IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 14/2022
[2022] NZSC 134

BETWEEN	MAKE IT 16 INCORPORATED Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	12 July 2022
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ
Counsel:	J S McHerron, G K Edgeler, E B Moran and C M McCracken for Appellant A M Powell and A P Lawson for Respondent
Judgment:	21 November 2022

JUDGMENT OF THE COURT

A **The appeal is allowed. The decision of the Court of Appeal is set aside.**

B **A declaration is made that the provisions of the Electoral Act 1993 and of the Local Electoral Act 2001 which provide for a minimum voting age of 18 years are inconsistent with the right in s 19 of the New Zealand Bill of Rights Act 1990 to be free from discrimination on the basis of age; these inconsistencies have not been justified in terms of s 5 of the New Zealand Bill of Rights Act.**

C **Costs are reserved.**

REASONS

WINKELMANN CJ, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] The minimum voting age in New Zealand is 18 years. The appellant, Make It 16 Inc, is a group seeking to have the voting age lowered to 16 years. As part of its advocacy for that legislative change, Make It 16 sought declarations in the High Court that the provisions setting the minimum voting age in the Electoral Act 1993 and the Local Electoral Act 2001 are inconsistent with the right to freedom from discrimination on the basis of age which is protected by s 19 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). "Age" for these purposes is any age commencing with 16 years.

[2] This Court in *Attorney-General v Taylor* confirmed there was jurisdiction to make a declaration that legislation is inconsistent with the Bill of Rights.[1] Subsequently, legislation has been enacted providing for the procedures to be followed

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1 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [65] per Glazebrook and Ellen France JJ and at [74] and [107] per Elias CJ.

in the House of Representatives and by the government of the day in response to such declarations.[2]

[3] The High Court declined to make the declarations sought by Make It 16 on the basis that the limit on the freedom from discrimination on the grounds of age in the two Acts was a justified limit under s 5 of the Bill of Rights.[3] The Court of Appeal disagreed that the limit was justified but nonetheless declined to make the declarations.[4] In doing so, the Court referred, amongst other matters, to the political nature of the issue.

[4] At issue on this appeal is whether declarations should have been made by the Courts below. As the case has been developed, that raises four principal questions. The first question is whether it is appropriate for the courts to engage in the inquiry which Make It 16 advocates. Relatedly and second, there is a question about the effect of s 12 of the Bill of Rights, which protects the voting rights in general elections for those aged 18 years and older, on the s 19 right to freedom from discrimination on the grounds of age. If inquiry is appropriate, and if s 12 does not override or qualify s 19, the third question is whether the inconsistency with s 19 was justified under s 5. The final question is whether, if the inconsistency has not been justified, the declarations sought should have been made.

[5] We address each issue in turn after discussing the statutory scheme and the approach in the Courts below in a little more detail.

The statutory framework

[6] The current position in terms of voting age is that 18 year olds and over may vote in general elections, local body elections and referenda.[5]

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2 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

3 *Make It 16 Inc v Attorney-General* [2020] NZHC 2630, [2020] 3 NZLR 481 (Doogue J) [HC judgment].

4 *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 (French, Miller and Courtney JJ) [CA judgment].

5 Electoral Act 1993, ss 3(1), 60 and 74; Local Electoral Act 2001, ss 20, 23 and 24; and Citizens Initiated Referenda Act 1993, ss 2, 18 (eligibility to sign an indicative referendum petition), 24, 24A and 27. See also Referendums Framework Act 2019, s 13 (repealed on the close of 1 July 2022 by s 3); and New Zealand Public Health and Disability Act 2000, sch 2 cl 3 (repealed on 1 July 2022 by s 103(1) of the Pae Ora (Healthy Futures) Act 2022).

The electoral legislation

[7] The minimum voting age for general elections has gradually been reduced from the starting point of 21 years[6] to, first, 20 years[7] and then, in 1974 to the current age of 18 years.[8]

[8] In general terms, the effect of the Electoral Act is that most citizens and permanent residents who have reached the age of 18 are legally entitled to register to vote. Upon registration, persons in this category are eligible to vote. Sections 60 and 74 of the Electoral Act, which establish these rights, do not themselves refer to the age of 18 years.[9] Rather, s 60 states who may vote and refers to those persons "qualified to be registered as an elector of the district". Under s 74, every "adult person" qualifies for registration if the specified criteria are met. "Adult" is defined as "a person of or over the age of 18 years".[10]

[9] The age of 18 for the purposes of voting in a general election cannot be amended or repealed without the support of a 75 per cent majority of the House of Representatives or of a majority of votes cast in a poll of eligible voters on the General and Māori rolls.[11] The relevant sections are called "reserved" or entrenched provisions.[12]

[10] In the Local Electoral Act, eligibility to vote is broadly based on being a parliamentary elector and therefore it also has a minimum voting age of 18.[13] The Local Electoral Act provisions are not entrenched.

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6 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 42.

7 Electoral Amendment Act 1969, s 2. This was followed, in 1970, by a lowering of the age of legal majority to 20: Age of Majority Act 1970, s 4.

8 Electoral Amendment Act 1974, s 2. The voting age for local government elections has followed a broadly similar pathway. See generally Kenneth Palmer *Local Government Law in Aotearoa New Zealand* (2nd ed, Thomson Reuters, Wellington, 2022) at ch 4.

9 As the Court of Appeal notes, s 60(f) is an exception: CA judgment, above n 4, at [6], n 3. That subsection enfranchises (subject to the provisions of the Electoral Act) any member of the Defence Force who is outside New Zealand, if he or she is or will be of or over 18 years on polling day, and his or her place of residence immediately before leaving New Zealand is within the district.

10 Section 3(1)(a).

11 Electoral Act, s 268(1)(e) and (2).

12 Section 268(1) and (2). See also by way of background *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 at [1]–[2], [10]–[11], [13]–[14] and [20] per William Young, Glazebrook, O'Regan and Ellen France JJ and at [75] per Elias CJ (dissenting).

13 Local Electoral Act, ss 20, 23 and 24.

The Bill of Rights

[11] The relevant provisions of the Bill of Rights are s 12, dealing with electoral rights, and s 19, which protects the right to freedom from discrimination.

[12] Section 12 protects the current minimum voting age in relation to general elections and provides as follows:

> **12 Electoral rights**
>
> Every New Zealand citizen who is of or over the age of 18 years—
>
> (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
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> (b) is qualified for membership of the House of Representatives.

[13] Section 19 reads as follows:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
>
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

[14] The prohibited grounds of discrimination in Part 2 of the Human Rights Act 1993 include age.[14] "Age" is defined in s 21(1)(i) of that Act for these purposes as relevantly encompassing differential treatment based on any age from the age of 16 years.

The Courts below

[15] We come back later to some of the detail in the reasoning of the Courts below but it is useful to first summarise the approaches taken.

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[14] Human Rights Act 1993, s 21(1)(i).

The High Court

[16] In the High Court, Doogue J rejected the argument for the Attorney-General, an argument which was reprised in this Court, that the Court should decide at the outset to dismiss the application without assessing the competing positions.

