IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 9**

	Reference No. HRRT 020/2011
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**ADOPTION ACTION INCORPORATED**
	PLAINTIFF
AND	**ATTORNEY-GENERAL**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Mr MJM Keefe JP, Member
Ms ST Scott, Member

REPRESENTATION:
Mr RH Ludbrook for plaintiff
Ms M Coleman, Ms J Emerson and Mr S Humphrey for defendant
Ms F Joychild QC and Mr M White for Human Rights Commission as intervener

DATE OF HEARING: **18, 19, 20, 21, 22, 25, 26 and 27 November 2013; 13 and 14 January 2014**

DATE OF DECISION: **7 March 2016**

DECISION OF TRIBUNAL[1]

[1] [This decision is to be cited as: *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.]

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INTRODUCTION

[1] The Adoption Act 1955 came into force on 27 October 1955, some 61 years ago. But as one informed commentator has pointed out, the origins of the Act go back to at least 1881. See Ross Carter "'Spouses' in the Adoption Act" [2010] NZLJ 271:

> [The Adoption Act 1955] is the successor, via the Adoption of Children Act 1895 and the Infants Act 1908, of the Adoption of Children Act 1881. The 1881 Act's restrictions on who may adopt were, says Smith (1921) 3 JCL & IL (3rd series) 165 at 168 "suggested partly by … the Code Napoléon … and partly by … the Adoption Laws … of New York and Massachusetts, though they are not identical with any such".

[2] Indeed, as noted by the Law Commission in its report *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) (*Adoption and its Alternatives*) at para 16, in 1881 New Zealand became the first country of the Commonwealth to enact adoption legislation. For a succinct overview of the history of adoption in New Zealand, convenient reference can be made to the Law Commission report at paras 17 to 30.

[3] All contemporary commentators are in agreement the Act is now seriously out of date, reflecting as it does the values and practices of its day. Massive social changes have occurred in the nearly 61 years since it was enacted. See for example Bill Atkin "Adoption law: The courts outflanking Parliament" (2012) 7 NZFLJ 119. The Law Commission in its earlier discussion paper *Adoption: Options for Reform* (NZLC, PP38, 1999) at paras 2 and 3 illustrated the point in the following terms:

> 2 Since 1955 changes in social conditions and public attitudes have had a marked effect upon the institution of adoption. They include:
> - the Status of Children Act 1969 (the 'Status of Children Act'), which removed the legal concept of 'illegitimacy';
> - the Adult Adoption Information Act 1985 (the 'Adult Adoption Information Act'), which has facilitated the open exchange of information between adopted persons and birth parents; and
> - the increasing practice of open (as opposed to closed) adoption.
>
> 3 It is perhaps ambitious to expect 'social' legislation to have a life of more than 15–20 years in view of the way societal needs, expectations and values can change so rapidly from one generation to the next. This has certainly been the experience with adoption legislation. Changing social needs and expectations have prompted several reviews of the Adoption Act, the first of which was conducted in 1979. Other such reviews occurred in 1987 and 1990 and 1993. None of these reviews have led to legislative reform. The result is that adoptions must be conducted in accordance with law that was drafted some 45 years ago and which may not adequately represent contemporary social needs and values. [Footnote citations omitted]

[4] To the long list of reviews which have not led to legislative reform must be added the Law Commission's own report *Adoption and its Alternatives*. The Commission at para 153 identified what in its view is the most plausible reason for the continuing lack of action:

> That the current adoption legislation has lasted as long as it has is not a testament to its success – rather, it is a reflection of the fact that adoption forces people to question basic social principles, and that obtaining agreement as to what those basic principles should be, is an extremely difficult task.

[5] The Law Commission at p xx also referred to adoption law as the "Cinderella" of family law – neglected, at times underfunded, but of vital importance in the larger scheme of things.

[6] Since the 2000 Law Commission report the pace of social change has only increased as reflected in, for example, the Civil Union Act 2004, the Care of Children Act 2004

(COCA) and the Marriage (Definition of Marriage) Amendment Act 2013 (MDMA Act). While several amendments have been made to the Adoption Act since its enactment, those changes have been piecemeal, without a fundamental re-appraisal of its underlying assumptions and without a clear statement of the Act's purpose and of the values and interests it is to reflect in the second millennium.

[7] In these proceedings under Part 1A of the Human Rights Act 1993 filed on 22 July 2011 Adoption Action Inc (Adoption Action) alleges particular provisions of the Adoption Act and of the Adult Adoption Information Act 1985 (AAI Act) discriminate against certain persons and classes of persons in eight different respects on six prohibited grounds of discrimination. The allegations are more fully articulated in the amended statement of claim filed on 25 March 2013. In each case the remedy sought is the only one within the Tribunal's jurisdiction, namely a declaration under s 92J of the Act that the particular provisions are inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights).

[8] With a single exception the response filed by the Attorney-General is one of general denial. The exception relates to the challenge to s 4(1) of the AAI Act. In respect of this cause of action the Crown abides the decision of the Tribunal on both liability and remedy. That fact does not, of course, relieve Adoption Action of the responsibility to establish, to the civil standard, that the provision under challenge is inconsistent with the right to freedom from discrimination.

Adoption Act Inc

[9] Adoption Action Inc was incorporated under the Incorporated Societies Act 1908 on 7 September 2010. Its aims and objects include the proposal and promotion of changes to adoption law, policies and practices that will (inter alia):

- Enhance the rights and wellbeing of children affected by adoption.
- Eliminate the discriminatory provisions in current New Zealand adoption laws.
- Introduce new laws which will reflect current social attitudes and values and will accord with national and international human rights standards.

[10] Mr RH Ludbrook is currently the Treasurer of the society.

Standing

[11] Adoption Action does not claim to be the victim of discrimination but in bringing these proceedings does assert an interest greater than that of the public at large. It relies on *Attorney-General v Human Rights Review Tribunal [Judicial Review]* (2006) 18 PRNZ 295 at [56] to [66] as authority for the proposition that in proceedings under Part 1A of the Human Rights Act a complainant need not act in a representative capacity for an aggrieved person and that proceedings can be brought by a third party such as Adoption Action.

[12] Before the Tribunal the Crown conceded Adoption Action has standing but reserved its position in relation to any potential appeal.

[13] Adoption Action is candid that after years of unsuccessfully lobbying various Ministers and government administrations, these proceedings have been brought as a last resort to bring about change to the adoption law of New Zealand. The fact that the claim has a political character is not, however, a disqualification. As recognised in *Attorney-General v Human Rights Review Tribunal* at [65], the Human Rights Act "manifestly admits claims having a political purpose".

The Human Rights Commission

[14] By virtue of s 92H(1) of the Human Rights Act the Human Rights Commission has a right to appear and to be heard in proceedings before the Tribunal.

[15] On 11 March 2013 the Commission gave formal notice of its intention to appear on the grounds the proceedings raise significant issues of general or public importance which will have a significant impact on the development of human rights jurisprudence in New Zealand.

[16] Through Ms Joychild QC the Commission played a significant role at the hearing and the Tribunal acknowledges the invaluable assistance it has received.

The report of the Children's Commissioner

[17] The Tribunal must also acknowledge the assistance given by the Children's Commissioner who, at the request of Adoption Action and acting pursuant to s 12(1)(g) of the Children's Commissioner Act 2003, filed a report supporting two particular aspects of the claim before the Tribunal, namely:

> **[17.1]** The challenge to s 4(1) of the AAI Act which prevents persons aged under 20 from obtaining a copy of their original birth certificate showing their birth parents.
>
> **[17.2]** The challenge to s 16(2) of the Adoption Act. The Commissioner challenges the fact this provision does not permit the recording of an adopted Māori child's whānau, hapū and iwi affiliation.

Delay

[18] As mentioned these proceedings were filed on 22 July 2011. Two main reasons account for the delay in bringing them to a conclusion. First, at the request of the Crown and with the consent of Adoption Action, the dispute between the parties was on 4 November 2011 referred by the Tribunal to the Human Rights Commission for mediation. It was not until 28 September 2012 that Adoption Action and the Tribunal learnt the Crown would not agree to a mediated solution. See the *Minute* issued by the Chairperson on 28 September 2012. The amended statement of claim was not filed until 25 March 2013.

[19] The second reason is that following the conclusion of the ten day hearing on 14 January 2014 the Tribunal had a large volume of evidence and submissions to consider. Delay regrettably occurred because all members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously. Nevertheless the delay is acknowledged and an apology offered to the parties.

OVERVIEW OF THE CLAIM

[20] The amended statement of claim filed on 25 March 2013 sets out a number of grounds (there is some overlap or duplication) on which it is alleged the Adoption Act discriminates against certain persons. In all six prohibited grounds of discrimination are involved. In this decision we do not attempt to summarise or address each and every point raised in submissions made by the parties during the ten day hearing. Nor do we attempt to discuss or analyse each of the many cases cited in argument. Rather we have set out to distil and then address the essential points relevant to the plaintiff's claim and the Crown's response.

[21] First, a general overview of the claims is necessary.

Sex

[22] Amended statement of claim para 9.1.1. A sole male applicant wanting to adopt a female child must prove special circumstances. A sole female applicant wanting to adopt a female child does not have to prove special circumstances. See Adoption Act, s 4(2).

Sex and marital status

[23] Amended statement of claim paras 9.1.2 and 9.2.2. A birth father who is not married to the mother of the child and not otherwise a guardian is not required to consent to the adoption of the child unless in the opinion of the court it is "expedient" for such consent to be required. Birth mothers can never have their consent dispensed with without proof of one of the circumstances listed in s 8(1)(a) such as abandonment or neglect. The consent of the birth mother is always required whatever her marital or relationship status. See Adoption Act, s 7(3)(b).

Marital status and sexual orientation

[24] Amended statement of claim paras 9.2.1 and 9.6.1. Partners who have entered into a civil union are unable to adopt a child. The effect of s 3(2) of the Adoption Act is that an adoption order can be made only on the application of "2 spouses jointly". Adoption Action contends the term "spouse" as used in the Adoption Act does not apply to civil union partners.

[25] Amended statement of claim paras 9.2.1 and 9.6.1. Partners who have entered into a same sex de facto relationship are similarly unable to adopt a child because s 3(2) of the Act provides an adoption order can be made only on the application of "2 spouses jointly". Adoption Action contends the term "spouse" as used in the Adoption Act does not apply to same sex de facto relationships.

[26] Amended statement of claim paras 9.2.3 and 9.6.2. The consent of the unmarried opposite-sex or same-sex partner of a sole applicant for an adoption order is not required even where the couple are living together at the time of the adoption application. The consent of the spouse of a married applicant is, however, always required. See Adoption Act, s 7(2)(b).

Disability

[27] Amended statement of claim para 9.4.1. The consent of any birth parent can be dispensed with on the grounds of parental dereliction (s 8(1)(a)) but in the case of birth parents with a physical or mental disability their consent can be dispensed with on the additional ground that the parent is unfit, by reason of any physical or mental incapacity, to have the care and control of the child and the unfitness is likely to continue indefinitely. See Adoption Act, s 8(1)(b). Birth parent consent of non-disabled parents can be dispensed with only on the basis of parental dereliction as listed in s 8(1)(a), not on the basis of prohibited characteristics.

Age

[28] Amended statement of claim para 9.5.1. Unless there are special circumstances an adoption order cannot be made unless the applicant, or in the case of a joint application, one of the applicants, has attained the age of 25 years and is at least 20 years older than

the child. Couples over 25 can adopt a child without proof of special circumstances. See Adoption Act, s 4(1)(a).

[29] Amended statement of claim para 9.5.2. The effect of s 4 of the AAI Act is that a person under 20 years of age cannot obtain a copy of his or her original birth certificate and is therefore denied access to information about his or her parenthood and personal identity. See the definition of "adult" in the AAI Act and also s 4(1). This discriminates against young persons aged 16 to 19 years on the grounds of their age.

Race

[30] Amended statement of claim para 9.3.1. In the case of a Māori or Pasifika child, or a child from a culture which accords important status to members of a child's wider family, s 16(2)(c) of the Adoption Act has the detrimental effect of expunging such children's ancestry and lineage (whakapapa) and severing their relationship with members of their whānau, hapū, iwi aiga or other cultural family group. This is alien to the cultural values of Māori and Pasifika people and people of minority cultural groups that have similar values. The severance of a Māori child's legal and family ties with whānau, hapū and iwi impacts more harshly on Māori children and their family members because it may deny children information about, and access to, their whakapapa and tūrangawaewae and thus destroy or damage a significant element of their identity as Māori. This alienation also unfairly disadvantages members of the child's broader family and breaches their entitlements under the Treaty of Waitangi in that it is likely to disrupt or destroy their connection with children to whom they are related.

[31] This claim of indirect discrimination was at the hearing amended to apply to Māori and Pasifika children only and then further amended to apply to Māori children only. There was no dispute that the test for indirect discrimination in s 65 of the Human Rights Act (which is in Part 2 of the Act) was to be taken as a useful guide as to how indirect discrimination should be assessed under Part 1A (*Northern Regional Health Authority v Human Rights Commission* [1988] 2 NZLR 218).

[32] The following Tables 1, 2 and 3 produced during the course of the hearing provide a convenient overview of the plaintiff's view of the operation of the provisions of the Adoption Act to be discussed in this decision.

Table 1 - Claims of Unlawful (Direct) Discrimination

Joint Applications to Adopt	Can they adopt	Relevant legal provision or case law	Prohibited ground engaged
Married opposite sex	Yes	s 3(2) Adoption Act 1955	None
Married same sex	Yes	s 3(2) Adoption Act as amended by Marriage (Definition of Marriage) Amendment Act 2013. See amended interpretation provisions in Adoption Act for definition of 'spouse'.	None
Civil Union opposite sex	No	• Civil Union Act 2004 did not amend the Adoption Act in relation to who may adopt • Persons in civil unions are described in the Civil Union Act as 'partners' not 'spouses'	Marital status

		• Obiter comments in *AMM & KJO* [2010] NZFLR 629 (HC) at [39] re 'formidable barriers' to inclusion under s 3(2)	
Civil Union same sex	No	• Civil Union Act did not amend the Adoption Act in relation to who may adopt • Persons in civil unions are described in the CU Act as 'partners' not 'spouses' • Obiter comments in *AMM* at [39] re 'formidable barriers' to inclusion under s 3(2)	Marital status
De facto opposite sex	Yes BUT still disadvantaged	*AMM* construes 'spouse' in s 3(2) AA to include opposite sex partners in committed and stable relationships only – BUT • No such requirement of stability for married couples • Due to departmental uncertainty birth parents are warned that court may not grant a joint adoption order to them	Marital status
De facto same sex	No	Explicitly excluded from *AMM* decision at [39] & [54]	Marital status and sexual orientation
If neither spouse over 25	No - unless special circumstances	s 4(1) Adoption Act	Age
If neither spouse 20 or older and child is a relative	No - unless special circumstances	s 4(1) Adoption Act	Age

Whether single applicants can adopt	Can they adopt	Relevant legal provision or case law	Prohibited ground engaged
Single woman if child female	Yes	s 3(3) Adoption Act	No
Single woman if child male	Yes	s 3(1) Adoption Act	No
Single man if child female	No - unless he is father of child or there are special circumstances	s 4(2) Adoption Act	Sex
Single man if child male	Yes	s 3(1) Adoption Act	No

Consenting person in adoption	Consent required?	Relevant legal provision	Prohibited ground engaged
Birth mother	Always	s 7(3)(a) and (b)	No
Birth father	Sometimes	Only if he was married to mother at time of child's conception or birth or is a guardian of the child: s 7(3)(a). If not, the Court may require his consent only if, in the Court's opinion, it is 'expedient' to do so: proviso to s 7(3)(b).	Sex
Spouse of single adoption applicant	Always	s 7(2)(b) Adoption Act	No
De facto opposite sex partner of single adoption applicant	Possibly	*AMM* defined 'spouse' to include opposite sex partners in stable and committed relationships	Marital status
De facto same sex partner of single adoption applicant	Never	s 7(2)(b) requires consent for spouses only	Marital status and sexual orientation
Civil Union opposite sex partner of single adoption applicant	Never	s 7(2)(b) requires consent for spouses only	Marital status
Civil Union same sex partner of single adoption applicant	Never	S 7(2)(b) requires consent for spouses only	Marital status
Birth parents with qualifying disabilities and incapacity	No	S 8(1)(b) Adoption Act consent can be dispensed with where qualifying disability and incapacity	Disability

Table 2 - Claim of Indirect Discrimination

Condition or requirement at issue	Differential effect	Prohibited ground
s 16(2)(a) to (c) Adoption Act which irrevocably severs legal and family relationships between adopted children and birth families	Māori peoples due to cultural practices and values relating to birth links and whānau, hapū, iwi relationships	Race and ethnic origin
s 16(2)(a) to (c) Adoption Act which irrevocably severs legal and family relationships between adopted children and birth families	Pacific peoples due to extended family values	Race and ethnic origin

Table 3 - Claim of Direct Discrimination: Adult Adoption Information Act 1985

Access to adoption information	Access granted	Relevant provision	Prohibited ground engaged
Adopted person under 20	No	s 4(1) AAI Act	Age

OVERVIEW OF THE CASE FOR THE ATTORNEY-GENERAL

[33] The following overview of the case for the Crown has been taken from its submissions dated 13 January 2014:

> **[33.1]** Before being subject to the substantive requirements of ss 19 and 5 of the Bill of Rights, each of the challenged provisions must be interpreted consistently, as far as it is possible to do so, with fundamental Bill of Rights rights, New Zealand's international obligations and in an ambulatory manner, consistent with changing social mores and attitudes.
>
> **[33.2]** When this approach is applied, broad, rights-consistent meanings can, and therefore must, be given to each of the challenged provisions. Specifically:
>
> > **[33.2.1]** "Spouse" must mean married couples, civil union couples and couples in committed de facto relationships, either heterosexual or homosexual.
> >
> > **[33.2.2]** "Special circumstances" must mean where making the adoption order would be in the best interests of the child concerned.
> >
> > **[33.2.3]** "Expedient" must mean advantageous, fit, proper, or suitable for the purpose of ensuring the child's best interests are met.
>
> **[33.3]** When each provision is interpreted as contended, none is in breach of Part 1A. This is either because the meaning in question does not contravene s 19 of the Bill of Rights, or in the alternative, such a limitation on the right is demonstrably justifiable in a free and democratic society under s 5.
>
> **[33.4]** To the extent any of the provisions is found to breach Part 1A in its entirety, this is an exceptional case in which the Tribunal ought to decline to grant declaratory relief under s 92J of the Human Rights Act.

