IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA640/2020
[2021] NZCA 681

BETWEEN	MAKE IT 16 INCORPORATED Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	5 August 2021
Court:	French, Miller and Courtney JJ
Counsel:	J S McHerron, G K Edgeler, E B Moran and C M McCracken for Appellant A M Powell, D Jones and A P Lawson for Respondent
Judgment:	14 December 2021 at 9 am

JUDGMENT OF THE COURT

A The appellant's application for declarations of inconsistency is declined.

B The appeal is dismissed.

C There will be no order as to costs.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Make It 16 Inc is a lobby group seeking to lower the minimum voting age from 18 years to 16 years. As part of its campaign, Make It 16 issued proceedings in the High Court. It sought a declaration that the provisions of the Electoral Act 1993 and the Local Electoral Act 2001 that set the minimum voting age at 18 are inconsistent

with the right to freedom from age discrimination guaranteed under s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).

[2] The application for a declaration was unsuccessful. The Judge, Doogue J, held that although setting the voting age at 18 did discriminate against 16 and 17 year olds, it was a limitation on the right against age discrimination that was justified in a free and democratic society. The voting age provisions therefore did not breach the Bill of Rights Act.[1]

[3] Dissatisfied with that outcome, Make It 16 now appeals.

[4] For completeness we note that since the appeal was heard, the Supreme Court has delivered its decision in *Fitzgerald v R*[2] addressing various aspects of the Bill of Rights Act. We did not consider it impacted on the issues in this appeal and therefore did not consider it necessary to call for further submissions.

The controversy

[5] The minimum voting age in New Zealand has been 18 years since 1974 when it was reduced from 20 years. Prior to 1974, it had been 21 years.

[6] Under the Electoral Act, generally speaking most citizens as well as permanent residents who have attained the age of 18 are legally entitled to register to vote and once registered are legally entitled to cast a vote in parliamentary elections. The two sections (ss 60 and 74) that create these rights do not specifically refer to the age of 18 years.[3] Section 60 sets out who may vote and references those who are "qualified to be registered as an elector of the district". Section 74 states that every "adult person" is qualified to be registered as an elector of an electoral district if certain criteria are met. The 18 years comes about because "adult" is defined in s 3 of the Electoral Act as meaning "a person of or over the age of 18 years".

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1 *Make It 16 Inc v Attorney-General* [2020] 3 NZLR 481, [2020] NZHC 2630 [High Court judgment].

2 *Fitzgerald v R* [2021] NZSC 131.

3 With the exception of s 60(f) which enfranchises (subject to the provisions of the Electoral Act) any member of the Defence Force who is outside New Zealand, if he or she is or will be of or over the age of 18 years on polling day, and his or her place of residence immediately before he or she last left New Zealand is within the district.

[7] In so far as those three provisions (ss 3, 60 and 74) prescribe 18 years as the minimum age for persons qualified to register as electors or to vote, they are what are called reserved provisions under s 268(1)(e) of the Electoral Act. Having that status means they can only be amended or repealed by a special majority of 75 per cent of all members of the House of Representatives or by a majority vote in a public referendum.[4]

[8] As its name suggests, the Local Electoral Act regulates the elections to local bodies such as territorial authorities, regional councils, and community boards. Under its provisions, the right to vote in such elections is largely dependent on registration as a parliamentary elector which in turn means the minimum voting age is also 18.

[9] The question of whether the voting age should be lowered to 16 years is a contentious one. Over the years, it has been the subject of petitions and Private Members Bills and has been discussed in both a 1986 Royal Commission Report[5] as well as various Parliamentary Committee reports following the general elections in 2011, 2014 and 2017.[6] Since the hearing in this case, the Government has launched what is described as a major review of many aspects of New Zealand's electoral law to be completed by the 2026 general election. The voting age has been identified as one of the matters to be reviewed.

[10] Those opposed to lowering the voting age to 16 years argue that 16 year olds lack the maturity, world experience and the necessary independence to vote. They also claim that any move to change the voting age is not supported by the general public as evidenced in a number of opinion polls and the failure to garner large numbers of signatories to the petitions.

[11] Countervailing views are that denying the vote to 16 year olds is unjust. It denies them any say in decision making which will directly impact on them in the

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4 Electoral Act 1993, s 268(2).

