IN THE SUPREME COURT OF NEW ZEALAND **SC 14/2022**
I TE KŌTI MANA NUI O AOTEAROA

BETWEEN **MAKE IT 16 INCORPORATED**

Appellant

AND **ATTORNEY-GENERAL**

Respondent

Appellant's submissions on appeal

Date: 17 June 2022

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Counsel for the appellant certify that this submission contains no suppressed information and is therefore suitable for publication

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INTRODUCTION

1 Make It 16 Inc is a group advocating for Parliament to lower the voting age. However, this proceeding is much narrower. It focuses solely on whether the voting age provisions in the Electoral Act 1993[1] and the Local Electoral Act 2001[2] are inconsistent with the right to be free from discrimination on the basis of age, affirmed in s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights).[3] By way of relief, Make It 16 seeks two declarations of inconsistency (DoIs).

2 Make It 16 acknowledges the ultimate issue of whether the voting age should be lowered is a matter for Parliament. The DoIs will not affect the validity of the current legislation, or anything done lawfully under the relevant Acts. However, and importantly, they will provide formal confirmation that the rights of 16 and 17 year olds have been unjustifiably infringed. Making the DoIs sought in this case is thus consistent with the usual function of the courts.

THE DECISION UNDER APPEAL

3 It is common ground that the voting age provisions in both the Electoral Act and the Local Electoral Act are inconsistent with the Bill of Rights.[4] The Crown failed to establish that the limits on the right to be free from age discrimination are reasonable limits that can be demonstrably justified in a free and democratic society.[5]

4 Every aspect of the Court of Appeal's reasoning is correct, apart from on relief. In particular, the Court of Appeal was right to conclude:

4.1 Sections 12 and 19 of the Bill of Rights are not in conflict. They can be read together, and each given full effect.

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1 Electoral Act 1993, ss 60, 74 and the definition of "adult" in s 3(1) **[[ABOA Tab 1]]**.

2 Local Electoral Act 2001, ss 20, 23 and 24 **[[ABOA Tab 3]]**.

3 New Zealand Bill of Rights Act 1990, s 19 **[[ABOA Tab 4, p 0040]]**. See also, Human Rights Act 1993, ss 21(i), and 21A **[[ABOA Tab 2]]**.

4 *Make It 16 Inc v Attorney-General* [2021] NZCA 681, (2021) 12 HRNZ 930 (Court of Appeal judgment) at [32] **[[101.209]]**.

5 At [49]–[59].

Section 12 guarantees the right of those aged 18 and over to vote, but does not preclude voting by 16 and 17 year olds. Thus, it would be a breach of s 12 to raise the minimum voting age, but not to lower it. This interpretation gives effect to s 6 of the Bill of Rights, which governs interpretation of the Bill of Rights itself.[6]

4.2 The voting age provisions in both the Electoral Act and the Local Electoral Act are inconsistent with the right affirmed in s 19 of the Bill of Rights to be free from age discrimination (this was undisputed — the Crown accepts the voting age provisions are inconsistent with s 19).[7]

4.3 The onus is on the Crown to justify the limit on the right. The justification has to be demonstrable. Section 5 justification of the voting age provisions required assessing why Parliament excluded 16 and 17 year olds from voting.[8]

4.4 The term "deference" is not helpful if it is read as suggesting the Court does not need to undertake the scrutiny required by the human rights legislation.[9]

4.5 The Crown wrongly submitted that, because the voting age is a "political matter", the Court should defer on "democratic grounds" to "the considered opinion of the elected body".[10] Rather, the Court held, "[e]xamination of the justification for limiting the rights of 16 and 17 year olds was required."[11]

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6 At [28]–[31] **[[101.208]]**. On 17 June 2022, the Attorney-General advised the Court he no longer challenges this aspect of the judgment.

7 At [32].

8 At [52] 'What is the social advantage of limiting the age to 18 years? If there is one, does the social advantage outweigh the harm to the protected right. Would extending the franchise to 16 and 17 year olds be harmful? Would it have benefits?'.

9 At [53]–[54].

10 At [46].

11 At [54]. The Crown seeks to re-argue this point in this Court: respondent's leave submissions at [7.2] **[[05.014]]**. Make It 16 wishes to consider the Crown's written submissions before making detailed submissions in response. Pro tem, Make It 16 relies on its written arguments in the Court of Appeal **[[101.145]]** and High Court **[[101.062]]**.

4.6 The Crown failed to establish that the limits on the right of 16 and 17 year olds to be free from age discrimination created by the voting age provisions are reasonable and can be demonstrably justified in a free and democratic society.[12] Those limits on rights lack a clear and sufficiently important purpose. The distinction between 16 and 17 year olds and 18 year olds was not supported or justified. In particular, the Crown provided no evidence to suggest 16 year olds lacked the necessary competence to vote. On the contrary, the evidence before the High Court suggested they are competent.[13] Neither consistency with other age limits nor international practice suffice as a justification.[14] As the right at issue involves a core democratic right, the argument that a voting age of 18 "is within the range of reasonable alternatives" is insufficient to discharge the Attorney-General's burden of proof under s 5.[15]

5 However, having reached these conclusions, the Court of Appeal was wrong to "choose to exercise restraint and decline" the DoIs sought. The Court erred in law and principle, took into account irrelevant considerations and was plainly wrong[16] to refuse to make the DoIs absent a compelling reason to do so. This aspect of the decision should be reversed and DoIs should be made.

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12 At [59] **[[101.216]]**.

13 At [56], referring to the Report of the Children's Commissioner dated 24 August 2020 **[[201.047]]**.

14 At [57].

15 At [58].

16 Make It 16 submits the Court of Appeal's decision warrants reversal according to the "stricter" criteria for appeals outlined in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32]. However, the constitutional significance of the "discretionary" aspects of the Court of Appeal's decision, and the fact that it was made contrary to the principles of natural justice, support this Court approaching the matter as a *de novo* general appeal. In *Kacem v Bashir*, this Court observed at [32] that "the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary".

