Electoral (Disqualification of Convicted Prisoners) Amendment Bill

Departmental Report for the Law and Order Committee

16 August 2010
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Overview

Introduction

1 A total of 55 individuals and organisations made written submissions on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill (the Bill). The Law and Order Select Committee (the Committee) heard 13 oral submissions. A list of submissions is provided as Appendix A.

General

2 Of the 55 written submissions on the Bill, two (including Paul Quinn, MP) indicated support for the Bill, 51 submitters opposed the Bill outright, and two stated they did not support or oppose the Bill and instead proposed amendment to clause 4 of the Bill (specifically amending section 81(1)(c) of the Electoral Act 1993) to improve the administrative process of disqualifying prisoners. The range of overall views on the Bill is set out in the following table:

<table>
<thead>
<tr>
<th>View</th>
<th>Total</th>
<th>%</th>
<th>Number of Submitter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supports</td>
<td>2</td>
<td>3.5%</td>
<td>10, 39</td>
</tr>
<tr>
<td>Opposes</td>
<td>51</td>
<td>93.0%</td>
<td>1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55</td>
</tr>
<tr>
<td>Neither supports nor opposes</td>
<td>2</td>
<td>3.5%</td>
<td>11, 40</td>
</tr>
</tbody>
</table>

55 100%

The main emphasis of the submissions was to express opposition to clause 4 of the Bill. Clause 4 provides that any person detained in prison on conviction is disqualified for registration as an elector.

Key themes

3 The key themes that submissions focused on were:

- the Bill of Rights Act
- international obligations
- effect on democracy and universal suffrage
- proportionality of disqualification
- international enfranchisement trends
- rehabilitation goals/community engagement
- effect on Māori
- practical and administration factors.
Major Risks to Recommending the Bill

4 The recommendations in this report are predicated on the assumption that the Committee will recommend that the Bill is passed. The Committee needs to be aware of the risks involved in recommending a Bill that, according to the Attorney-General, is in breach of section 12 of the Bill of Rights Act 1990 and cannot be justified under section 5 of that Act. The risks are described as follows:

- Firstly, prisoner disqualification cases have been argued in the highest appellate courts of comparable international jurisdictions. It is therefore considered highly likely that a blanket disenfranchisement of prisoners would be the subject of an immediate legal challenge and that a class action case would be taken all the way to the Supreme Court. The argument that the Bill breaches the Bill of Rights Act is a strong one, and it is likely that the applicant(s) will ask for a declaration of inconsistency.

- If a declaration of inconsistency is made the enactment is not repealed. It remains in force and no court can decline to enforce it. However, the Minister responsible for the enactment must publicly reassess and report to Parliament on the declaration and on what the Government’s response to the declaration is.

- The leading case of *R v Hansen* [2007] 3 NZLR 1 (SC) left the question open of whether the courts had the ability to issue a declaration of inconsistency, but the Bill, if enacted, could serve as a test case.

- The financial costs associated with defending an action through to the Supreme Court, and potentially internationally, would be substantial.

- Secondly, cases may be brought by short-serving prisoners disqualified from enrolling to vote, for example, where someone has been imprisoned for a week for failing to pay fines, the week before polling day. A court looking for an interpretation consistent with the Bill of Rights Act may consider that Parliament’s intention (to penalise persons convicted of “serious crimes” as referred to in the Explanatory Note of the Bill) means that the disqualification should not apply. Alternatively, the court could decide to issue an injunction to prevent a prisoner being removed from the electoral roll while the case was being argued.

- The number of such cases could be substantial, and could have a significant impact on the court system if they were required to be heard at short notice as may be the case when an election is pending.

- Thirdly, enactment of the Bill is likely to draw unfavourable attention at an international level. The reasons that make the Bill contrary to the Bill of Rights Act means the Bill is likely to be contrary to Article 25 of the International Covenant on Civil and Political Rights (ICCPR). A prisoner who has exhausted her or his domestic remedies could take a case to the United Nations Human Rights Committee. New Zealand would be
required to respond, and the United Nations Human Rights Committee may find against New Zealand.

- The United Nations Human Rights Committee may also raise the Bill in the context of New Zealand’s next periodic report on the ICCPR. The United Nations Human Rights Committee cannot change New Zealand’s domestic legislation, but its findings have considerable moral force and could affect New Zealand’s international standing.

