Disability, Education and the New Human Rights: Can Tomorrow's Schools continue to shield government from claims of discrimination against disabled students?

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Abstract

This paper examines whether New Zealand's current human rights legislation is adequate to protect the right of all disabled students to equal learning opportunities at their local primary or secondary school. It looks at the history of the recently introduced Part 1A of the Human Rights Act from the abandonment of Consistency 2000 through to current case law. It is suggested that government responses to Part 1A claims have contributed to widespread misunderstanding around the purpose of the provision and risk stunting the development of human rights in New Zealand.

By examining possible government responses to a complaint made on behalf of disabled students by IHC to the Human Rights Commission, the framework of Tomorrow's Schools is used to illustrate how traditional legal thinking underpinning that misunderstanding is anathema to effective human rights protections. It is argued that the approach taken by parts of the judiciary towards human rights legislation must change and that until this happens government will continue to use Tomorrow's Schools as an excuse for failing to treat the concerns of disabled students and their families as human rights issues.

Introduction and summary

Difficulties faced by disabled students and their parents when attempting to secure equal learning opportunities at local primary and secondary schools are well documented. The problem has been around for decades, pre-dating the beginning of Tomorrow's Schools introduced under the Education Act 1989. The difficulties are so entrenched and widespread that many parents, teachers and others from disability and education sectors have become inured to the reality, creating for many a sense that change is impossible. There's probably no greater example than parents who find themselves stuck between a school unable to fully accommodate their son or daughter, and an unwillingness of the Ministry of Education to do anything about it. For parents of disabled students, this is the reality of Tomorrow's Schools.

In a recent report the Human Rights Commission cites a sharp increase over the past two years in complaints from and on behalf of disabled students.[1] The Commission categorises the complaints as falling within four general themes:

- schools not wanting to enrol children at all or only for limited hours;

[1] *Disabled Children's Right to Education*, Human Rights Commission 2009.

- children stood down, suspended or expelled because of disability or behaviour caused by disability;
- lack of funding or lack of special assistance required to fully access the curriculum;
- exclusion from participation in wider school activities such as school camps and other activities.

These issues are also the focus of the IHC complaint lodged with the Commission on 31 July 2008. The complaint is not about debating the types of education settings that best meet students' needs. Nor is it directly concerned with how schools or boards of trustees operate. The complaint instead focuses on government's responsibility to provide equal learning opportunities to disabled students in instances where parents have chosen to enrol their son or daughter at their local primary or secondary school, a choice given to parents under the Education Act.[2]

The complaint is made under the relatively untested Part 1A of the Human Rights Act that took effect 1 January 2002.[3] Part 1A provides for challenges to "acts and omissions" of government purported to breach the right to freedom from discrimination set out in s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA). The definition of "act includes an activity, condition, enactment, policy, practice, or requirement". The definition is wide and captures a broad range of activity. Potential remedies are also extensive ranging from a declaration of inconsistency with s 19, through to any other relief the Human Rights Review Tribunal or court thinks fit.[4] Disability is one of the grounds upon which claims can be brought.[5]

The Ministry of Education's response to the complaint echoes those received by countless parents who have attempted to involve the ministry in their struggles to secure fair access for their children. The deputy secretary – special education wrote to IHC:[6]

> *The information sheet about your complaint states that no individual school is being targeted and that the complaint is against the government rather than individual schools. This indicates a misunderstanding in respect of school governance. School boards of trustees are crown entities under the Crown Entities Act and section 75 of the Education Act gives school boards the complete discretion to govern their schools. In doing this boards of course must comply with the law, such as the human rights legislation. The government has no direct role in school operational management and the practice of the Ministry and the Crown Law Office, when notified by the Human Rights Commission of complaints involving particular school practices or policies, is to leave such complaints in the hands of the boards.*

Part 1A effectively replaced the Consistency 2000 policy that would have ended the Human Rights Act's subordinate status in relation to other domestic legislation and regulation on 31

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[2] Education Act 1989, s 9. The general policy underpinning s 9 is parental choice, subject to a residual ability of the Secretary for Education to direct enrolment elsewhere.
[3] Human Rights Amendment Act 2001.
[4] Human Rights Act 1993, s 92I. The exception is where an enactment is found to breach Part 1A, in which case the only remedy available is a declaration: s 92J.
[5] Human Rights Act 1993, s 21(1)(h).
[6] Letter from Deputy Secretary – Special Education to Director of Advocacy IHC, 14 April 2008.

