the howard league
Canterbury + Otago + Wellington

Wellington Howard League
P O Box 5807, Wellington 6012
wellington@howardleague.org.nz

29 June 2019

Justice Committee
Parliament Buildings
New Zealand
justice@parliament.govt.nz

re: Let Prisoners Vote Petition

Tēnā koutou

1. Thank you for this opportunity to make this submission to the Justice Committee to provide background information about the matters outlined in our petition.[1]

Introduction

2. The issue of prisoner voting in New Zealand has gained significant attention in recent months:

   * in early November last year (2018), the Supreme Court upheld the High Court's decision that section 80(1)(d) is inconsistent with the NZ Bill of Rights Act.[2]

   * the United Nations received a formal complaint about prisoner disenfranchisment in January this year.[3]

   * in March this year the Green Party introduced the Electoral Strengthening Democracy Bill which includes a provision to repeal section 80(1)(d).[4]

   * the Waitangi Tribunal's urgent hearing into Māori Prisoner disenfranchisement (WAI2870) was held on 20-22 May 2019.[5]

   This points to both increasing interest in the topic of prisoner disenfranchisement, and the questioning of prisoner disenfranchisement in relation to wider legislative frameworks, like the Bill of Rights Act 1990 (BoRA) and Te Tiriti o Waitangi.

3. The "Let Prisoners Vote" petition was organised by the Wellington Howard League. We are one of three leagues in the National Coalition of Howard Leagues which have a direct lineage to the English Howard League for Penal Reform established in 1866 and named after English penal reformer John Howard (1726-1780). The Howard League was first established in New Zealand in 1924. We receive no government funding and have no political affiliations.

4. Over 2,000 people signed the "Let Prisoners Vote" petition. Over half of the people who

[1] Technically there are two petitions - one electronic and one paper - with the same question. We initiated the paper petition to enable its circulation in prisons.
[2] Attorney-General v Arthur William Taylor SC 65/2017
[3] Sherman "Formal complaint lodged with UN over New Zealand's prisoner voting ban" n.p.
[4] Electoral (Strengthening Democracy) Amendment Bill 2019
[5] Documents from the hearing can be found at: https://forms.justice.govt.nz/search/WT/. The Crown's closing submissions (WAI2870 03.3.9) are at: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_149557261/Wai%202870%2C%203.3.009.pdf

signed the petition are prisoners.

Prisoner voting in New Zealand

5. A history of prisoner voting in New Zealand is outlined in the Supreme Court judgment Attorney-General v Arthur William Taylor SC 65/2017.[6] The relevant sections of the decision are appended to these submissions in **Appendix A**.

6. In New Zealand, the Electoral Act 1993 s80(1)(d) excludes all sentenced prisoners from registration as electors. The subsection states:

> "*The following persons are disqualified for registration as electors: ... a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010*."

7. This subsection doesn't simply remove the right of sentenced prisoners to vote, it removes sentenced prisoners from the electoral roll, requiring them to actively re-enrol in order to vote after prison. As Chris Hipkins noted during the Third Reading of the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill Electoral Amendment Bill debate in December 2010:

> "*We are not depriving them of the right to vote just when they go to jail; we are removing them from the electoral roll, which means that even when they are finally released from jail, they are still not guaranteed the right to vote unless they re-enrol. We are talking about some of the most marginalised people in society. When they are released from prison, do we really think that their first priority will be to trot down to the post shop to get back on the electoral roll? That probably will not happen. The reality is that if we remove prisoners from the electoral roll, the odds of their re-enrolling on the electoral roll in the future are very, very low. It is likely that we are ultimately depriving them of the ability to vote for ever.*"

Reasons for prisoner franchise

8. We consider the following to be the key reasons for supporting prisoner franchise:
   a) Voting is a human right
   b) NZ prisoner disenfranchisement is out of step internationally
   c) NZ prisoner disenfranchisement disproportionately affects Māori
   d) Prisoner disenfranchisement further marginalises the marginalised
   e) Prisoner disenfranchisement can have longer and wider effects beyond the individual imprisoned and the length of their incarceration
   f) Prisoner voting supports reintegration
   g) Prisoner disenfranchisement is an unfair and additonal punishment
   h) Disenfranchisement contributes to poor prison conditions

   These reasons are elaborated below.

