IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 65/2017
[2018] NZSC 104

BETWEEN	ATTORNEY-GENERAL Appellant
AND	ARTHUR WILLIAM TAYLOR First Respondent
	HINEMANU NGARONOA, SANDRA WILDE, KIRSTY OLIVIA FENSOM AND CLAIRE THRUPP Second to Fifth Respondents

Hearing:	6 and 7 March 2018
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	U R Jagose QC, D J Perkins and G M Taylor for the Appellant First Respondent in person R K Francois for the Second to Fifth Respondents A S Butler, C J Curran and J S Hancock for the Human Rights Commission as Intervener
Judgment:	9 November 2018

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The cross-appeal is allowed. Mr Taylor accordingly has standing.**

C **Costs are reserved.**

REASONS

	Para No.
Glazebrook and Ellen France JJ	[1]
Elias CJ	[73]
William Young and O'Regan JJ	[122]

GLAZEBROOK AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] The primary issue raised by this appeal is whether the High Court has the power to make a declaration that legislation is inconsistent with the provisions of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The issue arises in the context of an amendment in 2010 to the Electoral Act 1993. The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the 2010 Amendment) extended the prohibition on voting to all prisoners. Prior to the 2010 Amendment, the prohibition was confined to prisoners sentenced to a term of imprisonment of three years or more.

[2] It is accepted that the prohibition in the 2010 Amendment is inconsistent with the right to vote in s 12(a) of the Bill of Rights. Section 12 provides that:

> Every New Zealand citizen who is of or over the age of 18 years—
>
> (a) 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; …

[3] The respondents, five prisoners, sought a declaration in the High Court that the 2010 Amendment was inconsistent with s 12(a).[1] An application to strike out the proceeding on the ground there was no jurisdiction to make a declaration was dismissed by Brown J.[2] The matter proceeded to trial after which Heath J in the High Court made a declaration that:[3]

> Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act.

[4] The Attorney-General appealed to the Court of Appeal from this decision on the ground the Court had no jurisdiction to make the declaration. The Court of Appeal dismissed the appeal.[4] The Court did so on the basis there was a power to make a declaration and, with one qualification, considered it was not unreasonable to make a declaration in this case. The qualification was that the Court ruled that the first respondent, Mr Taylor, had no standing. That was because he was prevented from voting by the earlier legislation, not by the 2010 Amendment.

[5] The Attorney-General appeals with leave to this Court.[5] Mr Taylor cross-appeals on the standing issue. The Human Rights Commission was given leave to appear as an intervener.

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1 Mr Taylor and others have also brought proceedings challenging the validity of the 2010 Amendment on the basis it involved an amendment to an entrenched provision of the Electoral Act 1993 without compliance with the requirement for a super-majority. This matter is the subject of an appeal to this Court: *Ngaronoa v Attorney-General* [2017] NZSC 183. Judgment is reserved.

2 *Taylor v Attorney-General* [2014] NZHC 1630.

3 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 [*Taylor* (HC)] at [79].

4 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 (Kós P, Randerson, Wild, French and Miller JJ) [*Taylor* (CA)].

5 *Attorney-General v Taylor* [2017] NZSC 131.

Background

[6] Before discussing the approach taken in the Courts below, it is useful to say a little about the history of disenfranchisement of prisoners in New Zealand.[6] We essentially adopt the description of this aspect in the judgment of Heath J.[7]

Prisoner voting

[7] The first point of reference is the New Zealand Constitution Act 1852 (Imp) (the 1852 Act).[8] Under that Act, the franchise was restricted to males over 21 years of age who owned property.[9] Relevantly, for present purposes, s 8 of the 1852 Act provided that prisoners incarcerated for "any treason, felony, or infamous offence, within any part of Her Majesty's dominions" were prohibited from voting. The Qualification of Electors Act 1879 extended the prohibition for a period of 12 months after the prisoner's sentence was completed.[10]

[8] The scope of the prohibition changed under the Electoral Act 1905.[11] Section 29(1) of that Act removed the extension of the period of post-conviction disqualification but the class of offences to which the prohibition applied was widened. Prisoners sentenced to death or to a sentence of one or more years of imprisonment, amongst others, were added to the class of disenfranchised prisoners.

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6 Jaqueline Hodgson and Kent Roach "Disenfranchisement as Punishment: European Court of Human Rights, UK and Canadian Responses to Prisoner Voting" [2017] PL 450 at 450 note that "Whether or not prisoners should enjoy the right to vote is a controversial subject in many democracies".

7 *Taylor* (HC), above n 3, at [16]–[26].

8 At [18], citing New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72 [the 1852 Act]. Of the provisions in the United Kingdom dealing with prisoner disenfranchisement, the European Court of Human Rights noted they "reflected earlier rules of law relating to the forfeiture of certain rights by a convicted 'felon' (the so-called 'civic death' of the times of King Edward III)": *Hirst v United Kingdom* (No 2) (2006) 42 EHRR 41 (Grand Chamber, ECHR) at [22] and see [53]. See also Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 166–167; and Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443 at 445–447.

9 The 1852 Act, s 7. The franchise was extended to Māori men by s 6 of the Maori Representation Act 1867.

10 Section 2(4). At that point, the franchise was extended to all adult men, including those without property: ss 2(1) and 2(2).

11 By this time the franchise had extended to women via the Electoral Act 1893.

[9] The Electoral Act 1956 imposed a complete ban on voting on those detained in a penal institution as a result of a conviction.[12]

[10] The position changed for a brief period with the Electoral Amendment Act 1975.[13] Section 18(2) of that Act removed the disenfranchisement of prisoners completely. That position remained only until 1977 when the prohibition on serving prisoners voting was re-introduced.[14]

[11] The situation altered again with the enactment of the 1993 Act. As originally enacted, s 80(1)(d) disqualified serving prisoners detained under a sentence of life imprisonment, preventive detention, or a term of imprisonment of three years or more.[15] The 2010 Amendment extended the prohibition to all prisoners. Under the current regime, only remand prisoners retain the right to vote. The Attorney-General, in his report to the House of Representatives under s 7 of the Bill of Rights, said that "the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 of the Bill of Rights Act and … it cannot be justified under s 5 of that Act".[16]

[12] Against this background the respondents, all serving prisoners, brought an action in the High Court seeking a declaration of inconsistency.

The approach in the Courts below

[13] In the High Court, after a review of the authorities, Heath J said the "general principle" was that "where there has been a breach of the Bill of Rights there is a need for a Court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right".[17] There was no reason for a different position in

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12 Section 42(1)(b). Remand prisoners retained the right to vote.

13 The Electoral Amendment Act 1969 lowered the voting age to 20: s 2. The age was lowered again, to 18: Electoral Amendment Act 1974, s 2.

14 Electoral Amendment Act 1977, s 5.

15 The Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, December 1986) at [9.21] and recommendation 42, recommended the prisoner voting prohibition be limited to prisoners serving sentences of three years or more; and see Letter from J J McGrath (Solicitor-General) to W A Moore (Secretary for Justice) entitled "Rights of Prisoners to Vote: Bill of Rights" (17 November 1992) which also favoured a three-year threshold.

16 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (17 March 2010) at [16].

17 *Taylor* (HC), above n 3, at [61].

relation to the legislative branch. Heath J said that Parliament did not intend, in the Bill of Rights, "to exclude the ability of the Court to make a declaration of inconsistency".[18]

[14] The Judge considered that the ability, since the enactment of s 92J of the Human Rights Act 1993, for the Human Rights Review Tribunal to make a declaration of inconsistency supported that view.[19] Finally, Heath J did not consider making a declaration would bring into question parliamentary processes in a way contrary to art 9 of the Bill of Rights 1688 (Imp).

[15] Given the fundamental nature of the right involved, the right to vote, the Judge determined it was appropriate to make a declaration in this case.

[16] The overall conclusion of the Court of Appeal was that the source of the higher courts' jurisdiction to make a declaration of inconsistency was "the common law jurisdiction of the higher courts to answer questions of law".[20] The Court took the view that there was no constitutional bar to a court issuing a declaration of inconsistency nor any bar under the Bill of Rights. Indeed, the language and purpose of ss 2–6 of the Bill of Rights and the associated case law supported the existence of the power as did the ability to make a declaration of inconsistency conferred on the Human Rights Review Tribunal under the Human Rights Act.[21]

[17] Turning to the particulars of the present case, although no question of Mr Taylor's standing was raised by the Crown, the Court of Appeal concluded he had none.[22] The Court did so on the basis the challenge was confined to the 2010 Amendment. Mr Taylor had no interest in that because, in contrast to the other respondents, as a long-term prisoner he could not vote under the earlier legislation. Nor did the Court consider Mr Taylor could be treated as a representative plaintiff.

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18 At [61].
19 At [62]. Section 92J applies in the context of breaches of the right to be free from discrimination affirmed by s 19 of the Bill of Rights.
20 *Taylor* (CA), above n 4, at [109].
21 At [108].
22 At [176]–[177].

[18] Finally, the Court determined that it was open to the High Court to make a declaration in this case and noted that it was "right to do so".[23] The Court relied in this respect on the need to "convey the Court's firm opinion that the legislation needs reconsidering and to vindicate the right".[24]

[19] For completeness, we add that the Court found there had been no breach of parliamentary privilege in the use made by Heath J of the report from the Attorney-General to the House of Representatives pursuant to s 7 of the Bill of Rights.[25] That aspect of the case is not in issue before us.

The statutory scheme

[20] The key provisions of the Bill of Rights for present purposes are the long title, ss 2–7, and s 12(a) which is set out above. The long title provides that the purpose of the Bill of Rights is two-fold, namely:

> (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

[21] Section 2 confirms that the rights and freedoms in the Bill of Rights are "affirmed".

[22] The application of the Bill of Rights is addressed in s 3. Section 3 states:

> This Bill of Rights applies only to acts done—
>
> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

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23 At [186].
24 At [185].
25 At [146].

[23] The effect on other enactments is dealt with in s 4 which provides as follows:

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

[24] Section 5 states that, subject to s 4, the rights and freedoms in the Bill of Rights "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 6 is a direction to prefer a Bill of Rights consistent meaning whenever possible. Finally, s 7 provides for the Attorney-General to draw to the attention of the House of Representatives any provision in a Bill, on its introduction, which appears inconsistent with the Bill of Rights.

Does the High Court have power to make a declaration of inconsistency?

