

New Zealand Law Society

Submission on Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010

Introduction

1. The Bill proposes to remove the right of a person serving a term of imprisonment of less than 3 years to register as an elector. Currently a person serving a sentence of imprisonment for a term of less than 3 years is able to register as an elector. The effect of this Bill is that all persons imprisoned in New Zealand at the time of a general election will be unable to register as an elector and hence unable to vote, no matter what the length of their prison sentence is. The rationale appears to be that all convicted prisoners should have their right to vote taken from them for the period of their incarceration as a further punishment for their offending (Explanatory note, P.1).
2. The Society has serious concerns about this Bill. It is an unnecessary and retrograde step. The current law maintains the correct balance between the maintenance of a free and democratic society, the right to vote for all New Zealand citizens and the necessary removal of certain rights from prisoners. Specifically, the Bill:
 - (a) constitutes an unjustified violation of s12 of the New Zealand Bill of Rights Act 1990 (NZBORA), as the Attorney-General concluded in his report on the Bill tabled under s7 of the NZBORA;
 - (b) is contrary to Article 25 of the United Nations International Covenant on Civil and Political Rights (ICCPR) which New Zealand has ratified; and
 - (c) is out of line with international law relating to blanket restrictions on the right of prisoners to vote.
3. The Society's reasons for these views are as follows:
 - (a) The Bill unnecessarily excludes certain citizens from participating in the election of the government under which they are living.
 - (b) The Bill is irrational, discriminatory and unfair as, while some persons convicted of an offence will not be able to vote because they received a custodial sentence,

others convicted of the same offence will be able to vote if they received a non-custodial sentence.

- (c) The Bill impairs the fundamental right to vote more than is reasonably necessary to achieve the purpose of punishing persons for serious crimes and is not in due proportion to that purpose.
- (d) The Bill overrides without good reason the recommendation of the 1986 New Zealand Royal Commission on the Electoral System, on which the current law disqualifying persons convicted of more than 3 years in prison is based.

The right and opportunity to vote – ICCPR and NZBORA

- 4. New Zealand has guaranteed to all its citizens, through its ratification of the ICCPR, the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives, and the right to vote (Articles 25 (a) and (b)). New Zealand has also guaranteed that persons in prison shall be treated with humanity and respect for the inherent dignity of the human person and that the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation (Articles 10.1 and 10.3).
- 5. In relation to the right to vote, the Human Rights Committee of the United Nations, which oversees implementation of the ICCPR's articles, adopted a general statement (No. 25(57) dated 12 July 1996), as follows:

In their reports State Parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. *If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence.* (Emphasis added)

- 6. The right to vote is protected by the NZBORA, s12 of which provides that 'every citizen who is over the age of 18 years has the right to vote in genuine periodic elections of members of the House of Representatives'. That right, like all others, is only qualified by 'such reasonable limits as can be demonstrably justified in a free and democratic society' (s5).

7. The legal test in New Zealand to determine whether a provision in an enactment is a justified restriction on the right to vote was confirmed by the Supreme Court in *R v Hansen* [2007] NZSC 7. The following four questions must be all answered in the affirmative before the provision can be said to be justified:
- (a) Does the exclusion of prisoners from voting where they are serving less than 3 years in prison serve an objective sufficiently important to justify curtailing the right to vote?
 - (b) Is the exclusion of prisoners from voting rationally connected to this objective? In other words, does breaching the right help achieve the objective?
 - (c) Does the exclusion of prisoners from voting impair the right to vote no more than is reasonably necessary for sufficient achievement of the objective?
 - (d) Is the exclusion of prisoners from voting in due proportion to the importance of the objective?

Attorney-General report

8. The Attorney-General has concluded that the Bill appears to be unjustifiably inconsistent with the electoral rights affirmed by s12 of the NZBORA and tabled a report in the House of Representatives (as required by s7 of the NZBORA).
9. Among other reasons, the Attorney-General stated that a blanket ban on prisoner voting does not impair the right as minimally as reasonably possible because it disenfranchises prisoners in an irrational and irregular manner. A prisoner convicted of a serious violent offence who serves a 2½ year sentence between general elections could vote in both elections, while someone convicted to a one-week sentence served during a general election could not vote in that election. Further, if the Bill were passed, mentally impaired prisoners detained in a hospital or secure facility for less than 3 years could vote while all prisoners serving sentences less than 3 years in prison could not.
10. The Society agrees with and endorses the Attorney-General's analysis and conclusions on the Bill.

