IN THE COURT OF APPEAL OF NEW ZEALAND

CA145/2016
[2017] NZCA 351

BETWEEN	HINEMANU NGARONOA AND SANDRA WILDE Appellants
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND First Respondent
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent
	THE ELECTORAL COMMISSION Third Respondent

CA287/2016

BETWEEN	ARTHUR WILLIAM TAYLOR Appellant
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND First Respondent
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent
	THE ELECTORAL COMMISSION Third Respondent

Hearing:	10-11 May 2017
Court:	Winkelmann, Asher and Brown JJ
Counsel:	R K Francois for Appellants in CA145/2016 GJX McCoy QC and D A Ewen for Appellant in CA287/2016 P T Rishworth QC, D J Perkins and G M Taylor for First Respondent No appearance for Second and Third Respondents

Judgment: 17 August 2017 at 12 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B There is no order as to costs.

REASONS OF THE COURT

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Introduction

[1] The ability for a person subject to a sentence of imprisonment to participate in the electoral process has long been a contentious and somewhat unsettled issue.[1] When the Electoral Act 1993 (the 1993 Act) was first enacted, the disqualification contained in s 80(1)(d) prohibited from voting those prisoners who had been sentenced to life imprisonment, preventive detention or imprisonment for a term of three years or more. However, in 2010 the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the 2010 Act) was enacted, amending s 80(1)(d) to extend the prohibition on voting to all prisoners by disqualifying any person detained in a prison pursuant to a sentence of imprisonment from registering as an elector.

[2] The imposition of this blanket exclusion by the 2010 Act has been held to be inconsistent with the right to vote affirmed and protected by s 12(a) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights), an inconsistency which could not be demonstrably justified under s 5.[2] A declaration was made in the High Court to that effect.[3] An appeal by the Attorney-General to this Court challenging the jurisdiction of the higher courts to make such a declaration was dismissed.[4]

[3] In this proceeding, the appellants, Mss Ngaronoa and Wilde and Mr Taylor, who are all prisoners in the custody of the Department of Corrections, sought declarations that the 2010 Act was inconsistent with other rights affirmed by the Bill of Rights, namely:[5]

(i) the right to freedom from discrimination on the ground of race, affirmed in s 19;

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1 See discussion in Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at [4.3].

2 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

3 At [79]. The terms of the order were: "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."

4 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.

5 Along with the alleged breaches of the New Zealand Bill of Rights Act 1990, the appellants also alleged that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 was inconsistent with the right to freedom from discrimination on the basis of their political opinions and beliefs under s 21(j) of the Human Rights Act 1993.

(ii) the right not to be subjected to degrading and disproportionally severe treatment, affirmed in s 9; and

(iii) the right of everyone deprived of liberty to be treated with humanity and with respect for their inherent dignity, affirmed in s 23(5).

[4] They also challenged the legitimacy of the 2010 Act, contending that, in consequence of s 268(1)(e) of the 1993 Act, the 2010 Act was required to be passed by a majority of 75 per cent of the House of Representatives (we refer to this argument as "the entrenchment issue").

[5] Two separate notices of appeal against Fogarty J's judgment were filed. Mr Taylor's appeal in CA287/2016 is confined to the entrenchment issue. Mss Ngaronoa and Wilde, who are Māori, appeal in CA145/2016 on all issues.

The scheme of the 1993 Act

[6] In order to understand the issues arising on appeal, some background to the relevant electoral law is required. The ability to vote in New Zealand is regulated by the 1993 Act. Although the "right to vote" is affirmed in s 12(a) of the Bill of Rights Act, the same language is not adopted by the 1993 Act. Rather, the 1993 Act sets out the qualifications for registering as an elector. It is registration as an elector that is the gateway to both voting and standing as a candidate for election as a Member of Parliament.

[7] With some exceptions, every adult New Zealand citizen or permanent resident is able to be registered as an elector of an electoral district. The qualification is found in s 74, which 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 1 year; and

(c) that electoral district—

(i) is the last in which that person has continuously for a period equalling or exceeding 1 month; or

(ii) where that person has never resided continuously in any one electoral district for a period equally or exceeding 1 month, is the electoral district in which the person resides or has last resided.

…

[8] An "adult" is a person of or over the age of 18 years.[6] A person who is qualified to register may only register as an elector of one electoral district.[7] For a person who is Māori[8] there is the option of being registered either as an elector of a Māori electoral district or as an elector of a General electoral district.[9] However, this is a choice; a Māori person cannot register as an elector of both.

[9] A person who is qualified to register as an elector of an electoral district must do so.[10] This is by way of an application to the Electoral Commission by completing and signing the appropriate form, including details such as name, date of birth and place of residence.[11] If the Electoral Commission is satisfied an applicant for registration is qualified to be registered, it must enter the name of the applicant on the roll.[12] As a general rule, only a person whose name lawfully appears on the roll and is qualified to be registered as an elector of the district is entitled (although not required) to cast a ballot at an election.[13] Further, only a person registered as an elector is qualified to be a candidate and to be elected as a Member of Parliament, whether for that electoral district or another or by way of inclusion on a party list.[14]

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6 Electoral Act, s 3(1), definition of "adult".
7 Section 75(1).
8 Defined in s 3 of the Electoral Act as "a person of the Maori race of New Zealand; and includes any descendant of such a person".
9 Electoral Act, s 76(1).
10 Section 82(1). It is an offence for a person qualified to register to knowingly and wilfully fail to apply for registration.
11 Section 83.
12 Section 89(1). The "roll" refers to an electoral roll, a main roll or supplementary roll as the case may be: see s 3(1), definition of "roll".
13 Section 60(a). See ss 60(b)–(f) and 61 for persons not coming within that general rule who are also entitled to vote.
14 Section 47.

[10] A person who is disqualified from registering as an elector therefore cannot vote or qualify as a candidate for election as a Member of Parliament. Section 80 of the 1993 Act sets out those that are disqualified for registration as electors. Relevantly for present purposes, it provides:

> **80 Disqualification for registration**
>
> (1) The following persons are disqualified for registration as electors:
>
> …
>
> (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:
>
> …

[11] When a person is disqualified under s 80, their name must be removed from the roll by the Electoral Commission.[15] Thus, while part of the appellants' challenge is premised on the impact on the right to vote under s 12(a) of the Bill of Rights Act, what has actually been withdrawn from the appellants is their ability to register as an elector and have their name on the electoral roll. The practical effect on the appellants, however, is the same.

[12] Some aspects of the electoral system are considered to be of such fundamental importance that they should not be subject to political whim or partisan attitudes. These provisions are said to be "entrenched" or "reserved", in that they may only be repealed or amended by a 75 per cent "super-majority" of all members of the House of Representatives, rather than a simple majority.[16] This restriction applies to both direct repeal or amendment and implied repeal through enacting later inconsistent legislation.[17] The reserved provisions are set out in s 268, which provides:

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15 Section 98(1)(f).

16 Section 268(2). A reserved provision may also be repealed or amended if carried by a majority of the valid votes cast at a poll of the electors of the General and Māori electoral districts (a national referendum).

17 The doctrine of implied repeal provides that if two provisions are inconsistent with one another so that the two cannot stand together, the later enactment will prevail: see *Kutner v Phillips* [1891] 2 QB 267 at 272.

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

[13] It is s 268(1)(e) that is of interest in these appeals. The nub of the appellants' argument on the entrenchment issue is that: first, s 268(1)(e) refers to and thus reserves or entrenches s 74 in its entirety, not simply the adult prerequisite; and, secondly, because s 74 is stated to be subject to other provisions of the 1993 Act, s 268(1)(e) thereby refers to and indirectly entrenches the disqualifications from registration in s 80. It was therefore required to be passed by a 75 per cent super-majority. As the 2010 Act was not enacted by a 75 per cent super-majority, on the appellants' argument the 2010 Act was invalidly enacted and, they contend, is therefore unenforceable.

The High Court judgment

[14] In the judgment under appeal,[18] Fogarty J commenced his analysis by putting to one side several political propositions advanced, along with arguments that misconceived the scope of judicial review of administrative action. He identified

[18] *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 [*High Court judgment*].

two justiciable arguments on the pleadings, namely the entrenchment issue and the allegation of inconsistency with the various provisions of the Bill of Rights.[19]

[15] After setting out Mr Francois's opening statement verbatim,[20] the Judge then briefly traced New Zealand's constitutional history, noting in particular the Declaration of Independence of New Zealand signed in 1835 (the Declaration)[21] and the Treaty of Waitangi signed in 1840 (the Treaty).[22] He then traced the legislative history of the various electoral statutes and the shifting policies on prisoners' ability to vote.[23]

The entrenchment issue

[16] Fogarty J accepted that, in addition to s 5(1) of the Interpretation Act 1999, s 6 of the Bill of Rights applied to the task of interpreting s 268 of the 1993 Act so that an interpretation consistent with the Bill of Rights should be preferred.[24] He was also prepared to entertain the possibility that some Treaty principles could bear on the interpretation task but did not view the Declaration in the same way.[25]

[17] The appellants contended that the correct reading of s 268(1)(e) was that it reserved the whole of s 74, as well as those parts of ss 3(1) and 60(f) that prescribe 18 as the minimum voting age; the Attorney-General's interpretation was that s 74 was only reserved to the extent it referred to the term "adult". The Judge was satisfied that while it was clearly Parliament's intention that only a 75 per cent majority be able to alter the minimum age of 18 for voting, that protection did not extend beyond that age-eligibility criterion. He postulated that the other parts of s 74 were not protected as they were "less important aspects of democracy".[26] The issue, for example, of whether a person who is not a New Zealand citizen should be able to

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19 At [26].
20 At [42].
21 The te reo Māori version of the text being He Whakaputanga o te Rangatiratanga o Nu Tireni.
22 *High Court judgment*, above n 18, at [43]–[58].
23 At [59]–[68].
24 At [71]–[74].
25 At [57]–[58].
26 At [105].

vote is "clearly a matter upon which there is room for amendment without significantly affecting democracy".[27]

[18] Fogarty J regarded as critical in interpreting para (e) the words "those provisions", noting they are plural. Although they could conceivably have referred to only two items, namely ss 3(1) and 60(f) as the appellants contended, the most natural meaning of "those" was that it referred to all three provisions.[28] The application of s 6 of the Bill of Rights could not change that interpretation as it did not license judges to give statutory provisions strained meanings.[29] Consequently, s 74 was only a reserved provision to the extent it related to the minimum age of 18 for voting. As such, the 2010 Act was validly enacted as it did not purport to amend an entrenched provision.

