IN THE SUPREME COURT OF NEW ZEALAND SC 65/2017

BETWEEN **ATTORNEY-GENERAL**
Appellant/Cross-Respondent

AND **ARTHUR WILLIAM TAYLOR**
First Respondent/Cross-Appellant

HINEMANU NGARONOA
SANDRA WILDE
KIRSTY OLIVIA FENSOM
CLAIRE THRUPP
Second to Fifth Respondents

Hearing:	6-7 March 2018
Coram:	Elias CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	U R Jagose QC, D J Perkins and G M Taylor for the Appellant/Cross-Respondent Respondent/Cross-Appellant Taylor in Person (via AVL) R K Francois for the Second to Fifth Respondents A S Butler, C J Curran and J S Hancock for the Human Rights Commission as Intervener

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CIVIL APPEAL AND CROSS-APPEAL

SOLICITOR-GENERAL:

E ngā Kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. Your Honours I appear with Mr Perkins and Ms Taylor.

ELIAS CJ:

Thank you Madam Solicitor.

MR FRANCOIS:

Francois, Your Honours, for second to fifth respondents.

ELIAS CJ:

Thank you Mr Francois.

MR BUTLER:

Ko Andrew Butler, mātou ko Chris Curran, ko John Hancock mō te Kāhui Tika Tangata.

ELIAS CJ:

Thank you Mr Butler. And Mr Taylor?

MR TAYLOR:

Yes Your Honours, I'm appearing for myself.

ELIAS CJ:

Thank you Mr Taylor. Thank you Madam Solicitor for filing your memorandum as to order. I think the Court would be most helped if we followed the order of hearing the appeal first in its entirety and then the cross-appeal. But as to the helpful time indications we'd hoped that, given the fact that we've read all the submissions, we may not need to keep too accurately to what seems to be a fairly generous allocation of time. So we would hope to move along a bit faster.

SOLICITOR-GENERAL:

Yes, thank you Ma'am.

ELIAS CJ:

Thank you Madam Solicitor.

SOLICITOR-GENERAL:

Your Honour, the issue in the Crown's appeal is whether the Court has the power to grant by way of relief, indeed the only relief given and sought, by formal order a declaration that an enactment is inconsistent with the New Zealand Bill of Rights Act 1990. That enactment, of course, being section 80(1)(d) of the Electoral Act 1993 prohibiting people who are imprisoned on election day from voting.

ELIAS CJ:

Can I just ask you, sorry, about that, because the statement of claim doesn't, I think, recite 80(1)(d) but simply the Amendment Act, and I would have thought that perhaps, although this more relevant to the cross-appeal, Mr Taylor is also looking to section 6 of the Amendment Act.

SOLICITOR-GENERAL:

The Amendment Act, Your Honour yes you're right it was pleaded, but the Amendment Act simply means the principal Act. The Amendment Act is –

ELIAS CJ:

Well it may not because only section 6 is what Mr Taylor, what affects Mr Taylor I think isn't it?

SOLICITOR-GENERAL:

Of the Amendment Act?

ELIAS CJ:

Of the Amendment Act, which is not carried into the principal Act. It seems a bit strange to me. Anyway, that is more important for the cross-appeal, and you can come to it in due course after you've had a chance to reflect on it, but I'm just picking you up on saying that this is all about section 80(1)(d).

SOLICITOR-GENERAL:

Yes, thank you Ma'am. I mean the declaration sought is that the Amendment Act provision is inconsistent, quite so.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

The Amendment Act, it means the principal Act, I take your point, Your Honour, but the standing might be a different question.

ELIAS CJ:

Well I think the Amendment Act may continue in terms of Mr Taylor's status, but that's something that you can perhaps consider.

SOLICITOR-GENERAL:

In fact I should have said at the beginning, Your Honour, that with Your Honour's leave, Mr Perkins will lead the Crown's cross-appeal in response.

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

Simply put, the Crown's case in the Crown's appeal is that this sort of declaration, as given by the High Court is not available to the Court. It is not within the inherent power of the Court, or the judicial function, as that concept has been understood and developed in our common law tradition. The law doesn't, we submit, admit a judicial function that is non-adjudicative. That doesn't determine whether any matter of law, whether interpretive or as to the rights and duties of parties, or others, but rather where that function is wholly advisory. Indeed, not even advisory as to what the law is but advisory as to whether Parliament's limit as enacted was justified. To be clear, the Crown's case is not about whether the Court can criticise an enactment. It's well

established in our common law system of democratic Government according to law that Court's do and should make criticism of enactments where that criticism is justified, as they grapple with enactments in the course of judicial determination, nor is the Crown's appeal about mootness or deference or discretion. Each of those issues, when they arise in a proceeding involve the exercise of discretion. Sorry the exercise of jurisdiction. The Crown's case is that there is no jurisdiction in the strict sense for the relief that was given here and upheld on appeal. The declaration that was given is purported to be a form of relief. It was said to be a declaration but declaratory relief nonetheless, and given by way of a formal Court order. The objection is simple, that it lies outside the power of the Court, the inherent power, which is, at its broadest, a power of adjudication. Halsbury's Laws of England tell us simply that jurisdiction of the Court's is the authority which a Court has to decide matters that are litigated before it, or to take cognisance of matters presented in a formal way for its determination. This is at paragraph 6, at 23. It goes on to say the general rule that where there exists a right recognised by the law, there exists also a remedy for infringement of rights, and we'll come to that rights and remedies more probably in the second part as we address the Bill of Rights Act. But also Halsbury's tells us there must be a justiciable dispute and Your Honours, of course, this is an important moment in New Zealand's constitution. Observing, as the Courts below have, this is the first time in which the Court has made such a declaration. In my submission we are at something of a crossroads. The full illumination of the issues and the determination by this Court of this question is crucial. Indeed, as far as our research has uncovered, we are the only common law country to have asserted the existence of such a power outside of legislatively authorised power. So the step is not merely without precedent for New Zealand, but we have found it without precedent.

ELIAS CJ:

Correct me if I'm wrong, but I thought the Crown had actually invited the Court to make a declaration of compliance with the Bill of Rights Act in *Hansen*?

SOLICITOR-GENERAL:

Of incompatibility or of compliance?

ELIAS CJ:

No, of compliance.

SOLICITOR-GENERAL:

In *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 the Crown's argument was that the legislative provision was consistent.

ELIAS CJ:

Yes, but they actually sought a determination – oh perhaps not a formal, that's the point you make?

SOLICITOR-GENERAL:

Thank you Your Honour. That was the distinction.

ELIAS CJ:

But I did see a determination that the legislation was consistent with the Bill of Rights Act.

SOLICITOR-GENERAL:

The distinction that Your Honour has just touched on, is the point at the key at the heart of the Crown's case. Where Courts determine matters, as they go along the way, steps and the reasoning to determine the case, is a different matter from the formal order. The relief that is in the formal order of the Court, and that is the point on which the Crown's appeal rests today. The Crown does not object, of course, to Courts, as a step in the reasoning to determining a matter, concluding either compliance or non-compliance with the Bill of Rights Act. Invariably the order in those types of cases, as in *Hansen*, is the conviction stands. The legislation says what the legislation says. It's really steps in the reasoning, as the Court of Appeal put it, where those indications – and it doesn't really matter much what word we call it either. We might say a *Hansen* declaration. The Courts have called that an indication to make sure we know what we're talking about, but the language isn't so important, but its function is important. Where along the way does the Court make this determination or indication?

To that end, the Court of Appeal considered it was taking a short step from accepting, as the Crown did, that steps in the reasoning indicating inconsistency with the Bill of Rights Act thought it was taking a short step from steps in the reasoning to merely affirm as an order of the Court a declaration. That's at paragraph 41 of the Court of Appeal judgment. The Crown says otherwise taken in the context of our common law method and tradition over many years – over centuries – this remedial declaration is not a step. It's more akin to a species leap in remedial function of the Court, and that is because in this context fashioned as a remedy in its own right formal Court order, divorced from the judicial process of adjudicating any matter, whether that's to determine what the law is or parties' rights and obligations under the law are, and absent any competing position as to the meaning of the law we normally see the Court come to questions like that in formulating its conclusion. What we have here is something that is essentially qualitative rather than interpretative, qualitative rather than remedial or relief-giving.

GLAZEBROOK J:

Madam Solicitor, is the argument that just because it's absolutely clear it breaches the Bill of Rights you can't have a declaration? What say it wasn't absolutely clear and – I mean, say in *Quilter* there was an argument in terms of interpretation. You still say at the end of that there can't be a declaration either of consistency or inconsistency but it can be put in the reasoning that it's either consistent or inconsistent. So what's the difference with a formal declaration in those circumstances which is very much part of an argument about interpretation? I use *Quilter* because although some might have said the legislation was very clear there was certainly an argument that it could be interpreted in accordance with the Bill of Rights, and should be, or there could be an argument in that sense.

SOLICITOR-GENERAL:

Yes. This is the first time this matter has come so starkly before the Court, because of course since –

GLAZEBROOK J:
But is it just because it's stark, is the question?

SOLICITOR-GENERAL:
I'll get to that, yes. So from all throughout the celebrated cases that have helped us understand the shape of the Bill of Rights Act as an actor from *Temese v Police* (1992) 9 CRNZ 425 (CA) through *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA), as Your Honour points out, through to *Hansen*, the difference here is that the formal order of the Court, where the Court adjudicates the issue that is brought before it, should be to say the law says X or, in a differently-brought case with these facts, plaintiffs X and Y are not permitted to vote. If the Court also says, "But we find that inconsistent with the Bill of Rights Act," we take no issue with that.

ELIAS CJ:
So you don't mind a declaration that it's in breach of the right contained in the Bill of Rights Act. It's the section 5 exercise, is it?

SOLICITOR-GENERAL:
No, Your Honour. I would say we don't mind much the word. We object to the fashioning a remedy.

ELIAS CJ:
Sorry, the word, what?

SOLICITOR-GENERAL:
We don't object to the word "declaration". The Court might say, "This is the order of the Court and we declare that we haven't been able to find a consistent meaning." It's the fashioning of it as a remedy, as relief from the Court. The only relief in this case that was given was that the –

GLAZEBROOK J:
But what I can't understand is what – I mean, I can understand there might be a slight difference when it's the only relief. But that can only be when there is

absolutely no question and accepted – one assumes – that it is in breach of the Bill of Rights because otherwise if it's not accepted it's in breach of the Bill of Rights then there will be an argument about that as to whether it's consistent or not consistent and there will be an argument about interpretation, presumably.

SOLICITOR-GENERAL:
That's right. And in the course of the interpretative process by which the Court comes to grant relief, in those types of cases that Your Honour refers to, the relief the Court orders, the order that the Court gives, will be to determine what the law is and what the parties' rights are.

GLAZEBROOK J:
So in the context of that, there can be a declaration but it can't be a declaration if it's absolutely clear that it is breach of the Bill of Rights from inception.

SOLICITOR-GENERAL:
It cannot be the remedial relief given by the Court.

GLAZEBROOK J:
Right, so it's only – so the answer to my question is, the argument only arises where it's absolutely clear from inception that it's in breach of the Bill of Rights and there's nothing else the Court's being asked to do. Is that right?

SOLICITOR-GENERAL:
That is right, Your Honour.

GLAZEBROOK J:
Right, thank you.

WILLIAM YOUNG J:
So would you say it would have been okay for the Supreme Court to have made a declaration in *Hansen* i.e. a formal order that the onus of proof provisions were in breach of the Bill of Rights?

SOLICITOR-GENERAL:

Perhaps I've misunderstood Her Honour's questioning.

WILLIAM YOUNG J:

I think you may have.

SOLICITOR-GENERAL:

Because I would say not. I would say there is no concept of the remedial – the arsenal of remedies available to our common law Courts to make a declaration.

WILLIAM YOUNG J:

You say as a step in the reasoning it may be material for the Court to conclude whether or not legislation is in breach of the Bill of Rights but that – and one would expect that to be recorded in the reasons.

SOLICITOR-GENERAL:

Described, yes.

GLAZEBROOK J:

But I thought you said they could declare it in the remedy.

SOLICITOR-GENERAL:

I'm sorry, Your Honour, if I've misunderstood you because His Honour Justice Young's question to me made me think that I must have misunderstood your question. Can I try one more time? We don't object to the word "the declaration". In fact, we've happily called what happened in *Hansen* a *Hansen* declaration until we had to make the distinction here of indications and declarations.

GLAZEBROOK J:

Well, sorry – so you can't indicate in the formal orders whether it's an indication or called a declaration? Because I thought you said – in fact, I'm sure you said that you can in the course of saying it's not inconsistent that you can actually

say in the formal orders. So can you or can't you say in the formal orders rather than in the body?

SOLICITOR-GENERAL:
Our case is that you cannot make an order of the Court declaring inconsistencies.

GLAZEBROOK J:
Right, so you can't.

ELIAS CJ:
If you do say, though, all you would accept could be said is that the order dismisses the appeal, that the reasons why are in the body of the judgment but it must not be said in the order because the statute is unmistakeable the appeal is dismissed.

SOLICITOR-GENERAL:
That is the order of the Court in the case where the only issue is inconsistency.

ELIAS CJ:
Well, it's whether the statute applies or whether it can be construed to give effect to the right.

SOLICITOR-GENERAL:
But if in the process – whether the process has required the Court to go through that determination and determine the appeal, or whether – like this one – the applicant, the plaintiff has simply said to the Court, "Can we please have a declaration of inconsistency?" the Court order cannot be – the relief given, we say, cannot be a declaration of inconsistency.

ELIAS CJ:
So when can a declaration as to what the law means be made as relief? Are you saying it's only in the circumstances of the Bill of Rights Act that there cannot be a declaration?

SOLICITOR-GENERAL:

That is this case that it is only in this case relating to the Bill of Rights Act.

ELIAS CJ:

But it can't be special to it unless you can point to something in the, in this particular legislation so it must be a general proposition that you're putting forward.

SOLICITOR-GENERAL:

Yes, and the reason for that, Your Honour, is because Courts – as the Court of Appeal said, although it said it in terms of upholding the judgment in the High Court – that Courts grapple with inconsistency between legislation all the time and that's a matter for the Courts.

ELIAS CJ:

But very often it will be a matter of great moment what the determination of the Court is and that may be the whole point of the litigation. You may be dealing with questions of status, for example. In fact, on one view this legislation is about status, so that there is continuing effect.

SOLICITOR-GENERAL:

So in the cases where the Courts have to grapple with legislation that is inconsistent, that will form the part of the order, because the Court will have to determine which of the legislation enactments that is inconsistent triumphs in the case before it, and in the order of the Court the remedy given will give that as the order. But that is not to say it merely declares it in a non-legal, not making any determination of rights, simply as a descriptor or advice as to whether Court thinks that the justification was limited, in those ordinary cases the Court will say, this is the law. Yes there's inconsistent legislation –

ELIAS CJ:

So why can't we say this is the law?

SOLICITOR-GENERAL:

Because section 4 of the Bill of Rights Act, as Your Honour pointed to earlier –

ELIAS CJ:

Well I think, I mean you will come to what I think is the key in the case, which is paragraph 91 of your submissions, in which you do draw, you say there cannot be a determination of breach of the Bill of Rights. I query that. I think really that's the effect of what you're saying. That the Court, because of section 4, cannot decide that legislation breaches right, and I think that we need to confront that.

SOLICITOR-GENERAL:

And we will come to that, yes.

ELIAS CJ:

Can I just, sorry, just ask you since we've stopped you, just looking at the thing as a matter of pleading really, the respondents have pleaded that the Act is inconsistent with the Bill of Rights Act, it breaches of the Bill of Rights Act, I'm not quite sure how they put it. You haven't, it seems to me, formally responded to that but in the course of this litigation you have accepted that there is breach of the right to participate in the electoral process, and that you don't seek to justify it. What's wrong with the Court in those sorts of circumstances saying the plaintiff has succeeded, it is inconsistent, the Crown has now admitted that, because of course there are other consequences such as costs that flow from that determination. Why is that not an available outcome?

SOLICITOR-GENERAL:

So the Crown has not sought to justify it, I agree with that. The Crown hasn't admitted a breach of the Bill of Rights Act, is one of the propositions –

ELIAS CJ:

The Crown hasn't?

SOLICITOR-GENERAL:

No.

ELIAS CJ:

Right, well then why is not a determination of that by the Court very important going forward. It may mean that down the track, for example, there is another opportunity to argue that circumstances have changed and this restriction is no longer justifiable in a free and democratic society. Why would you want to go back to rearguing whether there is a breach of the Bill of Rights Act? That's one possibility but you're establishing some datum for the future. The other is, this Bill of Rights Act takes place, or operates partly in an international context. We have signed the optional protocol. If the respondents wanted to go to the Human Rights Committee, they had to show that they'd exhausted their legal remedies. Isn't it important in that context that they can say, we have the determination of the highest Court that but for section 4 this would have been, or this is a breach but section 4 means that there is no other remedy.

SOLICITOR-GENERAL:

So can I address that last point first Your Honour. A person would be equally able to take that international point where the Court says, as in the Crown submission it should, there is no case here, there is no matter that the Court can determine. There is nothing for us to adjudicate, you have fulfilled your obligation to exhaust your domestic legal remedies. There are none.

ELIAS CJ:

But then you can argue in the international forum that there is no breach, whereas if this Court had determined, because you're not opposing it, that there is a breach, that's the datum in that context.

SOLICITOR-GENERAL:

Well the argument in the international forum would be focused on whether Parliament was justified in enacting the matter.

ELIAS CJ:

Yes, that's what the argument would be.

SOLICITOR-GENERAL:

That is a matter for the Human Rights Committee to address, as it has, to the New Zealand, to the State –

ELIAS CJ:

I understand all of that, it's just that you – I'm just looking at the utility of a declaration that resolves matters as far as they can be resolved in this jurisdiction.

SOLICITOR-GENERAL:

Well respectfully, Your Honour, it might be that it is more useful for a person to attend an international stage with such a declaration, but we come back to the Crown's main proposition, that until now we haven't seen, we don't understand or admit the concept of a non-adjudicative function of this Court sounding in a formal remedial order that has no effect. It doesn't tell us anything, it doesn't tell the parties anyone what the law is.

GLAZEBROOK J:

It does to a degree, doesn't it, because let's get away from this case where it's clear, let's go to a *Quilter* or a *Hansen*, it does tell, it does say what the law is and it says what it isn't.

SOLICITOR-GENERAL:

Yes, absolutely it does Your Honour, and that's the difference –

GLAZEBROOK J:

So it either says it's compliant with the Bill of Rights, and therefore there isn't a section 4, 5 or any issue, or it says it isn't compliant with the Bill of Rights and whether there is or is not an interpretation that's consistent.

SOLICITOR-GENERAL:

I absolutely agree with Your Honour. That is the difference between the sort of case in which an interpretive dispute arises, I'm not saying interpretive disputes are the only thing that the Courts do, but where one arises then the Courts are properly taking account of what is the alternative meaning, which is the meaning that should be preferred. If they get to section 4 as in *Hansen*, as in *Quilter*, along that way, that would be quite evident from the conclusions the Court draws, and I fear I'll be repeating myself to say, that the Court's order then is to say, this is how we resolve the justiciable part of this controversy, by determining the meaning of the law is, what the main Act says, what the Misuse of Drugs Act meant, that is the determination of the Court in its inherent function between (inaudible) matters. By contrast the declaration here, as I've said already, is advisory in the objectionable way but it's not advisory as to what the law is, and to answer one of the Chief Justice's earlier questions, which I haven't got back to yet, about declaratory relief in the ordinary sense, it might well be if this Court has said in *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194, that the declaratory relief function is quite broad, does it necessarily require lis between parties and so on. I don't, of course, try and step away from that, but that is still in the adjudication of a matter, what does the law mean, or what will the law mean to parties or if a certain set of circumstances arise, what would the law be. It's very different, qualitatively, the declaration that we have here, that does it resolve any justiciable controversy. There is no dispute about what the law is –

ELIAS CJ:

Well hang on a second. There was a justiciable controversy as to whether, as to the meaning and as to whether it infringed the Bill of Rights, but the Crown doesn't dispute those. So as constituted the proceeding before the Court, there's nothing wrong with the proceeding before the Court.

SOLICITOR-GENERAL:

Well the proceeding didn't raise a justiciable controversy in my submission. The proceeding asserts that there is a breach. It asserts that the Amendment Act is inconsistent with the Bill of Rights Act right to vote, and it seeks a declaration –

it acknowledges that section 4 means the Court can't take a different meaning, and it seeks a declaration. So the proceeding in itself shouldn't have been brought.

ELIAS CJ:

But if you unpackaged that, the first point was that the proceedings, as you say, asserted that there was a breach. Take that – that is a legal question. The Crown is actually accepting that there is a breach. Why should a Court not declare that? You didn't come back to me on costs either, because that would be justification for a costs order, consequential costs order. So, you know, there is a point of law, it's been brought to a head through properly constituted proceedings. Why shouldn't it entail a formal order of the Court?

SOLICITOR-GENERAL:

Well there isn't a contest about the point of law, Your Honour, so –

ELIAS CJ:

As it turns out.

SOLICITOR-GENERAL:

Nor did the claim seek to, for example, attack or criticise a step prior to the fact that the applicants or the plaintiffs couldn't vote. The registrar of electors hasn't been, you know, one could, and I'm not saying this is a good idea, but it is possible to formulate a case where it only becomes clear at the end that we're up to section 4 and there is no different determination as to what the law is. It might be, well, as we've, *Hansen* is a good one –

ELIAS CJ:

Well *Quilter* is the one that has been put to you.

SOLICITOR-GENERAL:

Quilter, yes, is a good example of that, that isn't immediately obvious that the plaintiffs did not say, we can't vote, they urged on the Court – sorry, they can't get married. They urged on the Court a different interpretation using the

interpretive functions both of ordinary interpretation and on the Bill of Rights to say we urge on you a different interpretation of the section. That is quite different from what we have here where there is no such suggestion that there is anything to do –

GLAZEBROOK J:

So it's only an interpretive function so the Crown, for example, couldn't come and say in a *Hansen* case, we want to have a declaration or we want the Court to look at whether there is a breach of the Bill of Rights here because we're actually a bit sick of everybody bringing this up at every moment. Because we believe – and one of the good examples of that I think might have been the drink-driving stopped without a reason legislation, because I think the Attorney-General filed a report to say it was in breach of the Bill of Rights. Parliament took a different view, I think, having taken other advice, and I might have the sequence wrong because I was trying to look back last night to find what the sequence was, but I know that Parliament took different advice, decided in accordance with that advice that it wasn't in breach of the Bill of Rights despite the Attorney-General's view, and it could be there would be some utility in coming to the Courts to have that confirmed by Parliament because of a wish to know what the law is i.e. is it or is it not in breach of the Bill of Rights.

SOLICITOR-GENERAL:

Your Honour is right on my point there. Coming to the Court to say what is the law. That is not what we have here. There has been no question, the Court has not been required to, nor can it, say what –

GLAZEBROOK J:

So your answer was there has to be an interpretive question, or some other specific reason for that –

SOLICITOR-GENERAL:

For deploying the remedial relief of the Court.

GLAZEBROOK J:

– rather than you are stuck with the law as it is?

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

Even from the Crown's point of view.

SOLICITOR-GENERAL:

The Court might have come at this question, as the High Court did in *Re Bennett* (1993) 2 HRNZ 358 (HC), where Justice Grieg in the High Court had a similar application from a prisoner who was unable to vote and Justice Grieg did hear the matter, a very short judgment, he appointed an amicus to assist the Court, but quickly got to the point of section 4, said there's nothing to do here. He wasn't invited to take a section 5 analysis, sorry he may have been invited, but he didn't take the section 5 analysis, he just got straight back to section 4 and that is, in my submission, what the Court should have done in such a case where there is no controversy, there is no question, there was nothing for the Court, respectfully, to do that is in the nature of relief from the common law Courts.

WILLIAM YOUNG J:

Well the law that governs the case, you say, is the law that specifies electoral capacity. That it may be inconsistent with another statute is of no moment because all the function of the Court is this is a statement of law, and I think that's your argument, isn't it? By way of example if there are two other statutes, statute A and statute B, that are in conflict, the Court will have to resolve which prevails, but it's not going to make a declaration that they're in conflict, it's simply going to make a declaration what the law is. Now that may not be a complete answer to the case that was found against you by the Court of Appeal, but that's the point you're making, isn't it?

SOLICITOR-GENERAL:

Well the Court of Appeal was comforted, I think, by the sort of analysis that function of Courts is to identify and resolve inconsistency from statutes and –

WILLIAM YOUNG J:

Well one wouldn't say the Fair Trading Act provisions on liability are inconsistent with the Limitation Act provisions, we'll make a declaration they're inconsistent but decide Limitation Act prevails, or Fair Trading Act prevails, you'd just simply say what is the limitation period that prevails.

SOLICITOR-GENERAL:

Yes, thank you Sir.

ELIAS CJ:

Well my query though then is whether all of this argument is being driven by the language we are choosing to use. It is customary to talk about declarations of inconsistency but it's something that I've always felt a bit uncomfortable with, which is really why I think that the real question is whether there is a breach of the Bill of Rights Act and therefore tackling your para 91. But the effect of this declaration is a declaration that the voting legislation is inconsistent with the Bill of Rights Act. You can say, I mean I can't see the point myself in saying, just declaring that it's inconsistent. You have to say that it, the real gravamen of it is that it is in breach.

SOLICITOR-GENERAL:

The relief, to follow Your Honour, the relief might have been, the case is dismissed. There is an inconsistency not disputed. The relief given, or the order of the Court is to dismiss the case.

GLAZEBROOK J:

But you say they can't even bring the case in the first place, but you did concede that somebody could come and say I'm being prevented from voting, and that's wrong.

SOLICITOR-GENERAL:

Well it's possible to contrive a controversy. To say, a judicial review against the registrar of electors say for refusing to register me to vote, that might –

GLAZEBROOK J:

And then the answer is merely well sorry that's the law.

SOLICITOR-GENERAL:

Yes, the relief the Court –

GLAZEBROOK J:

But what, I'm just having trouble, as you can probably gather, in working out exactly when you can and can't go before the Courts on the Crown's position because – I mean I can understand the argument in terms of the declaration itself, but this seems to be based on the fact that you can't go before the Courts at all, except if there is, even presumably a specious interpretive view, and I don't mean specious in terms of the plaintiff's mind, but I mean in terms of, because people can come with specious arguments to the Court as long as it's not an abuse of process or there's another motive for it because we don't say to people just because you have a very odd view of language, we're not going to hear your case.

SOLICITOR-GENERAL:

So setting aside for now a sort of contrivance or a controversy that might just still take you to section 4. In this case we do say that there was nothing that can be brought to the Court because what is the cause of action here, really is just the flip side of the Crown's main point. There was no relief, there was no remedial relief that the Court can give. What is the cause of action here? The cause of action has been to assert the inconsistency and to seek a declaration of inconsistency. There is no cause of action that allows –

ELIAS CJ:

Cause of action is a funny concept in public law, isn't it?

SOLICITOR-GENERAL:

Well I was trying to address Her Honour Justice Glazebrook's question about, you said people should be able to come to Court with this question. People should not be able to come to the Court to raise a question for which the Court is unable to give relief, other than to say the matter is dismissed. I shouldn't put it so high. They can come to the Court, the High Court should have dismissed it.

ELIAS CJ:

But *Quilter* they could have come to the Court and so there's nothing wrong with the proceedings as on track, but once the Court had got to the view that section 4 applied, you say it simply has to dismiss the application and can't, in the order, say anything about what the law is.

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

It can say what the law is, but I mean it depends on what you mean by what the law is. Is the law, can a same sex couple marry, then the Court gives an answer. Is the law, has my right under the Bill of Rights Act been breached, well that might be another issue, so it maybe it's a question of whether rights under the New Zealand Bill of Rights Act are freestanding.

GLAZEBROOK J:

Which is a legislative instrument though, so it is slightly different from the other examples given of matters that aren't legislative instruments.

SOLICITOR-GENERAL:

We will come, of course, to the Bill of Rights question that keeps arising about section 4 and sections 5 and 6, but might it be useful –

ELIAS CJ:

Well isn't the most important section 3?

SOLICITOR-GENERAL:

Yes, section 3, yes. May I come to that shortly?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

But it might be useful just to, by way of contrast, or to think about, it is instructive what Courts have said about the power to make declarations, when they have been given them, or they do have such a power. Where they are being asked to declare absent any *inter partes* or otherwise controversy, and I say that's instructive because it comes back to the point that the Courts have, both the House of Lords in a case that we haven't put in the casebook but I'll hand up with Your Honours leave, *Momcilovic v R* [2011] HDC 34, (2011) 245 CLR 1, the High Court of Australia.

ELIAS CJ:

I think we've probably all got it electronically.

SOLICITOR-GENERAL:

In both cases those Courts say about declarations, they are not part of the judicial function, they are not part of the inherent judicial function and yes in the State of Victoria they have been, the State Court had been granted that function, but the whole purpose of the High Court in *Momcilovic*, as it turned out, because Ms Momcilovic's matter was resolved on quite a different point, but as the High Court said, granting leave this case bristles with constitutional issues, and so it did. The question about, is a declaration of inconsistency, power been given, no question about that, is it part of the judicial function. Is it useful to take Your Honours through both *Momcilovic* and the House of Lords case that I haven't given you yet, to address this point?

ELIAS CJ:

Tell us what the propositions are first that you're taking us too and then, yes, by all means take us through it. But just so we know what we're looking at, what are your propositions?

SOLICITOR-GENERAL:

The propositions are that judicial indications of inconsistency between domestic enactments and conventional charter, or in our language Bill of Rights, is not part of the judicial inherent power, it must be conferred.

GLAZEBROOK J:

Well actually but you say indications are but, so what's the proposition again, because I thought you said of course you can give indications, as in any…

SOLICITOR-GENERAL:

Being able to come to the Court and the Court being able to give, as its formal relief –

GLAZEBROOK J:

So it's not an indication of inconsistency, it's a formal relief. I'm sorry I just do want to really pin down what the argument is.

SOLICITOR-GENERAL:

So that is the proposition.

GLAZEBROOK J:

So it's a formal matter of inconsistency is not part of the judicial function. Sorry, it's just that you have said, of course the Courts can criticise, of course they can give indications in the course of judgments about inconsistency, and in fact they almost have to as a step of the reasoning, because you have to say either it's consistent, in which case you don't have to look at anything, or you have to say well it's inconsistent and I can't find an interpretation that is consistent and therefore it stands, or it's inconsistent but justifiable or…

SOLICITOR-GENERAL:

So I say the Court can't craft a form of relief, is merely saying an enactments is inconsistent with the Bill of Rights Act.

ELIAS CJ:

If you could, and I understand that you argue you can't, if you could determine whether an enactment breaches the Bill of Rights Act, could you get a declaration to that effect? So leaving aside this indeterminate language of inconsistency, if it's a breach.

SOLICITOR-GENERAL:

If it's inconsistent and, like in the Human Rights Act 1993, the tribunal in that case has been given the function to declare an inconsistency.

ELIAS CJ:

Well, if it's in breach, in the case of the executive there would be no impediment, would there, to a declaration that the act of the executive is in breach of the Bill of Rights Act.

SOLICITOR-GENERAL:

In a case where the executive action was challenged?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

That's right.

ELIAS CJ:

But no other relief may be sought. Maybe it's all historic.

SOLICITOR-GENERAL:

That's right.

ELIAS CJ:

Maybe they're seeking it as a first step in some other battle. But there's no impediment in those circumstances, are there?

SOLICITOR-GENERAL:

Not for the executive action. That's right.

WILLIAM YOUNG J:

There's no problem with seeking a declaration if the execution of a search warrant was in breach of section 21.

SOLICITOR-GENERAL:

There is no impediment, so executive action, no issue.

ELIAS CJ:

No. So it's not the nature of declaration. It's not that they're advisory or – you know, all this language gets in the way of really understanding, I think. It's not that it's phrased that it's an inconsistency. You can make a declaration because that is about what's required as a matter of law and whether you measure up to it. So then it all comes down to whether section 4 in context makes all the difference.

SOLICITOR-GENERAL:

Quite so, Your Honour. Our case is that there is no part of the judicial function in our common law tradition to make such formal relief that is declaratory – to use that word – or that says there's an inconsistency between an act and section 4.

ELIAS CJ:

Or that there's a breach by Parliament.

SOLICITOR-GENERAL:

And the second question is, did that all change in 1990? Did the enactment of the Bill of Rights Act give impliedly, it must be, that power to the Courts.

ELIAS CJ:

Is there any other enactment, apart from the Bill of Rights Act, that says this Act binds Acts of the legislative, executive, and judicial branches of Government? I can't think of any, but is there anything else that purports to touch legislative function?

SOLICITOR-GENERAL:

I can't think of any either, Your Honour, but might I come back to you on that?

ELIAS CJ:

That is a break from tradition in our system.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

So the question is what you make of that.

SOLICITOR-GENERAL:

I think probably the best thing is actually to come to paragraph 91 of the written submissions as Your Honour has indicated.

ELIAS CJ:

Well, I will find that useful, I must say.

SOLICITOR-GENERAL:

So that comes to the point that – well, sort of colloquially put that Courts would fashion a remedy where there has been a right breached. That might be – and I understand the Commissioner's argument, doubtless discourteously summarising it to that point, but that is as I understand –

GLAZEBROOK J:

I'm sorry, I missed that.

SOLICITOR-GENERAL:

The Court's function, it might be said – or it is said, has been said – that where there is a breach of – where there is a right and a breach then it is the Court's function to fashion a remedy.

GLAZEBROOK J:

All right. I just missed the last part.

SOLICITOR-GENERAL:

And so at paragraph 91 the Crown's proposition is that –

ELIAS CJ:

Sorry, not just rights, because under the Bill of Rights Act they are fundamental rights. So, you know, in terms of qualitative measures, again, the legislature has done something that's different from our tradition, which says that the dog act is as important as any other.

SOLICITOR-GENERAL:

Well, yes, quite so and where enactments are inconsistent, of course, we know that that's the Court's function to say – not to declare but just to say the law is as we have determined it to be, the dog act prevails or whatever is the right legislative provision.

But at paragraph 91 of our written submissions is the proposition that to talk about a breach such that a remedy must be fashioned when the actor is legislature, is wrong, that there is no breach, and it takes me immediately, of course, sections 3, 4, 5 and 6, that the summary is that because the Bill of Rights Act contemplates in its express words that enactments may justify – sorry, that enactments may limit –

ELIAS CJ:

May be inconsistent.

SOLICITOR-GENERAL:

May limit – they may be inconsistent. It does us no good – and we can't really talk about an enactment breaching a right. Yes, it will be inconsistent with the right and that is what section 4 and the opening line of section 5 subject to section 4. It begins with justified limitations, tells us.

ELIAS CJ:

Can we start with section 3? Because it doesn't put Acts of the legislature on any different footing than Acts of the executive or judicial branches.

SOLICITOR-GENERAL:

Well, section 3 read alone, I accept that it sets out legislative, executive or judicial branches of the Government of New Zealand. The Bill of Rights Act applies to all of that.

GLAZEBROOK J:

So presumably that means that they can only – in fact, consistently with the Bill of Rights pass legislation that they think is justifiable in a free and democratic society if it breaches the Bill of Rights, in the same way that any – if you're looking at the European Convention et cetera that is with the margin of appreciation that's what Parliaments are allowed to do and they're limited by that. Why is the New Zealand Parliament not limited by that? It might not be in breach because it might be right when it thinks that. It mightn't have thought of that, which is the case I think in some of the situations where things have gone through on supplementary order papers and it hasn't actually properly turned its mind to that, which is some of the criticisms of our process where the report is the report at the beginning, not on the amendments as they go through. It will still be in breach of the Bill of Rights, won't it? Because the Bill of Rights doesn't say you can do whatever you like. It says you can only pass legislation and actions consistently with the Bill of Rights.

SOLICITOR-GENERAL:

Well, if section 3 was alone, I might have to accept that point. But taken in its context, it cannot – of section 4 in particular –

ELIAS CJ:

But section 4, if you look at section 4 it's very, very specific. It just says, "No Court can hold it to have been impliedly repealed or in any way invalid or ineffective." That is not excusing breaches of the Bill of Rights Act. So it doesn't say the legislature can ignore –

SOLICITOR-GENERAL:

Yes. Please don't take my submission to be legislature can do what it likes and that's the end.

ELIAS CJ:

No, no. I understand that. But I'm just looking at the context of these provisions.

SOLICITOR-GENERAL:

So if we start at section 3, and as Your Honour the Chief Justice put, the legislature, executive and judicial branches are all in the same provision, Acts that the right complies.

ELIAS CJ:

Conforms.

SOLICITOR-GENERAL:

But it can't be that that elevates the Bill of Rights Act to supreme law which –

ELIAS CJ:

No, because of section 4, because the Courts have to give effect to Acts even if inconsistent. But that doesn't mean there isn't a breach of the Bill of Rights Act, and that being so why shouldn't the Courts have to determine, you know, what the law is saying.

SOLICITOR-GENERAL:

So even if I accept – and with respect, Your Honour, I don't, that it's a breach, I accept that it's an inconsistent enactment but even if we get to the point of –

ELIAS CJ:

Sorry, you're not seeking to justify, you acknowledge that it is inconsistent. Why is that not a breach?

SOLICITOR-GENERAL:

Perhaps I should say that it isn't a breach such that the Court can fashion a remedy.

ELIAS CJ:

Well, I understand that. You say there's no remedy. But you have to be saying that it's a breach.

SOLICITOR-GENERAL:

I don't say that, Your Honour, because the concept of –

ELIAS CJ:

Well, then, perhaps we should determine it, because that's what the litigation asks for a determination on.

SOLICITOR-GENERAL:

The litigation asks for a determination – sorry, not for a determination, for a declaration that one enactment is inconsistent with the Bill of Rights Act. That is a very different matter from saying, "My rights have been breached by the Amendment Act and I want declaratory relief to vindicate that breach." Because section 4 says otherwise. Section 4 says –

GLAZEBROOK J:

Well, what say we say it has been accepted by the Crown that this is inconsistent with the Bill of Rights, therefore it's in breach of the Bill of Rights in absence of a justification which the Crown doesn't seek to put forward and we just say that in the judgment. I mean, I personally can't see the difference

between saying that in the judgment and a formal declaration, but in any sort of effect.

SOLICITOR-GENERAL:

Sorry to ask you a question, Your Honour, but what would the relief have been in your – what would the Court's order have been? That the matter is dismissed?

GLAZEBROOK J:

Well, either they declare it but if you say they can't declare it then they may say, well, the law is that Parliament is in breach of the Bill of Rights because of that and you say you can't declare it, the relief would be but we can't give a declaration to that effect which is all that's sought, so we dismiss the application.

ELIAS CJ:

Well, you might actually give judgment for the applicant because the –

GLAZEBROOK J:

Yes, you might but without making an application. Yes, a judgment for the applicant.

ELIAS CJ:

I don't see how you could simply say judgment for the applicant without saying because of what the law is.

SOLICITOR-GENERAL:

And in my submission it does draw the Court into conflict with section 4, because although – I think it was Your Honour the Chief Justice who was saying it's quite clear in saying you mustn't hold the enactment or any provision of it to be impliedly repealed or revoked or to be in any way invalid or defective. Now, if a Court is to declare to give a formal remedial order that the legislative branch has breached the Bill of Rights Act and yet there is no, nothing changes, nothing happens, the law remains as it was.

ELIAS CJ:

But there may be. There may be consequential relief. There may be – there's nothing – I mean, it's an argument for another day but there's nothing on the face of section 4 to prevent a remedy in damages, for example.

SOLICITOR-GENERAL:

That would – so if we come back to thinking about how this Court – sorry, how the Court in New Zealand developed the remedial public law compensation damages arising out of *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA), where in that context where it was traditionally considered to be relief would be that the evidence so unlawfully gathered would not be allowed to be put, that wasn't sufficient to vindicate the right that had been breached. That comes back to my submission that we cannot and should not talk about it in that way because Parliament isn't in breach of individual rights when it enacts inconsistently. It changes what those rights are.

