

Voter Eligibility and Age Discrimination: The View From Aotearoa New Zealand

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INTRODUCTION

In November 2022, the Supreme Court of New Zealand issued a declaration of inconsistency¹ against electoral legislation that excluded persons aged sixteen and seventeen years from voting on account that such a measure breaches the right to be free from age discrimination.² The Court wrote that the voting age is both a political matter and a matter of public opinion and, as such, restrictions maintaining the voting age at eighteen are no longer warranted. Such a decision was the direct result of activism efforts from youth based groups' legal and social advocacy efforts—signaling the ability for national and international efforts to achieve similar results through organizing tactics. The judiciary's consideration of ageism was both progressive and revolutionary for youth rights in the country, and provides a snapshot of if and how the right to be free from age discrimination can be reconciled with the right to vote in Aotearoa New Zealand.³

This Commentary will open with an overview of the evolution of the voting age in Aotearoa New Zealand, as well as its wider age-based legislative framework pertaining to children. Having set out the domestic legislative framework that permits age-based distinctions, the Commentary will explore the judicial response that led to the Supreme Court's finding that the current voting age amounts to unjustifiable discrimination. Next, this Commentary will canvas the discourse surrounding the wider academic discussion regarding what an appropriate voting age is and the influence of age discrimination in such debates. Finally, the Commentary will conclude with strategies that can utilize this discourse to inform wider public and

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1. A declaration of inconsistency is a way for the courts to confirm formally to Parliament that legislation has infringed the fundamental human rights set out in the New Zealand Bill of Rights Act 1990, and to require the government to report on its response to the declaration. *See* New Zealand Bill of Rights Act 1990, ss 7A, 7B [hereinafter NZBORA]. Declarations are not political statements but they can highlight those laws that are inconsistent with a fundamental right. *See* Attorney-General v. Taylor [2018] NZSC 104, [2019] 1 NZLR 213 at [77].

2. *Make It 16 Inc v. Attorney-General* [2022] NZSC 134.

3. Aotearoa is a te reo Māori (Māori language) name for New Zealand. Alexander Gillespie et al., *Putting Aotearoa on the map: New Zealand has changed its name before, why not again?*, THE CONVERSATION (2021). To honor the Indigenous name of the country, as well as to avoid confusion, this article will refer to the nation as “Aotearoa New Zealand.”

political debate, and the general importance of the fight for a fair voting age to Aotearoa New Zealand's democratic process.

I. AGE-BASED LEGISLATION IN AOTEAROA NEW ZEALAND

As with many democracies, universal suffrage amongst adults in Aotearoa New Zealand was a gradual process. Initially, only males over the age of twenty-one years who owned, leased, or rented property of a certain value could vote.⁴ This provision largely prevented indigenous Māori people from voting until 1867 as English law regarded them as owning land communally prior to legislative intervention.⁵ The franchise was extended to all males in 1879,⁶ and then to women aged twenty-one years and over in 1893.⁷ In 1969, the voting age was reduced to twenty years,⁸ and then to the current age of eighteen years in 1974.⁹ Aotearoa New Zealand's international legal obligations regarding the right to vote—stemming from its ratification of the International Covenant on Civil and Political Rights (“ICCPR”)¹⁰—were incorporated into domestic law by the New Zealand Bill of Rights Act 1990 (“NZBORA”) with the voting age being set at eighteen years.¹¹ This precedent has since been maintained, with persons eighteen years old and over being permitted to vote in general elections,¹² local body elections,¹³ and general referenda.¹⁴

The NZBORA also prohibits discrimination on the grounds set out in the Human Rights Act of 1993 (“HRA”) which incorporates Aotearoa New Zealand's anti-discrimination international legal obligations.¹⁵ Claims of discrimination can be brought against the government and anyone carrying out a public function.¹⁶ While age discrimination is one of the prohibited grounds of discrimination that claimants can base their suit on, only those aged sixteen years or older can bring age-based discrimination claims

4. See New Zealand Constitution Act 1852, s 42.

5. See Māori Representation Act 1867, s 3.

6. See Qualification of Electors Act 1879, s 2(3).

7. See Electoral Act 1893, s 3.

8. See Electoral Amendment Act 1969, s 2.

9. See Electoral Amendment Act 1974, s 2.

10. International Covenant on Civil and Political Rights Art. 25, Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

11. NZBORA, s 12.

12. Section 60 of the Electoral Act 1993 sets out who may vote and references those who are “qualified to be registered as an elector of the district”, whilst section 74 states that every “adult person” is qualified to be registered as an elector of an electoral district if certain criteria are met. Section 3 of the Electoral Act 1993 defines adult as “a person of or over the age of 18 years.”

13. See Local Electoral Act 2001, ss 20, 23, and 24.

14. See Citizens Initiated Referenda Act 1993, ss 2, 18, 24, 24A, and 27.

15. NZBORA, s 19. See Human Rights Act 1993 [hereinafter HRA]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights Art. 2 (Dec. 9, 1948) [hereinafter UDHR]; ICCPR, *supra* note 10, Arts. 2(1), 26.

