IN THE COURT OF APPEAL OF NEW ZEALAND

CA470/2015
[2017] NZCA 215

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	ARTHUR WILLIAM TAYLOR First Respondent
	HINEMANU NGARONOA, SANDRA WILDE, KIRSTY OLIVIA FENSOM AND CLAIRE THRUPP Second to Fifth Respondents

Hearing:	26 and 27 October 2016
Court:	Kós P, Randerson, Wild, French and Miller JJ
Counsel:	P T Rishworth QC, D J Perkins and E J Devine for Appellant D A Ewen for First Respondent R K Francois for Second to Fifth Respondents A S Butler and E M Watt for Human Rights Commission, intervening with leave V E Casey QC for the Speaker, intervening with leave
Judgment:	26 May 2017 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the second to fifth respondents' costs for a complex appeal on a Band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild and Miller JJ)

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Introduction

[1] In December 2010 Parliament amended the Electoral Act 1993, extending to all prisoners a prohibition on voting that was formerly restricted to prisoners sentenced to three or more years' imprisonment.

[2] The respondents, five prisoners, brought a proceeding in the High Court seeking a declaration that the amending legislation,[1] which we will call the 2010 Act, is inconsistent with the right to vote affirmed and protected by the New Zealand Bill of Rights Act 1990. Section 12(a) of the Bill of Rights, as we will call it, provides:

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

[3] In a judgment delivered in the Auckland High Court on 24 July 2015, Heath J held that the 2010 Act is inconsistent with the protected right and the inconsistency could not be justified. He made a declaration accordingly:[2]

> 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] The general issue on which the Attorney-General appeals is whether the High Court was right to make the declaration. Deciding that issue requires us to answer three questions of constitutional law:

> (1) *Jurisdiction?* Do the higher courts of New Zealand have jurisdiction to make a declaration?

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1 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

2 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79].

(2) *Source of the jurisdiction?* If yes, what is the source of that power? Is it to be found in the common law, or does it reside in the Bill of Rights? Or in a combination of both?

(3) *Ambit of the jurisdiction?* What is the proper ambit of the jurisdiction to make a declaration – what limitations ought to be placed upon its use?

[5] A fourth question, raised by the intervention of the Speaker of the House of Representatives, is whether the Judge breached parliamentary privilege by using a report made under s 7 of the Bill of Rights, in which the Attorney-General advised Parliament that the 2010 Act was inconsistent with the protected right to vote.

Terminology

[6] It is as well to explain at the outset the terminology that we have chosen to adopt. We will call a declaration that legislation limits a protected right in a manner that cannot be justified in a free and democratic society a "declaration of inconsistency". It might be preferable to adopt "declaration of incompatibility", which better recognises that the court must both identify a limitation upon a protected right and find the two incompatible, in the sense that the limitation cannot be justified in a free and democratic society.[3] The latter requirement should not be underestimated, and for that reason it is appropriate to speak of claims in which a declaration is sought as incompatibility proceedings. However, "declaration of inconsistency" has become a term of art in New Zealand.[4] We adopt it accordingly and refer to the remedy as a DoI.

[7] We will use the term "*Hansen* indication" to describe a statement in which a court expresses, as part of its reasons, an opinion that legislation limits a protected

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3 Incompatibility is the term used in s 4 of the Human Rights Act 1998 (UK), which expressly authorises courts to make such a declaration.

4 Notably, Parliament provided in s 20L of the Human Rights Act 1993 that an enactment is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) if it limits the right to freedom from discrimination and the limitation is not justified under s 5 of the Bill of Rights. The leading texts also speak of a declaration of inconsistency: see for example Paul Rishworth and Others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 834–835; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1607.

right in a manner that cannot be justified in a free and democratic society, but does not grant the plaintiff a DoI or other remedy.

The 2010 Act's impact upon the right to vote

[8] Before amendment s 80(1)(d) of the Electoral Act disqualified from voting a prisoner sentenced to imprisonment for a term of three years or more. It did that by disqualifying such persons from registering as electors.

[9] The eventual objective of the 2010 amendment, as it appears from the Bill's original explanatory note and a subsequent Law and Order Committee report, was to disenfranchise persons sentenced to imprisonment for "serious crimes".[5] It achieved this purpose by extending the existing disqualification to all sentenced prisoners.

[10] Before the Bill's first reading the Attorney-General reported under s 7 of the Bill of Rights, which requires that the Attorney "must bring to the attention of the House" any provision in a Bill that "appears to be inconsistent" with a protected right. He advised that:[6]

> … the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 … and … cannot be justified under s 5 of [the Bill of Rights] Act.

[11] The Attorney advised that the Bill's purpose was not rationally linked to its effect, which was also disproportionate. His reasons were, in short, that:

(a) The Bill would disqualify some who were not serious offenders. For example, a fines defaulter given a short salutary sentence of imprisonment would be disqualified if the sentence coincided with an election.

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5 Electoral (Disqualification of Convicted Prisoners) Amendment Bill) 2010 (117-1) (explanatory note) at 2; and Electoral (Disqualification of Convicted Prisoners) Bill 2010 (117-2) (select committee report) at 2.

6 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (17 March 2010) at [16].

(b) The Bill was at the same time under-inclusive, in that a serious offender whose sentence was less than three years could still vote if the sentence fell between elections.

(c) The Bill also introduced irrational inconsistencies into electoral law; for example, it did not alter s 80(1)(c) of the Electoral Act, which provides that someone detained as mentally impaired under a criminal process loses the vote only if detained for more than three years.

[12] The Bill was subsequently referred to the Select Committee, which supported it,[7] and passed, coming into force as the 2010 Act on 16 December 2010.

The respondents

[13] Four of the five respondents were disenfranchised by the 2010 Act. The fifth, Mr Taylor, had already lost his right to vote because he was serving a term exceeding three years' imprisonment, but he claimed to be suing for other prisoners disenfranchised by the 2010 Act.

The High Court's judgment

[14] Heath J's judgment is comprehensive and carefully reasoned. It describes the application to the Court, outlines the purposes of the Bill of Rights, describes the impugned legislation, traces the history of prisoner disenfranchisement legislation in New Zealand, sets out the s 7 report and then turns to an analysis of the issues the Judge needed to decide.

[15] Heath J traced the history of the disenfranchisement of serving prisoners back to its origin in the concept of "civil death" in the Greek and Roman Empires. The Judge explained that disenfranchisement was a mark of "infamy", bestowed on those "guilty of heinous and treacherous crimes involving moral depravity, and resulted in the forfeiture of rights such as voting and holding certain public offices". Heath J

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[7] The Select Committee recommended that the prohibition apply not to convicted offenders, as the Bill originally proposed, but to sentenced prisoners, and this modification was adopted. See Electoral (Disqualification of Convicted Prisoners) Bill 2010 (117-2) (select committee report) at 2.

pointed out that infamy was one of the original grounds on which prisoner disqualification was first based in New Zealand law.[8] The Judge then traced the history of prisoner disenfranchisement in successive legislation in New Zealand and referred to some of the underlying policies. We need not go into that, because the Attorney has not sought to justify the inconsistency.

[16] After recording the opposing submissions,[9] Heath J turned to the boundaries of his jurisdiction. He noted this Court's suggestion, made in 2000 in *Moonen v Film and Literature Board of Review*, that the Court had "the power, and on occasions the duty, to indicate" that a statutory provision is inconsistent with the Bill of Rights, in the sense that it does not constitute a reasonable limitation in terms of s 5.[10] The Judge did not think that the broader role suggested for s 5 in *Moonen* conflicted with the policy underlying s 4. Section 5 required the Court to undertake a new type of analysis. Whether or not it was undertaken for the purpose of interpretation, there was no conflict with s 4, the effect of which was unequivocal.[11]

[17] The Judge then noted the distinction the Attorney sought to draw between an "indication" and a "formal declaration" of inconsistency. The argument that only the former was permissible drew on the language employed by this Court in *Moonen* and by McGrath J in the Supreme Court in *Hansen*, in which McGrath J held that a court must be prepared to find that an enactment is inconsistent with a protected right and state that it has had to resort to s 4 of the Bill of Rights to give effect to the enactment, but added that normally the court's opinion will be sufficiently apparent from its reasons.[12]

[18] Some academic articles were the Judge's next focus. The first was written in 1992 by Professor Brookfield, who considered the Court should, at least where it found inconsistency in a case of serious infringement, "formally declare that inconsistency even though it can go no further than that".[13]

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8 *Taylor v Attorney-General*, above n 2, at [16], referring to the New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict, s 8.

9 See [29] below. The argument before us was substantially the same.

10 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20].

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

12 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253] per McGrath J.

13 FM Brookfield "Constitutional Law" [1992] NZ Recent L Rev 231 at 239.

[19] In a similar vein was an article by Professor Paul Rishworth published six years later,[14] following this Court's judgment in *Quilter v Attorney-General*.[15] The article pointed out that the proscriptions in s 4 of the Bill of Rights do not "preclude comment and proclamation", and suggested "declarations are even pointedly reserved as a possibility by s 4".[16] Professor Rishworth considered "there is room for judicial choice as to where our Bill of Rights should be located on the spectrum of constitutional significance".[17]

[20] The third article was written in 2009 by Professor Claudia Geiringer. Her article explored cases "touching on the suggestion that the New Zealand Courts have an implied power to formally declare that legislation is inconsistent with the rights and freedoms contained" in the Bill of Rights.[18] She referred to *Moonen*,[19] *R v Hansen*,[20] and *Taunoa v Attorney-General*.[21] Professor Geiringer concluded "the prospects for the development of a formal declaratory jurisdiction of this kind in New Zealand are, if anything, receding".[22]

[21] Because of the uncertain nature of the jurisdiction, Heath J stated he proposed to consider the issue as one of first impression, guided by what had been said in the cases and academic articles to which he had referred. He said he was doing this on the basis of the "judicial choice" to which Professor Rishworth had referred.[23]

[22] The Judge's starting point was "the fulsome jurisprudence" on the topic of remedies for breach of rights affirmed by the Bill of Rights, and he began with *Baigent's Case*,[24] from which he drew the following points: it involved a breach by the executive branch of Government (as opposed to inconsistent legislation enacted by Parliament); none of the five Judges accepted that the absence of a remedies

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14 Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] NZ L Rev 683.
15 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).
16 Rishworth, above n 14, at 693.
17 At 693.
18 Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 613.
19 *Moonen*, above n 10.
20 *R v Hansen*, above n 12.
21 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
22 Geiringer, above n 18, at 616.
23 *Taylor v Attorney-General*, above n 2, at [49].
24 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

provision in the Bill of Rights militated against the availability of compensatory damages; and all five Judges considered that a breach of the Bill of Rights must be attended by a remedy appropriate and proportionate to the breach.[25]

[23] Heath J then turned to the Supreme Court's decisions in the more recent cases of *Taunoa v Attorney-General*[26] and *Attorney-General v Chapman*.[27] The Judge noted that in neither of those cases had the Attorney-General asked the Supreme Court to reconsider the approach this Court had taken in *Baigent's Case*. Heath J considered the general thrust of the two judgments was captured in Blanchard J's observation in *Taunoa* that a Court, when considering a remedy for infringement of a right:[28]

> … must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances…

[24] Heath J then asked himself whether a different approach was required in respect of the legislative branch of Government. His answer was "no", for two reasons.

[25] First, the Judge considered the way in which the Bill of Rights, particularly ss 4 and 5, had been framed meant Parliament did not intend to exclude the ability of the Court to make a DoI.[29]

[26] Second was the enactment, effective from 1 January 2002, of s 92J of the Human Rights Act 1993. Section 92J(1) and (2) provide that the only remedy the Human Rights Review Tribunal may grant if it finds an enactment discriminatory:

> … is a declaration that the enactment … is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.

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25 *Taylor v Attorney-General*, above n 2, at [50]–[58].
26 *Taunoa v Attorney-General*, above n 21.
27 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.
28 *Taunoa v Attorney-General*, above n 21, at [258] per Blanchard J.
29 *Taylor v Attorney-General*, above n 2, at [61].

[27] The Judge made four observations about the jurisdiction s 92J confers on the Tribunal:[30]

(a) Section 92J(4) made it clear the Bill of Rights stands apart from the s 92J(1) and (2) jurisdiction.

(b) A s 92J declaration can be made on a standalone basis.

(c) There is a right of appeal to the High Court from any determination by the Tribunal.[31]

(d) The s 92J jurisdiction signalled that Parliament sees no political objection to that particular remedy being granted.

