IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 14/2022**

BETWEEN	**MAKE IT 16 INCORPORATED**
	Appellant
AND	**ATTORNEY-GENERAL**
	Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

8 July 2022

Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
Una Jagose QC/Abbey Lawson
Una.Jagose@Crownlaw.govt.nz/Abbey.Lawson@crownlaw.govt.nz

COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

CONTENTS

Summary of argument

1. The Attorney-General submits the Court of Appeal was right to refuse the appeal. The Court is being invited to engage in a policy-heavy, constitutionally significant question before Parliament has done so. The judicial restraint exercised in dismissing the appeal was right.

2. Nevertheless, there is a powerful basis to say that discretion in this newly confirmed declarations of inconsistency jurisdiction (**DoI**) might be deployed, in rare cases such as this one, by refusing to exercise the jurisdiction and not determining the substance of the application. That was the better approach here – for reasons of restraint and comity.

3. Additionally, the Attorney-General supports the Court of Appeal's judgment on a different basis: the statute book and restraint/comity show that the voting age of 18 is a justified limit on 16- and 17-year olds' right against age discrimination.

Introduction

4. In 1974 Parliament changed the age of universal adult suffrage from 20 to 18, where it has remained ever since. Parliament has dealt with the age of universal adult suffrage since that date by protecting and enshrining that universal right from partisan politics[1] and, consistent with international obligations, guaranteeing the right to all citizens.[2]

5. The appellant, Make It 16, is a lobby group that seeks to influence the "intensely and quintessentially political issue"[3] of whether the voting age for general, local and other elections should be reduced to 16 years old. This proceeding is part of its campaign. There being no dispute that the law does not permit 16- and 17-year-olds to vote,[4] Make it 16 seeks a DoI

---

1 Electoral Act 1993, s 268 [[RBOA 4]]. Voting age was first entrenched in the Electoral Act 1956. *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 at [27] [[RBOA 14]] (***Ngaronoa SC***). Note that the entrenchment only applies to the voting age for general elections, under the Electoral Act 1993. However, the voting age for local and other elections is set by reference to the voting age for general elections. A change to the age in the Electoral Act would therefore affect the voting age in local and other elections.

2 New Zealand Bill of Rights Act 1990, s 12 [[ABOA 0039]] (**NZBORA**).

3 *Make It 16 v Attorney-General* [2021] NZCA 681 at [62], [[COA 101.217]] (**Court of Appeal's judgment**).

4 Electoral Act 1993, ss 3(2), 60, 74 [[ABOA 0003]]; Local Electoral Act 2001, ss 20, 23 and 24 [[ABOA 0031]]; New Zealand Public Health and Disability Act 2000, sch 2, cl 3 [[RBOA 6]] (repealed from 1 July 2022 by s 103 of the Pae Ora (Healthy Futures) Act 2022 [[RBOA 8]]); Citizens Initiated Referenda Act 1993, ss 2, 18, 24, 24A, 27 [[RBOA 2]]; Referendums Framework Act 2019, s 13 [[RBOA 9]] (**the voting age provisions**).

as "formal confirmation that the rights of 16- and 17-year-olds have been unjustifiably infringed."[5]

6. The Courts below both refused the application, for different reasons, but the underlying rationale for declining the application was the same, being based in comity and judicial restraint. Any extension of the universal adult franchise is quintessentially a matter for Parliament.

7. The Attorney-General submits both Courts were right to recognise the important principles of comity and restraint, albeit they brought that restraint to bear in by different methods; the High Court in its New Zealand Bill of Rights Act 1990 (**NZBORA**) justification analysis and the Court of Appeal in its consideration of relief.

8. The Attorney-General says the Court of Appeal was right to dismiss the appeal, however, submits that the discretion may have been exercised at an earlier stage. That is by the Court resisting the invitation to engage in the policy-heavy, constitutional questions that are inextricably bound to any assessment of the justification for the voting age, before Parliament has done so. The Attorney-General submits that the extension of the universal adult franchise is one of the rare circumstances in which the Court should exercise restraint and not enter the fray.

9. It is clear from *Taylor* that the DoI remedy is discretionary,[6] but it is a young remedy, and its nature and scope did not require detailed examination in that case. The scope, extent and exercise of the discretion squarely arises in the present case.

10. The Attorney-General says that discretion must apply at all stages of the DoI jurisdiction – not only to withhold the remedy as the final step in a suitable case (as distinct from indicating in the reasoning of judgment that a right has been limited without adequate justification (**a *Hansen*-indication**)) but, in rare circumstances, to decline to exercise the

---

5 Appellant's submissions on appeal, at [2].

6 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [46], [58] and [70] [[ABOA 0140]] (***Taylor SC***).

jurisdiction altogether and not enquire into any inconsistency for reasons of comity and restraint.

11. Determining that a matter is one where judicial restraint is called for is a determination of law, and the Courts below were right to do so.[7]

The Courts below

12. In declining Make It 16's application, the High Court applied restraint in the s 5 NZBORA justification exercise:[8]

    12.1 Justice Doogue found the voting age of 18 was a demonstrably justified limitation on the right to be free from discrimination. Eighteen years is within the range of reasonable alternatives available to Parliament to give effect to the legitimate objective – setting the universal adult franchise.

