NEW ZEALAND LAW SOCIETY

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Electoral (Registration of Sentenced Prisoners) Amendment Bill

22/04/2020

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

1. Introduction

1.1 The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Electoral (Registration of Sentenced Prisoners) Amendment Bill (**the Bill**).

1.2 If enacted, the Bill will reinstate the law that applied from 1993 to 2010, allowing prisoners to vote unless serving sentences of three or more years' imprisonment.

2. Executive Summary

2.1 The Law Society generally supports the Bill, having opposed the restriction imposed by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (**the 2010 Act**) that disqualified all prisoners from voting.[1] The 2010 Act was subsequently (in 2015) the subject of the first "declaration of inconsistency" [with the New Zealand Bill of Rights Act 1990] made by a New Zealand court.[2]

2.2 The Law Society recognises the Bill still limits the rights of prisoners to vote – even if not to the extent of the total ban in the 2010 Act. That raises the question whether the remaining limits in the Bill are consistent with the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).

2.3 Contrasting views are possible, however, the question must be carefully resolved within the parameters set by the right to vote in section 12 of the Bill of Rights, and because it impacts upon Māori, consistently with the principles of the Treaty of Waitangi.

2.4 This submission:

a. **identifies** issues that the Select Committee should consider when determining whether the Bill is consistent with the right to vote in section 12 of the Bill of Rights and with Treaty of Waitangi principles; and

b. **recommends** that, when reporting back to the House, the Select Committee articulate the rationale for restricting prisoner voting, including the reasons for the threshold being three years (or such other threshold as the Committee may decide); and

c. **suggests** two amendments to new sections 86A-86E to further promote the enrolment of eligible voters in prison, and those leaving prison.

2.5 The Law Society seeks to be heard.

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1 New Zealand Law Society submission on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010.

2 See *Taylor v Attorney-General* [2015] NZHC 1706, *Attorney-General v Taylor* [2017] NZCA 215, and *Attorney-General v Taylor* [2018] NZSC 104.

3. Identifying the rationale for limiting the right to vote

The differing views

3.1 The Bill will re-enact the threshold for voter disqualification that existed from 1993 to 2010: that is, sentences of imprisonment for life, of preventive detention and imprisonment for a term of three or more years.

3.2 In its Regulatory Impact Assessment (**RIA**), the Ministry of Justice (**Ministry**) says its preferred option is that all prisoners should have the right to vote (as was the position from 1975 to 1977).[3] It says this is "most consistent" with the right to vote in section 12 of the Bill of Rights[4] and "less inconsistent" than the status quo, as well as being required by the principles of the Treaty of Waitangi.[5]

3.3 On the other hand, Crown Law's advice is different. It says a three-year threshold is consistent with the right to vote in section 12, being a "reasonable limit" and therefore permitted by the Bill of Rights by dint of section 5.[6]

3.4 The two opinions differ over whether there are good (in the sense of "available") reasons to restrict prisoner voting. The Ministry's view is that there is no "good policy rationale" for disqualifying prisoners from voting, no matter what threshold of sentence is chosen.[7] In contrast, Crown Law's advice frames the Bill's objectives as "enhancing civic responsibility and respect for the rule of law; and enhancing the criminal sanction".[8] It says these objectives "may be seen as sufficiently important reasons for limiting the right to vote".[9]

3.5 The Crown Law advice sees a three-year threshold as reasonable because it marks out prisoners whose offending was sufficiently serious to warrant a sentence of that length, for whom a further sanction in addition to imprisonment is appropriate.[10] Those who receive lesser sentences are unaffected by the restriction.

3.6 The reasonableness of restricting prisoners' voting rights is ultimately a matter of judgment on which different views are possible, as reflected in the two views noted above. It is ultimately a question of (1) identifying the actual *objective* of restricting voting by prisoners; (2) assessing its *legitimacy* as an objective; and (3) assessing the *reasonableness* of the particular threshold at which restrictions apply. That there be *some* threshold below which prisoners must be entitled to vote is a given: the High Court in *Taylor v Attorney-General* declared in 2015 that a blanket ban is

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3 Regulatory Impact Assessment, *Prisoner Voting,* Ministry of Justice at p 2.

