IN THE SUPREME COURT OF NEW ZEALAND SC 102/2017

I TE KŌTI MANA NUI [2018] NZSC Trans 6

BETWEEN **HINEMANU NGARONOA, SANDRA WILDE AND ARTHUR WILLIAM TAYLOR**
Appellants

AND **ATTORNEY-GENERAL**
First Respondent

CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS
Second Respondent (Abiding)

ELECTORAL COMMISSION
Third Respondent (Abiding)

Hearing: 26 March 2018

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: R K Francois for Appellants Ngaronoa and Wilde
F M R Cooke QC, P A Joseph and E M Gattey for Appellant Taylor
U R Jagose QC, P T Rishworth QC and D J Perkins for First Respondent

CIVIL APPEAL

MR COOKE QC:

May it please the Court. I appear with Mr Joseph and Ms Gattey for Mr Taylor.

ELIAS CJ:

Thank you Mr Cooke.

SOLICITOR-GENERAL:

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

ELIAS CJ:

Thank you Madam Solicitor.

MR FRANCOIS:

May it please Your Honours. Mr Francois for the first and second appellants.

ELIAS CJ:

Thank you Mr Francois. Mr Cooke?

MR COOKE QC:

Two fundamental strengths of the New Zealand constitution arise in this appeal. The first is flexibility that our constitution adapts over time to meet the needs of the nation. Those developments usually are initiated by the legislature, or initiated by them, but also involve the courts who identify and clarify questions when they arise, and I guess the enactment of the New Zealand Bill of Rights Act 1990 is an example of that in the sense that the legislature enacted that legislation. The courts then interpreted and clarified its effect and meaning and took incremental steps itself, for example,

in the development of the *Baigent* remedies, and potentially the question of the declarations of inconsistency. In that way, the law has developed in accordance with our constitutional traditions.

The second related concept is one I really just foreshadowed. It is that this occurs through what can be described as the dialogue between the branches of Government, that is part of that flexibility, and again the example I've given is an illustration of that. The enactment of the Bill of Rights Act, the Court's interpretation of it, the development of *Baigent* damages, and potentially declarations of inconsistency are an example of a dialogue between the branches of Government.

The provisions of the Electoral Act and those it entrenched certain of its provisions give rise, in my submission, to both of those matters. What is in issue is the meaning and effect of the provisions of our electoral law including the entrenchment provision, and there are perhaps four notable features of those provisions that can be highlighted from the outset. The first is that whilst we're dealing with the 1993 Act, what we're really dealing with was what was carried over from the 1956 Act, and the 1956 Act was really pioneering legislation in the building of nationhood. Pioneering although not necessarily fully developed or mature or sophisticated in its conceptions and where there was a degree of uncertainty about what was being done but where nevertheless the general thrust of what Parliament was seeking to achieve in that pioneering legislation was apparent. The interesting thing about that, apart from that pioneering sense, if we go back to the concept of the dialogue in terms of the entrenchment provisions it has now taken 60 years for the Court to join the conversation. The provisions that were entrenched in the 1956 Act and then carried over to the 1993 Act haven't really been brought to the Court to ascertain what the full effect and meaning of that entrenchment actually is.

ELIAS CJ:

Which is surprising that ambiguity was identified in them before enactment of the 1993 Act.

MR COOKE QC:

Yes, but there's been this latent ambiguity or uncertainty about what the real effect of what was being done is, that's been carried through and only now are the Courts being invited to join the conversation. So that's the first notable feature. The second is I think important, the 1993 Act, as for the 1956 Act, the 1993 Act was passed unanimously. So Parliament unanimously agreed to the entrenchment provisions and the extent of the electoral law at that time.

The third striking feature, as all these features sort of make public lawyers' pulse quicken, but the third striking feature is that these provisions are only singularly entrenched. Presumably that was with ultimate recognition to the sovereignty of Parliament. Parliament can always in the end enact the laws when it desires. But the effect of single entrenchment is that it must directly confront what it is doing. It must directly confront whether what it is proposing is inconsistent with an entrenched provision, and if necessary if it still wishes to proceed with that measure, to then amend the entrenchment provision to allow to do it by an ordinary majority.

ELIAS CJ:

Subsection (2).

MR COOKE QC:

That's correct. And the fourth striking feature is the identification of what is, and what is not entrenched involves the location of a dividing line, and that is because some but not all of the aspects of voter eligibility are entrenched. So in the end the difficult question of dividing line is inherently there and always has been since 1956, and on that question of the dividing line –

ELIAS CJ:

Well if there is a dividing line, and I know that you're not arguing that there isn't a dividing line, but I have to flag by my way of thinking that almost gives the game away because how is the Court to, what's the compass for the Court in picking its way through the provisions.

MR COOKE QC:

I understand the issue and that's obviously something I'll have to come to. But my point at this point is to say that that difficulty has always been there.

ELIAS CJ:

Well it's identified in the Parliamentary materials. It's probably highlighted in the report of the Electoral Commission too.

MR COOKE QC:

It is. It's also, to take it an even more basic level, is apparent from the language of the provision.

ELIAS CJ:

Yes.

MR COOKE QC:

So it's inherently there.

ELIAS CJ:

Well that's probably the first start isn't it, the language.

MR COOKE QC:

And given that inherent difficulty with it on its text, let alone the wider materials, it cannot be controversial to say that the legislation is interpreted given its text and in light of its purpose, and consistently with fundamental rights so far as the wording allows. That shouldn't be a controversial submission.

ELIAS CJ:

What's your, what purpose do you say entrenchment has, or you're going to come on and deal with it?

MR COOKE QC:

I can deal with that briefly now because I think the purpose is, that Parliament was seeking to entrench or protect those things that were regarded as

fundamental to the electoral system. I don't think it needs to be more elaborately developed than that. That is the purpose of the entrenchment provision.

In terms of what I just said earlier about interpreting legislation and my text and purpose, and in light of fundamental rights as far as the wording allows, we do have this issue about whether the entrenchment that applies to the entrenchment provision, which I'll come to, but it shouldn't be as a general proposition, that shouldn't be regarded as controversial, text, purpose and consistently with rights so far as the wording allows.

Now then looking at what we've got at here, the starting point in my submission is the Electoral Act 1993 does enact the right to vote. Even at the that level we have a somewhat subtle technical point than my learned friend's submissions that the right to vote was instantiated, not generated, by the Electoral Act but in my submission the right to vote is established by the Act and it is encapsulated primarily in section 74 but section 74 in light of section 60, and perhaps I can invite Your Honours to go to the provisions, and going to the Ngaronoa bundle of authorities, volume 1, behind tab 4, we've got excerpts from the Electoral Act and if you look firstly at section 60.

ELIAS CJ:
Sorry, bundle, this is at tab 3?

MR COOKE QC:
Tab 4. So section 60 is optimistically titled, "Who may vote," but within section 60 what you see is the continued reference to the person to being qualified to register as an elector. So under the legislative scheme being one of the registered electors is necessary to understand who may vote. So you need to go to who the registered electors are by going to section 74. Section 74 contains, in my submission, in subsection (1) the fundamental right. We have the words, "Subject to the provisions of this Act," which is something I'll come back to, but then the meaningful expression, "Every adult person is qualified to be registered as an elector." Then we have on the

balance of section 74 what we described, as Your Honours will be aware, the machinery or regulatory provisions. But it's that expression, "every adult person is qualified to be registered as an elector," that we say that the right to vote is encapsulated, and interestingly it is encapsulated in a way that's consistent with the New Zealand Bill of Rights Act right. You'll see that behind tab 5 of the same bundle, the Bill of Rights Act, section 12, "Electoral rights, every New Zealand citizen who is of or over the age of 18 years has the right to vote." So that encapsulation in section 74 of the right to vote, definition of adult person being the person of 18 years of age, is consistent with a New Zealand Bill of Rights Act right.

ELIAS CJ:

Well it channels it, doesn't it, because it sets up additional qualifications from every person and it is also subject to the provisions of this Act.

MR COOKE QC:

Yes. Just to foreshadow the subject of the provisions of this Act's importance, those are two types of provisions, the ones as Your Honour has just identified in section 74 and elsewhere, which we say regulate that right, but also the entrenchment provision. So it's those two sets of provisions that this is subject to.

ELIAS CJ:

Sorry, you say subject to this Act is to be interpreted in the light of the entrenchment.

MR COOKE QC:

I'm saying that one of the things that it's subject to is the entrenchment provision.

ELIAS CJ:

I see, yes.

MR COOKE QC:

So it cuts both ways. In some ways the ambiguity that we wrestle with, the dividing line, is in those words subject to the provisions of this Act, because the provisions that are subject to are both what I call the machinery provisions and the entrenchment provision.

ELIAS CJ:

Well and also the exception provisions and section 80 which have always been there.

MR COOKE QC:

Yes. Your Honour we'll come to this question about whether they're exceptions or regulation and whether there's a meaningful identification of the difference between the two, that might be the dividing line question. But the importance for this purpose is to identify that the New Zealand Act does establish the right to vote by saying that everyone becomes vested with that right when they become adults as defined.

ELIAS CJ:

If.

MR COOKE QC:

Yes, when they become adults as defined.

ELIAS CJ:

No, if and then there's a lot of matters that indicate, that you say are detail in your argument.

MR COOKE QC:

Yes.

ELIAS CJ:

If they're New Zealand residents and citizens and so on.

MR COOKE QC:

Yes, and obviously I need to address those, the meaning and effect of those qualifications but for the moment I'm just establishing that we do have in the Act the right to vote once you've attained the age of 18 years, and any doubt about that should be interpreted in light of the fundamental rights including the New Zealand Bill of Rights Act, the rights-consistent interpretation, there can't be any doubt about section, the Bill of Rights Act biting on that question because we're not dealing with the entrenchment provision at this stage. But the fundamental right to vote is encapsulated by reference to obtaining adulthood as defined.

So the next question is what the meaning and effect of the entrenchment provision in section 268 is and so if we turn to 268 we get the identification of what are called the reserved provisions, or we call it the entrenched provisions, but these are the provisions that are protected by special procedure. A special procedure that makes it more difficult for them to change unless the procedure itself is amended. It protects them in the sense that any challenge to the substance of those rights has to be directly confronted. And in interpreting section 268 our submission is that it encapsulates entrenchment in a way that corresponds to the fundamental right in section 74 I've just described. So in the section we're dealing with, section 268(1)(e) the first point is it refers first to section 74. Section 74 being the place which actually contains, in my submission, the fundamental right.

Secondly, it mirrors how section 74 does so encapsulate the right to vote and that does say by describing that all persons who turn 18 become entitled to be registered as electors. Now I guess that could have been expressed in even clearer language. It could have said after listing 74, 3(1), 60(f), so far as those provisions prescribe that every person may vote on attaining the age of 18 years, but that is what it says in different words, and the words that I've just described are the words that will be consistent with the right as encapsulated in the New Zealand Bill of Rights Act and elsewhere as a fundamental right.

ELIAS CJ:

Well I find it very difficult to understand why it isn't also fundamental that electors be New Zealand citizens or New Zealand residents. So it's this dividing line that you are trying to establish that I find difficult to understand.

MR COOKE QC:

I will come to it, I know I keep on promising, but I will come to that. But all at the moment I'm doing is establishing that the Act does establish the right to vote and does protect the right to vote in the entrenchment provision. So my rewording of subsection (e) so far as those provisions prescribed, that every person may vote on attaining the age of 18 years, I hope responds to the challenge my learned friends to identify the more rights-consistent wording of the provision.

The third point to note is that the end of subsection (e) expressly refers to the right to vote. So it talks about persons qualified to be registered as electors or to vote. Now my learned friends say that that is only there by reference to members – because of the members of the military who have to be given a special position.

ELIAS CJ:

Well because they are given a right to vote by section 60. So that's why the argument is that there is a specific reference to vote.

MR COOKE QC:

But in my submission the idea of being entitled to be a registered elector is synonymous to having the right to vote in terms of establishing the fundamental rights, not just members of the military gaining the right to vote. So this provision does entrench, protect the right to vote, not just to people in the military, but all people who obtain it under the Act's provisions. And as we say in our submissions, the right to vote is inextricably interlinked with the age of entitlement as a matter of logic. That's how the right to vote is expressed in these provisions. You can't protect the age of entitlement without protecting the right that you acquire when you turn that age. They're logically

inseparable. It's important that this is the Parliament's chosen means of expressing the right to vote in a manner, in my submission, that is consistent with fundamental rights because it captures the concept of the universal and equal suffrage. We all know to our detriment that age is universal, it applies to every person. It's the chosen qualifier that is equal and universal, and that is why the Crown's argument that these provisions do not entrench the right to vote, can't be right.

ELIAS CJ:

Can I just ask you, under the 1956 Act, is section 99 presumably that's the right of those serving overseas to vote, because it's the equivalent provision, is that in exactly the same terms as section 60? We don't have that in this bundle.

MR COOKE QC:

I'm sorry, I can't recall.

ELIAS CJ:

That's all right, perhaps you can come back to that at some stage.

MR COOKE QC:

So we then need to test the implication of the submissions I've just been making in the context of the Act and ask this question. If Parliament sought to amend section 60, that's the one that says who may vote, by an ordinary majority, that introduced a provision that said only people aged 20 could actually cast a vote, that, in my submission, would clearly be inconsistent with the right that is set out in section 74 and which is entrenched by section 268, and that seems clear from text, purpose, let alone doing so, interpreting these provisions in light of the presumptions.

So the real question, and it's the question Your Honour the Chief Justice has asked me now really twice, the real question arises from the fact that Parliament has protected some but not all of the conditions for being a registered elector. So there is a line drawing exercise, and I think we

established by the section 60 example that you can't change the age at which you cast a vote in another provision in a way that would be consistent with the protection, and I say other measures of that kind would do so as well. If Parliament by ordinary legislation sought to say that only men could cast a vote, that would be inconsistent with the protected right of all 18 year olds to vote. As Parliament has formulated the right to vote, the right for universal suffrage.

Equally, a provision that prohibited certain racial or ethnic groups from voting, no Māori could cast a vote, or no Chinese could cast a vote. That could not be done by ordinary amendment to section 60 without obviously engaging the protected right in section 74 as entrenched in section 268. Again, that would be clear from text and purpose, let alone text and purpose in light of the mandate to interpret these provisions consistently with fundamental rights as far as the wording allows.

ELIAS CJ:

And reintroduction of a property qualification was mentioned in the debates, yes. So that would operate, you'd have to say, as implied repeal contrary to section 268(2), if it was an amendment to another provision.

MR COOKE QC:

I prefer it described as simple inconsistency. An implied repeal is a very technical way describing it.

ELIAS CJ:

Well (2) is a protection against repeal or amendment, so you have to get to that and similarly you have to say that something inconsistent in section 80, the introduction of a restriction would be, would trench on what you say is the essential entrenched provision in 268.

MR COOKE QC:

Yes, I prefer the concept of inconsistency in *King Salmon* [2014] NZSC 40, [2014] 1 NZLR 673 authority for that. Your Honours might recall the

Privy Council case *Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) which was the, and in that –

ELIAS CJ:
Yes, Ceylonese, and the Bribery Commissioners.

MR COOKE QC:
Ceylonese, Bribery Commission, so all these cases that you're taught at university –

ELIAS CJ:
Yes, lovely to see.

MR COOKE QC:
Finally we get the opportunity to… but that was an inconsistency case, so that was the establishment of a –

ELIAS CJ:
It was a constitution though, wasn't it?

MR COOKE QC:
Yes but –

ELIAS CJ:
So it's invalidity you're talking about there but here you have to ground it in the terms of section 268(2) don't you, because what you're contending for is the correct manner and form hasn't been followed.

MR COOKE QC:
Yes.

ELIAS CJ:
So you have to show…

MR COOKE QC:

Well I'm not yet sure that anything is going to turn on this idea of describing as inconsistency or implied repeal or, but let me just, I'll pass up McGee *Parliamentary Practice*.

GLAZEBROOK J:

This is very much the effect of the entrenchment provision, because if you can impliedly repeal it not only by ordinary majority of actually repealing it, but by having an inconsistent provision, there's not much point in having entrenchment.