**Summary of Submitters Who Support the Bill**

5 Two submitters (3.5%) support the Bill, one of whom is Paul Quinn, MP (no. 39). The other submitter (no. 10) provides the following reasons for supporting the Bill.

**Less arbitrary disqualification than status quo**

6 Disqualifying convicted criminals from voting is less arbitrary than the current three-year threshold and is a superior dividing line because prison is reserved for either the more serious offences or repeat offenders.

7 The reasoning behind the three-year threshold was established by the 1986 Royal Commission on the Electoral System. The Commission recommended that “…the disqualification should be limited to prisoners serving a sentence equal to or greater than the maximum period of continuous absence overseas consistent with the right to vote, namely 3 years”¹.

8 The view that all convicted prisoners should be disqualified because they are more serious or repeat offenders is inconsistent with what is commonly considered by the criminal justice system to be serious offending. Serious offenders are usually defined as “long-term” prison sentenced offenders serving determinate sentences of greater than 2 years².

**Loss of right consistent with loss of other rights when imprisoned**

9 Losing the right to vote upon going to prison is consistent with the loss of the right to free speech, freedom of movement, freedom of association etc.

10 It is universally accepted that offenders lose some rights when they are sentenced to imprisonment as punishment for their crimes. However, Article 29(2) of The Universal Declaration of Human Rights states that “in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and

¹ Report of the 1986 Royal Commission on the Electoral System (pp236 & 238)
² Section 4 of the Parole Act 2002 interprets a long-term sentence as a sentence of imprisonment that is:
   "(a) a determinate sentence of more than 24 months imposed on or after the commencement date; or
   (b) a notional single sentence of more than 24 months; or
   (c) an indeterminate sentence imposed before, on, or after the commencement date; or
   (d) in the case of a pre-cd sentence, a sentence of more than 12 months".
respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. The 1986 report of the Royal Commission on the Electoral System found that “contemporary penal theory is generally opposed to the view that imprisonment entails a general suspension of the rights of citizenship”. This was highlighted by the European Court of Human Rights in Sauvé v Canada that stated that “. . .[T]he fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights. . ., even though the enjoyment of those rights must inevitably be tempered by the requirements of his situation…”

**Administration**

11 Disqualifying all convicted prisoners would be easy to administer.

12 Disqualifying all convicted prisoners would require more work to be undertaken by agencies in terms of increased volumes of prisoners’ identification and status to be verified and notified and prisoners’ electoral enrolments disqualified. The following table indicates the effect of the Bill on the administrative requirements of the EEC, the Department of Corrections, and of the Ministry of Justice (Courts) depending on whether amendments are made to the Bill.

<table>
<thead>
<tr>
<th>Amendment</th>
<th>Agency</th>
<th>Electoral Enrolment Centre</th>
<th>Department of Corrections</th>
<th>Ministry of Justice (Courts)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All convicted prisoners disqualified</td>
<td>More work required</td>
<td>No change</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td>All disqualified + info matching</td>
<td>Substantially more work required</td>
<td>More work required</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td>All disqualified + Courts to notify</td>
<td>More work required</td>
<td>No work required</td>
<td>More work required</td>
<td></td>
</tr>
<tr>
<td>All disqualified + Courts to notify + info matching</td>
<td>Substantially more work required</td>
<td>No work required</td>
<td>Substantially more work required</td>
<td></td>
</tr>
</tbody>
</table>

Key:
- All convicted prisoners would be disqualified as per clause 4 of the Electoral (Disqualification of Convicted Prisoners) Amendment Bill
- “+ info matching” refers to the Privacy Commissioner’s submission proposing that an authorised information matching programme be required
- “+Courts to notify” refers to the Electoral Enrolment Centre’s submission proposing that the Registrar of each Court be required to notify the EEC of prisoner disqualifications

**Summary of Submitters Who Oppose the Bill**

13 51 submitters (93%) do not support the Bill. A variety of reasons were given for the opposition to the Bill and the main themes are summarised below.
Bill of Rights Act

14 36 submitters (65% of all submitters) explicitly support the Attorney-General’s report to the Committee on the Bill and believe the Bill breaches section 12 of the New Zealand Bill of Rights Act 1990 affirming citizen’s electoral rights. Section 12 affirms that every New Zealand citizen who is of or over the age of 18 years has the right to vote and stand in genuine periodic elections of members of the House of Representatives.