December 1999. Rather than requiring domestic legislation to be consistent with human rights principles, Parliament instead gave citizens the ability to challenge government activity, on a case-by-case basis, as to whether it can withstand the test of discrimination provided by s 19 of NZBORA.

Despite a significant amount of criticism towards the abandonment of Consistency 2000[7] questioning whether the range of remedies available under Part 1A really were on par with what had been hoped Consistency 2000 could achieve, it is clear that Part 1A is able to scrutinise government activity in ways traditional causes of action cannot. Part of the problem, however, is that government seems to not yet properly understand how Part 1A cases ought to be approached.

The key to Part 1A is acknowledgment that it is not about *unlawful* discrimination. This is probably best illustrated in the difference between claims under Part 1A (that are about discrimination only), and claims under Part 2 (that are about *unlawful* discrimination). The difference between the two parts highlights the true purpose of Part 1A and, hopefully, realisation of the full potential a proper approach can offer.

A declaration of inconsistency with s 19, through Part 1A, must surely be largely for the purpose of steering government activity towards consistency with human rights principles. This is especially apparent given Part 1A's ability to scrutinise legislation which of course in New Zealand cannot ordinarily be unlawful. It is this specific declaratory aspect to Part 1A that highlights its clear watchdog function designed to assist government in its policy development role.

This is in stark contrast to identifying unlawful activity, which is the focus of claims under Part 2, and that ordinarily involve culpability and sanction.[8] Many of the, admittedly few so far, decisions under Part 1A have characterised the provision as involving unlawful discrimination, including instances where the subject matter of the complaint is an enactment. This fundamental error if left uncorrected may well be responsible for a major wrong turn in New Zealand's human rights jurisprudence, and is likely to have already contributed to the significant and unnecessary defensiveness from government in Part 1A claims thus far.

Traditional jurisdictional defences do not sit comfortably in the Part 1A context because there is very little, if anything, government can legitimately say is in need of protection. Unfortunately, history tells us this is not likely to deter government from attempting to use them. Should government be able to say, for example, that the IHC complaint is about what happens at schools therefore claims of discrimination against disabled students have nothing to do with them? Similarly, should government be able to point to the aspect to the complaint involving resource allocation to say the issue is something the judiciary should really keep its nose out of?

Identifying the precise nature and scope of any claim is obviously crucial when answering these types of questions, especially in Part 1A cases given its fairly unique set of

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[7] For example, see: Human Rights Commission, *Consistency 2000 Report to the Minister of Justice*, 31 December 1998.

[8] Since the abandonment of Consistency 2000 and the introduction of Part1A, claims under Part 2 became primarily about acts and omissions of non-government and private sector (with a small number of exceptions, see: s 21A).

characteristics, the least being the kinds of remedies potentially available in any particular case.

For example, if Part 1A's sole function was one of determining pure legal liability followed by the issuing of an appropriate sanction, then the answers may well be more along the lines of how government has responded to date. Traditionally the doctrine of comity prevents the judicial branch of government deciding issues that have a strong policy element to them, including scrutiny of government spending - and quite rightly so. Government should be left relatively free to explore policy initiatives it sees as necessary for the wider good. It is not the judiciary's role to question the desirability of a particular policy direction.

However, if the purpose of Part 1A is the identification of discrimination at the hands of government, including in instances where consequences for government, apart from a declaration of inconsistency, do not automatically flow, any basis for limiting jurisdiction quickly falls away. The comity doctrine becomes relevant when considering an appropriate remedy, but ought not to apply in ways that restrict jurisdiction at the outset or interfere with the legal test for discrimination. To do so would render Part 1A close to ineffectual by removing even the possibility of a declaration. Indeed, the statute requires the Tribunal to consider, for example, financial implications of granting a particular remedy, competing demands on public expenditure and so on - but in relation to remedy only - *after* a breach has been determined.

Despite this, signs are emerging that point to decisions about discrimination being affected by these sorts of issues which are undoubtedly a consequence of an incorrect characterisation of Part 1A overall. If this trend takes hold it will be very difficult reverse, and we should prepare to say goodbye to any hopes we had that government was interested in embracing human rights ideals.

