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IN THE SUPREME COURT OF NEW ZEALAND SC 14/2022

I TE KŌTI MANA NUI O AOTEAROA [2022] NZSC Trans 14

BETWEEN **MAKE IT 16 INCORPORATED**

Appellant

AND **ATTORNEY-GENERAL**

Respondent

Hearing:	12 July 2022
Court:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Kós J
Counsel:	J S McHerron, G K Edgeler, E B Moran (via AVL) and C M McCracken for the Appellant A M Powell and A P Lawson for the Respondent

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CIVIL APPEAL

MR McHERRON:

Tēnā koutou e ngā Kaiwhakawā. Ko Jason McHerron tōku ingoa. Kei kōnei mātou ko aku hoa mā, ko Mr Edgeler, ko Ms Moran kei korā, ko Mr McCracken kei kōnei mō te kaipīra.

WINKELMANN CJ:

Tēnā koutou.

MR POWELL:

E Te Kōti Mana Nui. Tēnā koutou. Ko Powell ahau, kei kōnei māua ko Ms Lawson, mō te Karauna. May it please the Court, Powell and Ms Lawson appearing for the Attorney-General.

WINKELMANN CJ:

Tēnā korua. Now just a general comment that the protocol which was issued two weeks ago I think regarding the appearance of duty counsel applies so I'm not sure if you're organised to have your duty counsel make submissions but I'm just reiterating the willingness of this Court to accommodate splitting of submissions to enable that, and also I want to check with al parties that they have, with both counsel as to whether they have split up the time available, because we will have to be finishing by 4 o'clock. Right. Mr McHerron.

MR McHERRON:

Thank you your Honour. With your Honour's leave, and consistent with the spirit of this claim, we wish to make maximum advantage of the Chief Justice's practice note on the role of junior counsel, all four of us wish to share the burden of Make It 16's oral submissions, as long as you don't make us carry the burden of justification, which we say is for the Attorney-General alone.

On the outline, which your Honour's should have, I will run through to point 8(b). Mr Edgeler will take up the rather large 8(c) and I will resume briefly for 8(d) and then Ms Moran and Mr McCracken will carry the argument at point 9. With your Honour's leave I will make the reply submission.

A selection of affidavits in the case on appeal indicates some of the breadth of background and disadvantage occasioned by the discrimination the members of Make It 16 face in not being able to vote in local or Parliamentary elections. There is Gina McLay at 201.023 who says, “Things like the climate crisis and COVID-19 recovery can't want for me to grow a little older to make decisions about... Whatever the solutions are, they will impact my generation for years to come. That may be in the way we are taxed, whether or not we can find a job or travel overseas to study and more… I would really like to see stronger action to ensure my generation has a healthy planet to live on for years to come.”

Isobel Smith of Wanaka at 201.026 says: “I am invested in my community, yet by my inability to vote for local elected officials, my voice can get lost on issues of importance. Our largest issue over the past few years has been managing exponential growth in a region whose infrastructure cannot support this growth. I've missed out on voting for councillors who will make future planning decisions.” Isobel said she was able to participate in conversations about these issues. She was particularly concerned about wanting to participate in the referendums in 2020 which she says: “Will greatly affect the culture and direction of the country she is growing up in,” worried that these issues may not be put to the nation again despite the fact that it is young people like herself who will live with the consequences of these decisions.

In Benjamin McKie at 201.029 who was politically active at the age of 17, interested in taxation and formulating fiscal policy around concepts like land values yet unable to vote in the general election and frustrated that a group, “that the view’s of a large group of thoughtful and aware young people are being ignored in our current voting system.”

Turning to our submissions and to answer the question who are Make It 16, it is a group including 16 and 17 year olds who have a range of legal rights and responsibilities but who cannot vote in local and/or parliamentary elections due only to their age. Of course, they are advocating for Parliament to change the law and lower the voting age, but this proceeding is much narrower than that. It focuses only on whether the voting age provisions are inconsistent with the

right to be free from discrimination on the basis of age affirmed in section 19 of the New Zealand Bill of Rights Act 1990. "Make It 16 acknowledges the ultimate issue of whether to chance the voting age is a matter for Parliament. The declarations of inconsistency sought by Make It 16 will not affect the validity of the current legislation or anything done lawfully under the relevant Acts, but they will provide formal confirmation that the rights of 16 and 17 years olds have been unjustifiably infringed. Making the DOIs is therefore consistent with the usual function of the courts."

In this case, Make It 16 takes issue with very little of the Court of Appeal's judgment under appeal. As we list in paragraph 4 of our submissions we say: "Every aspect of the Court of Appeal's reasoning is correct, apart from," in the final few paragraphs, "on relief."

So we come to the question of what is a declaration of inconsistency case? We say it is the Court's own assessment of the limit on rights of 16 and 17 year olds in the voting age provisions assessed against the human rights standards and the Bill of Rights Act. What a declaration of inconsistency case is not is a judicial review of the legislature in 1974, which was the last time the voting age was changed. It's not a review of the lack of a report by the Attorney-General under section 7 in relation to the current legislation, nor is a DOI case about engaging in a policy-rich assessment of what the voting age should be, and nor does a DOI case require the Court to evaluate the competence of 16 and 17 year olds to vote. But, as the Court of Appeal recognised, the evidence shows that they are competent.

At point 3 of the outline we submit that it is: "Not in dispute that voting age provisions are inconsistent with section 19 of the Bill of Rights Act." There is a prima facie inconsistency age discrimination against 16 and 17 year olds and that is not at issue.

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KÓS J:

Well, it may not be between counsel, Mr McHerron, but I'm not myself yet sure that that is right. The Crown has conceded as a matter of law, but the question is what is the law in terms of the Electoral Act 1993 and here the Bill of Rights Act 1990.

MR McHERRON:

Yes, well, if your Honour pleases I am happy to develop submissions on that point at a time of your Honour's convenience.

KÓS J:

Well, I don't want to stop your main thrust, but on that particular point I should just indicate that I'm not yet convinced that the Crown's apparent concession is correct.

GLAZEBROOK J:

It might be worth elaborating slightly more on that if it's the point about the voting right.

KÓS J:

The point is whether section 12 covers the ground as the specific provision and the source of the right to vote under the Bill of Rights Act which is set at the age 18. When in 1993 Parliament added section 19 in its present form, the parliamentary debates don't indicate that there was any consideration of the voting age when they added age discrimination as a ground under section 19. So it may be better that you come back to this argument. I'm just indicating my concern about whether your not at issue point is correct.

MR McHERRON:

Well –

WINKELMANN CJ:

I think you come back to when you want to Mr McHerron in your order of argument.

MR McHERRON:

Yes. Perhaps I might just start by saying that the reasoning of the Court of Appeal on this point is really where we would like to start on this issue and hopefully end as well. The point was well ventilated in both the High Court and Court of Appeal and it was rejected in both courts. The argument was framed by the Attorney-General in terms of a collision between sections 12 and 19 and that once that collision was explored then it was argued that section 12 must prevail because it creates an exception to section 19, which was the Attorney-General's preferred analysis, or because it trumped section 19. In the High Court it was described as an accidental conflict and then that argument was taken on again by the Court of Appeal, which accepted that there was some force in some of the submissions that were made, but rejected the basic premise of their being a collision between those two sections in the Bill of Rights Act.

The Court of Appeal accepted Make It 16's submission that, in Facebook, consistent with the purposive and rights' affirming interpretation of the Bill of Rights itself by reference by section 6 of the Bill of Rights Act which the Court of Appeal correctly, in my submission, found applies to interpreting the Bill of Rights itself, that each of those independent provisions, section 12 and section 19, can be read and given full effect each to themselves. To put it another way, the Court of Appeal said the rights in section 12 and section 19 can co-exist. There is no internal inconsistency. Section 12, and this is essentially the punchline of the reasoning, section 12 does not say anything about the voting of 16 and 17 year olds. It does not preclude the voting age from being lowered, for example. It would not be a breach of section 12 for Parliament to lower the voting age. All it does is create a minimum, a floor and so it is not consistent with section 12 to raise the voting age above 18. That would be a breach of section 12, but lowering it would be completely independent of section 12.

KÓS J:

So why have section 12?

MR McHERRON:

Section 12 is what should be seen perhaps now as a reflection of its time. It was incorporated in the Bill of Rights Act essentially to reinforce or carry over what the current law was. Without it, if there was no age, then section 12, then it would permit a challenge, Make It 16 could make a challenge that the current law is inconsistent with section 12 if it had no reference to the age of 18 because of course Make It 16 is comprised of citizens of New Zealand. You don't have to be 18 to be a citizen or permanent resident. So it would permit a challenge and it would also permit the Attorney-General more easily, in my submission, to come to this Court and say: "Well, 18 is within a range of reasonable alternatives," and my friend Mr Edgeler will develop that point. If there is no age specified, then it's much easier to come back and say: "Well, we've got no guidance here."

The guidance that we have though now since 1994, so after section 12 was enacted, is in section 19 and section 19 creates a bright line rule that it is not possible for laws to discriminate against 16 and 17 year olds above without having a reasonable justification and be consistent with the Bill of Rights Act. That's all it does. It doesn't change the law. It doesn't, we're not asking the Court to find that the Electoral Act provisions need to be read down by reference to section 19. It's not that powerful, in our submission. All it does is create a requirement to justify the limit and if you can't justify the limit, then we say you should get a declaration of inconsistency. I'm happy to develop that point further at any time if your Honour wishes.

To come back to the outline, I was at point 3 and I think I'm at point 4 now which is what we say the issues in this appeal are: "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?" That's not the issue on our appeal, that's the issue on the Attorney-General's appeal. The issue on our appeal is 4(b): "If not, was the Court of Appeal correct to decline to make DOIs?"

In our submission at point 5: "The Court should reject the Crown's additional and unnotified ground of appeal, that the Court should refuse to enter the inquiry altogether as it is," in my submission, "an attempt to divert the Court's focus from the Attorney-General's failure to justify the discrimination." And, we say: "Asking this Court to abdicate its judicial responsibility by ceding its section 5 review role to Parliament which is contrary to the DOI jurisdiction establish and recognised by this Court in the *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 case."

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So as I indicated, it is not in dispute, and the Court of Appeal accepted that there is a prima facie inconsistency. So to ask the question at point 6" "What does the Court require of the Crown when a prima facie inconsistency is found?" The answer to that question is in point (a) the Attorney-General has the onus to show a justified limit, and I would like to take the Court to the *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 case, and by the way I do not understand it to be in dispute that the Attorney-General has the onus, but I do intend to cover what that means in some detail.

At paragraph 108 of *Hansen* in the judgment of his Honour Justice Tipping. His Honour says that: Parliament has nevertheless given the New Zealand Courts a significant review role. That role arises by virtue of s 5, which requires that a limit on a right or freedom be *demonstrably* justified. Determination of this question necessarily falls to the Courts. Parliament must therefore be taken," and sorry to interrupt myself, but I should tell the clerk that the link appears to be broken. I was intending to take your Honours through this so I will continue if that's okay.

WINKELMANN CJ:

Yes, go ahead.

MR McHERRON:

"Parliament must therefore be taken to have disclaimed any kind of presumptive justification simply because it has enacted the limit." That's –

WINKELMANN CJ:

What paragraph is that at sorry?

MR McHERRON:

At paragraph 108. Here we are. "Parliament must therefore be taken to have disclaimed any kind of presumptive justification simply because it has enacted the limit." And in my respectful submission never a truer word was spoken as might apply to the present case where it is being submitted on behalf of the Attorney-General that really Parliament has exclusive cognisance of its enacted age limit here, and the Court should just leave it alone. So there's no presumptive justification. "The onus is on those who claim the limit is reasonable and justified to satisfy the Court that this is demonstrably so."

Justice Tipping went on to talk about asking the question how much weight to give to Parliament's appreciation of the matter, but then he goes on in paragraph 109 to note that the discussion of, and I should note in relation to this paragraph that the discussion of giving weight to Parliament's weight appreciation in the *Hansen* case was in the context of a section 7 report that had been issued by the Attorney-General, which cleared the reverse onus provision, and concluded that it was a justified limit. Then Parliament went ahead and, to use Justice Tipping's word "ratified" that by passing the law.

So that's important context which is very different from the present case where we have no section 7 report, no consideration, no evidence of any consideration of human rights issues in relation to the voting age provisions.

GLAZEBROOK J:

Does that perhaps suggest that it may be premature, this application, because the process hasn't been gone through by Parliament, especially in terms of something as important as voting rights in the Electoral Act?

MR McHERRON:

No, your Honour, in my submission the application is not premature because the Bill of Rights Act has retroactive application in the sense that it applies to

legislation that was enacted before its enactment. The DOI jurisdiction is therefore available as part of the section 5 review function in relation to old pre-Bill of Rights Act enactments, and while this Court has not had another case of a DOI relating to pre-Bill of Rights law so far, the Human Rights Review Tribunal has, and the *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 case, which is in our supplementary bundle, is an example of that.

GLAZEBROOK J:

It was not an issue of jurisdiction, it was a question in relation to discretion.

MR McHERRON:

Yes, your Honour, thank you for that clarification.

GLAZEBROOK J:

And also in an area where there's probably no right or wrong answer that's absolutely clear, especially given the voting age provisions throughout the world in respect of, in free and democratic societies and age limits set in those societies.

MR McHERRON:

Well, I think there are two points there your Honour. The first point relating to discretion, the I suppose rhetorical question I would respond with is, if not now then when, and that question is significant in terms of the Attorney-General's arguments relating to entrenchment. That this is a law that is fiendishly difficult to change, and for good reason. We do not dispute that there is an imperative to ensure that the voting age cannot be manipulated for political advantage, but because it's difficult to change, and because it relates, this claim relates to an issue of minority rites affecting not only a very small number of people relative to the total population, but a group of people who are unable to directly influence the change to the law that they seek. They are not able to vote in elections. They would not be able to vote on a referendum on the issue and the cruel irony of the Attorney-General's submission suggesting that Make It 16 initiates a citizen's initiated referendum on the topic, is, in my respectful submission, out

of touch with the reality of the fact that 16 and 17 year olds would not only not be able to sign the petition, and so they wouldn't be included within the 10% of people that are needed to trigger the citizen's initiated referendum, but they're also outside the ability to vote in the referendum themselves.

So it's an unpopular issue. It's a minority issue. It makes it imperative that there is a way for those who are disadvantaged because their rights are being limited by the current law can come to the Court and ask for an authoritative declaration as to whether their rights have been limited unjustifiably. There is no other remedy that they can get for getting an assessment of that question and a vindication of their rights.

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KÓS J:

Except the democratic process itself, in which they are disqualified I accept, but in which their voice will still be heard, and in which Parliament might, through the select committee process, the evaluation of Ms Ghahraman's Member's Bill which has been drawn undertake the assessment which this Court is in a far less able position to make.

MR McHERRON:

Well, Sir, I accept the proposition that this Court is less able to determine what the voting age should be and how and when the law should be changed, but that is not what Make It 16 is asking this Court to do. Make It 16 is asking this Court to make a declaration that 16 and 17 year olds' rights have been limited by the current law. So what happens in the future is not for this Court and that in a sense should be a relief in my submission to the Court.

KÓS J:

Yes, but you are asking more than that Mr McHerron. That's only the first stage. If you're right on the statutory provision, and I have indicated my concern on that, then the inconsistency is apparent and it exists anyway. Even if I'm right in my interpretation of sections 12 and 19, that doesn't answer the position of local body franchise, because section 12 only deals with general elections. But

you're asking us to do more than simply declare inconsistency. You're asking us also to say that the limit is unjustifiable and that is what raises concerns about discretion. The first question, inconsistency is a straight forward question of law. We can answer that.

MR McHERRON:

Well, I certainly wish to develop submissions on the issue of justification, bearing in mind that it is not for Make It 16 to justify the measure and it is not, I would add, for the Court to fill the void that is coming from the Attorney-General here either. It's not for the Court to attempt to justify the matter. It is simply the Court's role to assess whether the Attorney-General has met his burden of justification in the present case.

GLAZEBROOK J:

So you are saying that the Court doesn't have an independent role to see whether it's justified on grounds that the Attorney-General may not have brought up or not brought up in that. If it is the Court's role, I suppose I should be clear, if it is the Court's role to see whether something is justified or not, then to say we're limited by the arguments that are put forward by one side or the other does not seem to be congruent with the role of the Court under the Bill of Rights or the normal role of the Court. Now obviously if we came in relation to something that hadn't been raised by the Attorney-General, then it would be incumbent on the Court to run that past counsel, but I'm quite surprised at a submission that says: "The Court has no independent role to fill in the gaps in circumstances where that might not have been done."

MR McHERRON:

Well, the Court is obviously engaged in an enquiry as to whether the rights have been limited, and that is conventionally done according to a proportionality test as reflected in the *Oakes* case and adopted in *Hansen* and accepted by the Attorney-General as the proper process to follow. It essentially is a process for evaluating the law against the test in section 5 to assess whether there is a reasonable limit that is justifiable in a free and democratic society. So of course the Court has a role in evaluating that, but my point is rather that the

Attorney-General has the job to assist the Court by telling the Court what the objective of the limit is, and then the Court can evaluate that and decide whether it is a sufficiently important objective and then it is for the Attorney-General to establish that there is a rational connection between the limit and the objective, and then it is for the Court to evaluate that and decide, and so on, whether there is a reasonably available alternative that would nevertheless achieve the objective and then to weigh up the balance of social advantage caused by the limit against the disadvantage, the detriment occasioned by the limit on rights. That of course is the Court's role to go through that process, but it can't do it on its own. It's not an inquisitorial process. We're working within an adversarial system and the roles and responsibilities within that system are clear and well established and accepted that the Attorney-General has some responsibility to come to the court armed with a justification for the Court to evaluate. If the Attorney-General –

GLAZEBROOK J:

So the submission is that if the Attorney-General doesn't do that, there's no justified limitation and the Court is obliged to come to that view, that's what I'm challenging you on?