MR COOKE QC:

No, that's right. I don't want to get too side-tracked on the difference between implied repeal and the invalidity of inconsistency, because they may just be different words for describing the same thing.

ELIAS CJ:

Well are you worried about implied repeal because anything inconsistent could be said to be impliedly repealing subsection (2). Is that a problem with…

MR COOKE QC:

I'm not sure that it is a problem at the moment but it's that kind of thing. I mean McGee, I've just passed up, on page 455 and under the heading "Reserved Provision" the second paragraph, "A proposal for the amendment of one of the reserved provisions is understood to as including any provision extending or restricting the application of such a provision." And amendment in inverted commas.

ELLEN FRANCE J:

On your approach if section 74 was changed so that you had to get a natural born New Zealand citizen in order to be able to vote, that wouldn't be affected by the intention of the provision?

MR COOKE QC:

It probably isn't. One of the things about the line drawing exercise, it's difficult, is of course when I identified that there is a need to draw a line I then obviously in the submission get asked well when do you draw it in all these cases and there are other difficult issues about the mental capacity provisions in section 8, so they're all quite –

ELLEN FRANCE J:

Well the reason for focusing on citizenship is because the right in section 12 is for every New Zealand citizen, isn't it?

MR COOKE QC:

So in that sense make it only naturally born citizens is a qualification of that right, then the question becomes, in my submission, is that qualification reasonably justified in a fair and democratic society. Now I answered before –

GLAZEBROOK J:

Is that the question though, because it might be and so might a restriction on prisoner voting, but isn't the argument yes they might be justified but you have to do it by a higher majority than you would otherwise.

MR COOKE QC:

Yes.

GLAZEBROOK J:

So is that even, do we care because in fact they can have a provision that is not justified in a fair and democratic society as long as they have a 75% majority, and as long as they don't care about being inconsistent with the Bill of Rights.

MR COOKE QC:

That is true but only to a point because the difficulty we have, and I'll keep on saying this, the difficulty that arises from what Parliament has given us, is that there is a line drawing difficulty.

ELIAS CJ:

Or an interpretation difficulty which –

MR COOKE QC:

I mean there's an interpretation difficulty –

ELIAS CJ:

Yes.

GLAZEBROOK J:

So why is there a line drawing difficulty?

MR COOKE QC:

Because as I say it establishes that everyone attaining 18 gets the right to vote, subject to the provisions of this Act, which include –

ELIAS CJ:

Section 80.

MR COOKE QC:

Section 80 but also the entrenchment provision.

GLAZEBROOK J:

So the line drawing is really the only thing entrenched is the universal right to vote at 18, and the line drawing is the question of what actually encompasses, is that…

MR COOKE QC:

Yes and what is permissibly enacted by ordinary legislation.

ELLEN FRANCE J:

Well it seems to me a bit odd that if that was so that citizenship would be included in what you describe as regulation.

ELIAS CJ:

Or detail.

ELLEN FRANCE J:

Or detail.

MR COOKE QC:

Well, and I was about to come on to say, I initially responded to Your Honour by saying yes natural born citizens probably all right but actually there may be a genuine question about that. Whether that is actually a qualification of the right rather than its regulation.

ELIAS CJ:

Which is really why you have to start with the question of what's the policy of entrenchment, and you answered that in terms of what is fundamental to the electoral order. Well what's been put to you is one would have thought the right of citizens to vote is pretty fundamental.

MR COOKE QC:

Yes.

ELIAS CJ:

Or indeed identifying who can vote, which is what section 74 does, which is why I suppose I don't understand giving away the game.

MR COOKE QC:

Well one of the things about arguing in this case is there are many different ways of trying to put –

ELIAS CJ:

Yes, I understand that, and it doesn't mean that there isn't a Bill of Rights argument. We're only concerned with entrenchment.

MR COOKE QC:

Yes, and the implication of that, single entrenchment also, so the implication of that, that Parliament can always ultimately do this, it's just a question of whether they have to appreciate that this intrudes on what the previous Parliament universally said was fundamental in our electoral system, and should only be changed by either special majority or if a decision is made to change that entrenchment provision. So again the questions I've been given are saying well where is this dividing line, and citizenship has been raised as a good question in terms of the dividing line, and what I am seeking to say, all I need to do in this case is persuade the Court that the prisoner voting ban is on the wrong side of the line. There are difficult questions about what else is on the wrong side of the line and –

ELLEN FRANCE J:

Well it just seems to me odd that the distinction would be made in that way if the entrenchment provision is as broad as you say. I mean I don't understand why the logic of your argument isn't that all of section 74 is covered by the entrenchment provision.

MR COOKE QC:

Well that is why reference to how, what the fundamental right is as interpreted internationally is important. Even the International Covenant articulates the right in terms of the right arising without unreasonable restriction.

ELIAS CJ:

But we're not really, I mean I know it's background, we're not really directly applying the International Covenant here, or section 12 of the New Zealand Bill of Rights Act, we are trying to ascertain the meaning of the entrenchment provision.

MR COOKE QC:

Yes, and it is a different rubric in which we ask these questions but nevertheless the same issues that the international materials throw up, are relevant to our interpretation question. Perhaps I can illustrate it by going to

the decision of the European Court of Human Rights in *Hirst v United Kingdom (No 2)* [2005] ECHR 681, (2006) 42 EHRR 41, because I think that identifies this issue, and that's in Mr Taylor's bundle of authorities behind tab 2. The passage I wanted to draw Your Honours' attention to is really on page 11 beginning at paragraph 60 of the judgment. So you'll see in paragraph 60 it refers to the right in the European Convention, Article 3, Protocol No 1, makes the point that they are not absolute.

ELIAS CJ:

Sorry, where are you at, just tell me again?

MR COOKE QC:

It's behind tab 2 of Mr Taylor's authorities, page 11, paragraph 60.

ELIAS CJ:

Thank you.

MR COOKE QC:

And you see in paragraph 60 at the top, "There is room for implied limitations and contracting states must be allowed a margin of appreciation in this sphere." Then there's debate about the breadth of the margin, which is really what Your Honour has been putting to me, then at the end of the paragraph: "There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe, which is for each contracting state to mould into their own democratic vision." The Court is there as a last resort: "it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence."

ELIAS CJ:

But this is all directed at whether section 80 and the prisoner voting exclusion complies with section 12 of the New Zealand Bill of Rights Act.

MR COOKE QC:

It isn't solely addressed to that question. It's also directed to the question of how do we make sense of what Parliament has done in section 74, 268 in enacting and protecting the right of all 18 year olds to vote subject to this Act. So it helps in that line drawing exercise just as much because we should interpret our legislation in a manner consistent with fundamental rights as far as the wording allows, and there is an overt interpretation question thrown up by these provisions. Where does one, where can one change in a manner that's not inconsistent with the protected right.

ELLEN FRANCE J:

Well it seems to me in relation to that in your, the distinction you seek to draw between regulating and abrogating, that that's your element when you're talking about justification and that's the context in which the European Court makes its observation in *Hirst* because they're talking about the margin of appreciation and then in the Canadian case to which you refer, the remarks that you rely on are also in the context of talking about is this a justified limit under section 1 of the Charter because there the breach was accepted, so I just struggle to see how that distinction that you want us to draw is helpful or quite –

ELIAS CJ:

Or is helped by this analysis.

ELLEN FRANCE J:

Mmm.

MR COOKE QC:

Well because we have to decide where the dividing line is in our Electoral Act.

ELIAS CJ:

Well do we have to really because if the correct interpretation of section 74 is that subject to this Act means subject to other provisions in the Act, such as

section 80, why do we need to decide the point of ambiguity about interpretation of section 268.

MR COOKE QC:

Well if Your Honour means by that that those words mean that Parliament by an ordinary majority could amend section 60 and say that you have to be 20 before you cast a vote, or you have to be a man, or you have to be of a particular racial group, it seems to me that those examples illustrate that those are provisions that are inconsistent with what Parliament must have meant in entrenching the right of all 18 year olds to be registered electors.

ELIAS CJ:

Well I would understand that argument if you were saying that the whole of section 74 was entrenched, but you're not. You're saying only the age is entrenched. And that carries as baggage into it all – I'm not sure what you're saying, you're not saying all New Zealanders because you say, or all citizens or all residents, because you say that's a matter of administration or detail.

MR COOKE QC:

I say that there must be a level of measure that is permissibly done, that would not require the special majority. If, for example, you wanted to add in a provision that said that everyone had to present identification when they registered as elector, or voted, that would seem to me to be a provision that wouldn't be inconsistent with the right as encapsulated by Parliament. Now I appreciate that in section 80 in particular, and section 74, you have conditions that are more profound than that.

ELIAS CJ:

More substantive than that.

MR COOKE QC:

More substantive, that's true, and one way of responding to my argument is Your Honour the Chief Justice to say well actually Mr Cooke's argument goes further, it's not just the voter provision that would intrude against the right as

encapsulated, but others as well, and I guess one of the issues is, when the 1993 Parliament put these measures in place, it did so by a unanimous act. So to the extent to which there are restrictions on the right to vote, they have been implemented unanimously, that is by the special majority.

WILLIAM YOUNG J:
And couldn't be released, couldn't be loosened other than by a special majority.

MR COOKE QC:
That would be the argument, and I was putting the alternative, but there is –

WILLIAM YOUNG J:
Sorry, so what do you say about that?

MR COOKE QC:
I agree, that was the one thing that wasn't, it may well have been that they realised in 2010 that they were doing something inconsistent with the Bill of Rights Act, but what they didn't address was that they were dealing with something that a unanimous Parliament had established in 1993.

ELIAS CJ:
So the section 80 restrictions as enacted in 1993 do not fall foul of the entrenchment provision, but any amendment –

MR COOKE QC:
Yes.

ELIAS CJ:
Well is it any amendment to them?

MR COOKE QC:
Well this goes to whether Your Honours are attracted to my idea that there are some that do not intrude.

ELIAS CJ:

Well say what the “some” are, or say what the some that do intrude are?

MR COOKE QC:

Well I don’t need to.

ELIAS CJ:

Like race and things like that?

MR COOKE QC:

Yes.

ELIAS CJ:

Or property qualification.

MR COOKE QC:

Yes.

ELIAS CJ:

So you have to import where from, from the, from New Zealand’s constitutional history some substantive values.

MR COOKE QC:

Text, purpose and right of fundamental rights and I guess you add to that always context to –

GLAZEBROOK J:

You would say that you look at it in terms of what the right is, and because it’s not an absolute right there are some justified limitations on that right. Now that, without buying into the argument whether section 5 overrides the right or is a qualification on the right. We just assume for these purposes that whatever is the limit of the right, and presumably the limit of the right would be if you are not capable of exercising the democratic right because of being mentally unwell or any of those matters then that would be not necessarily a justified limitation on the right, but actually a qualification on the right.

MR COOKE QC:

Implied limitation on the right –

ELIAS CJ:

But hang on, justification is irrelevant to the argument you've come to the Court on because you've come to the Court on whether the correct manner and form has been followed in terms of enactment.

MR COOKE QC:

But the relevance of justification is important in the interpretive exercise to work out what does and doesn't have to comply with that provision, because we've established in the Act that there is a fundamental right to vote of 18 year olds, and we've then seen that there are conditions that are associated with that. We've got to work out where that dividing line is.

ELIAS CJ:

So you're inviting the Court to say what is a reasonable, what's the reasonable scope of the right and that is entrenched, is that it?

MR COOKE QC:

That's one way of describing the argument, and all I need to do for this purpose is demonstrate that a prisoner voting ban is outside anything that could be demonstrably justified.

ELLEN FRANCE J:

What if it was a different prisoner voting ban? I mean if it was one that, like the previous one kicking in after three years for example.

MR COOKE QC:

Well that one was introduced by a unanimous Parliament.

ELLEN FRANCE J:

That may be so but that's not answering the question. On your approach this sort of, what's entrenched shifts.

MR COOKE QC:

What is entrenched doesn't have a bright line but that's the problem that Parliament created. There is no bright line here. We've just got to try and make sense of what Parliament has given us. What Parliament has given us is not a provision that makes it absolutely clear what, who gets the right and when it is qualified and when the supermajority must be followed. We've got to do our best to make this work in a way that is consistent with fundamental rights. Text, purpose and fundamental rights, and for my purpose all I need to persuade the Court of is that there is no justification for a prisoner voting ban that involves anything in the nature of the due regulation, legitimate regulation of a right to vote, that might be argued to be outside the entrenchment. That's all as far as I need to go in this case, and I appreciate there are some difficult questions about other potential qualifications like precisely when could you qualify a citizen's right to vote in a way that doesn't require the majority, the supermajority to be ascertained.

WILLIAM YOUNG J:

Can I just come back. The 1993 Act precluded, disqualified prisoners serving sentences of three years or more.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

On your argument that could not have been repealed except by a qualified majority?

MR COOKE QC:

Yes. And that is what has happened here.

WILLIAM YOUNG J:

So it would not be possible to say all prisoners could vote, other than by qualified majority.

MR COOKE QC:

Unless you amend the entrenchment provision. This conversation drew out of *Hirst*, can I just complete what I was referring to there in that paragraph 62 there's the reference to the conditions imposed, and I'm reading from about half way down 62, "In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature" – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. And then down at the end, "Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws is promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes."

Then they go on to say, and I'm going on to page 17, paragraph 82, why prisoner voting bans are outside of that margin of appreciation, and 82 in the middle, "The provision imposed a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence, and irrespective of the nature or gravity of their offence… Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible."

So equally, when we are trying to make sense of our provision, and trying to make sense of what measures do require Parliament to directly address what they are doing, I say the prisoner voting ban measures are of that quality, and because of our constitution, and we only have a single entrenchment provision, what that means is that when Parliament considers such measures, of the kind they enacted in 2010, they must own it. They must realise that this actually is outside the proper limits, and if they're going to impose it, it is inconsistent with what a unanimous Parliament decided in 1993, and if they're going to try and pursue it, notwithstanding they don't have the requisite majority, they must pass an amendment to the entrenchment provision.

ELIAS CJ:

Well that's sort of adapting and expanding the view that Parliament must squarely confront things in terms of the Bill of Rights Act but the other perspective is that this manner and form restriction is quite extraordinary in our constitutional arrangements and therefore some care needs to be taken about expanding it.

MR COOKE QC:

Well expanding is the question isn't it.

ELIAS CJ:

Well you're inviting us to expand it because you're inviting us to decide what is essential.

MR COOKE QC:

Yes but I don't, with respect, describe that as expansion.

ELIAS CJ:

Right.

GLAZEBROOK J:

It's contraction because it actually says 74's entrenched, I suppose.

MR COOKE QC:

And even just putting aside the wording, we do know the Parliament in 1956 and the Parliament in 1993 were, albeit in an initial – perhaps unsophisticated way were trying to lay down what was truly fundamental in our electoral system, and we do know that word may encapsulated the right to vote, which they did do so. They did do so by reference to universal suffrage concepts. Everyone who acquires the age of 18 may vote. We do know also that they recognised conditions of that but they imposed that by a universal vote of Parliament. So whether you call that expansion or contraction I'm not sure that helps you wrestle with this issue because it seems to me that this is just the job that Parliament has given the Court. Trying to make sense of what

Parliament has done, recognising it was intended to be fundamental, in a way that is consistent not just with the text and the purpose of it, but which gives effect to fundamental human rights as far as their wording allows. All I need to do is persuade Your Honours of an available meaning and I would have thought, with respect, that the argument, it must at least put forward an available meaning of the provisions, and in the dialogue that we have between Court and legislature, because Parliament has always been sovereign, the issue will then just need to be addressed by Parliament again. Recognising that the Parliament of 2010 sought to do something without recognising the significance of the vote of the, universal vote of Parliament in 1993.

Seeing what provisions are on the other side of the line, I accept that there are legitimate issues, not just citizenship as Your Honour Justice France mentioned, but also the question about those in section 80 who are identified as having mental capacity issues, that might be seen as a legitimate regulation of the right because it is a capacity issue.

ELIAS CJ:

It is all, I can't remember, I thought it was just those who were convicted of criminal offences, or have I got that wrong. Sorry, which section?