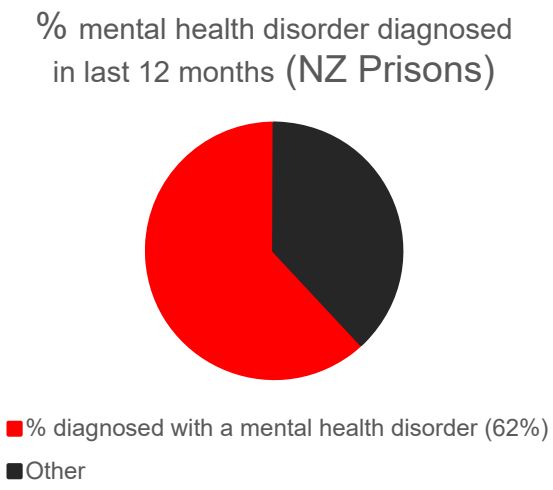
9. **Voting is a human right:** Voting in New Zealand is a right given to every New Zealand citizen 18 or over in our Bill of Rights Act. **Blanket disenfranchisement of prisoners breaches BoRA, and breaches the UN's Declaration of Human Rights** which identifies voting as a fundamental human right. We attach the submissions of the Human Rights Commission (HRC) to the Waitangi Tribunal urgent hearing on Māori Prisoner voting, which outlines the Commission's position on domestic and international law on voting as a human right (**Appendix B**).[7] We support these HRC submissions and encourage you to ask the HRC to make an oral submission to you on this matter.

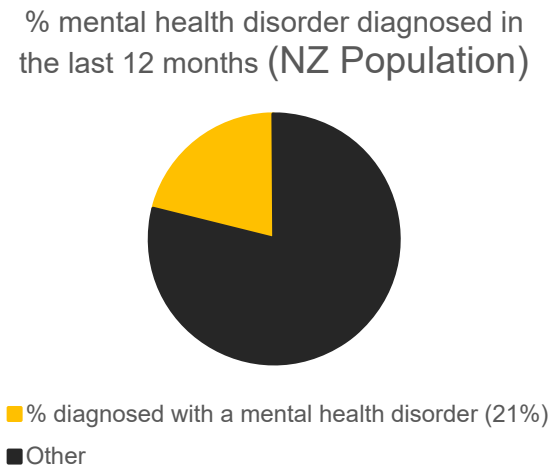
[6] Attorney-General v Arthur William Taylor SC 65/2017
[7] WAI2870 03.3.1 Opening Legal Submissions on behalf of the Human Rights Commission

10. **NZ prisoner disenfranchisement is out of step internationally:** Prisoner disenfranchisement is at odds with many countries internationally. Voting is also a right for prisoners in Albania, Bosnia, Canada, Croatia, Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Macedonia, Montenegro, Serbia, Slovenia, Spain, South Africa, Sweden, Switzerland and Ukraine. Most prisoners can vote in Cyprus, France, Germany, Greece, Iceland, Italy, Luxemborg, Malta, Moldova, Monaco, Netherlands, Norway, Portugal, Romania, Slovakia. In these case voting is the default position, and disenfranchisement is part of a sentence and specific to the crime (e.g. electoral fraud, treason etc), not disimilar to NZ's section 80(1)(e) of the Electoral Act which disqualifies "*a person whose name is on the Corrupt Practices List.*" Countries with blanket bans on prisoner voting include: Russia, Georgia, Estonia and Hungary.

11. **NZ prisoner disenfranchisement disproportionally affects Māori:** The systemic racism of our justice system is well known and has been well documented.[8] More than half of New Zealand's 10,000 prisoners are Māori - so Māori are particularly affected by section 80(1)(d) removing their right to vote. At the recent urgent Waitangi Tribunal hearing into Māori prisoner voting, the Crown evidence of R Lynn demonstrated that in 2004 - before the 2010 amendment to the Electoral Act, which removed the right to vote from prisoners with sentences of three years or less - "*Māori were 4.4 times more likely to have been removed from the electoral roll than non-Māori*."[9] Following the amendment, between 2010 and 2011, Māori were were 9.3 times more likely to be removed from the electoral roll.[10] The evidence suggests this effect has been increasing, and stated that by 2018 "***Māori were 11.4 times more likley to have been removed from the electoral roll than non-Māori***."[11] The exhibits documenting this Crown evidence is attached in **Appendix C**.