The submissions

[25] The submissions for the Attorney-General in support of the proposition that the High Court does not have power to make a formal declaration focus on the language of the Bill of Rights and on its legislative history and on the nature of the judicial function. In developing these submissions the argument is made, first, that in preserving parliamentary sovereignty s 4 of the Bill of Rights contemplates enactments the courts may consider are inconsistent with the rights and freedoms in the Bill of Rights. It is accordingly not correct to treat that situation as a breach of the Bill of Rights requiring remedy. Second, it is contended that the making of a declaration is an advisory opinion and so outside of the judicial function.

[26] The respondents support the judgments in the Courts below. Mr Taylor also emphasises that there is no other remedy available for the respondents. Mr Francois for the other respondents also submits that the arguments for the Attorney-General

overstate the distinction between indications of inconsistency as part of the court's reasoning process and a formal declaration.

[27] The Human Rights Commission submits that the making of a formal declaration is part and parcel of the scheme and intent of the Bill of Rights. Further, counsel argues the jurisdiction to make a declaration if viewed in the context of New Zealand's constitutional setting is consistent with judicial function.[26]

[28] We address these submissions after first discussing briefly the position taken in the key authorities prior to the present case.

The approach to date

[29] From the outset, the authorities have made it clear that in order for the Bill of Rights to be effective, the courts had to provide remedies for breaches of the Bill of Rights. The following observation from one of the earlier Bill of Rights cases captures the position that has been taken:[27]

> A statement of fundamental human rights would be a hollow shell and the enactment of a Bill of Rights an elaborate charade if remedies were not available for breach. On the contrary the premise underlying the Act is that the Courts will affirmatively protect those fundamental rights and freedoms by recourse to appropriate remedies within their jurisdiction.

[30] As foreshadowed by this excerpt, it is also well-established that in order to ensure any remedy is an effective one, the courts can draw on the usual array of remedies, of which declaratory relief is a part. Cooke P in *Simpson v Attorney-General* (*Baigent*'s *Case*) stated:[28]

> Subject to ss 4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection. Secondly, the long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law when necessary. Such a

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26 Mr Taylor supported the Commission's approach in his submissions.

27 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 191 per Richardson J. See also: Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 [the White Paper] at [3.8]–[3.12].

28 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent*] at 676. See also *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [1]–[2] per Elias CJ and [203] per McGrath and William Young JJ; and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [258] per Blanchard J and [300] per Tipping J.

> measure is not to be approached as if it did no more than preserve the status quo.

[31] There have been a number of cases in which a formal declaration of inconsistency has been sought but, until the present case, no declaration has been made.[29] There is however no dispute that courts can conclude as part of the reasoning process that legislation is inconsistent with the Bill of Rights. The classic illustration of this is provided by this Court's decision in *R v Hansen* which found that the reverse onus presumption of supply in the Misuse of Drugs Act 1975, applying to those in possession of controlled drugs above the specified amounts, was inconsistent with the presumption of innocence in s 25(c) of the Bill of Rights and that this could not be justified.[30]

[32] In *Hansen*, McGrath J noted that the court should not "shirk its responsibility to indicate" its view legislation is inconsistent with the Bill of Rights and that the need in those situations to rely on s 4 normally will be "sufficiently apparent from the Court's statement of its reasoning".[31] And the Court of Appeal in *Moonen v Film and Literature Board of Review* used the language of "indications" or "declarations" interchangeably.[32] In other cases the possibility of making a formal declaration has been flagged.[33]

[33] *Boscawen v Attorney-General* exemplifies the high point of the authority against the availability of a power to make a formal declaration.[34] That case dealt with a challenge to the omission of the Attorney-General to report an apparent inconsistency with the Bill of Rights to the House of Representatives under s 7 of the Bill of Rights. The Court of Appeal outlined reasons which the Court considered told against there being jurisdiction for the High Court "to make a declaration of inconsistency in the abstract".[35] Those factors included the adoption of the

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29 Heath J discusses some of the cases: *Taylor* (HC), above n 3, at [41]–[42] and [45]; and see the discussion in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [28.6.1]–[28.7.12].

30 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

31 At [253]. See also the comments at [254] and [259].

32 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [19]–[20].

33 See, for example, *R v Poumako* [2000] 2 NZLR 695 (CA). In that case Thomas J (dissenting) would have granted a declaration: at [70] and [106]–[107]. Henry J also expressly left open the possibility of making a formal declaration: at [68].

34 *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229.

35 At [55] per O'Regan J for the Court.

recommendation of the Attorney-General's advisory group on the establishment of the Supreme Court not to give the Court the power to give advisory opinions. The Court also noted the courts are "not well placed to give opinions without a specific factual background to assess the inconsistencies".[36] However, the Court made no final decision on the point.[37] Similarly, the Court left open the question of the availability of a declaration of inconsistency in a disputed case.[38]

[34] In other cases, for various reasons, the court has decided not to make a declaration but has left the possibility of doing so open. For example, the possibility of making a declaration was left open in *R v Manawatu*.[39] The Court said that that was not a case where a declaration would be made even if there was jurisdiction where the Court's position that the provision in the relevant legislation[40] should be repealed had been accepted and legislation to implement repeal introduced.[41]

[35] The Court of Appeal in *Belcher v The Chief Executive of the Department of Corrections* declined to make a declaration of inconsistency in relation to the extended supervision order regime.[42] The Court considered it had no jurisdiction because it was being asked to exercise an originating jurisdiction.[43] The Court also concluded there was no power to make a declaration of inconsistency in a criminal proceeding.[44]

[36] In a similar vein, in *R v Exley*, the Court of Appeal said there was no jurisdiction to make a declaration of inconsistency in the context of an appeal against sentence.[45]

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36 At [54].
37 At [55].
38 At [56].
39 *R v Manawatu* (2006) 23 CRNZ 833 (CA) at [13].
40 Crimes Act 1961, s 398 affecting the ability for dissenting judgments in criminal appeals.
41 See also the interlocutory decision in *Taunoa v Attorney-General* [2006] NZSC 95 where the Court noted that there is no jurisdiction where the legislation in relation to which the declaration is sought is not in force at the relevant time.
42 *Belcher v The Chief Executive of the Department of Corrections* [2007] NZCA 174.
43 At [12].
44 At [13]–[16]. Leave to appeal declined: *Belcher v The Chief Executive of the Department of Corrections* [2007] NZSC 54.
45 *R v Exley* [2007] NZCA 393 at [21]. Leave to appeal declined: *Exley v R* [2007] NZSC 104.

[37] Finally, in *McDonnell v Chief Executive of the Department of Corrections*, the Court of Appeal relevantly summarised the position after *Belcher* as follows:[46]

> (a) No decision has yet been made by the Supreme Court on whether declarations of inconsistency are available in criminal proceedings. However, this Court has indicated (in an obiter comment) that they are not; a separate civil proceeding is required: …
>
> (b) The preferred approach to identifying inconsistencies is to do so in the reasons for judgment, without issuing a formal declaration.
>
> …
>
> (d) There is no jurisdictional bar to the Court of Appeal granting a declaration of inconsistency where such a declaration was not first sought in the High Court but was technically available.

Is the making of a declaration contemplated by the Bill of Rights?

[38] Contrary to the submission of the Solicitor-General that the making of a declaration does not fit with the language and legislative history of the Bill of Rights, we see the making of a formal declaration as a logical step from the settled position outlined above. That is, that an effective remedy should be available for a breach of the Bill of Rights and the courts can draw upon the ordinary range of remedies to provide such a remedy.

[39] This approach is contemplated in *Baigent* in which the Court of Appeal found that to enable an effective remedy, public law damages were available for a breach of the Bill of Rights.[47] Cooke P in *Baigent* considered the absence in the Bill of Rights of an express provision about remedies was "probably not of much consequence".[48]

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46 *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [123].

47 *Baigent*, above n 28, at 677–678 per Cooke P, 691–692 per Casey J, 702–703 per Hardie Boys J, 706 and 713 per Gault J and 718 per McKay J. See also by way of example, *R v Goodwin*, above n 27; and Law Commission *Crown Liability and Judicial Immunity: A Response to* Baigent's *case and* Harvey v Derrick (NZLC R37, 1997). See also the discussion on the courts' function by John Hart Ely "Toward a Representation-Reinforcing Mode of Judicial Review" (1978) 37 Md L Rev 451 at 471 and 485–486; and John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge (Mass), 1980). For a discussion of the way in which judicial responses can be seen to de-escalate social tensions in a political context see William N Eskridge Jr "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics" (2005) 114 Yale LJ 1279 at 1292–1312.

48 At 676.

With reference to *Baigent*, the point was put in this way in *Attorney-General v Chapman*:[49]

> While it naturally followed that ordinary judicial remedies were available for the enforcement and protection of rights, the strength of this expression of the [Bill of Rights'] purpose required that the courts develop the current law where necessary rather than simply preserve the status quo.

[40] We now explain why we do not see this approach to the Bill of Rights as inconsistent with the terms of the Bill of Rights and, indeed, we consider that it is a means of meeting its stated objectives.

[41] Taking the latter point first, the purposes include protecting the rights and freedoms contained within it and, as well, affirming New Zealand's commitment to the International Covenant on Civil and Political Rights (the ICCPR).[50] Under art 2(3)(a) of the ICCPR the states parties to the Covenant undertake to ensure those whose rights are violated "have an effective remedy".[51] In a situation such as the present, there is no other effective remedy.[52] The importance of the rights suggests that, unless granting such a remedy is inconsistent with the statutory language, the courts should follow the usual approach and provide a remedy.

[42] The Attorney-General seeks to distinguish *Baigent* (and other cases like *Chapman* and *Taunoa*) which support the proposition that an effective remedy should be provided on the basis those cases dealt with executive acts. This distinction may be a reason for restraint in granting a declaration but, given the statutory scheme, there is no apparent reason to erect a jurisdictional bar. Indeed, the desirability of providing an effective remedy suggests that as a matter of policy the same principles should apply.

[43] The latter point finds support in the fact that the Bill of Rights expressly applies to acts done by the legislative branch.[53] It is possible to construe s 3 as clarifying the

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49 *Attorney-General v Chapman*, above n 28, at [118] per McGrath and William Young JJ.