Voting critical to a free and democratic society

11. Voting, including the right to vote, is a critical and necessary component of our democratic system of government. Voting encourages, supports and connects citizens with participation in public life which is necessary for a strong and healthy democracy. Democracy is eroded when citizens are excluded from participating in determining the makeup of the government which makes rules and policies to which they are subject. The right to vote exists as much for the purposes of ensuring and maintaining a strong and healthy democracy as it does as a personal right for each individual citizen. Having groups of persons living in society who have been excluded from participating in the makeup of the government is undemocratic. Therefore, any rule that prevents New Zealand citizens from voting needs very careful scrutiny to ensure that it is not an erosion of the foundations of our free and democratic society, as well as scrutiny to ensure that it is not an unjustified erosion of a guaranteed fundamental right.

12. New Zealand has a 3 year parliamentary term between general elections. Persons who have a term of less than 3 years imprisonment return to the community before the next 3 yearly election. Hence, if they are denied the right to vote they come out of prison to live under the rules and policies of a government they had no part in determining. This is an unhealthy situation and an erosion of a free and democratic system of government. The law must ensure that after prisoners have served their punishment they will return to a society that they feel fully a part of. To have exercised the right to vote in elections for a government under which they are living is an important way in which the law plays its part in ensuring the barriers to social reintegration, rehabilitation and contribution are removed. In this way the law plays its part in protecting society against reoffending.

Bill irrational, discriminatory and unfair

13. The purpose of the Bill is to add another punishment to all persons in prison because any length of imprisonment reflects serious offending. However, in less serious classes of offending New Zealand courts have been given discretions by Parliament as to whether to order terms of imprisonment, a suspended sentence along with other community-based sentences, or even a fine. Many factors including age, health and family commitments can all affect the sentence given. Hence, two persons convicted of the exact same offence committed in the same circumstances may receive different sentences – one being custodial and one non-custodial. This Bill adds an additional punishment to the offender sentenced to imprisonment that the offender with the community-based sentence does not

receive. This extra punishment (exclusion from the right to vote) is irrational and arbitrary. It has a discriminatory and unfair effect.

Exclusion not in due proportion to purposes of punishment

14. By removing the right to vote from all incarcerated persons this Bill removes a fundamental human right which exists for the health of democracy as well as for the individual citizen. The blanket exclusion of all prisoners from voting, regardless of the scale and seriousness of their offending, and regardless of how long they will be removed from the community, is not a proportionate response to the need to ensure persons convicted of serious criminal offending are punished.
15. The varied lengths of prisoners' sentences reflect the varied level of seriousness of the crimes they have each committed. Their sentence length is proportional to their crime. That proportionality is a fundamental tenet of the operation of the criminal justice system. Yet under this Bill persons who are imprisoned for 1 day to 3 years are treated the same as persons in prison for over 3 years, who in most cases have committed violent offences, sexual offences or other serious offences. The Bill is not proportionate with the purposes of punishing serious offenders. It also impairs the fundamental right to vote more than is reasonably necessary.

Royal Commission

16. The Royal Commission recommended a cut off time for loss of the right to vote at a sentence of 3 years' imprisonment, reflecting the seriousness of offending. The time marker was consistent with another provision in the Electoral Act where the right to vote is lost after 3 years' continuous absence from New Zealand (s80(1)). The Commission's reasoning was that a prisoner retained the ordinary rights of a citizen, insofar as they are consistent with loss of liberty and the requirements necessary for proper containment and management of citizens in prison. Restricting the right to vote was not necessary for proper containment and prison management. This Bill goes squarely against this approach. It neither creates a measure to distinguish between levels of offending, nor takes account of the principle of retention of rights except as are necessary for management of incarceration.

International case law

17. In comparable jurisdictions such as Canada, Ireland, South Africa and Australia, the highest courts have in the last ten years held that blanket bans on the right of prisoners to vote are unlawful or unconstitutional. The European Court of Human Rights has held similarly in relation to a blanket ban on prisoners voting in the United Kingdom.

Conclusion

18. The Society considers this Bill should not proceed beyond this Select Committee. It is retrograde legislation, which will erode the free and democratic nature of New Zealand society without justification. It is irrational and arbitrary and unreasonably impairs the right to vote more than is necessary. It is also not in due proportion to the objective of punishment.
19. The Society wishes to be heard in support of this submission.

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President
8 June 2010