15 These submitters also agree with the Attorney-General that convicted prisoners being exempt from voting cannot be justified under section 5 of that Act. Section 5 states that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

16 A blanket prisoner disenfranchisement provision is inconsistent with the Bill of Rights Act because it penalises a person for being in prison during an election, and not for the offence committed.

17 Although section 3(a) of the Bill of Rights Act provides the Act applies to acts done by the government, there is nothing in the Act which limits the government’s ability to pass legislation that is inconsistent with the Act. Such legislation would still have the full force of the law, and a court could not refuse to apply it. Section 4(b) of the Act provides:

no court shall, in relation to any enactment, decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.

18 However, wherever possible a court will interpret legislation in a manner that is consistent with the Bill of Rights Act because of section 6 of the Act that provides:

wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

19 The risks to the Government that this Bill would engender if it were to be enacted are described in paragraph 4 above.

Proportionality of disqualification

20 30 submitters (55%) state that disqualifying all convicted prisoners is an arbitrary ban that is disproportionate to the seriousness of the crime(s) committed. “How the Bill would apply to individual prisoners is contingent on the date of trial, the date of the next election and whether or not they have factors in their favour for home detention; basically every factor excepting those that have any relevance to the Bill’s objective (such as the nature and seriousness of the offence)” (16).
Two examples of how the proposed disqualification of convicted prisoners would be disproportionate are as follows:

- Firstly, some submitters have given the example of two people being convicted of the same crime but receiving different sentences because of personal circumstances. One offender, because his home is not suitable, is not able to be sentenced to home detention. The other offender’s home is suitable and he is sentenced to home detention. The home detainee retains the right to vote but the prisoner is disqualified from voting even though the same type and seriousness of crime was committed.

- Secondly, the timing of the prison sentence could be a factor. One offender could be sentenced to two and a half years in prison for a violent offence within an electoral term. The other offender might be sentenced to a month in prison for a much less serious offence but an election is held whilst the offender is in prison. The more serious offender is qualified to vote at the time of the election but the other offender is disqualified.

Effect on democracy

30 submitters (55%) believe that the intentions of the Bill undermine New Zealand’s reputation as an inclusive, progressive and tolerant democratic society. Some of these submitters also contend that New Zealand’s international reputation for universal suffrage would also be damaged.

New Zealand does have a reputation for being a fair and open, democratic society. It is also known for being the first country in the world to allow women, including Māori women, to vote (the Electoral Act was passed on 19 September 1893). Disqualifying all convicted prisoners from voting is likely to negatively effect New Zealand’s reputation on both these fronts.

International obligations

28 submitters (51%) assert that the Bill contravenes international conventions that New Zealand is a party to. Most of these submitters contend that the Bill contravenes Article 25 and/or Article 10 of the International Covenant on Civil and Political Rights.

Article 25 recognises the right of citizens to vote in genuine periodic elections without unreasonable restrictions. The United Nations Human Rights Committee’s General Comment on Article 25 provides that convicted persons may have their voting rights suspended on objective and reasonable grounds that are proportionate to the offence and the sentence.

Article 10 refers to the treatment of all persons deprived of their liberty. Specifically section 3 of Article 10 states that the penitentiary system shall
comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

28 Contravention of international agreements such as these that New Zealand is a party to will attract scrutiny by various international bodies such as the United Nations Human Rights Council and is likely to negatively affect New Zealand’s human rights reputation.

**International enfranchisement trends**

29 26 submitters (47%) cite international jurisprudence to demonstrate that this Bill is contradictory to international prisoner enfranchisement trends. There have been several 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.

30 The majority of these submitters cite *Sauvé v Canada, Hirst v United Kingdom (No. 2)* and *Roach v Electoral Commissioner* where it was found there was no credible or justifiable reason for denying prisoners the fundamental democratic right to vote.

31 Described more fully in the Initial Briefing to the Committee, the following summarises decisions that have been made in international jurisdictions with electoral systems similar to New Zealand:

- In Hong Kong, provisions in Legislative Council Ordinance (Cap 542) disqualified all prisoners from being registered as an elector and voting. In *Chan Kin Sum Simon v Secretary for Justice* [2008] HCAL 79, the Hong Kong High Court ruled that this was an unreasonable restriction of the right to vote protected under BL 26 and Article 21 of the Hong Kong Bill of Rights (Cap 383, 1991).

- In *Sauvé v Canada (No 1)* [1993] 2 SCR 438, the Supreme Court ruled that the Canada Elections Act’s blanket disqualification of prisoners contravened section 3 of the Canadian Charter of Rights and Freedoms (the Charter) which guarantees all Canadian citizens the right to vote.