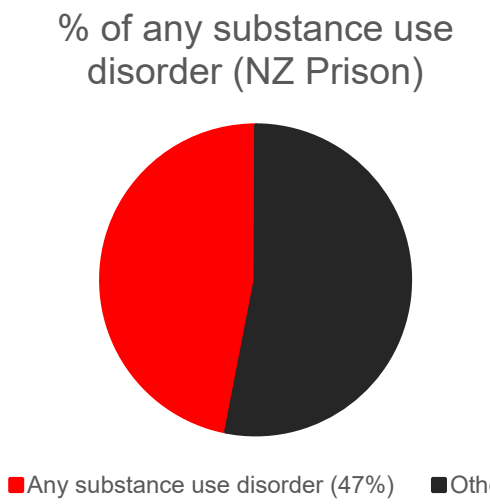
12. **Prisoner disenfranchisement further marginalises the marginalised:** Most prisoners are from disadvantaged backgrounds. As seen in the diagrams below, people in prison are disproportionately affected by mental health disorders, substance use disorders, and poor literacy and numeracy.

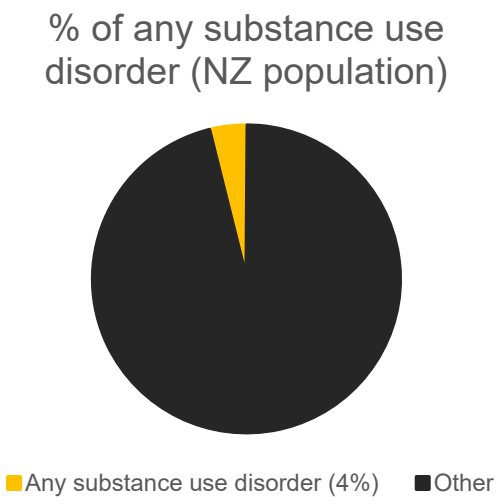




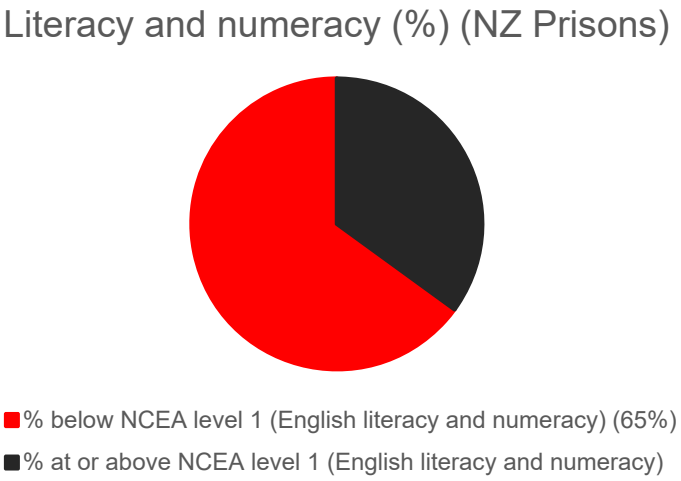
source: Indig, Gear and Wilhelm, p. v.

[8] For example, the Department of Corrections "Over-representation of Maori in the criminal justice system" and WAI250 *Tū Mai te Rangi*.
[9] WAI2870 A022: Affidavit of Robert Lynn, 25 March 2019 at [10]. The associated data provided as evidence is WAI2870 A022(a): Index and Exhibits to Affidavit of Robert Lynn
[10] WAI2870 A022: Affidavit of Robert Lynn, 25 Mar 19 at [12].
[11] WAI2870 A022: Affidavit of Robert Lynn, 25 Mar 19 at [12] (emphasis added).