16. HRA, s 20.

to court.¹⁷ Although paradoxical, having a (minimum) age threshold for bringing a claim of age discrimination reflects other Aotearoa New Zealand laws that make age-based distinctions. For example, subject to certain exceptions,¹⁸ young people under the age of eighteen are referred to the youth justice system rather than to adult criminal jurisdictions.¹⁹ At sixteen years a person is able to leave school,²⁰ is entitled to adult minimum wage rates,²¹ and is able to provide or withhold consent to medical treatment as if they were an adult.²² Moreover, with the permission of family courts, sixteen-year-olds can marry or enter into a civil union,²³ and at seventeen years old, a person can enlist in the armed forces.²⁴ However, even with such privileges, contracts entered into by minors are generally unenforceable,²⁵ and in Aotearoa New Zealand, the age of majority is currently set at twenty years.²⁶

II. MAKE IT 16 V. THE ATTORNEY-GENERAL

As part of its advocacy for legislative change to reduce the voting age, “Make It 16”—a non-partisan youth-led group that was formed out of Aotearoa New Zealand’s Youth Parliament²⁷—sought a declaration that the provisions in the Electoral Act 1993 and the Local Electoral Act 2001 that fixed the minimum voting age at eighteen years for general elections, by-elections, District Health Board elections, referenda, and local elections were inconsistent with the right to be free from discrimination as set out in the NZBORA.²⁸

The High Court (Aotearoa New Zealand’s highest court that is able to hear cases at “first instance”) determined that fixing the voting age at eighteen years was justifiable discrimination because the purpose of the legislation was “to implement the basic democratic principle that all qualified

17. *Id.* at s 21(1)(i). See Margaret Bedgood & Claire Breen, *The Rights to Equality and Non-Discrimination*, in INTERNATIONAL HUMAN RIGHTS LAW IN AOTEAROA NEW ZEALAND 177–86 (Margaret Bedgood, Kris Gledhill, & Ian McIntosh eds., 2017).

18. For example, Aotearoa New Zealand’s minimum age of criminal responsibility is set at ten years old. Claire Breen, *10 is too young to be in court—NZ should raise the minimum age of criminal responsibility*, THE CONVERSATION (2022), <https://theconversation.com/10-is-too-young-to-be-in-court-nz-should-raise-the-minimum-age-of-criminal-responsibility-188969> [https://perma.cc/3HCA-PETL].

19. Oranga Tamariki Act 1989 [Children and Young People’s Well-being Act 1989], ss 2, 252.

20. Education and Training Act 2020, s 35.

21. There is no minimum wage rate for those under sixteen years nor is there a general minimum age at which children can work. See Minimum Wage Act 1983, s 4.

22. These provisions do not indicate that those aged under sixteen years cannot consent to or refuse medical treatment. See Care of Children Act 2004, s 36.

23. Marriage Act 1955, s 18.

24. Defence Act 1990, s 33.

25. Contract and Commercial Law Act 2017, ss 85, 86.

26. Age of Majority Act 1970, s 4(1).

27. Make It 16, “The Campaign,” <https://www.makeit16.org.nz/our-story> [https://perma.cc/7CWX-QAJ5].

28. See generally *Make It 16 Inc v. Attorney-General* [2020] NZHC 2630.

adults (as opposed to children) should be able to vote.”²⁹ The High Court found that any limitations on the right to be free from age discrimination were no more than reasonably necessary to ensure that voting constituents had the adequate developmental and mental capacity to participate in the democratic process,³⁰ and that such measures were rational and proportionate.³¹ Because the voting age of eighteen years fell within the range of reasonable alternatives available to Parliament,³² and no justifiable discrimination was found, the High Court declined to issue a declaration of inconsistency.³³

Make It 16 then appealed the decision to the Court of Appeal where it was found that the voting age of eighteen years amounted to unjustifiable age discrimination. Contrary to the High Court’s opinion, the Court of Appeal concluded that maintaining general consistency with the law could not be a justification because the age of responsibility varies greatly under New Zealand law.³⁴ Neither did the Attorney-General provide adequate evidence to suggest sixteen-year-olds lacked the necessary competence to vote. Rather, as the court noted, evidence to the contrary had been provided to the High Court.³⁵ The Court of Appeal found that international practice was an insufficient justification, especially in the context of a process of incremental change.³⁶ Finally, the Court of Appeal was not persuaded that setting the age at eighteen years fell within the range of reasonable alternatives that would discharge the high burden of proof necessary to exclude the fundamental democratic right to vote from a class of citizens.³⁷

In sum, the Attorney-General had not established that the limits on the right of sixteen- and seventeen-year-olds to be free from the age discrimination caused by voting age provisions were reasonable limits that could be demonstrably justified in a free and democratic society. The application for the declaration of inconsistency was declined, however, because the question of the voting age was an “intensely and quintessentially political issue involving the democratic process itself and on which there are a range of reasonable views”; it was not the role of the courts to make such a determination on this matter.³⁸

29. *Make It 16 Inc v. Attorney-General* [2020] NZHC 2630 at [95]–[96], [104]–[105], [109], [112].