MR COOKE QC:

Section 80, "Disqualifications for registration." So we have a list of 80(1)(a), if you're outside, you're a citizen but you're outside of New Zealand within the last three years. Permanent resident who's outside for 12 months. Then in (c) you get all the mental capacity issues, I think you can describe them as. Then you get in (d) the provision that we're focusing on, and then there's (e), there's the Corrupt Practices List, so someone can get on the Corrupt Practices List if they commit a corrupt practice during an election or that's the main way of doing it, but also if there are other corrupt practices they engage in, and I guess if I was trying to address each of these in terms of demonstrably justified, it would say that it would appear that those do not have the capacity because of mental issues, that seems to be demonstrably

justified and also the corrupt practices issue, because it protects the integrity of the modality, and that's another way of describing it. That the majority of the Supreme Court in *Sauvé v Attorney-General of Canada* 2002 SCC 68, [2002] 3 SCR 519 talked about the legitimacy of regulating the modality of the exercise of the right to vote as opposed to disqualifying categories of the community.

There are other issues that have been raised in the, perhaps more technical issues that have been raised in the argument that I might now address. The first one is that the Bill of Rights Act rights are not engaged at all on the entrenchment provision, and there are two really, two inter-related reasons why it's said that that is so. The first is that the entrenchment provision is a procedural not a substantive provision. So you can't read it in a more rights-consistent way, and then secondly, if it's interpreted as we say, it's capable of being rights-limiting, because it would prevent the repeal of a measure that was an unjustified limit on the right such as a prisoner voting ban. In a sense that is a suggestion of a human rights own goal in terms of our approach. In a sense those two provisions are, those two arguments are inherently inter-related.

Just on the first of those ideas, my submission is that a procedural provision is more rights-consistent if it creates a greater procedural protection for an underlying right, and that doesn't seem, with respect, to be a controversial proposition, and that, with respect, would especially be so with a single entrenchment provision, which ultimately involves limits on fundamental rights being directly confronted. So in my submission it's different from the kind of issue that arose in the *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 case that was relied on by the Court of Appeal. There is a rights-consistent interpretation of the entrenchment provision if it creates a better stronger procedural protection for those underlying rights. And as I say, that is not a human rights own goal –

ELIAS CJ:

Well you could also say it is not necessarily the rights consistency motivation but maybe the introduction of the entrenchment provision itself can't be seen as simply procedural because it is to protect important values in the electoral system.

MR COOKE QC:

Yes, so that must have been the policy behind it, to protect what was fundamental. So identifying properly what is to be regarded as fundamental, therefore protected, must engage the Bill of Rights. It is, as I say in the written submissions, I see this as a somewhat technical argument in the sense that even if the Bill of Rights wasn't engaged the interpretation of a domestic law consistently with legal international obligations and just generally the presumption that we do apply the law in a manner that's consistent with what is fundamental as far as possible seemed to me to get you to the same point anyway, and the argument that the Bill of Rights Act wasn't engaged, has the air of the austerity of tabulated legalism, which is something I was going to make sure I mentioned in submissions at some point. I confess –

ELLEN FRANCE J:

Well in relation to the tabulated legalism, if one's looking at the straight words of 268, and you look at that section as a whole, I mean I understand your argument about the right being broader, but the pattern does seem to be, to refer to the section and then to the things within the section that are protected.

MR COOKE QC:

I can see that pattern.

ELLEN FRANCE J:

But your approach wouldn't really give any, you would require reading that more broadly, wouldn't you?

ELIAS CJ:

Only for (e).

ELLEN FRANCE J:

Yes, well that's my point I suppose, not very well made.

MR COOKE QC:

Well I won't accuse Your Honour of the austerity of tabulated legalism but more substantively I don't think the alternative formulation I have for (e) was dramatically controversial so far as those provisions provide that all persons attaining 18 years of age may vote. That doesn't seem to me to be a particularly controversial formulation of that, and that's why it's consistent to do so.

ELLEN FRANCE J:

Well you are saying, aren't you, section 74 insofar as it creates the right to vote.

MR COOKE QC:

Which is what is said. I'll read the actual wording in the section, "74… so far as those provisions prescribe."

ELLEN FRANCE J:

18 years.

MR COOKE QC:

"18 years as the minimum age for persons qualified to be registered as electors or to vote."

ELLEN FRANCE J:

Yes but you're separating out that latter part, aren't you?

MR COOKE QC:

Well I really don't think so. This is where, I don't see how you can say people when they obtain 18 years old, get the right to vote and not also protect that right. What is it you get when you're 18, the right to vote. That's what's been protected. It's impossible to protect the age and not the entitlement. That

isn't the question. That can't be the question. They're inextricably interlinked those two ideas. The only question is the qualifications –

ELIAS CJ:

But it isn't an entitlement anyway, even on the face of section 74 because of the requirements of residency and citizenship.

MR COOKE QC:

I accept that there are, that's why I say the real issue is the conditions not the idea that subsection (e) doesn't protect the right of 18 year olds to vote. The real question is what is a legitimate limitation on that as a matter of statutory interpretation of these provisions. Or how do we make sense of the idea, that Parliament said that we are going to regard as fundamental the idea that all 18 year olds may be the registered electors, but also at the same time saying there are these conditions associated with that franchise. How do we make sense of that, and the submission I'm putting to the Court is simply that there are some measures that do not reflect either what Parliament did in 1993, that would be a simple way of doing it, that's really what His Honour Justice Young has put to me, that's a simple level of the argument, but that is what was decided, or the alternative view that there are some measures that might still be done that don't require the supermajority. But there are some that definitely do and that is to remove the right to vote from particular people, isn't dealing with a modality of franchise. Is it within the margin of appreciation described in *Hirst*, modality described in *Sauvé*. It is taking away a fundamental right recognised by the Parliament in 1993.

GLAZEBROOK J:

Well isn't another way of putting this that it would be in breach of the entrenchment provision to remove the right to vote from people who are 18 on the basis of say a property qualification which was something referred to.

MR COOKE QC:

Yes. Or I say –

GLAZEBROOK J:

Because you still have the right to vote at 18, you just have to have an added restriction. I know you say the prisoners, I'm just trying to keep away from that at the moment, because –

MR COOKE QC:

Yes, I would say that that was seeking to enact inconsistently with what Parliament must have meant, and I've used the other examples of gender, race, the idea that those aren't protected should be shocking, and that must have been what was behind what Parliament in 1956 and 1993 had in mind. It may not have been particularly sophisticated, but they must have had in mind that there is a fundamental thing here. That everyone who turns 18 are the electors of our Parliament, and that there will be some things that will be done that are just not consistent with that. Take away property qualification, racial qualification, gender qualification, anything that identifies a category of person, that's what the European Court of Human Rights in *Hirst* zeroed in on. When you're zeroing in on a group of people and disqualifying them, that's when there's an issue about the proper interpretation of what Parliament is permitted to do in the sense of the European Convention and the Canadian Constitution, and what we in New Zealand must accept what Parliament has identified as something that requires a particular procedure to deal with.

ELLEN FRANCE J:

Well we do disqualify categories of person because we do disqualify those who haven't resided continuously in New Zealand for the requisite period.

MR COOKE QC:

Yes, and those were enacted by a universal vote of Parliament.

ELLEN FRANCE J:

But you say they're not entrenched. Your argument entails saying that they're not entrenched, so it doesn't matter.

MR COOKE QC:

Well my argument has two levels. The first is the one that Your Honour Justice Young put which is that the limits were universally agreed by Parliament in 1993, and there's my alternative approach, which is to say that back, the way that Parliament has done it is not clear, because they've established the fundamental right of 18 year olds, then qualified it, we've got to work out where the line of legitimate qualification lies, and on that view, I'll end up repeating myself, but that is where you can look to the international material about dividing line on the right to vote and when it's legitimately regulated. Whether modality is properly addressed. Where there is the margin of appreciation. That is where that material is helpful in trying to understand what our Parliament must have contemplated could be done without supermajority and what needed supermajority to implement.

ELLEN FRANCE J:

But in the New Zealand context, in our Bill of Rights, we have protected citizenship.

MR COOKE QC:

We have.

ELLEN FRANCE J:

So in that sense we have adopted an approach that's different in some respects from some of the international jurisprudence.

MR COOKE QC:

Well as the European Court said in *Hirst* that there is a, each country has its own history and its own way of dealing with rights and there is a margin for appreciation for dealing with that, and we've chosen in our Bill of Rights Act to talk about citizenship. In the White Paper it immediate said, and perhaps it would be helpful to go to that, there would be legitimate regulation around that right. If I can take Your Honours to the Taylor bundle of authorities. If we look at the White Paper behind tab 6, and of course at that stage they were contemplating an entrenched Bill of Rights. But on page 78 of the

White Paper, that's paragraph 10.52, "Permissible limitations under Article 3 would doubtless include such usual requirements as voter registration and reasonable residence tests. These are commonplace provisions in democratic societies. Again, their detailed regulation is properly left to Parliament in the ordinary way." That is, it's the very nature of this kind of right, the electoral right, that it is subject to implicit metes and bounds. It's almost like the right in the Bill of Rights on reasonable search and seizure. There is, within the concept of voting rights, a recognition that you have to – because you do have to regulate the modality of the exercise of voting. It's just part and parcel of voting. It is an administrative process for this, the members of a community going to places and fill in forms and put them in boxes or do it electronically. It is inherently something that is administered or regulated. So there are some things, as the Supreme Court in *Sauvé* called it, that involve the regulation of a modality. But there are on the other side of the line things that don't involve the due regulation of the modality, but involve removal, abrogating the right. the Supreme Court in *Sauvé*, the European Court in *Hirst*, the South African Constitutional Court in *August v Electoral Commission* [1999] 3 SALR 1 (SACC), said prisoner voting bans is on the other side of a line, and I guess what was important about what the Constitutional Court said in *August* is that it focused on this idea of being a person. That being a person carries with it a badge of dignity. Everybody counts. It is inherent in the nature of being recognised as a person in the community. That is why measures that remove that from a category of person first raise an issue about whether they could be demonstrably justified, and second in our system raise an issue as to whether it is consistent with what Parliament protected in 1993 as a right vested in everyone who attains 18, using the same idea of being a person of universal suffrage.

The next technical issue I wished to address was the relevance of the 1986 –

GLAZEBROOK J:

Well you had two limbs to that. The fact that entrenched the repeal of matters. Did you want to specifically say anything about that or is that covered by Justice Young's point that if it's modality, of course you can

because it's just modality, and if it isn't justified so there is an entrenchment on the right then there's nothing that entrenches it. Because effectively the only things that protect it specifically are those things that are fundamental to the right to vote, and logically if something goes against that right then it can be amended by a subsequent Parliament, or is there some other answer you had?

MR COOKE QC:
I'm not sure I entirely follow the question.

GLAZEBROOK J:
Well do you want to just tell us – you had a second limb.

MR COOKE QC:
Did I? I'd forgotten.

GLAZEBROOK J:
The second limb was that –

MR COOKE QC:
Oh yes. This is what I was, there are two aspects of this argument. There's the one that really Justice Young put to me, which was the idea that you can to one side this distinction I've drawn between abrogating and regulating and just say Parliament in 1993 unanimously decided what the limits on the right to vote actually were, and you can't change that without the supermajority, or amending the provision. Then, that's as I understood what was put to me, and I think the Chief Justice in a sense also put that to me. That's one way of –

GLAZEBROOK J:
Well I thought it was also if in fact Parliament decided later that it wasn't a justified limit to have any prisoner voting restrictions at all could those provisions, assuming they were still there, about the, or whatever they were,

the three years' imprisonment or whatever it was, would they be caught by the entrenchment provision. That's how I understood his question.

MR COOKE QC:

Yes, and I answered that question, yes they would be –

GLAZEBROOK J:

And why was that, if in fact they weren't justified limitations in the first place.

MR COOKE QC:

Well this was accepting Justice Young's proposition that you can put to one side that justified limit regulation versus abrogation idea, and just say the conditions.

GLAZEBROOK J:

Okay, I understand that.

MR COOKE QC:

Now there have been reference to two of the ideas contained in the 1986 Royal Commission and perhaps I can just draw Your Honour's attention to the part I referred to which –

ELIAS CJ:

Sorry, is this the second point you wanted to…

MR COOKE QC:

Yes.

ELIAS CJ:

And what's the point, sorry?

MR COOKE QC:

The point is that in a sense the one that Your Honour the Chief Justice has put to me, that this question about the scope of what is protected has always been there and was recognised in 1993. My learned friend's counterpoint is

to say, well they didn't change the law as a consequence of this report, and I say that doesn't matter because what the Royal Commission recognises there already, and where in the Taylor bundle of authorities, behind tab 7.

ELIAS CJ:
This is about the legal force.

MR COOKE QC:
And paragraph 9.187, which is on page 291, and I guess to some extent this goes to some of the questions about purpose, but you see in 9.187, "The argument for enhanced protection being required by law is that these matters are the most important of those in the electoral system and that they should be given the greatest protection on the face of the statute. The legislation can also mark out a very important limit on majoritarian power. It can give symbolic and actual significance to the principle of the protection of minority rights. On the other hand, it could be difficult to draw the line between those matters which should be subject to this more complicated and more expensive process, and those which can be dealt with through the process of agreement between the major parties in the House."

Then at the end of that paragraph, "We consider that certain matters should stay with the good sense and good judgment of the political leaders and the importance of conventional restraints in our constitutional system should be emphasised."

Then if you go back to page 289, at paragraph 9.178, you'll see the context in which this debate about entrenchment is raised. At the beginning of 9.178, and there's a reference to – sorry I should go back to 9.177 which lists the entrenched provisions.

ELIAS CJ:
Well at least so far as age is concerned.

MR COOKE QC:

Yes. then if you go on to 9.178 in the middle of that, "Because of the close connection between the right to vote and the right to be a candidate, the present distinction can be questioned. (That comment assumes, contrary to parliamentary practice that not only the voting age but also the right to vote is entrenched by the present provisions; the effect of the working of s 189 is not clear.)" Section 189 being the 1956 Act provision. So what the Royal Commission is saying it's not just age but the right to vote is entrenched. So my learned friend's come back on that and say, but the Royal Commission recommended that all the criteria in section 74 be entrenched and that wasn't implemented.

ELIAS CJ:

Was there a specific recommendation to that effect?

MR COOKE QC:

Well there's a supplementary bundle –

ELIAS CJ:

Oh I see it, if you look at page 292 there is a recommendation, the elements of the right to vote.

MR COOKE QC:

Yes. So in the end what they recommended –

ELIAS CJ:

All they did was repeat what was in the…

MR COOKE QC:

They just kept the status quo, but they kept the status quo in the context of this Royal Commission saying it's not just the age but the right to vote which is entrenched, and that means Parliament in 1993 just, this conversation between the judicial and legislative branch, just meant it was going to be an interesting conversation as soon as it got to the Courts because we, the

Courts, are going to have to then make sense of what was being done. I guess, as I say, there are two ways of doing that. One is saying that in effect the unanimous Parliament entrenched all the matters that are protected, or the alternative that I've put which is that there are some that can be legitimately considered as part of the modality, the regulation of the right to vote as described by the Supreme Court.

The third of my technical points is one I think I've already addressed which is that because the prisoner voting ban provision is implemented through an amendment of section 80, rather than an amendment of section 74, it is valid, and I think I've already addressed that in questions and answers with the Chief Justice by reference to the *Ranasinghe* case, that passage from McGee, and actually Her Honour Justice Ellis in the High Court in this proceeding on the interim relief decision, recognizing that you don't actually have to expressly amend the provision in question to offend the entrenchment provision if in substance you are undermining it and I guess that's illustrated best by the idea you couldn't change section 60 by saying only 20 year olds can actually cast a vote, when they're obviously acting inconsistently with a right in section 74 which was entrenched by section 268.