THE EVIDENCE

The witnesses

[34] This case being largely about statutory interpretation and the application of the Bill of Rights, the only oral evidence heard by the Tribunal was given by Mr Ludbrook for Adoption Action and Ms EA Nelson for the Crown. Ms Nelson is employed by the Ministry of Social Development (MSD) as a Team Leader in the Care and Protection Support Team, National Office. In her current role she is responsible for a team of Senior Advisors who provide support to social workers operating in MSD's regionally managed care and adoption services. This includes providing practice guidelines and advice to social workers.

Mr Ludbrook – whether an expert witness

[35] Mr Ludbrook deposed:

> **[35.1]** After completing his law degree at the University of Canterbury in 1958 he was admitted as a barrister and solicitor in 1959. After working in London he was admitted as an English solicitor in 1964 and gained a Diploma in Sociology from London University in that year. Shortly after his return to New Zealand he joined the firm of Cairns Slane Fitzgerald & Phillips, becoming a partner in 1969. He developed a specialist family law practice, including adoption. He left the

partnership in 1980 to work with community law centres in London, Auckland and Sydney. He was admitted as a New South Wales solicitor in 1994. He last held a New Zealand practising certificate in 1992.

[35.2] Since the 1980's his special interest has been children's rights. After spending two years at the Children's Legal Centre in London (1983-1985) in 1986 he established the first New Zealand Community Law Centre (Youth Law). He was later the founding director of the Australian National Children's and Youth Law Centre based in Sydney (1993-1996) and has worked for the New Zealand Commissioner for Children (1997-1998) and for the New South Wales Commissioner for Children and Young People (2000-2001).

[35.3] At the request of the then President of the Law Commission (Justice Baragwanath as he then was) he peer reviewed the Law Commission Report *Adoption and its Alternatives*.

[35.4] Since 1982 he has written and updated most of the original text (including the section on adoption) in *Ludbrooks Family Law Practice* and other related publications and has written articles about adoption law and practice.

[36] For Adoption Action it was submitted Mr Ludbrook was an "expert" within the meaning of the Evidence Act 2006 and his opinion evidence was admissible if the Tribunal was likely to obtain substantial help from that evidence.

[37] For its part the Crown accepted Mr Ludbrook has expertise in respect of adoption law and practice in New Zealand and Australia. However, it was submitted the Tribunal should not accept all his testimony as "expert evidence". Specifically his expertise had not been established in relation to first, the issue whether the age of 25 is an appropriate proxy for the skills and maturity necessary to parent a child not born to one and second, the disparate impact of adoption on Māori.

[38] There is some force to this submission, particularly in relation to the evidence relied on by Adoption Action in support of the racial discrimination claim. In fairness Mr Ludbrook did not claim to be an expert on this topic.

[39] Apart from the 25 years of age and racial discrimination points raised by the Crown, we see little real difference between the evidence produced by the parties and accept Mr Ludbrook's evidence has been of substantial assistance. Where it is necessary we will indicate the occasions on which his evidence is not accepted as expert evidence.

[40] For her part Ms Nelson did not claim to be an expert but her evidence was fairly given and helpful. There were no significant matters on which she and Mr Ludbrook disagreed.

Overview of the adoption process

[41] A description of the adoption process in New Zealand is to be found in the Law Commission discussion paper *Adoption: Options for Reform* at Appendix B and in the report itself *Adoption and its Alternatives* at paras 31 to 72. Useful though these descriptions may be as a "snapshot" they do not address the particular provisions of the Adoption Act which are under challenge.

[42] As to the specific evidence heard by the Tribunal, the following summary prepared by the Crown is repeated:

[42.1] There are two ways in which a child can be adopted within New Zealand:

[42.1.1] An identified child adoption; or

[42.1.2] A MSD mediated adoption.

[42.2] Identified child adoptions (sometimes referred to as "private adoptions") arise where the birth parents and applicants are known to each other, and the applicants apply directly to the Family Court for an adoption order, generally without MSD involvement. Most identified child adoptions are by relatives.

[42.3] The second type of adoption is one that is mediated by MSD. In this type of adoption, the birth parent (or parents) will approach MSD seeking to place their child for adoption and MSD will link them with people seeking to adopt. Such adoptions normally take place shortly after the child to be adopted is born.

[42.4] If a birth parent (or parents) approach MSD seeking to place their child for adoption, MSD will discuss all options with them.

[42.5] Even when the father is not a guardian of the child, MSD will encourage the mother to involve him in decision-making.

[42.6] MSD also encourages wider whānau and family involvement in decisions in relation to adoption, including exploring with the wider family whether there is anyone within their families that might want to care for the child. However, MSD cannot require this unless the birth parent (or parents) agree.

[42.7] Parents placing a child for adoption provide a personal history detailing information that can later be given to the adopted child.

[42.8] All applicants wishing to take part in MSD mediated adoptions must attend a "Ways to Care" programme and provide certain documentary information. They are then assessed by a MSD social worker with reference to the six core needs assessment framework.

[42.9] Those who pass the various stages of assessment are added to the pool which contains the profiles of prospective adoptive parents.

[42.10] The profiles are kept geographically but are available nationally to all adoption social workers.

[42.11] There is also a national Māori register, which records the iwi affiliation of applicants.

[42.12] All those who are assessed as "fit and proper" to adopt are permitted to enter the pool.

[42.13] A person will not be denied the opportunity to be assessed for entry into the pool based on their gender, marital status or sexual orientation.

Open versus closed adoption

[43] In view of the challenge to the AAI Act it is necessary to refer briefly to what are termed "closed" and "open" adoptions. While Ms Nelson did give some evidence on the subject, the account by the Law Commission in its discussion paper *Adoption: Options for Reform* at paras 13 to 20 is also of assistance:

[43.1] The Adoption Act is based upon an assumption that the best way to conduct an adoption is in secret.

[43.2] Some adoptees, however, report problems in establishing a sense of "identity". Most people gain background knowledge of one's family as a part of normal development, yet an adopted person will never experience that in an environment of secrecy.

[43.3] Since the 1980s, social workers have facilitated the practice of open, rather than closed adoption. Open adoption involves varying degrees of contact between the child, members of its adoptive family and members of its birth family. Contact may involve communication by mail at periodic intervals or regular visits. The degree and regularity of contact is decided upon by the parties involved through a Contact Agreement. Ms Nelson stressed, however, that such agreement is a statement of intent and is not legally binding. Nevertheless participants in such adoptions for the most part are positive about the benefits contact can confer.

[43.4] Research indicates birth mothers have found contact with the adoptive family and the child assists them in alleviating their sense of loss and helps them come to terms with the adoption. Adoptees are better able to establish a sense of self, come to terms with feelings of "abandonment" and feel secure in their adoptive family environment. The experience of adoptive parents has been that although they may be initially apprehensive, contact can improve their relationship with the child. Evidence suggests adoptive children are more able to develop a successful attachment to their adoptive parents when there is contact with birth parents.

[44] Where necessary, more particular evidence which relates to the specific grounds of challenge will be referred to in the context of the specific ground.

The claim based on race dismissed

[45] First, however, it is necessary to dispose of the claim of indirect discrimination made in relation to Māori children.

[46] Mention has been made of Mr Ludbrook's concession he has no expertise in relation to Māori concerns about adoption under the Adoption Act and Māori conception of the role of whānau, hapū and iwi in child rearing. The case for Adoption Action was presented on the basis the Tribunal take into account the writings of the various authors cited in Adoption Action's written submissions. Particular reference was made to two passages from the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare *Puao-Te-Ata-Tu (Daybreak)* (1988), the Law Commission Report *Adoption and its Alternatives* and the first three pages of an article by Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato Law Review 124. Most, if not all of the balance of the academic writing referred to was not produced in evidence.

[47] The importance of whānau, hapū and iwi in the rearing of Māori children, while undisputed, is insufficient of itself to establish a claim of indirect discrimination. As the submissions for the Crown pointed out:

[47.1] To determine whether the provisions in question have the discriminatory effect claimed, the Tribunal must be satisfied the legal implications of an adoption order, as stated in s 16(2) of the Adoption Act, affect Māori differently from other

cultures, and that the difference in impact materially disadvantages people of such cultures.

[47.2] Adoption Action has provided some information about the impact adoption has on people of Māori descent, but critically, it has produced no evidence about the impact adoption orders have on people of other cultures.

[47.3] There is therefore no evidence before the Tribunal allowing it to consider the comparative effect of these provisions on different cultures.

[48] The Human Rights Commission itself submitted insufficient evidence had been put forward to establish the claim of indirect systemic discrimination.

[49] In these circumstances we find the claim of indirect discrimination is not made out and it is dismissed. This is not a finding there is no discrimination as alleged. Our ruling is simply that no or no sufficient evidence has been brought forward by Adoption Action to establish the factual foundation for the claim.

[50] Before addressing the balance of the grounds on which Adoption Action bases its challenge it is necessary to set out the analytical framework to be applied.

THE ANALYTICAL FRAMEWORK

[51] The right to freedom from discrimination is set out in s 19 of the Bill of Rights which provides:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

[52] The prohibited grounds of discrimination listed in s 21 of the Human Rights Act include all those pleaded by Adoption Action namely sex, marital status, race, disability, age and sexual orientation.

[53] As stated in s 20I of the Human Rights Act, the purpose of Part 1A of the Act is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by s 19 of the Bill of Rights is in breach of Part 1A if the act or omission is that of a person or body referred to in s 3 of the Bill of Rights, being:

[53.1] The legislative, executive, or judicial branch of the Government of New Zealand; or

[53.2] 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.

[54] The amended statement of claim specifically pleads the present claim is made against the legislative branch of the Government of New Zealand. While a belated attempt was made during the hearing to expand the claim to include also the executive branch (the principal complaint being failure to introduce legislation reforming the law of adoption), Adoption Action is bound by its pleadings. If permitted, expansion of the case would unravel the preparatory stages of the hearing including discovery and the filing of written statements of evidence. It would also potentially lead to a strike out application based on the principle of non-interference by the courts (and tribunals) in parliamentary

proceedings. See *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 307-308.

[55] For these reasons the case must be determined on the basis pleaded, namely that the challenge is confined to an allegation certain of the provisions of the Adoption Act are inconsistent with the right to freedom from discrimination as affirmed by s 19 of the Bill of Rights. The effect of s 20L of the Human Rights Act is that such inconsistency is established if the act or omission:

[55.1] Limits the right to freedom from discrimination; and

[55.2] Is not, under s 5 of the Bill of Rights, a justified limitation on that right.

[56] The parties and the Human Rights Commission were in agreement that in determining whether a breach of Part 1A of the Human Rights Act has been established the Tribunal is to apply the six-step analytical framework identified by Tipping J in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92]:

Step 1. Ascertain Parliament's intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.

Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[57] Shortly put, in the present case Adoption Act can only succeed in its claim if the ordinary meaning of the relevant provision infringes s 19 of the Bill of Rights and is not justifiable under s 5 and it is not reasonably possible to give to the provision a meaning consistent (or less inconsistent) with the rights and freedoms in the Bill of Rights.

Hansen Step 2 - discrimination

[58] The parties were further agreed the test for discrimination (relevant to Step 2) is that found in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109] (followed and applied in *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [125]). There are two steps to determining whether there has been discrimination under s 19 of the Bill of Rights:

[58.1] First, there must be differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination.

[58.2] Second, there must be a discriminatory impact (meaning that the differential treatment imposes a material disadvantage on the person or group differentiated against).

The relevant comparator

[59] In cases brought under Part 2 of the Human Rights Act the relevant section will often specify the required comparator (see for example s 22(1)(c)). But in Part 1A cases the comparator is not statutorily specified. Everything is left to implication. A comparator can be a useful analytical tool and as pointed out in *Attorney-General v IDEA Services Ltd* at [126] the first step in the discrimination analysis (differential treatment) is sometimes approached by identifying the group affected by the decision at issue (the affected group) and comparing that group with those "whose treatment is logically relevant to the person or group alleging discrimination (the comparator group)". See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573 per Tipping J. This is because, as pointed out by Tipping J, "[t]he essence of discrimination lies in difference of treatment in comparable circumstances". Identifying the affected group and the relevant comparator group assists in making an assessment whether there has been a difference in treatment of people in comparable circumstances.

[60] In approaching the comparator issue in relation to the different categories of claim made by Adoption Action we have been guided by the following statements of principle:

[60.1] As explained by Elias CJ for the majority in *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [34] the task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue and a comparator will not be appropriate if it effectively deprives part of the statutory scheme of its operation:

> The task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all facets of the scheme, including particularly any defences made available to the person against whom discrimination is alleged. A comparator which is appropriate in one setting may produce a completely inapt result in another. It will certainly do so if it effectively deprives part of the statutory scheme of its operation.

[60.2] In *Air New Zealand Ltd v McAlister* Tipping J at [51] expressed the point in the following terms:

> [51] The second matter concerns the comparator issue. In general terms discrimination by reason of a prohibited ground involves one person being treated differently from someone else in comparable circumstances. The approach of the Court to the comparator issue should be guided by the underlying purpose of anti-discrimination laws and the context in which the issue arises. Anti-discrimination laws are designed, as I have said, to prohibit employment and other relevant decisions from being influenced by any feature which amounts to a prohibited ground of discrimination. Exceptions allow what would otherwise be a discriminatory feature to be taken into account if there is good cause for doing so. A comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. By artificially I mean that the comparator chosen fails to reflect the policy of the legislation, which is to take a purposive and untechnical approach to whether there is what I will call prima facie discrimination, while allowing the alleged discriminator to justify that prima facie discrimination if the case comes within an exception.

[60.3] It is not necessary that the comparator should be the mirror of the complainant group. See *Ministry of Health v Atkinson* at [60]:

> [60] The focus on an appropriate comparator arises because it is necessary to determine whether the person or group is being treated differently to another person or group in comparable circumstances. There has been considerable discussion in Canada and England, both in the authorities and amongst the commentators about the usefulness of the comparator exercise and the impact of the choice of comparator on the success of claims. The Supreme Court of Canada in *Withler v Canada* has recently retreated from the concept that the comparator should be the mirror of the complainant group, that is, the comparison should put the comparator in exactly the same circumstances as the claimant group save only for the discriminatory factor. In the United Kingdom, the search for a comparator has been described as an arid exercise. However, we do not need to resolve any of the broader questions about the use of a comparator in the present case. The High Court treated the comparator as a helpful tool and no one takes any issue with that approach. [Footnote citations omitted]

[60.4] The comparator exercise will miscarry if the comparator group is framed in terms which result in the comparator not having work to do. See *Ministry of Health v Atkinson* at [67].

[60.5] If the comparator group is to be used to assist in determining whether there is discrimination, the selection of the comparator group "must be conducive to a determination of the potential impact of the impugned policy without a negation of its relevance". See *Attorney-General v IDEA Services Ltd* at [139] quoting from *Hutchinson v BC (Ministry of Health)* (2004) BCHRT 58 at [100], affirmed in *R v Hutchinson* 2004 BCSC 1536, (2004) 261 DLR (4th) 171. This statement of principle was earlier cited in *Ministry of Health v Atkinson* at [69].

Hansen Step 3 – justified limitations

[61] There was no dispute the questions to be addressed in the context of the s 5 analysis are those formulated by Tipping J in *Hansen* at [104]:

[61.1] does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

[61.2]

[61.2.1] is the limiting measure rationally connected with its purpose?

[61.2.2] does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

[61.2.3] is the limit in due proportion to the importance of the objective?