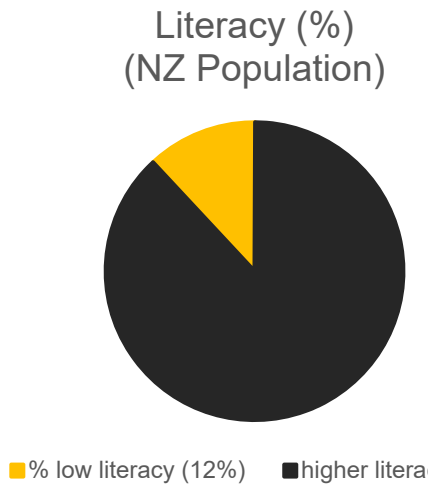


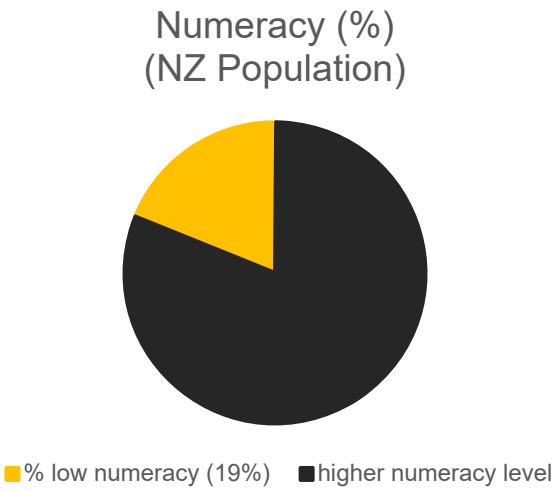


source: Indig, Gear and Wilhelm, p. viii.



source: Department of Corrections "Embedded literacy and numeracy" n.p.





source: Earle "Survey of Adult Skills: Regional profiles"

13. At the Waitangi Tribunal hearing on Māori prisoner voting (WAI2870), academics from Auckland University and the University of Otago, Assoc. Prof. Ann Sullivan and Prof.

Janine Hayward, refered to Arend Lijphart's research on the socioeconomic bias of voting. They stated that it has been shown that "*People from the middle and upper classes are more likely to vote, so the better educated vote more than the less educated*," and reiterated an observation by V.O. Key that "***politicans and officials are under no compulsion to pay much heed to classes and groups of citizens that do not vote***" (at [35]).[12]

14. **Prisoner disenfranchisement can have longer and wider effects beyond the individual imprisoned and the length of their incarceration:** Sullivan and Hayward also refered to "*strong evidence from international literature that voting is a "habit'*" (at [24]) and that "*[n]on-voting is also a habit*" (at [25]). They cited research by Franklin (2004) and Vowles (2015) that "*if young people do not vote in their first eligible elections, that lack of an "electoral footprint" makes it less likely that they will vote in subsequent elections.* ***The habit of voting and not voting tends to be set during the first ten years that people are eligible to vote***" (at [25]).[13] 33% of sentenced prisoners are 29 years old or under, indicating that a significant group of sentenced prisoners will be in prison during the first decade they are eligible to vote and suggesting a likely high impact on their future voting patterns.[14]

15. Sullivan and Hayward also refered to the possibility of the effects of disenfranchisement being felt beyond the prisoners themselves. They cite research by McIntosh and Workman (2019) (at [49]) to support their conclusions that "***Māori prisoner disenfranchisement may spill over into whānau and communities who may also be less likely to vote if that right has been denied to others in their group****. Non-voting also has intergenerational effects on whānau, hapū and the wider community*" at ([59]).[15]

16. **Prisoner voting supports reintegration:** Voting keeps people connected to their community, something vital for successful prisoner reintegration. Professor Nicola Lacey, who gave evidence as a criminal justice academic to the UK's parliamentary Joint Committee on the Draft Voting Eligibility (Prisoners) Bill in 2013, has written that "*the denial of the franchise is a powerful symbol of the exclusion of offenders from full membership of society, and that the knock-on effects of* ***this sort of exclusion is one of the main barriers to the successful reintegration of ex-offenders*** *into society following release*."[16]

17. Participation in democracy supports people to be law-abiding and assists community reintegration, including interests in how political policies might affect themselves, but also others in the community, including their friends and family. An issue raised in the Waitangi Tribunal related to prisoners' desire to vote in order have a say about issues affecting their children and community. If we want prisoners to properly reintegrate into society we need to proactively involve them in it. Voting is one way to do this. Professor Gideon Yaffe, from the Yale Law School, has argued in an opinion piece in the *Washington Post*, that "***those who feel a sense of ownership in their government are***