Inconsistency with the Bill of Rights

[19] In turning to the Bill of Rights arguments, Fogarty J noted that the inconsistency with s 12 arose from the "blanket" exclusion of the right to vote, rather than the exclusion per se. The Judge concluded that the loss of the right could not be characterised as cruel, degrading or disproportionately severe treatment as those terms are used in s 9.[30] Nor did he consider it arguable that the loss of the right to vote breached the individual prisoner's right to be treated with humanity and respect and with inherent dignity. The Judge considered the only live issue was the right to be free from discrimination under s 19 of the Bill of Rights.

[20] The breach of s 19 was not advanced on the footing that the policy of disqualifying prisoners from registering as electors was intended to be discriminatory against Māori. Rather it was said that the disqualification had the unintended consequence of indirect discrimination because of the political impact of the loss of the right to vote on the large number of prisoners who are Māori.

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27 At [105].

28 At [107], noting that Ellis J took the same approach in constructing s 268(1)(e) in relation to s 74 in *Taylor v Attorney-General* [2014] NZHC 2225, [2015] NZAR 705 at [79].

29 *High Court judgment*, above n 18, at [109].

30 At [120].

[21] Finding neither the Treaty nor the United Nations Declaration on the Rights of Indigenous Peoples of assistance, Fogarty J followed the two-step test set out in *Ministry of Health v Atkinson*.[31] While the Judge accepted the Attorney-General's submission that the natural and appropriate comparison on the loss of voting was between Māori prisoners and non-Māori prisoners, he did not agree that it followed automatically that there could be no discrimination by reason of loss of voting having regard to the Māori electoral option set out in s 76 of the 1993 Act. The Judge considered:[32]

> This is because the vote by a M[ā]ori prisoner can be appreciated as more effective because of the right M[ā]ori have to choose between two electorates as to how to vote. Pre-election, the pollsters can and do identify marginal seats. One of these two may be marginal, giving the M[ā]ori voter more electoral power by choosing to register in the marginal electorate.

[22] However the Judge did not consider that the loss of the option as to where to vote, on top of the loss of the vote, was a material disadvantage as understood in the Bill of Rights:[33]

> Generally, the M[ā]ori electorate has an electoral or civic advantage over the non-M[ā]ori electorate. They are not treated as equal. Equal would be having one available electorate to vote in. M[ā]ori voters have a choice of electorate. In that sense, it can be said the loss of the vote to a M[ā]ori person is more significant than the loss of the vote to a non-M[ā]ori person. But, in my judgment, none of this is material discrimination of the kind intended by the International Covenant on Civil [and Political] Rights, the same intent being understood to be reflected in the [Bill of Rights]. For it is not even indirectly a racist distinction or any indirect degrading of M[ā]ori prisoners.

[23] Fogarty J concluded that, to the extent there was disadvantage and so discrimination for Māori, it was not motivated in any way by any governmental or legislative hostility to the race or ethnicity of Māori.[34] Thus there was no breach of s 19 of the Bill of Rights.

The issues on appeal

[24] The structure of this judgment addresses the following issues:

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31 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].
32 At [145].
33 At [151].
34 At [152].

(a) Does the interpretive approach in s 6 of the Bill of Rights apply?

(b) The application of the Treaty of Waitangi and Declaration of Independence.

(c) The meaning of s 268 in the light of its text and purpose.

(d) Discrimination.

(e) Sections 9 and 23(5) of the Bill of Rights.

[25] Issues (a), (b) and (c) are interrelated. The overall question for determination on the entrenchment issue is the proper interpretation of s 268(1)(e) of the 1993 Act. In respect of issue (a), Mr McCoy QC for Mr Taylor argues that s 6 of the Bill of Rights applies to the interpretation of s 268, mandating a preference for a wide and rights-maximising interpretation. In terms of issue (b), Mr Francois for Mss Ngaronoa and Wilde argues that the Treaty and the Declaration are relevant aids to the interpretation of s 268(1)(e), requiring an interpretation that is consistent with the principles or rights that they establish. We consider it convenient to deal with issues (a) and (b) first to determine whether the Bill of Rights, Treaty or Declaration are relevant interpretive aids, before turning to issue (c), the meaning of s 268 in light of its text and purpose. We will then turn to the question of whether, for the purposes of any declaration of inconsistency, the 2010 Act breaches the rights affirmed under ss 9, 19 or 23(5) of the Bill of Rights.

Does the interpretive approach in s 6 of the Bill of Rights apply to s 268(1)(e)?

[26] Section 6 of the Bill of Rights provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[27] Section 6 is the primary statutory discretion concerning the interpretation of the Bill of Rights.[35] Textual ambiguity is not a prerequisite to the application of s 6.[36] As Tipping J observed in *R v Hansen*:

> [89] The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament. Once the resulting meaning, which I will call Parliament's intended meaning, has been identified, the next step is to determine whether there is any inconsistency between that meaning and the Bill of Rights. If there is none, the matter rests there. …

[28] The relationship between s 5 of the Interpretation Act and s 6 of the Bill of Rights was explained by McGrath J in this way:

> [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. 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.
>
> (Footnote omitted.)

[29] In the High Court, noting the appellants' contention that the issue of whether the whole or only part of s 74 of the 1993 Act is a reserved provision bore directly upon the preservation of the right to vote in s 12 of the Bill of Rights, Fogarty J concluded that s 6 of the Bill of Rights had to be applied to the analysis:[37]

> [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 [Bill of Rights] issue.

[30] However, having undertaken his analysis of the interpretation of s 268(1)(e) Fogarty J concluded that, because there was only one meaning of the phrase "those

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35 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [179] per McGrath J.
36 At [13] per Elias CJ.
37 *High Court judgment*, above n 18.

provisions", there was no alternative meaning that "can be given" to s 268(1)(e).[38] He commented that s 6 did not justify a forced and fallacious interpretation of the 1993 Act.

[31] On appeal, Mr McCoy submitted that the Court must promote the Bill of Rights guarantee of the right to vote at general elections to the fullest extent possible, consistent with the purpose of the relevant legislation. An interpretation of s 268(1)(e) consistent with s 6 required the Court to construe s 268(1)(e) generously so as to maximise the protection it offers to the criteria defining the qualification of electors.

[32] Such protection required the provision to be construed as reserving s 74 in its entirety. To "collapse" the reservation of s 74 to embrace only the minimum voting age of 18 years was said to be fundamentally at variance with a Bill of Rights analysis.

[33] The rejoinder of Mr Rishworth QC for the Attorney-General was that s 268(1) concerns the process of law-making on certain electoral matters, not the substance of such changes. Because of this, the provision cannot sensibly have its meaning determined by the accident of whether a particular meaning advances a more rights-consistent outcome in a particular case.

[34] An attempt was made to illustrate the point by way of a hypothetical example where the 2010 Act had restored the ability of all prisoners to vote but had been enacted by a majority of less than 75 per cent. The appellants' interpretation of s 268(1)(e) would count against its validity, despite the outcome being more consistent with s 12 of the Bill of Rights. That example was said to demonstrate the impropriety of applying s 6 to a provision about process where it cannot truly be said that one interpretation (and so one process) is "consistent" with the right to vote and the other is not.

[35] Attention was drawn to a broadly similar issue in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*,[39] which concerned the

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[38] At [109].

possible application of s 6 to two competing interpretations of the Equal Pay Act 1972, one enabling "equal pay" and the other "pay equity". This Court said:

> [212] Section 6 requires the court to prefer a meaning that is consistent with rights and freedoms contained in the Bill of Rights over "any other meaning". In this context, the phrase "any other meaning" can only refer to a meaning that is inconsistent with the rights and freedoms contained in the Bill of Rights. Section 6 thus only applies where on one interpretation of a provision, the provision is inconsistent with a protected right or freedom.
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> [213] That is not the case here. Even on Terranova's interpretation, the [Equal Pay] Act is not discriminatory. The Act does not itself infringe s 19. It simply may provide either greater or lesser protection against discrimination by employers. To put it another way, Terranova's interpretation does not mean that the Act breaches s 19 but simply that the scope of the protection it provides may be narrower than the scope of the protection provided by s 19. And there is nothing in the Bill of Rights requiring courts to read all other statutes as positively replicating the extent of the protection in the Bill of Rights itself.
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> [214] In our view, it follows that s 6 is not engaged because there can be no initial finding that Parliament's intended meaning is inconsistent with a relevant right or freedom.
>
> (Footnote omitted.)

[36] We consider that those observations are apt in the present case. Section 268(1)(e) of the 1993 Act can only be said to "limit" s 12 of the Bill of Rights if:

(a) Parliament purports to enact legislation impairing the rights of some adult citizens to vote;

(b) it does so by a majority of more than 50 per cent of members present in voting, but less than 75 per cent of all members; and

(c) s 268(1)(e) "fails" to impede Parliament doing so.

[37] However, even in such a case, the meaning attributed to the provision by Fogarty J is not inconsistent with the affirmed right to vote. It is Parliament's action in enacting rights-inconsistent legislation that is rights limiting — not s 268(1)(e)

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[39] *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.

itself. Each of the two competing meanings in play is consistent with s 12, although, in this particular situation, the appellants' interpretation of s 268(1)(e) may plausibly offer greater protection of that right in requiring a greater majority before such rights-inconsistent legislation could be passed.