    12.2 In reaching this conclusion, Doogue J applied a "healthy dose of deference" to Parliament, given the heavy policy content of this issue and the valid policy arguments that exist on each side of the debate.

13. In declining Make It 16's application by applying restraint in the exercise of discretion against relief, the Court of Appeal:[9]

    13.1 Disagreed with the High Court's approach, on the basis that it was overly deferential to Parliament.

    13.2 Held that, instead of demonstrating that 18 years old was in the range of reasonable alternatives, the Attorney-General was required to demonstrate why 18 years was justified over 16.

    13.3 Found the Attorney-General had not attempted to justify that 18 was a reasonable limit and therefore had not established that the limit on 16- and 17-year-olds could be justified in a free and democratic society.

---

7 *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at [75] – [76] [[RBOA 16]].

8 *Make It 16 v Attorney-General* [2020] NZHC 2630 at [109] [[COA 101.133]] (**High Court's judgment**).

9 Court of Appeal's judgment, above n 3, at [53] – [62] [[COA 101.215]].

13.4 Declined to issue a declaration of inconsistency because of the context. The issue is:

13.4.1 already in the public arena;

13.4.2 intensely and quintessentially a political issue involving the democratic process itself; and

13.4.3 one on which there are a range of reasonable views.

14. The factors which the High Court and Court of Appeal relied on in declining Make It 16's claim are in truth factors that are more appropriately deployed to counsel restraint in entering into the question at all as to whether there is discrimination.

Issues for determination

15. The issues for determination on appeal are:

15.1 What is the scope and extent of the Court's discretion to decline to award a DoI?[10]

15.2 Was any prima facie limitation of s 19 justified under s 5 of NZBORA?[11]

Law

16. The legal framework enacting the voting age is uncontested:

16.1 18-year-olds (and over) may vote in general, local body, District Health Board elections and referenda and 16- and 17-year-olds may not.[12]

16.2 The age of 18 for voting purposes in general elections cannot be amended or repealed without the support of a 75 per cent majority of Parliament or a majority of votes cast in a poll of eligible voters on the General and Māori rolls.[13]

---

10 Applicant's notice of application for leave to bring civil appeal [[COA 05.001]] and proposed amended notice of application for leave to bring civil appeal [[COA 05.007]].

11 Respondent's notice of intention under r 20A of the Supreme Court Rules 2004 to support the Court of Appeal's decision on other grounds [[COA 05.014]].

12 The voting age provisions, above n 4. Note that District Health Boards were disestablished on 1 July 2022 by sch 1, cl 9 of the Pae Ora (Healthy Futures) Act 2022 [[RBOA 8]].

13 Electoral Act 1993, s 268 [[RBOA 4]].

16.3 NZBORA guarantees:

16.3.1 the right to vote in general elections to all citizens aged 18 and over;[14] and

16.3.2 the right to be free from discrimination on the basis of "any age commencing with the age of 16".[15]

SUBSTANTIVE SUBMISSIONS

17. Voting is the essence of democracy, expressing in a formal way the consent of the governed. The right to vote is fundamental to "democracy and the rule of law".[16]

18. Voting represents the principal accountability mechanism in our system of democratic government according to law, in both general and local elections.

19. Parliament's decision on the voting age is manifest in primary legislation that occupies an important place in our constitutional infrastructure.

Declarations of Inconsistency are discretionary

20. This Court in *Taylor* confirmed the Court's civil jurisdiction to grant a DoI (as distinct from a "*Hansen*-indication").[17]

21. The DoI jurisdiction is young and there is limited guidance from this Court on the scope and extent of the discretion.

22. The Court below was right to find that there will be cases where a DoI should be refused, even where there is a legislative provision that is inconsistent with a guaranteed right.[18] There should be no presumption that relief by way of a DoI will always follow.

---

14 NZBORA, s 12 [[ABOA 0039]].

15 Section 19 [[ABOA 0040]]; Human Rights Act 1993, s 21 [[ABOA 0026]]

16 *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519 at [9] [[RBOA 21]].

17 *Taylor SC,* above n 6 [[ABOA 0119]].

18 Court of Appeal's judgment, above n 3, at [60] – [62] [[COA 101.216]].

23. The *Taylor* Court of Appeal held that whether to grant a DoI is discretionary, not as a matter of jurisdiction, but as a matter of judicial policy.[19] Further, that Court:

    23.1 recognised that it would be proper exercise of the judicial function for the Court to exercise restraint in a DoI application for a number of reasons;[20] and

    23.2 firmly rejected the idea that a plaintiff can lay claim to a DoI "as of right".[21]

24. The *Taylor* Court of Appeal identified matters as relevant for the exercise of discretion:

    24.1 restraint for reasons of comity or deference to other branches of government;[22]

    24.2 "Courts must be sensitive to the risk … that the remedy will invite claims that, although of public interest, cannot or should not be decided by the judicial branch";[23] and