THE NATURE OF THE DOI JURISDICTION

6 In *Attorney-General v Taylor*, the majority of the Supreme Court held that the power to make a DoI can be implied from the scheme of the Bill of Rights.[17] A DoI:

6.1 is a formal declaration of the law and of the effect of inconsistent provisions on the affected person's rights;[18]

6.2 can amount to a declaration of right within the scheme of the Bill of Rights;[19]

6.3 would have implications in the context of a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights;[20]

6.4 may assist Parliament if the subject arises in that forum;[21] and

6.5 is another means of vindicating the right in the sense of marking and upholding its value and importance.[22]

7 Recent legislative developments show Parliament accepts the courts' jurisdiction to make DoIs and is likely to establish a process for responding to them.[23] As Professor Geddis has stated:[24]

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17 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [***Taylor* (SC)**] at [50] (Glazebrook and Ellen France JJ) and [117] (Elias CJ) and see [122] (William Young and O'Regan JJ) "if such a jurisdiction exists, it flows from the Bill of Rights Act itself" **[[ABOA Tab 8, p 0140]]**.

18 At [53] per Glazebrook and Ellen France JJ **[[ABOA Tab 8, p 0141]]**.

19 At [105] per Elias CJ **[[ABOA Tab 8, p 0151]]**.

20 At [55] per Glazebrook and Ellen France JJ, **[[ABOA Tab 8, p 0141]]**, citing *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20].

21 At [55] per Glazebrook and Ellen France JJ, citing *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [***Taylor* (CA)**] at [20] **[[ABOA Tab 7, p 0080]]**.

22 *Taylor* (SC), above n 17, at [56] per Glazebrook and Ellen France JJ **[[ABOA Tab 8, p 0142]]**.

23 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (230-2) **[[ABOA Tab 6, p 0067]]**.

24 Andrew Geddis, "Parliament and the Courts: Lessons from Recent Experiences" in J Burrows and Finn (eds) *Challenge and Change, Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 136 **[[ABOA Tab 28, p 0913]]**.

> Rather than repudiate the courts' claim to exercise a quasi-oversight role over legislative quality, Parliament instead has chosen to incorporate it into its own future lawmaking practices.

8 In *Taylor*, the argument in this Court focused on the DoI jurisdiction itself. The Court did not resolve questions about how the "discretion" to grant relief should be exercised.[25]

9 Nor were submissions addressed to the Court of Appeal on discretion in the present case.[26] The Crown advanced no reasons why discretionary relief should be declined. Having agreed with the High Court that the voting age provisions are discriminatory and having found that the Attorney-General failed to establish that the discrimination is justified, the Court of Appeal should have made the DoIs Make It 16 seeks.

SUMMARY OF CORRECT APPROACH TO THE DOI JURISDICTION

10 A court assessing a DoI application should not over-complicate its job by dwelling on the political dimensions of the provisions in question. Rather, the court's role is an orthodox legal one — to assess legislation for human rights consistency under the standard set by the Bill of Rights. If an inconsistency is established which the Crown has not met its onus to justify, a DoI should ordinarily follow absent some compelling ground for refusing one. This essentially tips the Court of Appeal's decision on its head. If the relevant preconditions are met, DoIs should be presumptively granted (absent compelling reasons to the contrary), rather than presumptively declined.

THE COURT OF APPEAL'S ERRORS

11 The Court of Appeal's errors fall into two categories:

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[25] *Taylor* (SC), above n 17, at [70] per Glazebrook and Ellen France JJ **[[ABOA Tab 8, p 0144]]**.

[26] Make It 16 addressed submissions to the High Court on discretion, but the topic of discretion did not arise in the hearings in that Court or the Court of Appeal.

11.1 reversing the Crown's s 5 justification onus when the Court came to consider whether to make DoIs;

11.2 misconceptions of the Court's own role in making DoIs.

On the question of relief, the Court of Appeal effectively reversed the s 5 justification onus

12 The Court of Appeal stated at [62] that its decision:

> … rests not on a positive finding that discrimination on grounds of age cannot be justified but on what we have held to be a failure to attempt to justify the existing age limit.

13 There are three errors in this statement:

13.1 First, the Court of Appeal erred in suggesting that it was for Make It 16 to prove that the limit "cannot" be justified before a DoI could be made. Requiring a positive finding that discrimination "cannot be justified" before the Court would contemplate making a DoI seems to require the applicant to prove a negative. This effectively reverses the s 5 onus. Conventionally, in establishing inconsistency of legislation with the Bill of Rights, an applicant must establish that the legislation limits an affirmed right. This aspect of the case was uncontested: the Court accepted that Make It 16 established the voting age provisions limit the right of 16 and 17 year olds to be free from age discrimination.[27] Once a limit is established, the onus then shifts to the Crown to justify that limit on the right.[28] The limit must be "demonstrably" justified.[29] The focus should be on whether the Crown has demonstrated the justification, rather than whether the limit might hypothetically

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27 Court of Appeal judgment, above n 4, at [32], and [49]–[59] **[[101.208]]**.

28 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [108], [110], and [120] (per Tipping J) **[[ABOA Tab 13, p 0344]]**; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91] **[[ABOA Tab 9, p 0184]]**; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [163]–[166] **[[ABOA Tab 12, p 0297]]**.

29 New Zealand Bill of Rights Act, s 5 **[[ABOA Tab 4, p 0037]]**. See also *Child Poverty Action Group Inc v Attorney-General*, above n 28, at [91]–[92] **[[ABOA Tab 9, p 0184]]**.

ever be justifiable.[30] The latter will ultimately be for Parliament to consider, if and when it revisits the inconsistent law, to reconcile it with the Bill of Rights.[31]

13.2 Secondly, the Court of Appeal was wrong to suggest the granting of a DoI depends on how much effort the Crown puts in to justifying the limiting measure. To justify the limit, more was needed, the Court said.[32] Yet the Court's merciful approach to relief suggests that, for the Crown, less was more. The Crown should not be able to thwart the making of a DoI, simply by not trying to justify the limit.

13.3 Thirdly, the Crown *did* attempt to justify the limiting measure in both of the lower courts in the present case.[33] The Court of Appeal mistakenly portrayed the Crown's failure to justify the limit as a failure *to attempt* to justify it.

The Court of Appeal misconceived its role with respect to DoIs

14 The basis for the Court of Appeal's refusal to make a declaration was "restraint for reasons of comity among or deference towards the other branches of government" in the context of an issue that "is very much in the public arena already" and which "is an intensely and quintessentially political issue involving the democratic process itself and on which there are a range of reasonable views".[34]

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30 "To establish that require[s] evidence about the basis on which the legislative choices were made such as would provide and submit to scrutiny the rational justification for the measures": *Chisnall v Attorney-General* [2021] NZCA 616, (2021) 13 HRNZ 49 at [226] **[[ABOA Tab 10, p 0257]]**.