ELIAS CJ:

Why is section 4, then, so specific in saying not that you can't fashion a remedy but you must apply the inconsistent legislation? And it's only by reason only, isn't it, of – by reason only that the provision – I mean, I've always pondered that and wondered whether that means there's some other basis of invalidity. There's a bit of an incitation – incitement, sorry.

SOLICITOR-GENERAL:

Yes, and that is a case for another day, what by reason only might deliver and what might develop. As Justice Cooke as he was then in *Temese* – you know, we haven't yet seen how section 4 can take us and that's as right now as it was when he said that in 1992.

ELIAS CJ:

Well, I must say that I'm amazed that the Crown wants to ventilate these issues in something where the difference is so slight. You're accepting that in the body of the judgment there can be an indication that this is inconsistent with the Bill

of Rights. You don't seek to justify it. You just say you can't make a formal declaration.

SOLICITOR-GENERAL:

And the reason that the Crown is here is twofold. One is we don't think that that is a small step. I accept that linguistically it is a small matter of difference. As I said earlier, it's something more of a species leap in terms of judicial remedial functions and I have already said this is unprecedented, not just in New Zealand but in the common law world that such a declaration that makes no difference to the law as it is and as it is applied to the citizens would be given by the Courts. But there's a second reason, too, that the Crown comes to this Court because this is a critical part of our constitutional framework, this question about whether the Court has this function and it is a matter, really, that the most senior Court should determine.

O'REGAN J:

And we are being asked to determine it in circumstances where the current policy of the Government is that the Court should have the power and we've been told that.

SOLICITOR-GENERAL:

Yes.

O'REGAN J:

So it's – this case would presumably be the last where the existence or otherwise of the power independently of legislation will ever be in issue.

SOLICITOR-GENERAL:

Well, it might be, Sir, and I mean, of course, you know, never say never in terms of how far Government policy goes in terms of legislation.

O'REGAN J:

Sure, I accept that.

SOLICITOR-GENERAL:

But quite possibly. But the question is not –

O'REGAN J:

But obviously there is no objection to the Court having the power. The only objection seems to be to the source of it.

SOLICITOR-GENERAL:

To the Court taking the power, yes. Because that sets us up in a position where the Court will say by way of a formal order there's an inconsistency and it might be met by no action, absolute inaction. And we come, really, to a rule of law point at that point, that –

O'REGAN J:

Well, that's what happened in *Hansen*, isn't it? The Court indicated – I think in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) the Court used the word "declare" but in *Hansen* it said "indicate". But there was a very clear indication that there was a deafening silence afterwards, wasn't there?

SOLICITOR-GENERAL:

But the difference is that in *Hansen* it was not the order of the Court which in our tradition, rightly so, is recognised and taken note of, can be enforced, there are consequences for not complying with it. I say it's a rule of law matter because it is important that that is how judicial orders work. That they are given, that they have a status, that they must be complied with, which is why we say this shouldn't be something that the Court takes as a power, part of its arsenal of remedies because nothing happens next.

GLAZEBROOK J:

It's not an order that tells anybody to do anything though is it, and declarations traditionally can be – obviously one would expect the Crown to consider carefully whether it complied with the declaration, but it never has had to comply.

SOLICITOR-GENERAL:

The Crown as executive Government has never had to have mechanics to orders to make it comply with a declaration about its lawfulness of action, absolutely right. But as to the legislature, that is a different question, and to come back to His Honour Justice O'Regan's –

ELIAS CJ:

We've had a number of cases, of course, where the decisions of Courts have been overturned by decision of the – you know by Acts of Parliament, so there is a different relationship there. I'm just thinking in terms of public law generally, in the old days when Ministers were thought not to be amenable to injunctions, declaration was the remedy. You say that that's still fine, it's just the application to enact of the legislature that is an extension, yes.

SOLICITOR-GENERAL:

Can I come back to finishing the point that Justice O'Regan had raised?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

The proposed policy if enacted would have the mechanism that traditionally goes with the power to make declarations, in the United Kingdom, in Australia, in the Human Rights Act. The mechanics that properly attend to the parts of Government speaking to each other. So the declaration –

ELIAS CJ:

In your submissions you don't actually expand on that. You do mention that point and I was going to ask you about that. So how, and I haven't looked it up, so how are they channelled? You say if it was legislatively conferred, as it is in those other jurisdictions, there are a lot of –

SOLICITOR-GENERAL:

Yes, mechanics is the –

ELIAS CJ:

Mechanics.

SOLICITOR-GENERAL:

But if we start with the Human Rights Act, which is at tab 5 of the –

ELIAS CJ:

You can just tell us briefly what –

SOLICITOR-GENERAL:

It tends to be that the executive is required to put the matter before the House within a certain time period, and the House is then left free to deal with it as it sees fit. So an obvious sort of carveout of the sovereignty of Parliament, but it requires that step so that the Court's declaration must be put back to the body to whom the Court was speaking, for it to attend to it.

ELIAS CJ:

That doesn't seem to be a huge restriction on the power.

GLAZEBROOK J:

In fact, it seems to be an extension of the power in that it says that the Government must look at it, Parliament must look at it, whereas Parliament is free to ignore indication and judgment in presumably in the same way it can ignore declarations.

SOLICITOR-GENERAL:

Well I come back to my early submission about this is a rule of law matter because the Courts shouldn't be able to give full orders of the Court that are simply ignored. If they are formally given then it can have the mechanism that puts all of the right players in their place. The Court determines the declaration if given the power. The executive is required to put it back in front of Parliament and Parliament can do what it likes. People can see that that is the right way that the branches of our democracy are working in concert and not in conflict with each other.

ELLEN FRANCE J:

Why does that go to jurisdiction though as opposed to simply the nature of the discretion? So it might mean a very, a much less expansive power on the part of the Court. Why does it go to jurisdiction?

SOLICITOR-GENERAL:

That point doesn't go to jurisdiction Your Honour, and the reason I raised it was in response to a question about will the Crown doesn't object to declarations per se because the Government's policy is to promote the legislative change that it's indicated it will, so my point on jurisdiction is not affected by that point.

ELLEN FRANCE J:

But I understood that part of your point about jurisdiction was the rule of law argument. That is it's not right that the Court exercises, makes a formal order and that can simply be ignored, and I'm just querying whether that does, in fact, go to jurisdiction or power as opposed to questions of when the power should be exercised.

SOLICITOR-GENERAL:

Yes, which I accept is an exercise of the jurisdiction.

WILLIAM YOUNG J:

If you see the Court as having coercive powers when it makes orders which have to be complied with, and with possible exceptions in relation to Crown susceptibility to injunctions et cetera, elicit a different sort of declaration.

SOLICITOR-GENERAL:

It is utterly a different sort of declaration, one that hitherto has been not recognised as part of a judicial function.

ELIAS CJ:

But section 4 provides for it. Section 4 makes it clear that you can't have the expectation that it's going to be complied with if it's contrary to legislation.

SOLICITOR-GENERAL:

Well, respectfully, that relies on a determination and maybe Your Honours are at that point. That the Court does have a free-formed power to take non-adjudicative function, absent –

ELIAS CJ:

Well I don't accept it's non-adjudicative if it's saying what law is. You've accepted in the *Quilter* situation, or in this situation until the Crown decided how it was going to respond, there might have been an issue as to interpretation application of the other statute, or indeed as to application of the Bill of Rights guarantee, particularly in cases where they're qualified rights.

SOLICITOR-GENERAL:

Mmm.

ELIAS CJ:

So I'm not, I'm indicating that I'm not accepting the initial point that you're making, that this is not an adjudicative function.

SOLICITOR-GENERAL:

To take your point about section 4, if the Court has the adjudicative – if this is an adjudicative function the Crown's appeal is wrong on this point. Section 4 doesn't grant the power, we would say. It doesn't say, it doesn't exist either if it does exist. But section 4 in itself the Crown is right, and there is no judicial function like this, then section 4 does nothing to change that, that's our submission. It does nothing to change that because we are on that point about rights and breaches and remedial action by the Court. The reality is that some of these rights in the Bill of Rights Act, guaranteed as they are, are part of the social order which needs to accommodate the rights and legitimate interests of others and of society. Justice McGrath said as much in *Hansen*. So when we see Parliament enacting legislation that does trench on those rights, we are, I would say, in something of a grey area, well very grey, as between the judiciary and the legislature. Because those questions, those difficult questions, not about how should it be interpreted, not about whether the Marriage Act allowed

same sex couples to marry, but whether a plain and explicit trenching on a right by the legislature should then be subject to a formal Court order otherwise. We say not, we say that is well beyond the judicial function, and it is Parliament we know from cases like *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) and Lord Hoffmann's clear indication that where Courts trench on rights and privileges, sorry where Parliament trenches on rights and privileges, they need to do so explicitly and clearly and they suffer the consequence at the ballot box in summarising badly doubtless Lord Hoffmann's comment, but that is where the determination of this question should go. Those hard cases invariably, or those hard matters, invariably get dealt with by the legislature.

ELIAS CJ:

I'm not so bothered about the section 5, because I still have substantial reservations about the *Hansen* process, but it's the inconsistency with the right that bothers me. The inability for the Court to say that it's inconsistent because it may be a very useful step to take for the reasons we've discussed may lead on to other things. It may assist in terms of where the litigant goes then, and I don't see – given section 4 – that that is judicial overreaching because the Courts have to be cognisant of the fact that Parliament does have the final say. So it's not necessarily criticism of what Parliament has done at all, particularly if you don't go on to the section 5 matter. Although I do find it odd that we have been invited in the past to consider justification by the Crown. Sorry, that was in parenthesis but what's the impediment to the determination? Because otherwise you could have – and there's the whole thing about getting some – because these are matters of status for the – particularly for the prisoners – getting some agreed point of departure for further consideration.

SOLICITOR-GENERAL:

Yes, I was going to come to that point because in fact Your Honour raised it earlier about getting data for the future, I think was how Your Honour put it.

ELIAS CJ:

Well, having data, yes.

SOLICITOR-GENERAL:

Yes, that sort of concept about that it's a useful matter.

ELIAS CJ:

Otherwise the Crown will come back and argue in subsequent cases, "Well, that may have been what the Solicitor-General argued then but we actually want to say it's not a breach."

SOLICITOR-GENERAL:

Well, this Solicitor-General continues to argue that it's not a breach. I just want to be clear about that, accepting it's an inconsistency.

ELIAS CJ:

I'm really confused about this position. But carry on.

SOLICITOR-GENERAL:

Your Honour, to come to that point about the future indications, and I was just saying that these hard matters are properly left to Parliament and the accountability to the people at the ballot box, because in a future provision about prisoner voting might well be different. When the Bill of Rights Act was enacted there was a complete ban on prison voting, and the history of prison voting takes place that originally all sentenced prisoners were disqualified from voting. Then in 1975 all imprisoned people could vote. Then the blanket disenfranchisement went back on in 1977 and it was in that context that the Bill of Rights Act was enacted. In 1993 we went to three years and we're back to a blanket ban. These matters are *par excellence* for Parliament to determine and to suffer the consequences, and I really risk repeating myself that it actually is – I think it is bad for our democratic system of Government for the Court to formally take a power that we say it doesn't have to criticise. I mean, the Court of Appeal was quite open about saying this gives –

ELIAS CJ:

There may not be any criticism at all.

SOLICITOR-GENERAL:

Well, criticism is perhaps the wrong word, but the Court of Appeal was quite clear that one of the reasons that it thought that it had – that the power existed was to give people something of a – it didn't use the word “leg-up” but give people something of a head start and it’s in their approach to the legislature.

ELIAS CJ:

Well, that’s the dialogue sort of notion, I suppose.

GLAZEBROOK J:

But also how – you say it’s for Parliament but does Parliament determine for itself whether it’s in breach without any assistance from the Court. I mean, it becomes slightly odd that you’ve got an Act that actually says you can’t do anything inconsistent with the Bill of Rights and the Courts have the power to say whether it’s consistent or inconsistent for everybody but Parliament and Parliament itself decides whether it’s in breach. I mean, Parliament obviously can legislate in breach and in fact it can certainly do so if it’s justifiable in a free and democratic society.

SOLICITOR-GENERAL:

Well, with respect, Your Honour, I wouldn't put it to say that Parliament is legislating in breach, but Parliament’s assessment of the limitations that are justified is an assessment.

GLAZEBROOK J:

Oh, absolutely, I’m not suggesting – because it can certainly do that because it can say, well, yes, it would be in breach absent the justification. But I think what’s been put to you by the Chief Justice is why at the first stage is it not helpful for the Courts to be able to say it is in breach?

SOLICITOR-GENERAL:

As I say because that’s the Court’s assessment. I said earlier –

GLAZEBROOK J:

It can give an indication, you say, that it's in breach so it can say –

SOLICITOR-GENERAL:

In dealing with a justiciable matter –

GLAZEBROOK J:

Well so why is that not helpful to Parliament?

SOLICITOR-GENERAL:

My case is that these declarations are not helpful. That is not the case and in fact it can't be in light of the Attorney-General Minster of Justice's pre-statement that's before the Court. The point is that the Court doesn't have the power.

WILLIAM YOUNG J:

Can I just ask you, say the House of Representatives debate showed that the majority that supported the Bill were of the view that contrary to the Attorney-General's opinion it was a law that was consistent with a free and democratic society. Would it be difficult for the Court to come to a different view without impeaching the proceedings or conclusions of the House of Representatives? This is sort of alluded to in the Court of Appeal decision but it's not fully engaged with.

ELIAS CJ:

Well it's, I mean are we really going to get into section 9. Is that what you want?

WILLIAM YOUNG J:

No, I'm just wondering –

GLAZEBROOK J:

But in the course of an interpretive debate you might have to. Whether even if you had the power to make a declaration you would do so in those circumstances I would suggest. I can't conceive of a situation unless the majority thought that torturing every prisoner in prison was actually something

that was consistent with the Bill of Rights and justifiable in a free and democratic society, I'm just putting an absolutely extreme example.

WILLIAM YOUNG J:

This is an issue upon which people have had different views over the decades, and may well be, and I suspect from some of the footnotes this is a case, that some of those who voted for the amendment did think it was consistent with a free and democratic society.

SOLICITOR-GENERAL:

We know that Parliament was alerted to, at least, the Attorney-General's view of the inconsistency, and it voted nevertheless. I take Your Honour's point though, that there is a potential for Courts to come into conflict or to breach Parliamentary privilege, or at least to come up against a point of privilege, Parliamentary privilege that is, if it was to mark Parliament's exam paper as to how well it had done in the –

ELIAS CJ:

Well it really does depend on what the meaning of section 9 of the Bill of Rights, the original Bill of Rights Act, means. I really query the, I was going to say sanity of counsel, I'll keep that in, of trying to make up the constitution on the hoof here. I mean these are important and deep matters. Thankfully not much agitated in the Court's to date, but you're taking a pretty absolutist stance here and, you know, so that it's a question of the difference between the inherent jurisdiction to say what the law is, and it's okay if it's conferred by Parliament and can be taken away by Parliament. Those are rule of law issues that the Court has to be very concerned about in the constitutional balances.

SOLICITOR-GENERAL:

Might I just address Your Honour's point, that we do make up the constitution of this country not on the hoof, I hasten to say, though in a very thoughtful, that we do make up the constitution of this country which is why it is important that this Court determines this issue, because the Crown does say it is a critical part

of our constitutional fabric, where does the judicial function end. We're right at that point with this case.

ELIAS CJ:

One would have thought, and this is why I sort of separate section 5 out from whether there's been a breach, one would have thought that it is quite important for those who have the carriage of making these democratic decisions, to understand that they are, that there is an authoritative determination that they are entrenching on rights, and that they therefore have to be of the view that it's a limitation that's justifiable in a free and democratic society. I, for my part, have no problem about Parliament being the correct place to make those assessments but one would have thought that whether it's in breach of the rights, is a question of law, and is something on which the opinion of the Courts is not only valid but actually helpful.

SOLICITOR-GENERAL:

I accept that it is a question of law as to whether something within the meaning of enactment that is come to by the Courts is inconsistent with the Bill of Rights Act, like it was in *Quilter*, is the best sort of comparative example to what we have here. I'm bound to say, and possibly I'm afraid to repeat, that in this case the plaintiffs themselves said, this is inconsistent. It cannot be justified. We just want a declaration. They are using a method that is used where Courts have been given the power with the mechanism to report back.

ELIAS CJ:

Well they're also using a mechanism that has been part of the judicial function of the common law and also under the Declaratory Judgements Act 1908 we have a cultural acceptance of a function of the Courts in declaring what the law is.

SOLICITOR-GENERAL:

Yes, and Your Honour is on the Crown's point there, because the declaration of what the law is, is not what was given in this case. It was a declaration perhaps of what the law should be, no it wasn't. A declaration that the law is

inconsistent with the Bill of Rights Act. It wasn't a declaration as to what the law is brought up through an adjudicative function which is what the Courts do.

ELIAS CJ:

Well if it was a – if there had been a declaration that the law is inconsistent with, I can't even remember what section we're talking about here, section 12 is it?

SOLICITOR-GENERAL:

It was 80(1)(d) of the Electoral Act.

UNKNOWN MALE SPEAKER:

12(a).

SOLICITOR-GENERAL:

I beg your pardon, the Bill of Rights Act.

ELIAS CJ:

No sorry, it's section 12, but the Electoral Act provisions, and I think they're probably both provisions, are inconsistent with section 12. Does the Crown have a problem with that?

SOLICITOR-GENERAL:

Sorry, Your Honour, I didn't – does the Crown have a problem with what?

ELIAS CJ:

Well if the declaration was that the Electoral Act provisions are inconsistent with section 12 of the New Zealand Bill of Rights Act.

ELLEN FRANCE J:

That is the form of the order that –

SOLICITOR-GENERAL:

That is what, that was what the declaration is.

ELIAS CJ:

Or it was that form.

SOLICITOR-GENERAL:

Sorry, I thought I was missing something else Your Honour but that is –

ELIAS CJ:

Well I thought that that you said –

GLAZEBROOK J:

An indication that it's inconsistent in the body of the judgment, in the context of an interpretative dispute is fine, but it can't be –

ELIAS CJ:

No, I understand that. I thought that your point was that there was a declaration that it was inconsistent with the Bill of Rights Act, which would entail perhaps consideration of section 5 in that. I'm asking, if the declaration was that the legislation was inconsistent with section 12, is there a problem with that?

SOLICITOR-GENERAL:

Can we turn up the declaration as given?

ELIAS CJ:

I'm just trying to find out whether your problem is really with section 5 or whether it's with interpreting the Bill of Rights Act.

SOLICITOR-GENERAL:

Can we turn up the declaration which is in the case at tab 8?

ELIAS CJ:

Is this in the judgment?

SOLICITOR-GENERAL:

In Justice Heath's judgment, yes, at page 124 of the case.

GLAZEBROOK J:

It cannot be justified so it is the two-pronged –

SOLICITOR-GENERAL:

Inconsistent and it cannot be –

GLAZEBROOK J:

– but in fact that wasn't, the Crown didn't think to justify it, I suppose, so it becomes a slightly, it's not a case where there are, a *Hansen* case, for instance, where there might be very legitimate differences between the, between people, different from the margin of appreciation, but legitimate difference of opinion as to justification.

SOLICITOR-GENERAL:

Yes. So it wasn't a matter that had come before the Courts saying please adjudicate for us on the meaning, and we say, and one party says we say that the rights consistent meaning –

ELIAS CJ:

Well that's as it turned out. That's as it turned out, but there was a claim that had to be made in order to constitute the proceedings. You could have denied and there could have been issue joined on whether it was inconsistent with section 12, but as it turned out you didn't, and you didn't seek to justify it. What I'm just really trying to feel for though is are you opposed both to the first part of the declaration and the second part under section 5, or is it both that you say can't be done?

SOLICITOR-GENERAL:

Well the way that it's worded, separating out inconsistency from justification as it does – sorry, I'll answer your first question. We object to it in its full form, but really all it is, is a declaration of inconsistency because if it could have been justified in a different case, if there was a justification, it wouldn't be inconsistent with the Bill of Rights Act. So the –

ELIAS CJ:

Well if there was a difference between breach, well, all right, now I understand your argument. Yes. Thank you. Perhaps it might be sensible to take the adjournment now and then you can consider where you're going in the light of the matters that we've covered, probably taking you well out of order, but we may well have covered a lot of your argument.

SOLICITOR-GENERAL:

Thank you Your Honours.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.45 AM

SOLICITOR-GENERAL:

Thank you Your Honours. In the break I've gone through some of the issues that I would like to raise further. I don't anticipate this taking terribly much longer. Certainly I anticipate getting to probably lunchtime but maybe before that.

I indicated earlier that I'd like to take Your Honours to a couple of Courts, the House of Lords and the Australian High Court, on the question of judicial power and judicial function, and if I may hand up the House of Lords case that isn't in our case. So *A and others v Secretary of State for the Home Department* [2004] UKHL 56, I understand Mr Taylor has been given a copy. Good. This was a challenge by foreign nationals detained under the Anti-terrorism, Crime and Security Act 2001. They had an appeal right to a specialist tribunal which led to the quashing of the derogation order by which the State said it was able to derogate from Convention rights in order to detain without judicial determination these foreign nationals. But what's interesting for our purposes is the express commentary from at least two of the Lords, or in fact three, that the power to declare the Anti-terrorism, Crime and Security Act 2001 inconsistent with the Convention rights, was not a power they would have had other than having had it conferred by the Human Rights Act. To that end I'll start with Lord Scott, which is at page 145, paragraph 142. His Honour has the most of the three

points that I want to take Your Honours, the most expansive assessment of this issue. Of course he acknowledges that it hasn't been suggested and it couldn't be that the 2001 Act was ineffective. He says at the bottom of paragraph of 142, the import of a declaration that they have made, in fact it was made and overturned in the Court of Appeal and reinstated by the House of Lords, "The import of such a declaration is political not legal." So he asks, "What is the point of these proceedings and these appeals – "

ELIAS CJ:
Sorry, which paragraph?

SOLICITOR-GENERAL:
Paragraph 143.

ELIAS CJ:
Thank you.

SOLICITOR-GENERAL:
"What is the point," he asks in 143. I won't go through all of what he says there. At 144, "The effect, my Lords, of all this on the lawfulness under domestic law… is nil. A challenge to the lawfulness of their incarceration requires a challenge to be made," under the domestic legislation. "That challenge is not made." It goes on to observe that the European Court of Human Rights is not part of domestic law except to the extent that it has become so under the 1998 Act." That's the Human Rights Act. "It did not entrench the articles... so as to bar Parliament from… enacting legislation inconsistent with those articles." So too here I say. At 144 continuing, Parliament can enact inconsistent legislation.

ELIAS CJ:
So this is making the point, this is an unincorporated, or the Treaty is not incorporation to this extent, but we have, of course, a domestic, two domestic statutes we're looking at.

SOLICITOR-GENERAL:
That's right.

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
But it is the same – well, let me come to the point that I raise all of this for. It is not entirely the same in terms of international and domestic instruments. But at the end of that page, 145, the '98 Act didn't deprive Parliament of its power to legislate inconsistent with the international instrument.

Now, 145 paragraph is the point I want to emphasise. The normal and proper function of Courts is to adjudicate on the rights and liabilities under domestic law of citizens or institutions with legal personality, or to adjudicate on the validity of executive actions or omissions that may affect those rights and liabilities. It is not normally the function of the Court to entertain proceedings, the purpose of which is to obtain a ruling as to whether an Act is compatible with international treaty obligations. It goes on. In being asked, therefore, to perform the function to which I have referred, the Courts are being asked to perform a function, the consequence of which would be political in character rather than legal. A ruling doesn't detract from the validity of the Act.

Now, the final two sentences in that paragraph. "This is not a function that the Courts have sought for themselves. It is a function that has been thrust on the Courts by the 1998 Act, the Human Rights Act which specifically empowers the Court to make declarations of incompatibility." I am raising that in support of the proposition that it is recognised by Courts that do have the power conferred to make such declarations that but for the power conferring it they wouldn't have had the power.

ELIAS CJ:
Well, in the context of applying an international instrument.

SOLICITOR-GENERAL:

With the purpose of declaring an inconsistent domestic statute?

ELIAS CJ:

Making a declaration of inconsistency, yes.

SOLICITOR-GENERAL:

So to similar point at paragraph 90, Lord Hoffman –

ELIAS CJ:

Sorry, can I just ask – I can't remember, the Human Rights Act, has it got 1998 – does it have an equivalent section 3?

SOLICITOR-GENERAL:

Can I come back to you on that? I'm not certain.

ELIAS CJ:

Yes, that's fine. Thank you.

SOLICITOR-GENERAL:

Paragraph 90, Hoffmann, until the '98 Human Rights Act the question of whether the threat of a nation was sufficient to justify a suspension of habeas corpus could not have been the subject of judicial decision. There could be no basis for questioning an Act of Parliament by Court proceedings. Under the '98 Act, the Court still can't say that the Act of Parliament is invalid, but they can declare that it is incompatible with the human rights of persons of this country. In paragraph 42, Lord Bingham –

ELIAS CJ:

Sorry – he doesn't touch on this issue?

SOLICITOR-GENERAL:

On the international instrument versus juris –

ELIAS CJ:

Well, no, he doesn't touch –

SOLICITOR-GENERAL:

He does, Your Honour. He says until the '98 Act, there was no basis for questioning. This claim couldn't have been brought. There's no basis for questioning an Act of Parliament by Court proceedings until under the '98 Act we can't declare an Act of Parliament invalid but the Courts can now declare the incompatibility.

WILLIAM YOUNG J:

The Human Rights Act excluded the Houses of Parliament from the definition of public authority, section 6.

ELIAS CJ:

Thank you. It's quite a point of distinction, then. This is the case where he talks about the Armada and everything, isn't it, and what it means about British values being threatened by – yes. Sorry, Bingham?

SOLICITOR-GENERAL:

So Lord Bingham touches on the point – but he only touches on it – at paragraph 42 criticising the Attorney-General's submissions that there is something antidemocratic about the declaration sought to be made. The line just over the page pointing out that that '98 gives the Court a very specific wholly democratic mandate to make such declarations.

O'REGAN J:

Sorry, what paragraph are you on now?

SOLICITOR-GENERAL:

Paragraph 42.

GLAZEBROOK J:

They're not really dealing with the question of the Act itself or the specific power, because they're saying if there wasn't a domestic Act the Courts couldn't question an Act of Parliament, and I don't think anybody's suggesting otherwise here.

SOLICITOR-GENERAL:

No, they're saying with the power to so declare, otherwise one wouldn't have been able to make such a declaration.

GLAZEBROOK J:

Well, I don't totally read what they say to say that, but they say absent the Act you couldn't do that.

WILLIAM YOUNG J:

But they're referring, I think, to the specific power in the Act to make declarations.

GLAZEBROOK J:

No, it's not totally clear, actually, but …

SOLICITOR-GENERAL:

I had taken them to be referring to the power to make the declaration but absent that provision they wouldn't be able to make it. The point is made much more clearly, in my submission, in *Momcilovic* in the High Court of Australia. That is in the case. One of Your Honours has already indicated that it is.

ELIAS CJ:

No, well, perhaps you should pass it up if you've got it there. Oh, we have got it.

SOLICITOR-GENERAL:

It's at tab 9 of the Crown's authorities.

ELIAS CJ:
Which volume?

SOLICITOR-GENERAL:
The appellant's bundle.

ELIAS CJ:
Trees have died.

SOLICITOR-GENERAL:
In my submission, the Court of Appeal was too swift to dismiss this case as Australian constitutional exceptionalism, and certainly the intricacies and complexities of federation and the Australian Constitution play a role in how this matter was determined and it is – it turns on some peculiarly Australian features. But what was relevant here is the Court's consideration as it needed to do in order to determine the federal and constitutional question whether the legislative conferral of declarations of inconsistency function on the state Court of Victoria was a judicial function. And the reason they had to think about that was because only a judicial function can – because judicial functions can be lawfully conferred on state Courts in some circumstances.

Momcilovic was a case much like *Hansen*, a reverse onus provision where Ms Momcilovic was convicted with a jury instruction that because of the quantity of drug that had been found in her flat there was a prima facie basis that it was in her possession for the purpose of convicting her of the crime.

ELIAS CJ:
In Australia the protection, I think, as Professor Taggart once said, protection of strong judicial function which includes, of course, striking down legislation is maintained by a very strict separation in terms of functions.

SOLICITOR-GENERAL:
In the constitution, yes. That's right.

ELIAS CJ:

And he's questioned, really, whether it's been quite worth the candle in terms – yes. I mean, it works if you've got a judicial review of legislation, of course, because in the end that determines it.

SOLICITOR-GENERAL:

As it turned out, Ms Momcilovic won her appeal on a wholly new and non-charter basis that hadn't been considered in the Courts below. Actually, the reverse onus provision which caused all the controversy didn't actually apply to the offence that she was charged with.

And so the assumption of the amount of the quantity of drugs found in her flat was actually not relevant, so it's important to us for the point that each of the Judges consider what is the concept and the scope of judicial power and non-judicial power and the quirk – that's probably the wrong word for it – of the federal system meant that the state Court gets conferred with Federal Court status because of the prosecution Ms Momcilovic was in a resident of another state when she came before the Victorian state Court, which meant that they were exercising a federal jurisdiction function.

WILLIAM YOUNG J:

Was that because she'd been extradited from Queensland?

SOLICITOR-GENERAL:

She had been extradited, yes.

WILLIAM YOUNG J:

And that was all?

O'REGAN J:

She was a resident of another State.

SOLICITOR-GENERAL:
She was in another State while the Court was considering this crime, so they had to exercise Chapter 3 Court functions.

WILLIAM YOUNG J:
Okay.

SOLICITOR-GENERAL:
But there are limits that, again through constitutional quirk, or through the constitution, there are limits that State Parliaments can confer on State Courts and State legislation can be invalid if it improperly breaches this provision that prohibits the imposition of a judicial function onto a Federal Court through State legislation. So the question was entirely relevant to ours today, would the Court say, or certain members of the Court, and I'll point Your Honours out, or you might, the written submissions will have in a footnote the paragraphs of which each Judge addresses the question, that the power under the Victorian State legislation, section 36, which enabled the Court to make determinations of inconsistency, was not judicial in nature. The reasoning is that it has no impact on the proceeding, and misses the key element of judicial power being to adjudicate matters.

I will turn up Justice French, the Chief Justice's comment on this point, which is at paragraphs 80 – sorry, it's 89.

ELIAS CJ:
He was, I think, Bell agreed with him, didn't she?

SOLICITOR-GENERAL:
On this point all seven members of the Court agreed that the exercise of the power was not judicial in nature. So at paragraph 89 –

ELIAS CJ:
I mean just in terms, I think she joined his reasoning.

SOLICITOR-GENERAL:

Yes indeed. So paragraph 89, "Despite its form and its connection to the proceedings before the Supreme Court… a declaration of inconsistent interpretation… does not involve the exercise of a judicial function. At the point at which such a declaration is made the Court will have decided all matters relevant to the disposition of the proceedings. The power conferred by s 36 plays no part in that process. The declaration sets down no guidance for the disposition of future cases… It has no legal effect upon the validity of the statutory provision.. It has statutory consequences of a procedural character." Not so here but that comes back to my discussion with Justice O'Regan about the mechanics that usually attach to such provisions. "Those statutory consequences are relevant to the Attorney-General." Some of that's different from what we're talking about there because they do have a provision with the mechanical parts.

He goes on at 90, "The declaration of inconsistent interpretation cannot be described as incidental to judicial power for essentially the same reasons that it cannot be described as an exercise of judicial power." And the other Judges all, in similar fashion, make that same point.

ELIAS CJ:

There's no indication that a declaration of breach of the right would be beyond the jurisdiction of Court. It's the statutorily conferred declaration of incompatibility that the Court strikes down?

SOLICITOR-GENERAL:

Well in fact in that, yes, because in that case the controversy before the Court was indeed to ask and answer the question about whether the provision that meant that a certain quantity assumed a certain point, they had to determine whether that was consistent. So there was a controversy before them, but they also used their declaration of power. And the question for them was about the declaration power only, not about how the case was resolved.

ELIAS CJ:

No, but what the Court is doing is it strikes down this power to make a declaration, doesn't it, as inconsistent with the constitution.

SOLICITOR-GENERAL:

Well it considers whether that is the case, whether the section of the Act is inconsistent in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 terms.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And in relation to that four of the Judges said it wasn't invalid under *Kable*, so it wasn't struck down, but they certainly did consider whether it should have been.

ELIAS CJ:

Yes, thank you. That's right, I'd forgotten.

WILLIAM YOUNG J:

Some thought it was an incident incidental to –

SOLICITOR-GENERAL:

Two of the Judges thought that the power was incidental.

ELIAS CJ:

That was Crennan and Kiefel.

SOLICITOR-GENERAL:

But I did agree it wasn't, so whether it was part of the function or incidental to the function. And while one does have to make one's way through elements of the Australian constitutional framework being so utterly different from our own, my submission is that this is a useful indication – sorry, a useful case for us to show why that Court thinks, even in the exercise of that function, it's non-judicial

for reasons, as I've gone to and I might go back to them, but each of the Judges come to that same view about it doesn't do anything to the matter before us, it's not relevant to the issue so it doesn't determine the issue. We determine the issue using our judicial functions and then we have this extra function given to us by statute. That is what I wanted to point out to Your Honours on those two cases.

GLAZEBROOK J:
Are there any other particular passages you wanted to draw our attention to?

SOLICITOR-GENERAL:
The written submission, and it's in those –

GLAZEBROOK J:
It's all right, it's in there, that's fine.

SOLICITOR-GENERAL:
It does footnote the particular references. Do you want me to take you to them?

GLAZEBROOK J:
No, I just wondered if there was anything specific other than what the Chief Justice said that you wanted to take us to.

SOLICITOR-GENERAL:
Well I do draw to your attention each of the Judges –

GLAZEBROOK J:
No, I understand that, yes.

SOLICITOR-GENERAL:
Yes, okay. I don't need to take you there now. So that is that point. The next point just to cover off is that Your Honour the Chief Justice asked is there any other statute that has a section 3 type provision and we still don't think so but the Electoral Act itself binds Parliament to an extent, of course, it has the entrenched provisions when it quite clearly is the way in which the Parliament

says, Parliament you must not do this sort of enactment, manner and form type provision there. That must be very different from what section 3. Section 3, when it talks –

ELIAS CJ:
Sorry, I haven't been thinking about the entrenched provisions, but this is not one of the entrenched provisions, is it?

WILLIAM YOUNG J:
Arguably it was but there was a debate about that.

ELIAS CJ:
Oh is there?

O'REGAN J:
That's the next case.

GLAZEBROOK J:
Yes, that's the next case.

SOLICITOR-GENERAL:
Your Honours will be soon asked to determine that question.

ELIAS CJ:
Oh that's the next case?

GLAZEBROOK J:
Yes.

ELIAS CJ:
I haven't read it yet.

SOLICITOR-GENERAL:
That question which comes before you at the end of this month is exactly that. Whether we are on an entrenched provision. But I raise it as an example of

how Parliament prevents itself from making certain types of legislation, or at least without reaching certain, in this case, threshold of majority. But it's very different, in my submission, to section 3 because section 3 –

ELIAS CJ:

So are you conceding a manner and form restriction would be effectively enforced by New Zealand Court Madam Solicitor, because that remains an open question, I would have thought.

SOLICITOR-GENERAL:

If the Court, sorry, if Parliament does not meet legal requirements for enacting a statute, that is a matter for the Court to determine.

ELIAS CJ:

Well, it's a big question. I mean I don't think –

SOLICITOR-GENERAL:

Well I mean it will depend on all manner of things, but as a proposition if there are legal barriers to Parliament enacting legislation, and they enact it regardless of those legal barriers, the Court should determine that question.

ELIAS CJ:

And section 3, you say, is not such a barrier?

SOLICITOR-GENERAL:

Well section 3, in my submission, cannot be said to say that Parliament cannot legislate inconsistent with the Bill of Rights Act. It certainly urges Parliament to consider what it's doing. It also speaks to other branches of the legislature's function other than legislating alone. So, for example, one might be able to say, or would be able to say, that in a Parliamentary inquiry, so Parliamentary, exercise of Parliamentary function to inquire into a question, you would expect that Parliament would attend to matters of natural justice and – well, that's a good example, natural justice. But the question of breach of those –

GLAZEBROOK J:

I doubt that Parliament would be very keen on the Courts interfering in a Parliamentary inquiry on that basis.

WILLIAM YOUNG J:

Well, that might involve section 9 of the 1688, 1689…

SOLICITOR-GENERAL:

Exactly, exactly it does.

GLAZEBROOK J:

Even those people who weren't particularly concerned about – might actually quibble at that.

SOLICITOR-GENERAL:

I was just going to come to the point to say that while that is the indication to the Court to Parliament from section 3, an asserted breach of, say, natural justice in my example, wouldn't come to the Court, it wouldn't, the Court –

GLAZEBROOK J:

That's certainly what I would have thought.

SOLICITOR-GENERAL:

Yes. So that's not to say that section 3 is meaningless in relation to the legislature. So it can't – my main submission is that it can't be that section 3 prohibits valid legislation where it limits rights, even in a way where a Court cannot find a justification for that, because section 4 tells us so.

I'd like to address just briefly Justice O'Regan's question about is this our last, will this be our last case. There's certainly a couple of matters still in the pipeline coming, may come to you, don't know, that might raise this question again. But also, I'm bound to say, we don't know what the ultimate enactment, if any, looks like, what transitional provisions are in force and so on.

Next can I just address Your Honours on section 92J of the Human Rights Act, and that is in our authorities at tab 5. And this goes to the submission that I was on before the morning tea about the concept of breach and inconsistency, because the enactment there at subsection (1) says, "If in a proceeding before the Tribunal the Tribunal finds an enactment is in breach of Part 1A," the anti-discrimination provisions, "the only remedy is a declaration."

O'REGAN J:
Could you just move a little bit closer to the microphone? Thanks.

SOLICITOR-GENERAL:
So 92J(1), "If the Tribunal finds an enactment is in breach of Part 1A the only remedy is the declaration referred to," you see, the declaration is prescribed, "The only declaration that can be granted is that the enactment is inconsistent with the right to freedom," and so on. So the statute itself makes the distinction.

ELIAS CJ:
The statute, this reads as a restriction?

SOLICITOR-GENERAL:
On the Tribunal?

ELIAS CJ:
Well, yes, as to the manner of a declaration that can be granted.

SOLICITOR-GENERAL:
Yes, it does, it is that. If it finds a breach it can only give that declaration.

ELIAS CJ:
I understand that. But it doesn't – it's not like the legislation considered in *Momcilovic*, it doesn't confer jurisdiction, it simply says that if you're making a declaration – well, that you can only make a declaration as remedy and that if you do it must be in this form.

SOLICITOR-GENERAL:

Must look like this, yes. And the reason for my raising it to your attention is that pulling apart, separating out concepts of breach and inconsistency.

ELIAS CJ:

Well, it's just that it rather does seem to proceed on the assumption that declarations are available.

SOLICITOR-GENERAL:

To the Tribunal?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes. I mean, the Tribunal of course has had to have all of its powers conferred on it.

ELIAS CJ:

Yes. So is there a specific conferral?

SOLICITOR-GENERAL:

This is the power that specifically confer that – sorry, this is the provision that specifically confers that power. So if the Tribunal in a proceeding which raises a discrimination –

ELIAS CJ:

I see.

SOLICITOR-GENERAL:

– finds that it's the enactment…

WILLIAM YOUNG J:

But section 92I sets out all the remedies, which include a declaration the defendant has committed a breach, any other relief the Tribunal thinks fit.