5 John Wallace and others *Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at [9.8]–[9.15].

6 Justice and Electoral Committee *Inquiry into the 2011 general election* (April 2013); Justice and Electoral Committee *Inquiry into the 2014 general election* (April 2016); and Justice Committee *Inquiry into the 2017 General Election and 2016 Local Elections* (December 2019).

future. It is also inconsistent with how 16 year olds are viewed legally for other purposes. New Zealand law considers 16 year olds old enough and responsible enough to be paid the adult minimum wage,[7] have sex, get married,[8] choose to leave school,[9] apply for a firearms licence[10] and adult passport[11] and independently refuse or agree to medical treatment.[12] Proponents of change also point to the progressive lowering of the voting age historically, and the fact that people mature earlier today than before. Proponents further contend that 16 year olds are competent to vote and that granting them the vote will have the added benefit of making voting a lifetime habit. The sky, they say, did not fall in Scotland when the age was lowered to 16 years and indeed the change there is considered a success.

[12] Lowering the voting age is supported by the Children's Commissioner in a report commissioned by the High Court for the purpose of this proceeding. The Commissioner considered that lowering the age to 16 would be consistent with what studies show regarding the evolving capabilities of children and young people and consistent with the Children's Convention[13] which states that children have the right to inform their own views freely on matters that affect them.[14] The Commissioner recommended that any lowering of the voting age should be accompanied by a comprehensive citizenship education curriculum.

The declarations sought

[13] The wording of the two declarations sought is as follows:

> The Electoral Act Voting Age Provisions are inconsistent with the right to be free from discrimination on the basis of age affirmed and guaranteed in section 19 of the New Zealand Bill of Rights Act 1990; and
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> The Local Electoral Act Voting Age Provisions are inconsistent with the right to be free from discrimination on the basis of age affirmed and guaranteed in section 19 of the New Zealand Bill of Rights Act 1990.

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7 Minimum Wage Act 1983, s 4.
8 Marriage Act 1955, ss 17 and 18.
9 Education and Training Act 2020, s 35.
10 Arms Act 1983, s 23(1)(a).
11 Passports Act 1992, ss 4(3)(a) and 5(1)(a).
12 Care of Children Act 2004, s 36.
13 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).
14 See B J Casey, Rebecca M Jones and Todd A Hare "The Adolescent Brain" (2008) 1124 Annals of the New York Academy of Sciences 111.

Issues on appeal

[14] It was common ground that this appeal presents two key issues for determination:[15]

(a) When considering the limits on 16 and 17 year olds voting in parliamentary elections, does s 12 of the Bill of Rights Act create an exception to the right to be free from age discrimination contained in s 19 or can both ss 12 and 19 be given full effect in this context?

(b) Has the Attorney-General established that the limits on the right of 16 and 17 year olds to be free from age discrimination created by the voting age provisions are reasonable limits that can be demonstrably justified in a free and democratic society:

(i) in respect of parliamentary elections?

(ii) in respect of non-parliamentary elections?

[15] For completeness we record that at the hearing counsel traversed different approaches that may be taken in Bill of Rights Act cases including the conventional six step *R v Hansen*[16] analysis adopted in the High Court and the approach taken in *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council*.[17] However, because the two issues for determination by us on appeal are so narrow and specific, it is not necessary for us to engage in any discussion of the merits or otherwise of any particular methodology. This case does not turn on methodology.

[16] Turning then to the two issues. As will be apparent, the first issue raises questions about the interaction of two provisions in the Bill of Rights Act itself. Our analysis therefore begins with those two provisions.

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15 In the High Court, the Attorney-General also argued that Make It 16's claim was not justiciable. That argument was rejected by Doogue J and is not the subject of any cross-appeal.

16 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

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

The interaction between ss 12 and 19 of the Bill of Rights Act

[17] Both ss 12 and 19 are found in pt 2 of the Bill of Rights Act. Part 2 is headed "Civil and political rights". Section 12 is one of seven sections grouped under a sub-heading entitled "Democratic and civil rights". Section 19 appears along with one other provision under the sub-heading "Non-discrimination and minority rights".