[38] As noted in *Terranova*, the fact that an interpretation may offer less protection of a given right than that afforded in the Bill of Rights does not mean that that interpretation is one that is inconsistent with the Bill of Rights. Section 6 does not mandate an interpretation that replicates the extent of protection afforded under the Bill of Rights but rather only requires a preference for a rights-consistent interpretation over one that is inconsistent. Here, because neither interpretation can be seen as inconsistent with s 12 of the Bill of Rights, we do not consider s 6 is engaged.

The application of the Treaty of Waitangi and Declaration of Independence

Does the Treaty of Waitangi apply for any interpretive purpose?

[39] The second amended statement of claim succinctly framed the contention in this way:

> The subject matter of the Electoral Act 1993 directly relates to Māori political representation that are matters of chieftainship or rangatiratanga guaranteed under Article 2 of the Treaty. As a result, the Act must be interpreted in accordance with the "principles" of the Treaty of Waitangi as they are incorporated or implied into the statute.

[40] After discussing the implications of *New Zealand Maori Council v Attorney-General*[40] (*The SOE Case*) and reciting an extract from *Barton-Prescott v Director-General of Social Welfare*,[41] Fogarty J concluded:[42]

> [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

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40 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*The SOE Case*].
41 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).
42 *High Court judgment*, above n 18 (footnote omitted).

> Sir Rodney Gallen and Goddard J[J] in *Barton-Prescott v Director General of Social Welfare*.

[41] *The SOE Case*, as Fogarty J noted,[43] concerned the first recognition of the Treaty of Waitangi as an instrument relevant to the interpretation of statutes. This Court there recognised that s 9 of the State Owned Enterprises Act 1986 stated a fundamental principle guiding the interpretation of legislation which addressed issues involving the relationship of Māori with the Crown. More recently, with reference to an identical provision, the Supreme Court observed in *New Zealand Maori Council v Attorney-General* that s 45Q of the Public Finance Act 1989 brings with it the heritage of s 9 and must be invested with the equivalent significance of the Treaty.[44]

[42] In *The SOE Case* this Court was concerned with interpreting a far-reaching statute significant in part for its express incorporation of the principles of the Treaty in the particular field of New Zealand domestic law.[45] Cooke P observed that a broad, unquibbling and practical interpretation was demanded.[46] Before turning to address the issues which the Court was called upon to decide he remarked:[47]

> Counsel for the applicants did not go as far as to contend that, apart altogether from the State-Owned Enterprises Act, the Treaty of Waitangi is a Bill of Rights or fundamental New Zealand constitutional document in the sense that it could override Acts of our legislature. Counsel could hardly have done so in face of the decision of the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* … that rights conferred by the Treaty cannot be enforced in the Courts except in so far as a statutory recognition of the rights can be found. The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.

[43] The decade which followed witnessed the enactment of many statutes which incorporated references to the Treaty in a variety of formulae. Only the Conservation Act 1987 contained a provision expressly requiring the statute to be

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43 At [53].
44 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [59].
45 *The SOE Case*, above n 40, at 655.
46 At 655.
47 At 655–656 (citation omitted).

"interpreted and administered as to give effect to the principles of the Treaty",[48] described by Matthew Palmer as the strongest form of the Treaty clause.[49] Other formulae required persons acting under the relevant statutes to "take into account", "acknowledge", "give effect to", "give particular recognition to" and "have regard to" the principles of the Treaty.[50]

[44] However it was a statute of some maturity containing no reference to the Treaty which was to be the vehicle for a significant advance. In the context of a proceeding under the Guardianship Act 1968 a Full Court of the High Court in *Barton-Prescott v Director General of Social Welfare* accepted that Treaty principles could be deployed in statutory interpretation whether or not the statute expressly provided, stating:[51]

> 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 [T]reaty in the statute. We also take the view that the familial organisation of one of the peoples a party to the [T]reaty, 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 [T]reaty 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.

[45] That approach received the endorsement of this Court in *New Zealand Maori Council v Attorney-General*:[52]

> [72] We are satisfied that the law is as stated in the *Lands* case. We do not see the *Radio Frequencies* case as overriding that statement of principle.

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48 Conservation Act 1987, s 4.

49 MSR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 94.

50 The various provisions are discussed by Palmer, above n 49, at 182–183 and Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 523–525.

51 *Barton-Prescott v Director General of Social Welfare*, above n 41, at 184.

52 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

> That is not to say that the Treaty does not have direct impact in judicial review cases or in cases involving statutory interpretation.

[46] Today it can be stated with confidence that, even where the Treaty is not specifically mentioned in the text of particular legislation, it may, subject to the terms of the legislation, be a permissible extrinsic aid to statutory interpretation.[53]

[47] Fogarty J did not specifically pursue that approach in the course of his statutory interpretation analysis. For the reasons which follow we consider that was unsurprising.

[48] Mr Francois submitted that the 1993 Act directly relates to Māori political representation and that it made sense to imply the principles of the Treaty to redress historical breaches of Māori voting rights. He contended that Treaty principles implied in the 1993 Act were relevant in that the disenfranchisement of Māori prisoners breached their rights under the Treaty.

[49] However, the challenge to the 2010 Act is not the context in which to engage with historical breaches of Māori voting rights traversed in Mr Francois's submissions. As recognised in the context of the discussion of s 6 of the Bill of Rights, the focal point of that interpretive exercise, s 268(1), concerns the process of law making on certain electoral matters. The issue is whether there are different credible interpretations of s 268(1)(e) of the 1993 Act in relation to the choice of which the Treaty principles provide guidance. We consider that the answer must be the same as that given in respect of the s 6 contention.

[50] Although Mr Francois's argument was premised on the basis that s 268(1)(e) was ambiguous and that the provisions had been interpreted by Fogarty J (and also by Ellis J) in a way that "increases the vulnerability of an already vulnerable Treaty partner", it seemed that his real concern was not with s 268(1)(e) but rather s 80(1)(d) of the 2010 Act, which was addressed in some detail in his written submissions.

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[53] See *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [248] citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 223 and *Barton-Prescott v Director-General of Social Welfare*, above n 41, at 184.

[51] However, even if the issue of consistency with Treaty principles was able to be directed to the interpretation of s 80(1)(d) by implied reference through the route of the introductory phrase of s 74(1), we agree with the analysis of Ellis J in an earlier proceeding on this matter:[54]

> [36] Perhaps even more fundamentally, however, the *Barton-Prescott* approach can only be applied where there is an interpretive exercise that the court is able to undertake. As I have already said, s 80(1)(d) cannot reasonably bear another meaning, there is no room for Treaty principles to be read into it. To interpret the word "prisoner" as excluding Māori prisoners is simply not open to me. Section 80(1)(d) is clear on its face and (if otherwise valid) universal in its application.

[52] Hence we conclude that on the issues of interpretation raised in this case Treaty principles cannot assist in the interpretation task.

Does the Declaration of Independence apply for any interpretive purpose?

[53] Although there were many assertions in the second amended statement of claim concerning the fact and significance of the Declaration, there was no contention that the 1993 Act must be interpreted in accordance with the principles of the Declaration as was submitted in respect of the Treaty. Rather, the relief sought in respect of the first cause of action (which was framed in terms of issues of legality, failure to take into account relevant considerations, irrationality and breach of legitimate expectation) included a declaration that the 2010 Act breached the Declaration and/or was inconsistent with its principles.

[54] Mr Francois's opening statement to the High Court emphasised that this was the first occasion that the Court had been presented with the opportunity to elucidate the legal status of the Declaration.[55] Fogarty J understandably construed the submission made as an invitation to give recognition to the Declaration. He declined to do so, explaining:

> [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

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54 *Taylor v Attorney-General,* above n 28.

55 See *High Court judgment,* above n 18, at [42].

> Independence and starts with the Treaty of Waitangi signed five years later. It is irrelevant whether that is a good thing or a bad thing. Rather, it is a constitutional fact.
>
> (Footnote omitted.)

[55] The amended notice of appeal of Mss Ngaronoa and Wilde asserted error in the form of an alleged determination that the Declaration did not assist them as an aid to statutory interpretation. In brief their grounds were that the Ngāpuhi tribes proclaimed sovereignty over the northern region of the North Island and did not cede sovereignty to the Queen of England under the Treaty. It was said that the right of the Ngāpuhi tribe to self-determination and political representation is enshrined in the Declaration and that the right of Ngāpuhi to vote in the Te Tai Tokerau electorate must therefore be implied in the 1993 Act.

[56] It was Mr Francois's submission that an interpretation of ss 268(1) and 78 of the 1993 Act consistent with the rights of Ngāpuhi under the principles of the Declaration favoured the entrenchment of all the qualifications of voters, not simply their age. It followed that the Act implied that all Ngāpuhi over the age of 18 residing in the Māori electorate of Te Tai Tokerau were entitled to vote.

[57] The genesis of the Declaration is described in detail in the 2014 Waitangi Tribunal Report *He Whakaputanga me te Tiriti: The Declaration and the Treaty*.[56] The Declaration, signed on 28 October 1835 by 34 leading Te Raki rangitira,[57] was a declaration by those rangitira of sovereignty and independence. It was a pragmatic response to a perceived foreign threat to their authority from the Anglo-French adventurer Baron Charles de Thierry, who advised he was coming to New Zealand to establish himself as sovereign chief.[58]

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[56] Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014). The Declaration was debated and signed in te reo Māori although the text was a missionary translation from a draft in English by the British Resident James Busby.

[57] At [10.2]. Almost all signatories were from the Bay of Islands and Hokianga. Over the following three and a half years a further 18 rangitira became party to the Declaration: at [4.3.5].

[58] At [4.1.1] and [10.2].

[58] The Declaration did not herald a radical change in political organisation among those hapu whose rangitira signed it. Ultimate authority remained with the hapu. As the Waitangi Tribunal stated:[59]

> It is important to be clear that authority remained with hapū after he Whakaputanga as before. On that basis, we do not believe that any collective or confederate northern Māori sovereignty existed in 1835, or before. Nor do we believe that a single state existed in the Bay of Islands and Hokianga area or neighbouring districts prior to 1835, and nor was one created by he Whakaputanga. Indeed, had rangatira intended to make such a significant step as declaring their nationhood on a collective or confederate basis, we think they would have found their own occasion rather than waiting until a letter from Tahiti prompted the British Resident to action.