The explanatory note to the amendment Bill that introduced Part 1A referred to the government being "committed to the development of a robust human rights culture in New Zealand" and "human rights institutions that are able to effectively perform the dual functions of promoting and protecting human rights."[9] Part 1A does, of course, provide a complaint mechanism that can deliver the range of remedies referred to above. However, the provision's dual function suggests government should not automatically duck for cover whenever a Part 1A claim is made, and instead should look to welcome opportunities that will bring it closer to operating in ways that reflect human rights principles. The courts too must begin to understand what it means to view government activity through a human rights lens, and realise the sky does not fall as a result. Until this happens we will continue to deny ourselves the guidance and platform for change that Part 1A offers. This is true not only in respect to education, but in all areas involving government activity and the citizen.

Consistency 2000

The Human Rights Act took effect on 1 February 2004. The plan was that nothing in the legislation would affect any other statute or regulation or anything done by or on behalf of government until 31 December 1999, from which time all government activity was expected to be consistent with the Human Rights Act and, arguably, would become subordinate to it.[10]

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[9] Supra n 3.
[10] Human Rights Act 1993, ss 151, 152 (repealed).

The programme was known as Consistency 2000, and was overseen by the Human Rights Commission.

However, in 1997 government introduced plans to wind down the project. A number of amendments to the statute followed that included extending government's immunity from discrimination claims. The Consistency 2000 project was finally replaced with the current Part 1A by the passing of the Human Rights Amendment Act 2001.

While there was much discussion about what the precise implications for other domestic legislation and regulation would have been had Consistency 2000 been left to run its course[11], there seems to have developed a general belief that Part 1A provides less protection than what we would have been left with had government become subject to the general legislation as planned.

However, this may not necessarily have been the case in every instance. The expiry of government's exemption meant its activities would have become subject to scrutiny under Part 2, which contains a different test for discrimination than under Part 1A. While both tests include an initial inquiry into *prima facie* discrimination, their respective governors are quite different. The second step in the inquiry under Part 2 requires consideration of whether the person or organisation under the spotlight could take or could have taken reasonable steps to avoid the alleged breach.

However, to successfully defend a claim under Part 1A government must show the *prima facie* discrimination to fall within "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[12]. A defence under Part 2 is generally about what's practical, whereas the defence under Part 1A is, or at least should be, about what is in human rights terms desirable.

The difference between the two tests undoubtedly means there will be claims that would have failed under Part 2 but will succeed under Part 1A and *vice versa*. While the outrage expressed by some over the abandonment of Consistency 2000 may well have been justified, Part 1A has an ability to deal with claims that would have been hopeless if brought under Part 2, the most obvious being those with significant resource allocation implications. This is because under Part 2 the practical implications around resource allocation would have been for government relevant to the test for discrimination, whereas such issues under Part 1A are dealt with specifically in relation to remedy only.

It is clear that Part 1A's general focus, while providing for concrete sanctions in cases involving acts or omissions that are not enactments, is to continue the strong objective inherent in Consistency 2000 which is about the promotion of human rights principles. The fact that legislation comes under its purview with the sole remedy of a declaration is one clear indication of this function. There is probably no dispute about the existence of this aspect to human rights protections generally, including in our own Human Rights Act. However, far greater importance must be given to it if we are to avoid the unfortunate responses from

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[11] Supra n 7. For example, some commentators have said from 1 January 2000 all domestic legislation would have clearly become subordinate to the Human Rights Act. Others have pointed to consideration of whether or not the enactment in question pre-dates the Human Rights Act. Some are of the view that the existence of the sunset clause would have given the Human Rights Act a superior status because without it New Zealand's constitutional arrangement could not entertain domestic legislation being given a subordinate status.

[12] New Zealand Bill of Rights Act 1990, s 5.

government and to a slightly lesser degree the judiciary that can only have the effect of weakening those protections. We must start doing this by refraining from characterising Part 1A as being about *unlawful* discrimination – it's not about this at all.

