JUSTICE SELECT COMMITTEE

Submission on the Electoral (Registration of Sentenced Prisoners) Amendment Bill

24 April 2020

The Equal Justice Project (EJP) is a non-partisan pro bono charity operating out of the University of Auckland. We apply Law students' legal training and knowledge to promote social equality, inclusivity and access to justice in our local and wider community.

Members of the EJP Communications Team (Kate MacKay, Hannah Jang, Hannah Ko, Nithya Narayanan, Sam Meyerhoff, Ling Yee Wong, Daniel Meech and Max Pendleton), as authorised and edited by the Communications Team Managers (Anuja Mitra and Bronwyn Wilde) and Head Editor (Lauren White), have considered the Electoral (Registration of Sentenced Prisoners) Amendment Bill. *We broadly support the passage of this Bill, with more detailed commentary below.*

Contents

The Right to Vote

1.1 Voting is a fundamental human right. It enables citizens of a democratic state to elect those who will represent them in their country's political framework, providing a vital pathway to having one's voice heard. The right is not only important within itself but gives rise to other important rights, including the freedom of expression, freedom of assembly, freedom of association and freedom from discrimination.[1]

1.2 The right is cemented by Article 21 of the Universal Declaration of Human Rights, which states that "everyone has the right to take part in the government of his/her country, directly or through freely chosen representatives" and that there is to be "equal suffrage".[2] The International Covenant on Civil and Political Rights (ICCPR), to which New Zealand is a party, further affirms the right in Article 25. It also provides for voting to take place "without unreasonable restrictions".[3]

[1] See International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
[2] *Universal Declaration of Human Rights* GA Res 217A (1948).
[3] International Covenant on Civil and Political Rights, art 25.

1.3 In New Zealand, the right to vote is guaranteed by s 12(a) of the Bill of Rights Act 1990 (NZBORA). The Act is unentrenched and can therefore be amended with a simple majority.[4] This has allowed for the continued disenfranchisement and re-enfranchisement of prisoners in New Zealand.[5]

Prisoner Voting Rights Overseas

2.1 In Australia, prisoners serving sentences of three years or less can vote. Other prisoners are still allowed to stay on the electoral roll and vote upon their release.[6] Prior to this, Australia had enforced a blanket ban on prisoner voting in 2006. However, the 2007 Australian High Court case *Roach v Electoral Commissioner* recognised for the first time that the Australian Constitution protected the right to vote.[7]

2.2 In Canada, all prisoners have the right to vote and a prison officer must actively aid them to enrol (if they have not already).[8] This followed the Supreme Court decision *Sauvé v Canada* in 2002, which ruled that s 3 of the Canadian Charter of Rights and Freedoms affords prisoners the right to vote.[9]

2.3 In the United Kingdom, a blanket ban prevents all prisoners from voting while in prison. Prior to Britain's exit from the EU, the UK and Armenia, were the only two EU member states to violate the European Convention on Human Rights (ECHR) order against blanket bans.[10] These violations were justified by the UK, citing their

[4] Geeti Faramarzi "The Bill of Reasonable Rights: Solving a conundrum and strengthening an enactment" [2009] 15 Canta LR 37 at 65.
[5] Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443.
[6] Australian Electoral Commission "Prisoners" (22 February 2019) <www.aec.gov.au/Enrolling_to_vote/Special_Category/Prisoners.htm>
[7] Human Rights Law Centre "Defending Australian's right to vote and other democratic freedoms" (May 18, 2019) <https://www.hrlc.org.au/news/2019/5/18/defending-australians-right-to-vote>
[8] Elections Canada "Voting by Incarcerated Electors" (June 2019) <https://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90545&lang=e>
[9] *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 2002 SCC 68.
[10] Prison Phone "Can prisoners in the UK vote?" (2018) <https://www.prisonphone.co.uk/blog/can-prisoners-in-the-uk-vote/>

own Parliamentary supremacy as power to effectively ignore their ECHR obligations.[11]

2.4 The USA has some of the world's toughest restrictions on prisoner voting.[12] Maine and Vermont remain the only states where prisoners can continue to vote whilst in prison, and upon release.[13] This is in contrast with Iowa, where all people with felony convictions are permanently disenfranchised.[14] Kentucky and Virginia follow the same restrictions with some leeway. The Governors of both states process the restoration of voting rights for felons on an individual basis, with the Kentucky Governor restoring the right for 140,000 non-violent felons in December 2019.[15] Other convicted felons in these states can petition their respective Governors to have their right restored.

