IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2101
[2016] NZHC 355

BETWEEN	ARTHUR WILLIAM TAYLOR, JOEL TWAIN MCVAY, RHYS WARREN, EDWARD VINCENT ROLLO Prisoner of Auckland (and Kaikohe - Fourth Applicant) First, Second, Third and Fourth Applicants
	HINEMANU NGARONOA, SANDRA WILDE, MARITTA MATTHEWS Prisoners of Christchurch Fifth, Sixth and Seventh Applicants
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Public Servant of Wellington First Respondent
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent
	THE ELECTORAL COMMISSION Third Respondent

Hearing:	27-29 October 2015
Counsel:	RK Francois for Applicants PT Rishworth QC, DJ Perkins and EJ Devine for Respondents
Judgment:	4 March 2016

JUDGMENT OF FOGARTY J

This judgment was delivered by me on 4 March 2016 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

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The parties

[1] The applicants are all prisoners in the legal custody of the Department of Corrections. The first respondent, the Attorney-General is sued by reason of being responsible for exercising all his powers, duties and functions subject to the New Zealand Bill of Rights Act 1990 (NZBORA). The second respondent is sued on the basis that he is responsible for ensuring that the Corrections system operates in accordance with all applicable laws. The third respondent is the Electoral Commission, sued on the basis that it is responsible for facilitating participation in a democracy, exercising powers under the Electoral Act whose acts are subject to NZBORA, and responsible for ensuring the Maori electoral system operates in accordance with all applicable electoral laws.

Introduction to the principal issue

[2] This case is principally about whether all prisoners have been lawfully barred from voting in parliamentary elections. Prior to 2010, certain prisoners were disqualified from registering to vote by s 80(1)(d) of the Electoral Act 1993 (the Act) which provided:

> **80. Disqualifications for registration-**
>
> (1) The following persons are disqualified for registration as electors:
>
> …
>
> (d) A person who, under-
>
> (i) A sentence of imprisonment for life; or
>
> (ii) A sentence of preventive detention; or
>
> (iii) A sentence of imprisonment for a term of 3 years or more,-
>
> is being detained in a penal institution:

[3] Then, in 2010, Parliament enacted the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (2010 Act). The Bill was passed by a simple majority. Section 4 of the 2010 Act provides:

> **4 Disqualifications for registration**
>
> Section 80(1) is amended by repealing paragraph (d) and substituting the following paragraph.
>
> "(d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010:"

[4] Before s 80(1)(d) was amended, the Attorney-General reported to Parliament that "the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 of the Bill of Rights Act and that it cannot be justified under s 5 of the Act".

[5] Section 12 of NZBORA 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.

[6] In a judgment delivered on 24 July 2015, this Court declared, consistent with the report of the Attorney-General, as follows: [1]

> Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act.

[7] Section 5 provides:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, 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.

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[1] *Taylor & Ors v Attorney-General of New Zealand* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79].

[8] That judgment is under appeal. I am advised that is not because the Crown disputes the inconsistency. Rather, the appeal is against the proposition that the High Court has the jurisdiction to make such a declaration of inconsistency.

[9] Accordingly, this litigation proceeds on the footing that s 4 of the 2010 Act is in conflict with s 12 of the NZBORA, and that the conflict cannot be justified under s 5 as placing reasonable limits on the right to vote in s 12. Putting it more concisely: a law preventing any prisoner from voting, however short the sentence, is not a reasonable limit on the otherwise universal right to vote.

Was Section 4 of the 2010 Act lawfully enacted – the principal issue

[10] In this case, the applicants argue that the 2010 Act was enacted unlawfully by a bare majority because s 268(1)(e) of the Electoral Act 1993 requires a majority of 75 per cent. The applicants seek a declaration that this statute is invalid, unlawful and of no effect. Such a claim for relief is unprecedented.

[11] Section 268 provides:

> **268 Restriction on amendment or repeal of certain provisions**
>
> (1) This section applies to the **following provisions (hereinafter referred to as reserved provisions)**, namely,—
>
> (a) Section 17(1) of the Constitution Act 1986, relating to the term of Parliament:
>
> (b) Section 28 of this Act, relating to the Representation Commission:
>
> (c) Section 35 of this Act, and the definition of the term "General electoral population" in section 3(1) of this Act, relating to the division of New Zealand into electoral districts after each census:
>
> (d) Section 36 of this Act, relating to the allowance for the adjustment of the quota:
>
> (e) **Section 74 of this Act, and the definition of the term "adult" in section 3(1) of this Act, and section 60(f) of this Act, so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:**
>
> (f) Section 168 of this Act, relating to the method of voting.

(2) **No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal—**

(a) Is passed by a majority of 75 percent of all the members of the House of Representatives; or

(b) Has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts:

Provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

(Emphasis added.)

[12] The reader will note that s 268 does not anywhere refer to s 80, let alone s 80(1)(d). But it does so indirectly because s 74, referred to in s 268(1)(e), is the section that sets out the qualifications of electors, and begins "Subject to the provisions of the Act", which qualification cross refers to s 80 which is entitled "Disqualifications for Registration".

[13] Section 74 of the Act provides:

74 Qualification of electors

(1) Subject to the provisions of this Act, **every adult person is qualified to be registered as an elector of an electoral district if—**

(a) That person is—

(i) A New Zealand citizen; or

(ii) A permanent resident of New Zealand; and

(b) That person has at some time resided continuously in New Zealand for a period of not less than one year; and

(c) That electoral district—

(i) Is the last in which that person has continuously resided for a period equalling or exceeding one month; or

(ii) Where that person has never resided continuously in any one electoral district for a period equalling or exceeding one month, is the electoral district in which that person resides or has last resided.

(2) Where a writ has been issued for an election, every person—

> (a) Who resides in an electoral district on the Monday before polling day; and
>
> (b) Who would, if he or she continued to reside in that electoral district until the close of polling day, have continuously resided in that electoral district for a period equalling or exceeding one month,—
>
> shall (whether or not he or she does so continue to reside in that electoral district) be deemed, for the purposes of subsection (1)(c) of this section, to have completed on that Monday a period of one month's continuous residence in that electoral district.
>
> (Emphasis added.)

[14] The argument of the applicants is that the purported amendment of s 80(1)(d) by a simple majority, by s 4 of the 2010 Act which disqualifies all prisoners from being an elector has denied them their entitlement to vote under s 74 as New Zealand citizens or permanent residents.

[15] The applicants argue the correct interpretation of subpara (e) of s 268 separates s 74 from s 3(1) and s 60(f) so that the whole of s 74 is a "reserved provision" and so can only be repealed or amended, directly or indirectly, if the amendment or repeal is passed by a majority of 75 per cent of all the members of the House of Representatives.

[16] The applicants rely on a number of different arguments to support their interpretation of s 268(1)(e).

Introduction to review arguments

[17] In addition to the argument that the amending statute in 2010 is ineffectual because it was passed by a simple majority, the applicants run a set of arguments built around the concept of judicial review. And, secondly, of numerous other breaches of NZBORA.

[18] The second amended statement of claim runs to 50 pages. The claim is divided into seven causes of action. However, many of these are not justiciable causes of action.

[19] Substantial parts of the review arguments are challenging decisions of Ministers of the Crown, including the Attorney-General, for refusing to review the provisions of the Act disqualifying all prisoners from voting. Ministers of the Crown, including the Attorney-General, are Members of Parliament as well as being members of the Executive. As politicians, they are involved in formulating policy positions which lead to bills being introduced into the House and enacted into law. None of those political functions are in any way judicially reviewable by the High Court. Judicial review by the High Court is confined to ensuring that government is lawful. It has absolutely nothing to do, and does not reach, decisions which Ministers of the Crown and other politicians make as to what bills should be placed before the House and acted upon. It is important to distinguish the Executive functions of Ministers of the Crown and other Members of Parliament from their conduct as politicians. The former are reviewable. The latter is not reviewable in any way at all.

[20] I am not going to burden the judgment by pleading all the detail of it, but the error of law in the argument can be captured in the following passage from page 14 of the submissions of Mr Francois.

[21] Having introduced the case by establishing that the 2010 amendment preventing any prisoner from voting was inconsistent with s 12 of NZBORA, that being the opinion of the Attorney-General confirmed by the High Court, the argument went on:

> *In the present case, the Attorney-General and/or the Executive did not provide any reasons for refusing to review the legislation.* The Attorney-General failed or refused to consider the concerns raised by a Judge of the Waitangi Tribunal in a comprehensive ruling. After considering evidence of the discriminatory impact of the legislation on the Maori electoral population and the Maori electorates, the Judge stated this is an exceptional case with very important issues that should be enquired into by the Tribunal with some urgency. It is important that consideration be given to Treaty implications of the present legislation.
>
> Subsequently, one High Court judgment states that the constitutional criticisms of the impugned legislation are "weighty and significant".[2] In another judgment the High Court made the first declaration of its kind on a

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2 *Taylor & Ors v Attorney-General* [2014] NZHC 2225, [2015] NZAR 705 at [79].