[28] Although the s 92J jurisdiction is restricted to the s 19 right to be free from discrimination, Heath J found it difficult to see why Parliament would authorise an inferior tribunal to make a declaration of inconsistency with s 19 if it did not accept that the High Court (a senior court of record with inherent jurisdiction) could not do the same for other rights affirmed and protected by the Bill of Rights. The Judge thought the s 92J jurisdiction pointed "firmly" to an acceptance by Parliament that it is appropriate for the Court to make declarations about the inconsistency of legislation with rights protected by the Bill of Rights. He also found support in Parliament's decision to confer a right of appeal from the Human Rights Review Tribunal to the High Court in respect of an exercise of the Tribunal's s 92J jurisdiction.[32]

The Attorney-General's case on appeal

[29] For the Attorney, Mr Rishworth QC submitted that the High Court's jurisdiction extended to giving a *Hansen* indication as part of the Court's interpretive function but the Court could not go further and make a DoI, which is a formal remedy and solemn declaration informing all New Zealanders that Parliament has

30 At [63].
31 Human Rights Act, ss 123(2)(c) and 123(2)(d).
32 *Taylor v Attorney-General*, above n 2, at [64].

enacted legislation incompatible with a fundamental right.[33] Such a declaration is qualitatively different from a *Hansen* indication, in which the court's opinion appears from its reasons. Counsel recognised that in *Moonen* this Court had said an indication of inconsistency could be made and in *Hansen* the Supreme Court had made one. But in both cases that was done in the course of an interpretive exercise. *Hansen* does not establish that a court might go further and make a DoI.

[30] Mr Rishworth advanced seven reasons why the court is without jurisdiction. First, a DoI forms no part of the judicial function under New Zealand's constitution, for it is a new remedy, never previously recognised, that would resolve no justiciable controversy between litigants and determine or apply no law. Rather, it would trespass upon the functions of the political branches, for it would be tantamount to an address to Parliament or the nation about the quality of laws when measured against fundamental rights. For these propositions he cited *Momcilovic v The Queen*, in which the High Court of Australia held that declarations of inconsistency between legislation and protected rights are not a judicial function under Australian constitutional law, for they have no legal effect on the legislation and serve a purpose that forms no part of judicial power; namely, to set in train a process under which the political branches of government might decide to change the legislation.[34]

[31] Counsel accepted that New Zealand's constitutional arrangements derive from those of Great Britain and retain much in common. The higher courts in New Zealand enjoy all the jurisdiction of the courts of Queen's Bench, Common Pleas, and Exchequer, at Westminster as at 1860. That jurisdiction was conferred under the Supreme Court 1860, continued under the Judicature Act 1908 and now continues under the Superior Courts Act 2016. It follows that an inquiry into judicial function under New Zealand's constitution leads to English history and jurisprudence. Counsel submitted, however, that no historical description of the English courts' jurisdiction identifies any historical power to give advisory opinions, or to declare one enactment inconsistent with another.

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33 See at [30] and [77(d)].

34 *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1 at [89] per French CJ and at [661] per Bell J.

[32] Second, such a "remedial" power could only be conferred by statute. Declarations are a recognised general judicial remedy at common law, deriving from the inherent power of the Court of Chancery, but so reluctant were the English courts to make them that the legislature enacted the declaration of right as an independent remedy. The New Zealand Parliament did so in the Declaratory Judgments Act 1908, which does not permit declarations by way of commentary on legislation or advice to Parliament. Against this background, counsel submitted, a power to make declarations of inconsistency must be statutory in nature, as it is in the United Kingdom, Ireland, Victoria and the Australian Capital Territory.

[33] Counsel emphasised that no statute in New Zealand expressly confers such a power, and specifically the Bill of Rights does not. Section 3 envisages a *Hansen* indication, but it is not a substantive constraint on Parliament's power to legislate.[35] Further, s 5 does not contemplate a DoI, and Heath J erred in finding that it did. And finally, any remedial powers the courts might have following *Baigent's Case* are limited to granting remedies against the executive, and not the legislature.

[34] Third, the International Convention on Civil and Political Rights (ICCPR) does not generate or support a jurisdiction to make a DoI. It contemplates a member state giving effect to rights and enabling remedies within that state's constitutional order. In New Zealand's case that is a *Hansen* indication. Further, the ICCPR commits New Zealand, as a whole, to providing effective remedies; it does not require a specific remedy such as a DoI. And a DoI is not technically a remedy at all, let alone an effective one.[36] Nor is it needed so that New Zealand citizens can

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35 See Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a substantive legal constraint on Parliament's power to legislate" (2007) 11 Otago LR 389 at 391.

36 In *Human Rights: Judicial Protection in the United Kingdom*, the authors, referring to a declaration of incompatibility, stated: "While not in itself an effective remedy, a declaration of incompatibility may give an otherwise unsuccessful party some measure of comfort and, indeed, assist in any subsequent proceedings brought before the Strasbourg Court, which is likely to treat a national finding of incompatibility with considerable respect." Jack Beatson and others *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) at [7–15].

"exhaust domestic remedies", as Mr Taylor argued in the High Court; if it is not available, domestic remedies are simply exhausted earlier.[37]

[35] Fourth, asserting a DoI jurisdiction in the absence of statutory authority would be "inimical to the preservation of the institutional character and authority of the judicial branch". Since there is no mechanism for bringing a DoI to the attention of Parliament or the Executive, it would risk undermining the stature of the court, because it would be unenforceable. And a DoI jurisdiction is incompatible with the legislative history of the Bill of Rights, which clearly does not support judicial review of legislation.

[36] Fifth, s 92J of the Human Rights Act does not support the existence of a DoI jurisdiction. Parliament only went as far as the limited jurisdiction s 92J confers on the Human Rights Review Tribunal.

[37] Sixth, it would open the "floodgates" to countless applications for a DoI by people disaffected with all sorts of enactments. It would then be difficult for the courts to control that tide of litigation.

[38] Finally, and in the alternative, counsel submitted if the jurisdiction exists it is discretionary and exceptional and ought not to have been exercised here.

[39] We will begin our examination of these arguments with the Attorney's claim that a DoI is unconstitutional because it exceeds the judicial function and is not authorised by the Declaratory Judgments Act. This requires that we discuss the important concept of restraint. In light of our conclusions on these issues, we will then examine jurisdiction under the Bill of Rights. We examine the ambit of the remedy and other remedial considerations further at [147] below, after dealing with the Speaker's intervention.

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[37] In *Pratt and Morgan v Jamaica*, the Human Rights Committee held that the so-called "local remedies rule" does not require resort to appeals that objectively have no prospect of success: *Pratt and Morgan v Jamaica*, Communication No 210/1986, Communication No 225/1987 (UNHCR) CCPR/C/35/D/210/1986 (1989), IHRL 2462 (UNHRC 1989) at [12.6]–[12.7].

Jurisdiction and restraint distinguished

[40] We preface our discussion of jurisdiction at common law and under the Bill of Rights by drawing a centrally important distinction between jurisdiction and restraint.

[41] At the core of the Attorney's case lies the proposition that it is no part of the judicial function under New Zealand's constitution to make DoIs absent legislation expressly authorising them. This is a bold argument. We pause to set it in context. This case concerns inconsistency between one Act, the 2010 Act, and another, the Bill of Rights. The latter expressly requires courts to examine other legislation for inconsistency with protected values, seeking rights-consistent interpretations where possible and specifying when legislation must be given effect under s 4. So the Attorney cannot and does not suggest that it is no part of the judicial function to interpret legislation by reference to those values, or to give reasons explaining that legislation is inconsistent with them.[38] The Attorney focuses rather on remedy, insisting that the courts are without jurisdiction to take the seemingly short step from reasons to declaration; alternatively, that to take it would be a radical and imprudent departure from constitutional tradition.

[42] The first of these arguments uses "jurisdiction" in its strict sense, meaning that the courts have "no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised".[39] It is sometimes used in a wider sense, to characterise what courts do when choosing not to intervene as a matter of settled practice. But a decision not to intervene is better described as the exercise of restraint, which is usually justified on grounds of comity or institutional competence or democratic legitimacy. In the words of Lord Diplock:[40]

> The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

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38 *R v Hansen*, above n 12, at [82] per Blanchard J, at [108] per Tipping J and at [253]–[254] per McGrath J.

39 *Guaranty Trust Company of New York v Hannay & Company* [1915] 2 KB 536 (CA) at 563.

40 *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136 (PC) at 1155 per Lord Diplock.

In this judgment we will use "jurisdiction" in the strict sense when dealing with the Attorney's first argument and "restraint" when dealing with the second.

The common law jurisdiction of the higher courts

[43] The Attorney's contentions that a DoI forms no part of the judicial function and would require express statutory authority require that we rehearse some elementary principles about the relationship between the political and judicial branches of government and the role of the higher courts under New Zealand's constitution.

Jurisdiction

[44] The supremacy of the Crown in Parliament is, as Lord Bingham put it in the *Hunting Act* case,[41] the "bedrock" of the constitution. Parliament may make or unmake any law it wishes, unconstrained by any entrenched or codified constitution. This principle is as fundamental in New Zealand as it is in Britain. It finds expression in the Constitution Act 1986, which declares that Parliament consists of the Sovereign in right of New Zealand and the House of Representatives, and further proclaims that Parliament continues to have full power to make laws.[42] The power to make and unmake laws is supreme in a community governed by the rule of law. That is why Parliament itself is often described as supreme or sovereign.

[45] But Parliament does not owe this great power to the Constitution Act. Sir John Salmond explained that no statute can confer upon Parliament the power to make laws:[43]

> All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed *ad infinitum* in tracing the descent of its principles. It is requisite that the law should postulate one or more first causes, whose operation is ultimate and whose authority is underived … The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law

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41 *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at [9] per Lord Bingham of Cornhill [The *Hunting Act* Case].

42 Constitution Act 1986, ss 14 and 15.

43 John Salmond *Jurisprudence* (10th ed, Sweet & Maxwell, London, 1947) at 155. See also HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012).

> has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal … It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred.

[46] Of course the laws must be enforced, and that is the function of the courts. Indeed, Dicey defined a law as any rule that the courts will enforce.[44] Parliamentary supremacy accordingly depends on another rule, that of judicial obedience to the legislative expression of Parliament's will. That rule owes nothing to legislation either. Rather, as Sir William Wade emphasised, it is both a construct of the common law and a political fact:[45]

> The rule of judicial obedience is in one sense a rule of common law, but in another sense—which applies to no other rule of common law—it is the ultimate *political* fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation.

[47] Nor do the higher courts owe their common law judicial authority to Parliament. As Professor Joseph observes, no legislation conferred their general and inherent powers of adjudication:[46]

> The superior courts acquired their common law powers of adjudication just as Parliament acquired its co-ordinate power of legislation – through historical evolution and adjustment without formal grant of the law.

[48] Salmond made the same point:[47]

> So also the rule that judicial decisions have the force of law is legally ultimate and undefined. No statute lays it down. It is certainly recognised by many precedents, but no precedent can confer authority upon precedent.

[49] We pause here to emphasise, as should already be apparent, that we are not making the claim that Parliament owes its supremacy to the common law. Some eminent jurists have made that claim: for example, Sir Owen Dixon said that it is

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44 AV Dicey *An Introduction to the Study of the Law and the Constitution* (10th ed, MacMillan Press, London, 1979) at 40.

45 HWR Wade "The Basis of Legal Sovereignty" (1955) 2 CLJ 172 at 188 (emphasis in original). See also The *Hunting Act* Case, above n 41, at [102] per Lord Steyn.

46 Phillip A Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 328.

47 Salmond, above n 43, at 155–156.

"not the least of the achievements of the common law that it endowed the Parliament which was evolved under it with an unrestricted power of altering the law",[48] and in the *Hunting Act* case Lord Steyn said that the Judges created the principle that Parliament is supreme.[49] But that is to beg the question of where the Judges in turn got their authority,[50] and so to invite the inquiry into ultimate legal sources that Salmond characterised as futile.

[50] It suffices rather to recall that a distribution of the state's sovereign powers among the branches of government emerged from the political settlement concluded in the decades following the Glorious Revolution of 1688.[51] The Revolution's principal achievement, following a long period of conflict, was the final subordination of the Crown to Parliament. It is for this reason that legislative power lies not with the Sovereign in person but with the Sovereign in Parliament.[52] But also central to the settlement was the insistence that legal rights be decided at common law and the grant of independence to the judges, who had formerly served at the King's pleasure.[53] A leading article in the social sciences literature describes "a Parliament with a central role alongside the Crown and a judiciary independent of the Crown" as the "fundamental institutions" to emerge from the Revolution.[54] The Stuarts had used prerogative powers to engage in activities — ranging from the sale of monopolies to purveyance to forced loans to naked expropriation of property — that had often occasioned Parliamentary grievances and fuelled resistance to the

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48 Owen Dixon "The Law and the Constitution" (1935) 51 LQR 590 at 592.

49 The *Hunting Act* Case, above n 41, at [102] per Lord Steyn.

50 See Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 52–53. This reference explains that ultimate authority can be claimed only by moral reasoning, regarding which judges have no claim to authority.

