

14 February 2020

Attorney-General

**Electoral (Registration of Sentenced Prisoners) Amendment Bill (22565/5.0) –
Consistency with New Zealand Bill of Rights Act 1990
Our Ref: ATT395/308**

1. We write to advise you of Crown Law's view on whether the Electoral (Registration of Sentenced Prisoners) Amendment Bill ('the Bill') is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.
2. The Bill removes the blanket disqualification from electoral registration that, since 2010, has applied to all sentenced prisoners. It restores electoral law to its pre-2010 position, under which only prisoners serving a sentence of imprisonment of three years or more were disqualified from registration.
3. The Bill engages the right to vote affirmed by s 12 of the Bill of Rights Act, and the right to be free from discrimination (including on the ground of race) affirmed by s 19(1). In our opinion the Bill does not appear to be inconsistent with either right.

Summary

4. By providing that prisoners serving a sentence of imprisonment of three years or more are disqualified from registering as electors, the Bill would limit the right to vote. However, the limitation serves the aims of deterring and denouncing serious criminality, and enhancing civic responsibility and respect for the rule of law. Moreover, the fact that the Bill:
 - 4.1 restricts the limitation to prisoners convicted of serious criminal conduct;
 - 4.2 restricts the limitation to the duration of their imprisonment only; and
 - 4.3 contains measures to assist prisoners to re-register upon releasemeans the limitation goes no further than necessary to fulfil those aims.
5. The restriction may therefore be considered justified under s 5, in that it represents a reasonable limit on the right to vote, prescribed by law, which can be demonstrably justified in a free and democratic society.
6. In *Ngaronoa v Attorney-General* the Court of Appeal held that blanket disqualification did not give rise to unjustified discrimination against Māori, since the Bill applies

equally to and with equal effect on Māori and non-Māori prisoners. Applying the Court of Appeal's approach, but also taking into account the evidence and findings of the Waitangi Tribunal in *He Aba i Pērā Ai? The Māori Prisoners' Voting Report*, we conclude:

- 6.1 the Bill does not discriminate against Māori, since the numbers of potential voters likely to have their right to vote temporarily removed is so small that it would not give rise to material disadvantage.
- 6.2 in the event we are wrong, and the measure does limit the right to be free from discrimination, that limitation may be justified under s 5. Therefore, the Bill is not inconsistent with s 19(1).

Background

7. The recent history of restrictions on prisoners' voting rights may be briefly summarised.
 - 7.1 Prior to 1993, all sentenced prisoners were disqualified from electoral registration.
 - 7.2 Between 1993 and 2010, only prisoners sentenced to three years' or more imprisonment were disqualified.
 - 7.3 Since 2010, all sentenced prisoners have been disqualified (i.e. a return to the pre-1993 position). At the time this disqualification was proposed, the then Attorney-General reported to Parliament "the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 of the Bill of Rights Act and that it cannot be justified under s 5 of the Act".
 - 7.4 In 2015 the High Court declared blanket disqualification inconsistent with s 12 of the Bill of Rights Act.¹
 - 7.5 In 2017 the Court of Appeal held blanket disqualification was not inconsistent with s 19(1) of the Bill of Rights Act.²
 - 7.6 In 2019 the Waitangi Tribunal concluded that in introducing the blanket disqualification in 2010, the Crown acted inconsistently with principles of the Treaty of Waitangi/Te Tiriti o Waitangi. It recommended the removal of all restrictions on prisoners' right to vote.
8. The Bill proposes to revert to the 1993-2010 position, in that only prisoners sentenced to imprisonment for three years or more would be disqualified. The Bill would also:

¹ *Taylor v Attorney-General of New Zealand* [2015] NZHC 1706, [2015] 3 NZLR 791. The case was appealed to the Court of Appeal and Supreme Court (on the question of the jurisdiction of the Court to make declarations of inconsistency), which upheld the declaration.

² *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643. Leave to appeal to the Supreme Court on this point was refused: [2017] NZSC 183.