Hansen Step 5 – Bill of Rights, s 6

[62] The ordinary (or Interpretation Act) interpretation exercise in *Hansen* Step 1 is not to be conflated with the interpretation exercise mandated by s 6 of the Bill of Rights and which is undertaken at the later *Hansen* Step 5. Section 6 provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[63] As to whether an enactment "can" be given a meaning consistent with the rights and freedoms contained in the Bill of Rights, various synonyms were used in *Hansen*. Elias CJ at [15] and [25] referred to a meaning that is tenable on the text and in light of the purpose of the enactment. Blanchard J at [57] and [60] framed the issue as whether the provision is reasonably or legitimately capable of bearing another meaning. At [61] he added that s 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

[64] In preferring to formulate the issue in terms whether a suggested meaning is reasonably possible (see [158]), Tipping J described the approach of the United Kingdom courts to the analogous s 3 of the Human Rights Act 1998 (UK) as more "adventurous" than that in New Zealand and emphasised that the finding of alternative meanings under s 6 of the New Zealand provision must follow a legitimate process of construction; s 6 must not be used as a concealed legislative tool. The courts may interpret but must not legislate. The alternative meaning must be intellectually defensible:

> [156] As Butler and Butler observe, and their proposition retains validity although they were writing before *Wilkinson*, the approach of the United Kingdom Courts appears to be more "adventurous" than that in New Zealand. The same point could be rendered by saying that the English Courts, in their different and more complicated supranational environment, seem to have felt it appropriate to strike the balance between the judicial and the legislative roles in a rather different way. I myself have previously emphasised that the finding of alternative meanings under s 6 must follow a legitimate process of construction; s 6 must not be used as a concealed legislative tool. The Courts may interpret but must not legislate. A corollary of the latter proposition is that s 6 cannot be used to give a meaning to an enactment which is clearly contrary to the meaning which Parliament understood its words to convey. In such a situation no other meaning "can" be given to the enactment. Lord Millett, in his dissenting speech in *Ghaidan*, spoke of an alternative meaning having to be intellectually defensible.
>
> [157] As Butler and Butler suggest, all the various words and phrases which have been used to indicate what can and cannot be done under the United Kingdom s 3 and the New Zealand s 6 give colour to the issue rather than supply criteria by means of which a specific case can be determined. There remains an inevitable element of subjectivity in the judicial assessment. The tension between what is legitimately possible and what is only illegitimately possible is to a degree reflected in the blunt and unadorned juxtaposition of s 4 against s 6 in the New Zealand legislation. Each section fulfils an important purpose but no specific guidance is provided to the Courts in deciding which purpose should prevail in the case at hand. It is difficult to elaborate beyond the proposition that Courts must not legislate as that would contravene s 4. This necessarily means that the Courts may only interpret when exercising their function under s 6. If that creates analytical and substantive uncertainty, such is the result of what is necessarily a rather subjective exercise, with little to guide the Judge except intuitive perceptions of whether a particular meaning "can" be given to parliamentary words. That, after all, is the s 6 test. Attempts to elucidate or gloss it amount to little more than adding flavour or colour to the language Parliament has chosen to adopt.
>
> [Footnote citations omitted]

[65] McGrath J at [252] spoke of a reasonably available meaning while Anderson J at [290] preferred the formulation of a reasonably possible meaning as opposed to one which is strained and unnatural. The duty of the courts is to construe, not to reconstruct.

INTERPRETATION – GENERAL

[66] The first *Hansen* step requires the meaning of the particular legislative provision to be determined in accordance with standard principles of statutory interpretation, particularly those set out in the Interpretation Act 1999. The separate s 6 Bill of Rights interpretation exercise follows later at Step 5.

[67] Reduced to its simplest terms, the Crown submits that if the challenged provisions are properly interpreted:

> **[67.1]** The term "special circumstances" in s 4(1) and (2) of the Adoption Act means "when in the best interests of the child". It follows there is no additional hurdle for single men wishing to adopt a female child or for persons under 25 wishing to adopt.
>
> **[67.2]** The term "expedient" in s 7(3)(b) must similarly be read as meaning "when in the best interests of the child" and again there is no difference in the circumstances in which the consent of both birth fathers and birth mothers will not be required. Neither will be required where either parent has met the conditions in s 8(1)(a).
>
> **[67.3]** The term "spouse" includes not only married couples (opposite sex and same sex) but also all de facto couples (opposite and same sex) in a committed relationship and all civil union couples (opposite and same sex).
>
> **[67.4]** There is no difference in treatment between disabled and non-disabled birth parents when deciding whether or not to dispense with consent to an adoption. In each case, provided the parents have been assessed as unfit or unable to properly parent, the reason for dispensing with consent is the best interests of the child.

[68] In these submissions there are two recurring themes. First, that the best interests of the child principle permits an interpretation of the challenged provisions which does not result in discrimination, or at the very least is an interpretation to be preferred under s 6 of the Bill of Rights. Second, that the application of s 6 of the Interpretation Act facilitates a reading of the challenged provisions which brings them up to date and in a manner which reflects current social reality. In relation to both themes some preliminary observations must be made. Those observations apply throughout this decision and will not be repeated unless there is specific need to.

Best interests of the child

[69] As the "best interests of the child" principle infuses most of the Crown submissions the principle is addressed briefly in general terms before it is examined in the context of the specific statutory provisions about to be discussed.

[70] It is well-established there is a presumption of statutory interpretation that so far as its wording allows, legislation should be read in a way which is consistent with New Zealand's unincorporated international obligations. See *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289 per Keith J and *Ye v Minister of Immigration* [2010] 1 NZLR 174 (SC) at [32] per Tipping J. The "so far as its wording allows" qualification was repeated by Glazebrook J in *B v G* [2002] 3 NZLR 233 (CA) at [43] while more recently Mallon J in *P v Attorney-General* HC Wellington CIV2006-485-874, 16 June 2010 at [192] observed that "it is one thing to interpret legislation and to develop common law consistently with international obligations, but it is another to insert new words into a statutory provision".

[71] In the present case the relevant international obligations include:

> **[71.1]** The Convention on the Rights of the Child, 1989 (UNCROC). While Article 3(1) requires the best interests of the child to be a primary consideration in all

actions concerning children, Article 21 requires the best interests of the child to be "the paramount consideration" in the adoption context.

[71.2] The Convention on the Rights of Persons with Disabilities, 2006 (CRPD). It similarly provides in Article 23(2) that with regard to the adoption of children, the best interests of the child shall be paramount.

[72] In the present case the dispute lies not in the principle but in its application. The best interests of the child are not a cure all or silver bullet which overcomes all interpretation and application challenges or gives licence to refashion statutory provisions. It does not permit the extension of a provision beyond that intended by Parliament. See *Re T (An Adoption)* [1996] 1 NZLR 368 at 372 where Blanchard J held the making of an access order in favour of a birth parent would be inconsistent with the scheme of the Adoption Act:

> The promotion of the welfare and interests of the child is of paramount importance in exercising powers conferred under the Adoption Act (*Director-General of Social Welfare v L* [1990] NZFLR 125, 127). It will therefore be a weighty matter to take into account in interpreting the provisions of the Act which confer powers. But the principle cannot determine the existence of those powers in the first place. It is not simply a matter of looking at the welfare and interests of the child, determining that, in the opinion of the Judge, they would be best facilitated through access to a birth parent, and concluding that s 20 must permit the Court to make an order to that effect. It is also to be remembered that, although undoubtedly what is generally considered by society to promote the welfare and interests of children will change over time as society itself changes, the jurisdiction conferred by a statute remains constant.
>
> In essence, the question of jurisdiction is one of statutory interpretation, having regard to the intention of the legislature derived from the plain meaning of the words in the light of the overall purpose of the enactment. Certainly a liberal construction is justified in order to ensure the welfare and interests of the child, but that does not license the extension of an Act's scope beyond that intended by Parliament.

[73] This decision was cited with approval by the Full Court (Wild and Simon France JJ) in *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 at [53].

[74] Nor do the best interests of the child mean the interests of the birth mother and birth father are displaced. They too are rights holders and have interests which must be both respected and ensured. This can only be done by taking those rights and interests into account even though ultimately, they are subordinated to the best interests of the child. In addition, sight must not be lost of the fact that in assessing the best interests of the child, those interests may well include, for example, hearing the birth father's views on adoption or having the parenting ability of a birth parent with physical or mental impairment assessed not according to the nature of the disability but according to his or her parenting skills and the degree to which the best interests of the child will be promoted or, as the case may be, impaired by those skills. The *Hansen* Steps require a more nuanced analysis than simply asserting that because discrimination against a birth parent can be said to further the best interests of the child, those interests are a justified limitation on the right to non-discrimination or that those interests permit an interpretation inconsistent with the parents' right to non-discrimination (Bill of Rights ss 5 and 6).

[75] Finally, as to COCA and guardianship, it is noted guardianship is different from adoption in three main respects. See the Law Commission report *Adoption and its Alternatives* at paras 64 to 66:

[75.1] Adoption creates the "status" of legal parenthood, ensures permanency and creates new rights of succession.

[75.2] Adoption is a legal means by which people can permanently acquire the status of parenthood. Guardianship confers certain rights and responsibilities in respect of the child, but it does not have the legal effect of deeming a person to be a parent. Guardianship is a less permanent legal status than adoption as it terminates when the child attains the age of 20 years or marries under that age.

[75.3] Guardianship does not carry with it automatic rights of succession as between the guardian and the child in the same manner as adoption.

Section 6 Interpretation Act – ambulatory interpretation

[76] The principle of applying an enactment to circumstances as they arise is supported by s 6 of the Interpretation Act which provides:

> **6 Enactments apply to circumstances as they arise**
>
> An enactment applies to circumstances as they arise.

[77] The practical and theoretical questions raised by this provision are discussed at some length in Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 413 to 422. It is intended to note only the following:

[77.1] To be able to engage in ambulatory interpretation it must be clear:

[77.1.1] That the **words** of the Act will support the interpretation which is being placed on them. While a liberal interpretation is often necessary, there will be occasion where the words simply will not bear the meaning attributed to them. See the text at 415:

> An example is *Quilter v Attorney-General*, where the Court found that, however great the tolerance of same-sex relationships in society today, the terms of the Marriage Act 1955 simply did not in 1997 admit of a valid marriage between persons of the same sex. That tolerance saw those terms on 19 August 2013 amended so marriage "means the union of 2 people, regardless of their sex, sexual orientation, or gender identity". But this change was by way of express amendment, not interpretation. [Footnote citations omitted]

[77.1.2] That the interpretation is within the **purposes** of that Act. If the new development is outside the purpose or ambit of the statute it will be held not to be covered either, unless the wording of the Act compels that conclusion.

[77.2] The provision does not authorise an interpretation that has regard only to consistency with modern developments. The task is to reconcile that with the purpose and concept of the original legislation.

[77.3] In some cases more than just meaning and purpose probably play a part. The issue may be one of substantial social, political or economic importance and the court may decide that any expansion in the scope of the legislation is more appropriately left to parliamentary amendment that judicial interpretation. See the text at 419:

> In *Re AMM*, however, parliamentary inaction to reform adoption law did **not** prevent "spouses" in the Adoption Act 1955, s 3 from being interpreted in an updating way by the High Court (and as the New Zealand Bill of Rights Act 1990, s 6 requires, so held Wild and France JJ) to include a man and a woman who are unmarried but in a stable

> and committed marriage-like relationship (despite the history, and statute book-wide drafting, arguably showing that "spouses" means a married couple only). On one view this outcome was a sensible updating in line with purpose. On another view, it was not interpretation but legislation. [Footnote citations omitted]

[77.4] Exactly when the court will apply an ambulatory approach and when an historical one, is far from clearly defined.

[78] The Crown's submissions on an ambulatory or updated reading of the Adoption Act made frequent reference to decisions of the Family Court said to exemplify such reading. We have not found these decisions helpful. They are usually fact specific but more importantly in none did the Family Court consider the question now before the Tribunal, namely whether the relevant provisions of the Adoption Act are inconsistent with the right to freedom from discrimination affirmed by s 19 of the Bill of Rights.

[79] It is now intended to address separately each of the remaining challenges made by Adoption Action. The six *Hansen* steps will be applied sequentially.

[80] Although a brief summary of each challenge has already been given, in the interests of clarity that summary and the relevant statutory provision will be provided at the beginning of each section.

CHALLENGE 1: SEX – THE SINGLE MALE APPLICANT AND "SPECIAL CIRCUMSTANCES"

The claim

[81] Amended statement of claim para 9.1.1. A sole male applicant wanting to adopt a female child must prove special circumstances. A sole female applicant wanting to adopt a female child does not have to prove special circumstances. See Adoption Act, s 4(2):

> (2) An adoption order shall not be made in respect of a child who is a female in favour of a sole applicant who is a male unless the court is satisfied that the applicant is the father of the child or that there are special circumstances which justify the making of an adoption order.

Step 1: the intended or ordinary meaning

[82] It is an express stipulation that an adoption order "shall not" be made in respect of a female child in favour of a sole male applicant who is not the father of the child unless there are special circumstances which justify the making of an adoption order. The term "special circumstances" is not defined in the Act but there was no dispute at the hearing that they are circumstances that are uncommon, not common place, out of the ordinary or abnormal. See *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24]. The ordinary meaning of s 4(2) is that an adoption order cannot be made unless such special circumstances are established.

[83] In giving meaning to "special circumstances" it is necessary to read the Act as a whole. Doing so one finds s 11 prescribes three pre-requisites to the making of an adoption order. Of the three matters about which the court must be satisfied only the first two are directly relevant in the present context:

> **11 Restrictions on making of orders in respect of adoption**
>
> Before making any interim order or adoption order in respect of any child, the court shall be satisfied—

(a) that every person who is applying for the order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child; and
(b) that the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; and
(c) that any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

[84] The welfare and interests of the child in s 11(b) is now to be read as a reference to the best interests of the child and in terms of New Zealand's obligations under UNCROC Article 21, those interests must be regarded as the paramount consideration provided the wording of the Act so allows. See for example *Director-General of Social Welfare v L* [1989] 2 NZLR 314 (CA) at 318.

[85] But even as the paramount consideration, the injunction in s 11(b) does not make redundant the explicit statutory requirement in s 11(a) that the applicant be a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child. Nor does it render redundant the religion clause in s 11(c). Likewise it does not render redundant the express statutory prohibition in s 4(2) on a sole male applicant adopting a female child unless there are special circumstances.

[86] In the result reading (as one must) ss 4 and 11 together, before an adoption order can be made in favour of a sole male applicant who is not the father of the female child, the following must be established:

[86.1] Special circumstances which justify the making of the order.

[86.2] That the applicant is a fit and proper person in terms of s 11(a).

[86.3] That the welfare and interests of the child (understood as the best interests of the child) will be promoted by the adoption, the best interests of the child being the paramount consideration.

[87] The fact the best interests of the child are a paramount consideration does not mean they are therefore the **only** consideration, providing a pretext for ignoring or doing away with express statutory stipulations which clearly identify eligibility criteria which must receive separate consideration. Text is at the centre of the interpretation exercise as emphasised by the Interpretation Act, s 5(1) and see also Carter *Burrows and Carter Statute Law in New Zealand* at 221:

> *The text* – however far the purposive approach may extend, the actual words of the Act nevertheless remain the most important single factor in statutory interpretation, for it is the true interpretation of those words that one is seeking. However, the meaning usually to be placed on those words is not the narrow, purely literal, meaning that once held sway, but the most natural reading in that context and taking into account their purpose. While in a few cases circumstances may dictate that a meaning other than the most ordinary is appropriate it is as true as it ever was that words cannot be given "meanings" that they are incapable of bearing.

[88] Even if the best interests of the child are among the statutory considerations, there is nothing in UNCROC which would support the argument the interests of the child make redundant all other considerations. The New Zealand case law is clear and unequivocal. Legislation is to be read in a way consistent with New Zealand's unincorporated international obligations only so far as the wording of the legislation allows.

[89] In these circumstances we conclude Parliament's intended meaning was that no adoption order in favour of a sole male applicant (who is not the father of the child) for the adoption of a female child can be made unless there are special circumstances which justify the making of the order.

Step 2: whether ascertained meaning inconsistent with the right to non-discrimination

[90] Whereas a sole male applicant (not the father of the child) wanting to adopt a female child must prove special circumstances, a sole female applicant is not so required. This is differential treatment between persons in comparable situations on the basis of a prohibited ground of discrimination, namely sex. The material disadvantage is that the sole male applicant must establish "special circumstances" over and beyond the other statutory requirements, including the s 11(b) best interests of the child. This cannot be done by establishing, without more, that the making of the order would be in the best interests of the child. While the ultimate question under s 11(b) is whether making the order is in the best interests of the child, it is not the only statutory requirement, subsuming all way-stations to that ultimate assessment. As sole male applicants must pass a way-station which does not apply to sole female applicants, there is material disadvantage. The evidence of Ms Nelson was that she was not aware of any sole male applicant applying to be in the pool. This is hardly surprising.

[91] We accordingly find the intended or ordinary meaning of s 4(2) of the Adoption Act is inconsistent with the right to be free from discrimination based on sex.

Step 3: whether inconsistency is a justified limit in terms of s 5 of the Bill of Rights

[92] The Crown expressly disavowed (in the context of Challenge 1) reliance on s 5 of the Bill of Rights and as in *Application by AMM and KJO* at [10], advised the Tribunal that in the event of a finding the provision was discriminatory, did not seek to justify that discrimination. We accordingly move to the application of s 6 of the Bill of Rights.

Step 5: the s 6 analysis – whether a meaning consistent or less inconsistent with the right can be found

[93] The submission for the Crown was that "special circumstances" in s 4(2) should be read as "in the best interests of the child". Significantly, however, the Crown concedes the courts have not interpreted special circumstances in this way. It nevertheless submits the preferred interpretation is consistent with the treatment of s 4(2) by the Family Court.

[94] The first decision is *Re an application by A* [2004] NZFLR 865 but as can be seen from that case, far from reading special circumstances as "in the best interests of the child", the court at [30] regarded s 4(2) as requiring something different to the s 11 considerations. The court regarded the sole male applicant's religious and cultural responsibilities as constituting special circumstances. In our view this case supports the view that the fact special circumstances and the best interests of the child may overlap does not make them the same.

[95] The second decision is *Re an application by BWS to adopt a child* [2011] NZFLR 621. Again, the decision underlines the fact that the Family Court does not conflate "special circumstances" with "best interests of the child". Rather, as in the first case, the special circumstances requirement is given separate and detailed consideration. Indeed the court at [69] specifically stated the "special circumstances" requirement in s 4(2) posed a "problem" with regard to the application. While on the facts special

circumstances were established, the "problem" would not have existed had the applicant been a sole female.