50 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

51 See also art 2(3)(b) and (c).

52 The same could be said of the example given by William Young and O'Regan JJ in their reasons below at [143].

53 Section 3(a). See also Mark Elliott "Interpretative Bills of Rights and the Mystery of the Unwritten Constitution" [2011] NZ L Rev 591 at 615–617.

application of the measure rather than a more positive assertion. That is because of the prefatory phrase, "applies only to". That said, the fact there is an express recognition that the Bill of Rights applies to the legislative branch is of importance in the overall scheme.[54]

[44] Next, s 4 makes it plain a court cannot hold a provision "to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) decline to apply any provision … by reason only that the provision is inconsistent" with the Bill of Rights. That section means the courts cannot, for example, refuse to apply the voter disqualification only because of inconsistency with the Bill of Rights. It says nothing about the present issue. As Professor Brookfield suggested, in his important discussion of the availability of a declaration of inconsistency, the:[55]

> … very precise wording of s 4 leaves it open – and indeed the Bill as a whole arguably requires – that a Court should, at least in a case of serious infringement … formally declare that inconsistency ... .

[45] The argument was made by the Solicitor-General that Parliament does not breach individual rights when it enacts inconsistent legislation because Parliament has, in this way, changed the content of those rights.[56] Counsel also drew in aid s 92J of the Human Rights Act. That section provides that where the Human Rights Review Tribunal finds an enactment is "in breach" of Part 1A the only declaration the Tribunal can make is that the enactment is "inconsistent" with the right to freedom from discrimination.[57]

[46] It is clear that the scheme of the Bill of Rights preserves Parliament's ability to legislate inconsistently with rights. But a formal declaration to the same effect is not in conflict with that. Rather, in this sense, the Bill of Rights remains as the standard or palimpsest albeit Parliament has exercised its power to legislate inconsistently with

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54 Contrast Human Rights Act 1998 (UK), s 6(3) (acts of public authorities exclude Parliament).

55 F M Brookfield "Constitutional Law" [1992] NZ Recent Law Review 231 at 239. See also Andrew S Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ L Rev 43; and Paul Rishworth "*Reflections on the Bill of Rights after* Quilter v Attorney-General" [1998] NZ L Rev 683.

56 Hence the submission was made that it is inapt to refer to the vindication of rights because the legislature has acted lawfully in enacting the measure.

57 Section 92K(1)(a) of the Human Rights Act 1993 makes it clear that a declaration under s 92J does not affect the validity of the enactment to which the declaration relates. See also New Zealand Public Health and Disability Act 2000, s 70E(6) and (7).

that standard. The fact that Parliament may have enacted legislation, concerning which the Attorney-General has reported that the measure is not a justifiable limit on a right, does not affect this analysis. The s 7 report and a formal declaration serve different purposes albeit there may be debate about the effect of an adverse s 7 report on the exercise of the discretion to grant relief.

[47] Nothing turns on the choice of wording in s 92J of the Human Rights Act emphasised by the Solicitor-General. Two points can be made. First, s 92J was necessary to confer jurisdiction on the Human Rights Review Tribunal, as a statutory body without inherent jurisdiction, the power to make a declaration. And second, we agree with the Courts below that the s 92J jurisdiction provides some support for the notion declarations of inconsistency are within judicial function.

[48] It follows also that we do not consider this analysis is inconsistent with the legislative history, namely, the enactment of the Bill of Rights as an ordinary statute rather than, as initially proposed, supreme law.[58]

[49] In terms of the legislative history, for the reasons given in *Baigent* nor do we see that the absence of a remedies clause in the Bill of Rights alters the position.[59] We add that art 25 of the draft Bill attached to the White Paper would have provided for persons whose rights had been "infringed or denied" to "apply … to obtain such remedy as the court considers appropriate and just in the circumstances".[60] The White Paper said that in most situations covered by the Bill of Rights the courts would be able to "provide a remedy from their present armoury".[61] Hence, the White Paper set out various remedies from that armoury including that:[62]

- a person who wishes to take action forbidden by a statute claimed to be in breach of the Bill can seek a declaration.

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58 The impact of the legislative history and, in particular, the shift away from supreme law is discussed by Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago LR 389 at 389–392; and see also Scott Stephenson *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (The Federation Press, Sydney, 2016) at 191–193.

59 *Baigent*, above n 28, at 676–677 per Cooke P, 691 per Casey J, 698–699 per Hardie Boys J, 707 per Gault J, and 718 per McKay J.

60 The White Paper, above n 27, at 114.

61 At [10.184].

62 At [10.184].

[50] For these reasons, we consider the text and purpose of the Bill of Rights overall supports the court exercising its usual range of remedies of which a declaration is a part.

[51] The Attorney-General also placed some reliance on the absence of any of the mechanics that would usually be associated with provision for the making of a declaration such as ensuring notice is given to the Attorney-General and so on.[63] We agree that is the usual course in equivalent overseas legislation. But the absence of the mechanics does not mean the absence of a power.

Consistency with judicial function?

[52] The second of the Solicitor-General's two principal submissions was that there was no jurisdiction to make a declaration because the judicial function is adjudicatory. Here, where there is no controversy over the interpretation of the 2010 Amendment and no action can be taken in relation to the declaration, the submission is that the High Court's action is purely advisory. This submission is made in the context of the statement by the Court of Appeal that a declaration of inconsistency:[64]

> … is not a declaration of right. It determines no legal rights and conveys no legal consequences as between the parties.

[53] But a declaration that s 80(1)(d) is inconsistent with the Bill of Rights is a formal declaration of the law and, in particular, of the effect of the 2010 Amendment on the respondents' rights and status. It provides formal confirmation they are persons who are disqualified to vote by a provision inconsistent with their rights. Further, the courts may make a declaration under the Declaratory Judgments Act 1908 even when there is no lis.[65] Finally, the making of such a declaration is consistent with the usual function of the courts.

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63 Comparable statutes make provision for example for the Attorney-General to present the declaration to Parliament and prepare a response to it within given time-frames: Human Rights Act 2004 (ACT), s 33; and Charter of Human Rights and Responsibilities Act 2006 (Vic), s 37. There are also powers for the Minister to take remedial action: Human Rights Act 1998 (UK), s 10; and provision for the possibility of paying compensation: European Convention on Human Rights Act 2003 (Republic of Ireland), s 5.

64 *Taylor* (CA), above n 4, at [66].

65 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [5]–[9] per Elias CJ and [82] per Blanchard, Tipping, McGrath and William Young JJ.

[54] There is some support for the latter proposition in the decisions of the Supreme Court of Canada in *Manitoba Metis Federation Inc v Canada (Attorney-General)*[66] and in *Canada (Prime Minister) v Khadr*[67] both of which are referred to in the more recent decision of *Mikisew Cree First Nation v Canada (Governor General in Council)*.[68] A majority of the Court in the latter case indicated declaratory relief may be available post-enactment to provide a remedy in the context of a challenge to legislation on the basis it is inconsistent with s 35 of the Constitution Act 1982, which recognises and affirms aboriginal and treaty rights.[69] In discussing the relief available post-enactment of legislation, Karakatsanis J noted that a declaration was available without a cause of action.[70]

[55] Nor is the declaration without consequence. It would have some implications in the context of a complaint under the Optional Protocol to the ICCPR.[71] Tipping J delivering the judgment of the Court of Appeal in *Moonen* noted that a "judicial indication" of inconsistency "will be of value should the matter come to be examined by the Human Rights Committee".[72] And, the Court of Appeal suggested, "It may also be of assistance to Parliament if the subject arises in that forum."[73]

[56] The making of a formal declaration is also another means of vindicating the right in the sense of marking and upholding the value and importance of the right.[74] Accordingly, while Cooke P in *Temese v Police* indicated that a statement by the court

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66 *Manitoba Metis Federation Inc v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623 at [143] per McLachlin CJ and Karakatsanis J (on behalf of McLachlin CJ, LeBel, Fish, Abella, Cromwell and Karakatsanis JJ).

67 *Canada (Prime Minister) v Khadr* 2010 SCC 3, [2010] 1 SCR 44 at [2], and see also [46]–[47].

68 *Mikisew Cree First Nation v Canada (Governor General in Council)* 2018 SCC 40.

69 At [47] per Karakatsanis J (delivering the reasons of Wagner CJ, Karakatsanis and Gascon JJ), citing *Manitoba Metis*, above n 66, at [69] and [143]. See also [63]–[64] per Abella J (delivering the reasons of Abella and Martin JJ), [145] per Brown J and [167] per Rowe J (delivering the reasons of Moldaver, Côté and Rowe JJ).

70 At [47]. Abella J also observed that declarations are available regardless of whether consequential relief is available at [97], citing *Canada (Prime Minister) v Khadr*, above n 67, at [46]–[47].

71 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

72 *Moonen,* above n 32, at [20]. This was in the context of whether there was utility in the Court considering whether or not a provision was inconsistent with s 5 of the Bill of Rights albeit the effect of s 4 was that the Court would have to apply the provision.

73 At [20].

74 *Vogel v Attorney-General* [2013] NZCA 545, [2014] NZAR 67 at [83]–[84]. See also *Taunoa*, above n 28, at [107] per Elias CJ, [300] per Tipping J and [368] per McGrath J; *Manga v Attorney-General* [2000] 2 NZLR 65 (HC) at [126]; and *Golder v United Kingdom* (1975) 1 EHRR 524 (ECHR) at 541.

of inconsistency "could be seen by some to be gratuitously criticising Parliament by intruding an advisory opinion", Cooke P also suggested that, "possibly that price ought to be paid".[75]

[57] As to other implications, the Court of Appeal did not attach any weight to the implications in terms of costs. That was because an indication of inconsistency in the reasoning (as in *Hansen*) could be relevant to the discretion to award costs.[76] We, similarly, do not see the costs implications as significant.

[58] Finally, the Crown's argument relied on the fact there was no dispute that the 2010 Amendment was inconsistent with the Bill of Rights (and was not a justified limit on the right to vote). But that is not always going to be the position. Other cases may not be so clear cut. In those cases the making of a declaration can have some effect in the sense of clarifying a disputed point of interpretation. Further, where a formal declaration has been made, that may provide some protection against any attempt to re-litigate the question of consistency with the Bill of Rights. Arguably, the greater formality means a declaration is more effective than an indication of inconsistency in this sense. In any event, matters such as the utility of relief may be relevant to the discretion to grant relief.