> stand-alone basis that the legislation in question breached the right to vote under s 12 of NZBORA.[3]
>
> (Emphasis added.)

[22] Then the submission to the Court is this:

> It is submitted that the decision of the Attorney-General and/or the Executive is reviewable in these circumstances. *The applicants are entitled to know the reasons and justification for refusing to consider changing the law, particularly since the Attorney-General agreed it is inconsistent with NZBORA and cannot be justified in a free and democratic society*.
>
> (Emphasis added.)

[23] That is a political proposition. It has absolutely nothing to do with the power of this Court to judicially review the exercise of government powers. Whether or not, in the light of the Attorney-General's certification and the High Court's declaration, there should be a change of the law, is a political decision for Parliament to consider. Parliaments' deliberations are quite removed from the oversight of the Court, which is responsible for the different and essential duty of ensuring that all government is in accordance with law. This Court does not in any way at all review the political process, except where that political process is itself governed by statute, such as the Electoral Act.

[24] Another indication as to the erroneous scope of some aspects of these proceedings is that one of the complaints is that the House of Representatives, when deliberating on these amendments, "failed to consider that the subject matter of the Electoral Act directly relates to Maori political representation and Maori citizenship rights that are matters of chieftainship or rangatiratanga guaranteed and protected under Articles 2 and 3 of the Treaty, or that they failed and refused to take into account the United Nations Declaration of the Rights of Indigenous People". This Court does not review the deliberations of Parliament.

[25] This Court is not obliged to set out before rejecting them, arguments which are hopeless, because they misconceive the scope of judicial review of administrative action. For that reason, significant parts of the 75-page submissions of Mr Francois,

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3 *Taylor & Ors v Attorney-General*, above n 1.

for the applicants, and 41 pages of submissions by Mr Taylor, are not the subject of analysis in this judgment.

[26] Rather, this judgment is confined to those parts of the pleadings in the statement of claim which are justiciable, that is, which are capable of being judged by this Court. They are two:

(a) Whether or not s 268(1)(e) of the Electoral Act required a 75 per cent majority before the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill became law.

(b) If the Bill is properly law, whether or not it is inconsistent with other provisions of the NZBORA in addition to s 12, particularly ss 9 (right not to be subjected to torture or cruel treatment), 19 (freedom from discrimination) and 23(5) (persons deprived of liberty be treated with humanity and respect for the inherent dignity of the person).

[27] This judgment engages in those pleadings. But does not deal with the remainder of the second amended statement of claim, for the simple reason that those pleadings presume upon a power which this Court does not have and this Court will not engage on the merits of what are essentially political arguments.

The applicants' standing to sue

[28] The first applicant in these proceedings, Mr Arthur William Taylor, was always barred from voting under the original s 80(1)(d). But a number of the other applicants who are prison inmates were eligible to vote.

[29] The Crown accepts that the applicants Mr McVay, Mr Rollo and Ms Wild have a legal interest to challenge that Act's validity.[4] On Election Day they were detained in prison serving sentences of less than three years imprisonment. If the 2010 Act was invalidly enacted, so that s 80(1)(d) as it was enacted in 1993 applied, they would each have been entitled to register and vote.

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4 See [1] above.

[30] The Crown submitted that Mr Taylor's disqualification for registration is not affected by the 2010 Act's amendment, because of the length of his sentence. This has been previously noted in the electoral petition decision,[5] which I have not referred to thus far, and needs no further reference. Therefore he does not have a direct standing to sue.

[31] However, and quite sensibly, pending a ruling on Mr Taylor's standing, counsel for the Crown did not object to Mr Taylor making submissions as a lay litigant in these proceedings, which submissions the Court found very helpful to elucidate the issues of the case. In cases of significant public interest, the courts do not apply the common law of standing, *locus standi*, rigorously.[6]

[32] The Crown also challenged Mr Warren's status, he having been released from Auckland Prison on 6 August 2014, arguing he would have been entitled to register at any time up to and including 19 September 2014 so his right to register and vote was in fact unaffected by the 2010 Act. And in respect of Ms Ngaronoa and Ms Matthews, they were in prison pursuant to sentences of more than three years and, without going into the detail, whether or not the 2010 Act was invalidly enacted, they would continue to be disqualified by s 80(1)(d) as originally enacted.

The litigation to date

[33] This proceeding is the latest of several pursued in this Court, the Court of Appeal and the Waitangi Tribunal over the last two years, all seeking to impugn the 2010 Act. The first proceeding, known after its file number 4141,[7] was commenced on 5 September 2013, the remedy being confined to declarations, but additional to inconsistency with s 12(a), including inconsistency with ss 9, 19(1) and 23(5) of the NZBORA.

[34] The first move of the Crown was to seek to strike those proceedings out. That application was dismissed by Brown J of this Court who, however, directed the

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5 *Taylor v Key (No 3)* [2015] NZHC 722 confirmed by Heath J in *Taylor v Attorney-General*, above n 1, at [3].

6 See the discussion of standing in *Philip Joseph Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [27.6.3].

7 See n 1 above.

Chief Executive of the Department of Corrections be removed as a defendant.[8] The applicants then applied for a priority fixture which was dismissed on 31 July 2014 by Venning J in this Court.[9] On 17 December 2014, the applicants abandoned their applications in proceeding 4141 for declarations of inconsistency with ss 9, 19(1) and 23(5). Going forward they sought only a declaration in respect of s 12(a) and obtained the declaration in their favour from the Court.[10]

[35] On 10 July 2014, the day before the delivery of Brown J's strike-out judgment, a number of the applicants sought an urgent hearing before the Waitangi Tribunal.[11] The Deputy Chairperson declined the application but accorded it priority. It was originally anticipated it would be heard in mid-2015. Because the applicants subsequently defaulted in several procedural obligations, the grant of priority was rescinded on 13 April 2015.

[36] Venning J's refusal to grant proceeding 4141 a priority fixture seems to have prompted the applicants to try a different strategy and it was three weeks later, on 22 August 2014, that these proceedings were commenced.

[37] The applicants sought interim orders to preserve their position ahead of the 2014 General Election. Ellis J of this Court rejected that application.[12] She did so because it was impossible to grant an interim order without granting substantial relief prior to the election.[13]

[38] The appellants appealed and the President of the Court dismissed an application for an urgent hearing. Later, by application of the Court of Appeal Rules of Procedure, the appeal has been deemed to be abandoned. The consequence of this was that amended statements of claim were filed in these proceedings. Mr Rollo was added as an applicant. And so the original broad spectrum claim of breaches of ss 9, 19 and 23 of NZBORA have been reinstated and fall for consideration in this judgment.

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8 *Taylor v Attorney-General* [2014] NZHC 1630.
9 *Taylor v Attorney-General* [2014] NZHC 1795.
10 See above n 1.
11 Waitangi Tribunal *The Electoral (Disqualification of Sentenced Prisoner) Amendment Act Claim* (Wai 2472, 2014).
12 *Taylor v Attorney-General*, above n 2.
13 At [25] and [79]-[80].

The applicants' opening statement

[39] This case is advanced to this Court as a major case of constitutional importance. So that although it turns on a statutory interpretation problem or, alternatively, on a re-evaluation of the status among statutes of the New Zealand Bill of Rights Act (NZBORA), one of many or superior, the case has to be approached with an understanding of its constitutional significance.

[40] Constitutional issues can arise out of apparently particular and detailed provisions found amidst a large number of commonplace statutory provisions. Where constitutional issues are at play, the case law shows that common law judges are sensitive to these issues and are prepared to apply such statutory provisions in a manner designed to protect or advance important constitutional principles.

[41] For example, it is now accepted that the Supreme Court of the United States can strike down any legislation passed by the Federal Congress and Senate or by State legislatures which is in breach of the American Constitution. No such power is actually expressed in the American Constitution. That power was implied as the only way to ultimately give effect to the American Constitution.[14] The same line of reasoning was followed in Australia in respect of its Federal Constitution.[15]

[42] For these reasons, I think it is appropriate to set out at the outset of this judgment the opening statement of Mr Francois, counsel for the applicants, of 18 paragraphs verbatim:

> 1.1 This case is about the fundamental right to vote - the foundation of a democracy. All prisoners are barred from qualifying and enrolling as voters in Parliamentary elections by section 80(1)(d) of the Electoral Act 1993 (the Act). The applicants argue that this not only amounts to a violation of their rights and freedoms under the New Zealand Bill of Rights Act 1990 (NZBORA), but that it has no effect and cannot be applied in law.
>
> 1.2 The applicants assert that the essential elements of the right to vote are the right to express and communicate ideas, to recall a government to its duties and obligations, and to affirm one's allegiance to the body politic. The heart of any modern democracy, the applicants submit, can only be protected and preserved when a

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14 *Marbury v Madison* 5 US 137 (1803).

15 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (HC).

government must answer, not just to a particular group of people, or those of a particular gender, religion or race, but to all of its people.