Part 1A is about discrimination by government, not* unlawful *discrimination

It is concerning when the judiciary, government agencies and others refer to Part 1A as being about *unlawful* discrimination. An accurate description could not be further away. To start with, Part 1A's heading reads "Discrimination by Government, related persons and bodies, or persons or bodies acting with legal authority", whereas the heading to Part 2 reads "Unlawful discrimination". Nowhere in Part 1A does the word *unlawful* appear, except once where reference is made to specific provisions under Part 2[13], which *is* about unlawful discrimination.

Another obvious clue is that Part 1A allows scrutiny of legislation. The definition of "act" includes an enactment. This of course is no surprise given the objectives central to Part 1A's forerunner Consistency 2000, which were about bringing government activity, including legislation, closer to the spirit and intent of the Human Rights Act. Nonetheless, legislation is captured together of course with any "activity", "condition", "policy", "practice, and "requirement". The list is non-exhaustive. While the only remedy available to a claimant challenging an enactment is a declaration of inconsistency with the right to freedom from discrimination contained in s 19 of NZBORA, if an enactment is found to be discriminatory there is no obligation whatsoever on government to do anything, apart from inform Parliament. Similarly, if an act or omission that is not an enactment is found to breach Part 1A, there is no obligation on the Tribunal or court to order government to fix things. The statute requires the Tribunal to consider a number of factors, including financial implications for government, when deciding an appropriate remedy.[14]

The claim by Child Poverty Action Group (CPAG) involved legislation. It alleged the Tax Act's exclusion of families for whom state assistance is a main source of income from receiving various tax credits was discriminatory on the ground of employment status. If successful, the sole remedy available was a declaration; no other relief was possible. CPAG sought a declaration to help highlight what it regarded is an inequitable distribution of social assistance that disadvantages an already vulnerable group. A declaration, it was hoped, would send a message to government that it needed to lift its game in this particular area on the basis that such treatment was not "justified in a free and democratic society"[15].

It's difficult to see why government responses to Part 1A claims have been so defensive. Surely the Crown cannot be opposed to citizens checking to see whether we're still 'free and democratic'? In *CPAG*[16] the Crown sought unsuccessfully to have the claim struck out on what were very narrow and technical grounds relating to procedure that one might expect to

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[13] Section 20J(2) ensures that Part 1A does not apply to acts or omissions that are unlawful under specific provisions of Part 2 that do apply to government, namely sections 22, 23, 61 to 63 and 66, being the exceptions to the general rule that Part 1A applies to government and Part 2 to non-government and the private sector.

[14] It is important to note, and is discussed in more detail below, that these factors relate to remedy only, not the test for discrimination – the point being crucial to understanding where Part 1A sits in relation to other legislation and the distinct functions peculiar to the executive, legislative and judicial branches of government.

[15] Supra n 12.

[16] See: *Child Poverty Action Group Inc v Attorney- General* HRRT Decision No 28/05; *Attorney-General v Child Poverty Action Group Inc* [2007] NZAR 67; *Attorney-General v Human Rights Review Tribunal* (2006) 18 PRNZ 295 (HC).

see in an aggressive corporate takeover rather than a case about whether the poorest of our poor were being treated fairly.

A brief look at what the Crown argued shows the thinking behind the approach government takes to claims where nothing is at stake apart from guidance on whether human rights concepts are being adhered to.

Firstly, the Crown argued that Part 1A did not provide for an organisation to bring a complaint on behalf of a wider affected group therefore CPAG could not be viewed as a party to the proceeding. This was despite, and as the court found, the legislative history being clear that a class of person could always have complaints brought on its behalf, that the Human Rights Act specifically allows persons having "an interest greater than the public generally" to appear and present evidence before the Human Rights Review Tribunal, and that this type of arrangement was not uncommon in a context involving the identification of discrimination. The Crown's second concern was that CPAG's claim was "premature" and could not proceed because although the legislation complained of had been passed, it was not yet in force. Again, as the court found, Part 1A gives authority to scrutinise enactments therefore the claim could of course go ahead, this again being especially so given the purpose of the legislation. An irony also arose in that by the time the Crown's objections had been heard the legislation complained of had come into force.

The Crown's objections were more than just mentioned in passing, but were vigorously pursued, firstly by way of a two-day hearing before the Human Rights Review Tribunal, followed by an appeal to the High Court then finally a fully argued judicial review proceeding also before the High Court.[17] Surely questions must be asked whether such a 'win at all cost' approach is appropriate in cases where the only potential outcome is a declaration of inconsistency intended to provide government with guidance on adherence to human rights objectives.