[17] Having engaged in the inquiry, the Judge concluded that there was an apparent inconsistency between the voting age and s 19. The Judge then turned to whether the limit on the right in s 19 was justified. In determining this, the High Court applied the steps set out by Tipping J in *R v Hansen*.[15] That methodology, in very broad terms, requires the Court to consider whether the objective of the limit is sufficiently important and, if so, the proportionality of the means adopted to achieve that objective. Doogue J concluded that the limit was a reasonable one and so was justified in terms of s 5 of the Bill of Rights. In reaching that view, the Judge said that the purpose of the legislation was "to implement the basic democratic principle that all qualified adults (as opposed to children) should be able to vote" and that there was a rational connection between that objective and setting the minimum voting age at 18.[16] The Judge also considered that s 12 of the Bill of Rights signalled that Parliament had considered 18 years was a "reasonable minimum restriction".[17]

[18] Doogue J said that New Zealand law draws the line at a number of different ages for various purposes with a range of issues involved. To illustrate the point, she noted the contrast drawn between, for example, the age at which a person is entitled to adult minimum wage rates (16 years) and the age at which a person can serve as a juror (18 years).[18] The conclusion was that drawing the minimum voting age line at 18 was within the range of reasonably available options.

The Court of Appeal

[19] Reflecting the argument put to it, the Court of Appeal dealt first with the inter-relationship between ss 12 and 19 of the Bill of Rights. The Court concluded that both sections could be read together and each given their full effect.

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15 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
16 HC judgment, above n 3, at [95]–[96].
17 At [104]. See also at [109].
18 At [105].

[20] The Court then turned to whether the voting age provisions imposed a reasonable limit on the right to protection from age discrimination. The Court noted that some limit on voting age was justified but disagreed with the approach adopted to this issue by the High Court. In particular, the High Court Judge had stated the purpose "too broadly".[19] The Court of Appeal took the view that the focus under a s 5 *Hansen* analysis was on the purpose of the limit. In this case, that purpose was "to demarcate between those who are to be considered adults and those who are to be considered children".[20] Accordingly, the question that had to be addressed was why the choice was made, that is, to exclude 16 and 17 year olds from voting. There had to be some social advantage to this and that advantage needed to be a matter outweighing the infringement to the right to be free from discrimination on the basis of age.

[21] On the question of why the choice was made, the Court noted there were a number of possible justifications but these were either not raised or did not meet the s 5 test. That left the Court to consider the argument that the age of 18 was within the range of reasonable alternatives. Because the right at issue involved a core democratic right, the Court was not persuaded that this justification was sufficient to meet the requirements of s 5 either.

[22] There was, therefore, a breach of s 19 so the Court turned to whether a declaration of inconsistency should be made. The Court said this was a matter of discretion and that restraint in granting relief may be exercised "for reasons of comity among or deference towards" other branches of government.[21] The Court expressed its reasoning for declining to make a declaration of inconsistency in these terms:

> [62] In this case, we have decided there is no need to go any further than a finding that on the information before this Court in this case, the Attorney-General has not established that the limits on the right of 16 and 17 year olds to be free from age discrimination caused by the voting age provisions are reasonable limits that can be demonstrably justified in a free and democratic society. The decision rests not on a positive finding that discrimination on grounds of age cannot be justified but on what we have held to be a failure to attempt to justify the existing age limit. Further, the issue is very much in the public arena already. It is an intensely and quintessentially political issue involving the democratic process itself and on which there are

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19 CA judgment, above n 4, at [51].
20 At [51].
21 At [61].

> a range of reasonable views. That being the context, we choose to exercise restraint and decline the application for declarations.

The positions taken by the parties

[23] The parties adopt starkly different positions. Make It 16 says that the Court of Appeal was right to find that the minimum voting age was not a justified limit on s 19 but was wrong not to make the declarations sought. The argument is that where there is a breach a declaration should ordinarily follow.

[24] The Attorney-General's case is that the Court of Appeal was correct to exercise its discretion against making declarations. Indeed, the submission is that the Court should not have engaged with this inquiry at all but, having done so, should have concluded that the minimum age of 18 years was a justified limit.

[25] It is helpful to deal first with the Attorney-General's argument that this is one of the situations (which he concedes will be rare) in which, for reasons of restraint and comity, the Court should not engage in a Bill of Rights consistency inquiry.

A role for the Courts?

[26] In developing the submissions on this point, the Attorney-General says that this case has constitutional dimensions that take the question of consistency out of the Court's purview. The constitutional dimensions relied on are twofold.

[27] First, the argument is that through the entrenched provisions Parliament has set out the process for changing the law in this area. That, as we have seen, requires broad support for change either through a super majority in Parliament or with a referendum of eligible voters. This democratic process should be followed first. Second, the Attorney-General makes the related point that Parliament has not yet considered lowering the voting age and it should be able to consider the issues before the Court releases a decision that potentially skews public and political debate on the matter.[22] In other words, the Court should not pre-emptively enter the debate when the matter is one to be determined not only by Parliament but also the electorate in general.

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[22] As we discuss at [61] below there has, since the hearing, been some debate on the issue.

[28] We do not see the factors relied on by the Attorney-General as supporting the view that the Court has no role at all in the present case. As Glazebrook and Ellen France JJ said in *Taylor*, "the making of such a declaration is consistent with the usual function of the courts".[23] To decline to inquire into the issue here would not be consistent with that role, particularly where fundamental rights are involved. As Doogue J said, this is "not by nature an entirely political issue" to be decided only by reason of the fact the voting age was entrenched.[24] Rather, determination of the issue also involves consideration of the relevant, fundamental, rights.

[29] In support of the submission this is essentially a "no-go" case for the Court, the Attorney-General relies on the decision of the United Kingdom Supreme Court in *Regina (Nicklinson) v Ministry of Justice*.[25] The Court in that case was considering, amongst other matters, an application for a declaration under s 4(2) of the Human Rights Act 1998 (UK). That section provides that if the Court is satisfied a provision is incompatible with a right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[26] it may make a declaration of that incompatibility.

[30] In *Nicklinson* the Court was asked to make a declaration that s 2 of the Suicide Act 1961 (UK), which makes encouraging or assisting a suicide a criminal offence, was contrary to art 8 of the ECHR. Article 8 protects the right to respect for private life. At the time the Court decided this case, Parliament was due to consider the same issues in the context of the Assisted Dying Bill which Lord Falconer had introduced into the House of Lords. A majority of the Court took the view that the issue was within the Court's institutional competence.[27] Among those Judges, a majority determined that it would be premature to grant a declaration and that Parliament should first have the chance to consider the issue.[28] We accordingly see

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23 *Taylor*, above n 1, at [53] and see also at [63].

24 HC judgment, above n 3, at [45].

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

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

27 *Nicklinson*, above n 25, at [148(b)] and [148(c)(i)] per Lord Neuberger P, at [150] and [191] per Lord Mance SCJ, at [196]–[197] per Lord Wilson SCJ, at [300] per Lady Hale DP and at [326] per Lord Kerr SCJ.

28 At [115]–[116] and [148(c)(ii)] per Lord Neuberger P, at [150] and [190] per Lord Mance SCJ and at [196]–[197] per Lord Wilson SCJ.

Nicklinson as consistent with the view that the factors the Attorney-General advances as to the need for restraint and comity are relevant to the exercise of the discretion to grant a declaration but are not a bar to engaging in any inquiry at all.

[31] We add that the submission that the Court's involvement may skew the public debate both undercuts the courts' role in stating the law and overstates the effect of a declaration. A declaration will of course provide a statement of the Court's view of the law but it will ultimately be a matter for Parliament and/or the electorate as to what, if any, response is made to that statement. This view is supported by the recent enactment of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022. Together with the Standing Orders of the House of Representatives, it creates a procedural pathway requiring such a declaration to be responded to by the government and debated by Parliament. The legislation and Standing Orders ensure that declarations are appropriately dealt with in the democratic process.