[18] Section 12 which is limited to parliamentary elections states:

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

[19] Section 19 creates what is sometimes termed an equality guarantee. It provides:

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

[20] The prohibited grounds of discrimination in the Human Rights Act 1993 include age discrimination.[18] Two important points should be noted. The first is that "age" for the purposes of age discrimination is defined under the Human Rights Act as "any age commencing with the age of 16 years". The second point is that s 20L of the Human Rights Act provides that an enactment is inconsistent with s 19 of the Bill of Rights Act if it limits the right to freedom from discrimination in that Act and the limitation is not justified under s 5 of the Bill of Rights Act.

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

[21] A right against age discrimination was not a right guaranteed under the Bill of Rights Act when the latter was first enacted. It only came about three years later as a result of the enactment of the Human Rights Act and its expanded list of prohibited grounds of discrimination. The legislative history of the Human Rights Act suggests that Parliament did not turn its mind to how a right against age discrimination would stand alongside s 12.[19]

The argument[20]

[22] Mr Powell contends on behalf of the Attorney-General that there is "a collision" between ss 12 and 19 which can only be resolved by statutory interpretation of the Bill of Rights Act itself. He says further that once the statutory interpretation exercise is undertaken, it permits of only one answer, namely that s 12 must prevail either because it creates an exception to s 19 (the Crown's preferred analysis) or because it trumps s 19. It follows in Mr Powell's submission that s 12 affords a complete answer to the claims made by Make It 16 at least in so far as parliamentary elections are concerned.

[23] In the High Court, the Judge accepted the existence of what she described as an "accidental" conflict between the rights in the two sections — accidental because it was never adverted to when the Human Rights Act was enacted.[21] The Judge further held that the correct stage of the analysis for resolving the conflict between the two sections was at the later s 5 justification stage.[22] That is to say, at the stage when having found an inconsistency between the limiting provision and the right, the Court must consider under s 5 of the Bill of Rights Act whether the limit is a reasonable limit that is demonstrably justified in a free and democratic society.

[24] The Judge's deferral of the issue was, Mr Powell argued, an error. He says the conflict should have been addressed and resolved at the outset when defining the scope of the right. In his submission, by deferring resolution of the conflict between the two sections to the later justification stage, the Judge in effect resolved the conflict in

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19 See generally (15 December 1992) 532 NZPD 13202–13220; (22 July 1993) 536 NZPD 16740–16752; and (27 July 1993); and (27 July 1993) 537 NZPD 16903–16951 and 16953–169799.

20 We record it was not argued that s 12 was itself discriminatory.

21 High Court judgment, above n 1, at [77].

22 At [78].

favour of s 19 without determining whether as a matter of interpretation that is how the sections interact.

[25] Developing these central themes, Mr Powell submitted that s 19 provides for a general right to be free from discrimination on grounds of age, limited only by what is demonstrably justified in a free and democratic society. It is thus in conflict with s 12 when it comes to electoral rights because s 12 distinguishes between citizens aged 18 and over who have a constitutionally protected right to vote in general elections and those younger than 18 who do not. That is to say, s 12 expressly and unequivocally permits the very age distinction which Make It 16 says constitutes an unjustified limitation of s 19.

[26] As mentioned, the enactment of a right to freedom from age discrimination post-dates the enactment of s 12. Mr Powell however rejected any suggestion of an implied repeal of s 12. He argued it was simply a case "where the general [s 19] yields to the specific [s 12] in the area of voting age, not as a matter of dogged application of a canon of construction but because that represents the balance that Parliament must be presumed to have intended".

[27] Mr Powell drew further support for the primacy of s 12 from the fact that entitlement to participate in elections is such a fundamental provision. He argued that having taken care to express and entrench the voting age in provisions which remained intact when the Electoral Act was updated in 1993 (a few months after the Human Rights Act received the royal assent) it was highly unlikely that Parliament would have intended to make such a significant change and alter the guarantee of electoral rights without saying so.

Our view

[28] There is obvious force in some of these submissions. However, we do not accept the basic premise. In our view, correctly interpreted, ss 12 and 19 are not in

conflict. They can be read together and each given full effect.[23]

[29] Section 6 of the Bill of Rights Act provides that whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning shall be preferred to any other meaning. In our view, that principle must govern the interpretation of the Bill of Rights Act itself, including s 12.[24]

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

[31] That means we answer issue one in favour of Make It 16 and confirm that s 12 is not dispositive of the appeal relating to the voting age provisions in the Electoral Act.

