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Exclusive Jurisdiction for the Human Rights Review Tribunal?

Hanna Wilberg, University of Auckland, asks which courts and tribunals are excluded by *Winther* and why

“[T]he drafting of Part 1A [of the Human Rights Act 1993 (HRA)] is not a model of clarity”, said the Court of Appeal in *Winther v Housing Corporation of New Zealand* [2010] NZCA 601, [2011] 1 NZLR 825, in a display of the time-honoured judicial tradition of understatement. Part 1A sets out the relationship between the anti-discrimination provisions of the HRA and s 19 of the New Zealand Bill of Rights Act (BORA), and its interpretation presents more of a challenge than it should. Unfortunately, it seems the Court may have failed in its attempt to navigate the maze in this case.

The Court held that the Tenancy Tribunal (TT) does not have jurisdiction to determine tenants’ discrimination complaints against public authority landlords such as Housing New Zealand (HNZ), either under the HRA or under s 19 BORA. That was the position that had also been reached by Wild J in the High Court, but for different reasons. Part 1A of the HRA was considered for the first time in this litigation in the Court of Appeal (see at [9]), and provided the basis on which that Court found the TT to lack jurisdiction. The express provision in s 12A of the Residential Tenancies Act 1986 (RTA) giving tenants complaining of discrimination a choice of procedures between the TT and the HRA’s complaint procedures was held to be overridden by the inconsistent provisions of Part 1A of the HRA: the latter provided that discrimination complaints against public authorities could be brought in only one venue, being the Human Rights Review Tribunal (HRRT) under the HRA.

The focus of this note will be on that jurisdictional question. For completeness, however, the remaining findings in this litigation should also be noted. The Court of Appeal further held that once a notice to terminate a tenancy has been found to have been discriminatory by proceedings in the HRRT, then this amounts to an “unlawful act” under s 12 of the RTA, and the TT has power to refuse to make a possession order. In the proceedings brought by Ms Winther and others, however, the HRRT has since dismissed the discrimination complaint. The complaint was that in evicting Ms Winther and her co-complainants because of the anti-social behaviour of their partners, HNZ had discriminated against them on the prohibited ground of family status (s 21(1)(l)), namely their relationship with their partners. The HRRT held that HNZ’s decision had not been made “on the grounds” of the complainants’ relationship with their partners: *Winther v Housing New Zealand Corporation* [2011] NZHRRT 18. Despite that further win, HNZ shortly after that decision withdrew the eviction notices (*The New Zealand Herald*, 1 September 2011).

A surprising and far-reaching reading of part 1A

The Court of Appeal’s ruling on the jurisdictional question, based on its reading of Part 1A of the HRA, has relevance well beyond the particular context of HNZ tenancy dispute. While the particular decision in *Winther* concerned only the jurisdiction of the TT, the reasoning very much appears to turn on finding that *no* court or tribunal other than the HRRT has jurisdiction in the first instance to hear discrimination complaints against public authorities – if so, that would mean the High Court also lacks such jurisdiction. The Court expressly stated that s 20K in part 1A of the HRA

allows no exceptions to the “statutory policy” that allegations of discrimination by public authorities are to be determined under the HRA, “whether in tenancy cases or otherwise” (at [41]; see also at [36]). It also found the language of s 20K so “explicit” in this regard that it could only be held to override the inconsistent provision in s 12A of the RTA (at [42]; see further below, final part of this note).

This is a surprising reading of s 20K in the context of Part 1A. By far the more likely reading is that Part 1A makes available an *additional* set of remedial options, alongside other remedies that are always available for breach of s 19 BORA. The apparent contrary finding in *Winther* is open to doubt: first, it does not represent the most logical reading of Part 1A; and secondly, the substantive merits of the restriction are at least arguable either way. A narrower basis for excluding the TT’s jurisdiction would have been at least potentially available, but this was not adopted by the Court. I turn now to expand on each of these three points in turn.

The logical reading of part 1A

I turn first to consider the logical reading of part 1A. It will be helpful to set out the provisions of this part in full:

Part 1A Discrimination by Government, related persons and bodies, or persons or bodies acting with legal authority

20I Purpose of this Part

The purpose of this Part is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990 is in breach of this Part if the act or omission is that of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990.

20J Acts or omissions in relation to which this Part applies

(1) This Part applies only in relation to an act or omission of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990, namely—

- (a) the legislative, executive, or judicial branch of the Government of New Zealand; or
- (b) a person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

(2) Despite subsection (1), this Part does not apply in relation to an act or omission that is unlawful under any of sections 22, 23, 61 to 63, and 66.