- 8.1 require prison managers to advise prisoners serving a sentence of less than three years' imprisonment, and prisoners to be released after a longer sentence, about registering as electors;
- 8.2 require prison managers to ask prisoners whether they want their details sent to the Electoral Commission; and
- 8.3 require the Electoral Commission to treat receipt of a prisoner's details as the receipt of an application to register as an elector.

Section 12 – The Right To Vote

- 9. Section 12(a) of the Bill of Rights Act provides that every New Zealand citizen over the age of 18 years has the right to vote in genuine periodic elections of members of the House of Representatives.
- 10. The Bill would limit that right. The limitation would be less restrictive than the current (blanket) limitation, but would be a limitation nonetheless. It is therefore necessary to consider whether it may be justified under s 5.
- 11. The right to vote is foundational to our democracy. Weighty reasons must be given if its restriction is to be justified. The justifications for restricting a prisoner's right to vote are twofold: enhancing civic responsibility and respect for the rule of law; and enhancing the criminal sanction.
- 12. These principles may be expressed in different ways in different jurisdictions, nevertheless they are clear and they march together. The restriction may be seen as forming part of an overall sentencing package intended to denounce and deter serious criminal conduct. It also marks the moral approbation society conveys to those who cause serious harm to society, and serves to convey the importance society accords to civic responsibility and the rule of law.
- 13. These justifications may be considered sufficiently important reasons for limiting the right to vote. They express a coherent view of moral responsibility, sentencing and democratic rights deeply held by many in society. The 'social contractarian' approach to democratic rights upon which they draw may be in tension with the universalist promise of human rights, but to some extent this tension is built into s 12 itself, which restricts the right to vote to citizens (who have chosen to further restrict it to those citizens who are resident in or maintain a connection with the country), in contrast to other rights which are held by 'everyone'. The aims are not incompatible with the aims of rehabilitation or the dignity of the person, and the return of voting rights upon release marks the former prisoner's full return to the democratic community.
- 14. This view is consistent with a number of domestic and international authorities, including the approach taken by former Solicitor-General Sir John McGrath QC,³ the High Court of Australia,⁴ the European Court of Human Rights,⁵ the European

³ Opinion on consistency between NZ Bill of Rights Act and restrictions on prisoners' voting rights by the Former Solicitor General JJ McGrath QC dated 17 November 1992

⁴ *Roach v Electoral Commission* (2007) 233 CLR 162 in which the High Court held that amendments to the Commonwealth Electoral Act that disqualifed all prisoners from voting were invalid, in that they were incompatible with the right of

Court of Justice,⁶ the United Nations Human Rights Committee⁷ and a minority of the Supreme Court of Canada in *Sauvé*.⁸

- 15. We have considered the criticisms of this view expressed by the majority of the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)*, but are not persuaded that its approach need be followed. Context is important. The *Sauvé* majority relied on the fact the right to vote was subject to protection from unjustifiable parliamentary limitation.⁹ Any limitation on the right therefore required a special standard of justification, beyond that required for some other Charter rights and freedoms.¹⁰ No such special protection is afforded to the right to vote in the structure of our Bill of Rights Act.
- 16. The *Sauvé* majority also took account of the fact that sentences of two years were sometimes imposed for offences of no particular gravity.¹¹ It may be significant that the threshold of two years was lower than the thresholds in other jurisdictions where restrictions on prisoner voting have been upheld, and lower than the threshold in this Bill.
- 17. In our opinion, the measure may be considered rationally connected to its aims. It pursues them with minimal interference to the right in question and therefore represents a proportionate limitation of the right to vote. We reach that view in the light of the following.