[59] The Tribunal recognised that there had been a tendency to neglect the Declaration in scholarly debate,[60] observing that published interpretations of the Declaration were generally based on the English-language texts, were mistakenly viewed through a retrospective lens and were largely dismissive.[61] Noteworthy, however, was the striking absence of any explicit mention of the Declaration, at least in European observers' accounts, at the Waitangi hui on 5 February 1840 before the Treaty was signed.[62]

[60] We acknowledge the perspective that the Declaration may be viewed as the parent document to the Treaty,[63] and that given the repetition in the Treaty of terms in the Declaration such as rangitiratanga and kawanatanga the Declaration was not superseded by it. However we do not consider, given the context in which the Declaration was signed and the content of the Treaty which followed five years later, that the Declaration should be accorded discrete status as an extrinsic aid to the interpretation of contemporary statutes. In our view, Fogarty J's conclusion that, rightly or wrongly, the Treaty is the starting point for the legitimacy narrative of New Zealand's constitutional arrangement was sound. We do not consider that there was any error of the nature alleged.

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59 At [4.7.2].
60 At [10.3.4(3)].
61 At [4.6.3].
62 At [10.3.4(3)].
63 At [10.3].

[61] We now turn to the issue of entrenchment which turns upon the proper interpretation of ss 268(1)(e) and 74(1).

The meaning of s 268 in the light of its text and purpose

Argument on appeal

[62] The appellants contend that s 268(1)(e) of the 1993 Act entrenches all of the eligibility criteria listed in s 74 for registration as an elector so that any change to the right to register as an elector must be passed by the 75 per cent super-majority. The issue of statutory interpretation raised by their argument turns in large part upon whether the word "those" in s 268(1)(e) relates to some or all of the provisions listed in that paragraph; does it relate only to ss 3(1) and 60(f) as the appellants would have it, or also to s 74 as the respondents contend?

[63] For ease of comprehension we set out ss 74(1) and 268(1)(e) again:

> **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 1 year; and
>
> (c) that electoral district—
>
> (i) is the last in which that person has continuously resided for a period equalling or exceeding 1 month; or
>
> (ii) where that person has never resided continuously in any one electoral district for a period equalling or exceeding 1 month, is the electoral district in which that person resides or has last resided.
>
> …

> **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, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:
>
> …

[64] The appellants say that the words "[s]ubject to the provisions of this Act" in s 74 must be read as "[s]ubject to the provisions of this Act *as at the date of its enactment*" in order to make the reservation under s 268(1)(e) work as Parliament would have intended. On this approach, s 80 is entrenched by implication, because it is a provision bearing upon the qualification of electors. Amending s 80 would impliedly amend s 74. Any amendment of s 80 after 1993 would therefore need to be passed by the 75 per cent super-majority.

[65] The appellants argue that to read s 268(1)(e) as an entrenchment of the entirety of s 74 does not require a strained reading, but merely a robust approach to interpretation to make the 1993 Act work as Parliament intended. Mr McCoy submits the appellants' case does not require that words be read into s 74. In contrast, the interpretation contended for by the respondents depends upon a niggardly, at best narrow, grammatical construction of the provision turning upon, as Mr McCoy put it, "a curious comma and an ambivalent 'and'". The appellants argue that their interpretation is available on a textual analysis, but is clearly to be preferred when the purpose of the entrenchment provision is added into the interpretation mix. It was, they say, the intention of Parliament in enacting the predecessor to s 268 to put the most important parts of the electoral system "above and beyond the influence of Government and party".[64] The right to register as an elector under s 74 is the pathway to the primary electoral right the 1993 Act confers, the right to vote — a right so fundamental that it is affirmed by s 12 of the Bill of Rights. Naturally, Parliament would have intended the whole of s 74 to be entrenched.

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64 (26 October 1956) 310 NZPD 2839.

[66] The appellants contend that Fogarty J erred in the importance he placed upon the meaning of the word "those" in s 268(1)(e). He should, the appellants say, have interpreted it to relate only to the references to ss 3(1) and 60(f). He also made questionable assumptions about why Parliament might reserve the definition of "adult", one aspect of the qualification of electors, but not other elements.

[67] Mr Francois also advances an alternative argument. He says that even if the Crown is correct in its construction that the limiting phrase "so far as those provisions" applies to each of ss 74, 3(1) and 60(f), it still has the effect of entrenching the entirety of s 74. Mr Francois argues that the conditions stated in paras (a)–(c) in s 74(1), which qualify a person as an elector, apply if, *and only if*, a person is 18 years or older. Therefore, he says, paras (a)–(c) are "prior conditions" to being qualified as an elector — "prior conditions" as against the minimum age of 18. This makes them reserved provisions under s 268.

Approach to statutory interpretation

[68] We have earlier addressed the broader issue of the approach to interpretation of this legislation, and in particular the relevance of the Bill of Rights, the Treaty and the Declaration. The interpretation of s 268 is governed by s 5 of the Interpretation Act. In *Commerce Commission v Fonterra Co-operative Group Ltd*, the Supreme Court described the required approach to statutory interpretation as follows:[65]

> The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5.

[69] The purpose of s 268(1)(e) can be ascertained from its text, from its immediate and general legislative context, and also from its social purpose as is strongly argued for the appellants in this case. Some assistance with the latter can be gleaned from the legislative history which we address after our assessment of the text of the paragraph, along with consideration of that text within the context of the 1993 Act overall.

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[65] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnote omitted).

Textual analysis

[70] We start with the language of the provision under consideration. Each of the provisions referred to are separated by commas, followed by the word "and". The three clauses are therefore each separated from each other in an identical way. After this list appears the qualifying clause, which is expressed with the plural "those" — "so far as those provisions". Since each clause is constructed and delineated in the same way, a conventional reading of the sentence is that "those" applies to each clause. As a matter of conventional grammatical construction, the qualifying clause in s 268(1)(e) applies, as the respondents submit, to all three provisions. We therefore reach the same conclusion as Fogarty J on that point, although by a slightly different route.

[71] If Parliament had intended the reading the appellants contend for, it would be expected to indicate this by separating the other two provisions from s 74, rather than using the word "and" between each, thereby indicating a uniform list.

[72] The appellants argue that a strong textual indication that s 74 is not simply part of a list, but is to be treated differently from ss 3(1) and 60(f), is that s 74 does not prescribe 18 as the minimum age for registration — there is nothing in s 74 on which the limitation in s 268(1)(e) can have effect and it follows that s 74 must have been intended to be treated differently to ss 3(1) and 60(f). We do not agree. A detailed analysis of the relevant sections does not support this.

[73] Section 3(1) defines adult as follows:

> **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

As mentioned earlier, s 60 describes those qualified to vote and s 60(f) addresses particularly the voting status of members of the Defence Force serving overseas on polling day as follows:

> (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.

[74] Although s 3(1) defines "adult", it does not prescribe 18 as the minimum age for registration as an elector or for voting. Rather it is s 74 which so prescribes, and it does so by using the defined term "adult" as part of the qualification for registration as an elector. If that part of s 74 which prescribes the minimum age (the part which employs the defined term "adult") were not entrenched, later parliaments would be free to step around the reservation of 18 as the minimum age by simply abandoning the use of the defined term "adult" in s 74(1).

[75] The Attorney-General argues that the appellants' interpretation, which separates s 74 from ss 3(1) and 60(f), renders s 268(1)(e) incoherent because it ascribes to s 3(1) alone the mechanism of prescribing 18 years as the minimum age to register when the section does no such thing. We agree.

[76] Placing s 268(1)(e) in the context of s 268(1) as an entire subsection provides further assistance with the textual analysis. Each of the other paragraphs in s 268(1) lists a particular section or sections that are said to be reserved, followed by a brief description of their subject matter. Each deals with only one core electoral principle. For example, s 268(1)(f): "section 168, relating to the method of voting". The description in para (f) does nothing to define or limit the extent to which the provision is reserved.

[77] Paragraph (e) is the only paragraph in s 268(1) that does not follow that basic formula. The additional phrase, "so far as those provisions prescribe", limits or defines the extent of the reservation, rather than describing the subject matter of the provisions listed. It reaches into each provision and separates out a part of each which is entrenched. This is necessary as each of the provisions listed relate to more than the minimum age.

[78] We do not see that this interpretation turns purely upon matters of grammar. In our view, even were all the punctuation removed, the plain meaning of the paragraph would be that the limitation applied to all of the provisions listed. There

simply is nothing in the language of the paragraph that separates s 74 from the other provisions. In short, there is no textual indication within para (e) to support the appellants' case on the entrenchment ground.

[79] We also think it an unlikely construction. If Parliament intended to entrench all of s 74, it could be expected to have done so more clearly. Following the general style of s 268(1), we would expect to see s 74 separated out in its own paragraph, with the usual description of subject matter. And even if that simple drafting technique was not followed, if s 74 was intended to be treated differently from ss 3(1) and 60(f) within para (e) as the appellants argue, then, consistent with the overall style of s 268(1), we would expect to see the description "relating to the qualification of electors" following the mention of "s 74" in the paragraph. There is no such descriptor, and so there is good reason to treat s 74 the same as ss 3(1) and 60(f) within s 268(1)(e).

[80] There are also other difficulties with the appellants' argument. The appellants acknowledge that if the intention was to make the whole of s 74 a reserved provision, ss 47 (candidacy), 60 (who may vote) and 80 (disqualification) would be impliedly entrenched, as amendment to those provisions could effectively side-step the entrenchment of s 74. As we noted earlier,[66] the appellants argue that the introductory part of s 74 must then be read as "Subject to the provisions of this Act as enacted in 1993". It is inherently implausible that Parliament would have left such extensive entrenchment to implication. And, if s 60 was impliedly entrenched, Parliament have would not have needed to expressly entrench s 60(f) in s 268(1)(e).