    24.3 one of the factors in considering relief may require the court to invoke its needs "for sensitivity to the judicial role in government".[24]

25. Further reasons for not exercising the jurisdiction were outlined by the Court of Appeal in *Taylor*, including situations where the DoI would serve no purpose, or where the issues engaged were not of sufficient public importance to warrant the Court's involvement.[25]

26. While this Court did not need to determine the nature and scope of the discretion, it observed that questions over the approach to be taken to the exercise of the discretion to grant relief will arise as the jurisprudence

---

19 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [171] [[ABOA 0115]] (***Taylor CA***)

20 At [168] – [172] [[ABOA 0114]].

21 At [169] [[ABOA 0114]].

22 At [169] [[ABOA 0114]].

23 At [170] [[ABOA 0115]].

24 At [171] [[ABOA 0115]].

25 At [169] – [172] [[ABOA 0114]]. This Court also indicated that the utility of a formal declaration vs an indication of inconsistency was relevant to the exercise of the discretion: *Taylor SC*, above n 6, at [58] [[ABOA 0142]].

develops.[26] Further this Court indicated its view (without deciding) that a DoI should be to vindicate the rights of those affected, not to assist Parliament in its role.[27]

27. In the United Kingdom it is accepted that declarations are discretionary — s 4(4) the Human Rights Act 1998 says "may" and not "must"[28] — but the circumstances in which they have not been made, over the past 20 years, when the discretion has been considered at the end of the test, have been narrow. There are two cases: one where no declaration was made because the impugned legislation had already been amended by the time the court case was decided, and a second where the inconsistency had already been declared in an earlier case and the matter was before Parliament.[29]

28. Each of the examples given by the Court of Appeal in *Taylor* sensibly apply also to a discretion to refuse to exercise the jurisdiction, rather than to exercise it but withhold the formal remedy. Where the reason for refusing to exercise the jurisdiction is restraint for constitutional/institutional competence reasons rather than inexpedience or lack of utility, restraint in exercising the jurisdiction recommends itself on two grounds:

    28.1 Where the Court is declining to make a DoI on constitutional grounds it is refraining from casting doubt on or endorsing the legitimacy of the enactment in question. Declining to exercise the jurisdiction rather than withholding a remedy prevents a *Hansen*-indication from having that same effect.

    28.2 As this Court identified in its justification for the DoI as a proper exercise of judicial function,[30] a DoI may be a valuable and important remedy even in the absence of any dispute as to the

---

26 *Taylor SC*, above n 6, at [70] [[ABOA 0144]].

27 *Taylor* SC at [66] [[ABOA 0144]] and [107] [[ABOA 0152]].

28 [[ABOA 0575]].

29 *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271 [[RBOA 15]]; *Re Close's Application for Judicial Review* [2020] NICA 20 [[RBOA 19]]. Another case was disposed of on admissibility grounds but the Court indicated it would likely have withheld a declaration: *A Local Authority v AG* [2020] EWFC 18; [2020] Fam. 311 [[RBOA 10]].

meaning of the enactment in question or its consistency with affirmed rights – however, that reasoning falls away if the Court engages in the issue but refrains from providing the DoI.

29. This approach is consistent with the approach of the United Kingdom's Supreme Court in *R (Nicklinson) v Ministry of Justice* where a majority of the United Kingdom's Supreme Court refrained from considering the question whether the statutory ban on assisted suicide was inconsistent with the right to a private life under the European Convention on Human Rights (**ECHR**) (and thus the Human Rights Act 1998 (UK)) on the basis that this should be properly considered by Parliament before the Court entered the dialogue.[31] Specifically: four members of the Supreme Court (Lords Sumption, Clarke, Reed and Hughes) considered that the nature of the subject matter, including its moral complexity, rendered it institutionally inappropriate for the Court to consider this issue; three (Lords Neuberger, Mance and Wilson) determined that the Courts could assess this issue, but it was institutionally inappropriate to consider this issue in advance of Parliament doing so; and two (Lord Kerr and Lady Hale) considered it was appropriate for the Court to consider the issue at this point and held that the prohibition was incompatible with the right to private life.

30. This case cannot determine all of the situations where the discretion to refuse to exercise the jurisdiction will apply, but the Attorney-General submits this case is certainly one in which the Courts below were right to decline the remedy. That is particularly so here where, on what appear to be quite unique facts, Parliament has expressly postponed any question of whether the universal franchise should be expanded to 16- and 17-year-olds until broad democratic support for it is manifest.[32]

31. The only evidence available of Parliament's assessing the merits of an age at which the franchise is to be granted lies in its expansion of the

---

30 *Taylor SC*, above n 6, per Ellen France J at [53] [[ABOA 0141]].

31 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 [[ABOA 0665]].

32 Electoral Act 1993, s 268 [[RBORA 4]].

franchise from 20 to 18 years.[33] As submitted below, ignoring that legislative fact but requiring the Attorney-General to now produce evidence supporting 18 as opposed to 16 as the age for universal franchise risks turning the DoI jurisdiction into a judicial inquiry into where the franchise should be set, rather than an assessment of the basis on which Parliament enacted it.