MR McHERRON:

Well, the declarations that Make It 16 is seeking are both framed in terms of whether the limit has been justified and that is the exercise that the Court is evaluating, whether the limit has been justified. It is not a hypothetical exercise to ascertain whether or not there might be some sort of possible justification for the limit because that's for Parliament, that's for Parliament later. The only role of the Court here, according to relief that Make It 16 are seeking, is to assess the Attorney-General's case for justification.

WINKELMANN CJ:

So Mr McHerron, do you say that the Attorney-General hasn't even identified what the objective of the limitation is because Mr Powell does make an argument that this is a limitation which is justified in a free and democratic society. He makes the submissions and your big picture response to that is

that the respondent has failed to go through the necessary steps for justification?

MR McHERRON:

Yes, Your Honour. Starting with the objective of the limit on rights, the Attorney-General has not identified any objective for the limit on 16 and 17 year olds' rights or any reason for treating them differently to 18 year olds.

GLAZEBROOK J:

Well, he has really, hasn't he, because he has gone through the different or the limits that there might be in the differences between 16 year olds and 18 year olds in terms of particular types of legislation and particular types of rights and also drawn attention to the variety of age limits throughout free and democratic societies.

WINKELMANN CJ:

Well, is your point that he has to say, that the Attorney-General has to say something like: "The limit is to make sure that the people who are voting are those who have sufficient knowledge and engagement with the issues?" That's a justified limitation because that's the objective to make sure that people who are voting have this level of engagement or something like that?

MR McHERRON:

That might be one possible objective that could be identified, but the point is it hasn't been identified and if it were to be identified as an objective as the Court of Appeal recognised, the evidence before the Court suggests that 16 and 17 year olds are competent.

WINKELMANN CJ:

Has any other country engaged in this kind of rights' analysis of their voting age limitation?

MR McHERRON:

Well, this is the first declaration of inconsistency that's being sought in relation to the voting age however, apart from a somewhat perfunctory effort in Canada many years ago, but there is another current effort underway in Canada and that is being led by a team from the University of Toronto. That is taking some comments in the recent *Frank v Canada (Attorney General),* 2019 SCC 1, [2019] 1 SCR 3 case in Canada which I was about to come to your Honour and challenging their voting age as an unjustified limit on Charter rights, the right it's anti-discrimination on the basis of age once again. So that case has only just commenced in the Ontario Superior Court late last year, but I'm not aware that there's been any hearing of the substantive issue or any judgment so far.
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WINKELMANN CJ:
But no legislature has addressed it, in terms of rights consistency, when you trawl through all the material in other jurisdictions?

MR McHERRON:
No, I cannot assist with any specific rights consideration. I will have a look at that to see if there's anything that we can highlight on that.

WINKELMANN CJ:
When I said to you, you know, the obvious objective is to make sure that people who are casting a vote have competence, especially competence of engagement, you said that's one way of framing it. What are the other ways of framing if that you've come across in your extensive work in this area?

MR McHERRON:
Well I would like to come to Dr Eichhorn's affidavit in due course.

WINKELMANN CJ:
All right, don't let me take you out of your natural order.

MR McHERRON:

Yes, it is part of the plan to take you through the sort of straw person arguments that have been put up and rebutted by him in his evidence.

ELLEN FRANCE J:

So will that cover the argument that was made in the High Court, Mr McHerron, in terms of the objective?

MR McHERRON:

Well if I understand the question correctly, and please do come back if I don't, but the objective that was put to the High Court was essentially that the purpose of the limit was to delineate between adults and children. So it's not really that different from the objective that the Attorney-General claims to put forward now. The High Court –

GLAZEBROOK J:

Sorry, perhaps if you just, so what do you say the objective he claims to put forward now is?

MR McHERRON:

Well it's essentially to demarcate the difference between adulthood and childhood.

GLAZEBROOK J:

And you don't, in fact, quibble with that, do you, you just quibble with the age, because you're not suggesting that 12 year olds should vote for instance?

MR McHERRON:

Well it's not part of Make It 16's claim to do so. Make It 16's claim is based on section 19 of the Bill of Rights Act, which creates a convenient bright line of 16. So it's not part of Make It 16's claim to argue for anything lower than 16 because in our submission the Bill of Rights Act answers the question itself in section 19 by saying 16 is the age at which you need to have a justification for your discrimination. Below that you can discriminate and it's not necessary, according to human rights legislation, to justify the limit.

So coming back to her Honour Justice France's question about the High Court, the objective accepted in the High Court, the High Court accepted the submission that the purpose of the law was essentially to protect the right of adults, and not children, to vote, to uphold and affirm that right, which is already upheld and affirmed in section 12, but of course this is not a section 12 case. We're not arguing breach of section 12.

The problem with the High Court accepting that as the objective was identified by the Court of Appeal at paragraph 51. So: "…not only was her reliance on s 12 misplaced but also that her formulation of the purpose of the voting age provisions ('to implement the basic democratic principle that all qualified adults (as opposed to children) should be able to vote'), was to state the purpose too broadly…" and the relevant purpose is the purpose of the limiting measure.

In a sense our criticism of the purpose that was accepted by the Court was that all it really does is re-state the limit. It just describes in different words what the voting age provisions do. It doesn't actually contain any purpose in it at all. It doesn't answer the next question, which is at paragraph 52: "… the Court needed to inquire why Parliament made the choice it did, why are 16 and 17 year olds excluded…" So for a proper articulation of the purpose you need to have a reason, for example, the Court of Appeal went on to suggest at 56 competency. Then other possible justifications identified by the Court of Appeal, lack of independence at 57; issues of knowledge and world experience; and then international practice, coming back to your Honour Justice Glazebrook's point about international practice. The Court of Appeal did not regard that on its own as sufficient justification and its easy, in my submission, to see why that should not be a sufficient justification. Not only because of the process of incremental change that the Court of Appeal refers to, but of course when one reflects on other incremental changes that have been made to rights of enfranchisement, it's easy to see that international inertia in terms of retaining, for example, exclusionary rules preventing certain members of society from voting, is not a sufficient justification.

I mean I recall submitting to the Court of Appeal that it was not until the 1960s, I believe, when there were more than 50% of countries who had women enfranchised, and so it would be certainly wrong in a process of incremental change, which was occurring throughout the 20th century, led by New Zealand, to suggest that because more than 50% of countries disenfranchised women, then that makes it justified, and so I think that's why it was easy for the Court of Appeal to reject that as a ground for justification. It may reflect other aspects of inertia that apply here, such as the difficulty of changing the law because it relates to minorities who are not well protected other than by the Courts.

So I have some references at 8(a) to the *Frank* case, which is the case I mentioned earlier, that is the basis for the current Canadian challenge to the voting age, and in *Frank* at 43 the Chief Justice referred to a "stringent standard of justification" where the reviewing court must examine the Government's preferred justification carefully and other than adopting a deferential attitude. Deference may be appropriate in the case of a complex regulatory response or a decision involving competing social and political policies, but is not the appropriate posture for a court reviewing an absolute prohibition of a core democratic right, and the *Frank* case does relate to voting rights. It relates to the denial of the right to vote for Canadian citizens who have resided overseas for five or more years unless or until they resume residence in Canada.

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KÓS J:

Was this a case of removal of a right or is the engrafting of a right? Is this a *Taylor* type case which was a removal or a Make It 16 type case which is an expansion?

MR McHERRON:

I'm sorry, I can't answer your Honour's question.

KÓS J:

That's all right, I can look it up. I just haven't looked at *Frank* before today.

MR McHERRON:

Yes, there are similar provisions in New Zealand legislation. They were a blanket prohibition on Canadian citizens from voting if they had been overseas for long enough and of course this issue has arisen throughout the pandemic where people can't get home and so there's a sort of blanket cut off. From my, from memory, I think there may have been some oscillation in the requirements over time as there were in *Taylor*. I don't think it's exactly the same as our case which is a progressive reduction in age. I will try and give your Honour more information a bit later.

At paragraph 46 of *Frank*: "The integrity of the justification analysis requires that the legislative objective be properly stated. The relevant objective is that of the infringing measure, not, more broadly, that of the provision." That's relevant to the discussion about the High Court's acceptance of the overly broad purpose or objective. "The critical importance of articulating the measure's purpose at an appropriate level of generality has been repeatedly affirmed… If… it is stated too broadly, the result may be to exaggerate the importance of the objective and compromise the analysis."

And then the *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519 case, which is the much earlier case also about voting rights but this time for prisoners. At paragraph 9 of that case: "The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense."

That is relevant in terms of what the Court's role is, in my submission here, not to determine what the voting age should be or whether it should be lowered, but simply to assess the justification that's proffered by the Attorney-General against the human rights' standards.

So we submit that with no justification forthcoming from the Attorney-General because there was no objective articulated at the right level of generality for the limit, the Court cannot complete the remaining steps of the proportionality assessment and the Court should find against the Attorney-General and make the declaration sought in terms of the limit on rights not having been demonstrably justified.

ELLEN FRANCE J:

I suppose that's in part the purpose of my question Mr McHerron because it seems to me a justification has been advanced, or an objective has been advanced. You can say that it's not a sufficient objective, but I don't know that you can say there isn't one.

MR McHERRON:

Well, yes, your Honour, but all I can say in response to that is that we accept and adopt and invite this Court to adopt the Court of Appeal's assessment of that objective.

ELLEN FRANCE J:

I understand that. I just think that's a different point from saying there's no objective for the Court to consider.

MR McHERRON:

Well, I'm sorry, your Honour, but I would actually submit that to restate the provision which is effectively all that the Attorney-General's objective has done is just to restate the provision, is not an objective because it doesn't go on to answer the question why and that's what the objective needs to do.

WINKELMANN CJ:

Well, what evidence can the Attorney-General put up as to what was the objective? All the Attorney-General can put up is to postulate the objective and my understanding is that the objective postulated is one of engagement and knowledge.

MR McHERRON:

That's the objective postulated by the Court of Appeal. The Attorney-General has never confidently put that objective forward.

GLAZEBROOK J:

But also I think, just reading between the lines in terms of the Attorney-General, I think the idea that the electorate generally has to have some say in respect of that and the electorate generally has to have confidence in the – now, I understand against that is the minority rights as against the majority, but we are talking about elections and a democratic process, and a process for changing that, that is relatively rigorous, so that's the point against you in respect of that as against for you, arguably, and certainly I think in terms of what the Attorney-General is arguing.

MR McHERRON:

Well, yes, your Honour, and all I can say is that we fully accept that this is a job for Parliament to assess when and if and how to change the voting age.

WINKELMANN CJ:

I must say I did understand the Attorney-General to be making the competent engagement purpose, although I think you are probably right to say it has been made slightly obliquely, but that seemed to me the reason for marshalling all the provisions which shows that Parliament is making a series of decisions about issues of competence in various contexts.

GLAZEBROOK J:

And also that the electorate generally is supportive of it or at least not against it in terms of the public perception of the results of the elections.

MR McHERRON:

Yes, well, I mean the public of course will have its say in terms of who is elected and whether or not there is a mandate for changing the law, or whether indeed there is a referendum on the topic. But in terms of your Honour the Chief Justice's question about whether there is evidence of what Parliament

was thinking about in 1974 in terms of its justification, I would just like to come back to the point that this is not a judicial review of Parliament in 1974.

WINKELMANN CJ:

I wasn't suggesting that there should be such evidence. I said you can't really, that's not what you're looking for.

MR McHERRON:

No.

WINKELMANN CJ:

It's quite interesting, yes. So we are not, right, okay, I think that was my point, we're not expecting the Attorney-General to put forward evidence as to what Parliament had in their mind.

MR MCHERRON:

No, it's what is the objective of the limit now because the law is always speaking.

KÓS J:

That must be right and so the fact it was introduced in 1974 immediately advanced a particular by-election, is probably neither here nor there. It's why it's there now. But if the if, why and how is for Parliament, then how do we engage with the question of justification? If Parliament refused to engage, refused ever to consider again that the age should ever move from 18 then one might be more within the realms I think of non-justifiability, but Parliament is engaged here with this issue and the why, if and when is going to be worked out over the select committee enquiry that is currently occurring in the debate on the Bill.

MR MCHERRON:

Well, sorry, if I could just pick up on that point, there is no select committee enquiry in relation to the Bill of Ms Ghahraman.

KÓS J:

No, it's a general enquiry. Is there not an electoral committee? Isn't that referred to in the evidence of Ms Ghahraman?

MR MCHERRON:

Well, there is a review underway, but that's an independent review. It's not part of –

1100

KÓS J:

I'm sorry, you're quite right.

MR McHERRON:

It's an executive led review. There is no current select committee process underway and it is certainly not something that I can confidently predict that there ever will be in the foreseeable future a select committee considering lowering the voting age as a specific issue.

ELLEN FRANCE J:

What, just remind me, what stage the Bill is at then?

MR McHERRON:

The Bill has, Ms Ghahraman's Bill, has been introduced and it's in a queue of Member's Bills. I think it's, last time I checked, at number four on that queue and so it has not been, it has not had its first reading and there is no – I'm not aware of any indication of support for the Bill to the point where it can confidently be said that it will pass its first reading. I haven't heard any indication that it has the numbers, but then I might not necessarily hear that sort of thing anyway.

ELLEN FRANCE J:

No, but it will just progress through. It will progress through the list if you like and then have its first reading?

MR McHERRON:

Yes, but there is no indication as to whether the Government will support that Bill in terms of the voting age. There are other pieces of legislation that pick up aspects of that Bill that the Government is supporting, but not that one.

So I got to the top of the second page of the outline. Our submission is that the remaining steps of the *Oakes* and *Hansen* analysis were not in fact completed by the Court of Appeal because of that problem with the objective and so it looks as if there is no issue now, but the *Oakes* test is the correct test if one looks at the Attorney-General's outline. However, really, the Court of Appeal got stuck on the objective and that's clear from paragraph 52 of the Court of Appeal's reasons: "That being the case, in terms of the remaining steps, the Court needed to enquire why Parliament made the choice it did, why are 16 and 17 year olds excluded, deemed children not adults. 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, et cetera. Overly broad formulation of the purpose, 53, resulted in the judge being unduly deferential to Parliament and in turn failing to enquire whether the Attorney-General had discharged the burden of proof."

So in short, the Court of Appeal is saying that the High Court fell into error because of the lack of justification offered by the Attorney-General, couldn't complete the analysis and that led to a failure to justify the limit.

So we have throughout this claim made an attempt to fill the gap. It's not our job to do that, but it is the responsible thing to do what we can to try and assist the Court to see what the remaining steps of the analysis might look like if a proper purpose or objective had been articulated and so we have a number of sources of material that assist the Court to think about, evaluate the remaining steps in the *Oakes* and *Hansen* analysis. Those sources include a report from the Children's Commissioner filed at the request of the High Court under the Children's Commissioner Act 2003 which refers to the Children's Convention and states at paragraph 5 that the: "Children's participation in decisions that affect them is a fundamental right in the Children's Convention," and that it's

"not widely recognised or valued in Aotearoa". The Children's Commissioner said at seven that "a reduction in the voting age would be in line with the intention of the Children's Convention to protect the rights of the child to form their own views and express them freely".

Article 24, at paragraph 9 of the IPPCR "recognises the need to give effect to children's civil and political rights".

Paragraph 10: "Article 4 of the Children's Convention states that: *States Parties shall undertake all appropriate legislative, administrative, and other measures of the implementation of the rights…*" It talks about the UN guidance at 15 and 16.

At 21 the Office of the Children's Commissioner did a survey of children and that showed strong support for lowering the voting age. Then at 25 and following the Children's Commissioner talks about the evolving capabilities of the child, and the distinction between making immediate personal decisions, and decisions that can be made about moral dilemmas or hypothetical situations where they can rely on logical information making more rational decisions. Scientific papers cited in the Children's Commissioner's Report, the links in that report are live. If your Honours wish to look at those papers the Court of Appeal cited one of them in its decision, the Icenogle decision.

Paragraph 26 of the Children's Commissioner's Report: "In scenarios where tasks are mainly cognitive – where there is time to make decisions… adolescents show competence levels similar to adults…": citing the Mercurio et all study in the Latin American context where a number of countries in South America have a voting age of 16 years, and the science supports cognitive capacity, for example logical reasoning and memory maturing by the age of 16, adolescents achieving the same cognitive abilities as adults at age 16.

At 27 the Children's Commissioner refers to a recent study of over 5,000 people which identified, that's the one cited by the Court of Appeal, the Icenogle study,

"…across 11 countries identified that when situations call for deliberation in the absence of high levels of emotion (cold cognition), such as voting, granting consent for research participation, and making autonomous medical decisions, the ability of an individual to reason and consider alternative courses of action reaches adult levels during the mid-teen years."

So at 28 the Children's Commissioner says that that study advocates for two different legal age boundaries. "One for decisions typically made with deliberation, with a suggested designation at 16… second for decisions made in emotionally-charged situations… with a suggested designation at 18 years or older."

Then the Commissioner talks about the hotchpotch of legal ages of responsibility in New Zealand and concludes essentially that young people in Aotearoa are held legally responsible at the age of 16, with the exception of criminal responsibility, where they're actually held responsible much earlier, so a reduction in the voting age would be consistent with the legal age of responsibility in existing legislation.

Paragraph 44, consistency of lowering voting age with the Children's Convention and 45, reduction of the voting age "… would be consistent with how children and young people are considered in law, except for criminal responsibility…" referring to the ability of children to be convicted for murder and manslaughter at age 10 and 11, "… but they are not permitted any meaningful involvement in determining the state of affairs of their country until they are 18."

1110

Now, your Honour Justice Kós mentioned the recently announced review into electoral law which is underway and likely to issue a report after the next general election, but there is an earlier report that we have relied on extensively by a Royal Commission on the electoral system some 36 years ago led by Sir John Wallace and one of its members was a former judge of this Court Sir Kenneth Keith and the Royal Commission report, the relevant excerpts are

in the case on appeal at 301.054. It started with the proposition that children are members of the community and that the only justification for excluding children from voting would be lack of confidence. But the Royal Commission concluded that by the age of 15 or 16 children are competent for the purposes of voting, and went on to say that 15 or 16 might in fact be a better qualifying age than 18, and the Royal Commission pointed to the advantages of doing so because it said that enfranchising people aged 16 and 17 "may help to encourage a sense of citizenship and social responsibility".