1.3 In a country where government is by the consent of the governed as in ours, Parliament must be limited in its power to act against the rights and freedoms of its people. As Baroness Hale has said:

> it does not follow that a democracy can properly do whatever it likes, simply by virtue of the democratic mandate for its acts. The protection of minorities is a necessary concern of any democratic constitution. Prisoners belong to a minority only in the banal and legally irrelevant sense as most people do not do the things which warrant imprisonment by due process of the law.[16]

1.4 The legislature passed the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the Act) by the barest of majorities where only two political parties voted in favour of enacting the legislation. Confronted by the panoply of government power, the applicants submit that the democratic and electoral rights guaranteed by Part 2 of the NZBORA ensures that there may be no unreasonable interference with the right to freedom of choice in democratically held elections; no imposition of penalty or punishment by public authorities high or low without justification; no restrictions on the freedom of their children to seek education or opportunity of any kind so that every child in this country can be become all that he or she is capable of becoming.

1.5 For Maori prisoners, the legislation discriminates against them on basis of their race and ethnicity. This is due to the disproportionate impact disenfranchisement has on Maori based on relative prison and minority populations. If successful, allowing Maori prisoners to vote results in another breach of the anti-discrimination provisions of the NZBORA in relation to non-Maori prisoners. Otherwise, the indirect discrimination of Maori prisoners becomes direct discrimination of non-Maori prisoners.

1.6 The applicants are here in the name of democracy. All citizens of this country over the age of 18 are afforded at every election the power to be heard, the right to share in the decisions of government, which the State guarantees under s 12 of the NZBORA. Ninety per cent of people sentenced to a term of imprisonment today will be released two years from now. Most of the applicants are parents with children who live in the community and their future is important.

1.7 Every decision of government that affects our lives - family, work, education, affordable housing, a place to rear one's children - all this depends on the will of government. The power to participate in these decisions can be stripped away by a government that does not respect the interests of its people, or heed the demands of its people, and I mean all of its people.

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16 *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271.at para [112].

1.8 The right to vote is unrelated to a prisoner's incarceration. Restrictions on the freedom of movement and the right to be free from unreasonable search and seizure are incidental to imprisonment, but the right to vote like the right to speak one's native language or the freedom to practise one's religion has nothing to do with one's confinement in prison.

1.9 The applicants know after two years of fighting for their rights in the proceedings before this Honourable Court, that the path to democracy is not easy. Many countries have experienced revolution, and loss of life in order to attain it. The applicants acknowledge that New Zealand has experienced its own struggles between ideal and reality in this regard, but the great ideals of democracy - inclusiveness, tolerance, and equal suffrage – have recalled this country to its obligations as the longest running democracy in the world.

1.10 It is this commitment that brings the applicants here today as equals before the law. At a time when access to the courts is restricted and beyond the means of most, the applicants submit that the only recognition, and indeed vindication of their rights, is by way of the declarations they seek. The Supreme Court has said many times that where there is a wrong perpetrated by the State against its people there must be a remedy.

1.11 This must be done here, not because the limiting measure fails to serve a purpose sufficiently important to curtail the most fundamental right that a citizen has in a democracy; not because the legislation is arbitrary and irrational, although it is; not because the sanction of disenfranchisement is disproportionate to the gravity of offending of most sentenced prisoners, although it is; not because the penalty bears no rational connection to any legitimate aim, although it doesn't; not because the laws of natural justice command it, although they do. The applicants submit that it must be done because it is the right thing to do.

1.12 Today the disenfranchisement relates to prisoners, but the applicants believe that it may well be someone else or some other group tomorrow. The concerns of one inevitably become the concerns of others. The applicants submit that the evidence produced in this proceeding will show that the legislation dilutes the Maori Electoral Population and the total number of Maori electorates over time.

1.13 Individual Maori citizenship rights are protected by Article 3 of the Treaty, and the right to vote is considered by the Waitangi Tribunal to be the most important Maori citizenship right. The legislation not only breaches Article 3 of the Treaty but on a macro electoral level it also breaches Article 2. The Act reduces the number of Maori on the Maori electoral roll, which in turn reduces the total number of Maori electorates in the New Zealand electoral system. Article 2 of the Treaty embraces the right of self-determination, and Maori political seats represent the closest form of political self-determination currently available to Maori. This is a case where the illusion of difference is the root of discrimination and injustice.

1.13 A lawyer and long-term prisoner once said that you cannot judge the civilisation of a country by how it treats its highest citizens, but how it treats its lowest. Nelson Mandela said those who live with us are our brothers, and they share with us the same short moment of life seeking as all of us do, what satisfaction and fulfilment they can. It is this common bond that supports the applicants' for claim relief in this case.

1.14 We are living in a time where human rights are under more pressure than ever. This presents many dangers for those who are confined by the State. Whether it be the denial of a prisoner's first right of appeal. Whether it be the mandatory imposition of the sum of $5,880 to appeal any judgement of this Honourable Court without any consideration of the merits of the case. Whether it be preventing prisoners from speaking to the media without considering their free speech rights, or whether it be the requirement that a prisoner pay $100.00 to be taken from prison to a courthouse to have his day in court. These are reflections of the inequalities of justice, the imperfections of divisions within society based on income and wealth, and the lack of sensibility towards our fellow citizens.

1.15 People in prisons have lost control of their lives, and their rights are all they have left. The knowledge that there are people in the legal system who are willing to reflect upon the issues they face and understand the importance of their rights is an important consideration in this case. But these are matters left not for persuasion, but a state of mind, a preponderance of judicial courage over timidity, a temper of the will, and a quality of imagination.

1.16 This Honourable Court is in a position to declare that legislation passed by Parliament is in breach of the Treaty of Waitangi and cannot reasonably be applied in combination with the NZBORA and the entrenched provisions of the Electoral Act 1993. The applicants submit that this is consistent with the rule of law, the values we uphold in a modern legal system and the rights respected in international human rights instruments around the world.

1.17 It is submitted that the Treaty of Waitangi and the Declaration of Independence serve to protect not only the rights of the indigenous people in this country, but to act as a counterpoint to a legacy of prejudice, stigma, undignified social and economic deprivation, and stolen sovereignty. It is also the first time that a Court has the opportunity to elucidate the legal status of the Declaration of Independence of the Confederated Tribes 1835.

1.18 There are few who brave the disapproval of their brothers, or the censure of their colleagues, or the contempt of the society in which they live. Moral courage, according to Aristotle, is a quality of those who seek to make a difference in this world. At the Olympic Games, he said: "it is not the finest and the strongest men who are crowned, but they who enter the lists.... So too in the life of the honourable and the good it is they who act rightly who win the prize"

New Zealand's Constitution

[43] New Zealand does not have a written constitution but its three branches of government (the Legislature, the Executive (headed by the Ministers of the Crown) and the Judiciary) act within and in accord with constitutional principles. Amongst other things, this litigation is in effect seeking to establish the NZBORA as superior law. This is notwithstanding s 4 of the NZBORA which provides:

> **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.

[44] There was a political difference of policy behind that section. That New Zealand should have a Bill of Rights, and that it should be superior law, were both law reforms promoted by Sir Geoffrey Palmer as a Minister of the Crown and as a leading and senior member of the Labour Party at the time. The Minister proposed that the Courts would be able to declare as invalid any Act of Parliament if contrary to the Bill of Rights.[17] The proposal engendered significant opposition. Sir Geoffrey was seeking to follow the Canadians in this respect. He lost.

[45] It is improper, however, to construe a statutory provision in the light of an understanding of the political outcome of a debate which led to its enactment. Rather, the task of the judges are to apply the law as it is enacted, interpreting the text, not seeking out the personal intentions of the drafters of the text.

[46] As will be apparent from the opening statement of Mr Francois, the plaintiffs see this case also as an opportunity to give further legal effect to the Treaty of Waitangi and to achieve some judicial recognition of the Declaration of

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[17] *A Bill of Rights for New Zealand: A White Paper* (Government Printer, 1985) at 5.

Independence[18] of the confederated tribes 1835. The 1835 Declaration was encouraged at the time by the Crown.

[47] The Treaty of Waitangi has achieved some status as a legal document, being recognised as having ongoing legal effects; though only since the 1980s.[19] The Declaration of Independence has never been recognised.[20] Part of the setting of this case involves recognition of the concept of legitimacy in constitutional discourse.

New Zealand's constitutional legitimacy[21]

[48] A necessary condition for the stability of all governments is legitimacy. All countries have their own narrative of legitimacy. In respect of our constitution, Professor Joseph says:

> The basic structure of the democratic process gives legitimacy to the constitutional system and the powers of government.

[49] At the same time he is able to say and, in the same paragraph:

> New Zealand's democratic system is not entrenched but is almost entirely flexible.

Superficially, that last phrase might suggest that any change is possible. That is not so. Democratic government is not simply the rule of the majority over the minority. It is much more sophisticated and has to accommodate significant minority views. It is not a tyranny. Our democracy is described in s 5 of NZBORA as a "free and democratic society".