[32] In *Regina (Steinfeld) v Secretary of State for International Development* the United Kingdom Supreme Court expressed the "salutary" reminder "that a declaration of incompatibility does not oblige the Government or Parliament to do anything".[29] The Court then cited the following passage from *Nicklinson*:[30]

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

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29 *Regina (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1 at [60]. See also *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 at [53] per Lady Hale; and *Regina (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 at [63] per Lord Hutton.

30 At [60] citing *Nicklinson*, above n 25, at [343] per Lord Kerr SCJ.

[33] The final point to note is that one of the main factors relied on by the Attorney-General for restraint by the courts is inapplicable to local body elections. As we have noted, the local body provisions are not entrenched.

[34] In summary, we do not consider the Courts below were incorrect to inquire into the consistency of the minimum voting age requirements with s 19 in this case.

Effect of s 12

[35] It is appropriate at this juncture to address the effect of s 12 of the Bill of Rights. The Attorney-General, in his notice to support the judgment of the Court of Appeal on other grounds, advanced the proposition that s 12 prevailed over s 19 and created an exception to the protection against age discrimination in s 19. Prior to the hearing the Court was advised that this aspect would not be pursued. We did however hear some argument on whether s 12 effectively covers the ground when the minimum voting age is in issue and, as Kós J takes a different view on the point, we now turn to that question.

[36] The legislative history suggests that the question of possible conflict between ss 12 and 19 was not considered when in 1993, some three years after the enactment of the Bill of Rights, the prohibited grounds of discrimination in s 21 of the Human Rights Act were incorporated into s 19.[31] That said, as the Court of Appeal observed, the inter-relationship between the two sections raises a question of interpretation which is governed by s 6 of the Bill of Rights.[32] That section is a direction to prefer a Bill of Rights consistent meaning whenever an enactment can be given that meaning. Differing in this respect from Kós J, we see no reason from

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[31] Human Rights Act, s 145 and sch 2 (now repealed and substituted respectively). Discrimination in employment (and other limited areas) on the basis of age was prohibited in 1992 following an amendment to the Human Rights Commission Act 1977. The Human Rights Commission Act and the Race Relations Act 1971 were later consolidated by the Human Rights Act. In the Human Rights Act, the prohibition on age discrimination applies more broadly and is no longer confined to just employment matters: Christopher Jury and others *Human Rights Law* (looseleaf ed, Thomson Reuters) at [HR21.01] and [HR21.15]. For a brief reference to voting age by a member in the debate on what became the Human Rights Commission Amendment Act 1992 see (6 September 1990) 510 NZPD 4354 (Hon Richard Prebble MP).

[32] This aspect of the case is focussed on how to resolve internal inconsistencies within the Bill of Rights itself – contrast the broader issues addressed in *Hansen*, above n 15.

departing from the plain terms of s 6. Accordingly, we agree with the Court of Appeal that:

> [30] Read in that light, all that s 12 does is guarantee the right of those aged 18 and over to vote. It would be a breach of that right to increase the age from 18 but not a breach were the age to be lowered and the right extended to someone younger. The rights of the 18 year olds and over would not be affected by such an extension. To put it another way, the rights in ss 12 and 19 can co-exist. There is no internal inconsistency. Section 12 does not positively preclude voting by 16 year olds.

[37] It is also possible to envisage situations where the threshold in s 12 might clash with another protected right in a way that would very obviously be problematic. For example, initially the franchise for parliamentary elections was limited to adult male property owners. If the right to vote in s 12 was limited in that way, whatever the temporal relationship between the provisions, it is not an attractive proposition to suggest the courts would not apply s 6 and treat such a limitation on voting rights now as contrary to s 19 and declare accordingly.

[38] We accept that s 12 may provide some support for the proposition that adopting the age of 18 is within the range of reasonably available alternatives. But, for reasons we come to shortly, that is not sufficient to meet the s 5 test here.

[39] Finally, we note that the declarations sought by Make It 16 relate to both the Electoral Act and the Local Electoral Act restrictions. Section 12 of the Bill of Rights does not apply to local body elections.

[40] We do not see s 12 as a barrier to the relief sought.

A justified limit?

[41] We turn now to the arguments about s 5 and whether the Court of Appeal was correct to find that the Attorney-General had not established that the limit on the right of 16 and 17 year olds to be free from discrimination created by the voting age provisions was a justified limit. For ease of reference we note that s 5 provides that the protected rights and freedoms "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[42] As we have indicated, Make It 16 supports the conclusion of the Court of Appeal on this aspect. Make It 16 also makes the point that the Attorney-General has not sufficiently identified an objective for the limit on s 19. Make It 16 argues that, given the Attorney-General has the onus to show that the limit is a justified one when measured in terms of its objective, the Attorney-General cannot succeed in the argument s 5 is met.

[43] The case for the Attorney-General is that the limit here is a justified one if it can be shown that the 18 year minimum voting age is within a range of reasonable alternatives.[33] Anything else is a judicial inquiry into where the franchise should be set. The submission is that 18 years is within the range of reasonable alternatives.

[44] In this respect, the Attorney-General argues that, beyond the absurd point, for example voting rights for infants, a lawmaker starts to encounter the age at which some social responsibility is being accepted. Ultimately, therefore, it is clear that the line has to be drawn somewhere. A minimum voting age of 18 is consistent with the position taken in the majority of other countries. Further, as the High Court noted,[34] the current position is consistent with New Zealand's obligations under art 25 of the International Covenant on Civil and Political Rights. (Article 25 is silent as to a minimum voting age.) Moreover, at 18 years there are certain changes to a person's legal status and rights, such as no longer being subject to the authority of their parents or guardian,[35] being able to enter and be bound by a contract,[36] and being called for jury services.[37] It is said that these features provide support for the view that age 18 is within the range of reasonable alternatives.

Our assessment

[45] We accept that a limitation on a right may be one that is well recognised either in the relevant international instruments (such as the International Covenant on Civil

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33 In referring to a range of reasonable alternatives, the Attorney-General relies on the discussion of that approach to s 1 of the Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK) [Canadian Charter] in *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 at [160] per McLachlin J.

34 HC judgment, above n 3, at [108].

35 Care of Children Act 2004, s 28.

36 Contract and Commercial Law Act 2017, Part 2 Subpart 6.

37 Juries Act 1981, s 6.

and Political Rights[38]) or common law. In that situation, evidence about the reasonableness of the limit may not be required or may be minimal. By contrast, here, the Attorney-General has to show why 18 was chosen as opposed to 16 or 17 given that the prohibition on discrimination expressly defines the scope of the protection by reference to age 16. The Attorney-General is candid that he has not sought to do that. We appreciate that there may be reasons for not doing so. Given the need for a broad acceptance of the age for the franchise, it may be seen as preferable not to express a view on the point until the process(es) adopted to measure public support for change have been concluded. Whatever the merits of the approach adopted, the result is that we are not persuaded the limit has been justified on the material before us.

