986 enactments are at this point in time "*law*".

4.10 The restrictive definition of "*enactment*" suggested by the appellant would have the effect of requiring any harm caused by enactments to commence before an issue could be litigated.

4.11 This interpretation, given that litigation takes time and as well it is strongly arguable that the interim relief provision in s 95 HRA could not operate to delay the implementation legislation, would have the practical effect of affected persons having to suffer a reasonably lengthy period of harm without any prospect of compensation as this remedy is not available in respect of legislation found to be discriminatory perhaps after several

appeals. This cannot have been the intention of Parliament without a clear statement to this effect.

4.12 Consider, such an argument in the context of legislation enacted but not yet in force which allegedly discriminates on other grounds such as race or ethnic origin or disability. It cannot be correct in principle that enactments must be in force and affecting people (perhaps for some lengthy period of time and particularly where no injunctive relief is available) before challenges under the HRA can occur.

4.13 Refer to the *Environmental Defence Society* case which refers to the House of Lords decision in the *Inland Revenue Commissioners* case per Lord Diplock who refers to an earlier judgment of Lord Denning MR which speaks of government departments or public authorities who are "*transgressing the law, or are about to transgress it*" (at page 221 - emphasis added).

4.14 The appellant refers at para 76.1 to two cases which discuss the principle that Bills which are not yet enacted cannot be the subject of litigation.

4.15 The first case: *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 concerned appellants wanting injunctive relief in respect of legislation which was not enacted but was anticipated as a result of a deed of settlement entered into by the Crown and Maori concerning claims by Maori to fisheries resources.

4.16 The Court referred to "*the established principle of non-interference by the Courts in parliamentary proceedings*" (p 307). And further said this principle "*applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill to Parliament*" (p 308).

4.17 The Court said further: "*the proper time for challenging an Act of a representative legislature …. is after the enactment*" (p 308).

4.18 The second case referred to by the appellant: *Milroy v Attorney-General* (unreported, Court of Appeal, 11 June 2003, CA197/02) concerned challenges to a decision made by a Minister relating to a settlement proposal for particular Maori claims. The Court said at para [14]: "*The formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review*". (Also see para [18].)

4.19 The present case is not at all comparable to these two cases. It is agreed that Bills could not form the basis of litigation under the HRA for various reasons including because they are not enactments.

4.20 The present case in contrast to the two cases referred to by the defendant concerns an enactment which s 20J(1) read with the definition of "*act*" in s 2 (along with s 92B(1)(b)) make clear can be the subject of proceedings before the Tribunal.

4.21 This point raises possible evidential issues but is not a jurisdictional issue. One evidential issue which could arise in some cases concerns not being able to adequately assess the claimed disadvantage or effects of some new enactments. This assessment may not be able to be made until the enactment is operational and some period of time has passed to allow the effects of the enactment to manifest. The appropriate remedy in such cases would be a strike out application based on insufficient evidence to establish the claim.

4.22 However, this does not apply to the present case. The IWP provisions do not create a completely new and untested policy with effects which cannot be reasonably assessed. In such circumstances the appellant's argument on this point might be stronger.

4.23 The aspect the defendant wishes removed from consideration in the present proceedings, namely the IWP, replaces the CTC which at present has and since 1996 has had an actual effect on those not entitled to receive it. The link between the two payments is clear from s 13 Taxation (Working for Families) Act 2004 which will insert a new s KD 2(2) into the Income Tax Act 2004 from 1 April 2006. That new section provides that a person is entitled to an "*IWP or a CTC*".

4.24 The (non)entitlement to both payments remains the same and thus also arguably do its effects; only the name of the payment will change as well as the amounts payable. The claim cannot thus be described as premature or hypothetical (refer para 76 of the defendant's submissions).

4.25 Concerning the Government's view as to future effects the Ministry of Justice, though without referring to any authority, has said: "*Under the Bill of Rights Act it is immaterial whether this disadvantage has already occurred or whether it is being assumed that it will occur as a result in the future*". (Refer *The Non-discrimination Standards for Government and the Public Sector*, Ministry of Justice, March 2002, page 20.)

4.26 Also, presumably the Government completed research and other work to anticipate or predict the effects of the legislation at issue prior to recently deciding to continue the policy behind the CTC through the new IWP. This information has not yet been made available to the respondent but is expected to be so following discovery prior to the substantive hearing. It is anticipated that this information will be of considerable assistance to this Tribunal in assessing the continuing effects of the IWP once it replaces the CTC.

4.27 Importantly, it is noted that future, actual and practical effects of the provisions relating to the IWP (as well as some other benefits) seem to be sufficiently clear to the Inland Revenue Department because they have published information about the levels of payments to which people will be eligible (in respect of a range of benefits not only the CTC or the IWP) right through to the 2007 – 2008 financial year.

4.28 The provisions relating to the IWP have been passed and assented to. These are now reasonably described in terms of the ordinary meaning of this word as being an "*enactment*" and its effects can reasonably be assessed as being substantially similar to those of the CTC. It is submitted not only would the HRA provide jurisdiction to hear the substantive claim in respect of the IWP prior to it coming into force but as well such a claim could be sensibly heard on the basis of a solid factual foundation.