 - 17.1 By imposing the limitation only on those who have received a sentence of imprisonment for three years or more, the Bill restricts the limitation to those prisoners convicted of serious criminal conduct.
 - 17.2 There is also some force in the point made by the 1986 Royal Commission on the Electoral System that three years is the time which a citizen can spend overseas without returning to New Zealand, before temporarily losing the right to vote.¹²
 - 17.3 The threshold of three years' imprisonment is consistent with what the High Court of Australia considers a reasonably appropriate and adapted limitation on its constitutional right to vote,¹³ and the European Court of Human Rights considers is a proportionate on its Convention right.¹⁴

⁶ *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde (Case C 650/13)* (2015)

⁷ [14] of UNHCR, General Comment 25

⁸ *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 2002 SCC 68 at [36]–[37]

⁹ The right could not be overridden by application of the “notwithstanding” clause: Charter, s 33.

¹⁰ *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 2002 SCC 68 at [36]–[37].

¹¹ At [54]

¹² Page 237 *Report of the Royal Commission on the Electoral System, 1986*

¹³ fn 4, above

¹⁴ fn 5, above

- 17.4 The limitation is for the duration of imprisonment only.
- 17.5 The Bill contains measures to assist prisoners to return to the electoral roll upon release.
- 17.6 A limitation is not arbitrary simply because it is automatically imposed by operation of law upon the passing of a sentence, rather than through an explicit decision of the sentencing court. The length of the ban will be determined by the length of the sentence of imprisonment the court imposes, which will in turn be tailored to the facts of the case (including the severity of the criminal conduct) and the personal circumstances of the offender.
18. For the above reasons, in our opinion the Bill proposes to limit the s 12 rights of some prisoners in a manner capable of justification under s 5.

Section 19(1) – The Right To Be Free From Discrimination

19. In *Ngaronoa* the Court of Appeal considered whether the current law (blanket disqualification) gives rise to unjustifiable discrimination within the meaning of s 19(1) on the ground of race. The Court's findings may be summarised as follows.
- 19.1 The appropriate comparison was between Māori and non-Māori prisoners. Both are treated in the same way.¹⁵
- 19.2 Although Māori may suffer the loss of opportunity to register on the Māori electoral roll, the potential loss of voters from the Māori roll as a result of the 2010 law was not sufficient to trigger the creation of an additional Māori electoral district.¹⁶
- 19.3 The right to choose to register in a Māori or general electoral district is a form of positive discrimination. Removal of this choice is not discriminatory.¹⁷
- 19.4 Because of the disproportionately high numbers of prisoners who identified as Māori, Māori were disproportionately affected by the law.¹⁸ However, because the number of prisoners affected was so small (less than one percent of Māori as a whole), no material disadvantage arose.¹⁹
20. Following *Ngaronoa*, the Waitangi Tribunal conducted an urgent inquiry into the consistency of prisoner disqualification with the principles of the Treaty/te Tiriti, and any prejudicial effect that may arise. The Tribunal was not directly concerned with s 19 of the Bill of Rights Act, but with the different but related Treaty/te Tiriti principles of equity and active protection.

¹⁵ *Ngaronoa v Attorney General* [2017] NZCA 351, NZLR at [138].

¹⁶ At [140]–[143].

¹⁷ At [143]–[144].

¹⁸ At [147].

¹⁹ At [147].