Now of course it said that this was a matter for Parliament, referred to the reserved provisions, the lack of consensus on the topic. It says that it must be kept under review because it was concerned that children's rights were not adequately monitored in this area and this, in my submission, comes back to your Honour Justice Glazebrook's question about waiting until Parliament has had an opportunity to consider this issue and my rhetorical response at that time which was to ask: "Well, if not now then when?" Because when such a clear compelling authoritative recommendation was made 36 years ago and nothing has happened since, then the question then becomes: "Well, what is left for 16 and 17 year olds to vindicate the limit on their rights?" So that is why we are here.

Dr Jan Eichhorn was Make It 16's expert witness in the High Court. He is a social scientist at the University of Edinburgh and has a particular research interest in what has happened in Scotland over the last decade or so where the voting age has been lowered to 16 there, first for the independence referendum and then, because it worked so well, for national and local elections. His affidavit and all of the research materials on which he relies, including his own book in the case on appeal, and this is to come back to your Honour the Chief Justice's question about some of the other justifications that are sometimes offered, some of the other purposes or objectives that are sometimes offered for limiting, not extending the rights of 16 and 17 year olds to allow them to vote and he sets out those common objections at paragraph 35 and he does so not because he wishes to give credence to those but they are straw people that he then sets up to rebut in the following paragraphs of his

affidavit. So Dr Eichhorn talks about the slightly lower political knowledge of 16 and 17 year olds, but then says it is not empirically valid to assess that, or use it as a justification given that there are changes that occur when 16 and 17 year olds are enfranchised.

He addresses mental capacity at 46 [*sic*] not being considered a criterion for allowing people to vote in a gradated way. Talks about a treatment effect in which 16 and 17 year olds who are enfranchised become more politically engaged. He talks about more "active citizenship" at paragraph 50.

At 38 he talks about: "There being little evidence of 16-17-year-olds treat their vote in a less mature way." At 39: "The same average level of political interest as the adult population." In fact, referring to an Austrian study which shows higher levels of interest than slightly older people.

He addresses the concern about lack of independence following the votes of parents and says that the evidence in fact shows that a large proportion of young people vote differently from their parents. Nevertheless, parents are a key influence on role modelling the practice of voting and that's why introducing votes at a younger age is seen as starting people on hopefully a habitual process of continuing to vote throughout their lifetimes and that it is more likely to occur in a stable environment when 16 and 17 year olds are at school or at home, which they are more likely to be at that age.

Little evidence of manipulation, 42. Voter turnout is higher at 16 and 17, 47 and 51 and those effects are partly carried through to later ages and that young people vote for parties that address their interests and concerns in similar patterns to adult voters.

Then I would like to refer to two relevant examples of how section 19 of the Bill of Rights operates in practice in relation to age discrimination. Both of these examples involve complex matters of social policy and difficult moral choices. These reports are published on the Ministry of Justice websites. They are section 7 reports by the Attorney-General on two Bills, the End of Life Choice

Bill and the Care of Children Bill. They are published these reports so that people can see when the Attorney-General regards a provision is inconsistent and why. Advice to the Attorney-General is also published even if that doesn't lead to a section 7 report.

So the first one of those is the section 7 report in relation to the Care of Children Bill which is in the appellant's supplementary bundle.

ELLEN FRANCE J:
Sorry, Mr McHerron, so what do you think these show?

MR McHERRON:
These show how section 19 is applied in practice in relation to issues of complex social policy and difficult moral choices.

WINKELMANN CJ:
Is your point that it's a model in terms of identifying objectives et cetera –

MR McHERRON:
Yes.

WINKELMANN CJ:
– are logically connected in proportionate response to the objectives?

MR McHERRON:
Yes. It's also a model in my submission of how these issues can be identified in terms of application of human rights' law in a way that is divorced from the detail of the policy and the difficult moral choices involved and in fact the End of Life Choice Bill summarises that distinction very well and I will come to that in a moment. Just briefly in relation to the Care of Children Bill, that was relating to the issue of age discrimination –

GLAZEBROOK J:
Have we got that? Because I can't immediately find it, I'm sorry.

WINKELMANN CJ:

Yes, our screen is frozen.

1120

MR McHERRON:

It's in the supplementary bundle.

GLAZEBROOK J:

Yes, I just don't seem to have it up here, so.

WINKELMANN CJ:

I was wondering if my screen was frozen on paragraph 35. Right, carry on Mr McHerron.

MR McHERRON:

Okay, so the issue of age discrimination was the age of guardianship continuing to 18 and the then Attorney-General concluded that that was an unjustified limit on age discrimination in section 19. The objective was identified as lack of "maturity, experience or competence" of children but the Attorney-General noted that 18 is the default age for the end of childhood under the Children's Convention, but that Article 5 recognises that guidance is to be constant with growing capacity for children over time, and the Attorney concluded that it is not possible to say that the "wide range of matters" over which a guardian may exercise control "are all inappropriate for 16 and 17 year olds to decide for themselves."

WINKELMANN CJ:

Sorry, what paragraph is that?

MR McHERRON:

I am, I apologise, your Honour, I'm chopping around a little bit.

ELLEN FRANCE J:

It would be good to have it on the screen.

MR McHERRON:

Yes. I think if the clerk could just go to the end of the report please.

KÓS J:

It's paragraphs 16 and 17.

WINKELMANN CJ:

16 and 17, so the previous page that we have, the immediate previous page and its connection has been lost.

MR McHERRON:

So the paragraph reference is for the provisions, the parts of the report I have just mentioned. The object being "lack of maturity, experience or competence" of children, that's paragraph 14 of the report. The references to the Children's Convention are in paragraph 15. The inability of the Attorney-General to conclude that the age limit was justified is in paragraph 16 and the reasons articulated there.

If I might move now to The End of Life Choice Bill which is at 308.1573 of the case on appeal. This Bill of course relates to the age of eligibility for assisted dying of 18 years and the Attorney-General concluded that that was not a justified limit.

At paragraph 4, I will just wait for that to come up. I might just give your Honours the reference there, paragraph 4 in which the Attorney-General said that: "Assisted dying is an issue on which philosophical, moral, religious, ethical and clinical views are divided. My report relates to the legal question of the Bill's consistency with the Bill of Rights Act. Social and moral considerations raised by the Bill are matters for Parliament." That is a very pithy, in my submission, summary of the distinction that may have been troubling your Honours this morning and it clearly delineates what the legal question is and what the moral and social question is.

WINKELMANN CJ:

Because one of the arguments that the Attorney-General advances is that our voice would sound too loudly in the policy process were we to issue the declaration of inconsistency and that there is thought and policy work to be done and we would tilt the table too much on that. So your answer would be that this is simply legal indication but there is still the political process to run through when, which the philosophical, social, et cetera considerations can be taken into account?

MR McHERRON:

Yes, that is one answer. Another answer is that section 5 refers to a free and democratic society and part of what it means to have a free society is to have independent courts that decide legal issues and have their hearings in public, issue their decisions in public and don't hold back on deciding a case because of a concern raised about whether that might influence anyone's thinking, including that or Parliament.

GLAZEBROOK J:

But if we haven't had the full justification, then aren't we making a decision on incomplete information when it hasn't been through the processes? I mean, that's the issue here because there is a process underway at the moment. Admittedly that was about 30 years ago, but there's now a current process of that review and a Bill before Parliament.

KÓS J:

Except I suppose in a way what Mr McHerron is arguing is for summary judgment in his favour. In a sense, you're saying the onus is on the Attorney. The Attorney hasn't discharged the onus, consequence follows, isn't that your argument in a nutshell?

MR McHERRON:

Yes, Sir. I mean when the emperor has no clothes the Court should say so in my submission. It's a case of actually the issue is before the Court. We have put this issue before the Court for determination. There has been proper notice

given of what the issue is. The Attorney-General has human rights experts on tap. They know the test. They know what their role is.

WINKELMANN CJ:

And your point is the Attorney-General can procure this outcome simply by not putting forward a justification?

MR McHERRON:

That is the concern, your Honour, because political issues are legion when it comes to what Parliament does. It is its job to, I suppose, make legislative decisions as a culmination of a political process.

GLAZEBROOK J:

It's also Parliament's job to apply the Bill of Rights, isn't it? I mean, it is free to depart from it.

MR McHERRON:

Yes.

GLAZEBROOK J:

But in fact, it's its job to apply the Bill of Rights hence the whole section 7 process in the first place, but it has to know when it is acting contrary to the Bill of Rights and the definitive view from the Court to say it is acting contrary, it only leaves the possibility of saying we don't care when it might have a different view of justification and possibly a legitimately different view because there will be other matters that will have come before it in the course of the process.

MR McHERRON:

Yes, well, I mean it's very interesting to consider that in the context of another Bill that we haven't discussed yet in this hearing and that is the Bill of Rights Declarations of Inconsistency Amendment Bill which is currently progressing through the House. It's at the Committee of the Whole stage at the moment. It has so far received unanimous support from all members and it was amended

quite extensively in select committee with the assistance of the Privileges Committee's expert advisor Janet McLean QC and the result of that amendment is to provide for a process for Parliament to respond to declarations of inconsistency and part of that process involves bringing to bear the policy machine of the executive government to the question that the Court has already considered recognising that the Court's ability to assess the policy dimensions will necessarily have been incomplete because it's a completely different process. The Court has only assessed one dimension of that process and there are other dimensions.

1130

So, although this Court in *Taylor* was reluctant to conceive of declarations of inconsistency as part of a dialogue between the courts and the Parliament, in our submission, the existence of that Bill and the strong likelihood that it will pass suggests that Parliament itself is inviting the Court to make declarations and is signalling that they will be received as useful information to lead into its own processes without giving any commitment to what the ultimate outcome will be because as Baroness Hale has said: "Parliament may ultimately decide to do nothing and that is its prerogative." But the DOI Bill, as we have said in our submissions, there is some evidence that the Court's involvement in this is welcome in as much as it will itself trigger a parliamentary process that might not otherwise occur and this case actually presents an example where to come back to your Honour Justice Kós' question about select committees, it's perfectly conceivable that there will be no select committee at all considering the voting age in detail in the foreseeable future. But if the DOI Bill passes, and if this Court makes the declaration sought, then that will trigger a select committee process.

WINKELMANN CJ:

So, Mr McHerron, it's now past 11.30, so a natural point for us to take the morning tea adjournment, but I wonder how you are going in terms of your time?

MR McHERRON:

Well, I apologise, but because of the very helpful dialogue it has been slower progress than perhaps I anticipated. I will consolidate over the break and attempt to round off my remaining submissions very quickly. In fact, I think I have got there. I think Mr Edgeler can probably start straight away after the break if your Honours please.

WINKELMANN CJ:

And you're aiming to be finished by what time?

MR McHERRON:

Well, we will certainly aim to be finished I would expect within the next half an hour.

WINKELMANN CJ:

Okay, we will take the adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.48 AM

MR EDGELER:

Thank you, your Honours.

WINKELMANN CJ:

So, Mr Edgeler, we've got a problem with the click share system so we will be going to the documents. If you wanted to take us to them, you might just need to give us a moment.

MR EDGELER:

Happily I was not intending to, thank you, your Honour, and also happily some of the matters I wish to deal with have been ably dealt with by my friend.

WINKELMANN CJ:

Vaguely dealt with?

MR EDGELER:

So I'm certainly happy to take questions, of course, at any time, but I think it's useful to start. I'm really addressing the Crown's core argument as a sort of a justification of why 16 and 17 year olds should be denied the right to vote that is given to 18 year olds and older as that it is within the range of reasonable alternatives open to Parliament. That's possibly a good argument in other countries. Article 25 of the International Covenant on Civil and Political Rights which underpins our section 12, but does not itself mention an age, and so if this was a case of has New Zealand given a good, has New Zealand complied with its obligations under section 12 as other countries that are covered by the ICCPR, does its law comply with that? And when you're addressing a range of reasonable alternatives, you know, many countries, New Zealand included for example, don't have a public vote for the head of state. Other countries do. There is options available to countries within that realm and one of them is naturally age. But New Zealand, and in only very few other countries, we have an additional factor which, when you're talking about a range of reasonable alternatives, is that we have section 19 and we have the bright line age of 16.
1150

So if this were a section 12 case and perhaps if section 12 didn't mention 18, or if this was in Canada with their Article 3 of the Canadian Charter of Human Rights not mentioning an age, the question of range of reasonable alternatives would be one, much more open to the Crown. Certainly, we might still have an argument, but I would say it would be a harder one to make. But when looking at range of reasonable alternatives in New Zealand, the first point is, and this isn't a section 12 case, this isn't an Article 25 case, this is a section 19 case and so the range of reasonable alternatives takes a very – the very starting point of it is for the denial of the right for 16 and 17 year olds when Parliament has said: "16 and 17 year olds, if we're to deny them a right, if we are to discriminate against them, we need a good reason and it needs to be demonstrated by evidence."

And so the suggestion that 16 is within the range of reasonable alternatives, the first question we get to after that is, okay, why is it within the range of

reasonable alternatives? Yes, other countries, perhaps 18 as an age. Other countries don't have non-discrimination rights which kick in at 16. Age discrimination is unlawful in a number of other countries. Canada is one which mentions age. It doesn't mention a specific age. It just says: "Age discrimination must be justified." It's true in New Zealand, but we start at 16 and so when you're looking at the democratic rights of citizens to vote, that's the first point.

The one sort of comparable country that we've come across which not only has sort of democratic rights but also has non-discrimination rights which specifically start at an age 16, the one we've found is Scotland. We've looked at some various Canadian and Australia and a few other countries and Scotland is, of course, one country where the voting age for Scottish elections at the local elections in Scotland is 16 and so when we're doing international comparisons, and the Crown is to come to this Court and point to international comparisons and say: "These intention comparisons give us a good reason why this is within the range of reasonable alternatives." It's important to ask about the distinction between that country, or those countries and ours and that distinction is section 19 and the age of 16.

So when we're addressing what we say is somewhat of an artificial argument we say that not having been clarified exactly what the rationale, or the why, why 16 and 17 year olds are denied the right to vote it makes it difficult to assess whether there are less restrictive alternatives. But if the ones that the Court of Appeal has mentioned, it's the competence, or the ones that Dr Eichhorn mentioned. Are there less restrictive ways? Could we ensure the right of 16 and 17 year olds not to vote, but their right to be free from discrimination is protected while in a less restrictive manner when we are talking about the voting age? And the answer is yes, you could allow for 16 and 17 year olds to vote and if you want to deny them the vote, bring evidence as to why it's justified.

I'm going somewhat at speed, but having dealt with some of these things already I think it's useful and the question we get of what is this Court to do when the Crown doesn't bring forward evidence. We have a sense of what it

does. A similar issue arose in *Taylor*. The Crown, there will have been, or there was a process in Parliament about what Parliament thought the law should be. There was a section 7 report, but it was a Member's Bill, of course, the Bill that was in *Taylor*, so there wasn't a government backdrop of policy creation process that had been gone through. The Crown was coming to this Court with a well, this was a decision made by Parliament, not necessarily one that was a Crown position and a decision made by Parliament in 1974 not necessarily the one that the Crown would want or feel obligated to defend, or it might have different reasons if it chooses to defend than the reasons that would have been adopted in 1974 when we didn't have an age discrimination law and it might have had a different view, but it's still got the option of calling evidence. We have some evidence. Indeed, we have some evidence from the executive in the sense that the Children's Commissioner has given a report. We don't see that it would be difficult for the Government to have done something similar. There are other experts like Dr Eichhorn whom the Government could've called to give evidence, but choosing not to, it places itself and this Court in a position of what are we to do now, and what this Court in *Taylor* did, and what the High Court and the Court of Appeal in *Taylor* did, was no rationale has been offered. So the question comes back to onus, which is possibly –

KÓS J:

It's a little different. *Taylor* was a lay down misère (11:56:08). The argument was only ever what remedy should be granted. In this case there is at least an argument if some paucity of evidence on the Crown's part. You don't have Mr Powell saying that this is incapable of justification.

MR EDGELER:

That's fair.

KÓS J:

He's going to attempt to justify it.

O'REGAN J:

Well, he's going to try and attempt to persuade us not to issue a declaration anyway.

MR EDGELER:

Yes, I mean this of course –

O'REGAN J:

Whereas the Solicitor-General in *Taylor* accepted if there was jurisdiction, then there should be a declaration.

MR EDGELER:

Yes.

O'REGAN J:

That's quite a different situation from this case.

MR EDGELER:

It's different, but there are, I would submit, a reasonable similarity between them. It's both about minority rights in the election context where we say the Crown does not offer a reason why. It will say, as it did in *Taylor*, it will say you shouldn't do it. It will say, here this is the type of question that you shouldn't do. This is a matter for Parliament and particularly at times this is a matter which is entrenched. We would look at entrenchment and say in fact the reverse is the case. Where something is entrenched Parliament is less inclined to bring it up again. Well, even if a majority of members of Parliament supported the idea they potentially are wasting their time if they discuss this because they know they can't get it across the line. Sometimes that might work.

There is currently a Bill before Parliament to amend the Māori electoral option, which appears to require a super majority to pass, and the Government thinks it's worth it nonetheless, perhaps because they think they can actually get a majority for it. But something like this, the fact that something is entrenched doesn't make it a different – entrenchment isn't, it's constitutionally important, but entrenched sections aren't themselves a constitution and so, for example,

I'm trying to remember the case, it would be *Wybrow v The Chief Electoral Officer* [1980]. I don't have the, I've probably got it in my computer somewhere I'm sure, which was a slight inconsistency, or at least a dispute between it would've been section 106 of the old Electoral Act in 111 or 115, I'm not sure, it would've been at the time with two sections. Old 106, which was entrenched, how do you vote? You cross off the name of every candidate you don't want and leave one. Section 115, you count every vote if the voter's intention is clear. The entrenched section gave way. Yes, that's the instruction to vote is it's entrenched. Parliament could only change that with a super majority, but we still count the votes. We have that here too. Yes, there is entrenchment, but that entrenchment is to protect it. It's a question of how it's amended or repealed. It's not a question of is there a discrimination or not. The fact that something is entrenched can't mean there's not a discrimination. In fact, that's something that my friends, my others will get to is something that you will take into account when looking at discretion. It might be a reason to get it.