2.5 Several other countries have notable prisoner voting policies. Iceland allows prisoners to vote, except those considered "serious offenders". The justification is that those who commit crimes "considered heinous by public opinion" forfeit their right to vote.[16] France, on the other hand, determines a prisoner's right to vote using a proportionality analysis. They consider losing the right to vote as an additional punishment on top of a prison sentence, meaning that removal of the right must be proportionate to the offence committed.[17]

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[11] Helen Hardman "Prisoner voting rights: the conflict between the government and the courts was really about executive power" (20 June 2019) The London School of Economics and Political Science <https://blogs.lse.ac.uk/politicsandpolicy/prisoner-voting-rights/>

[12] Christopher Uggen, Ryan Larson, and Sarah Shannon "6 million lost voters" (6 October 2016) The Sentencing Project <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>

[13] ACLU "Felony Disenfranchisement Laws (Map): Vermont, Maine" (2020) American Civil Liberties Union <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map?redirect=votingrights/exoffenders/statelegispolicy2007.html>

[14] ACLU, above n 13.

[15] Andy Beshear, Governor of Kentucky "Executive Order relating to the restoration of civil rights for convicted felons" (12 December 2019) <https://governor.ky.gov/attachments/20191212_Executive-Order_2019-003.pdf>

[16] Penal Reform International "The right of prisoners to vote: a global overview" (March 2016) <https://cdn.penalreform.org/wp-content/uploads/2016/08/The-right-of-prisoners-to-vote_March-2016.pdf>

[17] BBC News UK "Prisoner Votes by European Country" (22 November 2012) BBC News UK <https://www.bbc.com/news/uk-20447504>

Prisoner Voting Rights in New Zealand

3.1 Prior to 2010, the Electoral Act 1993 only disenfranchised individuals who had been sentenced—either through imprisonment or preventative detention— to a sentence length of three years or greater.[18] These provisions were in accordance with the perspectives of the Royal Commission on Electoral System, who had submitted that disenfranchisement could only be justified for the most serious of offenders.[19]

3.2 However, the three-years-limit was overcome when the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 was passed. This 2010 amendment imposed a blanket voting disqualification upon all individuals incarcerated from 16th December 2010 onwards.[20] The registrar of electors would remove the name of prisoners who had already been enrolled to vote, and prisoners who had not yet enrolled could not then enrol while imprisoned.[21] Of this amendment, the Attorney-General said in the s 7 report that "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".[22]

3.3 Heath J of the High Court issued a formal declaration of inconsistency, and found that the Act was an unjustified limitation of prisoners' voting rights under s 12(a) of the New Zealand Bill of Rights Act 1990.[23] The Supreme Court confirmed in *Attorney-General v Taylor* the judicial jurisdiction to make formal declarations of inconsistency with regards to abrogation of rights set out by NZBORA.[24] In New Zealand, declarations of legislative incompatibility are non-binding, lacking the force of entrenched constitutional rights as in the US case of *Madbury v Madison.*[25] *Taylor* is the first case in New Zealand where declarations of inconsistency could constitute

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[18] Electoral Act 1993, s 80(1)(d).
[19] John Wallace and others "Report of the Royal Commission on the Electoral System: 'Towards a Better Democracy' [1986-1987] IX AJHR H3.
[20] Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, s 2.
[21] Electoral Act 1993, s 98(1), s 80(1)(d).
[22] Christopher Finlayson "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill" (17 March 2010) at para 16.
[23] *Taylor v Attorney-General* [2015] NZHC 1706 at [33].
[24] *Attorney-General v Taylor* [2019] NZSC 18.
[25] *Marbury v Madison* 5 US 137 (1803) at 177.

a legitimate check on Parliamentary supremacy. If the 2020 Amendment Act is instituted, this could signal a significant constitutional development for New Zealand. Courts—acting as the protector of citizens' rights—could instigate dialogue with Parliament about legislation through s 5 of NZBORA.[26]

3.4 Supporters of the current Bill argue that the 2010 Amendment Act is a form of voter suppression as it forced individuals off the electoral roll.[27] Opponents of the 2020 Amendment Bill argued that disenfranchising prisoners was valid as it was a punitive measure.[28]