GLAZEBROOK J:

Well, it's a restriction because they have to apply the enactment I suppose is the, so the restriction on remedy, because they can't provide any of the other remedies because the enactment has to be applied. But it's not a – it doesn't say you can't – that you would say that absent section 92J there can't be a formal declaration but all they could have done otherwise was indicate in their decision that while it was discriminatory that was a function of the statute and nothing could be done about it, and any of the other remedies are unavailable.

SOLICITOR-GENERAL:

Sorry, Your Honour, the point of raising it is not to make that point, although that is so, that is so. The point of raising it is to show the distinction that is being drawn between an enactment that is in breach and what the legislation at least says about what that means for the Bill of Rights Act, not that the Bill of Rights Act has been breached but that enactment has been inconsistent with that.

ELIAS CJ:

Well, can you just spell that out, that submission out a little more?

SOLICITOR-GENERAL:

Before the break, we were engaged variously on the question of is there a breach of the Bill of Rights Act here and my submission is that that sort of language – the Crown doesn't take that sort of language as what has happened when in a properly-brought matter before the Court for adjudication it is determined or it is said that an enactment is inconsistent. That is not a breach, in my submission, such that the Court might find it needs to fashion a remedy for the breach.

ELIAS CJ:

But couldn't it equally be described as a breach?

SOLICITOR-GENERAL:

Well, in my submission that isn't right. It isn't the right language or the right way to think about what Parliament does when it says this is what we say the law is.

Because it has trenched on the right, it changes the nature of the right. It doesn't breach it.

ELIAS CJ:

Well, has it observed its obligation under section 3? I mean, you can just play with these words. What we're grasping for is the substance of what is envisaged.

SOLICITOR-GENERAL:

The Crown's submission, what is envisaged in the Crown's submission is that using language of breach is inapt for legislation enactment when it's inconsistent with the Bill of Rights Act.

ELIAS CJ:

Well, I understand that that is your assertion.

SOLICITOR-GENERAL:

It is.

ELIAS CJ:

I'm grasping for what the reasons are. I suppose they're the reasons the constitutional context that you've already addressed us on.

SOLICITOR-GENERAL:

Yes, and the only reason to draw this to your attention is to point out that in this enactment there's a distinction drawn, too, between a breach of Part 1A, the discriminatory provisions, and what the remedy is. It is not a declaration of breach. It's a declaration of inconsistency. It's not a finding of breach.

ELLEN FRANCE J:

Is that right in terms of what 92I says?

SOLICITOR-GENERAL:

I don't have it in front of me, Your Honour.

ELLEN FRANCE J:

Well, if you – sorry, I've got –

ELIAS CJ:

92I. It's not in this extract.

WILLIAM YOUNG J:

It sets out a series of remedies that can be granted.

ELLEN FRANCE J:

And the 92I(3)(a) refers to a declaration that the defendant has committed a breach of Part 1A. Now, I know that's talking about Part 1A, but Part 1A in turn then applies via section 20J to the Acts of the legislature et cetera i.e. the replica of section 3, the Bill of Rights. So my query is just how much of a distinction can you draw then between the concept of breach and inconsistency? I mean, I understand 92I is subject to 92J, but nonetheless isn't the language of breach and inconsistency being used interchangeably then?

SOLICITOR-GENERAL:

Well, I had – my submission is that it's not, that it's drawing out a separation. Because once the tribunal has gone through the process of determining whether or not a plaintiff or applicant has been discriminated against, if they butt up against the breach being because of an enactment, really my point is the one that I've already said: that this legislation says, well, that's not a breach by the legislature. That's an inconsistency.

ELIAS CJ:

If you act inconsistently with an obligation, why is that not a breach of the obligation?

SOLICITOR-GENERAL:

I suppose my submission has to be that in common parlance you might not make a distinction, but where we are looking as we are here –

ELIAS CJ:

This is a technical term, you say.

SOLICITOR-GENERAL:

In that when the Courts find a breach –

ELIAS CJ:

There should be a remedy.

SOLICITOR-GENERAL:

Yes, Your Honour. That is the point that the Crown says we are not at that point because we can't say that the statute is in breach for which remedy might be fashioned.

GLAZEBROOK J:

Well, it says that the enactment is in breach of Part 1A in 92J(1).

SOLICITOR-GENERAL:

Yes. That's right. It does.

GLAZEBROOK J:

Well, so if it finds that it's in breach of it, the only remedy is –

O'REGAN J:

That's a breach of the Human Rights Act, isn't it, rather than the Bill of Rights?

SOLICITOR-GENERAL:

It's in the Human Rights Act.

GLAZEBROOK J:

There seems – the issue that was being put is that an enactment can't be in breach of it, but 92I says it's in breach of it.

SOLICITOR-GENERAL:

92I says that if there is an enactment in breach of Part 1A, so the remedy – so it deals with the question of if there is a breach there must be a remedy. It says what the remedy is, a declaration of inconsistency.

GLAZEBROOK J:

No, I understand that but I thought you were saying that the Parliament can't be in breach of it, that because of the inconsistency – well, maybe I misunderstood your point. I thought you said there was something technical about inconsistency that didn't mean breach, but that seems a bit odd given 92J(1) says breach.

SOLICITOR-GENERAL:

No, I'm saying that in the context of the Bill of Rights Act, which is what we are addressing and perhaps I've been distracting to point to 92J, but in the Bill of Rights Act where Parliament enacts inconsistently it changes the law as it applies to the person for whom otherwise would have a protected right. It doesn't breach it. It's the wrong language, in my submission.

GLAZEBROOK J:

Well, I don't see that this helps you to say it's the wrong language, and I thought that's why you took us to it.

ELIAS CJ:

Well, you're resisting the submission that's been made that this is an indication that Parliament has approved declarations.

SOLICITOR-GENERAL:

And I'm pointing out – unsuccessfully, it appears – the distinction that those subparagraphs make between breach and remedy being an inconsistent declaration, inconsistency declaration.

GLAZEBROOK J:

Well, I thought your real point was it has to be conferred by Parliament. Here it was, and in the Bill of Rights it's not.

SOLICITOR-GENERAL:

Well, that is our main point. But we did get on to, before the adjournment, the question of if there is a breach shouldn't there be a remedy? Isn't that what Courts do? That's what this Court did in *Baigent* and variously throughout history the finding of a breach causes the Court to look for a remedy.

ELIAS CJ:

So the executive and the judiciary may breach the Bill of Rights Act but the legislature can only act inconsistently with it?

SOLICITOR-GENERAL:

When it enacts legislation.

ELIAS CJ:

Yes. It's a very subtle argument.

GLAZEBROOK J:

And doesn't really serve to be borne out by section 92J(1) in its wording.

SOLICITOR-GENERAL:

Yes. I can't take that point any further. That is the point I wished to raise.

GLAZEBROOK J:

But that doesn't detract from the point that you say if you do have a remedy it has to be conferred by Parliament, which is your main point about the Human Rights Act.

SOLICITOR-GENERAL:

Yes. If there is such a remedy to be given, it's to be given by Parliament, yes.

Your Honours, I'm just checking that the written submission is, of course, the full submission from the Crown. I don't intend to go through it all.

Would Your Honours be assisted by – not now but the Crown handing up an explanation of how the other jurisdictions have given the power and the mechanics that follow? Is that a useful thing from the Crown or shall we – or is that not of any use to Your Honours? I know that Justice O'Regan raised it with me and I think I answered it in such a summary way.

O'REGAN J:
Well, I think we know that they all have – one way or another, they require the matter to be put before the House, so they enforce a form of dialogue. The detail probably doesn't matter.

WILLIAM YOUNG J:
So the other is Victoria, arguably, and the UK?

O'REGAN J:
And ACT.

GLAZEBROOK J:
Is that the only point about them that you would make rather than pre-declaration formalities?

SOLICITOR-GENERAL:
Yes, it's just that I had raised it earlier and had not answered the question fully.

GLAZEBROOK J:
Yes.

SOLICITOR-GENERAL:
Your Honours, unless you have any further questions for me, that's the Crown's submission.

ELIAS CJ:

Do you have a chance to consider what the Electoral Act – you know, the section, the Amendment Act, section 6 point? You can perhaps come back to that. It does really principally arise in the standing appeal for Mr Taylor. So that will be fine.

SOLICITOR-GENERAL:

Okay, yes, thank you, Your Honour. May it please the Court.

ELIAS CJ:

Thank you, Madam Solicitor. So then I have assumed that the order as between the respondents and the intervener is that the intervener will go first. Is that convenient? Is that all right, Mr Taylor?

MR TAYLOR:

Yes, Your Honour.

ELIAS CJ:

Thank you, Mr Taylor.

MR BUTLER:

Thank you, Your Honours. If I can have a moment just to organise my materials.

ELIAS CJ:

Yes.

MR BUTLER:

Good afternoon, Your Honours. Now, obviously I've had the benefit of listening to the exchanges that you've had with my learned friend and I'm taking my cue, Your Honour the Chief Justice, in terms of the submissions having been read. So I'm not proposing to take you in detail through the submissions, but there may be aspects that I will just signpost and direct Your Honours to if that's in order.

I would like to, if I could, however, pick up on a number of the themes that have emerged from the discussion this morning. I've tried to order them over the morning adjournment. I hope they make sense. One or two of them – I may switch the order just in light of the way the discussion unfolded after the adjournment. So if Your Honours will just allow me that little indulgence, I would be very grateful.

Could I just say as a first point, because I felt – with great respect to my learned friend Ms Jagose and a number of the Members of the Bench – that there is a little bit of a risk of us talking past each other on one or two of these issues, so I thought I should expose my own language straight away so that Your Honours can pull me up if you don't agree with me on one or two particular points.

So the premise that I'm working off when we are talking in this appeal about a declaration of inconsistency is that in effect it is a declaration that is made after the approach to the interaction between a substantive right in section 5 of the Bill of Rights has been completed. In other words, it's the conclusion – you reach a conclusion saying, look, a right is in play and legislation or an executive act or a judicial act has breached – I will use the language of "a breach", another word is infringe if you're looking for something neutral – has breached that right in a way that is unjustifiable in terms of section 5.

Now, I accept, and this Court has said in a number of cases, that not every right necessarily needs the section 5 analysis to apply. So, for example, this Court indicated in *Cropp v Judicial Committee* [2008] 3 NZLR 774 in a section 21 case, you probably don't need to go to section 5. Academics disagree but I wear my academic hat. I disagree. But at the end of the day, the important thing is in a *Cropp*-type scenario one has come to the conclusion that whether section 5 is needed or not, ultimately what has happened here is not in conformity with, is not consistent with, is in breach of, the New Zealand Bill of Rights Act 1990.

ELIAS CJ:

The order made by Justice Heath then, you'd allied those two would you?

MR BUTLER:

So this, if I was taking out my red pen à la Dr Every-Palmer and slightly red-penning things, wouldn't have used the language "cannot be justified", I think a legal conclusion is "is not justified", that's the legal conclusion that was reached in the case by His Honour, not challenged on appeal by the Crown –

ELIAS CJ:

No, I wasn't referring to felicities of expression, as referring to the fact that he does the two.

MR BUTLER:

Correct, he does the two. And I think, with great respect, His Honour did that just to make it crystal clear that the declaration was a declaration reached after both consideration had been given to the substantive right and the section 5 analysis had been done. Recall, even though my learned friend the Solicitor-General hasn't referred you to the history of the litigation, in fact His Honour Justice Heath was not prepared simply to accept the Crown's concession, right. If you go back to the High Court decision Your Honours will see that he said, "Well, I have heard the concession being made, I wish to form my own view as to the reasonableness or otherwise of the limitations imposed here in the prisoner disenfranchisement rules, and indeed he found an additional one Your Honours will recall, in terms of how work for somebody, if I remember rightly, in terms of being able to be on community – being on home detention or not on home detention: if you're on home detention the rules don't apply, you're not disenfranchised; even if you were eligible for home detention but unfortunately there wasn't an appropriate residence available for you and you're in prison therefore, then you are disenfranchised, and he said, understandably in the Commission's submission, that that's a further unjustifiable limitation on the right in question, because often you don't have a choice as to whether you've got a suitable residence available for you. So I just think that's quite important when we're hearing about justiciable controversies

and everything like that, the Crown, both in the Court below, I didn't appear in the High Court, and in the Court below, and today, has been very quick to say, "Oh, there's nothing to see here because we concede it." That's not actually yes, they did, but it's not actually how the analysis played out in the High Court, I just think that's important to realise.

But where I was starting, Your Honours, was just simply to say I'm not sure that today is necessarily the, that there's a necessity to fully resolve again the section 5 controversy that was visited in *Hansen.* I will be taking Your Honours to aspects of the *Hansen* –

WILLIAM YOUNG J:
But how do we sidestep it? Just say it doesn't matter, we don't worry about section 5?

MR BUTLER:
Well, I think the core of it, Sir is that a conclusion as to inconsistency is reached, whether in respect –

WILLIAM YOUNG J:
Sorry, but it's plainly inconsistent because it imposes limits on what is expressed as being an absolute right for people to vote if they're over 18.

MR BUTLER:
Correct.

WILLIAM YOUNG J:
So there's no meat in that is there?

MR BUTLER:
So there's no meat, except that under our system, as I said, typically one says that where you can justify that limit and you say there's no inconsistency and if there's no inconsistency then relevantly speaking there is no breach of the right.

WILLIAM YOUNG J:

Yes, sorry, but how could we avoid section 5 on this line of reasoning? What would be the point of saying something that's obviously correct, that restrictions on the right to vote are in breach of the right to vote?

MR BUTLER:

I take Your Honour's point. Well, I suppose where I'm coming at it from is, where the Commission's submission is simply this, is that I'm conscious of the fact that there are difference of view really as to the role that section 5 can have in certain instances. My apprehension is that the way in which most Courts and most Judges have tackled the matter post-*Hansen* is to accept that section 5 is absolutely part and parcel of the analysis that must always be applied whenever it is said that any act, executive, legislative or judicial, is said to be in breach of the Bill of Rights and, indeed, in the *Hansen* case itself the judgment is littered with references to prima facie breach – Your Honours recall that's again a colloquialism that we use to talk about, "Well, look, it certainly brings the right into play and seems to interfere with that right. Now let's go on and consider whether in terms of section 5 that prima facie breach, something that looks like a breach, whether that breach is justified or not." So my preference, Sir, is that we do say that section 5 is part and parcel of the conclusion that's reached and part of the declaration of inconsistency. All I'm acknowledging is that there are others who hold the view that you don't need to go to section 5, you can do something like the justificatory work within the substantive right itself.

WILLIAM YOUNG J:

It depends on how the substantive right is expressed doesn't it?

MR BUTLER:

Precisely. And that's all, I just wanted to make sure that – I was just conscious, I had a feeling that we might be talking past each other so I just wanted to expose where I'm coming at it from so if at any stage we are talking past each other at least you'll be able to pull me back, I suppose, to what I've just said in terms of how I'm approaching it.

O'REGAN J:
But I'm not sure it matters that much on the issue of does the Court have power.

MR BUTLER:
Correct, that's what I'm trying to say. So nomenclature I have a feeling is important, but I'm just trying to say I don't think today it's going to affect the outcome. So that was the first clarificatory point I'd wanted to make.

So from the Commission's perspective there's a couple of points that are really quite important to be made right up front. It was heartening to hear – because in the written notes I prepared last night I was going to say that I think, in terms of determining this appeal, there's a couple of critical matters which go to upholding the decision of Justice Heath and the Court of Appeal, and if I can just list those and then I'll come back and discuss each one of them.

So the first matter was section 3. Section 3, Your Honour the Chief Justice, I think you put it in terms, is at the heart of the case, and for its part the Commission agrees. The Bill of Rights is unique, almost – I'll come back to the "almost" in a moment – is unique in the way in which it expresses the way, and the compendious way in which it expresses its intended application. It talks about it applying to acts of the legislative, executive and judicial branches of the Government of New Zealand, and I think it's fairly conceded, it's certainly implicit in what my learned friend the Solicitor had to say, that an enactment is one form of act by the legislative branch of the Government of New Zealand. So on its face the legislation applies to enactments and says of those enactments, "There's a standard to be met, you should not interfere with the rights protected in Part 2. But if you do, you can only do so in a way that can be justified in a free and democratic society," and that injunction applies to all three co-ordinate branches of Government. And I'll come back – I want to make these generic points and I would like, if Your Honours would indulge me, to take you to some of the cases where these points are made, I'd just like to surface them so Your Honours can see how this is put. And some of the cases which I'll be referring to Your Honours have said things like, "Section 5 sets a standard

to measure the legitimacy of Parliament's actions when it is enacting legislation," and that is exactly what the Commission says.

WILLIAM YOUNG J:
So you have no difficulty then with section 9 of the…

MR BUTLER:
No. And I can touch on that, Sir. Could I come back to section…

WILLIAM YOUNG J:
Yes, of course, absolutely.

MR BUTLER:
Yep, at a later point. It's a good point to raise. I'll put it down under explaining the practicalities – section 9 BORA, 1688. So that's the first point I'd wanted to touch on.

The second point I'd wanted to touch on, which got a little bit of an airing but not much, was the significance or otherwise of the absence of a remedies provision in the New Zealand Bill of Rights Act. In the Commission's submission the absence of a remedies clause right from the early days of the New Zealand Bill of Rights Act 1990 has never been regarded as a bar to appropriate effective relief under the New Zealand Bill of Rights Act 1990. In fact, as Your Honours will be aware from cases like *Baigent* and, indeed, *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462, (2011) 9 HRNZ 257, and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 – there are many others – the Courts have seen the absence of a remedies clause, correctly in the Commission's submission, as a parliamentary conferral on the Courts to develop the possibilities of judicial remedy. And in using that language of course I'm using the language set out in Article 2. 3. of the ICCPR. Could we just very briefly look at that provision just while we're here?

So that provision is in my bundle, I've hid them very well, including from myself. Tab 3.

GLAZEBROOK J:
So volume 1?

MR BUTLER:
Volume 1, yes, so the blue volume, page 174, it has on the top of the page. "Each state party to the present covenant undertakes to ensure that any person's rights or freedoms as here and recognised are violated shall have an effective remedy," so that's where that notion of effectiveness that's often referred to in Bill of Rights remedies and cases, that's where that language comes from. But (b) is also important. "To ensure that any person claiming such a remedy shall have his right there to determined."

Now, the reason I want to stop just there on that particular point is that right in (b), to ensure that any person claiming such a remedy shall have his right there too determined is quite critical here. I just want to flag it, and the reason I want to flag it is that my understanding of the Solicitor's case is that if she's right, then it's absolutely appropriate for the Crown to seek to strike out a claim couched in the form in which the claim before this Court comes, and it would be quite appropriate to strike out that claim because all the claim seeks is a declaration of inconsistency.

What I'm saying in terms of Article 2. 3.(b) is that by denying the ability consistent with our constitutional tradition of Parliamentary sovereignty denying the ability for people in the shoes of the respondents to come to the Court and say, "We believe a provision of an enactment that affects us" – so there's one of the constraints you have – "breaches our rights." To deny them that possibility of getting a declaration, an assessment and a declaration to that effect, I say, is not consistent with the terms of Article 2. 3.(b).

O'REGAN J:
What would you say is required in terms of (c) to enforce the remedy if it's a declaration of inconsistency?

MR BUTLER:

So that's where I see the yin and yang, the back and forth, the dialogue, coming in. In my written submissions, I obviously had no clue that we were going to get the announcement that we got just last week. One of the points I had touched on in my written submissions and was going to expand upon orally not knowing that this development was going to come along was to say that the one thing we definitely know about the Bill of Rights is that if you looked only at the statute you wouldn't get a full appreciation for the way in which constitutionally the statute operates. In other words, there's a range of other actors have responded to the way in which it has evolved over time and clipped on, for want of a better term, additional measures, mechanisms, response, checks, whatever you wish to call it, onto it. So for example the section 7 vetting exercise that we've got, all that's required is the Attorney-General notify where in the view of the Attorney-General the Bill breaches – to use my preferred language – breaches the Bill of Rights. There's no requirement to provide any advice out there, put advice out there, if the view is it complies. The practice has evolved to do that. Practice has further evolved so now where there is a section 7 vet – and what I mean by, sorry, section 7 report – what now happens is that Parliament has amended the standing orders to make sure that that stands referred to the relevant select committee to be done.

Your Honours will also be familiar with the fact that now that in order to support the way in which the Bill of Rights operates, the Cabinet Manual has been amended – extensively amended – to make sure that there is due consideration to the Bill of Rights.

So what I say is when there's a look to ensure that the competent authorities shall enforce such a remedy when granted, the obligation there is an obligation that will fall upon not only the Judges but also other state institutions to make sure that having regard to whatever the remedy is the effect can be given to it.

GLAZEBROOK J:

What in that analysis is the difference between what the Crown accepts – leaving aside their only remedy issue, what's the difference between an

indication that they accept can be made in the course of a proceeding and a formal declaration?

MR BUTLER:
Look, there's actually a number in my submission, Your Honour. So the first one goes to the very point I made just a few minutes ago which is the striking out point. If the Solicitor is correct –

GLAZEBROOK J:
No, I understand in terms of the – if the only remedy is sought is that.

MR BUTLER:
Because we don't allow people to go to Court for amusement. You've got to be seeking the relief, some relief from the Court. So my point is if an indication – as has been pressed upon you very strongly by the Solicitor, whatever it is – it is not relief. It is not a remedy.

O'REGAN J:
But it's not unusual in other Bills of Rights where there is an explicit power to say that it has to arise in the course of a proceeding where there is another issue, is it?

MR BUTLER:
No. I don't accept that, for a start, because it's absolutely possible, for example, under the Human Rights Act UK for you to say, "Hey, look, there's no interpretation issue. What I want is a declaration of incompatibility, as they call it." You could absolutely do that.

WILLIAM YOUNG J:
Are there cases where that's happened?

MR BUTLER:
Yes. I can get you a couple of those, Sir. As you know, of course, in the UK after the indication from the House of Lords as then was and some of the earlier

cases what the now Supreme Court and the lower Courts strive to do, we say, in New Zealand, illegitimately, is to use section 3 of the UK Human Rights Act, their equivalent to our section 6, they strive to use that to avoid any incompatibility. But there have been a number, Sir.

GLAZEBROOK J:
They strive a bit further than we would, perhaps.

MR BUTLER:
Than we would. Sorry, when I say illegitimately obviously it's not for the New Zealand Courts to comment on how the UK Courts approach it. What I was really getting at was that we would not go as far as the UK Courts have gone in terms of –

GLAZEBROOK J:
But it probably does mean that there usually is a point of interpretation given that they might strive in a way that we would not here.

MR BUTLER:
The ingenuity is extraordinary.

O'REGAN J:
I think the Victorian Charter requires it, doesn't it? Doesn't it say it has to arise in a case where the Court is engaged in some sort of endeavour rather than …

MR BUTLER:
Not in terms, Sir, but typically – counsel has often been involved in preparation of these proceedings and there has been reference to *Quilter* as an example. Another case you might say was the Lecretia Seales case where, you know, I became quite convinced by the interpretation arguments that were being advanced as to how it was that the Crimes Act 1961 actually should be interpreted in order to accommodate the Bill of Rights rights, whereas lots of people were telling me, "You're wasting your time because there's no chance of those provisions being interpreted in that way." What actually the claimant

was looking for in that case, really, was a view as to the justifiability of what most of the commentators said was the correct interpretation of the Crimes Act i.e. there is no room for it. So there's always going to be some possibility, I suppose, of coming up with some form of argument. It's just that in this case the respondents here didn't want to trouble the Court below with what would be a very strained interpretation – I'm not quite sure what argument one would run – in order to flick the switch to say, yes, we're in through the gateway. When you step back, doesn't that just feel very artificial? Then more to the point, when you look at how it works under the parallel jurisdiction, under our Human Rights Act 1993, there is no need for there to be an interpretation issue before somebody can seek a declaration of inconsistency under Part 1A.

So a point that I did want to make was about the nature of a declaration as a remedy. I don't really understand it to be contested. Certainly in the Court below there was quite an interchange about status as being a remedy, and you'll see in my written submissions I've referred to textual indications, for example, in the Human Rights Act itself which uses the language of remedy to describe the declaration of inconsistency, and I've also referred Your Honours to some of the English cases where the word "remedy" is used to describe a declaration of incompatibility, and I'm almost sure I referred Your Honours to the Irish High Court decision of *Foy v Attorney General* [2007] IEHC 470 which is the one to do with recognition of transsexual gender identity, where the language of remedy and relief is also used.

It may be something that the Solicitor needs to come back to in reply but I think it's incontestable that a declaration of inconsistency in the form of a formal order from the Court is indeed a remedy. *Foy*, for example, Your Honour the Chief Justice raised the question of cost. There are surely consequential orders that can flow from the making of a formal order in the form of a declaration of inconsistency. That's exactly right, in my submission. So in the *Foy* case, the Irish case which is in the bundle – perhaps I should just make reference to it, Your Honours. I've touched upon it lightly in my written submissions. That will be in volume 2, which is the green – appropriately enough green – oh, yellow. Sorry, not appropriately enough. The yellow bundle. Tab 24. I wasn't able to

get an official copy of this report. I understand it may be reported but I just have not been able to get it so just for explanation, you've got Lydia Foy, a post-op male to female transsexual. You'll see at paragraph 1 that she was born female and so the challenge here was brought to the absence in Irish law of a regime to recognise gender identity. Now, typically you would say you would not expect – sorry, I should say in Ireland there is a piece of legislation called the European Convention of Human Rights Act 2003 which allows, among other things, a declaration of inconsistency to be sought in respect of legislation that is incompatible with the European Convention of Human Rights. Now, typically litigation under that 2003 Act is not required in Ireland because, as Your Honours well know from previous litigation, Ireland has got a supreme law constitution which is typically what you would rely upon if you were a litigant because you want to – a legal remedy to strike the legislation down.

The reason this issue arose in this setting is that the view had been formed that for the purposes of the Irish constitution – details I don't need to bore you with – Irish exceptionalism, I think you'll accept that phrase from me – it was not found to be incompatible with the wording of the Irish constitution and language around family and the traditional family, it was not found to be incompatible for the state to have failed to have legislated to recognise the legal position of post-operative male to female transsexuals.

So the remedy available was to either get an interpretation of some law consistently with it, or to get a declaration of inconsistency. The view that was formed by the High Court is we cannot interpret the legislation consistently with the European Convention jurisprudence, so where are we to go to? We are to go to the declaration of incompatibility and you'll see that dealt with from paragraph 106 onwards, and I apologise, Your Honours, there's no page numbering. So this was the first time, as I understand it, that there was going to be a declaration of incompatibility under the Irish legislation. You'll see at 106 the relevant provision is set out. It's worth emphasising to make my point about remedy in any proceedings the High Court or the Supreme Court, when exercising its jurisdiction, may have in regard to the provisions of on application

and where no other legal remedy is adequate and available make a declaration, et cetera.

Just coming to the point about what's the value of a declaration of incompatibility and consequential orders and so on, which is the point of making reference to this particular case, that's covered at paragraph 110 of the judgment. You can see the position of the state – i.e. the Crown – that would be of no value. While it's correct to say a declaration of incompatibility does not affect the validity continuing operation or enforcement of the existing law, nevertheless it does have consequences and may be of value to an applicant in the first instance, and then there's reference made to the particular mechanism. So Ireland has a mechanism similar to the UK mechanism and the mechanism we've got under our Human Rights Act.

Secondly – and this was a theme picked up on by the Court of Appeal and, indeed, by Justice Heath in the Court below, such a declaration can only issue from a constitutional Court. Now, the Irish High Court is no more a constitutional Court than the New Zealand High Court. It's just a superior Court of record, the Court of first instance. But it has a constitutional function as part of how it performs its role. Such a Court can have a reasonable expectation that the other branches of Government would not ignore the importance or significance of the making of such a declaration. Now, isn't that language, Your Honours, that resonates with what His Honour Justice McGrath had to say, for example, in the *Hansen* case and with which the Court of Appeal – the language used by the Court of Appeal in *Moonen*?

Thirdly, there is a possibility of ex gratia payment. Well, that's going to be, relatively speaking, unique in the Irish situation because, of course, as Your Honours know when you got to Strasbourg even if the interference with your rights has been affected through legislation, domestic legislation, that is no reason, there is no bar to you getting just satisfaction from the Strasbourg Court. So the idea of this is to save people having to go to Strasbourg and see if the Government will make you an ex gratia payment.

And finally, the granting of such a declaration may have implications for the Court's discretion with regard to the costs of proceedings.

So I just wanted to bring that in front of you from a Court that's had to consider the sorts of issues that Your Honours have touched on in terms of the significance or otherwise of a declaration of inconsistency.

I'm conscious of time but there's two points I want to make quickly before lunch and then after lunch we'll look to just finish, round off one or two extra ones, and then take Your Honours if I may to the cases.

The Commission's submission, when you look at the history of the way in which the Courts have approached the issue of remedies under the New Zealand Bill of Rights Act, a number of points emerge. From the very early days when we were looking at, for example, exclusion of evidence, the exclusion of evidence rule, the Court of Appeal recognised that the Bill of Rights was something new. To use the language of Justice Casey in *Baigent's Case*, it is something new in our legal pantheon. The Courts recognised that in order to give effect to its newness, the fact there was something unique and constitutional in nature, that the old ways of doing things, old thinking, could not necessarily govern, and that the Judges might need to be innovative, particularly when it comes to remedies in order to ensure that the Bill of Rights is no mere tinkling symbol, to use the language of Justice Hardie Boys in *Baigent's Case*.

In the Commission's submission, what's being asked of this Court here is not constitutionally objectionable. When you look at the way in which our constitution evolves – and evolve is, in my submission, the correct word to describe the way in which the New Zealand constitution has progressed over time – you've got to look at the bits contributed by range of the different – by range of constitutional actors. Here I say it is relevant for the Court to look at whether or not there has been any Parliamentary approbation of this type of response, this type of remedy from Parliament. That is relevant to deciding whether this is constitutionally objectionable. You heard from the Solicitor-General. She said you're at a constitutional crossroads. I'm not saying

we are. I don't see it that way for the Commission, but if it is a crossroads it's a crossroads that we have seen on the horizon for a very long time. The idea of a declaration of inconsistency has been around for at least 25 years and we have, exactly as one would expect, slowly progressed and inched our way through as people get more and more comfortable with whether in fact this is a massive significant constitutional innovation. I'll come back and talk a little bit more around that.

Just before I break, there was a question asked before – of the Solicitor-General whether there is any other statute that has something like section 3 of the Bill of Rights Act and her answer was no, and I said to you the Bill of Rights Act is relatively unique. But of course there is one other statute that does have something like section 3, and that is the Human Rights Act itself. You look at Part 1A of the Human Rights Act. That part pivots off exactly the same language as is the language in section 3 of the Bill of Rights Act, and I see – and we'll draw after lunch parallels between the way in which the declaration of inconsistency jurisdiction has been conferred under the Human Rights Act and what I say is absolutely legitimate remedially for this Court to do. So I shall stop. It's 1 o'clock, Your Honours.

ELIAS CJ:
Thank you. We'll take the luncheon adjournment now and resume at 2.15.

COURT ADJOURNS **1.01 PM**

COURT RESUMES **2.17 PM**

ELIAS CJ:
Thank you.

MR BUTLER:
Good afternoon, Your Honours. Just apologise in advance – I've got a throat lozenge in my mouth. I'm not chewing gum or anything of that sort. My voice is struggling at the moment.

ELIAS CJ:

Right. Well, cricketers do.

MR BUTLER:

Just before the luncheon adjournment, I had just stopped on a point – I'd finished on a point, really, trying to meet the challenge, I think it was, posed by my learned friend the Solicitor about whether we're at a constitutional crossroads and I'd said that from the Commission's perspective that's not quite how we see it. We see it, if it is a crossroads, it's something that's been on the horizon for a very long time, and I've said it's really something that's evolutionary more than revolutionary, and the point I'm trying to make there, really, is that the declaration of inconsistency which was granted in the High Court is not something that's been cut from whole cloth. As I'd indicated, it's an idea that's been out there for quite some time, at least 25 years, and of course as Your Honours know the idea of a declaration of inconsistency – called declaration/indication of inconsistency was certainly floated quite strongly in the Commission's submission by the Court of Appeal in the *Moonen* case.

But I thought it would be helpful for us to have a little look at the Human Rights Act 1993, in particular the amendments that are effected to that Act through the Human Rights Amendment Act 2001. So what I've handed up, Your Honours, you might have there in front of you, were some provisions that were missing from both bundles. Do Your Honours have a copy of Part 1A of the Human Rights Act there?

ELIAS CJ:

Yes.

MR BUTLER:

I just thought we should probably just start very quickly with that. So Part 1A, discrimination by Government-related persons and bodies et cetera. The purpose of Part 1A, you'll see, is to provide that in general an act or omission that is inconsistent with the right to freedom from discrimination

affirmed by section 19 is – here is the language – in breach of this part if the act or omission is that of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990. So that was – I've made reference just before the luncheon adjournment about there being one other statute that dealt with application in the same way, or a comparable way, to the Bill of Rights Act and you'll see it's the Human Rights Act.

ELIAS CJ:
So that's unmistakeable reference admitting the possibility that Parliament may be in breach.

MR BUTLER:
Yes, I say that's exactly right, Your Honour.

So that theme comes through quite strongly, in my submission, when you consider the other provisions in this Part 1A, and again Part 1A – just for those of us who do this on a regular basis – we just casually refer to Part 1A all the time, so excuse me if I do it. But the remedies – the relevant remedies part is actually in Part 3 of the Human Rights Act, so Part 1A, even if we refer to in a kind of remedial sense, is really just the substantive provisions which establish how it is that the Human Rights Act applies to public bodies. I won't bore you, Your Honours, but I have access in the materials to how it was that Part 1A came into being, or the background to it was.

But you'll see in section 20J that the parts – so Part 1A applies only in relation to an act or omission of a person or body referred to in section 3, and there again explicitly you've got reference to the legislative branch of the Government of New Zealand, picking up on the language of section 3(a) of the New Zealand Bill of Rights Act.

You'll see – if you go to 20L – acts or omissions in breach of this part. An act or omission in relation to which this part applies including an enactment is in breach of this part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.

So I say there's again a reflection – I think the word that was used earlier was interchangeability. I think Your Honour the Chief Justice might have put to the learned Solicitor that really isn't "breach" and "inconsistency" really used in a kind of an interchangeable sort of a way, and in my submission yes, that's what you see expressed here in section 20L.

And you'll see that in subsection (2) of 20L for the purposes of subsection (1) an act or omission – obviously including an enactment – is inconsistent with section 19 if the act or omission limits the right to freedom from discrimination affirmed by that section and is not, hence why I was red-penning the order earlier, is not rather than cannot – is not under section 5 of the New Zealand Bill of Rights Act 1990 a justified limitation on that right.

To avoid doubt, subsection (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment. So in my submission it's clear that the reach of Part 1A –

ELIAS CJ:
Sorry, enacted in?

MR BUTLER:
This was enacted in 2001, so all of these were inserted. If you go to page – do you see the Part 1A inserted on 1 January?

ELIAS CJ:
Yes, that's fine. Thank you.

MR BUTLER:
And then we go to the later provisions in the Act, which are in the bundle. That's section 92I and 92J in particular.

WILLIAM YOUNG J:
Whereabouts in the bundle are they?

MR BUTLER:

Tab 1 of the Human Rights Commission bundle, so that's the blue bundle.

ELIAS CJ:

Sorry, what tab?

MR BUTLER:

Tab 1.

GLAZEBROOK J:

Is that different from what's in the Crown?

MR BUTLER:

I think I've got more in there so that's why I chose to go there.

GLAZEBROOK J:

Yes, that's fine. It doesn't matter.

MR BUTLER:

Okay. So just for context of the provisions I'm going to take you to shortly, if you look at the contents page of the Human Rights Act 1993 or the index or whatever one wants to call it, so that's page 5 of the statute book. Part 3, so we're heading to Part 3, which is where this provision stands. Go to tab 1, small page number, page 5, Part 3.

ELIAS CJ:

I'm not sure that we have Part 3.

ELLEN FRANCE J:

We don't have the analysis of Part 3.

MR BUTLER:

All right. Your Honours will have to take it from me that the heading to Part 3, which this provision appears in, says "resolution of disputes about compliance with Part 1A and Part 2," so that's the heading to the part within which these provisions are to be found.

GLAZEBROOK J:

So resolution of compliance?

MR BUTLER:

Yes, resolution of disputes about compliance.

GLAZEBROOK J:

Oh, dispute about compliance, thank you.

MR BUTLER:

Yes, with Part 1A and Part 2. And then there's a subpart – it doesn't use the language of subpart – but there's an italicised heading called "remedies" and I'm hoping you have got that, at least, at page 74.

ELIAS CJ:

We have got that.

MR BUTLER:

Good. You will see that this remedies section was inserted as part of the package of reforms that was made in 2001. You see that under the heading of remedies inserted on 1 January 2002?

ELIAS CJ:

Yes.

MR BUTLER:

And so 92I talks about the remedies that can be granted by the tribunal if it finds where there's a breach and then this section – 92I(1) says the section is subject

to 92J and 92K, which relate to the only remedy. Again, there's the important word "remedy", so we're starting in a subpart called "remedies".

ELIAS CJ:

Sorry, I'm getting – it's fine going through the statute but I'm getting a bit lost at what the submission is that you're making to us.

MR BUTLER:

Right. The submission I am trying to make is that, as I apprehend the Solicitor-General's case, she says that effective you're taking to yourself – the Courts have taken to themselves a power they don't otherwise have. So what she's trying to say is that she used the phrase that we're at a constitutional crossroads – so in other words she didn't use the word "constitutional crisis" or something of that sort, but what she's suggesting is you're doing something really big and what I'm trying to do is I'm trying to contrast that way of looking at it by saying, no, in our constitutional setting you look at all of the elements, all of the pieces of the puzzle and part of the piece of the puzzle is what Parliament itself has contributed to all of this, so I thought, well, I'm going to take you to the statute. I may as well just touch on one or two of the points so that I don't have to come back to the statutory provision again. I want to come back to a little bit of the background materials to this part and in particular the declaration of inconsistency.

ELLEN FRANCE J:

But part of the argument is that you need to have this Part 3 because it is a remedy that's in issue and you need express approval, Parliamentary approval, for that.

MR BUTLER:

To which I say no, you don't. I say that based on *Baigent's Case*, for example, the New Zealand courts have resolved long ago that they don't actually need an express Parliamentary allocation or conferral of power to grant remedies. The question I say that might legitimately be asked is, is a declaration of

inconsistency a remedy and I say it absolutely is, and I say that Parliament's own language supports me in that regard.

GLAZEBROOK J:

It doesn't have any effect, though, on the individual person, unlike *Baigent* damages, which have an obvious monetary effect.

MR BUTLER:

That's correct in that sense, but –

GLAZEBROOK J:

And isn't that one of the points that's being made against you that if that is the only thing it has no effect whatsoever on the individual's rights or obligations?

MR BUTLER:

That's where I disagree, with great respect to my learned friend. I understand Your Honour's putting to me the proposition that is being put to me, but that's where I take issue, really, with the Solicitor because in fact I say it is a remedy because while it does not change the way in which ultimately the constellation of legislation affects the individual, what this remedy does do is it does vindicate the rights that have been guaranteed to the individual in a manner that is compatible with the current state of our constitutional system. It says to the rights holder, "Sorry, we can't do what they can do overseas and strike down the legislation, but what we can do is acknowledge and declare a breach of your rights that has been effected by Parliament." Allied to that is what Justice McGrath said in *Hansen* and has been said in *Moonen*, and I took you to similar language in the *Foy* case in Ireland, about there being a reasonable constitutional expectation that some action, some response will be taken. So it's about vindication for the individual in the New Zealand constitutional setting.

ELLEN FRANCE J:

Well, for the individual how does that take it any further than reasoning which explains why it is that something is inconsistent?

MR BUTLER:

Well, if I can respond in a very poignant way by these means, first of all, you've got the form, first of all, you're allowed to go to Court to seek this ruling. That's the first point.

ELIAS CJ:

Otherwise it would be struck out.