51 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 at [41] per Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge [*Brexit Case*].

52 Constitution Act, s 14.

53 FW Maitland *The Constitutional History of England* (The Lawbook Exchange Ltd, New Jersey, 2001) at 312–313. Maitland says that "at once" after the Revolution the question of judicial independence was raised and judges were commissioned during good behaviour but the Crown refused assent to a Bill that would have made it law. The Crown ultimately yielded in the Act of Settlement of 1700, under which Judges could be removed only on conviction for some offence or on the address of both Houses of Parliament: Act of Settlement 1700 (UK) 12 and 13 Will 3 c 2, s III. It may be that the issue first arose in the Convention Parliament of William and Mary: see Wade, above n 45, at 191, n 56.

54 Douglass C North and Barry R Weingast "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England" (1989) 49 Journal of Economic History 803 at 804. The article has been described as "canonical": Ron Harris "Legal Scholars, Economists and the Interdisciplinary Study of Institutions" (2011) 96 Cornell L Rev 789 at 794, n 17.

Crown.[55] Royal proclamations were enforced by prerogative courts,[56] which were abolished by legislation in 1640, as one of the last acts of the Long Parliament.[57] The 1640 Act prescribed that all cases involving property should be "tried and determined in the ordinary Courts of Justice, and by the ordinary Course of the Law".[58]

[51] It is apt to speak of a resulting distribution of sovereign powers. Legislative, judicial and executive powers are all sovereign in the sense that they inhere in any sovereign state. (So, for example, courts may decide disputes between citizens, but they are not arbitrators; they derive authority not from the parties but from the state.) And while the branches of government are co-dependent, each is sovereign within its sphere of authority in the sense that it may act without the permission or authority of the others.[59] So the Parliamentary Privilege Act 2014 recognises that the legislative and judicial branches are "separate and independent" and each has its "proper sphere of influence".[60] On this view government is a "collaborative enterprise",[61] with each branch exercising distinct but complementary powers to a common end. Professor Joseph has described the relationship as follows:[62]

> Throughout English constitutional history, Parliament and the Courts have exercised co-ordinate, constitutive authority – Parliament through legislation, the Courts through statutory construction and common law. … Theirs is a symbiotic relationship founded in political realities: Parliament and the political executive must look to the Courts for judicial recognition of legislative power, and the Courts must look to Parliament and the political executive for recognition of judicial independence.

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55 North and Weingast, above n 54, at 810–812.

56 The Court of Star Chamber, the Council of the North, the Council of the Marches, and the Court of High Commission. The last of these dealt with ecclesiastical matters.

57 An Act for the Regulating of the Privy Council, and for taking away the Court commonly called the Star Chamber 1640 (UK) 15 Cha I c 10. This did not finally settle the issue. Following the Restoration James II sought to reclaim jurisdiction in ecclesiastical matters, conferring control of the Church upon appointed commissioners; this was one of the "illegal and pernicious" acts cited in the Declaration and the Bill of Rights: Maitland, above n 53, at 312.

58 An Act for the Regulating of the Privy Council, and for taking away the Court commonly called the Star-Chamber, s III.

59 Joseph, above n 46, at 333–334; and Salmond, above n 43, at 491–492.

60 Parliamentary Privilege Act 2014, s 4(1)(b).

61 David Dyzenhaus "Reuniting the Brain: the Democratic Basis of Judicial Review" (1998) 9 Public Law 98 at 107.

62 Joseph, above n 46, at 322. See also Goldsworthy, above n 50, at 54.

[52] To similar effect, Professor Goldsworthy says that legal authority depends on "general consensus" among the branches of government.[63] So for example, there is no practical possibility that Parliament would now pass a bill of attainder, which condemns a person without trial,[64] for that would be to usurp the judicial function.

[53] To say that government is a collaborative enterprise is to recognise, as even Dicey did, that Parliament does not exercise arbitrary power.[65] It experiences constraints of various kinds. Those that concern us are legal in nature. The principal such constraint is the rule that Parliament cannot bind its successors. That is a necessary corollary of Parliament's continuing supremacy, but it is also a rule of the common law.[66]

[54] Courts will also declare void any act of "any organ of government, whether legislature or administrative", that exceed the limits of the power that organ derives from the law.[67] This principle too is not radical; again, Dicey recognised it.[68] It may apply when the legislature relies on a power of enactment derived from another statute. That happened in the *Hunting Act* case, a challenge to the Parliament Act 1911, which prescribes that in some circumstances a Bill passed by the House of Commons may become law without the support of the House of Lords.[69] It happened in New Zealand, when this Court pronounced unlawful colonial legislation found to be inconsistent with authority derived from Westminster.[70] The same

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63 Goldsworthy, above n 50, at 54.

64 The right to pass judgment by attainder was abolished in the UK in 1870: Forfeiture Act 1870 (UK), s 1.

65 Dicey, above n 44, at 71.

66 Wade, above n 45, at 186–187.

67 Dixon, above n 48, at 596.

68 Dicey, above n 44, at 109. See also K J Scott *The New Zealand Constitution* (Oxford University Press, London, 1962) at 41.

69 The *Hunting Act* Case, above n 41.

70 *R v Lander* [1919] NZLR 305 (CA). Section 53 of the New Zealand Constitution Act 1852 (entitled "an Act to grant a Representative Constitution to the Colony of New Zealand") authorised the New Zealand Parliament to enact laws for the peace, order and good government of New Zealand that were not repugnant to the law of England. Parliament enacted s 224 of the Crimes Act 1908, which defined bigamy as a married person marrying another person in any other part of the world. Holding that it lay beyond Parliament's power to pass laws having extraterritorial application, the Court quashed the conviction in New Zealand of a soldier who had entered a bigamous marriage in England. See also *in re the Award of the Wellington Cooks and Stewards Union* (1906) 26 NZLR 391 (SC).

judicial power was deployed in the recent Brexit litigation, although that case concerned executive action rather than legislation.[71]

[55] Courts may also scrutinise legislation to verify that it is "enacted law" to which obedience is due.[72] This means that the judicial function extends to deciding, if needs be, whether a Bill has been passed by the House of Representatives and given the Royal assent.[73]

[56] It may be protested that seldom do such questions of legal authority call for answer in New Zealand, which is not a federation and has a unicameral legislature. But that is to doubt the power because rare is the occasion for its use. When issues arise affecting the legislature's legal authority, recourse must be had to the courts, both for an authoritative answer and as a practical necessity. To quote Wade and Forsyth:[74]

> Even under the British system of undiluted sovereignty, the last word on any question of law rests with the courts.

[57] This means, as Wade explained elsewhere, that:[75]

> … it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact.

[58] The *Hunting Act* case illustrates the point, while demonstrating that courts refuse to question Parliament's legislative supremacy or review its internal workings. Lord Bingham emphasised that the courts have no power to declare enacted legislation invalid, but found the proceeding legitimate because it involved no inquiry into parliamentary proceedings and because a question of law needed answering. The question of law could not "as such, be resolved by Parliament", and "it would not be satisfactory, or consistent with the rule of law, if it could not be

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71 See the *Brexit Case*, above n 51. The question was whether legislation, the European Communities Act 1972 (UK), precluded use of prerogative power to withdraw from treaties constituting the European Union.

72 The *Hunting Act* Case, above n 41, at [27] per Lord Bingham of Cornhill.

73 Constitution Act, s 16.

74 HWR Wade and CF Forsyth *Administrative Law* (8th ed, Oxford University Press, Oxford, 2000) at 29.

75 Wade, above n 45, at 189.

resolved at all".[76] Lord Nicholls agreed, emphasising that although the question of law concerned the legislative process, it turned on the interpretation of legislation and, that being so, it lay within the courts' jurisdiction, not that of Parliament.[77]

[59] Parliament also experiences constraints that were voluntarily assumed but which it is unlikely to abandon. Into this category fall commitments assumed by international treaty and lent force by domestic legislation. The Bill of Rights is such an enactment. It expressly binds the legislative branch, and the long title states that it was enacted:

> (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

[60] Of course even the Bill of Rights can be repealed if Parliament thinks fit. But so long as it remains on the statute books it serves a constitutional function. Relevantly for present purposes, it authorises courts, within prescribed limits, to interpret legislation both present and future by imputing to Parliament an intention derived from protected values, so qualifying to that extent the principle that no parliament may bind its successors.[78]

[61] That brings us to *Momcilovic*, on which Mr Rishworth relied. In our opinion the judgment evidences what Mr Butler aptly described as Australian constitutional exceptionalism. Making that very point, French CJ[79] and Gummow J[80] cautioned against undiscriminating reliance upon authorities from jurisdictions (such as New Zealand) where, as Gummow J put it, "Diceyan notions of parliamentary sovereignty remain influential".[81] Under the Australian Charter there exists a formal separation of powers and only "judicial functions and functions incidental thereto"

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76 The *Hunting Act* Case, above n 41, at [27] per Lord Bingham of Cornhill.

77 At [51] per Lord Nicholls of Birkenhead.

78 In "The Common Law and the Constitution" Sir Stephen Sedley made a similar point, speaking of the European Communities Act 1972 (UK) and its impact on later domestic UK legislation. Stephen Sedley "The Common Law and the Constitution" in Lord Nolan and Stephen Sedley *The Making & Remaking of the British Constitution* (Blackstone Press, London, 1997) 15 at 24.

79 *Momcilovic v The Queen*, above n 34, at [19] per French CJ.

80 At [156]–[157] per Gummow J.

81 At [157] per Gummow J.

may be vested in a State court.[82] The High Court in *Momcilovic* refused to give effect to state legislation that would have conferred upon such court a declaratory jurisdiction very similar to that created in this jurisdiction by the Human Rights Amendment Act 2001,[83] the constitutional validity of which cannot be called into question in this country.

[62] In conclusion, judicial power in New Zealand can be traced through the New Zealand Constitution Act 1852 to a political settlement that distributed authority among the branches of government. The judicial function extends to answering questions of law, and as a general proposition it does not require express legislative authority. Inconsistency between statutes is a question of interpretation, and hence of law, and it lies within the province of the courts.

[63] That being so, there is prima facie no constitutional bar to a DoI. Mr Rishworth sought to resist this conclusion on two grounds. The first was that a declaration, a remedy developed by the courts, is available only where legislation expressly authorises it. Counsel drew our attention to no authority supporting his contention that the Declaratory Judgments Act 1908 has covered the field so as to preclude use of the remedy at common law. The authorities are clearly to the contrary.[84] Notably, in *Association of Dispensing Opticians Inc v Opticians Board*, this Court held that the Act is not a code and jurisdiction to make a declaration lay under both the Act and the Court's general equitable jurisdiction.[85]

[64] The same view had earlier been taken in *Peters v Davison*.[86] Notably for present purposes, a Full Court of Appeal there held that the declaratory jurisdiction at common law is not confined to cases where rights or duties are asserted or owed between relevant parties; rather, a declaration might be made where a public

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82 *R v Murphy* (1985) 158 CLR 596 (HCA) at 614.

83 See Human Rights Act, ss 92J and 92K.

84 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 170 and 187 per Richardson P, Henry and Keith JJ; *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA) at [10]; and *Apineru v The Board of Trustees of the Congregational Christian Church of American Samoa in New Zealand (Porirua) Trust* (2004) 1 NZTR 14-015 (HC) at [31] and [58].

85 *Association of Dispensing Opticians of New Zealand Inc v Opticians Board*, above n 84, at [10].

86 *Peters v Davison*, above n 84, at 187 per Richardson P, Henry and Keith JJ.

authority's error of law had "real practical consequences".[87] The Court founded this conclusion in its "central constitutional role" in judicial review to "rule on questions of law".[88]

[65] We record for completeness that in this case we need not address the limits of the High Court's declaratory jurisdiction in law or equity. It suffices for present purposes that the Declaratory Judgments Act does not exclude the jurisdiction.

[66] Counsel's second ground was that a DoI is a remedy addressed to the political branches. Mr Rishworth emphasised that it has no effect on the plaintiff's rights. We accept that a DoI is not a declaration of right. It determines no legal rights and conveys no legal consequences as between the parties. The position is as stated in s 92K of the Human Rights Act, which deals with a declaration of inconsistency made under that Act: such a declaration does not affect the validity, application or enforcement of the enactment concerned or prevent the continuation of whatever activity was the subject of the complaint.[89] We accept too that a DoI speaks to the respondent, who is usually the Attorney or another representative of the executive branch.

[67] But it does not follow that the political branches are the only audience for the remedy. Indeed, if the argument were correct it would preclude *Hansen* indications, which also speak to the political branches. A DoI is a remedy granted to a particular plaintiff on a given set of facts. We explain at [155] below that in the context of a particular claim a court might wish to use a DoI to better convey its firm opinion that the other branches of government should revisit legislation, or to vindicate a protected right. In so doing, it affords the plaintiff some assistance in seeking an administrative or legislative remedy. That being so, we do not accept that a DoI exceeds the judicial function under New Zealand's constitution.