[46] In reaching the view the limit has not been justified, we agree with the Court of Appeal[39] that the statutory objective adopted by the High Court, namely, "to implement the basic democratic principle that all qualified adults", not children, "should be able to vote" was too broad.[40] It must however be valid for the Court to say that the objective is to ensure an electorate of sufficient maturity, or competency, as the Court of Appeal put it. A similar argument to that made by Make It 16 about the effect of a failure to identify an objective was rejected in *Fitzgerald v Alberta*.[41] The Alberta Court of Queen's Bench in that case dealt with an application made by two Canadian citizens, who at that point were 16 years old, challenging the statutory provisions that prevented anyone under the age of 18 from voting in municipal and provincial elections. The Court found that the provincial provision was a breach of the right to vote and that both provisions breached the protection against discrimination in ss 3 and 15(1) respectively of the Canadian Charter of Rights and Freedoms 1982. The applicants failed however because the Court concluded that the limit was a justified one under s 1 of the Charter, the Canadian equivalent to s 5 of the Bill of Rights.

[47] The Government in *Fitzgerald* did not adduce any evidence of the objective that the legislature had in view at the time the age restrictions were introduced. Indeed,

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38 See, for example, International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 19(3).
39 CA judgment, above n 4, at [51].
40 HC judgment, above n 3, at [95].
41 *Fitzgerald v Alberta* 2002 ABQB 1086, (2002) 331 AR 111.

the Court noted that the amendments setting the voting age restrictions were passed at a time which pre-dated publication of legislative debates in Alberta and there was nothing on the face of the provisions about the objective. The Court nonetheless rejected the argument for the applicants that the omission of any explicit statutory objective was fatal to the claim that the limit was justified under s 1 of the Charter. Rather, the Court said it was clear that the objective of the voting age requirement "was to ensure, as much as possible, that those eligible to vote are mature enough to make rational and informed decisions about who should represent them in government".[42] We interpolate here that we agree that was the purpose.

[48] The Court then worked through the balance of the s 1 test and concluded the limit was a justified one under s 1 of the Charter. In that analysis, the Court accepted the line had to be drawn somewhere and that age 18 was proportionate to the objective. In this context, the Court placed some weight on the fact that by 18 years of age individuals will have finished their high school social studies which would mean they had some information about the political system and "important background knowledge for rational and informed voting".[43] The Court considered the age restriction was "the only reasonably effective means" of making sure there was a good chance voters had the necessary maturity to vote.[44]

[49] The decision was upheld on appeal to the Alberta Court of Appeal.[45] We note that by the time the matter reached the Alberta Court of Appeal, the case was technically moot as the applicants had turned 18. While the Court of Appeal proceeded to hear the appeal, it was dismissed summarily. An application for leave to appeal was dismissed without reasons by the Supreme Court of Canada.[46]

[50] In the s 1 analysis in *Fitzgerald* the Alberta Court of Queen's Bench accepted "any reasonable age-based restriction is going to exclude some individuals who could

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42 At [56].
43 At [71].
44 At [76].
45 *Fitzgerald v Alberta* 2004 ABCA 184, (2004) 348 AR 113.
46 *Fitzgerald v Alberta* [2004] SCCA No 349. More recently, there is a challenge to the federal voting age in Canada. An application has been filed in the Ontario Superior Court of Justice but is yet to be heard.

cast a rational and informed vote, and include some individuals who cannot".[47] The Court was not however faced with a provision protecting individuals from discrimination from a specific age. As Make It 16 says, s 21 of the Human Rights Act clearly sets the age of 16 as the point from which actions may be discriminatory. The position in New Zealand in this respect differs from that in comparable jurisdictions. In Canada,[48] the United Kingdom,[49] and in Australia,[50] by contrast, discrimination on the basis of age is prohibited but the legislation does not define "age" by reference to a specific age.

[51] Further, as McLachlin CJ for the majority in *Sauvé v Canada* said in rejecting arguments about the need for judicial restraint in a case about restrictions on the rights of prisoners to vote, there is a difference between cases involving "a competition between competing social philosophies" and a case like the present.[51] In particular, McLachlin CJ said, "core democratic rights … do not fall within a 'range of acceptable alternatives' among which Parliament may pick and choose at its discretion".[52]

[52] It is also relevant to note that the Court in *Fitzgerald* did not have the benefit of evidence contradicting the material on the age at which individuals develop the requisite maturity of thought. For our purposes, it suffices here to refer to the Report of the Children's Commissioner dated 24 August 2020 written in response to a request from the High Court in these proceedings.[53] The Children's Commissioner discusses,

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47 *Fitzgerald*, above n 41, at [69].

48 Canadian Charter, s 15.

49 Human Rights Act 1998 (UK), sch 1 art 14.

50 See, for example, s 8 of the Human Rights Act 2004 (ACT); and see also at the federal level s 5 of the Age Discrimination Act 2004 (Cth).

51 *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519 at [13]. This is a feature distinguishing the present case from that of *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [151], relied on by the Attorney-General. Assessment of the reasonableness of the limit by reference to the range of reasonable alternatives took place in *Atkinson* in the context of consideration of possible policy approaches to the payment of family members for the provision of disability support services to their children. The Court of Appeal referred at [151]–[152] to the discussion in *Hansen*, above n 15, at [79] per Blanchard J, at [126] per Tipping J and at [217] per McGrath J.

52 *Sauvé*, above n 51, at [13].

53 The report was requested under the Children's Commissioner Act 2003, s 12(1)(g)(i).

amongst other matters, a 2019 study of over 5,000 people aged between 10 and 30 years across 11 countries.[54] The study, the Commissioner reports:[55]

> … 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. When situations that involve emotionally-charged situations where time for deliberation and self-restraint is unlikely or difficult (hot cognition), such as driving, consuming alcohol, and criminal behaviour, impulse choices are more likely and mental processes are slower to develop, reaching adult levels into adulthood.
>
> 28. The … study advocates for two different legal age boundaries. One for decisions typically made with deliberation, with a suggested designation at 16 years of age, and a second for decisions made in emotionally-charged situations in which psychosocial immaturity may compromise judgement, with a suggested designation at 18 years or older.

[53] The Report of the Children's Commissioner in these respects was supported by the expert evidence for Make It 16 from Dr Jan Eichorn, a Senior Lecturer in Social Policy at the University of Edinburgh. Dr Eichorn considered there was "little evidence" to support 18 as a "suitable proxy for maturity and competency to vote".

[54] The Court of Appeal in the present case also addressed the possible justification that 16 and 17 year olds are more dependent on their family than 18 year olds and so lack the "necessary independence of thought".[56] The Court noted that matter was not one raised by the Attorney-General, nor were questions about knowledge and world experience. International practice had been raised but the Court did not consider that "on its own" could suffice as a justification "especially in the context of a process of incremental change".[57] We agree.

[55] We interpolate here that the fact the minimum voting age is also the minimum age for membership of the House of Representatives may have raised additional

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54 Grace Icenogle and others "Adolescents' Cognitive Capacity Reaches Adult Levels Prior To Their Psychosocial Maturity: Evidence for a 'Maturity Gap' in a Multinational, Cross-Sectional Sample" (2019) 43 Law & Hum Behav 69.

55 Footnote omitted. The Commissioner also says a reduction in voting age to 16 would be consistent with the way in which children and young people are considered in law, apart from the age of criminal responsibility, which is lower (Crimes Act 1961, s 22).

56 CA judgment, above n 4, at [57].

57 At [57].

questions about the proportionality of the limit.[58] Make It 16 however was not seeking to maintain that link so we do not need to address that issue.