31 For clarity, Make It 16 has added the words "and that inconsistency has not been justified under s 5 of the Bill of Rights Act" to the declarations it seeks: draft amended notice of application for leave to bring civil appeal and accompanying memorandum, 2 March 2022. This change reflects the wording of the declarations made by the Court of Appeal in *Chisnall v Attorney-General* [2022] NZCA 24, (2021) 13 HRNZ 107 **[[ABOA Tab 11, p 0260]]**.

32 Court of Appeal judgment, above n 4, at [58] **[[101.216]]**.

33 See Respondent's synopsis of argument in the Court of Appeal [48]–[85] **[[101.184]]**; Defendant's High Court submissions at [117]–[141], and [153]–[157] **[[101.095]]**.

34 Court of Appeal judgment, above n 4, at [62].

15 For these eight reasons, the Court of Appeal's rationale for refusing DoIs was wrong in law and principle, took into account irrelevant considerations, and was plainly wrong.

(i) The Court is being asked to determine a legal question not a political one

16 The Court of Appeal's emphasis on the voting age being a political issue indicates it has misapprehended its role. Make It 16 has not asked the court to determine what the voting age should be. Its claim relates solely to the resolution of a legal question relating to human rights as affirmed in legislation: whether the voting age provisions should be judged inconsistent with the Bill of Rights standard or palimpsest. This distinction is material. Make It 16's legal claim is non-political. Inconsistency between statutes is a question of interpretation, and hence of law, lying within the province of the courts.[35]

17 In *Taylor v Attorney-General*, at first instance, Heath J emphasised that in making a declaration of inconsistency the court is not making a political statement in an endeavour to persuade Parliament to change its mind. Rather, the court's "function is firmly grounded in the obligation of the Court to declare the true legal position."[36]

18 *Taylor* also involved an issue that could be described as "quintessentially political involving the democratic process itself". That case, like the present case, concerned "the right of all citizens to elect those who will govern on their behalf."

19 A danger of portraying a DoI as a political act by a court is that refusing a DoI may be seen as equally political. Refusal because of concerns about intruding on politics can unconsciously signal a preference for maintaining the status quo. This is especially

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[35] For a recent articulation of this distinction see *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 13 HRNZ 109 at [62].

[36] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 (***Taylor* (HC)**) at [70] **[[ABOA Tab 16, p 0543]]**.

problematic in the present case because the Court of Appeal found that the status quo perpetuates a limit on the rights of 16 and 17 year olds that has not been demonstrably justified. That finding should have led to a remedy.

20 With respect, the safer approach was that of Heath J, who recognised that the courts' task is not political at all, but legal. Further, as described by Elias CJ in *Taylor*, making a DoI fulfils the courts' "responsibility" and "traditional role" to "declare and maintain the boundaries and protect against erosion of human rights".[37]

(ii) The fact the issue is in the public arena is not a basis for refusing DoIs

21 The fact an issue is in the public arena is not a proper ground for refusing a DoI. The jurisdiction is not restricted to private or unpublicised matters. As *Taylor* shows in respect of prisoner voting, and *Chisnall* in relation to extended supervision orders and public protection orders, DoIs tend to involve highly politically charged and controversial issues. It is inherent in the nature of the jurisdiction that DoIs have been sought, and made, in relation to issues of significant public interest.

22 Moreover, part of the reason why the issue of youth voting is in the public arena is *because* Make It 16 has gone to court to seek DoIs. That Make It 16's members have generated debate about lowering the voting age is not a valid reason for denying them the vindication of an unjustified breach of their rights.

(iii) A DoI is a declaration of a legal right

23 One of the Court of Appeal's reasons for refusing any remedy was that a DoI "is not a declaration of a legal right".[38] The Court of Appeal made a similar statement in *Taylor*.[39] However, it did not explain what

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37 *Taylor* (SC), above n 17, at [117] per Elias CJ **[[ABOA Tab 8, p 0154]]**.

38 Court of Appeal judgment, above n 4, at [60] **[[101.216]]**.

39 *Taylor* (CA), above n 21, at [66] and [169] **[[ABOA Tab 7, p 0091]]**.

relevance this proposition has to the availability of relief, or why a DoI was made in *Taylor* but not in *Make It 16*. Moreover, the Court of Appeal failed to mention that a majority of the Supreme Court in *Taylor* did not accept that a DoI is not a declaration of a legal right. Glazebrook and Ellen France JJ said a DoI:[40]

> … 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. Finally, the making of such a declaration is consistent with the usual function of the courts.

24 Elias CJ said:[41]

> 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".

(iv) Right to an effective remedy

25 Make It 16 disagrees with the Court of Appeal's statement that the usual presumption of a remedy where a wrong has been established applies with less force in respect of a DoI than in judicial review.[42] The Court did not articulate why this should be the case. Its statement is inconsistent with the often-cited statement of Holt CJ in *Ashby v White*:[43]

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for (a) want of right and want of remedy are reciprocal.

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40 *Taylor* (SC), above n 17, at [53] (footnote omitted) **[[ABOA Tab 8, p 0140]]**.

41 At [105] **[[ABOA Tab 8, p 0151]]**.

42 Court of Appeal judgment, above n 4, at [60] **[[101.216]]**.

43 *Ashby v White* (1703) 2 Ld Raym 938 (KB) at 953 **[[ABOA Tab 24, p 0637]]**; cited in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 697 (Hardie-Boys J) and 717 (McKay J) **[[ABOA Tab 14, p 0423]]**.

26 The right to an effective remedy for human rights violations is established by international human rights treaties.[44] In *Simpson v Attorney-General [Baigent's Case]* a majority of the Court of Appeal held that the Bill of Rights implies that effective remedies should be available for its breach.

27 President Cooke also held in *Baigent's Case* that the courts have a "duty" to give an effective remedy for human rights violations:[45]

> Section 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.

28 A DoI is the only remedy available to vindicate the right of 16 and 17 year olds not to be discriminated against on the basis of age, which has been limited by the voting age provisions.[46]

(v) Deference did not warrant refusal of DoIs

29 In assessing whether the limit was justified under s 5, the Court of Appeal:

29.1 chastised the High Court for being "unduly deferential to Parliament and in turn failing to inquire whether the Attorney-General had discharged the burden of proof that lay on him to justify the limit on the protected right";[47] and

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[44] Universal Declaration of Human Rights GA Res 217A (1948), art 8 **[[ABOA Tab 23, p 0625]]**; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(3) **[[ABOA Tab 22, p 0620]]**.