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87 At 188 per Richardson P, Henry and Keith JJ.

88 At 188 per Richardson P, Henry and Keith JJ.

89 See also Human Rights Act (UK), s 4(6); and *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 at [63] per Lord Hutton.

Restraint

[68] That brings us to the Attorney's argument that if jurisdiction exists to make a DoI the courts ought to disclaim it. In particular, a DoI is a new remedy which is addressed to the political branches but requires no formal response, and that being so, it is ineffective; it also invites pointless litigation on policy matters that courts are ill-equipped to decide.

[69] There is substance in the Attorney's concern that the availability of a remedy will divert private resources that ought to have been devoted to political remedies and waste public resources in pursuit of litigation. Protected rights may be subject to reasonable limitations, and these limits are contested primarily through the political process. Judges have what has been described as a secondary responsibility, that of ensuring legality, and they must be scrupulous not to lose sight of that.[90]

[70] However, it does not follow that the remedy ought to be excluded a priori, for several reasons. First, we have noted that under the Bill of Rights courts are expressly authorised to consider and evaluate the policy justification for a given legislative or administrative action. It is certainly possible that the availability of a DoI will increase demand, but the nature of the inquiry required of a court is not new.

[71] Second, it follows that any fixed rule of non-intervention ought to be founded not on remedial considerations but on the jurisdiction invoked and the characteristics of the government action under scrutiny. The paradigm example of an area in which courts refrain on policy grounds from intervention in judicial review is national security.[91] Even there, though, the principle of legality applies.[92]

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90 Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 337 at 342.

91 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 402–403. We need not enter the debate about whether it is permissible to take this decision on a priori grounds. See Lord Steyn "Deference: a tangled story" (2005) PL 346.

92 Jeffrey Jowell "Judicial deference: servility, civility or institutional capacity?" (2003) PL 592 at 598; and *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [29] per Lord Bingham of Cornhill and at [116] per Lord Hope of Craighead.

[72] Third, the principle of restraint should keep judicial intervention within proper bounds and avoid unnecessary conflict among the branches of government. Restraint is an important and long-established constitutional principle having two related dimensions: comity and deference.

[73] We begin with comity. In the language of the Parliamentary Privilege Act 2014:[93]

> [T]he principle of comity… requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges…

[74] This principle recognises not only that each branch has a separate sphere of influence but also that they overlap, necessitating restraint on all sides. Sir Owen Woodhouse, speaking extra-judicially, described comity as a convention made necessary by the imprecise distribution of constitutional powers among the three branches of government.[94] Comity is reciprocal, finding expression not only in the Act but also in the Standing Orders of the House of Representatives,[95] the Cabinet Manual,[96] and numerous judicial decisions.[97]

[75] Deference is the term used to describe a court's decision to refrain from exercising its jurisdiction on the ground that another decision-maker enjoys greater institutional competence or experiences democratic accountability.[98] These considerations may arise when the inconsistency concerns a protected right because,

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93 Parliamentary Privilege Act, s 4(1)(b).

94 Owen Woodhouse "Government under the law" (The J C Beaglehole Memorial Lecture, Victoria University of Wellington, 4 October 1979).

95 Standing Orders of the House of Representatives 2014, SO 115–117.

96 Cabinet Office *Cabinet Manual 2008* at [4.12]–[4.15].

97 By way of example, *British Railways Board v Pickin* [1974] AC 765 (HL) at 799 per Lord Simon of Glaisdale. See also *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330–331; and *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [98].

98 *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 at [114]–[115]; *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569 at [32]; *Right to Life Inc v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 752 at [53] per Blanchard J; and *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at [69] per Lord Hoffmann. See also Hunt, above n 90, at 350–351.

as the Bill of Rights itself recognises,[99] rights must sometimes be balanced against other societal interests or other rights and such evaluative decisions may lie within the province of the legislative branch.

[76] Finally, it is true that no formal mechanism exists to bring a DoI to the attention of Parliament. But it does not follow that Parliament will not be made aware of it or that the remedy will be ignored. We explain at [167] below that a DoI should not be made without notice to the Attorney or other suitable representative of the Crown. And a DoI, or its alternative the *Hansen* indication, is made in the reasonable constitutional expectation that the other branches will respond to it by reappraising the limitation and its justification.

Summary

[77] We decline the Attorney's invitation to exclude the declaration of inconsistency as unconstitutional. We have rejected his narrowly circumscribed view of the judicial function, holding rather that it extends generally to answering questions of law and specifically to questions of consistency between legislation and protected rights. This is not to question the supremacy of Parliament, which may make or unmake any law it wishes, or to discount the importance of restraint in the exercise of judicial power. We conclude that there is no constitutional bar to a court issuing a DoI in a proceeding that appropriately presents for decision a question of incompatibility between an enactment and a protected right.

Jurisdiction under the Bill of Rights

[78] We turn to the question whether the Bill of Rights confers jurisdiction to make a DoI.

The Bill of Rights itself

[79] We share Heath J's view that the starting point is the Bill of Rights itself. It is ordinary legislation only in the sense that it is not entrenched. Its substance is of constitutional importance. We have quoted its long title at [59] above, as an act to

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[99] Bill of Rights, s 5. See also John Griffith "The Political Constitution" (1979) 42 Modern L Rev 1 at 12.

affirm, protect and promote human rights and to affirm New Zealand's commitment to the ICCPR. The important general provisions in Part 1 follow. Section 2 provides "the rights and freedoms contained in this Bill of Rights are affirmed". Section 3 expressly applies the Bill of Rights to each of the three branches of the Government of New Zealand. So long as it remains enacted law the Bill of Rights applies to Parliament itself, just as it does to the other branches.

[80] Section 4 provides that no Court is to hold any enactment invalid or refuse to apply it by reason only of its inconsistency with the Bill of Rights. Subject to s 4, s 5 then provides that protected rights and freedoms are subject only to justified limitations. And s 6 requires that a rights-consistent interpretation is to be preferred wherever available.

[81] Those provisions, and in particular s 5, require the Court to assess whether the legislation in issue justifiably limits the relevant right or freedom. As Blanchard J put it in *R v Hansen*, s 5 requires the courts:[100]

> … to undertake, within the bounds of their jurisdiction and processes, an analysis of the legitimacy of challenged statutory provisions in their particular societal context …

[82] Tipping J commented to the same effect:[101]

> … If Parliament enacts a limit [on rights and freedoms], it must generally be taken to have regarded that limit as reasonable and justified in the free and democratic society in which it is designed to operate. Obviously Parliament must have anticipated that its assessment in that respect could come under judicial scrutiny …

[83] Similarly, Anderson J:[102]

> … Parliament … by the terms of the Bill of Rights Act, accepted the prospect of judicial assessment of the consistency of its enactments with affirmed rights and freedoms.

[84] The Attorney accepts all of this but contends that a court's powers, in particular under s 5, are limited to giving *Hansen* indications as part of the

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100 *R v Hansen*, above n 12, at [82] per Blanchard J.
101 At [106] per Tipping J.
102 At [267] per Anderson J.

interpretive function. Mr Rishworth sought to make something of the fact that *Hansen* was an interpretation case about the meaning of the words "until the contrary is proved" in s 6(6) of the Misuse of Drugs Act 1975.

[85] Such a jurisdictional limitation does not appear from the Bill of Rights itself. When the Court inquired of Mr Rishworth why it should be so interpreted, counsel referred to an observation by Cooke P in *Temese v Police* that if it made a declaration "the Court could be seen by some to be gratuitously criticising Parliament by intruding an advisory opinion".[103] That is a policy answer. It invites two rejoinders. First, a reasonable observer should accept that a court does not act gratuitously by answering questions of incompatibility when necessary, and all the more so if the Bill of Rights itself contemplates that the court will draw attention to unjustified limitations on protected rights. Second, it proves too much, for a *Hansen* indication, which the Crown accepts is within jurisdiction, can equally be characterised as an advisory opinion.

The Bill of Rights and the ICCPR

[86] As set out at [59] above, one of the two purposes of the Bill of Rights recorded in the long title is to affirm New Zealand's commitment to the ICCPR. The Supreme Court has several times reiterated the need for New Zealand law to be construed, where possible, to give effect to New Zealand's international obligations.[104]

[87] By art 2(3) of the ICCPR New Zealand undertook to provide effective remedies for violation of human rights and to develop the possibilities of judicial remedy. New Zealand reports periodically to the United Nations Human Rights Committee on its performance. By adopting the first optional protocol to the ICCPR on 26 August 1989, New Zealand also accepted individual access by its citizens to the Human Rights Committee for violation of rights under the ICCPR, when they have been unable to obtain a domestic remedy.

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103 *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427 per Cooke P.

104 *Attorney-General v Chapman*, above n 27, at [4] per Elias CJ; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [36] per Elias CJ.

[88] As noted at [34] above, a DoI is not needed before an individual plaintiff can complain to the Human Rights Committee. All that is necessary is that the plaintiff should have exhausted such domestic rights as he or she has. But it is the wider point that matters. The obligation to supply effective remedies may justify an indication of inconsistency, as Tipping J recognised in *Moonen*:[105]

> That purpose [indicating whether a limitation is justified] necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.

[89] The point being made here is not that New Zealand courts are in dialogue with the Human Rights Committee but that they should fashion domestic remedies that reflect New Zealand's international commitments. Casey J made this point expressly in *Baigent's Case*:[106]

> The [Bill of Rights] reflects Covenant rights, and it would be a strange thing if Parliament, which passed it one year later, must be taken as contemplating that New Zealand citizens could go to the United Nations Committee in New York for appropriate redress, but could not obtain it from our own Courts.

[90] In reporting, over the years, on New Zealand's compliance with the ICCPR, the New Zealand delegation has referred to the comments in the New Zealand cases about the Court's duty to identify inconsistencies,[107] and has also noted the DoI that Thomas J would have had the Court make in *Poumako*.[108] Although the reports do not consistently acknowledge the jurisdiction to make a DoI, it was acknowledged in the 22 March 2016 report by New Zealand's delegate, who reported to the

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105 *Moonen*, above n 10, at [20].

106 *Baigent's Case*, above n 24, at 691 per Casey J.

107 See for example Human Rights Committee *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Fourth periodic report of States parties due in 1995: New Zealand* CCPR/C/NZL/2001/4 (7 March 2001) at [18]–[19]; and Human Rights Committee *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Fifth periodic report of States parties due in 1995: New Zealand* CCPR/C/NZL/5 (24 December 2007) at [14].

108 *R v Poumako* [2000] 2 NZLR 695 (CA) at [107] per Thomas J.

monitoring body that "although there were no legislated remedies under the Bill of Rights Act, the courts had established a range of remedies, including … a declaration of inconsistency".[109]

[91] To summarise, the Attorney accepts that jurisdiction to identify an incompatibility emerges from ss 2–6, but contends that jurisdiction is limited to giving *Hansen* indications as part of the court's interpretative function. We see nothing to support such a jurisdictional limit, which in our view would run contrary to the courts' role under s 5 of the Bill of Rights and to New Zealand's obligations under the ICCPR.

The case law

[92] The Bill of Rights came into force on 28 August 1990. This Court first grappled with ss 4, 5 and 6 the following year in *Ministry of Transport v Noort*.[110] The four substantive judgments delivered (McKay J concurred with the judgment of Richardson J) were the subject of articles, the first by Professor Rishworth,[111] and the second by Professor Brookfield entitled "Constitutional Law".[112] Professor Brookfield considered that:[113]

> … there may be a role for the Courts in relation to s 5, in the kind of case under discussion. The very precise wording of s 4 leaves it open – and indeed the Bill as a whole arguably requires – that a Court should, at least in a case of serious infringement where a provision in an enactment is found to be inconsistent "with *any provision* of this *Bill of Rights*" – that is, including s 5 itself, as well as the rights and freedoms in Part II – formally declare that inconsistency even though it can go no further than that.

[93] *Temese* was decided in November 1992, a little over two years after the Bill of Rights came into force, and seven months after *Noort*. Cooke P described the various opinions expressed in *Noort* on the relationship between ss 4, 5, 6 and 7 of the Bill of Rights as "more or less tentative".[114] We have mentioned that

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109 Human Rights Committee *Summary record of the 3244th meeting: consideration of reports submitted by States parties under Article 40 of the Covenant: Sixth periodic report of New Zealand* CCPR/C/SR.3244 (22 March 2016) at [47].

110 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

111 Paul Rishworth and Scott Optican "Two Comments on *Ministry of Transport v Noort*" [1992] NZ Recent L Rev 189.

112 Brookfield, above n 13.

113 At 239.

114 *Temese v Police*, above n 103, at 427 per Cooke P.

