Submission by the Human Rights Commission

ELECTORAL (DISQUALIFICATION OF CONVICTED PRISONERS) BILL

To the Law and Order Committee

11 June 2010

Contact person: Sylvia Bell
Principal Legal and Policy Analyst
Phone 09 306 2650
1. INTRODUCTION

1.1 This submission on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill is made by the Human Rights Commission (the Commission).

1.2 The Commission derives its statutory mandate from the Human Rights Act 1993 (HRA). The long title of the HRA describes it as an Act “to provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Right”. The right to vote is reflected in a number of the international human rights instruments.

1.3 The right to vote is considered fundamental to representative democracies. In Western democracies, in particular, it is well recognised that the right to vote applies to all citizens subject only to the narrowest exceptions but although the trend has been to gradually extend the franchise, the one group that has most often been the target of disenfranchisement is convicted prisoners.

1.4 In New Zealand only people serving sentences of more than three years are unable to vote. This Bill would amend the Electoral Act 1993 by removing the right of all prisoners serving a sentence of imprisonment to vote.

1.5 The Commission considers that if enacted this Bill has the potential to undermine New Zealand’s democratic arrangements and would be inconsistent with its international commitments.

1.6 The Commission is strongly opposed to this Bill for the following reasons:

- It is inconsistent with international standards and international jurisprudence
- It breaches s.12(a) of the Bill of Rights Act and cannot be justified under s.5 of that Act
- It will impact disproportionately on Maori, both men and women, and therefore may amount to indirect discrimination which could not be defended as reasonable

• It is inconsistent with the aim of the penal system to rehabilitate offenders

• It is at odds with the concept of a democracy

• It undermines the tolerant, inclusive society New Zealand prides itself on being.

2. INTERNATIONAL STANDARDS

2.1 Political participation is the basis of a democracy and vital to the enjoyment of all human rights. The right to vote in elections, without discrimination, is therefore considered one of the most fundamental of all human rights and civil liberties2.

2.2 The right to vote has its genesis in Article 21 of the *Universal Declaration of Human Rights* (the Declaration) which states that:

(1) *Everyone has the right to take part in the government of his country, directly or through chosen representatives ....*

(3) *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*

2.3 The right of every citizen to vote is protected by Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR) which reads:

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:*

(a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*

(b) *To vote ... at genuine public elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*

2.4 Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) identifies the right to vote as part of equal and universal suffrage. The *Convention on the Elimination of all Forms of Discrimination against Women*

---

(CEDAW) requires States Parties to ensure women have the right to vote on equal terms with men.

2.5 New Zealand has ratified all three treaties committing itself to protecting the rights they contain domestically 3.

2.6 Although the ICCPR recognises that the right to vote is not absolute, any derogation needs to be explained and justified. In General Comment 25(57)4 the Human Rights Committee charged with monitoring implementation of the Covenant stated in regard to Article 25:

In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

2.7 It follows that the obligation undertaken in relation to the right to vote is to ensure that if conviction is a reason for suspending the right, the period of suspension should be proportionate to the offence and the sentence.

2.8 The change proposed cannot be justified in terms of the General Comment. The suggestion in the Explanatory Note that total disenfranchisement is somehow justified because 69% of first time offenders convicted of possession of methamphetamine and amphetamine have already received non-custodial sentences5, overlooks the fact that it will impact on anybody who is convicted and sentenced for even a relatively minor offence.

2.9 The change in 1993 (which disqualifies any person serving a sentence of imprisonment for more than three years from voting) was based on contemporary thinking that a prisoner retained the rights of other citizens (except for loss of liberty) but “that punishment for a serious crime against the community may properly involve a further forfeiture of some rights such as the right to vote.”6

3 New Zealand ratified the ICCPR in 1978, CERD in 1972 and CEDAW in 1985
5 Explanatory Note, Electoral (Disqualification of Convicted Prisoners) Amendment Bill (117-1) at 2
6 Ibid.
2.10 Developments in international jurisprudence and social policy over the intervening period suggest that disenfranchisement has no recognised deterrent effect and it is more appropriate that prisoners are encouraged to view themselves as part of the community than further excluded from it. This approach is also consistent with Article 10(3) of the ICCPR which specifically states that “The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation” indicating that the principal aim of imprisonment should be rehabilitation rather than punishment and deterrence.

2.11 The rationale for the proposed amendment appears to be that committing any crime that attracts imprisonment means a person automatically forfeits the right to political participation. This can only be seen as punitive and is scarcely conducive to rehabilitation.