[32] If s 12 cannot be interpreted in the way suggested by the Attorney-General, it was common ground that for the purposes of issue two, there is no need to distinguish between parliamentary elections and local body elections. That is to say, it was common ground that the voting age provisions under both the Electoral Act and the Local Electoral Act are inconsistent with the s 19 right to be free from age discrimination. What was not agreed was whether that inconsistency was nevertheless a justified limit on the s 19 right under s 5.

[33] And that brings us to issue two.

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23 *Re J (An Infant)* [1996] 2 NZLR 134 (CA) at 146: "[P]otential conflicts of rights assured under the Bill of Rights Act [are to be approached] on the basis that the rights are to be defined so as to be given effect compatibly. The scope of one right is not to be taken as so broad as to impinge upon and limit others".

24 See *Fitzgerald v R*, above n 2, at [48] and [59] per Winkelmann CJ.

Has the Attorney-General established that the limits on the right of 16 and 17 year olds to be free from age discrimination created by the voting age provisions are reasonable limits that can be demonstrably justified in a free and democratic society?

The High Court judgment

[34] Section 5 of the Bill of Rights Act is headed "[j]ustified limitations" and relevantly states that "the rights and freedoms contained in this Bill of Rights [Act] may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[35] In applying s 5 to the present case, the Judge adopted a methodology derived from a Canadian decision[25] and endorsed in *Hansen*.[26] Under this approach, the Court must ask whether the limiting measure satisfies the following requirements:[27]

(a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

(b) Is the limiting measure rationally connected with its purpose?

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

(d) Is the limit in due proportion to the importance of the objective?

[36] The Judge found that the voting age provisions in the Electoral Act and the Local Electoral Act met all those requirements.[28]

[37] First, she identified that the purpose of the provisions was "to implement the basic democratic principle that all qualified adults (as opposed to children) should be able to vote" and was satisfied that was a sufficiently important purpose to justify

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25 *R v Oakes* [1986] 1 SCR 103.

26 *R v Hansen* above n 16, at [42] per Elias CJ, [64] per Blanchard J, [103]–[104] per Tipping J, [203]–[205] per McGrath J, and [269]–[272] per Anderson J (although with some amendments to the first limb).

27 At [104] per Tipping J.

28 High Court judgment, above n 1, at [113].

curtailment of the right or freedom.[29] She was further satisfied that the current voting age had a rational connection with that purpose.[30]

[38] As to whether the measure impaired the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose, the Judge noted that New Zealand draws the line at a number of different ages for a range of purposes. She referred to the matters mentioned in [11] above regarding 16 year olds but also noted that people under the age of 18 are generally referred to the youth justice system rather than the adult criminal jurisdiction, that at 17 years a person is able to enlist in the armed forces and at 18 a person is considered an adult for the purposes of the Oranga Tamaraki Act 1989, can be appointed a company director, serve as a juror and purchase alcohol. And at age 20, a person reaches the age of majority, can gamble in a casino and can adopt a relative.[31]

[39] The Judge went on to say that in each of these examples, there were plainly complex issues of morality, social justice, individual responsibility and public welfare at play. Any proposed change would involve a substantial policy process.[32]

[40] Similarly, the evidence before her about the voting age showed that the issue was not a simple one and that there were passionate and strong arguments on both sides of the debate. It was relevant, in the Judge's view, that in its 1986 report the Royal Commission on the Electoral System had acknowledged the possibility of lowering the voting age to 16 years but noted that any change would require broad political and public support. Public discussion was needed.[33]

[41] The Judge went on to say that in a democratic society it was reasonable to grant voting rights to adults and not children and to draw a line between adults and children at age 18. Given the heavy policy content and the existence of valid arguments on both sides "a healthy dose of deference to Parliament" was warranted.[34] The age of 18 was within the range reasonably available. The Judge also relied on s 12 as

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29 At [95].
30 At [96].
31 At [105].
32 At [106].
33 At [106].
34 At [109].