[59] The Attorney-General relies also in this context on *Momcilovic v R*[77] and on *A v Secretary of State for the Home Department*.[78] *Momcilovic* involved a set of facts analogous to *Hansen*[79] in that it related to the application of a reverse onus in a drug case. *A v Secretary of State* dealt with the validity of a declaration the Special Immigration Appeals Commission had granted. The declaration was to the effect that legislation declaring a state of public emergency was inconsistent with anti-discrimination provisions in the Convention for the Protection of Human Rights and Fundamental Freedoms.[80]

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75 *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.
76 *Taylor* (CA), above n 4, at [161].
77 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.
78 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
79 Above n 30.
80 Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953), arts 14 and 15. This Convention is included in sch 1 to the Human Rights Act 1998 (UK).

[60] *Momcilovic* was decided on grounds not relevant here but the Court considered a number of issues relating to the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter). The Charter contains provisions equating to ss 5 and 6 of the New Zealand Bill of Rights.[81] Section 36 of the Charter empowered the Supreme Court to make declarations of inconsistent interpretation. Section 36(5) makes it clear that a declaration does not affect "the validity, operation or enforcement" of the provision to which the declaration relates or create "any legal right or give rise to any civil cause of action".

[61] The Attorney-General points to the findings in *Momcilovic* that making a declaration of inconsistency under s 36 was not within the judicial function conferred by Ch III of the Commonwealth of Australia Constitution Act 1900 (UK) (the Constitution).[82]

[62] We consider the approach to this aspect in *Momcilovic* has to be assessed against the particular Australian constitutional law setting. Only "a court referred to in s 71" of the Constitution can exercise Commonwealth judicial power and such a court "cannot exercise non-judicial power, or a power that is not incidental to a judicial power".[83] Importantly for present purposes the Constitution is, as Professor Michael Taggart said, generally treated "as establishing a firm separation of powers between the three branches of government, much stricter than in the [United States of America] or Canada".[84] It is construed as "especially rigid in separating and protecting judicial power".[85] It is in the context of, essentially, ensuring the maintenance of the separation

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81 Section 7 of the Charter is the equivalent to s 5 of the Bill of Rights and s 32 is the equivalent of s 6.

82 See at [80] and [89] per French CJ. Bell J agreed with French CJ's reasons for the conclusion there was no exercise of a judicial function: at [661]. See also Gummow J at [178] and [184]. Hayne J agreed with Gummow J on this point: at [280]. Similarly, Heydon J said the power was not judicial but "merely advisory": at [457]. Crennan and Kiefel JJ said the making of a declaration was not an exercise of a judicial power but found it was incidental to judicial power: at [584] and [600].

83 Will Bateman and James Stellios "Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights" (2012) 36 MULR 1 at 7, discussing *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

84 Michael Taggart "'Australian Exceptionalism' in Judicial Review" (2008) 36 FL Rev 1 at 4. See also Scott Stephenson "Rights Protection in Australia" in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (OUP, Oxford, 2018) 905 at 922.

85 At 5.

of powers that the High Court of Australia considered s 36 of the Charter in *Momcilovic*.

[63] The observations in *Momcilovic* should be seen in light of this feature of the way the Constitution is interpreted. But, in any event, as we have said, we consider making a declaration which confirms rights and status is a part of the judicial function in the New Zealand context.[86] A further distinguishing feature in terms of the New Zealand position is s 3 of the Bill of Rights which has no equivalent in the Charter.

[64] Nor do we see *A v Secretary of State* as supporting the argument the making of a declaration of inconsistency is outside of judicial function. Indeed, the case overall provides support for the approach we take in that it confirmed the court had a role in scrutinising the proportionality of measures taken in derogation of obligations under the European Convention on Human Rights. That was so despite recognition that the decision that had been made about the existence of a threat to national security involved political judgement. Against that background, the majority decided that the response adopted here was not a proportionate one and was unjustifiably discriminatory on prohibited grounds. The order was quashed.

[65] We accordingly conclude that there is power to make a declaration of inconsistency and that such a power is consistent with judicial function.

[66] We add that in its reasoning towards the conclusion there was power for the higher courts to make a declaration of inconsistency, the Court of Appeal canvassed the relationship between the political and judicial branches of government and the role of the higher courts under the New Zealand constitution.[87] As is apparent, we have not found it necessary to undertake a similar exercise. We are accordingly not to be taken as endorsing the Court of Appeal's approach towards these matters.

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86 See also *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84 at [46].

87 *Taylor* (CA), above n 4, at [149]–[156] and [164]. We add that we are inclined to agree with the Chief Justice below at [107] that the declaration is a response to those whose rights are affected, and not, as the Court of Appeal suggested, to assist Parliament in its role.

[67] The remaining issues, that is, Mr Taylor's standing and whether a declaration should have been made in this case can be dealt with briefly.

Mr Taylor's standing – the cross-appeal

[68] As we have noted, no question of Mr Taylor's standing was raised by the Crown in either of the Courts below.[88] The matter was accordingly not dealt with in the High Court and was the subject of only brief discussion in the judgment of the Court of Appeal. In these circumstances, we consider it is not helpful for us to traverse broader questions of public interest standing. Given the way in which the issue of standing arose, we do not have the benefit of these broader questions having been properly ventilated in the Courts below.

[69] Instead, we are content to conclude Mr Taylor has standing on the basis the 2010 Amendment expressly continued the prohibition on voting for long-term prisoners especially in the context of a case focused on the jurisdiction of the court to make a declaration of the type sought.[89]

The decision to grant a declaration in this case

[70] As with standing, as the jurisprudence develops questions over the approach to be taken to the exercise of the discretion to grant relief will arise.[90] However, we do not need to resolve those questions or indeed any questions about how the discretion to grant relief should have been exercised in this case. That is because the argument before us focused on whether the court has the power to grant relief at all. In these circumstances where, apart from the question of Mr Taylor's standing, there were no submissions addressed to the exercise of the discretion, we see no basis for disturbing the conclusion of the Courts below that a declaration was appropriate.

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88 See above at [17].

89 2010 Amendment, s 6.

90 In addition, there may well be a range of other practical issues about the approach to those cases in which a declaration of inconsistency is sought. But it is not necessary or appropriate for us to embark on a consideration of these matters now in the absence of argument.

Result

[71] For these reasons, in accordance with the view of the majority, the appeal is dismissed. The cross-appeal is allowed. The effect of that decision is that Mr Taylor has standing. However, as the Court of Appeal did not amend the declaration of inconsistency granted,[91] we need not amend the order granted below.

[72] Costs are reserved. If not able to be agreed, submissions on costs should be filed by the respondents on or before 4 pm on 28 November 2018 and by the appellant on or before 4 pm on 5 December 2018. Any submissions in reply are to be filed by the respondents on or before 4 pm on 12 December 2018.

ELIAS CJ

[73] The High Court granted the respondents, all sentenced prisoners, a declaration that the voter disqualification for prisoners under the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 is "inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act".[92] The Court of Appeal dismissed the Attorney-General's appeal.[93] He now appeals with leave to the Supreme Court on a point of importance: does the High Court have jurisdiction to grant a declaration that legislation is inconsistent with the New Zealand Bill of Rights Act? It is accepted that the 2010 Act is inconsistent with the right to vote under s 12(a) and cannot be justified under s 5 as a limitation that is reasonable in a free and democratic society. The Attorney-General's position is, rather, that the High Court has no power to grant a declaration as a standalone remedy.

[74] I have had the advantage of reading in draft the reasons given by Ellen France J. I agree with her conclusion that a declaration is available as a remedy in circumstances of legislative breach of the New Zealand Bill of Rights Act and am in general agreement with her reasons, although I add some additional points of my

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91 *Taylor* (CA), above n 4, at [189].

92 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 (Heath J) (referred to throughout as *Taylor* (HC)) at [79].

93 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 (Kós P, Randerson, Wild, French and Miller JJ) (referred to throughout as *Taylor* (CA)).

own and differ in emphasis on some matters. I do not repeat the matters of background covered by Ellen France J, which I adopt.

The appeal

[75] The applicants in the proceedings are sentenced prisoners who are prevented by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 from being eligible to vote. The 2010 Amendment Act disqualified all sentenced prisoners by substitution of a new s 80(1)(d) of the Electoral Act 1993. It extended the pre-existing ineligibility of prisoners serving sentences of three years or more to all sentenced prisoners.

[76] The three year disqualification term had originally been included in the Electoral Act 1993 following the recommendation of the Royal Commission on Electoral Reform that such a term was comparable to the proposed loss of voting rights on three years' absence from New Zealand.[94] The same period was also used in the 1993 Act in the disqualification of those detained under mental health provisions.[95]

[77] The new s 80(1)(d) is expressed to apply only to those sentenced after enactment of the 2010 Amendment Act. For those prisoners already subject to disqualification because their sentences were for three years or more, transitional provisions in s 6 of the 2010 Amendment Act provided "[t]o avoid doubt" that a person disqualified by reason of the former s 80(1)(d) "continues to be disqualified for registration as an elector as if this Act had not been enacted".

[78] With the exception of Arthur William Taylor, all the respondents to the present appeal are prisoners sentenced after enactment of the 2010 Amendment Act. Mr Taylor was already a prisoner sentenced to more than 10 years of imprisonment at the time of the amendment of s 80(1)(d). His disqualification is therefore continued by the transitional provision contained in s 6 of the 2010 Amendment Act. An issue on the appeal (although not in the High Court) is whether Mr Taylor has standing to

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94 Royal Commission on the Electoral System "Report of the Royal Commission on the Electoral System: Towards a Better Democracy" [1986–1987] IX AJHR H3 at [9.21].

95 Section 80(1)(c).

seek a declaration that s 80(1)(d) is inconsistent with the right to vote contained in s 12(a) of the New Zealand Bill of Rights Act.

[79] The respondents' statement of claim sought a declaration that the 2010 Amendment Act was inconsistent with the right to vote under s 12(a) of the New Zealand Bill of Rights Act. It did not challenge the pre-existing disqualification for those prisoners serving sentences of more than three years under s 80(1)(d) as enacted in 1993.

[80] In his statement of defence, the Attorney-General did not plead to the claims of breach of s 12(a) (on the basis that they were assertions of law) but denied that the prisoner applicants were entitled to any relief. In addition, the Attorney-General took the position that the High Court lacked jurisdiction to make an order declaring an Act of Parliament to be "inconsistent" with a provision of the New Zealand Bill of Rights Act and, in any event, ought to decline to make any such order in the present case.