Doctrine of ripeness

4.29 The doctrine of ripeness is referred to at para 4 of the statement of reply as one of the appellant's preliminary issues, although this point appears not to be being pursued on appeal. However, for completeness the respondent considers that the Court should be aware of this doctrine as it specifically concerns the issue of when it is appropriate for Courts to consider Governmental action.

4.30 The doctrine has not received judicial consideration in New Zealand in relation to legislation. It was considered by the High Court in ***Zaoui v Attorney-General*** [2004] 2 NZLR 339, in relation to the judicial review of statutory powers of decision making, specifically whether judicial review was available at a very early stage of what could be a lengthy series of decision-making processes. However, some principles can be said to apply to the doctrine as it relates to legislation.

4.31 In ***Zaoui*** Williams J noted that section 4(1) of the Judicature Amendment Act 1972 allowed for judicial review of "*proposed exercise of statutory power*". Clearly this can involve imminent rather than actual "*harm*".

4.32 This part of Williams J's judgment was considered by the Court of Appeal in ***Attorney-General v Zaoui*** (unreported, 30 September 2004, CA 20/04) by Anderson J, who held at paragraph [19]:

> …. I am satisfied it is apt to review the Inspector-General's process en route to an appealable determination. It is the case that, as a generalisation, the Courts are diffident about intervening by way of judicial review before a matter is ripe for an available appeal. But an exception must be admitted where the whole process en route to the appealable decision may miscarry, with grave consequences, unless judicial guidance is obtained. There are compelling arguments for intervention in this case where a review by the Inspector-General is entirely unprecedented, where the subject's liberty and convention rights are potentially jeopardised and where the individual must join issue with one hand tied behind his back by an assertion of the existence of classified security information.

4.33 Glazebrook J simply said at paragraph [106] that:

> … the blanket application of the ripeness doctrine ..….is excluded by the Judicature Amendment Act (1972).

4.34 In other jurisdictions the doctrine of ripeness has been considered in both judicial review and statutory contexts. In simple terms, the doctrine prevents courts from hearing cases that are too premature for a court to make a ruling.

4.35 *Abbott Laboratories* 387 US 136 (1967) concerned the *circa* 1962 exercise of a statutory authority by the US Commissioner of Food and Drugs, in relation to prescription drug labeling.

4.36 In *Abbott Laboratories*, the doctrine of ripeness was expressed thus:

> [The] basic rationale (of the doctrine of ripeness) is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized (*sic*) and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring (the Court) to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

4.37 Thus the *Abbott* test for ripeness involves two steps:

- Are the issues fit for judicial decision; and
- Would the party seeking relief suffer undue hardship if adjudication were deferred.

4.38 The US Supreme Court has considered the concept of ripeness in several other decisions. In *Thomas v Union Carbide Agricultural Products Co* 473 US 568 (1985), the Court (citing *Abbott*) said that:

> …. "the fitness of the issues for determination" and "the hardship to the parties of withholding court consideration" must inform any analysis of ripeness … "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough. (Quoting *Pennsylvania v West Virginia* 262 US 553, 593 (1923).)

4.39 In *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City* 473 US 172 (1985) the US Supreme Court held that a claim is not ripe unless a final decision has been reached by the government agency in charge of enforcing the regulation. The Court also noted what it had earlier said in *Hodel v Virginia Surface Mining and Reclamation Assn Inc* 452 US 264, that where there are "*other opportunities to obtain administrative relief*", such potential "*confirms the conclusion that the (taking issue) simply is not ripe for judicial resolution*".

4.40 In *Texas v United States* 532 US 296 (1998) the Court cited *Thomas* noting that:

> … a claim resting upon contingent future events that may not occur as anticipated, or indeed may not occur at all … is not fit for adjudication.

4.41 The Court in *Texas* noted that the problem it had been asked to solve was "*too speculative*" and the hardship in the plaintiff biding its time "*insubstantial*". For those reasons the Court held that the matter was not ripe for adjudication.

4.42 From the above, the following may be distilled:

- The Judicature Amendment Act 1972 allows for judicial review of a "*proposed*" (i.e. pre-harm) exercise of a statutory power;
- Courts are diffident about intervening in a matter before it is "*ripe for an available appeal*" (*Zaoui* – Court of Appeal);
- Ripeness involves analysing both fitness for determination and hardship (*Abbott*);
- Contingent future events which may not eventuate are not "*fit*" for adjudication (*Thomas*/*Texas*);
- Alternative remedies restrict ripeness (*Williamson County*);
- Impending injury can ripen an issue (*Pennsylvania*).

Conclusion

4.43 In the present case, the following are clear:

- CTC and IWP are enactments;
- To that extent the democratic process has ended (thus rendering *Milroy* and *Te Runanga o Wharekauri Rekohu* obsolete to the analysis);
- Parliament has made a final decision about the legislation;
- Those excluded by CTC and IWP (i.e. that group whose interests are represented by the respondent) have no alternative remedies available to them to challenge the regimes;
- There are no "*contingencies*" with respect to the legislation – it clearly identifies who is and who is not eligible;
- There is clearly "*impending harm*" to the group represented by the plaintiff.

4.44 Importantly, as discussed above the effects of the IWP will be substantially similar to those of the CTC and thus the Tribunal will have evidence relating to nine years of experience with the CTC payment to assess the effects and disadvantage which will continue to be caused by the IWP.

……..
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