Decision No. 28/05

Reference No. HRRT 41/04

BETWEEN **CHILD POVERTY ACTION GROUP INCORPORATED**

Plaintiff

AND **THE ATTORNEY-GENERAL**

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle Chairperson
Ms P J Davies Member
Mr S Perese Member

HEARING: 27 & 28 June 2005 (Wellington)

APPEARANCES:

Mr R M Hesketh & Ms C A Rodgers-Smith for plaintiff
Ms V Sim & Ms J Foster for defendant

Decision Issued: 15 September 2005

DECISION
(ACCESS TO THE TRIBUNAL)

Introduction

[1] The plaintiff claims that the Child Tax Credit provisions of the Income Tax Act 1994 discriminate in a way that is inconsistent with the right to freedom from discrimination affirmed by the New Zealand Bill of Rights Act 1990. It says that the effect of the discrimination is widespread and significant. We were shown figures on the basis of which it was suggested for the plaintiff that as many as 250,000 children in families where the primary source of income is from a welfare benefit may be suffering the consequences.

[2] As an incorporated society with concerns about issues of this kind, the plaintiff would like to ask the Tribunal to make a declaration under the Human Rights Act 1993 that the relevant legislation is inconsistent with the right to freedom from discrimination affirmed by the New Zealand Bill of Rights Act 1990.

[3] In fact, the provisions known as the 'Child Tax Credit' scheme have already been a subject of further legislation. They are replaced (more or less) with effect from 1 April 2006 by the 'In-Work Payment' scheme. The relevant legislation has been enacted, but it has not yet come into force. However the plaintiff says that the In-Work Payment scheme is no better than the Child Tax Credit scheme. As a result it also wants to ask the Tribunal to make a declaration that the In-Work Payment provisions of the relevant legislation are inconsistent with the right to freedom from discrimination affirmed by the New Zealand Bill of Rights Act 1990, even though they have not yet to come into force.

[4] Can the plaintiff bring these claims at all?

[5] The defendant says it cannot. He denies the allegations generally, but says that in any event the plaintiff is not in a position to bring these sorts of issues to the Tribunal. Putting the matter more precisely, he contends that the issues raised by the plaintiff have not been the subject of a 'complaint', and that the plaintiff is not 'a complainant', within the meaning of those words as they appear in ss.92B and 76(2)(a) of the Human Rights Act 1993. With respect to the In-Work Payment scheme, he also says that the relevant legislation cannot be the subject of proceedings for a declaration of inconsistency because it is not in force yet. As a result the defendant asks us to strike out or dismiss the claims in this proceeding in their entirety, and at this stage. He says that we do not have jurisdiction to deal with them.

[6] We will deal with the issues raised under the following headings:

Background

[7] This is the first case under Part 1A of the Human Rights Act 1993 ('the HRA') that has been presented to the Tribunal by the Director of Human Rights Proceedings ('the Director').

[8] Part 1A was inserted into the HRA by the Human Rights Amendment Act 2001, which came into force on 1 January 2002. Broadly speaking, it provides for a process by which the acts and omissions of the legislative, executive or judicial branches of the Government of New Zealand can be subjected to scrutiny for compliance with the right to freedom from discrimination that is affirmed by s.19 of the New Zealand Bill of Rights Act 1990 ('NZBORA').

[9] Section 19(1) of NZBORA provides:

> *"Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993."*

[10] The relevant ground of prohibited discrimination alleged by the plaintiff under the HRA is s.21(1)(k)(ii): *"Employment status, which means … (ii) Being a recipient of a benefit under the Social Security Act 1994 or an entitlement under the Injury Prevention, Rehabilitation and Compensation Act 2001:"*

[11] In argument the Director placed considerable emphasis on the effect of the alleged discrimination on children of families who are not entitled to the tax advantages in issue, contending that the provisions of the Tax Acts in question treat them less favourably than others by denying the primary caregivers of such children access to tax advantages when the taxpaying primary caregivers (or their spouses) are recipients of an income-tested benefit.

[12] The plaintiff says that the legislation is therefore inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA, and that the justified limitation provisions of s.5 NZBORA do not apply (see s.20L(2) of the HRA).

[13] In the present case we are concerned with acts of the legislative branch of government, specifically in the form of:

[a] Sections KD2(4) of the Income Tax Act 1994 and KD2(4) of the Income Tax Act 2004 (the latter having replaced the former from 1 April 2005), both of which make provision for the allowance of a Child Tax Credit in certain circumstances ('the CTC provisions'); and

[b] Section KD2AAA(1)(e) of the Income Tax Act 2004, which is inserted into the Income Tax Act 2004 by s.14 of the Taxation (Working for Families) Act 2004. It comes in to force from 1 April 2006, and defines eligibility for an In-Work Payment tax allowance ('the IWP provisions') that will, more or less, replace the CTC provisions (the precise details of how that will happen do not matter for the present).

[14] This is a claim for a declaration of inconsistency under s.92J(2) of the HRA. It is clear that the Attorney-General is the appropriate defendant in this case: see s.92B(1)(b) of the HRA. It follows that a declaration under s.92J(2) of the HRA is the only remedy that can be applied for. There is no claim for any other kind of relief, nor could there be. This is a feature that we will return to when dealing with the questions of interpretation at issue in this case.

[15] The plaintiff is an incorporated society. Its objects include the promotion of awareness of the causes and consequences of child poverty and achieving better policies for children and young people, with a primary focus on the right of children and young people to security, food, shelter, education, health care, and opportunities for development. The organisation was founded in 1994 and formally incorporated in 1998. Various materials that were put before us show that the plaintiff has been active in pursuing its objectives through (amongst other things) the establishment of a website, preparation and sponsorship of relevant reports, political lobbying, and

arranging and supporting a programme of public lectures and presentations on topics of importance to its members - this list is illustrative and not exhaustive.

[16] The defendant accepts that the fact that the plaintiff is an incorporated society and not a natural person does not prevent it from bringing the claim: see s.29 NZBORA and s.29 Interpretation Act 1999. Instead the preliminary questions that we have to decide have to do with the connection between the plaintiff and the issues that it wishes to bring forward in this proceeding in the Tribunal.

[17] Ms Rodgers-Smith submitted that the plaintiff is a responsible public interest group that has a real and sincere concern about the issues it has raised. Nothing put before us by the defendant seriously suggested otherwise. But by its nature the plaintiff is not itself a taxpaying primary caregiver nor (to state the obvious) does it come within the group of children or young persons said to be affected by the discrimination alleged. Thus it is not directly involved in or affected by the issues that it asks us to consider, at least not in the sense that it might itself be benefited or disadvantaged by the outcome.

[18] The plaintiff has not asked us to deal with this claim on the basis that it is a representative action of any kind. Nor is it asking us to approach the matter on the basis that it has the authority (actual or implied) of any particular individual or individuals who might themselves be affected. Ms Rodgers-Smith made it clear that the case is not brought to us as a 'class' action. The action is brought by the plaintiff as a concerned observer of the issues, and on that basis only.

[19] The defendant's argument is that, no matter how well meaning the plaintiff may be, if the provisions of the HRA that govern access to the Tribunal for cases of this kind are properly understood the plaintiff has no sufficient connection with the issues to entitle it to bring the claim. As already indicated, the defendant also argues in respect of the IWP provisions that any claim for a declaration of inconsistency is premature. He says that until the legislation comes into effect on 1 April 2006 no-one can suffer or have suffered any disadvantage under it. Since disadvantage of some kind is an essential ingredient of any claim for unlawful discrimination, it follows that there is no-one who can establish the elements required for a successful discrimination claim under the HRA.

[20] We should make it clear that the defendant denies the assertion that either of the CTC or the IWP provisions are inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA. If the claims are the subject of a substantive hearing at some future date, he will say (amongst other things) that when properly analysed the basis for claiming the CTC is not determined by a taxpayer's employment status. In the alternative it will be argued that a statutory scheme which encourages those who wish to become independent of state assistance is a reasonable and justified measure, and that it is something that falls within the discretionary area of judgment or 'margin of appreciation' of the State. There will no doubt be other issues besides.

[21] None of these matters are for determination at this point. Instead, we are asked only to deal with the two preliminary issues, namely (i) whether the plaintiff is able to bring these claims, and (ii) whether it is in any event too soon for anyone to challenge the IWP provisions because they are not yet in force.

[22] For completeness, we should add that a possible third preliminary issue was also suggested. In his statement of reply, the defendant has asserted that because the CTC can only be claimed by the primary caregiver of a child or children, and not by the children who are said to be affected, at least insofar as children are concerned there can be no discrimination. That is because all children are treated alike – none of them have any entitlement under the relevant provisions.