[96] Having regard to the text of s 4(2) read with the other requirements of the Act, particularly s 11, we do not accept the requirement of special circumstances "can" in terms of s 6 of the Bill of Rights be read as "best interests of the child". As Tipping J observed in *Hansen* at [156] the finding of alternative meanings under s 6 must follow a legitimate process of construction. It is not reasonably possible or tenable to conflate two explicit statutory stipulations, the one that a particular category of applicant establish special circumstances and the other that the best interests of the child are paramount in all categories. While the two requirements are part of the inquiry into adoption and might even on a particular set of facts overlap (there is no requirement that they do), they are in the end separate statutory criteria.

[97] We accordingly find s 4(2) of the Adoption Act cannot be given a meaning consistent (or less inconsistent) with the right to be free from discrimination based on sex. Section 4 of the Bill of Rights accordingly mandates Parliament's intended meaning (see Step 1) be adopted.

CHALLENGE 2: SEX AND MARITAL STATUS – WHETHER REQUIRING THE CONSENT OF THE BIRTH FATHER IS EXPEDIENT

The claim

[98] Amended statement of claim paras 9.1.2 and 9.2.2. A birth father who is not married to the mother of the child and not otherwise a guardian is not required to consent to the adoption of the child unless in the opinion of the court it is "expedient" for such consent to be required. Birth mothers can never have their consent dispensed with without proof of one of the circumstances listed in s 8(1)(a) such as abandonment or neglect. The consent of the birth mother is always required whatever her marital or relationship status. See Adoption Act, s 7(3)(b):

> **7 Consents to adoptions**
>
> (1) Before the court makes any interim order, or makes any adoption order without first making an interim order, consents to the adoption by all persons (if any) whose consents are required in accordance with this section shall be filed in the court.
> (2) …
> (3) The parents and guardians whose consents to any such order in respect of any child are required as aforesaid, unless they are dispensed with by the court under section 8, shall be,—
> (a) …
> (b) in any other case where there is no adoption order in force in respect of the child, the mother or (if she is dead, and the guardianship concerned has not been terminated, for example, by the child turning 18 years of age) the surviving guardians or guardian appointed by her:
> provided that the court may in any such case require the consent of the father if in the opinion of the court it is expedient to do so:
> (c) ….

Ambit of application

[99] There was some dispute as to the size of the group of fathers to whom the expediency test applies. It does not apply to fathers who are guardians by virtue of ss 17 and 18 of the Care of Children Act 2004 which provide:

> **17 Child's father and mother usually joint guardians**

(1) The father and the mother of a child are guardians jointly of the child unless the child's mother is the sole guardian of the child because of subsection (2) or subsection (3).
(2) If a child is conceived on or after the commencement of this Act, the child's mother is the sole guardian of the child if the mother was neither—
  (a) married to, or in a civil union with, the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child; nor
  (b) living with the father of the child as a de facto partner at any time during that period.
(3) If a child is conceived before the commencement of this Act, the child's mother is the sole guardian of the child if the mother was neither—
  (a) married to, or in a civil union with, the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child; nor
  (b) living with the father of the child as a de facto partner at the time the child was born.
(3A) For the purposes of subsections (2) and (3), the mother and father of a child may be in a de facto relationship even if—
  (a) either parent is under 16; or
  (b) either parent is aged 16 or 17 and consent for the relationship (as referred to in section 29A(2) of the Interpretation Act 1999) has not been given.
(4) On the death of the father or the mother, the surviving parent, if he or she was then a guardian of the child, is the sole guardian of the child.
(5) This section is subject to sections 18 to 34, and therefore does not limit or affect the appointment of 1 or more additional guardians (for example, an additional testamentary guardian of the child appointed by the deceased parent under section 26(2)) or an order (relating to guardianship of the court) under section 33(1).

18 Father identified on birth certificate is guardian

(1) A child's father who is not a guardian of the child just because of section 17(2) or (3) becomes a guardian of the child if his particulars are registered after the commencement of this section as part of the child's birth information because he and the child's mother both notified the birth as required by section 9 of the Births, Deaths, Marriages, and Relationships Registration Act 1995.
(2) Subsection (1) does not change the guardianship status of a father who became a guardian before the commencement of this section.

[100] In summary, a father and the mother of a child are guardians jointly of the child if the father and the mother were married or in a civil union or living as de facto partners at any time during the period beginning with the conception of the child and ending with the birth of the child. Alternatively, a child's father who is not a guardian by reason of s 17 becomes a guardian if he and the mother both notify the birth as required by s 9 of the Births, Deaths, Marriages and Relationships Registration Act 1995 (BDMRA).

[101] The Crown submits the only circumstance where a father of a child born after January 2009 (the date on which the BDMRA came into force) will not be a guardian of a child will therefore be where:

> **[101.1]** He has not been identified as the father because the mother does not know who he is (or says she does not); or
>
> **[101.2]** The mother has identified him as the father, but he disputes it or the Registrar-General is not satisfied the information provided by the mother is accurate.

[102] The Crown further submits the evidence given by Ms Nelson establishes the MSD does everything it can to involve the birth father in the adoption process and encourages mothers to name the birth father, where they have not done so. The practice of the executive, however, is not a defence to a claim against the legislative branch of government.

[103] Just how far the Crown's interpretation is accurate was not easy to determine at the hearing and in one of the cases cited by the Crown (*Re CSN* FC Dunedin FAM-2011-012-358, 27 January 2012) the circumstances of the birth father did not meet either of

the two categories identified by the Crown yet the Court considered application of the proviso to him. He had not nor had attempted to have any contact or involvement with the child on the basis that "he was very happy and proud of her being placed with [the adoptive parents] and thus decided he did not need to have an ongoing relationship with her".

[104] Be that as it may, whatever the size of the group the point made by the Law Commission in the report *Adoption and its Alternatives* at para 408, remains, namely it should not be presumed the birth father does not have anything of value to offer the child:

> The non-guardian father (and his family) may well desire to play a role in his child's life and vice versa. Just as it is important for children to know their maternal heritage, so is it important for them to be aware of their heritage on the father's side of the family. Although the non-guardian father does not have any rights to make guardianship or custodial decisions in respect of the child, it should not be presumed that he does not have anything of value to offer the child.

The Commission further pointed out that UNCROC itself in Article 8(1) requires States to "respect the right of the child to preserve his or her identity, including nationality, name and family relations …". Part of a child's identity will be knowledge of his or her father. The Commission considered that, as far as practicable, the consent of a birth father to his child's adoption should be required, regardless of whether he is a guardian.

Step 1: the intended or ordinary meaning

[105] In the circumstances envisaged by s 7(3)(b) the consent of the birth father to the adoption will be required only if such consent is considered by the court to be "expedient". Given the consent of the birth mother is always required unless dispensed with under s 8 (parental dereliction), Parliament's intended meaning in s 7(3)(b) is clear:

> **[105.1]** The consent of the birth mother is always required unless s 8(1)(a) applies.
>
> **[105.2]** The consent of the birth father is not required at all unless it is "expedient".

Step 2: whether ascertained meaning inconsistent with the right to non-discrimination

[106] The stark contrast between the treatment of birth mothers and birth fathers would ordinarily quickly lead to the conclusion there is differential treatment between the two groups and that there is an obvious material disadvantage to the father in not having a say whether his child is to be adopted unless the expediency threshold is crossed.

[107] The Crown, however, submits the "expedient" category of birth fathers in s 7(3)(b) can be broken down into two categories:

> **[107.1]** Unidentified fathers. That is fathers of children who were born after January 2009 (date of commencement of the BDMRA), whose identity has not been notified to the Registrar or otherwise established in accordance with the BDMRA, or fathers of children born before that date who remain "unidentified" notwithstanding the mother's affidavit to the court.
>
> **[107.2]** Identified fathers of children who were born prior to 2009, who are not guardians, including because they were not married to the mother at the relevant time.

[108] In respect of the first category it is claimed a father who is an unidentified parent is not in a comparable circumstance to the mother, who is an identified parent, and therefore not discriminated against by s 7(3)(b).

[109] In our view the parents are indeed in comparable circumstances because they are both biological parents of the child. Subject to s 8(1)(a), the mother has an unqualified right to give (or withhold) her consent, the father does not. He is treated differently on the prohibited grounds of sex and marital status. Such difference in treatment constitutes material disadvantage given the effect of an adoption order is to sever the relationship between the birth father and his child.

[110] In respect of the second category it is claimed the court must read "expedient" to mean "in the best interests of the child" so that:

> **[110.1]** If the father has maintained contact with his child it is "hard to conceive of a situation where the best interests of the child would not be promoted by the seeking of the father's consent". The court would have to exercise its discretion under s 7(3)(b) to require consent.
>
> **[110.2]** Conversely, if the father has not maintained any contact with, or shown any interest in his child, the court may decide, taking into account the individual circumstances of the case, the father's consent need not be obtained in order for it to be satisfied as to what is in the best interests of the child. In such a case, the father could not claim he had been materially disadvantaged as the court's decision to not require his consent is a result of his own inaction.
>
> **[110.3]** There is no difference in treatment between a father in such a situation whose consent is not required, and a father or mother whose consent is dispensed with under s 8(1)(a) because they have "abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child".

[111] In our view these submissions are based on a false premise. The child is not the only rights holder in the adoption context. While the child's best interests are the paramount consideration, it does not follow the other parties do not themselves have rights or interests which must be taken into account in the context of consents to adoption.

[112] The point must also be made that the father may not be aware of the birth of the child. Or the mother may not have allowed contact with the child. In addition, without any finding of unfitness under s 8(1)(a), a birth father in the s 7(3)(b) category is presumed to have nothing of value to say about whether his child should be adopted. In the case of the birth mother the presumption is the other way. From the father's perspective the legal consequences of an adoption order are of the most severe kind. The child is deemed to become the child of the adoptive parents and is further deemed to cease to be the child of the birth father (and mother). See Adoption Act, s 16(2)(a) and (b).

[113] In our view:

> **[113.1]** On ordinary principles of fairness, one would expect the birth father to be heard just as the birth mother is heard. Indeed s 27(1) of the Bill of Rights explicitly provides such right. Exercise of this right in no way diminishes the best interests of the child. If anything, hearing the father allows the court to make a better informed decision as to what the best interests of the child are.

[113.2] UNCROC itself requires consideration to be given to:

[113.2.1] The right of the child not to be separated from his or her parents against their will except where such separation is necessary for the best interests of the child. The birth father (being an "interested party") must be given an opportunity to participate in the proceedings and to make his views known. See Article 9(1) and (2).

> ***Article 9***
>
> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

[113.2.2] While stipulating the interests of the child shall be the paramount consideration in adoption, Article 21(a) nevertheless requires any decision to be made "on the basis of all pertinent and reliable information". This recognises that the best interests of the child are served (and could hardly be undermined by) the decision-maker hearing the views of both the birth mother and the birth father before an adoption order is made.

> ***Article 21***
>
> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

[114] In these circumstances it is difficult to see the basis on which s 7(3)(b) presumes the father to have nothing of value to offer the inquiry unless he establishes it is "expedient" for him to be heard. There is also the Catch 22 element that the decision whether it is expedient for the father to be heard would in many cases be made without hearing the father.

[115] The overarching point is that the right of the birth father to be heard and his right to be heard to the same extent as the birth mother (ie his right to non-discrimination) are not in competition with the best interests of the child. The rights coexist and would ordinarily complement each other as recognised by the UNCROC articles referred to. While in the case of a conflict of rights the interests of the child prevail, it is difficult to see how, in any meaningful way, hearing the father before his relationship with his child is legally severed conflicts with or compromises the interests of the child.

[116] It follows we do not accept the Crown's argument that "expedient" is to be read as "in the best interests of the child". In our view the focus of the proviso to s 7(3)(b) is on the father and his rights (or the lack thereof). The gap cannot be filled by inserting the

rights and interests of a third party (the child) as, in effect, the only considerations, rendering the father's rights or interests irrelevant.

[117] For the reasons given we find the intended or ordinary meaning of s 7(3)(b) is inconsistent with the right to be free from discrimination based on sex and marital status.

[118] Given the way the Crown's argument on Step 2 has been framed it has been necessary to anticipate interpretation issues relevant to s 6 of the Bill of Rights. This has been unavoidable.

Step 3: whether the inconsistency is a justified limit in terms of s 5 of the Bill of Rights

[119] The initial question is whether the proviso to s 7(3)(b) serves a purpose sufficiently important to justify curtailment of the right to be free from discrimination based on sex and marital status.

[120] The Crown submits the child's best interests are such a sufficiently important purpose.

[121] We find to the contrary for the following reasons:

> **[121.1]** If the Adoption Act regards (as it does) the obtaining of the birth mother's consent as compatible with the child's best interests (subject to the power to dispense consent under s 8(1)(a)), it is difficult to see how obtaining the birth father's consent is contrary to the child's best interests or to express the point another way, why the father's consent is only necessary if the circumstances satisfy the "expediency" threshold.
>
> **[121.2]** It is hard to see how a court making an assessment of the best interests of the child will not be better informed by hearing both the mother and the father.
>
> **[121.3]** Beyond that again it is difficult to see how recognising the right of the father to be heard and the right of the father not to be discriminated against will prejudice or jeopardise the best interests of the child.
>
> **[121.4]** The position will always be that the child's interests are paramount but imposing an "expediency" pre-requisite to hearing a birth father's view on whether an adoption order should be made serves no purpose sufficiently important to justify discriminating against the birth father and there is no rational connection between imposing the threshold and the protection of the best interests of the child.

[122] Then the Crown submits that impairment of the father's rights would be minimal because only fathers who have failed to maintain contact with, or shown no interest in, their child would be affected. As to this, the minimal impairment limb of the test turns not on the number of persons affected but on the impact on the individual discriminated against. Here the effect of the discrimination is to place the s 7(3)(b) birth father in the situation where unless he is heard via the proviso, the irrevocable severance of his legal status vis-à-vis the child will follow on the consent of the mother only.

[123] We can see no justification for the discrimination and are reinforced in this conclusion by the fact that not only does the father have a legitimate complaint as to breach of s 27(1) of the Bill of Rights itself, UNCROC Article 9 and Article 21 recognise

the birth father should be given an opportunity to participate in the adoption process so the court has all pertinent and reliable information.

[124] We find the discrimination is not a justified limitation in terms of s 5 of the Bill of Rights.

[125] As Step 4 thus falls away we move to Step 5.

Step 5: the s 6 analysis – whether a meaning consistent or less inconsistent with the right can be found

[126] The question is whether a reasonably available interpretation is one in which "expedient" can be read to mean "in the best interests of the child".

[127] Bearing in mind the s 6 Bill of Rights exercise is one of interpretation, not legislation, we are of the view the Crown interpretation is untenable. The reasons have largely already been given in the context of Step 2 but in summary they are:

> **[127.1]** Nowhere in the case law relied on by the Crown has it been held that "expedient" means "in the best interests of the child".
>
> **[127.2]** The effect of the Crown argument is that the rights, interests and conduct of the birth father are only to be considered to the extent relevant to the child's welfare and best interests. That is the effect of what s 4(3) of the Care of Children Act provides in a quite different context but to read such provision into s 7(3)(b) of the Adoption Act is to legislate.
>
> **[127.3]** The child is not the only rights holder in the adoption context. While the child's best interests are the paramount consideration, it does not follow the other parties do not themselves have rights or interests which must be taken into account in the context of consents to adoption.
>
> **[127.4]** The right of the birth father to be heard and his right to be heard to the same extent as the birth mother (ie his right to non-discrimination) are not in competition with the best interests of the child. The rights coexist and would ordinarily complement each other as recognised by the UNCROC articles earlier referred to. While in the case of a conflict of rights the interests of the child prevail, it is difficult to see how, in any meaningful way, hearing the father before his relationship with his child is legally severed compromises the interests of the child.
>
> **[127.5]** In our view the focus of the proviso to s 7(3)(b) is on the father and his rights (or the lack thereof). The gap cannot be filled by inserting the rights and interests of a third party (the child) as, in effect, the only considerations – rendering the father's rights or interests irrelevant.

[128] For these reasons we find s 7(3)(b) of the Adoption Act cannot be given a meaning consistent (or less inconsistent) with the right to be free from discrimination based on sex and marital status. Section 4 of the Bill of Rights accordingly mandates Parliament's intended meaning (see Step 1) be adopted.

CHALLENGE 3: MARITAL STATUS – MEANING OF THE TERM "SPOUSE"

The claim

[129] Amended statement of claim paras 9.2.1 and 9.6.1. Partners who have entered into a civil union are unable to adopt a child. The effect of s 3(2) of the Adoption Act is that an adoption order can be made only on the application of "2 spouses jointly". Adoption Action contends the term "spouse" as used in the Adoption Act does not apply to civil union partners.

[130] Amended statement of claim paras 9.2.1 and 9.6.1. Partners who have entered into a same sex de facto relationship are similarly unable to adopt a child because s 3(2) of the Act provides an adoption order can be made only on the application of "2 spouses jointly". Adoption Action contends the term "spouse" as used in the Adoption Act does not apply to same sex de facto relationships.

The meaning of "spouse"

[131] The determinative point in this challenge is the meaning of the term "spouses" in s 3(2) of the Adoption Act. The provision remains today in its "as enacted" 1955 form:

> **3 Power to make adoption orders**
>
> (1) Subject to the provisions of this Act, a court may, upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child, whether domiciled in New Zealand or not.
> (2) An adoption order may be made on the application of 2 spouses jointly in respect of a child.
> (3) An adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse.