The obvious reply would be to say that the rule of law must be adhered to, that this includes looking at all aspects of a judicial proceeding and that consideration of a substantive matter cannot be rushed into if procedural issues have not been properly dealt with. Quite right. However, there must come a point where a line is drawn to ensure fairness and common sense prevails. While the Crown's attempts to halt CPAG's claim were unsuccessful, similar attempts in Part 1A cases in the future can only increase the chances of bad law being created in an area that is about the protection of human rights, especially given the current confusion about Part 1A and how it ought to be applied.

The IHC complaint

The ministry's initial response to IHC is that it intends defending the complaint on the basis that the issues raised are for school boards of trustees and not government.[18] Its position seems to be that New Zealand's education framework, Tomorrow's Schools, itself provides government with a defence against disabled students' claims of discrimination. The proposition is not unfamiliar and resembles the stock response received by many parents who seek the ministry's assistance when specific problems arise for their son or daughter at their

[17] The Crown's appeal to the High Court was wrongly brought, and the judge in the judicial review proceeding remarked on the Crown's persistence in trying to have CPAG's claim struck out.
[18] Supra n 6.

local school. It assumes government to have no responsibility to ensure students receive equal learning opportunities.

There can of course be situations where discrimination is alleged that only the particular school can be responsible for. However, the IHC complaint does not aim to address issues of this kind. It is the structural and systemic problems the complaint aims to combat. This means that an important focus of the inquiry will inevitably involve issues of resource allocation. Crucial in this respect will be the evidence of schools and boards of trustees who will give testimony to the difficulties of providing equal access to disabled students, and that will create part of the necessary link between government and the experiences of disabled students and their parents. It will not be surprising, however, if the Crown will want to raise resource allocation issues as relevant to the test for discrimination.

While the High Court in *CPAG* did acknowledge that Part 1A brought "with it the possibility of complaints to the Commission of an essentially political character"[19], how far this will assist IHC is uncertain. In *Howard v Attorney-General*[20] the issue was whether legislation that limited a particular type of assistance to ACC claimants upon reaching the age of 65 was discriminatory on the basis of age. The Tribunal found that it was, and accordingly issued the first declaration under Part 1A since the provision was introduced. However, in its decision the Tribunal identified cost to government as a relevant factor when determining whether the age-related discrepancy was justified, hence whether it breached Part 1A:

> *…we have not been persuaded that the prima facie age-related discrimination that we have identified in s.85 and Cl.52 IPRCA is justified under s.5 NZBORA, when there is no material additional cost to the ACC scheme in removing it, and no other adverse social or economic consequences that could possibly be said to follow if the age limit on eligibility were removed.*

In a case where no other remedy apart from a declaration was possible, that is, government could not be required to do anything apart from provide a report to Parliament, the Tribunal considered potential cost if the government were to decide to remove the discrimination as a relevant factor when determining the *existence* of discrimination. Upon this logic, cases such as *CPAG* which involved a $450 million difference in resource allocation would be viewed as hopeless from the start preventing even a mere declaration from being issued. Jettisoned also of course is the guidance towards compliance with human rights principles such declarations aim to deliver.

Of concern also is the outcome reached by the Court of Appeal in *Trevethick v Ministry of Health*[21]. Special leave to appeal a decision to strike out the initial claim was refused because the vast difference between levels of assistance available under the health and ACC systems was considered a justified limitation on the right to freedom from discrimination, the inference being that resource allocation is an area reserved for policy-makers.

In *Trevethick* the plaintiff argued the disparity between the two systems amounted to discrimination on the basis of disability. The Crown's application to have the claim struck out was successful because the definition of disability in the Human Rights Act was said not to include the *cause* of disability. Both leave to appeal and special leave were refused

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[19] *Attorney-General v Human Rights Review Tribunal* (2006) 18 PRNZ 295.
[20] HRRT, Decision No. 10/08.
[21] *Trevethick v Ministry of Health* [2009] NZAR 18.

because the statutory definition of disability was too great a hurdle, but the Court of Appeal went further to decide the justification issue as well.[22]

The policy objective identified was the ACC scheme's no-fault cover replacing the right to sue in personal injury cases, therefore, according to the Court of Appeal, the lower level of support received through the health system by people with the same impairment could not amount to discrimination.[23]

The result the Court of Appeal reached in *Trevethick* shouldn't be confused with the outcome of the substantive matter in *CPAG*[24]. CPAG's claim failed because government was seen as entitled to embark on policy initiatives it saw as necessary or desirable. There was no requirement for government to show the success or effectiveness of the policy underpinning the alleged discrimination. It was sufficient that government could introduce policies it considers necessary to achieve a particular policy objective.