The next point that I wanted to address is just to be clear about what the appellants seek and the effect of what it seeks, that may seek. Although with respect it's not very clear on the pleadings, it is nevertheless clear from the way this proceeding has developed, and that's most clearly articulated by Justice Fogarty in the High Court in paragraph 10 of that judgment, was a declaration the 2010 Act was invalid and of no effect, and I think that's, for Your Honour's reference it's in case on appeal, volume 1, tab 6 at 119. Justice Fogarty articulated that in paragraph 10 and as I understand the procedural course of this, this really became clearly articulated particularly –

ELIAS CJ:

Sorry what was the paragraph reference to his judgment?

MR COOKE QC:

Paragraph 10 in his judgment explaining that's what the challenge was about. Mr Francois can correct what the procedural course was but I think the argument about the entrenchment provision became most clearly put in the interim relief argument, that became the focus of that interim relief application, and then the proceeding has continued without an express amendment of the pleadings to identify that.

ELIAS CJ:

So what's your position?

MR COOKE QC:

That we seek a declaration that the 2010 Act was invalid and of no effect.

GLAZEBROOK J:

And what follows from that?

MR COOKE QC:

That would mean that the provisions of the 1993 Act as enacted would govern the position. If it helps, and that's the provision that has a prisoner voting restriction for those who are serving sentences of three years or more, preventative detention or life imprisonment, I think it was, if it helps I do have copies of the 1993 Act as enacted, if that would help the Court?

ELIAS CJ:

Yes, I'd like that, thank you.

MR COOKE QC:

I haven't given the whole Act, of course, but I think I've given all the provisions that are materially in issue. So just so we're clear about this it may be helpful just to go through to particularly section 80 as enacted in 1993, which is essentially the same. There are some wording changes to what is now section 80(1)(d), the provision that was enacted unanimously was a person who is under a sentence of life, imprisonment for life, sentence of preventative

detention, sentence of imprisonment for a term of three years or more, is being detained in a penal institution. So the effect of the declaration here would be the 2010 amendment to that provision would be ultra vires for not having complied with the special procedure. It may just help to briefly address the history of prisoner voting bans so Your Honours understand that –

ELIAS CJ:

I'm just thinking about the form of the order. We're not used to manner and form provisions. I'm just trying to think what would the, in *Trethowan*, for example, because that was a manner and form case considered, but against the context of the Australian constitution I guess it was invalidity that was the consequence there.

MR COOKE QC:

I think also ultra vires is the language that's been used to describe –

ELIAS CJ:

They like ultra vires in Australia, yes.

MR COOKE QC:

They do, but it's outside the authority which is –

GLAZEBROOK J:

Well is outside the authority or is it something that's just passed and actually applicable but should have been passed in a different way. I mean the reason I'm asking is the obvious sort of difficulty that there's been elections which have been conducted in accordance with the provision as passed.

MR COOKE QC:

Yes.

GLAZEBROOK J:

And so that's the basis of the question but also partly the basis of the question is if we're effectively saying it's invalid, then you're overruling Parliament, which is after all sovereign to pass what it likes.

MR COOKE QC:

Well whether you are or not is a moot question because what you're seeking to do is –

ELIAS CJ:

You're giving effect.

MR COOKE QC:

Giving effect to what Parliament actually said was required in 1993.

GLAZEBROOK J:

Procedurally that's right. I suppose I just need a bit more assistance on that and especially in terms of what that means in respect of elections that have already been conducted.

MR COOKE QC:

Yes, well that's the second question. The first one, another way of putting it is that the 2010 Act wasn't a valid act of Parliament at all because it didn't comply with the machinery necessary for it to be an act of Parliament. That Parliament had laid down itself.

WILLIAM YOUNG J:

Is that the statute somehow or other got into the statute book which the Speaker had, which the Governor-General hadn't given the assent to.

MR COOKE QC:

Yes, yes.

ELLEN FRANCE J:

It does seem to be just assumed that that would be the response of the Court, so all of the earlier arguments that one was brought up on seem to have disappeared.

MR COOKE QC:

And that may just be the reality of the position. That thinking about this has moved on from saying that this is something a Court should not do. For example, in *Jackson*, the House of Lords didn't say well we can't entertain the idea that that was an invalid act. It looked into the question of whether it was a valid act or not to make a decision as part of, regarded as part of the constitutional function of the Court to decide what is law in effect.

ELIAS CJ:

I suppose the, admittedly enacted at a different time when the 1852 constitution had passed, you know, before the Statute of Westminster, but the Declaratory Judgments Act does use the language of invalidity but whether… yes.

MR COOKE QC:

The only thing I'd say about this is let's not get diverted by the austerity of tabulated legalism. If the Act was not passed by the process that Parliament itself had said must be followed, there can't be any constitutional sin in a Court saying so. That is, after all, the Court's constitutional function. Neither is it an offence against Parliamentary sovereignty because the Court in doing so is ultimately doing so because of what the 1993 Parliament said, and in recognition that the Parliament can always do what it wishes to do under a single entrenchment.

GLAZEBROOK J:

But that can only apply because it's in legislation. It couldn't apply if it was in standing orders in terms of procedure could it?

MR COOKE QC:

I guess –

GLAZEBROOK J:

I mean I just want to know the limit of this, or what you're saying the limit is. I mean I can understand Parliament passed that as legislation.

MR COOKE QC:

Yes.

GLAZEBROOK J:

It set itself that, so it has itself decided it's invalid if it's done elsewhere, well at least on an interpretative basis, but looking into how legislation has been passed…

MR COOKE QC:

I think that's what Her Honour Justice France was really raising that with me in another way. I think it's recognised. There were debates about whether this intruded against the privilege of Parliament, going into this, but I think it's become clear that it's not because we're not going into the proceedings of Parliament in that sense. We're going to the validity of the Act by the very thing that Parliament said must be done.

ELIAS CJ:

And anyway, there are manner and form precedents, I would have thought.

MR COOKE QC:

Yes and I rely on those –

ELIAS CJ:

Have you really finished your submissions now Mr Cooke?

GLAZEBROOK J:

I need to have the answer about the elections that have already gone, which I think you were coming to Mr Cooke.

MR COOKE QC:

And I haven't quite finished my submissions but I'm very close to finishing my submissions.

ELIAS CJ:

Well can you answer Justice Glazebrook and then indicate what you still want to cover.

MR COOKE QC:

What I still want to cover is just, I wanted to go through the timeline of prisoner voting bans, which won't take me very long at all, and then I want to effectively finish with a summary of what we are suggesting is not constitutionally dramatic. So that would only take me five or so, 10 minutes.

ELIAS CJ:

Yes, thank you. Do you want to answer Justice Glazebrook now or after the morning adjournment?

MR COOKE QC:

Perhaps I can answer that after the adjournment.

ELIAS CJ:

All right. We'll take the morning adjournment now thank you.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.48 AM

ELIAS CJ:

Yes, thank you Mr Cooke.

MR COOKE QC:

So first to return to Your Honour Justice Glazebrook's question about the elections that have been held under the previous law that we're seeking to say was invalidly enacted. The answer to that is there is the prescribed procedure

in the Electoral Act to how you would question the result of an election. So under section 229, sorry I don't think we have these provisions in the bundle, but under section 229, of Part 8 of the Act, Electoral petitions, "No election and no return to the House of Representatives shall be questioned except by a petition complaining of an unlawful election or unlawful return (in this Act referred to as election petition) presented in accordance with this Part." So in other words you can only contest the outcome of any election by this process, and that process has a time limit in section 231. It has to be presented within 28 days after the commission has –

ELIAS CJ:

Section 231, do we have –

MR COOKE QC:

No unfortunately I don't think we have these provisions in the bundle. Section 231. So that requires the petition to be presented within 28 days of the day on which the commission has publicly notified the result of the poll.

ELIAS CJ:

But does this come within that. Is this a petition?

MR COOKE QC:

I think if you go back to 229, "No election and no return to the House of Representatives shall be questioned except by a petition." So in other words, and you can understand this, that there's a finite period of time where the questions of the election can be legitimately put in doubt. There's a process for doing that, there's a time limit, and after that time limit is followed the election is deemed to be valid and effective. So with respect it wouldn't have any implication for the results of previous elections. Even if people were, if people were held back from voting when they should have voted, that could be the subject of an electoral petition. In a normal sense, I'm not talking about the prisoner voting ban, but someone complained that someone kidnapped them and prevented them from voting and their vote wasn't counted that could be the subject of an electoral petition. But there's a prescribed process under

which that must be followed, and the results are deemed they are ineffective, so there would not be any adverse implications for the results of previous elections, and that is relating the point I was seeking to make before the adjournment about the declaration of invalidity we were seeking.

I just wanted to make sure the Court understood the history of prisoner voting bans. So the 1956 Act, which as I say was passed unanimously, did have a prisoner voting ban. There were then two pieces of legislation in the 70s that changed that. In 1975 that was changed so that all, there was no prisoner voting ban. That was not done by the special majority, that was an ordinary majority, Parliament passing that Act. There is then the further 1977 Act putting back in place what had been enacted in 1956. Then we had the 1993 Act passed unanimously with the lifers, preventative detention and three years or more rule. Then we've had the 2010 – and the 1993 Act was passed unanimously, and then the 2010 Act in its current term, anyone detained, in prison, sentenced after 15 December 2010.

O'REGAN J:
The 1977 Act that took it back to what it had been in 1956.

MR COOKE QC:
That's right.

O'REGAN J:
And it wasn't unanimous.

MR COOKE QC:
Correct.

O'REGAN J:
But you're saying in fact both 1975 and 1977 were of no effect, so 1956 had been in force all along.

MR COOKE QC:
Yes.

O'REGAN J:
Right.

MR COOKE QC:
One thing we talked about the purpose of those provisions. I think there is an element of which you can see that there's a party politics dimension to this. It's perhaps illustrated by '75 and '77, which is why it's so important to have the universal, the unanimous view of Parliament, as it was in 1956, and then universally changed in 1993, and we say as part of this constitutional growing up to understand what all these things means, the 2010 amendment, might have been done consciously, knowing it involved a contravention of the Bill of Rights Act right, but didn't grapple with the idea that the previous Parliament had unanimously cast the right in a different way. So it's in that context that we seek the declarations of invalidity.

Which really comes back to my final submission, that what the appellants are seeking is not constitutionally dramatic, because all that will happen is the matter will go back to Parliament so that it can directly address the issue. Whatever it decides can carry the day, if the current Parliament wanted to remove the prisoner voting ban completely, it can do so, it will have to amend the entrenchment provision to do so, but it can do so. All that the singularly entrenched entrenchment provision really requires is for a Parliament to directly own what it is doing. Alternatively it could be left in the way that the unanimous Parliament decided in 1993, and I say with respect that that is not a dramatic request, and by contrast the Crown's stance is a stark one. It concedes that New Zealand's current electoral law is in breach of fundamental human rights. That concession also effectively means that New Zealand is in breach of its international obligations in relation to fundamental rights. The Crown do not seek to justify that stance. No justification, demonstrably justified, justification is even attempted. Moreover the legislation which implemented these breaches relate, repeal a provision that had been adopted

unanimously by Parliament in 1993, and for the reasons we have advanced, or sought to be protected by a special procedure because of the fundamental nature of the rights involved. I say in that context the interpretation that the Crown advances cannot be said to be clear and unambiguous. The one thing I would have thought that could be agreed by all is that this provision is ambiguous.

All the appellants seek is an interpretation that is open on the statutory wording, interpreted in the text, in light of the purpose of protecting what is fundamental, and in light of fundamental rights so far as the wording allows. And on that basis we would submit that the appellants' contention is one that should find favour with the Court. So unless Your Honours have any further questions of me, those are the submissions for Mr Taylor.

ELIAS CJ:
Thank you Mr Cooke. Yes Mr Francois.

MR FRANCOIS:
May it please Your Honours. These might be of use. There's also an opening statement there Your Honour but I'm not going to make that unfortunately. I suffered a concussion on Thursday and I lost a great deal of blood and it came through my nose so that's why you probably can't hear.

ELIAS CJ:
Sorry, yes.

MR FRANCOIS:
So Your Honours I'll turn to the skeleton and the first question there I say is what is the case about. Well I'm not going to go through the opening statement, I'm just not in a position to do that.

GLAZEBROOK J:
We'll read it so thank you for providing it in writing.

MR FRANCOIS:

Just another little background. The legislative procedural history of this case, it's very set out in my written submissions, which are at paragraphs 2 to 3. Again, I don't see the point.

ELIAS CJ:

Yes, we've read those, yes.

MR FRANCOIS:

Entrenchment, I really, again I don't see the point in going over what my friend has said. The Māori appellants agree with that position. In terms of international standards on prisoner voting rights, again I turn Your Honours' attention to the full submissions on that.

ELIAS CJ:

Yes.

MR FRANCOIS:

Terranova Homes, again the appellants are in agreement with the third appellant on that proposition, and therefore the Court below erred in its interpretation of that case, application of that case. Prescribed by law, that's probably a little new so I'll touch on that. Obviously if the 2010 amendment didn't go through the correct, or proper manner and form, then we would say under the Bill of Rights it's not prescribed by law, none of those limitations that the amendment imposes are prescribed by law because it wasn't legally authorised.

The next major section for the Māori appellants is the application of the Treaty. Is it an aid to interpretation in this case and we submit it is, and it turns really again a bit like *Terranova Homes*, on whenever an enactment can be given a meaning, that's the key phrase for section 6, and we say that opens the door for the Treaty to act as an aid in that regard.

ELIAS CJ:

An aid to the Bill of Rights Act standards Mr Francois?

MR FRANCOIS:

Yes. So a treaty, so for example a treaty-consistent meaning supports the argument that the right to vote is entrenched in the Electoral Act, or more particularly section 74.

ELIAS CJ:

It's another aid to interpretation?

MR FRANCOIS:

Yes, to support our argument that section – that the right to vote of an adult is entrenched. Why, because it's consistent with Treaty principles of fair dealing. It supports or promotes the Māori electoral option, which is very important for Māori, and the right to self-determination. So in a sense the right is just as fundamental to Māori as it is to non-Māori, and the Treaty is of assistance in that regard.

ELIAS CJ:

Because it impacts not only on the individual votes but also on the number of Māori seats potentially.

MR FRANCOIS:

Potentially yes, yes, and it does impact on the Māori electoral population because it is –

ELIAS CJ:

That's what I mean.

MR FRANCOIS:

Yes, yes, which could affect, depending on really the size of the disenfranchisement and the fact that it does continue because people don't re-register, so they when they go out, or released back into the community

they don't automatically go onto the electoral roll whereas conversely when they go in they automatically taken off it. So a lot of them don't go through the process of re-registering, either because they don't know that they have to, and they front up at an election, and are told well you're not registered, or they just don't go through that process because a lot of people who have come out of the prison system just don't go through that process because a lot of people who have come out of the prison system just don't have great literacy skills, that's just a fact, and there's been measures to improve that but there's a long way to. So yes, in the long term it could affect the number of Māori seats, but in the short term it does affect the Māori electoral population. Again, there's a lot more detail in the written submissions about this but it's really going, it's just reinforcing the points. If you were to read them more fully you will see how important the right is to Māori, as a fundamental right.

So the last section, Your Honours, is the argument that the breach, that there is a breach of the Electoral Commission's functions in this case by refusing to – or should I put it this way, to adopt my friend's statement that there was a false interpretation by the Attorney-General in the Court below, which has affected the Electoral Commission by mistake or by oversight, that they have actually not facilitated the right by going to the prisons and providing polling booths for not only the remand prisoners, but convicted prisoners, who are serving less than three years. Now one of the reasons why that's important is because the Crown, or as a Crown entity the Electoral Commission cannot breach any Act or piece of legislation including the Bill of Rights, which is an ordinary statute, and when it does those actions are deemed invalid by section 19. So the appellants say there is a breach of section 12 of the Bill of Rights. The Attorney-General says that there isn't a breach, or let me say, the Solicitor-General says there is not a breach. She says that it's inconsistent with section 12, but it's not a breach, and I believe that's probably because if she concedes it is a breach they have problems in terms of the Crown Entities Act.

So that, Your Honours, are all the submissions that I have, unless you have any questions.

ELIAS CJ:

Thank you Mr Francois. Thank you for your written submissions and for this additional submission.