Applying the discretion in this case

32. There is no dispute here that 16- and 17-years olds are not – and have never been – within the scope of the universal adult franchise. Nor is it disputed that 16- and 17-years olds have a right not to be discriminated against on the basis of age. But the law should not be, as the appellant would have it, that once a facial inconsistency between rights is identified, a DoI will follow inexorably.

Judicial restraint: institutional competence

33. The constitution of Parliament itself lies close to its privilege of exclusive cognisance. That is not to say that it is beyond the scrutiny of the Court for compliance with manner and form provisions and electoral rights but that Parliament should be given the first say on extension of the franchise.[34]

34. Care is required here to avoid the Court exercising its jurisdiction where Parliament enjoys greater institutional competence and experiences democratic accountability for the choice of this important constitutional right.

35. The strong recognition in s 5 of NZBORA of a free and democratic society's assessment of what limiting of rights may be justified can be deployed here, not through a *Hansen*-lead evaluative approach to determine justification, but directly through the exercise of the discretion and not entering the fray.

---

[33] Affidavit of Caroline Greaney at [12] – [15] [[COA 201.037]] and exhibits CBG-7 [[COA 301.176]] and CBG-8 [[COA 301.177]].

[34] As also occurred in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 [[ABOA 0665]].

36. As the Court of Appeal said in *Taylor*:[35]

> [t]hese considerations may arise when the inconsistency concerns a protected right because, as the Bill of Rights itself recognises, rights must sometimes be balanced against other societal interests or other rights and such evaluative decisions may lie within the province of the legislative branch.

37. Universal adult franchise is fundamental to the constitutional underpinnings of our free and democratic society. As the Court below accepted, it is clearly justified to draw the line of where that franchise is granted somewhere.[36]

38. The Court's error, the Attorney-General submits, is in requiring the Attorney-General to bring evidence that the age of 18 was the better place to draw that line.[37]

39. For the Attorney-General to have engaged on those terms with the Court would amount to a judicial inquiry into the very question over which Parliament enjoys greater institutional competence. To do so would have ignored decades of constitutionally important steps that Parliament has taken to set, protect and guarantee the universal adult franchise.

40. Entrenchment, in particular, demonstrates Parliament's determination that the voting age should not be amended without a particularly powerful democratic mandate.[38]

41. Parliament has never considered a Bill to lower the voting age to 16. Were it to do so, its consideration of the issue would be likely to be informed by policy proposals, contemporary domestic reports by parliamentary committee and non-parliamentary bodies, as well as by a vigorous public debate.

42. Such consideration involves not only the rights of the individual but the interests of the democratic community. It raises broad constitutional issues such as the rights of citizenship, the timing of constitutional change

---

35 *Taylor CA*, above n 19, at [75] [[ABOA 0093]].

36 Court of Appeal's judgment, above n 3, at [49] [[COA 101.214]].

37 At [52] [[COA 101.214]].

38 *Ngaronoa v Attorney-General; Taylor v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [102] [[RBOA 13]]; see also *Ngaronoa SC*, above n 1, at [27] [[RBOA 14]].

and the need to ensure widespread public confidence in the electoral system.

Judicial restraint: the Court is not the right place, presently

43. The voting age provisions are of a fundamentally different character to the provisions that New Zealand Courts and the Human Rights Review Tribunal have considered in previous declaration of inconsistency proceedings: they were not enacted after the Bill of Rights Act was passed[39] nor is it legislation that preceded the Bill of Rights Act, where successive Parliaments have failed to address an inconsistency that arose when the Bill of Rights Act became law.[40] The voting age provisions were transferred into the Bill of Rights Act,[41] and they have a statutory mechanism purposefully preventing their alteration without broad consensus.

44. As the High Court noted, the 1986 Royal Commission on the Electoral System recognised that lowering the age of suffrage to 16 would require broad political and public support and public debate to allow Parliament to judge when the public is ready for such a change.[42]

45. The debates in *Hansard* for previous reductions of the voting age[43] illustrate the breadth and depth of the political issue and the room for disagreement between reasonable individuals. These differing views can still be seen in:

---

39 For example *Taylor SC*, above n 6 [[ABOA 0119]]; *Chisnall v Attorney-General* [2021] NZCA 616, (2021) 13 HRNZ 49 [[ABOA 0201]], which is currently under appeal to this Court (SC 26/2022). Another possible category of DoIs may be seen in the *Heads v Attorney General* (2015) 10 HRNZ 203, in which the Human Rights Review Tribunal made a declaration that cl 68(3)(b) of the first schedule of the Accident Compensation Corporation Act 2001 Act was inconsistent with the right to be free from discrimination on the basis of age. Unlike *Taylor,* in this case the discrimination in the Act did not appear to have been considered by Parliament as there had been no NZBORA s 7 report about it.

40 For example the Adoption Act 1955, about which the Human Rights Review Tribunal issued a declaration of inconsistency under s 92J of the Human Rights Act in *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113.