[23] The plaintiff rejects this analysis, and Ms Rodgers-Smith urged us to deal with the matter as a preliminary issue. But although the point has been raised on behalf of the defendant, Ms Sim resisted the call for a decision at this stage. She submitted that this particular nuance of the case is one that should be dealt with at a substantive hearing, should there ever be one. She preferred not to make any detailed submissions on the matter.

[24] We recognise that the case is at an early stage, and that there are dangers in trying to predict how substantive issues might be argued in future. Nonetheless we have an impression that the cause of this particular disagreement lies in a difference of perspective as to what class of people might be identified as suffering disadvantage if the claim of discrimination is to succeed. Given the objects and activities of the plaintiff it is not surprising that it approaches the issues from the perspective of what it sees as the effect of denying access to the relevant tax benefits on children in poverty. More than once in her submissions Ms Rodgers-Smith said that the plaintiff is bringing the claim in the interests of children said to be affected. She also referred us to s.21(2)(a) of the HRA, and submitted that the discrimination alleged pertains to children, insofar as they are relatives or associates of primary caregivers who cannot access the tax benefits at issue.

[25] We take the defendant's argument about the lack of any effect from the alleged discrimination on children as being a response to the plaintiff's child-centred approach and emphasis. But it must at least be arguable that another potentially relevant group to suffer the disadvantage of any unlawful discrimination is comprised of the primary caregivers who cannot access the relevant tax benefits. Looking after the interests of adult taxpayers may not be the plaintiff's first focus, but if one looks at the problem from the perspective of the primary caregivers rather than children, then it seems to us to be at least arguable that they (the primary caregivers who cannot access the tax benefits at issue) are a potentially relevant class of people who may be disadvantaged by the alleged discrimination.

[26] We not in a position to make any final decision about these issues. We therefore agree with Ms Sim's submission that, in this case, all questions about exactly who suffers or stands to suffer any relevant disadvantage (if anyone) are matters for the substantive hearing. We decline Ms Rodgers-Smith's invitation to deal with the proposed third preliminary issue in this decision.

The relevant statutory provisions

[27] Counsel were agreed that the question of whether the plaintiff in this matter can bring its claims to the Tribunal depends on an interpretation of the words '*complaint'* and '*complainant'* in ss.92B and 76(2) of the HRA.

[28] Various parts of s.92B were referred to in argument to support different propositions, so despite the length of the section it is convenient to set it out in full

(our emphasis draws attention to the words ‘complaint(s)’ and ‘complainant’ where they appear):

> *Civil proceedings arising from **complaints***
>
> *(1) If a **complaint** referred to in section 76(2)(a) has been made, the **complainant**, the person aggrieved (if not the **complainant**), or the Commission may bring civil proceedings before the Human Rights Review Tribunal—*
>
> *(a) for a breach of Part 1A (other than a breach of Part 1A that is an enactment, or an act or omission authorised or required by an enactment or otherwise by law), against the person or persons alleged to be responsible for the breach:*
>
> *(b) for a breach of Part 1A that is an enactment, or an act or omission authorised or required by an enactment or otherwise by law, against the Attorney-General, or against a person or body referred to in section 3(b) of the New Zealand Bill of Rights Act 1990 alleged to be responsible for the breach:*
>
> (c) *for a breach of Part 2, against the person or persons alleged to be responsible for the breach.*
>
> *(2) If a **complaint** under section 76(2)(a) relates to a discriminatory practice alleged to be in breach of Part 1A or Part 2 and to affect a class of persons, proceedings under subsection (1) may be brought by the Commission on behalf of the class of persons affected.*
>
> *(3) A person against whom a **complaint** referred to in section 76(2)(a) has been made may bring civil proceedings before the Tribunal in relation to the **complaint** if no proceedings in relation to the **complaint** have been brought under subsection (1) by, or on behalf of, the **complainant** or person aggrieved or a class of persons.*
>
> *(4) If parties to a **complaint** under section 76(2)(a) have reached a settlement of the **complaint** (whether through mediation or otherwise) but one of them is failing to observe a term of the settlement, another of them may bring proceedings before the Tribunal to enforce the settlement.*
>
> *(5) The rights given by subsections (1), (3), and (4) are not limited or affected just because the Commission or a mediator at a dispute resolution meeting or the Director is taking any action in relation to the **complaint** concerned.*
>
> *(6) Despite subsection (2), the Commission may bring proceedings under subsection (1) only if—*
>
> *(a) the **complainant** or person aggrieved (if not the **complainant**) has not brought proceedings; and*
>
> *(b) the Commission has obtained the agreement of that person before bringing the proceedings; and*

> *(c) it considers that bringing the proceedings will facilitate the performance of its functions stated in section 5(2)(a).*
>
> *(7) Despite subsections (1) to (6), no proceedings may be brought under this section in respect of a **complaint** or relevant part of a **complaint** to which section 79(3) applies.*

[29] There are several references to s.76(2)(a) of the HRA, which provides (again, the emphasis is ours):

> *"(2) The Commission has, in order to carry out its function under subsection (1)(b), the following functions:*
>
> (a) *To receive and assess a **complaint** alleging that there has been a breach of Part 1A or Part 2 or both: . . ."*

(The function specified in s.76(1)(b) of the HRA is that of facilitating the resolution of disputes about compliance with Part 1A or Part 2).

[30] To the best of our knowledge, aside from the Tribunal's decisions in *New Zealand Freedom from Discrimination Group v New Zealand Grand Lodge of Freemasons* [1980] 2 NZAR 401 and *Amaltal Fishing Company Limited v Nelson Polytechnic* [1996] NZAR 97 (both of which we refer to below) there are no authorities that deal directly with either of the terms 'aggrieved person' or 'complainant' as they appear in the HRA or its predecessors.

[31] We should make it clear that the issue we are asked to determine is one of interpretation only. The defendant does not dispute that the plaintiff began the processes of raising the CTC and the IWP issues by drawing its concerns in respect of each to the attention of the Human Rights Commission ('the Commission'). The defendant also accepts that the steps subsequently taken by the Commission were such as to comply with whatever is contemplated by the phrase 'receive and assess' in s.76(2)(a) of the HRA. For present purposes at least, the only things that the parties disagree about (at least in respect of the CTC provisions) are the meanings of the words 'complaint' and 'complainant' in the relevant statutory context.

The interpretation advanced by the defendant

[32] We take the interpretation for which the defendant argued first.

[33] Broadly speaking, the concern that underlies the defendant's argument has to do with the practical consequences of interpreting the words 'complaint' and 'complainant' in an unrestricted way.

[34] Taking s.92B(1) at face value, the only qualifying condition for a claim in the Tribunal alleging a breach of Part 1A or Part 2 is that there must have been a complaint of a kind referred to in s.76(2)(a). All that s.76(2)(a) requires is that the complaint must have been received and assessed by the Commission. There is no express requirement for the person who has made a complaint to have any connection with the subject matter of the complaint at all. If that is accepted, then Ms Sim submitted it follows that someone having no connection whatsoever with a person alleged to be affected or aggrieved by an act of unlawful discrimination could

make a complaint to the Commission, and then bring proceedings in the Tribunal, even if that person is no more than an intermeddling busy-body (and even if the person or persons who were affected do not wish to see the proceedings brought).

[35] In her written submissions Ms Sim argued that a 'complaint' under s.76(2)(a) should therefore be understood as meaning a complaint in respect of an identifiable aggrieved person or persons, and that 'complainant' means either (i) an aggrieved person who brings a complaint, or (ii) someone who brings a complaint with the authority of an aggrieved person or aggrieved persons. The central idea behind the argument is that, for those who are not themselves an aggrieved person or persons, then some sort of authority from someone who is aggrieved must be shown to have been given to enable the claimant to pursue the matter. Absent such authority, there is no 'complaint', and therefore no 'complainant' who can initiate proceedings in the Tribunal.

[36] It is not controversial that discrimination must involve persons: s.21(2) of the HRA makes it clear that the grounds of differentiation in s.21(1) are only prohibited grounds of discrimination if they pertain to a person, or to a relative or an associate of a person. But the effect of the defendant's argument is to ask us to read into the words 'complaint' and 'complainant' a restriction that would exclude from them any person who is not themselves aggrieved, or bringing a complaint with the authority of a person who is aggrieved.

[37] There is an immediate difficulty with the way in which this argument was formulated. The opening words of s.92B(1) describe the persons who can bring proceedings in the Tribunal if a complaint referred to in s.76(2)(a) has been made. They are (i) the complainant, (ii) the person aggrieved *' … if not the complainant …',* or (iii) the Commission. Clearly the section itself contemplates that a complaint can be made by someone other than an aggrieved person. There are no words in s.92B that explicitly state that a 'complainant' can only be someone who has some kind of authority from an aggrieved person to bring the complaint.