SOLICITOR-GENERAL:

Thank you Your Honours. The Crown submission is that the Courts below were correct to hold that 268(1)(e) entrenches the voting age and not the whole section 74 or by implication a number of other provisions as well, and the appellants appear to accept that now also. But the new argument in this Court that the reference to 18 years in (1)(e) entrenches in combination with section 74(1) a right to vote is, in our submission, incoherent and inconsistent with the scheme and purpose, both of section 268 and the Electoral Act as a whole. We say for three reasons that the appellants' approach is wrong. First of all, and most simply, the text and purpose of section 268, which I will come to. Secondly, the proposition that buried in the reference the, in my submission, limiting reference so far as the provisions referred to prescribe 18 years is the minimum age. Buried in that wording is the fundamental right to vote as a protected and also entrenched right, we say is wrong. We also say it is wrong to make the distinction the appellants do between abrogation and regulation, or perhaps regulation of some things and an absolute protection of fundamental rights. In our submission the appellants' approach really is taking the entrenchment provisions in section 268 as a proxy for giving this Court the power to declare invalid statutes which are inconsistent with the Bill of Rights Act rights and are not able to be justified in a free and democratic society. That *Marbury v Madison* or higher law type argument –

ELIAS CJ:

Well we wouldn't accede to that. We're really only seized of the issue as to whether the Electoral Act has been complied with and with what effect. So we're not looking for a *Marbury v Madison* moment.

SOLICITOR-GENERAL:

In my submission my friend is inviting you to find such a moment, but I accept Your Honour –

WILLIAM YOUNG J:

Do you say that if we were of the view that the 2010 amendment did require a special majority we should, the Act should not be declared to be invalid.

SOLICITOR-GENERAL:

No Sir. The Crown's position is that if the manner and form provision interpreted by this Court has not been met, then the consequence is that the 2010 Act has been invalidly enacted, and has no effect. The reason I referred to the *Marbury v Madison* idea is that my learned friend Mr Cooke's submissions are very much on the basis that what an entrenchment provision does is to require Parliament to face what it is doing. Language such as used in *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 and the principle of legality, this idea that Parliaments have to face when it intends to implement or enact inconsistent legislation. That language was very much part of my learned friend's oral address to you today.

ELIAS CJ:

We picked him up on it because it was suggested that this isn't really a rights case, although that's part of the flavouring, it is simply about whether the entrenchment provisions bite on the whole, on section 74 beyond the age.

SOLICITOR-GENERAL:

Yes, thank you Your Honour. So that distinction between abrogation and regulation we say is in itself incoherent. If I can make one reference before I go on, because I do want to spend a bit of time with section 268 and with some of the legislative history to the Electoral Acts, both 1956 and 1993, but can I ask Your Honours to just bring up section 12 of the Bill of Rights Act. It's in tab 5 of the Ms Ngaronoa and Ms Wilde's authorities. Volume 1. Section 12 of the Bill of Rights Act. It's at tab 5 of volume 1. This is the point that Her Honour Justice France was making to my learned friend, that what is in the right, so-called right to vote in the Bill of Rights Act, that actually has a number of concepts in it. "Every New Zealand citizen who is of or over the age of 18 years has the right to vote in genuine periodic elections of members

of the House of Representatives, which elections shall be by equal suffrage and by secret ballot." I emphasise "secret ballot" to make the point that as I understood my learned friend's argument, the way that you cast your vote, he suggested was a matter of modality or detail for which Parliament might be able to make legislative amendment by ordinary majority, and to call out the incoherence of that when we look at how the right to vote is described. Not just that you reach 18, that you are a citizen. You are entitled to vote in genuine periodic elections by secret ballot. The point that I want to make there is that there are only some of those matters that have been entrenched in section 268, not by any stretch all of them, or that a secret ballot has been entrenched. It wasn't considered to be a matter of mere detail. So I want to spend some time on the Electoral Act –

GLAZEBROOK J:
What hasn't been entrenched sorry?

SOLICITOR-GENERAL:
So it has been, I beg your pardon Your Honour.

GLAZEBROOK J:
No, I understand that, I just can't quite understand the point.

SOLICITOR-GENERAL:
As I understood my friend's argument, Parliament can make adjustments to New Zealand citizens who are able to vote, without reaching the supermajority –

GLAZEBROOK J:
Well I think he sort of retreated from that but I think what he was talking about in terms of procedural was if you had to carry a paper of identification or something of that kind.

SOLICITOR-GENERAL:

Yes, an interesting example that my learned friend came to, that the ability, or the requirement to carry identification in order to vote is being considered in the United States Courts, to start to trench on the right to vote is an inconsistent limitation on the right.

GLAZEBROOK J:

I understand.

SOLICITOR-GENERAL:

And really my point is to say that it is an incoherent argument to say that we can come to the Electoral Act and find protections of fundamental rights versus inability to regulate some things that appear to be matters of details –

ELIAS CJ:

Madam Solicitor, if you look, though, at the electoral rights in the New Zealand Bill of Rights Act, all of that content is covered in –

SOLICITOR-GENERAL:

Not in the age of majority.

ELIAS CJ:

No, not the age of – sorry, what?

SOLICITOR-GENERAL:

Not all of that content is covered by the reference to the age of 18 in –

ELIAS CJ:

No, I understand that, and I understand your argument that it's a very difficult argument that the appellants have sought to advance, but I'm wondering whether if these are fundamental aspects, well they are included in section 74.

SOLICITOR-GENERAL:

They're in 74, yes indeed they are.

ELIAS CJ:

So does that follow that if one is looking at a purpose of interpretation of what entrenchment is meant to achieve, they are all entrenched.

SOLICITOR-GENERAL:

Well in my submission 74 in its entirety is not entrenched.

ELIAS CJ:

And why do you say that, because that seems to be the same difficult argument.

SOLICITOR-GENERAL:

Also that comes to section 268, which I will come to, and the precise terms of (1)(e), what it was doing when it entrenched the Act.

ELIAS CJ:

Yes, well I think that's probably where the argument is, yes.

SOLICITOR-GENERAL:

I'll come that. I just make one preliminary point about entrenchment provisions. I took from Your Honour Justice France's question that there might have been some surprise at the proposition that if the manner and form provisions haven't been met then the Court can declare the legislation invalid. That is not a controversial proposition and the Crown accepted that if Parliament breaches a manner and form provision, its subsequent enactment isn't validly passed law, and that it is for the Court to determine the meaning of the law, of the entrenched provision, and the entrenchment provisions.

But that does require, in my submission, a discipline on the Court in determining what is in the content of the manner and form provision, such that it doesn't enable, this might go to a point that Your Honour Chief Justice has just mentioned is not accepted by the Court, that doesn't enable a Court to enquire as to Parliament's consideration of limitations and whether they are justified in order to work out whether the manner and form provision should

apply at all. In my submission Parliament did enact a bright line test when it enacted section 268 for the very reason that it is most unusual for – not for the very reason – but in my submission is very unusual for a Court to be asking is legislation invalid in our constitutional framework, and so it does bring the discipline of accepting the bright line that was passed in 268, and its predecessor in 1956.

I just corrected myself then about what the Court intended in 1956 – sorry what Parliament intended. It also thought it couldn't validly enact a manner and form provision by which its legislation could later be looked at by the Court and found to be wanting for vires. It thought that the entrenchment provisions in 1956 were going to have moral suasion only, but in my submission we've moved well past that as a proposition and that it is for the Court to determine the meaning of the law.

ELIAS CJ:

So is that the, it sounds very much like *Marbury v Madison* as you put it just then, but the point I was going to say is that because the conventions of the constitution have moved, or is it because of how we should today be interpreting the entrenchment provision?

SOLICITOR-GENERAL:

I think it is a style or an example of a maturation of how we understand our constitutional framework, that Parliament is sovereign within its boundaries, and the Courts are sovereign within theirs, and the Court's sovereignty is about determining lawfulness and what law means. When we come up against a manner and form provision, that is where the Court is, in my submission respectfully, quite within its sovereignty, and it's within its jurisdiction to say, what does this mean, and if it is a manner and form requirement, was it met. We don't need to ask that latter question here because we know that the 2010 Amendment Act was not passed not with the supermajority. So the constitutionally surprising part of all of that would be if the Court were inclined to give the reading to 268, which meant that

entrenched provisions mean different things in different circumstances depending on what is at issue.

WILLIAM YOUNG J:
Do you mean whether it's pro-Bill of Rights or anti-Bill of Rights?

SOLICITOR-GENERAL:
Quite so Sir. Whether it's consistent or inconsistent in content, manner and form provisions, like their name suggests, is about the process and how something is done. I don't step away from the idea that what was done is substantively important. The Electoral Act is substantively important, but the manner and form is about a form of lawful enactment. So let us come to –

ELIAS CJ:
But to protect what values.

SOLICITOR-GENERAL:
Well in this particular case I'd like to take Your Honours to what the 1956 Attorney-General said Parliament, was inviting Parliament to do when they enacted the predecessor to 268.

ELIAS CJ:
Yes, but that will have to be subject to the caveat that you've already introduced, that things have moved on, constitutionally.

SOLICITOR-GENERAL:
Yes, that's so. As to how the both – yes, I suppose that's a fair point, Your Honour. I was making the point to indicate that the 1956 Court thought it was doing something that only had moral effort –

ELIAS CJ:
Parliament, yes.

SOLICITOR-GENERAL:

– rather than that the Court would be able to look. That is where we have moved on, certainly.

ELIAS CJ:

Yes.

GLAZEBROOK J:

For myself too, and you will come to that, it's more what the Electoral Act itself says than actually the Bill of Rights or what anybody said they thought they were doing.

SOLICITOR-GENERAL:

Yes, I will certainly come to that.

GLAZEBROOK J:

And I'm not saying that you go to that now.

SOLICITOR-GENERAL:

Thank you, Your Honour. So my learned friend, his answer to many of the questions was to say that line drawing is difficult, and in my submission 268 does draw a bright line. But if I may stay where I said I would, with the 1956 Act, and for my hand-up the debate – so on the first page of the print, 2839, you see there the Attorney-General, Mr Marshall, moving the Electoral Bill which because the 1956 Act, and in the fourth, the furtherest to the right-hand column, you see there, "Under our constitution Parliament cannot bind successive parliaments." I don't need to dwell on that point, but that is where he was making the point I have already made. But I want to focus on what he says about six or eight lines into that paragraph, "Any legislation that we may pass providing safeguards for the electoral system could therefore be amended by a subsequent parliament," so he thought. He goes on, "That is what we are attempting to do in this Bill so far as the reserve provisions are concerned," so that is what we attempting to do, provide safeguards for the electoral system. He goes on to say there are six in

number, and you'll see a few lines down the age of voting is one of those safeguards to be entrenched. And if I can just turn Your Honours over the page to the continuation of that speech at 15 lines down, "Those reserve provisions and the obstacles placed in the way of their amendment are there to provide the best safeguard we can work out to protect what in the unanimous view of Parliament are essential safeguards of our democratic method of electing the people's representatives." And that's not to say that this Parliament thought that the right to vote, what didn't exist was being brought into existence or it wasn't important, but what they were attempting to do, and in my submission you can see it still in the scheme of 268, it was a protection of the safeguards for a democratic method of voting for the Parliament, that was what was being protected. So those two points are all that I wanted to make from that debate, it was plainly the age and it was about the system of democratic election of our parliaments that was being, as best they could, sought out to be protected by the special procedures.

GLAZEBROOK J:

I'm not sure where you are. Sorry where were you on the second point?

SOLICITOR-GENERAL:

In the speech? Sorry, Your Honour, literally where is it in the speech?

GLAZEBROOK J:

Yes.

SOLICITOR-GENERAL:

Or what is the point I'm making?

GLAZEBROOK J:

No, where were you reading from? I missed you.

SOLICITOR-GENERAL:

Page 2839, there's a big paragraph that starts, "Under our constitution," and about halfway through that.

GLAZEBROOK J:

Yes, I had that. Sorry, I thought you were on the second page.

SOLICITOR-GENERAL:

Okay, so then over the page, 20, 15 lines down, "In the unanimous view of Parliament what is attempted to be protected are the essential safeguards for our democratic method of electing the people's representatives." Do you see that, Your Honour, or do you not have the right…

GLAZEBROOK J:

No, that's what I'm…

O'REGAN J:

No.

ELLEN FRANCE J:

No, I think we must have the wrong page.

ELIAS CJ:

So what page is yours?

O'REGAN J:

We've got page 2839 and page 2841 but not 2840.

SOLICITOR-GENERAL:

I beg your pardon, unhelpful. Might I produce that in the lunchtime adjournment for Your Honours?

ELIAS CJ:

Yes.

GLAZEBROOK J:

I thought I was going insane, sorry.

SOLICITOR-GENERAL:

You and me both, Your Honour, but thank you for that.

ELIAS CJ:

Can you while you still have 2839 though in front of you, where he's describing the provisions that are entrenched, "Method of voting, the constitutional order of reference of the representation committee, the age of voting, the total population and the tolerance of 5%," what's that, what are those two?

WILLIAM YOUNG J:

Isn't that the setting of quota in the seats?

SOLICITOR-GENERAL:

Yes, what that has turned into is the adjustment of the quota.

ELLEN FRANCE J:

So it's now section 36…

O'REGAN J:

It's when, the size of electorates, isn't it, one…

WILLIAM YOUNG J:

Yes.

SOLICITOR-GENERAL:

So division of the country into –

ELIAS CJ:

Oh, I see, the tolerance of 5% and the total population of each electorate.

SOLICITOR-GENERAL:

And the division into districts, yes.

ELIAS CJ:

I see, yes.

SOLICITOR-GENERAL:

I apologise for that copying error. So in my submission the Electoral Act as a whole, what it delivers to us is the mechanics of the electoral system by which we exercise the right to vote. It starts from the premise, even in '56, it started from the premise that there already was a right to vote, whether that was political or moral the right to vote existed, and the Electoral Act was in order to provide the detail that enabled that right to be exercised.

GLAZEBROOK J:

Well, the right to vote has to come from the Act though, doesn't it? Because it doesn't exist independently of the Act.

SOLICITOR-GENERAL:

Well, in my submission it does, Your Honour. The right to vote –

GLAZEBROOK J:

Well, where does it come from?

SOLICITOR-GENERAL:

From the common law, I mean, as a fundamental common law right from –

GLAZEBROOK J:

But you're not suggesting that you have an Electoral Act and you don't go to that to see where your right to, that you've got a right to vote under that, you have to go back to the common law.

SOLICITOR-GENERAL:

I think you go to actually how you exercise that right, that is the submission, Your Honour, that..

GLAZEBROOK J:

Okay, well, that's an odd submission.

ELIAS CJ:

But how the right is exercised actually describes the right.

SOLICITOR-GENERAL:

Is critical to having the right, yes. Which is why the Crown's submission is that this – neither piece of legislation granted the right to vote, but it enabled the voting to occur.

WILLIAM YOUNG J:

But, I mean, if there was a right to vote – it's difficult to conceive of a right to vote that's independent of what you have to be to be able to vote.

SOLICITOR-GENERAL:

That has no mechanics.

WILLIAM YOUNG J:

I mean, the idea of a right to vote now in 2018 is rather different from what it was in 1818 or 1858 or whatever.

SOLICITOR-GENERAL:

Yes. And I accept the submission, sorry, the comment, the criticism, that without the machinery what is the right to vote? It is nothing.

WILLIAM YOUNG J:

But I don't think that, for instance, 150 years ago people would have said there was a right to vote would they, a freestanding right to vote that was independent of electoral qualification, because it would have been meaningless?

SOLICITOR-GENERAL:

Well, I would say that, you know, right from the birth of responsible government in New Zealand in 1856 it was a –

ELIAS CJ:

No, no, there was a property qualification.

SOLICITOR-GENERAL:
Well, quite so, and I'm not saying it was universal suffrage, but the idea of –

ELIAS CJ:
And there wasn't – yes.

SOLICITOR-GENERAL:
Sorry, Your Honour.

ELIAS CJ:
No, there wasn't universal suffrage.