[50] It should not come as any surprise that the only part of New Zealand law which is entrenched, requiring a 75 per cent majority in the House before it can be changed, is part of the law relating to voting in general elections.

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18 Above [41] at 1.17.

19 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

20 See Waitangi Tribunal Report, *He Whakaputanga me te Tiriti, The Declaration and the Treaty* (Wai 1040, 2014), Chapter 4, especially Part 4.8, at 1936-37: The impact of the declaration, and 4.9, concluding remarks. See also Chapter 10, Our Conclusions at 10.2.

21 See generally Joseph, above n 6, at [6.6.1].

[51] A glance at international history, as well as a reflection upon our own constitutional history, rules out forming any prejudgment as to the future development of our constitution. For example, less than fifty years ago law students were taught that the Treaty of Waitangi was irrelevant. This was based upon legal decisions of the Courts. Those Maori who agitated for greater recognition of the Treaty of Waitangi, were regarded as radicals and troublemakers by many in society.

[52] As Professor Joseph sums it up:[22]

> "Pragmatic evolution" characterises New Zealand's constitutional journey.

[53] The New Zealand Court of Appeal, prior to the establishment of the Supreme Court, contributed to the constitutional development and particularly the recognition of the Treaty of Waitangi. In the *New Zealand Maori Council v Attorney General*[23] the Court examined what was meant by the statutory requirement in the State Owned Enterprises Act 1986 to give effect to Treaty of Waitangi principles. That has led to increasing confidence on the part of the courts to pronounce that Treaty principles can be deployed in statutory interpretation whether or not that is an express requirement in a provision of a particular statute. In *Barton Prescott v The Director General of Social Welfare*, Sir Rodney Gallen and Goddard JJ said: [24]

> We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the Treaty in the statute. We also take the view that the familial organisation of one of the peoples a party to the Treaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly we take the view that all Acts dealing with the status, future, and control of children are to be interpreted as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the Treaty was intended to preserve and protect. Since we are satisfied that the wording of the Acts with relevance to this proceeding is such that there is no conflict with Treaty principles, indeed there are a number of provisions which directly incorporate those principles and there is certainly nothing contrary to that in the Guardianship Act itself, we are not therefore confronted with and do not comment on the situation which might arise where a statutory provision was seen to be in conflict with the Treaty of Waitangi or related principles.

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22 At [6.5.3], citing the report of the Constitutional Arrangements Committee "Inquiry to Review New Zealand's Existing Constitutional Arrangements" [2005] AJHR 124A at [26].

23 *New Zealand Maori Council v Attorney-General*, above n 19.

24 *Barton-Prescott v The Director General of Social Welfare* [1997] 3 NZLR 179 (HC).

[54] It is significant, however, that the first recognition of the Treaty of Waitangi as an instrument relevant to the interpretation of statutes was by way of a direction from Parliament.[25] That direction emboldened the New Zealand Court of Appeal in the Lands Case[26] to articulate Treaty of Waitangi principles and to develop the recognition for the first time of any legal importance of the Treaty, nearly 150 years after it was signed.

[55] The legitimacy of a government is recognised by the courts but, significantly, not created by the courts; which follow changes in the political legitimacy discourse or the legitimacy narrative. Ultimately, it is first a concern of politics, not of law, that the constitutional arrangements of government accommodate the needs, qualities and aspirations of the people being governed. This must be particularly so in our very young country, whose current governance as a free and democratic society is less than two hundred years old, and whose population is a combination of different racial and ethnic groups, the complexity of which is changing by the decade. In the course of the hearing of this case, we had occasion to cast our eye over earlier New Zealand statutes which divided all seats of the House of Representatives into "European" seats, on the one hand, and "Maori" seats, on the other.[27] Now no New Zealand parliament would enact a statute describing the non-Maori electorates as "European". There can be no doubt that over time the legitimacy narrative of New Zealand's democracy will continue to reflect the composition of society.

[56] In short, the function of judges is to recognise constitutional arrangements, but not to create them. That is, to identify what the law is and to apply it in order to do justice.

[57] For these reasons, I did not contemplate at all in the course of the hearing the prospect of taking up the invitation to give some recognition to the Declaration of Independence of 1835, notwithstanding its promotion by His Majesty's Government at the time it was being signed. Today, the legitimacy narrative of New Zealand's democracy ignores the Declaration of Independence and starts with the Treaty of

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25 State Owned Enterprises Act 1986, s 9.
26 *New Zealand Maori Council v Attorney-General*, above n 19.
27 See Electoral Act 1956.

Waitangi signed five years later. It is irrelevant whether that is a good thing or a bad thing. Rather, it is a constitutional fact.[28]

[58] In the course of the analysis, on the other hand, I have been prepared to entertain the possibility that there might be some Treaty principles which can be brought to bear to resolve the statutory interpretation problems which are at the heart of this dispute and I do this even though there is no parliamentary direction in that regard in the Electoral Act, but because the New Zealand Court of Appeal has approved the approach taken by Sir Rodney Gallen and Goddard J in *Barton Prescott v The Director General of Social Welfare.*[29]

Legislative history of the Electoral Acts – shifting policies on prisoners' right to vote

[59] The United Kingdom asserted sovereignty over New Zealand from 1840. First by Letters Patent in 1840, then by the New Zealand Constitution Act of 1846.[30] This Act was passed against a demand by the colonists for representative institutions. Governor Grey postponed its operation. Further agitation for local self government by the colonists led to a second Constitution Act in 1852.

[60] The United Kingdom's Parliament's New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72 established the House of Representatives, being part of the General Assembly, the members of whom to be chosen by VII:

> ... Votes of the Inhabitants of the Province who may be qualified as herein-after mentioned ; that is to say, every Man of the Age of Twenty-one Years or upwards having a Freehold Estate in possession situate within the District for which the Vote is to be given of the clear Value of Fifty Pounds".

It had a proviso in s VIII as follows:

> Provided always, That no Person shall be entitled to vote at any such Election who is an Alien, or who at any Time theretofore shall have been attainted or convicted of any Treason, Felony, or infamous Offence within any Part of Her Majesty's Dominions, unless he shall have received a free Pardon, or shall have undergone the Sentence or Punishment to which he shall have been adjudged for such Offence.

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28 See The Waitangi Tribunal Report, above n 20.

29 See *New Zealand Maori Council v Attorney-General* [2007] NZCA 269 at [72]-[74].

30 *Philip Joseph Constitutional and Administrative Law in New Zealand*, above n 6, at 14.4.1.

[61] So we can see that from the earliest constitutional history of New Zealand there was a restriction on voting rights against persons who had committed serious crimes.

[62] I move forward to the Electoral Act of 1956. Section 42 of that Act disqualified persons detained pursuant to convictions in any penal institution from registration as electors.[31]

[63] The same 1956 Act imposed restrictions on amendment of provisions of the Act unless passed by a majority of 75 per cent of all the members of the House of Representatives or a majority of the valid votes cast at a poll of the electors of the European and Maori electoral districts. This restriction is found in s 189 which is expressed not to apply to all the provisions of the Electoral Act. It was confined to six "reserved provisions", as are set out in s 189(1):

> **189 Restriction on amendment or repeal of certain provisions**
>
> (1) This section applies to the following provisions (hereinafter referred to as reserved provisions), namely:
>
> (a) Section 17(1), of the Constitution Act 1986, relating to the term of Parliament:
>
> (b) Section 15 of this Act, relating to the Representation Commission:
>
> (c) Section 16 of this Act, and the definition of the term "General electoral population" in subsection (1) of section 2, relating to the division of New Zealand into General electoral districts after each census:
>
> (d) Section 17 of this Act, relating to the allowance for the adjustment of the quota:
>
> (e) Section 39 of this Act, and the definition of the term "adult" in subsection (1) of section 2 of this Act, and paragraph (e) of section 99, so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:
>
> (f) Section 106 of this Act, relating to the method of voting.
>
> (2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal—

[31] Electoral Act 1956, s 42(1)(b).

(a) Is passed by a majority of 75 percent of all the members of the House of Representatives; or

(b) Has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts:

Provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

(3) Repealed.

[64] Of relevance to this litigation is that s 189(1)(e) provides for the minimum age of persons qualified to be registered as electors or to vote as a reserve provision. Section 74 of the Electoral Act 1993 re-enacted s 39 of the 1956 Act, and s 268 of the 1993 Act re-enacted s 189 of the 1956 Act.

[65] The 1956 Act was passed with bipartisan support. It was promoted by the National Party, then in government, via the Attorney-General, Sir John Marshall, and considered in the debate by the former and soon to be reappointed Attorney-General, Mr Rex Mason.