- In *Breathnach v Ireland* [2001] IESC 59, [2001] 3 IR 230, the Supreme Court dismissed an appeal against a High Court decision declaring unconstitutional the State’s failure to provide prisoners with facilities to enable them to vote.

- In 2004, in *Hirst v United Kingdom (No 2)* [2004] ECHR 122, the European Court of Human Rights ruled that the United Kingdom’s blanket disqualification of sentenced prisoners breached their human rights. That decision was confirmed in 2006.

- In Australia all sentenced prisoners were disqualified from voting in Senate and House of Representatives elections by federal legislation in 2006. In *Roach v Electoral Commissioner* [2006] HCA 43, [2007] 233 CLR 162, the High Court declared the 2006 federal legislation disqualifying all sentenced
prisoners from voting unconstitutional. However, a majority of the High Court upheld a 2004 amendment that disqualified prisoners serving a sentence of three years or more from voting.

32 As prisoner disqualification cases have been argued in the highest appellate courts of comparable international jurisdictions, it is considered likely that, should the Bill be enacted, a similar case would be taken to the Supreme Court of New Zealand as described in paragraph 4 above.

**Rehabilitation aims/civic responsibility**

| 33 | 23 submitters (41%) assert that disqualifying convicted prisoners from voting does not fit with the concept of rehabilitating and preparing prisoners to reintegrate back into the community upon release. The ability to participate in the electoral process is part of belonging to the community and having a valid voice. Removing that ability further disenfranchises an already disconnected section of the community. |

| 34 | It is recognised that almost all prisoners will eventually be released and return to live in the community. Offenders who face few or no major social or circumstantial problems in the community are less likely to re-offend. The Department of Corrections works to reduce the likelihood of prisoners re-offending by assisting them to address and resolve rehabilitation needs such as substance abuse and violence, and reintegration issues such as accommodation, employment, finances, relationships, community support, victim related problems, and health care continuity. |

| 35 | Removing the ability to vote from prisoners may send a message that they are not part of society. This message is contrary to generally agreed rehabilitation and reintegration aims for offenders. Allowing prisoners to vote may strengthen their social ties and commitment to the common good, thus promoting legally responsible participation in civil society. |

**Effect on Māori**

| 36 | 21 submitters (38%) state that disqualifying all convicted prisoners from voting would disproportionately affect Māori prisoners. Some submitters mention that already marginalised people (Māori, Pacific peoples and the poor) and the communities to which they belong would be further marginalised by this proposal. The exclusion from voting of Māori, both men and women, therefore may amount to indirect discrimination, which could not be defended as reasonable. |

| 37 | As advised in the Initial Briefing, Māori are over-represented in the prisoner population compared to their representation in the population of New Zealand as a whole. As at March 2010, 51% of the prisoner population identified as Māori. According to the 2006 New Zealand Census, 14.6% of the normally resident in New Zealand population identified as Māori. |

| 38 | On a percentage of population basis Māori males are most seriously affected by incarceration. For example, over 3% of 23 year old Māori males are sentenced |
to prison on any one day, the proportion of NZ European males of the same age is 0.4%.³

39 Higher rates of convicted and imprisoned Māori will mean that a much higher proportion of Māori would be excluded from voting compared to other ethnicities.

**Miscellaneous reasons for opposing the Bill**

40 Other reasons given for opposing the Bill include:

- finding no evidence to support the ability of this proposal to act as a deterrent to reduce offending or sufficient punishment to reduce re-offending
- not agreeing with social contract theory and the assertion that offenders have broken the contract so should have the right to vote removed
- not agreeing that everyone who is sentenced to prison must have committed serious or prolific crimes
- believing that disqualifying prisoners from voting is a double punishment (i.e. sentenced/punished once by the judge, and again by having their right to vote removed) that should not occur.

41 **Deterrent and punishment effect** - This proposal implies that offenders would rationally and deliberately choose criminal activity with the knowledge that they may lose their voting rights. Most offenders do not rationally weigh up the consequences of their actions or make conscious decisions about offending. Advisers have not been able to find any evidence that disqualifying prisoners from enrolling to vote upon conviction will deter people from offending or re-offending. The deterrence effect is unlikely to override factors such as substance abuse and addiction problems, mental health problems, broken families, school failure, high levels of illiteracy and unemployment.