[56] In applying the balance of the *Hansen* analysis it is true, as the Attorney-General submitted, that the situation is not as straightforward as the shifts from 21 to 20 years, and from 20 to 18 years were. In both of those cases there was a strong case for the argument that the new age was a proxy for adulthood. As the Royal Commission on the Electoral System noted, "[i]n the 19th century … voting rights were linked with property rights".[59] During this time, the "voting age was naturally identified with the age of majority, the age at which people could make wills, enter into enforceable contracts and marry without parental consent".[60] This explained the choice of 21 years. As the Commission also observed, while the age of legal majority has remained at 20,[61] "its significance has been steadily reduced as certain rights previously associated with it have been extended to minors".[62] However, as we have noted, the evidence that was before the Court in this case did not support the proposition that 16 and 17 year olds lack competency to vote. Rather, the evidence was to the contrary.

[57] The Court of Appeal was accordingly right to conclude that the limit on s 19 has not been justified. We should say now, as the form of the declaration will make clear, that we leave open the possibility that the limit could later be held to be justified. The position in this respect is therefore different from that in *Taylor*.[63] Rather, the position here is that evidence that might have rebutted the alternative view was not before the Court.

Was the Court of Appeal right not to make a declaration?

[58] As noted earlier, Make It 16 argues that where there is an inconsistency which has not been justified, there should be a presumption (in civil cases) that a declaration

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58 Electoral Act, s 47(1).

59 Report of the Royal Commission on the Electoral System "Towards a Better Democracy" [1986–1987] IX AJHR H3 at [9.8].

60 At [9.8].

61 Age of Majority Act, s 4(1).

62 Report of the Royal Commission on the Electoral System, above n 59, at [9.8].

63 The declaration in that case was that the restrictions on voting rights for prisoners "cannot be justified"; see *Taylor*, above n 1, at [3].

will follow so that there is an effective remedy for rights infringements.[64] Amongst other matters, this is said to be consistent with the approach adopted in cases in the Australian Capital Territory to the making of a declaration of incompatibility as provided for by s 32 of the Human Rights Act 2004 (ACT).[65]

[59] The Attorney-General argues that, largely for the reasons discussed already, the Court of Appeal was correct to exercise restraint. Essentially, the Attorney-General says that making a declaration would be premature where Parliament has expressly postponed any consideration of the question until there is broad democratic support for the change. Further, it is said that the question relates to the constitution of Parliament itself, which lies close to its privilege of exclusive jurisdiction. Reference is also made to the fact that there are other avenues by which the issue can be addressed.

[60] In terms of those other avenues, the Attorney-General points to the Independent Panel reviewing electoral law in which the voting age has been identified as a matter for review;[66] the fact there are parliamentary inquiries after each election by a select committee at which the voting age has previously been discussed;[67] and that there is provision for citizens initiated referenda which would allow the question to be put to the electorate for an indicative view.[68]

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64 It is accepted the position in relation to the criminal jurisdiction may be different. Although in a different context, see *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, [2019] 1 NZLR 791 at [111] per Winkelmann CJ, William Young, Glazebrook and O'Regan JJ and at [125] per Ellen France J.

65 Referring to *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83, (2021) 18 ACTLR 1; and *Re Application for Bail by Islam* [2010] ACTSC 147, (2010) 4 ACTLR 235. There are similar statutory provisions in Victoria (s 36 of the Charter of Human Rights and Responsibilities Act 2006 (Vic)) and Queensland (s 53 of the Human Rights Act 2019 (Qld)). The only declaration made in Victoria was set aside by the High Court of Australia in *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1. See the discussion in *Taylor*, above n 1, distinguishing the Australian Constitutional arrangements in that regard: at [63] per Glazebrook and Ellen France JJ.

66 CA judgment, above n 4, at [9]. See, for example, Kris Faafoi "Government to review electoral law" (press release, 5 October 2021).

67 For example, the voting age was discussed in Justice and Electoral Committee *Inquiry into the 2011 general election* (April 2013); Justice and Electoral Committee *Inquiry into the 2014 general election* (April 2016); and Justice Committee *Inquiry into the 2017 General Election and 2016 Local Elections* (December 2019).

68 Citizens Initiated Referenda Act.

[61] Finally, we note that in argument the Attorney-General referred to the fact that a member's Bill by Golriz Ghahraman MP would lower the minimum voting age to 16.[69] At the time of the hearing, the Bill had been drawn from the ballot and was to be considered by the House. The Bill did not however pass its first reading.[70] In general terms, the current electoral review was seen as a better avenue to pursue change.

Our assessment

[62] We turn first to the approach to be taken to the discretion. There has been considerable debate about the scope of the discretion in the context of the power in the United Kingdom to make declarations of incompatibility with the ECHR.[71] As Make It 16 observes, the courts there have engaged in policy-heavy issues.[72] By contrast, as the Attorney-General says, the equivalent New Zealand jurisprudence is in its infancy. Two of the Judges in *Taylor* indicated that utility of relief may be relevant to the discretion to grant a declaration, but there was no more general discussion of the topic.[73] It is not necessary for us to determine whether relief should otherwise presumptively be granted in the civil jurisdiction and we consider it is preferable to allow the jurisprudence to continue to develop on a case-by-case basis. We can address the question more generally in a case where that matters.

[63] We next address the argument for the Attorney-General that a declaration would be premature. We note that in *Nicklinson*, amongst those who considered the Court had the competence to determine the issue, the argument that making a declaration would be premature is the argument that gained favour with three of the Judges.[74] In that case the matter, as we have noted, was due to be debated in the House of Lords in the near future.

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69 Electoral (Strengthening Democracy) Amendment Bill 2022 (131-1).

70 (21 September 2022) 762 NZPD (Electoral (Strengthening Democracy) Amendment Bill – First Reading).

71 For a helpful discussion, see Conall Mallory and Hélène Tyrrell "Discretionary Space and Declarations of Incompatibility" (2021) 32 KLJ 466.

72 See, for example, *Steinfeld*, above n 29, dealing with the ability of different sex couples to enter into civil partnerships.

73 *Taylor*, above n 1, at [58] per Glazebrook and Ellen France JJ.

74 *Nicklinson*, above n 25, at [115]–[116] and [148(c)(ii)] per Lord Neuberger P, at [150] and [190] per Lord Mance SCJ, and at [196]–[197] per Lord Wilson SCJ.

[64] There is some support also in *Nicklinson* for the argument that these types of questions are very much within the competence of Parliament.[75] The position there can however be distinguished in a number of respects. For example, three of the Judges made the point that Parliament had considered the statutory approach to suicide frequently.[76] By contrast here, as the evidence of Caroline Greaney of the Ministry of Justice shows, there has not been the same degree of engagement at that level.

[65] Further, we are not persuaded it would be premature to make a declaration. It is difficult to say that to do so would be premature when the Royal Commission Report in 1986 said that "a strong case" could be made for reducing the voting age to 16 and recommended that Parliament "keep the voting age under review".[77]

[66] As to the argument based on institutional competence, we acknowledge the particular institutional competence of Parliament in these matters. But this is not a case of such complexity in terms of its resolution as to mean the Court is hampered in fulfilling its usual function.[78] Nor do we see the approach to the member's Bill as an impediment to the Court exercising its functions.