[66] Legislative history shows that the then dominant parties, National and Labour, had different policies as to the eligibility of prisoners to vote. The National Party was against it. The Labour Party allowed prisoners serving short sentences to vote. So the 1956 Act originally disqualified from registration all persons detained pursuant to convictions in any penal institution.[32] But then, in 1975, this was repealed and for two years some convicted prisoners were enfranchised.[33] The government then changed again, National coming back into power and the Electoral Amendment Act 1977 reinstated the disqualifications of all persons detained pursuant to convictions.[34]

[67] In the course of debates concerning amendments to aspects of s 39 relating to residency in the House, there was some discussion as to the extent to which provisions of the statute were preserved from change unless there was a 75 per cent

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32 Above.
33 Electoral Amendment Act 1975, s 18(2).
34 Electoral Amendment Act 1977, s 5.

vote. I will return to the legitimacy of relying on that material later in the judgment. I will do this when I examine more closely the competing interpretations in the hearing of this case of s 268(1)(e) of the 1993 Act.

[68] The present restriction from registering and voting of all persons in prison dates, as I have already noted, from 2010. When the amendment was introduced into the House, it was accompanied by a report from the Attorney-General pursuant to s 7 of the NZBORA which concluded:

> That the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 of the Bill of Rights Act and that it cannot be justified under s 5 of that Act.

The purpose of this litigation

[69] What is the purpose of this litigation: having succeeded before Heath J and obtained the declaration that the 2010 amendment was inconsistent with NZBORA? The goal of the plaintiffs is to get the provisions preventing them from voting held unconstitutional and struck down. This is to be achieved by obtaining a finding by this Court that the Disqualification of Sentenced Prisoners Bill, now the 2010 Act, needed a 75 per cent vote to be enacted because it amended part of s 74 of the Electoral Act 1993, the whole of s 74 being a "reserved provision" under s 268.

The validity of the 2010 Amendment – did it require a 75 per cent majority?[35]

[70] There are two competing interpretations of s 268(1)(e) of the Electoral Act 1993. The Crown's interpretation is relatively easy to grasp. The applicants' interpretation is not. It does not follow that because the applicants' interpretation is initially difficult to comprehend or unattractive that it is wrong.

Is this a New Zealand Bill of Rights issue?

[71] Before going into further analysis of the competing interpretations, it is necessary to decide whether s 6 of the NZBORA applies. Section 6 provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**

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[35] See [2] above.

> 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.

[72] Mr Taylor is arguing that the dispute as to whether the whole of s 74 is a reserve provision requiring a 75 per cent vote or only part as to 18 years, is a provision which bears directly upon preservation of the right to vote in s 12 of the NZBORA.

[73] I am satisfied that the phrasing "whenever an enactment can be given a meaning" is broad enough to include an enactment which indirectly gives a meaning which protects indeed, in the case of a 75 per cent vote enhances, the protection of a right such as s 12. I agree therefore that it is a NZBORA issue.

[74] It follows, s 6 of NZBORA has to be applied to the analysis.

[75] Section 5(1) of the Interpretation Act also applies.

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[76] McGrath J expressed the opinion in *R v Hansen*:[36]

> [252] Section 6 accordingly adds to, but does not displace, the primacy of s 5 of the Interpretation Act, which directs the courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the court taking up a meaning that is in conflict with s 5. That would be contrary to s 4.281 Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation. To qualify as a meaning that can be given under s 6 what emerges must always be viable, in the sense of being a reasonably available meaning on that orthodox approach to interpretation. When a reasonably available meaning consistent with protected rights and freedoms emerges the courts must prefer it to any inconsistent meaning.
>
> [253] While the courts' power to read down another provision so that it accords with the Bill of Rights, or to fill identified gaps in a statute, is accordingly limited by its function of interpretation, a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights consistent interpretation, that none could be found, and that it has been necessary for

[36] *R v Hansen* [2007] 3 NZLR 1 at [252]-[253].

> the court to revert to s 4 of the Bill of Rights Act and uphold the ordinary meaning of the other statute. Normally that will be sufficiently apparent from the court's statement of its reasoning.

[77] I find this dicta more apposite to the problem of this case than Tipping J's six steps set out in [92] of his judgment in *Hansen.* I will not burden this judgment by developing the point, except to say that it is important to keep in mind that in *Hansen* the starting point was an obvious ambiguity in the phrase "until the contrary was proved", (by whom?), which led to shading in Tipping J's steps which contemplated it may be possible for the Court to find more than one available meaning.

[78] I think for this case the safest course is to recognise that s 6 of NZBORA and s 5(1) of the Interpretation Act are both in play. NZBORA is not a superior statute. Section 4 ensures that it is not. For, under our constitutional arrangements, there are no superior statutes. Each parliament is sovereign.

Hansen reasoning

[79] In this dispute counsel contend for two competing interpretations of s 268(1)(e).[37] One is that the whole of s 74 is a reserved provision, the other is only that the meaning of the word "adult" in s 74(1) is a reserved provision. Reserved provisions require a 75 per cent majority before they can be changed. So, step one is to ascertain Parliament's intended meaning in the context of a dispute as to two meanings.

[80] In this case, there is a preliminary issue as to whether or not there is more than one available meaning of s 268(1)(e).[38]

[81] The applicant's interpretation is that when Parliament began subpara (e) with the phrase "Section 74 of this Act", it meant the whole of s 74 and when it referred to the definition of the term "adult" in s 3(1) of this Act and s 60(f) of this Act, it meant only those parts of s 3 and s 60 which prescribed 18 years as the minimum age.

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[37] See [11] above.
[38] See [13] above.

[82] The Crown's submission is that s 74 was a reserved provision only to the extent it referred to "adult", meaning a person 18 years or over.

[83] To appreciate both interpretations, it is necessary for the reader to study carefully the content of s 268. Section 268(1) and (2) are set out in [11] above. It is sufficient to restate s 268(1)(e) here.

> **268 Restriction on amendment or repeal of certain provisions**
>
> (1) This section applies to the following provisions (hereinafter referred to as reserved provisions), namely,—
>
> (e) Section 74 of this Act, and the definition of the term "adult" in section 3(1) of this Act, and section 60(f) of this Act, so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

[84] Section 74 is set out above in [13].

[85] Section 3(1) provides:

> **3 Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> adult—
>
> (a) Means a person of or over the age of 18 years; but
>
> (b) Where a writ has been issued for an election, includes, on or after the Monday immediately before polling day, a person under the age of 18 years if that person's 18th birthday falls in the period beginning on that Monday and ending on polling day:
>
> (Section 3(1) then goes on to define 63 other terms.)

[86] Section 60 provides:

> **60 Who may vote**
>
> Subject to the provisions of this Act, the following persons, and no others, shall be qualified to vote at any election in any district, namely,—
>
> (a) Any person whose name lawfully appears on the main roll or any supplementary roll for the district and who is qualified to be registered as an elector of the district:]
>
> (b) Any person—

(i) Who is qualified to be registered as an elector of the district; and

(ii) Who is registered as an elector of the district as a result of having applied for registration as an elector of the district before polling day:

(c) Any person who is qualified to be registered as an elector of the district, and was at the time of the last preceding election duly registered as an elector of the district or, where a change of boundaries has intervened, of some other district in which his or her then place of residence within the first-mentioned district was then situated:

(d) Any person—

(i) Who is qualified to be registered as an elector of the district; and

(ii) Who is registered as an elector of the district as a result of having applied, since the last preceding election and before polling day, for registration as an elector of the district or, where a change of boundaries has intervened, of some other district in which that person's then place of residence within the first-mentioned district was then situated:

(e) Any person who is qualified to be registered as an elector of the district pursuant to section 74 of this Act and who resides on Campbell Island or Raoul Island or has resided on either of those Islands at any time in the one month before polling day:

(f) Any member of the [Defence Force] who is outside New Zealand, if he or she is or will be of or over the age of 18 years on polling day, and his or her place of residence immediately before he or she last left New Zealand is within the district.

The applicants' interpretation of s 268(1)(e)

[87] The applicants' argument is that the qualifier in s 268(e) "so far as those provisions prescribe 18 years as the minimum age" etc qualify s 3(1) and s 60(f), as both of those sections contain definitions, in s 3(1) and other topics in s 60, unrelated to the prescription of 18 years. The plaintiffs argue that the correct reading of s 268(1)(e) is to reserve the whole of s 74, and those parts of s 3(1) and s 60(f) that prescribe 18 years as the minimum age.

[88] The applicants argue that the phrase "those provisions", referring to ss 3(1) and 60(f), are compendious provisions covering other topics which are irrelevant for this purpose and the proviso beginning "insofar as" reinforces that it is only those

parts addressing the definition of the term "adult" in s 3(1) and s 60(f). However, that the reference to s 74 in s 268(1)(e) is a reference to the whole of s 74.

[89] Commas were originally a sign of pauses that would naturally occur when a text was read out. Effectively, the applicants' argument would have a reader read paragraph (e) with a longer pause after the first clause the reference to s 74, and smaller pauses after the reference to ss 3(1), and 60(f). Another way of putting it was that you could put a semicolon after s 74, where it appears in s 268(1)(e), so that "those provisions" only apply to s (3)(1) and s 60(f).