[81] As already indicated, the Attorney-General accepts that the 2010 Amendment Act is inconsistent with the right to vote contained in s 12(a) by which "[e]very New Zealand citizen who is of or over the age of 18 years" has the right to vote in elections of members of the House of Representatives. Nor does the Attorney-General seek to argue that the blanket ban on prisoner voting is a limitation on the right to vote which is justifiable in a free and democratic society under s 5 of the New Zealand Bill of Rights Act.

[82] In this position, the Attorney-General holds to the view first expressed in his report on the Bill to the House of Representatives under s 7 of the Act. The report acknowledged that the disqualification appeared to be inconsistent with s 12(a). And it indicated that, because the proposed legislation was "both under and over inclusive", with "irrational effects" (which depended entirely on the date of sentencing), the effect of the Bill was "disproportionate to its objective" and could not be justified under s 5.[96]

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[96] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (17 March 2010) at [14]–[16].

[83] The history of the litigation in the Courts below is set out at [13]–[19] of the reasons of Ellen France J and need not be repeated. A declaration of inconsistency was made in the High Court and upheld on the Attorney-General's appeal to the Court of Appeal. Heath J considered that Mr Taylor was in a different position than the other applicants but did not exclude him from the relief granted because no challenge had been made to his standing.[97] The Court of Appeal considered this approach was wrong and that "[t]he Crown ought to have been attentive to the wider implications of standing". Because it considered that the point was, for Mr Taylor, "academic" it declined him standing: "His rights are not sufficiently engaged to warrant an incompatibility analysis, let alone to justify extending a formal invitation to Parliament to reconsider the 2010 Act at his behest."[98]

[84] The principal area of dispute in the Courts below was about availability of the remedy of declaration of inconsistency. The Attorney-General did not seek to justify the blanket disqualification of prisoners introduced in 2010. As recorded by Heath J in the High Court, counsel for the Attorney-General advised the Court that he did not resile from the view in the s 7 report that "the present s 80(1)(d) appeared to be inconsistent with s 12 of the Bill of Rights, and could not be justified under s 5".[99] No such concession was made in relation to the disqualification of prisoners already serving sentences of three years or more under the pre-existing legislation continued in effect by s 6 of the 2010 Amendment Act.[100] The compatibility with s 12(a) of the disqualification on the basis of three years' imprisonment previously in effect and maintained in relation to prisoners like Mr Taylor is not in issue on the appeal.

[85] The questions on which leave was granted for appeal to the Supreme Court were whether the Court of Appeal was correct to make a declaration of inconsistency and whether Mr Taylor has standing in the appeal.[101]

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97 *Taylor* (HC) at [3].

98 *Taylor* (CA) at [177].

99 *Taylor* (HC) at [32].

100 Continued disqualification of prisoners already serving sentences of three years or more is provided for in s 6(a) of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010. It is unnecessary to decide whether without that provision existing disqualification would be a matter of "status" preserved by s 17 of the Interpretation Act 1999, as was suggested in argument.

101 *Attorney-General v Taylor* [2017] NZSC 131.

The statutory and common law context

[86] The Supreme Court of New Zealand, first established in 1841, was given "jurisdiction in all cases as fully as Her Majesty's Courts of Queen's Bench Common Pleas and Exchequer at Westminster have in England" and "all such equitable jurisdiction as the Lord High Chancellor of Great Britain hath in England".[102] The jurisdiction conferred included the inherent jurisdiction of the British courts as well as jurisdiction conferred by statute. When the Judicature Act was enacted in 1908, it provided that "[t]he Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand".[103] The Supreme Court, renamed the High Court in 1980, has continued to have the jurisdiction described in the Judicature Act 1908.

[87] Today the general jurisdiction of the High Court is described in s 12 of the Senior Courts Act 2016:

> **12 Jurisdiction of High Court**
>
> The High Court has—
>
> (a) the jurisdiction that it had on the commencement of this Act; and
>
> (b) the judicial jurisdiction that may be necessary to administer the laws of New Zealand; and
>
> (c) the jurisdiction conferred on it by any other Act.

[88] The New Zealand Bill of Rights Act 1990 was enacted "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand" and "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".[104] It "affirms" the "rights and freedoms" identified in Part 2 of the Act, largely patterned on the provisions of the ICCPR, but makes it clear that "existing" rights and freedoms

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102 Supreme Court Ordinance 1841 5 Vict 1, cls 2 and 3. Clauses 2 and 3 of the Supreme Court Ordinance 1844 7 Vict 1 (which replaced the 1841 Ordinance following its disallowance) were in the same terms.

103 Judicature Act 1908, s 16.

104 Long title, referring to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

are not abrogated or restricted "by reason only that the right or freedom is not included in this Bill of Rights or is included only in part".[105]

[89] Section 12 of the New Zealand Bill of Rights Act affirms art 25 of the International Covenant on Civil and Political Rights. It recognises a right to vote in elections. Commentary by the United Nations Human Rights Committee recognises that the right to vote may be restricted for grounds which are reasonable and to an extent that is proportionate, and that suspension of the right to vote of prisoners if proportionate and reasonable may not breach the right.[106]

[90] The "right to justice" recognised in s 27 of the New Zealand Bill of Rights Act provides every person with "rights, obligations, or interests protected or recognised by law" with the right to apply, in accordance with law, for judicial review of any determination of a public authority which affects those rights, obligations, or interests.

[91] The New Zealand Bill of Rights Act applies only to the exercise of public power. Its application is set out in s 3:

> **3 Application**
>
> This Bill of Rights applies only to acts done—
>
> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[92] Section 4 makes it clear that "other enactments"[107] are not affected by inconsistency with the Bill of Rights:

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105 Sections 2 and 28.

106 Office of the High Commissioner for Human Rights *CCPR General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote) – The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) at [14].

107 Defined by s 29 of the Interpretation Act as "the whole or a portion of an Act or regulations". "Act" is itself defined as "an Act of the Parliament of New Zealand or of the General Assembly; and includes an Imperial Act that is part of the law of New Zealand". Regulations are also defined to include rules made by Order in Council or other legislative instruments.

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

[93] The scheme of the New Zealand Bill of Rights Act is careful. It does not in its terms prevent judicial review of acts of the legislative, executive, or judicial branches of government for rights consistency. Indeed, s 27 of the Bill of Rights on its face recognises a right to apply for judicial review by someone whose rights or interests are affected. Such rights and interests must include those rights under the New Zealand Bill of Rights Act itself. Whether there is a right recognised by s 27 to judicial review of legislation which is inconsistent with rights is not a question directly before us. The Crown has not sought to argue that judicial review cannot be available. Rather, it argues that the Court does not have jurisdiction to grant declaratory relief that legislation is inconsistent with rights confirmed in the New Zealand Bill of Rights Act.

Declarations relating to rights are judicial functions

[94] A principal argument on behalf of the Attorney-General was that the declaration sought was outside proper judicial function because "advisory" only, in circumstances where no further consequential relief was available. Reference was made to observations in Australia that such advisory opinions are not within the judicial function of the Commonwealth. Reference was made also to the absence of any "advisory jurisdiction" such as the reference mechanism available under the Supreme Court Act in Canada.[108] The argument advanced for the Attorney-General drew also on statements made by the House of Lords about the departure from "traditional" function necessitated by the power to make declarations conferred in the Human Rights Act 1998 (UK).

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[108] Supreme Court Act RSC 1985 c S-26, s 53.

[95] The suggestion that the High Court has no proper function in declaring rights unless the declaration has further consequence for legal interests seems to me to be over-broad. The jurisdiction to grant a declaration as to the inconsistency of legislation with rights is not comparable with the Canadian advisory opinion mechanism which was considered and rejected when the New Zealand Supreme Court was set up.[109] In what follows I also indicate why I do not think that the reliance placed by the Attorney-General on the decisions of the High Court of Australia in *Momcilovic v R*[110] and the House of Lords in *A v Secretary of State for the Home Department*[111] is helpful to the argument. But the immediate point to be made about the suggestion that declaration of rights takes the judiciary out of its proper role is that the submission is inconsistent with our own legal order. It is inconsistent with the obligation of the courts to grant remedies for infringement of the New Zealand Bill of Rights Act, for reasons given by Ellen France J with which I agree. It is also inconsistent with the Declaratory Judgments Act 1908.

[96] The Declaratory Judgments Act 1908 is an Act of general application. By s 2 it provides that:

> No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

[97] This stand-alone provision making it clear that binding declarations of right may be made whether or not consequential relief is sought is distinct from the jurisdiction recognised by s 3 of the Act to make declaratory orders on originating summons. Indeed, s 11 recognises that declaratory judgments or orders may be made in cases where the Court "has no power to give relief in the matter to which the judgment or order relates" and irrespective of whether the matter would otherwise "be within the exclusive jurisdiction of any other Court".

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109 *Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, April 2002) at 48–49.

110 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

111 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

[98] Such declaratory orders may be made where the effect of something any person desires to do depends on the construction or validity of any statute.[112] The order has "the same effect as the like declaration in a judgment in an action" and binds anyone on whom the summons is served (pursuant to directions made by the Court on application) "and on all other persons who would have been bound by the said declaration if the proceedings wherein the declaration is made had been an action".[113]

[99] Both "declaratory judgments" made in any action or proceeding and "declaratory orders" made under the originating summons procedure provided by the Declaratory Judgments Act may be made "in anticipation of any act or event", providing authoritative advice against which future actions can be taken.[114] Declaratory judgments and orders are discretionary and may be declined by the Court "on any grounds which it deems sufficient".[115]

[100] The scheme of the Declaratory Judgments Act, in permitting declarations which have no other effect or are "anticipatory" and which are available even if the Court "has no power to give [other] relief", permits appropriate remedy for breaches of rights. In the case of legislative encroachment on rights, envisaged by the terms of s 4 of the New Zealand Bill of Rights Act, it meets rule of law concerns about non-vindication of fundamental rights owed by the legislative branch under s 3, while observing parliamentary supremacy in law-making.

The reason for a declaration

[101] As indicated, I agree with the reasons given by Ellen France J at [53]–[58] in explaining why a declaration of inconsistency is important in providing formal confirmation that the blanket disqualification of prisoners from voting is in breach of their rights under s 12(a). As she explains, such declaration may have implications under the Optional Protocol to the International Covenant on Civil and Political Rights. More immediately, it is a formal and authoritative statement which is vindication for the appellants in the litigation. For example, it may have implications

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112 Section 3.
113 Section 4.
114 Section 9.
115 Section 10.

in relation to re-litigation in the future between those who are parties to the decision or who are served with notice of it. As the Declaratory Judgments Act makes clear, but as also follows from common law principles, only those party to the judgment or who are served with notice of an application for declaratory order are bound by it and procedural rules to bring in such parties are provided both in the Declaratory Judgments Act itself and in the High Court Rules.