Mr Rishworth invoked Cooke P's note of caution about being seen to criticise Parliament gratuitously. The relevant passage merits full quotation. Cooke P said, referring to Professor Brookfield's opinion, that:[115]

> [Professor Brookfield] suggests … that, although a Court may find that an enactment is inconsistent with an affirmed right or freedom and therefore overrides the right or freedom, the Court should also be prepared to hear argument on whether the enactment is a limitation justified under s 5. *That approach may have the drawback that, if the Court were to say that the limitation was unjustified yet overridden by the enactment, the Court could be seen by some to be gratuitously criticising Parliament by intruding an advisory opinion. But possibly that price ought to be paid.* Happily the same difficulty does not arise if, as with breath screening, one sees the limitation as justified. It seems to me that the last word on the interrelationship of the four sections is far from having been said. It may safely be predicted that the debate will continue. (emphasis added)

Thus, even at that early stage, Cooke P accepted the possibility of the Court making a declaration of inconsistency. And, as he also predicted, the debate has continued, now with many further views to be considered.

[94] In *Baigent's Case* two years later, every member of this Court emphasised that a breach of the Bill of Rights must be attended by an effective remedy.[116] The majority reinstated the amended statement of claim in which the plaintiff claimed a total of $120,000 for a totally unjustified search of a plaintiff's home (the police had searched the wrong address). Amongst the several statements of principle is this one by Hardie Boys J:[117]

> The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed.

That and the similar statements made by other members of the Court support the making of a declaration of inconsistency where that is the appropriate and effective remedy.

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115 At 427 per Cooke P.
116 *Baigent's Case*, above n 24.
117 At 702 per Hardie Boys J.

[95] The judgment of Thomas J in this Court in *Quilter v Attorney-General* marks a further recognition of the jurisdiction to make a DoI.[118] The issue in *Quilter* was whether the Marriage Act 1955 allowed for marriage between same sex couples. The Court was unanimous in holding that it did not. Thomas J concluded that the Marriage Act breached s 19 of the Bill of Rights (freedom from discrimination). He stated:[119]

> … once Parliament has charged the Courts with the task of giving meaning and effect to the fundamental rights and freedoms affirmed in the Bill of Rights, it would be a serious error not to proclaim a violation if and when a violation is found to exist in the law …

None of the other judgments refers to the jurisdiction to make a DoI.

[96] *Moonen* comes next in time.[120] Delivering the judgment of a Full Court of Appeal, Tipping J proposed his now familiar five-step approach to ss 4, 5 and 6 of the Bill of Rights.[121] The fifth step was indicating under s 5 whether the limitation on the relevant right or freedom was justified. If not "the Court may declare this to be so".[122] The late introduction of s 4 into the Bill of Rights was not accompanied by any express recognition of the remaining point of s 5. But s 5 was retained and served a useful purpose. Tipping J then made the observations we have set out at [88] above about the Court's power, and on occasion its duty, to indicate that an enactment is incompatible with the Bill of Rights.

[97] The Court in *Moonen* did not need to decide whether or not to make a DoI. It simply held that the Film and Literature Board of Review had erred in not considering the relevant provisions of the Bill of Rights.[123]

[98] In *R v Poumako*, another decision of a Full Court of Appeal, the issue was whether legislation amending the penalty in a home invasion case applied to the appellant.[124] The Court dismissed the appeal because the legislation clearly had

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118 *Quilter v Attorney-General*, above n 15.
119 At 554 per Thomas J.
120 *Moonen*, above n 10.
121 At [17]–[19].
122 At [19].
123 At [40].
124 *R v Poumako*, above n 108.

retrospective effect, applying to any sentence imposed after the amendment came into force, even if the offence was committed earlier. The Crown did not attempt to justify the legislation under s 5 and Gault J (for himself, Richardson P and Keith J) observed:[125]

> It is difficult to imagine any possible justification for the retrospective changes in penalty … [T]he apparent lack of any justifiable limit strongly suggests that … the clause would breach both the Bill of Rights guarantee [in s 25(g), of minimum standards of criminal procedure] and the covenant right.

[99] But, because that issue "was not squarely addressed in the argument before us", the majority did not consider making a declaration.[126] Thomas J did, setting out in his separate judgment a formal declaration that the amending legislation was inconsistent with s 25(g) of the Bill of Rights and with art 15(1) of the ICCPR and that it had not been demonstrated to be reasonably justified in terms of s 5.[127] The majority's judgment urged legislative reconsideration of the amendment and observed that in a future case – if the legislation remained unchanged – the Court might perhaps have needed to consider "also the question (canvassed only briefly in argument) of whether there should be a declaration of inconsistency with s 25(g) of the Bill of Rights Act".[128]

[100] In *Zaoui v Attorney-General* at the High Court stage, the Crown presented an extensive argument that the Court had no jurisdiction to make a declaration that an Act of Parliament is inconsistent with the Bill of Rights.[129] Williams J regarded himself as bound by this Court's decisions in *Moonen*[130] and *Poumako*,[131] which "clearly conclude jurisdiction exists".[132] But the Judge considered the case before him was "not the appropriate case in which to make [a declaration of inconsistency]".[133]

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125 At [33] per Richardson P, Gault and Keith JJ.
126 At [33] per Richardson P, Gault and Keith JJ.
127 At [107] per Thomas J.
128 At [42]–[43] per Richardson P, Gault and Keith JJ.
129 *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC) [*Zaoui* (HC)]. The issue does not appear to have been considered on appeal: see *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA); and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.
130 *Moonen*, above n 10.
131 *R v Poumako*, above n 108.
132 *Zaoui* (HC), above n 130, at [166].
133 At [167].

[101] *Taunoa v Attorney-General* was a claim brought by several prisoners who alleged the Behaviour Management Regime (BMR) operated by the Department of Corrections breached s 9 (cruel treatment or punishment) and s 27(1) (natural justice) of the Bill of Rights.[134] Thus, *Taunoa* was not a case, such as this, where the issue was whether an enactment was incompatible with a protected right.

[102] *Taunoa*'s relevance lies in the Supreme Court's endorsement of the need for the Courts to provide effective remedies where protected rights are breached. Remedies should vindicate the right in a manner proportional to the seriousness of its breach.[135] The Supreme Court unanimously endorsed the High Court's declaration that the BMR breached s 9 and the High Court's award of compensatory damages, although it reduced the amounts.[136]

[103] Most recent is the Supreme Court's decision in *R v Hansen*, to which we have already referred.[137] To reiterate, the Court again emphasised the importance of the courts' function under s 5 of subjecting challenged statutory provisions to "judicial scrutiny".[138] Support for a jurisdiction to make a DoI in an appropriate case can, we think, be found in Tipping J's observation that:[139]

> … In this respect s 5 is just as much an instruction to Parliament as it is to the Courts, and the role of the Courts can be regarded as keeping Parliament faithful to the s 5 instruction, but with some inherent room for parliamentary appreciation.

And:[140]

> … a major purpose of a Bill of Rights (entrenched or otherwise) is to prevent minority interests from being overridden by an oppressive or overzealous majority. Herein lies the conundrum. How far is the majority able to go in legislating to restrict the rights and freedoms of minorities? The point is essentially the same whether the Courts have power to strike down legislation or whether, as in New Zealand, they do not, and can only declare that certain legislation, although operative, is inconsistent with the Bill of Rights.

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134 *Taunoa v Attorney-General*, above n 21.
135 At [109] per Elias CJ, at [253]–[257] per Blanchard J, at [318] per Tipping J, and at [368]–[370] per McGrath J.
136 At [118].
137 *R v Hansen*, above n 12.
138 At [106] per Tipping J.
139 At [106] per Tipping J.
140 At [107] per Tipping J (footnotes omitted).

[104] To similar effect is McGrath J's admonition that:[141]

> … a New Zealand Court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights-consistent interpretation, that none could be found, and that it has been necessary for the Court to revert to s 4 of the Bill of Rights and uphold the ordinary meaning of the other statute. Normally that will be sufficiently apparent from the Court's statement of its reasoning.
>
> Articulating that reasoning serves the important function of bringing to the attention of the Executive branch of government that the Court is of the view that there is a measure on the statute book which infringes protected rights and freedoms, which the Court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the Court's finding. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.

[105] We reject Mr Rishworth's submission that in using the word "normally" in the passage just cited, McGrath J was not acknowledging there may be cases where the Court needs to go further and make a remedial DoI. We think McGrath J was acknowledging exactly that.

Section 92J of the Human Rights Act 1993

[106] We consider that Heath J was right to find further support in the enactment, in 2002, of ss 92I–92J of the Human Rights Act 1993. Those provisions gave the Human Rights Review Tribunal power to make a declaration that an enactment is inconsistent with the right to freedom from discrimination affirmed by s 19 of the Bill of Rights. Parliament, when it passed that legislation, was aware of what the Courts had said in *Temese*, *Baigent's Case*, *Quilter*, *Moonen* and *Poumako*. It expressly conferred DoI jurisdiction on the Human Rights Review Tribunal in relation to enactments consistent with s 19 of the Bill of Rights.[142] Section 92J(4) provided that nothing in s 92J affects the Bill of Rights. The Select Committee

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141 At [253]–[254] per McGrath J.

142 Human Rights Act, s 92J(2).

explained the latter provision as an express saving and recognition of the developing jurisdiction under the Bill of Rights.[143]

[107] We agree with Heath J that the s 92J jurisdiction evidences parliamentary acceptance that a court may make declarations about the inconsistency of legislation with rights protected by the Bill of Rights. And we also agree with the Judge that Parliament's decision to confer a right of appeal from the Human Rights Review Tribunal to the High Court reinforces that view.[144]

Summary

[108] We summarise. The language and purpose of ss 2–6 of the Bill of Rights supports a statutory DoI jurisdiction. We agree with Heath J that the case law also supports that jurisdiction. So does Parliament's conferral, in 2002, of that very jurisdiction on the Human Rights Review Tribunal, albeit confined to inconsistency with s 19 of the Bill of Rights.

Overall conclusion on jurisdiction

[109] We conclude that the higher courts have jurisdiction to make a DoI. It finds its source in the common law jurisdiction of the higher courts to answer questions of law, which extends to incompatibility between legislation and a protected right, and is confirmed in the Bill of Rights.

Parliamentary privilege and the s 7 report

The Speaker's intervention

[110] At the hearing we granted the Speaker of the House of Representatives leave to intervene. The Speaker wished generally to address parliamentary privilege and comity between the judicial and legislative branches of government.[145] Ms Casey QC explained that the Speaker believes that by making inappropriate use

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143 Human Rights Amendment Bill 2001 (152-2) (select committee report) at 19.

144 *Taylor v Attorney-General*, above n 2, at [63]–[64].

145 The Speaker has previously been granted leave to appear in court proceedings that raise issues of parliamentary privilege: see *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713; and *Westco Lagan Ltd v Attorney-General*, above n 97.

of parliamentary proceedings in Bill of Rights litigation courts may inadvertently breach privilege.

[111] The Speaker's intervention led to a question about the capacity in which the Attorney appeared. Ms Casey submitted that Heath J erred when he said the Attorney-General appeared to represent "the legislative branch of Government",[146] for that is the Speaker's function. But she did not dispute that the Attorney is the appropriate representative of the Crown in Bill of Rights claims, including those dealing with allegations of incompatibility between legislation and protected rights.[147] The Attorney shouldered that burden before us as he did in the High Court, the Speaker focusing on privilege and its implications.

[112] So far as this case is concerned, Ms Casey submitted that Heath J breached parliamentary privilege by effectively subjecting the s 7 report to judicial review in several respects:

(a) setting out details of what happened at the Select Committee and second reading stages of the Bill;[148]

(b) setting out in quotation form large extracts from the report;[149]

(c) using the report to reinforce his own view of the substantive merits of s 80(1)(d);[150] and

(d) making the DoI.

In her oral submissions Ms Casey focused principally on (b) and (c). She did not discuss (d), explaining the Speaker does not take a position on the critical issue in this appeal. That ground was presumably included in the Speaker's list of concerns because the DoI arguably resulted from Heath J's reliance on the report.

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146 *Taylor v Attorney-General*, above n 2, at [9].
147 See *Attorney-General v Chapman*, above n 27, at [92] per Elias CJ and at [116] per McGrath and William Young JJ.
148 *Taylor v Attorney-General*, above n 2, at [14].
149 At [27]–[29].
150 At [32]–[33] and [71].

Parliamentary privilege

[113] Parliamentary privilege was declared by art 9 of the Bill of Rights 1688, which provides:[151]

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament [.]

[114] In *Prebble v Television New Zealand* Lord Browne-Wilkinson explained that the "basic concept" underlying art 9 is:[152]

> … the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the Courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say.
>
> (Our emphasis.)