KÓS J:

Well, you have the super majority for section 19, the 1993 amendment, because the vote there was 60 to four.

MR EDGELER:

Yes Sir, but there doesn't need to be is the short answer. Both laws are there and both can be given effect is also what we would've said and I think I don't need to go into the section 12 response as well. If both can be given effect they should be and you need a reason not to, and I think it's something I might hand over now, unless there's something more about the question of range of reasonable alternatives that I can assist you with, that's something for Ms Moran to continue with now.

1200

WINKELMANN CJ:

Thank you Mr Edgeler.

MS MORAN:

Thank you your Honours very much for allowing me to appear remotely today. As my friends have indicated I will be speaking to the discretionary aspect of Make It 16's submissions, and the central position being that if an unjustified, if this Court accepts that an unjustified limit on the right to be free from age discrimination is created by the voting age provisions, that a declaration of inconsistency should be made by this Court on the terms set out at paragraph 79 of the appellant's written submissions. In my submissions the request is not a controversial one, when regard is had to the orthodox role of the Courts in human rights cases, and to developing case law in a jurisdiction both domestically and internationally. I note my learned junior Mr McCracken will speak briefly to three key authorities from the United Kingdom, and for your Honour's reference that is dealt with at paragraphs 61 to 69 to the appellant's written submissions, and point 9(d) of the oral outline.

So the Court of Appeal's fundamental error in this case was to decline to grant an effective remedy for what it had established was an unjustified limit on rights created by the voting age provisions and what is fundamentally at issue in this case in the appellant's submission is the availability of judicial remedies where such an unjustified limit on a protected right has been established. It's trite that the want of right and want of remedy are reciprocal, and the appellant's position here is that this is a case where if an inconsistency is established, and the Crown has not met its onus to justify that inconsistency, a declaration of inconsistency should ordinarily or presumptively follow absent some compelling ground for refusing one, and it's necessary for that to occur to ensure that there is an effective remedy available. I appreciate your Honours. I appreciate your Honours are particularly concerned with both whether the limit can be justified, but also whether other considerations may give rise to a compelling reason to define "remedy" in this case, and I will be addressing those with as much haste as I can, but certainly open to answering questions if your Honours wish for me to talk to any particular points as we're working through.

O'REGAN J:

Can you give me an example of what a compelling reason would be?

MS MORAN:

Certainly your Honour. So in the Australian case *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1, which this Court distinguished on legal grounds in *Taylor*, a declaration was declined on the basis that the making of that declaration would undermine a criminal conviction. So that's a clear situation. Another situation that might exist where a compelling ground exists for refusing remedy is where there is an operational aspect of the law that enables a decision-maker to decide the application of the law consistently with the Bill of Rights Act, and that's simply not the case here. We have a (inaudible 12:03:34) exclusion on the rights of 16 and 17 year olds from voting, and no ability for that limit to be addressed through any executive action and certainly no ability for that, for any consistent interpretation of the legislation to be applied. So we're certainly not in a case where section 6 is relevant, under the Bill of Rights Act. We're in a pure section 5 analysis where we have a limit that excludes a group otherwise protected from the right to be free from discrimination based solely on their age and that in this case it prohibits them from participating fully in the democratic process.

WINKELMANN CJ:

Ms Moran, if there was something significant underway, say a select committee process currently underway in relation to this issue, would that be a reason to decline?

MS MORAN:

Not in my submission your Honour. It's certainly relevant that there is a process underway, and I think it speaks volumes that there are now some processes underway for the first time since the 1980s, which have happened since this proceeding was commenced by Make It 16 and since it kicked off its campaign. So that certainly shows that it is causing people to take notice, but what this Court's role in an orthodox rights-based approach is, is to declare the law in its current terms and so what's being asked of this Court is to look at the law, to look at section 5 and what that requires of this Court and what that requires of the Attorney-General and if there is an incompatibility between the voting age provisions as they stand and the section 19 right that is being limited, then the

Court should declare that to be the case assuming that no justification can be established. So it is certainly useful that there are processes underway. In my submission, it's helpful for those processes to be informed by this Court's clear and unequivocal view on what the law on its present terms says and whether it does consider that as the Court of Appeal did there is an unjustified limit in this case.

KÓS J:

Do you agree that the difficulty for us, Ms Moran, is on the justifiability limb?

MS MORAN:

I certainly understand why that is a concern and in my submission it needn't be an overly difficult matter for your Honours to consider. I think I was reflecting on what other types of cases might come before this Court where there was no section 7 report, for example, legislation that pre-dates the Bill of Rights Act and I was discussing with my learned colleagues for example if there were an application brought before this Court that the prohibition on threatening to kill in the 1961 Crimes Act was inconsistent with the right to freedom of expression, I don't think that the Attorney would struggle to manifest a satisfactory justification for that limit even if that justification was not available as a matter of legislative fact at the time that that law was passed.

In this case, in my submission, it does speaks volumes that there is no expert evidence before this Court as to why 16 and 17 year olds should be precluded from voting. There is ample evidence from the appellant's position as to why 16 and 17 and including from the Children's Commissioner as part of the executive why 16 and 17 year olds could well vote and what's important in this case under section 19 of the Bill of Rights Act is that those 16 and 17 year olds have an otherwise protected right to be free from a limit based solely on their age.

So, in short, your Honour, whilst I understand the concern, in my view, what this Court is being asked to do is interpret the law on its current position and then hopefully that will trigger and prompt Parliament to engage in that policy rich

discussion that is solely for Parliament to do as to whether that age can be justified and whether 18 is the right age or 20 is or 16 is. This Court is not being asked to tell Parliament what the right age is. It's being asked to say whether the provisions of the Electoral Act and Local Electoral Act and referendums that preclude 16 and 17 year olds from voting are inconsistent with their protected section 19 right.

WINKELMANN CJ:

So, if we issued a declaration saying it was inconsistent, would that preclude Parliament from looking at the material and deciding it was consistent?

MS MORAN:

Certainly not, it wouldn't preclude Parliament from doing so. What happens next is entirely up to Parliament and I think that's a point I would want to emphasise arising from some earlier questions is the nature of the declarations sought are that the inconsistency has not been justified, not that the inconsistency can never be justified on any hypothetical analysis. But on the information available to this Court, that inconsistency has not been justified so far and that's why yes, this case is unique because there isn't the availability of the legislative fact evidence that was before this Court in *Taylor* and also the Court of Appeal in *Chisnall*. But the orthodox approach that the Court is being asked to take is the same, does that evidence permit this Court to be satisfied that the limit is justifiable.

1210

GLAZEBROOK J:

I'm not sure that that's' what's really thought of as being a declaration of inconsistency though. A declaration of inconsistency says it is not justified and that is the Court's view. It's not, a declaration of inconsistency is not, it hasn't' been shown its justified.

MS MORAN:

Well I think on –

GLAZEBROOK J:

I understand that's what's being asked for, it's just that that's not my understanding of what a declaration of inconsistency does. It is a definitive statement on what is and what is not justified, which is not what we're being asked to do.

MS MORAN:

And I think in that regard, your Honour, the appellant's declaration, the specific form of declaration was amended after the notice of appeal was filed to include the words that the Court of Appeal adopted in *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107 (declarations) to reflect that the inconsistency has not been justified. Now of course it's open to this Court to conclude that that form of declaration is not appropriate, but it's certainly the appellant's case that that is what this Court is being asked to say.

In my submission it's important to reflect on the, certainly there's the challenge of justification, but there's also the important consideration of what it would mean for this jurisdiction going forward if the Court of Appeal's decision is upheld. If that decision is correct then there should be no remedy for an applicant who has established, according to the Court of Appeal, that their rights have been limited, and where the Crown has failed to meet its onus to justify that limit because the Court prefers to exercise its discretion to decline remedy on the grounds of deference and comity to the very body responsible for that unjustified limit, and at the expense of those whose rights have been limited, and for whom no other remedy is available.

Now there is a useful authority cited in the written submissions, and in the interests of time I don't intend to take your Honours there, but the decision of this Court in the *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46] case where the Court considered the fact that there might be some legislative change at some point is not sufficient to take the matter out of the scrutiny of this Court. This Court is being asked to clear the law as it stands on the evidence that is available to it so the alternative is, and as my friend McHerron submitted, if not now then when? What would be

a suitable case for this Court to exercise this jurisdiction in relation to legislation that limits a right and that pre-dates the Attorney-General's role under section 7 of the Bill of Rights Act.

I was hoping to spend some time talking about *Taylor* and both the distinction between the reasoning of the Court of Appeal and this Court if your Honours are content for me to do so, in the interests of time I'm happy to skip over that, reasonably succinctly. But in my submission both minority and majority reasons of this Court in *Taylor* are very instructive of how this Court should deal with this application, and it was an omission by both the Court of Appeal and the Attorney-General in their submissions to fully read and explore those reasons, that has led to the error in this case. As my friend Mr Edgeler has pointed out in *Taylor* there was a failure to justify but in that case there was a section 7 report to that effect and of great concern of the High Court that it should exercise comity and deference towards Parliament noting that in light of that section 7 report Parliament had still decided to proceed with the inconsistent legislation. Now that is instructive as to the arguments that have been proposed by the Court of Appeal for declining the jurisdiction in this case because there is no conscious decision by Parliament here. It's a continuous failure to act, a failure that, in our submission, continued since the 1980s. This Court, the majority, with the reasons given by your Honour Justice France, focused on the Court's orthodox role in rights cases and found that it was a straightforward exercise to conclude that section 7 required the Court to interpret the law as it is and that, if an unjustified limit arises, to declare that to be so.

Of particular relevance to the exercise of discretion in this case, the majority of this Court in *Taylor* did hold that the power to make a declaration of inconsistency can be implied from the scheme of the Bill of Rights Act, that it's a formal declaration of the law in the effect of the inconsistent provisions on the affected person's rights, it can amount to a declaration of right within the scheme of the Bill of Rights. This may assist Parliament if this effect does arise in that form and is another means of vindicating the right in the sense of marking and upholding its value and importance. In that case, the majority held that it

was the only response available for the denial of the right to vote in circumstances that were acknowledge not be justified.

In terms of that reasoning in my submission your Honour Justice France and the reasons for the majority departed from the Court of Appeal in a number of quite important regards, each of which favour the interpretation that when presented with the same discretionary exercise for consideration in this case a different approach ought to have been adopted, overall the majority was accepting of the decision of inconsistency as a remedy available arising from its inherent jurisdiction that this was a logical step from the settled position that an effective remedy should be available for a breach, that the text and purpose of the Bill of Rights overall supported this Court exercising its usual range of remedies.

WINKELMANN CJ:

Well, you don't need to go through that part, because we've got that common ground.

MS MORAN:

Certainly.

WINKELMANN CJ:

Is there anything else of significance you want, a point you want to make about *Taylor*? I understood you were saying there was a significant difference between the Court of Appeal and this Court in *Taylor* that you thought was significant here?

MS MORAN:

Certainly, in terms of the orthodox approach and the key observation that this Court did not endorse the Court of Appeal's approach to the relationship between the political and judicial branches of Government and the role of the higher courts under the New Zealand constitution and therefore that it was unnecessary to take the similar exercise that the Court of Appeal adopted in both *Taylor* and in the present case, and fundamentally there is the role of the

Hansen-indication and whether that was sufficient to remedy the wrong, as the Court of Appeal did determine in the present case. And there in the interests of time I won't labour the point, but your Honour Justice O'Regan, the minority, very succinctly and effectively addressed that point at paragraph 124 as to why the *Hansen*-indication is not suitable, it's not a remedy, it's part of the dialogue between the judiciary and Parliament which makes sense in a case involving sections 4, 5 and 6, of which this is not one. So skipping forward, your Honour, I'm conscious of time…

WINKELMANN CJ:

Yes, we are conscious of time too.

MS MORAN:

I will just very briefly hand over to my learned junior, Mr McCracken, to address this Court on the point 9(e) of the outline and what the international experience is, and then very, very briefly finish after that.

ELLEN FRANCE J:

Could I just ask one question?

MS MORAN:

Of course.

ELLEN FRANCE J:

Your submissions advance a presumptive approach to the granting of a declaration. Are you confining that to civil cases or are you including criminal in that as well? I'm just conscious of this Court, for example, in *Shark Experience.* I know it's not a Bill of Rights case, but it's seeing more problems, I guess, with declarations in the criminal context.

MS MORAN:

I would agree, your Honour, and also the *Shaheed* case in the criminal context. This is confined to the civil context.

ELLEN FRANCE J:

Thank you.

MS MORAN:

So Mr McCracken will now address the Court briefly on part 9(e).

WINKELMANN CJ:

Thanks, Ms Moran.

1220

MR McCRACKEN:

Tēnā koutou. Your Honours, as Ms Moran suggested, I'll be addressing briefly the approach by the UK court to declarations of incompatibility as it is called there and exercise of discretion.

Now, at the outset I just want to note that the UK courts, like New Zealand courts, have a discretion and that is due to section 4 of the Human Rights Act 1998 which says that: "They may issue a declaration of inconsistency."

I also want to note that the appellant's submissions at footnote 75 list where declarations of inconsistency have been granted in a number of UK cases and provide reference to a Ministry of Justice, a UK Ministry of Justice report on the same. I don't intend to go into those because they're not instructive and do not deal with the matter of discretion expressly.

In its submissions at paragraph 61 Make It 16 refers to the case of *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2014] UKSC 38, [2015] AC 657. Now Make It 16 will rely on its written submissions in that regard and in particular, the comment of Baroness Hale at paragraphs 300 and 325 of that judgment which are summarised at paragraph 61.

Given the greater relevance and instruction I shall therefore focus on the second two judgments being RSR *R (Steinfeld and Keidan) v Secretary of State*

of the International Development (in substitution for the Home Secretary and the Education Secretary) [2018] UKSC 32, [2020] AC 1 case which begins at paragraph 62 and then the *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] UKHL 21, [2003] 2 AC 467 case at paragraph 66.

KÓS J:

What are we to make of *Nicklinson* where those judgments that you refer to were very much minority position?

MR McCRACKEN:

Well, your Honour, so the reason that they were in minority position was that Baroness Hale and Lord Kerr considered that the limitation, the right, was incompatible whereas the balance of the court, the remaining seven judges were very clear that it could be compatible but they didn't think it was incompatible, therefore, they had of course no reason to go on to consider whether they would issue a declaration of inconsistency or incompatibility. If your Honour is satisfied, I will continue from *Steinfeld*.

KÓS J:

Yes, I may come back to you, thank you.

MR McCRACKEN:

Thank you, your Honour. *Steinfeld* was about the restriction on different sex couples entering civil partnerships and the case arose following the extension of marriage to same sex couples in 2013. The claimant argued that this was inconsistent with their Article 14 protection from discrimination operating as it has through Article 8 right to private and family life. Now, the Crown had argued that the case and Parliament's decision not to legislate for consistent and equal approach to civil partnerships fell, "squarely within the field of sensitive social policy which the democratically-elected legislature was pre-eminently suited to make," and, therefore, the matter should be left to the Court, sorry. To Parliament. The Court rejected this argument and unanimously went on to make a declaration of incompatibility.

Lord Kerr who held, depend on the Court's reasoning at paragraph 55, and I don't intend to take your Honours there I intend to go through it in summary., but at paragraph 55 note a no legitimate aim for not acting had been provided and so the Crown's argument it should be left for Parliament had less force. His Honour acknowledged that the power was discretionary but then went on at paragraph 60 to place weight on the fact that a declaration does not require government or Parliament to take any particular course of action or to remedy the issue at all.

His Lordship then concluded at paragraph 61 that: "In my view, there is no reason that this Court should feel in any way reticent about the making of a declaration of incompatibility. To the contrary, I consider that we have been given the power under section 4 of the Human Rights Act to do so and that, in the circumstances of this case, it would be wrong not to have recourse to that power." And your Honours, we refer to that in our oral at 9(e). His Honour's conclusion there reflects a starting point namely that unless there was some compelling reason to the contrary there would be a declaration and it's Make It 16's submission that a similar approach should apply here.

Turning now to *Bellinger v Bellinger* which starts from paragraph 67 of the appellant's written submissions, that case dealt with compatibility of section 11(c) of the Matrimonial Causes Act 1973 (UK) and whether or not it was compatible with Article 8 right for respect to private and family life. Mrs Bellinger was a transgender woman who was ceremonially married to a man and in this case sought to have her marriage declared valid. Section 11(c) provided that marriage could only be between a male and female and the House of Lords on good authority read that it could not be read except for referring to sex at birth, so female meant female at birth and therefore, it was unwilling to declare Mrs Bellinger's marriage valid. However, the Court went on to make a declaration of inconsistency noting that it wasn't compatible with the right and it did so even though the European Court of Human Rights had made the same substantive decision in *Goodwin v United Kingdom (2002)* 35 EHRR 18 and the UK government had committed to amending the law in light of that decision.

Lord Nicholls wrote the leading judgment in that case and after acknowledging the fact of the European Court's decision and the UK Government's commitment concluded at paragraph 55: "Nevertheless, when proceedings are already before the House, it is desirable that in a case of such sensitivity this House, as the court of final appeal in this country, should formally record that the present state of statute laws is incompatible with the Convention."

In a rather similar manner to this present case, there was no ability for the House of Lords to read the legislation consistently with the protected right and this encouraged the Court to have no reservation making a declaration of inconsistency.

Your Honours, the UK cases demonstrate that they will readily engage with incompatibility issues even if they might touch on topics that might be considered policy heavy or socially sensitive. Additionally, they reflect that the Courts will readily issue declarations where there is an incompatibility absent some exceptional circumstance or compelling reason and Make It 16 submits this reflects Baroness Hale's comment in *Nicklinson* as it refers to at paragraph 61 of its submissions.