[38] To the contrary, s.92B(3) describes the circumstances in which a person against whom a complaint referred to in s.76(2)(a) has been made can bring proceedings in the Tribunal. Such a person can bring proceedings in relation to the complaint if no proceedings have been brought under s.92B(1) ". . . *by, or on behalf of, the complainant* ***or*** *person aggrieved or a class of persons*" (our emphasis). This part of s.92B suggests that the distinction between complainants and persons aggrieved was intentional.

[39] That suggestion gains support if one looks at the provisions governing the steps that are to be taken by the Commission in attempting to facilitate the resolution of complaints brought under s.76(2)(a). The apparently deliberate distinction between complainants and aggrieved persons is, for example, maintained in s.80 (which deals with the actions which the Commission can take if the complainant or the person alleged to be aggrieved informs the Commission that they wish to proceed with the complaint). Again, in s.81(2) the distinction between complainants and persons alleged to be aggrieved is made clear (s.81 deals with the Commission's responsibilities to inform parties about the steps it is taking when gathering information about a complaint).

[40] It is difficult to reconcile those provisions with the idea that someone can only be a 'complainant' if they are either the aggrieved individual or someone acting with

the authority of an aggrieved individual. With respect to ss.81(2)(a) and (b), for example, it can be asked: why would the Legislature have gone to the trouble of making it so clear that notice of the Commission's intention to gather information must be given separately to the complainant and any person alleged to be aggrieved (if not the complainant), if the only people who can be 'complainants' (aside from persons aggrieved) are those who are acting with the authority of someone who is aggrieved?

[41] The legislative history of the provisions that allow access to the Tribunal also counts against the position for which the defendant argued.

[42] This Tribunal was first constituted under s.45 of the Human Rights Commission Act 1977 (at that time it was called the Equal Opportunities Tribunal). Aside from the Human Rights Commission, the class of people who could commence proceedings in the Tribunal at that time was specified in s.38(4) as *' … the aggrieved person …'*. There was no provision that might have allowed a complainant other than an aggrieved person to bring proceedings.

[43] That was also true of the Race Relations Act 1971, even after the amendments to that Act which followed the enactment of the Human Rights Commission Act 1977: see s.17(4) of the Race Relations Act 1971. We note, however, that the question of just who could initiate proceedings concerning racial intolerance had been the subject of comment at the reading of the Race Relations Bill on 15 December 1970. The Acting Minister of Justice said:

> *Clause 14 has been amended to permit a complaint to be made to the conciliator by someone other than the aggrieved person. This question gave the committee a great deal of difficulty. The last thing we want is to encourage the interfering busy-body or the person or organisation that for its own purposes wishes to foment complaints and grievances. On the other hand, as the New Zealand Law Society and other witnesses pointed out, some people who may be subject to racial intolerance might not themselves lay complaints with the conciliator simply because they may be inarticulate or ignorant of their rights, or suspicious or cynical of authority, or fearful of incurring expenses. The result is that the clause has been amended to permit complaints to be made on behalf of the alleged victim of discrimination, but the conciliator may decide not to proceed with the investigation if he feels that the complainant does not desire it."* (377 NZPD 5307)

[44] The significant point for present purposes is that, even as early as the 1971 Race Relations Act, the Legislature plainly appreciated a distinction between those who claim to be 'aggrieved individuals' and those who are 'complainants'.

[45] It is against that background that the subsequent introduction of the word 'complainant' must be assessed. Ms Rodgers-Smith informed us that the word was first introduced as an alternative description for those who could make complaints to the Commission and (later) bring proceedings in the Tribunal when the HRA was enacted in 1993. The two alternatives of 'complainant' and 'aggrieved person' were not altered when the Human Rights Amendment Act 2001 was passed.

[46] In the circumstances we agree with Ms Rodgers-Smith that the legislative decision in 1993 to arm 'complainants' with a right of access to the Tribunal was

deliberate, and must be seen as having been intended to expand the category of persons who could be heard in the Tribunal accordingly.

[47] Reference can also be made to an early decision in the Tribunal, although it dealt with the term 'aggrieved individual' rather than the words 'complaint' or 'complainant'. It is *New Zealand Freedom from Discrimination Group v New Zealand Grand Lodge of Freemasons* [1980] 2 NZAR 401. In that case the Tribunal held that the words 'aggrieved individual' in s.38(4) of the Human Rights Commission Act 1977 should not be read in an unduly restrictive way but, even so, that they were not intended to be so wide as to include anyone at all. The claim was dismissed on the ground that the group seeking to bring the proceedings had no sufficient connection with the subject matter of the claim to do so. It seems safe to infer from the language of the decision, however, that if the proposed plaintiffs had been able to establish that they had some sort of authority to bring the proceedings on behalf of an aggrieved individual, then the Tribunal would not have prevented them from doing so.

[48] We note two points about the decision. The first is that it was decided before the House of Lords dealt with the landmark case concerning *locus standi* in judicial review proceedings in *R v Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617. The second, and more significant for present purposes, is that it pre-dated the introduction of the words 'complaint' and 'complainant' in the HRA. Again we think the introduction of those words must be judged as having been designed to effect a change from the position as it stood after the decision in *New Zealand Freedom from Discrimination Group v New Zealand Grand Lodge of Freemasons, a*nd one that was intended to go beyond simply clarifying that persons acting on behalf of those who might claim to be aggrieved could bring proceedings on their behalf.

[49] That certainly seems to have been the view of the Tribunal in *Amaltal Fishing Company Limited v Nelson Polytechnic* [1996] NZAR 97. The case was decided after the HRA was enacted in 1993. It was brought by a fishing company that was agreed to have *a 'real interest'* in the provision of fishing cadet courses of a kind offered by the defendant. The plaintiff wanted to challenge the way in which places on such courses were reserved for people of certain racial or ethnic origins. There is no suggestion in the decision that the plaintiff was purporting to act for or on behalf of people who had tried to enrol in such a course, or who might have wanted to do so. Even so, the Tribunal referred to *New Zealand Freedom from Discrimination Group v New Zealand Grand Lodge of Freemasons* and then said:

> *" … we are satisfied … that the plaintiff comes within the wider definition of an 'aggrieved person' as expressed in the decision to which we have just referred. Indeed, there is no dispute between the parties on this point. We note that the provisions of s.83 of the Human Rights Act 1993 are wider than the corresponding provisions contained in the earlier legislation, in that not only may 'an aggrieved person' bring proceedings before the Tribunal (provided that the procedural requirements of the Act have been met), but a 'complainant' may also bring such proceedings. The plaintiff certainly comes within the term 'complainant'."*

[50] In our view the defendant's submission that 'complainant(s)' should be taken to mean something like 'persons acting with the authority of an aggrieved person or persons' cannot be reconciled with the other provisions of the HRA that we have referred to, or the legislative history. If the intention had been to restrict complaints to

only those things that are brought forward by or on behalf of someone who has been aggrieved by an alleged act of unlawful discrimination, it would have been a straightforward enough drafting exercise to say so. The fact that the Legislature used much more expansive terminology was clearly deliberate.

[51] As a result of the debate around these issues during the hearing, we understood the defendant's proposition to have been modified somewhat. Instead of restricting people who can be 'complainants' to those who have some kind of authority to make a complaint on behalf of someone who has been aggrieved, Ms Sim suggested that the restriction we should find to be implicit in the words 'complaint' and 'complainant' is one which allows only those people who have some sufficient connection with the matters at issue to justify their making a complaint and, later, bringing proceedings in the Tribunal.

[52] It was common ground that the plaintiff in this case is not a person aggrieved by the discrimination alleged and, as we have said, it is not directly affected by the issues raised. In the defendant's submission there is no sufficient connection between the plaintiff in this case and the discrimination issues raised in relation to the CTC and IWP provisions to justify a conclusion that the plaintiff is 'a complainant' within the meaning of s.92B(1), or to describe the concerns that it raised with the Commission as a 'complaint' for the purposes of s.76(2)(a) of the HRA.

[53] We think there is a significant issue as to how the restriction for which the defendant contends can or should be articulated if it is found to be justified: what does it really mean to say that there must be some sufficient connection between the proposed complainant and the issues?

[54] But for present purposes, and however the restriction is defined, it was the defendant's submission that the plaintiff in this case has not made a 'complaint' and so is not a 'complainant'.

The interpretation advanced by the plaintiff

[55] We turn to describe the competing interpretation that was advanced for the plaintiff.