(3) If this Part applies in relation to an act or omission, Part 2 does not apply to that act or omission.

(4) Nothing in this Part affects the New Zealand Bill of Rights Act 1990.

20K Purposes for which section 20L applies

Section 20L applies only for the purposes of—

- (a) any inquiry undertaken by the Commission under section 5(2)(h);
- (b) the assessment, consideration, mediation, or determination of a complaint under Part 3;
- (c) any determination made by the Director under Part 3 concerning the provision of representation in proceedings before the Human Rights Review Tribunal;
- (d) any determination made in proceedings before the Human Rights Review Tribunal or in any proceedings in any court on an appeal from a decision of that Tribunal;
- (e) any determination made by any court or tribunal in proceedings brought under this Act by the Commission;
- (f) any other process or proceedings commenced or conducted under Part 3;
- (g) any related matter.

20L Acts or omissions in breach of this Part

(1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.

(2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission—

(a) limits the right to freedom from discrimination affirmed by that section; and

(b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.

(3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment.

As the Court of Appeal explained (at [28]–[30]), this part was inserted into the HRA by amendment in 2001. The amendment arose from the need to deal with the expiry of s 151, which until then had exempted (1) Acts and regulations from scrutiny under the HRA, and (2) public authorities from discrimination complaints on several of the newer grounds of discrimination. The dual purpose of Part 1A, as also explained by the Court of Appeal (at [30]), was (1) to apply to complaints against public authorities the flexible general anti-discrimination standard of s 19 BORA subject to the reasonable limits provision in s 5 of that Act, rather than the prescriptive tests in Part 2 of the HRA; and (2) to provide for an accessible complaints process and effective remedies for breaches by public authorities.

The reach of these new provisions is defined by s 20J(1) and (2): Part 1A applies to discrimination complaints against all persons or bodies referred to in s 3 BORA – broadly speaking, public authorities – with the exception of a handful of special types of complaints listed in subsection (2). The first of the amendment’s two objectives, viz substituting the BORA standard for the HRA tests, is then achieved by s 20J(3) and s 20L. Section s 20J(3) provides that in the case of the complaints covered by this part, the highly prescriptive tests for determining discrimination that are set out in part 2 of the HRA are not to apply (see also s 21A on this). Instead of those tests, s 20L effectively provides that the test in the case of such complaints is to be that set out in ss 19 and 5 of BORA. In short, the HRA tests for discrimination are replaced by the BORA test in the case of complaints against public authorities.

This first objective, changing the test for discrimination by public authorities, could have been achieved simply by providing that complaints against public authorities could only be determined under the BORA. That, however, would not have resulted in any improvement in the accessibility and effectiveness of remedies — which was the second of the amendment’s two objectives. This second objective is achieved by ss 20K and 20L. These are also the crucial provisions on which the Court of Appeal relied in attributing exclusive jurisdiction to the HRRT.

Section 20L performs a double function here. Not only does it serve the first objective, by providing that the test for discrimination by public authorities is that found in BORA. It also provides that where this test is made out, the action amounts to a breach not only of BORA but also of the HRA — or, more specifically, of Part 1A of the HRA (it is “in breach of this Part”). Section 20K in turn provides that “[s]ection 20L applies *only* for” a list of “purposes” (emphasis added). That list of

purposes comprises the remedial procedures of the HRA and includes determinations of complaints by the HRRT (para (d)).

The Court of Appeal relied on the introductory words of s 20K, and in particular on the word “only”, to find that the procedures set out in s 20K were the exclusive means of bringing discrimination complaints against public authorities. This is where I suggest it may have gone astray. First, exclusivity of procedures was certainly not necessary to achieve the second of the amendment’s purposes as earlier stated by the Court of Appeal: effective remedies could be achieved by *adding* availability of the HRA’s remedial procedures to all those procedures otherwise available for breach of BORA, rather than by *replacing* the latter with the former. And secondly, such an enlarging rather than restrictive reading of Part 1A also represents the better reading of the words used.

The Court of Appeal’s restrictive reading involves a misunderstanding of s 20L and of the reference to it in s 20K. In my view, the relevant aspect of s 20L that is referenced in s 20K is its provision that breach of ss 19 and 5 of BORA also amounts to a breach of Part 1A HRA: it is that provision that “applies only for the purposes of” making available the HRA remedial provisions. What is excluded by “only” in s 20K is application of any other part of the HRA to complaints covered by part 1A.