[67] Other factors also strongly support providing Make It 16 with the remedy sought. Importantly, this case involves the protection of the fundamental rights of a minority group. The minority nature of the group means that the other avenues relied on by the Attorney-General may not be as effective at protecting the rights of this group. Further, the United Nations Convention on the Rights of the Child, to which New Zealand is a party, recognises an obligation to "assure to the child who is capable of forming his or her own views the right to express those views freely in matters affecting the child" with the child's views "being given due weight in accordance" with the child's age and maturity.[79] Finally, as we have noted, the fact that age 16 is specified in our anti-discrimination provisions is a feature distinguishing the position

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75 See the observations of Lord Sumption SCJ in *Nicklinson*, above n 25, at [230], albeit made in the context of discussing what we have termed the "no-go" argument.

76 *Nicklinson*, above n 25, at [116] per Lord Neuberger P, at [190] per Lord Mance SCJ and at [196]–[197] per Lord Wilson SCJ.

77 Report of the Royal Commission on the Electoral System, above n 59, at [9.14].

78 It does not, as Make It 16 submit, involve a complex regulatory scheme.

79 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 12. "Child" is defined in art 1 as persons below the age of 18.

in New Zealand from that in other countries. It requires a particular focus on provisions that discriminate against those aged 16 and 17.

[68] In these circumstances, we consider we should fulfil our role which is to declare the law. But in doing so it must be recognised that there may be other matters Parliament will take into account in ensuring that the position ultimately adopted has the necessary democratic legitimacy. Lady Hale SCJ made the point well in *Nicklinson* when she said:[80]

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

[69] For these reasons, we consider the Court of Appeal erred in declining to grant the declaratory relief sought.

The form of the order

[70] As foreshadowed, we agree it is not appropriate to use a formulation of the declaration which would pre-empt the ability of Parliament to reach a view that an age other than 16 or 17 was a justified limit on the protected right. We add that in this respect, the form of the order made is consistent with that now proposed by Make It 16.

Result

[71] For these reasons, in accordance with the view of the majority, the appeal is allowed. The decision of the Court of Appeal is set aside.

[72] A declaration is made that the provisions of the Electoral Act 1993 and of the Local Electoral Act 2001 which provide for a minimum voting age of 18 years are inconsistent with the right in s 19 of the New Zealand Bill of Rights Act 1990 to be

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80 *Nicklinson*, above n 25, at [325].

free from discrimination on the basis of age; these inconsistencies have not been justified in terms of s 5 of the New Zealand Bill of Rights Act.

Costs

[73] We understand that counsel for Make It 16 appeared on a pro bono basis. However, we did not hear from the parties on costs. If the parties cannot agree on costs, we seek submissions on costs. Costs are accordingly reserved. Submissions for the appellant are to be filed and served by 1 February 2023. Submissions for the respondent are to be filed and served by 15 February 2023 and any submission for the appellant in reply by 22 February 2023.

KÓS J

[74] I dissent, in part. I do not consider the provisions of the Electoral Act 1993, setting a minimum voting age of 18 years in parliamentary elections, are inconsistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights). Rather, I consider the explicit right to vote in parliamentary elections at 18 years, affirmed by s 12 of the Bill of Rights (and prescribed in the Electoral Act), prevails over the generalised right to freedom from discrimination affirmed by s 19.

[75] I agree however with the majority that a declaration of inconsistency must be made in relation to the provisions of the Local Electoral Act 2001. Those provisions stand alone, unaffected (and unprotected) by s 12. They are inconsistent with s 19, and the Attorney-General does not attempt to justify the inconsistency under s 5.

Important questions of public rights cannot be resolved by parties' forensic choices

[76] Non-inconsistency was advanced by the Attorney-General in the Court of Appeal, but rejected there.[81] As the majority in this Court notes, the Attorney-General initially re-advanced the argument here, in its notice to support the judgment on other grounds, but then abandoned it ahead of the hearing. Pressed on the point at the hearing, counsel did address the Court on the issue. Had the point persuaded more

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[81] *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 (French, Miller and Courtney JJ) [CA judgment] at [28]–[32].

than one of us, further argument may perhaps have been needed. It is regrettable the argument was abandoned by the Attorney-General. Important questions of public rights before this Court cannot just be resolved by the forensic choices made by parties.

Parliamentary elections

[77] In a parliamentary democracy, the extent of the franchise is determined by the express will of the electorate. That is, through Parliament, acting by legislation defining exactly who may vote. So it has been in New Zealand since 1852.[82] In play are both voter qualification and voter disqualification.

[78] Voter *qualification* has historically depended on five factors: sex, ownership or possession of real property, race, citizenship (or residence) and age. Today the last two alone remain relevant. Race, at least in principle, has only ever affected qualification to vote in the Māori electorate seats first established in 1867.[83] Property-based qualifications, which in fact had disproportionately disenfranchised Māori from entry on the general roll, were abolished in 1879.[84] New Zealand was the first nation state to exclude sex as a discriminating factor, in 1893.[85] As to citizenship/residence, what began as a right effectively confined to British subjects evolved to a qualification based on New Zealand citizenship *or* permanent residence, *combined* with continuous residence "at some time" for one year.[86] Finally as to age, a minimum voting age of 21 years was adopted in 1852 and retained by the Electoral Act 1956. Post-1956 reforms will be considered shortly.

[79] Voter *disqualification*, at least presently, focuses on (1) continuous absence from the jurisdiction of voters otherwise entitled to vote, (2) serving prisoners, (3) persons detained for treatment in a mental hospital or secure facility following specified processes, and (4) persons named on corrupt practices lists.[87] Only the

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82 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72. See generally Neill Atkinson *Adventures in Democracy: A History of the Vote in New Zealand* (University of Otago Press, Dunedin, 2003); Elizabeth McLeay *In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy* (Victoria University Press, Wellington, 2018); and Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014).

83 The Maori Representation Act 1867.

84 The Qualification of Electors Act 1879. Property qualifications had not applied in Māori seats.

85 The Electoral Act 1893.

86 Electoral Act 1993, s 74(1).

87 Section 80(1).

second has proved particularly controversial in recent years, with a number of legislative amendments having been enacted and a number of legal challenges advanced.[88]

[80] Parliamentary tinkering with electoral law had been a feature of the first half of the twentieth century. Second ballot voting (a form of preferential voting) was introduced in 1908 and repealed in 1913.[89] An Act was passed to elect members of the Legislative Council by single transferable vote in 1914, but never implemented.[90] A four-year parliamentary term was introduced in 1934, but repealed in 1937.[91] Legislation was passed twice during the Second World War to extend the parliamentary term.[92]

[81] What was singular about the Electoral Act 1956 — and is continued into the present Act — was the legislative entrenchment of six specific aspects of the electoral law it produced: the three-year parliamentary term, the constitution of the Representation Commission, the rules for drawing electoral boundaries, the five per cent electoral population quota tolerance, the voting method (secret ballot) and the minimum voting age.[93] Voting age continues to be "reserved" (or entrenched) by s 268(1)(e) of the current Electoral Act. That is, it may not be amended unless the amendment is passed by 75 per cent of all the members of the House of Representatives or by a simple majority in a plebiscite of electors.[94]

[82] Parliament in 1956 conceived reservation of these provisions as a means of safeguarding democratic rights to vote. It was unanimous in that resolution, the

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88 In *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 a majority in this Court declared that 2010 amendments enlarging the scope of prisoner disqualification were inconsistent with the New Zealand Bill of Rights Act 1990 [the Bill of Rights]. See also n 93 below.