3.5 In New Zealand, the most powerful human rights tool is the Bill of Rights Act 1990 (NZBORA). However, its impact is hobbled by s 4, which states that in the case of inconsistencies between Acts and NZBORA, statutory legislation shall prevail.[29] Having said that, s 4 is not a complete free pass - s 5 sets a "demonstrably [justifiable] standard in a free and democratic society" against which the legitimacy of statutory incursions on NZBORA rights must be examined.[30]

3.6 Prisoners' rights are removed as a retributive response to their breaking the social contract.[31] Prison restricts freedoms such as the right of expression, peaceful assembly, and association.[32] As the loss of the right to vote is arguably unrelated to the conditions of imprisonment, disenfranchisement constitutes an additional form of punishment.[33] Thus, in our view, eliminating the right of prisoners to vote is not "demonstrably justifiable." For this reason, we believe this amendment should enfranchise all prisoners.

3.7 Impact on Māori

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[26] Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from Attorney-General v Taylor" (13 December 2017) at 568.
[27] (17 March 2020) 745 NZPD at 17124.
[28] Above n 27 at 17126.
[29] New Zealand Bill of Rights Act 1990, s 4.
[30] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [22].
[31] Above n 27 at 17126 (Electoral (Registration of Sentenced Prisoners) Amendment Bill - First Reading, Mark Mitchell).
[32] New Zealand Bill of Rights Act 1990, s 14, 16-17.
[33] Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" (2011) 2011 NZLR 443 at 454.

3.7.1 Māori are disproportionately affected by s 80(1)(d) of the Electoral Act 1993. While the Waitangi Tribunal supports the reform of s 80(1)(d), the 2020 Amendment Act falls short.

3.7.2 In New Zealand, Māori constitute 16% of the general population.[34] Of the total prison population, 51.8% are Māori.[35] Among the female prisoners, 67% are Māori women.[36] The disparity between re-offending rates between Māori and non-Māori are high with the rate for Māori being 36.5% compared to 25.3% for Pākehā.[37] While Māori serve shorter sentences, they are over-represented at every stage of the criminal justice system.

3.7.3 Overrepresentation is a result of structural and institutional racism, intergenerational trauma, economic deprivation, and colonisation. The creation of a justice system that actively diminishes the role of tikanga has left the community vulnerable to a foreign system that does not align with Te Ao Māori.[38]

3.7.4 At present, the Act systematically removes prisoners from the electoral roll, and does not automatically re-enrol prisoners upon release.[39] As Māori tend to serve shorter sentences and have disproportionately high re-offending rates, the initial loss of rights leaves them less engaged with political discourse.[40] Many prisoners never re-enrol upon release, and efforts by the state to re-enrol prisoners have been ineffective.[41] Disengagement of these prisoners influences the voting behaviour of their whānau and broader community, so it is not just prisoners who feel the effects of disenfranchisement.[42]

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[34] Te Aniwa Hurihanganui "Study: Why do so many Māori end up behind bars?" (4 October 2018) RNZ <https://www.rnz.co.nz>.
[35] "Prison facts and statistics - December 2019" (December 2019) Department of Corrections <https://www.corrections.govt.nz>.
[36] Waitangi Tribunal *He Aha i Pera Ai The Māori Prisoners' Voting Report* (Wai 2870, 2019) at 20.
[37] "Briefing to the Incoming Minister 2017" (2017) Department of Corrections <https://www.corrections.govt.nz> at 17.
[38] "They're our Whānau" (October 2018) ActionStation <https://actionstation.org.nz> at 7.
[39] Electoral Act 1993, s 80(d).
[40] Derek Chang "Banning prisoners from voting hits Māori harder: Waitangi Tribunal" New Zealand Herald (online ed, New Zealand, 12 August 2019).
[41] Above n 36 at 33-34.
[42] Above n 36, at 30

3.7.5 The prevailing circumstances undermine Māori rights to political representation. In 2018, Māori were 11.4 times more likely to be removed from the electoral roll as a result of a prison sentence.[43] Māori seats provide an opportunity to exercise *tino rangatiratanga*, however this cannot be achieved with a low Māori electoral population and significant overrepresentation of Māori in the prison population.[44]