[56] In her written submissions and in her opening at the hearing, Ms Rodgers-Smith argued that the words 'complaint' and 'complainant' should be given their natural and ordinary meanings, and that (consistent with the purpose of Part IA of the HRA) they should be read as including a much wider class of potential litigants than that suggested by the defendant. We were referred to the definition of 'complain' in the Concise Oxford Dictionary (10th edition, 1999): *"An act or the action of complaining … A reason for dissatisfaction … The plaintiff's reasons for proceeding in a civil action."* On the basis of this definition, the only requirement is that a person who wishes to proceed in the Tribunal must first have expressed dissatisfaction about a state of affairs to the Commission. Once that has been assessed by the Commission, the person concerned becomes a 'complainant' within s.92B.

[57] As already noted, Ms Rodgers-Smith placed some emphasis on a submission that the plaintiff in this case is a responsible public interest group. She argued that the HRA should be interpreted in such a way as to ensure that responsible public interest groups (such as the plaintiff) are able to bring concerns of the kind raised in this litigation to the Tribunal for determination. She made it clear that she was not

arguing that the HRA should be interpreted in such a way as to allow any busybody to bring a claim.

[58] Her submissions were underpinned by reference to authorities dealing with the question of *locus standi* in judicial review proceedings in the High Court, such as *Environmental Defence Society Inc. v South Pacific Aluminium (No.3)* [1981] 1 NZLR 216.

[59] There are, however, at least two difficulties with this approach.

[60] First, authorities dealing with the way in which the High Court regulates access to the remedy of judicial review in the exercise of its inherent jurisdiction are not directly relevant to the question with which we are engaged, namely interpreting the provisions of the HRA which specify who can and who cannot bring a claim to the Tribunal (Ms Rodgers- Smith accepted as much in her written submission).

[61] The second difficulty is that, to allow a possibility that the words of either s.92B or s.76 might be read as somehow excluding 'busybodies', organisations that are not responsible public interest groups or anyone else, involves exactly the same process of logic in interpreting the sections as that suggested by the defendant. If it is right to say that neither ss.92B nor 76(2)(a) contemplate the possibility that some uninvolved third party can bring a claim in respect of discrimination under the HRA because they should be seen as a 'busybody', how is that really to be distinguished from the defendant's argument that those provisions should be read in a restricted way so as to include only those who have some sufficient connection with the alleged discrimination to bring proceedings?

[62] As a result of discussion around these issues, Ms Rodgers-Smith accepted that if (as she contended) the words 'complaint' and 'complainant' are to be given their natural and ordinary meanings then it must follow that anyone can bring a claim to the Tribunal alleging a breach of either Part 1A or Part 2 of the HRA - even if they are not themselves aggrieved or in the slightest affected by the event of discrimination alleged, even if they have no authority of any kind to represent those who were or are said to be affected, and even if they have no other connection with the matter whatsoever.

[63] As we understood the plaintiff's position at the close of argument, it was that the logical consequence of giving the words 'complaint' and 'complainant' their natural and ordinary meaning, in line with the dictionary definition, is inescapable. In other words, as long as the person or entity who wishes to bring proceedings in the Tribunal has made a complaint to the Commission (and that complaint has been assessed by the Commission), then the person concerned can subsequently file proceedings and expect the Tribunal to deal with the matter.

[64] For completeness, we add that Ms Rodgers-Smith also argued that, even if the interpretation for which the defendant argued were to be accepted, nonetheless the plaintiff in this case does have a sufficient connection with the matters at issue to warrant the conclusion that it should be allowed to bring these proceedings. Her argument in this respect drew attention to the work of the plaintiff and the public and important nature of the issues raised – involving, as they do, scrutiny of an Act of Parliament. In view of the conclusion that we have reached as to the interpretation of the relevant provisions it is not necessary for us to determine this issue. We will say,

however, that even if our conclusion on the interpretation of the HRA had been that for which the defendant argued, we would not have been willing to conclude at this stage that the plaintiff in this case is not sufficiently connected to the substantive issues to justify a decision to strike the claims in this matter out without a hearing.

CTC: Discussion

[65] We say at the outset that, in our view, the plaintiff is right to say that the Act should not be interpreted in the way for which the defendant contended. We accept that anyone can bring a claim for an alleged breach of Part1A or Part 2 to the Tribunal, even if they have no particular connection with the people involved in the facts at issue, or the particular grounds of discrimination alleged. All that is required is that the proposed plaintiff must first have addressed a complaint to the Commission, and the complaint must have been received and assessed by the Commission. We are not persuaded that there are any sufficient reasons to give the words 'complaint' and 'complainant' the sort of limited meaning for which the defendant argued.

[66] The reasons for this conclusion follow**.**

- ***The words of the Act***

[67] Both parties referred us to a decision of the High Court of Australia in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980-1981) 147 CLR 297-304. The following passage from that decision provides a useful starting point for this part of our decision (we have omitted the references which can found in the report of the decision):

> *"It is an elementary and fundamental principle that the object of the court, in interpreting a statute, 'is to see what is the intention expressed by the words used'. It is only by considering meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that the words mean what they say. Of course, no part of a statute can be considered in isolation from its context – the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking 'nothing remains but to give effect to the unqualified words'."*

[68] The Oxford English Dictionary Online (Oxford University Press, 2005) gives a number of different senses in which the word 'complain' is used – e.g., *"to bewail, lament, deplore"; "to give expression to sorrow; to make moan, lament".* All are broadly consistent with the idea that one who 'complains' is one who expresses a state of dissatisfaction about something. The particular meanings that fit most closely with our sense of what the word is understood to mean in common parlance in New Zealand in 2005 are *"to give expression to feelings of illusage, dissatisfaction, or discontent; to murmur, grumble"* and *"to make a formal statement of a grievance to or before a competent authority; to lodge a complaint, bring a charge".*

[69] All of the meanings have to do with the act of complaining. None of them seem to us to suggest that (aside from the act of complaining) there must also be some kind of connection between the person who complains and that which is complained about.

[70] If someone, no matter who they may be, goes to the Commission and expresses dissatisfaction about a state of affairs then on these definitions that person has made a 'complaint' and is a 'complainant'. The facts that they may have no personal connection with the events at issue, or that they have no authority from anyone who is or was affected by the events at issue, are not material.

- ***The purpose of the Act***

[71] Both Ms Sim and Ms Rodgers-Smith agreed that, because the HRA is an Act that deals with the topic of human rights, it must be given a fair, large and liberal interpretation to accord with the objects and purposes for which it was enacted: see, e.g., *King-Ansell v Police* [1979] 2 NZLR 531; *Coburn v Human Rights Commission* [1994] 3 NZLR 323; *New Zealand Van Lines Ltd v Proceedings Commissioner* [1995] 1 NZLR 100, *Quilter v Attorney-General* (1997) 4 HRNZ 170 and *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc*. (2002) 6 HRNZ 713 - this list of authorities is far from comprehensive. The cases all emphasise that such legislation must not be given a technical or literal interpretation, and that the approach required is that of a *" … 'contemporary pragmatist' rather than that of 'an out of date grammarian'"* (*Coburn*, supra at p 334 with reference to *Zarczynska v Levy* [1979] 1 All ER 814 at 817). Furthermore, where there are issues of consistency with the rights and freedoms protected by NZBORA, then an interpretation that is consistent with NZBORA is required if it is reasonably available: see s 6 NZBORA, *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272; *Quilter v Attorney-General* [1998] 1 NZLR 523 and *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at 589. All of these propositions are, of course, consistent with the statutory direction in s.5 of the Interpretation Act 1999 that the meaning of legislation must be ascertained from its text and in light of its purposes.

[72] Where counsel differed was as to how these propositions should be applied in the present case.

[73] Ms Sim drew particular attention to the need for the outcome of the interpretative process to be practical and sensible, even if the result is not necessarily the most natural grammatical interpretation of the text. We were referred amongst other things to *Holmes v Bradford Rural District Council* [1949] 2 KB 1, at p 7; *R v Wain* [1984] 1 NZLR 363, *Commissioner of Police v Carrington* [1996] 1 NZLR 135 and *Cooper Brookes (Woolongong) Pty Ltd* (supra) in which the High Court of Australia said:

> *"…there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent* …"(p 320, per Mason and Wilson, JJ).

[74] Ms Sim went on to discuss the scheme and purpose of Part 3 of the HRA, which concerns the resolution of disputes about compliance with Parts1A and 2. She argued that the processes that are provided for are directed towards disputes about discrimination that involve actually affected and identified individuals or groups. While accepting that human rights cases can by their nature have a public interest that go beyond the individual case, she submitted that the dispute resolution processes in the HRA are not designed for, or intended to be, a forum for policy

debates with unaffected persons about whether particular legislation, policies or practices are discriminatory. Ms Sim also drew support for her argument from the restrictions in s92B(2) HRA on bringing 'class' actions to the Tribunal in respect of discriminatory practices.

