



(NZSC, 2022)

Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

MAKE IT 16 INCORPORATED v ATTORNEY-GENERAL

(SC 14/2022) [2022] NZSC 134

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

- P. The appellant, Make It 16 Inc, is a group seeking to have the voting age lowered from 18 to 16 years. As part of its advocacy for that legislative change, Make It 16 sought declarations in the High Court that the provisions setting the minimum voting age in the Electoral Act 1993 and the Local Electoral Act 2001 are inconsistent with the right to freedom from discrimination on the basis of age which is protected by s 19 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). "Age" for these purposes is any age from 16 years.

The Courts below

The High Court declined to grant the declarations of inconsistency sought. It considered that while the voting age provisions appeared inconsistent with the right in s 19 of the Bill of Rights, the inconsistency was a reasonable limit on that right in terms of s 5 of the Bill of Rights.

The Court of Appeal disagreed, holding that the limit was not justified but nonetheless declined to make the declarations. In doing so, the Court referred, among other matters, to the political nature of the issue.

The appeal

Leave to appeal to the Supreme Court was granted on the question of whether the Court of Appeal was correct to dismiss the appeal.

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P. The Court allowed the appeal, by a majority (comprising Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ) in relation to the provisions of the Electoral Act and unanimously in relation to the Local Electoral Act. The Court granted a declaration that the provisions of the Electoral Act and of the Local Electoral Act which provide for a minimum voting age of 18 years are inconsistent with the right in s 19 to be free from discrimination on the basis of age; these inconsistencies had not been justified in terms of s 5.

In allowing the appeal, the majority rejected the argument for the Attorney-General that the constitutional nature of the issues meant the Court should not inquire into the question of inconsistency at all. The Court did not see that approach as consistent with its role, particularly where fundamental rights are involved.

The majority also addressed the effect of s 12 of the Bill of Rights. Section 12 guarantees "[e]very New Zealand citizen who is of or over the age of 18 years" the right to vote in parliamentary elections. The majority agreed with the Court of Appeal that, applying a rights consistent interpretation, s 12 simply defines the minimum extent of the right to vote, not the maximum. In other words, the voting age can be lowered without breaching s 12 but not increased.

P. Unlike other comparable jurisdictions, in New Zealand the protection against age discrimination expressly begins at age 16. For that reason, in agreeing with the Court of Appeal that the Attorney-General had not established that the limit on the right was a reasonable limit in terms of s 5, the majority considered it was necessary to show why 18 was chosen as opposed to 16 or 17. The Attorney-General had not sought to do so. In the circumstances, the s 5 test had not been met. The possibility was left open that the limit could later be held to be justified and this possibility was reflected in the wording of the declaration.

Finally, in determining that the Court of Appeal was wrong not to make a declaration, the majority was not persuaded that to do so would be premature or that the issue was of such complexity so as to hamper the Court in fulfilling its usual function. And other factors supported granting the declaration, including: that the case involved the protection of the fundamental rights of a minority group that did not necessarily have effective avenues to pursue a challenge; and the obligations applicable under the United Nations Convention on the Rights of the Child.

P. In these circumstances, the majority considered the Court should fulfil its role which is to declare the law. In granting the declaration, the Court also recognised that there may be other matters Parliament will take into account in ensuring that the position ultimately adopted has the necessary democratic legitimacy.

Kós J dissented in part. He agreed with the majority that a declaration of inconsistency must be made in relation to the voting age for local elections under the Local Electoral Act. However, he disagreed with the majority in respect of parliamentary elections under the Electoral Act. Having regard to the legislative history of the voting age and its subsequent entrenchment, Kós J considered the explicit right to vote in parliamentary elections at 18 years, grounded in the constitutionally-entrenched provisions of the Electoral Act and affirmed by s 12 of the Bill of Rights, prevails over the generalised right to freedom from discrimination affirmed by s 19.

Section 12 constituted a limited and specific exception to the general right in s 19 to be free from discrimination on the basis of age.

Contact person:

Sue Leaupepe, Supreme Court Registrar (04) 914 3613