This is very different to how the Court of Appeal approached the issue in *Trevethick*. The mere fact that the discrimination alleged was seen as having some connection to matters of policy generally[25] was sufficient for the Court of Appeal to deny the existence of discrimination. The error here is that the alleged discrimination, being the lower level of assistance provided through the health system, is not the target of the policy objective identified, but merely a consequence of a policy decision made elsewhere.

In *CPAG*, the policy objective behind issuing particular tax credits to people in employment was to create incentive for people in receipt of a social welfare benefit to move into employment. In *Trevethick*, the issue of policy the Court of Appeal pointed to was unrelated to the level support received by those with impairment not caused by injury. It's difficult to see how such a policy could be used to demonstrate the funding inequity as "justified in a free and democratic society", especially without evidence and argument on the point.

Considering how these concepts may apply in the IHC complaint is interesting. First, the IHC claim does not involve legislation, rather practices attributable to actions of government, including an omission. This creates a situation where a successful claim opens the way for remedies that go further than a mere declaration, and can include the Tribunal or court requiring government to take action in a range of ways. Remedies are discretionary, but it's enough to say the potential is there. The question is whether this could impact on the way the legal test is applied as to whether disabled students are discriminated against and whether government is in breach of Part 1A.

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[22] The Court of Appeal was not required to decide the justification issue in this case, but did so anyway. The concern here is not so much with the reasons for the initial strike-out, rather than the reasons for the justification under s 5. The proceeding in this instance was clearly the wrong forum for such a determination to be made. Section 5 NZBORA requires determining whether *prima facie* discrimination can be "demonstrably justified in a free and democratic society", yet the Court of Appeal decided the issue without hearing evidence or full argument.

[23] The decision of the Court of Appeal on this point was made as if *prima facie* discrimination had been established, which it had not, because the definition of disability in the Human Rights Act was considered as excluding cause of disability.

[24] *Child Poverty Action Group Incorporated v Attorney-General*, HRRT Decision No 31/08.

[25] The proposition ignores the fact that there would be very few situations where claims of discrimination against government would not involve matters of policy the logical extension beeing government would be near immune to challenge under Part 1A.

Second, the overall objective of equal learning opportunities for all students, including disabled students, is shared by government, disabled students and their parents, the wider community and so on. There is no dispute that the objective is an admirable one. In this respect the complaint is very different to the *CPAG* case. While CPAG and its supporters felt very strongly about the treatment of children whose parents' main source of income is a social security benefit, government's policy to discriminate[26] on the basis of income status was deliberate, and focussed on wider objectives designed to achieve a particular end. In other words, the case was one where the parties had differing views of what was a desirable state of affairs. In the IHC case, it is unlikely there will be disagreement about the desirability of ensuring disabled students can access the curriculum on the same basis as their peers. Indeed, according to government rhetoric this is already happening.[27]

Government has indicated its belief that responsibility for the issues the complaint raises sits with schools, whereas IHC believes this will be a matter of evidence. This is especially so given the claim involves practices and an omission. In general, students and their families will be required to show that the problems exist, and schools, academics and others will be required to show how those problems arise at a systemic level. The evidence overall will also need to show disadvantage.

In *Daniels v Attorney-General*[28] Baragwanath J discussed whether a finding of discrimination could be made on the basis of a failure to treat differently, or was limited instead to situations involving failure to treat the same. His Honour concluded the latter to be the case. The finding has been met with much criticism, and is relevant to the IHC complaint. Achieving equal education outcomes will at times require treatment that is different. Such a narrow approach to discrimination cases is at least unhelpful to IHC's claim.

However, the IHC complaint is well suited to tackle this finding head-on. This is especially so when failure to succeed on the point may not necessarily be fatal to the overall claim, since human rights legislation allows challenges against an omission.