2.12 The Commission considers that the proposed change is inconsistent with the international requirements. The fact that the ban would apply to anybody sentenced to a period of imprisonment, irrespective of the seriousness of the offence or the personal circumstances of the offender, is arbitrary and cannot be justified.\(^7\)

3. INTERNATIONAL JURISPRUDENCE

3.1 In recent years there have been a number of significant decisions in comparative jurisdictions that have addressed the question of whether legislation can legitimately deny prisoners the right to vote and, if so, in what circumstances.

3.2 In 1992, in Canada in *Sauvé v Canada*\(^8\) the Supreme Court unanimously struck down a federal legislative provision that barred convicted persons serving sentences of imprisonment from voting, on the grounds that it infringed the Canadian Charter. In response, the government introduced amendments which limited the ban to prisoners serving sentences of two or more years. This, in turn, was challenged. The Supreme Court again (although this time by a narrow minority) held that this could not be justified\(^9\).

---

\(^7\) For further discussion on this see Guttman, supra fn 1

\(^8\) [1992] 2 SCR 438; *Sauvé (No.1)*

\(^9\) *Sauvé (No 2)* [2002] 3 SCR 519
3.3 The Chief Justice summarised the reasons for the decision as follows:

The right of every citizen to vote, guaranteed by s.3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people – those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s.1 of the Charter as a ‘reasonable limit demonstrably justified in a free and democratic society’. I conclude that it is not. The right to vote which lies at the heart of Canadian democracy, can only be trammelled for good reason. Here, the reasons offered do not suffice.\(^{10}\)

3.4 The majority Judges considered that the reasons given by the government did not justify the infringement of the right. The measure did not promote ‘civic responsibility or respect for the law’ but was more likely to undermine those values by excluding prisoners from participating in the democratic system; there was no credible reason for denying a fundamental democratic right in the interests of additional punishment; the punishment itself was arbitrary as it bore no relationship to the circumstances of individual offenders; and disfranchisement could not be said to serve a valid purpose since there was no evidence that it had a deterrent effect.\(^{11}\)

3.5 In South Africa, the Constitutional Court found that legislation which disenfranchised prisoners serving sentences of imprisonment without the option of a fine infringed the right to vote in Art.19(3) of the Constitution. In Minister of Home Affairs v National Institution for Crime Prevention and the Re-Integration of Offenders and others\(^{12}\) the government justified its position on fiscal grounds arguing that the money necessary to accommodate the different categories of voters in prison would be better applied to ensuring other groups - such as the aged or physically disabled - could vote. The Court dismissed this argument, finding that the blanket ban could not be justified because it included prisoners whose convictions and sentences were still under appeal.

\(^{10}\) Ibid. para 1

\(^{11}\) The reasoning leaves it open whether the Court would support legislation which permitted disenfranchising prisoners if it was linked to a particular type of offence or if the Courts had the discretion to bar a prisoner from voting as part of the sentencing process: Davidson J, Inside Outcasts: prisoners and the right to vote in Australia, Department of Parliamentary Services, Current Issues Brief: No.12 2003-4 at 6

\(^{12}\) [2004] 5 BCLR 445(CC)
3.6 In the United Kingdom there is a blanket ban on sentenced prisoners voting. This was questioned in a case taken to the European Court of Human Rights in 2004. In *Hirst v United Kingdom (No. 2)*\(^{13}\), a court of seven judges agreed that while the right to vote was subject to exceptions that were imposed in pursuit of a legitimate aim, the English legislation violated Article 3 of the First Protocol to the European Convention of Human Rights\(^{14}\). As in Canada, the UK government argued that the purpose of the legislation was twofold – to prevent crime and punish offenders and to enhance civic responsibility and respect of the rule of law.

3.7 The European Court dismissed these arguments for much the same reasons as the Canadian Supreme Court – namely, denying prisoners the right to vote is more likely to undermine, rather than promote, civic responsibility and respect for democracy, and there is no evidence that disenfranchisement deters crime and therefore no rational link between punishment and offence. Again it was the absolute nature of the bar that was the problem\(^{15}\).

3.8 Finally, most recently, the Australian High Court addressed the issue of legislation which disqualified anyone from voting who was in prison when the election writ was issued. In *Roach v Electoral Commissioner & Anor*\(^{16}\), the plaintiff challenged the ban on the grounds that constraints deriving from the text and structure of the Constitution rendered the blanket ban invalid.