[115] It is important to bear this concept in mind because it can be difficult to decide when the proceedings of Parliament are being questioned. The answer usually depends on the context. As this Court put it in *Buchanan v Jennings*:[153]

> General statements may operate satisfactorily in the circumstances of the particular case in which they are stated but be problematical at best and misleading at worst in other circumstances. Rather, critical assistance is to be found in the particular words of art 9, its purpose and related principle (even if the particular understanding of both may shift over the centuries), and the actual rulings in, and facts of, the leading cases, as well as the particular facts of the case before the Court.

[116] The Parliamentary Privilege Act does not, strictly speaking, apply to this appeal as it came into force after this proceeding commenced.[154] However, argument focused upon it as Parliament's own modern affirmation and restatement of art 9,

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151 Bill of Rights 1688 (UK) 1 Will and Mar Sess 2, c 2, art 9. The Bill of Rights 1688 was declared part of the laws of New Zealand in the Imperial Laws Application 1988, s 3 and sch 1; it is also given effect in pt 2 subpt 2 of the Parliamentary Privilege Act.

152 *Prebble v Television New Zealand* [1994] 3 NZLR 1 (PC) at 8.

153 *Buchanan v Jennings* [2002] 3 NZLR 145 (CA) at [50] per Richardson P, Gault, Keith and Blanchard JJ; aff'd in *Jennings v Buchanan* [2005] 2 NZLR 577 (PC).

154 Parliamentary Privilege Act, ss 16(2) and 32.

which continues in effect.[155] Counsel did not suggest that the Act relevantly enlarged the privilege.[156]

[117] Section 11 prohibits the offering or use in litigation of evidence or statements concerning proceedings in Parliament, but only where such evidence, etc has the effect or purpose of doing certain things: questioning or establishing the truth, credibility, motive, intention or good faith of anything forming part of those Parliamentary proceedings, or of any person; drawing inferences or conclusions; proving or disproving facts necessary or incidental to liability; or resolving any matter or supporting or resisting any judgment or order:

> **11 Facts, liability, and judgments or orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, all or any of the following:
>
> (a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:
>
> (b) otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:
>
> (d) proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability:
>
> (e) resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

This provision does not prohibit use of parliamentary materials generally, but only to a limited extent which is determined by the effect or purpose of their deployment in litigation. We are concerned here with subsection (a), which prohibits statements

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155 The Act states that it declares the effect that art 9 had before the Act's commencement: s 16(1).

156 The Act recites that it was passed to alter the law in *Attorney-General v Leigh*, above n 145, dealing with the scope of "proceedings in Parliament", and also to deal with "effective repetition claims" of the sort exemplified in *Jennings v Buchanan*, above n 153: Parliamentary Privilege Act, ss 2(c) and 2(d). This is not relevant for our purposes however.

whose effect or purpose is to question or (its antithesis) rely on the truth, motive intention or good faith of anything said in parliamentary proceedings.[157]

[118] There are some longstanding uses to which proceedings in the House may be put in court proceedings without breaching privilege. Each is reflected in other provisions of the Parliamentary Privilege Act. These are not exceptions to s 11 but rather declarations that it does not apply to the specified uses.

[119] The first such use is to prove what was said and done in Parliament, as a matter of historical record.[158] This may be necessary for a number of purposes, including those mentioned in [54] and [55] above, in which we explain that Courts may scrutinise legislation to ensure that it was lawfully passed.

[120] The second use is to assist in interpreting legislation. As the House of Lords explained in *Pepper (Inspector of Taxes) v Hart*, to refer to Hansard or other parliamentary materials to ascertain the meaning of legislation is not to "question" parliamentary proceedings.[159] On the contrary, courts refer to parliamentary materials the better to give effect to Parliament's wishes.[160] This principle is reflected in s 13 of the Act, which authorises the use of certain parliamentary materials for the purpose of ascertaining the meaning of an enactment.

[121] The third and related use, also encompassed by s 13, which permits use of parliamentary materials to ascertain "the meaning that can be given to" an enactment, is to determine under ss 4–6 of the Bill of Rights whether legislation limits a protected right or whether any such limitation is justified.

What parliamentary materials may be referred to in an incompatibility proceeding?

[122] Ms Casey submitted that we should adopt what she characterised as the *Hansen* approach to evidence in incompatibility proceedings. That is, she submitted,

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157 See *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin), [2010] QB 98 at [58]. As the Judge there noted, fairness would require that, if one party is able to rely on parliamentary proceedings the other must be able to contest those proceedings, which invariably risks breaching parliamentary privilege.

158 *Prebble v Television New Zealand Ltd*, above n 152, at 11; and Parliamentary Privilege Act, s 15(1).

159 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL) at 638 per Lord Browne-Wilkinson.

160 At 638 per Lord Browne-Wilkinson.

legislative history is admissible but as a general proposition parliamentary proceedings are not. She instanced speeches in the House, select committee reports or submissions made to select committees, all of which come within the definition of "proceedings in Parliament" in s 10 of the Parliamentary Privilege Act. She recognised that parliamentary proceedings may include policy material of relevance in litigation, but submitted that it does not follow that a court need refer to such proceedings. Rather, the policy material itself can be put before the court for it to make its own assessment. She submitted that to rely on parliamentary proceedings is necessarily to consider whether the views expressed in them were correct.

[123] Counsel rested these submissions on *Office of Government Commerce v Information Commissioner*, which concerned a request for disclosure of Parliamentary information under freedom of information legislation.[161] The proceeding put in issue the adequacy of a Ministerial response to a parliamentary question and an opinion formed by a select committee. Stanley Burnton J held that the parties could not rely on the opinion of the Select Committee.[162] Ms Casey noted that the decision has been applied by the UK Court of Appeal and endorsed by the UK House of Lords and House of Commons Joint Committee on Parliamentary Privilege.[163]

[124] We find the submissions too broad, and observe that the authority relied upon does not fully support them. *Office of Government Commerce v Information Commissioner* involved an invitation to consider questions of adequacy, accuracy or propriety in the proceedings of Parliament, something courts scrupulously avoid doing. The judgment is good authority that courts should not consider select committee opinions with a view to approving or disapproving of them. It is not authority that in an incompatibility proceeding the courts may not consider parliamentary proceedings at all. The case was not brought under the Human Rights

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161 *Office of Government Commerce v Information Commissioner*, above n 157.

162 At [58]–[59] and [63].

163 *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2016] EWCA Civ 413, [2016] 3 WLR 1641 at [109] [*Reilly* (CA)]; and House of Lords and House of Commons Joint Committee on Parliamentary Privilege *Parliamentary Privilege: Report of Session 2013–2014* (3 July 2013) at [136].

Act 1998 (UK) and it did not raise questions of proportionality. Stanley Burnton J correctly identified this as an important distinction:[164]

> … it is of the essence of the judicial function that the courts should determine issues of law arising from legislation … Thus, there can be no suggestion of a breach of parliamentary privilege if the courts decide that legislation is incompatible with the European Convention for the Protection of Human Rights: by enacting the Human Rights Act 1998, Parliament has expressly authorised the court to determine questions of compatibility, even though a minister may have made a declaration under s 19 of his view that the measure in question is compatible.

[125] As that passage recognises, incompatibility proceedings differ from other statutory interpretation cases because they require that courts examine legislation for inconsistency and assess any justification. Courts will be inhibited, and perhaps disabled, from going about that work if they cannot consider anything falling within the definition of proceedings in Parliament.

[126] To begin with, a court needs to understand the legislation. Lord Nicholls stated in *Wilson v First County Trust (No 2)* that for that purpose the court may turn to "background material" that:[165]

> … may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be "questioning" proceedings in Parliament or intruding improperly into the legislative processes or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

[127] The Crown may also ask a court to defer to Parliament's view of the social policy justification for any given limitation on a protected right.[166] Such invitation

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164 *Office of Government Commerce v Information Commissioner*, above n 157, at [49].

165 *Wilson v First Country Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at [64] per Lord Nicholls of Birkenhead.

166 *R v Hansen*, above n 12, at [106] per Tipping J.

inevitably takes the court to the parliamentary process and record.[167] This is done not to question parliamentary proceedings but to establish that Parliament addressed the justification advanced in the litigation.

[128] The court may also need evidence of "legislative fact".[168] That term was used in *Hansen* to describe evidence going to the "content of law and determination of policy", in contrast to matters of adjudicative fact that are settled under the rules of evidence.[169] Evidence of legislative fact may be found in parliamentary proceedings.

[129] For these reasons we do not accept that proceedings in Parliament are per se inadmissible in incompatibility proceedings. As s 11 of the Parliamentary Privilege Act recognises, it is necessary to ask why and how the court uses such material. Attention must be paid to the purpose of the privilege and the circumstances, as this Court held in *Buchanan v Jennings*.[170] It bears emphasis that in *Hansen* itself, members of the Supreme Court used a s 7 report,[171] submissions to a select committee,[172] and a select committee report in their reasons.[173] Speaking generally, a court does not impeach parliamentary proceedings merely by describing parliamentary processes or making a finding about the same subject matter, so long as it is careful to make no finding on "the parliamentary treatment of the matter".[174] That is so even if the court should reach a contrary conclusion to that of the legislature.[175]

[130] However, we accept that courts must take care when admitting such material, to ensure that it is relevant and probative, and when using it, to ensure that they do

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167 In *Hansen* itself, the Court was asked to make its own assessment. *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 is an example of a case in which the Court was invited to defer to a Parliamentary process: at [70].

168 *R v Hansen*, above n 12, at [50] per Blanchard J, at [132] per Tipping J and at [230] per McGrath J.

169 At [230] per McGrath J.

170 *Buchanan v Jennings*, above n 153, at [50] per Richardson P, Gault, Keith and Blanchard JJ.

171 *R v Hansen*, above n 12, at [63] per Blanchard J and at [139]–[142] and [148] per Tipping J.

172 At [218] per McGrath J.

173 At [19] per Elias CJ.

174 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005) at 628, citing *Rann v Olsen* [2000] SASC 83, (2000) 76 SASR 450 at [80] per Doyle CJ.

175 McGee, above n 174, at 628.

not endorse or criticise Parliament's treatment of the issues. Four general points may be made.

[131] First, the court is undertaking its own analysis, not reviewing that of Parliament. Of course the legislation is the subject of the court's analysis and the legislative process and antecedents supply context, but in assessing questions of rights consistency and justification the court must follow its own processes and form its own opinion.[176]

[132] Second, the Court must bear in mind that Parliament speaks through the legislation itself, in which may be found the mischief addressed and the associated justification for limiting the protected right in the manner chosen. The legislature's thinking should not lightly be attributed to other parliamentary materials. As Lord Hobhouse said in *Wilson v First County Trust*, speaking of the inappropriate use of parliamentary debates:[177]

> It is not part of the duty of any member of Parliament to provide or state definitively in Parliament the justification for legislation which the legislature is content to pass.

[133] Third, to the extent the court must go further, it must take care to ensure that the materials it is relying on are reliable indicators of legislative intent or policy. Lord Woolf explained in *Lancashire County Council v Taylor* that:[178]

> … care must be taken not simply to produce anything from the files which helps to show why the impugned legislation took the form it did, but to approach the matter rather more rigorously. The first question is whether the policy justification for the distinction which is in issue is apparent from the legislation, whether read by itself or with its antecedents and the cases decided on the provisions. Only if the policy is not apparent from these materials should it become necessary to look wider.

[134] A similar point was made in *R (Reilly) v Work and Pensions Secretary (No 2)*, in which Underhill LJ stated that:[179]

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176 *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405 (HC) at 410–411. The judgment was overturned on appeal but not on this point: *Dingle v Associated Newspapers Ltd* [1964] AC 371 (HL).

177 *Wilson v First Country Trust Ltd (No 2)*, above n 165, at [143] per Lord Hobhouse of Woodborough.

178 *Lancashire County Council v Taylor* [2005] EWCA Civ 284, [2005] 1 WLR 2688-2 at [58].

179 *Reilly (CA)*, above n 164, at [109].

> It has become relatively commonplace in public law proceedings for every last word written or spoken in Parliament to be placed before the court. In particular, debates are relied upon extensively when they should not be and, furthermore, the conclusions of select committees are prayed in aid with the court being asked to "approve" them.

