IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-000764
[2020] NZHC 2630

UNDER	the New Zealand Bill of Rights Act 1990
IN THE MATTER OF	declarations that certain provisions of the Electoral Act 1993 and the Local Electoral Act 2001 are inconsistent with s 19 of the New Zealand Bill of Rights Act 1990
BETWEEN	MAKE IT 16 INCORPORATED Plaintiff
AND	ATTORNEY-GENERAL Defendant

Hearing: 24 August 2020

Counsel: J McHerron, G Edgeler and E Moran for the Plaintiff
A Powell, A Bloomfield and L Dittrich for the Defendant

Judgment: 7 October 2020

JUDGMENT OF DOOGUE J

This judgment was delivered by Justice Doogue
on 7 October 2020.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:
DLA Piper, Wellington
Crown Law, Wellington

Introduction

The application

[1] The plaintiff, Make It 16 Incorporated (Make It 16), is comprised of a group of people, some of whom are prohibited from voting at elections and referendums because they are not 18 years of age.[1]

[2] One of Make It 16's objectives is to raise the profile of changing the voting age as an important matter of human rights and significant public interest in New Zealand, including by bringing court proceedings.

[3] Universal adult suffrage is a fundamental right, and s 12 of the New Zealand Bill of Rights Act 1990 (BORA) guarantees that right to all New Zealand citizens 18 years or older.

[4] Section 19 of BORA provides for the right to freedom from discrimination. In 1993, BORA was amended to incorporate the prohibited grounds of discrimination in s 21 of the Human Rights Act 1993 (HRA) into s 19 of BORA. One of those prohibited grounds is discrimination on the basis of age, over the age of 16 years.[2]

[5] The expansion of the prohibited grounds of discrimination in 1993 created an inconsistency between ss 12 and 19 of BORA. There is now a collision between them, because the latter provides for a general right to be free from discrimination on the grounds of age at 16, while the former expressly provides for differential treatment from the age of 18 in the area of electoral rights. The very scope of the right affirmed in s 12 is defined by reference to a ground of discrimination prohibited by s 19.

[6] Make It 16 seeks a declaration that the provisions in the Electoral Act 1993 and the Local Electoral Act 2001 fixing the minimum voting age at 18 years for general elections, by-elections, District Health Board elections, referendums, and local

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1 I note the traditional plural for a referendum is "referenda", however more recent legislation uses the term "referendums"; for consistency, I use "referendums" in this judgment.

2 Human Rights Act 1993, s 21(1)(i).

elections (the voting age provisions) are inconsistent with the right in s 19 of BORA to be free from discrimination on the basis of the age.

[7] The Attorney-General opposes the making of the declaration on the following grounds:

(a) primarily, because it is not appropriate for the Court to scrutinise the alleged inconsistency with s 19; and

(b) in the alternative, in the event the Court does analyse the inconsistency, the limit on the right in s 19 is demonstrably justified.

What is a declaration of inconsistency?

[8] I pause here to note one obvious point at the outset: this Court cannot interpret the voting age provisions in any way to enable those under the age of 18 to vote, and Make It 16 does not ask it to.

[9] Make It 16's application is made under the jurisdiction of this Court to declare that legislation is inconsistent with BORA, as affirmed by the Supreme Court in *Attorney-General v Taylor*.[3] A declaration is a formal statement that an enactment is inconsistent with fundamental human rights protected by BORA.

[10] A declaration of inconsistency "provides formal confirmation" of the infringement of a claimant's rights, and is part of the judicial function.[4] It can be a "means of vindicating the right in the sense of marking and upholding the value and importance of the right."[5] A declaration that legislation is inconsistent with BORA can meet "rule of law concerns about non-vindication of fundamental rights owed by the legislative branch … while observing parliamentary supremacy in law-making."[6]

Areas of agreement between the parties

[11] It is common ground between the parties that:

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3 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.
4 At [53].
5 At [56].
6 At [100].

(a) this Court has jurisdiction to grant a declaration of inconsistency as a stand-alone civil remedy, following *Taylor*;[7]

(b) any decision about whether, when and how to lower the voting age is for Parliament, whereas the role of the courts is to "declare the true legal position";[8]

(c) the meaning of the voting age provisions under scrutiny is clear and unambiguous in setting the minimum voting age at 18 years, and no tenable alternative interpretation is available;

(d) the expansion of the prohibited grounds of discrimination in 1993 created an internal inconsistency in BORA, between ss 12 and 19;

(e) assuming the voting age provisions are inconsistent with s 19, the onus of proving the justification for the inconsistency under s 5 of BORA (on the balance of probabilities) falls to the Crown;[9] and

(f) the general approach to BORA analysis is the six-step test summarised by Tipping J in *R v Hansen* (the *Hansen* analysis).[10]

The issues for determination

[12] The following questions must be answered by this Court:

(a) Should this Court entertain Make It 16's claim?

(b) If the answer to (a) is yes: what method of analysis should this Court adopt?

(c) Should this Court make a declaration of inconsistency?

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7 *Attorney-General v Taylor*, above n 3.
8 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [70].
9 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [108], [110], [120] (per Tipping J); *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [163]-[166].
10 *R v Hansen*, above n 9, at [92] and [104].

The legal framework

The voting age provisions

[13] In their statement of claim, Make It 16 defined two sets of voting provisions:

(a) the Electoral Act voting provisions in the Electoral Act, contained in ss 60 and 74, and the definition of "adult" in s 3(1); and

(b) the Local Electoral Act provisions contained in ss 20, 23, and 24 of the Local Electoral Act.

[14] The full text of those provisions need not be reproduced here, because it is common ground that the meaning and effect of these provisions is clear and unambiguous. When read together, they prescribe 18 years as the minimum age of eligibility to register and vote in general elections and by-elections under the Electoral Act, District Health Board elections under the New Zealand Public Health and Disability Act 2000, citizens initiated referendums under the Citizens Initiated Referenda Act 1993, and referendums under the Referendums Framework Act 2019.

[15] It is also agreed that the local electoral rolls are based on parliamentary electoral rolls, and therefore any change to the age of eligibility under the Electoral Act voting provisions would carry through to the Local Electoral Act voting provisions, without the latter needing separate amendment. That is, the Local Electoral Act voting provisions do not independently prescribe a voting age. The same applies to elections and referendums under the New Zealand Public Health and Disability Act, the Citizens Initiated Referenda Act, and the Referendums Framework Act. In each case electors must be "parliamentary electors" to qualify.