3.7.6 Moreover, Te Tiriti o Waitangi guarantees Māori the full rights of citizens and *tino rangatiratanga,* which include the ability to partake in an election, vote and exercise the Māori electoral option.[45] Placing limits on such rights by way of s 80(1)(d) breaches articles two and three of Te Tiriti and the principles of active protection, equity and *kāwanatanga* obligations imposed on the Crown to reduce inequity.[46]

3.7.7 According to the Waitangi Tribunal's report, Crown officials failed to adequately consult with Māori on the amendments made by the 2010 Bill, and the select committee did not consider the potential effects of the legislation on Māori.[47] In enacting those amendments, the Crown did not actively protect the voting rights or the constitutional rights set out in Te Tiriti o Waitangi, and thus the enactment of s 80(1)(d) disproportionately impacted Māori.

3.7.8 The report made three recommendations based on the above findings. First, the Tribunal recommended the urgent amendment of legislation to allow all prisoners voting rights. Secondly, it recommended that all sentenced prisoners be enrolled for the 2020 election. Lastly, it recommended that a process is implemented to ensure Crown officials provide clear advice on the potential impacts a bill may have on Treaty obligations.[48]

3.7.9 We endorse these recommendations and believe they should be incorporated into the proposed Bill, in order to adequately address the impact s 80(1)(d) has on

[43] Above n 36, at 17.
[44] Nicole Roughan "Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy" (2005) 3 NZJPIL 285 at 289-290.
[45] Above n 36, at 32.
[46] Above n 36 at 32.
[47] Above n 36, at 33.
[48] Above n 36, at 34.

Māori. Merely enfranchising prisoners with sentences under 3 years is not enough, as Māori are overrepresented in the prison population across the board, and re-enrolment on release has not worked so far.[49] It is important to consider Māori when discussing an issue that has such wide-reaching consequences for the community.

Prisoners Serving Sentences of Less Than 3 Years

Section 86A

The proposed s 86A would enable prisoners serving a sentence of less than three years to vote. While EJP would prefer to see the restoration of voting rights for all prisoners, we support this section as an improvement on the current Act. However, we feel there to be residual unclarity surrounding the rationale behind the three-year limit and ask the committee to address this.

4.1 Seriousness of the offence

4.1.1 Members of the opposition place great emphasis on the seriousness of the offending as a reason for prisoner voter disqualification.[50] If the limit is intended to align with the seriousness of the crime—as opposed to the electoral cycle—a three year limit does not appear to be the best way of achieving this.

4.1.2 If the objective of the limit is to prevent restoration of voting rights to perpetrators of the most serious offending, setting the limit at two years' imprisonment or less would be more logical. In New Zealand, Category 1 offences attract only fines, while Category 2 offences have a maximum punishment of up to two years.[51] Category 3 offences are relatively more serious, and are punishable by custodial sentences of 2 years or more.[52] A three year limit, while including perpetrators of the more minor offences in Categories 1 and 2, would also include some

[49] Above n 36, at 34.
[50] (17 March 2020) 745 NZPD (Electoral Amendment Bill — First Reading, Agnes Loheni).
[51] Ministry of Justice "Offence categories & types of trials" (6 March 2020) <https://www.justice.govt.nz/about/lawyers-and-service-providers/criminal-procedure-act/offence-categories-and-types-of-trials/>.
[52] Ministry of Justice, above n 51.

perpetrators of the more serious Category 3 offences, including (potentially) aggravated assault, kidnapping and threatening to kill.[53] At the same time, there may be others serving sentences of longer than three years for the same crime who would be disqualified.

4.1.3 Guidance around sentencing starting points further supports the point that the three-year threshold could well restore voting rights to those who have engaged in violent offending. For example, less serious instances of grievous bodily harm could attract a starting points of 3 years,[54] while low-level aggravated robbery could attract a starting point of 4 years.[55] Various sexual offences—including sexual exploitation[56] and sexual connection with children[57]—have, in the past, attracted starting points under or close to three years.

4.1.4 This is also reflected in the lengths of actual sentences imposed. In the ten-year period between 1997 and 2006, kidnapping/abduction and aggravated burglary both had average custodial sentence lengths falling just under the 36 month threshold.[58] The average sentence lengths for indecent assault (20.45 months), robbery (21.55 months) and threatening to kill/threatening to cause GBH (8.37 months) fell well below the 36 month threshold.[59]

4.1.5 Overall, the three-year threshold cannot be explained from a sentencing perspective alone. If the rationale behind the limit were to prevent perpetrators of violent offenders regaining the right to vote, it should be noted that a vast array of such offenders may regain this right under the Bill. If it were Parliament's intention to take a proportional approach, a two-year limit would better achieve this purpose as it aligns with the upper limit of the less serious Category 2 offences.