[45] At 676 **[[ABOA Tab 14, p 0402]]**. Cooke P also said (in the same passage) that "[a] mere declaration would be toothless". See also *Taylor* (SC) at [29]–[30], [38]–[39], [41], [42], and [124] **[[ABOA Tab 8, p 0136]]**. As part of the common law of Aotearoa, the core values underlying tikanga Māori could also support the making of a DoI to bring closure to a dispute, where an applicant has established that a protected right has been unjustifiably limited. See, generally, Hirini Moko Mead, *Tikanga Māori* (Huia, 2016) at 31–36; Justice Joe Williams "Lex Aotearoa" 21 *Waikato Law Review* 1; and *Ellis v R [Tikanga Hearing]* [2020] NZSC Trans 19.

[46] See also *Taylor* (SC), above n 17, at [41] **[[ABOA Tab 8, p 0138]]**.

[47] Court of Appeal judgment, above n 4, at [53] **[[101.215]]**.

29.2 rejected the Crown's invitation to defer on justification of the limit, and instead held that "[e]xamination of the justification for limiting the rights of 16 and 17 year olds was required".[48]

30 Yet, despite shunning deference in relation to s 5 and concluding the limits on the rights of 16 and 17 year olds had not been justified, the Court inexplicably later embraced deference as a reason for refusing a remedy.

31 The Court did not explain why "…deference towards the other branches of government" warranted restraint in making DoIs. Neither did the Court explain its concerns with respect to the other branches of government. It is unclear which part of those branches' processes the Court thought DoIs would interfere with. The Court's reasons were brief and general — that it is a "political issue" in the public arena and the Government has announced a review of electoral law.

32 Having rejected the Crown's deference arguments in relation to justification, it was wrong in principle for the Court of Appeal to have accepted those arguments through the back door of discretion. By ultimately adopting a deferential approach to relief, the Court of Appeal shirked its task of undertaking the scrutiny required by human rights legislation.[49]

(vi) Comity with Parliament does not justify refusing DoIs

33 By making the DoIs sought this Court would neither be:

33.1 in conflict with Parliament; nor

33.2 purporting to override the will of Parliament.[50]

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48 At [54].

49 Contradicting relevant observations in *Child Poverty Action Group Inc (CPAG) v Attorney-General*, above 29, at [91]–[92] **[[ABOA Tab 9, p 0184]]**; a decision the Court of Appeal in *Make It 16* expressly affirmed (at [53]).

50 *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at [63] per Lord Hutton.

34 Comity governs aspects of the relationship between the courts and Parliament. It is usually understood as requiring the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges.[51] As explained, the courts' DoI role is to make a formal declaration of the law — to provide formal confirmation that 16 and 17 year olds are disqualified to vote by provisions inconsistent with their rights. A DoI that Parliament has acted inconsistently with a right does not impede Parliament's freedom of action in any way.[52]

35 Moreover, there are compelling signs that Parliament does not regard the courts' exercise of their DoI jurisdiction as an unwelcome intrusion. Before Parliament is the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (the DoI Bill), which has so far received unanimous support in the House. If enacted, it will "provide a stronger framework for considering and responding to declarations of inconsistency and the issues they raise …a clear framework for dialogue between the branches of government."[53] The Privileges Committee examining the DoI Bill considered this framework would "represent a significant development in New Zealand's constitutional architecture relating to fundamental rights" and hoped it would "promote genuine engagement with rights issues."[54] Significantly, the Committee did not find that the DoI Bill raised any issue of privilege.

36 The justification for the Court's reliance on comity as a ground for refusing relief is hard to fathom. Comity was not compromised by the

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51 Parliamentary Privilege Act 2014, s 4(1)(b) **[[ABOA Tab 5, p 0047]]**; and *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 6–7.

52 *Taylor* (SC), above n 17, at [103] per Elias CJ **[[ABOA Tab 8, p 0151]]**.

53 Report of the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill, 30 September 2021 at 1–2 **[[ABOA Tab 6, p 0051]]**. Second reading, 11 May 2021, passed by acclamation without a party vote being called for.

54 At 2.

Court's finding there is a limit on rights that the Crown has not justified. Neither will it be compromised if this Court makes DoIs.[55]

(vii) Comity with the executive does not justify refusing DOIs

37 The need for comity between the judicial and executive branches did not require restraint in making a DoI in *Taylor* and nor does it justify refusing DoIs in the present case. Respect for the executive's sphere of influence is maintained through respect for the ability of the other branches to determine how they respond to a DoI.[56]

38 A review of electoral law was announced after the Court of Appeal hearing and referred to in that Court's judgment.[57] But the electoral law review does not provide any justification to refuse a remedy. First, local electoral law is "out of scope", so it is unclear whether the review's recommendations will be coextensive with the DOIs sought herein.[58] Secondly, any legislation arising from the review will not be introduced in the current Parliamentary term, as the final report is not due until after the next general election. Thirdly, the last major review of electoral law, the 1986 Royal Commission on the Electoral System concluded 16 is a reasonable age to start voting. The Royal Commission recommended the voting age be kept under review.[59] Yet this recommendation has not led to any government or legislative action over the ensuing 36 years. Fourthly, the review would be greatly assisted by this Court's definitive ruling on the unjustified inconsistency of the voting age provisions with the Bill of Rights.

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55 *Taylor v Attorney-General* [2014] NZHC 1630 at paras [58] and [59] **[[ABOA Tab 15, p 0469]]**; and *Taylor* (HC), above n 36, at [69] **[[ABOA Tab 16, p 0542]]**.

56 The DoI Bill does not propose that either the legislative or executive branches be required by law to respond to a DoI in any particular way. In the spirit of dialogue and our constitutional arrangements, that is properly a matter for each branch to determine on its own: Report of Privileges Committee, above n 53, at 2 **[[ABOA Tab 6, p 0052]]**.

57 Court of Appeal judgment at [9] **[[101.203]]**. On 24 May 2022, the terms of reference and membership of the independent electoral review panel were announced.

58 Terms of Reference: Independent electoral law review at [17]. However, the terms of reference note that the impact of any legislative change arising from the review that affects local electoral law would need to be considered.

59 John Wallace and others *Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at [9.14].

(viii) DoIs will trigger policy consideration of voting age reform

39 DoIs are a signal to the other branches of Government that there is an inconsistency in the law. DoIs can prompt review, change and/or further consideration of the justification for the inconsistency.