The Electoral Act 1993

[16] The Electoral Act 1993 (and its predecessor, the Electoral Act 1956) is a statutory implementation of the principle that there is a right to vote. It sets out the machinery of elections and establishes the system of voter eligibility for general elections. It does not affirm the existence of the right to vote at the age of 18 with controlling effect over the other legislation discussed in [14] above.

[17] The Electoral Act voting provisions are among the few basic features of our electoral system that Parliament has entrenched, in s 268 of the Electoral Act, so these provisions cannot be amended or repealed by ordinary processes of Parliament. Repeal or amendment of these provisions requires the support of 75 per cent of Parliament, or a majority in a public referendum.

The New Zealand Bill of Rights Act 1990

[18] BORA fulfils a constitutional function. It sets the standard by which governments and Parliament are held to account.[11] Parliament is free to go further than the protections set out in the Bill of Rights Act.[12] However, s 5 of BORA provides that the rights and freedoms in BORA may be subject only to reasonable limits as can be demonstrably justified in a free and democratic society.

[19] Section 12 of BORA provides:

> **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
>
> (b) is qualified for membership of the House of Representatives.

[20] Section 12 defines the scope of the constitutionally guaranteed right to vote in New Zealand – at a minimum, New Zealand citizens of or over the age of 18 are able to vote in general elections. It thus expresses Parliament's affirmation of the right to vote at the level of principle, and provides the minimum guarantee for electoral rights in New Zealand.

[21] As originally enacted, s 19(1) of BORA affirmed that everyone "has the right to freedom from discrimination on the ground of colour, race, ethnic or national

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11 The Supreme Court in *Attorney-General v Taylor*, above n 3, at [46] stated that "the Bill of Rights remains as the standard or palimpsest" by which courts assess whether Parliament has enacted legislation that is inconsistent with the standard.

12 Indeed, the voting age provisions do in fact go further than the minimum protections recognised in s 12 of BORA in some respects: s 74 of the Electoral Act extends the right to vote in general elections to permanent residents, who are not covered by s 12.

origins, sex, marital status, or religious or ethical belief." With the enactment of the HRA, s 19 was replaced and it now provides:

> **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.

[22] The prohibited grounds of discrimination are listed in s 21 of the HRA. Section 21 includes reference to the original grounds in s 19 of BORA, as well as six additional grounds: disability, age, political opinion, employment status, family status, and sexual orientation.

[23] Section 21(1)(i) of the HRA prohibits discrimination on the basis of age. Although there are some specific exceptions within the HRA, age as a prohibited ground of discrimination generally (and for present purposes) means "any age commencing with the age of 16 years".

[24] Thus, the introduction of the HRA created an internal inconsistency between ss 12 and 19 of BORA.

[25] The legislative history suggests that Parliament did not consider the resulting inconsistencies within BORA, when it passed the HRA. There is no indication that Parliament implicitly amended or repealed the age threshold in s 12 by enacting the amendment to s 19, nor would it be tenable to suggest that Parliament deliberately set out to make BORA inconsistent within itself when it expanded the grounds of discrimination by reference to the HRA.

First issue: should this Court entertain Make It 16's claim?

[26] The Attorney-General accepted that, ignoring s 12, the voting age provisions are arguably inconsistent with s 19 of BORA. However, the Attorney-General submitted that it is not appropriate for this Court to scrutinise that inconsistency. The

first issue I must therefore determine is whether I should proceed with substantive analysis of Make It 16's claim.

The Attorney-General's submissions

[27] First, the Attorney-General submitted this Court must resolve whether (and if so, to what extent) the judiciary ought to entertain Make It 16's application for a declaration of inconsistency because it requires a substantive evaluation of arguments about what is ultimately a political question and not a legal question – in other words, a matter for Parliament and not for the courts.

[28] Second, the Attorney-General submitted that the scope of the declaration of inconsistency remedy is still developing and there has been no indication that it is intended to, or can, apply to internal inconsistencies within BORA itself, and that there are a number of indications to the contrary. The Attorney-General pointed to s 4 of BORA, which is headed "[o]ther enactments not affected". The Attorney-General also relied on the Court of Appeal's comments in *Taylor*, in the context of discussion about the jurisdiction to grant a declaration of inconsistency, that BORA requires courts to examine "other legislation" for inconsistency with values protected by BORA.[13]

[29] Third, the Attorney-General submitted that examination of Make It 16's case is inappropriate as a question of separation of powers and democratic legitimacy, when the Electoral Act voting provisions affect the constitution of Parliament and have entrenched status.

[30] Fourth, the Attorney-General submitted that, interpreting the text of BORA according to the usual principles of statutory interpretation, s 12 carves out a limited and specific exception to the general right to be free from discrimination on the basis of age in s 19. In other words, the general protection against age-based discrimination in s 19 must be read as subject to the specific "higher goal" of enfranchising adults that is enshrined in s 12.[14]

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13 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [41].
14 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573.

[31] Fifth, from an evidential perspective, the Attorney-General argued that no meaningful balancing of competing views (as required by the *Hansen* analysis) is possible, because there is no high-level governmental policy work on lowering the voting age. That means the question of justification in the present case can only be approached at the level of substantive factual evaluation. In other words, the Attorney-General's justification of the inconsistency would fail step three of the *Hansen* analysis.

[32] In summary, the Attorney-General submitted the application for a declaration of inconsistency should be "stopped in its tracks", characterising the state of the proceeding as follows:

> … where, as here, there is nothing before the Court other than a request for a [declaration of inconsistency], and the Court can identify a balancing exercise that it cannot be expected to resolve, the appropriate course is to decline to allow the proceeding to continue.

Make It 16's submissions

[33] Make It 16 argued it is appropriate for this Court to entertain their application for a declaration of inconsistency.

[34] Make It 16 argued that s 19 should prevail over s 12, because it was enacted later in time, and that granting a declaration of inconsistency in respect of s 19 will not impinge in any way on s 12.

[35] Make It 16 submitted a declaration of inconsistency may be of assistance to Parliament, if the subject arises in that forum. This has occurred in respect of the Electoral (Registration of Sentenced Prisoners) Amendment Act 2020 following the Supreme Court decision in *Taylor*,[15] which has re-enfranchised people who are serving a sentence of imprisonment for a term of less than three years.