[132] Although the term "adoptive parent" is not used in this section it is useful to note that "adoptive parent" is defined in s 2 of the Act and that it was amended by s 9 of the Marriage (Definition of Marriage) Amendment Act 2013 (MDMA Act). The definition in its current form follows. The "as enacted" and now deleted wording is indicated by the words which appear in square brackets:

> **adoptive parent** means any person who adopts a child in accordance with an adoption order; and, in the case of an order made in favour of a married couple [husband and wife] on their joint application, means both the spouses [husband and wife]; but does not include a spouse who merely consents to an adoption

[133] In *Application by AMM and KJO* the issue was whether the expression "spouses" in s 3 had the effect of barring an opposite sex couple in a de facto relationship from adopting a child. The Full Court at [16] and [17] accepted the term "spouse" as used in the Adoption Act refers to a married person (which as at the judgment date of 24 June 2010 meant a married person in an opposite sex marriage). Because the Attorney-General conceded interpreting "spouses" in this manner was inconsistent with the right to be free from discrimination, the Court moved directly to engage with the s 6 Bill of Rights analysis mandated by the fifth *Hansen* Step.

[134] The conclusion reached by the Court at [70] to [72] was that to extend "spouses" to include a de facto couple in an opposite sex relationship would not be inconsistent with either the text or purpose of the Act and because this meaning was more consistent with the Bill of Rights, s 6 required such meaning to be applied.

[135] The Court explicitly cautioned at [38] and [39] that while the ruling would open the door for other types of couple to seek a similar extended meaning, there were

"formidable barriers" to a successful application by a civil union couple (either of the same or opposite sex) and de facto same sex couples:

> [39] First, for reasons to be discussed more fully in the next section, we consider there are formidable barriers to a successful application by a civil union couple. In brief, as recently as 2005 Parliament rejected an amendment that would have allowed civil union couples (either of the same or opposite sex) to adopt. Second, in relation to the only other option, namely de facto same sex couples, it is apparent that there would not necessarily be the same concession of unjustified limitation from the Attorney-General as there is here. There may be, but not necessarily so. Further, without commenting on the validity of the arguments, it is apparent that different arguments would arise since such an application would represent a departure from the traditional family unit concept. [Footnote citations omitted]

[136] The position after *Application by AMM and KJO* and before enactment of the MDMA Act was as follows:

> **[136.1]** Married couples (opposite sex) were within s 3 of the Adoption Act and could adopt.
>
> **[136.2]** Couples (opposite and same sex) in a civil union could not adopt because they were not included in s 3 and faced "formidable barriers" in having s 6 Bill of Rights deployed in their favour so as to permit entry to s 3.
>
> **[136.3]** De facto opposite sex couples could adopt as the effect of s 6 of the Bill of Rights was that they were "spouses" for the purpose of s 3.
>
> **[136.4]** De facto same sex couples were not addressed by the Full Court and their position was left unresolved. Prima facie they fell outside s 3.

[137] Subsequently, however, Parliament enacted the Marriage (Definition of Marriage) Amendment Act 2013 (date of assent 19 April 2013 and date of commencement 19 August 2013) which, by amending the definition of "marriage" in the Marriage Act 1955 clarified that a marriage is between two people regardless of their sex, sexual orientation or gender identity. Schedule 2 of the MDMA Act made consequential amendments to the Adoption Act but only in one respect, namely the removal of the terms "a husband and wife" and "husband". Both were replaced with the term "spouse".

[138] In the result a married same sex couple can now adopt. But civil union (opposite and same sex) couples and same sex de facto couples remain incapable of adoption unless it is held by this Tribunal or a court that they are, by virtue of s 6 of the Bill of Rights, also spouses for the purposes of s 3 of the Adoption Act.

[139] For Adoption Action it was submitted the correctness of *Application by AMM and KJO* has yet to be determined by the Court of Appeal and Supreme Court and might not even be followed in the High Court. Be that as it may, the Tribunal is bound by the decision. The question is not whether it should be followed and applied, but whether the decision aids in the determination of either the ordinary meaning of spouse or in determining whether under s 6 of the Bill of Rights the term spouse "can" be given a meaning which would allow the presently excluded categories of relationship to be now included.

[140] Before the *Hansen* exercise is undertaken it is necessary to state that for the purposes of the analysis and to ensure like is compared with like, we proceed on the basis that those in marriages and civil unions are in stable committed relationships and similarly so are those in de facto relationships which meet the definition of "de facto relationship" in s 29A(1) of the Interpretation Act which provides:

29A Meaning of de facto relationship

(1) In an enactment, *de facto relationship* means a relationship between 2 people (whether a man and a woman, a man and a man, or a woman and a woman) who—
  (a) live together as a couple in a relationship in the nature of marriage or civil union; and
  (b) are not married to, or in a civil union with, each other; and
  (c) are both aged 16 years or older.

(2) Despite subsection (1), a relationship involving a person aged 16 or 17 years is not a de facto relationship unless that person has obtained consent for the relationship in accordance with section 46A of the Care of Children Act 2004.

(3) In determining whether 2 people live together as a couple in a relationship in the nature of marriage or civil union, the court or person required to determine the question must have regard to—
  (a) the context, or the purpose of the law, in which the question is to be determined; and
  (b) all the circumstances of the relationship.

(4) A de facto relationship ends if—
  (a) the de facto partners cease to live together as a couple in a relationship in the nature of marriage or civil union; or
  (b) one of the de facto partners dies.

[141] The evidence given by Ms Nelson confirms that in practice civil union couples and de facto couples are not treated equally to married couples as prospective parents are warned of the uncertainty whether their form of relationship is included in s 3(2).

Step 1: the intended or ordinary meaning

[142] As the Full Court stated in *Application by AMM and KJO* at [17] the word "spouse" is still ordinarily used to refer only to married persons. At [18] the Court stated:

> [18] There really is nothing in the language of the Act, or in common usage, to suggest that the ordinary meaning of spouse, as used in s 3 of the Adoption Act 1955, refers to anyone other than a married person.

[143] The MDMA Act confirms this ordinary usage. Whether the married couple are opposite or same sex, they are referred to as "spouses" because they are married. Put another way, the term "marriage" applies regardless of the parties' sex, sexual orientation or gender identity. The consequential amendments to other legislation made via Schedule 2 ensures neutral language is now used in other contexts by way of replacing the terms "husband" and "wife" with the neutral "spouse". But "spouse" is used to refer only to those who are married.

[144] The meaning of "de facto relationship" as set out in the Interpretation Act was not amended nor was the Civil Union Act changed by the MDMA Act. In the result the statement by the Full Court in *Application by AMM and KJO* that the term "spouse" in s 3 of the Adoption Act refers only to a married person remains true today.

[145] If the term is to receive a wider meaning it must do so in the *Hansen* Step 5 analysis through s 6 of the Bill of Rights. Parliament could have enlarged s 3 of the Adoption Act to include civil unions or same sex de facto couples in the term "spouse" but did not do so either in the Civil Union Act or in the Relationships (Statutory References) Act 2005 or in the MDMA Act.

Step 2: whether ascertained meaning inconsistent with the right to non-discrimination

[146] In *Application by AMM and KJO* it was conceded (see [11] and [19]) by the Attorney-General that the law, without logic or justification, discriminated against opposite sex de facto couples and in the present case the Tribunal was told by Ms Coleman from the Bar that that concession applied also to same sex de facto couples.

[147] It is not clear whether the same concessions are made in the present case. Because of the absence of clarity we proceed on the basis they are not.

[148] The exclusion of civil union couples (opposite and same sex) and of same sex de facto couples from eligibility to adopt is inconsistent with the right to freedom from discrimination. There is differential treatment between such couples compared to those who are married and those who are in an opposite sex de facto relationship. The material disadvantage is their statutory ineligibility to adopt a child.

[149] We conclude the ordinary meaning of "spouses" in s 3(2) of the Adoption Act is inconsistent with the right to be free from discrimination based on marital status and sexual orientation.

Step 3: whether inconsistency is a justified limit in terms of s 5 of the Bill of Rights

[150] The Crown submits any difference in treatment is demonstrably justified under s 5 of the Bill of Rights because being married is used as a legitimate proxy for sufficient commitment to ensure a stable family unit for the jointly adopted child.

[151] But as to this:

> **[151.1]** In logic the proxy point applies also to civil unions (both opposite sex and same sex), underlined by the fact couples who are married or in a civil union can change the form of relationship from the one to the other by having the new form of relationship solemnised without having to dissolve the first relationship. See the Civil Union Act, ss 17 and 18.
>
> **[151.2]** The "proxy" point did not inhibit the Full Court in *Application by AMM and KJO* from extending s 3 of the Adoption Act to opposite sex couples in a de facto relationship. Logic, if not consistency, requires the same for same sex de facto couples.
>
> **[151.3]** No restriction is placed by COCA on civil union couples and on de facto partners being appointed joint guardians of a child, thereby undertaking shared responsibility for the child's day-to-day care and for his or her intellectual, emotional, physical, social, cultural and other personal development. See s 16(1).
>
> **[151.4]** In every adoption application the Family Court is required by s 11(a) to be satisfied each person applying for an adoption order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child.

[152] In the result we see nothing in the Crown point.

[153] Our conclusion is the statutory exclusion from s 3 of the Adoption Act of civil union couples and those in a same sex de facto relationship does not serve a purpose sufficiently important to justify curtailment of their right to be free from discrimination. Their exclusion is not reasonably necessary and no objective is served by that exclusion. The discrimination is not justified in terms of s 5 of the Bill of Rights.

[154] As Step 4 of the *Hansen* analysis thus falls away, we move to Step 5.

Step 5: the s 6 analysis – whether a meaning consistent or less inconsistent with the right can be found

[155] The essence of the Crown argument is that the term "spouses" in s 3 of the Adoption Act should be extended to civil union couples and same sex de facto couples because:

> **[155.1]** The reasoning in *Application by AMM and KJO* supports such extension.
>
> **[155.2]** Enactment of the MDMA Act has eliminated the barrier to recognising civil union and same sex de facto partners as "spouses". The Act demonstrates social attitudes to who may constitute a core "family unit" in modern New Zealand has shifted considerably since 1955. It is now socially acceptable for civil union and same sex de facto couples to adopt children jointly. Interpreting "spouses" to include such couples is consistent with the broad purpose of s 3(2) to ensure a stable family unit for the child.

[156] In our view the logic of the statutory changes goes the other way. On each occasion on which Parliament has had opportunity to enlarge s 3 of the Adoption Act it has refrained from doing so:

> **[156.1]** The Care of Children Act 2004 (inter alia) revised the law relating to guardianship but not adoption, notwithstanding the Law Commission recommendation in *Adoption and its Alternatives*. See further *Application by AMM and KJO* at [56] and [57].
>
> **[156.2]** The Civil Union Act 2004 made some consequential amendments to the Adoption Act but as noted in *Application by AMM and KJO* at [58] those amendments did not include any change to the eligibility criteria and particularly, did not recognise a civil union as the basis for a joint adoption application.
>
> **[156.3]** The Relationships (Statutory References) Act 2005, described in *Application by AMM and KJO* at [60] as a "significant statutory exercise", omitted the Adoption Act from the enactment of neutral laws on relationships. As noted in the discussion in *Application by AMM and KJO* at [59] to [66] the purpose of the Act was to ensure the same legal rights and responsibilities applied to married, de facto (whether opposite or same sex) and civil union relationships. A proposal to amend the Adoption Act to allow adoption orders to be made in favour of civil union partners was defeated.
>
> **[156.4]** When most recently enacting the 2013 MDMA Act Parliament carefully extended the reach of s 3 of the Adoption Act to include same sex **married** couples but to no other forms of relationships. It must be presumed this was done in full knowledge of what was said in *Application by AMM and KJO*. The amendments made by Schedule 2 Part 1 of the MDMA Act to the Property (Relationships) Act 1976 reinforce the view Parliament clearly understood the differences between marriage, civil union and de facto relationships and did not intend to treat them all the same.

[157] There was a suggestion by the Crown during the hearing that as the Civil Union Act enables persons to change from civil union status to marriage status by a simple procedure, those in civil unions (opposite and same sex) who want to adopt a child can do so by simply changing the legal form of their relationship. In this regard we accept the submission by the Human Rights Commission that discrimination is not lessened by the fact a person might be able to self-remove the discriminatory feature and that there is no

duty on such person to avoid or escape discrimination. In our view the whole point of anti-discrimination law is to protect people who are being discriminated against. The freedom from discrimination guaranteed by s 19 of the Bill of Rights would be rendered illusory were individuals to be required to surrender those characteristics listed in s 21 of the Human Rights Act which are within their power to change.

[158] In these circumstances we are of the view it is not permissible to interpret the expression "spouses" in s 3 of the Adoption Act so as to include civil union partners (opposite and same sex) and same sex partners in a de facto relationship. To do so would be to apply aggressively what the Full Court in *Application by AMM and KJO* at [28], [29] and [49] has already described as an "aggressive" approach to s 6. Put another way, the Tribunal would pass from an aggressive application of s 6 to legislating. We do not accept the reading of the section in the manner contended for by the Crown is reasonably possible. For these reasons we find s 3(2) cannot be given a meaning consistent (or less consistent) with the right to be free from discrimination based on marital status. Section 4 of the Bill of Rights accordingly mandates Parliament's intended meaning (see Step 1) be adopted.

CHALLENGE 4: MARITAL STATUS AND SEXUAL ORIENTATION – THE QUESTION OF THE OTHER PARTNER CONSENTING TO ADOPTION

The claim

[159] Amended statement of claim paras 9.2.3 and 9.6.2. The consent of the unmarried opposite-sex or same-sex partner of a sole applicant for an adoption order is not required even where the couple are living together at the time of the adoption application. The consent of the spouse of a married applicant is, however, always required. See Adoption Act, s 7(2)(b):

> **7 Consents to adoptions**
>
> (1) ….
> (2) The persons whose consents to any such order in respect of any child are required as aforesaid, unless they are dispensed with by the court under section 8, shall be—
> (a) …
> (b) the spouse of the applicant in any case where the application is made by either spouse alone.
> (3) …

[160] Where application for an adoption order is made by both spouses, it is inferred both spouses consent to the adoption.

[161] Where only one spouse applies for the adoption order, s 7(2)(b) of the Adoption Act requires the consent of the other (non-applicant) spouse to be given.

[162] Because the term "spouse" is restricted to married couples (opposite sex and same sex) and to opposite sex de facto couples (see *Application by AMM and KJO*) it follows that in the case of civil union couples (opposite sex and same sex) and same sex de facto couples the consent of the non-applicant partner is not required.

[163] As this ground turns on the interpretation of the term "spouse" in the Act, an issue already addressed, it is intended to move through the *Hansen* Steps on the basis the earlier findings and conclusions in relation to Ground 3 apply in equal measure to Ground 4.

Step 1: the intended or ordinary meaning

[164] For the reasons given earlier, in its ordinary meaning, the term "spouse" applies to partners in a marriage (opposite or same sex), not to partners in a civil union. Nor does it apply to same sex couples in a de facto relationship. The question is whether these excluded categories can be brought into s 7(2)(b) by the application of s 6 of the Bill of Rights.

Step 2: whether ascertained meaning inconsistent with the right to non-discrimination

[165] Again, for the reasons given earlier, the exclusion of civil union couples (opposite and same sex) and of same sex de facto couples from the s 7(2)(b) requirement that the non-applicant partner give his or her consent to the making of the adoption order is inconsistent with the right to freedom from discrimination. There is differential treatment between such couples compared to those who are married or in an opposite sex de facto relationship.

[166] The material disadvantage is that:

> **[166.1]** In the excluded category the non-applicant partner has no legal right to consent or withhold consent despite the adoption affecting his or her financial and personal interests by having the partner's child or children becoming part of their family group and brought into the couple's household.
>
> **[166.2]** The unilateral act of the applicant spouse in assuming responsibility for someone else's child might set up tensions in the relationship and could result in the breakdown of that relationship with negative consequences for the adopted child.
>
> **[166.3]** The result of an adoption order being made in respect of one partner alone will be that the adopting parent has full rights and responsibilities for the care and upbringing of the child while the non applicant partner has no rights and responsibilities unless appointed a guardian. The unequal roles of the partners in relation to a child of their household may put a strain on the relationship and may not be in the best interests of the child.

[167] We accordingly find the intended or ordinary meaning of s 7(2)(b) of the Adoption Act is inconsistent with the right to be free from discrimination based on marital status and sexual orientation.

Step 3: whether inconsistency is a justified limit in terms of s 5 of the Bill of Rights

[168] Section 7(2)(b) is limited to marriage because the original conception of the Adoption Act was that the adoptive parents would be married. While marriage is now understood as an institution which includes opposite and same sex relationships and while *Application by AMM and KJO* has controversially extended the term "spouses" to include opposite sex de facto relationships, the two categories of civil union and same sex de facto relationships are simply not recognised. This is not due to any meaningful purpose being achieved. The discrimination exists because times have moved on and the Act has not kept pace. In our view each of the s 5 issues posed by Tipping J in *Hansen* must be answered in the negative.

[169] As there is no need to address Step 4, we turn to Step 5.

Step 5: the s 6 analysis – whether a meaning consistent or less inconsistent with the right can be found

[170] The question is whether a reading of "spouse" in s 7(2)(b) can, as a reasonably available interpretation, be read as including partners in a civil union (opposite and same sex) and partners in a same sex de facto relationship.

[171] For reasons given in relation to Category 3, we believe the answer is no. As Anderson J stated in *Hansen* at [290] the duty of the Tribunal is to construe, not to reconstruct. To legislate would contravene s 4 of the Bill of Rights. Our finding that the meaning suggested by the Crown is not reasonably possible means the limits of s 6 have been reached.

[172] For these reasons we find s 7(2)(b) of the Adoption Act cannot be given a meaning consistent (or less consistent) with the right to be free from discrimination based on marital status and sexual orientation. Section 4 of the Bill of Rights accordingly mandates Parliament's intended meaning (see Step 1) be adopted.