4 Ibid, at section 4, p 17.

5 Ibid.

6 Crown Law "Electoral (Registration of Sentenced Prisoners) Amendment Bill (22565/5.0) – Consistency with the New Zealand Bill of Rights Act 1990". Section 5 of the New Zealand Bill of Rights Act states "subject to section 4, 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".

7 Above n 3, at section 5.1, p 18.

8 Above n 6, at [11]. The first two expressions are drawn from the opinion of the European Court of *Human Rights in Scoppola v Italy* at para [104], which are cited also in *Roach v Electoral Commission* by Gleeson CJ.

9 Ibid, at [13].

10 Ibid, at [17].

inconsistent with the Bill of Rights and at no stage, before or after, has the Attorney-General argued otherwise.[11]

Identifying the Bill's objective and its legitimacy

3.7 The Bill and Explanatory Note do not themselves advance any objective for the three-year threshold. For their part, the Ministry's view (in setting out options for Cabinet to consider) was that there be no restrictions at all – precisely because no good policy reason was available. Crown Law advice, as noted, ascribes to the Bill the objectives of enhancing criminal sanctions, civic responsibility, and respect for the rule of law.[12]

3.8 The Law Society submits that in this state of affairs – where the Bill itself is silent on its objectives and they fall to be inferred – the Select Committee should carefully consider and articulate the rationale for the restrictions on prisoner voting, for the benefit of members in the House and the public. This will allow the rationale and any debate upon it in the House to be publicly available as part of the legislative history of the Bill.[13]

3.9 Articulating the rationale for the Bill will necessarily include the rationale for a threshold of three years' imprisonment (or whatever threshold is in fact recommended by the Committee), as opposed to a lower or higher figure.

Justifying the threshold of three years

3.10 As noted at [3.5] above, Crown Law's advice is that a three-year imprisonment threshold appropriately distinguishes prisoners whose offending was sufficiently serious to warrant sentences of that magnitude. Offending at that level was seen to justify a penalty enhancement of ineligibility to vote as well as imprisonment.

3.11 The provenance of the three-year threshold in New Zealand can be traced to the Royal Commission on the Electoral System in its report of 1986.[14] The position at that time was that no prisoners could vote. The Commission noted arguments for and against restrictions on prisoner voting, saying it had "some sympathy with the view, which we think is widely held, that punishment for a serious crime against the community may properly involve the forfeiture of some rights such as the right to vote".[15] The Commission concluded that "disqualification should be retained for those who have been sentenced to a long period of imprisonment".[16]

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11 Above n 2.

12 Above n 9.

13 As the majority of the Constitutional Court of South Africa, in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* 2005 (3) SA 280 – a case about prisoner voting – observed, a court evaluating the consistency of a law needs information about the law's objective and, while this may be able to be discerned through common sense and judicial knowledge, it is generally for the party seeking to justify a law to spell out the reasons for the justification of an apparent limit on a right.

14 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, December 1986.

15 Ibid, at [9.21].

16 Ibid.

3.12 To that point the Royal Commission was speaking to the general objective of restrictions on prisoner voting – that it should apply to those convicted for serious crimes and hence for long periods. As to the precise threshold for such restrictions, the Commission went on to say:[17]

> Long-term prisoners can be viewed in the same way as citizens absent overseas who lose their right to vote if they are away for more than a certain length of time. We therefore recommend that the disqualification should be limited to prisoners serving a sentence of imprisonment equal to or greater than the maximum period of continuous absence overseas consistent with retaining the right to vote, namely three years.

3.13 The recent Crown Law advice notes "some force" in that observation of the Royal Commission.[18] Importantly, both the Royal Commission's view and the Crown Law advice appear to rest independently on the proposition that forfeiture of voting rights is an appropriate consequence of punishment for serious crime. The three-year threshold serves as a proxy for what *counts* as a serious crime.