[90] Implicit in the applicants' argument is that the whole of s 74 addresses core criteria of democracy, defining the qualification of electors. Whereas by contrast, there are 65 definitions in s 3(1), 63 of which utterly unimportant to the critical right to vote, such as the definition of public money or public place. And in the case of s 60, it is just a machinery provision dealing with the fact that persons can move electorates, or be affected by something like a change of boundary, only s 60(f) refers to the age of voting

[91] Mr Taylor's argument is that if one reads s 268(1)(e) with the assumption of an intent that the whole of s 74 is to be entrenched, then the need to select only relevant parts of ss 3 and 60 makes sense.

[92] In support of that argument, Mr Taylor and the other applicants rely on the fact that the Honourable RD Muldoon was at one point in possession of a legal opinion, to the same effect as the applicants argument: that the whole of s 74 was entrenched as a reserve provision. The opinion was raised in the House. The Court was taken to passages in Hansard of the exchanges between the Attorney-General, Dr Martin Finlay and the Honourable RD Muldoon.[39]

[93] The exchanges occurred during the Committee stage after the first and second readings of the 1975 Act where the then Minister of Justice noted a proposal to amend s 39 of the 1956 Act (s 74's forerunner). The Minister of Justice argued in the

[39] Normally I would not accept this material but, given the constitutional significance of this case and the reputation of the Honourable RD Muldoon, and status as leader of the opposition, I let it in.

House that the only reserve provision was the voting age. The then Attorney-General was Dr Martin Finlay. The Honourable RD Muldoon queried whether s 189(1)(e) (the predecessor to s 268) reserved all of s 39 or simply the age of qualification. Speeches were made by the Minister of Justice and the former Attorney-General, Sir John Marshall. A Crown Law Office opinion was obtained. That opinion supported the view the proposed clauses did not require a carriage by a 75 per cent majority. The third reading of the 1975 Act was passed by 42 votes to 28, less than 75 per cent of all Members of the House, indicating that all Members of the House had agreed that a simple majority was sufficient.

[94] Mr Francois' argument for this interpretation of s 268(1)(e) is supported, indeed driven, by constitutional arguments. He brings s 6 of NZBORA here on the first step of ascertaining meaning.

[95] Mr Francois argues that the 2010 amendment changes or amends the qualification of voters by denying citizens in prison the right to vote. That this power must be limited because Parliament could as easily be disqualifying large groups of people from voting based on a particular suburb, province or region where they live. More particularly, as an interpretation argument, he argues that s 74 is not simply about the age requirement but is about important matters of eligibility of voters, including the place of residence. That led to a submission:

> The whole of s 74 of the Act is entrenched because there would be no purpose in listing 74 at all in s 268(1)(e). The term "adult" is defined in the interpretation section (s 3) so it would be redundant to mention s 74.

[96] Mr Francois also submitted that Professor Joseph is of the same view, that the whole of s 74 is entrenched, citing this paragraph from his fourth edition :[40]

> Section 268 entrenches six key machinery sections. These are: s 28, which establishes the Representation Commission for dividing New Zealand into general electoral districts following each census; s 35, which prescribes the method by which the Commission draws the general electoral districts; s 36, which sets the margin of tolerance in the population quota for each general electorate; s 74, which establishes the qualification of electors (including the voting age and definition of adult in ss 3(1) and 60(f)); s 168, which prescribes the method of voting; and s 17(1) of the Constitution Act 1986, which fixes the term of Parliament at three years. If a government wished to

[40] Joseph, above n 6, at [16.7.1].

amend any of those sections, it would need to submit to either of the special legislative procedures.

This Court's analysis and resolution of the interpretation issue

[97] The first question is what Parliament intended when it enacted s 268(1)(e). I start by reading the whole of s 268, guided by the directions in s 6 of NZBORA, and s 5(1) of the Interpretation Act.

[98] There are six sets of reserve provisions in subs (1) addressing:

> (a) Section 17(1) of the Constitution Act 1986, relating to the term of Parliament:
>
> (b) Section 28 of this Act, relating to the Representation Commission:
>
> (c) Section 35 of this Act, and the definition of the term "General electoral population" in section 3(1) of this Act, relating to the division of New Zealand into electoral districts after each census:
>
> (d) Section 36 of this Act, relating to the allowance for the adjustment of the quota:
>
> (e) Section 74 of this Act, and the definition of the term "adult" in section 3(1) of this Act, and section 60(f) of this Act, so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:
>
> (f) Section 168 of this Act, relating to the method of voting.

[99] It is useful to note the subject matter of s 268(1) in order to get a register of the section's constitutional significance. The significance of s 268(1)(a) - (e) is as follows:

(a) The term of Parliament is obviously a critical political consideration in a democracy, because it determines the duration an elected government holds power.

(b) The Representation Commissioners have the very important task of providing for the "periodic readjustment of representation of the

people of New Zealand in the House of Representatives".[41] The selection of who are to be the Commissioners is very important.

(c) The adjustment of electoral boundaries can have a critical effect on the outcome of an election and this is the reason for the next reference to s 35 which defines and guides the duty of the Commission to divide New Zealand into electoral districts from time to time.

(d) Section 36 is on the same topic.

(e) "*Subject to the provisions of this Act*", s 74 has the critical function of defining who can vote. Essentially, they are adults, who are New Zealand citizens, or a permanent resident of New Zealand, and have qualifying periods of continual residence in New Zealand, and qualifying as to which electorate to vote in. Section 74 incorporates a policy that you must be residing in New Zealand to vote unless other provisions of the Act enable you to vote from overseas. Section 3(1) sets the minimum age at 18 years. Section 60(f) addresses military voters abroad aged 18 or older

[100] If the only concern of s 268(1)(e) was to protect the definition of "adult" as 18 years, that definition could have been drafted as a reserve provision of itself. I agree in that regard with Mr Francois' submission in [95] above.

[101] In the argument before me, counsel for the Attorney-General argued that the drafting of subpara (e) was, to a degree, inevitable. I do not agree. The English language is very flexible. I have never read a common law judge resolving a problem of interpretation by finding that there was only one way the intent could be expressed.

[102] The function of the Judge is to take the statutory provision as enacted by Parliament and then to ascertain its meaning, reading it in its context and in the light

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[41] Electoral Act 1993, s 28(1).

of its purpose. The latter is a mandatory requirement of s 5 of the Interpretation Act, as McGrath J explained in *Hansen*.[42]

[103] Turning to McGrath J's dictum in *Hansen* in [252], it is important to keep in mind that inevitably all text is read in context. We do it naturally all the time, and in the light of its purpose. It is linguistic nonsense to say that the meaning of a passage can be reliably determined by simply reading the text on the page, isolated from the surrounding text and disregarding context and purpose. This is not to say that it is never attempted. Usually context and purpose are deliberately ignored when the goal is to avoid the intended application of a statute.

[104] What is abundantly clear from a reading of s 268 is that Parliament did intend the minimum age 18 for voting to be altered only by a 75 per cent majority. The reasons for this are obvious. If a lower age is adopted, questions arise as to whether or not the young persons are sufficiently mature. If an older age is adopted, questions immediately arise as to why 18 year olds should be deprived of a vote. For we know, by the age of 18, most persons have left school and are either in employment and paying taxes, or are well on the way to obtaining qualifications to be valuable members of the community, and most can be presumed to be likely taking an interest in politics.

[105] The other parts of s 74 are less important aspects of democracy. For example, the question of whether a person who is not a New Zealand citizen should be able to vote is clearly a matter upon which there is room for amendment without significantly affecting democracy. Likewise, it is a phenomena that people move around the country at any one time and that there will always be a segment of the population who have been moving between electoral districts in the immediate vicinity of the vote. There has to be a judgment as to which electorate receives their votes.

[106] Those contextual factors influence one's reading of s 268. One cannot seriously attempt to interpret s 268 without reading the sections referred to in s 268: s 74, the definition s 3, and s 60. But, on the other hand, once these sections are

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[42] See above [76]

read, then one starts naturally to be forming a judgment as to what is likely to be the intent of singling out the age of 18 years in subpara (e).

[107] In my view, the critical word in subpara (e) is "those". That is a plural. It is referring to more than one provision. There are three provisions referred to in subs (1)(e). Why should "those" refer to two of the three and not all three? How can you determine which lesser number they refer to if they do not refer to the whole? In my view, the natural meaning of "those" is that it refers to all the provisions listed in subpara (e). That is also the view of Ellis J.[43] I came to my view without knowing her reasoning. Hence, I find her view reassuring. That is the natural meaning of subpara (e). That "those" refers to s 74, s 3(1) and s 60(f).

[108] While I favour the interpretation that s 268(1)(e) and its predecessor, s 189(1)(e) refers only to that part of s 74 (s 39) so far as those sections prescribe 18 years as a minimum age for persons qualified to vote, there is an arguable contrary point of view. That is the relevance of the debate in Parliament that I have referred to over the meaning of the word. And also of relevance is the paragraph cited in Professor Joseph's textbook. Though, in respect of that paragraph, it is not an extended analysis and functions as a summary of the position. I do not know if Professor Joseph has analysed the point in issue in this case. I assume he has not because if he had, he would have discussed the issue, it being significant. In my opinion, s 6 of NZBORA does not justify a forced and fallacious interpretation of the Electoral Act. That would elevate NZBORA to being a statute superior to all other statutes. Rather, it sits alongside all statutes, including the Interpretation Act, particularly s 5.