30. *Id.* at [105].

31. *Id.* at [95]–[96], [104]–[105], [109].

32. *Id.* at [117].

33. *Id.* at [118].

34. *Make It 16 Inc v. Attorney-General* [2021] NZCA 681 at [55].

35. *Id.* at [56]. See generally Grace Icenogle et al., *Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 *LAW & HUM. BEHAV.* 69 (2019).

36. *Id.* at [57].

37. *Id.* at [58].

38. *Id.* at [62].

Make It 16 successfully appealed the decision not to issue a declaration of inconsistency to the Supreme Court. The Court rejected the Attorney-General's view that the voting age was essentially a "no-go" case,³⁹ and that the inherently political nature of the matter meant that it should be decided by Parliament and the electoral process.⁴⁰

After upholding the finding that the lower courts were correct to inquire into the consistency of the minimum voting age with the right to be free from age discrimination,⁴¹ the Supreme Court then turned to deciding whether setting the voting age at eighteen years—the objective of which was to ensure an electorate of sufficient maturity or competency—amounted to a valid justification for restricting the right to be free from age discrimination. In that regard, the Supreme Court considered the Report of the New Zealand Children's Commissioner that had been prepared for the High Court,⁴² which referred to a 2019 study that drew a distinction between the cognitive abilities of young people (aged between ten and thirty) in different situations. In particular, the research indicates that when persons aged sixteen have time to deliberate, they show competence levels similar to older individuals that possess the right to vote.⁴³ Upholding the findings of the Court of Appeal, the Supreme Court found that the Attorney-General had not established that the voting age was a reasonable limit on the right to be free from age discrimination and concluded that the voting age's limitation on that right was not justified. But the Court also signaled the possibility that setting the voting age at eighteen years could still be justified at a later point.⁴⁴

The Supreme Court then turned to the question of whether to issue a declaration of inconsistency, and the wider constitutional implications of this course of action. At play here were questions around Aotearoa New Zealand's constitutional arrangements, the role of the judiciary (which can only scrutinize, not strike down legislation), the effect of their determinations regarding the protections afforded to fundamental rights, and the relationship between the courts (to scrutinize legislation), Parliament (as supreme law-maker), and the government (to introduce remedial legislation) when breaches are found.⁴⁵ That a core democratic right was at stake compounded the question of the relationship between the three bodies.

The Supreme Court viewed that issuing a declaration of inconsistency would not be premature (as argued by the Attorney-General), given that a 1986 report had determined that "a strong case" could be made for reduc-

39. *Make It 16 Inc v. Attorney-General* [2022] NZSC 134 at [29].

40. *Id.* at [26]–[32].

41. *Id.* at [34].

42. *Id.* at [53]–[55].

43. *Id.* at [56].

44. *Id.* at [57].

45. See generally Andrew Butler & Petra Butler, *THE NEW ZEALAND BILL OF RIGHTS ACT: A COMMENTARY* (2d ed. 2015).

ing the voting age to sixteen and recommended that Parliament “keep the voting age under review”.⁴⁶ The Court also acknowledged the particular institutional competence of Parliament in complex matters, but viewed that the question of the voting age was not one of those complex matters that would prevent it from exercising its judicial function.⁴⁷ Rather, there were strong reasons for granting the remedy. First, because the case’s principal focus was on a minority group, lesser protection may be afforded to this minority group’s fundamental rights.⁴⁸ Second, Aotearoa New Zealand was obliged under the 1989 United Nations Convention on the Rights of the Child (“CRC”), to “assure to the child who is capable of forming his or her own views the right to express those views freely in matters affecting the child” with the child’s views “being given due weight in accordance” with the child’s age and maturity.⁴⁹ Third, Aotearoa New Zealand’s anti-discrimination legislation specified that the age of sixteen required a particular focus on portions of the law that discriminate against those aged sixteen and seventeen.⁵⁰ As such, it made a declaration that those electoral laws providing for a minimum voting age of eighteen years were inconsistent with the right to be free from discrimination on the basis of age and that this inconsistency was not justified.⁵¹

In line with Aotearoa New Zealand’s constitutional arrangements, it became a matter for the government and Parliament to decide how to resolve the inconsistency between the fundamental right to be free from age discrimination and the current legislation on the right to vote. That portion of the constitutional process was undertaken in March 2023 when the public was invited to make submissions to Parliament’s Justice Committee on the Declaration of Inconsistency: Voting Age in the Electoral Act 1993 and the Local Electoral Act 2001.⁵² In May 2023, the Justice Committee issued its report,⁵³ wherein a majority of submitters favored lowering the voting age.⁵⁴ A majority of Committee members recommended that, regarding the voting age in general elections, the government should investigate lowering the voting age to sixteen years, taking into consideration the (not insurmountable) legal consequences of a change to the minimum voting age as

46. *Make It 16 Inc v. Attorney-General* [2021] NZCA 681 at [65] (citing Royal Commission on the Electoral System, *Towards a Better Democracy*, at [9.14] (Dec. 1986)).