Before I wrap up, did your Honours have any further questions on this part of the submission?

WINKELMANN CJ:

No, thank you, Mr McCracken.

MR McCRACKEN:

Thank you very much in which case I will hand back to Ms Moran.

WINKELMANN CJ:

We are back with Ms Moran, are we?

MS MORAN:

Thank you, your Honours, just to wrap this up, your Honour Justice Kós enquired of my learned friend Mr McHerron whether the Canadian case of *Frank* was concerned with a removal of a right or an expansion of a right and to clarify, in that case, there was an expansion of a right that retained an existing limit and it was that existing limit that was subsequently challenged in the *Frank* case some 10 or so years after that amendment, just to confirm that.

I don't intend to address anymore of the outline, simply to sum up in this case, your Honours, that there is an available remedy here. It is the only remedy that is available to Make It 16 for a limit that it says has been continued on its right to be free from age discrimination despite previous indications by the executive dating back to the 1980s. The making of a declaration of inconsistency in this case will correct that error and in so doing will fulfil this Court's responsibility and traditional role to declare and maintain the boundaries and protect against the erosion of human rights. I'm certainly happy to address any further questions, otherwise that concludes the submissions for the appellant.

1230

WINKELMANN CJ:

Thank you, Ms Moran.

MS MORAN:

Thank you, your Honour. As the Court pleases.

WINKELMANN CJ:

Mr Powell.

MR POWELL:

Thank you, your Honour. If I could deal first with the Court's most welcome introduction of the same protocols that apply in the Court of Appeal about involving junior counsel. I myself found that extraordinarily helpful, though I was fortunate that there were senior lawyers that were willing to give me that opportunity and I would certainly extend it to the very competent Ms Lawson. However I must take this case as I found it on Monday morning. A decision had

already been made, due to Ms Lawson's being unwell in the preparation, that she wouldn't present any oral submissions. I am just delighted to have her here in any capacity.

WINKELMANN CJ:

Thank you, Mr Powell.

MR POWELL:

There are a couple of preliminary points I wanted to make, and apart from that the oral submissions that I wish to address really was to emphasise the point that is made in the outline of oral submissions about the nature of the discretion, because it does arise in this case. It's something that the *Taylor* Court couldn't address because there was no question about the discussion being exercised against making a declaration. In the course of that discussion I hope there will be sufficient opportunity to address points that have arisen in the course of argument with my friends.

WINKELMANN CJ:

Yes. It would be helpful to the Court I think, Mr Powell, if you just stated in overview what your arguments now are, because I have a sense that the Crown's position may be shifting, and I may be wrong on that, so it would be helpful if you could state in overview what your arguments are.

MR POWELL:

All right, well, we start from the beginning about the availability of the remedy of a declaration of inconsistency being discretionary. The point is made in the written submissions that the Court of Appeal was right to recognise that the constitutional context of this declaration that was sought warranted the Court withholding the remedy. The written submissions develop that by pointing to the nature of the declaratory remedy as it was set out in *Taylor* but suggest that where the reason for restrain is constitutional, where the reason for the Court not entering into it is because it is a matter which is properly to be left for Parliament or at least to be deferred until Parliament has looked at it. The Court of Appeal should at that point have said that it is not suitable for a

declaration of inconsistency. What the Court of Appeal did was proceed all the way through what I have called the *Oakes* analysis, it's proceeded through that calculus that section 5 requires, and at the end of that process reached what we not seem to call a *Hansen*-indication but used these constitutional reasons as the justification for withholding an actual declaration.

Now the position that I am arguing for, as set out in the oral outline, is that the Court was right to recognise this as an occasion for restraint, but – and I will take your Honour to the point in *Taylor* where I suspect the confusion has arisen from – it is a matter to be considered earlier in the process. Now that, more or less, as Justice Doogue did in the High Court –

WINKELMANN CJ:

Is that a different argument to the first argument because I picked it up in the submissions that it was a different argument?

MR POWELL:

Well I certainly wasn't proposing to depart from anything the Solicitor-General had argued.

WINKELMANN CJ:

Well to say that – so Justice Doogue's approach is definitely not the approach you've just articulated earlier from the written submissions. She didn't say this is a constitutional issue and therefore the Court is not going to engage with it at all.

MR POWELL:

No, but the difficulty is that the Court of Appeal was right to recognise that constitutional dimension and what I suspect the oral outline I hope has clarified is that where the reason for restraint is because of that recognition of what I've called constitutional legitimacy that is an exceptional situation. In the vast majority of cases it won't require the withholding of a declaration of inconsistency. The process of considering a declaration of inconsistency involves proceeding at some stage to the point where there is a consideration

as to whether the measure is reasonable, whether it was within the range of reasonable options available to Parliament and this arises all the time when the Court is considering whether the executive has acted inconsistently with the New Zealand Bill of Rights Act.

GLAZEBROOK J:

Can you just clarify what you say the constitutional dimensions are in this particular case?

MR POWELL:

The only significant one for this purpose is that Parliament itself has described a process for changing the law that requires, as has been recognised at each occasion this has arisen, that there is broad support in the community for the change.

O'REGAN J:

Are you referring to the entrenchment provisions?

MR POWELL:

Yes and the reason for doing that was recognised by the Court of Appeal in *Ngaronoa v Attorney-General; Taylor v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643.

O'REGAN J:

Does that really bear on the issue as to whether the restriction on voting is or isn't in breach of section 19 and whether it is or isn't a justified limit on non-discrimination right?

MR POWELL:

In order to engage that point we would have to satisfy the Court that it was simply not an issue for the Court to resolve either because of the inherent limits of the judicial process that it could not produce an answer, or because it is a matter for Parliament, or it is a matter for Parliament to look at first.

WINKELMANN CJ:

So you've really got two main arguments then which the first one being that this is an issue that is clearly so constitutional in dimension that the Court should not even have embarked upon the justification enquiry at all?

MR POWELL:

Well, if the Court was able to reach that view before it had even looked at it, then yes, I suppose that's the case.

WINKELMANN CJ:

Because that seems to be the argument that's in the written submissions and then your second argument was take into account that constitutional political dimension. It was available, open to the High Court judge to take the reasonable, within the realms of reasonable responses, so it was a justified limitation?

MR POWELL:

Yes.

GLAZEBROOK J:

Although the slight difficulty with that is that I'm not sure the Crown has a specific provision on whether it's a justified limitation or not because the process and the review of the Electoral Act is underway at the moment and one assumes the Crown isn't already saying, well, that review is useless because in fact we've already decided and we're clear it is a justified limitation. Of course in any event Parliament would have to look at that as well, but…

1240

KÓS J:

Well, they're not incompatible though.

WINKELMANN CJ:

No. But am I right that those are two arguments, Mr Powell?

MR POWELL:

Well, yes, they are two arguments. Yes, they are two arguments in that sense.

WINKELMANN CJ:

They're alternatives?

MR POWELL:

Yes.

KÓS J:

I understand that now. Now Ms Moran in her argument was starting to suggest, I think, that we might grant a light declaration as opposed to an intense declaration. The light declaration was incompatibility and not justified, it has not been justified, whereas of course an intense declaration, the normal one that this Court would consider, is a finding that it is not justifiable in a free and democratic society.

MR POWELL:

In my respectful submission the first of those propositions cannot be right, and it's certainly not, looking at the current Bill that's before the house to amend the New Zealand Bill of Rights Act. What will introduce section 7(a), it says: "This section applies if a declaration made by a senior court that an enactment is inconsistent with this Bill of Rights and not made under section 92J of the Human Rights becomes final because," et cetera, and that's what triggers the obligation. Now unmistakably, and this Court and other courts ever since 1990 have emphasised, that passing the New Zealand Bill of Rights Act in 1990 did make these issues of law. So the question of whether the relevant section of the Electoral Act is consistent with section 19 of the New Zealand Bill of Rights Act is a question of law, and if the Court has properly before it a proceeding which seeks to determine that question then it must answer it.

Now to go back to one point that was made earlier –

WINKELMANN CJ:

So you're saying that it is not open to the Court to issue that light – I don't know if it's light, but different form of declaration – it's not actually contemplated the Bill of Rights Act, that kind of declaration?

MR POWELL:

No, no, the Court's function is to determine questions of law and this Court in *Taylor* made that clear that to get over the objection that was made in the argument for the Attorney-General before it that it wasn't part of the legitimate function of the courts to issue what was in effect an advisory opinion, and the Court roundly rejected it.

KÓS J:

Well, this is not advisory though, this is simply a formal finding at the first step of analysis which is that there is an incompatibility that section 19 here has, the rights that have been denied, to find that as a matter of law, and then secondly to say that forensically the Crown had not offered justification for it, that I think is the declaration that we are being asked to give.

WINKELMANN CJ:

And Ms Moran did say it's based on, that the Court of Appeal did issue that sort of declaration in *Chisnall.*

KÓS J:

Yes. I'm not sure, incidentally, that the Court of Appeal in *Chisnall* though it was doing that.

MR POWELL:

No.

KÓS J:

It's just the formulation.

MR POWELL:

Well, yes, with issues of law they either are or they aren't. Now one point that arose, I think in the course of Mr McHerron's argument, I immediately disclaim any suggestion that the Crown can somehow manipulate this exercise by not putting evidence before the Court, that certainly would never be the Crown's intention and it can't be the effect of what it does. But when the Court is asked to determine, even not in a declaration of inconsistency but where an issue of interpretation arises otherwise in connection with the Bill of Rights Act, when it arrives at the utilitarian balancing exercise in section 5 then it must make a determination, if it's required to, as to whether or not the limit is justified, whether it is justified and demonstrably justified in a free and democratic society, so it either is or it isn't. And if the Crown has put insufficient evidence before the Court that may be taken by the Court and in many instances will be a reasonable inference that the Crown has nothing more to say about it. If it occurred to the Court there must be more to this, then it would a case of calling for that evidence to be put before the Court. But the idea that there is some not proven alternative, in my submission, is inconsistent with what the function that this Court describes that the declaration had in *Taylor* and on that subject, as the submissions for the Solicitor-General put in the written submissions made clear, the jurisdiction is in its infancy. And immediately, almost immediately when this proceeding arrived, one sees that there is potentially a huge difference between how you would answer an application for a declaration of inconsistency in respect of a Bill that's been passed after the New Zealand Bill of Rights Act and has been passed purposely, even if not necessarily contrary to a section 7 report that has been filed by the Attorney-General.

In terms of what is relevant to put before the Court, it will be the legislative fact, the legislative history of the enactment such as it is, what did Parliament have before it. Obviously, the scope for the evidence is far more significant there than it would be when there is a bare issue of statutory interpretation where there are limits on what the Court can have regard to. But that goes to the very heart of what a declaration of inconsistency is about. It is essentially a finding that Parliament itself has acted inconsistently with the Bill of Rights Act.

Now, there was discussion about that in *Taylor* about whether remedies could be imposed effectively against Parliament. The remedy doesn't do that. But when you're talking about a voting age provision that was last enacted in 1974, if the question is well, why hasn't Parliament amended it? The short answer is because Parliament hasn't been asked to amend it. There has been no Bill put before the House until the member or Parliament Ms Ghahraman's Bill was drawn from the biscuit tin and has made its way into Parliament.

So, who is the declaration of inconsistency talking to? It's really talking to the executive. The Government is the only body that can put a Bill before the House. Other members of Parliament can seek to do so, but they must submit to the ballot and either it will get drawn or it won't and of course, it has no guarantee of support.

WINKELMANN CJ:

Why can't it be talking to Parliament to assist because it's a statement of law? It's talking to everybody. It talks to the whole of the population of New Zealand and all institutions, isn't it?

MR POWELL:

Yes, yes, that is what the declaration speaks to. But what I am suggesting is that there is a difference when you are talking about a purposeful decision made by Parliament since the Bill of Rights Act as against what has been the lack of any enactment in the ensuing years.

ELLEN FRANCE J:

I don't quite understand why there would be a difference. I can see it might lead to a difference in terms of the nature of the evidence that could be available.

MR POWELL:

Yes.

ELLEN FRANCE J:

But it is still possibly, isn't it, subsequently to put something together which explains what the objectives were?

MR POWELL:

Yes. As we attempted to do in this case, which was to find the legislative history of this enactment and of course the primary explanation for the measure that was taken first in 1969 and then in 1974 was the debates in the House and Hansard explained why those measures had been taken, why it was reduced to 18.

1250

WINKELMANN CJ:

And I'm not understanding the difference about the timing of the legislation because it is not a declaration that's intended to chastise the Parliament that enacted it. It's a declaration which is intended to say something about the content of the legislation.

MR POWELL:

Yes, but –

WINKELMANN CJ:

And one person's constitutional provision which should be left to Parliament to sort out is another person's, or another time's perhaps is a better way of putting it, another time's significantly discriminatory provision such as for instance once upon a time what would have seemed settled and sensible that women not have the vote is in other times an offensive, discriminatory provision. So I'm not clear on where you would ever draw the line on your first argument about what's constitutional and a Court should just back away from.

MR POWELL:

No, well perhaps if I may turn to the outline of the oral. We of course rely on the fundamental proposition that this is an occasion for restraint and the courts have previously identified that there will be cases where judicial restraint is appropriate.

GLAZEBROOK J:

Why in particular in this case? I mean, I can understand arguments that there is already an executive process underway but Parliament hasn't yet looked at it, but it is an entrenched provision that was not consciously passed at the time it was past in contravention of the Bill of Rights given that there wasn't a Bill of Rights at that time. Are those the sort of things that you are talking about? It's just that the submissions are couched in a bit more absolute terms than specifically related to this particular matter.

MR POWELL:

Well, what I've sought to clarify in the oral outline is there is of course an obvious risk that the Court, to use Justice McGrath's words in *Hansen* is seen to "shirk is own responsibilities". So, the circumstances in which the Court should effectively stop at the front door and say "we're not going in there because that's a matter for Parliament," must be very, very narrow.

GLAZEBROOK J:

Yes, but why in this case is it somewhere because sometimes the more important the right the more important it is that the courts do get involved?

MR POWELL:

Yes, yes –

GLAZEBROOK J:

I mean I can understand not yet because there are processes and at the moment those processes haven't gone through, we don't know what the effect of those processes would be, we don't whether they will be justifications that aren't immediately obvious at the moment, for instance.

MR POWELL:

Well, I can't take the point any further than it's been advanced in the written argument. That the way in which the voting age provisions have been prepared, the way that they sit within the boundaries of the reservation in section 268 indicates that the winds of change must blow through the electorate before this

issue arises for consideration. It is not just that Parliament has said it's a matter for us. It is said that there must be broad support for such a measure and that arises because it's not just about a super majority. There are two ways in which such a provision can be passed. The first is that it has a consensus across the House sufficient to pass the 75% majority, which is a proxy for broad acceptance. But the other, even if that super majority is unavailable, is to seek a poll of voters, of the eligible voters in the general and Māori electorates and if 50% in that poll, in that referendum support the change, then it is past.

WINKELMANN CJ:

So I suppose in terms of the winds of change blowing through the electorate, the electorate might be assisted by the Court's view that on Parliament's own framework set out in sections 12 and 19 in the New Zealand Bill of Rights Act, the existing provisions are inconsistent?

MR POWELL:

Well, I was going to do so slightly later but I certainly don't mind being taken slightly out or order, so it might be useful to do it at this stage. Like the counsel for the appellants I consider the Court will be assisted by looking at the *Nicklinson* decision of the United Kingdom Supreme Court and the background to this case which I'm sure the Court knows is that it was a challenge to the provisions which criminalised providing assistance to someone who wished to end their own life and the issue that arose was the consistency of that with the European Convention and therefore, it arose as an issue for a declaration for incompatibility.

Now, I cannot agree with the way it was characterised in the submissions for the appellant in terms of the description of the approach of Baroness Hale and Lord Kerr. Perhaps if I could take your Honours to that. The case is under tab 26 and the particular passage I wanted to refer you to first is at paragraph 300. There's a page number 867 down the bottom if that's of any assistance.

O'REGAN J:

Whose judgment is this?

MR POWELL:

This was the judgment of Baroness Hale in the *Nicklinson* decision.

GLAZEBROOK J:

Sorry, have you got a paragraph number?

MR POWELL:

300.

WINKELMANN CJ:

Click share seems to have been resurrected.

MR POWELL:

Oh, we're back.

WINKELMANN CJ:

For now.

MR POWELL:

Now, the position that Baroness Hale took, which was a minority position, in paragraph 300 where she says about half way down: "Having reached that conclusion, I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility." So Baroness Hale was clearly of the view if the Court had determined that there was an incompatibility, that it wasn't an interference with the parliamentary process to say so. That where she said: "It may do nothing, either because it does not share our view…" or because it considers it should do something else.

ELLEN FRANCE J:

I thought that was what Mr McCracken said?

MR POWELL:

Yes, that's Baroness Hale. Now, if I take you to the decision of Lord Sumption. This is at paragraph 230. These are quite long paragraphs. Again, if you just look at the heading that Lord Sumption helpfully gave above paragraph 230, it's headed "Parliament or the courts".

1300

So this is the part of his decision where he outlines his approach about, again, towards the end of that paragraph: "Where there is more than one rational choice the question may or may not be for Parliament, depending on the nature of the issue. Is it essentially legislative in nature? Does it by its nature require a democratic mandate?" The first, then he talks about the reasons, he says: "In my view a classic example of the kind of issue which should be decided by Parliament. There are, I think, three main reasons. The first is that the issue involves a choice between two fundamental but mutually inconsistent moral values upon which there is at present no consensus. Such choices are inherently legislative in nature." Now that might be described as the high point of the majority Judges, because the other Judges didn't take that view, but he was essentially saying it was something the Court simply shouldn't look at, it was a matter for Parliament.

GLAZEBROOK J:

Although that's in the context of there being more than one rational choice, isn't there?

MR POWELL:

Yes.