MR BUTLER:

Otherwise it would be struck out. So you're allowed to go to Court. Being allowed to go to Court and make this claim and succeed in that claim, that itself is a vindication. "I was right. Yes, my rights were trenched upon. Under our constitutional system I have to live with that, for the moment." But in our constitutional setting that is vindication, that's the first point. The second point was the one I talked about earlier in terms of cost consequences and the like.

GLAZEBROOK J:

Yes, although costs only arise if you're allowed to go to Court in the first place. So it's chicken and egg, isn't it?

MR BUTLER:

Indeed, exactly. So, you know – yes, it's chicken and egg, it is. But the poignant point I was going to make was, put it this way: we had a seminar last year down at university in relation to this general issue, and Professor Rishworth was advancing an argument in terms of the significance or otherwise of what a declaration of inconsistency would be. And the point he made, which I say entirely proves the case for the Commission, is the media and the way the political people responded to it was they said Mr Taylor had won. Exactly, that's exactly right. That citizen had gone to Court, he was allowed to go to Court, and he was able to show and have the Court agree with, by order, that his rights had been unjustifiably interfered with. Reasoning lost in a 100-page long judgment, doesn't hack it.

And the last practical point is one I was going to come to later, but let's raise it now, is the res judicata point that I think Your Honour the Chief Justice was having an exchange with my learned friend the Solicitor about in terms of, well, you know, today, you weren't casting aspersions obviously on my learned friend Ms Jagose but saying, well, the Court, you know, the Crown could say today, "Well, we don't contest it, whatever it is," but if it doesn't bind, if it's just merely reasoning that has no legal effect in terms of saying, "Right, Crown, you had your chance, you didn't step up to the plate or you failed to justify, you can't come back and do it again," so it has a res judicata element to it as well, which goes with it being an order and seen in that way.

So, look, in terms of remedies, Your Honours, all I'd wanted to point out was the heading to this section, this subpart, is, "Remedies," you see the language in 92I(1), "remedies", "It's the only remedy that's available," and we see in 92I(3) the nature of the declaration that can be made.

I'd wanted to then come, if I could, to 92J, which talks about the remedy for enactments in breach of Part 1A, where the Tribunal finds that an enactment is in breach of Part 1A, the only remedy is the declaration referred to. Then we've got the terms of the declaration, the declaration is that the relevant enactment is, "Inconsistent with the right to freedom from discrimination affirmed." And there's 92J(4), which I just thought I should touch on briefly. In her written submissions the Solicitor says 92J(4) supports a view that Parliament only had in mind that a declaration of inconsistency was available through statutory recognition, and that, with respect, is not how I read the relevant legislative history. In fact, if I could take you just at this juncture, within the same volume, to the select committee report on the Bill, the Human Rights Amendment Bill, so that's at tab 7.

O'REGAN J:
Just before you do that, what the point you make about subsection (4), what are you saying it tells…

MR BUTLER:

That will hopefully become obvious when I just take you to this select committee passage. So if you look at page 19, so tab 7, Your Honours, page 19, you see there's a heading, "Declarations of inconsistency"?

ELIAS CJ:

Sorry, what tab was it again?

MR BUTLER:

So tab 7 and page 19 of the select committee report. And you see the second paragraph under the heading, "Declarations of inconsistency," so it notes that the, the first paragraph notes that, "If the Tribunal finds that an enactment is in breach of Part 1A, the only remedy that it may grant is a declaration of inconsistency." Then the next paragraph, "Government, Green and ACT members recommend amending proposed new section 92J to state that nothing in that section affects remedies available under BORA. The provisions for declarations of inconsistency may be misinterpreted as a signal the courts should not extend the practice to other rights. The above amendment should clarify the issue." Then it goes that the National party members who are in the minority on this legislation, are opposed to declarations of inconsistency for reasons they set out, you see the minority view set out later on in the report. But I say Sir, coming back to your question as to why do I make reference to it, I say that that 92J(4) is Parliament clarifying that it was not in the least bit concerned about the development that had taken place in *Moonen* and it wanted to signal to the Courts that you can continue going as you've indicated you intend to go through the *Moonen* decision. That's my submission Sir.

O'REGAN J:

It does later on though refer to declarations of inconsistency as an innovation.

MR BUTLER:

Yes, and I think I may even have used that word "innovation" when I was talking about what the New Zealand Courts have said they're able to do in order to give effect to the twin purposes of the New Zealand Bill of Rights Act.

O'REGAN J:

It goes on to say, "This is quite different from the current position with the Bill of Rights Act," this is on page 27 of the same…

MR BUTLER:

Yes, so are we reading the National Party's declaration of inconsistency?

O'REGAN J:

Is that what it is, is that –

MR BUTLER:

– that's the minority view I'm sure?

O'REGAN J:

Yes.

MR BUTLER:

Yes, if you look at page 25 you'll see the heading "National and ACT minority views"?

O'REGAN J:

Yes.

MR BUTLER:

So everything you're reading there is the minority view. In view of all context, Your Honours, of the back and forth that I say is our constitution, recall we go back to the point, even if we use the word "innovation" Sir, Justice O'Regan that you've latched onto, for want of another term and I don't mean anything by that, one of the things our constitutional system that is of interest is that even in the area of remedies there is an element of back and forth, and call it dialogue, call it interaction between this place and the place across the road. So, for example, in the area of say exclusion of evidence, we know that the jurisprudence in that area, there was change over time in time of the judicial attitude to exclude evidence and Parliament decided post-*Shaheed* to enact a regime now through

section 30, I think that's right isn't it, 30 of the Evidence Act, and set down Parliament's view as to what should happen in a situation where there's been an established breach of the New Zealand Bill of Rights Act. Another example would be the, I think I've got the title right, the Prisoners' and Victims' Claims Act 2005, I think that's the right name of it, which deals with compensation remedies for people who are prisoners and enables, places limits on the circumstances in which, or considerations to be taken into account when you've got a prisoner in front of you who claims a breach of rights. In other words, my point is that innovation, Parliamentary response and so on, development on an incremental basis is just part and parcel of how we do constitutional law, particularly under the rubric of the New Zealand Bill of Rights Act 1990. Seen in that wider context what the Courts below did is not some form of constitutional crossroads. You're not crossing a constitutional rubicon. This remedy is something which is supported through the statutory recognition of it and is consonant I say with the overall remedial approach that's been adopted by the Courts since the enactment of the Bill of Rights Act in 1990.

ELIAS CJ:

So can you just perhaps indicate to us what topics you particularly want to cover in your submissions, just so that we can see the direction?

MR BUTLER:

Yes, I can. So I've dealt with the Human Rights Act and the various provisions that I'd wanted to draw Your Honours' attention to there, I've referred to the purpose of BORA. The general point I'm trying to make is that there is constitutional nuance, we say, that operates here. I'd wanted to come and to refer, deal with one or two of the practicalities, I'd had a question put to me by Justice Young in relation to section 9 of the Bill of Rights Act 1688 and how that would work, and I had thought I'd probably need to say a little but not very much on *Momcilovic*, the ability for the Crown to seek a declaration of consistency, which was a point raised by Your Honour Justice Glazebrook, I thought I should probably touch on that particular point, I'd want to talk about the very precise wording of section 4 and the adjudicative nature of the exercise that's involved. So they were the principal points I'd wanted to come to.

ELIAS CJ:

Yes, thank you.

MR BUTLER:

I had offered Your Honours the opportunity to be taken to some of the passages in *Baigent*, *Hansen* and so on, I don't know whether that's being helpful or unhelpful to Your Honours if I do that – I refer to, you know, I do refer to relevant parts in my –

ELIAS CJ:

We're pretty familiar with those cases, Mr Butler, I think you can press on with your submissions and if we need to we can go to them.

MR BUTLER:

Great, all right. Thank you Your Honour, I'm grateful for that indication. So if I could talk then a little bit about those practical issues…

WILLIAM YOUNG J:

Sorry, it's just a question that I suppose 'cos out of some of the material, some of the points, you've made. If you ask the question – do the prisoners have the right to vote? – you start off with what's not an unusual problem where you've got one statute that seems to say they do and another statute that seems to say they don't, and if you just resolve that in a way that leaves out of consideration any higher value to the New Zealand Bill of Rights Act, the short answer is, whether they have a right to vote, that it turns on the way the two statutes operate together, and if you come up with the answer that the specific statute prevails and they don't have a right to vote. Now is that because the electoral legislation amends, repeals, affects the way in which the New Zealand Bill of Rights Act operates?

MR BUTLER:

No, I think not. I'm glad Your Honour has raised that, because I had actually made a little note that I should come back to Your Honour. You posed very early on a question I may have not correctly captured, but what does "question

of law" mean in this context was basically the thrust of the point that I understood Your Honour –

WILLIAM YOUNG J:
Well, I would be inclined to think the question of law is, "Can I vote?" not intermediate, not as to intermediate elements or intermediate questions that have to be addressed in terms of reaching the answer to that.

MR BUTLER:
And this is where I think it depends on who the claimant is and I think, and it comes to back what the nature of a claim is that comes before a Court. So that Your Honour is right, no doubt there will be some people who would say, "I just want to know, I want an answer to the following question: if I turn up and try to register to vote or if I want to register a vote to be a candidate, can I, can the registrar choose not to register me in what I might call that practical sense, I want to know can I or can I not?" that is one question that can be asked. But a separate question, which is what the Bill of Rights turns up, is a separate question, which namely is, "If, as a result of the interpretation you take the view that one law says I cannot vote, I have a legal question for you which I'd like answered: is such a prohibition, is such a ban justified, justifiable, a justifiable limit on my section 12 right in terms of the New Zealand Bill of Rights Act 1990?" Now that is also a question of law, it is clearly a question of law, there is a clear legal test, a legal standard that must be met.

WILLIAM YOUNG J:
But one can always identify questions of law in the abstract, like, was *Donoghue v Stevenson* [1932] UKHL 100 correctly decided? But I can't issue proceedings seeking an answer to that.

MR BUTLER:
No. That's right. But that's where, you see, the language that's been used – with great respect to my learned friend – of advisory opinion, might make sense in the context of that and advise of an academic opinion.

ELIAS CJ:

But it's just that if you're a rights holder, you have an interest in having your rights recognised.

MR BUTLER:

Correct. Exactly.

ELIAS CJ:

It's just as simple as that.

MR BUTLER:

That's just what I was about to say. It's as simple as that.

WILLIAM YOUNG J:

What's the effect of section 12? I mean, is it not – has it not been amended? Has it been revised by the electoral legislation?

MR BUTLER:

No, and that's where I –

ELIAS CJ:

Are you suggesting implied repeal?

WILLIAM YOUNG J:

No, I'm just wondering whether it has or not. We have two statutory provisions that were inconsistent.

MR BUTLER:

That's correct. That's why – it was when Your Honour posed that question that you've now gone on to articulate is exactly the very one you would have thought after studying this for 28 years I would have thought about it before. But the point you make is a very good one because nobody is suggesting at all that it is as a result of the existence of the relevant provision, section 80(1)(d) of the

Electoral Act that somehow section 12 of the Bill of Rights Act has been repealed. It has not.

WILLIAM YOUNG J:
It's no longer true. That's part of the problem.

MR BUTLER:
No, I just would like to complete the thought. That section has not been repealed. It has not been repealed, nor has section 5 been repealed. So the standard – the legal standard established by the New Zealand Bill of Rights Act – remains throughout. It has not been repealed at all, so that standard which asks questions about whether or not public acts – including enactments – stays in place and throughout, notwithstanding the existence of an inconsistent enactment, throughout it is therefore continuously legitimate to ask the question, the legal question, as to whether or not that enactment – that other enactment – the Electoral Act here – is or is not consistent with the New Zealand Bill of Rights Act 1990. That is a question that is asked in respect of an affected rights holder. That rights holder, we say, is entitled to have that question resolved if they ask for it. Some people couldn't be bothered. They don't want to know. They would prefer just to cut to the chase, just tell me.

WILLIAM YOUNG J:
Is that tantamount to saying that – I guess it is – that legislating inconsistently with the New Zealand Bill of Rights Act is a breach of rights?

MR BUTLER:
Yes.

WILLIAM YOUNG J:
And gives rise to a remedy?

MR BUTLER:
Yes. We don't resile from that at all. We say that section 4 – the very precise wording of section 4, to use the phrasing of Professor Brookfield in his seminal

article, is indeed very precise. It says what Courts cannot do when they have come to the conclusion when another enactment is inconsistent with the legal standard established by the New Zealand Bill of Rights Act 1990.

WILLIAM YOUNG J:
We could go round in circles, but one way of construing the electoral legislation is that it's an assertion that those who are in prison do not have the right to vote.

ELIAS CJ:
Well, that is, then, a repeal – an implied repeal. Since we're settling the whole of the New Zealand constitution, we'll have to deal with *Smith v East Elloe Rural District Council* [1956] AC 736, [1956] 1 All ER 855, [1956] UKHL 2 and all of those cases about implied repeal and how they survive in the post-recognition that the principle of legality probably denies implied repeal.

O'REGAN J:
Also the fact that the Bill of Rights contemplates inconsistent legislation.

ELIAS CJ:
Yes, exactly, exactly so there's a statutory coat hanger for that but really this is really very heavy stuff. It's hard to think that it really – well, maybe it is necessary.

GLAZEBROOK J:
The other way of looking at it is that section 4 is there so that the Courts don't override earlier legislation because otherwise they could override earlier legislation on the basis of either implied repeal or supreme law. So it has two functions. It is very carefully worded.

MR BUTLER:
It is very carefully – remember in the introduction copy when the Bill of Rights was introduced in 1989 there was no section 4. Section 4 came in as clause 3(A) only at the select committee stage. My understanding is that that was prompted by – among other things – an article that had been produced by

Professor – then Mr – Rishworth who pointed out correctly that if there was no such thing as section 4, then following Canadian human rights legislation there would be a choice for Courts to make when there's an inconsistency between two statutes. It would be no different from what you had in *R v Pora* [2001] 2 NZLR 37 (CA) and *R v Poumako* [2000] 2 NZLR 695 (CA) and other cases of statutory inconsistency and is there a rule that helps us resolve which trumps which where there is an established consistency. So Parliament took the view through section 4, well, when you establish – when you come to the conclusion that there is an inconsistency between the two statutes, here are the things, Courts, that you cannot do. Implicit in that is that there's a whole range of things that you can do. It's a carve-out, I say, from the otherwise ample remedial jurisdiction available to our Courts.

WILLIAM YOUNG J:

When the threshold for trial by jury was increased from three months to two years, the legislature specifically amended section 24(f) of the New Zealand Bill of Rights Act. Say they hadn't. Wouldn't that result have been arrived at indirectly?

MR BUTLER:

No, and that's a really good example of the broader point I was trying to make, that there was no implied repeal going on here. What happened there was a judgment call was made that no longer did Parliament want to assess access to a jury trial by reference to what had previously been the three months, I think. It was a three month standard. They wanted to push it out to a two year standard, which is what the amendment was.

WILLIAM YOUNG J:

Yes, so it was – they provided that explicitly in (b), they amended section 24(f).

MR BUTLER:

Correct. But what it meant on a going-forward basis, Sir, no one could come to the Courts and claim that if you were denied a right to jury trial for an offence of, say, where the maximum sentence was one year you could not claim that

your rights under the Bill of Rights had been infringed, prima facie infringed, never mind the subject of unjustifiable limits.

WILLIAM YOUNG J:
I just wondered what would have happened if they hadn't bothered to amend the Bill of Rights.

ELIAS CJ:
We'd be having the same argument as we're having here.

MR BUTLER:
Exactly what I was going to say. Exactly, we'd be in this particular Court.

GLAZEBROOK J:
Well, they specifically took the view, in any event, that it wasn't appropriate to have it as a right and that was on the basis of it shouldn't have probably been in there in the first place, and at such a low threshold, I think. But having done that, they took the view that not that it was a justifiable limit but that it wasn't part of the right.

MR BUTLER:
The right itself had been pitched too broad.

GLAZEBROOK J:
Yes.

MR BUTLER:
Precisely, that's exactly right. But what that episode does in my submission demonstrate is that when Parliament wants to change the legal standard by reference to which other enactments are to be assessed, it does so. If you don't amend the Bill of Rights, then the standard stays in place and that is a standard you use to assess the consistency of the other legislation.

ELIAS CJ:

But there has been a resolution accomplished by the Bill of Rights because before there would have been the argument of Parliament implied repeal that Justice Young is raising and, after all, section 4 makes it clear that the Bill of Rights Act doesn't impliedly repeal all statutes with which it's inconsistent, so there must have been a fear of implied repeal. Now, the question is – and I don't think any Court has yet decided this – whether it is quite clear in the context that inconsistent legislation doesn't impliedly repeal it, and – you know, it been put to you that it's got the seeds of that in the legislation itself.

MR BUTLER:

And to be clear I do not accept that proposition. In fact, I reject that proposition. That is not what is going on in those cases. What Parliament has chosen is a rule for the resolution of inconsistency between the two, that is all that is going on in a section 4-type scenario. It is an absolutely the implicit basis upon which section 4 is founded is that there is inconsistency between the two statutes. That's not an implied repeal of the Bill of Rights. The Bill of Rights stays in place. It just does not empower the Courts and it's directed to the Courts. It does not empower the Courts to take certain remedial actions.

So I'm grateful to Your Honour Justice Young for raising the issue in the way in which he did because in my submission it serves to underscore the durability of the underlying rights and freedoms and the section 5 that goes with them. They continue on as continuously as the standard by reference to which the hurly-burly of statute – Sir Geoffrey's always referred to New Zealand as the fastest law-maker in the West. There's a lot of it.

ELIAS CJ:

Sorry to interrupt you but I'm just getting a bit worried about time. But it also underscores the specificity of section 4, which is something that you're going to come on to deal with.

MR BUTLER:

It is. And, look, in relation to that, since it's been raised, Your Honour, I'll just simply say that the language of section 4 is specific and if one looks at it, you

look first at whom it is directed. It's not directed to Parliament as such. It's explicit. No Court shall. Tab 2 of my bundle.

ELLEN FRANCE J:
Well, you can start with the heading, can't you, of 'other enactments'.

MR BUTLER:
Yes, not affected. So it doesn't in terms say Parliament can do whatever it likes. It doesn't say that. It doesn't say Parliament can ignore the standard that it has set for itself and which it has applied to itself by dint of the language in section 3 paragraph (a) of the Bill of Rights. What it does is, working with the constitutional tradition that Parliament can make whatever law it likes from time to time, it tells the Courts what to do when they are faced with a scenario, an inconsistency scenario.

The Court shall hold any provision of the enactment to be impliedly repealed or revoked or to be in any way invalid or ineffective, not defective. Ineffective. Or decline to apply any provision of the enactment. Very targeted and specific prohibitions – proscriptions on what Courts can do by reason only that the provision is inconsistent with any provision of this Bill of Rights, and there's that notion of inconsistency again. But implicit in section 4, the whole premise of section 4, is that a Court will have reached a conclusion that the other enactment is indeed inconsistent with the Bill of Rights.

Now, if there was a true, implied repeal going on of the Bill of Rights through that other enactment then you wouldn't have an inconsistency, in my submission. What you'd have is a repeal. So there would be nothing for there to be an inconsistency with.

WILLIAM YOUNG J:
Well, mightn't impliedly repealed or revoked be referred to statutes passed before 1990 and any one valid or ineffective be a –

GLAZEBROOK J:

No, because it says before or after the enactment.

WILLIAM YOUNG J:

I know before or after but they've got two words, two of which look referable to what's gone before and two of which look as though they're referable to what's after, comes after. I mean, how can you impliedly repeal something that comes later, or revoke something that hasn't happened?

ELIAS CJ:

Because they're covering everything.

MR BUTLER:

Yes. I mean, Your Honour's reading of it is the way I've typically read it, but impliedly repeal refers to earlier and invalid is for what comes later. I think my overall point remains the same. There's no suggestion in section 4 that the other enactment repeals the Bill of Rights. The Bill of Rights stays. There is an inconsistency.

WILLIAM YOUNG J:

Enactment means act or regulation?

MR BUTLER:

Yes, it does. That's right.

WILLIAM YOUNG J:

Is that because of the Interpretation Act?

MR BUTLER:

The Interpretation Act, exactly. I had the great joy of being Crown counsel trying to argue with absolutely no success that section 4 applied to regulations broadly.

ELIAS CJ:

It hasn't come to this Court yet.

MR BUTLER:

No. But if we look at section 5, all I was going to point out was that you look at section 5, put to one point subject to section 4 for a moment, but section 5 is clear. The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. So again, that's setting that legal standard. We know it's a legal standard. It's the standard that gets applied by all similar Courts of stature similar to this Court. There is a bog standard methodology that is used now widely throughout the world.

ELIAS CJ:

Well it's a reinforcement prescription of law can't – must be set in reasonable limits but that is subject that the fact that the Courts must apply inconsistent legislation.

MR BUTLER:

Correct, that's exactly how I read it Your Honour. Again it reinforces that prohibition directed to the Courts.

ELIAS CJ:

It doesn't remove any prohibition on Parliament.

MR BUTLER:

Correct. it doesn't say, it's not – because again if you go to the proposition that was advanced by my learned friend the Solicitor, so when she was asked, okay, "So what does section 3(a) reference to legislative branch mean," and the answer she had, after a little wee while, was, "Oh maybe it means select committees have got to respect natural justice." Seriously. I mean in a context where every other branch of the Government is having its action fully tested by reference to the Bill of Rights, including the judiciary, and this Court affirmed that in *Chapman*, it said we don't need to give a particular type of

remedy in order to vindicate, but this Court absolutely accepted that the judicial branch was fully subject to the obligations in the Bill of Rights, the only disagreement being, you know, about what remedies were required, and you might recall that the Court, the majority was very clear about saying, judicial breaches are responded to by a range of different means within the judicial system, so there was no kind of, this doesn't apply to us. There was nothing in the text of the Bill of Rights which suggests that somehow Parliament has got a carveout and that it says in section 3, hey, we're subject to the Bill of Rights, like everybody else is, but somehow we're not when it comes to the most important thing that we do legally which is enact enactments, or statutes.

GLAZEBROOK J:

I must say the better argument of the Solicitor I think, rather than saying Parliament can ignore it, because clearly Parliament can't, I mean section 7, there'd be very little point in having a section 7 or any of those provisions, it seems to me, if Parliament can ignore it. The better argument I think was that any remedy is for Parliament. That, yes, of course it's subject to it, but any remedy is for Parliament and there will be remedies in the democratic process, and also in the procedural process of Parliament.

MR BUTLER:

That's right, quite right. I have two responses to that. The first response is to deal with the immediate issue of the select committee and the natural justice point, which is, there's two elements to that. First of all, Parliament has accepted through its standing orders that it's subject to the Bill of Rights and section 27, and if you go to the standing orders, the standing orders explicitly give effect to the section 27 obligation. But under our system, going back to section 9 of the Bill of Rights Act and so on, that constitutional principle of leaving proceedings of Parliament for Parliament to resolve, and to stay within the House, is not something which the Bill of Rights justifies interfering with and the Courts have found that in numerous different scenarios. That deals with that specific issue. But more broadly, it seems to me –

GLAZEBROOK J:

And I wasn't talking about that, I was talking about specifically legislation rather than the select committee.

MR BUTLER:

So coming then to legislation, the reason why it will be wrong for the Courts to interfere say in the select committee, I'm just using the select committee scenario as the point of contrast, simply because that would interfere with another important constitutional principle, that of respecting the privileges of Parliament, proceedings of Parliament. In the Human Rights Commission submission there is no similar constitutional objection to this Court saying in respect of an enactment here's a formal order that we make declaring the enactment to be inconsistent with the Bill of Rights. That does not offend any similar constitutional principle. In fact I submit that it is consistent with our evolving constitutional system, as reflected in, for example, the Human Rights Act 1993 as amended in 2001 for example. By reference, for example, to the provisions in the Treaty of Waitangi Act 1975 which allow reference of Bills to the Waitangi Tribunal and so on so, you know, our constitution has, is not entirely linear. It has a range of excrescences to it. It's a little bit gnarly and bumpy in places. It can easily and will easily accommodate the declaration of inconsistency development and indeed the recent announcement, that was recognised through the terms of section 92J(4), that's why I took you to that, if Parliament did not like declarations of inconsistency there was a perfect opportunity to say, "We don't like them," and the select committee report that I've taken you to explicitly inserted a provision in the Human Rights Act to make sure that nobody would draw an inference that somehow this development should not occur under the guise of the New Zealand Bill of Rights Act 1990. There simply is no constitutional objection, in fact there's constitutional congruency in my submission.

Section 9 of the Bill of Rights Act 1688, there is in these sort of situations where one is looking to assess the consistency of enactments with the Bill of Rights, parliamentary materials, we had a little bit of a debate in the Court below around all of this, it's not bubbled up so I'm not wanting to get into a huge amount of

detail on this appeal. But in cognate jurisdictions where you've got constitutional review where this is just bread and butter for Courts like this, there is no issue of clash. Similar provisions to section 9 of the Bill of Rights 1688 operate in all of those overseas jurisdictions. You simply don't need to refer to the parliamentary debates in order to analyse the relevant statute and the policy objectives and so on that are going on, and at the moment, Sir, we do this. We have already had three declarations of inconsistency against New Zealand enactments under 92J, so we we've had two provisions of the ACC Act found to be consistent, we've had many provisions of the Adoption Act found to be inconsistent. I've got references if you want those, I can hand them up or I can do a memo overnight and give you references to them. All of that has been able to occur without a single reference in a way that would interfere with the provisions of section 9 of the Bill of Rights Act 1688, so I don't see that as being an issue or an objection to *Momcilovic*. I came up with the phrase of "Australian exceptionalism", that's because I had the misfortune to study Australian constitutional law in my last year of law school in Dublin. Sir Anthony Mason in materials that are in the Crown's bundle captured it very well, I feel, and he's at tab, I think it was tab 19 of my friend's bundle – yes, that's right, page 10 of the Lord Cooke lecture that he gave in 2010 I think it was. So tab 19 of the Crown's bundle.

ELIAS CJ:

Do you really need to take us to this material or do you just want to tell us what you take from them?

MR BUTLER:

Yes. So, Sir Anthony Mason said, "I'm not going to assail you with the complexities of Australian constitutional law," make the simple point the nature and character of a declaration is when properly – it's tilting at windmills is exactly, is how he described it. This Court will not profit, in my submission, from having to enter the entrails of very peculiar Australian constitutional law when it comes to the regulation of the allocation of judicial power under the Australian constitution. It simply does not speak to anything relevant under our constitutional system and, as Professor Rishworth put in one of the articles in

my bundle, so tab 41 page 347, he referred to *Momcilovic* as referring to, "Uniquely Aussie," Australian I should say, "consideration," sorry, "Australian considerations," and nobody's suggesting relying on the Australian constitutional jurisprudence that somehow there is something constitutionally objectionable either to a statutory DoI regime or to a judicially crafted one, so I do refer you to that article, I wholeheartedly agree with what Professor Rishworth had to say there.

You've got my written submissions where I take issue with the very, what I consider to be a very fine distinction that the Crown wants to rely on. So apparently indications of inconsistency are okay but declarations of inconsistency are not. The advisory opinion objection surely must apply to both in terms of what's actually going on in substance, exactly the same analysis is going on. Why is one a legitimate advisory opinion and the other not? Just not explained.

GLAZEBROOK J:
Sorry, when you're saying there is an interpretive issue, is still an advisory opinion in the same way, is that the, because it mightn't be if the interpretation goes the other way I suppose is the point made by the Crown. By the time the conclusion comes that the interpretation is inconsistent and can't be made consistent, then it's the same process, is that the point?

MR BUTLER:
It's the same process, exactly. And the other point I suppose is, advisory opinions cut both ways, don't they? I mean in certain cases an advisory opinion, for example, I'm a bit diffident because I think I'm right that there's a judgment outstanding in relation to the *New Health New Zealand Incident v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 case but I could certainly make this point relying simply on the Court of Appeal's decision, but before the Court of Appeal as I read the judgment, and certainly the judgment of the Court below, there was an anxiety to get the Court to conclude that fluoridation was Bill of Rights consistent. So if you look at the Court of Appeal's decision, all the interpretation stuff is done first. The Court came to a very clear

view that this relevant statutory framework absolutely authorised fluoridation within certain, I don't understand all the specificities, but you could do it within a certain whatever standards, but then having concluded that, having finished off the interpretation issue then embarks on a consideration fully argued from what I can tell about the justifiability, the compatibility consistency with the Bill of Rights of the regime, and that goes exactly to the point that Your Honour Justice Glazebrook raised in terms of well the Crown sometimes want to get a declaration of consistency, yes it might want to do. I can't imagine it'll want it every day of the week, but from time-to-time it may, as a counterclaim, seek a declaration of consistency.

GLAZEBROOK J:
Certainly it would argue it as in *Hansen*.

MR BUTLER:
Mmm.

GLAZEBROOK J:
Could and did argue it in *Hansen*.

MR BUTLER:
Correct, well of course, it absolutely did. There was a little bit of a tussle around evidence and stuff like that as I remember rightly.

GLAZEBROOK J:
Yes, without evidence and much…

MR BUTLER:
Yes, the mistake won't happen again I'm sure. Everyone, one knows how it's going to work, and knowing how it works, can I just come back, because I think that's a real important point as well in terms of how we actually do, how those sort of proceedings actually get run. So one of the points I made in the article that I wrote back in 2000, which I'll only make this simple reference to it here since it's in the bundle, was simply workability. So having a claim done this way

with formal notice of the relief I'm looking for is a declaration of inconsistency puts everybody on notice that the Bill of Rights consistency issue is absolutely on the table. Now that's got to be a good thing in terms of making sure the issues get ventilated and properly explored as opposed to the ducks and drakes of well I'm going to put up an interpretation and you take a risk as to whether or not or how I develop some of the section 5 material. This is about a much clearer way of making sure the issues are identified and ventilated and I think that's got to be right. A declaration of inconsistency is not non-adjudicative, I won't say anything more than that except to make it quite plain that that is the Commission's view of the matter.

My learned friend said you shouldn't go near a declaration of inconsistency because really these things need to be left in the political realm, and people should face the electoral consequences of legislation that maybe inconsistent. But the point from the Commission's perspective of a declaration of inconsistency, is it establishes a very important datum which is that when the matter gets, so let's move away from the individual rightsholder as vindicated and talk about it at a public law aspect, it means that when there is discussion around the relevant topic, the public, and those who make decisions, MPs and Ministers, have access to a really important piece of information, namely the current regime doesn't measure up that to the standard that you yourselves have set for yourselves, and that's a really important piece of data, and that has real value. It doesn't dictate a particular constitutional response, though there is language as I said of a constitutional expectation of a response, but it surfaces in a very explicit, a clear way, a clear piece of data. It crystallises it in the Court order.

Reference to the UK cases, I think Your Honour Justice Young made the point that the Human Rights Act, UK Human Rights Act, explicitly excludes Parliament from the definition of public authorities, so that makes the UK scenario different in my submission from the New Zealand situation, section 3 is clear that it captures the legislative branch. Then there was reference to some passages from *A and the Home Office* . I read those passages in two ways. I read them as being passages about saying, well, in the absence of a

statute this standard-setting review exercise that we embark on we simply could not do, and it's also, let's be honest, it was a defensive mechanism. Go back to 2004, just post-9/11, where what the highest Court in the land was doing, if I remember rightly nine Judges, were sending a very strong message in terms of the viability of certain proposed antiterrorism measures. It was important to communicate, the Court wasn't just simply taking this on for the, so as to speak, for the fun of it, it had been given a very serious constitutional task, a function to perform, that had been conferred by Parliament itself, and that was the role that it was discharging. So I don't see it as laying down some broad general rule about what the judicial function is, and particularly not the judicial function as we would understand it in New Zealand.

O'REGAN J:
Well, it might also have been that they were really saying, "We couldn't have done this without there being a Human Rights Act."

MR BUTLER:
That's right. So that was the first point I was trying to say: no statute, no can do – nothing to do.

O'REGAN J:
Nothing to compare with.

MR BUTLER:
No standard, exactly. And that was what I took – there's been very little reference to the decision of the Court below, immediately below, in terms of the reasoning, but that was – for example, when I read that first part of the judgment, you know, critical to that understanding of the common law, judicial function, is the fact that there is a statute that sets a standard. So there's a little bit perhaps, there's a little bit of artificiality in terms of separating out the common adjudicative, what common law Judges do, and then a separate Bill of Rights section. But that first part where it talks about the common law function of Judges is quite critical, but you can only understand it in a context

where the Court have made it plain that there's a statute that sets a standard that the common law Judge is looking to give effect to.

GLAZEBROOK J:
Well, I must say that's the way I'd read it as well in terms of the statute setting the standard. What the Crown says though is that it was actually talking about the specific power to make a declaration of inconsistency. That, I must say, was not the way I'd read it.

MR BUTLER:
It's not the way I read it.

GLAZEBROOK J:
Because it was saying, well, absent that nearly having the international standard would not have been enough.

MR BUTLER:
Correct. And remember the backdrop to that was that – and it goes back to the stuff that we're seeing in the UK at the moment, Brexit and everything like that. We all of us who have been there know that the idea of the Strasbourg Court enforcing European standards in the UK is an element of insensitivity, shall we put it that way, in the UK. And the Court was going out of its way, as I read the judgment, to say, "Look, Parliament, our domestic Parliament, has decided to incorporate these European standards and it's given to us the task of giving effect to them and we're just simply doing what we've been asked to do, we have the authority to do that."

GLAZEBROOK J:
And actually the fact it is the European standards I was probably putting it even not as high as it should be, because in fact it's not an international standard, it is a specific European standard which does…

MR BUTLER:
A specific regional standard, exactly, that's right.

GLAZEBROOK J:
So that – absolutely.

MR BUTLER:
So I think when you look at it in that context, and I just don't see any, with great respect, I don't see any support for the proposition that was being advanced by my learned friend the Solicitor.

Now I am conscious of time, I'm getting the look. So could I very quickly just check with my learned junior and see if there's anything – there's much that could be said but I have the feeling that –

WILLIAM YOUNG J:
Could you just say, what's your short answer to section 9? There isn't a problem?

MR BUTLER:
So my short answer to section 9 is in order to be able to answer a section 5 question, right, you will not need to get into the proceedings of Parliament in order to be able to make the assessment. As I said, my answer is look at the actual data, we have actual data in New Zealand, it is these three cases here, and the two other cases where a declaration of inconsistency has been rejected. So look at the Child Poverty Action Group case, which came to the, it didn't come to this Court I don't think, but it came to the Court of Appeal, when what you were looking at was an attack under the Human Rights Act, Part 1A declaration, against a key part of the tax system, the family tax credits, Working for Families. It was all able to be done on material that did not involve having to question the proceedings in Parliament, and that way of conducting that type of litigation is absolutely normal and standard in every other jurisdiction that on a daily basis that has to look at these issues. You never have to impugn other views of individual members.

GLAZEBROOK J:

But isn't your other answer that in fact if there is an interpretation issue before the Court, the Court does have to do a section 5 analysis in order to answer the interpretation question –

MR BUTLER:

So, thank you, that's exactly, so now we're going –

GLAZEBROOK J:

– so it can't be constitutionally improper to do so per se because everybody accepts that has to be done.

MR BUTLER:

Correct, you're quite right, and you'll see some of that recorded, if I remember rightly, actually in the judgment in the Court below, it's not been raised here, but we had quite a discussion, it's all coming back to me now, quite a discussion in relation to exactly that, exactly that issue. How odd is it that for the purpose of interpretation, and using section 5 as part of the interpretation exercise, you can look at all of that material and there's no objection to that, but to form the same view i.e. is this legal standard set in section 5, you know, between the relevant substandard right in section 5, is that legal standard met or not met, when it's brought in a proceeding like this you can't, it just jars.

WILLIAM YOUNG J:

Okay so you say that to conclude that a statute is in breach of the New Zealand Bill of Rights Act, is not to question proceedings in Parliament?

MR BUTLER:

No. Absolutely not.

WILLIAM YOUNG J:

Or impeaching it.

MR BUTLER:

Sorry.

ELIAS CJ:

Madam Solicitor, I don't think you're suggesting that are you?

MR BUTLER:

No, I just wanted to, there was a phrase that was used that actually my learned junior Mr Curran has asked me just to clarify because I think this is quite important. These sorts of cases and the one here is not about marking Parliament's copybook, or individual MP's copybook and their understanding, or lack of understanding of the Bill of Rights. What this is, is it's a form of review of the statute as enacted by reference to the relevant legal standard. That is exactly what it is and it is no more and no less than exercised in there.

ELIAS CJ:

But once a statute is enacted –

MR BUTLER:

It is what it is.

ELIAS CJ:

– Parliament lets it go. It floats out.

MR BUTLER:

It floats out, exactly. Exactly. That's exactly right.

GLAZEBROOK J:

And Courts all the time will say things like how, and they usually blame the draftsperson, nevertheless all the time Courts will say this is incomprehensible legislation. We can't even discern – well not all the time – but in many cases will say we can't even discern a purpose of this, we don't know what it means, we have to do the best we can, and Parliament should have a look at this.

MR BUTLER:

Precisely, and so look –

GLAZEBROOK J:

And Parliament often will do.

MR BUTLER:

I think we've also got to be not too hard on ourselves, so this is the first time that a genuine and in a really crystal-clear way, this issue of DoIs has come up to the High Court, Court of Appeal and Supreme Court, so is everything perfect in terms of how it's run, no, we can criticise a little bit the drafting of the orders. Was it perfect, and I hope that Mr Perkins won't mind me putting it this way, that when asked well what's the Attorney's stance on the justifiability or otherwise of the legislation, his instructions were to say the Attorney does not resile from the views expressed in the section 7 report, which was simply, this is why it's not a criticism, it was simply a shorthand way of saying, photocopy the reasons that were set out in the section 7 report and let me just import them into my submissions, and they are the reasons why the Crown says, we have to accept that the legislation is bad. Then what Justice Heath did is he ran the ruler separately over it and said, yes, I agree with you about those and you forgot this one, and frankly I've had a look myself and in the footnotes you've seen I've said well it also affects the right to be a candidate at an election which is also protected by section 12 of the Bill of Rights, you can only be a candidate if you're a registered elector, so as it happens that right has also been affected but let's not go there because that wasn't raised in terms of the relief that's sought. So I would imagine that in the future when we've got cases like this, and certainly as is the case when you've got these Human Rights Act DoI challenges, the Crown just comes forward and says, yes, this is justified or not justified for X-Y-Z reasons. Who knows, there might be a reference to the Minister's introduction and statement in respect to the legislation, I think there was, in the CPAG, in the Child Poverty Action Group, as to what it was the then Labour Government was looking to achieve and so on, some reference to that kind of material, but that's not really section 9 Bill of Rights territory at all, there's no impugning at all of the proceedings. And if you need any assurance on that

there's any number of authorities I could refer you to from overseas where overseas Courts make it very clear that that is not what they are doing when they're undertaking this type of review, and you won't allow yourselves to be sucked into it, and counsel simply will not go there in my submission.

I will just very quickly check that there's nothing I've not covered. Thank you very much, Your Honours, for your time and indulgence.

ELIAS CJ:
So, Mr Francois.

MR FRANCOIS:
Is it me, Your Honour?

ELIAS CJ:
Yes, it is.

MR FRANCOIS:
I thought Mr Taylor as the first respondent…

ELIAS CJ:
Oh, I'm sorry, I thought that Mr Taylor was adopting yours in part, but I might be wrong with that. Mr Taylor, do you want to go next or do you – what would you prefer?

MR TAYLOR:
I was just going by the timetable, Your Honours. I just wonder if you can see me properly, the camera and everything?

ELIAS CJ:
Yes, we can. Would you prefer to sit down though, would it be easier sitting down there?

MR TAYLOR:
I'd be able to see better.

ELIAS CJ:
Yes, sit down.

MR TAYLOR:
Thank you.

ELIAS CJ:
You might need to keep your head up.

MR TAYLOR:
Sure.