[135] Finally, the Court must take care not to cross the line in its own reasons between examining the justification advanced in litigation and questioning proceedings in Parliament.[180] This happened, for example, in the High Court in *R (Reilly) v Work and Pensions Secretary (No 2)*, with critical reference being made to the justifications advanced in Parliamentary speeches.[181] The judgment of the Court of Appeal is notable because it dealt with the same issues in an appropriate manner,[182] and because it recognised that the trial Judge had been placed in a difficult position by counsel, who had invited her by way of justification to rely on the speeches.[183] The Court agreed with Stanley Burnton J in *Office of Government Commerce v Information Commissioner* that a court should not be asked to "approve" the opinions of select committees.[184]

The Speaker's criticisms of the High Court's use of the s 7 report

[136] It is not in dispute that a report under s 7 forms part of parliamentary proceedings. The section requires the Attorney to report to the House when it appears that some provision of a Bill appears to be inconsistent with a protected right. As Ms Casey stressed, the Attorney has dual legislative and executive functions but a s 7 report is plainly delivered in the former capacity.[185]

[137] The Speaker's concern lay with those parts of the judgment in which Heath J examined the report before agreeing with it.[186] Counsel accepted that the Judge's lengthy quotations from the report were not in themselves objectionable but submitted that he erred by then going on effectively to review the report. Although

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180 At [109].

181 *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2014] EWHC 2182 (Admin), [2015] 2 WLR 309 at [91] and [96]–[98].

182 *Reilly (CA)*, above n 163, at [80], and [99]–[100].

183 At [109].

184 At [109].

185 *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229 at [32]. See also Standing Orders of the House of Representatives 2014, SO 265(4).

186 *Taylor v Attorney-General*, above n 2, at [27]–[29], [32]–[33] and [71].

the Judge said he had independently considered the Attorney's reasons,[187] he relied on them almost entirely in determining that s 5 had been breached.[188] Counsel also drew attention to this passage:

> [71] … I see no reason why, having regard to [the differing functions of the Attorney and the courts], the Court should not act to reinforce the Attorney's report … Having said that, nor should the Court hesitate to declare inconsistency when it disagrees with a s 7 report asserting that there appears to be none, and the circumstances are such that a declaration is an appropriate remedy. As it happens, in this particular case, I am not calling into question the Attorney's report. Rather, in finding inconsistency, I am reinforcing the opinion that the Attorney expressed to Parliament.
>
> (Footnote omitted.)

[138] Finally, Ms Casey noted that Heath J referred to the select committee process and details of voting in the House, recording that:

> [14] Unusually, the Bill was referred to the Law and Order Committee. Typically, the Justice and Electoral Committee is the select committee that considers proposed changes to electoral laws. When the Bill was reported back to the House, it was supported by two parties, New Zealand National and ACT New Zealand. The remaining parties — New Zealand Labour, the Green Party, the Māori Party, the Progressive Party and United Future — opposed enactment. Ultimately, it was passed into law by a majority of 63 votes to 58.

[139] Counsel accepted that this paragraph could be read merely as a statement of events in Parliament but submitted that it "approaches the limit" because it could be read as a criticism of the legislative process. Further, these details were irrelevant.

No breach of privilege in use of s 7 report

[140] As noted, Ms Casey did not suggest that the report was inadmissible on privilege grounds. That would be to confront *Hansen*, which concerned legislation that had been the subject of a s 7 report opining that a limit on a protected right was justified. Several of the judgments in the Supreme Court noted the report and its conclusions.[189] The report was part of the legislative history, and the Court used it

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187 At [33].
188 At [34]–[35].
189 *R v Hansen*, above n 12, at [55] and [63] per Blanchard J, and at [99], [109] and [140] per Tipping J.

primarily to establish that Parliament understood it was affecting a protected right.[190] That is also the principal significance of the report in this case. It may have implications for remedy, as we explain at [155] below.

[141] Nor did Mr Rishworth complain that the report embarrasses the Attorney, making it difficult for him to advance a full defence of the 2010 Act in his capacity as the Crown's representative in litigation. Parliament having chosen to pass the legislation, the Attorney is free to advance any defence or justification available to the Crown.

[142] So the privilege question reduces to whether Heath J inappropriately marked the Attorney's exam paper, as it were, by undertaking a critical analysis of his reasons. As mentioned, the Judge quoted at some length from the report. He noted that counsel for the respondents had surveyed a wide range of material but counsel for the Attorney did not seek to advance any justification. He recorded that he had independently considered the Attorney's reasons and agreed with them, with one addition.[191]

[143] We do not consider that Heath J questioned proceedings in Parliament by referring to the report in this way. It would have been better, as a matter of comity, to summarise the report and record in his own words why the legislation was inconsistent with the protected right, and not to speak of "reinforcing" the report. But counsel chose to make the report the focus of attention by telling the Judge that the Attorney did not resile from it. That being so, and there being no dispute, it was understandable that the Judge might use the report as a convenient way to list the relevant reasons. He did not lose sight of his obligation to form his own view and he was receptive to anything the Attorney might say by way of justification. Nor did he examine reasons given in the debates for enacting the legislation despite the report.

Reference to support in the House irrelevant but not done to question proceedings

[144] We acknowledge the Speaker's concerns about Heath J's references to the Bill's passage through the House. We agree that the narrowness of the majority by

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190 At [63] per Blanchard J and at [99] per Tipping J.
191 *Taylor v Attorney-General*, above n 2, at [33]–[35].

which it passed is irrelevant, as are the identities of the parties for and against and the choice of select committee. To mention these facts, even in passing, is to risk being seen to question parliamentary proceedings. We accept that it would be better had they not been mentioned.

[145] That said, Heath J made note of these facts not to comment on Parliament's treatment of the issues before him but because Mr Taylor had claimed in separate proceedings that s 80(1)(d) is invalid for other reasons. (He pleaded that it effectively amended s 74 of the Electoral Act, which can be amended only by a 75 per cent majority of the House of Representatives or a public referendum.) The Judge was being scrupulous to note that that issue awaited decision and was not affected by his judgment. He did not refer to these facts when assessing the 2010 Act's compatibility with the right to vote.

Summary and conclusions

[146] We have sought to clarify the use that may be made of parliamentary proceedings in incompatibility proceedings, recognising the Speaker's concern that by their very nature such proceedings may risk breaching privilege. Courts must be sensitive to that risk and refrain from making any finding, whether by approval or criticism, on Parliament's treatment of the subject matter. Because Parliament speaks through legislation, courts may not need to go beyond the words of the statute, or orthodox statutory interpretation materials, in search of policy or justification. Seldom if ever will it be relevant to refer to the way in which members of Parliament voted on a bill, and to do so is to risk questioning proceedings in Parliament. So far as the Speaker's intervention bears on this case, we conclude that Heath J did not breach privilege by referencing the s 7 report as he did.

The remedial declaration of inconsistency

[147] We have held that there is no constitutional bar to a DoI and no policy reason to disclaim the jurisdiction to make one when addressing incompatibility claims. Jurisdiction established, we must now consider whether a DoI ought to have been made here.

[148] We first address points of general application: *Hansen* indication or DoI, mootness, standing, process and discretion. We qualify these observations by recognising that they are not final; as this Court has previously remarked, remedies should be allowed to evolve as necessary.[192] Nor are they exhaustive; in particular, we express no view on the questions whether a declaration is available in criminal proceedings,[193] or whether the District Court has jurisdiction to make one.[194]

Why go beyond a Hansen *indication?*

[149] Two characteristics of incompatibility proceedings distinguish a DoI from other declarations. The first concerns the plaintiff. As we have explained above, a DoI expresses the court's opinion that legislation limited the plaintiff's protected right in an unjustified way, but it is not a declaration of right; the legislation remains valid and so does anything lawfully done under it.[195] The second concerns the political branches of government. Because it is they who decide whether to modify an incompatibility, the court's opinion can be seen as part of a dialogue.[196]

[150] The dialogue metaphor is not unique to constitutional disputes. It describes the routine work of government, in which Parliament legislates and the executive administers and courts interpret, leading in due course to legislative reform to better meet the community's evolving needs. In an incompatibility claim, however, the court's opinion is more pointed. To quote again from McGrath J's judgment in *Hansen*, it:[197]

> [254] … serves the important function of bringing to the attention of the Executive branch of government that the Court is of the view that there is a measure on the statute book which infringes protected rights and freedoms, which the Court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the Court's finding.

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192 *Baigent's Case*, above n 24, at 676 per Cooke P.

193 *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [17] [*Belcher (CA)*]. The Supreme Court has indicated that the jurisdiction of the courts to make a declaration in criminal proceedings is not settled: *Belcher v Chief Executive of the Department of Corrections* [2007] NZSC 54 at [6]–[8].

194 *Belcher (CA)*, above n 194, at [14]. See also Geiringer, above n 18, at 630, n 83.

195 Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (2011) 9 NZJPIL 1 at 11–12.

196 The metaphor of dialogue is consistent with the view that government is a collaborative enterprise. For further discussion see for example Geiringer, above n 18, at 614–615.

197 *R v Hansen*, above n 12, at [254] per McGrath J.

[151] In expressing such opinion the court acts on the reasonable expectation that other branches of government, respecting the judicial function, will respond by reappraising the legislation and making any changes that are thought appropriate. As McGrath J went on to say:

> [254] …. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.

[152] The corollary is that for its part, the court exercises restraint, paying attention to comity and any appeal for deference, before expressing such opinion.

[153] A court will consider a DoI only where it is satisfied that the enactment impinges further on a protected right than can be justified in a free and democratic society, and such a conclusion can be reached only after evaluating the policy underlying the enactment and assessing any invitation to defer to another branch of government.[198] So the court will have satisfied itself that it is able to decide the compatibility issue and that it ought to do so. It will have explained itself in its reasons, so giving a *Hansen* indication that should trigger the reasonable expectation that the other branches will respond.

[154] So when and why might a court go further and make a DoI?

[155] Four answers were given in argument. The first was that a DoI is a formal remedy and sometimes its additional force may be needed to emphasise to the other branches that the legislation needs reconsidering. We agree, but emphasise that it must depend on the circumstances. By way of illustration, reasons may suffice if, for example, there may have been developments in policy or in other jurisdictions since the legislation was enacted, or if there was no s 7 report identifying the inconsistency between the legislation and the protected right.[199] In such a case the court may properly assume that the other branches will respond. Indeed, Parliament

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198 *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at [75]–[76] per Lord Hoffmann.

199 *R v Poumako*, above n 108, at [66]–[68] per Henry J.

may already be seised of the matter.[200] On the other hand it may be that, again by way of illustration, Parliament had received a s 7 report identifying a serious inconsistency but proceeded nonetheless. If no or no adequate justification has been advanced in the litigation, the court may think it necessary to make a more emphatic statement, in the form of a DoI.

[156] The examples just given recognise that the dialogue in which the court is engaged is a formal one. It is conducted through the machinery of government, it rests on reasonable constitutional expectations rather than political predictions, and it respects parliamentary privilege by employing only admissible materials.[201]

[157] The second answer was that a DoI may be needed to vindicate the right. Vindication is a central concern in Bill of Rights litigation. A court wants to ensure that remedies should repair or compensate for a wrong done to the plaintiff, and more generally that remedies should uphold the protected right and deter further breaches.[202]

[158] Of course an incompatibility proceeding differs from other Bill of Rights claims in that the plaintiff's right was limited by law. The official conduct complained of being lawful, legal remedies cannot be designed either to compensate the plaintiff or to deter further conduct that but for the limitation would breach the right. Vindication still matters, however, in that the important public interest in the right being defended and upheld may justify the court in speaking out where the limitation was not justified. Such a statement upholds the right in a constitutionally proper manner, by inviting Parliament to reappraise the statutory limitation upon it.

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200 *R v Manawatu* (2005) 23 CRNZ 833 (CA) at [12]–[13].

201 See [127]–[135] above.

202 *Baigent's Case*, above n 24, at 676 per Cooke P, at 691 per Casey J, and at 702 per Hardie Boys J; and *Taunoa v Attorney-General*, above n 21, at [106] per Elias CJ, at [253] per Blanchard J, at [300] per Tipping J, and at [366] per McGrath J.

[159] To reason that vindication matters in incompatibility claims is not to conclude that vindication necessarily calls for a DoI. On the contrary, a *Hansen* indication may well suffice.[203]

[160] The third answer was that a DoI may be needed in some cases to meet New Zealand's ICCPR commitment to provide an effective remedy. In our opinion this consideration justifies establishing the remedy for reasons given at [86]–[91] above. We emphasise, however, that the effectiveness of the remedy in any given case is gauged by domestic considerations, for reasons given at [89] above.

[161] The fourth answer was that a DoI means the plaintiff is a successful party for costs purposes. In our opinion, to establish or allow the remedy for that reason is to allow the tail to wag the dog. Nor is it necessary, since costs are discretionary. A court may treat a *Hansen* indication as a successful outcome for costs purposes even if no formal remedy is issued.

[162] We conclude that a *Hansen* indication should ordinarily suffice. It triggers an expectation that the other branches of government will respond to the court's opinion. But there may be circumstances in which a court may go further and make a DoI to emphasise that the legislation needs reconsidering or to vindicate the right. In our opinion the legislature recognised, by authorising a DoI under ss 92I–92J of the Human Rights Act, that the remedy may serve these purposes. More than that it is not necessary to say.