[75] From this platform Ms Sim made the following central submissions:

[a] The procedures for dealing with disputes under the HRA do not distinguish between complaints brought under Part 1A and those brought under Part 2. It follows that the words 'complaint' and 'complainant' must mean the same thing whether applied to disputes under Part 1A (which deals with 'public' action, such as the actions of the legislative, executive or judicial branches of government) or under Part 2 (which includes disputes that can be of a much more 'private' nature, including for example disputes about discrimination between private employers and their employees, discrimination in relation to access to places and facilities, discrimination in the provision of goods and services and so on):

[b] The suggestion that an unaffected person could bring a Part 2 complaint about discrimination against a single individual other than on behalf of that individual does not make sense. It would have the consequence that anyone could complain that an individual has suffered discrimination even if the person who complains cannot be affected by the outcome, has no authority to bring the claim, has no connection with the events in issue, has no realistic prospect of achieving anything other than (perhaps) a declaration, and even if the person or persons who have allegedly been affected do not want to see the matter pursued. That is not a result that Parliament can have intended;

[c] The responsibility for pursuing matters that raise general public concerns about discrimination belongs to the Commission, which can receive submissions from anyone on such matters under s.5(2)(f) of the HRA, and can inquire into matters in certain circumstances under s.5(2)(h) of the HRA. The Commission can then institute proceedings in the Tribunal under s92E (see s.5(2)(i) of the HRA);

[d] The outcome for which the plaintiff contends is not supported by NZBORA, the International Covenant on Civil and Political Rights or principles ordinarily applied by the courts in exercising jurisdiction under the Declaratory Judgments Act 1908;

[e] The outcome for which the plaintiff contends is impractical, and would open the floodgates to large numbers of claims by people who wish to challenge legislation for any reason – which would be potentially unfair to those who have actually suffered discrimination, and would then be likely to face unacceptable delays in having their cases dealt with. In this part of her argument Ms Sim referred to dicta from judicial review cases such as *Moxon v Casino Control Authority* (Unreported, Hamilton High Court, M324/99 & M 325/99, 24 May 2000 per Fisher, J), *Environmental Defence Society v South Pacific Aluminium* (supra) and *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159.

[76] We acknowledge that if the interpretation of the words 'complaint' and 'complainant' is as suggested by the plaintiff, then the door to proceedings in the Tribunal is open very wide indeed. We also accept that there is force in the concern that a wide interpretation allows the possibility that someone with no personal interest in a matter whatsoever can initiate proceedings in respect of that matter, notwithstanding that all reasonable observers would agree the matter is one with which the complainant has no connection at all (aside from the act of complaining about it).

[77] Nevertheless we agree with Ms Rogers-Smith that the interpretation for which the defendant contends asks us to read a restriction of some kind into the usual meaning of the words 'complaint' and 'complainant'. The interpretation for which she contended does not. In our view it follows from all of the authorities that we have referred to at para [71] above that the plaintiff's interpretation should be preferred unless the purpose and scheme of the Act are so clear as to compel a conclusion that (despite the natural and ordinary meaning of the words used) the Act should be taken as meaning something different and more restrictive.

[78] In our view one of the more significant difficulties with the argument for the defendant is that it focuses on the dispute resolution procedures in the HRA. In doing so it pays insufficient attention to the more fundamental purpose of the HRA which, as the Long Title makes clear, is to provide better protection for human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights. In our view the Act recognises that everyone in New Zealand has an interest in living in a society that is free of unlawful discrimination, no matter where it occurs. It is for reasons of this kind that the HRA has been described as being 'no ordinary statute' **-** see *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* [2002] 3 NZLR 333, at 339. It is also why there are so many authorities that emphasise the need to interpret the HRA liberally, and not in a restrictive or limiting way.

[79] Notwithstanding the practical concerns raised by Ms Sim, we have a clear view that the approach for which she argued is much less likely to be conducive to the wider end of protecting freedom from discrimination than is the approach for which Ms Rodgers-Smith argued. And although we agree that the wide approach gives rise to the prospect of some practical issues at the 'private' end of the spectrum of disputes, it does not follow that such an approach was not intended. The bigger picture of all of the different kinds of issues that can potentially be brought to the Tribunal need be considered. It has long been recognised that, by their very nature, cases involving issues of discrimination can have consequences that go beyond the private interests involved. As Robertson J said even before Part 1 A was introduced into the HRA:

> *" … an important part of the spirit and letter of the Human Rights Act is its educative aspect and the creation of preventative measures in respect of any future human rights breaches. … the discrimination provisions under the Employment Contracts Act 1991 are orientated towards a fair resolution of an individual grievance. There is a wider perspective under the human rights legislation"* (*Transportation Auckland Corporation Ltd v Proceedings Commissioner* (1998) 4 HRNZ 422, at 455)

[80] We also note a recent decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 where Lord Nichols observed (at para [9] of his judgment):

> *"Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced."*

[81] There is an informative discussion of the different approaches to the issue of standing in an human rights context in Miles, *Standing under the Human Rights Act 1998* [2000] CLJ 133. The article concerns the Human Rights Act in the United Kingdom, and it was written at a time when NZBORA was in force but before the Human Rights Amendment Act 2001 was enacted in New Zealand. Nonetheless the author argues convincingly that the very nature of a jurisdiction to declare legislation to be inconsistent with fundamental rights (in the UK, as contained in the European Convention; and in New Zealand, as affirmed by s.19 NZBORA) is such that a victim-based rule of standing is inappropriate:

> *"The declaration of incompatibility should be taken into account in attempting to characterise the nature of the judges' function under the Human Rights Act. The declaration procedure essentially involves the Courts in a dialogue or 'partnership' with Parliament and the executive about the compatibility of UK legislation with (their understanding of) the true scope and meaning of the abstract rights enshrined in the Convention. Such a procedure cannot readily be accommodated within the dispute resolution model of the judicial role; it renders Human Rights Act proceedings clearly more expository in nature."* (p 164)

[82] The author of the article suggests a number of reasons why it may well be preferable for litigation of the kind we are dealing with in this case to be brought by an organisation such as the plaintiff:

> *"One of the staunchest (if doubtful) arguments put in favour of victim standing is that victims' particular interest in seeing their arguments succeed means that they may be relied upon to make a good case. Yet in declaration cases, the victim will have nothing personally to gain … and so may <u>not</u> necessarily put up a satisfactory case. In any event, even an ideologically motivated victim is unlikely to be best qualified to present the necessary evidence to the court. In particular, where the argument for incompatibility turns on legislative facts, interest group involvement of some sort may be vital to ensure that adequate information is put before the court and so enhance the quality of the 'dialogue' between courts and Parliament."* (p 165)

[83] We have no doubt that when Part 1A was enacted it was intended to open the possibility of anti-discrimination challenges to all kinds of public functions. The question of whether an Act of Parliament is inconsistent with the right to freedom from discrimination affirmed by NZBORA is one that we regard as quintessentially public in character. In our view the procedural provisions of the HRA are intended to allow anyone to challenge that kind of action. The fact that the provisions may not fit as well when it comes to dealing with disputes at the more 'private' end of the spectrum under Part 2 is not a sufficient reason to adopt a restrictive approach across the board.

[84] We should add that, even if we had been persuaded to accept the defendant's focus on the scheme and purpose of Part 3 of the HRA only, we would not have accepted that the defendant's interpretation must be preferred. In our view the provisions of Part 3 recognise the value of informal and early dispute resolution, and the procedural flexibility that is required to provide an effective framework for dispute resolution to occur. There is nothing in these sections that seems to us to suggest that they were not intended to cover all kinds of disputes – ranging from matters at the very 'public' end of the spectrum (for example, a challenge under Part 1A to an Act of Parliament) to the much more 'private' end of the spectrum (an example might be the case of a dispute under Part 2 of the HRA between an employer and employee concerning sexual harassment where no issues of any real interest outside those of the parties are raised).

[85] Nor do we accept the suggestion for the defendant to the effect that concepts of dispute resolution, mediation, settlement and remedies only make sense in the context of claims about actual discrimination suffered by an aggrieved person. It may be that a case involving a challenge under Part 1A to a public function could have a public interest dimension that is challenging to deal with in a party on party dispute resolution process. But every case has its own demands and dynamics, and the whole point of mediation is to allow the parties to explore mutually acceptable outcomes that might not be available were the matter to be litigated in the Tribunal. So, for example, a challenge to a policy or practice could result in agreement to review the policy or practice in consultation with the person who has brought a complaint, and/or others, in a way the Tribunal would not have any power to direct.