41 Hon Geoffrey Palmer, Minister of Justice, A Bill of Rights for New Zealand: A White Paper (Government Printer, Wellington, New Zealand: 1985) explicitly recorded that "the voting age of 18 is also a reserved provision by virtue of s 189(e) of the Electoral Act and thus partly entrenched" at [10.50] [[COA 302.405]]. This was also affirmed in the Interim Report of the Justice and Law Reform Select Committee, Inquiry into the White Paper - A Bill of Rights for NZ [1986-1987] I AJHR I.8A at 38 [[COA 303.455]].

42 High Court's judgment, above n 8, at [106] [[COA 101.132]].

43 These are annexed to the affidavit of Caroline Bridget Greaney: Electoral Bill 1965 (12 October 1956) 310 NZPD 2450 (Exhibit CBG 2) [[COA 301.029]]; Electoral Amendment Bill 1969 (5 – 13 August 1969) 362 NZPD 1723 (Exhibit CBG 4) [[COA 301.149]]; Electoral Amendment Bill 1974 (18 September 1974) 394 NZPD 4266 (Exhibit CBG 8) [[COA 301.177]].

45.1 the evidence filed by Make It 16, in support of its application;[44]

45.2 the fact that New Zealand defines the age of majority differently in different contexts;[45] and

45.3 observations of the Royal Commission on the Electoral System as to the voting age.[46]

46. Once s 5 of NZBORA was engaged, justification of the limit on s 19 became a question of law, but the Court below was right to see the issue as intensely and quintessentially a political one on which there are a range of reasonable views.

47. The Attorney-General submits the appellant is wrong to characterise the Court of Appeal's approach as refusing to determine a matter of law – and so being, in effect, an abrogation of the judicial function. Mindful that not every issue would properly be for the Court to determine, the *Taylor* Courts expressly preserved the DoI as a discretionary jurisdiction. Further, in recognising that this issue was one for Parliament, the Court determined, as a matter of law, that restraint on its part was required.[47]

48. There are more suitable avenues within the democratic process where the appellant should pursue its objectives. Absent those processes, this is the wrong time for the Court to weigh in on the legal issues that are inseparable from their constitutional and political context.

49. Opportunities for electoral law reform arise frequently, most recently with the Independent Panel reviewing Electoral Law which will consider the voting age.[48]

50. There have been two Private Members Bills recently that sought change to the voting age, the latter of which, brought in the name of Ms Golriz

---

44 Affidavit of Jan Eichhorn, at [35] – [44] [[COA 201.011]].

45 These are listed in the High Court's Judgment, above n 8, at [105] [[COA 101.132]].

46 *Towards a Better Democracy* Report of the Royal Commission on the Electoral System (1986) (at pp 233-236 (Affidavit of Caroline Bridget Greaney, at Exhibit CBG-3) [[COA 301.053]].

47 *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at [75] – [76] [[RBOA 16]].

48 Court of Appeal's judgment, above n 3, at [9].

Ghahraman MP in March 2019, was drawn from the ballot after the judgment below and is now before the House.[49]

51. In addition, there are Parliamentary enquiries after each election by the Justice and Electoral Select Committee. The voting age has been discussed in each of the Reports to the House following the general elections in 2011, 2014, 2017 (and the local government elections of 2016).[50] In each of these reports to the House the Committee noted differences of views of submitters and members as to the voting age being lowered to 16 or remaining at 18 but no Committee has recommended to the government that the issue be considered further. Rather, the Committees expressed the view that greater public and political consensus were required.

52. Also, s 268 of the Electoral Act itself provides a direct means to engage the necessary popular support for a change in the voting age but the appellants have not been able to secure sufficient public enthusiasm for the debate to be brought to the House by the public.[51] There is no evidence of significant public enthusiasm before this Court, instead there is evidence of mixed views. There is also evidence of two petitions requesting that Parliament lower the voting age were brought in 2019/2020. The public support indicated by these petitions is moderate, at best, with them achieving 43 and 68 signatures respectively.[52]

53. The Court below was right to refuse the application for a DoI; the Court is not the right place to advance the appellants' campaign.

54. This is particularly so given that the Attorney-General cannot bring evidence of a policy process which shows that 18 years can be justified over 16 years as the age of universal suffrage. The voting age is 18 because the constitutional pre-requisites for it to change have not been

---

49 Affidavit of Caroline Greaney at [17] [[COA 201.038]].; Electoral (Strengthening Democracy) Amendment Bill, at: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_123871/electoral-strengthening-democracy-amendment-bill.

50 Affidavit of Caroline Greaney at [24] – [29] [[COA 201.040]] and exhibits CBG-14 [[COA 302.241]], CBG-15 [[COA 302.285]] and CBG-16 [[COA 302.350]].