ELIAS CJ:
Yes, thanks.

MR TAYLOR:
There's not really much I can add, Your Honours, to what Justice Heath has said, five Judges in the Court of Appeal and Mr Butler have pretty much covered what I wanted to say.

Though I think I can usefully make the point that in relation to section 7 – it's just basically the opinion of the Attorney as to whether it may or may not meet the Bill of Rights standard, where there's something completely different to the formal declaration by a Court that it does not, it is inconsistent with the Bill of Rights. So I want to make that point.

Now the utility of a declaration of inconsistency as opposed to the reasoning emerging from a judgment of the Court, as in *Hansen*, it's got real practical significance because in the dynamics of how our Court cases are actually brought. For instance, legal aid may be more readily available to someone because, as Mr Butler said, the media didn't have to trawl through the extensive judgments of the Court of Appeal and the High Court to find out what came out of that proceeding. There it was in paragraph 79 of Justice Heath's judgment in the declaration of inconsistency, exactly what he determines. So it was

reported as a win, as Mr Butler said. So that had importance of bringing it to at least the public notice, notice of the politicians, that there was an inconsistency in our Bill of Rights here. So it's got importance, real importance there, in saying it so clearly and bringing it out, rather than, as I say, trawling through the whole judgment, as in *Hansen*, you might have to do, and if you've got a win you'll get costs, normally. So, as I say, it's got implications for the practical defence of the rights in the Bill of Rights, being able to be defended by proceedings being brought. They may be brought when legal aid is available to initiate proceedings, as they would be in a declaration of inconsistency, but not available in some other proceeding, some sort of other declaration. So it's of great assistance there in relation to a remedy.

Now there's just something I wanted to touch on in relation to section 4. As Mr Butler said, it's very specific on what it does and does not prohibit. Now in the lead-up to this proceeding there was also a companion proceeding brought in before Justice Ellis, that sort of injunction in relation to the 2014 election. Now I made the submission there that there was some – the wording in section 4, 'by reason only that the provision is inconsistent with any provision in the Bill of Rights'. But that meant effectively that a Court could hold a provision to be inconsistent, could decline to apply it, if it was inconsistent with the Bill of Rights on other grounds other than just inconsistency with the Bill of Rights. In that case I argued it was inconsistent with the provisions in the Electoral Act, the ICCPR and several other provisions, but Her Honour declined to go along with that reasoning, but she did recognise that a Court may be able to hold the Court to apply legislation if it's inconsistent with other applicable considerations other than just the Bill of Rights. Not just the Bill of Rights per se. I think the heading in that case, it's not in the authorities there but it's *Taylor v Attorney-General* [2014] NZHC 2225. So we did go down that road to a certain extent.

Now, Mr Butler very helpfully in my submission touched on section 1A of the Human Rights Act. Now, of course we're dealing here in this particular case with section 12 of the electoral rights but there are other rights in the Bill of Rights such as 19, which is the freedom from discrimination. So for someone

who's been discriminated against, they can bring a proceedings under the Bill of Rights or they could go to the Human Rights Act. If they go to the Human Rights Act, the remedy specifically available to them for the same breach under section 19 is a declaration of inconsistency. Now, as Mr Butler said, the heading to section 92I of the Human Rights Act is remedies. So it's recognising that a declaration isn't of itself a pure remedy. It's vindication of a breached right. And specifically in relation to discrimination, so why should there be any difference because it's anomalous. If you go down the Bill of Rights Act and say, right, here we've got a breach of section 19 and I've been discriminated against on the grounds of the Human Rights Act, you can't get a – on the Crown's argument you can't get a declaration that it's inconsistent with legislation. But if you go down the Human Rights Review Tribunal route and bring an action under section 1A, you can as a remedy get a declaration – and I'll go to 92J – that the particular action infringes your right to be free from discrimination, as is in section 19 of the Bill of Rights Act, and I'm referring here to section 92(2). So it's anomalous. And of course we don't have (inaudible). The HRT – the appeal to the HRT to the High Court. So the cases can arise. I mean, you saw a remedy of declaration of inconsistency under the Human Rights Act for breach of section 19 of the Bill of Rights and the HRT might not have granted you that declaration but a High Court Judge can. He has power over that declaration. So it's not novel or controversial that a High Court Judge can grant declarations of inconsistency. He's got that specific power. It just depends – in that particular example – how the particular action reaches the High Court. And of course the recognition is that it is a remedy. Of itself it's a remedy, just that declaration. That's the point I make on that.

So the language of semantics around whether it's an infringement, a breach, whatever, the specific language used there in section 92A, a declaration that there has been a breach of Part 1A or Part 2. So the language is there. Of course, the question people at the High Court – and the High Court, of course, has got an inherent power of jurisdiction. That's why it's necessary to specifically grant by way of statute for the Human Rights Tribunal, because that hasn't got any inherent jurisdiction. It's a creature of statute. So that's in my

respectful submission why it's necessary to confer that power on the Human Rights Tribunal, otherwise it simply wouldn't be able to craft that remedy.

The fact that the declaration – we've got the Declaratory Judgments Act of 1908 as well. Now, section 3 of that Act says no action or proceeding – and I submit that this is a standalone provision – if interpreted in accordance with section 6 of the Bill of Rights and the rights consistent with A, section 3 of Declaratory Judgments Act could give the authority to the High Court and section 3 reads no action or proceeding of the High Court shall be open to objection on the grounds that a declaratory judgment order sought thereby in the said Court may make declarations of right for any consequential relief that could be claimed or not. So in my submission, the Court can also look at the big picture and whether these declarations are available to it, that as well. That of course has been the law since 1908.

ELIAS CJ:
Yes, it's interesting that there is no equivalent in Australia or, I think, in the UK. I think it's based on no other precedent.

MR TAYLOR:
No, Your Honour, that's why I observed earlier on there is no equivalent, apparently, to section 3(a). Now, section 3(a) can only be referring to the legislature in relation to its acting legislation. There is no real other function in the legislation that could be caught by the Bill of Rights, so it's clearly referring to that, the enactment of legislation. Quite clearly what we would have, unless it intended that the Acts of the Legislature would be caught by it.

The unique feature in this case was there is no other remedy available, because we start right back a long time to the Act, which of course provides an effective remedy should be available through the ICCPR. So there is no other remedy that can be put in place other than a declaration, no other remedy whatsoever.

So if someone has rights that are infringed, under the Bill of Rights they would have no remedy whatsoever, absent a declaration of inconsistency. That's an

important point in my submission, Your Honours. How else would you get your right vindicated, your rights under the Bill of Rights vindicated? I couldn't get *Baigent* damages being available, particularly when it's authorised by an Act under the legislature. The Court in its discretion probably wouldn't award monetary damages but the Court below – Justice Heath very carefully examined what an appropriate remedy was and he came to the conclusion that the only one available was a declaration and as I submitted earlier, Your Honours, it's not non-remedy as a declaration. Courts make that every day of the week.

I'll just reinforce what Mr Butler earlier submitted. The Bill of Rights sets a standard. The question is, I think it was Justice Young asked earlier, I think the question should be phrased, "Does the Bill of Rights give me a right to vote?" and in my submission, Your Honours, it does. The legislation in section 80(1)(d) that infringes that right is inconsistent with that section 12(1)(a) right which is very clear. That's the question that a declaration answers.

ELIAS CJ:
Thank you. Does that complete what you want to say to us, Mr Taylor?

MR TAYLOR:
I'm just checking over my notes, Your Honour, if you don't mind.

ELIAS CJ:
Yes, that's fine.

MR TAYLOR:
I just want to go back to Justice Heath's judgment, Your Honour, where he's very clear about the purpose of a formal declaration is to draw attention to the public that Parliament has enacted legislation – sorry, I'll give you a reference. This is His Honour Justice Heath's judgment at tab 7 of the case of appeal, page 920. His Honour clearly sets out what the purpose of a formal declaration is. It's to draw to the attention of the views of the public that Parliament has enacted legislation consistent with a fundamental right. It does so in a manner

that is more accessible to them than a report to Parliament by the Attorney-General, and again that touches on what I submitted to Your Honours earlier about the difficulty of the public, or perhaps more journalists, they have to trawl through literal judgments such as *Hansen* to actually work out what the Court said, what the Court's findings were, with the greatest of respect to the Court of course.

Now His Honour again says what I touched on earlier: when reporting under section 7 the Attorney's responsibility is to Parliament. When determining questions of public law, this Court's responsibility is to all New Zealanders, and that's the important distinction there, Your Honour.

Now Your Honours were earlier asking some questions about section 9 in the Bill of Rights Act 1689. Now we had application for a strike-out in this case and His Honour Justice Brown dealt very succinctly with this point. It's at tab 5 of the case on appeal and –

WILLIAM YOUNG J:
Tab 6, I think.

MR TAYLOR:
Sorry, Your Honour. 5 isn't it? Sorry, no, 5, tab 5, case on appeal.

O'REGAN J:
I think it's 6.

MR TAYLOR:
And at paragraph 53 His Honour starts dealing with Article 9. So I'll just bring to Your Honours' attention what Justice Brown said about that, he very carefully examined that very question, and he had the able assistance of Mr Pike on behalf of the Crown. But His Honour nevertheless found against the Crown's submissions that Article 9 was being infringed, and His Honour deals with that at paragraphs 53 and 68 I think it is. He deals also with comity, legislative comity, and that's from 69 through to about 80, sorry, through to his analysis at

paragraphs 79 and 80, that was a major part of his judgment, dealing with that. Now it's got to be, Your Honours, of great assistance to Parliament, the Court's actual opinion on whether the legislation infringes the Bill of Rights, it's far more important than just a simple opinion from the Attorney-General that it "may" infringe the Bill of Rights.

Unless I can assist Your Honours any further…

ELIAS CJ:
Thank you, Mr Taylor. Yes, Mr Francois.

MR FRANCOIS:
Yes, thank you, Your Honours. I actually need to consult with Mr Taylor about one or two points. I haven't been able to consult with him all day, that's obvious.

ELIAS CJ:
You're not representing Mr Taylor.

MR FRANCOIS:
No, I'm not representing him, but I –

ELIAS CJ:
Can we get underway with your –

MR FRANCOIS:
– am one of, I represent two, three, four and five of the respondents.

ELIAS CJ:
No, no, I understand that.

MR FRANCOIS:
And Mr Taylor is one of those respondents. I need to discuss our case with him. I can't do that with the set-up that we have here.

ELIAS CJ:

All right. Mr Francois, what I am enquiring of you is whether you can get underway with your submissions.

MR FRANCOIS:
I would like –

ELIAS CJ:
Because you can then have at the end of the, when we take the adjournment, we will then facilitate your discussion with him.

MR FRANCOIS:
Well, I believe, Your Honour, the adjournment is at four. I might be wrong.

ELIAS CJ:
Yes.

MR FRANCOIS:
I might be wrong. So we're 15 minutes short?

ELIAS CJ:
Yes.

MR FRANCOIS:
Right. Well, I ask that I have that time to discuss with my friend in that period and we will resume tomorrow and I will begin. I don't see – in 15 minutes I don't see – there's some issues that have come up here.

ELIAS CJ:
Mr Francois, of course if you're telling us you are not in a position to address us –

MR FRANCOIS:
That's it.

ELIAS CJ:

– we will take the adjournment now. It is extremely inconvenient and irregular because we have read your submissions and we could profitably have used the 15 minutes that we have.

If we can make the arrangements, Mr Taylor, for you, we'll start tomorrow at 9.45 to try and make up the time.

MR TAYLOR:

It shouldn't be a problem, Your Honour, I'll let the people know.

ELIAS CJ:

Thank you.

MR FRANCOIS:

In fact, Your Honour, my submissions are not going to be long, they will be less than five minutes.

ELIAS CJ:

Yes, that's fine, thank you. We will take the adjournment now and resume at 9.45 tomorrow.

COURT ADJOURNS: 3.46 PM

COURT RESUMES ON WEDNESDAY 7 MARCH 2018 AT 9.46 AM

ELIAS CJ:

Yes, Mr Francois.

MR FRANCOIS:

Yes, Your Honours. I believe Mr Butler has…

MR BUTLER:

Your Honours, just very briefly, I've been asked to clarify a point yesterday by my learned friend the Solicitor. So you might remember in the exchanges that I had with Your Honours a question arose as to the practice in the United Kingdom under the Human Rights Act 1998 and I was asked a question as to whether or not it is possible in the United Kingdom to not bother seeking an interpretation consistent with the Convention but rather proceed directly to getting a "declaration of incompatibility", that being the phrase over there, and I'd said to you the answer to that is yes. There was some doubt expressed about that but in fact it is indeed the case. I can give Your Honours some references to some cases where that has arisen, I can't imagine it's a matter of huge moment. But one of the cases is a case, *M v Secretary of State for Health* [2003] EWHC 1094 (Admin), that was a case in which certain parts of the mental health legislation were held to be inconsistent with the Convention, there was no possibility at all of a consistent interpretation.

Similarly in a reported case called *Nasseri,* so that's *R (at the suit of Nasseri) v Secretary of State for the Home Department.* It's reported in the appeal cases at [2010] 1 Appeal Cases, page 1. Ultimately the House of Lords took a view that there was no Convention breach in that case, so that the relevant challenged legislation was not in breach of the Convention. At the lower Court level before the Queen's Bench Division there was a contrary finding. There's no suggestion whatsoever that proceeding directly to seek a declaration of incompatibility where all were agreed that there was no possible interpretation of the legislation that would be consistent with asserted Convention right was somehow illegitimate. It is true to say, however, as I said yesterday, that in

most cases because of the way in which the senior Courts in the United Kingdom have interpreted and approached section 3 of the UK Human Rights Act, their equivalent of our section 6, that very often issues will be resolved through an interpretation rather than through a declaration of incompatibility. There have been approximately 25 confirmed declarations of incompatibility issued. By "confirmed" I simply mean the appeal processes have run their way through. There's a number of declarations which are outstanding and are still the subject of litigation. So I hope that's helpful to Your Honours in terms of the clarification I was asked to give by the Crown. Thank you.

ELIAS CJ:
Yes, Mr Francois.

MR FRANCOIS:
Yes, may it please Your Honours. I have a brief opening statement to make and I have hand-ups. It is brief, it's only one page and a little bit, and then I will move on to the submissions which, again, I'm not going to dwell on too much, it's been covered, so I'd look at another five minutes. So altogether you will have me here in front of you for 10 to 15 minutes.

ELIAS CJ:
Thank you.

MR FRANCOIS:
Because I have nothing else to say about the standing issue, that is left to the first respondent and the other parties.

ELIAS CJ:
Yes, thank you.

MR FRANCOIS:
So, without further ado, Your Honours, this case is about a fundamental right, to some it's the most fundamental right in our country; others say it actually

doesn't matter anymore. You can take away that right by legislation, without restriction. My clients say that's a brazen assault on the foundation of our democracy. Your Honours, I'll make it clear, the right to affirm one's allegiance to the body politic in society and the power to recall a Government to its duties and obligations are cornerstones of our democracy.

Decisions of Government, they affect all our life. Issues of family, education, a home to rear one's children, all of this depends upon the will of the people and all of it can be taken away by a Government that doesn't respect the interests of its people, and I mean all of its people. Yes, my clients know the path to democracy isn't easy. This nation has seen its own struggles between ideals and reality. But the great ideals of democracy, equal suffrage, inclusiveness, openness and tolerance have recalled this country to its obligations as the longest-running democracy in the world. In a country where Government is by consent of its people, Government must be limited in its power to act against its people.

Parliament cannot do whatever it likes simply by virtue of the democratic mandate for its actions. My clients say that all New Zealanders have the opportunity to bring an action to vindicate their rights and freedoms in this country. For what is our Bill of Rights, what has it got if it can't say the things it truly values? But the words that the Crown says it means, then there is no declaration of inconsistency, there is no *Baigent* damages, or even the right to consult a lawyer at the roadside. So once more, Your Honours, my clients say into the depths of imagination. One cannot judge a nation by how it treats its highest citizens but its lowest ones. Mr Taylor has said those who live with us share the same short moment of time on this planet, which is dying, seeking the same satisfaction and fulfilment they can. Life's too short.

In the plane that brought me here I flew over the battlefields in which thousands of people suffered and died. The crucible of the darkest conflict on New Zealand soil, the beginning of the longest struggle for rights and freedoms in this country, and my clients carry the burden of defeat handed down from one

generation to the next, and through it all they stand tall without the security of our constitution of law as it stands.

But if we think no individual can change the lives of others, it was a young Polynesian who sailed across the Pacific Ocean and discovered a new world. A woman fought for a cause that established the first democracy in the world. A prisoner broke down the barriers of apartheid and united a nation and it was a man from Virginia who declared all men are created equal.

So I turn, Your Honours, I refer now to the submissions. You have them. They're on electronic file. I'm not going through them again. You've read them, I understand. I'm just going to make something new rather than go over covered material.

Justiciability or dispute? The Crown says there is no dispute. That's covered, I believe, in one paragraph in my submissions but I'll refer to it now and that's the case of Sandy Wilde, or Sandra Wilde, the third respondent. Her case is probably the most on point – it is the most on point – when it comes to actually looking at a dispute, where there is a dispute between the parties. I understand somewhat of the Crown's argument, but I never understood it fully, but this argument that I make or this point that I make I believe trumps everything, because she was sentenced to a period of two years and nine months in – and it's in the submissions – I believe 30 March 2013.

ELIAS CJ:
Sorry, where in the submissions is this?

MR FRANCOIS:
Unfortunately I don't have my computer. I didn't realise I could actually set it up.

ELIAS CJ:
That's fine. We can find it.

MR FRANCOIS:

For your search, it's all text recognised in the stick, in the USB stick. So if you just work – I think she's only mentioned once so if you search, for example, "Sandra Wilde", apart from the intituling.

ELIAS CJ:

Yes. We'll find it. Don't worry about it. It's fine.

MR FRANCOIS:

The point is this. She was sentenced to two years and nine months in 2013. I won't quibble about the exact date. It doesn't matter. It's immaterial. She missed the election. She was still confined when the election came around in 2014.

GLAZEBROOK J:

It's paragraph 17.

MR FRANCOIS:

Thank you, Justice Glazebrook. So the point is that under the old legislation which was – nobody contested it as being invalid or unjustifiable – even a legislation which had a three-year term to qualify – she would have been able to vote. Now, Mr Taylor has admitted that but he does go through another argument. He doesn't concede that he doesn't have that same sort of dispute, but his sentence was much longer and that's why I'm saying Sandra Wilde is different because she was just under three years and she – when the election, under the old law she would have been able to vote and I believe that is a contestable dispute in terms of her rights.

The other respondents are slightly shorter periods and they actually didn't miss the election so the Crown can easily say, well, there's no dispute there because while they went to prison for six months, eight months, nine months, they were very short terms, they were out before the 2014 election. So they never really lost in a sense the right to vote, and I think that's my friend's argument in terms

of – well, there's no real dispute here so that's the point on dispute, Your Honour. I don't think I have to take it further than that.

The next point I want to make is also, I believe, important and hasn't really – maybe I haven't got the gist of it but I want to make it simple. The amendment that's been proposed by the Attorney-General to expressly allow Courts to have a DoI jurisdiction does not help this Court, because another Government, of course, can come along and the next Government, let's say, can repeal that amendment. The importance of this case, of course, is that there is no express statement in the Bill of Rights as it exists as to whether the Court can make a declaration of inconsistency. If Your Honours make that declaration of inconsistency, then we don't have that problem of future Parliaments doing the same thing and repealing and then introducing an amendment that says three years or less, all prisoners can't vote and so they're all disenfranchised. So I think it's very important on that basis.

I did have another point. I can't remember it. I don't think anything hinged on it. When I read it, anyway, overnight I didn't really think much hinges on it, so those are my submissions, Your Honours, unless you have anything to say, any questions.

ELIAS CJ:
No, thank you, Mr Francois. Yes, Madam Solicitor.

SOLICITOR-GENERAL:
I have a few points only in reply. Yesterday there was a suggestion that the Crown may have or may wish to seek declarations of consistency. I understand there to have been a suggestion that it may have been done in *New Health* or in *Hansen*, so I can briefly just address that to say the Crown has never sought in a formal declaration a relief that is to declare consistency. Of course in the course of argument it might be that the Crown urges an interpretation that is consistent. That's quite a different thing, in my submission.

ELIAS CJ:

Well, it's sought findings that limitations are consistent, but –

SOLICITOR-GENERAL:
Which is part of the interpretive process.

ELIAS CJ:
Well, it may be a bit more than an interpretive process. It's an evaluative process. In fact, it's substantive evaluation of the legislation but you say it has never actually sought a formal declaration and that is consistent with your principal submission. You can say – you can make comment in the reasoning but you can't lead to relief by way of declaration.

SOLICITOR-GENERAL:
Thank you, exactly right, and the relief that would be given in such a case, if the Crown were successful in those cases, would be obvious from the order given.

Your attention yesterday was drawn by me first in 92J but also by my learned friend Mr Butler to 20I and 20J of the Human Rights Act. In a submission from the Human Rights Act I understood it to be said that the concept of breach of an enactment and inconsistency are used interchangeably and they don't matter much. They're used interchangeably. In my submission, the contrary is so. That legislative language – I don't need to take Your Honours back to it now but I ask you to look at it – that legislative language removes any concept of relief from a judicial-like body, in that case, the tribunal.

GLAZEBROOK J:
Any concept of relief on what, sorry?

SOLICITOR-GENERAL:
It removes the concept – from the concept of relief – sorry, it removes from relief the concept that an enactment has been made in breach of the Bill of Rights Act. It does it quite carefully by saying civil proceedings can be brought asserting that an enactment is in breach of the Human Rights Act Part 1A. But it limits –

GLAZEBROOK J:

I'm just not entirely sure how you square that with your language in section 92J(1) but maybe you're going to explain.

SOLICITOR-GENERAL:

Well, this is precisely my point that 92J(1) is saying if in the course of the proceeding the tribunal finds there's been a breach, I would say that's equivalent in our context to the language we've used of the steps and the reasoning get them to say the this enactment is in breach of the Human Rights Act. The legislature has carefully then said the formal remedy is a declaration of inconsistency and in my submission that is a very careful language to avoid any confrontation between the branches to make sure that this administrative tribunal is able to declare not a breach but an inconsistency.

ELIAS CJ:

What is an inconsistency if not a breach?

SOLICITOR-GENERAL:

Well, a breach has a connotation of unlawfulness.

ELIAS CJ:

No, I understand that sort of connotation, but what is it in substance if not a breach?

SOLICITOR-GENERAL:

Well, it is not unlawful. It is not a breach in that way. It is inconsistent, which is our case in my submission the Bill of Rights Act actively contemplates that an enactment can be made, can be properly made, and be inconsistent with a right.

ELIAS CJ:

Is that therefore a remedy which is an interpretive remedy? I'm just wondering about your – about the distinction that you drew earlier between interpretation and substantive relief.

SOLICITOR-GENERAL:

And the similar distinction, perhaps, is when I submit that the Crown takes no issue with the Court concluding either through steps in the reasoning or as a conclusion of the steps in the reasoning, that we can't make an – take an interpretation that is different or that is rights-consistent and Courts get to that point in the reasoning. We take no issue with that. The issue is, of course, with this formal relief that's –

ELIAS CJ:

What about a declaration that the Act – you would be happy, would you, or perhaps you wouldn't because it's relief for a declaration that the statute cannot be interpreted consistently with the Bill of Rights Act

GLAZEBROOK J:

– and therefore must apply in its terms.

SOLICITOR-GENERAL:

If the remedy was to say the respondent – sorry, the plaintiffs are right, they cannot vote, that would be the remedy. The determination of the matter –

ELIAS CJ:

The outcome.

SOLICITOR-GENERAL:

- has to be in the relief. So I'm just thinking through Your Honour's offer that there might be an alternative where the Court concludes. We cannot find a rights consistent meaning and the relief we grant, the order we give, that the matter is dismissed.

ELIAS CJ:

Is that the statute applies.

SOLICITOR-GENERAL:

Yes. That is the distinction.

ELIAS CJ:

What's the impediment to a declaration to that effect? Because you've already said that that sort of reasoning doesn't jump over proper boundaries. So what's the impediment to giving that sort of declaration as a remedy?

SOLICITOR-GENERAL:

Well, I say that it's a new form of declaratory relief which has no declaration of right and determines nothing about the law, legal rights, and parties or others, how they need to act, like we understand declaratory relief to be. It's quite different in character from declaratory relief where a person or the Crown needs no further statement or order to do something, it will obey the declaratory position of the Court. But here the –

ELIAS CJ:

But there are plenty of – I'm just trying to think of some of the examples of declarations which don't really fit within that category, where people do seek interpretation of law from the Court so that they can then order their conduct.

SOLICITOR-GENERAL:

To comply with the law?

ELIAS CJ:

No, no, not – well, but it's not a question of any compulsion arising out of what the Court does, they then have choices and they can apply things. So I'm just not sure that you're looking at the – when you said it's a new form of declaratory relief, well, declarations take whatever form is required in the particular circumstances.

SOLICITOR-GENERAL:

But they take whatever form is required in order to make a declaration as to right or what the law is.

ELIAS CJ:

Well, this is as to what the law is.

SOLICITOR-GENERAL:

The declaration here is that, not that the law is that the plaintiffs cannot vote but the law is inconsistent with the Bill of Rights Act, and that is the objection.

ELIAS CJ:

Well, I – all right, I think I understand your argument. It's so subtle.

SOLICITOR-GENERAL:

Well, the reasons given for why such a remedy should be fashioned, in my submission, don't stack up: to allow the plaintiff a day in Court, Mr Butler said – or he didn't say, "Day in Court" – to allow the plaintiff to come to Court, to entitle a plaintiff to legal aid or to a costs award, those are all, as the Court of Appeal said, correctly in my submission, tail wagging the dog stuff; that's at 161, it's the Court of Appeal.

GLAZEBROOK J:

I'm sorry, what…

SOLICITOR-GENERAL:

This is tail wagging the dog, sort of boot-strapping analysis as to why a remedy is required.

GLAZEBROOK J:

Okay.

SOLICITOR-GENERAL:

Coming to Court is how one obtains the remedy, it isn't a remedy in itself. And while these remedial declarations might be helpful or useful or, as Mr Taylor

said, it was useful to him to have the media being able to say, “Mr Taylor has won his case.” It’s equally unpersuasive, in my submission, to take on what I submit is a new remedial power.

GLAZEBROOK J:

What I think has, and taking it aside from this case, I think his point as I understood it was that it serves a useful purpose if it – and let’s assume it’s a case where it is an interpretation issue and so therefore it does matter and the Courts, as you’ve agreed, can go through that process. My understanding was his point was that if somebody has to trawl through the reasoning of the case to come to that conclusion it is much easier if it is part of the relief of the Court and part of the judgment of the Court so that it can be accessible to people who want to find out what the case decided.

SOLICITOR-GENERAL:

Yes, although I’m bound to say in response to that, Your Honour, that if there had been an interpretative dispute, if the Court had come at this in a different way with a dispute, the order of the Court, to put it in Mr Taylor’s terms, would have been to say the media would have said Mr Taylor lost, because the interpretation would include that the plaintiffs weren’t able to vote.

GLAZEBROOK J:

Well, it might conclude that he’d lost, but his point would be it wouldn't say why he had lost. And one would have to go to the reasoning of the Court – and I think he was trying to politely put this – that it’s not always that easy to find the reasoning of the Court in a judgment, and especially if, say, you’ve got people who are in a hurry or not legally trained who don’t necessarily understand how to do that, and especially perhaps if there are multiple judgments it can be quite difficult as well for the lay person. So this is a way, he says, of a conclusion. And, I mean, another way of doing that is, I suppose, having a summary at the end, and to my mind I don’t quite see the difference between that and containing it in a formal order of the Court.

SOLICITOR-GENERAL:

I understand that you don't –

GLAZEBROOK J:

I do agree that normally one would not wish to be doing an evaluative process as under section 5, but that is what has been given to us to do by Parliament and everybody, including the Crown, agrees that we do have to do that evaluative exercise in order to find out what the law is, because that is a step on, in the interpretation.

SOLICITOR-GENERAL:

I don't think this is the time for me to go back through my submission.

GLAZEBROOK J:

No, it's not but it's just that that was the point that Mr Taylor was making, an accessibility access point, as I understood his point.

SOLICITOR-GENERAL:

I had understood it differently, but I'll leave that point there.

GLAZEBROOK J:

I did see him nodding.

MR TAYLOR:

Yes, Your Honour.

SOLICITOR-GENERAL:

The other reason given for a declaration of inconsistency is by the Court of Appeal.

GLAZEBROOK J:

Well, did you have a comment on accessibility?

WILLIAM YOUNG J:

One might be – if we overrule a case we don't normally issue a declaration that it's wrong. It's just a step in the reasoning. It's whether steps in the reasoning should form part of the judgment which normally they don't.

GLAZEBROOK J:

Well, they may not. But the argument is that it's constitutionally improper in this case for them to do so.

ELIAS CJ:

When we overrule a case, the formal order of the Court is that the decision below is quashed.

WILLIAM YOUNG J:

That's reversal. I'm talking about where we overrule an earlier decision.

GLAZEBROOK J:

Well, we may actually do so.

ELIAS CJ:

We might. If you found it useful to do so, you might which is really the point I was making earlier, that the form of declarations has to be tailored to what's in issue and what's needed. The Courts have to be able to respond to what is needed.

SOLICITOR-GENERAL:

To address Justice Glazebrook's point, then, about accessibility or Mr Taylor's point, if it was his, there are other ways that the Court can achieve that if that is desirable. I'm all for accessibility of what the Court is saying, but it might be a press release. It might be a conclusion. My objection – to repeat the submission, and I won't go into it again – is in the formal nature of the order. The question arose – sorry, another reason that was said by the Court of Appeal to justify declaration of inconsistency and it was something that was discussed yesterday, not quite in these terms, was to give strength to the plaintiffs in taking

the matter up on a political stage, either to Parliament or to Geneva. The Court of Appeal notes that at paragraph 67 quite openly that that is a useful purpose and a reason that they were encouraged to conclude this power did exist. In my submission, that is achieved through reasoning, if there is inconsistency, but it is a step too far in my submission to give a formal order of this Court in order that a plaintiff has a better political armoury to approach either Parliament or Geneva.

ELIAS CJ:
Do you say that the optional protocol confers a political right?

SOLICITOR-GENERAL:
Well, the optional protocol requiring as it does that states ensure their domestic legislation has effective remedies and that parties have access to legislative or administrative or judicial competent authorities doesn't require a state to have legislation that has superior or supreme status, of course. In New Zealand the state will say that we have met that protocol obligations through having the Human Rights Review Tribunal power to make a declaration, having the section 7 part of the Bill of Rights Act often –

GLAZEBROOK J:
Well, that can only relate to discrimination, though, can't it?

SOLICITOR-GENERAL:
The Human Rights Review Tribunal?

GLAZEBROOK J:
Yes, so that doesn't answer – in any event, I don't see it as a remedy issue here.

SOLICITOR-GENERAL:
I was answering – I was attempting to answer the Chief Justice's question as to whether this is legal or –

ELIAS CJ:

Well, your characterisation of this is political.

SOLICITOR-GENERAL:

Well, this is what this Court of Appeal said was the purpose for giving a formal order was so that a plaintiff could go and take –

ELIAS CJ:

Well, no, I'm not seeking to cavil too much at your description of the Court of Appeal reasoning. I'm just asking you whether it is fair to characterise the optional protocol procedure as a political remedy.

SOLICITOR-GENERAL:

Sorry, I misunderstood you. The procedure by which a person can take their complaint to the international stage?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes, I would say that is more political than legal in that it speaks part to the – the Human Rights Committee speaks back to the Parliament, to the state about its legislation.

ELIAS CJ:

Well, that might be so but I'm just a bit surprised to hear it characterised as that. That may be the outcome, a requirement of the state. That is the outcome.

SOLICITOR-GENERAL:

Well, the optional protocol puts legal obligations on the state, so I'm not saying – I'm only talking about an end process.

ELIAS CJ:

But an individual can access it, and I would have thought the process – in fact, well, it would be useful to see how it was described when we acceded to it, to the public of New Zealand. But I'd be very surprised if it was described as a political process. But that may just be a question of words.

SOLICITOR-GENERAL:

I doubt very much if it was described as a political process because, in fact, as I understand your question to be at the endpoint, but the taking of the optional protocol was a commitment by the state to the legal content of it. So I don't want to be taken to be saying that it was a political –

ELIAS CJ:

Well, it's a process that New Zealanders can access.

SOLICITOR-GENERAL:

Yes, it is.

GLAZEBROOK J:

The optional protocol doesn't give those commitments. It's the convention itself.

SOLICITOR-GENERAL:

It's the commitment to the convention into our domestic legislation.

GLAZEBROOK J:

So the optional protocol – I haven't looked at it recently but the optional protocol only gives the individual the right, effectively, to enforce those rights and bring the state to account internationally through the –

SOLICITOR-GENERAL:

Through its domestic processes.

GLAZEBROOK J:

Well, no, no. You have to go through the domestic processes but under the optional protocol the individual brings the state to account directly internationally – directly for a breach of the convention which has nothing to do with domestic processes. Well, it does in the sense that they can only be brought to account if they've breached the convention in the domestic processes or legislation.

SOLICITOR-GENERAL:

And when it's about enactment as in here the international language speaks back to the state and Parliament.

GLAZEBROOK J:

Absolutely. But an individual brings them to account.

SOLICITOR-GENERAL:

Yes, indeed.

GLAZEBROOK J:

And I think they think of it as a judicial process. One might have –

SOLICITOR-GENERAL:

Yes, that's a fair point. I should step away from saying it's a political process. My point was that it's spoken in the political sphere once the person has whatever they get from international forum.

ELIAS CJ:

As do orders of the domestic Courts directed at the executive. Anyway, perhaps that's a slight exaggeration. I suppose since we could grant it injunctions it might not be fair to say that. I was thinking more of declaratory relief.

SOLICITOR-GENERAL:

Not at the executive – against the executive I say that's quite a different proposition.

ELIAS CJ:

Yes, yes.

SOLICITOR-GENERAL:

The executive wouldn't say unenforceable you can't – this means nothing. This doesn't mean it was unlawful. It will certainly not take any of those points.

ELIAS CJ:

Well, I mean, it has happened, hasn't it? *M v Home Office* in the UK but anyway, I do understand your point there.

SOLICITOR-GENERAL:

Yesterday – this is my last point in reply. Yesterday the issue of Article 9 in the Bill of Rights came up and I merely point out to the Court that one of the other reasons the Court of Appeal had at 155 for – by a declaration of inconsistency might be required, that might well raise an Article 9 point. I mean, it was only an example. It doesn't raise it here. But they were saying there was no section 7 report to identify the inconsistency there might be a purpose and a declaration of inconsistency by the Court rather than an indication in the proceeding. As we know from the Court of Appeal in *Boscawen v Attorney-General* [2009] NZCA 12, [2009] NZLR 229, that might well draw the Court directly into conflict with a Parliamentary proceeding in a way that would be – would bring the comity question into frame. I don't say that's the case here, but I point out that the Court of Appeal's example of when they might say a declaration of inconsistency was required might well do that.

For that reason, our submission is that it's the conferral of the power by Parliament on the Court inviting the Court to declare or to determine any inconsistencies with an enactment in the Bill of Rights Act and for that matter to be returned to Parliament for consideration best fits with our constitutional

framework and avoids the language in the Human Rights Act – as I've just mentioned – avoids any of those clashes that might well occur as these difficult and, you know, somewhat stark matters come before the Courts.

Your Honours, those are my reply submissions.

ELIAS CJ:

Thank you, Madam Solicitor. Right, now we will have the standing appeal which, Mr Taylor, is yours.

MR TAYLOR:

Yes, Your Honour. Thank you. I understand the Human Rights Commission are going to put their submissions according to the timetable we've got first. I may have misunderstood.

ELIAS CJ:

Is that what you would prefer, Mr Taylor?

MR TAYLOR:

Yes, Your Honour, I would.

ELIAS CJ:

All right. That's fine if that's all right with you, Mr Butler.

MR BUTLER:

Thank you, Chief Justice. If I can indicate that my learned friend Mr Curran will be delivering the Commission's submissions for this aspect of the hearing.

ELIAS CJ:

Yes, thank you. Thank you, Mr Curran.

MR CURRAN:

Your Honours should have a road map in front of you now. I've understood throughout this appeal that the Court is interested in crispness so I do wish to approach the road map in its true sense, as a survey of the terrain but with no obligation to stop off at every destination. Before I address that road map, I did want to address just one point of context, and that is to do with the way in which the Court of Appeal dealt with issues of standing, because it's important in my submission to acknowledge at the outset that the Court was neither comprehensive nor categorical on those issues. The judgment was extremely brief in its treatment of standing. The issue of approach to standing in these proceedings received only a single substantive paragraph, paragraph 166, and the assessment of the cross-appellants' standing took only two paragraphs, paragraphs 176 to 177. The judgment was framed, in my submission, in qualified terms. The Court described at paragraph 148 its remarks as "observations" that were neither "final" nor "exhaustive" and were subject to likely evolution. And further at paragraph 166 when the Court was dealing with issues of approach, it limited to observation to what "ordinarily" would be the case in declaration proceedings. So it's difficult in my submission to read the Court of Appeal judgment as anything other than the start of a conversation on these matters, rather than its endpoint.

But nonetheless, clarifying the approach to standing is undoubtedly of general and public importance for future cases, and that is why the Commission joins issue with the Crown in the cross-appeal. Your Honours will know from the written submissions, and it's there on my outline at points 2 and 3, that the Commissioner advances two submissions on this matter. First that in appropriate cases the public interest can supply a valid basis for standing in declaration proceedings, and second on a proper application of such a public interest test standing should be granted on that basis to the cross-appellant in these proceedings.

Before embarking on those points, I did just want to briefly address – perhaps with some trepidation – an issue raised by Your Honour the Chief Justice in the course of interchange with my learned friend the Solicitor yesterday about

whether a declaration of inconsistency brought against, as I understood it, section 6 of the Amendment Act, might itself supply a basis for standing. I say I'd do that with some –

ELIAS CJ:
Well, I wasn't – my query was whether we shouldn't be looking at section 6, because that's the provision, it seems to me, that prevents Mr Taylor from, and continues to, because it continues the old regime, and it did seem to me that the statement of claim was not specific –

MR CURRAN:
It is so.

ELIAS CJ:
– and that therefore that was on the table despite the way it had been looked at in the lower Courts, that's my query.

MR CURRAN:
I see, Ma'am. I have perhaps taken that ball and run with it a little bit further to analyse it through the prism of standing, because if the question is where is the hook for the application of the Amendment Act, which Your Honour quite rightly identifies as front row and centre in the statement of claim as being challenged *in toto*, whereas the hook that lets that affect Mr Taylor, and the Crown submission deals with that, one answer might be, well, section 6, which drags through the disqualified status from previously, the pre-commencement position. So I did not want to descend into – that's a question of personal standing, personal interest standing, and that really is, in my submission, a matter for the parties to deal with as opposed to the general matters that the Commission is –

ELIAS CJ:
You're raising public interest standing, yes.

MR CURRAN:

I am, Ma'am. Could I say though, just a couple of points as to why you might still want to look at public interest standing, even in circumstances where Your Honours thought that section 6 might provide that personal interest standing hook. The first is that I apprehend one of the Crown's objections relies on the case of *R (Chester) v Secretary of State for Justice & Anor* [2013] UKSC 63*,* which is in the supplementary bundle that the Crown has filed in respect of the cross appeal. And the problem in *Chester, Chester* you have the victim, the prisoner who was sentenced to life was affected by the blanket prisoner disqualification legislative rule in issue in *Chester.*

ELIAS CJ:

So it's tab 4 is it?