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[12] WAI2870 A012: Amended Joint Brief of Evidence Ann Sullivan and Janine Hayward at [35] (emphasis added). The list of references Sullivan and Hayward rely on can be found in WAI2870 A012(a): Index of documents for Amended Brief of Evidence of Ann Sullivan and Janine Hayward.
[13] WAI2870 A012: Amended Joint Brief of Evidence Ann Sullivan and Janine Hayward at [24]-[25] (emphasis added). The list of references Sullivan and Hayward rely on can be found in WAI2870 A012(a): Index of documents for Amended Brief of Evidence of Ann Sullivan and Janine Hayward.
[14] Department of Corrections "Corrections Volumes: 2016-2017" p. 11. This is the most recent copy of the Volumes report on the Corrections website. The age groups reported are: under 20, 20-29, 30-39, 40-49, 50+.
[15] WAI2870 A012: Amended Joint Brief of Evidence Ann Sullivan and Janine Hayward at [49], [59] (emphasis added). The list of references Sullivan and Hayward rely on can be found in WAI2870 A012(a): Index of documents for Amended Brief of Evidence of Ann Sullivan and Janine Hayward.
[16] Lacey "Denying prisoners the vote creates a barrier to their reintegration into society" n.p. (emphasis added).

***less likely to commit crimes*.**"[17] Likewise, voting engages people with our law-making processes. Exercising democratic rights helps people support the law and contribute positively to society. As Yaffe has noted: "*We cannot hold citizens to account for violating our laws while denying them a say over those laws*."[18]

18. **Prisoner disenfranchisement is an unfair and additonal punishment:** Denying prisoners the vote is an additional punishment on top of that given by the courts, and is only denied to sentenced offenders detained in prison - not those on home detention or community-based sentences, for the same offence. For people refused parole because of housing poverty, or for technical reasons related to electronic bail, this is simply a punishment for being poor. Prison is a severe punishment, and the law justifies this on the grounds of public safety - denying a right to vote cannot be justified in this way. Incarceration - the denial of freedom - **is** the punishment of imprisonment. Removal of basic human rights, such as voting, is a further additional punishment and so is fundamentally unfair.

19. Additionally, **prisoner disenfranchisement is unfair** because:
    a) It is <u>an arbitrary punishment</u>:
        i. If a prisoner is imprisoned for less than 3 years, it is the timing of the sentence which determines whether or not they are disenfranchised because of the three year election cycle.
        ii. When people are sentenced, their time on remand (which may coincide with an election) will be counted as part of their sentence, but not subject to disenfranchisement. Remand prisoners include those accused waiting for trial and those who are convicted waiting for sentencing. If they are on remand during an election they are entitled to vote - because they are not a sentenced prisoner. This means that the timing and length of remand are factors that determine disenfranchisement.
        iii. Those people sentenced to home detention are not disenfranchised, while those having committed the same offence sentenced to imprisonment are disenfranchised.

    b) It is <u>a disproportionate punishment</u> because it is a blanket punishment applied regardless of severity of offence. This appears to be inconsistent with section 9 of the the Bill of Rights Act 1990 (BoRA) which states that "*Everyone has the right not to be subjected to ... disproportionately severe ... punishment*."

    c) It is <u>an extra-judicial punishment</u>. Disenfranchisement is not a sentence available to judges under the Sentencing Act 2002. The sentence of imprisonment does not include disenfranchisement because disenfranchisement is not a condition of imprisonment prescribed in the Corrections Act 2004.

20. This issue of unfairness, where people committing the same crime do have different access to voting, means that **recourse to social contract theory**,[19] which proposes that criminal offenders should forfeit civil rights, such as voting, **is invalid** because disenfranchisement is linked to only one of many punishments (imprisonment) not to all criminal offending.

21. **Disenfranchisement contributes to poor prison conditions:** Prison conditions in NZ are not good. Currently overcrowding in prisons is exacerbating diminished prison conditions, including high hours of lockup and inadequate access to healthcare. There are persistent and recurring failures documented by the Prison Inspector, the

[17] Yaffe "Give felons and prisoners the right to vote" n.p. (emphasis added).
[18] Yaffe "Give felons and prisoners the right to vote" n.p.
[19] In the Parliamentary debate on the Electoral (Disqualification of Prisoners) Amendment Bill 2010, reference was made to Social Contract Theory, specifically that committing crime breaches the social contract between citizens and the state, and thus justifying removing offenders' right to vote.