The law

[36] In *Taylor* at first instance in the High Court, Heath J emphasised that in making a declaration of inconsistency the Court is not making a political statement in an

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15 *Attorney-General v Taylor*, above n 3.

endeavour to persuade Parliament to change its mind.[16] Rather, the Court's function is firmly grounded in the obligation of the Court to declare the true legal position.[17]

[37] Heath J noted that case, like the present case, arose in "the context of the most fundamental aspect of a democracy; namely, the right of all citizens to elect those who will govern on their behalf."[18] He described the purpose of a formal declaration as being to draw to the attention of the New Zealand public that Parliament has enacted legislation that is inconsistent with a fundamental right. He noted that when determining questions of public law, "this Court's responsibility is to all New Zealanders."[19]

[38] And in the same case on appeal, the Court of Appeal noted that under BORA, courts are expressly authorised to consider and evaluate the policy justification for any given legislative action.[20]

[39] I have also had regard to the approach taken recently by the United Kingdom Supreme Court in *R (Steinfeld) v Secretary of State for International Development*, a case relating to extension of civil partnerships to opposite-sex couples.[21] In that case, as in the present case, the Crown sought to discourage the Court from making a declaration of incompatibility because the issue in question was "one which fell squarely within the field of sensitive social policy which the democratically-elected legislature was pre-eminently suited to make."[22]

[40] The Court was undeterred, concluding there was "no reason that this court should feel in any way reticent about the making of a declaration of incompatibility."[23] The Court referred to comment of the House of Lords in *Bellinger v Bellinger* that where the Court finds an incompatibility, it should "formally record that the present state of statute law is incompatible with the [European Convention on Human

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16 *Taylor v Attorney-General*, above n 8, at [70].
17 At [70].
18 At [77].
19 At [77].
20 *Attorney-General v Taylor*, above n 13, at [70].
21 *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1.
22 At [54].
23 At [61].

Rights]".[24] The Supreme Court also observed that a declaration of incompatibility does not oblige the government or Parliament to do anything.[25]

[41] The Court also referred to *R (Nicklinson) v Ministry of Justice*, as an obvious example where the Court should refrain from making a declaration.[26] *Nicklinson* concerned the compatibility of s 2 of the Suicide Act 1961 (which made encouraging or assisting suicide a criminal offence) with art 8 of the European Convention on Human Rights (the right to respect for private and family life). At the same time as the Court was deciding the case, Parliament was due to consider the same issues in the context of the Assisted Dying Bill. A majority of the Court held that it was within the Court's power to make a declaration of incompatibility (even where the decision on whether assisted suicide should be lawful or not lay within the state's margin of appreciation), and the Court should not shirk from its exercise. However, the majority decided that, as Parliament was about to consider the Bill, it would be premature for the Court to consider making a declaration of incompatibility.

[42] By contrast, in *Steinfeld*, the Court noted there was no imminent change in the law to remove the admitted inequality of treatment.[27] Even if there was, "this would not constitute an inevitable contraindication to a declaration of incompatibility."[28]

[43] Finally, I note the explanatory note to the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill envisages a process for the Executive and the House of Representatives to consider and, if they think fit, respond to a declaration of inconsistency made under BORA or the HRA. This process upholds:[29]

> … promotes the principle of comity that requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges …

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24 *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593 at [55].
25 *R (Steinfeld) v Secretary of State for International Development*, above n 21, at [60].
26 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.
27 *R (Steinfeld) v Secretary of State for International Development*, above n 21, at [58].
28 At [58].
29 Parliamentary Privilege Act 2014, s 4(1)(b).

Discussion

[44] In essence, the Attorney-General is asking the Court to decide at the outset to decline the application without any analysis of the competing positions, when they concede a prima facie inconsistency on the face of the relevant legislation. There are a number of reasons why I decline to adopt that approach.

[45] First, I am not persuaded that the subject matter of this proceeding constitutes a barrier to the scrutiny that Make It 16 is seeking. It is not by nature an entirely political issue to be determined exclusively by the fact that the voting age is entrenched and cannot be amended or repealed by ordinary processes of Parliament. The fact that a provision is entrenched does not mean that the courts cannot scrutinise the provision.[30] If a declaration is made, this Court is obviously not changing the voting age, and is not dictating what Parliament must do. There would be no interference with Parliament's procedures, and no inappropriate incursions into the separation of powers. I also note that a need for deference to Parliament in certain areas does not necessarily circumvent the need for the Court to "undertake the scrutiny required by the human rights legislation".[31]

[46] Second, I reject the argument that the jurisdiction to make a declaration of inconsistency (to the limited extent it has developed to date) contraindicates any application to resolving internal inconsistencies within BORA. BORA is simply an enactment. The question can and should be resolved by giving effect to each of the provisions in the context of the enactment as a whole; identifying if they can be reconciled and if not, why not; and identifying whether the limitation one places on the other is justifiable or not. In the present case, the correct approach to determining these questions is to entertain Make It 16's claim by engaging in a BORA analysis.

[47] Third, the declaration of inconsistency is a developing area of the law in New Zealand and the Court should be slow to decline to hear claims relating to fundamental rights.

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30 *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147.
31 *Child Poverty Action Group Inc v Attorney-General*, above n 9, at [92].

[48] Finally, it seems unjust not to exercise the Court's supervisory role solely because a defendant says it cannot discharge the onus to establish that the limit on the right is justified.

[49] I conclude that these considerations require this Court to undertake the necessary legal analysis to determine whether the voting age provisions are inconsistent with s 19 of BORA.

Second issue: what method of analysis should this Court adopt?

[50] Having determined that it is appropriate for this Court to scrutinise the alleged inconsistency, I must now determine the appropriate methodology to use.

Make It 16's submissions

[51] Make It 16 submitted that this Court should use the methodology in *Hansen*, and given the areas of agreement between the parties, the focus in the present case is on the s 5 analysis of whether the limit is justified.

The Attorney-General's submissions

[52] The Attorney-General submitted this Court's task is to determine whether the voting age provisions are consistent with the rights and freedoms in BORA as a whole, and that s 19 must be read in its proper context. That means that s 12 is central to the analysis, as it expressly enshrines electoral rights by reference to a threshold based on age.

[53] The Attorney-General urged this Court to follow the approach of Miller J in *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council* in the present case.[32]

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[32] *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437.