In short, what s 20K provides is this: the point of s 20L declaring breaches of ss 19 and 5 BORA to be breaches also of Part 1A HRA is quite simply to make available the HRA’s remedial procedures. There is, however, nothing in either s 20K or s 20L to suggest that those are the *only* remedies available: the breach of ss 19 and 5 BORA surely remains a breach of BORA despite being declared also a breach of the HRA, and the remedies that are ordinarily available for breaches of BORA therefore remain available. Indeed, s 20J(4) expressly provides that nothing in Part 1A affects BORA.

Courts since 2001 had certainly so far proceeded on the assumption that challenges relying directly on s 19 BORA could be brought in the High Court (albeit without discussion of the point). While few, if any, such challenges have succeeded, none failed on the ground that they should have been brought in the HRRT: see, for example, *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122 at [46]–[63]; *Daniels v Attorney General* HC Auckland M 1615-SW99, 3 April 2002 at [82]–[97] (the discrimination issue was not reconsidered on appeal: *Attorney-General v Daniels* [2003] 2 NZLR 745 at [4]).

Finally, it should also be noted that the Court further cemented its exclusive jurisdiction reading of part 1A by a reading of s 19 of the BORA that also appears erroneous. Section 19(1) provides: “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” The Court considered that since s 19 is thus “confined to discrimination on the grounds identified in the HRA ... there is no breach of s 19 unless there is a breach of the HRA” (at [37]). If this is so, then that means that discrimination complaints can only be determined under the HRA; and of course, according to this decision, the HRA confers jurisdiction only on the HRRT. However, the conclusion that “there is no breach of s 19 unless there is a breach of the HRA” finds no basis in the words of s 19. That provision relies on the “grounds of discrimination” in the HRA, and thus

does require reference to s 21 of the HRA, which is where those grounds are set out. However, beyond that, s 19 does not require any further reference to the HRA in order to determine whether it is breached.

Substantive merits of exclusive jurisdiction

When we turn to the substantive merits of the exclusive jurisdiction for the HRRT which the Court of Appeal has found to be provided by part 1A, arguments can be made both for and against this. There is certainly something to be said for entrusting the rather treacherous area of anti-discrimination adjudication to a specialist tribunal that can build up expertise in the area. The analysis of discrimination complaints by the general courts in New Zealand has not always inspired confidence. This argument from the advantage of expert adjudication by a specialist tribunal indeed formed some part of the Court of Appeal's reasons, relying on HNZ's arguments to this effect.

However, excluding not just the TT but all other courts and tribunals from hearing discrimination complaints against public authorities also has a number of possible adverse effects. My main point in this part of this note is that these possible adverse effects were not considered at all by the Court of Appeal, focused as it was on the particular case of the TT. Exclusive jurisdiction for the HRRT should not be confirmed without full consideration being given to the substantive arguments both for and against it. I briefly note here two of the possible adverse effects that call for further consideration.

First, the logical implication of the Court of Appeal's reasoning, as noted, is that the High Court also would have no jurisdiction to hear a discrimination complaint against a public authority under the BORA, other than on appeal from the HRRT as provided by the HRA. That means that any person who had good grounds of complaint against a public authority not only in terms of discrimination, but also in terms of traditional grounds of judicial review such as breach of the right to a hearing, would have to pursue those two sets of complaints in separate sets of proceedings, which is surely highly unsatisfactory.

Provisions requiring complainants to utilise special statutory avenues of redress against public authorities are, of course, not uncommon, and have been upheld by the courts in other contexts: see, for example, s 133(5) of the Accident Compensation Act 2001 and *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) (concerning that provision's predecessor). The difference there, however, is that all types of complaint against the relevant type of decision can be dealt with by the statutory avenue; the HRRT by contrast is a single issue avenue, leaving complainants to pursue other types of complaints elsewhere.

Secondly and more generally, exclusivity of remedies always gives rise to complications and scope for confusion and boundary disputes — witness the deluge of case law and commentary about the English division between public and private remedies (*O'Reilly v Mackman* [1983] 2 AC 237 (HL)), which has so far been happily avoided in New Zealand. This is to the detriment of complainants and of the justice system alike, and hence should be avoided unless there are very good reasons for it. The advantages of the HRRT's specialist jurisdictions may perhaps provide such good reason. But this question has not really been considered yet: my argument is that it

ought to be considered fully before the broader reach of the decision in *Winther* is confirmed, in relation to the High Court in particular.