21. The Tribunal's findings were made with the benefit of evidence not before the Court in *Ngaronoa*. The evidence before the Tribunal showed:
- 21.1 In 2018 Māori were 11.4 times more likely to be removed from the electoral roll because of a prison sentence than non-Māori, compared to in 2010 (before blanket disqualification) where Māori were 2.1 times more likely to be removed from the electoral roll because of a prison sentence.²⁰
 - 21.2 That because those who were removed from the electoral roll tended not to re-register, the impact of the 2010 legislation on the roll was increasing over time.
 - 21.3 That by December 2020, under the current law, approximately 32,000 people would have been removed from the electoral roll since December 2010, with a number of people removed multiple times. Almost 60 percent of those removed would have been Māori.
 - 21.4 That if the law had not been changed in December 2010 then by December 2020 only 5,000 people would have been removed from the roll; 27,000 fewer than under the current law. Furthermore, under the pre-2010 law, 48 percent of those removed would be Māori, approximately 12 percent less than the current law.²¹
22. The Tribunal found:²²
- Māori are disproportionately and prejudicially affected by section 80(1)(d) of the Act [as amended by the 2010 legislation] and therefore the Act is in serious Treaty breach because:
- Māori are significantly more incarcerated than non-Māori, especially for less serious crimes;
 - young Māori are more likely to be imprisoned than non-Māori impeding the development of positive voting habits;
 - the practical effect of disenfranchisement goes wider than the effect on individual prisoners, impacting on their whānau and communities;
 - and the legislation operates as a de facto permanent disqualification due to low rates of re-enrolment amongst released prisoners.
23. Like the Court in *Ngaronoa*, the Tribunal did not find sufficient evidence to conclude the loss of potential Māori electors as a result of prisoner disqualification may have suppressed the number of Māori electoral districts.²³

²⁰ At 18–19.

²¹ Affidavit of Robert Donald Lynn, Ministry of Justice in the matter of the Treaty of Waitangi Act and the Māori Prisoners Voting Rights Inquiry (22 March 2019).

²² *He Aha i Pērā Ai? The Māori Prisoners' Voting Report 2019* at 72.

²³ *He Aha i Pērā Ai? The Māori Prisoners' Voting Report 2019* at 27.

Analysis

24. Discrimination involves treating like cases differently on a prohibited ground, in circumstances where this differential treatment gives rise to a ‘material disadvantage’.²⁴ Section 21 of the Human Rights Act 1993 sets out the prohibited grounds for the purposes of s 19(1) of the Bill of Rights Act, one of which is ‘race’.
25. If enacted the Bill would not discriminate directly on the basis of race, e.g. by introducing a race-based qualification for electoral registration.²⁵
26. The *Ngaronoa* Court of Appeal’s finding that the current law does not give rise to indirect discrimination was arrived at on the basis that the law applied equally to prisoners of all races and affected prisoners in the same way. The fact that Māori prisoners lost the right to enrol and vote in a Māori electoral district did not mean that they suffered any greater material disadvantage than non-Māori prisoners.²⁶ Applying that approach to this Bill leads to the same answer.
27. The Court went on to consider whether the current blanket restriction on prisoner voting might be discriminatory, were the basis of comparison not Māori and non-Māori prisoners, but the wider Māori and non-Māori voting populations.
28. Following established case law,²⁷ the Court described this approach as involving the selection of a ‘different comparator group’.²⁸ However, it is unclear who, under such a comparison, the potential victim of discrimination might be. Even if it could be shown that disenfranchisement impacts disproportionately on the Māori electorate, that does not make it any more likely that any particular member of the Māori community would be prevented from voting unless they were themselves to be convicted of serious criminality.
29. The comparison might be justified on the basis that Māori, as a group, would suffer discrimination because their voting base would be disproportionately diminished by disqualification. This consideration of the effect on Māori as a group appears to be what the Court had in mind in drawing this wider comparison²⁹ and we proceed on that basis.³⁰
30. Because a higher portion of the Māori population than the non-Māori population are serving prison sentences of imprisonment of three years or more, the Bill would necessarily have a proportionally greater impact on the wider Māori potential voting pool.

²⁴ *Ministry of Health v Atkinson* [2012] NZCA 184.

²⁵ Following similar reasoning as in *Ngaronoa v Attorney General* [2017] NZCA 351, NZLR at [133].

²⁶ *Ngaronoa v Attorney General* [2017] NZCA 351, NZLR at [143]–[146].

²⁷ In particular, *McAlister v Air New Zealand* [2009] NZSC 78.

²⁸ *Ngaronoa v Attorney General* [2017] NZCA 351, NZLR at [147].

²⁹ *Ibid* at [149].