47. *Id.* at [66].

48. *Id.* at [67].

49. *Id.* at [67] (citing the Convention on the Rights of the Child Art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3).

50. *Id.* at [67].

51. *Id.* at [72].

52. New Zealand Parliament, *Declaration of Inconsistency: Voting Age in the Electoral Act 1993 and the Local Electoral Act 2001* (Mar. 2, 2023), https://www.parliament.nz/en/pb/sc/make-a-submission/document/53SCJU_SCF_ROP_130299/declaration-of-inconsistency-voting-age-in-the-electoral.

53. Justice Committee, New Zealand Parliament, *Declaration of Inconsistency: Voting Age in the Electoral Act 1993 and the Local Electoral Act 2001* (May 2023).

54. *Id.* at 6.

set out in the Committee's report.⁵⁵ The Justice Committee also noted that the findings of the Independent Electoral Review Commission could raise further issues that the government may wish to take into account.⁵⁶

However, those sections of the Electoral Act regarding the voting age are entrenched provisions in Aotearoa New Zealand's (unwritten) constitution, meaning that any change would need to be supported by seventy-five percent of MPs or endorsed in a national referendum.⁵⁷ Although the government's response was promising at the outset of the Supreme Court decision,⁵⁸ a change of Prime Minister saw a change of willingness to even attempt to change the law. The government went back on its promise to introduce legislation to lower the voting age on the grounds that it would not achieve the support of seventy-five percent of Parliament and that the proposed bill would be a waste of taxpayers' money at a time when the country was facing a cost of living crisis.⁵⁹ This announcement came two days before the closing date for submissions to the Justice Committee regarding the declaration of inconsistency around the voting age.⁶⁰

III. COMPETENCY AND THE VOTING AGE: CHANNELLING THE CALL FOR CHANGE

A. *Wider Academic Discourse: A Snapshot*

As elaborated in other contributions to this Special Edition, academic discourse on the voting age tends to center around the perceived competency of children and young people. This focus originates in debates around whether any rights should be extended to children because children lack the capacity and ability to make rational choices.⁶¹ Based on this logic, proponents of age limits argue that the agency of young persons must be restricted for the safety of the persons themselves. As the following paragraphs show, the basis for such restrictions comes in different guises.

Age-based restrictions in law, such as those adopted in Aotearoa New Zealand, are often explained in terms of the need to protect young people from the potentially severe consequences (to either themselves or others) of

55. *Id.* at 15.

56. *Id.*

57. New Zealand Electoral Act 1974, s 268(1)(e).

58. Tess McClure, *Ardern Promises Bill to Lower Voting Age to 16 in New Zealand after Discrimination Ruling*, THE GUARDIAN, Nov. 21, 2022, <https://www.theguardian.com/world/2022/nov/21/voting-age-of-18-is-discriminatory-new-zealand-supreme-court-rules> [perma.cc/F6T7-AMSJ] (last accessed Aug. 13, 2023).

59. See PM Chris Hipkins *Announces Second 'Reprioritisation', With \$1b in Total Savings*, RNZ NEWS, Mar. 13, 2023; Claire Breen, *Throwing Voting-Age Legislation Onto the 'Policy Bonfire' Only Delays a Debate That Has to Happen*, THE CONVERSATION, Mar. 21, 2023.

60. New Zealand Parliament, *Declaration of Inconsistency*, *supra* note 52.

61. See generally Claire Breen, *The Ageing of Article 2 (1): The Child's Right to be Free from Age-Based Discrimination*, in CHILD RIGHTS AND INTERNATIONAL DISCRIMINATION LAW 55 (Marit Skivenes & Karl Harald Søvig eds., 2019).

engaging in activities where adolescent development may be a heightened risk factor. Common examples are found in legislation governing driving, drinking alcohol, or firearms use. However, age-limits are not binary. In order to ensure that young people are afforded a healthy and gradual development, age limits have also been designed to gradually ease—particularly when concerning young people’s ability to be employed, educated, and eased into society as adults. In the context of voting, the logic of using harm prevention as a justification to restrict an adolescent’s decision is difficult to discern. Rather, much like the case of access to employment, lowering the voting age to sixteen years seems to benefit young people by enabling them to experience greater political interest and democratic satisfaction, as well as develop trust in political institutions.⁶²