The law

[54] In order to determine the appropriate methodology to use in the present case, I now examine the interpretive provisions in BORA itself, the orthodox approach in *Hansen*, and the approach adopted in *Mangawhai*.

The BORA interpretive provisions

[55] Sections 4, 5 and 6 of BORA are described collectively as the "interpretive provisions"; they guide how the courts are to interpret the impact of enactments on the rights and freedoms in BORA.[33]

[56] They provide as follows:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

R v Hansen

[57] The leading authority on the application of the interpretive provisions is the decision of the Supreme Court in *Hansen*. When adopting the methodology set out in *Hansen*, the Court starts by identifying Parliament's intended meaning in the allegedly inconsistent provision, and must then determine "whether there is any inconsistency

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[33] *R v Hansen*, above n 9, at [57] (per Blanchard J); *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council*, above n 32, at [60].

between that meaning and the Bill of Rights. If there is none, the matter rests there."[34] It is only if the natural meaning of the legislation gives rise to an apparent limitation on rights that the Court must proceed to examine whether or not the limitation is demonstrably justified in terms of s 5.[35]

[58] It is settled law that the purpose of the s 5 justification analysis is essentially to determine whether a justified end is achieved by proportionate means.[36] The Court's function in doing so is one of review and ensuring legality. Tipping J set out the classic formulation of the section 5 test in the following terms:[37]

> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

[59] In terms of deference to Parliament, Tipping J examined the European doctrine of 'margin of appreciation':[38]

> [116] This approach, and that of Lord Hoffmann in the *Denbigh High School* case to which I am about to come, supports the view that the courts perform a review function rather than one of simply substituting their own view. How much latitude the courts give to Parliament's appreciation of the matter will depend on a variety of circumstances. There is a spectrum which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other. The closer to the legal end of the spectrum, the greater the intensity of the court's review is likely to be. …
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> [117] Ultimately, judicial assessment of whether a limit on a right or freedom is justified under s 5 of the Bill of Rights involves a difficult balance. Judges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise, as they may do even with matters primarily involving legal issues. …the courts should allow the decision-maker … some degree of discretion or judgment. If the

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34 *R v Hansen*, above n 9, at [89].
35 At [88]-[89].
36 At [123].
37 At [104].
38 *R v Hansen*, above n 9 (footnotes omitted).

> decision-maker is Parliament, and it has manifested its decision in primary legislation, the case for allowing a degree of latitude may well be the stronger.
>
> …
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> [119] This general approach, with which I respectfully agree, can be figuratively described by reference to a shooting target. The court's view may be that, in order to qualify, the limitation must fall within the bull's-eye. Parliament's appraisal of the matter has the answer lying outside the bull's-eye but still on the target. The size of the target beyond the bull's-eye will depend on the subject matter. The margin of judgment or discretion left to Parliament represents that area of the target outside the bull's-eye. Parliament's appraisal must not, of course, miss the target altogether. If that is so Parliament has exceeded its area of discretion or judgment. Resort to this metaphor may be necessary several times during the course of the proportionality inquiry; indeed the size of the target may differ at different stages of the inquiry. The court's job is to delineate the size of the target and then say whether Parliament's measure hits the target or misses it.

[60] The Court of Appeal, [39] and Supreme Court,[40] have also subsequently referred to the following observation by the Supreme Court of Canada:[41]

> … the law must be carefully tailored so that rights are impaired no more than necessary. 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.

[61] If the relevant provision is found to be demonstrably justified, that is the end of the matter. If it fails the s 5 test, then ss 4 and 6 come into play. Section 6 requires the Court to look for a reasonably possible alternative meaning, and give preference to that meaning.[42] If no other tenable meaning is available that is consistent with BORA, s 4 must be applied to give effect to the ordinary meaning of the inconsistent provision, thereby reaffirming the primacy of the legislature.[43]

[62] Tipping J summarised his overall approach to ss 4-6 in the well-known six-step test:[44]

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39 *Ministry of Health v Atkinson*, above n 9, at [153].
40 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [132].
41 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [160] (citations omitted).
42 *R v Hansen*, above n 9, at [88]-[91] (per Tipping J).
43 At [179] (per McGrath J).
44 At [92].

Step 1.	Ascertain Parliament's intended meaning.
Step 2.	Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
Step 3.	If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
Step 4.	If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
Step 5.	If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
Step 6.	If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[63] This has become the orthodox approach to assessing the consistency of enactments with rights that are protected by BORA. However, Tipping J intended his approach to be "principled rather than prescriptive."[45] Blanchard J also observed that BORA does not mandate any one specific method, and when new situations arise it is necessary to approach them in a way which is best suited in the circumstances to give effect to what appears to be Parliament's overall intention.[46]

Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council

[64] Consistent with that view, in *Mangawhai*, Miller J noted that the circumstances of a case may not warrant a substantive proportionality analysis as a matter of course,[47] and the methodology used may vary with the right, the limit, and the justification.[48] Miller J observed the approach in *Ministry of Transport v Noort*,[49] endorsed by Blanchard and McGrath JJ in *Hansen*,[50] may remain appropriate.[51] That approach incorporates relevant considerations into "an overarching weighing process", rather

45 At [91].
46 At [61].
47 *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council*, above n 32, at [65].
48 At [66].
49 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).
50 *R v Hansen*, above n 9, at [64] and [186].
51 *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council*, above n 32, at [66].

than the structured s 5 test outlined by Tipping J in which the enactment's natural meaning must cross each step along an analytical path.[52]

[65] Miller J considered it appropriate to adopt a different methodology due to three features of the case: the nature of the protected right in the case (the right to judicial review in s 27(2) of BORA), which differed from other rights (such as the right to life) that are thought of as non-derogable;[53] the policy nature of the justifications offered in support of the allegedly impugning provisions, and the invitation to defer to Parliament on the ground that the rationale was economic in nature and within Parliament's prerogative to assess;[54] and the legislative process followed in enacting the allegedly impugning provisions, in which justifications were identified and their impact on rights recognised.[55] Miller J's methodology was informed by his conclusion that the s 5 analysis in that case was "substantially and properly a question of institutional preference."[56] The methodology he adopted was:[57]

> (a) I examine the scope of the protected right to judicial review;
>
> (b) I identify the natural meaning of the protected transactions regime and decide whether it would limit the protected right;
>
> (c) I examine the legislative objective and the justification advanced for the limit that it places on the right;
>
> (d) I consider the invitation to defer to the legislature;
>
> (e) I consider whether the limit is proportional to the objective, having regard to the means of implementation, the degree of impairment, and the available evidence;
>
> (f) I reach an overall conclusion as to whether the limit is reasonable and demonstrably justified, or has not been proved, or is unjustified.