Ombudsman and the United Nations in our prisons. It is within a context of systematic and prolonged failure of the prison system that we believe that the disenfranchisement of prisoners needs to be understood. We suggest that **disenfranchisement is one of a number of mechanisms which sustain the persistence of substandard prison conditions**.

22. **Disenfranchised communities are not politically influential**. As mentioned above in [13] Sullivan and Hayward identified research supporting this. There is a structural dependency in a democracy between power and its responsiveness to voters' interests and values. This is not an issue of malice, but rather one of pragmatics and the setting of political priorities. Section 80(1)(d) of the Electoral Act 1993 prohibits political representation for prisoners. It intends that people who are disenfranchised do not have political power.

23. The significance of having a political voice on penal policy in New Zealand is clear from the report of the Chief Science Advisor who attributed growth in the prison population to politically-effective constituencies. He observed in March 2018 that:

> "*The evidence is that prison growth has been driven largely by "tough on crime" policies, from successive administrations on both sides of the political spectrum, encouraged by vocal, professional lobbyists. This is known as "penal populism" - where politicians offer vote-winning, simplistic solutions for selected law-and-order problems - ... where reactive policy choices that are not particularly evidence-based have resulted in disproportionate incarceration and cost, with no evidence of concomitant increase in public sense of safety or realisation of decreasing crime. In reality, crime rates are falling but these are not related to prison policy.*
>
> *Ministry calculations have shown that if no policy changes had been made since 2000, the estimated prisoner population would now be around 8,800, whereas the current prisoner population is around 10,600*."[20]

24. The above suggests that **lack of political representation is likely to mean that prisoners are less able to effectively influence the conditions which they are sentenced to live in**. This is likely exacerbated by prisons operating beyond public view, further reducing the effectiveness of prisoners' voices. The hidden nature of prisons is why the United Nations' Committee Against Torture (CAT) established the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) (adopted 18 December 2002). OPCAT established a system of international and national monitoring of places of detention. The UN Subcommittee for the Prevention of Torture (SPT) is the international monitor of OPCAT. In New Zealand the Ombudsman is the National Preventive Mechanism (NPM) charged with monitoring prisons. The NZ Human Rights Commission is the Central NPM with national oversight of the process. This is legislated for in the Crimes of Torture Act 1961. The Ombudsman's role is to independently inspect, make recommendations and report on prisons.

25. Despite this system of monitoring, **recommendations to address prison conditions often go unheeded**. We submit that a context, where recommendations from independent monitors are not always attended to, and where prison conditions are hidden from public view, exacerbates the impacts of disenfranchisement because these factors further marginalise prisoners and undermine their ability to effect change. **Appendix D** to these submissions provide excerpts from inspection reports resulting from OPCAT monitoring. These excerpts are narrowly focussed on access to healthcare and lock-up hours.

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[20] Office of the Prime Minister's Chief Science Advisor "Using evidence to build a better justice system" at [17]-[18].

26. Thank you for providing this opportunity for us to make a submission on these matters. If it is of assistance to the committee we would be happy to also make an oral submission

Nāku iti noa, nā

Christine McCarthy
President
Wellington Howard League for Penal Reform

APPENDICES

REFERENCES

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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 65/2017
[2018] NZSC 104

BETWEEN	ATTORNEY-GENERAL Appellant
AND	ARTHUR WILLIAM TAYLOR First Respondent
	HINEMANU NGARONOA, SANDRA WILDE, KIRSTY OLIVIA FENSOM AND CLAIRE THRUPP Second to Fifth Respondents

Hearing:	6 and 7 March 2018
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	U R Jagose QC, D J Perkins and G M Taylor for the Appellant First Respondent in person R K Francois for the Second to Fifth Respondents A S Butler, C J Curran and J S Hancock for the Human Rights Commission as Intervener
Judgment:	9 November 2018

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The cross-appeal is allowed. Mr Taylor accordingly has standing.**

C **Costs are reserved.**

Background

[6] Before discussing the approach taken in the Courts below, it is useful to say a little about the history of disenfranchisement of prisoners in New Zealand.[6] We essentially adopt the description of this aspect in the judgment of Heath J.[7]