51 Affidavit of Caroline Greaney at [18] [[COA 201.038]] and exhibit CBG-13 [[COA 301.216]].

52 These petitions may be compared to the 11,000 signatures on the petition that preceded the reduction of the voting age to 18 in 1974: Affidavit of Caroline Greaney at [11] [[COA 201.037]].

met and Parliament has never considered lowering the voting age to 16. That is not to say that the Court should enable political inertia over rights inconsistencies to prevail. Another very relevant aspect of the context here is there is a particular mechanism by which the issue could be forced into political arena for consideration. The Electoral Act's protection of the voting age (among others) from change by requiring a super-majority of Parliament also provides for change by a (simple) majority of votes cast in a poll of the eligible voters in the General and Māori electorates.[53]

55. Another powerful reason for the Court to exercise its discretion not to grant the declaration sought is that a finding from the Court that the voting age provisions amount to a *prima facie* breach of s 19 of NZBORA[54] and is not, or has not been, justified not only casts doubt on the validity of the voting age but also inappropriately skews public and political debate on this issue, even if this is not accompanied by a formal DoI.

56. Indeed, the same could be said of the High Court ruling that the discrimination was justified. The Court has there also 'entered the fray' in a substantive way before the public has had the opportunity for the sort of informed policy debate required.

57. In a democracy, the question of how and when changes to the law take place may be as significant as the substantive changes themselves. The Court was right to be sensitive to the "intensely and quintessentially political issue" here but wrong to seek to engage in the policy debate before the public and the Parliament had done so.

58. A Citizens Initiated Referendum would allow, with only 10% (or more) of the voting public in support, to have the question put to the electorate for an indicative referendum.

59. For these reasons the Attorney-General submits that this is one of the rare cases where the Court should exercise its discretion and refrain from determining an application for a DoI.

---

53 Electoral Act 1993, s 268 [[RBOA 4]].

54 Noting that the threshold for a prima facie breach of s 19 is reasonably low, as set out in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 [[ABOA 0261]], differential treatment and material disadvantage.

60. The appropriate outcome in this case was a refusal to entertain the applicant's motion for a DoI. The (appropriate) restraint displayed by each of the Courts below is best given its expression by this Court leaving the matter for popular debate leading to either parliamentary determination or a referendum under the Electoral Act. And given the necessity for such debate, a judicial finding of "inconsistency" in relation to the current law (or indeed, even consistency) will be a distorting feature.

The age of universal adult suffrage is a reasonable limit, and can be justified

61. In addition to the argument above, the Attorney-General supports the decision in the Court below on other grounds by submitting that the granting of universal adult suffrage at 18 is a demonstrably justified limit on the rights of 16- and 17-year-olds to be free from age discrimination.

The approach to s 5 in this context

62. The Court below, having accepted that some limit on an age basis is "clearly justified" should have asked whether 18 years old was within a range of reasonable alternatives for the granting of universal suffrage, as the High Court did. As submitted above, in the present context, the Court was wrong to seek to engage directly in the policy inquiry and criticise the Attorney-General for being unable to do so.

63. In *Hansen,* Tipping J held that the intensity of the Court's review at the s 5 NZBORA stage may vary depending on context and that in matters which involve "major political, social or economic decisions" it may be necessary to show some latitude to Parliament.[55]

64. At paragraph [118] Tipping J cited, with approval, the speech of Lord Hope of Craighead in *R v Director of Public Prosecutions, ex p Kebilene:*[56]

> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered

---

55 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [111] – [112] [[ABOA 0344]].

56 At [118] – [119] [[ABOA 0346]]; *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL) at 380 [[RBOA 18]].

> opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.
>
> This general approach, with which I respectfully agree, can be figuratively described by reference to a shooting target. The court's view may be that, in order to qualify, the limitation must fall within the bull's-eye. Parliament's appraisal of the matter has the answer lying outside the bull's-eye but still on the target. The size of the target beyond the bull's-eye will depend on the subject matter. The margin of judgment or discretion left to Parliament represents that area of the target outside the bull's-eye. Parliament's appraisal must not, of course, miss the target altogether. If that is so Parliament has exceeded its area of discretion or judgment.

65. Although the description of this approach as one of 'deference' does not command universal support, the approach itself is recognised as arising from fundamental constitutional principles concerning the respective roles of Parliament and the Courts.

66. While determinations of law are a judicial function, kaitiakitanga of the rule of law (including the rights guaranteed by NZBORA) is a responsibility shared by all three branches of Government and as Lord Hoffman observed in *R (ProLife Alliance) v British Broadcasting Corporation*:[57]

> The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others.

67. The approach of the United Kingdom Supreme Court in *R (SC and others) v Secretary of State for Work and Pensions* suggests that it may be particularly important to proceed with a sensitivity to this distinction in discrimination cases where the breadth of non-discrimination laws creates a "risk of undue interference by the courts in the sphere of political choices".[58]

68. In that case, Lord Reed, giving the Judgment of the Court, said of the margin of appreciation to be provided to Parliament in matters of social and economic policy:[59]

---

57 *R (ProLife Alliance) v British Broadcasting Corporation*, above n 7, at [75] – [76] [[RBOA 16]].

58 *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 [[RBOA 17]].

59 At [162] [[RBOA 17]].

> It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in [*JD and A v United Kingdom* [2020] HLR 5], para 11:
>
> > "Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."
>
> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.