3.9 By a 4-2 majority the Court upheld the challenge, the Judges accepting that the blanket ban lacked the necessary nexus between the criterion leading to disqualification and conduct which made it reasonable to exclude a person from participating in the electoral process. Chief Justice Gleeson noted [at para 12] that:

---

\(^{13}\) 74025/01 ECHR 2004

\(^{14}\) The first protocol to Art.3 reads: *The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*

\(^{15}\) Despite the decision in *Hirst* the situation in the UK has not altered, with the consequence that the recent election was arguably not compliant with the European Convention: Committee of Ministers, Council of Europe (CM/ResDH (2009) 1601, Execution of the judgment of the European Court of Human Rights, Hirst against the United Kingdom No.2)

\(^{16}\) [2007] HCA 43 (26 September 2007)
... since deprivation of the franchise takes away a right associated with citizenship, that is, with full membership of the community, the rationale for the exclusion must be that serious offending represents such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right.

3.10 The effect of the decision is to reinstate the situation which existed before the change. That is, a person serving a sentence of three or more years is unable to vote.

3.11 Together these decisions indicate that a blanket ban which has the effect of disenfranchising prisoners simply because they have been found guilty of an imprisonable offence is unacceptable, inconsistent with democratic ideals and undermines social responsibility.

3.12 At present the position in New Zealand is consistent with the situation in other comparable countries. The effect of the Bill would be to undermine this by removing a significant constitutional right from anyone sentenced to a term of imprisonment. The Commission therefore considers that the proposed amendment is a retrograde step that cannot be justified either legally or morally and is inconsistent with international jurisprudence17.

4. CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

4.1 The New Zealand Bill of Rights Act 1990 (BoRA) was enacted to affirm New Zealand’s commitment to the ICCPR. Although not all the rights in the Convention are reflected in the BoRA, most are. They include Art.25 which is translated into s.12(a) and which is the basis for democratic elections in New Zealand.

4.2 Section 12(a) provides that every citizen in New Zealand over the age of 18 is entitled to vote - subject to the limits in the Electoral Act 1993 (which include inter

17 The decisions from Canada and the ECHR are more compatible with the domestic statutory framework in New Zealand than the decision in Roach where the challenge was explicitly linked to the Australian Constitution, the Chief Justice noting that the “uncritical translation of the concept of proportionality … in the Australian context could lead to the application of a constitutionally inappropriate standard of judicial review of legislative action”[ibid at para 17]
alia the current restriction on people who are imprisoned for an offence of three years or longer being unable to register).

4.3 As with all the substantive rights in the BoRA, the right to vote can be limited if it can be justified as a “reasonable limitation in a free and democratic society”\(^\text{18}\). In deciding whether this is the case, the Supreme Court in _R v Hansen\(^\text{19}\)_ considered it was necessary to consider whether the limiting measure serves a purpose sufficiently important to justify curtailment of the right or freedom; whether the limiting measure is rationally connected with its purpose; whether the limiting measure impairs the right or freedom no more than is reasonably necessary to achieve its purpose and whether the limit is proportionate to the importance of the objective.

4.4 The only case to date which has addressed the issue of the conflict between s.12(a) and the effect of the Electoral Act on prisoners was _Re Bennett\(^\text{20}\)_ . Grieg J found there was a clear statutory conflict and that the Electoral Act prevailed by reason of s.4 BoRA. However, that case involved enacted legislation whereas the situation here differs in that the legislation is still in Bill form.

4.5 The Attorney-General in his s.7 opinion concludes that the Bill is both inconsistent with the BoRA and cannot be justified in terms of s.5. He reached this conclusion principally because the disenfranchisement will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or to the conduct of the prisoners whose voting rights are taken away. The irrational effects of the Bill also cause it to be disproportionate to its objective\(^\text{21}\).

4.6 The Commission agrees with this assessment but would go even further. Unlike the Attorney-General, we do not agree that the Bill could be said to serve a significant and important objective. The Attorney-General’s position (albeit, we admit, qualified) is based on the assumption that temporarily disenfranchising serious offenders as a part of their punishment could be construed as a significant

\(^{18}\) Section 5 BoRA  
\(^{19}\) [2007] 3 NZLR 1 (SC) at 28  
\(^{20}\) (1993) 2 HRNZ 358 (HC)  
\(^{21}\) Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill (J.4) at para 15
and important objective. However, presumably this already occurs under the Electoral Act as anyone serving a sentence of three years or more cannot vote. The effect of the Bill, as we have already noted, would be to prevent anyone sentenced to a period of imprisonment from voting and, as the Attorney-General notes,