Mootness

[163] Mr Rishworth submitted that relief should be denied for mootness. There is no dispute about the meaning of the 2010 Act, and no remedy available (other than a DoI); that being so, he submitted, there is no live issue to determine. Because mootness is a judicial doctrine and courts sometimes agree to hear proceedings that

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[203] For an example in which a right was breached but a declaration was refused on the ground the relevant official decision was to be reconsidered and the court's reasons sufficed to vindicate the right, see *Watson v Chief Executive of the Department of Corrections* [2016] NZHC 1996, [2016] NZAR 1264 at [54].

are strictly moot,[204] this submission is appropriately examined at this point in our reasons.

[164] If accepted, Mr Rishworth's submission would summarily eliminate claims in which the statutory meaning is plain, however stark the incompatibility with a protected right. Fortunately, we need not accept it. The submission rests on the false premise that there can be no dispute for Bill of Rights purposes when the meaning of legislation is clear. The better view is that a dispute is raised when a plaintiff complains that his or her protected right has been limited unjustifiably by legislation. A judicial opinion to that effect may serve a proper purpose if it furthers a dialogue among branches of government in a constitutionally appropriate manner. A DoI may serve the same purpose, as we have just explained. That being so, a claim is not moot simply because a DoI is the only remedy sought.

Standing

[165] When recognising a new remedy under the Bill of Rights courts may need to address ancillary restrictions on rights, such as those of standing and process.[205]

[166] Standing matters in incompatibility proceedings because courts will not embark upon general inquiries into conflicts between legislation and protected rights.[206] Accordingly, a claim for a DoI should not ordinarily be entertained unless the plaintiff's protected right is affected on the facts, in the sense that but for the limitation the official conduct complained of might plausibly have breached the right.[207] We note that in the United Kingdom it has been held that, in some circumstances, a representative plaintiff can initiate proceedings under the Human Rights Act (UK) but only when no other plaintiff will step forward, and where a

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204 *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [16].

205 In *Baigent's Case*, above n 24, for example, the Court held that claims for public law compensation should be decided by a Judge alone: at 677 per Cooke P, 692 per Casey J and 703 per Hardie Boys J.

206 *Boscawen v Attorney-General*, above n 185, at [38] and [54]–[55].

207 *Lancashire County Council v Taylor*, above n 178, at [38]–[43].

plaintiff is representative a court may decline a declaration in the exercise of discretion.[208]

Process

[167] The proceeding should be a suitable vehicle for a DoI. The question of incompatibility should arise squarely for decision on the facts, and the court should have any evidence that it thinks necessary, including where appropriate evidence of legislative fact.[209] The Crown must be on notice that a DoI is sought and it must be permitted to defend an inconsistency or advance a justification.[210] In the normal way this would require that the Attorney, if not already a respondent, be given notice and permitted to assume the burden of justification.

Remedy necessarily discretionary

[168] In our opinion a DoI, like a *Hansen* indication, must lie in the court's discretion. There is no room for the usual presumption in judicial review that, a wrong having been established, the plaintiff is prima facie entitled to a remedy.[211]

[169] By way of explanation, we accept of course that a DoI may assist the plaintiff to obtain an administrative or legislative remedy. But it is not a declaration of legal right, and when considering it a court may choose to exercise restraint for reasons of comity among or deference toward the other branches of government. For these reasons a plaintiff cannot lay claim to it as of right.

[170] More generally, the courts need discretion over remedy to control incompatibility claims that, although not strictly moot, do not on their facts raise a serious issue justifying a remedy, still less a remedy of such importance. Judicial experience of Bill of Rights litigation suggests that, although the rights themselves are always important and require sensitive treatment, the claims invoking them do

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208 *R (Wright) v Secretary of State for Health* [2007] EWCA Civ 999, [2008] QB 422 at [52] per May LJ; *Lancashire County Council v Taylor*, above n 178, at [38]–[43]; and *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 at [99]–[100] per Baroness Hale of Richmond.

209 *R v Hansen*, above n 12, at [230] per McGrath J; and *Lancashire County Council v Taylor*, above n 178, at [58].

210 Compare Human Rights Act (UK), s 5.

211 *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [59]–[60].

not, on their facts, always justify serious consideration, let alone a remedy. A complaint that is properly adjudged hypothetical or peripheral may not warrant troubling the court for a full incompatibility analysis, let alone a remedy. A complaint that is inadequately articulated or opposed may not offer a secure footing to decide the issue. Or the alleged incompatibility may raise no issue of genuine public or private interest to justify troubling the legislature. Courts must also be sensitive to the risk, mentioned at [69] above, that the remedy will invite claims that, although of public interest, cannot or should not be decided by the judicial branch.

[171] The rationale for refusing relief in such cases is one not of jurisdiction but of judicial policy.[212] The court may invoke its needs for an adequate adversarial contest, for economy in use of judicial resources, and, not least, for sensitivity to the judicial role in government.[213]

[172] By way of illustration, in *Rusbridger v Attorney-General* the editor of The Guardian sought a declaration that the Treason Felony Act 1848 could not be used to prosecute him for peacefully promoting abolition of the monarchy.[214] No such prosecution was in prospect, so the claim was dismissed as hypothetical.[215] But the House of Lords also accepted a submission that there should exist some cogent public or individual interest that might be advanced by the remedy.[216] No such interest could be served by the litigation, so plainly was the 1848 Act a relic of a bygone age.

Lesser remedies not precluded

[173] This case concerns a DoI and its alternative, the *Hansen* indication. By adopting this convenient terminology we do not mean to exclude the lesser remedy of a declaration or opinion that legislation limits a protected right. There may be

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212 The term "judicial policy" was used in *R v Gordon-Smith*, above n 204, at [16] when explaining that courts may choose not to decide an appeal within jurisdiction when the decision will have no practical effect on the parties' rights.

213 At [18].

214 *Rusbridger v Attorney-General* [2003] UKHL 38, [2004] 1 AC 357.

215 At [33] per Lord Hutton, at [43] per Lord Scott of Foscote, at [53] per Lord Rodger or Earlsferry and at [60] per Lord Walker of Gestingthorpe.

216 At [24] and [28] per Lord Steyn. The example given of an individual interest was a right to die case: *Airedale NHS Trust v Bland* [1993] AC 789 (HL).

cases in which that is the issue, or in which the court is unable or unwilling to decide whether a limitation is justified.

[174] We now turn to the DoI granted in this case.

Remedy in this case

The High Court's conclusions

[175] Heath J reasoned that courts should be willing to speak out where human rights have been unjustifiably breached and that the removal of a citizen's right to vote was a matter of such constitutional importance that it justified a declaration.[217] He does not seem to have considered whether a *Hansen* indication would suffice.

The case of Mr Taylor

[176] It will be recalled that the High Court was not asked to declare prisoner voting prohibitions per se incompatible.[218] The challenge was confined to the 2010 Act, which extended to all prisoners a prohibition on voting that had previously applied to those serving terms of three years or more. As a long term prisoner who could not vote under the former legislation, Mr Taylor could not benefit from the DoI. Heath J recognised this but noted that no challenge had been made to his standing.[219]

[177] The Court may allow a representative plaintiff to seek a remedy, but Mr Taylor is not representative of affected prisoners. Further, the other plaintiffs' rights were directly engaged. There is a practical sense in which their presence makes his immaterial, but this is a precedent-setting case. The Crown ought to have been attentive to the wider implications of standing. From Mr Taylor's perspective the remedy is academic. His rights are not sufficiently engaged to warrant an incompatibility analysis, let alone to justify extending a formal invitation to Parliament to reconsider the 2010 Act at his behest.

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217 *Taylor v Attorney-General*, above n 2, at [76] and [77].

218 Compare *Sauvé v Canada (Chief Electoral Officer)* [2002] SCC 68, [2002] 3 SCR 519; and *Hirst v United Kingdom (No 2)* [2005] ECHR 681, (2006) 42 EHRR 41.

219 *Taylor v Attorney-General*, above n 2, at [3].

The case of Mss Ngaronoa, Wilde, Fensom and Thrupp

[178] Each of these applicants is a prisoner directly affected by the 2010 Act. Accordingly, their claim for a DoI should be considered on the merits. The Attorney is an appropriate respondent, and he has had sufficient opportunity to advance a justification.

[179] As noted earlier, the Attorney was not required to mount a general defence of prisoner voting prohibitions, which have a long history in New Zealand.[220] We also note Lord Sumption's observations in *R (Chester) v Secretary of State for Justice* that such bans are seen in many societies.[221] It would not be appropriate, then, to assume in this proceeding that there exists no social policy justification for them, or that the courts are necessarily better placed than the legislature to evaluate such justification. If the courts are to address those issues, they must do so in proceedings that confront them directly.

[180] The Attorney has not sought to advance any justification for the 2010 Act's extension of the ban to all prisoners. While not formally conceding the point, he has not disputed the respondents' claim that the legislation imposes an unjustifiable limitation. This is an unusual stance in litigation of this kind, and worth emphasising because it may distinguish this case from others to come.[222]

[181] The Attorney did resist a declaration on discretionary grounds. He contended that, because the legislature had the s 7 report, a DoI serves no purpose and further that a court undermines its own authority by granting an unenforceable remedy.

[182] It does not follow from the existence of a s 7 report that a DoI would serve no purpose. The report is not a judicial opinion. It does not carry with it a reasonable constitutional expectation that the political branches will reappraise the objectives of enacted legislation and the means by which the enactment implemented them. Further, the report need only draw attention to an apparent conflict between a bill

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220 Greg Robins "The Rights of Prisoners to Vote: A review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 167–171.

221 *R (Chester)*, above n 208, at [114] per Lord Sumption.

222 There are a few cases where this has happened in the United Kingdom: *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094 Admin, [2003] 3 All ER 672 at [9] and [14]; and *In re Z (A child)* [2016] EWHC 1191, [2016] 3 WLR 1369 at [14]–[17].

and a protected right. It need not identify any justification or subject it to proportionality analysis. In this case the report did go on to conclude that the legislation lacked justification, but it did not undertake a full proportionality analysis; rather, it adopted an explicit assumption that temporarily disenfranchising serious offenders as part of their punishment would be a significant and important objective.

[183] For these reasons, we do not accept that a DoI would be pointless. On the contrary, it may suggest that a judicial opinion to the same effect warrants the additional support of a formal remedy.

[184] The Judge's conclusion was that the legislation imposes so egregious and unjustifiable a limitation upon a fundamental right that the Court should see it as its duty to make a DoI in vindication. This conclusion is not as straightforward as it might seem. It is inseparable from the broader question whether prisoner voting prohibitions are per se unjustifiable, but that question is not before us and even if it were, the record does not allow us to answer it in a measured way. And while he advanced no justification, the Attorney did not concede that the limitation is so egregious as to warrant a DoI.

[185] What can be said is that because it underpins equality and sustains consent to government, the right to vote is a core prerogative of citizenship in a free and democratic society. The undiscriminating limitation imposed by the 2010 Act on so central a right demanded justification. None was forthcoming. The record shows that the legislature knew of the inconsistency at the time, and our attention was drawn to no developments in policy, or in other jurisdictions, that might lead it to reappraise the 2010 Act independently of this litigation. In these circumstances, it was not unreasonable to conclude that a DoI was the appropriate way both to convey the Court's firm opinion that the legislation needs reconsidering and to vindicate the right.

[186] We conclude that it lay within Heath J's discretion to make a DoI on the application of Mss Ngaronoa, Wilde, Fenton and Thrupp. We consider he was right to do so.

Result

[187] To answer each of the questions we set out at [4]:

(1) The higher courts of New Zealand have jurisdiction to make a DoI.

(2) The jurisdiction derives from the power of the higher courts to answer questions of law and is confirmed by the Bill of Rights.

(3) The power to make a DoI is discretionary and must be exercised with restraint. Its ambit is discussed above at [149]–[162].

[188] When considering the justification for legislation a court must be sensitive to parliamentary privilege. It may examine the parliamentary record to the extent that it is necessary and useful, but it must not question the parliamentary treatment of the matter in issue.

[189] Finally, we have held that a DoI ought not to have been granted on Mr Taylor's application, because he lacked standing to ask for it. However, the DoI was made in a single proceeding in which all plaintiffs joined.[223] That being so, the formal result is that the Attorney's appeal is dismissed.

Costs

[190] Mr Taylor is the only respondent who is legally aided. The second to fifth respondents are not, so we award them costs for a complex appeal on a Band A basis with usual disbursements.

Solicitors:
Crown Law Office, Wellington for Appellant
Ord Legal, Wellington for First Respondent
Warren Simpson, Papakura for Second to Fifth Respondents
Russell McVeagh, Wellington for Human Rights Commission as Intervener

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[223] A number of proceedings were issued, but this appeal is brought in only one, CIV-2013-404-004141, in which all the present respondents joined in the same causes of action.