[109] I remain of the view that the natural and only meaning of the phrase "those provisions" is a reference to the three provisions in the same sentence in the preceding clause of that sentence. I conclude, there is no alternative meaning which "can be given" to s 268(e). The phrase "whenever an enactment can be given a meaning" is not intended by Parliament to be a licence for judges to identify "strained" meanings which meanings would never in ordinary cases to be held to be the meaning of an enactment.

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[43] *Taylor v Attorney-General*, above n 2.

Conclusion

[110] Accordingly, I have come to the conclusion that there is only one meaning of s 268(1)(e) and that is that ss 74, 3(1) and 60(f) are reserve provisions only to the extent that they prescribe 18 years as the minimum age. That the 2010 amending Act is valid as the amendment of the right of prisoners to vote was not amending a reserve provision.

Subsidiary issues

[111] I now turn to the subsidiary issues as to whether or not the section is in conflict with the other pleaded provisions of NZBORA, being ss 9, 12, 19 and 23(5).

[112] The High Court, in the judgment of Heath J, has already declared s 268(1)(e) to be in conflict with s 12 of the NZBORA inasmuch as it reserves the right to vote from any prisoner, however, short her or his sentence.

[113] In respect of s 23(5), the applicants seek a declaration that this section breaches the applicant's right to be treated with humanity and respect with inherent dignity.

[114] In respect of s 9, they seek declarations that the 2010 Act breaches the right of prisoners not to be subject to degrading and disproportionately severe treatment.

[115] The purported application of ss 23(5) and 9 can be dealt with briefly. The NZBORA is a partial implementation into domestic law of the International Covenant on Civil and Political Rights.[44]

[116] The context of the International Covenant is that it follows on from the Universal Declaration of Human Rights entered into after the World War II. The very first sentence of that declaration is:

> Whereas recognition of the inherent dignity and of the equal and unalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

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[44] International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1996, entered into force 23 March 1976).

[117] In my view, when applying any of the rights protected in the NZBORA, it is important to keep in mind they are formulated as rights which the sovereign parties to the International Covenant on Civil and Political Rights can all agree on. The sovereign countries have signed because they consider there is general acceptance within their societies of the legitimacy of these rights. It follows that they are rights expressed which moderate political parties to the right and to the left can agree.

[118] It is important that these rights be interpreted and applied in a way which maintains the common understanding of a particular right and its self-evident justification to persons across the political spectrum, but allows room for reasonable differences of opinion within the range of political views found in a free and democratic society.[45]

[119] New Zealand's own history shows a consistent pattern where the centre right party favours no voting by prisoners and the centre left party favours voting by prisoners who are under a short term of imprisonment. The certificate of the Attorney-General and the declaration of this Court by Heath J have, in that sense, invited the centre right parties to adjust to a different moral position than previously held. In that sense, the enactment of NZBORA has made a difference. The inconsistency with s 12 is the "blanket" exclusion of the right to vote.[46] It is not of exclusion per se. It allows for removal of the right to vote for prisoners serving long sentences.

[120] The loss of the right to vote cannot be characterised as degrading and disproportionate and severe treatment as those terms are used in s 9. Nor do I think it is arguable that the loss of the right to vote breaches the individual prisoner's right to be treated with humanity and respect and with inherent dignity. Rather, in my view, the only live argument is whether or not the loss of the right to vote to all Maori prisoners is in breach of their right to be free from discrimination under s 19 of the Act.

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45 New Zealand Bill of Rights Act 1990, s 4.

46 See [6] above.

[121] The argument presented to this Court that the 2010 Act discriminates against Maori needs to be approached carefully. Mr Francois said the disenfranchisement of Maori prisoners materially prejudices Maori voting rights under the Electoral Act in four ways:

(a) By decreasing the number of Maori on the Maori Electoral Roll (MER).

(b) Reducing the "ratio" of Maori on the MER to Maori on the General Electoral Roll.

(c) Reducing the total Maori electoral population.

(d) Reducing the number of Maori electorates.

[122] The fourth point (d) was eliminated by a submission from the Crown. The number of Maori electoral districts is reckoned after each census by reference to the "Maori electoral population" (MEP).[47] The MEP includes persons who claim Maori descent at the census, but who are not registered in any electoral district.[48] It therefore includes Maori prisoners. As such, the number of Maori electoral districts is unaffected by the disqualification of Maori prisoners. It is not suppressed by reason of any over-representation of Maori in the criminal justice system.

[123] In addition to the three points, (a), (b) and (c) set out above, Mr Francois also made the point that the number of Maori prisoners effectively excluded from voting is not confined to those currently in prison. Rather:

> The number increases cumulatively each year as prisoners are released because the legislation continues to punish them for their criminal offending. In order to participate in the electoral process again, every prisoner must re-register on the Electoral Roll. Most Maori prisoners have limited literacy skills or none at all, which makes re-registering confusing and arduous. About nine thousand prisoners are released every year, and about 90 per cent of the prison population would be released in two years.

Consequently, he submitted that the number of deregistered Maori voters continues

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47 Electoral Act 1993, s 45(3).

48 Section 3.

to greatly exceed the number who re-register. He went on to argue that disenfranchisement of Maori prisoners had an effect on the outcome of the last election in the seat of Te Tokerau, the margin for the successful Labour Party candidate being 1,119 votes over the Internet-Mana candidate. That was on election night. That margin was reduced to 739 votes when the Electoral Commission publicly announced the official result. The Internet-Mana party manifesto contained numerous criminal justice and prison reform policies that appealed to prisoners, and it is for this reason that Mr Francois submits the disqualification of Maori prisoners from voting could have swung the election in Te Tokerau.

[124] It is important to keep in mind that the 2010 Act also disenfranchises all prisoners in New Zealand, including the Pakeha and Asian prisoners. Why is it discriminatory and in breach of s 19 for Maori prisoners, but not for these other races and ethnicities?

[125] The argument seems to be captured in three propositions:

(a) Maori are over-represented in prison.

(b) Maori have a special position in New Zealand society by reason of the Treaty of Waitangi so that a removal of voting rights in respect of them constitutes a breach of art 3 of the Treaty.

(c) The 2010 Act "increases the vulnerability of an already vulnerable Treaty partner in this country's political landscape".

[126] In support of the discrimination argument, the applicants rely on the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous People.

[127] I am of the view the neither the Treaty of Waitangi nor the United Nations Declaration are of assistance in the analysis of this argument as to discrimination. Rather, this Court should be guided principally by the leading decision of the Court of Appeal in *Ministry of Health v Atkinson.*[49]

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

[128] Counsel for the applicants are not suggesting in any way that the policy adopted by Parliament of refusing the vote to prisoners was intended to be discriminatory against Maori. The argument is that it has the indirect effect of being discriminatory.

[129] Section 19 of NZBORA 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.

[130] Part 2 of the Human Rights Act is headed:

> **Unlawful discrimination**
>
> *Application of part to persons and bodies referred to in section 3*
>
> This includes Parliament for s 21A(2)(a) provides:
>
> **21A Application of this Part limited if section 3 of New Zealand Bill of Rights Act 1990 applies**
>
> ...
>
> (2) The persons and bodies referred to in subsection (1) are the ones referred to in section 3 of the New Zealand Bill of Rights Act 1990, namely—
>
> (a) the legislative, executive, and judicial branches of the Government of New Zealand

[131] Section 21B(2) provides:

> **21B Relationship between this Part and other law**
>
> ...
>
> (2) Nothing in this Part affects the New Zealand Bill of Rights Act 1990.

[132] Section 21(1)(e) and (f) provides:

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the prohibited grounds of discrimination are—
>
> …
>
> (e) Colour:
>
> (f) Race

[133] Under the Human Rights Act, discrimination includes "indirect discrimination". Section 65 provides:

> **65 Indirect discrimination**
>
> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part of this Act other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

[134] Andrew Butler and Petra Butler in their textbook[50] explain the difference between "direct" and "indirect" discrimination:

> (a) Direct discrimination occurs when a law, rule or practice on its face discriminates on a prohibited ground. In other words, it uses the prohibited ground as the very basis upon which to differentiate between two groups or two people. An example is prohibiting black people from voting.
>
> (b) Indirect discrimination occurs when a law, rule or practice is neutral on its face but has a disproportionate impact on a group because of a particular characteristic of that group. A historical example is the minimum literacy requirement for enrolling to vote in the United States which excluded many black people from voting.

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[50] Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: a commentary* (Lexis Nexis, Wellington, 2015) at [17.12.1].

[135] The argument here then is that the removal of the right to vote from all prisoners has the consequences (unintended) of indirect discrimination. This is because of the political impact of the loss of the right to vote on the large number of prisoners who are Maori.