[66] In summary, Miller J said if the justification for a limit is obvious "the Crown should not be put to the trouble of mounting a comprehensive defence."[58] And if the Court is persuaded that the circumstances warrant restraint, "it may confine its

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52 Claudia Geiringer "Sources of Resistance to Proportionality Review of Administrative Power Under the New Zealand Bill of Rights Act" (2003) 11 NZJPIL 123 at 127 and 158 as cited in *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council*, above n 32, at [66].

53 At [69].

54 At [70].

55 At [71].

56 At [72].

57 At [72].

58 At [78].

scrutiny to establishing that the limit falls within what seems a margin of appreciation, which may be more or less large depending on the circumstances."[59]

[67] In discussing the different approaches to BORA methodology, Miller J also made the following observations in relation to deference to Parliament:

> [67] The state not uncommonly invites a court to defer, for reasons of democratic legitimacy and institutional competence, to legislative judgements about the importance of an objective or the reasonableness of a justification. Deference is a convenient term for this approach but it is not entirely apt. The court does not eschew its interpretive duty but instead decides that the balancing exercise should be left to Parliament, to which s 5 is also addressed, provided the outcome is within an appropriate margin of appreciation. As Lord Hoffmann explained in *R (ProLife Alliance) v British Broadcasting Corporation*:[60]
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> > In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.
> >
> > This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. …. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.
>
> And as this Court held in *Child Poverty Action Group v Attorney-General*:[61]
>
> > It must also be kept in mind that the effect of the Human Rights Act [1993] and the Bill of Rights is that when a measure is prima facie discriminatory the courts have to decide whether or not the measure

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59 At [68].

60 *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at 240.

61 *Child Poverty Action Group Inc v Attorney-General*, above n 9, at [92].

> meets the s 5 threshold. As Lord Scott said in *A v Secretary of State for the Home Department*, the function of measuring compliance with human rights norms is not one "that the courts have sought for themselves" but it is nonetheless a function that has been "thrust" on the courts by the Human Rights Act and the Bill of Rights. In that context, the term "deference" as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away from or shirk that task. Rather, it is a question of recognising the respective roles of the courts and the decision maker, here, the legislature.
>
> [68] A court may respond to an invitation to defer in a number of ways. If persuaded that the circumstances warrant deference it may confine its scrutiny to establishing that the limit falls within what seems a margin of appreciation, which may be more or less large depending on the circumstances. If not so persuaded, the court may insist that the state persuade it, by evidence if necessary, that the limit is demonstrably justified.[62]

Discussion

[68] Although Miller J issued the minority decision in *Mangawhai,* his is another example of the Court having tailored approaches to BORA analysis, having regard to the particular provisions under scrutiny and the particular circumstances of the case. It is early in the development of this jurisdiction, and this approach may well gain traction as it has much to commend it at the level of principle.

[69] However, I consider that in the circumstances of the present case, the *Hansen* analysis is the more appropriate analytical framework for this Court to follow. Given the nature of the right at issue in the present case, I see no reason to depart from the orthodox approach in *Hansen*.

[70] Regardless, I do not consider much turns on the methodology in the present case. As will be seen at [93]-[112] below, the principles of Miller J's reasoning can largely be incorporated into step 3 of the *Hansen* analysis.

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[62] Of course there may be limited evidence available. Policy need not be based on empirical evidence, as this Court accepted in *Ministry of Health v Atkinson*, above n 9, at [164]–[166], and that may require a commonsense approach to evaluation by reference to what is known.

Third issue: should this Court make a declaration of inconsistency?

[71] Having determined the preferable methodology is the *Hansen* approach outlined at [58] and [62] above, I turn now to my substantive analysis of Make It 16's claim.

Step 1: What was Parliament's intended meaning in the voting age provisions?

[72] The parties agree that the meaning of the voting age provisions is clear and unambiguous: they set the minimum voting age at 18 years, and no tenable alternative interpretation is available.

Step 2: Is that meaning apparently inconsistent with a relevant right or freedom?

[73] The Attorney-General submitted that the inconsistency can be resolved by statutory interpretation, and that s 12 prevails over s 19 as a matter of statutory interpretation. As a preliminary matter, I therefore consider the impact of s 12 on this step of the *Hansen* analysis, by determining whether the inconsistency between ss 12 and 19 precludes a finding that the voting age provisions are apparently inconsistent with a relevant right or freedom. I then consider whether the voting age provisions are inconsistent with s 19.

Does the inconsistency between ss 12 and 19 preclude a finding that the voting age provisions are apparently inconsistent with a relevant right or freedom?

[74] In *New Health New Zealand Inc v South Taranaki District Council*,[63] the Supreme Court addressed when to consider a conflict between rights. The Court was required to consider whether mass fluoridation of water was a breach of the right in s 11 of BORA to refuse to undergo medical treatment. The right in s 11 was in tension with the right in New Zealand's international obligations to provide a minimum standard of health. The Supreme Court held the Court of Appeal had been wrong to take into account the conflict of rights at the interpretation stage, finding it was better addressed under the s 5 analysis:

> [82] We consider that the Court of Appeal was wrong to take into account the conflict of rights at the interpretation stage in this case. It is clear that the

[63] *New Health New Zealand Inc v South Taranaki District Council*, above n 40.

> conflict was a material factor in the Court's decision to restrict the scope of s 11 to exclude public health measures. That had the effect of potentially excluding from the protection of s 11 public health measures that could, at least hypothetically, involve the mass administration of medication. In the present context, we consider that the resolution of the conflict of rights is better done in the context of s 5. That allows the meaning of "medical treatment" to be determined on the orthodox approach based on text and purpose, taking the generous approach that is adopted in interpreting the Bill of Rights Act. The Crown is then able, if necessary, to justify the provision under challenge under s 5, which allows for a reasoned consideration of the justification and whether it is "demonstrable". We do not consider that Professor Hogg's fear of an opening of the floodgates of Bill of Rights Act litigation (in cases involving public health measures) is likely.