[81] Mr Rishworth submits that on the appellants' argument, other provisions must also be impliedly entrenched. The Attorney-General produced a lengthy list — ss 27 (prescribing that the House of Representatives comprises only elected members), 61 (providing for special votes for those qualified to vote), 72 (rules for determining place of residence), 73 (definition of permanent resident), 75–79 and 81–89A (dealing with qualification of electors and registration), and 163–172 (dealing with voting and special voting). The appellants respond that the interpretation they argue for does not require that these provisions be impliedly

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[66] See [63] above.

entrenched and that the respondents are deliberately overstating the implication of what the appellants argue for. We do not propose to determine arguments for and against implied entrenchment of these provisions were the appellants' interpretation accepted. It is enough to say that the respondents' proposition is arguable in respect of at least some of these provisions, which usefully highlights the uncertainty that would be created by the appellants' construction of s 268(1)(e).

[82] In contrast, if para (e) is interpreted so that only the minimum age is reserved, the introductory phrase "[s]ubject to the provisions of this Act" in s 74 can be given effect without any such struggle with its interpretation. While the minimum age is entrenched through reservation of the provisions which prescribe that age, the balance of s 74 may be amended or altered in effect by other provisions of the 1993 Act as amended from time to time. Without reservation of each of the provisions listed in para (e) that protection would not be achieved.

[83] Finally, we address Mr Francois's alternative argument. Practically it may be the case that an adult cannot enrol as a voter until the criteria in paras (a)–(c) of s 74(1) are met. In this sense they are "prior conditions". But s 74(1) does not treat paras (a)–(c) as prior conditions. Section 74(1) envisages the determination of age as the *first step* in determining a potential elector's qualifications to register. As such, it makes textual sense that s 268(1)(e) provides that s 74 is reserved as far as it relates to the minimum age — the first step in determining qualifications to register. Section 268(1)(e) can do this without affecting, in any way, the status of paras (a)–(c). Mr Francois's alternative argument must therefore fail.

Purpose cross-check

[84] Having formed the view that the plain meaning of the provision was as Fogarty J found, we then undertake the necessary purpose cross-check.

[85] We agree with the Judge that the parliamentary intention evidenced by the plain meaning of the paragraph and its immediate legislative context is to entrench the minimum age to vote. If Parliament intended to protect from amendment by a bare majority all eligibility criteria, or even more fundamentally the right to vote, the inclusion of para (e) was the most obscure way of achieving that. Why include the

minimum-age qualification at the end of s 268(1)(e) if Parliament intended to reserve all eligibility criteria? And if Parliament intended to protect the right to vote, an intention which the appellants' argument entails, we would expect to see this clearly signalled, at least by the express entrenchment of s 60. In short, there is nothing in the text of the paragraph or its legislative context to suggest that the purpose of para (e) is wider than entrenchment of the age of 18 as the minimum age to register as an elector.

[86] It is also necessary, in undertaking this cross-check, to consider the provision's legislative history and the objectives of the entrenchment.

Legislative history

[87] The first appearance of an entrenchment provision in New Zealand was in s 189 of the Electoral Act 1956 (the 1956 Act), the statutory predecessor of s 268 of the 1993 Act. Section 189 was unanimously enacted by the House. Although there has been debate as to the legal effect of entrenchment, s 189 has subsequently been complied with so that amendments to the reserved provisions have been made with more than 75 per cent support.[67] As the Minister of Justice and Attorney-General at the time, the Hon Jack Marshall MP, said:[68]

> … to the extent that these provisions are unanimously supported by both sides of the House, and to the extent that they will be universally accepted by the people, they acquire a force which subsequent Parliaments will … attempt to repeal or amend at their peril against the will of the people …

[88] The parts of s 189 relevant to this discussion provided:

> **189 Restriction on amendment or repeal of certain provisions**
>
> (1) This section applies to the following provisions of this Act (hereinafter referred to as reserved provisions), namely:
>
> (a) Section twelve, relating to the duration of the House of Representatives:
>
> (b) Section fifteen, relating to the Representation Commission:

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67 For example, the Electoral Act 1993 was unanimously supported.

68 (26 October 1956) 310 NZPD 2852.

(c) Section sixteen, and the definition of the term "European population" in subsection one of section two, relating to the division of New Zealand into European electorates after each census:

(d) Section seventeen, relating to the allowance for the adjustment of the quota:

(e) Subsection one of section thirty-nine, and the definition of the term "adult" in subsection one of section two, and paragraph (e) of section ninety-nine, so far as those provisions prescribe twenty-one years as the minimum age for persons qualified to be registered as electors or to vote:

(f) Section one hundred and six, 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 seventy-five per cent 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 European and Maori electoral districts:

…

[89] Section 39 was the section containing eligibility criteria for electors. It provided as enacted:

39 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) He is a British subject; and

(b) He is ordinarily resident in New Zealand; and

(c) He has at some period resided continuously in New Zealand for not less than one year; and either

(d) He has resided in that electoral district for not less than three months immediately preceding the date of his application for registration; or

(e) He has resided continuously in that electoral district for not less than three months and has not subsequently resided continuously for three months or upwards in any one electoral district; or

> (f) He resides in that electoral district, or has resided in that district and has not subsequently resided in any other electoral district, and, because of his occupation or employment or that of his spouse, whether as a seaman, an actor, or a commercial traveller, or otherwise, he has not resided continuously for three months or upwards in any one electoral district.
>
> …

[90] We consider that while there were differences in detail,[69] s 189 was identical in all material respects to s 268. Although the reference in s 189(1)(e) to a subsection of s 39 (s 39(1)) can be contrasted with the reference to the whole of s 74 in s 268, this is explicable on the basis that the remaining subsections in s 39 related to the qualification of Māori and European persons to register in particular electoral districts. This is now an electoral relic. There are no equivalent provisions in s 74. As with the s 74 criteria, the criteria listed in s 39(1) related to an adult elector but did not stipulate any age. Thus, the definition of the term "adult" in s 2(1) of the 1956 Act needed to be entrenched as well.

[91] After the draft of s 189 was inserted into the Electoral Bill 1956 (89-2), Mr Marshall led debate on the Bill as follows:[70]

> The provisions which are reserved are six in number. They are the provisions relating to the life of Parliament, the method of voting, the constitution and reference of the Representation Commission, the age of voting, the total population, and the tolerance of five per cent …
>
> …
>
> The principles which we have tried to apply in the drafting of this Bill are worthy of mention. The first is that no qualified person should be deprived of the opportunity to register or to vote.

[92] Former (but soon to be reappointed) Attorney-General, the Hon Rex Mason MP discussed what would become s 189(1)(e) and asked:[71]

> Why is the restriction to twenty-one years as the minimum age for persons qualified to be registered as electors or to vote, alone crystallised in the Bill? Why are no other provisions put beyond the power of ready alteration?

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69 For example, the minimum age protected was 21 years.
70 (26 October 1956) 310 NZPD 2839.
71 (26 October 1956) 310 NZPD 2845.

[93] This material provides support for the meaning and purpose we have gleaned from the text of s 268 — the purpose of the equivalent paragraph in s 189 was to entrench the age aspect of eligibility, but not the other criteria.

[94] The Attorney-General also referred us to parliamentary debate in 1975 as to the effect of s 189(1)(e). The context for this debate was the introduction to the House of a Bill that would amend the citizenship and residence qualification. At the Committee stage of the reading of the Bill, the Leader of the Opposition queried whether s 189 entrenched the whole of s 39(1) so that enactment of the Bill required a 75 per cent majority.[72] Ultimately the Speaker made a formal ruling in accordance with a Crown Law opinion that a 75 per cent majority was not required and the Bill amending s 39 was passed with less than 75 per cent of the House voting in favour of it. We mention this only as a piece of the legislative history. As we commented to counsel during the course of the hearing, it is for the courts to determine the meaning of legislation. The post-enactment opinion of members of Parliament as to the proper interpretation of legislation, or advice the Speaker receives on that issue, are not properly taken into account in interpreting legislative provisions.

[95] We narrate also as part of the legislative history that there have been adjustments to eligibility to register in relation to serving prisoners in 1975, 1977 and 2010, with no suggestion made that a reserved provision was being amended.[73] We note that the 1977 amendment to the disqualification of prisoners was passed with less than a 75 per cent majority.[74]

[96] The next piece of legislative history to which we have had regard is the report of the Royal Commission, established in 1985 to inquire into a wide range of matters concerning the electoral system.[75] Mr McCoy characterised the Royal Commission report as critical to understanding the 1993 Act and as evidencing that Parliament must have intended to give greater protection to the right to vote when it enacted s 74.

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72 See discussion at (9 July 1975) 399 NZPD 2963–2965.

73 For a detailed account of these amendments see Heath J's analysis in *Taylor v Attorney-General*, above n 2, at [16]–[26].

74 Electoral Amendment Act 1977, s 5; and (16 December 1977) 416 NZPD 5431–5432.

75 John Wallace and others *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"* (December 1986).

[97] The 1986 Royal Commission report does provide interesting background to the enactment of the 1993 Act. The Commission recommended that a referendum be held on changing the voting system from first-past-the-post to mixed-member-proportional representation.[76] A non-binding referendum was held in 1992 indicating support for such a change to the electoral system, and then a binding referendum in 1993 confirmed it, leading to the enactment of the 1993 Act.

[98] But it is another part of the report and another recommendation to which Mr McCoy attaches significance. When discussing s 189 the Commission described it as complex and not always clear as to effect. Although describing s 189 as entrenching the qualification of electors "at least so far as age is concerned",[77] the Commission questioned whether "contrary to parliamentary practice ... not only the voting age but also the right to vote is entrenched by the present provisions".[78] The Commission recommended entrenchment of "the elements of the right to vote and to be a candidate".[79]

[99] We are not sure that the Commission was recommending the entrenchment of the entirety of what is now s 74 of the 1993 Act. Those provisions are concerned with the right to register as an elector, not the right to vote. The Commission's recommendation was that the right to vote, the more fundamental right, be expressly protected.