signalling Parliament's view that an age restriction in voting age provisions is a reasonable limit on the right to be free from discrimination on account of age.[35]

[42] Having regard to all these matters, the Judge held that the age restriction in the voting age provisions impaired the s 19 right no more than is reasonably necessary for sufficient achievement of the purpose of granting adults the right to vote. She also held that maintaining the voting age at 18 was reasonable and proportionate to the important objective of granting adults the right to vote.[36]

Arguments on appeal

[43] Make It 16 submitted the Judge's reasoning was flawed in a number of respects. In particular, the Judge mischaracterised the purpose of the limiting provisions in a way that amounted to "reverse engineering"; she misinterpreted s 12; and was overly deferential to Parliament. Counsel Mr Edgeler contended it was incumbent on the Judge to engage with the merits of the competing sides of the debate, rather than ask whether the voting age provisions fell within the range of reasonable alternatives open to Parliament. He drew support for those propositions from the Canadian decision of *Suave v Canada (Chief Electoral Officer)* where it was said:[37]

> At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process.

[44] Mr Jones who argued this part of the appeal on behalf of the Attorney-General however supported the Judge's reasoning. He contended the Judge was right to conclude that the current voting age represented a demonstrably justified limit on the right to be free from age discrimination.

[45] Mr Jones emphasised the constitutional and political importance of the voting age and the fact that the issue of lowering it has been the subject of intense and wide-ranging public debate for a long time.[38]

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35 At [109].
36 At [112].
37 *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] SCR 519 at [23].
38 Electoral Amendment Act 1969, which lowered the voting age from 21 to 20; and Electoral Amendment Act 1974, which lowered the voting age from 20 to 18.

[46] He rejected criticism that the Judge should have engaged with the merits of the opposing views. That she did not was, in in his submission, entirely proper. The arguments for and against lowering the age are essentially political arguments and thus the very type of issue on which the Court should defer on democratic grounds to the considered opinion of the elected body. In his submission, expressions in the caselaw such as "wide margin of appreciation", "low intensity of review", "discretionary areas of judgment" and "deference" are all apposite in this case because they serve to ensure that the Court's powers of review are exercised with an appreciation for the boundaries between questions of legality and questions of political decision-making. The Court needed to be sensitive to that distinction especially given the breadth of non-discrimination laws.[39]

[47] Mr Jones acknowledged that the voting age has been lowered to 16 years in a number of countries,[40] most notably Scotland and Wales but noted that the United Nations Convention on the Rights of the Child fixes the presumptive age of adulthood as 18[41] and that 18 is still the international norm for voting. He also argued that in countries where the voting age has been lowered, it was a decision taken by the legislature following a process of inquiry and debate, not because of any court ruling on human rights law. The international experience thus confirmed that this was a political question.

[48] In short, for the purposes of this appeal, the Attorney-General took no position on what the appropriate voting age should be. That is to say, he did not contend that there was necessarily any magic in 18. Rather his position was that while age is one of the prohibited grounds of discrimination, some limitation on the voting age is inevitable. In relation to young people moving towards maturity, there was however no single self-evidently correct age — no bright line test. Society's views on what "adult" should mean in different contexts will evolve over time. Why stop at 16 years

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39 Citing *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428.

40 According to the report of the Children's Commissioner, at least 11 jurisdictions permit 16 year olds to vote in general elections: Austria, Nicaragua, Brazil, Scotland, Wales, Isle of Man, Jersey, Malta, Argentina, Cuba and Ecuador.

41 Convention on the Rights of the Child, art 1.

he asked. Why not 15 years? The line has to be drawn somewhere. And 18 which accords with international practice was a reasonable line.

Our view

[49] We agree that as a matter of common sense some limit on voting age is clearly justified. However, for the purposes of a Bill of Rights Act analysis, our focus is of necessity on 16 and 17 year olds because the protected right under s 19 against age discrimination only applies to those aged 16 and over. Fifteen year olds could not argue a breach of s 19 if the voting age were lowered to 16 years.

[50] For the reasons we now traverse, we agree with Make It 16 that the approach taken by the Judge was wrong.