The perceived requirement that children need to be protected also underpins the justification that children need to be protected from undue parental manipulation—a portrayal that paints the relationship between many parents and their children in an unduly negative fashion. Yet international law recognizes the right to respect for family and private life.⁶³ It also recognizes that the family is the fundamental unit in society,⁶⁴ and provides for parents the right to furnish guidance in a manner consistent with their child’s evolving capacities to decide for themselves.⁶⁵ Aotearoa New Zealand domestic law makes similar provisions.⁶⁶ This suggests that parental influence at a moderate level is not only permissible, but encouraged—even when concerning a child’s democratic rights. At a practical level, the spectre of parental manipulation also belies the influence of our families, friends, and the wider culture in which we live. It also raises questions for the right to freedom of opinion and expression.⁶⁷

The “Make It 16” case highlighted the view that a voting age of eighteen years is necessary to protect democracy, and the democratic rights of adult New Zealanders, from the poor decision-making of purportedly incompetent young people. For this argument to be valid, evidence that

62. See generally Maria Borg & Andrew Azzopardi, *Political Interest, Recognition and Acceptance of Voting Responsibility, and Electoral Participation: Young People’s Perspective*, 25 J. YOUTH STUD. 487 (2022); Jan Eichhorn & Johannes Bergh, *Lowering the Voting Age to 16 in Practice: Processes and Outcomes Compared*, 74 PARLIAMENTARY AFFAIRS 507 (2021); Christine Huebner & Jan Eichhorn, *Votes at 16 in Scotland: Political Experiences Beyond the Vote Itself*, LOWERING THE VOTING AGE TO 16: LEARNING FROM REAL EXPERIENCES WORLDWIDE 121 (2020); Constanza Sanhueza Petrarca, *Does Voting at a Younger Age Have an Effect on Satisfaction with Democracy and Political Trust? Evidence from Latin America*, in LOWERING THE VOTING AGE TO 16: LEARNING FROM REAL EXPERIENCES WORLDWIDE 103 (James Sloam, Constance Flanagan, & Bronwyn Hayward eds., 2020).

63. UDHR, *supra* note 15, Art. 12.

64. International Covenant on Economic, Social, and Cultural Rights Art. 23, Dec. 16, 1966, 993 U.N.T.S. 171 [hereinafter ICESCR]; Convention on the Rights of the Child Preamble, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

65. CRC, *supra* note 64, Art. 5.

66. See New Zealand Care of Children Act 2004, ss 4–6; New Zealand Oranga Tamariki Act 1989 [Children and Young People’s Well-being Act 1989], ss 4, 5.

67. ICESCR, *supra* note 64, Art. 19; NZBORA, s 14.

demonstrated such restrictions would actually result in responsible and rational decision-making would be necessary. However, this requirement—whichever way it is applied—is problematic at a wider level as voter competence is not a demand made of other societal groups.⁶⁸ Moreover, voter competence is ill-defined, even among voting experts.⁶⁹ To the extent that a definition of “voter competence” has been proffered, it can be understood as the capacity to make rational decisions, based on available information, about different parties, candidates and policies, and interests, aims and goals that are worthwhile. Yet voter competence is not to be confused with the requirement to make rational or wise choices.⁷⁰ In any case, these types of concerns seem not to have actualized in the experiences of countries that have lowered the voting age, demonstrating that democracy is not at risk by lowering the voting age. In fact, democracy has been strengthened.⁷¹

The assumption that adolescent voters are incompetent and incapable of rational decision-making is open to a particular challenge given the research findings (within different disciplines) about the brain development of adolescents. A key finding critical to such discussion is that competence in young people is not a uniform concept. Much like adults, different types of decisions make different sorts of demands on individuals’ brains and abilities.⁷² For example, developmental psychology research identifies different types of competence. Social or emotional competence develops later, allowing for higher levels of socio-emotional interference in already risky activities, such as driving, drinking alcohol, and using firearms.⁷³ The science here largely aligns with age-based restrictions designed to mitigate the harm that adolescents may cause to themselves or others. However, research findings in developmental psychology suggest that the activity of voting tends to be governed by a different type of competence that draws from a higher-order, goal-directed, and deliberative nature, a competence that matures to adult levels at around sixteen years.⁷⁴ Developmental neuroscience findings also reveal that those parts of the brain systems implicated in intellectual maturity or basic cognitive processes mature before those parts of the brain systems implicated in self-regulation or social and emotional maturity. In other words, adolescents mature intellectually before they mature

68. See Nicholas John Munn, *Against the Political Exclusion of the Incapable*, 35 J. APPLIED PHIL. 601, 612 (2018).

69. Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1489 (2011).

70. See John Wall, *GIVE CHILDREN THE VOTE: ON DEMOCRATIZING DEMOCRACY* 43–44 (2021).

71. Borg & Azzopardi, *supra* note 62; Eichhorn & Bergh, *supra* note 62; Huebner & Eichhorn, *supra* note 62.

72. Hamilton, *supra* note 69, at 1504–10. *But see* Katharine Silbaugh, *Developmental Justice and the Voting Age*, 47 FORDHAM URB. L.J. 253, 253 (2019).