[100] It is notable that these recommendations were not adopted by the 1993 Act, a fact which we see as undermining Mr McCoy's argument that the Royal Commission report provided some "watershed" constitutional moment which justifies a different interpretation of what was to become s 268. Parliament's persistence with the existing language, structure and content of the entrenching provision (in material part) suggests an intention to persist with the "parliamentary practice" the Commissioners identify as to what was entrenched.

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76 At [2.182].
77 At [9.177].
78 At [9.178].
79 At [9.188].

[101] That takes us to the submission about purpose most forcefully made by both Mr Francois and Mr McCoy. Mr McCoy was critical of Fogarty J for speculating that Parliament entrenched the age criterion but not the other criteria in s 74 because it accorded more significance to that particular qualifying criterion. Both Mr McCoy and Mr Francois submit that if Parliament was acting in 1956 and then in 1993 to protect the electoral system from party-based political interference, it was obvious that the thing they would have protected was the entirety of the qualifications to register as an elector. Any failure to do so would leave New Zealand citizens and permanent residents without the protection of their right to vote, this being the most fundamental incident of citizenship within a political community. Without the right to vote, the ability to participate in the public affairs of the nation is removed. Mr McCoy described the thought that Parliament would not have protected this right as "grotesque". He submits that the fixing of the class of electors determines the membership of the political community. The failure to protect the right to vote leaves it open that Parliament might, by a simple majority, disenfranchise one group of citizens. That is what Parliament has done on this occasion, the defining characteristic of that group is their status as serving prisoners. A discrimination, Mr Francois submits, which falls unfairly and increasingly upon Māori citizens.[80] And, submits Mr McCoy, it is easy to conceive of further discriminatory amendments which could be passed with a simple majority.

[102] We agree that the purpose of these entrenchment provisions was to immunise the electoral system against party-oriented and political game-playing. But we infer from the list of matters that were entrenched that the concern was to ensure that parties did not manipulate the system to achieve party-related advantages, rather than a concern to protect the right to vote against discriminatory incursion. If there were such a concern then we would expect the whole of s 60 to be listed as a reserve provision. The reserved provisions are in those parts of the system, where a party might be inclined to tinker in order to achieve some electoral advantage, such as lowering the minimum voter age and then advocating a policy which deliberately targeted adolescent voters.

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[80] See further discussion at [108] below.

[103] We are also not convinced that Fogarty J was wrong when he posited that Parliament may have attached more significance to the age criterion than to other eligibility criteria. We note that s 12 of the Bill of Rights explicitly protects the right of every New Zealand citizen over the age of 18 to vote. It makes no mention of other criteria for registration such as place of residence or time spent in an electoral district. We do not see this point undermined by the fact that the Bill of Rights was not enacted until well after the first entrenchment of this provision. The Bill of Rights enshrines rights and fundamental values of New Zealand society.

[104] It is a valid question to ask why Parliament would not protect the right to vote. But ultimately that is a political question beyond the scope of the issues before us. In the face of such plain language, and clear evidence of purpose, we have concluded that Parliament did not choose to include all eligibility criteria, or the right to vote, in the reserve provisions. It follows that the appellants' arguments as to the construction of s 268(1)(e) cannot succeed.

[105] We therefore agree with Fogarty J that only that part of s 74 which relates to the age for registration is entrenched by dint of s 268(1)(e).

Discrimination

Introduction

[106] In this part of the judgment we deal with the discrimination arguments raised by Mr Francois for Mss Ngaronoa and Wilde relating to the Bill of Rights. Mr Francois put forward a number of submissions, which he summarised as follows:

(a) Disqualifying prisoners from registering to vote under s 80(1)(d) of the 1993 Act amounts to discrimination on the basis of race under s 19 of the Bill of Rights because it materially disadvantages Māori prisoners and Māori people generally.

(b) Section 80(1)(d) breaches Mss Ngaronoa and Wilde's right to be free from discrimination on the basis of their political opinions and beliefs under s 21(1)(j) of the Human Rights Act 1993.

(c) The Electoral Commission is in breach of its functions under s 4C of the 1993 Act and ss 18 and 19 of the Crown Entities Act 2004 because s 80(1)(d) is discriminatory and breaches the rights and freedoms of prisoners under the Bill of Rights.

[107] For convenience we set out again 80(1)(d) of the 1993 Act, which provides:

> **80 Disqualifications for registration**
>
> (1) The following persons are disqualified for registration as electors:
>
> …
>
> (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:
>
> …

[108] Mr Francois pointed to historic grievances and the systemic issues Māori face on a day-to-day basis in New Zealand as a result of colonial displacement and the imposition of English political structures. A core theme to his submissions was the overrepresentation of Māori in New Zealand prisons. Mr Francois told us, without contest from the Crown, that Māori men represent 51 per cent of convicted male prisoners and Māori women 58 per cent of the female prison population, despite the total number of Māori (both men and women) in the population of New Zealand being only 15 per cent. As set out above, when a person is disqualified from registering as an elector their name is removed from the electoral roll. Accordingly, once prisoners leave prison, they must re-register to vote, which requires active steps on the part of the voter. Given that literacy is a problem for many Māori prisoners, Mr Francois says that this disqualification will have an accumulating effect as those who are disqualified whilst in prison fail to register back onto the electoral roll on release, and will quickly and significantly reduce Māori political participation.

The scheme of the legislation

[109] The prohibition against discrimination in New Zealand is in s 19 of the Bill of Rights. It 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.
>
> …

[110] The Human Rights Act sets out the prohibited grounds of discrimination at s 21. Mr Francois relied on s 21(1)(f) and (g) which read:

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the **prohibited grounds of discrimination** are—
>
> …
>
> (f) race:
>
> (g) ethnic or national origins, which includes nationality or citizenship:
>
> …

[111] Section 19 of the Bill of Rights sets out the right and the Human Rights Act sets out the grounds of discrimination and makes certain discriminatory actions unlawful. The sections in the two different Acts work together to define, and protect people from, discrimination. Section 65 of the Human Rights Act extends discrimination to indirect discrimination:

> **65 Indirect discrimination**
>
> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part 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.

[112] The long title to the Human Rights Act states that one of the purposes of the Act is the provision of better protection of human rights in New Zealand "in general accordance with United Nations Covenants or Conventions on Human Rights". There are a range of international instruments that protect the right to freedom from

discrimination.[81] One of those instruments that is ratified by New Zealand is the Convention on the Elimination of All Forms of Racial Discrimination. Article 5 refers to the right to vote on the basis of "universal and equal suffrage".

[113] Mr Francois did not invoke the Human Rights Tribunal jurisdiction. His approach in this case has been to seek a declaration that s 80(1)(d) breaches the right to be free from discrimination under s 19 and to seek consequential relief.[82] Mr Perkins, who presented submissions for the Attorney-General for this part of the appeal, did not take any issue with the pleadings, or with the ability of this Court to grant declaratory relief should we determine s 80(1)(d) is discriminatory. His submission is that s 80(1)(d) is not discriminatory, and does not otherwise offend against any of the rights in the Bill of Rights.

[114] For the purposes of the present appeal, the combined effect of the statutory provisions is that all persons have a right to be free from direct and indirect discrimination by the legislative branch of government on the basis of race.

Approach

[115] The ideal, which discrimination defeats, is the equal protection and equal benefit of the law. Nevertheless, legislation and policy decisions will often involve different treatment of groups of persons to a greater or lesser extent. For there to be prohibited discrimination under the Bill of Rights, there must be more than the different treatment of groups of people in a community. The question is whether the legislation (s 80(1)(d)) discriminates on a prohibited ground.[83] The key ground put forward in this case is race.

[116] The courts have sought to provide an analytical framework in order to discern whether an instrument or policy is in fact discriminatory. The essence of

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[81] See for example International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26; International Covenant on Economic, Social and Cultural Rights 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), arts 2 and 10; and Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature on 21 December 1965, entered into force 4 January 1969), art 5.

[82] This Court has confirmed the jurisdiction of the higher courts to make a declaration of inconsistency with the Bill of Rights in *Attorney-General v Taylor*, above n 4, at [109].

[83] *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51].

discrimination is the treatment of persons in comparable circumstances differently. But not all discrimination is unlawful.

[117] The appropriate method of analysing unlawfulness for Bill of Rights purposes was addressed by this Court in *Ministry of Health v Atkinson*.[84] A full bench of this Court stated:

> [55] It is agreed that the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

[118] The Court said this about the second step:[85]

> [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 a person or group differentiated against.

[119] Indirect discrimination under s 65 of the Human Rights Act can arise when a criterion in a law or policy, which is not on its face discriminatory, corresponds to a feature (or lack thereof) of all or part of a group and results in that group being treated differently on a prohibited ground. A Canadian example we will refer to is a policy in a public health system which does not fund the provision of translation services to deaf patients who could otherwise use state care.[86] The provision did not mention deafness, and did not explicitly exclude deaf patients from the benefit of state care, but a failure to provide translation services to deaf patients effectively denied them equal access to important benefits that were available to other persons who were not deaf. Accordingly, the discrimination does not need to be direct.

Comparing groups

[120] As we have set out, the concept of discrimination involves one group being treated differently from another in a comparable situation. The requirement for a differential treatment as between those in a comparable situation gives rise to the issue of who is to be compared to whom. The choice of an appropriate group or

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84 *Ministry of Health v Atkinson*, above n 31 (footnotes omitted).
85 At [109] (emphasis added).
86 *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624.

person with whom to carry out the comparison enables a determination of whether the person or group has been treated differently to another person or group in comparable circumstances.[87]

[121] There has been judicial debate in the Commonwealth about the usefulness of a comparator exercise. In the United Kingdom the search for a comparator has been described as an "arid" exercise.[88] We accept that a comparator exercise should not be treated as a formula to determine the answer to an allegation of discrimination. Comparator groups can be overly refined by building into the comparators the contested assumptions, thereby neutralising the comparator exercise.[89] However, since discrimination is, in essence, treating persons in comparable situations differently, it is inevitable that the reasoning involved in such a process will include choosing a person or group for comparison purposes. As we will elaborate, it is not necessary to fix a single conclusive comparator.