SOLICITOR-GENERAL:
There wasn't universal suffrage. But there was –

ELIAS CJ:
So where do we get the content that there is universal suffrage except from the Electoral Act?

SOLICITOR-GENERAL:
Yes, I accept that, I accept that that is where we see how it gets exercised. And the reason I make the point is to say that if the enactment was to say there is a right to vote we would expect that to be provided and probably protected in a much more straightforward way than the approach my friends invite you to take in relation to what was enacted and entrenched for the age. Can we go to section 268?

ELIAS CJ:
But your submission does entail reading section 268 so that the introduction of, reintroduction of, say, a property qualification, would not be entrenched.

SOLICITOR-GENERAL:
Yes, that is right, that is the submission. And in my submission the provisions in 268 don't need to do all of the work to protect the right to vote. Mr Cooke suggested that it would be possible for a parliament to enact legislation that

said only men could vote perhaps or that no particular ethnic group of people could vote. In my submission the entrenchment provisions are not the protection for those sorts of legislative proposals, which we don't have in front of us, which do not arise, which I say other aspects of our constitutional democratic system are the protections for, but not section 268. Have Your Honours got 268 in front of you?

GLAZEBROOK J:

Well it does seem if it was protecting the democratic system rather odd to say that when they were thinking about, that we didn't have them here, rather off to say well they could say, well it's only people who have property worth more than whatever and it's only men and it's certainly not Māori can, only those people can vote, and that that wasn't sees as a fundamental part of the democratic system.

SOLICITOR-GENERAL:

It's not my submission that it isn't part of the system. My submission is that 268 is not for protection against trenching on those –

GLAZEBROOK J:

So it isn't protecting the fundamental parts of the voting system, it's only protecting some of them and the one that's particularly named.

SOLICITOR-GENERAL:

What they considered in 1956 were the essential safeguards of the democratic method of electing our people's representatives.

GLAZEBROOK J:

So the only one of those that they thought was important was not universal suffrage, it was age, which actually would seem to me about the least of the things that you might want to protect but –

SOLICITOR-GENERAL:

Well in 1956 it also, there was also a British, the requirement to be a British subject and to have been resident for a certain period of time. That was another thing that was important then that we don't have now. Because the other approach to 268 in which it is available to protect all of the things we hold dear in our democratic system of Parliament's representative status, it would be done in a most peculiar roundabout and unclear fashion, such that the bright line that in my submission manner and form requirements need to have, is utterly lost, and Parliament will be doing the line drawing that my learned friend indicated would be a highly contested, complicated, difficult to understand when Parliament needed a supermajority or not.

GLAZEBROOK J:

Well I suppose what I'm really putting to you is why don't we read it as if it says it's entrenching section 74, and I'm not suggesting that I'm accepting what that means in terms of your friend's submissions.

SOLICITOR-GENERAL:

Let me come to 268 then. There are nine points I want to make about it in supporting the overall submission that what (1)(e) does is entrench, as it says, 18 years as the minimum age for persons qualified to be registered as electors, or to vote in the case of the defence personnel. So the first point to make is in the marginal note, "Restriction on amendment or repeal of certain provisions." Now I don't want to take that too far because I accept entirely my friend's –

ELIAS CJ:

Sorry, what are you referring to?

SOLICITOR-GENERAL:

The heading to 268. "Amendment or repeal of certain provisions." I can't take that too literally because I accept my friend's submission that if section 60 was amended to say who may vote, only people over 30, that would plainly step on an entrenched provision, the age of 18. But it is a restriction on provisions

and it is a restriction that is plain and is not about concepts of content as to whether it's consistent or inconsistent. It's about certain provisions are protected, and they go on at subparagraph (1), "Hereinafter referred to as reserved provisions." And as you have already exchanged with my friend, is the pattern has been noticed through (a) through to (f), first referencing the section and then describing it. Section 17 relating to the term. Section 28, "Relating to the Representation Commission." And of course subsection (e) is different from that pattern, and in my submission that is because section 74 and 3 and 60 all have more than one concept in them but what subparagraph (e) was to pull out was the 18 years as the minimum age.

ELIAS CJ:

Can I just ask you if you know the answer that the reference to 60(f) in the 1956 Act that was to 99(e) I think. Was that in the same terms as 60(f)?

SOLICITOR-GENERAL:

I now have it in front of me. (e), "Any serviceman who is outside New Zealand, if he is or will be of or over the age of twenty-one years before polling day, and his place of residence immediately before he last left New Zealand is within the district."

ELIAS CJ:

Yes, that's what I thought, I just wanted to make sure, thank you.

SOLICITOR-GENERAL:

So the reason that subparagraph (e) is different in its character from the pattern that we've observed through (a), (b), (c), (d) and (f), is that each one of those sections has multiple concepts in it, and so the words "so far as those provisions" are limiting in the scope of what's just been referred to. So far as those provisions, as the Court of Appeal correctly –

GLAZEBROOK J:

So you're actually saying that they could deprive the Defence Force of the right to vote without looking at the entrenched provisions, because I can't quite see what other concept there is in 3(1), in the definition of "adult".

SOLICITOR-GENERAL:

That's just the definition.

GLAZEBROOK J:

That isn't related to being 18. You accept there were other provisions that had to be there because they dealt with something more, but the definition of "adult" only seems to deal with being 18 to me.

ELLEN FRANCE J:

But other isn't the part, there are other definitions in 3(1).

GLAZEBROOK J:

Well, no, but it says, "And the definition of the term 'adult' in 3(1)," it's not absolutely clear that it's not looking at any of the other provisions in 3(1). It's only looking at a definition of "adult" and the only thing that deals with is 18. I know, I mean the second bit of it is saying if you're 18 at a particular time but I mean it still seems to be 18.

SOLICITOR-GENERAL:

It does, yes, no, I accept that.

GLAZEBROOK J:

And section 60(f) does have other things in it. Is the submission that it's not entrenching the ability of the Defence Force if they're overseas to vote?

SOLICITOR-GENERAL:

That's right, yes.

GLAZEBROOK J:

So it's only saying if – so basically they can't, the only thing they can't change in (f) is putting at 20.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

Okay, that's alright.

ELIAS CJ:

The other point is that so far as, which are words of limitation, are necessary in relation to 3(1) and 60(f) in relation to the age.

SOLICITOR-GENERAL:

Well 74 and 60(f), I accept Justice Glazebrook's comment –

ELIAS CJ:

No, 3(1) as well.

SOLICITOR-GENERAL:

The definition of "adult" in 3(1) only refers to 18.

ELIAS CJ:

Yes but the qualification "so far as" is not the same as "relating to" which is the sort of descriptor used in the other things.

SOLICITOR-GENERAL:

Yes, so it's limiting language.

ELIAS CJ:

So this is clearly a limiting provision which makes sense in relation to the 18 years minimum period in respect of both 3(1) and 60(f).

SOLICITOR-GENERAL:

Quite so, that in 3(1) it is possible to amend 3(1) to deal with its different aspects, that period between when the writ has been issued when the person turns 18. It's the age of 18 that is being –

ELIAS CJ:

But the age of – those provisions – section 74 doesn't prescribe 18 years as the minimum age a person is qualified to be registered. That is –

SOLICITOR-GENERAL:

No, that's the word "adult".

ELIAS CJ:

Well it's the word "adult" but it does qualify, but it is right to say so far as section 3(1) and 60(f) make the minimum age 18. I mean the whole thing comes down to how you construe this provision and initially one would have thought that section 74 stands alone and it's the provisions which are concerned with the 18 years minimum that is – well it stands equally. Now you can get into complexities concerning the commas, but the "so far as" is not an equivalent descriptor to the descriptions in the other provisions of 268. So there is a deviation in that.

SOLICITOR-GENERAL:

And the reference in 74 to 18 years is the reference to adult. Every adult person, and it needed to capture both that and section –

ELIAS CJ:

Well that's your argument, but it could be – if, for example, the commas had been slightly differently distributed, it could have been quite compelling that it was section 74, and then these other provisions in so far as they specify 18.

SOLICITOR-GENERAL:

Given the pattern we would expect that if it that was the case to see section 74 relating to qualification of electors new subparagraph.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And the fact that they are together –

ELIAS CJ:

But it really adds very little, those descriptors. It's a form of enactment that, you know, is unnecessary since section 74 does relate to the qualification of voters.

GLAZEBROOK J:

Can I just ask, these other sections that are supposed to relate to something, do they all deal with – I actually haven't checked, I should have done – do they actually deal with a whole lot of other things as well?

SOLICITOR-GENERAL:

No, actually, they don't.

GLAZEBROOK J:

So in fact it's just a description of this –

SOLICITOR-GENERAL:

And those are the provisions that are entrenched. Well, sorry, the Representation Commission, say, for example, if you look at section 28 –

ELIAS CJ:

There's quite a lot of detail that's entrenched in respect of that.

SOLICITOR-GENERAL:

Precisely. So 28 is a good example of that, which entrenches all of 28, I don't think there's any quibble with that.

GLAZEBROOK J:

Sorry, entrenches what sorry?

SOLICITOR-GENERAL:

All of section 28 relating to Representation Commission.

GLAZEBROOK J:

Yes, so the argument that they specify what it is, if it's entrenching the whole of the section then all it is, is the description of the section and what the section does, not saying we're only entrenching 28(1) and not the rest of it.

WILLIAM YOUNG J:

Difference of wording though. The others are all "relating to."

GLAZEBROOK J:

No, I understand there's a difference of wording but it's not a pattern that says we're only picking little bits of sections that we're entrenching, which is the –

SOLICITOR-GENERAL:

Which is why subparagraph (e) is so interesting as to what it's doing when it breaks that pattern to, in my submission, limit the scope –

GLAZEBROOK J:

Well I think the argument it breaks the pattern is better than the argument it follows the pattern, yes.

SOLICITOR-GENERAL:

No, it breaks the pattern because section 74 and 3(1) definition of "adult" and 60(f) all require grappling with the age of 18.

ELIAS CJ:

It is shockingly casual legislation for something as important as this. That's not anything attributing to you, but it is very surprising, particularly as it was known in 1993 that it was ambiguously worded.

SOLICITOR-GENERAL:

Might I ask Your Honours to have a look again at that Royal Commission report that my learned friend took you to, and it's at tab 7 of –

ELIAS CJ:

I wasn't really referring to that so much because that's perhaps less so. It was the indication in the debates that Crown Law had given an opinion saying that it was ambiguous, and it was enacted in that light. Didn't I read that in the materials?

SOLICITOR-GENERAL:

The reference to the opinion was that it was clear, and the Court of Appeal said, well we can't really be helped by extrinsic aids about what other people thought it meant. Fair enough.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

But that advice was that it was only the age – no, that advice wasn't that it was ambiguous but the reference in the Royal Commission, my learned friend took you to that part. It's at tab 7 of Mr Taylor's submissions, and he took you to 9.178 at page 289, where the Commission was saying, half way through that paragraph, "Because of the close connection between the right to vote and the right to be a candidate, the present distinction can be questioned. (That comment assumes, contrary to parliamentary practice, that not only the voting age but also the right to vote is entrenched by the present provisions; the effect of the wording or s 189 is not clear.)" That's what my friend took you to.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Just in the next paragraph, the recommendation, well, the recommendation comes on the next page, but at 9.179 the Commission saying they're asking questions about how far should these protections go and defining the matters that should be protected is difficult. They say, about threequarters of the way

in, “Does it go further, to the plurality system, and exclude proportional preferential or another new system of voting? We propose that, rather than the present method of listing the sections in the legislation, the entrenching provisions should identify the essential matter that is reserved.” So that was one recommendation as to how any confusion should be removed.

ELIAS CJ:

They repeat in parenthesis, as indeed does the present provision, creating uncertainty.

SOLICITOR-GENERAL:

Yes, although they do observe that their own proposal will produce an uncertainty.

ELIAS CJ:

Would also, yes.

SOLICITOR-GENERAL:

But anyway, the point I’m making there is that the recommendation which, as we see in legislative history, was not adopted, that rather than entrenching provisions concepts be given that protection, give it they identify the essential matter that is reserved hasn’t been done and wasn’t done.

GLAZEBROOK J:

Although arguably they did by actually putting what the thing was about afterwards I suppose.

SOLICITOR-GENERAL:

That was the same as the earlier legislation, it hadn't, for these authors anyway, clarified –

ELIAS CJ:

They simply copied over what the Royal Commission…

GLAZEBROOK J:

Sorry, I should have put that differently. What they thought they were doing was actually the same thing by giving certainty but by topic.

ELIAS CJ:

No, they enacted the same provision.

SOLICITOR-GENERAL:

That was the same as the ’56, they pretty much re-enacted the same provision.

GLAZEBROOK J:

No, no, I understand that. I’m saying they thought that that was sufficient to identify the concept. Sorry, I should put it that way.

SOLICITOR-GENERAL:

Because I understood my learned friend’s argument, he suggested that an alternative wording or alternative approach to subparagraph (e) would be to read in the words after the phrase, “So far as those provisions prescribe,” to read in that, “Every person may vote on attaining the age of 18.” There’s a lot of work, in my submission, for what I submit is a clear and not inconsistent with a right and freedom provision in an enactment to then simply offer up another alternative reading, including a considerable new proposition to be read in, that the section just simply cannot bear.

Your Honour the Chief Justice just mentioned commas. I mean, like the Court of Appeal the –

ELIAS CJ:

Commas? Oh, yes. I really – yes.

SOLICITOR-GENERAL:

The grammar and punctuation really matters little.

ELIAS CJ:
It's just badly punctuated.

WILLIAM YOUNG J:
Well, either meaning could have been established with certainty with a little thought, in terms of structure.

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
Well, yes, either way. And if it had been that 74 was to be entrenched, I see no reason why the drafter and Parliament wouldn't have said, "Do it like you've done all the other sections that we wanted entrenched."

WILLIAM YOUNG J:
Yes, it would be a (d), an (e) and an (f) then, yes.

SOLICITOR-GENERAL:
It would be section 74 relating to the qualification of electors, and then we would have the age question separately.

So I'll stay with section 268 for now. It wasn't especially clear to me how my learned friend invited the Court to take a more what he considered to be rights-consistent meaning of subparagraph (e) than the one the Crown advances and the Courts below held was the proper meaning. But it appeared to me to say that if the appellants could show another reasonably available meaning of subparagraph (e) then the Court would have a choice and should take the one that was more rights enhancing – I'm summarising what I understood the point to be. In my submission that is not how this Court should come at reading what subparagraph (e) means. If subparagraph (e), properly interpreted, with all the tools of statutory interpretation, delivers to us what Justice Tipping referred to in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 as, "Parliament's intended meaning," and that meaning is not inconsistent

with the Bill of Rights Act, then we need to go no further. It is not a proper course of statutory interpretation to, in the absence of an inconsistency, find some other possible meaning and invite the Court to take that one. Because this Court's function, naturally, is to determine what was Parliament's intended meaning in 268(1)(e).

WILLIAM YOUNG J:
But is section 6 not relevant to that?

SOLICITOR-GENERAL:
Section 6 might be relevant if we – well, section 6 is relevant to the extent that we might find in a legislative provision an inconsistency. And these provisions are very difficult, it's rather inapt to talk about them in terms of consistency and inconsistency, because they simply provide a process, or they simply refer to sections actually. And you have to do quite a lot of work to get to an inconsistency or a consistency argument about how those sections might be used. In my friend's written submissions the argument appeared to be that rights-consistent amendment could occur without meeting the supermajority requirement, but rights-inconsistent approaches couldn't. And in the exchange with Your Honour Justice Young I understood my friend to step away from that –

WILLIAM YOUNG J:
I thought he backed away from that.

SOLICITOR-GENERAL:
– to say also rights-consistent. So to use our example, to repeal the ban on prisoner voting I now understand the argument to be would require the supermajority.

ELIAS CJ:
Had you finished that? No…

SOLICITOR-GENERAL:

I'm just finishing, if I may, the question about does section 6 have any place.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

If the Court comes to the point on subparagraph (e) that it means is, in my submission, what has been given special protection of the procedure, is the reference to 18 is the minimum threshold age, among other threshold qualifications, then there is no inconsistency in that, for which section 6 invites us to find another tenable meaning that is more rights-consistent.