3.14 The analogy between citizens residing overseas for three years, and prisoners being in prison for three years, might be debated. On one possible view the connection is that persons in prison serving sentences of three years or more will be unable to vote in at least one election, just as is the case for persons who have resided for three years overseas at the time of an election.

3.15 The Crown Law advice further notes that adopting a threshold of three years for disqualification, reflecting seriousness of offending, is consistent with views expressed by the High Court of Australia and by the European Court of Human Rights.[19] (Incidentally, neither of these cases rested on any suggested analogy to citizens residing overseas for three years.)

3.16 In *Roach v. Electoral Commissioner*[20] the High Court of Australia had declared unconstitutional a total ban on prisoner voting, meaning it then had to consider the constitutionality of the previous law (which would be revived in consequence of its decision). That previous law had a three-year threshold. The four members of the High Court who ruled the total ban to be unconstitutional each held the three-year threshold in the previous law was consistent with the Australian Constitution:[21]

> The three year provisions (to put the subject matter in short form) of the 2004 Act differ in their nature from the 2006 Act. They operate to deny the exercise of the franchise during one normal electoral cycle but do not operate without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process. In that way the three year provisions are reflective of long established law and custom, preceding the adoption of the Constitution, whereby legislative disqualification of electors has been made on the basis of such culpability beyond the bare fact of imprisonment.

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17 Ibid.

18 Above n 6, at [17.2].

19 Ibid, at [17.3].

20 *Roach v Electoral Commissioner* [2007] HCA.

21 Ibid, at [98] per Gummow, Kirby and Crennann JJ; Gleeson CJ expressed a similar view at [19]. The two remaining judges held the total ban on prisoner voting to be constitutional.

3.17 In *Scoppola v Italy (No. 3)*[22] the European Court of Human Rights found that a provision in Italian law whereby persons sentenced to three or more years were denied the franchise for five years (and not just while in prison), was consistent with the European Convention on Human Rights.

3.18 In relation to this Bill, the Crown Law analysis was confined, as it must be, to the actual proposal in the Bill – a three-year threshold. It was not necessary to consider whether another, greater or lesser, threshold might have been more appropriate – say 5 years, or only life and indeterminate sentences. The Select Committee might consider whether a higher threshold could have been selected that still meets the Bill's objectives but is less restrictive on the right to vote.

3.19 In making that assessment the Committee ought to balance the importance of the objective against the degree of its impact on affected persons. This would involve considering some of the other, non-punitive, objectives of imprisonment, especially rehabilitation and the inculcation of civic responsibility.

3.20 The Committee should record its reasons for the benefit of the record, which may be of assistance if the consistency of the Bill were to be challenged in fresh litigation similar to that in the *Taylor* case.

Recommendations

3.21 For the above reasons the Law Society:

a. **recommends** the Select Committee carefully consider the rationale for prisoner disqualification, and the policy reasons for setting it at three years**;** and

b. **recommends** that if the Select Committee agree the threshold should be three years, it clearly articulate its reasons for that view in its report to the House; and

c. otherwise **supports** the Bill insofar as it removes the current total ban on prisoner voting and thereby responds to the declaration of inconsistency with section 12 of the Bill of Rights made by the High Court in *Taylor v Attorney-General*.

4. Principles of the Treaty of Waitangi

4.1 The Waitangi Tribunal has recently found that, in passing the 2010 Act, the Crown had acted inconsistently with the Treaty of Waitangi principles of partnership, kāwanatanga, tino rangatiratanga, active protection and equity.[23] The Tribunal found Māori in 2018 were 11.4 times more likely than non-Māori to have been removed from the electoral roll.[24]This compared with prior to the 2010 Act where Māori were 2.1 times more likely to have been removed from the electoral roll than non-Māori and in 2011, following the enactment of the 2010 Act, 9.3 times more likely to have been removed. Part of the discrepancy lay in a failure to re-enrol Māori formerly in prison, leading to a de facto permanent disqualification from voting which compounded over time.