CHALLENGE 5: DISABILITY

The claim

[173] Amended statement of claim para 9.4.1. The consent of any birth parent can be dispensed with on the grounds of parental dereliction (s 8(1)(a)) but in the case of birth parents with a physical or mental disability their consent can be dispensed with on the additional ground that the parent is unfit, by reason of any physical or mental incapacity, to have the care and control of the child and the unfitness is likely to continue indefinitely. See Adoption Act, s 8(1)(b). Birth parent consent of non-disabled parents can be dispensed with only on the basis of parental dereliction as listed in s 8(1)(a), not on the basis of prohibited characteristics:

> **8 Cases where consent may be dispensed with**
>
> (1) The court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:
>
> (a) if the court is satisfied that the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child; and that reasonable notice of the application for an adoption order has been given to the parent or guardian where the parent or guardian can be found:
>
> (b) if the court is satisfied that the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child; that the unfitness is likely to continue indefinitely; and that reasonable notice of the application for an adoption order has been given to the parent or guardian:
>
> (c) if a licence has been granted in respect of the child under section 40 of the Adoption Act 1950 of the Parliament of the United Kingdom, or under the corresponding provisions of any former or subsequent Act of that Parliament, or under the corresponding provisions of any Act of the Parliament of any Commonwealth country.

Some observations on disability

[174] In its report *Adoption and its Alternatives* at para 430 the Law Commission noted a submission by the Donald Beasey Institute that the provision for dispensing with consent on the grounds of a physical or mental disability was inappropriate and discriminatory, and in breach of New Zealand's obligations. Article 2(1) of UNCROC provides:

> State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's … disability … or any other status.

[175] To this may be added Article 23(4) of the Convention on the Rights of Persons with Disabilities which provides for respect for home and the family. It stipulates a child should not be separated from his or her parents on the basis of disability of one or both of the parents:

> 4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

[176] The Law Commission report at paras 431 to 433 went on to make the following points:

> **[176.1]** The Adoption Act is the only piece of family-related legislation with a statutory reference to parental disability.
>
> **[176.2]** A search of reported and unreported cases reveals that it appears s 8(1)(b) has never been used on its own to justify dispensing with a birth parent's consent. In all the cases involving mental incapacity of a parent, the court has found that grounds are made out under s 8(1)(a) as well as s 8(1)(b).
>
> **[176.3]** The essential issue is whether the child will receive adequate care. If there is incapacity, it is unnecessary to stipulate further detail. The Law Commission considered s 8(1)(a) provides an adequate basis upon which to dispense with the consent of a parent whose intellectual disability entails incapacity to care for a child. Section 8(1)(a) does not require culpability on the part of the birth parent.

[177] Included in the Common Bundle of Documents (vol 2, p 861 at 863) is a response by the Donald Beasey Institute to the Law Commission view. Two points are made:

> **[177.1]** Intellectual disability in itself does not automatically equate to incapacity to parent. The statement by the Law Commission that "if there is incapacity, it is unnecessary to stipulate further detail" is incorrect.
>
> **[177.2]** It is also inappropriate to deny a parent the right to refuse to consent to adoption because the parent is unable, through no fault of his or her own, to care for the child him or herself. A biological parent may have very good reasons for wishing to retain a non-custodial parental role with regard to the child, rather than giving up all parental rights through agreeing to adoption.

[178] Be that as it may the point remains that it is expressly stipulated in s 8(1)(b) that a birth parent who is unfit by reason of any physical or mental incapacity to have the care and control of the child may have his or her consent to adoption dispensed with in circumstances over and beyond the criteria for parental dereliction in s 8(1)(a) ie where the parent has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child.

[179] Adoption Action submits (inter alia):

> **[179.1]** Many natural parents can, and do, parent or co-parent a child despite having some physical or mental disability or impairment. Blind or partially-sighted parents, deaf or hearing-impaired parents, and parents with artificial limbs or who are dependent on a wheelchair often parent their children quite adequately

(sometimes with family help or outside assistance). Parents with a mental disability can provide adequate parenting, sometimes with the assistance of medication to control their condition.

[179.2] Even though a parent or guardian is restricted by reason of some disability or impairment in assuming a fully "hands-on" role in relation to the parenting of a child, he or she may still be able to play an important role in relation to the child's care, development and upbringing.

[179.3] The rights and responsibilities of parents and guardians as now set out in s 16 of COCA include:

> **[179.3.1]** Contributing to the child's intellectual, emotional, physical, social, cultural and other personal development.
>
> **[179.3.2]** Determining for or with the child or helping the child to determine questions about important matters affecting the child such as the child's name, place of residence, education, medical treatment and culture, language and religion. That is, the responsibilities of a parent go beyond being able to attend to the physical needs of the child.

[179.4] A parent with a disability might require assistance with some of the physical tasks of parenting but may be uniquely placed to provide for the child's education and emotional, social and cultural development.

[179.5] To deny a parent or guardian the right to refuse consent to the adoption of a child on the basis of disability places the focus on the disability and how that disability might affect their ability to provide care and control for the child. It does not take into account other qualities or strengths that the parent may have. The grounds in s 8(1)(a) involve a degree of parental neglect or failure to carry out the responsibilities of parenthood and the parent concerned is seen to have forfeited his or her parental rights. The ground in s 8(1)(b), on the other hand, does not require proof of any such failure, but is premised on assumptions about the effect on a person's parenting ability based on the presence of a physical or mental disability.

[179.6] Adoption Action does not dispute the disability of a parent may, in some cases, be a relevant consideration in deciding whether or not a birth parent has the ability to provide adequate care for the child. However, it will be only one of many factors. Section 8(1)(b) unfairly shifts the focus from a broad assessment of the ability of a parent to provide the child with adequate care to the disability affecting the individual claimant.

[180] For the Human Rights Commission it was equally acknowledged there will be some persons who by reason of mental or physical disability are unfit to parent a child. However, it is submitted the vast majority of persons with disabilities are and will continue to be fit to parent children. The issue is whether they should be singled out for special categorisation under the provision dispensing with consent. All other parents in respect of whom the court may dispense with consent are assessed on the basis of their behaviour. Parents with disabilities are assessed on the basis of their characteristics. They are subject to differential treatment which sets them at a material disadvantage.

[181] The essence of the Crown submissions is that:

[181.1] The purpose of the factual inquiry in ss 8(1)(a) and 8(1)(b) is the same, namely to determine whether the parent is able to exercise the necessary care and custody required to properly parent the child.

[181.2] The sole difference between s 8(1)(a) and s 8(1)(b) is that the former requires a factual assessment of parental fitness based on past conduct whereas the latter does not.

[181.3] In practice no such difference arises because the court still needs to decide whether dispensing with parental consent to an adoption will be in the child's best interests. Reliance is placed on *Director-General of Social Welfare v L* [1989] 2 NZLR 314 (CA) which held that the decision of the court under s 8(1) is the same as under s 11, namely the welfare and interests of the child. At p 320 Richardson J stated that a finding against a parent under s 8(1)(a) or (b) was a finding the parent had "forfeited" the legal right to refuse consent.

[181.4] In deciding whether to dispense with consent the focus is on how the welfare and interests of the child would best be met, in light of the parent's ability to meet those needs.

[181.5] The sole difference between the requirements under the two subsections is that in one case parental fitness includes a factual assessment of past conduct whereas in the other there is no such requirement on the face of the statute. In reality, the legal issue to be decided and practice demonstrate no difference as to when consent can be dispensed with.

[181.6] Nevertheless, even if the Tribunal were to find the wording of the provision alone constitutes differential treatment on the ground of disability and that that disability remains a material ingredient in the court's decision, such discrimination is justified as being in the best interests of the child.

[182] The competing views are to be resolved within the *Hansen* framework.

Step 1: the intended or ordinary meaning

[183] Section 8(1)(a) takes as its focus parental dereliction which has already occurred ("has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child"). This provision does not, in relation to the birth parent, use the s 8(1)(b) term "fit" or the term "unfit". Nor does it contain any reference to the s 8(1)(b) requirement as to the capacity of the birth parent to exercise the normal duty and care of parenthood.

[184] The operation of s 8(1)(b), on the other hand, turns not on what has happened in terms of dereliction, but on the fitness and capacity of the disabled parent to have the care and control of the child.

[185] The fact that when exercising its powers under s 8(1)(a) and s 8(1)(b) the court is additionally to take into account the welfare and interests of the child (see s 7) does not erase or alter the language of s 8(1)(a) or s 8(1)(b). The best interests of the child must be considered within the framework set by the legislation. Parental dereliction must still be established under (a) while unfitness by reason of physical or mental incapacity to have the care and control of the child must still be established under (b). The fact that the best interests of the child are considered in the context of both subsections does not produce the result that both subsections are the same or impose the same test. We

cannot accept the Crown submission that "[I]n reality, the legal issue to be decided and the practice demonstrates no difference as to when consent can be dispensed with".

[186] Nor do we accept the obiter observation by Richardson J in *Director-General of Social Welfare v L* at 320 that an adverse finding under s 8(1)(b) means the same thing as an adverse finding under s 8(1)(a), namely that the parent has forfeited the right to refuse consent:

> … there is no room in the exercise of the statutory discretion under s 8(1) for according any weight to the interests of the parent who, as a result of a finding against the parent under (a) or (b), has forfeited the legal right to refuse consent. In my opinion an exercise of the discretion to dispense with consent then rests on considerations of the welfare and interests of the child.

While "forfeiture" may be a permissible description of the outcome of an adverse finding under the parental dereliction provisions of s 8(1)(a), it is not realistic to contend that the physical or mental incapacity of a birth parent can similarly be stigmatised in the s 8(1)(b) context. Having a characteristic which is not within one's power to change, such as physical or mental disability, is not one's "fault" nor does one "forfeit" rights by reason of being disabled. While the best interests of the child are indeed paramount, it does not follow the interests of the disabled parent are not to be taken into account at all, as the obiter comment might appear to suggest.

[187] We conclude the ordinary meaning of s 8(1) is that s 8(1)(a) and s 8(1)(b) are separate, independent grounds on which a court may dispense with the consent of a birth parent to the adoption and that subs (1)(b) applies only to parents who have a physical or mental incapacity.

Step 2: whether ascertained meaning inconsistent with the right to non-discrimination

[188] A birth parent who has a physical or mental disability is treated differently to a birth parent who does not have such disability. The latter's consent to adoption can only be dispensed with in the case of established past events which can loosely be described as parental dereliction. A birth parent who is disabled faces, in addition to that risk, the risk of an inquiry into whether he or she is not fit by reason of incapacity to have the care and control of the child. Section 8 does not prescribe such inquiry where the parent is not disabled.

[189] In oral submissions the Crown argued the appropriate comparator is a birth parent who is unfit to parent. The alternative formulation was that the comparison must be between a disabled parent unable to parent properly and a non-disabled parent who is unable to parent properly. The argument was s 8 treats both groups the same. The difficulty with this argument is that s 8(1) demonstrably does not treat both groups the same and the Crown formulation artificially removes disability from the comparison. The comparator has no real work to do.

[190] On established principle the appropriate comparator is a birth parent who does not have any physical or mental incapacity. As stated in *Attorney-General v IDEA Services Ltd* at [139] this is because, if a comparator group is to be used to assist in determining whether there is discrimination, the selection of the comparator group must be conducive to a determination of the potential impact of the impugned policy (or provision) without a negation of its relevance. Or as expressed by Tipping J in *Air New Zealand Ltd v McAlister* at [51], a comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. Similarly in *Ministry of Health v Atkinson* at [67] the Court rejected a comparator which had been framed in terms which left no work for the

comparator to do. Transposed to the circumstances of the present case these formulations mean the comparator group must be one that enables a determination of whether the difference is on the basis of physical or mental incapacity or on some other (non-discriminatory) basis.

[191] The Crown referred to the majority judgments in *Purvis v New South Wales* [2003] HCA 62, (2003) 217 CLR 92. We, however, find more helpful the statement by McHugh and Kirby JJ (dissenting) at [130]:

> … the purpose of a disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations.

[192] In our view it is not only inappropriate to attribute the characteristics of the disabled person to the comparator, it is equally inappropriate for those characteristics to be taken away from the disabled person. Such removal would, however, be the practical effect of the Crown's formulation of the comparison exercise. It would take disability out of the assessment of the reason for the difference in treatment.

[193] Turning to the issue of material disadvantage, it should be clear from the earlier discussion that a birth parent with a physical or mental incapacity faces a form of "double jeopardy" in that consent may be dispensed with not only under s 8(1)(b) but also under s 8(1)(a). A non-disabled parent is in jeopardy under s 8(1)(a) only. In these circumstances it is clear the disabled parent is materially disadvantaged.

[194] We accordingly find the intended ordinary meaning of s 8(1) is inconsistent with the right to be free from discrimination based on disability.

Step 3: whether inconsistency is a justified limit in terms of s 5 of the Bill of Rights

[195] Both Adoption Action and the Human Rights Commission properly conceded there will be some persons who by reason of mental or physical disability are unfit to parent a child. In that context s 8(1)(b) does serve a purpose sufficiently important to justify curtailment of the right to be free from discrimination on the basis of disability. It similarly follows there is a rational connection between the provision and its purpose.

[196] But it was not disputed before the Tribunal that the majority of persons with disabilities are fit to parent children. The issue is whether they should be singled out for special categorisation under provisions which allow the dispensing of birth parent consent to the adoption of the child.

[197] As previously mentioned, s 8(1) does not impose on a parent who is not disabled an inquiry into their fitness to have the care and control of the child and whether that unfitness is likely to continue. It is difficult to see why the children of disabled parents are in greater need of protection than children of parents who are not disabled. If the needs of the child are indeed the paramount consideration, one would expect all parents, irrespective of their ability or disability, would be subjected to the same inquiry as to whether they are fit to have the care and control of the child. Treating parents differently according to whether they are able or disabled achieves no real purpose, a point tacitly accepted by the Crown in its submission that because the single test is the best interests of the child, the legal issue to be decided demonstrates no difference as to when consent can be dispensed with. Furthermore, it is not without significance that according to the research carried out by the Law Commission, s 8(1)(b) has never been used on its own to justify dispensing with a birth parent's consent. In all cases involving mental

incapacity of a parent the court has found that grounds are made out under s 8(1)(a) as well as s 8(1)(b).

[198] In these circumstances we conclude s 8(1)(b) fails the last two stages of the s 5 analysis. That is, the provision impairs the right to be free from discrimination more than is reasonably necessary to achieve the purpose (protection of the best interests of the child as a paramount consideration) and the provision is entirely disproportionate to the importance of the protection of the child's interests.

[199] As there is no need to address Step 4, we turn to Step 5.

Step 5: the s 6 analysis – whether a meaning consistent or less inconsistent with the right can be found

[200] Section 8(1)(b) explicitly addresses the parent who has a physical or mental incapacity. It mandates an inquiry into that person's "fitness" to have the care and control of the child. By no known process of statutory interpretation can this provision mean anything other than what it states on its face.

[201] The Crown argument is that both s 8(1)(a) and 8(1)(b) come down to the same thing, namely birth parent consent can be dispensed with if such is in the best interests of the child.

[202] However, as previously observed in this decision, the best interests of the child are not a licence to redraft the Adoption Act. We do not accept it is reasonably possible to collapse the explicit statutory stipulations in s 8(1)(a) and s 8(1)(b) into a single requirement which specifies, in effect, that the court may dispense with the consent of any parent to the adoption of a child if the court is satisfied it is in the best interests of the child (as the paramount consideration) so to do. This is redrafting on a grand scale, well outside the bounds of s 6, the application of which depends on a legitimate process of statutory interpretation.

[203] We accordingly find s 8(1)(b) of the Adoption Act cannot be given a meaning consistent (or less inconsistent) with the right to be free from discrimination based on disability. Section 4 of the Bill of Rights accordingly mandates Parliament's intended meaning (see Step 1) to be adopted.

CHALLENGE 6: APPLICANT FOR ADOPTION MUST HAVE ATTAINED THE AGE OF 25 YEARS

The claim

[204] Amended statement of claim para 9.5.1. Unless there are special circumstances an adoption order cannot be made unless the applicant, or in the case of a joint application, one of the applicants has attained the age of 25 years and is at least 20 years older than the child. Couples over 25 can adopt a child without proof of special circumstances. See Adoption Act, s 4(1)(a):

> **4 Restrictions on making adoption orders**
>
> (1) Except in special circumstances, an adoption order shall not be made in respect of a child unless the applicant or, in the case of a joint application, one of the applicants—
> (a) has attained the age of 25 years and is at least 20 years older than the child; or

[205] There are two preliminary matters. First, the amended statement of claim seeks a declaration of inconsistency in relation to s 4(1)(a) only. However, at the hearing

Adoption Action submitted the Tribunal should make a declaration in relation to s 4(1)(b) also. Although there was no explicit objection by the Crown we are of the view it is not acceptable in a case such as this that new claims be added during the course of the hearing. It follows only the issues pleaded in the amended statement of claim can appropriately be determined although it may well be that the reasoning which applies to s 4(1)(a) will also attach to s 4(1)(b).

[206] Second, while s 4(1)(a) uses the phrase "applicant or, in the case of a joint applicant, one of the applicants", for convenience we will refer only to an "applicant" as whatever is said of the one applies to the other.

The evidence question

[207] Neither Adoption Action nor the Crown called expert evidence as to the appropriateness of the implicit assertion in s 4(1)(a) that a person who has not attained the age of 25 years is prima facie unsuitable to be an adoptive parent except in special circumstances. This point is returned to later in the context of the Crown onus in the justification analysis. The non-expert evidence given by Ms Nelson was conveniently summarised by the Crown as follows:

> **[207.1]** A single person under the age of 25 or a couple both under 25 seeking to take part in a MSD mediated adoption would be asked to defer the assessment of their application until they reached 25, but would be invited to participate in the Ways to Care programme (which is the first step of the assessment programme). If that person or couple insisted on being fully assessed it is possible they would be, and if their reason for seeking to adopt was child-focused rather than adult-focused, they could be placed in the pool.
>
> **[207.2]** Parenting a child not born to you requires a lot of life experience and is not the same as parenting a child born to you.
>
> **[207.3]** In general, people over 25 will have had more opportunity to get themselves settled, to establish a career, to have a stable relationship that has stood the test of time (if they are in a relationship), to have a place in society and to understand that place.
>
> **[207.4]** It is hard to envisage "special circumstances" in terms of s 4(1) that relate to the needs of the child as distinct from the wishes of the applicant to parent.