GLAZEBROOK J:

I can understand that argument but this might be a circumstance where you actually try and interpret consistently. As I understood the argument, it's you interpret consistently with the Bill of Rights when you're working out what it was that Parliament was actually trying to say was fundamental to the voting system, being the aspects that are protected under section 12, and in terms of working out what an entrenchment provision might be doing it's legitimate to look at the fundamental aspects of the system, and it's not really a question of inconsistency or section 6, although it comes in because it protects against Parliament without the requisite majority that it set down, willy-nilly changing things that are inconsistent with those fundamental values, both in the Electoral Act and in the Bill of Rights. It's probably more subtle and convoluted than it needs to be, but that's what I'd understood the argument to be.

SOLICITOR-GENERAL:

That there is a background sort of environment in which we say fundamental rights require that the interpretation of subparagraph (e) means we should read in something in order that the protection is extended to any possible incursion on a right to vote, that's where that needs to get up to.

GLAZEBROOK J:

I don't think it's reading – well, you can submit it's reading in, but I think the argument is that it should be, as everybody seems to agree it could have two meanings, that the meaning that is more rights-consistent should be accepted rather than the literal interpretation which isn't even an unambiguous interpretation.

SOLICITOR-GENERAL:

And my quibble to that is that it would therefore depend whether the legislative protection mechanism applies will depend on how one views any moment what it is that Parliament is wanting to enact in relation to electoral matters.

GLAZEBROOK J:

Well, no, just in relation to the qualifications for voting.

SOLICITOR-GENERAL:

And I see that it's 1 o'clock, but I would like to come to the balance of the Act to look at where those provisions might be put throughout the Electoral Act that could, if they were amended, also have significant implications on every person's right to vote in a way that I say means that one has to read in to subparagraph (e) a lot more than section 74, many provisions in the Electoral Act would also require the protection, in my submission of course being that can't possibly be what was intended with this wording.

Is this a convenient time, Your Honour, to take the lunch adjournment?

ELIAS CJ:

Yes, it is. We'll adjourn for lunch, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.15 PM

SOLICITOR-GENERAL:

Mr Registrar has swapped out the incorrect version of the Hansard on your tables for the correct version. If Your Honours want me to remind you that it was page 2840 that I was highlighting the piece that Your Honours didn't have, 10 lines in, so we can work out, "To protect what a unanimous view of Parliament are essential safeguards for a democratic method." That was the piece I was reading out. But I also need to hand up, and I'm sorry I should have done this in the break, in the 1993 Act of course the excitement then of course was the introduction of MMP and all of the Hansard is about that and there's very little about the entrenchment provisions, but I need to point out to Your Honours, because in fact it is not a point in the Crown's favour. This reference in what the Attorney Paul East said, page 17140, and improperly and conveniently it's marked on your page there, the marks have come out on the copy, that paragraph where the Attorney, referring to the Electoral Act 1956, says, "What's entrenched by section 189," and you'll see there in the last line of that paragraph he refers to it as the qualification of electors to vote. Now of course in my case that was wrong but I didn't want it to be said that we were only giving you parts of the Hansard that suited our purposes, because there he refers to what I would say was the age of qualification as the qualification of electors to vote.

The other thing that came up just before the lunch adjournment was Your Honour the Chief Justice made a reference to the Crown Law opinion, and I want to just clarify that the Court of Appeal refers to that at paragraph 94 of the decision below. I just wanted to clarify that it wasn't a matter where the opinion was said to have said that the matter was ambiguous, but rather the opinion was obtained and I don't know rely on that for any intrinsic or extrinsic aid to interpretation, just to clarify the point, that it's at 94. If Your Honours want to see that material it was filed –

ELIAS CJ:

No, definitely not, it's really just what was being referred to.

GLAZEBROOK J:
So when was the opinion sorry?

SOLICITOR-GENERAL:
In 1975.

GLAZEBROOK J:
1975, that's what I thought. It was the earlier amendment.

SOLICITOR-GENERAL:
Yes, and that's referenced in our written submissions, paragraph 56 refers to that 1975 Amendment Bill. The issue then, which gave rise to the question, what in fact was entrenched, was the removal of the British subject requirement, which left in place just the one year residency requirement, and the question there had been what was entrenched, and the Ministry of Justice cited there at paragraph 56 of our written submissions, "I mention this because the age of voting is included as part of section 39 of the principal [1956] Act, *which is reserved only in so far as the age of voting is concerned.* There are provisions in this Bill to change those parts [of s 39] related to British nationality and the period of residence, but they are not reserved." But they were all in the same paragraph, sorry, section 39.

As we finished just on lunchtime Your Honour Justice Glazebrook I took to have said something to the effect of, I think we can all agree that section 268(1)(e) is ambiguous, and I wanted to be clear that the Crown doesn't consider that section to be ambiguous. Quite the opposite, in fact, we say that it is very clear, and actually well drafted as to what was intended, and we've had the exchange before lunch about why 74 was needed, given it doesn't refer to the age of 18, but 74 and 3(1) together needed to be referenced in 268 in order that the minimum age be entrenched, because it's only in combination that section 74 and the age of 18 is kept safe, or kept protected, because of course had 74 not been included, the registration age could have been lowered or raised in effect by removing the reference to "adult person" and substituting it with some other reference such as every citizen who has a

certain status, every person aged over 21 years, there would have been an easy subversion of the 18-year requirement, which is why we say 268(1)(e) lines up 74 and the definition of the term “adult” and section 60(f).

GLAZEBROOK J:
But the only 18 requirement is in 74 isn’t it?

SOLICITOR-GENERAL:
Well, there it’s not referred to by its age, you have to go back to 3…

GLAZEBROOK J:
Well, I understand that, but by itself the definition doesn’t matter…

SOLICITOR-GENERAL:
But the definition does matter.

GLAZEBROOK J:
It doesn’t give you the right to vote at 18, only 74 does.

SOLICITOR-GENERAL:
Yes, in concert – well, I say they don’t give you the right to vote, they set the minimum threshold, but –

GLAZEBROOK J:
Well, I understand that, but there’s nowhere else that does that. It’s not as if, if you put 3(1) in, let alone 60(f), that you actually had anything that says when you can vote, unless you're a military personnel in which case it tells you when you can.

SOLICITOR-GENERAL:
That’s right, so that's why you had to have 60(f). But we needed to have 74 and 3(1) in concert to catch 18 years of age.

GLAZEBROOK J:

Well, you didn't really, you could have left 3(1) out, because 74 already said "adult".

SOLICITOR-GENERAL:

Then you could have changed the definition of "adult" in 3(1) to say "everyone over 21.

GLAZEBROOK J:

Well, no, it's not that you didn't – I mean, yes of course you could, but…

SOLICITOR-GENERAL:

Well, that was the purpose, in my submission, of putting the three things together in subparagraph (e) in order to entrench the age of 18 and nothing more. To the end, we say, it's very carefully crafted to deliver what Parliament had intended, to capture the age of 18 as the minimum threshold and nothing else.

ELIAS CJ:

It's really hard to see that this was carefully crafted.

SOLICITOR-GENERAL:

Well, I hear you, Your Honour, but section 74 needed to be there.

ELIAS CJ:

But it's carefully crafted, you say, as to the limited to 18, but it's certainly not a model of careful drafting.

SOLICITOR-GENERAL:

Well, you've been invited to take a different view of it based on what my friend says is some difficult line drawing that he invites you to do as to whether or not what is done with the provision is consistent or inconsistent.

ELIAS CJ:

No, well, I understand that, and that's really why I said to him that it didn't seem to me that he was making his argument as well as it might have been done in that respect. I can understand why he has, because you have formidable arguments in your favour too, and it's a way of minimising the risk perhaps.

SOLICITOR-GENERAL:

Thank you, Your Honour…

ELIAS CJ:

But if the Electoral Commission said that it didn't know what it meant, I think we can agree that it's not well drafted.

SOLICITOR-GENERAL:

With respect, Your Honour, I don't agree that it's not well drafted.

ELIAS CJ:

All right.

SOLICITOR-GENERAL:

I do accept that the Electoral Commission said it wasn't clear. I think that, in my submission, when you look at what was done and what was intended to be done it is clear, but I don't need to take that further because we say that is what 268(1)(e) does and what it means, and in my submission it is a bright line, unlike the line drawing that my friend encourages both this Court and, actually, future parliaments to engage in, there is a bright line as to what is protected by the reservation.

I said earlier that I wanted to take Your Honours to some of the sections that, if amended, could affect something of a fundamental right to vote such that in order for my friend's argument to be successful a really large number of other provisions need to be read in to section 268(1)(e) in a way, in my submission,

it just cannot bear. Are Your Honours assisted by that or do you want me to refer you simply to where those sections are located?

GLAZEBROOK J:

Well, I don't understand anyone's suggesting we read other sections in. The only one that's there is 74. So I'd only be assisted by it to the extent that you say they come within section 74.

SOLICITOR-GENERAL:

I understood my friend's argument to be that if Parliament was – in fact I think he described it as a "shocking state of affairs" that on the Crown's interpretation of 268(1)(e) Parliament could move to say that only men could vote, or only certain ethnic characteristics in a person meant you could or could not vote, and I understood him to be therefore shoe-horning all of those protections into the provision of section 268.

ELIAS CJ:

Sorry, where are those protections? I would be interested in seeing them.

SOLICITOR-GENERAL:

Well they're certainly not in section 268, for example, could a Parliament –

ELIAS CJ:

No, but where are they in the Electoral Act?

SOLICITOR-GENERAL:

They're not in the Electoral Act.

ELIAS CJ:

All right.

SOLICITOR-GENERAL:

And they exist because society and Parliament is a democracy and society has an impact on that democracy and how it exercises its functions. The protection exists because even Parliament's sovereignty has its

boundaries and we're not there on this case, but those protections exist, but not in the Electoral Act.

GLAZEBROOK J:

Isn't the argument that they do exist under section 74 because it says everybody over 18 can register to vote. So the argument is that those protections do exist in section 74.

ELIAS CJ:

I think it doesn't say everyone.

GLAZEBROOK J:

No, well whatever, it's every adult, whatever it says.

SOLICITOR-GENERAL:

If we pull up 74 that is a useful place to start, because it says, "Subject to the provisions of this Act."

GLAZEBROOK J:

"is qualified to be registered as an elector… if," and has a number of qualifications.

SOLICITOR-GENERAL:

"Of an electoral district." A further point in 74 that hasn't actually yet come up but, yes, "Every adult person is qualified to be registered as an elector of an electoral district." Now that is an order that the machinery that the Electoral Act puts in place of determining electoral boundaries, working out who lives in which electorate, therefore where you are entitled to be registered to vote. There's nothing in that section that says, or suggests that this is a significant right to vote being enacted and, on my friend's argument, entrenched, but it rather is more like the machinery or the detail that he refers to saying you're qualified to be registered as an elector in an electoral district if you meet these criteria. But if he's right about that, my submission is that a large number of other sections must also, by implication, be read as being protected by the

reservation in 268, in order that, on my learned friend's argument, that protected right remains untrammelled except by supermajority.

And our written submissions set some of those out at paragraph 66. The Court of Appeal set out some further ones at paragraph 80 and 81. The Court didn't conclude as to whether they agreed with each of the Crown's asserted provisions that needed implied entrenching as well, although they were able to say, the position was argued in respect of at least some of those provisions, and some of those have already been mentioned today by Your Honours in exchange with my learned friend, section 80 obviously, the disqualification provisions; 60 and 61, the provisions about permanent residents and how permanent residents are defined, sections 149 to 172 in my submission are a whole swag of other provisions that could be said, if amended, and again it would depend on how they were amended, go towards undercutting what my friend says is protected in 268(e). And I'll just take one example, 149, a poll to be taken, "A poll shall be taken by secret ballot at several polling places of the district on polling day." What if that section was to say, "A poll shall be taken by secret ballot at five polling places of the district on polling day," is it entrenched, is it not entrenched? I raise that to raise up the difficulty – and I'm not going to go through all of 149 to 172 with fanciful examples of what a parliament "might" do, bearing in mind my submission that part of the protections and part of these protections are society in fact and the representation that Parliament delivers to society. But even section 27, they're saying that Parliament is made up of elected members, "House of Representatives has as its members people who are elected from time to time in accordance with the '56 Act or this Act." Could Parliament enact an Amendment Act that said, "200 members will be appointed by executive discretion, in addition to those members"? The line drawing my friend invites becomes too difficult and would require considerable invention and further prescription of section 268. That's why I come back to the proposition that it is actually careful in its drafting, it does just capture one thing.

ELIAS CJ:

Can you just pause for a moment about section 27 because I haven't been thinking about that? It simply is reflective of the other provisions of the Act which of course includes section 74.

SOLICITOR-GENERAL:

And so if 74 or the reference to 18 somehow includes this wider concept of the right to vote, which we discussed earlier, is given life in the procedures in the Electoral Act or the mechanics in the Electoral Act, but there's a lot of damage to that right that could be done through ordinary enactment, unless this Court is to say that requires every reference in this Act that might trammel the right to vote to also be entrenched.

GLAZEBROOK J:

But you'd have to look at it in terms of section 35 as well in relation to some of those. So a lot of these entrenchment provisions mean you can't actually willy-nilly amend a number of the other provisions either.

ELIAS CJ:

It all has to spring off the entrenchment provision.

SOLICITOR-GENERAL:

Quite.

ELIAS CJ:

If the entrenchment provision scoops up section 35 and section 74 in toto, and I understand your argument that is doesn't, well then why do we need to sort of worry about what else gets – because there's nothing inconsistent in section 27 or nothing improbable about section 27 being left out, it's included on that interpretation of section – I mean, it says what is a member of Parliament and that is somebody who is elected from time to time in accordance with section 74, which is entrenched.

SOLICITOR-GENERAL:

Well, I don't say 74 is entrenched, but accept that that –

ELIAS CJ:

No, I understand you don't say that, but what I'm just answering is your reductio ad absurdum which I always feel is not a terrifically strong suit because it invites this sort of enquiry. But I don't see the fact that section 27 is not mentioned in the entrenchment provision as being either – it's neither here or there because if section 74 is entrenched in toto, I accept that's not your argument, then that's the end of it.

SOLICITOR-GENERAL:

One more thing may I say about that point: in the Courts below of course the appellants did argue that 74 was entrenched in total.

ELIAS CJ:

I know, yes, I know they did.

SOLICITOR-GENERAL:

And the argument is not that in this Court.

ELIAS CJ:

I know that.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Yes.

ELLEN FRANCE J:

I suppose another way of putting the argument –

GLAZEBROOK J:

I think it's Mr Francois' argument still isn't it?

ELIAS CJ:

Yes, I think it is. Sorry.

ELLEN FRANCE J:

No, I was just going to say another way of putting the argument I suppose is as supporting the submission that what you have is a collection of machinery-type provisions, in the Act, and that that might be an explanation as to why, if you start to unpick it…

SOLICITOR-GENERAL:

Yes, that you might find yourself coming up against this so-called entrenched right to vote, yes, quite so, thank you, Your Honour, yes.

ELIAS CJ:

Well, I just wonder whether a label like “machinery provisions” really helps in a context where after all the term of Parliament, for example, is entrenched. That couldn't be dismissed as a machinery provision. And I personally find it hard to see that the way electors are identified is something that is simply a machinery provision. I don’t think it’s necessary to get into these things because I think you're right that the important thing is really what the entrenchment provision says, and it does it by reference to other provisions and it’s only those provisions identified which are entrenched, and it’s probably not helpful to look into grading the importance of provisions. Now I understand that that's been opened up by Mr Cooke and you're responding to that, but I don’t see it myself in the structure of the entrenchment provisions.

SOLICITOR-GENERAL:

If Your Honours don’t have any more questions on 268 or 74 that I can assist with I’ll just go into another couple of points.

ELIAS CJ:

Are you going to address the purpose of the entrenchment provisions?

SOLICITOR-GENERAL:

So I've said already that the intended purpose, at least in 56, was to protect those provisions about the representative democracy of Parliament.

ELIAS CJ:

Yes, the important provisions.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Yes, thank you.