40 A framework for considering and responding to DoIs has been proposed by the Privileges Committee in the DoI Bill. It envisages that, following a declaration:[60]

40.1 the resources and expertise of the public service will be used to develop a policy response to the issues raised by a DoI;

40.2 the Government "in dialogue with the judicial branch" is accountable to Parliament — and the wider public — for its administration of the law and its policy response to the DoI;

40.3 some issues may require extensive policy work to address or may benefit from the consideration of significant empirical evidence beyond what was available to the court or tribunal that made the declaration.

41 The Court of Appeal was wrong to decline to make DoIs. As Heath J said in *Taylor*, if a DoI is not made in the context of the most fundamental aspect of a democracy — namely, the right of all citizens to elect those who will govern on their behalf — then it is difficult to conceive of a context in which a DoI would be made.[61]

42 In *Ngāti Whātua Ōrākei Trust v Attorney-General*, this Court considered it would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice as a reason to take matters relating to that decision out of the reach of

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60 Report of the Privileges Committee, above n 53, at 3 **[[ABOA Tab 6, p 0053]]**.

61 *Taylor* (HC), above n 36, at [77(a)] **[[ABOA Tab 16, p 0544]]**.

supervision by the courts. That would ignore the function of the court to make declarations as to rights.[62]

43 In that regard, the recent introduction of the Electoral (Strengthening Democracy) Amendment Bill should not dissuade this Court from making DoIs in the present case.[63] It is not yet clear whether that Bill will be read a first time and referred to select committee, let alone enacted. It is not a Government Bill, so it has not benefited from the resources and expertise of the public service in developing the policy in it. Lowering the voting age would not breach the Bill of Rights, so Government consideration of the rights consistency of the Member's Bill cannot be expected to cover the issue raised by the present proceeding. If the Member's Bill progresses, Parliamentary consideration would benefit from a definitive court ruling on the inconsistency of the voting age provisions with the Bill of Rights, by way of DoIs. If the Member's Bill does not pass, the inconsistency of the voting age provisions will not disappear. Rather, as the issue of extending the voting age to include more rangatahi assumes more prominence, this Court's definitive ruling will be even more useful to the executive and Parliament as a formal declaration of the law in relation to affected persons' rights.

WHAT ARE THE CRITERIA AGAINST WHICH DISCRETION TO MAKE OR REFUSE A DOI SHOULD BE CONSIDERED?

44 The Supreme Court has not previously addressed discretionary grounds for refusing a DoI in circumstances where:

44.1 a provision in a statute limits a right or freedom protected under the Bill of Rights Act; and

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62 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46].

63 The Bill was introduced since this Court granted leave to appeal after it was drawn from the ballot on 19 May 2022. One of the many reforms proposed in this Bill is to reduce the minimum voting age to 16 by amending (among other provisions) the definition of "adult" in s 3 of the Electoral Act 1993.

44.2 the limit has not been shown to be demonstrably justified.

45 In *Attorney-General v Taylor* the Supreme Court reserved the issue of the approach to be taken to the exercise of discretion to grant relief for future consideration in a suitable case:[64]

45.1 Glazebrook and Ellen France JJ found that, as no submissions were addressed to the exercise of discretion, there was no basis for disturbing the decision of the Courts below that a declaration was appropriate.[65]

45.2 Elias CJ accepted that whether to grant declaratory relief is a matter for assessment by the Court. Her Honour considered that the courts below were right to make a DoI "because it was the only response available for denial of the right to vote in circumstances acknowledged not to be justified."[66]

46 This case offers an opportunity for this Court to clarify the approach to be taken to the exercise of discretion.

47 The approach taken by the Court of Appeal in the present case is inconsistent with the approach taken in other cases in which DoIs were made, in particular, *Attorney-General v Taylor* and *Chisnall v Attorney-General*.[67] In these cases the Crown made no or limited attempt to justify the inconsistency at issue. These cases also involved issues that were "in the public arena" and which were "intensely and quintessentially political". There is a danger that, unless discretion is approached on a principled basis, availability of the remedy will come to depend on individual judicial predilection.

48 Like *Make It 16*, *Attorney-General v Taylor* involved "the democratic process itself" in the sense that it concerned who is eligible to vote.[68]

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64 *Taylor* (SC), above n 17, at [70] **[[ABOA Tab 8, p 0144]]**.

65 At [70].

66 At [121] **[[ABOA Tab 8, p 0155]]**.

67 *Chisnall v Attorney-General*, above n 30 **[[ABOA Tab 10]]**; and *Chisnall v Attorney-General* (declarations), above n 31 **[[ABOA Tab 11]]**.

68 Court of Appeal judgment, above n 4, at [62] **[[101.217]]**.

In *Taylor*, the Crown argued a DoI was unnecessary because there was no dispute that the legislation at issue was inconsistent with the Bill of Rights and was not a justified limit on the right to vote. Glazebrook and Ellen France JJ responded:[69]

> … 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.

49 It is not disputed that the current voting age is a limit on the right to be free from age discrimination, but the Courts below differed as to whether the Crown had justified the limit. Thus, the need for DoIs is stronger than it was in *Taylor*. The making of DoIs will clarify the "disputed point of interpretation" and protect against attempts to re-litigate the question of consistency of the current voting age provisions with the Bill of Rights.

50 Vagueness about the discretionary criteria for making a DoI leads to uncertainty for parties. It will assist for this Court to set out criteria for the exercise of discretion to make a DoI. This will enable parties to predict more confidently whether a declaration is likely to be granted before committing to litigation.

There should be a presumption that a DoI will follow a finding of inconsistency with the Bill of Rights that has not been justified

51 It should be presumed that a DoI will follow in a case where an inconsistency with the Bill of Rights has been established that has not been justified unless a compelling reason exists not to do so.
A presumptive approach to making a DoI will give successful applicants access to a more predictable and effective remedy. Such a

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69 *Taylor* (SC), above n 17, at [58] **[[ABOA Tab 8, p 0142]]**.

presumption will also encourage the Crown to take a more rigorous approach to the task of discharging its justification onus.

52 It is submitted that, by taking this more principled, "legalistic" approach, the courts will be better able to focus on their task of applying the standard in the Bill of Rights to rights-offending legislation.[70] Under this approach, it will be understood that if legislation is inconsistent with an affirmed right and has not been justified, then a DoI will generally be made, absent a compelling reason for not doing so.