89 Second Ballot Act 1908; and Legislature Amendment Act 1913.

90 Legislative Council Act 1914. See Atkinson, above n 82, at 121.

91 Electoral Amendment Act 1934; and Electoral Amendment Act 1937.

92 Prolongation of Parliament Act 1941; and Prolongation of Parliament Act 1942. See also Atkinson, above n 82, at 154; McLeay, above n 82, at 84–87; and *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 at [62] per William Young, Glazebrook, O'Regan and Ellen France JJ.

93 Electoral Act 1956, s 189. In *Ngaronoa*, above n 92, a majority of this Court applied a fairly literal construction to the reserved provisions; thus the prisoner voting disqualification provisions were not entrenched and could be amended without a super-majority: at [70] per William Young, Glazebrook, O'Regan and Ellen France JJ.

94 Electoral Act 1993, s 268(2). This is "single entrenchment", as s 268 can in theory be amended by simple majority.

1956 Act passing without dissent. Describing reservation as an "attempt to place the structure of the law above and beyond the influence of Government and party", the then-Attorney-General, the Hon J R Marshall MP, characterised the reserved provisions as providing "the best safe-guard we can work out to protect what in the unanimous view of Parliament are essential safeguards for our democratic method of electing the people's representatives".[95] He continued:[96]

> As I have said already, these provisions will depend for their real force on whether they commend themselves to the people. While we can entrench them as far as we can go in the law, with the limitations I have mentioned, they will only really be entrenched if they become universally accepted as rules which commend themselves to the sense of fairness of the people as a whole. Only then can they be regarded as a permanent part of our democratic way of life. That perhaps is the unique and the most important part of this Bill, but the Bill contains a number of other matters to which attention should be drawn.

[83] His colleague (and a future Attorney-General) the Hon J R Hanan MP saw reservation as "almost an attempt to attain some of the advantages of a fixed constitution—that is, making laws unalterable except under certain conditions".[97] And while it was true it was not fully entrenched, it "gives the people a right to the continuance of those principles" (contained in the entrenching provision) so that repeal would be at a government's "peril":[98]

> There is created a strong moral obligation on any future Government not to alter the "rules of the game" unless with a 75 per cent vote in the House of Representatives or through a referendum.

[84] In closing the debate, the Attorney-General observed:[99]

> What we are doing has a moral sanction rather than a legal one, but to the extent that these provisions are unanimously supported by both sides of the House, and to the extent that they will be universally accepted by the people, they acquire a force which subsequent Parliaments will, I believe, respect, and which subsequent Parliaments will attempt to repeal or amend at their peril against the will of the people.

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95 (26 October 1956) 310 NZPD 2839–2840.
96 (26 October 1956) 310 NZPD 2840.
97 (26 October 1956) 310 NZPD 2850.
98 (26 October 1956) 310 NZPD 2850.
99 (26 October 1956) 310 NZPD 2852.

[85] The 21-year voting age instituted in 1852 was retained, more than a century later, by the Electoral Act 1956 (along with more restrictive citizenship requirements than now apply).[100] Whether that age was right was queried by the then-leader of the opposition, the Rt Hon Walter Nash MP, who wondered aloud whether "democracy commences ... after a person becomes twenty-one".[101] In 1969, cross-party support (led by the then-National Government) lowered the minimum voting age to 20 years.[102] Labour largely preferred a move to 18 years, regarding the Government's more modest proposal as a (misconceived) attempt to gain political advantage. But it still supported the measure.[103] In 1974 more cross-party support (this time led by the then-Labour Government) lowered the minimum voting to 18 years, where it remains.[104]

[86] Thirty years after the 1956 Act, the Royal Commission on the Electoral System considered Parliament's then-aspiration — to "place the structure of the law above and beyond the influence of Government and party" — had succeeded in fact, noting its "force as a convention of the constitution appears to be clearly established".[105] With one exception (arising after the Commission's Report), subsequent electoral amendments either had cross-party support or were abandoned for want of it.[106] In short, the reserved provisions had become a permanent part of New Zealand's democratic way of life, and had acquired the conventional status hoped for.

[87] In 1968 New Zealand signed the International Covenant on Civil and Political Rights (ICCPR), ratifying it a decade later in 1978.[107] Article 25 provides that "[e]very citizen shall have the right … [t]o vote … at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the

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100 Electoral Act 1956, ss 39(1) and 2(1).

101 (26 October 1956) 310 NZPD 2843.

102 Electoral Amendment Act 1969, s 2. Cross-party support was of course needed given the partial entrenchment of the voting age.

103 (5 August 1969) 362 NZPD 1723–1724; (13 August 1969) 362 NZPD 1937–1971; Atkinson, above n 82, at 180–182; and McLeay, above n 82, at 158–160.

104 Electoral Amendment Act 1974, s 2; and Electoral Act 1993, ss 74(1) and 60, and the definition of "adult" in s 3(1).

105 Report of the Royal Commission on the Electoral System "Towards a Better Democracy" [1986–1987] IX AJHR H3 at 288.

106 The exception is a contested vote carried by a qualifying majority of 79 votes to 13 in 1995, relating to voting method: see *Ngaronoa*, above n 92, at [56], n 65.

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

free expression of the will of the electors". What however is required by citizenship, age and periodicity is left to local legislatures to define further — here done in the provisions of the Electoral Act 1993. To that extent the exact form the right takes is itself given only limited expression in the ICCPR.[108]

[88] The Bill of Rights then further affirmed that right in s 12(a) by providing that every New Zealand citizen aged 18 years or more has the right to vote in genuine periodic parliamentary elections, by equal suffrage and secret ballot. That limited formulation repeats some of the language of the ICCPR, and at the same time draws upon some (but not all) of the reserved provisions of the Electoral Act 1956. Those limits, and the connection to the reserved provisions, were noted in the White Paper that preceded the Bill of Rights:[109]

> **10.48** This Article is concerned with basic principles and is not designed to entrench the present law in its details. Thus it guarantees the right to vote to New Zealand citizens only, whereas the present law (Electoral Act 1956 s 39) gives the franchise also to all permanent residents of New Zealand who have lived continuously in New Zealand for one year. That provision will not be affected, and will remain in force unless Parliament decides to change it. …
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> …
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> **10.50** The voting age of 18 is also a reserved provision by virtue of s 189 (e) of the Electoral Act and thus partly entrenched.
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> **10.51** "Equal suffrage" does not require an exact equality of population for electorates. The present 10 percent differentiation allowed under the Electoral Act s 17 (itself a "reserved provision") is already one of the narrowest in Western democracies. Only if the permitted discrepancies in the populations of electorates were gross might a court hold that this Article had been infringed.
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> **10.52** Permissible limitations under Article 3 would doubtless include such usual requirements as voter registration and reasonable residence tests. These are commonplace provisions in democratic societies. Again, their detailed regulation is properly left to Parliament in the ordinary way.

[89] When, three years later in 1993, s 19 was amended — by simple majority — to include — by incorporation — freedom from discrimination on the ground of age,

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[108] This is true of other international instruments such as the *Universal Declaration of Human Rights* GA Res 217A (1948).

[109] Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

there was no reference in Hansard to non-discrimination as to age in *voting*.[110] The focus, so far as age discrimination was discussed at all, was on the interests of senior, rather than junior, citizens.[111] Voting was not discussed. There is no explicit suggestion that the amendment to s 19 was intended to alter the voting rights affirmed by s 12. Nor does that potential consequence appear to have been appreciated, either at the time or for many years thereafter.[112]

Assessment

[90] My assessment draws on the legislative history just discussed. I make four points.