MR CURRAN:

That's tab 4, Ma'am, of the Crown's supplementary bundle. But a point that the Crown takes, as I understand it, is that even where you are directly affected it may be true to say that a statutory rule that is rights consistent could be crafted that would leave your position unaffected, and that was the position in *Chester.* Mr Chester was sentenced to life, so he was definitely affected by a blanket ban on prisoner voting, but in the course of – so no issue about standing, clearly a victim, which the UK Courts use as a touchstone for standing even in declaration proceedings it appears – but at the back end the question of remedial discretion, should we grant a declaration, two of the Supreme Court Judges, Lord Mance and Baroness Hale, gave substantive judgments in that case, described as one of the remedial discretionary factors the fact that this rule was hypothetical qua Mr Chester because, reading the tealeaves of the European Convention jurisprudence, one could craft a rule consistently with the European Convention that banned, for example, prisoners sentenced to life. And I understand that's still a point that my friends for the Crown do take in respect of Mr Taylor given –

ELIAS CJ:

That it would be section 5 compliant?

MR CURRAN:

That a rule – and no one's examined this but the Crown does hint in a footnote that there are powerful arguments, they use Justice Heath's reference to this, there might be powerful arguments for upholding the right to consistency of the previous pre-commencement.

ELIAS CJ:

Well, I understand that but, as you say, it hasn't actually been directly confronted and it would depend, well, it would depend on how persuasive, I suppose, the European case law is, it would depend on New Zealand circumstances and the wording of section 12 as compared – do we have the text of the European…

MR CURRAN:

On the right to vote?

ELIAS CJ:

Yes.

MR CURRAN:

I'm not sure that we do.

ELIAS CJ:

No. All right, that's fine.

MR CURRAN:

And just to be clear, Ma'am, I wasn't suggesting that that was a fait accompli, the outcome of that exercise. What I was endeavouring to suggest was that if one takes public interest standing that's a way of cutting through those kind of arguments, because if one accepts that one can advance the true rights impact of a piece of legislation and the extent of its inconsistency or breach in the public interest, it's inconsistent with that approach to then come at the final hurdle in remedial discretion and say, "Well, you're not sufficiently a victim to qualify for relief," so that's one –

ELIAS CJ:

Sorry, is your submission that that it should not be treated as a matter of standing, it should be treated as a matter of remedy at the end of the process?

GLAZEBROOK J:

Your target shouldn't really even be a matter of remedy if it was public interest standing but in fact…

ELIAS CJ:

No, no, I don't mean standing.

GLAZEBROOK J:

No.

ELIAS CJ:

Standing is fine, but you might determine that the person wasn't entitled to the relief they sought.

MR CURRAN:

That is the UK approach, Ma'am, and what I suggest is you can cut through that Gordian knot if you accept public interest standing, because it can't be true that an anti-public interest standing rule applies at the remedial discretion phase. It can't both be true that you're entitled in the public interest to advance the rights impact of a piece of legislation but then be denied a relief on the basis that you're insufficiently a victim, that's the remedial discretion rule only makes sense in the context of a victim-based standing.

O'REGAN J:

It's not much help to the person who's trying to get a declaration to say, "You didn't lose on standing, you lost on discretion," you still lose, don't you?

MR CURRAN:

I agree, Sir. And just to be very clear, I don't endorse that particular form of reasoning that you see in *Chester.* What I'm suggesting is that public interest

standing is a way of circumventing a potential problem that the Crown certainly advances. But perhaps we're getting lost a little in the weeds…

ELIAS CJ:

But does it matter what the nature of the right is that's in issue? Because some rights are much more personal, arguably the right to vote is, well, institutional, probably constitutional, I mean, it affects you not just in casting the vote but in the shape of the democracy.

MR CURRAN:

Yes, Ma'am, and that is part of our case.

ELIAS CJ:

Yes, I saw that.

MR CURRAN:

But if ever you were to grant public interest standing, a context like the present, which sees legislation tranche on the universal franchise, that is a powerful context in which the public interest is engaged: a right that inheres in all of us that is tranched upon by a legislative actor that is meant to be representative of us and accountable to us. And so that is, in my submission, yes, a very powerful factor in favour of public interest standing in this case, Ma'am.

ELIAS CJ:

No one's referred us to some of the US writing in this area, you know, the John Hart Ely writing on the fundamentals that a principal responsibility of Courts is to keep open the democratic channels, that that is – in other words, looking at the quality of this right, which of course is reinforced I suppose by section 5.

MR CURRAN:

Yes, Ma'am, and I can only apologise for the breadth of the survey. I think the Commission was the only person before the Court to endeavour to do a round-the-houses on the position in the respective jurisdictions, and so the secondary material in the US context, I admit, the Commission hasn't got to.

Can I give one other reason why, even in circumstances where there might be a direct interest, personal interest standing point, you might want to consider public interest standing, and that is just that it's clean and simple. So, for example, in the Canadian Supreme Court's case of *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney-General)* [2012] SCC 45, [2012] 2 SCR 524, which I commend to Your Honours, is in this context a very sophisticated and in my submission persuasive framework for assessing public interest standing when one is considering the adjudication of rights against legislation. In that case the second applicant –

ELIAS CJ:
So where do we find that one?

MR CURRAN:
That is – it'll be in the green bundle, Ma'am, somewhere in the twenties – 25. It's a unanimous decision of the Court given by Justice Cromwell. And there it was a claim brought against the prostitution provisions of the Canadian criminal code and the two applicants both sought and were granted public interest standing. There was a public interest group, the Downtown Eastside Sex Workers United Against Violence Society, and there was also an ex-sex worker, Sheryl Kiselbach, and in the end Ms Kiselbach also advanced a personal interest standing argument, one suspects that might have been difficult, complex, because she was not at the time of the Court case in genuine jeopardy of the Criminal Code provisions, so the Court simply approached the matter through the lens of public interest standing, granted that on that basis and said, "Well, accordingly we don't need to consider personal interest standing." So that was all I wanted to say on those issues, Ma'am. I suspect it's more a matter for my friend Mr Perkins and Mr Taylor.

I wanted to – I appreciate that Your Honours have the benefit of the Commission's submissions on this point – but I wanted just to touch at the outset on the main arguments that the Crown makes against public interest

standing in their written submissions, and they're dealt with in my road map at paragraph 2.1, and I apprehend that there are four of them.

The first argument is that this is quite different from judicial review says the Crown. We can understand, says the Crown, that in judicial review you need wide standing because there's a constitutional function that the Court is embarking on to hold the executive to account, there's a rule of law context, and so we needn't be so fussy about standing where the Court is performing a rule of law function. But that's different, the Crown says, here, because you're not performing a rule of law function. Instead there's no question, says the Crown, about the validity of the legislation that breaches rights and downstream executive acts are lawful, they say, so no rule of law to see in this picture, and the Commission takes issue with that proposition. It says that in declaration of inconsistency proceedings there are a number of rule of law tasks that are being performed. They are dealt with or touched upon in the written submissions of the Commissioner at paragraph 2.27, but just to hit on them briefly, there seem to be at least four or potentially five rule of law tasks that the Court is actually performing in declaration proceedings.

The first is that a declaration proceeding is holding the state, the legislative branch of the Crown, to compliance with a legal standard set out in the Bill of Rights Act. I should say that all of these points trade on the distinction that was traversed by Bench and Bar yesterday about is it truly in breach of the Bill of Rights when the legislature acts inconsistently when them, and is it truly a legal standard that the Bill of Rights – or an obligation or a compliance requirement on the legislature imposed by the Bill of Rights Act. If you don't find the Commission's answers persuasive on those points, then none of these points will make sense, so I suspect that my friends for the Crown just won't engage with these issues. But if you do accept that the legislature is bound by section 3(a), that's what it's doing there, and that there is a legal standard of compliance against which legislative acts are assessed, then it also makes sense to say that the rule of law is engaged because in our rule of law respecting society the Government acts in compliance with the rule of law and the declaration is an accountability mechanism there. It also ensures equality before the law. That's

another important rule of law value, what Lord Bingham would describe as "the laws of the land should apply equally to all". Every actor within the system – whether it's an individual or a Government actor – should be held equally to legal standards, and the declaration ensures that that gap is filled. So that's a rule of law function.

There are two more rule of law functions related to rights, and I can't improve, with respect, on the analysis that Your Honour the Chief Justice gave in *Chapman* on this particular issue and if I could – I appreciate the decision is well known to the Court but if I could just touch on two –

ELIAS CJ:
It's a dissenting opinion.

MR CURRAN:
Yes, Ma'am, it was a dissenting opinion but there was no inconsistent treatment, in my submission, on the rule of law aspects that Your Honour was articulating in that particular case, and in fact the concept of Justice Young's judgment and Justice McGrath in that case talked about judicial breach, focused much more on the actor that was considered in that case but definitely considering that actors named in section 3 were bound by the Bill of Rights and were in breach if they failed to uphold those rights.

But if I could just take the Court to those points which I don't apprehend are matters of controversy between the Members of the Court, you can find *Chapman* at tab 12 of the blue volume, volume 1, of the Commission's authorities. I just wanted to call up paragraph 1 of the judgment. A right without a remedy is a vain thing to imagine, citing Chief Justice Holt in *Ashby v White* (1703) 2 Ld Raym 928, 92 ER 126 (KB), that rights are vindicated through remedy for breach is fundamental to the rule of law.

So again, that won't make any sense to the Crown if you don't think rights are being breached here, but if you do such that you agree there's a declaration of inconsistency power then there are rule of law things going on. And of course

Your Honour wasn't cutting from whole cloth there. The idea of vindicating breaches of rights through remedies was a central motivating force in the Court's decision in, for example, *Baigent*.

And then the other paragraph, I just wanted to lightly touch on is paragraph 26 and this is the other rule of law dimension based around access to judicial remedies. The final sentence of Your Honours' paragraph 26, "More generally, vindication of right and a society based on the rule of law must ultimately be able to be achieved by claim of right to the Courts." And again, that's exactly what is involved in the declaration proceeding and again that's not cutting from whole cloth either. That's Article 2.3B of the ICCPR talking about the obligation on state's parties to develop judicial remedies for breaches of rights.

The fifth rule of law dimension is a more contestable one. That relies on whether you think the rule of law is thick, philosophically thick, in other words incorporates human rights as part of the rule of law, as someone like Lord Bingham considers, or whether you're philosophically thin, Raizen concept of the rule of law. So I don't take that point further. But if you do believe that the rule of law – in order to have a rule of law promoting society you comply with human rights, like Lord Bingham does, that too is something that is called in aid when a declaration of proceeding – of inconsistency occurs.

There's just one further point on the discrepancy with judicial review I wanted to touch on, because the Crown itself makes this argument and I heard it again from my friend Madam Solicitor yesterday that of course it would be possible to reconceive these proceedings as a judicial review application. You could find an executive actor, maybe the Electoral Commission, and challenge their conduct in judicial review and the answer would ultimately bubble up that there is an inconsistent statute and that would be how you could find your way to an argument about a declaration of inconsistency.

In my submission, that's a point against the Crown on public interest standing because if one can reconceptualise these proceedings as a judicial review, of

course we'd be in judicial review standing and judicial review standing is notoriously wide.

ELIAS CJ:

But why aren't we in judicial review standing? Why aren't we in public law standing? I don't really understand the distinctions that are being drawn.

MR CURRAN:

Thank you, Ma'am, and that is –

ELIAS CJ:

Well, I don't know and it is actually an open question. Why – is there authority that suggests standing in – under the Bill of Rights Act is different from standing in public law cases?

MR CURRAN:

No, Ma'am. There is no such finding, at least to counsel's knowledge. It is true to say that it's an underexamined, under-theorised aspect of Bill of Rights jurisprudence but Your Honour's theme, I think, is one that the Commission entirely endorses. We have a new form of public law accountability, if Your Honours accept that the declaration exists, a new form of public law accountability on foot here. And yet somehow the Crown would want us to think that a more narrow form of standing applies only to that particular branch of public law accountability, left that well behind, in my submission, from *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 (HL) onwards where the concept of public interest standing in the administration of justice and to promote the rule of law was accepted into New Zealand law through cases like *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 and *McVicar v New Zealand Parole Board* [2015] NZHC 2153 and encapsulated by –

ELIAS CJ:
It's a bit strange to cite Canadian authority when I think the thaw in standing probably occurred first in New Zealand.

MR CURRAN:
Yes, Ma'am, and just by starting with –

ELIAS CJ:
It may encapsulate it better but …

MR CURRAN:
Yes, Ma'am, and simply by starting with a Canadian case I didn't mean to give that presentation or priority or otherwise because it is very much a part of the Commission's argument that in fact that is 2.2B New Zealand public law standing, that this would be a carve-out from the status quo for unclear reasons from the emphasis that now obtains in New Zealand public law on merits, the legal merits of the case, dominating other considerations on issues of standing. As Justice Ellis put it in the *McVicar* case, if you raise issues of the – the legal issues of wide public import, we don't care about the identity of the applicant.

Now, that is not to say that the floodgates open. I just want to be very, very clear about that. The Commission's position is still that a public interest assessment has to be conducted. There's no room for vexatious people or busybodies or anyone else who just reduce an already-scarce judicial resource. But where it is genuinely in the public interest to ventilate basic human rights issues, the Commission says this Court can recognise public interest standing.

So that dealt with, I hope, the Crown's first objection from the rule of law.

The next two objections I can take as one because in my submission they're not objections. They're discretionary factors. So the argument goes that, well, if we have a limited form of standing we can avoid general inquiries and advisory opinions, and that's a good thing, and C, limited standing also avoids

declaration proceedings directed to political causes which are better resolved by other branches. That's a comity argument, as I understand it.

And my response to that argument is to say that they're really non sequiturs rather than objections to the concept of public interest standing because they can perfectly factor into an assessment of whether it's in the public interest to grant standing and in fact do. So apologies for citing that Canadian case again, but in *Downtown Eastside*, one of the non-exhaustive factors going to the third limb of that public interest assessment at paragraph 51 is "whether the issue will be presented in a sufficiently concrete and well-developed factual setting". So getting at that abstraction general inquiry point, so it can be factored in but it's not a reason to cut off public interest standing at the pass.

ELLEN FRANCE J:
So how is it factored in?

MR CURRAN:
In the Canadian context, Ma'am?

ELLEN FRANCE J:
No, well, you're saying it can be factored in.

MR CURRAN:
Yes.

ELLEN FRANCE J:
How is it you're saying it can be factored in? Making sure you've got a proper factual basis?

MR CURRAN:
Yes, Ma'am. So consider *Boscawen*, the case in *Boscawen*, which has been described in the case itself and in subsequent commentary as sort of the epitome of an abstract case. There was no pleaded rights impact on any person. It was a free-for-all attack on the legislation per se. I would say – and

the Canadian Supreme Court would say – well, that's probably going too far. We don't have a proper case capable of adversarial determination. We're risking a very abstract inquiry. But in a case like the present where the pleaded rights impact on the respondent prisoners is right through the statement of claim and where, in fact, it doesn't actually matter for the purposes of the rights analysis, as it turns out, to pick up Your Honour the Chief Justice's point, because the unjustified inconsistency was conceded by the Crown, we would say we're in a concrete factual setting. We're not too abstract for someone like Mr Taylor to come along and make his claim and of course the Court found it – or the Courts below, at least, were quite comfortable granting the declaration.

So that is one of the factors. One further point just on the comity issue, it seems to me, whilst that also could be factored in, it probably shouldn't be factored in at standing. It probably should be an issue that goes to remedial discretion, and in fact that's how the Court of Appeal treated it at paragraph 170 of its judgment, and that's because if the argument is that the Courts simply lacked the institutional competence to deal with a particular justification matter or the justification matter is one requiring democratic accountability such that the Courts should defer to Parliamentary assessments, if that is the argument it's not clear to me why it should matter who is bringing the argument. It seems to me to be a rejoinder that you could apply to someone with personal interest standing, and accordingly I suspect it might be better placed where the Court of Appeal had it in the remedial discretion. But again, the major point is this is not a concern that requires a universal prohibition on public interest standing.

The final point that I wanted to deal with is, again, in my submission not a compelling objection. That is that it's unnecessary to resolve the cross-appellant's claim to public interest standing, given that the Court already has four respondents with unquestioned standing. In my submission, well, it does matter. It's necessary for Mr Taylor. Mr Taylor advances his claim for a remedy and you'll see from his written submissions public interest standing is the primary basis on which he relies. So it is of critical importance, not to the other four respondents but it is to him. It is also necessary for the Court. The Court has granted leave on the cross-appeal and needs to resolve it and one

of the primary grounds on which the matter is argued is the interest of public interest standing, so in my submission it's absolutely necessary for the Court to determine these arguments, regardless of the fact that the primary declaration – issue of rights consistency is perfectly capably advanced through the other four respondents.

The positive reasons for public interest standing are set out at paragraph 2.2. I touch upon the nature of the declaratory remedy and this touches upon the recognition in *Taunoa* – and that citation is at footnote 4 of the Commission's submissions in the judgments of Justices Blanchard, Tipping and McGrath – but the point that there are two victims where a breach of rights occurs under the Bill of Rights Act. The individual rights-holder is affected, but so too is society, because it undermines the rule of law. Fundamental societal norms are jeopardised and it impairs public confidence in the efficacy of rights protection. Justice Tipping went on to say that that's why society, too, needs vindication. We need to uphold the importance and value of the right, not just for the individual rights-holder but for society. And so the corollary of that, in my submission, is that more than just the individual rights-holder have a dog in this fight. They have a stake in rights breach proceedings. Of course, that is intensified, in my submission, in the case of a legislative breach of rights, which has wider impact. It's not like Your Honour Justice Young's example of the executive search of the House where you might be worried about Mrs Baigent's neighbours taking the case. This is legislation that affects all of us and even more so, in my submission, to pick up the thread that Your Honour the Chief Justice postulated, even more so in cases involving the universal franchise.

I refer to the consistency with the New Zealand public law standing. I think we've dealt with that point.

The third point there is why does standing for declarations under the Human Rights Act 1993. There's a consistency issue there. Mr Taylor alighted on this point yesterday. The Crown says, well, there's a reason why you might have a wider form of standing under the Human Rights Act. That turns on its unique statutory language and history, and it is true to say that the word "complainant"

under the Human Rights Act has been held by our Courts to be a very wide import of someone who complains so that's pretty wide, but the implication is that Parliament somehow intended different approaches to the same remedy in respect of the same right – section 19 – depending on which fundamental human rights statute you plead or put in your intituling, in my submission that's a very difficult and strange proposition in the field of human rights. Parliament cannot have intended different outcomes and in fact the issue of consistency between the Human Rights Act and New Zealand Bill of Rights Act regimes was described as desirable in *Taunoa* at paragraph 322 by Justice Tipping. His Honour there was talking about the approach to remedy of damages. That was obviously the context in *Taunoa*, but His Honour's point about remedial consistency across the human rights framework in New Zealand in my submission holds exactly here.

Touching briefly on the issue of comparator jurisdictions, I've cited Canada and South Africa as good examples of where public interest standing applies in rights-based adjudications of legislation in those jurisdictions. *Downtown Eastside* is the latest expression of the Supreme Court of Canada's approach and the constitution of South Africa makes it explicit in section 38D of the constitution. That's at tab 12 of the green bundle if Your Honours want to go there later. It expressly permits anyone acting in the public interest to bring an action for breach of the Bill of Rights contained in that constitution, chapter 2.

In my submission, there are good reasons to follow those international analogues. We have a strong impetus in this jurisdiction to align ourselves with the Canadian charter position. Right through the White Paper the Bill of Rights Act is projected as a child of the Charter and there are constant references back to the equivalent provisions. The very legal test engaged in declaration of inconsistency proceedings is a Canadian test. We call it the *Hansen* test. They call it the *R v Oakes* [1986] 1 SCR 103 test. Canadian jurisprudence is an important reference point throughout the New Zealand Bill of Rights Act jurisprudence. But there's another important way in which both Canada and South Africa are useful analogues, in my submission, and that is that they are

both relative contemporaries of the New Zealand Bill of Rights Act 1990, the Charter in 1982 and the South African Constitution in 1996, and that forms an important point of contradistinction, in my submission, from the position prevailing under other international comparators which are more hidebound in their adherence to individual rights-holder claims.

So, for example, the European Convention is a classic example. Writing in the Cambridge Law journal, I do have copies of this article if Your Honours are interested. It didn't make its way into the bundle, but Joanna Miles described by reference to the *travaux préparatoires* in respect of the European Convention – a product of 1950 – that at the time the Convention was negotiated granting individual standing in international law was radical enough, and there was debate in the *travaux* about, well, would this give antidemocratic proselytisers a forum to flood the European Court with applications that would destroy the convention system? That was the fear in 1950.

Public interest standing 31 years before Lord Diplock in *Inland Revenue Commissioners* was someway away and so in my submission analogising to a victim-based standard under the European Convention would be a misstep in approaching the issue under the Bill of Rights Act.

Just dealing with the position under the UK Human Rights Act, that's an interesting one in that the answer to standing is not dictated by the UK statute. So unlike claims against public authorities in section 7 of the UK Human Rights Act, a declaration of inconsistency under section 4 is possible without victim status. What the Courts appear to have done – again, this appears to be a developing field but what the Courts appear to have done is use victim status – as I said earlier in my submissions – as a touchstone for assessing whether it's a good idea to hear a particular case. But it's important just to be a bit careful about reading that as an invariable rule. It's not. It's not a requirement of statute, and the Courts acknowledge it. To the extent – the Commission subjects to the extent that the UK Human Rights Act pays obeisance to the convention victim standard, it's ruled by the 1950 outmoded approach. But it

does, importantly, including in the cases that the Crown puts in its supplementary bundle, reserve the position for future examination.

So, for example, Lord Woolf in the English Court of Appeal in the *Lancashire County Council v Taylor* [2005] EWCA Civ 284 case – that's tab 3 of the Crown supplementary bundle at paragraph 44 – Lord Woolf cites Lord Steyn's judgment in *R (Rusbridger) v Attorney-General* [2003] UKHL 38 for the point that declaration applicants do not have to demonstrate victim status under section 7, as he must. That is true. And Lord Woolf calls that a "desirably flexible" approach to declarations of inconsistency.

Same position applies or is recognised by Baroness Hale in the *Chester* case that we discussed earlier. There Her Honour at paragraph 102 acknowledges the Human Rights Act does "leave open the possibility of a declaration in abstracto" which I apprehend that Baroness Hale means non-victim claims by abstract claims and confirms there may be occasions when that would be appropriate. She said the Court should be extremely slow, but there may be occasions when that is appropriate. So I just flag that nuance for the Court in case the Court is worried that another contemporary of the New Zealand Bill of Rights Act somehow has a more strident position.

My final positive point is the point from legislative history, and Your Honours will have received the small supplementary submission on that particular point. The basic proposition was – and I apologise for –

ELIAS CJ:
Sorry, I just want to check that I have it. Yes.

MR CURRAN:
Thank you, Ma'am. The reason for that supplementary submission was counsel's late discovery of an argument made by another counsel in one of the cases there was in the bundle about the legislative history of the Bill of Rights Act, and it turns out that the remedial provision also had, arguably, a standing requirement built into it. So Article 25 of the draft Bill appended to the White

Paper is set out in that supplementary submission, and that said that anyone whose rights or freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply for appropriate remedies. That concerned some people in the submissions process. They're worried about – amongst other things – whether third parties could assert the rights of others. Those submissions are captured at footnote 5 of the supplementary submission, and essentially the way the institutional actors in that legislative history process responded was by reassuring everybody, "Don't worry. Ordinary rules of standing will apply." That's what the interim report of the Justice and Law Reform Committee said. The White Paper had also envisaged that the existing rules on standing which responded to public interest by broadening standing would apply in Bill of Rights adjudication. And so obviously then Article 25 disappeared, as we know, and the Court in *Baigent* speculated a little bit on why that might be so. It might have been bound up with the precedent in concerns about supreme law, bills of rights or judicial invalidity. But the concern, I suppose, that some submitters had never crystallised; article 25 was never in the Bill of Rights as introduced to the House and so one is always careful with legislative history arguments and the Commission does not say that this is determinative, but the Commission does draw two lessons, one that even when Article 25 was in play in the legislative history process, the relevant select committee and the White Paper did not view it as impeding ordinary rules of standing, which include at the time that this was all happening in 1985 for the White Paper, 1987 for the select committee report, we're into post-*Inland Revenue Commissioners*, post-*EDS*, public law standing here in New Zealand. So never considered to be an impediment and even if one did consider Article 25 to be an impediment, obviously the New Zealand Bill of Rights Act was ultimately enacted without that provision, so what the Commission draws from that is that certainly no impediment, and perhaps some comfort in that history for recognition of a public interest standing process test here.

I just wanted to finish the Commission's submissions by briefly hitting the points which the Commission says is salient in applying the public interest. This gets to Your Honour Justice France's question about, well, how would you apply

public interest standing in this context? Well, first it must respond – as Your Honour the Chief Justice pointed out – to the importance of the right. The Supreme Court – pardon me, the Constitutional Court of South Africa which does have that public interest standing test built into its constitution – recognises the importance of the right and the implications of its breach as being important factors going to whether to grant public interest standing.

The vulnerability of the persons affected. This Court has recognised that prisoners are vulnerable. There's a corresponding public interest in seeing their rights vindicated and protected.

The third point, that the cross-appellant is engaged in these issues. He is a member of the broader affected group of prisoners, so this is without prejudice to Mr Taylor's argument on direct personal interest standing, but if he is not in this Court's analysis directly or personally affected he must be the next – if you were to map the interest he must be the next concentric circle out from that core, in my submission. As a prisoner, he is interested in defending the rights of prisoners and avoiding an intrusive rights climate for prisoners and further he might well be interested in any remedial line-drawing that might happen in Parliament which may affect him.

Further, Mr Taylor is an avowed prisoner rights advocate with a long track record of success in defending those rights. Mr Taylor in his submission says that he would satisfy the *Downtown Eastside* public interest test, and the Commission agrees. Here is someone who has constantly defended prisoner rights and his prisoner status has been an important factor in the grant of standing to him, for example, in cases where he has successfully challenged smoking restrictions, although Mr Taylor is not a smoker.

ELIAS CJ:

Well, it would be slightly odd if he could incorporate himself into an association promoting prisoner rights and sailed through on the sort of standing we have given to environmental groups for example.

MR CURRAN:

Quite so, Ma'am. Another, a way of pitching it where you have multiple applicants is to test as, I think it was Justice Fisher did in the *Moxon v Casino Control Authority* HC Hamilton M324/99, 24 May 2000 case, well, what is the addition, what is the positive impact that this particular applicant has had on proceedings as against the prejudice, if any, that his attendance may create, and in my submission there are numerous positives that the Court has derived from having Mr Taylor present. He describes in his submissions on the cross-appeal in paragraphs 50 and 79, and I don't understand them to be gainsaid, the dynamic prevailing within the respondent group. He says that he initiated the proceedings, he's the first-named applicant in the statement of claim. He says that he carried the burden of the argument in the High Court before there was an Intervener, and he added his experience and expertise as a proven advocate to the case, and if Your Honours need some selected highlights from Mr Taylor's litigation curriculum vitae you can see those at paragraphs 3.17 to 3.18 of the Commission's submissions. And finally in the positive column, the substantive merit which New Zealand public law standing says is almost the entire game: does your legal claim have merit? Well, Mr Taylor and his co-respondents won a substantial victory in this case, and it seems a little churlish now retrospectively to try and deny him standing.

And as against that, there's an absence of prejudice in the Commission's submission. There's no prejudice to the Crown on their own assessment. Justice Heath noted that they didn't take any objection to Mr Taylor's standing in the High Court, it wasn't a feature of the Crown's notice of appeal, it didn't appear, as it did in *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094, one of the cases in your bundle, in the Crown's statement of defence, so no objection all the way through, so in my submission no Crown prejudice.

It's also important to consider whether there is prejudice to third parties, that is one of the issues that the Canadian Supreme Court is particularly sensitive to, because it doesn't want persons with perhaps more experience or an important perspective that the Court might be interested in to be denied - standing by someone acting in the public interest peremptorily, but in my submission there's

no concerns about third parties here because of course there are directly affected prisoners who are given standing in this case, and in fact, if any anything, Mr Taylor galvanised and facilitated and supported those claims rather than blocked them.

Finally, I just wanted to touch at 3.5 of the outline on what is in my submission probably the Crown's best argument but still, in my submission, not determinative, and that is that the cross-appellant is somehow superfluous to these proceedings, that the Crown does have or the Court, pardon me, does have the benefit of the other plaintiffs' applications and so Mr Taylor isn't needed to vindicate the rights. In my submission that's really a submission that can only work in retrospect, given the outcome in this particular case, it may even look better on appeal. But if one were to ask in a strike-out context prospectively, like the Court was faced with in *Smith v Attorney-General* when the Crown tried to strike out Mr Smith's claim there on the basis of standing, and one were to ask the public interest standing question, "Is it in the public interest to add an experienced prisoner advocate engaged in the issues, with a track record of success in litigation of this kind, to a small group of prisoners who are seeking the first ever declaration of inconsistency in New Zealand legal history against a Crown who denies the existence of that remedy?" In my submission the answer is fairly clear cut, and it seems a very revisionist perspective indeed in my submission that, having completed this legal victory, the Crown is heard to be said that, "Well, you could have done it with fewer parties."

Your Honours, unless there are any questions, those are my submissions.

ELIAS CJ:

Thank you. Mr Taylor, we'll take the adjournment now and then we'll hear from you afterwards.

COURT ADJOURNS: 11.20 AM

COURT RESUMES: 11.44 AM

ELIAS CJ:
Right, Mr Taylor.

MR TAYLOR:
Yes, Your Honours. I understand you have my written submissions of 15 October and my affidavit sworn in support containing various details of my sentence dated 18 October that contains the sentence details I'm subject to?

ELIAS CJ:
Yes.

MR TAYLOR:
The affidavit?

ELIAS CJ:
Yes, thank you.

MR TAYLOR:
I just want to begin, if I may, at paragraph 9 of my written submissions. It appears that the Court of Appeal has here carved out a separate standing in relation to DoIs quite separate from, more rigorous than the normal rules applying to public interest litigation, and I submit, as a general proposition, that that's not justified, that the same rules that apply to public interest litigation generally should apply, both in relation to public interest standing and also personal standing. In my, in a blanket submission I say I had standing under both public interest and also personal standing to seek a declaration of inconsistency.

Now I think it's best to begin in looking at the question of my standing, to begin by looking at the amended statement of claim, the first amended statement of

claim, which was the operative pleading in this proceeding. If I can perhaps take Your Honour to paragraph 5 of that statement of claim. I'm sorry, I've got the Court of Appeal bundle here rather than the Supreme Court one so I can't tell you what tab it's at.

ELIAS CJ:
No, we'll find it.

GLAZEBROOK J:
Tab 4, I think.

WILLIAM YOUNG J:
Yes.

MR TAYLOR:
Yes, it's tab 3 in the Court of Appeal bundle – and perhaps paragraph 5, which sets out the first cause of action, ie a breach of section 12 of the Bill of Rights. And the first thing Your Honours will see at paragraph 5.3 that this application for a declaration of inconsistency related to the whole of 2010 Amendment Act. That obviously encompasses section 4 of that act, which inserted section 6, which is actually the operative legislative provision under which I'm currently disqualified from voting, but I'll expand more on that as we go on.

But just by way of a broad submission, it can't be the case if I'm not personally affected in relation to the 2010 amendment when that's the very Act that currently disqualifies me from voting, in the 2017 elections anyway. Now of course prospective breaches of the Bill of Rights can be covered by a proceeding as well as ones you're actually subject to at the time of filing the proceeding, and that of course was the case, that in view of the makeup of my sentence I would be disqualified by the 2010 Act at both the 2014 election and the 2017 one, the one just gone. So throughout the pleadings Your Honour will see there's a reference not to any particular section of the 2010 amendments, and I'm referring here to paragraphs 5.3, 5.5, statement of claim, the amended statement of claim, but the whole Act.

Now the next thing to note is that in view of what His Honour Justice Brown had said in the strike-out proceeding, which I don't know what tab Your Honours have got that in but it'll be in the case on appeal, the judgment of Brown J at paragraph 84 –

ELIAS CJ:
Tab 6.

MR TAYLOR:
Sorry, tab – yes, paragraph 84. This is when the first question of my standing was actually raised, not by the respondent, the defendant, but by His Honour Justice Brown when he said, "Indeed, in Mr Taylor's case he may also face a standing issue," and he goes on to say there. Now if one had thought that the Crown was going to raise any issue of standing or even the applicants, that's the green light to bring it on, bring it on. So in anticipation that they might raise a question of standing, in the statement of claim we undertook a section 5 analysis, sorry, a claim that section 5 would have justified it in any event, and that of course is at paragraph 5.13 – sorry, 5.6 right through to 5.4. Specifically, obviously in the section 5 analysis one of the things is going to be, well, what is this measure aimed at, has it got any justification in a free and democratic society, what could it be aimed it, what could justify it? Now the only thing we could come up with was, well, it must be punishment, it must be punishing people, that must be its only objective, punishing and deterring offenders while removing their right to vote. Now you'll see we specifically pleaded at paragraphs 5.8 that the apparent objective of the 2010 amendment was to disenfranchise the most serious offenders in this country, and 5.9, that people who commit serious crimes in the community forfeit the right to vote as part of their punishment.

Now when we made a claim, Your Honours, that if the Crown had challenged standing we would have argued, there would have been a need to undertake a section 5 analysis. Because it's trite law in this country as far back – and I refer to it at paragraph 99 of my submissions, I refer to the case *A (Victim) v*

New Zealand Parole Board [2008] NZAR 703 (HC), and it's in bundle somewhere, the case, and I refer to the relevant parts at paragraph 99 of my submissions, Your Honours. In *A v New Zealand Parole Board* His Honour Simon France J said that a sentence can be viewed as having two components, and at paragraph 4 he said, "It has always been the case that Parliament says how much the punishment part of a sentence will be. It does that by setting a basic rule applicable to all sentences," and His Honour notes that over the years that rule has changed, but at various times it's either been one-third, one-half or two-thirds of a sentence. So that case holds, so if the objective of this 2010 amendment was punishment or deterrence, well, I'd already served that, I'd already served that while I was (inaudible) because I'd already reached my parole date of 2012, as Your Honours can see in the affidavit – I think it was 23rd of May 2011 at that stage when the proceedings were filed, that's at paragraph 7 of the affidavit. So we were prepared and made in the claim if the Crown was going to rely on section 5, well, we've got an argument to that, you know, that if you're going to raise as part of standing that Mr Taylor doesn't have a personal interest, well, he does. Okay, on the face of it his sentence might exceed three, the former three years under the 1993 legislation which the 2010 amendment replaced but it's arguable, but nevertheless in an inconsistency proceeding, that it would be inconsistent to take the right away from prisoners, the right, a very important right to vote, when they've already served the punishment and deterrent part of their sentences and, as I've already touched on, that could be the only conceivable legitimate justification for taking their right to vote away from them. Why else would you do it? And I think that was the actual claim by Mr Quinn, as this was a private members' Bill, and unfortunately it never went to the Justice and Law Reform Committee, it was dealt with by the Corrections Committee, the committee that deals with Corrections issues, not electoral, and Justice Heath makes that point in this judgment as well, that this never went down the normal route, it wasn't a Government measure, it was a private members', so that's how it arrives there. So at 5.10 we've specifically pleaded, and this is relevant to standing obviously because it would have meant personal standing. So the first and third applicants have completed the retribution and deterrent component of their sentences, so that me and that's the third applicant's.

And then we go in at 5.11, to make a claim that effectively the section, a section 5 analysis would not justify it, it would not be justified in a free and democratic society, and we expand a bit more on that at 5.12 right through to the paragraphs – and we go to proportionality at 5.21, and right through to 5.25. So the whole Act does not amount to a reasonable limitation on the applicant's right to vote under section 12 of BORA. So either way, if we were disqualified by the former legislation, under the new legislation, the 2010 amendment that actually effectively implemented that, carried on that disqualification and it wasn't justified. If we undertook a section 5 analysis, it would fail. So we were anticipating it but the Crown never raised any question. It didn't question the section 5 justification claim. Never challenged it at all.

So the next point in relation to standing is His Honour Justice Heath that paragraph 3 of Justice Heath's judgment in the DoI. This is the next mention of standing. His Honour said – I will just refer to the relevant part of this paragraph – it's paragraph 3 – "While Mr Taylor is not subject to the present problem, no question of standing has been raised." And then His Honour says, "Accordingly, should he have a legitimate, genuine interest in obtaining statutory reason in the Court," this is the position, Your Honours. There's no challenge to any of that. Of course, we succeed in getting the DoI based on establishing the jurisdiction of the High Court. And then His Honour, holding as a matter of discretion that the declaration – I think it's paragraph 79 of his judgment – His Honour then issues the declaration at page 71 and he gives a very reasoned judgment, if I may submit, as to why – basically it came down to this. If you issue a DoI in a case that involves such a fundamental right as here, it's effectively right the way through to all our citizens, then when would you issue a DoI? That essentially sums up in a nutshell in my respectful submission why His Honour decided to exercise his discretion to issue a DoI, having held that the High Court does have that jurisdiction. So that's that document.

So as Your Honours can imagine I received the Court of Appeal's judgment and – oh, sorry, there's one further step you need to go to and that's the notice of

appeal, page 5, after His Honour's judgment. And Your Honours will see no mention anywhere in the notice of appeal that there's any question of standing.

ELIAS CJ:
Sorry, can you just hold on? We're trying to see if we have it.

O'REGAN J:
I don't think we do have it. This is the Crown's appeal to the Court of Appeal you're talking about?

MR TAYLOR:
Yes, Your Honours. As I say, I've got the Court of Appeal casebook.

ELIAS CJ:
We don't have it, Mr Taylor. Just tell us what it says.

O'REGAN J:
Just tell us what it says.

MR TAYLOR:
Okay, Your Honours. I'll give Your Honours the grounds of appeal. The High Court erred in determining – at paragraphs 43, 61, 64 and 66 of its judgment, it had jurisdiction to make a formal declaration and an Act that is inconsistent with a right and a guarantee under the New Zealand Bill of Rights Act 1990, it cannot be justified under section 5 of the NZBOR in any case. The circumstances where there was no dispute between the parties or a bona fide question as to the interpretation of the statute – of the enactment. Sorry. This is ground 2. The High Court erred in determining at paragraph 67, 71, 73, 76, and 77 of its judgment it was appropriate to exercise any jurisdiction to make a declaration of the kind referred to in (2) above in circumstances where in 2.1 the appellant brought the apparent inconsistencies to the attention of the House of Representatives. 2.2, there was no visible dispute between the parties or 2.2.2, bona fide question as to the interpretation of that enactment. Judgment sought. The appellant seeks orders from this Court in allowing the appeal 3.2,

setting aside the declaration made by the High Court at paragraph 79 of his judgment. 3.3, dismissing the plaintiff's application to the High Court and 3.4 the cost of this appeal in the proceeding of the High Court.

ELIAS CJ:
No question as to standing raised?

MR TAYLOR:
No, Your Honours. If we have a question as to standing, and put on notice as to it, we would have been – as I say in my written submissions, they would have deployed the section 5 article. That could have been deployed immediately. I'd already referred to it in the case I touched on with Your Honours yesterday before Justice Ellis when we were seeking a judgment to stop the 2014 election proceeding. They'd already deployed that argument. We were quite prepared to deploy it again. So we just didn't have an opportunity to answer any of it, Your Honour.

I think the counsel from the Human Rights Commission has already covered public interest standing really well. I basically cover it in my written submissions. It's quite comprehensive, in my respectful submission. So if the Court thinks it helpful to go straight to my personal standing.

ELIAS CJ:
Yes.