73. Hamilton, *supra* note 69, at 1504–1507; Megan E. Hay, *Incremental Independence: Conforming the Law to the Process of Adolescence*, 15 WM. & MARY J. WOMEN & L. 663, 666, 679–80 (2008).

74. Grace Icenogle et al., *Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for A “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 LAW & HUM. BEHAV. 69, 83 (2019).

socially or emotionally.⁷⁵ In effect, some decisions made by an adolescent might be mature, whilst others not so. The difference lies in the type of decision that they make and the cognitive process involved.⁷⁶

These findings come with a caveat: if restrictions are placed on the activities of individuals for reasons of (in)competency, then it is important to ensure that any scientific research is used carefully to inform (but not dictate) the legal and policy measure at issue, and that the policy question at hand is matched with the appropriate science, in this case the various research findings on adolescent brain development regarding competency to vote.⁷⁷ It is also important to ensure that such research findings are not viewed in isolation from the wider context of childhood experiences and state action.⁷⁸ Principally, as the Supreme Court of New Zealand noted, particular care must be taken to protect the fundamental rights of a minority group (children and young people).⁷⁹

B. From Discourse to Practice: Developments in Aotearoa New Zealand

As the journey of the Make It 16 case through the courts of Aotearoa New Zealand shows, debates around the ideal voting age are not confined to academia. Both sides of the argument for lowering the voting age have found their way into discussion in Aotearoa New Zealand's public and political arenas for nearly forty years.

The matter of lowering the voting age to sixteen garnered significant support in the 1986 Report of the Royal Commission on the Electoral System.⁸⁰ The report's response to the various arguments for retaining the age at eighteen years is instructive. The report acknowledged that "some attempt should be made to justify the voting age on independent principle" and that the starting premise should be recognizing that all New Zealanders are equal members of the community with rights and interests that should be protected.⁸¹ The only reason, therefore, for excluding young people from the right to vote would be competence. This argument was hard to sustain given the research in a number of Western societies that showed that the social and political world view of fifteen- or sixteen-year-olds was not dissimilar to adults. Thus, the Royal Commission concluded, "in terms

75. Laurence Steinberg, *The Science of Adolescent Brain Development and its Implications for Adolescent Rights and Responsibilities*, HUM. RTS. & ADOLESCENCE 65, 66 (2014). Hamilton, *supra* note 69, at 1507–10.

76. Icenogle et al., *supra* note 74; Steinberg, *supra* note 75.

77. Steinberg, *supra* note 75, at 65; Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AMERICAN PSYCHOLOGIST 739, 744 (2009).

78. Silbaugh, *supra* note 72, at 272–82.

79. *Make It 16 Inc v. Attorney-General* [2022] NZSC 134 at [67].

80. Royal Commission on the Electoral System, *supra* note 46, at [9.14].

81. *Id.* at [9.9].

of purely political competence, 15 or 16 might be a better general qualifying age than 18.”⁸²

Moreover, the Royal Commission viewed that, since young people could, among other things, leave school, consent to operations on themselves, pay income tax, and marry, there was an argument for treating them as “sufficiently responsible to vote for the political party that most represents their interests as they see them.”⁸³ Lowering the voting age would also foster social inclusion,⁸⁴ whilst the impact on the total political system would not be extensive because Aotearoa New Zealand’s triennial elections mean that the greater impact would be on the numbers of nineteen- and twenty-year-olds voting, rather than sixteen-year-olds, and the likelihood of political policies being overwhelmed by new voters would be little.⁸⁵ The report observed that although the public might not be open to the change, the Royal Commission was “conscious that children’s rights are not often the subject of public attention and must therefore be a particular concern of governments and the law.”⁸⁶

The Supreme Court also made reference to a report of the Office of the Children’s Commissioner (“OCC”), written in response to a request from the High Court in these proceedings.⁸⁷ It concluded that “a reduction in the voting age would be in line with the intention of the Children’s Convention to protect the rights of the child to form their own views and express them freely on matters that affect them” added to which was the view that “any lowering of the voting age should be supported by a comprehensive school-based citizenship education curriculum.”⁸⁸ These findings were framed in terms of Aotearoa New Zealand’s obligations under the CRC, Although it was noted that the Convention was silent on the matter of the right to vote,⁸⁹ the Children’s Commissioner framed the matter of the voting age in terms of states’ obligations under Article 4, and the child’s right to express their views under Article 12(1) with the starting point being that the child is capable of forming and expressing those views—and that the state is obliged to pass or amend legislation to give effect to that right.⁹⁰ In addition, the report noted that the creation of an environment that respects children’s expression of their views will contribute to building their capa-

82. *Id.* at [9.11].

83. *Id.* at [9.12].

84. *Id.*

85. *Id.* at [9.13].

86. *Id.* at [9.14].