69. While this was said in relation to Article 14 of the ECHR which does not include age as one of the prohibited grounds of discrimination it is no less apposite in this jurisdiction in which age is a prohibited ground of discrimination and in which Parliament has determined the granting of universal adult suffrage on an age basis.[60]

The considered opinion of the elected body should be given substantial weight

70. The question of whether the limitation is justified cannot be considered in a fresh inquiry, as the Court below anticipated, separated from the way in which Parliament has chosen to approach the question of suffrage.

71. As submitted above, the statutory landscape, across nearly five decades, affirms Parliament's settled view, and in relation to different electoral processes, that universal adult suffrage is granted at 18.

---

[60] Convention for the Protection of Human Rights and Fundamental Freedoms 2889 UNTS 221 (signed 4 November 1950, entered into force 3 September 1953), art 14 [[RBOA 22]].

72. While entrenchment does not render a statutory provision immune from challenge under s 19 of NZBORA, it reflects the importance of the provision in question and also Parliament's determination that the provision should be amended only with a particularly powerful democratic mandate. This suggests that it is an issue which lies within the realm of democratic decision making.

73. Finally, some account should be taken of the fact that Parliament chose, through s 12 of NZBORA, to guarantee only the right of those aged 18 and over to vote in Parliamentary elections. The fact that Parliament chose not to affirm a right to vote for those under 18 as a "human right and fundamental freedom", suggests that the issue remains within the sphere of democratic debate. It also, as the Court found at first instance, "signals that the age restriction in the voting age provisions is a reasonable limit on the right to be free from discrimination on the basis of age".[61]

74. None of this is to say that issues that Parliament has not yet considered should be immune from the DoI jurisdiction. However, an informed policy process, domestic research and vigorous public debate will all be necessary, in a democracy, for a change of the law in a matter of such constitutional importance.

75. The fact that this process has not taken place forms a critical part of the justification for the current law under s 5 of NZBORA.

Eighteen is an age of adult franchise within a range reasonably open to Parliament

76. Against this background, the Attorney-General submits the approach to s 5 NZBORA here is to ask whether the age of 18 as the age of universal adult suffrage is one that was available to Parliament among a reasonable range of alternatives.

77. Like many countries New Zealand provides young people with an incrementally increasing range of freedoms and responsibilities. However, the following reasons demonstrably justify it is reasonable that a person is granted suffrage at the age of 18:

---

[61] High Court's judgment, above n 8, at [109] [[COA 101.133]].

77.1 By providing that adults have the right to vote and fixing that age at 18, Parliament must be understood to have determined that 18 is the age of adulthood.

77.2 Article 1 of the International Convention on the Rights of the Child provides:[62]

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

77.3 At 18 a person is:

77.3.1 no longer subject to the authority of their parents or guardian;[63]

77.3.2 no longer subject to the youth justice provisions of the criminal justice system;[64]

77.3.3 may, in civil law, enter into any contract and be bound by its terms;[65] and

77.3.4 may exercise the full rights and responsibilities of democratic citizenship: voting,[66] standing for office,[67] being called for jury service.[68]

78. Because 18 is the age by which the law has deemed a person should be free from the authority of his or her parents or guardian and be exposed to a full range of adult responsibilities, it may be reasonably regarded as the age by which people should assume the responsibilities of democratic self-government and be entitled to vote.

79. The Attorney-General submits the current voting age is one that was reasonably open to Parliament to adopt. The age of 18 as the grant of

---

62 Convention on the Rights of the Child GA Res 44/25 (opened for signature 20 November 1989, entered into force 2 September 1990), art 1 [[RBOA 23]].

63 Care of Children Act 2004, s 28 [[RBOA 1]].

64 Oranga Tamariki Act 1989, s 2 [[RBOA 7]]. But see the exceptions in s 386AAA [[RBOA 7]].

65 Contract and Commercial Law Act, pt 2, subpt 6 [[RBOA 3]].

66 Electoral Act 1993, ss 3, 60 and 74 [[ABOA 0003]]; Local Electoral Act 2001, ss 20, 23 and 24 [[ABOA 0031]].

67 Electoral Act 1993, s 47 [[RBOA 4]].

68 Juries Act 1981, s 6 [[RBOA 5]].

suffrage lies well within the range of reasonable alternatives open to Parliament. Accordingly, the Court below was wrong to seek to engage in the merits of the arguments for and against reducing the voting age to 16[69] and failed to recognise, as the High Court did, that the "complex issues of morality, social justice, individual responsibility, and public welfare at play" are matters of legitimate democratic debate.[70]

80. As submitted above, the question of where the voting age can be justified in a free and democratic society is an issue that lies within the competence of Parliament.