Overseas approaches

United Kingdom

53 Under s 4(2) of the Human Rights Act 1998 (UK) (**HRA**),[71] where it is truly impossible for legislation to be interpreted under s 3 as compatible, the courts may make a declaration of incompatibility. The DoI does not result in invalidation but triggers a fast-track mechanism for legislative amendment.[72]

54 Commentators have referred to some divergence among United Kingdom judges as regards both when a declaration can be made under the HRA and how discretion should be exercised.[73]

55 The legislative history of s 4(2) of the HRA suggests an intention that courts would generally make declarations of incompatibility when they found an Act to be incompatible with the European Convention on Human Rights. However, courts would have a discretion not to make a declaration in the particular circumstances of the case,

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70 As Hon Sir Owen Dixon said at his swearing in as Chief Justice of Australia on 21 April 1952: "It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism." Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book Co, 1965) at 247.

71 Human Rights Act 1998 (UK), cl 42 **[[ABOA Tab 19, p 0575]]**.

72 Section 10. In this section of the submissions, we refer to the insightful analysis of Conall Mallory and Hélène Tyrrell (2021) "Discretionary Space and Declarations of Incompatibility" 32:3 K.L.J 466 **[[ABOA Tab 29]]**.

73 Mallory and Tyrrell, above n 72, at 495 **[[ABOA Tab 29, p 0961]]**.

including where there was an alternative statutory appeal route or procedure which an applicant could exhaust before a declaration is issued.[74]

56 DoIs have been granted in several cases.[75] However, commentators consider that, in some cases, judges have taken an overly restrictive approach to making declarations, based on a reluctance to upset Parliament.[76] Such an approach may be limiting the HRA, in particular its declaratory jurisdiction, from reaching its full potential to solve the tensions that can exist between human rights protection and democratic legitimacy.[77]

57 There are, however, several United Kingdom cases and some comments from individual judges that support the clear and certain presumptive approach Make It 16 says should be followed in Aotearoa New Zealand.

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74 At 467 **[[ABOA Tab 29, p 0933]]**.

75 See Ministry of Justice (UK) *Responding to human rights judgments, Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020-2021* (CP562, December 2021) **[[ABOA Tab 31]]**. Recent examples include: *In the matter of an application by JR111 for judicial review* [2021] NIQB 48 (DoI granted in relation to legislation requiring proof of a "disorder" in order to secure a gender recognition certificate); *Jackson v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin) [2020], 1 WLR 1441 at [66] (DoI granted in relation to bereavement support payment being denied to former cohabitee because not a spouse or civil partner of deceased); *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250 at [45] (DoI granted in respect of social security legislation denying widowed parent's allowance to a surviving unmarried partner); *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1 at [62] (DoI in respect of statutory provisions denying different-sex couples from entering civil partnership); *R (K (A Child)) v SSHD* [2018] EWHC 1834 (Admin), [2018] 1 WLR 6000 (DoI granted because 'deemed father' provision in immigration legislation Art 14-incompatible); *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916, [2018] QB 804 (DoI in relation to exclusion of cohabitees from bereavement damages); *R (Johnson) v SSHD* [2016] UKSC 56, [2017] AC 365 at [39] (DoI in relation to a good character requirement for citizenship inapplicable had parents been married); *R (Miranda) v SSHD* [2016] EWCA Civ 6, [2016] 1 WLR 1505 at [119] (DoI granted that Terrorism Act 2000 sch 7 powers have insufficient safeguards).

76 Mallory and Tyrrell, above n 72, at 495 **[[ABOA Tab 29, p 0961]]**.

77 At 495–496.

58 In their analysis of DoIs, Mallory and Tyrrell list six considerations (within three broad categories) which the United Kingdom courts have found to be relevant to whether a DoI ought to be made:[78]

58.1 The outcome of the instant case:

58.1.1 a DoI is not required to dispose of the case;[79]

58.1.2 an overlapping DoI has already been made;[80]

58.2 The operation of the legislation in question:

58.2.1 the incompatibility does not arise in all cases, or the instant case so does not impact the applicant;[81]

58.2.2 the relevant public authority is able to operate compatibly with the Convention;[82]

58.3 The legitimacy of the judicial role:

58.3.1 concerns about institutional competence;

58.3.2 the incompatibility is already the subject of democratic consideration.

59 Only the final category, legitimacy of the judicial role, is relevant in the present case as the other considerations do not apply.

60 In relation to institutional competence, Mallory and Tyrrell describe the divergence between those judges who have confidence in their legitimacy to issue a DoI because they regard the s 4 mechanism as a duty, to be departed from only exceptionally,[83] and those judges who "have tended to tie themselves in knots attempting to fulfil the purpose

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78 At 476–488 **[[ABOA Tab 29, p 0942]]**.

79 As in *Rusbridger v Attorney-General* [2003] UKHL 38, [2004] 1 AC 357.

80 As in *R (Chester) v Secretary of State for Justice; McGeoch v The Lord President of the Council and another (Scotland)* [2013] UKSC 63, [2014] AC 271.

81 *R (T) v Secretary of State for the Home Department* [2014] UKSC 35, [2015] AC 49 at [51]–[52] per Lord Wilson.

82 *Christian Institute v Lord Advocate* [2016] UKSC 51 at [88].

83 Mallory and Tyrrell, above n 72, at 495 **[[ABOA Tab 29, p 0961]]**.

of the regime in a manner which is not overly upsetting to Parliament".[84] Three cases serve to illustrate these different judicial approaches.

Nicklinson

61 The UK Supreme Court declined to make a DoI in *R (Nicklinson) v Ministry of Justice* despite a majority finding that s 2 of the Suicide Act 1961 (UK) (making encouraging or assisting a suicide a criminal offence) was incompatible with article 8 of the Convention (right to respect for private and family life) and two strong dissents by Baroness Hale and Lord Kerr.[85] Baroness Hale said that even though "Parliament is much the preferable forum in which the issue should be decided", having concluded that the law was incompatible with the Convention rights, there was "little to be gained, and much to be lost, by refraining from making a declaration of incompatibility". Parliament would be "free to cure that incompatibility…or to do nothing".[86] Baroness Hale concluded by aptly summarising the distinction between the work of judges and that of politicians, in respect of DoIs:[87]

> I should perhaps add that my conclusion is not a question of "imposing the personal opinions of professional judges". As already explained, we have no jurisdiction to impose anything: that is a matter for Parliament alone. We do have jurisdiction, and in some circumstances an obligation, to form a professional opinion, as judges, as to the content of the Convention rights and the compatibility of the present law with them. Our personal opinions, as human beings, on the morality of suicide do not come into it.

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84 At 495 **[[ABOA Tab 29, p 0961]]**.