[86] In any event, Part 3 also recognises that there will inevitably be some cases where, for one reason or another, informal dispute resolution is either not going to be effective or may even be inappropriate. An adjudicative process is provided for to meet that possibility. Again, we do not accept that there is anything in the provisions which govern access to the Tribunal from which it can safely be inferred that the Tribunal proceedings should be limited to cases involving complaints brought only by aggrieved individuals or others who have some other sort of connection with the subject matter that justifies allowing them to proceed.

- ***Practicalities***

[87] As we have indicated, the defendant argued that the wide interpretation for which the plaintiffs argued would be without precedent, and would be unworkable. It would allow for the possibility that an uninvolved stranger could complain to the Commission about something that he or she has no point of contact with whatsoever, and then bring proceedings in the Tribunal even if that be against the wishes of those who were involved. We accept there is force in the submission, particularly if one considers a case brought under Part 2 of the HRA at the 'private' end of the spectrum, in which there are no issues of proper interest to anyone other than those who were involved in the events giving rise to the claim (we put the matter this way because we regard it as clear that disputes between private parties can raise issues of public significance – see the Hon. Sir Ivor Richardson, '*Public Interest Litigation*' (1995) 3 Waikato LR 1).

[88] On the other hand, the HRA is legislation of a special character, so that we do not consider that the absence of any precedent in some other context is surprising.

[89] It also seems to us that potential practical concerns can be overstated. Anyone who complains about any state of affairs and then wishes to bring the matter to the Tribunal must begin by articulating the issues they wish to raise as a coherent claim under the HRA. There is no reason to fear that uninvolved third parties will routinely have access to all of the information that is needed to do that, particularly if what is in issue is something that they have no connection with. If a claim fails to disclose a tenable cause of action it can be struck out or dismissed (see the discussion in *Bissett v Peters* (HRRT Decision 33/04, 10 August 2004 at para's [15] to [24]) and, in respect of striking out, *Mackrell v Universal College of Learning* (Unreported, High Court, Palmerston North CIV-2005-485-802, 17 August 2005, Wild,J)).

[90] Furthermore, although there are no filing fees payable in respect of proceedings in the Tribunal, the reality is that proceedings in the Tribunal do require a commitment in terms of time and attention. There is always the prospect of an adverse costs award if a claim is unsuccessful. If a claim is brought by someone who has no connection with the subject matter of the case the business of finding and then producing the necessary evidence is likely to be problematic – especially if those who were involved are not willing participants. Even before a matter reaches hearing, the Tribunal has power to dismiss cases which are assessed to be trivial, frivolous, vexatious, or not brought in good faith: see s.115 of the HRA.

[91] Of course these sorts of disincentives to intermeddling will likely have less and less impact as one moves away from the truly 'private' kind of case and along the spectrum towards cases which involve acts or omissions of the legislative, executive or judicial branches of government, for example where the performance of a public function or power is in issue. But even at the most 'public' end of the spectrum where (as here) there is a challenge to an Act of Parliament, there are other disciplines at work. The only remedy that is available in the case of a successful challenge to an enactment under Part 1A is the declaration of inconsistency that is provided for by s92J (2) of the HRA. There is no power to award damages, or to make any other consequential orders.

[92] As we have said, we consider that there is some force in the concerns about practicalities that have been raised by the defendant. We do not, however, consider them to be sufficient to compel the conclusion that Parliament must have intended us to read the words 'complaint' and 'complainant' down in the way that Ms Sim asks us to.

- ***The nature of this Tribunal***

[93] We also think it relevant that the claims we are considering are all to be brought to this Tribunal, a specialist Tribunal that was established to hear cases under the HRA and other human rights-based legislation, namely the Privacy Act 1993 and the Health & Disability Commissioner Act 1994. One of the purposes of the Tribunal is to provide a forum to which all can have access without the costs normally associated with proceedings in the courts of general jurisdiction. It is one of the reasons why, in our view, the legislation should be read in a way that will make sense to persons who do not have the sort of legal training that is required to understand that the words 'complaint' and 'complainant' mean something a little different from what they appear to mean.

- ***Other domestic statutes***

[94] In her detailed submissions, Ms Rodgers- Smith drew our attention to various other statutes in which the terms 'complaint', 'complainant' and 'aggrieved person(s)' have been used. We appreciated the thoroughness of the research, and mean no disrespect when we say that the only other statute that seems to us to warrant mention here is the Privacy Act 1993. That Act makes it clear that '*any person'* can make a complaint to the Privacy Commissioner (s.67(1)), although the Privacy Commissioner can then decline to deal with the complaint if she considers that the complainant does not have sufficient personal interest in the subject matter of the complaint: see s 71(1)(e). Clearly under the Privacy Act anyone can be a 'complainant', no matter what connection they have with the matters at issue.

[95] The defendant's argument asks us to treat the words 'complaint' and therefore 'complainant' as meaning slightly different things in each of the HRA and the Privacy Act 1993. That is notwithstanding the fact that the relevant terminology appeared for the first time in the HRA in 1993, which was of course the same year in which the Privacy Act was passed. Broadly speaking, both statutes deal with issues of human rights. All other things being equal, we would have thought it preferable in the circumstances to read the word 'complaint' in the HRA in a way that is consistent with the wide meaning that it clearly has when used in the Privacy Act. Thus we see the use of the meaning of the word 'complainant' in the Privacy Act as providing further support for the interpretation for which the plaintiff argued.

- ***Difficulty in identifying the limits***

[96] As we have already indicated, we think that there would be considerable difficulty articulating exactly what the limits should be if the defendant's interpretation of the HRA were to be accepted – specifically who should be regarded as falling within the definition, and who would be excluded? For reasons we have already given, whatever the limit might be, it cannot in our view simply be identified as excluding anyone who does not have some kind of authority to represent an aggrieved person or persons.

[97] In argument at the hearing Ms Sim submitted that there must be shown to be some material connection with the discrimination at issue. But even if one takes that view, it is difficult to know exactly how the connection should be articulated. Furthermore, no matter how the limit might be expressed, it would inevitably involve reading something into the words 'complaint' and 'complainant' as those words appear in the HRA. At a practical level, we suspect that if a restricted interpretation were adopted the Tribunal would be faced with the same kinds of difficulties that have troubled the High Court in respect of its judicial review jurisdiction – including the problem of trying to decide whether or not a proposed plaintiff in any given case has the appropriate connection with the matters at issue before hearing all of the evidence, and forming a view as to what the substantive issues really are.

- ***Other models available when HRA enacted***

[98] Another reason to prefer the interpretation advanced by the plaintiff relates to the international literature that we take to have been available to the Legislature for consideration before the Human Rights Amendment Act 2001 was passed.

[99] We were referred amongst other things to the Optional Protocol to the International Covenant on Civil and Political Rights (which provides a complaints process through which complaints of alleged human right breaches can be brought by individuals against member states), s.7(1) of the Human Rights Act 1998 (UK), Article 25 of the European Convention on Human Rights, clause 24(1) of the Canadian Charter of Rights and Freedoms, s.46P of the Human Rights and Equal Opportunity Commission Act 1986 (an Act of the Australian Commonwealth), and s.38 of the Constitution of South Africa. We were also referred to *'A Bill of Rights for New Zealand – A White Paper'* (1985) which was issued as part of the discussion process that lead to the enactment of NZBORA**.**

[100] In their arguments counsel placed different emphases on different aspects of these materials. What is unarguable, however, is that these measures all represent differing approaches to the solving the problem of who is to be recognised as being entitled to bring human rights issues forward in different jurisdictions, and all of them were available for the New Zealand legislature to consider before ss.92B and 76(2)(a) were enacted as part of the Human Rights Amendment Act 2001. We think that the result that has been adopted in New Zealand must be regarded as a deliberate legislative decision that took account of the new declaration of inconsistency procedure that was being introduced. In our view there is force in the plaintiff's argument that the Legislature could have chosen from a number of different models if it had wanted to make it clear that rights of access to the Tribunal in these kinds of cases should more limited than that which appears from ss92B and 76(2)(a).

- ***Reference to ICCPR, NZBORA and 'ordinary principles' of a declaratory jurisdiction***

[101] Ms Sim submitted that the interpretation advanced for the defendant is supported by both the 1966 International Covenant on Civil and Political Rights ('ICCPR') and NZBORA, since both instruments require that any allegation of a breach of the rights they protect can only be brought forward by a victim of the alleged breach. It was also argued with reference to *Auckland City Council v Attorney-General* [1995] 1 NZLR 219 *and Gazley v Attorney-General* (1995) 8 PRNZ 313 that the victim based approach is consistent with the principle that courts will not act in a purely advisory role in the absence of an issue between parties.