[102] In addition to expressing agreement with the reasons given by Ellen France J as to why declaratory relief is available in vindication of rights, I also consider it is necessary to express my disagreement with what I consider to be an over-ambitious argument advanced for the Attorney-General. It was argued that there is no breach of rights in the enactment of inconsistent legislation since the legislation abridging the right has changed its scope. That submission denies the fundamental nature of the enacted rights (declared as such in the legislation) and is inconsistent with indications, contained for example in the Cabinet Manual, that legislation such as the New Zealand Bill of Rights Act occupies a position properly described as "constitutional".[116] Nor is the argument easy to reconcile with the principle of legality, which requires Parliament to speak unmistakeably when limiting fundamental rights recognised by the common law.[117] More importantly, I do not think it is an argument that is consistent with the scheme of the New Zealand Bill of Rights Act. The Act requires legislation to be given effect when it is inconsistent with the rights contained in the Act but withholds the legitimacy of compliance with those fundamental rights. That is because s 3 provides that observance of rights applies to acts of the legislature.

[103] Under New Zealand constitutional arrangements, saying whether the obligation of compliance has been met is inescapably a judicial function. I consider that the scheme of the New Zealand Bill of Rights Act means that modification of the content of rights contained in the Act is unlikely to be accomplished by inconsistent action but will generally need legislative amendment of the New Zealand Bill of

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116 Cabinet Office *Cabinet Manual 2017* at 2.

117 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 per Lord Hoffmann.

Rights Act itself.[118] That does not affect the ability of Parliament to legislate inconsistently with the New Zealand Bill of Rights Act. A declaration by the High Court that it has acted inconsistently with a right does not impede the freedom of action of Parliament.

[104] I agree with Ellen France J that, as recognised in *Baigent's case*,[119] the courts can provide remedies for breaches of the New Zealand Bill of Rights Act by drawing on the full range of general remedial responses they possess. In the case of the High Court, that includes through development of the common law as Gault J suggested might be appropriate in *Baigent's case*.[120] Such development is consistent with the statutory recognition that the High Court has "the judicial jurisdiction that may be necessary to administer the laws of New Zealand", laws which now include ss 3 and 4 of the New Zealand Bill of Rights Act.

[105] It seems to me that the scheme of the New Zealand Bill of Rights Act makes it clear that inconsistency with rights is indeed itself a question of right for which declaratory relief may be sought. I am not able to agree with the view of the Court of Appeal at [66] that a declaration of inconsistency "is not a declaration of right".[121] Declaration of right is available if inconsistency is a result of executive or judicial action. In such cases declaratory relief may well be in addition to other relief, but will be especially important where no other relief is available (as for example where there is an immunity as in *Attorney-General v Chapman*[122]). Otherwise there is a rule of law deficit, in relation not only to inconsistency with the right but in relation to absence of justification.

[106] The innovation accomplished by s 3 of the New Zealand Bill of Rights Act is its recognition that inconsistency with the enacted human rights may be as a result of legislation. Section 4 is a precise provision which requires inconsistent legislation to

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118 For a recent example of legislative amendment of the New Zealand Bill of Rights Act see the New Zealand Bill of Rights Amendment Act 2011 which amended s 24(e) to reflect the regime established in the Criminal Procedure Act 2011.

119 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

120 At 711.

121 If *Boscawen v Attorney-General (No 2)* [2008] NZAR 468 (HC) (aff'd [2009] NZCA 12, [2009] 2 NZLR 229) is authority for a different proposition, I would not follow it.

122 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

be observed (at least if breach of the New Zealand Bill of Rights is the "only" reason for invalidity). It leaves open what other relief may be appropriate. Declaration seems to me to be an obvious remedial response available to the Court given s 4 where legislative limitation is not justified.

[107] I am of the view that declaration in such circumstances is an available remedy for acts of the legislature constituting unjustified infringement of rights. I prefer to see such response as one made to those whose rights are affected, rather than one to assist Parliament in its function, as the Court of Appeal suggested.

[108] The case of *Momcilovic* relied upon in argument by the Attorney-General in support of the contention that declaration is not an appropriate judicial function concerned the Victorian Charter of Human Rights and Responsibilities Act 2006. Under s 36 of the Charter the Supreme Court of Victoria was empowered to make a declaration that legislation cannot be interpreted consistently with the Charter. Such declaration was stipulated in the legislation to have no legal effect on the outcome of proceedings before the Court. Nor did it affect the validity of the statutory provision under consideration.[123]

[109] The High Court of Australia took the view that the power under s 36 was not a judicial function, although Crennan and Kiefel JJ dissented on the point, being of the view that the declaratory function conferred was ancillary to judicial function.[124] As a result, French CJ and Bell J held that it could not found an appeal to the High Court under s 73 of the Constitution because it did not raise a "matter".[125] Gummow and Hayne JJ held that s 36 was invalid as entailing conferral of non-judicial function on courts invested with federal jurisdiction because such declarations could "produce no foreseeable consequences for the parties".[126] Heydon J agreed that s 36 was invalid but would also have found the Charter as a whole invalid.[127]

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123 Section 36(5).
124 *Momcilovic* at [582]–[600].
125 At [88] and [98]–[101] per French CJ (Bell J agreeing at [661]).
126 At [172]–[189] per Gummow J (Hayne J agreeing at [280]).
127 At [456]–[457].

[110] The analysis undertaken in *Momcilovic* depends on constitutional context which is quite different from that which applies in New Zealand.[128] It also turns upon imperatives relating to the consistency of the common law throughout Australia which do not apply in our unitary legal order.

[111] Comparison is also affected by the very different terms of the Victorian Charter and the New Zealand Bill of Rights Act. The requirement under s 3 of the New Zealand Bill of Rights Act that the rights recognised apply to acts of the legislative branch has no parallel in the Victorian Charter. Further difference in the New Zealand legal order arises from the long-standing jurisdiction of the High Court in New Zealand to grant declaratory relief, whether or not any other relief is available, discussed above at [94]–[100]. Because of these very different constitutional and legislative circumstances, I do not consider that the reasoning in *Momcilovic* is helpful when considering the remedies available in New Zealand under the New Zealand Bill of Rights Act.

[112] The argument for the Attorney-General also relied on the decision of the House of Lords in *A v Secretary of State for the Home Department.* In issue in that case was the validity of a declaration granted by the Special Immigration Appeals Commission that determination of the Secretary of State that there was a public emergency threatening the life of the nation (permitting derogation from the right to personal liberty under art 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[129]) was incompatible with the anti-discrimination provisions of the Convention. The Court of Appeal had allowed the appeal by the Secretary of State. The House of Lords, by majority, confirmed that the determination of the question of threat to national security was a matter of political judgment which the courts would be reluctant to second-guess. It nevertheless concluded that the response adopted was disproportionate and was unjustifiably discriminatory on the

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128 It entails stricter separation of powers than applies in jurisdictions with similar primary constitutional texts such as the United States or Canada: Michael Taggart "'Australian Exceptionalism' in Judicial Review" (2008) 36 FL Rev 1 at 4–5; and see also Scott Stephenson "Rights Protection in Australia" in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, Oxford, 2018) 905 at 922.

129 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

basis of nationality or immigration status. It quashed the order of derogation on that basis.

[113] It is clear from the reasons of members of the House of Lords that, even on the threshold question of whether there was a state of public emergency, there was no complete division of institutional responsibility between courts and the political branches. Thus, Lord Bingham recognised a "spectrum" in which the relative institutional competencies of courts and political decision-makers would vary according to the nature of the question in issue.[130] At the political end of the spectrum strong grounds would be required to displace the determination of the Secretary for State. But that was not to suggest the supervisory jurisdiction of the courts was ousted.

[114] In relation to the proportionality of the response to the threat, Lord Bingham rejected the distinction drawn by the Attorney-General between the political and judicial spheres. The Attorney-General had been "fully entitled to insist on the proper limits of judicial authority", but he had been "wrong to stigmatise judicial decision-making as in some way undemocratic".[131] That was particularly the case since s 6 of the Human Rights Act 1998 (UK) made it unlawful for courts, as well as other public authorities, to act inconsistently with Convention rights. In such circumstances Lord Bingham, citing Professor Jowell, thought that the courts had been "charged by Parliament with delineating the boundaries of a rights-based democracy".[132]

[115] With Lord Walker as the sole dissentient and Lord Hoffmann prepared to go further and hold that there was no emergency justifying recourse to derogation, the other members of the House of Lords were in general agreement with Lord Bingham. Lord Nicholls referred to the "duty" of the courts under the Human Rights Act "to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected" and their "responsibility" to intervene if the primary decision-maker had given insufficient weight to human rights.[133] Lord Hoffmann

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130 *A v Secretary of State for the Home Department* at [29].

131 At [42].

132 At [42], citing Jeffrey Jowell "Judicial Deference: servility, civility or institutional capacity?" [2003] PL 592 at 597.

133 At [80].

treated declaratory relief as entirely appropriate in relation to legislative encroachment on rights. Lord Scott acknowledged, as other members had done, that the supervision of legislative action was an enlargement of the "normal" function of the courts but one that was laid on the courts by the Human Rights Act.[134] Lord Rodger accepted that under the Human Rights Act it is for the courts to "police" any lawful limits on executive or legislative decision-making, although he thought that the function being undertaken was the "traditional role" of the courts in protecting liberty.[135] Baroness Hale and Lord Carswell expressed complete agreement with the reasons of the other judges in the majority.[136]

[116] I do not read *A v Secretary of State for the Home Department* as providing any support for the argument that granting a declaration relating to legislative limitation of rights is a non-judicial function. It is recognised to be an extension of the role of the courts, but it is accepted that the function under the Human Rights Act 1998 (UK) was to ensure that human rights are observed, including in legislation. And, as Lord Rodger points out, such protection of rights is a "traditional role" of the courts, even if its application to the acts of the legislative branch is unusual under our constitutional arrangements.