[51] In particular, we consider that not only was her reliance on s 12 misplaced but also that her formulation of the purpose of the voting age provisions ("to implement the basic democratic principle that all qualified adults (as opposed to children) should be able to vote") was to state the purpose too broadly. The relevant purpose to be identified under the *Hansen* s 5 analysis is the purpose of the limiting measure.[42] In this case, the limiting measure is the limitation of the franchise to those aged 18 and over, thereby disenfranchising those under the age of 18 years. The purpose of the limitation is to demarcate between those who are to be considered adults and those who are to be considered children.

[52] That being the case, in terms of the remaining steps in the s 5 analysis, the Court needed to inquire why Parliament made the choice it did, why are 16 and 17 year olds excluded, deemed children and not adults? What is the social advantage of limiting the age to 18 years? If there is one, does the social advantage outweigh the harm to the protected right. Would extending the franchise to 16 and 17 year olds be harmful? Would it have benefits?

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[42] See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [117]; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [65].

[53] The overly broad formulation of the purpose resulted in the Judge being unduly deferential to Parliament and in turn failing to inquire whether the Attorney-General had discharged the burden of proof that lay on him to justify the limit on the protected right.[43] The doctrine of "margin of appreciation" certainly allows Parliament some latitude or leeway but it can only go so far. As was said by this Court in *Child Poverty Action Group Inc v Attorney-General*:[44]

> That latitude or leeway to the legislature does not however alter the fact that the onus is on the Crown to justify the limit on the right. The justification has to be "demonstrable".

And:[45]

> … the term "deference" as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away or shirk that task.

[54] Examination of the justification for limiting the rights of 16 and 17 year olds was required.

[55] That justification cannot be general consistency with the law because as discussed earlier the age of responsibility varies greatly under New Zealand law. The Children's Commissioner aptly described it in his report as a "'hotchpotch' of inconsistency".

[56] The most obvious and cogent justification in our view would be competency. However, the Attorney-General provided no evidence to suggest 16 year olds lacked the necessary competence to vote. On the contrary, what evidence there was before the High Court suggested they are competent. In his report, the Children's Commissioner referred to a 2019 study[46] which drew a distinction between the ability of young people to make immediate personal decisions in emotionally charged situations and their decision-making ability in situations where there is time for

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43 *R v Hansen*, above n 16, at [108]–[112] per Tipping J; and *Ministry of Health v Atkinson*, above n 42, at [163].

44 *Child Poverty Action Group Inc v Attorney-General*, above n 42, at [91] (footnote omitted).

45 At [92].

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

deliberation. In the former situation (hot cognition), the adolescent brain does not have full capacity to over-ride impulses but in the latter situation (cold cognition) 16 year olds showed competence levels similar to older people, indicating cognitive maturity.

[57] Another possible justification might be that 16 and 17 year olds are more dependent on their family than 18 year olds and therefore do not have the necessary independence of thought. However, that was not raised by the Attorney-General. Nor were issues of knowledge and world experience. International practice was raised but that cannot on its own suffice as a sufficient justification especially in the context of a process of incremental change.

[58] That then leaves the argument that 18 is within the range of reasonable alternatives. Having regard to the fact that the right at issue involves a core democratic right, we are not persuaded that this purported justification is sufficient to discharge the burden of proof that lies on the Attorney-General under s 5. More was needed.

[59] We therefore answer issue two in the negative.

Should the Court issue a declaration of inconsistency?

[60] As is well established, the court has a discretion whether to issue a declaration. A declaration of inconsistency is not a declaration of a legal right and the usual presumption of a remedy where a wrong has been established in the judicial review context does not apply with the same force.[47]

[61] As also noted in the decision of this Court in *Taylor v Attorney-General*, a court may choose to exercise restraint for reasons of comity among or deference towards the other branches of government.[48]

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47 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [168]. The Supreme Court decision in *Taylor* does not address the issue of the discretion as that was not argued before it. See *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [70] per Glazebrook and Ellen France JJ; and [121] per Elias CJ.

48 At [171].

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

Outcome

[63] The appellant's application for declarations of inconsistency is declined.

[64] The appeal is dismissed.

[65] As regards costs, we were advised that counsel for Make It 16 are acting pro bono and the Crown confirmed it was not seeking costs. There will be no order as to costs.

Solicitors:
DLA Piper, Wellington for Appellant
Crown Law Office, Wellington for Respondent