87. Office of the Children’s Commissioner, *Report of the Children’s Commissioner under Section 12(1)(g) Children’s Commissioner Act 2003 in the matter of CIV-2019-485-764* (Aug. 2020). This Report was released to the author with the permission of the Honourable Justice Doogue, of the New Zealand High Court.

88. *Id.* at [7].

89. *Id.* at [13].

90. *Id.* at [14]–[18].

bilities to express their right to freedom of expression under Article 13.⁹¹ In the lead-up to the 2017 election, a survey of 806 children and young people by the OCC showed strong support for lowering the voting age as well as a desire for having a strong “civics education” available to them through their schools or communities.⁹² These young people understood that they should have a say in who controls their future since they are the ones who will have to live through it. They were able to discern those types of politicians and policies that they would vote for, with many preferring those that are action-oriented and future focused.⁹³ After reviewing the “hotch-potch” of legislation,⁹⁴ the report concluded that a reduction of the voting age to sixteen years would be consistent with the legal age of responsibility in existing legislation (whilst noting the exception of criminal responsibility),⁹⁵ simultaneously noting that eleven overseas jurisdictions had already lowered their voting age to sixteen.⁹⁶

More recent parliamentary inquiries after each election by a Select Committee have discussed the voting age, and recognized the need for wider political and public debate.⁹⁷ The arguments for and against lowering the voting age remain the same. Some Committee members considered that the voting age should be adjusted to the age at which young people are allowed to leave school and take on adult responsibilities such as full-time work,⁹⁸ whilst others took the view that eighteen is the age most reasonably aligned to when young people become independent, leave school, and go on to university or employment.⁹⁹ Other calls to retain the voting age at eighteen include the view that people under the age of eighteen are too vulnerable to undue influence from their parents and other people to be allowed to vote, and there ought to be a case for consistency between the age when young people are legally responsible for their actions and when they are able to vote.¹⁰⁰ The latter opinions suggest that a knowledge gap around the competency of young people when it comes to decision-making around voting

91. *Id.* at [19]–[20].

92. *Id.* at [36]–[41].

93. *Id.* at [21]–[24].

94. *Id.* at [29]–[31].

95. *Id.* at [32].

96. *Id.* at [33].

97. See New Zealand Parliament, Justice and Electoral Committee Final Report, *Inquiry into the 2011 General Election*, at 24–25 (Apr. 2013); New Zealand Parliament, Justice and Electoral Committee Final Report, *Inquiry into the 2014 General Election* (Apr. 2016); New Zealand Parliament, Justice and Electoral Committee Final Report, *Inquiry into the 2017 General Election and 2016 Local Elections*, at 35 (Dec. 2019); New Zealand Parliament, Justice and Electoral Committee, *Inquiry into the 2020 General Election and Referendums Interim*, at 21–22 (Dec. 2021).

98. New Zealand Parliament, Justice and Electoral Committee Final Report, *Inquiry into the 2011 General Election*, at 24 (Apr. 2013).

99. New Zealand Parliament, Justice and Electoral Committee Final Report, *Inquiry into the 2017 General Election and 2016 Local Elections*, at 35 (Dec. 2019).

100. *Id.*

remains with some MPs and the public, despite the findings of the Royal Commission and beyond.

More recent events suggest that there may be a change in attitude. In September 2022, a petition calling for the lowering of the voting age—which had over seven thousand signatures and the support of more than seventy mayors and local councillors—was handed over to Parliament.¹⁰¹ This marked a significant shift in momentum, given that previously such support for the measure was lacking (a 2019 petition requesting Parliament to lower the voting age to sixteen had only forty-three signatures,¹⁰² and a 2020 petition had sixty-eight signatures).¹⁰³ However, a Member's Bill (a non-government bill promoted by a Member of Parliament who is not a minister) calling for wider change, and which contained a provision to make the voting age sixteen, failed to be considered by the Select Committee.¹⁰⁴ The rationale for preventing the passage of the bill through Parliament was that such matters would be best dealt with by the Independent Electoral Law Review, which the government had established to make any changes by the 2026 general election.¹⁰⁵ The Independent Electoral Law Review issued its Consultation Document in September 2022, and the voting age was one of the issues that the Aotearoa New Zealand public was invited to submit on.¹⁰⁶ In March 2023, the Independent Electoral Review published a summary of 1,700 submissions, wherein just under half of submitters supported keeping the age at eighteen years, and others called for it to be lowered to sixteen years.¹⁰⁷ In June 2023, the Independent Electoral Review published its interim report in which it favoured lowering the voting age.¹⁰⁸ Both the Supreme Court and the Justice Committee had highlighted the significance of the views of this review, the final report of which is due in November 2023.