[122] Before us, Mr Perkins submitted without contrary argument from Mr Francois that the appropriate comparator groups were Māori serving a sentence of imprisonment (Māori prisoners) and non-Māori serving a sentence of imprisonment (non-Māori prisoners). Fogarty J made this comparison in his analysis.[90]

[123] Fogarty J appeared to be of the view that there was a difference between the effect of the loss of voting as between Māori and non-Māori prisoners.[91] He held:

> [145] I agree with the Attorney-General's submission that the natural and appropriate comparison on the loss of voting is between M[ā]ori prisoners and non-M[ā]ori prisoners. I do not agree, however, that it follows automatically that there could be no discrimination applicable to the M[ā]ori prisoners by reason of loss of voting. This is because the vote by a M[ā]ori prisoner can be appreciated as more effective because of the right M[ā]ori

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87 See the discussion in *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153; *Smith v Air New Zealand* [2011] NZCA 20, [2011] 2 NZLR 171 at [28]–[29]; and *Ministry of Health v Atkinson*, above n 31, at [60].

88 *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 at [97]. For a Canadian perspective see *Withler v Canada (Attorney-General)* 2011 SCC 12, [2011] 1 SCR 396 at [40].

89 See for example *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC) at [90]–[92]; and *Ministry of Health v Atkinson*, above n 31, at [67].

90 *High Court judgment*, above n 18, at [150].

91 At [145]–[146].

> have to choose between two electorates as to how to vote. Pre-election, the pollsters can and do identify marginal seats. One of these two may be marginal, giving the M[ā]ori voter more electoral power by choosing to register in the marginal electorate.

[124] He went on, however, to conclude that this did not create a material disadvantage. He considered that the disproportionately great number of Māori in prison had to do with "poverty and dysfunctional upbringings, two conditions which are common to most prisoners of every race and ethnicity".[92] The fact that Māori are overrepresented in prisons did not generate an obligation on Parliament to compensate.

The submissions

[125] Mr Francois's criticism of this reasoning is at two levels. First he says that there is discrimination on the basis of race because Māori are disproportionately represented in prisons and therefore the prohibition in s 80(1)(d) has a disproportionate effect on them. In percentage terms, a greater number of Māori are stopped from voting by s 80(1)(d) than non-Māori. At a second level he is more specific, and argues that the effect of the prohibition discriminates against Māori, because they lose not only their vote, but also the right to choose to vote in a Māori electorate. He points to several "material consequences" for Māori of the prohibition, specifically:

(a) decreasing the number of Māori on the Māori Electoral Roll (MER);

(b) reducing the "ratio" of Māori on the MER to Māori on the General Electoral Roll;

(c) reducing the total Māori Electoral Population (MEP); and

(d) reducing the number of Māori electoral districts (electorates).

[126] The MER significantly affects the Māori electorates. Mr Francois noted the 2013 census showed the number of Māori descent electors on the Māori roll was

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92 At [147].

256,212. If all Māori prisoners were enrolled on the Māori electoral roll that number would increase to 261,212, the number of Māori prisoners being approximately 5,000 (50 per cent of a prison population of around 10,000).

[127] The MEP represents the number of people registered as electors of the Māori electoral districts and a proportion of people of Māori descent (taken from the latest census) who are not registered as electors and a further proportion of the persons of New Zealand Māori descent under the age of 18 years.[93] The exclusion of 5,000 Māori from voting impacts directly on the Māori ratio and therefore the MEP as a whole.

[128] Assuming all Māori prisoners exercised the Māori electoral option, the MER would increase by 5,000. As a result, the ratio of Māori increases and the proportion taken from the Māori descent census also increases. In this case, Mr Francois said that this rise in the MEP would be nearly 10,000.[94]

[129] The MEP then determines the number of Māori electorates.[95] This is because this calculation is made by dividing the MEP by the South Island quota. An increase in the MEP could therefore see an increase in the number of Māori electorates. The 2013 census showed an MEP of 420,990 and the South Island quota as 59,679. The number of Māori electorates was therefore 7.05 and, rounded to the nearest whole number, totalled seven Māori electorates. On the basis of this rule, 8 Māori electorate districts would be created if the MEP divided by the South Island quota was more than 7.5.

[130] If 5,000 Māori prisoners were added to the MER, this would increase the MEP by approximately 10,000. This would increase the Māori Electorate count to 7.2. We observe this is still insufficient to trigger the creation of a new Māori electorate seat. However, Mr Francois submitted that "the number increases cumulatively each year as prisoners are released because they do not register".[96]

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93 Following the statutory formula defined as the "Māori electoral population" in s 3(1) of the Electoral Act.

94 From 420,990 to 429,206.

95 Electoral Act, s 45(3).

96 See [108] above.

[131] These submissions are not accepted by the Attorney-General. Mr Perkins submitted that Māori and non-Māori prisoners are treated identically by s 80(1)(d): both are disqualified from electoral registration to the same extent. Mr Perkins in oral submissions emphasised that there is no differential treatment because both Māori and non-Māori lose the right to register anywhere. He submitted that the right to vote on the Māori roll was a privilege only available to Māori prisoners and was therefore a form of positive discrimination. He relied on the Canadian decision of *Ferrell v Ontario (Attorney-General)* to support the proposition that the removal of affirmative discrimination cannot be discriminatory.[97] Furthermore, Mr Perkins submitted that if there was differential treatment, there was no material disadvantage.

Our analysis

[132] We agree that it is useful to treat as comparators Māori and non-Māori prisoners, although we will later consider the comparison between Māori and non-Māori voters.

[133] Treating people who are detained in prison differently because they have been convicted of a crime and sentenced to prison is not a prohibited ground under s 21 of the Human Rights Act. There has been a policy decision made by Parliament that persons convicted of a crime that is sufficiently serious to result in imprisonment should not vote while serving that sentence. Māori and non-Māori prisoners are both prohibited from voting. That is not directly inconsistent with s 19 of the Bill of Rights. Mr Francois does not argue otherwise. Rather, he relies on the indirect effects of s 80(1)(d).

[134] In determining whether there has been discrimination assistance can be drawn from some indirect discrimination cases. In *Smith v Air New Zealand Ltd* this Court briefly considered the import of s 65.[98] The Court indicated there was force in the argument that the prohibition of indirect discrimination could apply in a case where the plaintiff was alleging that Air New Zealand had, in failing to allow her to obtain extra oxygen she needed on flights at affordable prices, breached s 44 of the Human Rights Act, which protects persons against discrimination in the supply of

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97 *Ferrell v Ontario (Attorney-General)* (1998) 168 DLR (4th) 1.
98 *Smith v Air New Zealand Ltd,* above n 87, at [37].

goods and services. It could have the effect of treating persons who needed extra oxygen differently from others when it came to enjoying those goods and services.

[135] In Canada, indirect discrimination is referred to as "adverse effects discrimination". As we have discussed earlier,[99] in *Eldridge v British Columbia (Attorney-General)* the Supreme Court of Canada considered whether the fact that the British Columbia public health system did not fund the provision of translation services to deaf patients was discriminatory.[100] The Supreme Court held that the object of the system was to secure access to core medical services. The failure to provide translation services to deaf patients effectively denied them equal access to core benefits otherwise accorded to everyone within the province, and was therefore discriminatory.

[136] Likewise in *British Columbia (Public Service Employee Relations Commission) v BCGEU* the Supreme Court of Canada found that Province of British Columbia's adoption of certain fitness tests for forest firefighters was prima facie discriminatory because it set an aerobic standard that was likely to exclude women.[101] There was evidence that, owing to physiological differences, most women could not increase their aerobic capacity to the level required with training, whereas most men could with training. There was no credible evidence that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest fighter satisfactorily.

[137] In these cases the policy in question had the immediate effect of treating a group differently on the basis of a prohibited ground. They offer a useful comparison to the present appeal. Deaf people needing health services in comparison to non-deaf people needing health services could not enjoy health services. In this case, however, non-Māori prisoners are treated the same way as Māori prisoners. Neither can vote. The policy does not have the effect, directly or indirectly, of treating the two groups differently.

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99 At [119] above.
100 *Eldridge v British Columbia (Attorney-General)*, above n 86.
101 *British Columbia (Public Service Employee Relations Commission) v BCGEU* [1999] 3 SCR 3 at [83].

[138] If s 80(1)(d) is discriminatory under the Bill of Rights because the disproportionate representation of Māori in prisons means that they will be disproportionately disadvantaged, the same will apply to all prison policies that have a negative effect on prisoners' lives. The limits to the freedom of prisoners, to what they may eat and do and who they may consort with, as they apply to Māori and non-Māori prisoners, could all be criticised on the same basis. No prisoner has the right to any of these basic freedoms. Māori prisoners are not deprived of something that other prisoners can enjoy. Further, other groups in addition to Māori are overrepresented in prisons. For instance, as a commentator has pointed out, both males and young persons are seriously overrepresented in prisons.[102] On the appellants' argument it could be suggested that these individuals, or the wider demographic they represent, are being discriminated against.

[139] We turn to the more detailed submission which turns on the particular position of the Māori voter in New Zealand.

[140] What is being referred to is a consequence of the prohibition on voting, which prevents Māori voters from having an option that other, non-Māori voters do not have. The prohibition does not have the effect of treating Māori prisoners differently from other prisoners in the sense used in s 65. The only difference is that a downstream choice for Māori is removed. The removal of that choice that only Māori have places Māori in the same position as their non-Māori counterparts. Neither may register as electors. The prohibition on discrimination is aimed at achieving equality. Māori sentenced prisoners end up placed in a position of exact equality as against the non-Māori sentenced prisoners. Equality of treatment not being affected, s 65 does not apply.