If *prima facie* discrimination is established, that is, that disabled students as a class of person are treated in some way differently than other students, and that the difference constitutes detriment, the onus is then on the Crown to demonstrate the discrepancy to be a justified limitation on the right to freedom from discrimination. If we accept there to be no dispute between the parties on whether equal learning opportunities ought to be available to disabled students, how will government show the disparity is justified, apart from relying on the notion that resource allocation is an area reserved for the executive or legislative branches, and not the judiciary?

It would be disappointing but not surprising if government wished to proceed down this path. The case of *Howard* and the Court of Appeal's treatment of the justification issue in *Trevethick* will no doubt be regarded by the Crown as helpful. However, there is further indication in the statute pointing to how Part 1A ought to be applied, suggesting strongly how

[26] The Tribunal did find there to be *prima facie* discrimination, but that it was "demonstrably justified in a free and democratic society", therefore no breach of Part 1A occurred.
[27] Inclusive education is a stated aim within the NZ Disability Strategy, as well as the United Nations Convention on the Rights of Persons with Disabilities which New Zealand has ratified. The Ministry of Education has referred to inclusive education in statements of intent. Providing equal learning opportunities for disabled students is an accepted part of government policy.
[28] *Daniels and Ors v Attorney* (High Court, Auckland M 1615-SW99, 3 April 2002, Baragwanath J).

the aspects of *Howard* and *Trevethick* that may potentially provide a defence must surely be wrong.

While the range of remedies available if a breach is to be found are broad, there are a number of matters the Tribunal must take into account when decisions around remedies are made, and that highlight the types of issues it was envisaged Part 1A would be used to consider, for example:

- *the social and financial implications of granting any remedy sought by the plaintiff* (s 92P(1)(d));
- *the public interest generally* (s 92P(1)(f));
- *the obligation of the Government to balance competing demands for the expenditure of public money* (s 92P(2)(a));
- *the requirements of fair public administration* (s 92(2)(b)).

The legislature clearly intended that matters having a significant policy component would receive attention under Part 1A, including issues involving resource allocation. It is no coincidence that requirements to give consideration to these sorts of issues are set out in relation to determining the *remedy* in any particular case, and not when deciding issues of jurisdiction to hear the substantive matter, or how the legal test ought to apply, including questions around justification.

Similarly, a specific ability is given to the Tribunal to defer or modify remedies as it sees fit, for example:

- *to refuse to grant any remedy that has retrospective effect* (s 92O(2)(b));
- *to refuse to grant any remedy in respect of an act or omission that occurred before the bringing of proceedings or the date of the determination of the Tribunal or any other date specified by the Tribunal* (s 92O(2)(c));
- *to provide that any remedy granted has effect only prospectively or only from a date specified by the Tribunal* (s 92O(2)(c));
- *to provide that the retrospective effect of any remedy is limited in a way specified by the Tribunal* (s 92O(2)(d)).

Sections 92O and 92P were added to the statute at the same time as Part 1A, clearly for the purpose of allowing the Tribunal to properly deal with issues involving policy and resource allocation. This was necessary to enable the activities of government to be given judicial scrutiny, while at the same time allowing each branch of government to retain their distinct functions. This does not mean that claims involving policy issues or significant sums of government money can only be dealt with by way of a declaration. The flexibility in the provisions governing remedy[29] brings the potential for any number of innovative responses, in

[29] Human Rights Act 1993, s 92I.

addition to a declaration, that would not encroach upon functions of the executive or legislative branches.

To suggest that potential cost to government is relevant to the test for discrimination in Part 1A cases, as was done in *Howard*, is a misunderstanding of the relevance of the factors set out in s 92P that apply to remedy only. The logical extension of that suggestion is that discrimination claims could be successfully defended on the basis of potential financial cost to government without requiring consideration of whether the alleged disadvantage is discriminatory, something which was clearly not intended when Part 1A was introduced. The suggestion in *Howard* drags factors to be considered when deciding remedy into the test for discrimination, which on a purely statutory interpretation basis must also be wrong. If the legislature intended, for example, "competing demands on the expenditure of public money" to be relevant when deciding discrimination, it would have said so. To the contrary, it made careful efforts to achieve the opposite result by specifying such considerations as relevant when deciding remedy, not *discrimination*. There is still time to ensure such efforts have not been in vain.