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[53] Ministry of Justice, above n 51.
[54] *R v Taueki* [2005] 3 NZLR 372 (CA) at [34].
[55] *R v Mako* [2000] 2 NZLR 170 (CA) at [56].
[56] *See R v Stewart* [2009] NZCA 117 at [11], where a starting point of two and a half years was imposed.
[57] See *R v Johnson* [2010] NZCA 168 at [17], which identifies a four year starting point as being appropriate in (some) cases of sexual connection with young persons.
[58] (35.14 months and 35.85 months respectively) Bronwyn Morrison, Nataliya Soboleva and Jin Chong, *Conviction and Sentencing of Offenders in New Zealand: 1997 to 2006* (Ministry of Justice, April 2008) at 111. However, the lack of recency of these statistics should be noted, particularly given that they precede enactment of the Three Strikes legislation in 2010.
[59] Morrison, Soboleva and Chong, above n 58, at 111.

4.2 Political reasoning

4.2.1 When deciding the consequences for breaking the law, moral and legal reasoning should go hand-in-hand.[60] Any punishment, such as taking away a person's right to vote, should have a compelling moral argument behind it, or else it fails to meet the expectations of our society.

4.2.2 The current Bill would still deny persons serving a sentence of more than three years in prison the right to vote. There have been multiple lines of reasoning advanced for this limit. Before the Waitangi Tribunal, the Crown submitted that "serious criminal offending" has justified the removal of voting rights in foreign jurisdictions,[61] a rationale linked to criminal justice concerns of severity.

4.2.3 However, in parliamentary debate, the major justifications put forward in favour of a three-year limit seemed to be based in politics. Hon Andrew Little, argued that the limit allowed prisoners to choose who would govern them upon release.[62] Hon Kelvin Davies, Minister of Corrections argued that the three-year limit represented a compromise between the favoured approach of the judiciary and the Waitangi Tribunal, and the opposition.[63]

4.2.4 These arguments focus on the technical nature of parliamentary terms and political expediency in our society. Thus, they lack the moral justification necessary when dealing with the way our criminal justice system interacts with the rights of those within it.

4.2.5 This political reasoning is also not without flaws. As noted by Chris Penk, defending the three-year limit on the basis of allowing prisoners to choose who governs them upon release doesn't account for by-elections or elections which occur more than once every three years.[64]

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[60] AP Simester and WJ Brookbanks Principles of Criminal Law (5th ed, Thomson Reuters, Wellington, 2019) at 20.
[61] Waitangi Tribunal The Maori Prisoners' Voting Report (Wai 2870, 2019) at 28.
[62] (17 March 2020) 745 NZPD 17124.
[63] (17 March 2020) 745 NZPD 17129.
[64] (18 March 2020) 745 NZPD 17202.

4.2.6 Arguing for a compromise also presents issues. While motivated by noble intentions, the idea of setting a three-year limit on prisoner voting due to the desire to appease multiple parties sets a worrying precedent. Trying to come up with a balance between the Waitangi Tribunal and the opposition incentivises both sides to advance more radical views in hopes of any eventual compromise being closer to what they truly desire. The Waitangi Tribunal, like the judiciary, should not have to consider how politics and compromise may affect their recommendations when they make them, setting them against the opposition seems counter-productive.

4.2.7 Should this Bill succeed, prisoners' right to vote would have been altered four times in the last fifty years, in 1977,[65] 1993,[66] 2010,[67] and again in 2020. While we support this Bill passing, the manner in which its three-year limit has been defended seems to only make the issue even more of a political football than it already is. If a limit on prisoners' voting rights is necessary, it should be developed using reasoning which engages with the morality of the issue, not in a way which dehumanises the stakes at play, lacks internal consistency, and further polarises our system of government.