42 **Social contract theory** - Social contract theory is the view that persons’ moral and/or political obligations are dependent upon a contract or agreement between them to form a society. Paul Quinn MP has proposed that prisoners break the social contract by committing crimes that attract a sentence of imprisonment. Views are divided on social contract theory and its application to these events. Where social contract theory is accepted, views are divided on whether or not offending (of various levels of seriousness) breaks the social contract sufficiently so that the removal of a fundamental right such as voting can be justified.

43 **Prisoners have committed serious crime** – It is debatable whether or not all prisoners have committed serious crime. As advised earlier, in the criminal justice system serious offenders are defined as “long term” prison sentenced offenders serving determinate sentences of greater than 2 years.

³ Offender Volumes Report, 2007, Department of Corrections
Double punishment – The disqualification from enrolling to vote could be seen as punishing an offender twice, once by sentencing the offender to prison and twice by disqualifying the offender. The European Court of Human Rights in *Sauvé v Canada* stated that “[T]here is no clear, logical link between the loss of vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or ‘uncitizen-like’ but whose crime is not met by such a consequence”. In most nations, losing the right to vote is not a criminal sanction, but is an administrative sanction based on non-penal legislation and imposed automatically. It is a deprivation of a right that results as a direct consequence of a criminal conviction. It is likely that where disqualification from enrolling to vote is considered an additional punishment, it will be scrutinised by international rights groups and be challenged in the New Zealand courts.

Summary of Submitters Who Neither Support Nor Oppose the Bill

Submissions by the Electoral Enrolment Centre (11) and The Privacy Commissioner (40) neither support nor oppose the Bill. These submitters suggest how the notification of disqualification process could be improved and, in the case of the Electoral Enrolment Centre, propose that the Department of Corrections be more active in re-enrolling people being released from prison.

These submissions are discussed in more detail as part of the Clause 5 analysis later in this paper.

Consultation

The Ministry of Justice was consulted on court administrative matters and as the administrator of the Electoral Act. The Electoral Enrolment Centre have been consulted on electoral administrative matters. The Ministry of Justice and Electoral Enrolment Centre raised no concerns or issues about the content of the Departmental Report.
Recommended Changes to the Electoral (Disqualification of Convicted Prisoners) Amendment Bill

Clause-by-Clause Analysis

CLAUSE 1 – TITLE

48 This Act is the Electoral (Disqualification of Convicted Prisoners) Amendment Act 2010.

Submissions

49 No submissions were received on this clause.

Comment

50 Advisers consider that the intent of this Bill is to disqualify from voting people in prison who have been sentenced to imprisonment, not to disqualify prisoners who have been convicted. A prisoner may be convicted and remanded in custody until sentencing but at sentencing may receive a non-custodial sentence or a prison sentence equal to or shorter than the time the person has already served on remand in custody. In those circumstances the convicted prisoner will be released immediately. Disqualifying a person on conviction, rather than on sentencing, is therefore problematic. It would potentially disqualify up to 35% of prisoners from enrolling to vote who would immediately be released from prison upon sentencing and would therefore immediately re-qualify to be enrolled to vote.

Recommendation

51 It is recommended that the Act’s title be the Electoral (Disqualification of Sentenced Prisoners) Amendment Act.

CLAUSE 2 – COMMENCEMENT

52 This clause provides for the Bill to come into force on the day after the date on which it receives the Royal assent.

Submissions

53 No submissions were received on this clause.

Comment

54 Should the proposal of the Electoral Enrolment Centre be accepted to change the notification process for disqualified persons, the date the Act would come

4 35% of people remanded into prison are released because they were convicted and received a prison sentence shorter than or equal to the time they had already served on remand in custody, or (for a small number) they were convicted and received a minor penalty such as a fine, or they were acquitted, or the charges against them were dropped.
into force would need to be delayed until notification by the Ministry of Justice (Courts) is administratively possible.

55 Should the proposal of the Privacy Commissioner be accepted to apply information matching principles to the Electoral Enrolment Centre and to either the Department of Corrections or the Ministry of Justice (Courts), the date the Act would come into force would need to be delayed until an authorised information matching programme has been established.