The Court of Appeal's understanding of discrimination

[136] The Court of Appeal in Ministry of *Health v Atkinson* set out a two step test for determining whether government conduct is discriminatory: [51]

(a) The first step 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.

(b) The second step is to ask whether the difference in treatment, viewed in context, is discriminatory.

[137] The essence of discrimination lies in treating persons in comparable circumstances differently. The Court in *Atkinson* agreed that any analysis under s 19 must require the Court to first look to the prohibited grounds of discrimination contained in the HRA and ask whether there is differential treatment between persons in comparable situations based on one of those grounds. This step requires the Court to make a comparison, by finding a comparator: that is another person or group who is in similar circumstances to the plaintiff but is being treated differently.

[138] The second step of the test requires the Court to work out whether the different treatment is in fact, discriminatory. The Court defined "discrimination" as follows:[52]

> [W]e consider that differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes *a material disadvantage* on the person or group differentiated against.
>
> (Emphasis added.)

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51 *Ministry of Health v* Atkinson, above n 49 at [55].
52 At [109] and [135].

[139] It is necessary to select a comparator of a group of persons who are in an analogous or comparable situation. The Court of Appeal in *Child Poverty Action Group*[53] indicated that the reason for the comparator exercise is:

> …because legislation and policy decisions all involve to a greater or lesser extent differential treatment or the making of distinctions of some sort. What the Court is trying to do by reference to the comparator is to sort out those distinctions which are made on the basis of a prohibited ground. The Court is looking at the reality of the situation not, as Iacobucci J said in *Law v Canada (Minister for Employment and Immigration)*, "in the abstract". ... The comparator exercise, as has been said on earlier occasions, is simply a tool in that analysis. ...

[140] Selection of the comparator in cases of indirect discrimination is more complex than that in direct discrimination cases. Because equal treatment will amount to indirect discrimination where that treatment has a material disproportionate exclusionary impact on a group sharing a protected characteristic, it follows that the focus is different. Indirect discrimination is concerned with differential impact, rather than differential treatment. The choice of comparator must reflect this focus and be group-based.

[141] Mr Francois's submissions do not expressly go down the path of choosing a comparator group. Rather, it is implicit in his argument that the Court is to compare the disqualification of Maori prisoners from voting, with the general right of citizens to vote. And, as it happens, because of the large number of Maori in prison, the loss of the right to vote has measurable consequences on the outcome of elections – in the last election, on the Te Tokerau electorate.

[142] In reply, the Attorney-General first raised a procedural objection, arguing that such claims of discrimination must first be raised with the Human Rights Commission and may be subsequently litigated in the Human Rights Review Tribunal. The Crown relied on the Court of Appeal decision in *Winther v Housing Corporation of New Zealand.*[54] This was a rather surprising submission. That was a case where the Court of Appeal was examining the Tenancy Tribunal's jurisdiction, not the High Court's. The argument of counsel in *Winther* did not appear to suggest that the Human Rights Act ousted the High Court's jurisdiction to determine whether

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53 *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51].
54 *Winther v Housing Corporation of New Zealand* [2010] NZCA 601, [2011] NZLR 825.

there had been a breach of s 19 of NZBORA, only the Tenancy Tribunal's jurisdiction to consider whether there had been a breach of the Human Rights Act[55]

[143] The Attorney-General submits that the natural choice of comparator is a group treated the same way as the claimant group, but without the protected characteristic: that is, the other disqualified prisoners. This is called a "mirror" comparator. He argues that the applicants have not made out a case for casting a wider net.

[144] The Attorney-General further argues that departing from a "mirror comparator" in favour of a comparator group of non-Maori people generally, would require the character of the claimant group (race, ethnic or national origins) to be causative of imprisonment. He submits that while there is a stronger correlation between Maori race/ethnicity and imprisonment than there is between non-Maori race/ethnicity and imprisonment, imprisonment is not a necessary extension of Maori ethnicity. This is because only a small number of Maori people are imprisoned for serious offending. Put another way, banning sentenced prisoners from voting prevents proportionately more Maori than non-Maori from registration and voting, but people do not commit serious crimes resulting in imprisonment because they are Maori. Any correlation is not akin to the traditional example of comparator choice in disability discrimination claims, whereby banning dogs from a location necessarily also bans visually impaired people who also rely on dogs. He concludes that, as imprisonment is not a necessary consequence of Maori ethnicity, it would not be appropriate to compare Maori prisoners to non-Maori generally.

[145] I agree with the Attorney-General's submission that the natural and appropriate comparison on the loss of voting is between Maori prisoners and non-Maori prisoners. I do not agree, however, that it follows automatically that there could be no discrimination applicable to the Maori prisoners by reason of loss of voting. This is because the vote by a Maori prisoner can be appreciated as more effective because of the right Maori have to choose between two electorates as to how to vote. Pre-election, the pollsters can and do identify marginal seats. One of

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55 At [12]-[16].

these two may be marginal, giving the Maori voter more electoral power by choosing to register in the marginal electorate.

[146] However, I do not think that this loss of the discretion as to where to vote, on top of the loss of the vote, is a material disadvantage, as understood in the NZBORA, the meaning of which is derived from the International Covenant on Civil and Political Rights. I refer to my reasoning in [116] – [119], and apply it here.

[147] It is a happenstance that Maori are over-represented in the prisons. But that happenstance does not generate a rights obligation sounding in the NZBORA of Parliament to compensate. Over representation has to do with poverty and dysfunctional upbringings, two conditions which are common to most prisoners of every race and ethnicity.

[148] I do not read the authorities as requiring the selection of only one comparator. One of the key requirements of analysis is not to allow definitions of comparators to drive outcomes. They are an aid to analysis. They must not dictate the analysis. Here, I think that there are two comparators available, both of which shed light on the discrimination point. One is to compare Maori prisoners with other prisoners, which I have discussed. The other is to compare prisoners generally with non-prisoners.

[149] Taking this second comparator, it needs to be recalled that the breach of s 5 of the Act is the blanket elimination of voting. So there is a group of prisoners, both Maori and non-Maori, serving short term sentences who are disadvantaged from other persons in the electorate who are not prisoners. The disadvantage is that these prisoners, who ought to be able to vote, cannot.

[150] The next question is whether or not those Maori prisoners, who are so disadvantaged, are materially disadvantaged with non-Maori prisoners who are also not allowed to vote. The two available answers are “no” or “maybe”. The “no” answer is, they both lose the right to vote. The “maybe” is that, for a Maori prisoner to lose the right to vote, there is a greater penalty than a non-Maori prisoner. This is because Maori prisoners have a choice of two electorates, so they lose more.

[151] At this stage, I think it is permissible to go on to look at the materiality of discrimination. For this is the ultimate question. Generally, the Maori electorate has an electoral or civic advantage over the non-Maori electorate. They are not treated as equal. Equal would be having one available electorate to vote in. Maori voters have a choice of electorate. In that sense, it can be said the loss of the vote to a Maori person is more significant than the loss of the vote to a non-Maori person. But, in my judgment, none of this is material discrimination of the kind intended by the International Covenant on Civil Rights, the same intent being understood to be reflected in the NZBORA. For it is not even indirectly a racist distinction or any indirect degrading of Maori prisoners.

[152] I conclude that, to the extent there is disadvantage and so discrimination for Maori, it is not motivated in any way by any governmental or legislative hostility to the race or ethnicity of Maori. There is no indirect discrimination, in breach of s 19 of NZBORA.

Treaty of Waitangi

[153] The statement of claim pleads that the refusal to change s 80(1)(d) of the Electoral Act violates the Crown's obligation to protect Maori citizen rights and guarantee tino rangatiratanga or self determination. I do not think this is arguable. Fundamentally, the Treaty of Waitangi is not part of the law in the sense that any breach of which is justiciable by the courts, without the authority to do so conferred by Parliament. This Court has no jurisdiction to address the issue as to what the correct interpretation of the Treaty as to the issue of sovereignty. That is part of the legitimacy narrative. It is essentially a political issue, to be worked out over time by Parliament.

United Nations Declaration on the Rights of Indigenous Peoples

[154] The claim argues that the 2010 Amendment Act fails to take into account the United Nations Declaration on the Rights of Indigenous Peoples, recognising that discrimination on the basis of indigeneity includes any kind of discrimination. The argument is that the 2010 Act removing the rights to vote is discriminatory because of the over-population of Maori prisoners.

[155] Again,[56] this is not a matter for the courts. This Court has no power to tell Parliament what laws it should enact or not. Likewise, there is no power to judicially review Parliament. The fact that New Zealand endorsed the United Nations Declaration of the Rights of Indigenous Peoples does not make that declaration part of the law of New Zealand. It is not a function, again, of the Courts to find the Executive government or the Legislative branch to be in breach of such a treaty, unless Parliament has enacted that treaty into law through a statute.

Result

[156] The applicants' claims are all dismissed.

[157] Given the status of the applicants as prisoners, costs are reserved.

Solicitors: Warren Simpson, Papakura
Crown Law, Wellington

[56] At [19]-[25].