[75] In *Ministry of Health v Atkinson*, the Court of Appeal considered the right in s 19, and addressed whether to incorporate analysis of the justification for discrimination into the interpretation stage, or whether to consider justification in the s 5 analysis.[64] The Court rejected an argument from the Ministry of Health that matters of justification for discrimination ought to be considered in the determination of whether differential treatment of a group of persons amounts to discrimination, rather than left for consideration under s 5.[65] The Court determined that the correct approach was to interpret the right to be free from discrimination in light of the text and purpose of BORA, and then consider matters of justification in the s 5 analysis.

[76] The general approach contained in *New Health* and *Atkinson* is that it is not appropriate to unduly limit the scope of a right in step two of the *Hansen* analysis. Any balancing, resolution of inconsistencies within BORA, or justification is best left to the s 5 analysis. I acknowledge there is some conceptual difference between the internal inconsistency in the present case and that in *New Health.* While *New Health* involved a more obvious clash between two different rights, the present case involves a collision of rights of different type, with the scope of the right in s 12 defined by reference to a ground of discrimination prohibited by s 19.

[77] Nonetheless, I consider resolving the inconsistency at this point in the analysis, when it is obvious that neither Parliament nor the Attorney-General have turned their minds to it, is premature and unfairly prejudicial to Make It 16. To simply say the voting age provisions are consistent with s 12, and s 12 trumps s 19 by dint of a

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64 *Ministry of Health v Atkinson*, above n 9.
65 At [109]-[110].

legislative vacuum, is akin to a self-fulfilling prophecy rather than a genuine attempt to reconcile the effect and implications of the accidental inconsistency.

[78] I therefore take the same approach as in *New Health* and *Atkinson*, and leave any reconciliation of the inconsistency between ss 12 and 19 to the s 5 analysis in step three of the *Hansen* analysis.

Are the voting age provisions inconsistent with s 19 of BORA?

[79] The established test for determining whether there has been a breach of s 19 of BORA is stated in *Atkinson*:[66]

> … the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

[80] In terms of the first step, the requirement to show differential treatment as between those in comparable situations raises an issue about who is the appropriate comparator group.[67] The focus on an appropriate comparator arises because it is necessary to determine whether the person or group is being treated differently to another person or group in comparable circumstances.[68]

[81] The Attorney-General submitted there is some doubt as to whether the first step of the test in *Atkinson* is made out, due to difficulties in establishing a comparator group. The Attorney-General submitted it is possible to incorporate s 12 into the comparator group analysis, meaning there would be no discriminatory differential treatment. Those in the comparator group would be different from 16 and 17 year olds in two ways: their age (the complained of discrimination); and they have a constitutionally protected right to vote, separately affirmed by s 12 of BORA.

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66 *Ministry of Health v Atkinson*, above n 9, at [55] (footnotes omitted); *Child Poverty Action Group Inc v Attorney-General*, above n 9, at [43].

67 *Ministry of Health v Atkinson*, above n 9, at [56].

68 At [60].

[82] However, the Attorney-General also responsibly accepted that incorporating s 12 into the comparison conflates matters of justification for the discrimination, best left to the s 5 analysis.

[83] I also note that in *Atkinson*, the Court of Appeal commented:[69]

> There has been considerable discussion in Canada and England, both in the authorities and amongst the commentators about the usefulness of the comparator exercise and the impact of the choice of comparator on the success of claims.[70] The Supreme Court of Canada in *Withler v Canada* has recently retreated from the concept that the comparator should be the mirror of the complainant group, that is, the comparison should put the comparator in exactly the same circumstances as the claimant group save only for the discriminatory factor.[71] In the United Kingdom, the search for a comparator has been described as an arid exercise.[72] However, we do not need to resolve any of the broader questions about the use of a comparator in the present case. The High Court treated the comparator as a helpful tool and no-one takes any issue with that approach.

[84] With that in mind, I accept the Attorney-General's submission that it is unnecessary to dwell on the comparator exercise in the present case, and there is a need to adopt a "purposive and untechnical" approach to whether there is prima facie discrimination, to avoid artificially ruling out discrimination at this stage of the analysis.[73]

[85] I therefore consider the appropriate comparator group in the present case is New Zealand citizens aged 18 and above, who meet every requirement of being eligible to vote. I find there is differential treatment, on the basis of age, between that group and citizens aged 16 and 17 who are otherwise eligible to vote.

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69 At [60].

70 See, for example, Daphne Gilbert and Diana Majurey "Critical Comparisons: the Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111. Gilbert and Majurey suggest that the focus on the "right" comparator means a wrong choice can doom a claimant's case. Further, the focus on a single comparator group treats the categories of discrimination as rigid and distinct which is an over-simplification.

71 *Withler v Canada* 2011 SCC 12, [2011] 1 SCR 396.

72 *R (Carson & Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 at [97] per Lord Carswell and *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [28] per Lady Hale.

73 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [51]; *Ministry of Health v Atkinson*, above n 9, at [104].

[86] The second step requires the Court to decide whether the differential treatment, viewed in context, imposes a material disadvantage on the group differentiated against.[74]

[87] The Attorney-General accepted that the ineligibility of 16 and 17 year olds to vote, by reason of their age, has a discriminatory impact on them. Accordingly, without prejudice to its primary submissions outlined above, the Attorney-General accepted for the sake of argument that, if the effect of s 12 of BORA is set to one side and s 19 is considered in isolation of its statutory context, the voting age provisions amount to a prima facie discrimination against 16 and 17 year olds on the grounds of age.

[88] I therefore find the voting age provisions are apparently inconsistent with the right in s 19 of BORA to be free from discrimination on the basis of age.

Step 3: Is the inconsistency a justified limit in terms of s 5?

[89] Before embarking on the substantive s 5 analysis, I pause to note here that the Attorney-General submitted that it does not automatically follow that a prima facie inconsistency with s 19 amounts to a limitation that engages s 5. The Attorney-General submitted that s 12 "forecloses any argument that the voting age provisions amount to a limitation on rights that engages the need to undertake the separate justification analysis in s 5." The Attorney-General submitted that legislation that is consistent with the age threshold in s 12 cannot be treated as a limitation on the right to be free from discrimination on ground of age under s 19 requiring separate justification under s 5, as the age threshold is expressly built into the definition of the constitutionally protected right to vote itself; it is intrinsically justified by the manner in which Parliament has defined the right at the constitutional level.

[90] This submission appears to be simply an argument that the discrimination in s 19 is demonstrably justified by the express wording of s 12. I consider the correct approach is to engage in a s 5 analysis, to determine whether that is so.