MR TAYLOR:
That starts at paragraph 21. Now, first I better touch on the Crown's submissions about personal standing. That's the appellant's submissions of the date 9 February 2017 at paragraph 40. The Crown's submissions on the cross-appeal. Sorry, I'll start at paragraph 40 of their submissions. They appear to accept that but for the two sentences subsequently imposed on Mr Taylor after the 2010 Amendment Act came into force, but for those sentences Mr Taylor's sentence of imprisonment would expire on 12 December 2016. So in my respectful submission, I certainly covered in

section 6 – which is the present operative disqualification in the 2010 amendment, and that is set out, Your Honour, that paragraph 89 of those submissions – section 4 of the 2010 amendment repealed the existing paragraph – section 80(1), which is the one that said essentially that anyone serving a term of three years' imprisonment or over does not have the right to vote, so that was repealed. It was replaced by section 4 with paragraph (d) of section 80(2) which reads, "A person who is detained in a prison pursuant to a sentence of imprisonment imposed after the 2010 amendment," and I've paraphrased it. So in my respectful submission, the Crown accepts at paragraph 40 that I'm serving a sentence imposed after the 2010 amendment, and that my sentence would have expired but for those sentences imposed after the 2010 amendment, my sentences will all expire on 12 December 2016. So in my respectful submission, there can be no suggestion that I'm not affected personally by that 2010 amendment because I'm stopped from voting in the 2014 election. My sentences would have been up in December 2016.

Now, so that really – and at paragraph 41 of the Crown's submissions, you can see a helpful summary by the Crown of the sentences imposed on me. They are post-2010 sentences. The first was imposed on 27 April 2011 when I was sentenced to five months' imprisonment. That was to be served concurrently. Now, another sentence of seven years' imprisonment was imposed on 19 May 2011. Now, that was reduced to five years six months by the Court of Appeal. At the 2017 election, the sentences imposed after the Amendment Act came into force, they were what effectively barred me from voting.

Now, what is set out in my affidavit – it's got a few attachments – it was 27 July 2012, so if we go back to the section 5 claim that, you know, if it's been imposed it wouldn't be justified when I'd finished my punishment and my sentences from 2012 but I was barred from voting in the 2014 election as well. But because we never reached the stage of a section 5 analysis because the Crown hadn't argued it. So in either view you take it, Your Honours, in my respectful submission I have personal standing. I was affected by the Government legislation at the 2014 election.

Now, I hesitate to touch on the public interest aspect of this, but I fully, obviously, endorse what the Human Rights Commission counsel said. I do have public interest standing as well. I will make the point that these are – the whole purpose of this litigation has not been centred around some personal interest of mine, although I am obviously affected, in my submission, by the legislation, but I am a prisoner and a distinct minority of the group, I think I pointed out it's about 0.02 per cent of the population. I'm a member of that minority group just, let's say, as a member of an iwi, for instance, representing that iwi. So a distinct member of a distinct minority group who Your Honour has recognised, Your Honour the Chief Justice, are particularly vulnerable, they're a particularly vulnerable group. Now, the interests of prisoners as a whole are going to affect me because as I've pointed out in my submissions if the prisoner – if the prisoners have got a vote in the legislature the more likely prisoner-friendly policies are going to be implemented or anti-prisoner policies, you know, as opposed to their rights or interests. So my interests are getting a promoted model. So I've got a direct interest in promoting the whole group's interests. I think I summed it up a prisoner defending prisoner rights as Justice Brewer accepted in the – the Crown made a challenge to my standing to bring the anti-smoking litigation and Justice Brewer dismissed it and said Mr Taylor is a prisoner defending prisoner rights. So that really summarises my view on that.

There's a particularly generous standing adopted as to public standing in this country. Issues of perhaps environmental issues or other issues affecting the executives, the enforcers of the law. In this case Parliament itself the better because there's more chance of that being ventilated by the Courts. Now, the counsel for the Human Rights Commission touched on the actual dynamics in this case. Now, I think I can safely say that if I had never got involved in this case it would never have reached the Courts.

Now, when we were in the High Court I did carry the major burden of argument and I think Mr Francois – no disrespect intended to him, of course – spoke for about eight minutes and I carried the burden of the argument and Your Honours will see in the actual DoI judgment at paragraph 31 that Justice Heath made a

point – a very kind comment that he was – that I made helpful submissions to the Court. Yes, he says, "The helpful submissions made by Mr Taylor." So he was grateful for the assistance he's received from me and counsel and obviously Mr Francois. So no way can it be said that the Crown has been in any way disadvantaged and if they had been you can be sure they would have, you know, hammered the standing issue earlier. It seems to me that having seen this litigation right through from whoa to go that – I hesitate to attribute the words that counsel for the Human Rights Commission did in the Court of Appeal of perhaps being a wee bit churlish, but it just does have that sort of feel to me, now, to have it snatched from you right at the moment of victory more or less. But the point of course, as was made only too well yesterday, is that the judiciary is just as subject to section 3, under section 3(a) of the Bill of Rights as any other, as the executive and the legislature, and of course we've got section 27, and I develop this argument at – we've got section 27, natural justice. Start at paragraph 25, Your Honours – sorry, that may be wrong. Yes, sorry, Your Honours, page 25.

ELIAS CJ:

This is of your submissions?

MR TAYLOR:

That's right, Your Honour, it's page 25 of my submissions. It's headed, "Breach of natural justice argument." Now as I say at paragraph 108, I rely on what Professor Joseph says in *Constitution and Administrative Law in New Zealand*, which I believe the Court has in one of the bundles from the Human Rights Commission, as to the principles of natural justice that judicial bodies should observe. Now in particular, parties should have prior notice of the case against them so they have adequate opportunity to prepare a response, and of course we've got the Latin phrase there, which I'm not too good at, "audi alteram partem" I think. So with the greatest of respect, the Court of Appeal appears to have breached natural justice in holding that a declaration of inconsistency ought not to have been granted on my application because I lack standing. This was a significantly adverse finding against my interests because, as I say earlier in my submission, "Standing is the gateway to the Courts," if you haven't got

standing you're not going to get through the courtroom door, if you're denied standing your case is not going to be heard. So you don't disqualify someone for lack of standing unless they have the opportunity to be heard in my submission. So I say the Court of Appeal erred in not giving notice that this was going to be raised, that they themselves were going to raise this, and giving us an opportunity to respond because, as I earlier said, I would have deployed immediately the section 5 argument.

Now Your Honours are obviously familiar with many a judgment from the Court of Appeal that says, "We decline to rule on this issue because the issues were not adequately argued before us, they were not argued before us at all," and quite frequently the Court of Appeal say that in its judgments. Well, in my respectful submission they shouldn't have made this finding without something like that. In fact I refer at paragraph 111 of my submissions to the *Poumako* case, and the Court of Appeal not making a DoI because the issue, "Was not squarely addressed in the argument before us." So in *Poumako* there was a suggestion that a DoI should be issued but the Court of Appeal declined to do so because it, "Was not squarely address in the argument before us." And I say that the reasoning in *Poumako* majority there is directly applicable here where the issue was not raised at all, let alone squarely addressed.

Now the Attorney has made a submission at paragraph 72 of his submissions, "The Court of Appeal's decision is plainly not subject to judicial review." Well, I never ever suggested that it was, but it is subject to section 27 of the New Zealand Bill of Rights and also the principles of natural justice. Of course everybody knows anybody below the High Court is subject to judicial review.

Now at paragraph 113 I've quoted an elementary requirement of fairness, and the authority for that is *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604 at [30], "Surprise is the enemy of justice," I'm just reinforcing what I've already submitted. And then I just go on at paragraphs 114, 115. And 115 is quite important in my submission, Your Honour, because the Court of Appeal made a factual finding against me in 93, it said – yes, the Court of Appeal at paragraph 90, at 176 in the appeal

judgment, it said that, “Mr Taylor could not benefit from the DoI.” Now, as I submit, it’s not surprising it’s strayed into a factual error there because we had no argument on it. Obviously in answer we would have deployed again what I’ve deployed in those affidavits, and it would have shown that I was subject to the 2010 Amendment Act. Now these of course are just a reminder to everybody that, you know, these sort of errors can occur, and that’s why the principles of natural justice are there.

Now I go on at 116 to say that the Court of Appeal appears to have categorised DoI proceedings as – they should have a more restrictive rule applied to them. And again that was an important subject that wasn’t the notice of argument: if you're going to apply a more restrictive standard of standing, gateway to the Court, then there should be argument on that point, you know, to deter the Court perhaps from making that finding. In our adversarial justice system the Judges just rely on the parties, and they’re not going to be able to say anything unless they’ve got notice of it. I would have argued that, if I’d had the chance, that there’s no justification in the absence of a statutory requirement, section 7 of the Human Rights Act – because the UK Human Rights Act 1998 does have a standing requirement, a statutory one, it’s in section 7, and it specifically restricts the right to bring incompatibility proceedings to victims. Now that’s a standing requirement. But nevertheless – and I quote the case in my submission, but I think it’s the *Taylor* one – that the UK Courts and incompatibility proceedings have said that if there’s merit in the case they’ll still hear the case – and unless Your Honours want me to take you straight to it I’ll leave you to, at your leisure – but they will still hear the case. It comes down to merit, Your Honours. No one wants the Courts to be flooded with unmeritorious cases and, as I point out earlier on in my submissions, Courts have ample weapons in their armoury to squash unmeritorious cases at an early stage, such as strike-out, there’s ample provision under the High Court rules. So the floodgates argument, unmeritorious cases argument, cannot be deployed in my submission to impose a more restrictive standing in relation to DoIs, which are vitally in my submission, as we’ve just seen with the Attorney-General’s recent announcement that there’s going to be statutory recognition of them, a vital component in ensuring the rule of law is maintained in this country and our

citizens enjoy the full measure of their rights guaranteed under the Bill of Rights without encroachment by anybody including, with the greatest of respect, our Parliament. So you need as wide a catchment group as possible to be able to bring those proceedings, not a more restrictive one. If anyone's a busybody or is bringing an unmeritorious case, as I've already submitted, the Courts have got ample tools to stop it in their tracks.

Now I'll just make some submissions, Your Honours, if Your Honours were minded to uphold my appeal as to costs and the result sought and that's pretty much it, Your Honours.

ELIAS CJ:
Thank you, Mr Taylor. Yes, Mr Perkins. Madam Attorney, I should perhaps flag with you that there was a question I had which, when this appeal has been determined, I would like to raise, and that concerns the application of the Declaratory Judgments Act. I feel we should perhaps have looked at the provisions, and my question is really how it impacts on some of the submissions that you made to us upon the availability of declaratory relief.

SOLICITOR-GENERAL:
Do you want to have the –

ELIAS CJ:
No, I don't want to interrupt this appeal now.

SOLICITOR-GENERAL:
But after the cross-appeal has been heard, is that what you're signalling?

ELIAS CJ:
Yes, after the cross-appeal has been heard. Thank you.

MR PERKINS:
Your Honours, of course my submissions on the cross-appeal are premised on the assumption that this Court affirms the existence of declarations of

inconsistency as an available remedy, even without statutory conferral. So nothing I say in my submissions this afternoon should be either taken as undercutting the submissions to the effect that declarations are not, for the moment, an available remedy. It is accepted by all parties that if the remedy exists each of the second to fifth respondents has standing to seek a declaration of a kind that was made by Justice Heath. This is because their sentences of imprisonment were imposed after the commencement of the 2010 Act. By contrast, Mr Taylor's relevance –

GLAZEBROOK J:

Even though there wasn't an election before they were released, some of them?

MR PERKINS:

Those things may not necessarily be apparent prospectively. It is a matter of the Prime Minister's judgment when the Governor-General is advised to dissolve Parliament as to when an election would take place and so at the time that they were incarcerated –

GLAZEBROOK J:

There could be a by-election, I suppose, as well.

MR PERKINS:

Yes, there could be a by-election or Parliament could have been dissolved early. But it is uncontested that at least some of the plaintiffs – now respondents, the second to fifth – were excluded from voting at the 2014 general election and this proceeding was commenced prior to it taking place. By contrast, Mr Taylor's sentence of imprisonment was imposed prior to the 2010 Act's commencement, and it's my submission that he was therefore disqualified under the original section 80(1)(d).

GLAZEBROOK J:

Well, he might have been but he was no longer once the Amendment Act came, was he?

MR PERKINS:

Well, Your Honour Justice Glazebrook raises the question I was going to go to immediately, which was that put to the Solicitor by the Chief Justice yesterday at the outset. Her Honour the Chief Justice asked the Solicitor at the opening of argument whether Mr Taylor may have standing to seek this declaration by dint of section 6 of the 2010 Act and I took the Chief Justice to be suggesting that Mr Taylor may have personal standing because the relief that is sought in the first amended statement of claim at tab 4 of the case on appeal – and it may be convenient to turn to that now, that's tab 4 page 44 of the case on appeal – the relief that was sought was a declaration that the Electoral Disqualification of Sentenced Prisoners Amendment Act 2010 was inconsistent with the right to vote under section 12(a) of the New Zealand Bill of Rights Act, and the second part of what I took the Chief Justice to be driving at was that Mr Taylor's rights were at least in some way affected by the Amendment Act, and particularly section 6.

ELIAS CJ:

Well, I'm not suggesting that they were changed by the Act but that he – it seemed to me on a quick look at the Amendment Act that that is the source of – the current source of his disqualification.

MR PERKINS:

Your Honours, I propose to answer that question in four ways, and I think the way I'd like to approach it initially is to look at the precise text of section 6 of the Amendment Act itself. That's behind tab 3 of the appellant's bundle of authorities. So behind tab 3, section 6, starting with the heading, "Existing status under section 80(1)(d) of principal act not affected." And then that most invidious of phrases used in statutory drafting, "to avoid doubt", which in my experience tends to sow doubt rather than avoid it.

ELIAS CJ:

Can I just ask you, did this Act substituted the current provision for section 80(1)(d), did it not?

MR PERKINS:

Section 80(1)(d) –

ELIAS CJ:

Sorry, I thought I had it.

O'REGAN J:

It's in section 4 of tab 4. Sorry, tab 3, yes.

ELIAS CJ:

Sorry, it's repealed. That's what triggered this query I had that it actually is repealed. So if it's repealed there's no disqualification except through this avoidance of doubt provision, it seems to me.

MR PERKINS:

And my submission is that – well, first of all I might actually ask my junior to hand up to the Bench two documents, one of which is the supplementary order paper by which section 6 is added to the Amendment Act. It wasn't part of the Member's Bill as initially drafted, but rather came in after select committee stage as a supplementary order paper introduced by the Member himself.

The second document my learned junior is going to hand to the Court is section 17 of the Interpretation Act, which is referred to in section 6(c) of the 2010 Act.

ELIAS CJ:

Yes, I did look at that. But the problem with that is that's about the validity of Acts done under a previous enactment. What I'm concerned to be sure about is what authority is there for disqualifying Mr Taylor, leaving aside the argument he makes, the more particular argument he makes on the assumption that he's a prisoner sentenced to more than three years' imprisonment as at this enactment in 2010? What is there that authorises his disqualification post-repeal?

MR PERKINS:

So the manner in which disqualification is effected is that upon entry into prison the prison manager is directed to send a notice to the Registrar of Electors to say, "Arthur Taylor has been received into my prison. He is to be removed from the electoral roll," because at that time he was about to commence serving a sentence of more than three years' imprisonment. So the removal from the electoral roll is effected at the time of entry into prison.

ELIAS CJ:

Well, that can't be in accordance with this provision. There must be something else that you're relying on.

MR PERKINS:

Yes, Ma'am. It comes from section 81 of the Electoral Act.

ELIAS CJ:

Do we have that?

MR PERKINS:

Yes, Ma'am. If you look at tab 1 of the Crown's supplementary bundle, it's the machinery, as it were, for the removal upon entry into prison. So where a person who has been sentenced to imprisonment is received into a prison in which that person has to serve the whole or part of a sentence, the prison manager shall, not later than seven days after the prisoner is received, forward to the Chief Registrar of Electors a notice. Now, at the time Mr Taylor was sentenced –

ELIAS CJ:

Well, so what? What's the effect?

MR PERKINS:

The point is the removal from the electoral roll took place before the 2010 Act was enacted, the Amendment Act. So Mr Taylor's eligibility to vote was

removed at that time. He wasn't on the roll, therefore he couldn't present to the polling booth.

ELIAS CJ:

What's the authority for it? What is the authority for continuing his disqualification? That may well be what's happened but where's the statutory authority for it?

MR PERKINS:

Then – the section 80 and 80(1) at that time provided the machinery for the removal and that removal and disqualification meaning he couldn't re-enlist or re-enrol himself persisted by reason of section 80(1)(d) under the '93 Act which is continued by section 6(a) of the Amendment Act, and it's my submission that –

ELIAS CJ:

Sorry, I'm just trying to understand it. So suppose a prisoner is released. What happens? Does he remain disqualified for the period of his sentence? What happens?

MR PERKINS:

So upon release, as a matter of practicality – and I'm loath to give evidence from the Bar table – but as part of a release pack a prisoner is given an enrolment form. But once they've left the prison they're entitled to re-register once they've been resident somewhere for one month.

ELIAS CJ:

Well, there might be an interpretation argument consistent with section 12 of the Bill of Rights Act about whether there's authority for – well, it just seems very odd to me.

WILLIAM YOUNG J:

Isn't it section 80(1)(d)?

ELIAS CJ:

Well, that's the one that's the prior.

GLAZEBROOK J:

That's the prior authority.

ELIAS CJ:

That's the one that was repealed.

WILLIAM YOUNG J:

But then doesn't section – I know it's clunky – but doesn't 17 say that any capacity or incapacity continues?

MR PERKINS:

17 says – and that's in the hand-up that's been given to Your Honours by my learned junior – 17 talks about validity, invalidity, effect or consequence of anything done or suffered, existing rights, interests, titles, immunities or duties, existing statuses or capacities. So Mr Taylor's existing status as someone who is not entitled to register and someone who has been removed from the role is continued by section 17 of the Interpretation Act, and section 6(c) of the 2010 Act makes that plain.

GLAZEBROOK J:

Well, that can't really be right, if it was totally repealed that can't be an answer. So I'm not quite sure what 17 does.

MR PERKINS:

I say that the –

GLAZEBROOK J:

Because under the new 80(1)(d) he can't vote.

MR PERKINS:

Under the old 80(1)(d) he couldn't –

GLAZEBROOK J:

No, but well under the old one, which has been repealed, but under the new one he can't vote.

MR PERKINS:

It has been repealed but it has not been repealed in relation to him. So reading section 6(a) of the 2010 Act, "A person who is disqualified for registration as an elector by section 80(1)(d) of the principal Act immediately before the commencement of this Act," i.e. Mr Taylor, "continues to be disqualified for registration as an elector as if this Act had not been enacted."

ELIAS CJ:

Well, that's the provision that it seemed to me must be one that authorises his disqualification.

GLAZEBROOK J:

It is.

ELIAS CJ:

Which is why I raised whether it's sufficient to say that he wasn't, that the term of imprisonment wasn't imposed after 2010.

MR PERKINS:

And with great respect, Ma'am, what my submission is is that it is the original 1993 version of section 80(1)(d) which authorised Mr Taylor's disqualification, and in relation to him that Act has not been repealed, and it section 6(a) which says that in relation to him it has not been repealed. So his existing –

ELIAS CJ:

Yes, I do understand that. But it's still that that is the buckle that binds, that is the current legislative disqualification it seems to me. So that therefore he's affected by the Amendment Act which he sought to challenge, isn't he?

MR PERKINS:

And my submission would be that the disenfranchisement in relation to Mr Taylor was affected by ’93 Act and this is a mere transitional or savings provision.

ELIAS CJ:

Well, it may be, but it’s the only one left in place.

MR PERKINS:

The original Act has not been repealed in relation to Mr Taylor.

GLAZEBROOK J:

Well, it doesn’t really say that does it? It just says – I know it says, “For the avoidance of doubt,” but without that provision the new section 80(1)(d) would apply to him.

MR PERKINS:

That’s correct, Ma'am. But ‘as if this Act had not been enacted’ indicates in relation to people in Mr Taylor’s situation who are incarcerated for more than three years prior to December 2010 the Act, the old Act is effectively not repealed.

ELIAS CJ:

Well, look, that’s probably entirely right, I don’t question the logic of that, but subsection (6) of the Amendment Act is critical to that effect. So if he’s challenging his disqualification surely – or if he’s seeking to have his disqualification interpreted in the light of section 12 of the Bill of Rights Act, surely the proceedings he’s constituted he has an interest, he has a present interest in those.

MR PERKINS:

I’m not sure I can take this submission much further, Ma'am, I think I’ve made the Crown position as clear as I can. What I think I might do profitably, or more profitably, is to move on to the second of the four reasons, which I

foreshadowed at the outset, and that is that, in summary, a contextual reading of the statement of claim indicates that what was being challenged was the blanket disenfranchisement insofar as it applied to prisoners serving sentences of less than three years. At no stage was it part of the case brought by Mr Taylor or the other plaintiffs that a disenfranchisement of prisoners serving a sentence of more than three years was an unjustified limitation.

ELIAS CJ:
Their pleadings don't make that point…

MR PERKINS:
Can I draw Your Honour's attention then to a number of –

GLAZEBROOK J:
Well, you do need to deal with the section 5 analysis that Mr Taylor took us through, because that did seem to me to encompass, and that was his submission piece and persons who were serving longer sentences, but where the he calls "deterrent" part of the sentence has already been, deterrent and punishment part of the sentence has already been served

MR PERKINS:
So if I can take Your Honours through a number of paragraphs of the statement of claim where it is premised on the proposition that a disenfranchisement of prisoners serving, well, serious offenders, marked out been prisoners serving length prison sentences, such as the 17 and a half years Mr Taylor was serving, could be a justified limitation.

So if Your Honours go to paragraph 5.8 of the statement of claim, it's recited that the apparent objective of the 2010 Act is to disenfranchise the most serious offenders in the country, the stated objective means that people who commit serious crimes in the community forfeit their right as part of their punishment.

Now also at paragraph 5.14, there is no rational connection between a blanket ban on prisoner voting and disenfranchising the most serious offenders.

The second sentence of paragraph 5.16: prisoners in this situation are excluded from voting when in fact they are not serious offenders relative to other sentenced prisoners.

In 5.20, disenfranchising serious offenders in prison could be achieved by prohibiting classes of prisoners from voting based on the seriousness of their offending and the length of their respective sentences.

Now nowhere in this pleading was it suggested that the disenfranchisement of serious offenders was not a sufficiently important public policy objective to justify –

ELIAS CJ:
And there's no acceptance that three years' imprisonment is, a blanket ban on prisoners serving three years' imprisonment sentences is always justified, there's no concession there.

MR PERKINS:
It's my submission that the pleadings are premised on the assumption that a three year plus ban, to use shorthand, is not under attack here is the point.

ELIAS CJ:
Well, I think the Crown assumed that from the identification of the 2010 and the whole case probably has proceeded on the basis that there was a change in 2010. But if we're talking about standing, surely someone who is affected who is disqualified according to the 2010 Act has a personal interest in that disqualification?

MR PERKINS:
Ma'am, it would be my submission that – we're getting to *Chester* territory, which is the United Kingdom case which I was proposing to take Your Honours to later. But essentially that was where persons serving life sentences were challenging the blanket prisoner disenfranchisement in the United Kingdom. And Baroness Hale there was quite clear that –

ELIAS CJ:

That the European jurisprudence, which of course they were obliged to observe, had considered that and had concluded that it was justifiable.

MR PERKINS:

And, Ma'am, I should also say that the Australian High Court –

ELIAS CJ:

But who's considered whether this is justifiable?

MR PERKINS:

So a three-year ban has been considered by the Australian High Court and found to be justifiable.

ELIAS CJ:

Well, but is there – there isn't New Zealand authority on that?

MR PERKINS:

No.

ELIAS CJ:

No.

GLAZEBROOK J:

But even leaving that aside, if your point was the statement of claim, that accepts three years, 5.17, as talking about an anomaly of someone who might have committed a very serious offence and got two years 11 months and can vote, so clearly they weren't accepting that a three-year ban was a justifiable limitation. The argument was that people serving – whatever that might mean, and one might want to quibble about how you judge seriousness other than by length of imprisonment. But your point was the statement of claim accepted three years and I'm just saying to you 5.17 would suggest it didn't, and we're saying we might accept that serious offending where they haven't finished their punishment part of the sentence should be stopped from voting but we don't

accept – because the only rationale can be additional punishment – but we don't accept that those who have finished their punishment or who are not serious offenders should be.

WILLIAM YOUNG J:
I felt 1.3 to 5.18 does rather suggest that it's the 2010 amendment that's in issue and that the objection is to the blanket ban.

GLAZEBROOK J:
Yes, which a three year is probably a blanket ban as well. Life sentences in preventive detention, if anything is going to be serious offending, is going to be excluded, then those are.

MR PERKINS:
And a 17 and a half year sentence as the kind that Mr Taylor was serving is pretty close to that end of the spectrum.

GLAZEBROOK J:
Well, that's probably true as well.

WILLIAM YOUNG J:
It's supposed to be a partial blanket ban.

MR PERKINS:
I think the –

GLAZEBROOK J:
Well, his argument is rather that – as I understand it in the statement of claim – if it's only justifiable by additional punishment then it should cease at the time that that part of the sentence has been served.

MR PERKINS:
With respect –

GLAZEBROOK J:

I'm not suggesting I accept that argument at all, it's just if you're talking about the statement of claim –

MR PERKINS:

With respect, Justice Glazebrook, I would suggest that perhaps places too much weight upon what has been attempted with paragraph 5.17. It's actually almost a cut and paste of the Attorney-General's section 7 report and one of the rationales that he gave for –

GLAZEBROOK J:

Well, it doesn't matter where it came from, it's what was the point of the submission.

MR PERKINS:

The point of the submission is to say that someone could be serving a two year 11 –

GLAZEBROOK J:

No, no, sorry. Your argument was that the statement of claim accepts a three year as being rationale and justifiable.

MR PERKINS:

It is implicit in the statement of claim, yes.

GLAZEBROOK J:

Well, 5.17 doesn't, it doesn't matter whether it's a cut and paste, it shows that's not the case doesn't it?

MR PERKINS:

No, Ma'am –

WILLIAM YOUNG J:

Is it better to say it doesn't challenge the pre-existing policy?

ELIAS CJ:

Well, it challenges the Amendment Act.

WILLIAM YOUNG J:

Yes.

MR PERKINS:

It's a rather roundabout –

ELIAS CJ:

And clearly everyone has taken that to be a challenge simply to the – whether that's justified I'm not so sure. But for the purposes of standing my point – and that's obviously the basis on which the Crown has run the case, because one would have thought that if it was challenging the earlier disqualification of three years or more there wouldn't have been no section 5 attempt, justification attempted. So, I mean, one can accept that that's the way the thing has gone off. But here in this cross-appeal, where we're considering only Mr Taylor's standing, it does seem to me that he is affected by the Amendment Act.

MR PERKINS:

And it might be the best time for me to move on to the third and fourth of my points, which is to say that when one looks at both section 6 and how it works, when one looks at what's implicit in the statement of claim, when one looks at the way that Justice Heath approached the case and one looks at the declaration that Justice Heath gave, this was always a case not about challenging the ban against prisoners servicing sentences of more than three years from voting, it was always a case about the zero to three year prisoners, and Mr Taylor is not one of those and for that reason he does not have personal standing. But the next reference to which I wanted to take Your Honours –

GLAZEBROOK J:

Can we just have a look at the declaration, sorry?

MR PERKINS:

The terms of the declaration given by Justice Heath?

GLAZEBROOK J:

Yes.

MR PERKINS:

That's the fourth matter I was going to take Your Honours to, but it's right next to the third. The case on appeal at tab 8. If Your Honours turn to page 124 paragraph 78, I think the reason I brought – draw this paragraph to Your Honours' attention is it makes it very clear what Justice Heath – how Justice Heath conducted the case and how the case was, in fact, run. I make it clear that I am not making any ruling on the question whether the original section 80(1)(d) is inconsistent with section 12(a) of the Bill of Rights. There were powerful arguments that the limitations on the prohibition contained in the original section 80(1)(d) are justifiable in a free and democratic society. With respect, Her Honour the Chief Justice is correct when she says that had this been a case about the justifiability or otherwise of disqualifying serious offenders serving sentences of more than three years, the Crown would have offered ample justification evidence that that was never what this case was about.

Then to take Your Honour Justice Glazebrook's point, the precise terms of the declaration at 79 –

GLAZEBROOK J:

No, no, that's fine. As I understand Mr Taylor's point, though, he says if standing had been challenged then he would have brought the wider section 5 and the statement of claim isn't in fact accepting that the original section 80(1)(d) is consistent with the Bill of Rights.

MR PERKINS:

Well, Ma'am, my submission, which I'm not going to repeat, is that it is implicit and it was the entire way the case was run. His Honour Justice Heath's

declaration is, Your Honours will notice, in different terms from what was sought by way of relief in the statement of claim.

ELIAS CJ:

Yes, and it is confined to (1)(d), which isn't the source of Mr Taylor's detention.

MR PERKINS:

That's right. And it's somewhat of a double-edged sword when Mr Taylor talks about the notice of appeal the Crown filed from the High Court to the Court of Appeal. If Mr Taylor wanted a declaration that applied to his circumstances i.e. that the disqualification affected by the original section 80(1)(d) or continued by section 6(a) of the Amendment Act was inconsistent, this was his time to appeal that.

ELIAS CJ:

To cross-appeal.

MR PERKINS:

To cross-appeal, precisely, Ma'am.

GLAZEBROOK J:

Although can you sort of lose standing by not cross-appealing against a judgment that's already been made at a time when you …

MR PERKINS:

Well, if Mr Taylor was concerned that Justice Heath had granted a declaration which didn't confront what he wanted and that was an oversight, then the proper course would have been to draw that to His Honour's attention through perhaps an application for recall or a memorandum to say Your Honour's determined this part of the case but –

GLAZEBROOK J:

All I'm saying is, how can he retrospectively lose standing by not cross-appealing against a declaration?

MR PERKINS:

The point I would make, Ma'am, is that this is indicative and the fact that Mr Taylor did not cross-appeal is indicative that this was always a case about prisoners serving zero to three sentences. It was never a case about those prisoners disqualified earlier than 2010 serving three year-plus sentences, and that's why Mr Taylor does not have standing because he never – this case was never about him.

GLAZEBROOK J:

Well, he may just have decided it wasn't worth appealing against that because Justice Heath had said there may be justifications for it so it may have been that he was just accepting at that stage of the judgment.

MR PERKINS:

The point is that if this case was about prisoners serving lengthy sentences imposed prior to 2010, he has – Justice Heath has expressly refused to enter into that path and has not reflected it in the remedy that he granted. And so that would have been Mr Taylor's occasion to say, "Respectfully, Your Honour, you haven't addressed what was being sought from you."

GLAZEBROOK J:

All you're saying is the fact you didn't cross-appeal is an indication that's all the case was about always. Is that the sum total of the point?

MR PERKINS:

No, Ma'am, the sum total of the point is that plus the fact that he did not apply for recall because His Honour had not determined the entirety of the case that was brought before His Honour is indicative about what this case was always about. So it's the absence of appeal and it's the failure to apply for recall. That's the sum of my submission.

Your Honours, that was all I proposed to say about section 6 and Mr Taylor's private interest standing.

ELLEN FRANCE J:

What about Mr Taylor's point that the sentences – he is serving sentences imposed after December, the relevant date?

MR PERKINS:

Ma'am, he was not serving those sentences at the time the proceedings were commenced or the time that the declaration was given by Justice Heath. That's the Crown's position. Our view of how the cumulative sentences –

GLAZEBROOK J:

Is that because of the cumulative sentence structure?

MR PERKINS:

Yes, Ma'am.

GLAZEBROOK J:

But he was going to be serving them by the time of the election, wasn't he?

MR PERKINS:

At the time this proceeding was filed in 2013 and was the declaration given by Justice Heath in 2015, my submission is that he was still serving the original sentences imposed prior to 2010.

GLAZEBROOK J:

But in the future, in future elections, he was going to be affected by this, which I think is his – was his point in the submission.

MR PERKINS:

I think he's talking – well, I think – I hope I don't mischaracterise the submission to say that at some point last year and prior to the general election – sorry, at some point in 2016 prior to the 2017 general election he started serving a new sentence. Our view as to how sentences are structured when they are

cumulative and the fact that it is one sentence all the way through is articulated in our written submissions, but we do not accept that he's –

ELIAS CJ:

One thing that bothers me a bit – and it is a bit difficult dividing up standing and the substantive case because you do go backwards and forwards between them – we're talking here about a status and it seems very hard to say, well, when his proceedings were issued he had – things were different and denying him the standing to get a general indication about the position in respect of his rights to vote. Sorry, I probably didn't say that very well, but it's a bit – it does really reflect more back on the ability where you are someone who is under a disability to get to have the standing to seek a declaration of what the legal position is. Because it's really not very straightforward and one would have thought that if you're talking about taking away rights that are described as fundamental there'd be a bit more care taken.

MR PERKINS:

And if Your Honours trace the legislative history of the form of the Private Member's Bill through a select committee through the supplementary order paper, there was actually a great deal of care taken to improve the quality of the legislation or quality of drafting, whatever you might say about the merits of the substance of the issue, that to improve the quality of the drafting to ensure that it is as clear as possible.

ELIAS CJ:

Well, if it went to the last minute before they'd done something about maintaining the status quo for serious – for prisoners serving more than three years, it looks quite frightening, the process.

MR PERKINS:

Sometimes that is the case with Member's Bills that the Members who draft them don't necessarily have the full resources of the Parliamentary Counsel behind them.

ELIAS CJ:

Yes, I understand that.

MR PERKINS:

And so at some point in that process once it's been drawn out of the proverbial biscuit tin the Parliamentary Counsel Office will become more involved to ensure that the drafting is as robust as possible and fit for purpose for the New Zealand statute books, and that's what happened in this case. It was maybe seen on one view as being rather last minute but actually that's just in the very nature of Member's Bills, that they have a first reading as soon as they're pulled out the biscuit tin.

ELIAS CJ:

It's not only last minute. It's extraordinary that it's not in fact the subject of a provision in the current legislation that you have to go back to the Amendment Act to find the source, the linkage.

MR PERKINS:

Can I invite Your Honours to reflect on another example in which an Amendment Act of some sort has had a whole suite of new rights and responsibilities that wouldn't be apparent from the substantive Act, and that's the Judicature Act of 1908. We then had the Judicature Amendment Act of '72 which then introduces all these new procedures, some of which have obviously guided judicial review for the better part of 1972 through to 2016. Another example where an Amendment Act per se has substantive rights and responsibilities and status determined by it. So it is perhaps a slightly undesirable, but not uncommon, drafting technique that that happens.

Your Honours, I wonder if I might – I'm just trying to think if there's anything else I can assist Your Honours with in relation to private standing and I – the Crown's principal submission, which I can elaborate, perhaps, after the luncheon adjournment, is that Mr Taylor's presence was entirely superfluous in this proceeding. There were four obviously qualified plaintiffs who had standing to seek the remedy and who were able to pursue the public interest objectives that

have been referred to by my learned friends and Mr Taylor has been important and requiring vindication. There was no additional utility that was gained by Mr Taylor's addition to the proceedings. It was not like the – if the Courts felt motivated to make a declaration of the kind that Justice Heath did make, it was not as if they were going to be prevented from doing so by the absence of a suitable plaintiff coming forward. They had four of them.

Mr Taylor's presence, on the other hand, was not necessary to obtain the remedy that was sought and so if one is going to be talking about public interest factors and the importance of the rights being brought to the Court and adjudicated upon and reserving my leader the Solicitor has said about whether there is any adjudication of rights actually going on, then that was able to be amply achieved by the four obviously qualified plaintiffs.

GLAZEBROOK J:
Just as a matter of interest, this wasn't a point taken by the Crown?

MR PERKINS:
Standing, Your Honour?

GLAZEBROOK J:
Yes. Do you say you did?

MR PERKINS:
No, Ma'am, I do not say that we did.

GLAZEBROOK J:
Or in the notice of appeal?

MR PERKINS:
From the High Court to the Court of Appeal, or from the Court of Appeal to this Court, no, it was not taken in that way. It was drawn to His Honour Justice Heath's attention in the course of argument and that's why His Honour made some reflections about it. But the Crown took the view that it would have been

an unnecessary distraction to this proceeding when there were four obviously qualified plaintiffs to pursue having one of them removed, which would have been, no doubt, the subject of interlocutory appeals and simply to delay the substantive matter coming on. So no, the Crown did not apply for striking-out of Mr Taylor for that reason. It's just going to create unnecessary distraction and have little utility to the ultimate disposition of the case.

GLAZEBROOK J:
How do you decide who falls out in those circumstances? If it's a public interest and four people come forward separately, how do you decide only you can do it and not the other three?

MR PERKINS:
Well, each of those four were qualified and so each of them would have had a private standing which would have –

GLAZEBROOK J:
So is that the difference? But if there is a public interest standing, does it matter? How do you say you can do it but you can't?

MR PERKINS:
At the risk of putting a question to Your Honour, the distinction between there being two incorporated associations which have a legitimate interest in pursuing the issue and how do you choose between them? Is that what Your Honour is …

GLAZEBROOK J:
Well, yes. If you have public interest standing and you have four people wanting to do it, how do you say, "Mr Taylor, you can't, Mr Smith, you can"?

MR PERKINS:
I doubt the Courts would say that. If there were no otherwise qualified plaintiffs who had a private interest.

GLAZEBROOK J:

All right. So it's the fact they have a private interest that makes this superfluous, all right.

MR PERKINS:

So individuals with a private interest are going to be substantially more invested in marshalling the best evidence and the best advocacy to.

GLAZEBROOK J:

Well, of course, they may not be if it's a public interest matter because they may be much more interested in their private factors which is why in many cases perhaps either interveners will come in or the Court will appoint someone to look at the wider interest because I'm not suggesting in a case of this nature, but as a general rule you'd say you can't have a public interest person coming in because there's someone with a private interest, because that may be the very thing that makes it then not the suitable plaintiff. Obviously a plaintiff as of right, but not the suitable plaintiff to put the public interest side.

MR PERKINS:

Our legal system is always been premised on individuals coming to Court advocating for their rights. Whether they do a good job of it or a bad job of it in the particular circumstances of that case is neither here nor there.

GLAZEBROOK J:

But you're only going to have a public interest person coming along if in fact there is a public interest. Nobody's going to allow a public interest plaintiff in a private dispute, and in fact it's not even suggested that one would have standing in a private dispute.

MR PERKINS:

And this is a situation which we say there were four individuals who had vital private interest. Mr Taylor was superfluous to that, and for that reason it was legitimate for the Court of Appeal to say that the declaration wasn't available on his application, looking at the facts of this case. And the facts of the particular

case are one of the primary considerations when one looks at public interest standing and judicial review proceedings, Courts always say you've got to look to the substance and the merits of the case and the facts of it, and the facts of it were there were four qualified plaintiffs.

Your Honours, I note the time.

ELIAS CJ:
Yes, thank you. How long do you expect to be, Mr Perkins?

MR PERKINS:
I shouldn't be very long after lunch. No more than 15 minutes, I should think.

ELIAS CJ:
Yes, thank you. All right, we'll take the adjournment now.

COURT ADJOURNS 1.01 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:
Thank you.

MR PERKINS:
May it please the Court. Where I wish to pick up is by drawing attention to one perhaps slightly under-examined aspects of the Court of Appeal's decision on standing, and that is what it refers to as, "The possibility of a representative plaintiff being able to seek the remedy."

Can I take the Court to tab 9 of the case on appeal, page 178, paragraph 166, and after noting that, "A claim for DoI should not ordinarily be entertained unless the plaintiff's protected right is affected on the facts," the Court then goes to note the United Kingdom practice that, "It has been held that, in some circumstances, a representative plaintiff can initiate proceedings under the

Human Rights Act but only when no other plaintiff will step forward and where a plaintiff is representative a Court may nonetheless decline a declaration in the exercise of discretion. And having noted that practice in the United Kingdom, at paragraph 177 the Court of Appeal adopts that same approach, "The Court," and in this case I take it to mean a New Zealand Court, "may allow a representative plaintiff to seek a remedy, but Mr Taylor is not representative of affected prisoners. Further, other plaintiffs' were directly engaged." And it's the Crown's submission that what is being referred to here is not representative in the sense of having some sort of mandate to advance the interests of affected persons to pursue claims on their behalf or in their interests. Rather, when one has regard to the cases of *R (Wright) v Secretary of State for Health* [2007] EWCA Civ 999, [2008] QB 422 at [52] per May LJ and *Lancashire County Council*, both of them referred to at paragraph 208 of the Court of Appeal's decision –

ELIAS CJ:
Do we have those…

MR PERKINS:
Lancashire is in the…

GLAZEBROOK J:
Sorry, what paragraph did you say was referred to in the Court of Appeal?