[117] In New Zealand, there is no equivalent statutory conferral of a power to grant a declaration of incompatibility under the New Zealand Bill of Rights Act such as is found in the Human Rights Act 1998 (UK). That circumstance does not in my view mean that the reasoning in *A v Secretary of State for the Home Department* can be distinguished or that in New Zealand declaratory relief is inappropriate. I consider that the availability of declaratory relief follows from the scheme of the New Zealand Bill of Rights Act and its requirement that the rights recognised apply to the acts of the legislature. That is constitutional innovation, but it is a consequence of enactment of s 3. The responsibility to declare and maintain the boundaries and protect against erosion of human rights is however itself a traditional role undertaken by the courts, even though its application to legislative acts is unusual. The obligation of the courts is also reinforced by the inclusion of acts of the judicial branch as ones to which the

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134 At [145].
135 At [176]–[178].
136 At [219] per Baroness Hale and [240] per Lord Carswell.

rights contained in the New Zealand Bill of Rights Act apply. The Act treats the exercise of all jurisdiction of the courts, statutory and inherent, as itself public power in the exercise of which the rights and freedoms contained in the Act apply. Section 3 equally imposes in their acts the obligation to observe the New Zealand Bill of Rights Act, including in development of the common law.

[118] No statutory conferral of power to declare the law is required because such powers of declaration are within the inherent jurisdiction of the High Court, as explained above at [94]–[100]. Statutory conferral of a power to make declarations may have been necessary in the United Kingdom because the Human Rights Act 1998 (UK) does not contain a provision equivalent to s 3. The fact that the acts of the legislature are subject to the New Zealand Bill of Rights Act means that declaring whether it has acted inconsistently with that obligation is within the inherent jurisdiction of the High Court to say what the law is and because it has "the judicial jurisdiction that may be necessary to administer the laws of New Zealand", which include the New Zealand Bill of Rights Act.

[119] By contrast, because it is a statutory body, possessing no inherent jurisdiction, it was necessary for the jurisdiction to make declarations of incompatibility to be provided to the Human Rights Review Tribunal by the Human Rights Amendment Act 2001. But the conferral of that statutory jurisdiction is parliamentary recognition that declaratory jurisdiction is not incompatible with the New Zealand legal order and the balances struck by human rights legislation.

The claim by Arthur William Taylor

[120] I consider that Mr Taylor had sufficient standing to apply for a declaration that the 2010 legislation was in breach of the rights of sentenced prisoners to vote, applying general principles of standing in public law.[137] I do not accept the view expressed by the Court of Appeal that claims for declaratory relief for infringement of rights require a different approach to standing.[138] Mr Taylor cannot be treated as a busy-body with

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137 See *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL); *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA); and *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA).

138 See *Taylor* (CA) at [166].

no sufficient interest in vindication of the rights of prisoners. The observance of s 12(a) in relation to prisoners imprisoned for more than three years is not before us. But any interests Mr Taylor may have in challenging the arrangements under which he is disqualified are directly affected by the Attorney-General's stance that declaratory relief is never available for legislative breach of the New Zealand Bill of Rights Act. That position, the sole basis on which the appeal is brought in this case, is a stance of general application which would affect any claim he may subsequently bring relating to infringement of his rights. The declaration made, which the respondents seek to uphold in this Court, is not expressed in terms of violation of the rights of any of the respondents but is simply that the 2010 Amendment Act is "inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act". I consider that Mr Taylor has standing to seek that declaration and would allow his cross-appeal.

Conclusion

[121] I accept that whether to grant declaratory relief is a matter for assessment by the Court. In the present case I consider that the Courts below were right to make a declaration that the legislation is incompatible with s 12(a) because it was the only response available for denial of the right to vote in circumstances acknowledged not to be justified. For the reasons given, I would uphold the declaration made in the High Court.

WILLIAM YOUNG AND O'REGAN JJ
(Given by O'Regan J)

The issue

[122] The issue in this appeal is whether there is jurisdiction for the courts to issue declarations of inconsistency as a remedy for a person affected by a provision of a statute that is inconsistent with the New Zealand Bill of Rights Act 1990 and not a reasonable limit on the right that is justified in a free and democratic society. Like Ellen France J, we consider that, if such a jurisdiction exists, it flows from the Bill of Rights Act itself. The lack of express provision ruling out or ruling in such a jurisdiction means there is scope for differing views. We acknowledge the force of

the reasoning of Ellen France J and the Chief Justice, but have concluded that the better view is that, in the absence of a power conferred by statute, there is no such jurisdiction. We would therefore allow the Attorney-General's appeal and set aside the declaration made in the High Court. As this is a dissenting judgment, we will set out our reasons for this conclusion briefly.

Background

[123] The judgment of Ellen France J sets out the background and the relevant statutory provisions. We adopt her summary of the decisions of the High Court and Court of Appeal in these proceedings and of earlier decisions addressing the issue that arises in this case.

From indications of inconsistency to declarations of inconsistency

[124] There is no dispute that effective remedies should be available for breaches of the Bill of Rights Act.[139]

[125] Nor is there any question about the propriety of an indication of inconsistency being made in the context of the resolution of a dispute about the interpretation of a statute as set out by McGrath J in *Hansen* and Tipping J in *Moonen*.[140] But three things can be said about such indications. First, they are not purporting to be a remedy for a breach, granted to a victim of the breach. Secondly, they are a step in the reasoning to resolve a controversy before the court, rather than the resolution of a controversy. Thirdly, they are not a remedy that can be sought in a standalone claim for a declaration of inconsistency: there needs to be a controversy that requires the court to consider whether a provision is inconsistent in the course of an interpretation dispute requiring an analysis of ss 4, 5 and 6 of the Bill of Rights Act.

[126] The issue is whether the courts have jurisdiction to make a declaration in a self-standing proceeding, where the only issue is whether the statutory provision in

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139 Ellen France J, above at [29]–[30]; *Simpson v Attorney-General* [1994] 3 NZLR 667 [*Baigent's case*] (CA) at 676 per Cooke P.

140 Ellen France J, above at [31]; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253]–[254] per McGrath J; and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [19]–[20] per Tipping J.

issue is inconsistent with the Bill of Rights Act. The justification for this is said to be that Parliament has breached the Bill of Rights Act by passing the legislation containing the provision and the Court must fashion a remedy for the victim, that is the person whose right has been limited by the provision in a manner that is not reasonably justifiable. Ellen France J says the making of a formal declaration is a logical step from the idea that an effective remedy should be available for a breach of the Bill of Rights Act and the courts can draw upon the ordinary range of remedies to provide such a remedy.[141]

[127] In all the other jurisdictions where declarations of inconsistency or similar instruments are available, the purpose of the declaration is not to provide a remedy for a breach, because in all cases the legislature is not bound by the relevant rights instrument, so no breach occurs when inconsistent legislation is passed.[142] Rather, it is a *sui generis* process. In all cases, granting a declaration has legal consequences. In Victoria, the Australian Capital Territory and the Republic of Ireland, the making of a declaration triggers a requirement that a Minister or a similar public official draw the inconsistency to the attention of the legislature.[143] This is designed to prompt a reconsideration by the legislature.[144] In New Zealand, the Human Rights Act 1993 provides for a similar process where a declaration of inconsistency with the Human Rights Act is made by the Human Rights Review Tribunal under s 92J(2) of that Act.[145] In the United Kingdom, the making of a declaration of incompatibility triggers a remedial power allowing the relevant Minister to make amendments to the legislative provision in question to remove the incompatibility.[146]

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141 Ellen France J, above at [38].

142 See the Human Rights Act 2004 (ACT), ss 40(2)(a) and 40B; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 4(1)(i); Human Rights Act 1998 (UK), s 6(3); European Convention on Human Rights Act 2003 (Republic of Ireland), s 1(1), definition of "organ of the state".

143 See the Human Rights Act 2004 (ACT), ss 32(4) and 33; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36(6) and 36(7); European Convention on Human Rights Act 2003 (Republic of Ireland), s 5(3),

144 In the Australian Capital Territory and Victoria, the government is required to provide a formal response to the legislature within six months of receiving the declaration: see the Human Rights Act 2004 (ACT), s 33(3); Charter of Human Rights and Responsibilities Act 2006 (Vic), s 37.

145 Human Rights Act 1993, s 92K(2) and (3).

146 Human Rights Act 1998 (UK), s 10(2). This power is rarely used but amendments to resolve incompatibility issues have been made more frequently by the normal legislative process.

[128] As noted in the judgment of Ellen France J at [56], Cooke P said in *Temese v Police* that a statement of inconsistency "could be seen by some to be gratuitously criticising Parliament by intruding an advisory opinion".[147] He then said he thought it was possible that price should be paid, but it is not clear that he was foreshadowing a declaration granted as a remedy for a breach or an indication of the kind made in *Hansen*.

[129] In his Robin Cooke Lecture in 2010, Sir Anthony Mason talked about the possibility of a statement of inconsistency or a finding of inconsistency, but rejected the idea that there should be a declaration granted as relief or as a remedy.[148] In the same lecture, he said:

> The making of a formal declaration of inconsistency would have more significance if: (a) the court were authorised or required to make such a declaration; and (b) the Attorney-General were required (i) to be joined as a party; and (ii) to bring the making of a declaration to the notice of parliament within a prescribed time.

[130] We agree with that statement. In the Human Rights Act and the overseas models that provide for declarations of inconsistency to be made by a court, those features are present.[149]

[131] We accept that it would not be inconsistent with judicial function to have a process for making declarations of inconsistency, where that is a process mandated by the legislature. But, as just noted, in the overseas models, a declaration of inconsistency is not a remedy for breach of the relevant rights instrument. That raises the question of whether, when Parliament passes an inconsistent statutory provision, there is a breach of the Bill of Rights Act of a character for which the courts should fashion a civil remedy.

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147 *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.

148 Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (2011) 9 NZJPIL 1 at 14.

149 With the exception of the UK Human Rights Act in relation to (b)(ii): see above at [127]. See also above at n 143; Human Rights Act 2004 (ACT), ss 34 and 35; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36(3) and (4); Human Rights Act 1998 (UK), s 5; and European Convention on Human Rights Act 2003 (Republic of Ireland), s 6.

