OUTLINE OF ORAL SUBMISSIONS OF COUNSEL FOR APPELLANT

1. Who are Make It 16? A group that includes 16 and 17 year olds who have a range of legal rights and responsibilities but cannot vote in local and or parliamentary elections due only to their age: affidavits at 201.022-029; subs [1]-[5].

2. What a DoI case is. What it is not.

3. Not in dispute that voting age provisions are inconsistent with s 19 of the Bill of Rights: age discrimination against 16 and 17 year olds.

4. Issues on this appeal are:

   a. Has the Attorney-General established that the limit on the right of 16 and 17 year olds to be free from age discrimination is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society?

   b. If not, was the Court of Appeal correct to decline to make DoIs?

5. The Court should reject Crown's additional (unnotified) ground – that the Court should refuse to enter the inquiry <u>altogether</u> — as:

   a. an attempt to divert the Court's focus from the Attorney-General's failure to justify the discrimination against 16 and 17 year olds;

   b. asking the Court to abdicate its judicial responsibility by ceding its s 5 review role to Parliament, contrary to the DoI jurisdiction recognised in *Taylor*.

6. What does the Court require of the Crown when a prima facie inconsistency is found?

   a. Attorney-General has the onus to show a justified limit. *Hansen* at [105]-[110]; *RJR-MacDonald* at [128]-[129].

   b. Yet, no assessment of the justification of the limit on 16 and 17 year olds' rights has been done: Attorney-General's subs [8], [54], [35].

7. Comity is a principle of **mutual** respect between the legislature and the courts. It is inconsistent with mutual respect for the executive government to demand the courts exercise restraint, when it has simply refused to justify a limit on rights.

8. According to *Oakes/Hansen/Atkinson* the Court needs to be informed of the objective of the limit on rights, before it can assess its proportionality: Court of Appeal submissions 101.156-101.171:

   a. Objective of the limit on rights has a "stringent standard of justification": *Frank* [43] and [46]; *Sauvé* at [9]; *RJR-MacDonald* at [129].

      i. Attorney-General did not identify any objective for the limit on 16/17s' rights, or reason for treating them differently to 18s.

      ii. Lacking an objective for the limit, the Court cannot complete the remaining steps of the proportionality assessment.

      iii. With no justification forthcoming, the Court should find against the Attorney-General and make the DoIs sought.

Remaining steps of Oakes/Hansen analysis were not completed – as the Crown failed to demonstrably justify the limit

b. No rational connection shown between the limit and [any] "objective":

   Children's Commissioner 201.047 at [26]-[28], [45]
   Royal Commission 301.054-055 [9.10]-[9.11].
   Dr Jan Eichhorn 201.011-201.016 at [35]-[45]
   End of Life Choice Bill 308.1573; Care of Children Bill BOA (s 7 reports)

c. Minimal impairment/less restrictive alternative:

   i. Make It 16's claim is a s 19 discrimination claim. Abstract Comparison with voting rights claims (s 12 BORA, Art 25 ICCPR) is less helpful.

   ii. The Attorney-General's suggestion that there is a range of reasonable alternatives ignores the bright line of 16 as the age from which discrimination must be demonstrably justified.

   iii. In the s 19 context, the suggestion that there is a range of reasonable alternatives arises in the context in New Zealand of there being an age – 16 – at which protection from age discrimination commences. Other countries do adopt other ages for voting. Those countries tend not to have age discrimination provisions that start at 16.

   iv. There cannot be a range of reasonable alternatives when the purpose of the limit is not determined. The question is whether there is a range of reasonable alternatives to achieve a particular aim, which the Attorney-General has chosen not to advance.

   v. The Court of Appeal suggests measuring against "competency" at [56]. If that standard was adopted, given the evidence before the Courts, it would be clear (as it was to the Court of Appeal: [56]-[59]) that 16/17s would be competent to vote (to the extent competence is measurable/relevant). Importantly, the making of DoIs in this case does not require the Court to evaluate the competence of 16/17s.

   vi. The concept of there being a range of reasonable alternatives does not change if the limiting provision is entrenched. Entrenchment is about process by which Parliament amends a law. It does not affect the justification assessment under s 5.

   vii. If entrenchment was seriously a factor requiring restraint this would not affect the making of the 2nd DoI (local elections).

d. Balance of social advantage against harm to the right – Crown has pointed to no benefits, but age discrimination has real detriments for disenfranchised 16 and 17 year olds:

   Royal Commission 301.054-056 at [9.9], [9.12]-[9.14]
   Children's Commissioner 201.051-058 at [13]-[24], [29]-[47]
   Dr Jan Eichhorn 201.016-021 at [46]-[55]

9. This Court should make the DoIs:

   a. An unjustified limit on a protected right has been established. There must be an effective remedy:

      i. A want of right and want of remedy are reciprocal — *Ashby v White* cited in *Baigent's Case* at p 697.

      ii. Section 3 of BORA applies to acts done by courts. The courts therefore have a duty to give an effective remedy in these cases —*Baigent's Case* at p 676.

   b. It is consistent with mutual respect (as reflected in the DoI Bill) for the Court to make DoIs now and allow (and even encourage) Parliament to get on with its own scrutiny and response (the policy-rich aspect).

   c. In this case, as in *Taylor* (SC) at [41], a DoI is the *only* remedy available. It should be presumed that a DoI will follow unless a compelling reason exists not to. A presumptive approach will give successful applicants access to a more predictable and effective remedy.

   d. This provides a principled legal basis for the courts to focus on their duty of interpreting and applying the standard required by the Bill of Rights in a manner wholly consistent with the usual function of the courts — *Taylor* (SC) at [41], [46] and [53]. The alternative is to shirk the task of undertaking the scrutiny required by the human rights legislation — *Child Poverty Action Group Inc* at [91]-[92].

   e. International experience suggests the grounds for declining to grant a DoI will be rare. As with the UK, New Zealand courts have no ability to 'impose' their opinion on Parliament. However, there is jurisdiction, and in this instance an obligation, to form a professional opinion as to the content of rights and the compatibility of the present law with them — *Nicklinson* per Baroness Hale at [325]. There is no reason that this Court should feel in any way reticent about the making of a DoI — *Steinfeld* at [61].

   f. There is no compelling reason not to grant a remedy in this case. On the contrary, an unjustified limit has been established which touches on the democratic process itself. The making of DoIs will fulfil this Court's responsibility and traditional role to declare and maintain the boundaries and protect against the erosion of human rights — *Taylor* (SC) per Elias CJ at [117].