> It is questionable that every person serving a sentence of imprisonment is necessarily a serious offender. People who are not serious offenders will be disenfranchised. Fine defaulters may be sentenced to imprisonment as an alternative sentence. I doubt that this group of people can be characterised as serious offenders such that they should forfeit their right to vote. 22

4.7 Although we consider that the Bill does not serve a significant and purpose that justifies curtailing the right, there is also no rational connection between what the Bill seeks to do and the right to vote. The most likely effect will be to simply further alienate offenders. Denying prisoners the right to vote simply because they have been convicted of an imprisonable offence, irrespective of the nature of the offence or the personal circumstances of the individual, is arbitrary and out of proportion with what it seeks to achieve.

4.8 The Commission considers that, as the Bill is basically punitive and prisoner disenfranchisement cannot be coherently defended by the justification of punishment, it does not serve a significant and important purpose.

4.9 The Bill is inconsistent with s.12(a) BoRA and cannot be justified under s.5.

5. INDIRECT DISCRIMINATION BY REASON OF RACE

5.1 The Human Rights Commission not only deals with wider human rights issues but administers a disputes resolution process for complaints of discrimination.

5.2 Discrimination can be direct or indirect. Direct discrimination is not defined in the HRA but an action will be considered to amount to discrimination if it involves less favourable

22 Ibid. at para 12 See also comments in Belczowski v the Queen (1992) DLR (4th) 330 “the legislation catches not only the crapulous murderer but also the fine defaulter who is in prison for no better reason than his inability to pay.”
treatment by reason of one of the prohibited grounds (which include race and ethnicity). While the Bill cannot be said to discriminate directly, it does so indirectly.

5.3 Indirect discrimination is said to occur when a practice or policy that appears neutral disproportionately affects one of the groups against whom it is unlawful to discriminate in a negative way\(^{23}\). The discrimination can be excused if there is a good reason for the policy or practice.

5.4 In New Zealand, Maori are disproportionately represented in the prison population. Maori men make up an estimated 45% of the male sentenced population even though they are only 10% of the male population in New Zealand\(^{24}\) and Maori women make up nearly 60% of the female prison population. It follows that if the Bill were to be enacted it would impact to a significantly greater extent on Maori.

5.5 This situation is not unique to New Zealand. It is generally accepted that prisoner disenfranchisement disproportionately affects indigenous persons or minorities - usually men\(^{25}\). It follows that any disqualification on voting and/or restriction on the right to vote will have a greater impact on such groups and, in New Zealand, may amount to indirect discrimination against Maori. For the reasons already given, the discriminatory impact of the Bill cannot be defended as being for a good reason.

5.6 The discrimination is also inconsistent with aspects of the ICCPR and ICERD. The ICCPR specifically proscribes discrimination in delivery of the substantive rights in the Covenant (including the right to vote) while the ICERD requires States to guarantee, without distinction as to race, the right to participate in elections and vote on the basis of universal and equal suffrage\(^{26}\). ICERD also obliges States to amend, rescind or nullify

\(^{23}\) Section 65 HRA 1993
\(^{25}\) See, for example, Orr, G. *Ghosts of the Civil Dead: Prisoner Disenfranchisement*. Democratic Audit of Australia, Discussion Paper 5/2003 or Ridley-Smith, M. & Redman, R. “Prisoners and the right to vote” Chapter 16 in Brown, D. & Wilkie, M. (eds) *Prisoners as Citizens* (Federation Press, 2002). In Sauvé v Canada the majority considered the type of disenfranchisement proposed would have had a disproportionate impact on Canada’s “already disadvantaged Aboriginal population” and in *Farrahan v Gregoire*, the US Court of Appeals of the Ninth Circuit in January this year held that due to racial discrimination in the state criminal justice system, the automatic disenfranchisement of felons led to denial of the right to vote by reason of race. In late April, it was decided the case will be reheard by a panel of 11 judges.
\(^{26}\) Article 5, CERD
any laws that have the effect of creating or perpetuating racial discrimination, or of strengthening racial division\textsuperscript{27}.

5.7 The right to vote in Art.25 of the ICCPR must be available without discriminatory restrictions. When combined with Arts. 5 and 1 of ICERD (prohibition of racial discrimination that has the effect of nullifying or impairing the equal exercise of the right to vote) the legislative proposal can be seen, quite simply, as discriminatory.

5.8 Because of the disproportionate effect that a blanket disenfranchisement of prisoners would have on Maori, the Commission considers that the proposed legislation is discriminatory and conflicts with New Zealand’s international obligations.