[141] Moreover there are a number of factual difficulties in Mr Francois's submissions. Mr Francois's statistical analysis of how the currently disentitled Māori prison population could affect the number of Māori electorates does not isolate those prisoners who are serving a non-preventive sentence of imprisonment of less than three years, and who would therefore have not been affected by the

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[102] Selwyn Fraser "Māori qua what? A claimant-group analysis of *Taylor v Attorney-General*" [2017] NZ L Rev 31 at 47–48.

narrower prohibition in the predecessor to the current s 80(1)(d). The number of people caught by the current s 80(1)(d) who would not have been under its predecessor may have a material impact on Mr Francois's calculations. Additionally, the argument proceeds on the assumption that "if all Māori exercised the option to register on the Māori roll", the relevant calculations would follow. There is no clear evidence as to what percentage of the Māori prison population would register on the Māori roll, or indeed comparatively what percentage of Māori prisoners who are released will re-register, in comparison to non-Māori.

[142] In addition, the suggested calculation would not actually lead to the creation of another Māori electorate, and in fact quite significantly falls short of the necessary threshold. Instead, it relies on a catch-all comment that widespread failure among released prisoners to reregister to vote creates a growing group of persons who *will not* vote, rather than who are not legally entitled to do so.

[143] Fogarty J noted that Mr Francois's argument that the reduction of the number of Māori electorates constituted a disadvantage was abandoned in the High Court and was therefore not addressed in detail.[103] This was after a Crown submission that the Māori electoral population includes persons who claim Māori descent at the census, but who are not registered in any electoral district. Therefore the number of electoral districts is unaffected by disqualification of Māori prisoners.

[144] *Ferrell v Ontario (Attorney-General)* was a Canadian case where the Ontario Court of Appeal primarily addressed whether the state had a positive duty to enact legislation remedying systematic prejudices against minority groups.[104] The Court concluded there was no such duty. In doing so it commented on whether an Act removing positive discrimination could be regarded as discriminatory. It was held that the legislature was free to repeal a provision for positive discrimination, the Court stating:[105]

> [T]he legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under section 1 of the Charter.

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103 *High Court judgment*, above n 18, at [122].
104 *Ferrell v Ontario (Attorney-General),* above n 97.
105 At [36].

[145] This statement was made in the context of a different legislative background, and we do not exclude the possibility that the removal of positive benefits could be discriminatory. But in this case it reinforces the view we take that it is not necessarily discriminatory to indirectly neutralise a provision facilitating positive discrimination.

[146] We therefore cannot accept the submissions for the appellants based on a comparison between Māori and non-Māori prisoners.

[147] However, Mr Francois's indirect discrimination submission is more effective if a different comparator group is chosen, producing a different analysis. The Māori voting community can be compared to the non-Māori voting community. If Māori voters and non-Māori voters are compared, there is a difference in the effect of s 80(1)(d) on the number in proportional terms of persons who are prohibited from voting. This flows from the fact that a considerably greater percentage of the Māori population are in prison than the percentage for other groups. The effect is that proportionally, it deprives more Māori than non-Māori of the right to vote. The difference is sufficiently great for us to accept the argument of Mr Francois that there is an indirect difference in treatment.

[148] However, in terms of the overall number of voters, the difference is not significant. Less than one per cent of either group, Māori or non-Māori, is in prison.[106] Therefore, the impact of the prohibition on Māori as a group, affecting as it does less than one per cent, is so small that there is no material disadvantage to Māori resulting from the enactment of s 80(1)(d). We have already analysed the downstream effects of the policy on Māori voters, and have not been able to accept the more specific arguments of significant prejudice to Māori voters when they cannot exercise their choice to register on the Māori roll.

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[106] Statistics New Zealand "New Zealand Official Yearbook 2012" (4 July 2013) Stats NZ <http://www.statistics.govt.nz >. This publication was frequently referred to by Mr Francois in his written submissions, and we take judicial notice of the statistics published therein. We acknowledge that the data is not current to 2017.

[149] Thus while we accept that there are differential effects as between Māori and non-Māori voters that follow from the ban on prisoner voting, that difference is not discriminatory as it does not impose a material disadvantage on Māori.

Discrimination on the basis of political opinion

[150] Section 21(1)(j) of the Human Rights Act provides as a prohibited ground of discrimination:

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the prohibited grounds of discrimination are—
>
> ...
>
> (j) political opinion, which includes the lack of a particular political opinion or any political opinion

[151] Mr Francois also argued Fogarty J did not decide whether s 80(1)(d) breached Mss Ngaronoa and Wilde's right to be free from the discrimination on the basis of political opinion under s 21(1)(j). Disqualification prevents Māori prisoners voting for political parties they identify with. The meaning of "political opinion" goes beyond party political affiliations. Māori have common causes expressed in political terms "either in protest, media, the Waitangi Tribunal, or legislation". Māori prisoners who want to register to vote for Māori causes cannot, and "[n]on-Māori prisoners do not have the same political causes".

[152] The appeal under s 21(1)(j) of the Human Rights Act, which received little attention in submissions, cannot succeed. Mr Francois has not established that Māori prisoners are being discriminated against for holding any particular political view. Indeed there is no evidence that Māori as a group hold any particular political opinion.

Conclusion on discrimination as a ground of appeal

[153] While our reasoning is different in some respects from that of Fogarty J, we uphold his decision that s 80(1)(d) is not discriminatory. There is a difference in the way it affects Māori and non-Māori voters, because a significantly greater proportion

of Māori are in prison in comparison to non-Māori. However, the numbers involved are small, and we have not accepted that any unfair effects of the difference are exacerbated by the particular extra rights enjoyed by Māori voters. We have concluded that the policy does not impose a material disadvantage on Māori.

[154] It follows that we reject Mr Francois's submission that the Electoral Commission is in breach of its functions under s 4C of the 1993 Act and ss 18 and 19 of the Crown Entities Act.

Sections 9 and 23(5) of the Bill of Rights

[155] Sections 9 and 23(5) of the Bill of Rights provide:

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.
>
> **23 Rights of persons arrested or detained**
>
> …
>
> (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

[156] First, Mr Francois claimed s 80(1)(d) breaches s 9 of the Bill of Rights, the right not to be subjected to degrading or disproportionately severe treatment. He relied on the Supreme Court decision in *Taunoa v Attorney-General*, arguing that in each case engaging s 9 the courts must consider the context, vulnerability of an individual, and the circumstances of each case.[107] Disproportionately severe treatment will be prohibited under s 9 if it is so excessive as to outrage standards of human decency.[108]

[157] Mr Francois argued this threshold is met when one considers the cumulative effect of the circumstances of incarceration in addition to the removal of the right to vote. The deprivation of the right to vote is "intentionally demoralising" and erases Māori rights to tino rangatiratanga.

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[107] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
[108] At [147] per Blanchard J.

[158] Secondly, Mr Francois argued that Mss Ngaronoa and Wilde's right to vote is a matter of personal autonomy and independence protected by s 23(5) of the Bill of Rights, which requires that everyone deprived of liberty be treated with humanity and respect for their inherent dignity. "Human dignity" encompasses the ideas of autonomy and a person's control over their psychological integrity. Deprivation of the right to choose a government includes voting in Māori electorates about Māori issues. These matters relate to identity, autonomy and self-determination.

Analysis

[159] Sections 9 and 23(5) have a related existence and were comprehensively discussed in *Taunoa v Attorney-General*, in which the Supreme Court set a particularly high standard for s 9. In that case, a number of prisoners were subjected to a non-statutory regime, the Behaviour Management Regime, which involved a highly controlled environment and severe restrictions on association with others. The majority concluded that while that regime was unlawful and unacceptably breached s 23(5), it fell short of the high standard in s 9.[109]

[160] As to the relationship between ss 9 and 23(5), Blanchard J commented that while s 9 was concerned with conduct on the part of the state and officials which was to be condemned as outrageous and unacceptable in any circumstances, s 23(5) proscribes conduct which is unacceptable but not outrageous.[110] The prohibition on "disproportionately severe" treatment or punishment in s 9 takes its colour from the rest of that section.[111] Tipping J stated that to breach s 9, conduct would have to be "so severe as to shock the national conscience".[112] Furthermore, a breach of s 9 will often involve intention to harm or at least subjective reckless indifference as to the causing of harm.[113] A particularly high standard is therefore required.

[161] The threshold under s 9 is not met. While the number of Māori in prison is a great concern, the voting restriction plainly does not have the element of shocking maltreatment required. Mr Francois's argument is based on the impact of

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109 At [275] per Tipping J, [341] per McGrath J and [384] per Henry J.
110 At [170]. See also [339]–[340] per McGrath J.
111 At [176] per Blanchard J and [280] and [286] per Tipping J.
112 At [289].
113 At [295] per Tipping J and [383] per Henry J.

disenfranchisement on the individual. We agree with the observation of Andrew Butler and Petra Butler in *The New Zealand Bill of Rights Act: A Commentary* that ss 8–11 of the Bill of Rights are geared toward "securing bodily integrity".[114] There is no claim of harm to bodily integrity, and even taken cumulatively with the other conditions of imprisonment, we do not regard removal of the right to vote as meeting the high threshold required.

[162] Section 23(5) is a lesser standard, but is still not met. As the majority of the Supreme Court noted, the approach is whether the "conduct" would be considered unacceptable in New Zealand society. Examples of breaches of s 23(5) from *Taunoa* included:

(a) lengthy unlawful segregation from other prisoners;

(b) loss of ordinary prisoner entitlements while segregated;

(c) poor cell hygiene;

(d) bedding and clothing falling below prison regulation standards;

(e) inadequate monitoring of inmate mental health;

(f) inadequate exercise conditions; and

(g) some strip searches not complying with the law.

The prohibition in s 80(1)(d) of the 1993 Act does not approach the level of any of these examples.

Conclusion on Bill of Rights claims

[163] We conclude that s 80(1)(d) is not directly or indirectly discriminatory and does not involve a breach of any of the provisions in the Bill of Rights relied on by Mss Ngaronoa and Wilde.

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[114] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [10.6.2].

Result

[164] The appeals are dismissed.

[165] There is no order as to costs.

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