[91] First, the right to vote is inherent in a free and democratic society. Without that right, society is neither free nor democratic. As the Solicitor-General submitted, correctly, in *Ngaronoa v Attorney-General*, the Electoral Act 1993 creates the machinery by which we exercise the right to vote, but it assumes the existence of a right to vote as a fundamental common law right.[113] Since 1852 that common law right has been both affirmed and limited in this jurisdiction by the electoral legislation, with some of the legislative limitations peeling off over time and with some of the rights-protective provisions themselves being subject to legislative protection via entrenchment — an action intended by Parliament to have real constitutional

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110 Human Rights Act 1993, s 145 and sch 2 (now repealed and substituted respectively), passed by the 43rd New Zealand Parliament, a body of 97 members, by a simple majority comprising 64 votes (there were four votes against): (27 July 1993) 537 NZPD 16978–16979.

111 See, for example, (15 December 1992) 532 NZPD 13210–13211; (22 July 1993) 536 NZPD 16742 and 16751; and (27 July 1993) 537 NZPD 16911. The Justice and Law Reform Committee determined that "[t]he lower age limit is to be retained as it was not possible during the consideration of this bill to identify all the areas where young persons might be adversely affected by its removal" (this recommendation was discussed in some of the readings for the Bill): Human Rights Bill 1993 (214-2) (select committee report) at 8.

112 For instance, the potential clash of rights between ss 12 and 19 of the Bill of Rights is not adverted to in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003). In the first edition of Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), the authors noted only "how difficult younger age-based discrimination can be" and also discussed cl 27 of the Care of Children Bill 2003 (54-1), which "created differential treatment between 16- and 17-year-olds and persons aged 18 and over on the grounds of age": at [17.20.15]–[17.20.16]. The second edition of the text observed that "many New Zealand laws do not confer full adulthood and capacity on young persons until they reach their eighteenth birthday; how this approach squares with the prohibition on age discrimination in s 19 of BORA has yet to be fully worked through": Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.8.27].

113 *Ngaronoa*, above n 92, at 294.

consequence. As the debates demonstrate, along with the unanimity that prevailed in 1956, Parliament intended the reserved provisions to create enduring rights which have at least the force of constitutional convention. Those electoral rights were further affirmed, incompletely and in general terms, by the ICCPR and the Bill of Rights. Electoral rights reside in this combination of common law, statute and international law. Specifically, they include the constitutional protections given by the reserved provisions in the Electoral Act.

[92] Secondly, the internal inconsistency in the Bill of Rights between (1) the broad reach of s 19 in providing for a generic right to be free from discrimination on grounds of age (from age 16), limited only by what is demonstrably justified in a free and democratic society, and (2) the explicit reach of s 12 (consistent with the entrenched Electoral Act provisions) in making express provision for a right to vote from age 18, falls to be resolved by statutory interpretation of the Bill of Rights itself, discerning its meaning from the text in light of its purpose.[114] As Elias CJ made clear in *R v Hansen,* ascertaining the meaning and extent of rights and freedoms affirmed in the Bill of Rights is itself a matter of statutory interpretation:[115]

> Many of the rights recognised in Part 2 are qualified in their own terms or by necessary implication because they collide with other rights recognised in Part 2. The meaning of an enacted right therefore turns on the text, purpose and context of the New Zealand Bill of Rights Act.

In disagreement with the majority (and the Court of Appeal), I do not find s 6 of the Bill of Rights helpful in resolving a conflict *within* the Bill of Rights itself.[116] I regard that section as most fundamentally concerned with interpretation of primary legislation — here, the Electoral Act 1993. I do not consider it speaks coherently when the issue is what the "rights and freedoms contained in this Bill of Rights" actually are.

[93] Thirdly, the Court of Appeal, and the majority in this Court, construe s 12 as simply protecting 18 year-old voters against an *increase* in the voting age.[117] I disagree

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114 Legislation Act 2019, s 10(1).
115 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [7].
116 CA judgment, above n 81, at [29]. I do not read the passages cited there from *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 as really supporting the contrary proposition.
117 CA judgment, above n 81, at [30]; and above at [36]–[37].

with that construction, which I think takes too narrow a view of the relevant right. It does not fully account for the background to s 12(a), which reflects the reserved provisions as to voting age in what then was the Electoral Act 1956. The reserved provisions did not merely protect against *diminution* of voter qualification — for example, by increasing the qualifying age or, in the example given by the majority, re-inserting a property qualification. They also protected qualified voters against *enlargement* of voter qualification. Altering voter age is not a neutral political action. Whichever direction it goes in is likely to benefit some parties disproportionately. That consequence is perfectly fine, but it is one of the reasons voting age is reserved and requires a parliamentary super-majority. That purpose must also lie behind s 12 of the Bill of Rights.

[94] Fourthly, the difficulty here is the conflict within the Bill of Rights, because if s 19 extends to voting, the prohibited discrimination is triggered from the age of 16. Yet s 12, just one page, and seven sections, earlier, explicitly affirms that right with effect from the age of 18 years in the case of parliamentary elections. And relatedly, 18 years is also the constitutionally-reserved minimum age for persons otherwise qualified to be registered as electors or to vote under the Electoral Act 1993. Had Parliament intended to alter the temporal aspect of the right to vote, collectively affirmed by s 12 since 1990 and protected through entrenchment by the Electoral Act since 1956, it would have amended s 12 in 1993. It did not do so. I consider the better way of reading the two provisions together is that the explicit right to vote in parliamentary elections at 18 years, grounded in the constitutionally-entrenched provisions of the Electoral Act and affirmed by s 12 of the Bill of Rights, prevails over the generalised right to freedom from discrimination affirmed by s 19. Section 12 constitutes a limited and specific exception to the general right expressed in s 19. That conclusion can, and should, be reached without need to resort to the statutory interpretation canon *generalia specialibus non derogant* (general provisions do not derogate from specific ones), because it arises from a more fundamental review of (1) textual conflict and (2) the need to resolve that by reference to context and inferred parliamentary purpose. As to (2), both the legislative history and Parliament's silence

in 1993 is to me persuasive.[118] However, the canon propels analysis in the same direction.[119]

Local elections

[95] As noted earlier, I agree with the majority that a declaration of inconsistency must be made in relation to the provisions of the Local Electoral Act. Those provisions stand alone, unaffected (and unprotected) by s 12. They are inconsistent with s 19, and the Attorney-General does not attempt to justify the inconsistency under s 5. I make two final points.

[96] First, although it does not appear generally to reflect New Zealand local electoral history, there is nothing inherently illogical in a different voting age qualification applying to local elections.

[97] Secondly, it is important the public appreciate that what is made is a declaration of inconsistency, not illegality. Parliament is the sole arbiter of the content of legislation; the courts are the sole arbiters of legislative interpretation. The declaratory jurisdiction requires the courts to identify, for parliamentary and public attention, cases brought to it where Parliament has passed primary legislation that, duly interpreted, takes effect in a manner inconsistent with the Bill of Rights. In some cases Parliament will know that already, because the Attorney-General will have told it so under s 7, any judgment then serving as authoritative confirmation of that opinion. But what is to be done about the inconsistency identified is always a matter for Parliament.[120]

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118 See at [89] above.
119 See R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 607–619.
120 As to which, see now ss 7A and 7B of the Bill of Rights.