WILLIAM YOUNG J:

You've probably said this but if you have I can't remember. Were the reductions in age from 21 to 20 and then to 18 supported by appropriate majorities?

SOLICITOR-GENERAL:

I might just – my colleagues will know the answer to this. Yes, we think so, I think that is right. But I might come back to Your Honour on that.

GLAZEBROOK J:

You'd certainly hope so. Although of course, I mean there can be an argument that expanding the voting pool is different from contracting it, I suppose, which is what I put at one stage, and that was I think at one stage the argument that you can give greater rights, you just can't take away what's there.

WILLIAM YOUNG J:

Of course by giving greater rights you subtract from the rights of those protected.

GLAZEBROOK J:

Well, that's the other side of the argument of course.

SOLICITOR-GENERAL:

Yes, and that was part of the debate handed up about the majoritarian rule. And, as the Court of Appeal referenced, just to come back to the Chief Justice's question, part of the purpose was to keep some things protected from party politics' influence and to put some things at a level that the supermajority of the House is required for.

ELIAS CJ:

If the minimum age is entrenched, there's no maximum age entrenched is there? I'm just feeling that I'm at that stage of life where they might cut me out.

GLAZEBROOK J:

Well, they did talk about that with Brexit, didn't they, after Brexit?

SOLICITOR-GENERAL:

There isn't, no.

WILLIAM YOUNG J:

I think anyone who's over 18…

O'REGAN J:

Yes, I think you're safe.

ELIAS CJ:

Well, except then it isn't just a minimum age, is it? It's anyone over 18.

WILLIAM YOUNG J:

It's only a constraint.

ELIAS CJ:

But is that really commensurate with 268, as interpreted?

GLAZEBROOK J:

Well, an adult I suppose is anyone over 18.

SOLICITOR-GENERAL:

Well, it's the minimum age of qualification.

GLAZEBROOK J:

And so if you said…

O'REGAN J:

And you can't change that definition.

ELIAS CJ:

If you're 18. Okay, I'm safe, until I'm criminally insane.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

I think one of those provisions is just special patients isn't it?

SOLICITOR-GENERAL:

There are special patients as well, yes, that's right.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

I doubt Your Honour is going to fall into any of those disqualification characteristics in section 80.

ELIAS CJ:

Well, I don't know.

SOLICITOR-GENERAL:

Interestingly perhaps, just on the age question, what in fact the Act tells us happens when you turn 18 and attain the age of majority to be eligible to enrol is that you must enrol.

GLAZEBROOK J:

And you draw from that, what, that it is an important – sorry, I just, what are you drawing from that?

ELIAS CJ:

The consequence…

SOLICITOR-GENERAL:

Well, it's the only thing that the Electoral Act tells us is the consequence of reaching that, "Are you eligible?" and then you must enrol. You don't have to vote.

GLAZEBROOK J:

Oh, okay. Well, of course nobody is obliged to vote but everyone is obliged to enrol.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

So it would be unusual for it to say anything especially in relation to 18 year olds that's different from anyone else wouldn't it?

SOLICITOR-GENERAL:

Well, that's this consequence of meeting the age of the minimum threshold for eligibility, again telling against it being a concept that it is delivering the right to vote, but I've been around that submission and I don't need to get back into it.

The only last point I would make relates to invalidity and consequences, and I started my oral submissions accepting that if this Court finds the manner and form provision applied and was not met then the 2010 Electoral Amendment Act will be invalidly enacted as if – and I think it was Justice Young put to my learned friend – it was, for example, the Governor-General had failed to assent to a piece of legislation, it will not have been validly made. And I agree

with my learned friend's position on the question about what might be said to have happened to the two intervening general elections, that the challenge to any election as delivering up a valid parliament must be done, as he pointed to Your Honours to section 229 of the Electoral Act, by a petition within a certain timeframe. And it might be, if this Court is to find that that legislation is invalid, that there are other causes of action that emerge, those matters should properly be left to another day, and I don't even anticipate that I should imagine out loud what they might be but those are matters that aren't before you. The consequences of such a conclusion by this Court can be dealt with in subsequent challenges.

ELLEN FRANCE J:

Well, I was going to ask you, in some of the earlier cases like *Re Hunua Election Petition* and then more recently *Payne*, the Court does avert to the possibility that the common law power to declare an election void is still there, if you like, except to the extent it's been affected by a statute. That's not something you've thought about?

SOLICITOR-GENERAL:

Well, in my submission the thought was that the Electoral Act would be the place that the statute sets out how that might occur. Now what would be left of a common law power to declare…

ELLEN FRANCE J:

Well, I suppose the distinction that's drawn in that context is between something that's of a national scale like corrupt practices, for example, that affect the whole election, and something that affects an individual electorate.

SOLICITOR-GENERAL:

Yes. So that common law power to say something has gone so wrong, "That we can't conceive of this as a genuine periodic election." Well, I don't think we are at that point here, in any event. So section 299 tells us about the petitioner to contest the outcome of an election to the extent that there was a suggestion that the common law – I think I would only be able to say now that

we're not at such a point, it wasn't an Electoral Act matter that went wrong. If anything has gone wrong it's in a separate provision about prisoner voting.

So just to come back to that, so the question before this Court is did the 2010 Act need to comply with the manner and form provisions, and this Court will answer that question one way or the other.

The question about what happens next – I mean, it might be that the Court wants to hear further from both parties on this question, given it hasn't been part of the argument to date, the question has been about that 2010 Amendment Act and whether or not it needed to get the supermajority.

GLAZEBROOK J:
Another possibility, if we did decide this, would just be to declare that it should have been passed in that way. But of course that's not overly satisfactory, especially as it's accepted by the Crown that if that were the case it would not have been validly passed.

ELIAS CJ:
There's a present disentitlement, so it seems inescapable that we would have to, as you accept, say that it's invalid. Then as to any consequences, as you say they're not before us, and the statute is a bit quelling in terms of validity of elections and matters of that sort.

GLAZEBROOK J:
And it would have been only affecting, aside from the possible effect on the Māori electorates, individual electorates, in any event.

SOLICITOR-GENERAL:
As to whether there is an effect on the Māori electorates, that is, as the Court of Appeal set out, that in fact the Māori electorates are formed by reference to census data, not by electoral enrolments.

GLAZEBROOK J:

Yes of course.

SOLICITOR-GENERAL:

So I don't think that will actually be a –

ELIAS CJ:

What about the opting. Where's the, that's the number of but there's the options to go onto the Māori electoral roll…

SOLICITOR-GENERAL:

Yes, although I understood this to be the question about Māori seats and districts, which is why I was answering it that way.

GLAZEBROOK J:

No, no, sorry, it was more generic than that, but I think the opting only happens every – because it's just been opened again and won't be open again until later.

ELIAS CJ:

Yes. Every…

GLAZEBROOK J:

So you must, I mean presumably – well I don't think, I don't know when the last one was because there could have been people affected by it at that stage, if there was no right to be on the roll.

SOLICITOR-GENERAL:

If it was before 2010. Yes, I mean these matters haven't been before the Court so I'm anxious not to answer them, said to be in a full way, on my feet. Those matters would need argument and careful consideration, what does that mean.

ELIAS CJ:

Well they'd probably need to be the subject of proceedings anyway, to get them before the Court, because –

SOLICITOR-GENERAL:

It might be, I mean the Canadian jurisprudence, of course that's been developed where Courts are sometimes prepared to make prospective only declarations. That tends to be in situations where what would result in the striking down, in the language of legislation, would result in an unworkable situation, like in the *Minto* language case, where the criminal law was effectively struck down for want of its dual language. I don't think we're in that situation here, where this Court is, or hasn't heard any argument on the question of prospective declarations of invalidity. One answer I could invite Your Honours, in picking up Justice Glazebrook's point, is to say that the answer to the question as put, or on which leave was given, did the 2010 Amendment Act require the manner and form provisions to be met, the Court might answer that question and then invite the parties back if it becomes necessary to determine matters of consequence.

Your Honours, unless you have any more questions for me, those are the Crown submissions.

ELIAS CJ:

Yes, thank you Madam Solicitor. Mr Francois do you have any response?

MR FRANCOIS:

Maybe just to clarify Your Honour. In terms of just this latest development, what is the effect on the election results in the past if the law is avowed. The way the Māori appellants have approached their case in the lower Courts is that it really only affects the Māori electorates because the prisons are based in suburban areas that just in terms of the general electorate, just don't, wouldn't have a great impact. For example, Mt Eden, one of the largest prisons, if all Māori and if all prisoners were allowed to vote in that electorate,

it's such a majority. Mt Eden Prison is in Epsom. So I just don't see that as a problem. Paremoremo is in Helensville.

ELIAS CJ:

I don't think anyone is really arguing these sort of specifics, Mr Francois. The only thing that we were exploring in terms of the Māori electorates was that the number of Māori seats is, as I understand it, determined by those who opt to, or who enrol on the Māori roll, so it might affect the number of seats.

MR FRANCOIS:

I understand that, and that was argued in the Court below.

ELIAS CJ:

Yes.

MR FRANCOIS:

The Court below didn't agree with us because it was too marginal, the impact would be too marginal, whereas I said they overlooked, in applying for leave to appeal, they overlooked the importance of just little fractions, because it only takes a little fraction to go under .5, because that's where they just round it off. That it actually could go down, so for example if it started at 7.6 and then because of 5000 people, on the Māori, Māori who couldn't go on the Māori electoral roll because they weren't able to vote, then that could, over time, start to affect that little fraction, and that fraction could go down, and if it drops below 7.5 then, yes, you lose a seat, it goes down to seven. So instead of 7.6, it's 8. 7.4 it's 7. So, yes, it can, it can have an impact, but the Court of Appeal just thought with all the mathematics, and I had them worked out by a maths graduate, that they were right, it's just that they just didn't see the impact as being – well it was an argument of discrimination so that's another reason why they sort of didn't – although, yes, marginally it can affect the number of electoral seats, it can, it can go down. They just said in terms of the discrimination argument it just wasn't disproportionate enough in terms of an impact, because these were, we were doing, dealing with fractions. So

it was a discrimination argument that was run, so I think that is slightly different.

But look, one thing Your Honours, is Te Tai Tokerau, that was back in the day with Kim Dotcom and Hone Harawira, now that was only a very marginal, it was 751 votes. Now if you did take from that region you'd get three prisons, and that we were able to work out would actually result in about 1200 prisoners who were actually, could have voted Māori, or could have voted in the Māori electorate, and that would definitely have had an impact on an electorate.

ELIAS CJ:
Yes, I see, although we're not really looking at that in the argument here.

MR FRANCOIS:
No, no.

ELIAS CJ:
But thank you for that explanation.

MR FRANCOIS:
Yes, but if there's anything else?

ELIAS CJ:
No, I think that's all, thank you. Yes Mr Cooke?

MR COOKE QC:
I will be very brief in reply and in part because I see our role in this appeal to really assist the Court in getting to the right answer in this case, so I will really address my comments primarily in the context of the argument that the whole of section 74 is entrenched, rather than going back on the argument I've advanced earlier in terms of the primary submission for Mr Taylor.

In terms of focusing on that issue, which has been exchanged both by me and my learned friends, in my submission the Crown's position ultimately cannot be correct because it is built on a series of propositions that each in themselves is very difficult to accept. The first building block of the argument was that the Electoral Act doesn't itself create the right to vote, that it was in a sense a common law thing.

ELIAS CJ:

Just pause a moment Mr Cooke. You're really advancing a new argument here in reply here. I understand that it came out of what was said. You're not going to be lengthy and I will give Madam Solicitor an opportunity to respond if she wishes to.

MR COOKE QC:

And I'm only going to address the arguments that were exchanged between the Court, so I'm not going to develop anything new.

ELIAS CJ:

Yes, thank you.

ELLEN FRANCE J:

So is this your third argument? So you have your response to Justice Young and then the partial entrenchment and now we have full entrenchment.

MR COOKE QC:

Well it's partly the second argument that I exchanged with Justice Young and I'm really dealing with that, and at the same time dealing with the argument that the Court has exchanged with my learned friends about whether the whole of section 74 is entrenched. So my points address both those parts.

ELLEN FRANCE J:

So just to be clear, this is another alternative argument?

MR COOKE QC:

It's the proposition the Court has put to my learned friends that I'm addressing as well.

ELIAS CJ:

That's as I understood it, yes, all right, but briefly.

MR COOKE QC:

Well to be fair about it, this is not an easy case to deal with.

GLAZEBROOK J:

No, no, it's not a criticism.

MR COOKE QC:

The provisions are difficult and counsel does its very best to try and advance the propositions that best identify the issue for the Court, and like all arguments they move and you try and deal with them as they move.

ELIAS CJ:

Well we will be assisted by whatever you want to tell us.

MR COOKE QC:

Thank you Your Honour. So the building blocks in the argument were first that the Act doesn't itself create the right to vote, the subtle point about it being a common law right and only instantiating the right to vote, and with respect that can't be correct. The Electoral Act must establish the right to vote.

The second proposition that, with respect, cannot be correct is that section 268 creates a bright line test. The one thing that's clear from these provisions is there's no clear bright line in the legislative provisions. They are difficult ambiguous provisions that call to be interpreted and one cannot find bright lines.

GLAZEBROOK J:
Are you saying in the whole of 268 or just in (e)?

MR COOKE QC:
In (e), the provision that we're dealing with. The third proposition advanced by the Crown which I say cannot be correct, is that the right to vote, which I say is protected by 268(1)(e), would not be contravened, or it wouldn't be inconsistent with that entrenched right, if new provisions that introduce, or reintroduce the requirement for property, or which introduced a race or gender qualification of the right to vote, I suggest that such provisions would not be inconsistent with the entrenched right, in my submission, also cannot be correct. I can't find those anywhere else in the Electoral Act. They can only be found in section 74 and the associated provisions, and if they are to be regarded as fundamental, and part of the provisions that were protected by Parliament, it is through the protection in 268(1)(e).

The final related point about that is it cannot be right, as my learned friends have suggested, that there's no ambiguity in these provisions. There must be regard that there's ambiguity in these provisions. At the very least, looking at text and purpose, 268(1)(e) does refer to section 74 in plain language as being an entrenched provision. In terms of the purpose of the provision, even adopting the passages from Hansard that my learned friends advanced in terms of the 1956 Act, those entrenchment provisions were intended to protect the provisions that, in the words of Hansard, "The best safeguards that Parliament could work out to protect what in the unanimous view of Parliament are the essential safeguards for our democratic method of electing the people's representatives." So that, in terms of purpose, would suggest you don't limit the entrenchment purely to a question of age, but to the essential safeguards that protect the democratic method of electing the representatives, and that's text and purpose.

In the end one of the fundamental questions is whether the interpretation of an entrenchment provision should be influenced by fundamental rights and should be given an interpretation that is rights-consistent, if that is possible,

and the reality is that either interpretation that's available from looking at the texts of these provisions is open, and in those circumstances it is the usual presumption that one should adopt the interpretation that is more rights-consistent, and it is simply more rights-consistent to identify the protection of the entrenchment provision in a way that recognises what is truly fundamental, that is the right to vote of all persons once they attain the age of 18 years, and to suggest otherwise, in the words of Your Honour the Chief Justice, is shockingly casual, but the whole point of entrenchment provisions is that things aren't done in a casual way like that, that they are directly addressed and confronted in the legislative process. So the whole purpose of entrenchment provisions is to avoid casual alterations to what is truly fundamental in the electoral system.

So given that both interpretations are open on the wording of the statute, and given the purpose of the provision to identify what is truly fundamental, and that presumption to interpret it consistently with fundamental rights, if that's available, that should be the interpretation that is adopted.

So unless Your Honours have any follow up questions of me, those are my submissions in reply.

ELIAS CJ:
No thank you Mr Cooke. Madam Solicitor, is that anything you'd like to say?

SOLICITOR-GENERAL:
No thank you Your Honour, nothing in reply.

ELIAS CJ:
I think that had been sufficiently flagged with you. Thank you for that. Thank you very much counsel for your submissions. We'll take time to consider our decision in this matter.

HEARING CONCLUDES