22 *Scoppola v Italy (No. 3)* ECHR, App 126/05, 22 May 2012, paragraph [108].
23 Waitangi Tribunal *He Aha i Pērā Ai?: The Māori Prisoners' Voting Report* (Wai 2870, 2019).
24 Ibid at [4.3].

4.2 Like the Ministry, the Tribunal has recommended that no disqualification should apply to prisoners, because any threshold would disproportionately affect Māori and breach the principle of tino rangatiratanga.[25]

4.3 As previously noted, the Law Society supports the measures in the Bill aimed at improving the re-registration of all prisoners. The Law Society is aware of government efforts to significantly reduce Māori re-offending.[26] Those efforts combined with the three-year threshold should assist with reducing the rate of removal of Maori prisoners from the electoral roll to the 2010 level.

4.4 The Law Society notes the possibility of a further adverse Tribunal report if any disqualification threshold applies and raises this for the Select Committee's consideration.

5. Amendments to new sections 86A-86E

New section 86A: Capturing all relevant groups

5.1 The Law Society supports new sections 86A-86E, which aim to improve the rate of registration of qualifying people in prison, and people soon to leave prison.

5.2 New section 86A requires a prison manager to advise any person serving a term of less than three years of their right to enrol, but only when that person is "received" into a prison. As drafted the section appears to be both over- and under-inclusive:

a. The new section should apply only to those aged 17, 18 or over, as people aged 16 or younger may not enrol. (A person aged 17 may seek to enrol in advance of their 18th birthday but is not required to do so: section 82(2).) This concern applies also to new section 86B.

b. The new section may fail to capture at least two categories of people:

i. those people who turn 18 during the term of their imprisonment; and

ii. those people aged 18 or over who enter prison serving a term of imprisonment greater than three years, which is later reduced on appeal.

Recommendations

5.3 In new section 86A(1), replace "When a prisoner is received into a prison to serve a sentence of imprisonment for a term of less than 3 years" with "When a prisoner of or over the age of 18 years is received into a prison to serve a sentence of imprisonment for a term of less than 3 years or when a prisoner otherwise becomes eligible to register as an elector".

5.4 In new section 86B(1), replace "Before a prisoner who is serving a sentence of imprisonment" with "Before a prisoner of or over the age of 18 years who is serving a sentence of imprisonment".

5.5 The Select Committee may also wish to consider whether to extend the provisions in sections 86A-86E to qualifying people aged 17, on the basis that they may also apply to enrol.

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25 Ibid at [5.3].

26 See for example *Police launches Te Huringa o Te Tai* (New Zealand Police press release, 6 November 2019).

Opt-out process

5.6 Section 82(1) of the Electoral Act 1993 confirms registration as an elector is compulsory. Failure to register is punishable by a fine of $100 on first conviction (see section 82(7)). Notwithstanding that, the process suggested by new sections 86A-86E is *opt-in* only (see new section 86(1)(b)).

5.7 There is a compelling rationale for making the process in sections 86A-86E opt-out, to better facilitate the enrolment of all people in prison who may do so. The Law Society also considers an opt-out scheme better supports the intent of the Bill. That can be achieved by requiring a person in prison to provide the information listed in new section 86C(1), unless the person opts not to.

Recommendations

5.8 In new section 86A:

a. **delete** section 86A(1)(b) and replace it with: "advise the prisoner they are required to provide the prison manager with information described in section 86C(1) for the purpose of registration as an elector, unless the prisoner does not wish to register as an elector."; and

b. **delete** section 86A(2) and replace it with: "Section 86C applies unless the prisoner does not wish to register as an elector."

5.9 In new section 86B:

a. **delete** section 86B(1)(b) and replace it with: "advise the prisoner they are required to provide the prison manager with information described in section 86C(1) for the purpose of registration as an elector, unless the prisoner does not wish to register as an elector."; and

b. **delete** section 86B(2) and replace it with: "Section 86C applies unless the prisoner does not wish to register as an elector."

5.10 In new section 86C:

a. **delete** the introductory words of section 86C(1) and replace them with "If this section applies, the prisoner must provide to the prison manager the following information to facilitate their registration as an elector:".

Tiana Epati
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