85 *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2014] UKSC 38, [2015] AC 657, described by Mallory and Tyrrell as an example of "judicial trepidation". A range of factors dissuaded the majority from making a DoI: a view that Parliament was better qualified to decide the moral issues involved (Lords Sumption, Hughes, Reed and Clarke); uncertainty about how to identify and cure the incompatibility (Lord Neuberger at [118]); concern that Parliament was about to debate the issue in the context of the Assisted Dying Bill and that it might be appropriate to make a DoI at a future time if Parliament chose not to debate the issue (Lords Mance [190] and Wilson [202]–[204]) **[[ABOA Tab 26, p 0738]]**.

86 At [300] per Baroness Hale **[[ABOA Tab 26, p 0867]]**.

87 At [325] **[[ABOA Tab 26, p 0874]]**.

Steinfeld

62 Four years later in *R (Steinfeld) v Secretary of State for International Development* the Supreme Court unanimously made a DoI in respect of the bar on different-sex couples entering civil partnerships.[88] In that case, as in the present case, the Crown implored the Court to defer to Parliament because the issue in question was said to fall "squarely within the field of sensitive social policy which the democratically-elected legislature was pre-eminently suited to make".[89]

63 The Supreme Court was undeterred, concluding there was "no reason that this court should feel in any way reticent about the making of a declaration of incompatibility".[90]

64 Lord Kerr considered "it would be wrong" not to make a DoI especially since it would not oblige the government or Parliament to do anything.

65 In *Steinfeld*, the fact that no fewer than three Private Member's Bills had been introduced, proposing to extend civil partnerships to different sex couples, was not considered an impediment to making a DoI.[91] The Court considered there was no imminent change in the law to remove the admitted inequality of treatment but that even if there was an imminent change this would not constitute an inevitable contraindication to a DoI.[92]

66 The Court in *Steinfeld* cited a House of Lords decision from 15 years earlier, *Bellinger v Bellinger*, in support of the proposition that where the court finds an incompatibility, it should "formally record that the present state of statute law is incompatible with the Convention"

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88 *R (Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32, [2020] AC 1 **[[ABOA Tab 27, 0883]]**.

89 At [54].

90 At [61].

91 At [8].

92 At [8]–[10] and [58].

notwithstanding the possibility of legislation.[93] The Court also cited a statement from Lord Kerr's reasons in *Nicklinson* at [343] that:

> An essential element of the structure of the Human Rights Act 1998 is the call which Parliament has made on the courts to review the legislation which it passes in order to tell it whether the provisions contained in that legislation comply with the Convention. By responding to that call and sending the message to Parliament that a particular provision is incompatible with the Convention, the courts do not usurp the role of Parliament, much less offend the separation of powers. A declaration of incompatibility is merely an expression of the court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. In other words, the courts say to Parliament, 'This particular piece of legislation is incompatible, now it is for you to decide what to do about it.' And under the scheme of the Human Rights Act 1998 it is open to Parliament to decide to do nothing.

Bellinger

67 In *Bellinger*,[94] the House of Lords had held that, as there was no provision for the recognition of gender reassignment for the purposes of marriage, s 11(c) of the Matrimonial Causes Act 1973 (UK) was an obstacle to Mrs Bellinger entering into a valid marriage with a man. Their Lordships unanimously declared this provision to be incompatible with Mrs Bellinger's right to marry and with her right to respect for her private and family life. Their Lordships rejected the argument that the words "male" and "female" in that Act could be given an extended meaning. As Lord Nicholls explained:[95]

> The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.

68 Despite the fact the government had announced an intention to bring forward primary legislation and the European Court of Human Rights

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93 At [58] **[[ABOA Tab 27, p 0908]]**, citing *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] UKHL 21, [2003] 2 AC 467 at [55] and [79] **[[ABOA Tab 25, p 0656]]**.

94 *Bellinger v Bellinger*, above n 93, considered whether s 11(c) of the Matrimonial Causes Act 1973 (which, correctly interpreted, provided that "male" and "female" meant biological sex as determined at birth) violated the right to marry and the right to respect for private and family life in articles 8 and 12 of sch 1, pt 1 to the Human Rights Act 1998.

95 *Bellinger v Bellinger*, above n 93, at [37] **[[ABOA Tab 25, p 0652]]**.

had already found the relevant provisions to be incompatible,[96] their Lordships were not persuaded by the Lord Chancellor's submission that a declaration would be of no utility. Rejecting counsel's argument that a declaration would be "academic" Lord Hobhouse said:[97]

> The Government can not yet give any assurance about the introduction of compliant legislation. There will be political costs in both the drafting and enactment of new legislation and the legislative time it will occupy. The incompatibility having been established, the declaration under s.4 should be made.

69 This Court should take a similar approach to that adopted by the United Kingdom Supreme Court in *Steinfeld* and by the House of Lords in *Bellinger*. Making DoIs would not intrude on Parliament's ability to determine if and when to lower the voting age, preserving the important constitutional relationship of mutual respect between Parliament and the judiciary.

Australia

70 In Australia, three state level human rights statutes permit the courts to make DoIs that do not affect the validity, operation, or enforcement of the law:

70.1 In Victoria, s 36(1) of the Charter of Human Rights and Responsibilities Act 2006 (**CHRRA**) permits the Supreme Court to make a declaration that a statutory provision cannot be interpreted consistently with a human right, unless an override declaration has been made by Parliament in respect of that provision under s 31.

70.2 In the Australian Capital Territory, s 32 of the Human Rights Act 2004 permits the Supreme Court to declare a Territory law is inconsistent with a human right.

70.3 In Queensland, s 53 of the Human Rights Act 2019 permits the Supreme Court to declare that the court is of the opinion that a

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96 *Goodwin v United Kingdom* (2002) 35 EHRR 18.

97 *Bellinger v Bellinger*, above n 93, at [79] **[[ABOA Tab 25, p 0663]]**.

statutory provision cannot be interpreted in a way compatible with human rights.

Victoria

71 The only declaration of inconsistency that has been made under the CHRRA was set aside on appeal by the High Court of Australia in *Momcilovic*.[98] In that case, Crennan and Kiefel JJ observed "[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate…"[99] due to the possibility it may undermine a criminal conviction or otherwise would serve "no useful purpose". The Court added that "this does not, however, mean that the declaration will have no utility in other spheres", presumably where the Court does not consider the DoI jurisdiction is being used to mount a collateral challenge to a criminal conviction.[100]

72 Glazebrook and Ellen France JJ observed in *Taylor* that s 3 of the Bill of Rights, which Cooke P considered underpins the duty of courts in Aotearoa New Zealand to give an effective remedy where legislatively affirmed rights have been infringed, has no equivalent in the CHRRA.[101]

Australian Capital Territory

73 Courts in Australian Capital Territory appear more willing to issue DoIs than those in Victoria. Moreover, they follow the approach that a declaration should be made unless there is a good reason not to make

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98 *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1.