[208] Adoption Action submitted:

> **[208.1]** The age restriction is arbitrary and based on an assumption that people under the age of 25 will lack the maturity and skills necessary to care for a child as an adoptive parent. This assumption is unjustified and not supported by evidence. Younger prospective applicants are treated differently and less favourably on the basis of their age. Many young men and women in the 18 to 25 year age group are good parents of their natural children.
>
> **[208.2]** In making an assessment under s 11(a) whether an applicant for an adoption order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child, the court will consider a wide range of matters and will have the benefit of a report from an experienced social worker. Age is just one of the many factors to be considered and is only relevant if there is evidence the young age of an applicant has resulted in a less than adequate ability to care for the child.

[208.3] It is not unusual for an older sibling to seek to adopt a younger brother or sister where the parents are unavailable or unable to care for the child. Section 4(1) may preclude a young sibling from doing so.

[208.4] The Ministry of Justice has, on several occasions, proposed that the minimum age at which a person can adopt a child be lowered to 18 years, making the point the court will consider the suitability of young adoptive applicants as part of the usual assessment process. An example of such proposal is an undated memorandum by the Ministry of Justice for the Cabinet Policy Committee on the reform of adoption laws (Common Bundle, vol 3 at 1140) which offered the following view:

> When determining eligibility to adopt a child, current adoption legislation focuses first on a person's status and then their suitability. However, rather than placing inflexible and arbitrary limits on who is eligible to adopt, the focus should be on selecting suitable adoptive parents. What is important is the ability of potential adopters to parent a child. The widest possible pool of prospective adoptive parents would enable the best possible adoptive placements for children.

[209] For the Human Rights Commission it was submitted:

[209.1] Because age is a prohibited ground of discrimination, it cannot be used as a proxy for maturity unless there is evidence such is demonstrably justified. Apart from the general (and non-expert) evidence given by Ms Nelson, the Tribunal had been presented with no evidence to justify the age limitations in s 4(1).

[209.2] Enabling those under 25 to be in the adoption pool and to be considered on their merits as adoptive parents was in the best interests of the child.

[209.3] Age limits in overseas jurisdictions must be treated with caution as the discrimination challenge by Adoption Action must be resolved within the context of New Zealand's domestic discrimination law.

[209.4] It was significant the New Zealand Parliament has not considered the s 4(1)(a) age prescriptions for some 61 years apart from adjusting the age differential from 21 years to 20 years via the Age of Majority Act 1970, an event which itself occurred 36 years ago.

[210] The lengthy Crown submissions can possibly be succinctly summarised as follows:

[210.1] "Special circumstances" in s 4(1) must be interpreted to mean "when in the best interests of the child". The test for persons under and over 25 is thus the same. It follows there is no additional hurdle for persons under 25 and therefore no material disadvantage.

[210.2] Section 4(1)(a) does not operate as an absolute bar. Dispensation can be sought. In addition the provision merely requires the "not old enough" prospective adoptive parent to wait "a short period of time". Essentially they are told "not yet" rather than "No".

[210.3] Age is legitimately used as a proxy for capacity and maturity, qualities which underpin a prospective parent's ability to meet the care needs of the adopted child. Unless such capacity and maturity can be demonstrated the prospective parent does not qualify under s 11(a) as a fit and proper person.

[210.4] In the alternative, any infringement is justified:

[210.4.1] The best interests of the child being an important objective, age is a proxy for maturity and life skills.

[210.4.2] There is no absolute bar.

[210.4.3] A protective approach to the welfare of the child must be taken.

[210.5] In both the United Kingdom and in Canada (see particularly the majority decision in *Gosselin v Attorney General of Quebec* 2002 SCC 84, [2002] 4 SCR 429) bright line age-based tests have been approved.

[210.6] A United Nations survey of adoption practices in 104 countries reveals that:

[210.6.1] 80% prescribe a minimum age for at least one parent, with more than half of those prescribing a minimum age of 25.

[210.6.2] 23 countries require a higher minimum age.

[210.6.3] 72 countries also prescribe a minimum age difference between parent(s) and the adoptive child, ranging from 12 to 25 years.

[210.6.4] 58 countries have both requirements.

It is reasonable to infer from the United Nations survey, which is not western-centric in its coverage, that age 25 is a reasonable limit from a broad cultural perspective.

[210.7] The recently revised European Convention on the Adoption of Children permits member states to have minimum adoption ages, provided the minimum age is not less than 18 and not more than 30. The difference in age is preferred to be a minimum of 16 years. Because EU countries are required to comply with the non-discrimination principle it is reasonable to infer from the revised Convention that a minimum age of up to 30 will not infringe those obligations.

[210.8] This comparative information demonstrates that minimum ages of 20 in the case of adoption by relatives and 25 for those seeking to adopt a child not related to them must be considered as falling within a range that is reasonable.

[211] With regard to the survey of comparative age differences we are of the view the Human Rights Commission is correct in submitting little assistance is to be gained. It is not known how many of the 104 countries in the survey have anti-discrimination provisions comparable to those in New Zealand and of those that do, how many have (successfully) resisted a challenge of the kind made by Adoption Action in the present case. In *Gosselin* the issue was not just the age barrier of 30 but the setting of the welfare amount for those under 30 at roughly one third of the base amount paid to those over 30. The majority decision turns very much on the particular facts and on the particular Canadian-specific Charter issues.

[212] The dissenting judgment given by Bastarache J does, however, illuminate the fragility of the "age as proxy for maturity" and the "not yet" submissions by the Crown. While he accepted at [226] and [227] that distinctions based on age may often be justified, they are nonetheless equally suspect. He also pointed out a change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true:

> 227 However, despite this apparent recognition that age is of a different sort than the other grounds enumerated in s. 15(1), the fact of the matter is that it was included as a prohibited ground of discrimination in the *Canadian Charter*. Recall that in *Law* Iacobucci J. referred to the remark in *Andrews* that it would be a rare case in which differential treatment based on one or more of the enumerated or analogous grounds would not be discriminatory: *Law*, *supra*, at para. 110. In contrast, some human rights laws do not include age as a ground of discrimination, or limit the ground to discrimination between the ages of 18 and 65: *Human Rights Code*, R.S.B.C. 1996, c. 210; *Quebec Charter*, s. 10. But the *Canadian Charter* does include age, without internal limitation. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, McLachlin J. and I held that the grounds of discrimination enumerated in s. 15(1) "function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making" (para. 7). Legislation that draws a distinction based on such a ground is suspect because it often leads to discrimination and denial of substantive equality. This is the case whether the distinction is based on race, gender or age. While distinctions based on age may often be justified, they are nonetheless equally suspect. While age is a ground that is experienced by all people, it is not necessarily experienced in the same way by all people at all times. Large cohorts may use age to discriminate against smaller, more vulnerable cohorts. A change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Moreover, the fact remains that, while one's age is constantly changing, it is a personal characteristic that at any given moment one can do nothing to alter. Accordingly, age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change.

[213] Le Bel J (dissenting) at [403] similarly cautioned that differential treatment becomes discriminatory where the differential treatment:

> … reflects a stereotypical application of presumed personal or group characteristics, or where it perpetuates or promotes the view that the individual concerned is less capable or less worthy of respect and recognition as a human being or as a member of [Canadian] society.

[214] We return now to the question of evidence. For the Crown it was submitted that in the area of age, an "attenuated standard of proof" is appropriate. That is, there is a relaxed standard as to the kinds of evidence the Crown can lead to justify the provision in terms of s 5 of the Bill of Rights.

[215] If accepted, this submission would mean the absence of expert evidence establishing those who are under 25 are less suitable to be an adoptive parent than those over 25 can be remedied by reference to the non-expert evidence given by Ms Nelson, the UN survey, the revised EU convention and the English cases referred to in argument. Finally, it was submitted the Tribunal could also take judicial notice of the impact of poor parenting on children and by implication, judicial notice of the accuracy of Ms Nelson's evidence that while the relationship between age and maturity varies from individual to individual, it is clearly necessary for the applicant to have the required degree of maturity and in general, people over 25 will have had more opportunity to gain life experience, establish a career and to find a stable relationship.

[216] The danger with the Crown's approach are self-evident. First, the overseas material is, for the reasons earlier explained, of little value. Second, there are real dangers in accepting non-expert evidence which itself amounts to little more than restating the stereotype already embedded in s 4(1)(a) and which is under challenge. Judicial notice has precisely the same danger. The Tribunal is not able, without the assistance of expert evidence, to make a generalised assumption about the ability of a person under 25 to be a fit and proper adoptive parent. The stereotyped presumption in s 4(1)(a) needs to be interrogated by evidence and can too easily be perpetuated by "judicial notice" and by the admission of non-expert evidence. As Bastarache J stated in *Gosselin*, a change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Given the antiquity of the Adoption Act extreme caution is required.

[217] There is one further matter to note before the *Hansen* steps are addressed. Some of the issues raised by s 4(1)(a) have already been addressed in the context of Challenge 1 which pertains to the prohibition in s 4(2) on a male applicant adopting a female child. Such applicant must also establish "special circumstances". In the interests of brevity we adopt and apply in the context of s 4(1) the relevant analysis and conclusions reached in the context of s 4(2).

Step 1: the intended or ordinary meaning

[218] Section 4(1)(a) expressly prohibits the making of an adoption order unless the applicant has attained the age of 25 years and is at least 20 years older than the child unless there are special circumstances. The term "special circumstances" is not defined in the Act but there was no dispute at the hearing that they are circumstances that are uncommon, not commonplace, out of the ordinary or abnormal. See *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24].

[219] In our view the ordinary or intended meaning of the provision is clear and requires no further discussion.

Step 2: whether ascertained meaning inconsistent with the right to non-discrimination

[220] Whereas an applicant who has not attained the age of 25 years must establish "special circumstances" before an adoption order can be made, no such requirement attaches where the applicant has attained such age. Ordinarily, one would consider this to be differential treatment between persons in comparable situations on the basis of a prohibited ground of discrimination, namely age.

[221] The Crown submits, however, that if it is accepted "special circumstances" means "best interests of the child", there is no difference in treatment as both persons are assessed according to the same criteria, being those in s 11(b) (the welfare and interests of the child understood as the best interests of the child applied as the paramount consideration).

[222] But as has earlier been made clear, the fact that the best interests of the child must be taken into account via s 11(b) does not collapse the clear and explicit restrictions in s 4(1) and (2) into a "one stop" exercise in which the only issue a court must decide is whether the adoption will be in the best interests of the child.

[223] To express the point another way, an applicant under s 4(1)(a) must establish that although he or she has not yet attained the age of 25 years:

> **[223.1]** There are special circumstances which justify the making of the adoption order (s 4(1)(a)).
>
> **[223.2]** The welfare and interests of the child will be promoted by the adoption (s 11(b)).
>
> **[223.3]** The applicant is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain and educate the child (s 11(a)).

[224] If the Crown argument is correct, s 11(b) would do the work of both s 4(1)(a) and s 11(a) because the best interests of the child is an expression so broad it embraces all three statutory requirements.

[225] The interpretation is untenable as it requires the explicit terms of the Act to be ignored. In our view the discrimination analysis must be approached on the basis there is in fact a real and intended difference in the statutory prerequisites affecting those under 25 compared with those over 25. The Crown says in response this view is a triumph of form over substance. The short answer, however, is that the ends (protection of the best interests of the child) do not justify the means (ignoring the explicit text of the statute).

[226] Then the Crown argued the bar is not absolute. Dispensation can be sought via the "special circumstances" provision. In addition, the applicant need only defer pursuing the application "for a short period of time". As to this we are not persuaded that for an applicant under 25 years and between the ages of (say) 18 to 24, a wait of between 1 to 7 years (ie from 18 years of age to 24 years of age) is a "short time". Nor is it a short time for the child who could potentially be adopted.

[227] The Crown's submission (as does s 4(1)(a) itself) reflects a stereotypical application of presumed personal or group characteristics which perpetuates or promotes the view the (under 25) individual concerned is less capable or less worthy. It also suggests the right not to be discriminated against on the basis of age is not as important as other rights and that violation in the present case is not of any real significance or does not result in material disadvantage. In response we say care must be taken during the material disadvantage assessment to avoid minimising the disadvantage, thereby perpetuating the very discrimination complained of. In this context the "not yet" is in fact and in law a "No".

[228] We accordingly find the intended or ordinary meaning of s 4(1)(a) of the Adoption Act is inconsistent with the right to be free from discrimination based on age.

Step 3: whether inconsistency is a justified limit in terms of s 5 of the Bill of Rights

[229] The initial question is whether the age restriction in s 4(1)(a) serves a purpose sufficiently important to justify curtailment of the right to be free from discrimination based on age.

[230] The Crown submitted (inter alia) that promoting the best interests of the child is such important purpose. It is also contended age is a legitimate proxy for the maturity and life skills needed both to parent a child not born to one and to develop a relationship with birth parents and their families. The restriction is therefore rationally connected to that objective.

[231] Here we return to the observation made by Bastarache J in *Gosselin* at [227] that a change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Such is an accurate characterisation of what has happened in relation to the Adoption Act:

> **[231.1]** The Act has been on the statute books for nearly 61 years. None of the parties to these proceedings has seriously challenged the fact that it is seriously out of date and reflects the values and practices of its day.
>
> **[231.2]** The degree to which it is outdated can be illustrated by reference to more recent legislation in which the care of the child has been addressed:
>
> > **[231.2.1]** First, no minimum age for guardianship is set by Part 2 of the Care of Children Act 2004. The mother of the child will always be a guardian and the father will in most cases be one too (see s 17)

irrespective of their age. Here there is no stereotyping based on presumed personal or group characteristics such as age or maturity.

[231.2.2] Second, while guardianship and adoption are not the same, the responsibilities of a parent and of a guardian to the child are not dissimilar. Section 15(a) of COCA states that guardianship of a child means having, in relation to the child, "all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child". Section 16 goes on to state that:

> **16 Exercise of guardianship**
>
> (1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—
>
> (a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a child has that role just because of an appointment under section 26); and
>
> (b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
>
> (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.

[231.2.3] Third, there are no age limitations to the making of parenting orders under ss 47 to 57 of COCA, such order providing for the day-to-day care of the child.

[232] In the result, the most recent updating of New Zealand's laws relating to the care of the child underlines that old assumptions about age and maturity have been carefully re-thought by Parliament and done away with. Different, more efficacious criteria have been substituted to sit more comfortably alongside the best interests of the child. Overseas comparisons and surveys are therefore of little relevance and of even less assistance. We note again the absence of evidence that the age of 25 is indeed a suitable proxy for stereotypical application in present day New Zealand.

[233] In conclusion we do not accept the age limitation in s 4(1)(a) of the Adoption Act serves a purpose sufficiently important to justify curtailment of the right to be free from age-based discrimination. It follows also we find s 4(1)(a) impairs the right more than is reasonably necessary and is not in proportion to the importance of protecting the best interests of the child.

[234] We move now to the s 6 analysis.

Step 5: the s 6 analysis – whether a meaning consistent or less inconsistent with the right can be found

[235] As mentioned the submission for the Crown was that if special circumstances is to be read as "in the best interests of the child", s 4(1)(a) "can" be given a meaning consistent with the right to be free from discrimination based on age because a person under 25 and a person over that age would be assessed by the same criteria, namely the best interests of the child.

[236] This argument has already been addressed on more than one occasion and we have given our reasons for finding that it is not reasonably possible or tenable to conflate or collapse the explicit statutory stipulations of s 4(1)(a), 11(a) and 11(b) into each other or into the best interests of the child. While the requirements are part of the inquiry into

adoption and might even on a particular set of facts overlap (there is no requirement that they do), they are in the end separate statutory criteria.

[237] We accordingly find s 4(1)(a) of the Adoption Act cannot be given a meaning consistent (or less inconsistent) with the right to be free from discrimination based on age. Section 4 of the Bill of Rights accordingly mandates Parliament's intended meaning (see Step 1) be adopted.

CHALLENGE 7: AGE-BASED DISCRIMINATION IN THE ADULT ADOPTION INFORMATION ACT 1985

The claim

[238] Amended statement of claim para 9.5.2. The effect of s 4 of the AAI Act is that a person under 20 years of age cannot obtain a copy of his or her original birth certificate and is therefore denied access to information about his or her parenthood and personal identity. See the definition of "adult" in the AAI Act and also s 4(1). This discriminates against young persons aged 16 to 19 years on the grounds of their age. The definition of "adult" provides:

> **adult** as a noun means a person who has attained the age of 20 years; and as an adjective it has a corresponding meaning

[239] As noted in the Law Commission report *Adoption and its Alternatives* at para 51, after an adoption order has been made, a new birth certificate is issued with the adoptive parents entered in the place of birth parents. There is no indication on the face of the birth certificate that the child is adopted. The original birth registration of an adopted person is sealed until that child turns 20 and requests access under the AAI Act. Access to identifying details on the birth certificate will be restricted if the adoption occurred prior to the commencement of the AAI Act and the birth parent has placed a veto upon the disclosure of information.

[240] The significance of the AAI Act is that it is, for practical purposes, the only "official" gateway through which an adopted person can access details of his or her birth parents. While application can be made to the Family Court under the Adoption Act to inspect adoption records, the provisions are highly restrictive.