In April 2021, the Minister of Local Government established a review into the Future for Local Government,¹⁰⁹ which published its draft report on reforming local government in October 2022 where the matter of lower-

101. New Zealand Parliament, *Petition of Make It 16: Lower the voting age to 16* (Nov. 18, 2022).

102. New Zealand Parliament, *Petition of Ryan Yates - Lower the voting age to 16* (Mar. 17, 2019).

103. New Zealand Parliament, *Petition of Ethan Doughty - Change the voting age from 18 to 16* (Dec. 4, 2020).

104. See generally Electoral (Strengthening Democracy) Amendment Bill 2022.

105. Hon. Kris Faafoi, *Independent Panel Appointed to Review Electoral Law*, Beehive Media Release (May 24, 2022).

106. Independent Electoral Review, Consultation Document, *An Invitation To Tell Us What You Think About Our Electoral System*, at 18–19 (Sept. 2022).

107. Independent Electoral Review, Summary of Submissions, *Stage 1 Engagement*, at 14–15 (Mar. 2023).

108. Independent Electoral Review, Interim Report, *Our Draft Recommendations for a Fairer, Clearer, and More Accessible Electoral System*, at [7.10] (June 2023).

109. Hon. Nanaia Mahuta, *Independent Review to Explore Future for Local Government*, Beehive Media Release (Apr. 23, 2021) (last accessed Aug. 13, 2023), <https://www.beehive.govt.nz/release/independent-review-explore-future-local-government> [https://perma.cc/D4EZ-F4TN].

ing voting age was considered.¹¹⁰ The familiar arguments against the voting age also appeared, specifically the notions that lowering the voting age included the potential for parental coercion, and that sixteen- and seventeen-year-olds could already participate in our democracy by way of protesting, lobbying, petitioning, and presenting to Parliamentary committees. However, such arguments did not sway the review body from recommending that the voting age for local government elections should be sixteen years.¹¹¹ This recommendation was received more positively on the local scale than the national one, with the Aotearoa New Zealand Government promising to introduce legislation to lower the voting age in local body elections. There appears to be greater support across the political spectrum for this initiative, and any legislation involved in this initiative only requires the support of half of Parliament—raising the likelihood that such legislation will materialize in the near future.¹¹²

The “Make It 16” case demonstrates maturity and cognitive ability amongst young people in their own right. The case itself also provides an opportunity to highlight the often side-lined view that young people are competent to vote. The political and public debates to come—and Aotearoa New Zealand’s constitutional and democratic processes require that they do come—must be informed by the wide and longstanding body of research that challenges prevailing attitudes opposed to young people gaining the right to vote. This is particularly important as the right to free expression (a core political right) includes the right to access information, and young people have the right to have their opinions heard in all decision-making affecting them. Aotearoa New Zealand’s democracy will be better protected when its general public and political representatives engage with a wider range of information that challenges current (and often confused) understanding of young peoples’ maturity, and commit to protecting the rights of all New Zealanders, irrespective of their age.

IV. CONCLUSION

That a group of young people mounted a successful legal challenge all the way to the Supreme Court of New Zealand is itself an example of the types of maturity and cognitive abilities that many adults refuse to ac-

110. Future for Local Government Review Panel, Draft Report, *He Mata Whāriki, He Matawānui*, at 171–72 (Oct. 2022).

111. *Id.* at 21.

112. J. Ensor, *Prime Minister Chris Hipkins Abandons Plan for Legislation to Lower Voting Age for General Elections*, NEWSHUB (Mar. 13, 2023) (last accessed Aug. 13, 2023), <https://www.newshub.co.nz/home/politics/2023/03/prime-minister-chris-hipkins-abandons-plan-for-legislation-to-lower-voting-age-for-general-elections.html> [<https://perma.cc/LCL9-Y8RK>]; R. Palmer, *Labour Considers Voting Age Change for Council Elections*, RNZ NEWS (Nov. 22, 2022) (last accessed Aug. 13, 2023), <https://www.rnz.co.nz/news/political/479271/labour-considers-voting-age-change-for-council-elections> [<https://perma.cc/33JK-LV2P>].

knowledge in young people when denying them the right to vote. This denial is based on the perceived need to protect young people, adult voters, and/or Aotearoa New Zealand's representative democracy. Yet such assertions constitute unjustifiable age discrimination.

Clear support from the Aotearoa New Zealand public is necessary to make changes to the core democratic right that is the right to vote. Informed public debate is, therefore, vital. Future political and public debates must be informed by the wide and longstanding body of research that challenges prevailing attitudes that oppose young people gaining the right to vote. Regarding the centrality of the argument that democracy must be protected, it must also be recognized that Aotearoa New Zealand's Supreme Court, a Select Committee of its Parliament, and the (interim) report of the Independent Electoral Review—all significant actors in Aotearoa New Zealand's democratic and constitutional processes in this matter—have each recommended lowering the voting age to sixteen years. Moreover, the findings of these actors are a way for the Aotearoa New Zealand public to voice their calls for change. These developments must give some impetus for a call to continue and foster, with serious intent, public and political debate around the fundamental rights to vote and to be free from age discrimination.