99 At [605], compare [18] per French CJ.

100 In New Zealand, the Court of Appeal held that DoIs could not be issued in criminal proceedings, but that a separate civil application is required: *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [13]–[16] per William Young P, Chambers, O'Regan and Robertson JJ (Hammond J reserving his position); *R v Exley* [2007] NZCA 393 at [18]; and *McDonnell v Chief Executive of Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [123]. See also Bruce Chen "The Quiet Demise of Declarations of Inconsistency under the Victorian Charter" 44(3): *Melbourne University Law Review* (advance).

101 *Taylor* (SC), above n 17, at [63] **[[ABOA Tab 8, p 0143]]**. *Baigent's Case*, above n 43, at 676 **[[ABOA Tab 14, p 0402]]**.

one. This is the clear presumptive approach Make It 16 argues should be followed in Aotearoa New Zealand:

73.1 In *Davidson v Director-General, Justice and Community Safety Directorate,*[102] the Supreme Court declared that cl 4.3 of the 2019 Operating Procedure (enacted pursuant to s 14 of the Corrections Management Act 2007 (ACT)) is incompatible with the plaintiff's human rights under s 19(1) of the Human Rights Act 2004 to be treated with humanity and with respect for the inherent dignity of the human person while deprived of liberty. There was little discussion on whether the declaration of incompatibility sought was appropriate, and what would make it so. Having found that the provisions in question were incompatible with the Human Rights Act, the Court took at face value that the plaintiff was entitled to such a remedy and the declaration was simply made.[103]

73.2 Similarly, *Re Application for Bail by Islam*[104] suggests a DoI will inevitably follow unless there is a compelling reason not to do so. In that case, a declaration was made that s 9C of the Bail Act 1992 (ACT) is not consistent with the human right recognised in s 18(5) of the *Human Rights Act*, being that "Anyone who is awaiting trial must not be detained in custody as a general rule." The Court noted the relevance of submissions and assumptions tied to the discretion involved with the making of DoIs:[105]

> No submissions were made about whether, if I did find that s 9C could not be interpreted to be consistent with human rights, and could not be justified, I should make such a declaration; rather, this was assumed to be the inevitable result of such a finding.

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[102] *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83.

[103] At [437].

[104] *Application for Bail by Islam, Re* [2010] ACTSC 147.

[105] At [399].

73.3 The declaration was granted accordingly, with the Court noting the relevance of DoIs as a remedy to the plaintiff and a form of 'dialogue' between the separate arms of government:[106]

> I can think of no reason, having made a finding of inconsistency, for not making a declaration of incompatibility. The declaration has no legal significance for the application or operation of the relevant provision but its significance as a step in the "dialogue" involving the courts, the executive and the legislature (if three parties can have a dialogue), should not be overlooked. […] Relevantly, the approach is that "the judiciary should not be able to invalidate legislation but rather be able to give its opinion that a law is incompatible with the *Human Rights Act*".

Queensland

74 Queensland's Human Rights Act 2019 has only recently come into force. No declarations have yet been made.

Canada

75 The Canadian Charter of Rights and Freedoms is a supreme law Bill of Rights.[107] A declaration of invalidity in respect of legislation is not left to the courts' discretion. Rather, the declaration is mandatory, with discretion being left to the courts in determining the form and breadth of the declaration.[108] In exercising their discretion, the courts are guided by the following principles:[109]

75.1 Charter rights should be safeguarded through effective remedies;

75.2 the public has an interest in the constitutional compliance of legislation;

75.3 the public is entitled to the benefit of legislation; and

75.4 the courts and the legislature play different institutional roles.

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[106] At [400].

[107] Constitution Act 1982 (Canada), s 52(1).

[108] *Ontario Attorney General v G* 2020 SCC 38 at [86]; and *R v Ferguson* [2008] 1 S.C.R 96 at [65].

[109] At [94].

76 Options for the form in which a declaration can take include to strike down the law, read down or read words into the legislation,[110] sever the offending portion, or to suspend a declaration for a short time, such as where having it take immediate effect would pose a danger to the public, threaten the rule of law, or result in deserving persons being deprived of benefits.[111]

77 The difference in effect of a declaration of invalidity, in particular the ability of the court to strike down the offending law, limits the applicability of Canadian cases as guidance for the exercise of discretion in a New Zealand DoI context. However, the Canadian Supreme Court has observed that the violation of constitutional rights weighs heavily in favour of an immediate declaration.[112]

CONCLUSION AND REMEDY SOUGHT

78 For the reasons outlined, the Court of Appeal erred in law and principle, took into account irrelevant considerations, and was plainly wrong in declining to make DoIs:

78.1 the voting age provisions limit the right to be free from discrimination on the basis of age;

78.2 the Crown did not meet its onus of persuading the Court of Appeal that the limit on the rights of 16 and 17 year olds is reasonable and is demonstrably justified in a free and democratic society;

78.3 there was and remains no compelling reason for the Court to withhold declaratory relief. Rather, especially where age discrimination affects electoral rights, it is essential that the Court declares the correct legal position.

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[110] At [113].

[111] *Schachter v Canada* [1992] 2 S.C.R 679 at 719.

[112] *Ontario Attorney General v G*, above n 108, at [132], upholding the importance of the fundamental remedial principles of constitutional compliance and of providing an effective remedy that safeguards the rights of those directly affected.

Declarations sought

79 Make It 16 seeks a judgment allowing the appeal and making declarations that:

79.1 ss 60 and 74, and the definition of "adult" in s 3(1) of the Electoral Act 1993, are inconsistent with the right to be free from discrimination on the basis of age affirmed and guaranteed in section 19 of the New Zealand Bill of Rights Act 1990, and that inconsistency has not been justified under s 5 of the Bill of Rights Act; and

79.2 ss 20, 23 and 24 of the Local Electoral Act 2001 are inconsistent with the right to be free from discrimination on the basis of age affirmed and guaranteed in section 19 of the New Zealand Bill of Rights Act 1990, and that inconsistency has not been justified under s 5 of the Bill of Rights Act.

Dated: 17 June 2022

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J S McHerron | G K Edgeler | E B Moran
Counsel for Appellant

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