[241] The position taken by the Crown in relation to this challenge was to abide the decision of the Tribunal on both liability and remedy.

[242] The Report of the Children's Commissioner supported the challenge by Adoption Action. In addition to that report the Tribunal also heard evidence from Mr Ludbrook and Ms Nelson. That evidence and the report accords with the statement by Hammond J in *Hemmes v Young* [2005] 2 NZLR 755 (CA) at [117] (reversed on other grounds in *Hemmes v Young* [2005] NZSC 47, [2006] 2 NZLR 1) that adoption research has indicated many adopted persons have a deep psychological need to know the true identity of their birth parents:

> Adoption research has indicated that many adopted persons have a "deep" psychological need to know the true identity of those who brought them into this world. This because they must be enabled to place themselves in a social context, have a sense of continuity with their past, and what is sometimes called a "complete biography" (see Fortin, *Children's Rights and the Developing Law* (2nd ed, 2003), p 383). There are sound practical and psychological reasons to be aware of character traits, talents, and even the personal "oddities" of forebears. And there may be pressing medical or research reasons to know, if one can, of one's birth parents. … It is (inter alia) this sort of recognition of the human dimension which has prompted the reconsideration of the legal position of individual adoptees.

[243] Significantly, Hammond J further noted at [118] the AAI Act pre-dates the human rights legislation of the 1990s (eg the Bill of Rights and the Human Rights Act):

> [118] I am influenced too by the fact that the Adult Adoption Information Act was enacted prior to the enormous strides in human rights law over the last 20 years. It is not going too far to say that it is only with the passage of the human rights legislation of the 1990s that New Zealand has begun to start to come to grips with human rights issues of this kind.

[244] The report by the Children's Commissioner included the following statements:

> 35. The studies undertaken following the implementation of the Adult Adoption Information Act 1985 found that adopted children and adults can successfully integrate two or more families into their lives and that this often resulted in strengthened relationships.
>
> 36. A desire to know ones genetic parents has also been established in psychological literature as "*an understandable, common and part of healthy adaptation for adopted persons*". A study of American adopted adolescents found that 72 percent wanted to know why they were adopted, 65 percent wanted to meet their birth parents, and 94 percent wanted to know which birth parent they looked like.
>
> 37. In New Zealand, it is notable that most adoptions are now "open adoptions" where contact remains between the adopted child and the birth parents following the adoption process". [footnote citations omitted]

[245] Consistent with contemporary understandings of the needs and interests of the child and with contemporary human rights law, the Human Assisted Reproductive Technology Act 2004 (HART Act) gives specific recognition to the need for people born from donated embryos or donated cells to find out about their genetic origins. One of the explicit purposes of the Act is to establish a comprehensive information-keeping regime and it is an expressly stated Principle of the Act that donor offspring should be made aware of their genetic origins and be able to access information about those origins:

> **3 Purposes**
>
> This Act has the following purposes:
>
> …
>
> (f) to establish a comprehensive information-keeping regime to ensure that people born from donated embryos or donated cells can find out about their genetic origins.
>
> **4 Principles**
>
> All persons exercising powers or performing functions under this Act must be guided by each of the following principles that is relevant to the particular power or function:
>
> …
>
> (e) donor offspring should be made aware of their genetic origins and be able to access information about those origins:

[246] Part 3 of the HART Act accordingly sets out detailed provisions relating to the recording of information about donors of donated embryos or donated cells and also about donor offspring. It imposes on providers and the Registrar-General (under the Births, Deaths, Marriages, and Relationships Registration Act 1995) to keep information about both donors and donor offspring births. A donor offspring who is 18 years or older is entitled to access information held by the Registrar-General about the donor (a guardian of a donor offspring who is under 18 years can also request the information) (ss 50 and 57) and about siblings of the donor offspring (s 58). A donor offspring who is 16 years or older but under 18 years may apply to the Family Court for an order that for the purposes of the key access provisions in Part 3, the donor offspring is to be treated as a donor offspring who is 18 years old (s 65). In other words a person aged 16 or 17 can access the information without the assistance of a guardian.

[247] By contrast s 4(1) of the AAI Act provides that written application to the Registrar-General for an original birth certificate in relation to the applicant can be made only by an adult (defined in s 2 as a person who has attained the age of 20 years). If the applicant was adopted before 1 March 1986 (the date on which the AAI Act came into force), a birth parent may place a veto preventing access to adoption information and the original birth certificate. When the application relates to an adoption made after 1 March 1986 there is no veto and while an original birth certificate is issued, there is provision for the applicant to be first offered counselling before the certificate is issued.

[248] The issue is whether s 4(1) of the AAI Act discriminates against young persons aged 16 to 19 years on the grounds of their age.

Step 1: the intended or ordinary meaning

[249] There can be little doubt that s 4(1) of the AAI Act means exactly what it says, namely only an adult adopted person (defined in s 2 as a person who has attained the age of 20 years) may apply for an original birth certificate.

Step 2: whether ascertained meaning inconsistent with the right to non-discrimination

[250] Adopted persons who have not attained the age of 20 years are treated differently in that they are denied the opportunity to access their original birth certificate and through it information about their biological parents. This is clearly a material disadvantage.

Step 3: whether inconsistency is a justified limit in terms of s 5 of the Bill of Rights

[251] The evidence given by Mr Ludbrook and Ms Nelson, the practice of open adoptions and the Report by the Children's Commissioner establish that, in most cases, access to birth information is unlikely to compromise the welfare and best interests of the adopted child. This experience is reinforced by the provisions of Part 3 of the HART Act which allow unrestricted access by donor offspring 18 years and older to donor information. While access by donor offspring aged 16 or 17 is contingent on Family Court approval, the only criterion specified by s 65(3) is satisfaction it is in the best interests of the donor offspring that he or she be treated as if he or she is a donor offspring who is 18 years of age.

[252] In these circumstances we find the age restriction in s 4(1) of the AAI Act does not serve a purpose sufficiently important to justify curtailment of the right to be free from discrimination based on age. It does not have a rational connection with its purpose (supposedly protection of the adopted person) and the limit is well out of proportion to the importance of that objective. The discrimination is not a justified limitation in terms of s 5 of the Bill of Rights.

[253] As Step 4 of the *Hansen* test falls away we move to Step 5.

Step 5: the s 6 analysis – whether a meaning consistent or less inconsistent with the right can be found

[254] The question is whether the term "adult" used in s 4(1) can be given a meaning other than the meaning mandated by s 2, namely a person who has attained the age of 20 years. Only such a person may make application for an original birth certificate. In our view there is no rule of statutory interpretation which would allow the definition in s 2 to mean anything other than what it is plainly stated to mean by the Act.

[255] We conclude it is not possible for s 4(1) of the AAI Act to be given a meaning that is consistent (or less inconsistent) with the right to be free from age-based discrimination.

[256] Section 4 of the Bill of Rights accordingly mandates Parliament's intended meaning (see Step 1) to be adopted.

REMEDY

[257] These being proceedings under Part 1A of the Human Rights Act in which certain statutory provisions in the Adoption Act and in the AIA Act are challenged, the Tribunal is restricted by s 92J of the Human Rights Act to grant but a single remedy, namely a declaration of inconsistency:

> **92J Remedy for enactments in breach of Part 1A**
>
> (1) If, in proceedings before the Human Rights Review Tribunal, the Tribunal finds that an enactment is in breach of Part 1A, the only remedy that the Tribunal may grant is the declaration referred to in subsection (2).
> (2) The declaration that may be granted by the Tribunal, if subsection (1) applies, is a declaration that the enactment that is the subject of the finding is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.
> (3) The Tribunal may not grant a declaration under subsection (2) unless that decision has the support of all or a majority of the members of the Tribunal.
> (4) Nothing in this section affects the New Zealand Bill of Rights Act 1990.

[258] As explained by s 92K, a declaration of inconsistency does not affect the validity, application or enforcement of the enactment nor does it prevent the continuation of the act, omission, policy, or activity that was the subject of the complaint:

> **92K Effect of declaration**
>
> (1) A declaration under section 92J does not—
> (a) affect the validity, application, or enforcement of the enactment in respect of which it is given; or
> (b) prevent the continuation of the act, omission, policy, or activity that was the subject of the complaint.
> (2) If a declaration is made under section 92J and that declaration is not overturned on appeal or the time for lodging an appeal expires, the Minister for the time being responsible for the administration of the enactment must present to the House of Representatives—
> (a) a report bringing the declaration to the attention of the House of Representatives; and
> (b) a report containing advice on the Government's response to the declaration.
> (3) The Minister referred to in subsection (2) must carry out the duties imposed on the Minister by that subsection within 120 days of the date of disposal of all appeals against the granting of the declaration or, if no appeal is lodged, the date when the time for lodging an appeal expires.

[259] Adoption Action seeks a declaration of inconsistency in relation to the relevant provisions of the Adoption Act and the AAI Act in relation to which it has succeeded.

Crown submissions on remedy

[260] For the Crown it was submitted:

> **[260.1]** Granting relief would breach "the fundamental common law principle of comity: that the courts and Parliament must respect, and not impinge unreasonably upon, each others' constitutional roles". Given "the constitutional significance" of the s 92J remedy and the discretionary nature of relief under the section, it was appropriate for the Tribunal to consider whether the grant of declaratory relief would go too far and impinge upon the proper functions of Parliament, namely determining its own legislative priorities. That is, a declaration

could significantly influence legislative outcomes (as opposed to merely stimulating a response and debate about the specific provisions under challenge).

[260.2] The principle motive of Adoption Action in bringing its application was to effect wider law reform in the area of adoption. The Crown submits it is inappropriate to use the mechanism of a Part 1A application "to seek to shift legislative priorities and expedite a much broader and more complex law reform proposal".

[260.3] In any event MSD practice is to treat birth parents and applicants for adoption in a non-discriminatory manner. There was no need for a declaration.

[261] In our view none of the points made by the Crown have substance.

Discussion – the comity point

[262] As to the comity point, the Human Rights Act was substantially amended by the Human Rights Amendment Act 2001 which came into force on 1 January 2002. The effect of the new Part 1A of the principal Act was to bring within the Human Rights Act those persons and bodies referred to in s 3 of the Bill of Rights. See s 20J(1):

> **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.

[263] At the same time the 2001 Amendment Act made provision for the new (and only) remedy which can be granted by the Tribunal in those Part 1A cases where the Tribunal finds an **enactment** is in breach of Part 1A. At the same time Parliament ensured the limited reach of the Bill of Rights is to continue. Section 92J(4) stipulates that nothing in s 92J affects the Bill of Rights, echoing the identical provision in s 20J(4). Thus s 4 of the Bill of Rights is preserved:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) decline to apply any provision of the enactment—
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[264] In our view s 92J inserted by the 2001 Human Rights Amendment Act is Parliament's own statement as to the boundaries of the comity to be observed between Parliament and the Tribunal.

[265] As recently stated by Heath J in *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at 77:

> Parliament has accepted, by enacting s 92J of the Human Rights Act 1993, that it does not regard a formal declaration as an illegitimate intrusion into parliamentary processes. [footnote citation omitted]

[266] The fact that the declaration is "the only remedy" means Parliament anticipated it was also the appropriate remedy in those cases where the Tribunal makes a finding an enactment is in breach of Part 1A. That the grant of the remedy is discretionary does not

detract from the point. Extremely strong reasons would need to be established to withhold the remedy (see by analogy *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [60] and *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107] and [108]):

> **[266.1]** The Bill of Rights is underpinned by a policy of vindication and strong protection of individual rights and interests. That policy must be given effect to at the remedies stage. The Long Title of the Act states expressly that its purpose is to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand" and the Act must be interpreted and applied to give effect to this purpose. As stated by Thomas J (dissenting) in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 554:
>
> > [O]nce Parliament has charged the Courts with the task of giving meaning and effect to the fundamental rights and freedoms affirmed in the Bill of Rights, it would be a serious error not to proclaim a violation if and when a violation is found to exist in the law …
>
> **[266.2]** The point is reinforced by the fact that the expressly stated purpose of Part 1A of the Human Rights Act, as set out in s 20I, is to provide that, in general, an act or omission inconsistent with the right to freedom from discrimination is in breach of Part 1A if the act or omission is that of (inter alia) the legislative branch of the Government of New Zealand. Parliament must be taken to have understood that where a breach of a right is found, there must be a remedy. This is another way of saying the rule of law is to prevail. The remedy is the declaration of inconsistency.

The law reform point

[267] As to the criticism that the claim has a political character, the answer is to be found in *Attorney-General v Human Rights Review Tribunal* at [65]:

> [65] By admitting claims of discrimination in respect of enactments, however, Parliament has made available a cause of action and a forum in which such claims may be publicised and to some degree vindicated, if not actually remedied. Armed with a declaration, the plaintiff may press its case for a remedy in the community and in the Legislature. In other words, the legislation manifestly admits claims having a political purpose. That being so, one might have expected Parliament to restrict standing in 2001 had it meant to confine the right of action under Part 1A to aggrieved persons or the Commission itself. It did not do so, and the only conclusion that can be drawn is that it intended, consistent with the 1993 Act, that any person might first complain and then sue.

[268] The Crown also submitted a declaration of inconsistency made in relation to the Adoption Act would be an attack on the appropriateness of legislative prioritisation. In our view that is simply not the case and is made crystal clear by s 92K(1) which sets out the effect of a declaration. Furthermore, ss 20J(4) and 92J(4) expressly stipulate that nothing in Part 1A or in s 92J affects the Bill of Rights which, as noted, contains in s 4 an explicit recognition of parliamentary sovereignty.

[269] It is also to be noted this decision neither refers to nor takes into account the draft Adoption Bill which in November 2006 was provided by Parliamentary Counsel Office to the Ministry of Justice for comment.

The "good practice" point

[270] As to the Crown's reliance on "good practice" followed by the MSD, the short point is that, as was properly conceded, good practice cannot make otherwise discriminatory legislation non-discriminatory. Such practice is palliative only.

[271] Then it was submitted there is no immediate practical need for declaratory relief should the Tribunal find in favour of Adoption Action. As to this, the points raised by Adoption Action are not technical or of little practical relevance. They go to the heart of the circumstances in which an adoption order can be made. Adoption Action has established that both in relation to the giving of consent to adoption and in the making of adoption orders, the rights of birth parents and of would-be adoptive parents are directly affected. Most importantly, the best interests of the child, treated as the paramount consideration in the adoption context, are also directly affected. We see no justification for withholding a declaration of inconsistency.

The Crown request for a further remedies hearing

[272] There is one final matter. The comprehensive written submissions for the Crown on remedy were presented by Mr Humphrey. We were surprised when he was followed by Ms Coleman who developed further oral submissions.

[273] First, she drew attention to s 108B of the Human Rights Act which requires the Tribunal to hear the parties before granting a remedy:

> **108B Submissions in relation to remedies**
>
> (1) Before the Tribunal grants any remedy under Part 3, it must give the parties to the proceedings and, if the remedy under consideration is a declaration under section 92J, the Attorney-General, an opportunity to make submissions on—
> (a) the implications of granting that remedy; and
> (b) the appropriateness of that remedy.
> (2) Subsection (1) does not limit any provision in Part 3 or section 108.

[274] Second, it was said that while Mr Humphrey had given "some submissions", the Crown sought opportunity to make "specific submissions" after the Tribunal's decision has been given. That is, the Tribunal decision should be given in stages: a first decision addressing liability and, after a further hearing, a second decision addressing remedy. In the exchange with the Tribunal which followed the oral submission was crystallised by the Chairperson in the following terms:

> **Chair:** Well, just so that I've understood the Crown's position and the note I have made, which is my language, not yours, that given the terms of section 108B, if the Tribunal proposes to issue a declaration the Crown position is that the decision be issued with a draft of the proposed declaration so that the Attorney-General and the parties have an opportunity to be heard on that proposed declaration?
>
> **Ms Coleman:** Yes, Sir, thank you.

[275] However, unlike *Atkinson*, *IDEA Services* or *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729, the challenge in the present case is to "an enactment", not to a decision or policy of the executive.

[276] In our view the Attorney-General was, on the eighth day of the hearing (and in his reply submissions presented on 13 and 14 January 2014) fully "heard" in terms of s 108B. As has already been stressed, the only remedy the Tribunal can grant in the present case is that stipulated by s 92J. We cannot see how, on the facts, the Attorney-General can claim he does not know what Adoption Action's case is, what remedy the Tribunal might grant were Adoption Action to establish its case and what the consequences of such remedy are likely to be. The Tribunal was given no meaningful information to justify the implicit contention those consequences will be such that they require a separate remedies inquiry over and above the hearing already afforded the Attorney-General. We accordingly decline the request for a further remedies hearing.

DECLARATION

[277] We declare the following provisions of the Adoption Act are inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990:

[277.1] Section 3(2)

[277.2] Section 4(1)(a)

[277.3] Section 4(2)

[277.4] Section 7(2)(b)

[277.5] Section 7(3)(b)

[277.6] Section 8(1)(b).

[278] We declare the following provisions of the Adult Adoption Information Act 1985 inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990:

[278.1] Section 4(1).

[279] The claim of indirect discrimination based on race is not made out and is dismissed.

COSTS

[280] Costs are reserved. Unless the parties have come to an arrangement on costs the following timetable is to apply:

[280.1] Adoption Action is to file its submissions within 14 days after the date of this decision. The submissions for the Human Rights Commission are to be filed within the 14 days which follow with the submissions for the Crown to be filed within 14 days thereafter. Adoption Action is to have a right of reply within 7 days after that.

[280.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[280.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Mr MJM Keefe JP**	**Ms ST Scott**
Chairperson	**Member**	**Member**