Recommendations

While we broadly support the spirit and aims of this Bill, we do not believe there are sufficiently strong justifications for restoring the right to vote to only those prisoners serving less than three years. In the absence of a Bill applicable to all prisoners, we support passage of this Bill, but ask the committee to consider the justification for the three-year limit. If the scope of the legislation is to be limited by sentence length, Parliament should make a carefully considered decision as to what limit, if any, is appropriate and for what reasons.

[65] Electoral Amendment Act 1977, s 5.
[66] Electoral Act 1993.
[67] Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, s 4.

Unpublished Names

Section 115

The amended s 115 proposed by this Bill would allow prisoners to express a preference not to have their personal information appear on any main or supplementary electoral roll. While EJP believes there are good reasons why prisoners may not want their details published, the ease with which they can opt out of the published roll compared to the general public gives rise to an equality issue. This section should be altered to be fairer to all voters (as well as reworded for clarity).

5.1 Hon. Dr. Nick Smith claimed in the first reading of this Bill that this amendment relating to unpublished names gives prisoners rights and protection above those of law-abiding citizens.[68] Dr. Smith's allegation is serious and therefore we think this amendment deserves scrutiny.

5.2 The published roll containing the name, address and occupation of every voter is open to public inspection,[69] but voters can opt out by applying to the Electoral Commission. The proposed s 115(3) effectively allows prisoners to apply to opt out of the published roll merely by expressing such a desire to the prisoner manager handling their enrolment application.

5.3 By contrast, the general public must specifically apply to the Electoral Commission and provide supporting information.[70] This information must satisfy the Commission appearing on the published roll would endanger the safety of the applicant or their family. In our view, the proposed amendment does give rise to an equality issue in the sense that it requires less effort from prisoners than from the general public to opt out of the published roll.

5.4 However, the amendment could be worded in a clearer manner, as it is not immediately obvious whether the Electoral Commission does still retain discretion under s 115(2) in deciding to remove a prisoner from the published roll. If the

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[68] (18 March 2010) 745 NZPD 17196.
[69] New Zealand Electoral Commission "What is an electoral roll?" Election NZ <https://elections.nz/democracy-in-nz/what-is-an-electoral-roll/>.
[70] New Zealand Electoral Commission "Concerned about your personal safety?" Vote NZ <https://vote.nz/enrol-to-vote/enrol-check-or-update/concerned-about-your-personal-safety/>.

Commission does retain discretion (indicated by the use of the word "may" in s 115(2)), the explanatory note to s 115 in this Bill misrepresented the proposed amendment itself, [71] and may have misled Dr. Smith. In this case, the amendment would not give prisoners any advantage as the Commission still has ultimate discretion in removing a person from the roll, be they a prisoner or ordinary citizen.

5.5 Conversely, if s 115 is to be read as making it mandatory that the Electoral Commission remove a prisoner from the published roll upon their request, this indeed makes it easier for prisoners to be removed from the roll than members of the public.

5.6 Yet we want to acknowledge that prisoners, by virtue of being prisoners, have legitimate reason not to have their name, address, and occupation published as a matter of public record in the published roll. That is to protect them from vigilante retribution, especially for sensitive releases, and to protect the safety of family members living in the same address. The Ministry of Justice Regulatory Impact Assessment related to this Bill expresses similar concerns.[72]

5.7 We also acknowledge the purpose and importance of having a published roll. This is to allow scrutiny of the roll and maintain public confidence in its integrity. This is widely accepted and stated in, for example, Ministry of Justice Regulatory Impact Assessment on Enabling Election Day Enrolment.[73]

Recommendations

To balance the concerns above, we recommend replacing the proposed s 115(3), with a new clause in s 115 requiring the Electoral Commission to inform all voters that they can opt out (during or after enrolment), and the criteria to meet in order to opt out. This will encourage everyone at risk (prisoners and the general public alike) to opt out of the published roll and require similar paperwork from everyone. Our recommendation also

[71] Electoral (Registration of Sentenced Prisoners) Amendment Bill 2020 (223-1) (explanatory note) at 3.
[72] Ministry of Justice "Prisoner Voting" (Ministry of Justice, Regulatory Impact Assessment, February 2020) at 14-15.
[73] Ministry of Justice "Enabling Election Day Enrolment" (Ministry of Justice, Regulatory Impact Assessment, August 2019) at 2.

gives the Electoral Commission discretion as to when to inform voters of the opt out option, so as to prevent the enrolment process being too onerous as to discourage enrolment.