GLAZEBROOK J:

Which I think is the point that was being made against you, that effectively the majority in that case thought that it was within the margin of appreciation, to have that limit. So of course they weren't going to make a declaration in those circumstances, I would have thought.

MR POWELL:

Well, the…

GLAZEBROOK J:

Admittedly the last part is saying, well, this is a moral issue that's outside. But I think the argument there is, well, yes, there are a lot of those issues in the Bill of Rights that might be said to be moral issues but which are nevertheless still legal issues in terms of the Bill of Rights…

MR POWELL:

I hope I haven't suggested otherwise.

GLAZEBROOK J:

Without there being that, within the margin of appreciation.

MR POWELL:

Yes, I would hope that I haven't suggested to the contrary. But the –

KÓS J:

But there's a powerful threat of obiter. For instance, Lord Neuberger at paragraph 115, to the effect that even if a declaration of incompatibility was justified this would not be a case for it, in part because of the kind of institutional competence arguments that you seek to advance in your written submissions.

MR POWELL:

Yes.

KÓS J:

And I think still advance in your oral submissions.

MR POWELL:

Yes. And that is the position taken by most of the majority members. In the interests of time I won't take you through them, but I do suggest that the approach in the *Nicklinson* case is helpful, notwithstanding the context is slightly different.

WINKELMANN CJ:

That is an interesting fact, isn't it, and this is the case really that Lord Sumption went on to make his post-retirement comments that this is a law that you'd be justified in breaking.

MR POWELL:

Yes. You've got a lot to look forward to, Ma'am.

WINKELMANN CJ:

Yes. It's the luncheon adjournment time, Mr Powell. So how are we going time-wise? Okay, I gather.

MR POWELL:

Well, we are certainly okay and…

WINKELMANN CJ:

Because we've finished your first point more or less and we're on to your second point, which is whether or not there was a justification in this case?

MR POWELL:

Yes, I'm happy to proceed to the second point, and I have little to say about that. I would say –

WINKELMANN CJ:

But we don't need to say now, because we'll take the luncheon adjournment.

MR POWELL:

It's not that little.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.16 PM

MR POWELL:

Thank you, your Honour. Just before the break I indicated that I was prepared to move to the other question which is whether or not the Court of Appeal was right to find that it wasn't –

WINKELMANN CJ:

Justified, reasonably.

MR POWELL:

– reasonably justified. I'm confident that I can do that and still make a small point I wish to make about the first part of the argument and still leave plenty of time for my friends to reply. The point about the discretion that you are seeking to clarify arises from there is an apparent inconsistency between the way the Court of Appeal approached it and the way the Supreme Court approached it in *Taylor*. If I could refer you first to the Court of Appeal's decision which is under tab 7 of the appellant's bundle and the particular, it's page 112 down the bottom and the paragraph is paragraph 153. I know the Court is very familiar with these authorities but the particular passage it's where it says: "So the court will have satisfied itself that it is able to decide the compatibility…"

GLAZEBROOK J:

Sorry, is this one…

MR POWELL:

153, yes. It should be on the screen in front of you.

GLAZEBROOK J:

Yes.

MR POWELL:

So the Court of Appeal was saying: "So the court will have satisfied itself that it is able to decide the compatibility issue and that it ought to do so. It will have explained itself in its reasons, so giving a *Hansen* indication that should trigger the reasonable expectation that the other branches will respond." And so that presupposes that as set out in the oral outline that in most cases, indeed, by

that, in all cases, the Court will have resolved this question of whether it should resolve the issue and have decided that it can and should and satisfied itself that there is an inconsistency in the provision.

And the Court goes on to say, or to ask the question in paragraph 154: "So when and why might a court go further make a declaration of inconsistency?" And it dealt with the four arguments, but included in that was the suggestion that the declaration of inconsistency was not a declaration of right. In other words, the person who seeks it is not entitled to the declaration, and it did seem from the judgments of the majority, and also comments made by the Chief Justice, that that reasoning wasn't accepted and that if the declaration, if there is a *Hansen*-indication, if there is an inconsistency, that in most instances, in almost all instances it will be of some value to give a declaration. What the Court of Appeal did in the present case was that it went through to the stage of a *Hansen*-indication and then used the issue of restraint to justify not giving a declaration.

1420

So whether or not this is the right opportunity to resolve that, it wasn't clear from the reading of both decisions in *Taylor* when this issue of restraint was appropriately dealt with. It did appear, from the Court of Appeal's decision, that it should all be dealt with in the context of the Court's enquiry into section 5.

GLAZEBROOK J:

Where do you get that from?

MR POWELL:

Paragraph 153 of the Court of Appeal's decision.

GLAZEBROOK J:

I read that as where you've found an inconsistency, you then decide whether you're going to give a declaration of inconsistency.

MR POWELL:

Yes, but expressly it says at the start, a court will consider a declaration only where it is satisfied the enactment impinges –

GLAZEBROOK J:
Well because – otherwise it's not inconsistent, is it?

MR POWELL:
Correct, but it says that "such a conclusion can be reached only after evaluating the policy underlying the enactment and assessing any invitation to defer to another branch of government." So the Court will have satisfied itself, and I interpolate during the course of that section 5 analysis, that it is able to decide the compatibility issue, and it ought to do so.

WINKELMANN CJ:
The Court of Appeal here is expressing a sort of public lawyer's dialogic conception of the role of the Courts, whereas the Supreme Court said this is the role of the Courts full stop, and your point is?

MR POWELL:
Well the point is, in terms of where it's appropriate to address arguments about judicial restraint, the Court of Appeal in the present case under appeal has gone through the section 5 analysis without reference to it and then said that it is a reason to withhold the remedy.

WINKELMANN CJ:
Yes, but I don't see how that – how is the Court of Appeal decision in *Taylor* relevant to that – what's the point you're making based on *Taylor* that's relevant to that?

MR POWELL:
I was only attempting to point out that its' not clear from the *Taylor* decisions when these arguments are to be addressed. We thought it was clear – that it was during the course of the section 5 analysis, much as Justice Doogue did in the High Court.

GLAZEBROOK J:

I don't see the relevance of the Court of Appeal decision in *Taylor* rather than the Supreme Court decision in *Taylor*.

MR POWELL:

No I'm not, I wasn't endeavouring to put that, but the Supreme Court decision doesn't address this question in the way the Court of Appeal did. But it doesn't endorse what the Court of Appeal said expressly.

ELLEN FRANCE J:

The restraint referred to in 153 relates to the section 5 analysis, doesn't it?

MR POWELL:

Yes.

ELLEN FRANCE J:

But the deference relates to whether or not there's a breach, not whether you grant a remedy.

MR POWELL:

Well I'm not seeking to argue with that as a proposition but the subsequent sentence suggests that the Court will have satisfied itself that it's able to decide the compatibility issue, and that it ought to do so. It seemed that that was expressly reserving the point as to whether it was appropriate for the Court to answer the question in the context of a section 5 analysis.

KÓS J:

I think you have to be careful taking these generalised propositions out of the immediate context as *Taylor* is very much a case on its own facts.

MR POWELL:

It's not critical to the argument I'm presenting, I was simply wanting to identify what we had seen as a difficulty in reconciling that decision.

KÓS J:

One thing I want to understand Mr Powell is, is your deference or restraint argument, you call it restraint –

MR POWELL:

No one seems to like deference.

KÓS J:

No, well, I'll come back to that. Are you raising this as a matter of justiciability or are you raising it as a matter of remedial discretion? Where does it fit in your toolbox?

WINKELMANN CJ:

You're not arguing it's justiciable in either point, whether it's section 5 or remedy, are you, you're simply saying it's an issue of restraint/deference whether it's at section 5 stage or at remedial?

MR POWELL:

But, I accept what the House of Lords, I think it was the House of Lords, said in the *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 case, that it's not, if the Court chooses to exercise restraint it is deciding as a matter of law that restraint is appropriate. So the first and foremost it seems that because of the way the section 5 enquiry has been structed in the *Oakes* test, and the way it's been explained in *Hansen* and since, there is ample opportunity for that deference to be exercised by the simple recognition that where there is a range of alternative options, then the choice that the Government made on an area of policy perhaps, or social policy, is justifiable. So in a sense that is accommodating the fact that some –

GLAZEBROOK J:

But aren't you then just deciding that it is a justified limitation because there's a range – either that there isn't a breach because there are a range of ways of making, of complying with it.

MR POWELL:

Yes.

GLAZEBROOK J:

Or that it's justified. But you're not exercising restraint in any other sense.

MR POWELL:

No, but my point is that in almost all instances it won't be necessary for the Court to consider withholding a remedy in order to recognise where appropriate that Parliament was in a superior position to make choices, or in the context of cases that involved difficult moral choices. It's more important that the Court exercises the jurisdiction for the very reasons that your Honour said earlier in relation to arguments that my friend was putting, for example, it maybe that what Parliament is doing is seen to constitute majoritarian oppression of a minority. Well, the Court can only address that if it enters into the discussion, if it looks at the section 5 issue. So I'm not suggesting that is – often be a reason to withhold the jurisdiction, but if the Court has determined, as these judgments seem to contemplate, the Court may not be able to decide the issue, or that it ought not to do so, then that is a reason to withhold the remedy, and it's a reason not to take the examination any further if, in those what must be very rare circumstances, the Court was to conclude that it shouldn't be entertaining.

GLAZEBROOK J:

Well I suppose what ire ally wanted – why does this fall within the rare circumstances as against ones that might be thought to have probably more of a policy aspect to them than this.

1430

MR POWELL:

In my respectful submission I can't mount the argument based on policy because any number of very difficult policy issues may require examination by their very definition. We have the recent example of the Government's pandemic response. It is replete with difficult policy decisions having to be made, but they also involve putting limits on fundamental rights. And so, as the

COVID-19 Public Health Response Act 2020 properly acknowledges, it does not exclude the purview of the courts, it's more important than ever that the courts enter into those cases, notwithstanding their policy content. It can't simply be that, otherwise courts wouldn't, there would be too many areas of difficult moral choice that would be effectively excluded from examination. I'm not suggesting that could be the case, there has to be something about this, and the only point that we've raised that suggests that this is one of them is the point I've already endeavoured to articulate, and that is that there is a clear intent behind the Electoral Act that any change has to be preceded by a broad consensus. And so the Court entering into it would in effect be commencing a discussion in the Court that needs to begin in Parliament.

Now it stands or falls on its own merit as to whether that is a sufficient exception to warrant the Court saying: "This is not a suitable occasion for the Court to give a declaration," but if that is the position that's reached it seems odd to go through the whole process of determining whether or not the limit is justified and then say "but we're not going to issue a declaration", because the Court's *Hansen*-indication will have had that effect anyway, and so that simply suggest that the declaration of inconsistency is just a form of shouting, it doesn't, it must be something different than that, and indeed the way that Parliament is proposing to respond is not to codify or provide a statutory declaration of inconsistency procedure, it is to recognise that one already exists. But it is the Courts exercising their jurisdiction to say that an enactment is inconsistent with a fundamental right. So if the Court has decided that it is, then it should say so, unless there is a reason, probably based on utility, why it should withhold saying that or giving that declaration, perhaps the more so if it's conscious that it will trigger an obligation under the Bill of Rights Act itself when the amendment is passed, to commence the process of having that put before the house.

But this is not the case, it seems, to make that point. The point is that, for the Crown, that this is one of the rare situations where it is a question for Parliament and not the courts, and I'm sure the Solicitor-General could have made that a lot more eloquently and forcefully than I can. But the point is put there in their written argument and I can't take it any further than, or express it more

forcefully, than I have. But otherwise it does seem that the appropriate course was for the Court to do as the High Court did, that is make its way through the section 5 question and, where appropriate, accept that there were options before Parliament and it was entitled to choose amongst them.

Now that does take me to the point at which I wish to address the issue of justification. The identification of the social objective is, as it was put in the judgment of Justice Doogue and expressed by the Court of Appeal, it's not so banal as to be saying that the purpose was to set the voting age at 18, and of course it achieved that because that's what it did. What I would like to do is take your Honours to the parliamentary debates for the 1974 amendment. As I have said, we put the legislative history of this provision before the High Court in the affidavit of Caroline Greaney which had annexures consisting of all the material that was available and I would like to take you to, I see it is up on my screen, I hope it's in front of yours.

GLAZEBROOK J:

It would be easier on the eye if it was blown up a bit. Thank you.

MR POWELL:

Thank you. I do wish to refer your Honours to what was the introductory speech of the Honourable Prime Minister. It's the paragraph that begins: "I think it is appropriate that we should remind ourselves," and it's down the bottom of that paragraph. Now the important context of this as we've briefly discussed, is it's apparent from the debates itself that by the time the by-election arose in the Sydenham electorate as the result of the death of the previous Prime Minister they had already changed the Local Government Act to reduce the voting age to 18 and so it was brought forward for this. But the previous adjustment to the age where it came down from 21 to 20 was accompanied by consideration of another Bill which later became and what is still the Age of Majority Act 1970 which sets the age of adulthood at 20 and which hasn't since been changed. So, by the time Parliament came to consider the voting age in 1974, this is what was in the mind of the Prime Minister. I won't read out the whole part, but the whole passage is useful. But he says towards the bottom: "With the changing

circumstances of recent times, the electoral rights of these young people should not be ignored. It is a matter of matching their electoral responsibilities with the economic and social responsibilities which most of them have already been asked to assume."

So, what the purpose of the voting age provisions is, is to set what should be the age of adulthood for the purpose of voting. Given that voting is an adult benefit, it does not follow that there is any particular age that should be recognised as the age of adulthood because of course by the time the Parliament came to consider this in 1974 it had itself declared in the 1970 Act that the age of majority for general purposes and the law was 20.

Now, the Wallace Commission contains much greater history about the age of majority. You may have been aware that it was of course for many years 21 and that had been chosen in medieval times as the age at which one could be expected to put on a suit of armour and wield either a sword or a lance. The age of majority had clearly been affected no doubt by developments in the twentieth century. The fact that two generations had witnessed the conscription of 18 year olds to participate in armed conflict would no doubt have affected the public mood at the time. But what is clear from the statements by the Honourable Prime Minister at the time suggests that what they were looking for was a suitable age of maturity for the purpose of voting.

Now, how would that question, the question posed in the mind of the Prime Minister at the time, be approached now for voting purposes? Have things changed to the extent that it should now be 16 rather than 18, or 17. I accept, as my friends say, that the New Zealand Bill of Rights Act certainly means that it can no longer be raised back to 20 without an inconsistency with section 12.

1440

Now the Crown did not at any stage attempt to answer that question. It did not attempt to say 16 year olds have not reached that age, they are not sufficiently mature, they're not competent, they haven't assumed enough social and

economic responsibility to their community to justify having and extension of the franchise. The Crown sought not to enter that debate. It could only do so hypothetically. Now of course it falls on the Crown to justify a limit of a right, including obviously section 19, but what the Attorney-General did not consider he could do was essentially to become keep it 18. The whole of the evidence was only ever intended to demonstrate that when it comes to choosing what the suitable age of maturity is, 18, 17 and 16 must all be within a reasonable range that can be justified in a democratic society, and that argument was accepted by Justice Doogue.

GLAZEBROOK J:

But if there is a reasonable range, don't you have to show that 17 and 16 are not suitable ages, because if there's a discrimination provision in relation to 16 year olds, how can you jump to, well 18 is still okay. I mean if you say no 16 year olds are able to rent a property ever, or live on their own, or they don't get – I'm just trying to think of something that's clearly discriminatory that doesn't fit within this – but it just seems to me it's not an answer to say, oh well, 18 is okay.

WINKELMANN CJ:

In the fact of section 19.

GLAZEBROOK J:

In the fact of section 19 it might be otherwise.

MR POWELL:

Well the short point, is that is the case then it is not an argument that we attempted to make. There is no – the Attorney-General proffered no evidence in that regard. We simply relied on the record to demonstrate. By reference to what was happening in democracies elsewhere in the world, and what has happened in legislative steps that have been taken since to deal with other issues as to the majority, that it was acceptable – well, you have to have a voting age. You could simply say that all citizens can vote. In fact the way in which the right to vote is expressed in the International Covenant makes no

reference to age, but infants can't vote. Now when you get to beyond the absurd point you start to encounter the age at which some social responsibility is being accepted. But you end up having to have, to ultimately pick a number, and as the High Court said, wherever you put there will be precocious young people beneath it and incompetent adults above it, but you have to have one. The sole question is can 18 by justified and the answer we gave, the answer the High Court accepted was yes, it was within the range.

KÓS J:

In a sense it's not so much, is 18 justified, it is, can a 16 year old be denied the right to vote for two more years. To effectively delay, that's the limitation.

MR POWELL:

Yes.

WINKELMANN CJ:

Just collecting your thoughts Mr Powell?

MR POWELL:

I am, sorry, I know I'm doing that at the expense of others.

WINKELMANN CJ:

No that's fine. I was just anxious that you weren't waiting for us.

MR POWELL:

No, thank you. yes, the case I would like you to look at is *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 in the Court of Appeal under tab 12. Now I'm particularly looking at paragraphs 151 to 153 and it's really the – this is the point at which the Court of Appeal is discussing how it would approach the section 5 issue in terms of minimal impairment, which was then the term being used, and it cites at paragraph 151 and 152 Justice Tipping and Justice McGrath in *Hansen* as to what they said. Then it made reference to *RJR-MacDonald Insolvent v Canada (Attorney-General)* [1995] 3 SCR 199 in Canada at paragraph 153 and particularly where Justice McLachlin had said:

"The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement… On the other hand, if the Government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."

And from that point the Court of Appeal said: "We agree that if there is an alternative option that will have less impact it does not follow that the Ministry's option is outside the range of reasonable alternatives." But, of course, the problem there was, they said that the option the Ministry chose in that case was outside the range of reasonable –

GLAZEBROOK J:

But it is slightly different because here you have discrimination, let's assume that's accepted, discrimination against 16 and 17 year olds. What you have to show is that that discrimination is justified. It's not a matter of reasonable alternatives.