Declaration of inconsistency as a remedy for breach

[132] Professor Claudia Geiringer considers this issue in detail in an article published in 2007.[150] In that article, she expressed doubt as to whether s 3(a) of the Bill of Rights Act imposes on Parliament a legal obligation to legislate consistently with the Bill of Rights Act (albeit that this obligation cannot be enforced by the courts because of s 4). She described this view of s 3(a) as "fundamentally at odds with the policy of continuing legislative supremacy that underlay the enactment of the Bill of Rights".[151]

[133] It is true that the provision which is now s 3 was in its current form when the proposed Bill of Rights was intended to be supreme law.[152] However, the inclusion of s 4 into the Bill prior to its passing means that s 3(a), which says the Bill of Rights Act obligations apply to Parliament is immediately followed by s 4, which contemplates that Parliament will pass inconsistent legislation and that it will be effective.[153] In those circumstances, it is hard to see that s 3 is any limitation on Parliament's power to legislate. It is at least arguable that to the extent that there is a breach of the Bill of Rights resulting from the passing of inconsistent legislation, it is not of a character for which the courts are required to fashion a civil remedy. After all, s 4 removes the only truly effective remedy from consideration.

[134] We think it is also problematic as to whether a declaration of inconsistency is really a remedy and, if it is, whether it is an effective remedy. It does not do anything to benefit the "victim" in that the inconsistent statutory provision continues to apply so whatever limitations on the victim's rights have occurred continue to apply. Nor does it bind anyone to do anything. One commentator has described the power to

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150 Claudia Geiringer, "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago LR 389.

151 At 415.

152 See Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 [the White Paper] at 69. Clause 2 of the draft Bill proposed in the White Paper is on substantially similar terms to the current s 3 of the New Zealand Bill of Rights Act 1990.

153 Following consultation with the public, the Justice and Law Reform Committee recommended the proposed Bill of Rights Act be downgraded from "supreme" to "ordinary" law: "Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand" [1987–1990] XVII AJHR I 8C. This recommendation was carried through into the New Zealand Bill of Rights Bill 1989 (203-1). However, the current s 4 was not inserted until after the Select Committee process: see New Zealand Bill of Rights Bill 1990 (203-2) (select committee report) at 2–3.

make such declarations as "a judicial power to make non-binding declarations of legal non-right".[154] Again, this would be a unique feature of a New Zealand declaration of inconsistency because the declarations of inconsistency available under equivalent statutes in Australia, Ireland and the United Kingdom do have legal consequences, as described earlier.[155] Rather, a declaration would simply hang in the air and possibly create some sort of moral obligation on the part of the legislature to reconsider.[156] That in turn carries the risk that a formal order of the court may be simply ignored, with the consequential danger of the erosion of respect for the integrity of the law and the institutional standing of the judiciary.[157]

[135] Section 20L(1) of the Human Rights Act says that an enactment that is inconsistent with the right to be free from discrimination under s 19 of the Bill of Rights Act is a breach of Part 1A of the Human Rights Act. Section 92J provides that, if a finding is made that legislation breaches Part 1A of the Human Rights Act, the only remedy is the statutory declaration of inconsistency provided for in that section. Both the Attorney-General and the Human Rights Commission sought to draw support for their contrasting views from these provisions.

[136] For the Human Rights Commission, Mr Butler argued that these provisions were significant for three reasons. First, they demonstrated that Parliament recognised that a declaration of inconsistency jurisdiction would contribute to a robust human rights culture. We accept that is so, but we do not see that as supporting the case for a similar jurisdiction in the absence of a statutory provision conferring it. Secondly, s 92J(4) provides that nothing in s 92J affects the Bill of Rights Act, which clarifies that s 92J did not impliedly exclude a similar jurisdiction existing under the Bill of Rights Act. We accept this too, but we do not see that it can be converted into an indication by Parliament that a similar jurisdiction under the Bill of Rights Act exists in the absence of any statutory provision to that effect. Thirdly, as the s 92J jurisdiction

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154 Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 [Geiringer 2017] at 551.

155 Above at [127].

156 As the Court of Appeal suggested: *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [151], citing the observation made by McGrath J in *R v Hansen*, above n 140, at [254]. That observation was made in relation to an indication of inconsistency made as part of the Court's reasoning, rather than a formal court order, where one would normally expect an obligation rather than an expectation.

157 See Geiringer 2017, above n 154, at 570.

can be exercised by the courts on appeal from the Human Rights Review Tribunal, it would be anomalous if the courts could make declarations of inconsistency under s 92J but not otherwise. We see that as an argument that a more generic stand-alone jurisdiction to make declarations of inconsistency would be desirable, rather than that it exists.

[137] For the Attorney-General, the Solicitor-General argued that s 92J demonstrates that the legislative conferral of a power to make declarations of inconsistency is possible, but, until that is done, the making of a declaration of inconsistency is not a recognised judicial function.[158] She argued s 92J(4) was designed to ensure that the new jurisdiction under s 92J did not imply, recognise or confer a similar power on the courts in relation to the Bill of Rights Act generally. These points are arguable but the fact that s 92J can be credibly called in aid of such conflicting positions means that ultimately it does not provide strong support for either argument. It is notable, however, that the remedy available under s 92J of the Human Rights Act does have some consequence, in that it requires the responsible Minister to report to Parliament that the declaration has been made and the Government's response.[159]

Policy considerations

[138] We agree with Ellen France J that giving a declaration of inconsistency can be consistent with judicial function. But that does not create the jurisdiction to do so. Ellen France J says at [41] that a declaration meets the requirements of the International Covenant on Civil and Political Rights (ICCPR)[160] to give an effective remedy. That argument depends on the proposition that a declaration of inconsistency is an effective remedy, a proposition that we question.

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158 The Solicitor-General did not suggest any concern arose under art 9 of the Bill of Rights 1688 (Imp).

159 For completeness we note s 70E(7) of the New Zealand Public Health and Disability Act 2000 provides for a declaration of inconsistency in relation to (inter alia) Part 4A of that Act which does not appear to have any legal consequences. The context of that provision is important, however, as is apparent from its heading, which refers to precluding certain discrimination claims under the Human Rights Act 1993, in response to the decision of the Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456. That indicates the arguably ineffective remedy (precluding a declaration under s 92J of the Human Rights Act) for claims that were exempted from the complete bar created by the section was intentional.

160 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

[139] Ellen France J says a declaration is not without consequence, because it has implications for the victim in terms of the ability to complain under the optional protocol to the ICCPR, as Tipping J said in *Moonen* and in vindicating the right.[161] The former seems to us to be a relatively minor consequence. A complaint could still be made under the optional protocol if there were no stand-alone declaratory process available: it would just mean that this "domestic remedy" would not need to be exhausted before the complaint could be made. And, of course, Tipping J's comment was made in relation to an indication of inconsistency and, as mentioned above at [125], there is no dispute about the propriety of such indications. We accept vindication has value but we query the extent to which a declaration provides vindication given that a declaration binds no-one in relation to future actions and has no impact on the victim's position.[162]

Practical implications

[140] This is not a good case to decide these issues because the inconsistency is clear, there is no attempt to justify and Parliament knew this when it passed the Act restricting prisoner voting rights. However, it will not always be that case that there is no contest as to inconsistency. This is illustrated by the recent decision of *New Health New Zealand Inc v South Taranaki District Council* on fluoridation.[163] In that case O'Regan and Ellen France JJ concluded that the fluoridation of drinking water engages the right conferred by s 11 of the Bill of Rights Act 1990 not to be required to undergo medical treatment but was a justified limitation on that right and that accordingly there was no need to resort to s 6 of the Bill of Rights Act in the interpretation of the relevant statutory scheme. William Young J also considered that s 6 did not apply; this on the basis that the fluoridation of water does not engage s 11. There was thus a majority for the view that the fluoridation of water was not inconsistent with s 11.

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161 Ellen France J, above at [55] and [56], citing *Moonen,* above n 140, at [20].

162 The cases noted by Ellen France J above at n 74 refer to declarations made in relation to executive action. There is no dispute that the court has jurisdiction to make declarations in that context and such declarations are binding on the executive agency, unlike the declaration of inconsistency made in this case, which has no binding effect on the legislature. The issue in those cases was whether, as a matter of discretion, a declaration should be made rather than whether there was jurisdiction to make one.

163 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59.

[141] In deciding whether the fluoridating of water means that consumers are required to undergo medical treatment and, if so, whether statutory provision for fluoridation was a justified limitation on the s 11 right, it was necessary to engage in a process which involved:

(a) the interpretation of s 11;

(b) an evidence-based understanding of the way in which the fluoridation of water impacts on dental health and any other health benefits or disbenefits associated with drinking fluoridated water; and

(c) in the case of O'Regan and Ellen France JJ, an overlapping evaluative and in part factual assessment of whether fluoridation of water was a justified limitation for the purposes of s 5.

[142] This exercise occurred in a context in which the fundamental issue was whether the local authorities had a statutory power to fluoridate water. It was directed to "a step in the reasoning", that "step" being whether s 6 applied to the interpretation of the relevant legislation. This was in the context of judicial review proceedings where the evidence on which the case was determined was all in the form of affidavits on which there was no cross-examination. This meant that the exercise was reasonably manageable. In any event, given the importance of the right to seek judicial review of administrative action and the clear dictate of s 6, the Court had no alternative but to carry it out. If New Health's case had succeeded, the result would have been that the local authorities would not have been permitted to fluoridate water which would have been a tangible consequence of the litigation.[164]

[143] Let us assume that New Health had, from the outset, acknowledged that the legislation provided for the fluoridation of drinking water and had sought only a declaration that such fluoridation was inconsistent with s 11 of the Bill of Rights Act. As we understand the approach of the majority in this case, New Health would have been entitled to insist on what would have come down to a judicial inquiry into

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[164] Given the conclusions reached by the majority in *New Health*, it was not necessary for the Court to address whether s 4 of the Bill of Rights Act could have applied in the event that New Health's s 5 analysis had been accepted.

fluoridation. It is open to question whether the benefits which might flow from such an inquiry would have warranted the considerable expenditure in money and resources which would have been associated with it, given that the best outcome for New Health would have been a declaration that bound no-one to act in response to it and had no effect on anyone's rights.

Bill of Rights Act still effective

[144] We do not think that a finding that there is currently no power to make a declaration of inconsistency compromises the purposes of the Bill of Rights Act. We have had the Bill of Rights Act now for 28 years and a declaration has never been made. Indeed, until this case, there was no consensus as to whether the making of a declaration of inconsistency was legally possible. It can hardly be said that this has undermined the objective of the Bill of Rights Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand.

Cross-appeal

[145] In light of the conclusion of the majority that there is jurisdiction to make a declaration of inconsistency of the kind sought by the respondents, we agree with what Ellen France J says about the standing of Mr Taylor.[165]

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[165] Ellen France J, above at [68]–[69].