Before leaving this topic, there is one final point to touch on. It may perhaps be thought that there is little to worry about as far as the High Court's jurisdiction is concerned. Even if the Court of Appeal's reading of s 20K is adopted and confirmed, that is unlikely to preclude an application to the High Court for judicial review on grounds of breach of s 19 BORA. If it did, that would amount to an ouster of the High Court's judicial review jurisdiction, and the courts have consistently given very short shrift to such ousters: see *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA). However, that approach cannot necessarily be counted on in this context. Even if it is accepted that s 20K as read by the Court would amount to an ouster, there is reason to think that the *Bulk Gas* approach may not apply. While taking away the option of judicial review, s 20K as interpreted by the Court substitutes other remedies that are thought to be more effective. That type of ouster has at least in some cases been upheld: see *Ramsay* (above).

Alternative argument for excluding only TT jurisdiction

There is a line of argument that might have been relied on to exclude the jurisdiction only of the TT, leaving the HC's jurisdiction unaffected; but on my reading that is not the argument relied on by the Court of Appeal. The argument runs as follows. The TT as a creature of statute only has the jurisdiction given to it by the RTA. The RTA in s 12(1)(a) gives it jurisdiction to consider complaints for "contravention of the Human Rights Act", but not for breaches of BORA. Given that part 1A of the HRA converts breaches of s 19 BORA into breaches of HRA, that part might at first sight extend the TT's s 12 RTA jurisdiction to such breaches. That conclusion, however, is prevented by s 20K of the HRA, which makes it clear that s 20L's conversion of BORA breaches into HRA breaches is effective "only" for the purposes of accessing HRA procedures and remedies: that conversion cannot be relied on to give other institutions, such as the TT, jurisdiction that they would not otherwise have had.

If that is the argument, then it does not apply to exclude the High Court's jurisdiction, which, of course, is an inherent jurisdiction not dependent on particular statutory grants. Indeed, this may well have been the argument put forward on behalf of HNZ — the Court's summary of HNZ's argument at [15]–[16] and [49] is certainly consistent with this line of argument, and at [15] more positively suggests it.

However, this is not the line of argument adopted by the Court of Appeal. In considering the relationship between part 1A HRA and ss 12 and 12A RTA at [42], the Court asked *not* whether or not part 1A can be read as a basis for *extending* the jurisdiction granted by s 12, but rather how the *conflict* between part 1A HRA's generally exclusive jurisdiction and s 12A RTA's choice of procedures is to be resolved. (See also at [45]: any jurisdiction which the TT might otherwise have had to hear rights arguments is "excluded by statute".)

This line of argument would, moreover, also be potentially questionable in substance, but that is a point that can only be briefly touched on here. The problem is that the argument amounts to denying the possibility of collateral challenges for breaches of s 19 BORA by public authorities such as HNZ (see Dean Knight "Gangs, houses and rights" (2009) LAWS179 Elephants and the Law < <http://www.laws179.co.nz>> ,

commenting on the High Court's decision in this case). Ordinarily, an illegality committed by such a public authority can be challenged not only by bringing judicial review proceedings for that purpose, but also by way of defence to proceedings brought by the public authority in reliance on the illegal act or decision. In the present context, that would give the TT jurisdiction to consider BORA breaches when they are raised by way of defence to public authority landlords' applications for possession orders under the RTA. There would be no need for a specific statutory basis for this jurisdiction.

The point being made here is not that such collateral challenges should necessarily be available in this context. Collateral challenges themselves raise a host of difficulties and objections, and New Zealand courts have been criticised for too readily assuming them to be available, without discussion in many cases (Dean Knight "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 117). But their availability should at least be considered; here, the possibility was simply ignored, due to the different argument adopted by the Court. English authority on precisely this point was relied on in argument for the tenants, but was dismissed at [46] on the basis of the "legislative background" being "quite different from our own". Possibly relevant arguments concerning the Tenancy Tribunal's institutional capacity were touched on at [44] and [49], but were not followed through.

If collateral challenges are not available on BORA grounds by way of defence in possession order proceedings, a further question arising is whether the TT similarly lacks jurisdiction to hear arguments involving other judicial review grounds arising incidentally in other contexts. One area where that may be of particular relevance is the TT's newly acquired jurisdiction to hear disputes under the Unit Titles Act 2010. The Court of Appeal has held that "public law issues" such as the reasonableness of a body corporate's exercise of its powers may arise and call for resolution in such disputes: *Velich v Body Corporate No 164 980* (2005) NZCPR 143. Does the TT have jurisdiction to hear such arguments?

Conclusion

The Court's decision in *Winther* to deny the TT jurisdiction to consider discrimination complaints against public authority landlords was put on a much wider basis than was necessary. That involved a surprising reading of part 1A of the HRA as denying jurisdiction to all courts and tribunals other than the HRRT, and the far-reaching implications of that position were not considered. A much narrower argument was available for denying jurisdiction solely to the TT, but the arguments for and against that position were barely touched on.