MR POWELL:

Well –

GLAZEBROOK J:

It might be in some cases but here they can either vote or they can't. There's no other reasonable alternative that's being put forward to say that there's some reason they shouldn't, there's some very important objective to say that they shouldn't, and there's a better alternative to saying they can't vote. I don't know that they're able to put petitions up that are then thought about or whatever it might be. It really is a bit black and white here.

1450

WINKELMANN CJ:

Yes, this is about what is a minimal impairment. It's addressing a different issue.

GLAZEBROOK J:

And in *Atkinson* it was accepted that there might be limitations on parents being paid to look after children such as them being trained properly and whatever other limitations there might be. But a blanket denial was not only not in accordance with the facts because in many cases there was no alternative but the parents to look after these children. Well actually not children, actually adults in *Atkinson*.

MR POWELL:

Yes. Well, like you can see that that is conceptually a completely different approach to the one that the Crown took when it argued the case in the High Court and of course if that is the task that is required, then there was no evidence proffered to say that because the minimal impairment under that reasoning will always be 16. But surely that would apply to everything, every age restriction that is put in.

GLAZEBROOK J:

Well no because the age of restriction might be totally justified as it is with youth employment.

MR POWELL:

No, I don't mean to take that point. You would always have to justify why you hadn't reduced it to 16.

WINKELMANN CJ:

Yes, well I'm not seeing how *Atkinson* helps you. Can you tell us?

MR POWELL:

Well, no, only to say why we based our case on the range of reasonable options. Now your Honours countered that by saying: "Well, this isn't a case of a reasonable range, it's black of white."

GLAZEBROOK J:

Well it may have been absent section, the non-discrimination against 16 and 17 year olds. There may have been a range of reasonable alternatives which I think was actually conceded by the appellant.

WINKELMANN CJ:

Yes, but what is said against you is the difficulty you have. There may be a range of reasonable alternatives, but the difficulty you have is the age stipulation of 16. That is age discrimination beyond 16. This stipulation of 16 is the age protecting against discrimination?

MR POWELL:

Yes, any age above 16.

WINKELMANN CJ:

Yes.

MR POWELL:

You can discriminate against 15 year olds.

WINKELMANN CJ:

Yes.

MR POWELL:

But you cannot discriminate against 16 year olds without justifying it.

WINKELMANN CJ:

Yes.

MR POWELL:

Yes.

WINKELMANN CJ:

And that's the problem you have.

MR POWELL:

Well, if it's a problem we have, it's a problem we had in the High Court and I can't fix it now. There is no –

WINKELMANN CJ:

No, no, I mean that's the difficulty with the range of reasonable alternatives argument. You just can't say that. You have to say something more to get over the difficulty with that 16 age threshold.

MR POWELL:

Yes. Although it does –

WINKELMANN CJ:

And I had put to Mr McHerron that I had understood the submissions to be suggesting that it's justified in some way, but you're not advancing that?

MR POWELL:

Well, other than we were saying it was self-evident, but that was in respect of choosing 18 as the voting age rather than 16 or 17. That you can make the voting age 18. Now that's arguing past the point that your Honour has just made, but that's the way the argument was put and it was accepted by Justice Doogue but not by the Court of Appeal.

KÓS J:

But in a way, your primary argument feeds into this one because you can perhaps argue that the justification is partly one of process. In other words, that Parliament can't delay dealing with this issue, this inconsistency, but Parliament should deal with it before this Court does. If Parliament fails to deal with it then, as in *Nicklinson* where Lord Neuberger and Lord Mance and Lord Wilson all said: "Well, we may have to come back to this but not now."

MR POWELL:

Yes. And of course there are examples, and *Adoption Action* is probably the most glaring of them, of legislation that does perpetuate discrimination, and there's been no attempt to put, well, there have been attempts but it has not

been changed, it is still – so there are circumstances in which even if the Government was to come to the Court and say: "Well, not now, let us think about it," where the obvious rejoinder would be: "You've had 60 years to think about it." So all I can say is the New Zealand Parliament has a fairly unfailing history of recognising when it's appropriate to move to extend the franchise.

WINKELMANN CJ:

So Mr McHerron took us to some section 7 reports – it was Mr McHerron?

MR POWELL:

Yes.

WINKELMANN CJ:

He took us to section 7 reports which showed the Attorney-General saying: "Well, there may be very profound social and moral issues around this but I'm simply addressing compliance with the Bill of Rights," and says that's the approach we could take here, that this isn't such a profoundly complex social and moral issue that we can't in fact just apply the Bill of Rights Act.

MR POWELL:

Well, except that what the presupposes is that you – because you have to resolve those issues in the context of the section 5 analysis. But the former Attorney-General is quite correct, it is an issue of law as to whether there is an inconsistency with the Bill of Rights Act. But the fact that the New Zealand Bill of Rights Act puts in the way of that conclusion a qualitative assessment of whether there is utilitarian justification for the limit that is against the standards of a free and democratic society, unmistakeably the Bill of Rights Act applies not only to Parliament but also to the courts and the courts have said: "Well, that is what we must do." So if it is properly before the Court then the Court makes that assessment.

GLAZEBROOK J:

I mean, this is probably not a terribly difficult assessment to make in any event, is it? I mean, there are a lot more difficult policy assessment than something to do with 16 or 18, I would have thought.

MR POWELL:

I would have thought any number of issues about the commencement and the end of life would be…

GLAZEBROOK J:

Just my point is neither the Court nor Parliament can duck those, in the context of the Bill of Rights, and I would have thought this was relatively simple.

MR POWELL:

No, the – well, it has to be sufficiently straightforward, because there is an expectation that the public may be required to, there may be poll, depending on how things happen in Parliament, the electorate may be polled, and people have to be able to make a judgement as to whether they think 16 is the appropriate voting age or whether it should stay at 18. So, no, it can't inherently be complex. It's just that, I think the point was made that there are a range of views, and undoubtedly there are a range of view.

WINKELMANN CJ:

So it may be, I mean, of course it's one of the most fundamental issues that a society decides the extent of its franchise, to whom the franchise will be extended. But is there any reason why when Parliament and the general public consider that issue they shouldn't have the benefit of the Court's view about whether within the framework, rights framework created by Parliament, about where this issue sits within the framework, rights framework created by Parliament, which takes us back to the first issue.

MR POWELL:

Well, I don't want to suggest that you're not highly regarded in the community, but the argument that Baroness Hale makes on its face, it can't skew the argument, it's not going to lead to people saying: "Oh, well the courts have ruled

on that, there's no point in arguing about it any further." So, no, it's not. But on the other hand the majority in *Nicklinson* said that that wasn't really the point. It wasn't appropriate for the Courts to pre-emptively enter that debate when it was a matter to be determined, not only by Parliament, but possibly by the electorate in general.

WINKELMANN CJ:
So *Nicklinson* is your best authority about that?

MR POWELL:
It's not binding, it's just an indication of another senior court –

WINKELMANN CJ:
Yes, I know it's not binding.

MR POWELL:
– confronting a very similar dilemma and the way that they chose to respond to it. But if one goes back to the decision of this Court in *New Health*, the Court didn't enter into, or try and resolve the issue as to whether fluoridation of town water supplies should happen. It simply assessed that there were, there was evidence to support such a policy, just as there was evidence against it. So the Court could not have been said as a result of that decision, you could not read the *New Health* case as saying, henceforth whenever local authorities or anyone is considering fluoridating water, you must listen to the Supreme Court because they have said fluoridation is right or wrong. So the way the decision is couched makes it abundantly clear that it's not pre-empting the argument. But one has to make, or we have to make a case for this being special because it concerns the way in which – it's not, I should add, it's not only the right to vote, it is also the right to sit in the House of Representatives, which is a significant matter as well.

Of course there are examples, the other major condition on the franchise is citizenship. Now that in itself is a prohibited ground of discrimination because citizenship is the same as nationality, which is a prohibited ground of

discrimination, national origin, so our legislation has extended the franchise not only to citizens, but to permanent residents. The Bill of Rights Act, however, refers only to citizens. But the Electoral Act does place this additional domicile requirement, albeit ours is an extremely low bar, you have to be a citizen of New Zealand and have lived here continuously for a period of 12 months. But nonetheless it does cause intra-ground discrimination against people on the basis of nationality. That is a person who as a citizen of New Zealand –

GLAZEBROOK J:

It probably wouldn't be terribly difficult to justify that though, would it?

MR POWELL:

I would hope we'd get cross the line on that one, yes, but I mean you don't have to. If you expand it then, of course, as you see from the Canadian case, if you're talking about imposing a greater domicile obligation, that you could lose your ability to lose if you're absent beyond a certain period, that would be more difficult.

GLAZEBROOK J:

Well it maybe but if you're actually saying – well. I'm not sure it would be personally but it's certainly something you could attempt to justify.

MR POWELL:

Yes, although again that is one of the reserved provisions.

WINKELMANN CJ:

Right, so Mr Powell.

MR POWELL:

There is one – to address a point that your Honour Justice Kós raised about the argument about section 12, it was withdrawn after we made our leave submissions. I certainly don't resile from that. The Crown must accept the consequences of having done that.

GLAZEBROOK J:

You don't resile from what sorry? From withdrawing it or…

MR POWELL:

From withdrawing the argument that section 12 essentially answers the question and there is no discrimination as a result of section 12. But the argument – so I won't go through it now, but our submissions on that, the Court of Appeal submissions were included in the case on appeal, and the submissions were made were at paragraph 16 to 47 in respect of that argument if the Court is interested in it. But, as I say, I can't now change the Crown's position and urge that on you simply because your Honour indicated that (inaudible 15:05:28) prepared to look at it. But we cannot, in our concessions, control what the Court considers it wants to have regard to.

The one remaining matter I wanted to address, and I'll do so extremely quickly, I'm not sure, it wasn't a point that was developed in argument, but in footnote 45 in their submissions my friends made reference to the core values underlying tikanga Māori, and seemingly sought to recruit that in some way to support their argument. Now they haven't developed that in their oral argument before the Court, but the Crown's position is simply that it wouldn't want it thought that the issue had been raised and the Crown had ignored it. The Crown accepts that tikanga is part of the values of the New Zealand common law, as confirmed by this Court in *Takamore v Clarke* and it will happily respond to claims that tikanga is relevant to any particular issue. But it is for the applicants to make that clear including to identify the specific tikanga relied on and identifying how it interacts with any other principles, and why it should apply to the particular legal issue, and in my submission that hasn't really been done, or advanced, and that is why the Crown hasn't responded to it. But of course if it did arise then we would seek the opportunity to do so.

I'm most grateful for the hearing but that is all I wish to say unless your Honour has any questions for me.

WINKELMANN CJ:

Thank you Mr Powell. Mr McHerron.

MR McHERRON:

If your Honours please, I have five substantive points to make in reply, and a small number of minor points. To start with the first substantive point, and coming back to a matter that was discussed in the hearing before lunch, the language of the declaration sought. So we were at pains to stress that in our declarations that we are seeking, we have used the language "has not been justified". On reflection over the lunch adjournment we don't think it matters terribly exactly using that formulation, and in fact in my submission to use the language "is not justified" or "could not be justified" or "was not justified", are all broadly equivalent to the formulation that we have included in the declarations we have sought. All of those formulations, in my submission, are consistent with the language of section 5 of the Bill of Rights and the role of the Court. The reason for the choice of "has not" was really to reflect the fact, as conceded by my learned friend for the Attorney, that the Attorney did not offer a justification for the limit on rights and so it was designed to, in a sense, accommodate that and reflect the fact that the Court did not have the benefit of a justification provided by the Attorney.

1510

Where we get to in terms of the other formulation that was discussed that I haven't mentioned, and that is the formulation used in *Taylor*, cannot be justified. In my submission, that formulation is the only one that I have mentioned that is potentially problematic because of the fact that it sounds like it is pre-empting further consideration of the issue by Parliament rather than reflecting the fact that a declaration is being made on the basis of material before the Court at that time. All the other formulations properly reflect the Court's definitive statement that the limit is not justified and that is to come back to the language used by your Honour Justice Glazebrook in the discussion earlier.

Just picking up on the potentially problematic aspect of the formulation cannot be justified, and not in any way meaning to suggest that the declaration made

in *Taylor* was wrong or shouldn't have been made, but it is important to recognise, in my submission, that in *Taylor* the Court did not evaluate the justification in a thorough and comprehensive way either because it was never in issue. It was conceded by the Crown that the limit was not justified and so the Court did not need, and did not, explore the issue further other than to accept the concession and make a decision accordingly, and indeed I am not meaning to suggest that in *Taylor* this Court did pre-empt further consideration by Parliament. That was not for this Court to do and it did not do it and Parliament made its own mind up as to their appropriate response to the declaration in *Taylor* independently. It wasn't told to do it. It wasn't required to do it. It was informed by what the Court decided and made up its own mind.

My second substantive point in reply relates to the issue of entrenchment and I'd just like to draw your Honours' attention to Justice Tipping's reference in the *Hansen* decision at footnote 143 to Mill's reference in *On Liberty* to the: "Tyranny of the majority." And Justice Tipping saw the connection between that expression and the role of the courts as a bulwark against the "tyranny of the majority".

What we have where entrenchment is in play is potentially the tyranny of the super majority. So while entrenchment exists, it should not be seen by the Court as a barrier to performing its usual role.

WINKELMANN CJ:

No one has mentioned this but of course Parliament, when it enacted the present age, did not have the Bill of Rights Act. It wasn't reflecting upon the rights' competence aspects. Anything you want to say about that?

MR McHERRON:

No. Well sorry, your Honour, yes, I do want to say something about that. It comes back to the submission that this is not a judicial review of Parliament so Parliament cannot be faulted for not taking into account rights' standards that weren't in place. 1974 was still four years away from ratification of the ICCPR in New Zealand and many years more before the Bill of Rights Act was

enacted. But what one can see in the legislative history that my learned friend referred to and the earlier legislative history related to the changes in 1969 which are also in the case on appeal is treatment of the issue of voting age is a matter of when the privilege of adulthood should be extended and we decide that as Parliament because we set the laws. We are the democratic representatives who can make that decision on behalf of society. It's a privilege that we confer and at that time, as my learned friend was submitting to your Honours in relation to the age of majority, there was much more cohesiveness in terms of the various age limits that applied. Adulthood was much more of a bright line concept than it is now because it was the time when it was deemed to be appropriate for the rights and responsibilities of adulthood to be assumed.

WINKELMANN CJ:

It's actually characterised as a responsibility, isn't it, because it was seen as a responsibility for citizens to vote as opposed to a privilege? Both could be general responsibility but…

MR McHERRON:

Yes, your Honour. The Royal Commission touched on this in its report that I took your Honours to earlier at paragraph 9.3 where it said that, talks about property qualifications being abolished in 1879, women enfranchised in 1893. Then it says: "For adults, voting ceased to be a privilege extended only to those who were thought to deserve it and became a right open to all members of the community unless there was a good reason to restrict it." So that's been a developing concept that has been solidified and reinforced as the international rights instruments have been adopted, domestic human rights legislation has been passed. So, there has been a change of view over time, over a long period of time, but most of the final steps in that occurred subsequent to 1974 where voting is now recognised as a right not a privilege.

And it's not just voting that there has been that change witnessed. In our High Court submissions we have an appendix which is in the bundle at 101.052 which shows the range of minimum ages across the statute book. And now,

much more than then because of the need for justification of limits and the introduction of the bright line of 16, there is the developing notion of progressive capacities to do things and each responsibility or right has to be assessed individually and a justification for the limit needs to be mounted in each case.

It makes it much harder. It would be much easier for Parliament to make all adult rights commence at 18. That would be a very easy solution to this problem and many others, but it's not possible to do it that way anymore and unfortunately this sort of case brings into issue I suppose thought processes that occurred before all of this happened and so this is not meant as any negative reflection on the legislators in 1974 and 1979. All it reflects is that the statutes are ambulatory, they must be taken to have their meaning in light of present circumstances, and those include the human rights standards against which they must be assessed.

1520

I just wanted to briefly round off my second point, which was entrenchment, I just wanted to develop that a little bit further and just to say that the local government, the local electoral, rather, declaration that we're seeking, the second declaration of inconsistency, that has no entrenchment issues associated with it, and nor does it have any section 12 issues associated with it. And to briefly pick up on the point of permanent residence, which is associated to that section 12 issue, if challenges to legislation were to be legislation relating to voting, were to be limited to the criteria contained in section 12, then it would leave permanent residents in a precarious situation if discrimination existed in respect of their voting rights, for example. The obvious example is if members of a particular race or, for example, male permanent residents were banned from voting, that would not be inconsistent with section 12 but it would be inconsistent with section 19. So the two rights, as the Court of Appeal held, can be considered independently and do not cancel each other out, as was argued before that position of the Attorney's was changed.

My third substantive point in reply is to say that the fact that there is an electoral review currently underway and that a Member's Bill has been introduced are

not reasons for the Court to defer making a declaration of inconsistency. That is because only the Court can make an authoritative declaration that rights have been unjustifiably limited. The electoral review cannot do so and Parliament will not do so in the process of considering or enacting other legislation. The closest that the parliamentary process comes to it is the section 7 report from the Attorney-General but, as we've said, the absence of a section report certainly does not suspend or remove this Court's jurisdiction or it's, I would put it higher than that, I would say it's duty to assess the laws against the human rights standards. As your Honour the Chief Justice said earlier, this is the role of the Court, full stop.

To defer at this point or delay until other processes had got further down the track or been completed, would turn this exercise into a parliamentary judicial review process, which it should not be for reasons of comity. More important than ever, in my submission, for the Court's declarations of inconsistency to be made to inform those additional processes that have now commenced and, as we mentioned, the Bill before the House to amend the Bill of Rights Act, if it passes, is a positive signal from Parliament that it welcomes being informed by the Court in that way.

Another relevant factor to this is that there is no suggestion, highlighted by the Attorney-General's concession in this Court today that no justification was mounted for the limit on rights, there is no suggestion that the electoral law review will reach any different conclusions in relation to the voting age than the 1986 Royal Commission did. It may do of course, but there is no basis for assuming that that is likely. So, there is no need to wait and waiting is, in my submission, the wrong thing to do because it risks compromising comity. The advantage that the Court has in making a declaration today, or not today, but after a period of consideration, is that it is distanced to a considerable degree from immediate past parliamentary legislation. There has been a long period of time over –

WINKELMANN CJ:

It's away from the heat of the parliamentary process.