³⁰ The right to be free from discrimination under s 19 is guaranteed to ‘everybody’, which leaves open the question of whether social groups, as well as individuals, enjoy its protection. However, in defining indirect discrimination s 65 of the Human Rights Act expressly includes within its ambit, affected ‘groups of persons’. Therefore, for the purposes of this advice, we proceed on the basis s 19 is to be read in the light of section 65 and that Maori as a group enjoy the protection of s 19.

Material disadvantage

31. In *Ngaronoa* the Court held that any disproportionate impact of the current law was so small that it did not give rise to a material disadvantage. By ‘material advantage’ the Court appears to have had in mind the impact of the legislation on the potential size of the Māori vote, as expressed through both the Māori and the general electoral roll.³¹
32. The Court drew this conclusion on the basis that less than one percent of the Māori population were in prison at any one time. This Bill would reduce the number of Maori affected by the restriction even further. However, it is necessary to consider the evidence before the Waitangi Tribunal, which showed that whilst the number of Māori who were in prison at any one time was small, the effect of the measure must be considered over time, since prisoners tended not to re-register following their release.
33. We do not, for the purposes of this analysis, accept the Tribunal’s conclusion that the long-term impact of the current law means that the restriction amounts to a ‘de facto permanent exclusion from the register’.³² However, we do accept that the removal of prisoners from the roll creates difficulties for those who are seeking to exercise their voting rights after their release from prison. Further, that it may discourage Māori who are incarcerated at a young age from establishing the habit of voting, and is therefore capable of reducing the number of Māori voters in the voting pool over the long-term.
34. However, the evidence before the Tribunal indicated that, taken at its highest, the numbers of Māori who would have been removed from the electoral roll between 2010 and 2020, had the 2010 amendments not been made, would have been small: approximately 2,500 over a decade or approximately 250 every year.³³
35. This level of de-registration cannot confidently be projected into the future since much depends on future offending rates, sentencing policy and the (as yet unknown) impact of the measures contained in the Bill to assist prisoners to return to the register following their release.
36. Applying the approach of the *Ngaronoa* Court in to this evidence, it remains difficult to see how such low numbers could give to any material disadvantage to Māori as a whole, if material disadvantage is understood as significant, potential electoral impact.

Any minimal disadvantage may be capable of justification

37. Notwithstanding the above, it is at least arguable that there may be some material disadvantage to Māori arising from the Bill, particularly if its impact is approached not on the narrow basis of potential electoral impact but, as the Waitangi Tribunal did, through an exploration of the wider social impact of the loss of the franchise.

³¹ *Ngaronoa v Attorney General* [2017] NZCA 351, NZLR at [125].

³² He Aha i Pērā Ai? The Māori Prisoners’ Voting Report 2019 at 28–29.

³³ See para. 21.4, above

38. It is therefore necessary to consider whether any such limitation on the right to be free from discrimination is capable of justification. For the following reasons, it is our opinion that it may be justified.
39. For the reasons set out above at paras. 11 to 14, the restriction pursues a legitimate aim. This aim is pursued in a manner that gives rise to minimal interference with the right to be free from discrimination, in that:
- 39.1 The number of prisoners who are potentially affected will be small. So, the wider the impact of the limitation will be limited.
 - 39.2 By restricting the measures to those serving significant custodial sentences, the restrictions on voting are less likely to apply to many younger prisoners. This would address the Tribunal's concern that, in capturing so many younger people, the current law has the effect of preventing them from acquiring the habit of voting.³⁴
 - 39.3 The measures the Bill proposes in order to assist prisoners to re-register at the conclusion of their sentence will help ameliorate any difficulties that prisoners may face in enrolling after their release.³⁵

Conclusion

40. In our opinion the measures in this Bill are not inconsistent with the rights affirmed by ss 12 and s 19(1) of the Bill of Rights Act.
41. In accordance with Crown Law policy, this advice has been peer reviewed by Daniel Perkins, Team Manager/Crown Counsel.



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Noted



Hon David Parker
Attorney-General
15/2 /2020

³⁴ See 22, above

³⁵ See para. 8, above