81. The appellants point to a relatively small number of countries that have chosen to lower the voting age from 18 to 16, however, those examples show the international experience that this is an intensely political question. In none of these examples did the domestic courts of the country in question express the first view on the issue of voting age. In each of the examples considered in the appellants' evidence, the decision appears to have been taken by the legislature, following a process of enquiry and debate, absent any court ruling that human rights law required the legislature to consider the matter in a particular way.[71]

82. The appellant relies on the judgment of the Supreme Court of Canada in *Sauvé* to suggest that the Courts must closely examine any limitation on the franchise.[72] But that was a case, like *Taylor*, of an enactment that disenfranchised adults who had previously enjoyed the right to vote. The approach of the majority in *Suavé* to the prisoner voting issue before them is not an approach that Courts in other jurisdictions have chosen to follow.[73] Importantly, in *Sauvé* McLaughlin CJ (giving the Judgment of the majority) drew a distinction between the approach required when

---

69 Court of Appeal judgment, above n 3, at [52] [[COA 101.214]].

70 High Court judgment, above n 8, at [106] [[COA 101.132]].

71 Affidavit of Jan Eichhorn, at [11] – [34] [COA 201.004]].

72 *Sauvé*, above n 16, [[RBOA 21]].

73 *Delvigne v Commune de Lesparre Médoc* [2016] 1 WLR 1223 (ECJ) [[RBOA 11]]; *Roach v Electoral Commissioner* [2007] HCA 43, (2007) 233 CLR 162 [[RBOA 20]]; *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber) [[RBOA 12]]. In these cases the courts have found that whilst a blanket ban on all prisoners voting was inconsistent with the right to vote, it was reasonable and within the legislatures margin of appreciation to restrict the voting rights of those convicted of serious offences.

considering measures to restrict the franchise on the basis of criminal convictions and the issue of voting age:[74]

> The analogy between youth voting restrictions and inmate disenfranchisement breaks down because the type of judgment Parliament is making in the two scenarios is very different. In the first case, Parliament is making a decision based on the experiential situation of all citizens when they are young. It is not saying that the excluded class is unworthy to vote, but regulating a modality of the universal franchise.

83. Accordingly, the Attorney-General submits the voting age provisions are reasonable limits on the right against age-based discrimination and are justified.

Summary

84. In answer to the question on which leave was given, the Court of Appeal was right to dismiss the appeal. The strong constitutional grounds on which it did so plainly mark this as a rare case where judicial restraint was required.

85. However, that restraint was better exercised in not determining the substance of the appellant's application at all.

86. Alternatively, having entered into consideration of whether the facial inconsistency of the voting age provisions with s 19 of NZBORA was justified, the Court ought to have dismissed the appeal on the grounds that the voting age provisions fall within a reasonable range such as is demonstrably justified in a free and democratic society.

8 July 2022

Una Jagose QC / Abbey Lawson
Counsel for the respondent

[74] At [37] [[RBOA 21]].

List of authorities

Statutes

1. Accident Compensation Corporation Act 2001, sch 1, cl 68
2. Adoption Act 1955
3. Care of Children Act 2004, s 28
4. Citizens Initiated Referenda Act 1993, ss 2, 18, 24, 24A, 27
5. Contract and Commercial Law Act 2017, pt 2, subpt 6
6. Electoral Act 1956
7. Electoral Act 1993, ss 3, 47, 60, 74, 268
8. Human Rights Act 1993, s 21 & 92J
9. Human Rights Act 1998 (UK), s 4
10. Juries Act 1981, s 6
11. Local Electoral Act 2001, ss 20, 23, 24
12. New Zealand Bill of Rights Act 1990, ss 5, 12, 19
13. New Zealand Public Health and Disability Act 2000, sch 2, cl 3
14. Oranga Tamariki Act 1989, ss 2, 386AAA
15. Pae Ora (Healthy Futures) Act 2022, s 103 and sch 1, cl 9.
16. Referendums Framework Act 2019, s 13
17. Supreme Court Rules 2004, r 20A

Cases

18. *A Local Authority v AG* [2020] EWFC 18, [2020] Fam 311
19. *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113
20. *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24
21. *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213

22. *Chisnall v Attorney-General* [2021] NZCA 616, (2021) 13 HRNZ 49

23. *Delvigne v Commune de Lesparre-Médoc* [2016] 1 WLR 1223 (ECJ)

24. *Hirst v United Kingdom (No 2)* (2006) 42 EHHR 41 (Grand Chamber)

25. *Heads v Attorney-General* (2015) 10 HRNZ 203

26. *Make It 16 v Attorney-General* [2020] NZHC 2630

27. *Make It 16 v Attorney-General* [2021] NZCA 681

28. *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456

29. *Ngaronoa v Attorney-General; Taylor v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643

30. *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289

31. *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271

32. *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223

33. *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657

34. *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185

35. *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL)

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

37. *Re Close's Application for Judicial Review* [2020] NICA 20

38. *Roach v Electoral Commissioner* [2007] HCA 43, (2007) 233 CLR 162

39. *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519

Other

40. Convention for the Protection of Human Rights and Fundamental Freedoms 2889 UNTS 221 (signed 4 November 1950, entered into force 3 September 1953) at art 14

41. Convention on the Rights of the Child GA Res 44/25 (opened for signature 20 November 1989, entered into force 2 September 1990) at art 1

42. Electoral (Strengthening Democracy) Amendment Bill