Rehabilitation and Reintegration

6.1 Rehabilitation of Prisoners

6.1.1 We support the decision to amend s 80(1)(d) of the Electoral Act 1993, as we believe the enfranchisement of prisoners will help with their rehabilitation. However, we do not agree with the decision to disenfranchise certain groups of prisoners. From the perspective of rehabilitation, the decision to exclude these prisoners is arbitrary and unfair.

6.1.2 As noted in s 5(1)(c) of the Corrections Act 2004, the overarching goal of the corrections system in New Zealand is "the rehabilitation of offenders and their reintegration into the community". Consequently, the enfranchisement of prisoners should be a priority. Both the Human Rights Committee and the Waitangi Tribunal have emphasised the connection between enfranchisement and rehabilitation rates.[74] This is because enfranchisement "facilitates prisoners' re-entry to society, as [prisoners] are more likely to identify with a society they have had a stake in creating".[75]

6.1.3 As previously stated at paragraph 3.6, we believe that s 80(1)(d) of the Electoral Act 1993 is unduly punitive in nature. As such, it undermines the rehabilitative mission of the prison system. This is supported by evidence which suggests Māori prisoners who are prevented from enrolling in their first election year are less likely to vote once released from prison.[76] Clearly, the current laws do not support the rehabilitative purpose of the corrections system - instead, they reduce the likelihood of prisoners integrating back into society.

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[74] Human Rights Commission *Opening Legal Submissions on Behalf of the Human Rights Commission* (Wai 2870, 2019) at 19; Waitangi Tribunal, above n 36 at 25.
[75] Human Rights Commission at 19.
[76] Waitangi Tribunal, above n 36 at 25.

6.1.4 For these reasons, we support the decision to amend section 80(1)(d).[77] Enfranchisement would provide prisoners with one means of interacting with wider society. It would allow prisoners to engage with law and order in a constructive manner. It would encourage prisoners to continue to vote once their prison sentence had finished. It would also be educational – an opportunity for prisoners to learn about our democratic and social values.

6.1.5 However, although we support the decision to amend s 80(1)(d), we believe there are issues with cl 5 of the proposed Bill. The new section would prevent prisoners sentenced for life, prisoners sentenced under preventive detention, and prisoners sentenced for a term of 3 years or more, from voting.[78]

6.1.6 From the perspective of rehabilitation, the decision to grant voting rights to some prisoners but not others is arbitrary and unjust. Selective enfranchisement would mean only some prisoners are given access to the tools necessary to fully reintegrate into society. Other prisoners would be stripped of this opportunity. The goal of the corrections system is not to rehabilitate some prisoners, it is to rehabilitate all prisoners. For this reason, we recommend that the Committee reconsider the scope of prisoners to be enfranchised.

6.2 Prison Manager Duties

6.2.1 We support the proposal to introduce ss 86A, 86B, and 86C to the Electoral Act.[79] However, we believe these sections should go further. As well as the other duties outlined in these new sections, prison managers should be under a duty to educate prisoners about the electoral system. We also believe an enforcement mechanism should be established, to ensure prison managers do not neglect their new duties.

6.2.2 Numerous studies have established the link between education and rehabilitation rates.[80] The more education a prisoner receives - whether general or for a specific

[77] Electoral Act 1993.
[78] Electoral (Registration of Sentenced Prisoners) Amendment Bill 2020 (223—1), cl 5.
[79] Electoral (Registration of Sentenced Prisoners) Amendment Bill 2020 (223—1), cl 7.
[80] Cathryn A. Chappell "Post-Secondary Correctional Education and Recidivism: A Meta-Analysis of Research Conducted 1990-1999" (2004) Journal of Correctional Education Vol. 55 at 148.

vocation - the more likely they are to reintegrate back into society.[81] Although the right to vote does not require the voter to be informed, we believe prisoners should receive education on the electoral system. It would help them feel connected to society, make their choice under s 86A - whether to enrol or not - more meaningful and informed, and reduce the chance of reoffending. We believe this should be considered as one of the prison manager duties in s 87A, whether it be the active duty of the manager or a task to be delegated.

6.2.3 We also believe Parliament should consider establishing a proactive enforcement mechanism, to ensure the rights of prisoners are upheld. This enforcement mechanism does not need to be a part of the Act itself. A committee could be established to review the procedures prisons implement to collect the enrolment information of prisoners.