56 Further comment on these proposals is contained in the discussion on clause 5 in paragraphs 81 to 90.

Recommendation

57 It is recommended there be no change to this clause unless the proposals described above are accepted.

CLAUSE 3 – PRINCIPAL ACT AMENDED

58 This Act amends the Electoral Act 1993.

Submissions

59 No submissions were received on this clause.

Comment

60 No comment.

Recommendation

61 It is recommended there be no change to this clause.

CLAUSE 4 – DISQUALIFICATION FOR REGISTRATION

62 Clause 4 amends section 80(1)(d)(iii) to provide that any person detained in prison on conviction is disqualified for registration as an elector.

Submissions

63 The vast majority of submitters opposed the intent of this clause.

All prisoners qualified to vote

64 The New Zealand Council for Civil Liberties (36) wants the Act amended so that all prisoners are qualified to vote. The Council considers that disqualifying prisoners from enrolling to vote is largely an academic exercise, but that removing the right to vote leads to thinking of prisoners as being less than other citizens when they are, regardless of their offences, human beings.
Proposed modifications if Bill must pass

65 A moderate proportion of submitters recommended amendments that they considered needed to be made if the Bill must pass.

Disqualification of prisoners only after consideration by a judge

66 Two submitters (43, 44) proposed that clause 4 be amended to allow disqualification of prisoners only after consideration on a case-by-case basis has been made by a judge. This is because clause 4 is effectively:

- an additional punishment to incarceration
- is not proportionate to the seriousness of the crime
- lacks determination by a judge following a trial, such as occurs in 11 European countries.

67 These submitters agree with the rationale for the Bill that the three year arbitrary disqualification does not make sense but that the solution should be to limit disqualification to those who have subverted the electoral process, or have committed "outrageously heinous" crimes against society as determined by a judge.

Disqualification pursuant to a serious offence

68 One submitter (46) proposed that clause 4 be amended to allow disqualification upon “detention pursuant to a serious offence” with “serious offence” being defined as any offence committed under either Part 5 or Part 6 of the Crimes Act 1961. Using offence severity to disenfranchise certain prisoners is not to say that certain crimes are not serious but rather that some are more serious than others. More serious crimes are those that undermine the democratic, law-making process of society, pose a danger to the public order, or undermine the most ingrained of societal norms and can potentially warrant additional punishment.

Allow prisoners to vote in an election of the parliament who would be governing on their release

69 One submitter (34) proposed an amendment to clause 4 to allow prisoners to vote in an election of the parliament who would be governing the country on their release. This would allow those who are scheduled to be released within the three years following an election to vote in that election, irrespective of how long they have already served in prison.

Transitional arrangements

70 One submitter (34) proposed an amendment to clause 4 for transitional arrangements should the Bill be passed so that 80(1)(d)(iv) be “detention

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5 Part 5 offences cover crimes against public order such as treason, piracy, slave dealing, participation in criminal gang, and smuggling and trafficking in people. Part 6 offences cover crimes affecting the administration of law and order such as bribery and corruption, misleading justice (perjury and corrupting juries), and escapes from lawful custody.
pursuant to a conviction after the commencement of the Electoral
(Disqualification of Convicted Prisoners) Amendment Act”.

Comment

71 All prisoners qualified to vote – Advisers have no view on this proposal. Article 25 of the International Covenant on Civil and Political Rights provides that convicted persons may have their voting rights suspended on objective and reasonable grounds that are proportionate to the offence and the sentence. The 1986 Royal Commission recognised that serious crimes against the community may result in a forfeiture of the right to vote. It also recognised the importance of the right and concluded disqualification should only apply to those removed from the community for more than three years, which is equivalent to the restriction on New Zealanders travelling overseas.

72 Disqualification of prisoners only after consideration by a judge – Advisers do not support the proposal to disqualify prisoners from voting only after consideration by a judge. To maintain a fair and transparent democracy, the right to vote should be clearly defined in law rather than being determined by the discretion of a judge. This would give rise to uncertainty in sentencing and is likely to be administratively problematic.

73 Disqualification pursuant to a serious offence – Advisers do not support the proposal to disqualify prisoners from the right to vote pursuant to a serious offence as defined by the submitter. Offences involving crimes against public order and crimes affecting the administration of law and order do not consistently attract long-term prison sentences and would disproportionally effect offenders who received different sentences for the same crime.

74 Allow prisoners to vote in an election of the parliament who would be governing on their release – Advisers report that this proposal would not be possible to action accurately for every prisoner and on that basis do not support it. It would require complex calculations to be made involving accurately predicting actual release dates relative to election periods. The Department of Corrections would not be able to do this in cases where sentences of imprisonment are subject to parole decision and should not pre-empt the decisions of the New Zealand Parole Board.