[102] With respect to the ICCPR and NZBORA, there was particular reference to the 1976 Optional Protocol which allows individuals from members states to petition the Human Rights Committee in certain circumstances, and by which member states have agreed to recognise the competence of that Committee to deal with such claims. The reference to ICCPR is of course significant because it is one of the international covenants that are contemplated by the long titles to both NZBORA and the HRA.

[103] Even so, it seems to us that both the ICCPR and the Optional Protocol must be seen in proper context. It is beyond argument that both are cornerstone documents for any appreciation of the international framework governing the protection of human rights in New Zealand. But they should not be treated as something like a last word on the topic, nor should they be read as stipulating the greatest extent to which members states must act to protect human rights – they are a floor, not a ceiling (Miles, *Standing under the Human Rights Act,* supra at p143).

[104] The idea that a statutory tribunal should be vested with a power to declare domestic legislation to be inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA is one that has been developed, and is now implemented, several decades after the ICCPR and the Optional Protocol came into force. We think that it would be unfortunate if a commitment to the international covenants came to act as a brake on the development of human rights protections in New Zealand. We do not imagine that that was what was intended by Parliament when the 2001 amendments to the HRA were enacted.

[105] In any event, we see the Optional Protocol as dealing with an issue that is rather different from the one we are dealing with. The Optional Protocol allows individuals from members states to take grievances to the Human Rights Committee of the UN. It does not say anything about circumstances in which member states can or should provide their citizens with a domestic right to challenge the exercise of public functions on human rights grounds.

[106] The context of the authorities that deal with the Courts' jurisdiction under the Declaratory Judgments Act 1908 must also be recognised. In the *Auckland City Council* case (supra), for example, the High Court refused to make a declaration in part because there was no 'proper contradictor', i.e., no-one who would advance argument in opposition to the proposition put forward by the plaintiff. And in *Gazley* (supra) the Court declined to make the declaration sought in part because there was no 'factual setting' for the argument. Aside from the obvious points that both cases pre-date the 2001 amendments to the HRA, and neither deal with issues of discrimination, it seems to us that both are far removed from the circumstances we are asked to consider.

[107] In the present case there is a proponent and a 'contradictor' and, although no-one who claims to be affected by the legislation at issue is named as party, there is a clear factual setting for the argument. The plaintiff says that there are real people who are suffering a real disadvantage. The question is whether the specified legislative provisions are inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA. If the claim is upheld and a declaration is made then (subject of course to the outcome of any appeal) certain steps must follow: see s.92K of the HRA. We do not see the issues raised in this way as being moot or in any sense hypothetical; to the contrary, we see the claim as raising exactly the sort of issues that Parliament expects the Tribunal to deal with under Part 1A.

[108] For these reasons we do not consider that there is anything in the ICCPR, the Optional Protocol, NZBORA or the approach of the Courts to the granting of declarations under the Declaratory Judgments Act 1908 that provides the sort of support that was suggested by Ms Sim for her argument in favour of a limited interpretation of ss. 76(2)(a) and 92B of the HRA.

- ***Locus standi in judicial review cases***

[109] We have already noted that the plaintiff referred us to a number of authorities concerning *locus standi* in the context of judicial review proceedings in the High Court. We do not regard the cases as being directly applicable, because the question about when the High Court will allow access to litigants seeking remedies in its inherent jurisdiction have no immediate bearing on the issue before us. Our task is to interpret the words used in ss.76(2)(a) and 92B of the HRA.

[110] Nonetheless we agree with Ms Rogers-Smith that those who drafted the Human Rights Amendment Act 2001 must be taken to have been aware that the High Court does allow judicial review applications to be brought by public interest groups in certain circumstances. We were referred to many authorities, but our appreciation of the approach that has been adopted by the Courts is encapsulated by the following comment by Sir Ivor Richardson (*Public Interest Litigation*, supra):

> *"In some jurisdictions arguments over standing can occupy much time of the courts and are a feature of its administrative law. There is an understandable concern that the court processes should not be used for the proliferation or expansion of litigation by organisations and individuals who, though well meaning, have only a marginal interest in an issue. The New Zealand courts have tended to take a broad if not relaxed view of standing and have never felt oppressed by a busybody problem.":*

[111] Having regard to the cases that we were referred to in argument, we have no doubt that if the question of whether or not the plaintiff in this matter should be allowed to bring the claim were to be determined on the principles applied by the High Court in the exercise of its judicial review jurisdiction, the plaintiff's standing would be accepted (or, at very least, the issue of standing would be deferred to be dealt with at the end of the case).

[112] There is nothing in the HRA to indicate to us that Parliament might have expected a more restrictive approach to litigation under the HRA, so as to prevent an organisation such as the plaintiff from bringing forward the issues that we are asked to consider in this case (concerning, as they do, the allegation that there is an enactment amongst New Zealand's statutes that is not consistent with the right to freedom from discrimination affirmed by s.19 NZBORA).

- ***A consequence of the interpretation advanced by the defendant***

[113] There is another point that lends some further support to the plaintiff's argument. It concerns what the consequences would be if we were to accept that the more limited interpretation for which the defendant argued should be adopted.

[114] The defendant emphasised in his submissions that the words 'complaint' and 'complainant' must be interpreted consistently throughout the HRA. We agree. It must follow, then, that if those words have a restricted meaning the Commission's power to deal with complaints coming into its office is more circumscribed than it appears. Specifically, if the restrictive approach is accepted then the Commission does not have the jurisdiction to deal with any and all matters that come in to it. Instead it will have to decide which of the 'complaints' it receives have been brought by people who have a sufficient connection with the subject matter of the complaint. If a complainant were considered not have the necessary connection with the subject matter of the complaint, then it is not clear what remedy he, she or it would have. Certainly it is not at all clear that the Tribunal would have any power to interfere. Judicial review might be a possibility, but in reality there is a risk that the Commission would become a gateway to the Tribunal, with a power to make decisions that could affect the ability of the person who has complained to later bring the claim to the Tribunal.

[115] We agree with Ms Rodgers-Smith that would seem to be at odds with the structure of the HRA, and the predominantly dispute resolution/facilitative function that the Commission has had since the 2001 amendment to the HRA.

- ***A footnote***

[116] In the particular context of this case there is another practical point to note. Even if we had been persuaded to accept the defendant's argument, it would not have followed that the legislation would be beyond challenge, or that another challenge could not be put forward. The defendant conceded that, if these proceedings had been initiated by (say) a primary caregiver claiming to have been affected by the relevant legislation then - at least in respect of the CTC provisions - there could not be any objection to the matter proceeding. For reasons that were not altogether clear to us Ms Rodgers-Smith resisted the idea that the claim might have been (or might have to be) pursued in that way. But if the claim were brought by or on behalf of such a person, and if the Director were to act (just as he is in this proceeding) then there would be no cost to the person concerned. Nor would the person concerned be at risk of an adverse costs award if the litigation were to be unsuccessful: see ss.92C(3) and (4) of the HRA. If as many people are affected by the CTC /IWP legislation as was suggested to us, then it is difficult to see that there could be any great obstacle in finding someone to act as plaintiff. All of the issues raised by the plaintiff in this matter could be raised by such a plaintiff.

[117] The point is that, at least in this case, it is far from clear that a decision in favour of the defendant's proposed interpretation of ss.76(2)(a) and 92B would be an end of the matter (in this respect the situation is not unlike that considered in *R v Secretary of State for Social Security, ex parte CPAG* [1990] 2 QB 540).

CTC: Conclusion

[118] For the foregoing reasons we have concluded that the word 'complaint' in s.76(2)(a) and the word 'complainant' in ss.76(2)(a) and 92B should be given their ordinary meanings, i.e. as doing no more than to convey the idea of an expression of dissatisfaction (in the case of the word 'complaint'), and of someone who has expressed dissatisfaction about something (in the case of the word 'complainant').

[119] It follows that we consider that the plaintiff is entitled to bring the proceedings in this case.

The In-Work Payment Scheme

[120] Quite apart from the issues of interpretation dealt with above, the defendant says that in any event it is premature for the Tribunal to consider the IWP provisions because they do not come into force until 1 April 2006. Ms Sim submitted that, in the circumstances, the IWP provisions have no present effect, and cannot be the subject of a complaint under s.76(2)(a) because that section only contemplates the possibility of complaints ". . .*alleging that* ***there has been*** *a breach of Part 1A or Part 2 or both . . .*" (our emphasis).