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74 *Child Poverty Action Group Inc v Attorney-General*, above n 9, at [72].

[91] I note one final preliminary matter: the limitation must be prescribed by law. There does not appear to be any argument that the limit in the voting age provisions is not prescribed by law.

[92] I now turn to the s 5 analysis, adopting the approach outlined at [58] above.

Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right in s 19 of BORA?

[93] The Attorney-General submitted the purpose of the voting age provisions is to "implement the basic democratic principle that all qualified adults should be able to vote."

[94] Make It 16 submitted the underlying objective of the voting age provisions is not apparent from the terms of the provisions themselves. Make It 16 accepted that an objective of the voting age provisions focussed on voters' competence to vote could be considered an important objective, but did not accept that competence to vote truly underlies the limit on the ability of 16 and 17 year olds to vote. Make It 16 submitted that the history of the electoral legislation shows the age limit on voting corresponded with the age of majority (because voting rights were linked with property rights), before noting that the voting age has been decoupled from the age of majority since 1969. In their written submissions, they linked the true underpinning of the right to vote to a person's membership of the community, as expressed in the 1986 report of the Royal Commission on the Electoral System.[75]

[95] I accept the Attorney-General's formulation of the purpose of the voting age provisions, and consider it to be to implement the basic democratic principle that all qualified adults (as opposed to children) should be able to vote.

Is the limiting measure rationally connected with this purpose?

[96] Limiting the ability to vote to those aged 18 years and over is rationally connected with this purpose.

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[75] *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986).

Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

[97] The question then becomes whether defining an adult, for the purposes of the voting age provisions, as those aged 18 years and over impairs the right to be free from discrimination on the basis of age no more than is reasonably necessary for sufficient achievement of this purpose.

[98] Make It 16 submitted that making the voting age 18 impairs the right to be free from discrimination more than is reasonably necessary. They submitted there is no evidence an 18 year old has sufficient competence to vote, but a 16 or 17 year old does not. They relied on: the 1986 report of the Royal Commission on the Electoral System;[76] internal advice (acquired under the Official Information Act 1982) from the Electoral Commission about the possibility of lowering the voting age; and evidence from Dr Jan Eichhorn, senior lecturer in social policy at the University of Edinburgh, about international evidence that supports the conclusion 16 and 17 year olds are competent to vote (including in jurisdictions such as Scotland and Wales). Make It 16 also pointed to the fact that 16 year olds are considered competent in many other areas, such as making medical decisions.[77] Make It 16 submitted that Parliament could achieve the purpose by setting the minimum voting age at 16, and thereby avoid inconsistency with s 19 of BORA.

[99] In relation to s 12, Make It 16 submitted that this Court's task is to determine whether the voting age provisions are consistent with s 19 of BORA in respect of age discrimination; they said ss 12 and 19 have different roles, and consistency with s 12 does not preclude a finding of inconsistency with s 19.

[100] The Attorney-General submitted that the arguments for and against lowering the voting age to 16 are complex and varied, and the question is ultimately one for Parliament. The Attorney-General did not advance any factual arguments about the merits of any particular voting age, but rather submitted that the age of 18 is objectively reasonable. The Attorney-General also pointed to the fact that the

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[76] *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, above n 75.

[77] Care of Children Act 2004, s 36.

minimum age of 18 is unambiguously imposed by a democratically elected legislature, in both s 12 of BORA and the entrenched voting age provisions. The Attorney-General also submitted the age of 18 is consistent with New Zealand's international obligations, and is in line with other comparable jurisdictions around the world.

[101] So how is this Court to decide if 18 years is a legitimate age at which to draw the line? This limb of the *Hansen* test can be addressed by considering whether the age restriction in the voting age provisions falls within a range of reasonable alternatives.[78] I find Tipping J's target analogy in *Hansen*,[79] discussed above at [59], particularly helpful in the present case. I also note the following comments of Tipping J in *Hansen*:[80]

> … I still consider there is a place for some latitude, greater or less according to the circumstances, to be given to Parliament. The concept of a free and democratic society signals the kind of values which the Bill of Rights is designed to protect. But it also signals the need to give appropriate weight to the fact that a limit has been democratically enacted.

[102] As in *New Health*, I do not propose to attempt a "definitive ruling" on the policy issues in the present case.[81] I undertake a broad assessment with a view to determining whether the evidence provides a proper basis for concluding that the age limitation in the voting age provisions is a justified limitation on the right in s 19.[82]

[103] Turning first to s 19 of BORA itself, I note that although it is expressed in unqualified terms, the right to be free from discrimination on the grounds of age is plainly not absolute. There are express exceptions in various provisions of the HRA. This is consistent with the understanding at international law that the "enjoyment of rights and freedoms on an equal footing … does not mean identical treatment in every instance."[83] Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to

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78 *Ministry of Health v Atkinson*, above n 9, at [151].
79 *R v Hansen*, above n 9, at [119].
80 At [111] (footnotes omitted).
81 *New Health New Zealand Inc v South Taranaki District Council*, above n 39, at [122].
82 At [122].
83 Office of the United Nations High Commissioner for Human Rights *CCPR General Comment No. 18: Non-discrimination* (10 November 1989) at [8].

achieve a legitimate purpose.[84] The purpose of s 19(1) has been summarised by Tipping J as:[85]

> … to give substance to the principle of equality under the law and the law's unwillingness to allow discrimination on any of the prohibited grounds unless the reason for the discrimination serves a higher goal than the goal which anti-discrimination laws are designed to achieve.

[104] Much of the Attorney-General's submissions throughout the present case focussed on the fact that the age limit contained in the voting age provisions is consistent with the age prescribed in s 12. While this is obviously correct, this alone does not determine whether the voting age provisions constitute an unreasonable limit on the right in s 19. Simply because a legislative provision is consistent with one right in BORA, that will not necessarily preclude a finding that it is inconsistent with another right in BORA. However, it does of course signal that New Zealand's democratically elected legislature, in enacting BORA, considered the age of 18 to be a reasonable minimum restriction to impose on the right to vote in general elections.