75 Transitional arrangements - Advisers consider that the implication for this proposed amendment is to ensure that convicted prisoners are not disqualified retrospectively and that only those prisoners who are convicted after the Bill is enacted will be disqualified for registration as an elector (unless they are already disqualified under s80(1)(d) of the current Act). Should the Bill be enacted, disqualification could not be retrospective. The proposed amendment is therefore not required.

Other matters

76 Currently, prisoners are disqualified from registering as an elector once they have been sentenced to life imprisonment, preventive detention or prison for three years or more. Clause 4 of the Bill provides that any person detained in
prison on conviction is disqualified. As identified in paragraph 50, disqualifying a person on conviction, rather than on sentencing to imprisonment, is problematic.

77 Advisers note that clause 4 of the Bill amends subsection 80(1)(d)(iii) of the Electoral Act to provide that any person detained in prison on conviction is disqualified from registration as an elector. However, part of subsection 80(1)(d) of the Electoral Act is retained, including subsections 80(1)(d)(i) and 80(1)(d)(ii) so that the section as proposed will read:

“The following persons are disqualified for registration as electors: … (d) a person who, under – (i) a sentence of imprisonment for life; or (ii) a sentence of preventive detention; or (iii) any person detained in prison on conviction – is being detained in a prison.”

78 A person sentenced to life imprisonment or preventive detention who is in prison has been convicted and sentenced. Therefore the proposed amendment to subsection (iii) makes subsections (i) and (ii) redundant. In addition, the last part of s 80(1)(d), (“is being detained in a prison”), is not necessary if the amendment as currently drafted is made.

Recommendation

79 It is recommended that redundant parts of section 80(i)(d)(iii) of the Act be repealed and that the section be amended to provide that any person sentenced to imprisonment and detained in prison is disqualified from registration as an elector.

CLAUSE 5 – DETENTION IN PRISON PURSUANT TO CONVICTION

80 Clause 5 amends section 81 to provide that a prison manager must forward to the Chief Registrar of Electors a notice that a person who has been sentenced to imprisonment has been received into that prison.

Submissions

81 Two submitters proposed changes to this section (11, 40).

Courts to notify of disqualification

82 The Electoral Enrolment Centre (11) have proposed that the following change be made to the current administrative procedures under s81 of the Electoral Act 1993 for notifying the Chief Registrar of Electors when people are disqualified from registering as electors under s80(1)(d) of the Act:

- Amend s81 to allow the Registrar of each Court to send, on a daily basis, an electronic list of every person convicted in each Court that day to a term of imprisonment.
Authorised information matching

83 The Privacy Commissioner (40) stated that there appear to be few concerns with the accuracy of the Electoral Act information disclosure as it currently functions but that a substantial increase in the volume of prisoners to be matched against the roll may substantially increase the risks of inaccuracy and lack of ability to challenge mismatches. The Privacy Commissioner proposed that:

- If section 80(1)(d)(iii) of the Electoral Act is amended to provide that any person detained in prison on conviction is disqualified for registration as an elector, then section 81 of the Act should be amended to operate as an authorised information matching programme under Part 10 of the Privacy Act.

Comment

Courts to notify of disqualification

84 The Ministry of Justice (Courts) has advised that, were they to be responsible for disqualification notifications as per the EEC proposal, the data would have to be sourced and provided manually. The Ministry is not confident that it can access this data in a manner that would enable court related information to be accurately provided. Other issues that would have to be resolved are as follows:

- some accused can be sentenced on multiple charges and in different courts which is reality would result in multiple notifications, adding complexity
- the timing of provision of information – a whole range of issues arise when a sentence is appealed.

85 Because of the administrative and technical complexities required to enable the Ministry of Justice (Courts) to notify disqualifications, advisers do not support this proposal at this time. However, should this proposal be approved, the date the Act would come into force could be delayed until notification by the courts is administratively possible.

Authorised information matching

86 Advisers have no view on this proposal.

87 If the Privacy Commissioner’s proposal to operate an authorised information matching programme between the Department of Corrections and the Electoral Enrolment Centre is accepted, a Memorandum of Understanding would be required. The Department could organise for relevant prisoner information to be sent to the EEC via the existing data exchange provider. The Department would be required to conduct test runs of data matches which the Privacy Commissioner is required to oversee and approve. There would be cost implications including setting up the data extract (estimated at $5,000) and the exchange mechanism (estimated at $500) as well as ongoing operational costs.
(estimated at $3,500 per annum), based on an estimate of the volume of data matching required. The Department would be able to meet those costs from within its existing baseline.