6.2.4 We understand that - if a prison manager did fail in their duties - a prisoner could take the issue to court. However, this is reactive and not always practical. Because the right to vote is fundamental, and prisoners are in a uniquely vulnerable position where their rights are dependent on these prison managers, we believe it necessary to have a proactive approach to monitoring the implementation of these new duties.

The Shortened Select Committee Process

7.1 Some have questioned the legitimacy of this Bill given its shortened select committee process.[82] The truncation of this process is something to be seriously considered, especially in light of the current COVID-19 crisis. Select committees play a vital role in ensuring the health of New Zealand democracy, providing the necessary scrutiny and consideration for good law.[83] The fact that this Bill has a shortened process is disappointing. However, it is not critical to the Bill's passing.

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[81] Chappell, above n 81 at 148.
[82] (17 March 2020) 745 NZPD (Electoral Amendment Bill — Instruction to Committee, Mark Mitchell).
[83] "Select committee FAQs" New Zealand Parliament Pāremata Aotearoa <https://www.parliament.nz/en/pb/sc/select-committee-faqs/>.

7.2 A full select committee procedure may well boost the Bill's democratic legitimacy. However, it is not a necessary requirement for a bill to be passed democratically-whether according to the system, or the will of the public. There are instances where the select committee process has not only been shortened but removed entirely in situations of urgency or concern.[84] These are not positive or admirable examples but are a reality of the New Zealand parliamentary system. It must be examined whether this is a case of proportionate need to justify a truncated process.

7.3 The Hon. Andrew Little has given many reasons for the passing of this Bill.[85] Most of these are constitutional and have been described in this submission. In particular, Little highlights the need to uphold the virtue contained within the NZBORA, so that the public can actually recognise that the Act is not mere lip service, as well as acting in accordance with the very strong recommendations made by the courts and the Waitangi Tribunal

7.4 These reasons must be scrutinised, especially given concerns regarding the possible political motivations behind such a bill. The Hon. Andrew Little claims this Bill would affect approximately 1,900 people for the 2020 election.[86] That is the equivalent of just less than 0.02% of the votes the Labour Party acquired in 2017, an absolutely trivial number.[87] Even using alternative figures from Stats NZ only brings this to 0.06%.[88] We therefore do not believe claims that Labour is "screwing the scrum" to be justified.[89]

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[84] Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011) at 2.
[85] (17 March 2020) 745 NZPD (Electoral Amendment Bill — First Reading, Andrew Little).
[86] Above n 86.
[87] That is assuming the statistically improbable premise that there would be 100% voter turnout (when the national average is only 80%) and that all those affected would vote Labour. New Zealand Electoral Commission "Voter turnout statistics for the 2017 General Election" (October 2017) <https://elections.nz/democracy-in-nz/historical-events/2017-general-election/voter-turnout-statistics-for-the-2017-general-election/>.
[88] Stats NZ shows 6,657 prisoners serving a sentence of less than three years. Stats NZ "Prison (sentence, remand, and post-prison) and community-sentence population statistics: June 2018 fiscal year" <https://www.stats.govt.nz/information-releases/prison-sentence-remand-and-post-prison-and-community-sentence-population-statistics-june-2018-fiscal-year-nz-stat-tables>.
[89] (18 March 2020) 745 NZPD (Electoral Amendment Bill — Instructions to Justice Committee, Nick Smith).

7.5 We do not consider the reasons provided against this Bill to be compelling enough to delay for the sake of having a full select committee process. Constitutionally speaking, this Bill is overdue. Political opinion and philosophy may vary, but there have been three court decisions and a Waitangi Tribunal report denouncing the current law. The prisoner voting ban as it stands is subverting the democratic process more than a shortened select committee process ever could.

7.6 The Bill is not a radical one. It does not seek to enfranchise all prisoners, despite that being the recommendation of the Waitangi Tribunal.[90] The Bill merely returns the state of New Zealand electoral law to as it was before 2010. There is room to discuss granting the vote to all prisoners or entrenching the Electoral Act completely. These matters are contentious and should be argued on Parliament's floor and subject to a full and diligent select committee process. But this Bill is not that. This Bill is merely the bandage to staunch the flow of injustice before the country is too far lost.

[90] Waitangi Tribunal, above n 36 at 34.