MR McHERRON:

Yes, your Honour.

WINKELMANN CJ:

Or battle, if you want to put it that way.

MR McHERRON:

Yes.

KÓS J:

But how informed is Parliament going to be by a decision of this Court that reflects the declaration you seek which itself would say that the Attorney had not put out, or might say the Attorney has not put out a justification in this Court? It doesn't really add very much. We were talking before about how loud this Court speaks. That will be a rather soft voice.

MR McHERRON:

To use another possibly inappropriate metaphor, where there is no smoke there perhaps is no fire and it would be a good indication to all who see the declaration that we need to look harder and further here because the question has been raised that has not been answered and so is there a justification or not? Nothing has been –

O'REGAN J:

But doesn't that mean that every time somebody seeks a declaration, the Crown is effectively put to the position of having to institute like a commission of enquiry? I mean how would the Crown be able to justify in this case the voting age without doing the sort of work which the review that you've just been talking about is going to do over a three year period, or a four year period?

MR McHERRON:

Well, that is the task that section 5 gives to the Crown and in one sense the Crown does it every time a Bill is introduced. It vets that Bill for compliance against the human rights' standards. Admittedly –

O'REGAN J:

But it does that in advance, when it still has a chance to change the Bill. It doesn't do it in respect to something that happened 50 years ago.

MR McHERRON:

Yes, your Honour, but the same questions apply. The same questions of what –

O'REGAN J:

Yes, but at the time a Bill is introduced the policy work has already been done, hasn't it? What we're talking about here is a freestanding matter where, you know, it could be an issue where the Crown has absolutely no interest in it at all and Parliament has no interest in it at all. But you're saying as soon as someone asks for a declaration of inconsistency, the Crown then has to devote a whole lot of policy work to justifying that otherwise a declaration gets issued by default.

MR McHERRON:

It does not necessarily require a whole lot of policy work to –

O'REGAN J:

Well, it might, it might.

MR McHERRON:

It might.

O'REGAN J:

The *New Health* case was a good example of that.

MR McHERRON:

Yes. I was going to come back to *New Health*, your Honour, because the articulation of the objective of the limit in that case was illustrative of how simple this can be where the objective in that case was to prevent tooth decay in the areas where fluoridation had been introduced and my learned friend Ms Moran

mentioned the example of threatening to kill in the Crimes Act. Against that we have the *Nicklinson* case, a complex issue of morality on which a justification was offered to try and avoid the possibility that people might be pressured into ending their lives early and that justification was only accepted by some judges, not all of them and the issue remains controversial to this day in the United Kingdom. But the current legal position is that that justification has been accepted as a reasonable limit on the right. In the *R v (Conway) v Secretary of State for Just (Humanists UK and others intervening),* [2018] EWCA Civ 1432, [2020] Q.B.1 case that was accepted by the Court of Appeal and then the Supreme Court denied leave because it was not thought that that justification that had been mounted could be overcome.

1530

Now the Court did not need to engage in a complex commission of inquiry exercise, all it needed to do was to ask the State to do its job under the equivalent to section 5 to allow the Court to do its job, as Justice Tipping said, to perform its review role under section 5. There will be frameworks and schemes that are more complex than others but, as her Honour Justice Glazebrook was saying, this is not particularly complex. This is a case of putting up a justification to explain why 16 and 17 year olds are not allowed to vote. It's not beyond the Crown Law Office to do that –

O'REGAN J:

But it's not a matter of government policy, is it? Because in order to change the voting right you actually need every, well, 75 per cent of Parliament to change it. So what the Government thinks is neither here nor there in terms of changing the law. It is a different position from most cases where the Government of the day could introduce a Bill and successfully get it through the parliamentary process.

MR McHERRON:

Well, I think, your Honour, I think there is a simple answer to your Honour's question. Whether your Honour thinks it's a simple answer is another matter. But my attempt at a simple answer is to say that this function of the courts under

section 5 and this declaration of inconsistency jurisdiction is designed to be independent of government policy. It doesn't matter whether the Government is interested in this or not, and it would be dangerous if it was.

O'REGAN J:

No, I realise that. I'm just saying you're saying the Crown has to respond in a situation. So every time somebody comes to the Court and asks for a declaration of inconsistency the Crown is obliged to do whatever policy work is required to justify or concede the case.

MR McHERRON:

I'm sorry, your Honour, but that is the price that we pay for human rights standards, and this is made very clear in the Supreme Court of Canada's case in *RJR-MacDonald* at paragraphs which I had set out the paragraph numbers in the outline but…

WINKELMANN CJ:

This raises a question, Justice O'Regan's point raises a question about what role the Attorney-General is playing in the proceedings, doesn't it, because he's not acting for the Government really, he's acting for the Crown. Because he's putting forward defence of legislation which is many generations, many parliamentary generations, in the past. But someone has to speak under the Bill of Rights Act framework. Whether or not we've got declarations of inconsistency, even in a *Hansen* finding, there was always that requirement.

MR McHERRON:

Yes, your Honour. But 16 and 17 year olds are entitled to come to the Court and ask the Court to assess whether the rule that prevents them from voting is a justified limit. To say that, as an answer: "Well, it's not fair on the Crown to expect them to do all the work needed to justify it," is risking the jurisdiction becoming hamstrung and ineffective due to happenstance really, and it risks turning it into a jurisdiction that is only available for current issues of the day that the Crown has already engaged in. That turns it into a much more limited form of jurisdiction than I understood the Supreme Court in *Taylor* to have

recognised, and there's certainly no indication in the Bill of Rights itself that it is intended to be limited in that way, and there's certainly no indication in the Human Rights Act in respect of the Human Rights Review Tribunal and its role which is equivalent but statutorily blessed in a way that this one wasn't to assess legislation such as the adoption legislation, for rights compliance, in relation to rights that have only been introduced after that legislation was passed and in respect of which the Government may or may not have any current policy intentions.

There was a case only released by the Human Rights Review Tribunal a matter of a week or so ago called *Butcher v New Zealand Transport Agency* [2022] NZHRRT 21 in which Mr Butcher challenged the driver licencing requirements because he thought that the requirement to have a photographic licence was discriminatory.

WINKELMANN CJ:

I thought you were going to say he was challenging the age, but no.

MR McHERRON:

No. Although that is an interesting, no, I won't get into that. The point is that is an area of law which the Government has absolutely no intention of changing as far as I know. It's a legal issue that was effectively dealt with by the Court of Appeal in the late 1990s when the licences were introduced and yet the Crown came along and faithfully and diligently presented a justification which was persuasive in every respect to the Tribunal which, in a very lengthy and extremely tightly reasoned decision, dismissed the challenge. But nevertheless, Mr Butcher's right to bring the challenge plainly exists and the duty of the Attorney-General to respond to it plainly exists as well.

WINKELMANN CJ:

So, does that finish your point 3?

MR McHERRON:

Sorry, your Honour, yes. I just have a couple more points in relation to point 3 and that is –

WINKELMANN CJ:
So it doesn't finish your point 3.

MR McHERRON:
No, sorry, I will get there soon. The point about the Members' Bill, Ms Ghahraman's Bill, now, I just wanted to mention because it didn't come up before, but if that is a concern to the Court, in my submission, it shouldn't be. The *Steinfeld* case in which the Supreme Court of the UK unanimously made a declaration of inconsistency in relation to discriminatory aspects of the civil partnerships' legislation, that happened after three private Members' Bills had been introduced including one that was currently before Parliament. So it is certainly not seen as an obstacle to the Court's independent consideration.

I just want to finish point 3 with I suppose a sentence to sum up. What I am saying here is that not doing something is an active decision and so deferring for some uncertain process ahead is in effect a conscious and deliberate active decision of the Court. It is not a way of adjourning the issue for later consideration that, in my submission, is consistent with the review role. So that is point 3.

Point 4 is just to reflect on the fact that the Attorney-General has now conceded in oral argument today that no justification was mounted for the limit on 16 and 17 year olds' rights.

WINKELMANN CJ:
Are we clear that Mr Powell has conceded that because I don't think he has?

MR POWELL:
No, I conceded that we did not –

WINKELMANN CJ:

Can you move in front of the microphone, Mr Powell?

MR POWELL:

No, we did not put any evidence before the Court to justify why 16 year olds and 17 year olds should not be able to vote. We relied, without rehearsing my argument, on the submission to all courts that we've made that you could choose between 16 and 18.

1540

WINKELMANN CJ:

It was a legitimate – within the realm of reasonable choices.

MR POWELL:

Yes and your Honours raised some questions about that approach. But what I accepted was there was no evidence put before the High Court, and none since to, for example, to rebut the argument put by Dr Eichhorn. It is not a part of the argument that the Crown entered.

WINKELMANN CJ:

Right, got it, thank you.

MR POWELL:

But saying that we conceded that it was unjustified is going too far.

MR McHERRON:

Well, I am sorry for mis-stating the extent of my learned friend's submissions, but I understood him to say that the Attorney-General could not say, could not come to Court and say: "Keep it 18." And in my submission, that the Attorney-General needed to do that, needed to come to Court and explain why 16 and 17 year olds' rights are limited in that way. So I've really got to the point of the minor points now.

WINKELMANN CJ:

This raises an interesting issue about the role of the Attorney-General which we've been – in this kind of context, doesn't it, because in many cases the Attorney-General comes to court with the Attorney-General's section 7 report recently issued but here the Attorney-General is coming to Court and speaking about legislation of some decades' antiquity.

MR McHERRON:
It's not that unusual, in my submission.

WINKELMANN CJ:
I know, but Mr Powell said the Attorney-General could not come to court and say make it 16, as you said.

KÓS J:
Keep it 18.

WINKELMANN CJ:
Sorry, no, yes, keep it 18, keep it 18.

MR McHERRON:
In many respects it's, although I don't want to bring the judicial review analogy back too strongly, but in many respects, it is not dissimilar to, for example, a judicial review in respect of a piece of legislation that was made some time ago.

WINKELMANN CJ:
I think it is quite different, but anyway, because that's reviewing an executive action.

MR McHERRON:
Yes.

WINKELMANN CJ:
This is, in terms of the Bill of Rights Act application to the legislative branch.

MR McHERRON:

Yes, I take the point, your Honour. The only point I was trying to make really I suppose to respond to your question was that it's not uncommon for the Attorney-General to have to come to court to defend actions that her or his government had no part in, no interest in. It's a symbolic role in many respects in terms of being the principal law officer and the person who takes responsibility for –

WINKELMANN CJ:
The Crown.

MR McHERRON:
The Crown in defending these challenges.

WINKELMANN CJ:
I am thinking this is the Crown and Parliament. Right, anyway.

KÓS J:
Because even if Mr Powell was here saying "make it 16", agreeing with you, he would be bound also to point out that this is a decision of Parliament by 75%, so the argument hardly changes no matter what stance he might take here because overriding that is that reality.

MR McHERRON:
Yes and that certainly came up in the *Taylor* case as well. I mean it's one thing for a concession to be made on the basis of a section 7 report for the Court to accept that concession and make a declaration accordingly. But all of that is one step removed from Parliament's appreciation of the matter at the time and also subsequently.

GLAZEBROOK J:
And Parliament could either take the view that it doesn't care and is not going to look at it again, it could take the view that the declaration was wrong and in fact there is a justified limitation, especially if it has other information available to it, or it could say it doesn't care and will keep it at whatever it decides in any

event is really your submission, isn't it, that Parliament isn't constrained by this, it's just assisted by it, arguably?

MR McHERRON:

Yes, your Honour.

GLAZEBROOK J:

Or assisted by any declaration that might be made.

MR McHERRON:

Yes. I mean, that's looking at the declaration in its assisting and informing function, but of course there is the important vindication of rights function as well, which I think the Supreme Court focused on more in *Taylor.*

GLAZEBROOK J:

Absolutely.

MR McHERRON:

I'm just, I'm sorry to do this, your Honour Justice Glazebrook, but there was mention by your Honour earlier about a concession that your Honour thought that the appellant may have made, and I just made a note to follow that up because I wasn't aware that we had made a concession.

WINKELMANN CJ:

Well, what's the concession that you have or have not made, Mr McHerron?

MR McHERRON:

Well, I thought it was something to do with the range of reasonable alternatives, it certainly came up in the context of my learned friend's submissions on that. And I was just a little bit concerned because there was a record of a concession that was put into the High Court judgment originally and then –

WINKELMANN CJ:

Well, what's your note of what Justice Glazebrook has said you've conceded? Because I don't recall you saying anything.

GLAZEBROOK J:

I don't think I was saying you – I think, if anything, I was saying that you conceded that Parliament could decide that. I can't remember the context but I…

MR McHERRON:

If that's what it was then that's fine.

GLAZEBROOK J:

Yes, I don't think it was saying that you'd made any concession apart from that Parliament could decide what it was going to do.

MR McHERRON:

Yes, sorry, your Honour, okay. To clarify, my learned friend made a submission that –

WINKELMANN CJ:

Are you on point 5 now?

MR McHERRON:

Oh, these are rats and mice…

WINKELMANN CJ:

Minor points?

MR McHERRON:

Sorry, your Honour.

WINKELMANN CJ:

So we're still on point 4?

O'REGAN J:

No, we've jumped over to rats and mice.

KÓS J:

No, there was no point, there was – point 5.

O'REGAN J:

There is no point 5.

MR McHERRON:

I do intend to close on a larger rat if your Honours please.

WINKELMANN CJ:

Not one you have to swallow, Mr McHerron.

MR McHERRON:

This is just a small point. My learned friend mentioned a link between this case and, or at least the right to vote and the right to sit in the House of Representatives, and I just wanted to make it clear that that is not part of our claim and Make It 16 in this challenge does not regard those rights as being linked. It has never been a part of this claim and it's never come up before.

KÓS J:

Why do you make that point?

WINKELMANN CJ:

Because they are linked, aren't they? Isn't the right, isn't the qualification of the right to sit in the House of Parliament the right to vote?

MR McHERRON:

Yes, they are currently linked. But I guess this comes back to Justice Glazebrook's observation that it is up to Parliament to decide what to do next. And one of the things that Parliament may want to consider next is whether those two rights should be linked or whether there is a different set of justifications that might apply to sitting in the House of Representatives from voting. And so I just wanted to make the point that we don't necessarily say that those rights have to be linked in terms of their justification. Because I did not want the Court to say: "Well, the right to vote carries all these other rights

and we need to be very careful about going there," because the Court can ignore those other rights, that's not part of this challenge.

ELLEN FRANCE J:

Well, as a matter of law the two are linked.

MR McHERRON:

Well, yes, your Honour, you're quite correct about that, and I'm not meaning to suggest otherwise. But they are not linked in terms of Parliament's response.

WINKELMANN CJ:

Well, your simple point is that this is not a judicial review of the legislation so all you're asking for is the voting age declaration and it's for Parliament as to whether they wish to carry that link through.

MR McHERRON:

Yes, your Honour, yes. It does not follow from the declarations that we're seeking that Make It 16 is seeking to establish that 16 and 17 year olds can sit in Parliament. We see that as disconnected, even though your Honour is quite correct that in law they are connected. But that doesn't mean that Parliament needs to keep them connected.

WINKELMANN CJ:

Right. You've got 10 minutes, Mr McHerron, you'd better speed up.

MR McHERRON:

I'm sorry, your Honour, I will get there in 10 minutes, I guarantee it. I wanted to come back to your Honour Justice Kós' observation about, well, question really, can a 16 year old be denied the right to vote for two more years? I feel it's important to address that because it's sometimes thought of as a less right because it's progression through the ages and if you, you know, live until you're 18 then you will get a right to vote. That's not the way Make It 16 sees it, your Honour. Just as in the *Taylor* case it wasn't an answer to that case to say: "Well, just wait till you get out of prison and you'll be able to vote," and nor would

it be an answer for someone who is pregnant to wait until they had given birth before they can claim to be discriminated against. These rights have detriments and it's not only for the individual for two years to wait another two years. But there is a permanent denial of the right for an entire cohort of the population, which stands for as long as the law stands, and so it's not a progression for the cohort, the cohort always remains excluded.

KÓS J:

That was a good answer, Mr McHerron. I'm just sorry you thought my point was a rat or a mouse.

MR McHERRON:

I do apologise. It does, it's sort of getting into the bigger rat territory, and I do want to finish now if…

O'REGAN J:

Almost a feral cat.

MR McHERRON:

I wanted to finish on the point of comity, because I do feel the need to address that in reply, it is a principle as reflected in the Parliamentary Privilege Act 2014 of mutual respect, it's not one way, it's mutual between the legislature and the courts, and in my submission it is inconsistent with comity, or at least it creates a tension in respect of comity for the Executive to come to court and demand restraint when it has not provided the material that the Court would need to be able to thoroughly complete its proportionality analysis in the way that the Court would prefer, and you could see that in the Court of Appeal's judgment, there was an air of frustration from the Court of Appeal in asking a series of questions about what needed to be answered to be able to satisfy the Court that the limit was justified. We say that doesn't matter in terms of the outcome, a declaration can still issue. The Court is not required to wait, its duty is to conduct its own judicial and stringently rights- and evidence-based determination as per the quote from his Honour Justice Dixon at footnote 70 of our submissions, applying a strict form of legalism. This is not the Court straying into politics, it's

just applying the law. If Parliament had spoken ahead, the Court could take that into account and perhaps defendant to what Parliament had decided in terms of its legislative actions. But the absence of parliamentary determination does not prevent or excuse the Court from engaging with the issue and the Crown being put to proof.

Unless you have any further questions, your Honours, those conclude the submissions for the appellant.

WINKELMANN CJ:

Thank you, Mr McHerron. Well, thank you all counsel for your help with submissions. We will take some time to consider our judgment. We will now retire.

COURT ADJOURNS: 3.54 PM