MR PERKINS:
Footnote 208, which comes off paragraph 166.

ELIAS CJ:
Page 179 of the bundle.

MR PERKINS:
Your Honours, *Lancashire County Council* is, it's had three of the Crown's supplementary bundle of authorities, *Wright* is not in the Crown's bundle. But the point that I take from those cases is that it means representative in the

sense of being typical of a class of persons who run the risk of being directly affected by the measure of which complaint is made. Now to pick up our Court of Appeal's terminology – and this is from paragraph 166 – "The official conduct might plausibly have breached the right." So it's perhaps not necessary to show with a high degree of precision that one is affected by the limitation on the right in order to ground standing, but a plausible risk that the right may be breached would be sufficient within this concept of representative plaintiffs.

So, just to reiterate, it's not representative in the sense of being an elected or mandated group or body of persons to advance interest, it's representative in being typical of a class of persons.

ELIAS CJ:
Is it a complication we need? I mean, representative claims are used in a particular sense…

MR PERKINS:
In terms of class claims or in terms of – I mean, the phraseology of "representative claims" is used in a few different –

ELIAS CJ:
Yes. Well, that's what I'm querying, whether it's really useful. Because obviously the extent to which a plaintiff bringing a public interest claim is able to run the claim properly is important in deciding whether he or she has standing. Why do we have to complicate that with notions of representativeness? I mean, it may be a matter that it relevant, but it may not be.

MR PERKINS:
The point I wish to make by way of submission, Your Honour, is that "representative" here does not mean can adequately represent the interest in terms of be informed by, instructed by, take a mandate from, persons who are directly affected. It means a person who is typical of a class of people who could plausibly be affected. And so to adopt my friend Mr Curran's concentric

circles analogy, one can have private interests at the centre of the concentric circles. There might be people who are on the margins who, to use the Court of Appeal's phraseology, "Official conduct might plausibly breach their rights," so you don't necessarily need to find them on the innermost ring of the concentric circles definitively, but if there is a plausible basis upon which they can come close to that then that would be enough. So that is the sense in which representativeness is being used here, not in the sense which I take Your Honour the Chief Justice to be referring to say can they adequately represent this other group of people, which may fit into a public interest analysis. So if one is looking to consider –

ELIAS CJ:
Sorry, I'm just looking at the paragraph that you cite. It's only *Chester* we have of those cited in footnote 208, is it?

MR PERKINS:
Yes, 208. So *Lancashire* is the second case cited, and that's at tab 3 of the Crown's supplementary bundle.

ELIAS CJ:
But 99 to 100…

MR PERKINS:
That's of *Chester.*

ELIAS CJ:
Yes, which you cite. I don't see that it supports the proposition, if I understand the proposition that you're putting to us, which is that representativeness, used loosely, is an element that the Courts rely on.

MR PERKINS:
Without wishing be unduly critical of the Court of Appeal, I think the problem here is –

ELIAS CJ:

Oh, sorry, it's the Court of Appeal, not you, yes.

MR PERKINS:

The problem here I think is that three cases are cited in footnote 208 for a number of different propositions that are put in a sentence.

ELIAS CJ:

I see.

MR PERKINS:

And they're declining an exercise of discretion is what *Chester* relates to.

ELIAS CJ:

Yes.

MR PERKINS:

My submission is that *Wright* and *Lancashire County Council* are the ones which explicate this concept of representativeness.

ELIAS CJ:

Okay.

MR PERKINS:

So if Your Honour would be assisted by going to *Lancashire County Council*, 38 to 43, that's at tab 3 of the Crown bundle.

GLAZEBROOK J:

Is that the supplementary bundle or the other one?

MR PERKINS:

That's right, yes, Your Honour Justice Glazebrook, it is. And the key passage –

ELIAS CJ:

But that turns entirely on only if he is or would be a victim of the unlawful act. It's tied to the statutory form of relief, isn't it?

MR PERKINS:

Yes. And if Your Honour looks at paragraph 39 at (c) of the *Lancashire* case, is explicates one of the meanings of victims in the United Kingdom and European jurisprudence, "Individual complainants do not need to show that their rights have been violated by 'an individual measure of implementation'. It suffices that they 'run the risk of being directly affect by' the measure of which complaint is made."

ELIAS CJ:

But that's all, that expands a narrow view of what a victim is, but it doesn't – I mean, I'm just struggling to see how – sorry, your submission on representativeness is what?

MR PERKINS:

It is that is it designed to very carefully expand the scope of – private standing is beyond question, if one meets it on the facts.

ELIAS CJ:

Yes.

MR PERKINS:

The Court of Appeal has slightly expanded that concentric circle by including a concept of representative plaintiffs and saying Mr Taylor is not one of those. There is the risk that "representative" is a term that is used in very different context in different aspects of the law. I'm trying to explain to the Court the sense in which I submit the UK Courts use it and the Court of Appeal has picked it up.

ELIAS CJ:

Well, I must say that I don't find the UK cases are in point on this matter and I'm not sure why they would cause us to reconsider the approach that is taken to public interest litigation and standing to pursue it here.

MR PERKINS:

Very well…

ELIAS CJ:

Because it's a specific remedy that they're meeting in those cases.

MR PERKINS:

And in those cases, like *Lancashire*, the remedy that's being met is a declaration of inconsistency, or incompatibility I should say.

ELIAS CJ:

Yes, but it's one that's channelled by the way in which it's expressed, "Only if he or she would be a victim of the unlawful act," so that's the limitation there.

MR PERKINS:

And I'm simply trying to provide the Court with some context as to when the Court of Appeal picks up from the UK case law the concept of representativeness, it doesn't mean it in the sense which it might normally be understood in New Zealand law, it is taking it from a particular context in the UK.

ELIAS CJ:

Yes.

MR PERKINS:

And that is the first, you know, people around the edges of the private interest who plausibly run the risk of being captured by the limitation.

ELIAS CJ:

Because the statute requires them to have that interest.

MR PERKINS:

I might – well, I think I've said all I can say about what the Court of Appeal, I submit, meant, and to provide the Court with the best analysis that I can.

What I wish to say now is to just take the opportunity to remind this Court why – and it's almost elementary – as to why standing in general is important, and this is explicated by the Court of Appeal in summary form at paragraph 171, it's just over the page in the Court of Appeal from where we were. "The need for an adequate adversarial contest," recognising that Courts will be best served by having evidence marshalled and contending points of view advanced by those who are most directly affected. This sharpens the debate, and the absence of an adequate adversarial contest has the potential to prejudice the cases of those who are not currently before the Court but may have a more direct stake in the issues being litigated. It's important for economy and use of judicial resources. The Canadian case law, cases like *Downtown Eastside,* to which my friend Mr Curran referred, note that there is the need to ensure Courts do not become hopelessly overburdened with marginal or redundant cases and they screen out mere busybodies.

And to ensure sensitivity for the judicial role in Government – and this is to ensure the Courts play their proper role in our democratic system – they do not embark upon general enquiries into conflicts between legislation and affirmed rights, rather they must be sensitive to the limits of their constitutional role, which is to determine the rights of those who are affected by limitations and to determine their rights accordingly.

ELIAS CJ:

Mr Perkins, I just wonder if you can help me because – I should have checked this – but following on in terms of any differences with the UK legislation. So the UK legislation doesn't have an equivalent to our section 3 which binds acts of the legislature?

MR PERKINS:

That's correct, Ma'am, yes.

ELIAS CJ:

And the section 7(1), the declaration of inconsistency provision, doesn't apply to legislation – well, at least if this is section 7(1) that's being cited there, it's a public authority which is not defined to include the legislature, you can bring proceedings against the authority but only if you'd be a victim of the unlawful act, is that right?

MR PERKINS:

That's right, Ma'am. The relevant section of the UK Human Rights Act for present purposes, which confers the power to make declarations of incompatibility, is actually section 4 of the Human Rights Act, it's not section 7.

ELIAS CJ:

So was it section 7?

MR PERKINS:

Section 7 relates to public authorities, which –

ELIAS CJ:

Oh, I see. So it's section 4 that I need to look at?

MR PERKINS:

That's right, Ma'am.

ELIAS CJ:

And do we have that?

MR PERKINS:

Yes, Ma'am.

GLAZEBROOK J:

Well, you don't need to be a victim is what I'd understood under that but…

ELIAS CJ:

You don't need to be a victim?

GLAZEBROOK J:

But the Courts have sort of inserted a requirement is what I'd understood.

MR PERKINS:

So the position is, in my respectful submission, very close to –

GLAZEBROOK J:

But it really means that *Lancashire*, where you do need to be a victim, is perhaps not as to the point.

MR PERKINS:

Your Honour, I submit that it's quite well accepted in the UK case law that even though "victim" is not within the –

GLAZEBROOK J:

No, no, I understand that. But – well, all right. I mean, whether because you don't need to be a victim under section 4, whether it's exactly the same enquiry as for a public authority which is looking at individual rights being breached in individual circumstances usually. One can understand the very narrow or the relatively narrow view of "victim" even expanded.

MR PERKINS:

However, even where it is primary legislation that is being impugned, *Chester* is an example, that's the most recent of the United Kingdom prisoner voting litigation, that's the situation in which the concept of victimhood is still picked up in –

ELIAS CJ:

The concept of what?

MR PERKINS:

Victimhood.

ELIAS CJ:

Oh, I see.

MR PERKINS:

Is being picked up in a section 4 context. And so it's not just – I do acknowledge that "victim" is not present in the text of section 4, but it is well established in the UK case law that victimhood is the touchstone for section 4 in compatibility enquiries.

ELIAS CJ:

"Victimhood" in the sense of being deprived of rights owed to you, is that it?

MR PERKINS:

In the sense of private, what we call private standing. So also that's representative, as I've just talked about, a representative plaintiff, so running the risk that your rights will be limited. It can also be a next of kin can, you know, the victim is quite closely confined to a few established categories, I've just mentioned three.

ELIAS CJ:

Right. And then the last question relating to the UK system: they have of course a standing committee of the two Houses of Parliament which works in with the Human Rights Act. Is that actually set up under the legislation or is that just something adopted by standing orders or something of the Houses of Parliament?

MR PERKINS:

I don't know definitively, I'll ask –

ELIAS CJ:

It's all right, I can't probably find it out. I was just trying to work out the entire picture of the system.

MR PERKINS:

My expectation would be standing orders.

ELIAS CJ:

Yes.

MR PERKINS:

It would be unusual for a Parliament, sovereign, as the United Kingdom Parliament is, to prescribe in legislation the committees of the two houses, that would be a rather unorthodox approach to how the Houses constituted themselves for that purpose. But I will check that out and…

ELIAS CJ:

Yes, I would – no, that's fine, don't worry too much about it. It's less sovereign than ours really, because it does have *Factortame.*

MR PERKINS:

Although things might change. Your Honours, what I wish to move on to, and this will be effectively the last series of points I make, the Crown does not submit that public interest standing may never have a role to play in this newly emerged jurisdiction. But it is the Crown's submission that it is unnecessary to resort to public interest standing in the present circumstances, when there is uncontested standing acknowledged for four plaintiffs. The issue is already before the Courts, there is no risk that an issue of importance wasn't going to be litigated. The question must therefore be that with four qualified plaintiffs before the Courts represented by counsel, did the public interest require Mr Taylor's additional participation, and it would be the Crown's submission that it did not.

Now in reply to my friend Mr Curran, who invited Your Honours to have regard especially to the South African and Canadian provisions in this regard, it would be my submission that the South African position is an expansive standing right conferred by their constitution, and the Court will no doubt be familiar with the quite modern and exceptional circumstances under which that constitution came into being, but it was quite a liberalising constitution in many respects. So it would be my submission that to say standing would be evolved in

New Zealand by reference to a very specific constitutional moment in time in South Africa may not be especially helpful.

In Canada – and my friend placed a deal of alliance upon the *Downtown Eastside* case – it is important to recognise that their version of public interest standing is directed towards what they describe as "supervising legality", and it's legality not used in the sense in which it's used in the New Zealand/Australian/United Kingdom tradition, a principle of legality, it's legality used in the sense of compliance with Canada's supreme law, written constitution, and its charter of rights and freedoms. So when the Canadian cases talk about the importance of supervising legality and why that mandates an expansive view of what the standing ought to be, they are effectively saying that it must be necessary to have a broad view of standing in order that unconstitutional actions can be corrected, so it's really –

GLAZEBROOK J:
Do they not have a broad view of standing just on ordinary administrative law issues then?

MR PERKINS:
So the *Downtown Eastside* case is specific to Charter challenges.

GLAZEBROOK J:
Well, no, I understand that. But are you saying it's just limited to the supreme law and they don't have our concept of public interest litigation more generally and a relaxation of standing in those circumstances?

MR PERKINS:
I must admit, that's not a point I've looked into in detail, Justice Glazebrook, but what I would –

GLAZEBROOK J:
Well, because you're saying that we can't take any notice of it because it's in a very particular context?

MR PERKINS:

I'm saying it should be treated with caution because it's in a particular context which is much more akin to our executive or judicial review of executive action, in the sense that that is where the Courts are supervising vires, they're saying that executive actors have exceeded the vires or the powers that Parliament gave them and therefore it must be necessary that the Court can intervene to correct it and someone to bring that to Court so the Court can intervene.

ELIAS CJ:

Why would you have a different standard, accepting that there was – because that's the principal argument – that there's no, accepting that there is a right to seek a remedy here? Why would you have a different standard as to standing according to whether it's legislation or executive action?

MR PERKINS:

I think that leads on to one of the final points I wanted to make, which is it must be recognised that declarations of inconsistency as are being discussed here today i.e. those that are arising in the inherent jurisdiction of the Court are an extraordinary remedy. I say "extraordinary" in the sense that –

GLAZEBROOK J:

Can I just check, then, you wouldn't be challenging Mr Taylor's standing if there had been an interpretive issue that he wanted dealt with?

MR PERKINS:

Well …

GLAZEBROOK J:

So he comes – if he was coming and saying my – "I want to challenge the anti-smoking legislation," whatever it happens to be, if there was some specific provision that said nobody could smoke ever anywhere and Mr Taylor wanted to challenge that as a non-smoker, and had an interpretive issue that said it was related to the Bill of Rights and a credible interpretive issue, would he have standing then or not? So leave aside the extraordinary remedy because if it

was merely an interpretive issue where it's agreed that the Courts can go through the section 5, section 4 process, would he have standing in those circumstances?

MR PERKINS:
If he were challenging a prison rule, as he did in the 2012 case, so an exercise of delegated legislation by an executive decision-maker, Justice Brewer tells us in one of the cases in the bundle that he does have standing.

GLAZEBROOK J:
All right. So it's only in respect of a declaration of inconsistency that he doesn't have standing?

MR PERKINS:
That's what we're focused on today.

GLAZEBROOK J:
I know that's what you're focused on, but I just want to hear what your – the limits of this argument are.

MR PERKINS:
Well, the Crown hasn't taken this proceeding as the opportunity to attack the entire genre of public interest standing as it applies.

GLAZEBROOK J:
Well, that might be right but we have to understand where this argument fits in, in order to understand the argument on standing is that only because this is an extraordinary remedy – because it actually doesn't have any effect on any of the other parties, either, as the Solicitor has pointed out.

MR PERKINS:
It's our submission that one of the relevant factors that when one is thinking about public interest standing and is it in the public interest to grant individuals like Mr Taylor standing to participate in this litigation is a recognition that it is an

extraordinary remedy. So in answer to Your Honour Justice Glazebrook's question about are we being strict on standing just because it's Parliament as opposed to the executive, if I can paraphrase the question that way, that is a relevant factor that we submit is part of the public interest analysis.

GLAZEBROOK J:
That still doesn't answer my question. If there was a credible interpretation issue, could he – does he have standing?

MR PERKINS:
And it would be – my answer to that question is it would depend upon the nature of the rule that he was challenging, whether he was a primary –

GLAZEBROOK J:
Well, he's actually challenging legislation. He is saying this legislation can be interpreted in a way consistently with the Bill of Rights, and it should be, in my hypothetical example.

WILLIAM YOUNG J:
Might depend on whether he wants to smoke, I suppose.

MR PERKINS:
And if it was an attack on primary –

WILLIAM YOUNG J:
But it might depend on whether he wants to smoke.

MR PERKINS:
So he is a non-smoker now but if he wanted to smoke in the future?

WILLIAM YOUNG J:
Yes.

MR PERKINS:

If what he was attacking was primary legislation with the – the Crown would insist that if there was no judicial review element to it, if it was just a prima facie saying this law is inconsistent with the Bill of Rights and I wish to challenge it for that reason –

GLAZEBROOK J:

No, on my example he is saying, "I want this interpreted consistently with the Bill of Rights so that it has effect A rather than what the Crown says, it has this effect B and A is consistent with the Bill of Rights and B isn't and it's an interpretive question."

MR PERKINS:

So he's seeking a declaratory judgment-type remedy?

GLAZEBROOK J:

Well, he'd be seeking a declaratory judgment that it means A rather than B, A being the consistent meaning.

MR PERKINS:

The Crown doesn't propose to use this as an opportunity to say that the existing law as to declaratory judgments under the Declaratory Judgments Act 1908 would be revisited.

WILLIAM YOUNG J:

Declaratory judgments, like section 1, suggest probably it would be invoked if he intended to smoke, wanted to do an act, the legality of which depended upon or a – has another interest in the construction of a statute. Now, I suppose interest could mean academic interest, but it could also be construed as meaning practical interest.

GLAZEBROOK J:

Or possibly public interest, generally, and it was effectively a public interest matter.

MR PERKINS:

And so what our principal submission on this point is that the extraordinary nature of the remedy with one branch of Government being the judiciary saying to another Parliament, "You have not met the standard that you set yourselves." I suggest that – and also that this will create a, to use the Court of Appeal's phrase, "A legitimate constitutional expectation that Parliament will do something," emphasises the significance of the remedy and if they are to exist that they would be ordinarily exercised quite sparingly, and it's my submission that in a case like this, there is nothing improper saying that there is no additional public interest that would be served by adding someone like Mr Taylor who doesn't have a private interest in the case in circumstances where four plaintiffs who do have private interest have already engaged the Court's process.

So the point I'm making there is that the extraordinary nature of the remedy and the sparingness with which it is suggested it will likely be exercised warrants close attention to standing issues, especially when there is – or there are four qualified plaintiffs before the Court who can adequately advance their own case.

Unless I can be of any further assistance to Your Honours.

ELIAS CJ:

No. Thank you. Mr Perkins. Mr Taylor, we'll just give Mr Perkins a moment to go back to his seat.

MR TAYLOR:

Yes, Your Honours, thank you.

ELIAS CJ:

Now, I hadn't thought to call on the Intervener in response but was there anything that you wished to add first, Mr Curran?

MR CURRAN:

Yes, just a few points, Ma'am. I can be very brief.

ELIAS CJ:

Yes. Sorry, Mr Taylor. We'll hear from Mr Curran first.

MR TAYLOR:

Of course, Your Honour.

MR CURRAN:

Thank you, Ma'am. Just a couple of points, Ma'am, that may assist the Court. The first is just a point of data. In interchange with my learned friend Mr Perkins the Court asked about the Canadian position qua administrative law public interest standing versus constitutional standing. The position is exactly the same, so the same public interest standing approach that one sees in cases like *Downtown Eastside* was extended to the review of administrative authority in a case called *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607. It's one of the cases actually cited in *Downtown Eastside*. It extends the same public interest standing framework to a review of the administrative authority, so the Commission's general project of ensuring consistency of standing in public law accountability is absolutely the baseline position in Canada.

Two further minor points, on the issue of representative plaintiff, it is the Commission's submission that this is entirely an unhelpful concept in this particular context, that it's tied to the victim standing if not requirement then touchstone in the UK Human Rights Act. It's actually a response to an expansionist impulse on the part of the UK Courts who are rebelling against – well, UK and European Convention judicial bodies that are rebelling against the strictures of the victim standing requirement. It should not govern here.

My final point was one regarding what my learned friend Mr Perkins described as the high point of the Crown's stance which is that Mr Taylor's status was superfluous in this litigation. It may be logically true that it was not absolutely required as a legal matter to obtain the relief that the other four respondents

did, but it would be in my submission entirely ahistorical to suggest that Mr Taylor was not absolutely critical to the relief that was actually obtained in this particular case and Mr Taylor's submissions do deal with the dynamic that persisted amongst the respondent group and without his energy, organisation, galvanisation of the other respondents and carriage of the argument, the reality is we would not be dealing with successful decisions in favour of a declaration in the Courts below.

Those are my submissions.

ELIAS CJ:
Thank you. Yes, Mr Taylor.

MR TAYLOR:
Well, first of all, Your Honour, I thank Mr Curran for his very kind comments about me there. Now, the first thing we need to deal with in my submission is to look at what Mr Perkins has said about me being superfluous. Now, let's go back to the statement of claim. He describes the actors and it starts at paragraph 2.6, the statement of claim. The first actor is, of course, me so there's 2.5, 2.6, 2.7. It makes the point at 2.6 that I've completed the punitive non-parole period of my sentence. Justice Glazebrook hit the nail right on the head when she said that what we were saying here was we are considering who has the right to vote and stand as a candidate without exception, because I am a New Zealand citizen and over 18 years of age. If the Crown wants to justify and defend the DoI application under section 5, which is exactly what we were saying, we were saying that if you complete the punitive non-parole period of your sentence then it can't be justified in a free and a democratic society as – on the basis of punishment. So that's the first point.

Let's go to 2.8. The second actor of serving a sentence of seven years two months' imprisonment, which is in the same category as me. She's serving over three years. So there we go.

Let's go down to the third actor at paragraph 2.10. She's serving a sentence of two years nine months' imprisonment, and the fourth actor, who's serving a sentence of five months' imprisonment. She's certainly not going to be in prison at the next election. That's at paragraph 2.15.

So the reality was, Your Honours, that these applicants on their own would not have been able to mount a consistent argument or a consistent case any more than without my participation.

Let me look at the other descriptions of the other applicants or actors. That is why we were making that point. On the off-chance the Crown would come at us again and has been flagged by the Crown that it will stand again, we tried to cover it off. Now, there's been a great deal of criticism about why I can do this and can't do that. Well, the simple fact is, Your Honours, that we put the claim out there. If the Crown wanted to advance a section 5 justification, the ball is in its court, but it didn't. It hasn't. So I don't see how the applicants can be criticised in any way for blaming things on a hypothetical question.

If the Crown seriously thought to engage section 5, subject to the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable – and it's described by law as can be demonstrably justified in a free and democratic society. So prima facie within section 12(a) and 12(b) of the Bill of Rights.

My understanding of the jurisprudence is at that point the Crown wants to (inaudible).

Now, the next point I want to deal with is, we've had a great deal of focus by the Crown on the litigation of declaration of incompatibility. Now, can I please take the Court of 57 of my submissions? I deal squarely with that issue. This was the case that Justice Brown first flagged around the incompatibility, whether it might relate to New Zealand.

Now, what did the Court say there? Well, first of all, there's one point I need to make absolutely clear. We're looking at the case that's at tab 3 of the supplementary bundle of authorities, because these cases all hinge on section 7(1) of the 1998 Act, and that's set out at paragraph 38. So subsection 7(1) is in the following terms. It basically says but only if he is or would be a victim of the unlawful act, so that's quite different to what we've got here.

The next section sets out the law outstanding in the European Human Rights Act 1998. So in my respectful submission, the cases the Crown raises from the UK in the declaration of incompatibility context, aren't really of any assistance at all, in the face of a statutory injunction like that.

And as I submit in paragraph 58 of my submissions, even in the face of that statutory injunction, the Court noted at paragraph 43, His Honour says – first you go to section 7 of the UKHRA and he says this. "Mr Philip Sales submitted directly in argument that section 7 of the HRA primarily goes to standing. While in the field of human rights, as in public law generally, Courts are not attracted to arguments based upon a lack of standing if there is merit in the argument which has been advanced to see how Mr Taylor's argument can be characterised." I say at 59 that despite the statutory injunction limiting the right DoI applications in the UK to victims, a victim of the unlawful act, the UK Courts have said that basically if the case involved merit then they're not going to allow that to stand in the way. I've identified the case from the Court of Appeal - I cite what Lord Steyn said which I won't read out, Your Honour, but again it makes the point about section 7 and how the UK Courts see it. That actually assists my case in the light of my respectful submission because it shows (inaudible) meritorious claims.

The Courts are designed to secure justice, not to allow meritorious arguments and claims to be defeated on technical rules of standing. Let's get back to where standing comes from. It's the rule of the Courts that the Courts have created themselves, for whatever reason, for various reasons. So the Courts are free to depart from those and enforce them as they see fit. They're guided, of course, by previous precedent and jurisprudence.

Now, at paragraph 61 I've summarised what the European Court of Human Rights considers – what they consider someone, a victim, to be for the purposes of Article 34 of the European Convention on Human Rights. This assists me – I think it's now accepted without question that I am presently disqualified, I was disqualified from voting in the 2017 election by the amendment of section 81B that was put in by section 120 in November.

GLAZEBROOK J:
Mr Taylor, that's because of the sentence you're serving at present. Is that the argument sorry?

MR TAYLOR:
Yes, Your Honour.

GLAZEBROOK J:
Right. That's fine.

MR TAYLOR:
Yes. I think it's accepted, and the Crown has accepted in its submissions at paragraph 40 and 41 that all my pre-2010 sentences, they expired by 12 December 2016. That's at paragraph 41.

GLAZEBROOK J:
Thank you.

MR TAYLOR:
So that's why. Now, I think in section – there was a great deal also made of section 6(a) of the 2010 Amendment, because it continued existing disqualifications. At that particular point, I had an existing disqualification. But that existing disqualification only applied to 12 December 2016. So – and I make the point at paragraph 94 of my submissions that section 6A of the 2010 Amendment continued existing disqualifications but that can only be in respect of sentences imposed before its commencement, which is the 12 December

2010, I think it was. So the sentences that I was sentenced to after that, they are the ones that I'm presently disqualified from voting under and was prevented from voting and was prevented from voting at the 2017 elections.

Now, when we go to my final bullet point at paragraph 61 of my submissions, a person may not be affected yet but it may be very often the person is affected but there is no clear proof. In that case, the individuals in question may be regarded as potential victims. This is according to the European Court of Human Rights jurisprudence on what constitutes a victim, so even under the strict – the very strict rules there based on that statutory standing, in my respectful submission, Your Honour, it cannot be sensibly argued that I am not in some way affected by the 2010 amendment. As I probably have already emphasised, it's pursuant to that that I can't vote in the election that's just occurred. So it's not that I'm potentially affected by it. Irrespective of that, if the amendment had not yet come into force I was going to be in custody during the elections. I was going to be affected by it. So in my respectful submission, Your Honour, there is no justification of the Crown's position.

Now, at some point it's come out of this *Chester* case that – I just would like to take Your Honours to *Chester* at paragraph 4 of the Crown's supplementary bundle of authorities. I'd just like to take Your Honours to paragraph 37 of *Chester*. It's basically similar to the argument the Crown is trying to mount here, about standing. Now, the first case is *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849, which was a case that – it was the original case by which the European Court of Human Rights found the United Kingdom to be in violation of the European Convention on Human Rights in relation to prisoner voting.

Now, Mr Hirst was a prisoner serving life imprisonment. At the time he brought his proceedings, he'd served what in the United Kingdom is called the tariff period of his sentence and that is why I'm saying that the argument I've grasped about the distinction able to be advanced as to whether a ban on voting for prisoners who have completed serving a punishment. So Mr Hirst had completed serving that tariff period that was imposed by the Judge, the punishment and deterrence aspect.

Now – I'll just find Your Honours the reference to this – Mr Hirst – in the first case at paragraph 76, I'll give Your Honours a citation of that case.

GLAZEBROOK J:
We've got it in *Chester.*

MR TAYLOR:
Right. In that case, Your Honours, the European Court of Human Rights, the Grand Chamber, said that it found that the blanket ban imposed on all convicted prisoners was arbitrary in its effect and could no longer be said to serve the aim of punishing Mr Hirst, once his tariff – that period representing retribution and deterrence – had expired. So that's the argument we were being deployed, Your Honour, is the Crown has sought to rely on section 5. It's not fanciful. It's completely logical and certainly arguable based on *Hirst* and that's at paragraph 76.

So getting back to *Chester*, paragraph 37, the United Kingdom Government, as is recorded there, had made a submission. They're basically saying because he's sentenced on a serious offence and got life imprisonment for it that that does not disclose a violation. I hadn't sort of considered that.

In paragraph 72, which has been recorded on page 303, this is what the Chamber said in response to that submission by the United Kingdom Government which said he was directly and immediately affected by the legislative provision with which the complaint is made and in these circumstances the Chamber was justified in examining the compatibility of the Convention of such a measure, without regard to the question, where if the measure had been framed otherwise in a way which was compatible with that Convention it might still have been the primary debate. So the UK Government essentially refused to be saying, well, he's a life sentenced prisoner. But Mr Hirst is saying yes, on the face of it I'm a life sentenced prisoner. But I've searched my punishment and deterrence aspect. That, of course, opens a

whole can of – and the bottom line being here is standing because of that, in my submission.

And again, it makes the point – and this goes to the current provisions – for Parliament to amend the current law, restrictions on the right to vote still apply to post-tariff life prisoners which would necessarily be compliant with Article 3. And let's say the Parliament was to amend the law back to what it was, three years, it has opened argument that once a prisoner has served the punishment aspect bit, which is set by Parliament itself in the Parole Act – it says unless the Judge imposes a minimum period of imprisonment, prisoners are eligible for parole after one-third of their sentence. They've served their punishment and deterrence. They're now able to be released because they're not a danger to public safety, what we call an undue risk.

So those aspects would have been argued, no doubt, by the Crown if they'd bothered to, to trigger section 5. We would certainly have arguments on it. This reflects, of course, as to my standing to be able to do so because there's no question that I'd finished my punishment and deterrent aspect of all of my sentences back in 2012, well before these proceedings were commenced.

So just concluding, in my respectful submission, the general argument, then, the public interest or private interest, I have standing to bring these proceeding and at the end of the day if the Court of Appeal wanted to examine the question then it should have given us an answer to – an opportunity to respond and advance some sort of argument as to the facts which they got wrong, in my respectful submission, or otherwise.

So unless I can assist Your Honours any further, that concludes my submissions at that point.

ELIAS CJ:

Thank you, Mr Taylor. Yes, Madam Solicitor, I just want to be sure that I understand the Crown's position on the application for Declaratory Judgments Act.

SOLICITOR-GENERAL:

We say the Declaratory Judgments Act supplements the inherent jurisdiction of the Court and isn't a code or a bar to declaratory relief in the inherent jurisdiction. This is written in our – this is set out in our written submissions, Your Honour, at paragraphs 15 on.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

We note that – well, I note in submission that there are, of course, as Your Honours will be aware, different types of declaration, some that declare what the law is or will be, some that don't declare what the law is but actually change the nature of legal relationships, like divorce orders, decrees, adoption orders, dissolutions of partnership orders, so they're declarations of a different type again. They're not declaring the law – declaring what the law is but declaring new legal statuses, and then there might be some declarations that are both declarations of remedy and of right. The deed means X and plaintiff is entitled to a payment of Y.

So in all of those types of declarations – and I raise those ones because they're sort of non-executory, there's no execution part to them, they are declaratory – the common feature, we say, at paragraph 55 we set out is that there is some utility in a sense of declaring the law, determining legal positions, that is quite qualitatively different, as we say at paragraph 55, from what is asserted here, in my submission. Prisoners and electoral officials – either Government or public officials – don't need to have clarifications of their rights determined, nor any declaration about its terms or its scope. The meaning is plain. The only utility, as I mentioned earlier in my reply submissions, appears to be the utility that the plaintiffs get a hand to raise a political challenge to the Parliament or to the executive, I suppose, to encourage them to make an amendment to the legislation.

ELIAS CJ:

So it all comes down, really, the objectionable form of these proceedings, to there being no reasonably arguable question of interpretation, is it – does it?

SOLICITOR-GENERAL:

I would look at it at the other end and say the objection is that what the Court has given is not remedial. It isn't in the nature of a remedy that has any utility in a legal sense. It has a utility in a political sense.

ELIAS CJ:

Because of section 4?

SOLICITOR-GENERAL:

Of the Declaratory Judgments Act?

ELIAS CJ:

No, no, of the Bill of Rights Act.

SOLICITOR-GENERAL:

Oh, sorry, Your Honour. Yes, because of section 4.

ELIAS CJ:

I see. So you don't have any problems with the fact that the Declaratory Judgments Act makes it quite clear you don't have to have any utility or you don't have to have any consequential relief or you …

SOLICITOR-GENERAL:

That's right. That is not the element of the complaint and we accept that this Court has said that that isn't required. You don't need a lis. You don't need any other relief. But there will, of course, as Your Honour is well aware, Your Honour the Chief Justice's judgment setting out what it is that's required under the Declaratory Judgments Act. Even there the point at paragraph 9, the jurisdiction under that Act, as I say, we're not saying this Act supplants the inherent jurisdiction, enables anyone whose conduct or rights depend on the

effect or meaning of an instrument or including an agreement to obtain an authoritative ruling. That is not what is done here in this declaration either.

ELIAS CJ:

Well, I'm just looking at the alternative under section 3, which permits you to – where anyone claims to have acquired any right under a statute. So we have a claim of right here to apply to the Court.

SOLICITOR-GENERAL:

That person may apply to the High Court for a declaration determining …

ELIAS CJ:

Any question as to the construction or validity?

WILLIAM YOUNG J:

You have to be interested in it. It depends on what "interest" means, doesn't it?

ELIAS CJ:

Sorry, interest?

WILLIAM YOUNG J:

The first – there are two parts to the definition.

ELIAS CJ:

No, there's a …

WILLIAM YOUNG J:

I'll have to bring it up again.

ELIAS CJ:

Anyway, you don't want to – you don't have any comment on the very wide expression in section 3 or, indeed, on the fact that section 2 purports to be a

provision of general application not grounded on applications under the Declaratory Judgments Act.

SOLICITOR-GENERAL:

The point that we make in our written submissions is that – what we have taken from *Mandic* is that people's rights or conducts have to be determined or rest on the terms of the declaration and that is not the case here.

ELIAS CJ:

Where do you get that from, the language of sections 2 and 3?

SOLICITOR-GENERAL:

The part I was reading to Your Honour. It's in section 3. "May apply to the High Court for a declaration determining any question as to the construction or validity of the statute." There is no question here as to the construction or its validity.

ELIAS CJ:

Yes, so it all depends on there being – so if we, and we've gone over this but if we had an arguable question of construction there'd be nothing to prevent – leaving aside you'd say that a declaration shouldn't be made of inconsistency or infringement.

SOLICITOR-GENERAL:

Well, the declaration would be – if it was *Quilter*, for example, back in its time, that the Marriage Act means that a spouse means a man and a woman. That would be the order. That would be the declaration.

ELIAS CJ:

All right. And there's nothing further you want to say about section 9 of the Declaratory Judgments Act?

SOLICITOR-GENERAL:

And its future focus?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Well, I would make the same submission that even though it does have this expansive reach into the future it's still about what – if this happens, then what will be the effect in rights, duties, obligations.

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

Your Honour, just on a different point, you asked Mr Perkins about the United Kingdom mechanics. My colleague Ms Taylor has been researching it. Would you like her to address you just very briefly on the mechanics?

ELIAS CJ:

Yes. Thank you.

There wasn't anything arising out of that, was there?

MR BUTLER:

There were two points but I'm happy to yield.

ELIAS CJ:

Well, do you want to be heard first in case there's some response? Sorry, I shouldn't have opened it up.

MR BUTLER:

There are just a couple of points that were touched on that it does seem to me do need a quick reply. My learned friend the Solicitor said that the point of declaratory judgment declarations is that there is a utility stating the legal position. That's exactly right. That's what we say is the effect of a declaration

of inconsistency. She said, really, the point of it is to get a political hand and the effect is to change the law. Your Honours will recall that she has said that the Crown has no difficulty with the *Hansen* indication which she accepts also will allow you to make a political – to take an issue elsewhere and deal with the matters politically, so in my submission clearly dancing on the head of a pin, it seems to me.

She said it's not – it won't give rise to an authoritative ruling. I think this is quite important because it has been said once or twice by the Solicitor a bit glibly it is an authoritative ruling. The point is the Crown will be bound by a decision of this Court had we had full argument and had this Court come to the conclusion that this Act is, indeed, inconsistent with section 12(a) and section 5 of the New Zealand Bill of Rights Act.

ELIAS CJ:
I think we understand your argument. All I was asking – inviting the Solicitor-General to do was comment on anything in the Declaratory Judgments Act because we haven't been to that Act and I wasn't really asking you to re-traverse her argument.

MR BUTLER:
Okay. I thought they were matters arising out of her responses which seemed to be her substantive responses to the – to her way of deflecting.

ELIAS CJ:
Well, it does all come back to that.

MR BUTLER:
Yes, exactly.

ELIAS CJ:
But she wasn't cavilling at the terms of the Act itself. She just says it has no application for the reasons in her substantive argument.

MR BUTLER:

The last point, then, is simply the terms of section 11 of the Act itself. You'll note section 11 confers a power on the High Court to exercise jurisdiction that it might have under the DJA, even if it would not otherwise have the power to issue a declaration. So, for example, it seems to me that might be relevant in a context where, for example, by analogy of the Human Rights Review Tribunal has the power to issue a declaration of inconsistency, again, the DJA might be seen as a further way through which that mechanism which is available to the Tribunal under the Human Rights Act is one that can be exercised independently of going through the Human Rights Act itself. You can rely on the DJA by dint of analogy. You'd say, "Well, why can one not expand that out more broadly in the Bill of Rights Act area?"

They were the comments I wished to make.

ELIAS CJ:

Thank you. Nothing arising out of that, is there? No, thank you. Ms Taylor, would you like to come to the microphone? Thank you.

MS TAYLOR:

May it please the Court, I just wish to address you briefly on Your Honour the Chief Justice's question about the joint committee on human rights, which is a Parliamentary committee in the UK, and Your Honour asked whether that was set out in the Human Rights Act or standing order.

May I refer to the Court to standing order 152B, which establishes the joint committee and sets out the mechanics for remedial orders to be referred to it where delegated legislation is proposed which will remedy an inconsistency, and that's an inconsistency which has been determined by a Court. So while the Human Rights Act sets out in section 10 the ability to remedy that inconsistency by delegated legislation, the mechanics of doing that are in 152B of the standing orders.

ELIAS CJ:

I see. Thank you. That's helpful.

MS TAYLOR:

As the Court pleases.

ELIAS CJ:

All right. Mr Taylor, was there anything else that arose out of that?

MR TAYLOR:

Just briefly, Your Honours. I've got a comment on the utility of – utility of declaration is a really, in other words, what's its use? I refer the Court to what Justice Heath said at paragraph 77 of his judgment where he's made the important distinction that a section 7 is whether – and we touched on this earlier – it appears to be a breach of the Bill of Rights. The Court's role is to determine whether the legislation is in breach and, if so, whether any remedies should be granted. His Honour goes on to say what the formal remedy is, so there's certainly therefore a utility in that remedy. It's the only one available, and in this case it appears to have done the trick, if I may say so.

ELIAS CJ:

All right, thank you. All right, well, thank you, counsel, thank you, Mr Taylor for your submissions. We'll take time to consider our decision in this matter and we'll retire now.

HEARING CONCLUDES