88 If the Privacy Commissioner’s proposal to operate an authorised information matching programme were to apply to the Ministry of Justice (Courts) and the EEC, the Ministry is concerned about the quality of offender information to be matched. The Ministry would also have to establish the same processes to implement an authorised information matching programme as described for the Department above. However, costs have not yet been determined for the Ministry.

89 The EEC believes the concerns about the risks of inaccuracy and lack of ability to challenge mismatches could be managed within current processes. The EEC advises that they carry out information matching with details from a number of government agencies (under authorised information matching programmes) to ensure that the electoral roll is complete and correct. The Electoral Act includes provisions that allow those who are entitled to vote but for certain circumstances are not on the electoral role to be able to vote. For example, special declaration votes can be made by registered electors who are unable to vote because their names do not appear on the printed electoral role.

Recommendation

90 It is recommended there be no change to this clause. However, should the proposal of the Electoral Enrolment Centre be accepted to change the notification process for disqualified persons, the date the Act would come into force would need to be delayed until notification by the Ministry of Justice (Courts) is administratively possible.

91 Should the proposal of the Privacy Commissioner be accepted to apply information matching principles to the EEC and to either the Department of Corrections or the Ministry of Justice (Courts), the date the Act would come into force would need to be delayed until an authorised information matching programme has been established. In addition, an amendment to section 263B of the Electoral Act would be required.

Other Issues Raised by Submitters

92 Submitters made a number of comments and recommendations on other matters that do not directly relate to individual clauses, but relate to the Act. These are discussed below.

Re-enrolment Procedures

Submissions

93 The Electoral Enrolment Centre (11) further propose that the following change be made to the Department’s current reintegration procedure regarding re-enrolling to vote:
- A new clause be inserted to provide for the Prison Superintendent, at the time a person is being released from prison, to obtain from the prisoner a completed enrolment form and to forward the completed form to the Registrar of Electors.

**Comment**

94 When a prisoner is released from prison they are provided with an electoral enrolment pack. Currently there is no requirement to complete the enrolment form before leaving prison.

95 If the EEC proposal were accepted, the Department would be required to legally compel prisoners to complete the enrolment form ready for posting by prison staff before the prisoner is released from prison. There are various reasons why this proposal would be problematic. For example, it is not clear what controls or sanctions the Department would be able to employ should prisoners refuse to complete the enrolment form before being released from prison. Also, some prisoners are released from court and not from prison.

96 The Department could, however, offer space and privacy in prison for prisoners to complete the form if the released prisoner is willing to do so. This will prevent some released prisoners from going on to commit an offence because they have not registered to enrol within one month of qualifying to do so, as required under s 82(1)(a) of the Electoral Act.

97 Following discussion, the EEC now recognises that the Prison Manager could not obtain a completed enrolment form from all released prisoners. The EEC proposes working with the Department to develop a national procedure to encourage registration to enrol for prisoners released from prison. This proposal is supported.6

**Recommendation**

98 It is recommended that the Prison Manager not be required by law to obtain from the released prisoner a completed enrolment form for posting.

**Anomaly with Eligibility to Register of Persons Detained in a Hospital or Secure Facility**

**Submissions**

99 Some submitters identified that the Bill would introduce inconsistencies in the law because mentally impaired prisoners detained in a hospital or secure facility for less than three years would still be able to vote (s 80(1)(c)(iii)) while an ordinary prisoner serving a sentence of the same length in prison could not.

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6 The Department also acknowledges that failure by prison staff to deliver completed applications made by prisoners would make prison staff liable on summary conviction to a fine not exceeding $2,000 under s 121 of the Electoral Act.
Comment

100 This anomaly was identified in the Initial Briefing to the Committee. The Bill, if enacted, would disqualify prisoners from registering but would allow some special patients to be registered. For example, a prisoner (disqualified from registering) who serves their sentence in a hospital or secure facility for a period of less than three years would be entitled to re-register to vote. A prisoner serving his entire sentence in prison would not be eligible to register to vote.

Recommendation

101 It is recommended there be no change to this clause.
### Appendix A: Electoral (Disqualification of Convicted Prisoners) Amendment Bill - List of Submitters

<table>
<thead>
<tr>
<th>No.</th>
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