[121] The defendant accepts that the IWP provisions are an 'act' within the meaning of s2 of the HRA (clearly they are also an "enactment' within the meaning of s.20L of the HRA). It was submitted, however, that an act (which includes an enactment, activity, condition, policy, practice or requirement) must have some practical effect on

the rights of a person before it can contravene Part 1A. It follows, so it was argued, that an enactment must be in force before it can breach Part 1A, just as a policy must be in effect before it can be in breach of Part 1A. Ms Sim argued that if that were not so, then any enactment not yet in force and any policy not yet in effect (including legislative proposals and Bills themselves) could form the basis of a complaint under Part 1A.

[122] Ms Sim referred to and relied on the decisions of Court of Appeal in *Te Runanga O Wharekauri Rekohu Incorporated v Attorney General* [1993] 2 NZLR 301 and *Milroy v Attorney General* [2005] NZAR 562. It was an important part of her argument for the defendant that unlawful discrimination does not occur in a vacuum; without some proof that there has been an actual comparative disadvantage suffered by some person or group of persons there can be no discrimination. We note there is support for that submission in s.21(2) of the HRA which makes it clear that the grounds on which discrimination is prohibited only exist if the circumstances of discrimination currently exist, have existed in the past, or are suspected, assumed or believed to exist or to have existed. All of these are references to either a past or current state of affairs.

[123] We agree with the submission made by Mr Hesketh for the plaintiff, however, that neither of the *Te Runanga O Wharekauri Rekohu Incorporation* or *Milroy* decisions consider the circumstances we are asked to consider.

[124] In *Te Runanga O Wharekauri Rekohu* the Court of Appeal was asked whether the High Court could or should ever purport to restrain the introduction of a Bill into Parliament. Cooke, P (as he then was) said:

> *"There is an established principle of non-interference by the Courts in Parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice* [we have omitted the references given]*.*
>
> *However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament. As held in Eastgate* [(1990) 20 NSWLR 188], *the proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment."* (pp 307/308)*.*

[125] A Bill is, by it nature, a work in progress. For that reason it is difficult to see how it would ever be appropriate for this Tribunal to consider a challenge to a Bill under Part 1A until Parliament has settled on what will or will not be enacted.

[126] The same point applies in respect of the *Milroy* decision as well. That case concerned a challenge to the formulation of government policy. The Court of Appeal applied *Te Runanga O Wharekauri Rekohu* (supra) and went on to say:

> *"The importance of the process for addressing claims in respect of breaches of the Treaty* [of Waitangi] *is fully recognised. Where that involves the exercise by the Executive of statutory or prerogative powers, lawfulness can be challenged on established grounds of judicial review. But where the action challenged does not itself affect the rights of any persons and is undertaken in the course of policy formulation preparatory to the introduction to Parliament of legislation,*

> *the Courts will not intervene. Proposed legislative conduct of the Crown said to depart from a previous stance and to be inconsistent with Treaty rights may be within the jurisdiction of the Waitangi Tribunal and may be subject to representations to the Select Committees of Parliament. But, as Goddard J said, the Courts cannot help''* "(at p 567).

[127] Of course neither of those two cases were decided in the context of a statute-based jurisdiction that allows a challenge on the basis that legislation, policies and other acts are inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA. But even accepting (as we do) that the principle applies to our Part 1 A jurisdiction, in the present case we are not considering a Bill or a policy that has not yet been finalised. We are asked to consider a measure that has been enacted. Even though it may not yet be in force, the IWP provisions are not in any sense a work in progress. We accept that there is always a possibility of further legislative intervention but, unless that happens, the IWP provisions are on the statute books. They state the law as it now stands in respect of the period after the moment at which they come into effect.

[128] Submissions from the plaintiff placed some emphasis on the fact that the IWP provisions will, to a greater or lesser extent, replace the existing CTC provisions. The suggestion was that the disadvantage said to be associated with the CTC provisions should be seen as carrying over to become the disadvantage that the plaintiffs say will be suffered under the IWP provisions. But in our view this argument does not really meet the defendant's point about the IWP provisions, namely that they do not have any present direct effect.

[129] It was also submitted for the plaintiff that it would be wrong for the Tribunal to become too pre-occupied with the need to establish actual effect or disadvantage flowing from the IWP provisions at this stage, when the effect that will flow from those provisions is already clear. To put it colloquially, the plaintiffs say that the Tribunal need not wait until discriminatory effect 'bites' before it is entitled to scrutinise the legislation for compliance with the right to freedom from discrimination affirmed by s.19 NZBROA. This is not, after all, a situation in which there is a contingency or any other eventuality that must occur before the question of whether or not the IWP provisions have a disadvantageous effect can be assessed: those who are not going to be able to access tax credits available to others are clearly going to stand in a less advantageous position.

[130] Like the Director, we are troubled by the potential consequences of the position advanced for the defendant. Assume, as a hypothetical example, that legislation were to be enacted which disenfranchised a group of people who would otherwise be entitled to vote, and where the differentiating factor is a prohibited ground of discrimination (perhaps ethnicity, or employment status – the exact ground is not material for present purposes). Assume also that the legislation is expressed to come into force on the day of the next general election, but not before. Legislation of that kind would invite challenge under Part 1A of the HRA. We think it unlikely that Parliament would have intended that the Part 1A procedure would not be available until there was an election from which the disenfranchised group was actually excluded. It is difficult to see why Parliament would have gone to the trouble of establishing the declaration of inconsistency jurisdiction under the HRA and yet leave open a possibility that, even in such a case, there is nothing that can be done until the legislation at issue has taken effect.

[131] We say nothing at this stage as to whether whatever gives rise to the alleged disadvantage in this case arises out of any prohibited ground, or whether there are reasons on which the legislation in issue might be justified in any event. Those are matters for the substantive hearing. But we accept that, even now, it is arguable that if there is a group of people who will be unable to access tax advantages that will be available to another group, then the first group already stands in a position of disadvantage to the second. Indeed in our view it is also arguable that some disadvantage arising out of that state of affairs is already felt – not only because of the fact of unlawful discrimination (if that is what is found in due course), but also because those affected must now plan for the future in the knowledge of what is to come.

[132] A challenge to an Act of Parliament can only be brought under Part 1A of the Act. The only remedy we can grant is a declaration of inconsistency. The purpose of the jurisdiction is to provide a way in which compliance with the right to the freedom from discrimination that is affirmed by s. 19 NZBORA can be tested. In our view the question of what disadvantage is or will be suffered is a question of fact, the outcome of which depends on evidence.

[133] Whether the elements of unlawful discrimination will be established by the evidence in this case remains to be seen. We do not, however, think it would be right to strike this part of the claim out at this stage of the proceedings on an hypothesis that enacted legislation which has yet to come into force cannot in any circumstances give rise to a present disadvantage, or to the kind of disadvantage that is required to establish unlawful discrimination.

[134] As a result we consider that we presently have jurisdiction to evaluate not only the CTC provisions but also the IWP provisions for compliance with the right to freedom from discrimination affirmed by s.19 NZBORA - notwithstanding that, although enacted, the IWP provisions have not yet come into force.

Conclusions/Next steps in this proceeding

[135] We have concluded:

> The word ‘complaint’ in s.76(2)(a) and the word ‘complainant’ in ss.76(2)(a) and 92B of the HRA should be given their ordinary meanings, i.e. as doing no more than conveying the idea of an expression of dissatisfaction (in the case of the word ‘complaint’), and of someone who has expressed dissatisfaction about something (in the case of the word ‘complainant’). It follows that we consider that the plaintiff is entitled to bring the proceedings in this case;
>
> [b] We presently have jurisdiction to evaluate the IWP provisions for compliance with the right to freedom from discrimination affirmed by s.19 NZBORA notwithstanding that, although enacted, the IWP provisions have not yet come into force.

[136] The Secretary of the Tribunal is asked to contact counsel for the purpose of arranging a telephone conference with the Chairperson so that further steps in this litigation can be time-tabled appropriately.

[137] We were not addressed on the issue of costs, and it may be that the parties prefer to leave that question to be dealt with once litigation as a whole has been completed. But if that is not the case, and the parties wish us to deal with the issue of costs in respect of what has transpired in the proceedings to date, then the following time-table will apply:

[a] Any application for costs is to be made by way of memorandum together with any other supporting materials, all of which are to be filed and served within 21 days of the date of this decision;

[b] Any reply to be filed and served within a further 14 days;

[c] Unless either of the parties wish to be heard on the matter, we will deal with the question of costs on those papers.

_____
Mr R D C Hindle
Chairperson

_____
Ms P J Davies
Member

_____
Mr S Perese
Member