[105] New Zealand law draws the line at a number of different ages for a range of purposes, for example: subject to certain exceptions, young people under the age of 18 are referred to the youth justice system rather than the adult criminal jurisdiction;[86] at 16 years old a person is able to leave school,[87] is entitled to adult minimum wage rates,[88] and is able to consent to or refuse medical treatment;[89] at 17 years old a person is able to enlist in the armed forces;[90] at 18 years old a person is considered an adult for the purposes of the Oranga Tamariki Act 1989,[91] can be appointed a director of a company,[92] can serve as a juror,[93] and can purchase alcohol;[94] and at 20 years old a

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84 At [13].
85 *Quilter v Attorney-General*, above n 14, at 573; *Ministry of Health v Atkinson*, above n 9, at [116].
86 Oranga Tamariki Act 1989, s 272.
87 Education and Training Act 2020, s 35
88 Minimum Wage Act 1983, s 4.
89 Care of Children Act, s 36.
90 Defence Act 1990, s 33.
91 Oranga Tamariki Act, s 2.
92 Companies Act 1993, s 151.
93 Juries Act 1981, s 6.
94 Sale and Supply of Alcohol Act 2012, ss 243 and 5.

person reaches the age of majority,[95] can gamble in a casino,[96] and can adopt a relative.[97]

[106] In each of these examples there are plainly complex issues of morality, social justice, individual responsibility, and public welfare at play. If any change were proposed there would be a substantial policy process involved. The evidence before the Court in the present case shows that the issue of whether the voting age should remain at 18 or be lowered to 16 is not simple. As a 2018 report on lowering the voting age in Australia noted, "[t]here are passionate views on both sides."[98] It is also relevant that in its 1986 report, the Royal Commission on the Electoral System acknowledged the possibility of lowering the voting age to 16 years, but noted any change would require "broad political and public support" and public discussion would be needed "with a view to enabling Parliament to judge when and if the public is ready to accept a change."[99]

[107] There will inevitably be opponents to Make It 16's argument that the voting age should be lowered, however forcefully it is put. Dr Eichhorn confronted these arguments, but did not deny their existence. Make It 16's argument suggested that the Government has simply been culpable of inertia on the matter, and the age can no longer be justified in today's climate. That argument must fail in light of the weakness of the two most recent petitions requesting Parliament lower the voting age to 16: one in 2019 with 43 signatures, and one in 2020 with 68 signatures.

[108] Finally, I note that the voting age provisions are consistent with New Zealand's international obligations. Article 25 of the International Covenant on Civil and Political Rights affirms the right of every citizen to take part in the conduct of public affairs and to vote "without unreasonable restrictions".[100] The Office of the United

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95 Age of Majority Act 1970, s 4.

96 Gambling Act 2003, s 303.

97 Adoption Act 1955, s 4(1)(b).

98 Joint Standing Committee on Electoral Matters *Advisory Report: Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018* (Canberra, March 2019) at [2.8].

99 Royal Commission on the Electoral System *Report of Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, December 1986) at [9.14].

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

Nations High Commissioner for Human Rights describes setting a minimum age limit as an example of a restriction that would be reasonable, and observes that the right to vote "should be available to every adult citizen", but leaves states to establish the voting age for themselves.[101] It is also worth noting that for the purposes of the United Nations Convention on the Rights of the Child a "child" is defined as "every human being below the age of eighteen years."[102]

[109] In summary, I consider it is reasonable for a democratic society to grant voting rights to adults and not children, and to draw a line between adults and children at the age of 18. Given the present case involves heavy policy content, with valid arguments on both sides, I consider a healthy dose of deference to Parliament is warranted. The age of 18 is within the range reasonably available. Further, the fact that Parliament has recorded in s 12 of BORA that 18 is a reasonable limit on the right to vote signals that the age restriction in the voting age provisions is a reasonable limit on the right to be free from discrimination on the basis of age. I therefore find that the age restriction in the voting age provisions impairs the right in s 19 of BORA to be free from discrimination no more than is reasonably necessary for sufficient achievement of the purpose of granting adults the right to vote.

Is the limit in due proportion to the importance of the objective?

[110] Make It 16 submitted that the Attorney-General failed to discharge the onus in the *Hansen* test, and challenged the Attorney-General to "lay out, for the first time, the basis for the assumption that 16 and 17 year olds lack the capacity to vote." In particular, Make It 16 pointed to: the benefits associated with lowering the voting age, including encouraging a sense of citizenship and social responsibility, and higher voter turnout; and a lack of practical benefits to excluding 16 and 17 year olds from voting, noting there is no protective justification for the 18 year age limit as there may be in the other examples discussed above at [105].

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101 Office of the United Nations High Commissioner for Human Rights *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)* CCPR/C/21/Rev.1/Add.7 (12 July 1996) at [4] and [10].

102 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 1.

[111] The Attorney-General submitted that setting the age at 18 is objectively a fairly minimal intrusion on the right to be free from age-based discrimination.

[112] I note that the Court of Appeal has observed that in some cases, once it is accepted the other limbs of the s 5 test are met, it "inevitably becomes harder to say that the measure that results is not proportionate."[103] I consider that to be true in the present case. The arguments for and against lowering the voting age are complex and varied, and wide-ranging policy work needs to be done before it can be said that it should be lowered. Maintaining the minimum age at 18 is reasonable and proportionate to the important objective of granting adults the right to vote.

Conclusion on s 5 analysis

[113] The age restriction in the voting age provisions is a justified limit on the right in s 19 of BORA to be free from discrimination on the basis of age.

Conclusion

[114] As must be expected and should be encouraged, debate in the community about whether the voting age should stay at 18 or be lowered again has increased in recent years.

[115] Age may be an imperfect proxy for maturity or competence; there will always be precocious children above, and incompetent adults below, the line wherever it is drawn. But a bright line is reasonable when establishing eligibility at the population level.

[116] Make It 16 does not appear to object to the general principle that a minimum voting age may be reasonably prescribed by law. Their argument is simply that it is time for the boundary distinguishing adults from children in this context to be lowered to 16.

[117] The age of 18 years is within the range of reasonable alternatives available to Parliament, within a proper margin of appreciation. This is demonstrated by reference

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[103] *Child Poverty Action Group Inc v Attorney-General*, above n 9, at [151].

to other statutes in New Zealand that apply an age distinction between adults and children at 18 years, international law, and the fact that the vast majority of countries around the world also have a minimum voting age of 18. Its reasonableness is also reinforced by Parliament's clear intention, in s 12 of BORA, to grant those aged 18 and over the right to vote in general elections.

Result

[118] I decline the application for a declaration of inconsistency.

Doogue J