6. PURPOSE OF THE PENAL SYSTEM

6.1 We have already commented that the Commission considers a principal aim of imprisonment is rehabilitation. We are reinforced in that view by Art.10(3) of the ICCPR which refers to the “essential aim of the penitentiary system being reformation and social rehabilitation”.

6.2 This approach is echoed in comments of the UN Treaty bodies. For example, in 2002 the Human Rights Committee commented about New Zealand (in the context of privatisation of prisons) that:

\textit{... there does not appear to be any effective mechanism of day-to-day monitoring to ensure that prisoners are treated with humanity and with respect for the inherent dignity of the human person and further benefit from treatment, the essential aim of which is directed to their reformation and social rehabilitation. The State party should ensure that all persons deprived of their liberty are not deprived of the various rights guaranteed under article 10 of the Covenant.}\textsuperscript{28}

6.3 The UN Standard Minimum Rules, which are appended to the Corrections Act 2004, also emphasise the importance of rehabilitation stating that:

\textit{The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in

\textsuperscript{27} Art. 2, CERD
\textsuperscript{28} CCPR/CO/75/NZL (HRC, 2002) at para 13
them the will to lead law-abiding and self-supporting lives after their release and fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

6.4 Restricting prisoners’ civil rights is out of step with this goal and inconsistent with modern rehabilitative aims.

6.5 As Ridley-Smith and Redman observe, if the principal aim of punishment is rehabilitation and facilitation of a prisoner’s positive re-entry into society when they are released, the denial of rights such as the right to vote serves no useful purpose and can arguably alienate them even more. Rather than feeling part of society, they are more likely to feel further excluded.

6.6 The Supreme Court of Canada commented along similar lines in Sauvé noting:

Denying inmates the right to vote is to lose an important means of teaching them democratic values and social values ... It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration.

6.7 The Commission considers that prisoners should not be disenfranchised as it has the effect of excluding them from society and is incompatible with rehabilitation. Allowing prisoners to vote enables them to engage with law and order in a constructive, rather than a destructive, manner. Being able to vote facilitates their re-entry to society as they are more likely to identify with a society they have had a stake in creating. It is also more consistent with a penal system that has as its objective social rehabilitation.

7. CONCLUSION

7.1 Political participation is fundamental to a democracy and voting is a basic human right. The disenfranchisement of prisoners cannot, in the Commission’s opinion, be justified as punishment – particularly if, as would be the case here, the restriction would apply irrespective of the sentence or nature of the offence. If the ban on voting was linked to the severity of the crime there may (arguably) be some logic in imposing it but where it is dependent on the fact of sentencing alone, it can be

29 Supra fn 26 at 285
seen as little other than punishing people twice over. It is worth remembering that people are sent to prison as punishment not for punishment.

7.2 Disenfranchisement has no proven deterrent effect and it can actively undermine the ability of prisoners to engage constructively with the very society to which they will be released when discharged and, thus, their eventual social rehabilitation.

7.3 As in other jurisdictions where there have been similar attempts to disenfranchise convicted persons, there seems to be some tacit notion that preventing prisoners from voting can be justified because they have violated society’s rules i.e. there is some sort of “social contract” whereby ‘those who do not obey the laws of the land are barred from receiving the benefits of society, including the right to vote’\(^{30}\).

7.4 The concept of the social contract has been raised in other contexts in New Zealand - most recently in *Atkinson & Ors v Ministry of Health*\(^{31}\) where it was recognised that, while there may well be some form of social contract, “… we are a long way short of being able to specify the actual ingredients of a social contract.”

7.5 Perhaps a more obvious way of refuting the social contract argument is to recognise that modern democracies are based on the concept that all people – including prisoners – have rights simply by virtue of their common humanity. It then follows that “prisoners retain the link they have with society by serving their sentences. To disregard their right to vote then becomes a fundamental breach of the social contract”\(^{32}\).

7.4 The Commission therefore strongly opposes the move to ban all convicted persons from voting. Voting is a fundamental human right and cannot be justified either as punishment or as a deterrent. The Bill itself is inconsistent with New Zealand’s international commitments and overseas jurisprudence. In the domestic context it contravenes the BoRA and cannot be justified and the disproportionate impact on Maori amounts to indirect discrimination. Perhaps most importantly, however, it undermines the notion of New Zealand as a democracy where everyone has rights and responsibilities.

---


\(^{31}\) HRRT 33/05 (8 /1/10)

\(^{32}\) Supra fn 31 at 193