Prisoner voting

[7] The first point of reference is the New Zealand Constitution Act 1852 (Imp) (the 1852 Act).[8] Under that Act, the franchise was restricted to males over 21 years of age who owned property.[9] Relevantly, for present purposes, s 8 of the 1852 Act provided that prisoners incarcerated for "any treason, felony, or infamous offence, within any part of Her Majesty's dominions" were prohibited from voting. The Qualification of Electors Act 1879 extended the prohibition for a period of 12 months after the prisoner's sentence was completed.[10]

[8] The scope of the prohibition changed under the Electoral Act 1905.[11] Section 29(1) of that Act removed the extension of the period of post-conviction disqualification but the class of offences to which the prohibition applied was widened. Prisoners sentenced to death or to a sentence of one or more years of imprisonment, amongst others, were added to the class of disenfranchised prisoners.

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6 Jaqueline Hodgson and Kent Roach "Disenfranchisement as Punishment: European Court of Human Rights, UK and Canadian Responses to Prisoner Voting" [2017] PL 450 at 450 note that "Whether or not prisoners should enjoy the right to vote is a controversial subject in many democracies".

7 *Taylor* (HC), above n 3, at [16]–[26].

8 At [18], citing New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72 [the 1852 Act]. Of the provisions in the United Kingdom dealing with prisoner disenfranchisement, the European Court of Human Rights noted they "reflected earlier rules of law relating to the forfeiture of certain rights by a convicted 'felon' (the so-called 'civic death' of the times of King Edward III)": *Hirst v United Kingdom* (No 2) (2006) 42 EHRR 41 (Grand Chamber, ECHR) at [22] and see [53]. See also Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165 at 166–167; and Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443 at 445–447.

9 The 1852 Act, s 7. The franchise was extended to Māori men by s 6 of the Maori Representation Act 1867.

10 Section 2(4). At that point, the franchise was extended to all adult men, including those without property: ss 2(1) and 2(2).

11 By this time the franchise had extended to women via the Electoral Act 1893.

[9] The Electoral Act 1956 imposed a complete ban on voting on those detained in a penal institution as a result of a conviction.[12]

[10] The position changed for a brief period with the Electoral Amendment Act 1975.[13] Section 18(2) of that Act removed the disenfranchisement of prisoners completely. That position remained only until 1977 when the prohibition on serving prisoners voting was re-introduced.[14]

[11] The situation altered again with the enactment of the 1993 Act. As originally enacted, s 80(1)(d) disqualified serving prisoners detained under a sentence of life imprisonment, preventive detention, or a term of imprisonment of three years or more.[15] The 2010 Amendment extended the prohibition to all prisoners. Under the current regime, only remand prisoners retain the right to vote. The Attorney-General, in his report to the House of Representatives under s 7 of the Bill of Rights, said that "the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 of the Bill of Rights Act and … it cannot be justified under s 5 of that Act".[16]

[12] Against this background the respondents, all serving prisoners, brought an action in the High Court seeking a declaration of inconsistency.

The approach in the Courts below

[13] In the High Court, after a review of the authorities, Heath J said the "general principle" was that "where there has been a breach of the Bill of Rights there is a need for a Court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right".[17] There was no reason for a different position in

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12 Section 42(1)(b). Remand prisoners retained the right to vote.

13 The Electoral Amendment Act 1969 lowered the voting age to 20: s 2. The age was lowered again, to 18: Electoral Amendment Act 1974, s 2.

14 Electoral Amendment Act 1977, s 5.

15 The Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, December 1986) at [9.21] and recommendation 42, recommended the prisoner voting prohibition be limited to prisoners serving sentences of three years or more; and see Letter from J J McGrath (Solicitor-General) to W A Moore (Secretary for Justice) entitled "Rights of Prisoners to Vote: Bill of Rights" (17 November 1992) which also favoured a three-year threshold.

16 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 [16].

17 *Taylor* (HC), above n 3, at [61].

OFFICIAL

IN THE WAITANGI TRIBUNAL **WAI 2870**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act (WAI 2472)

AND

IN THE MATTER of the Prisoners' Voting Rights Claim (WAI 2482)

AND

IN THE MATTER of the Māori Prisoners' Voting Rights Inquiry (WAI 2870)

OPENING LEGAL SUBMISSIONS ON BEHALF OF THE HUMAN RIGHTS COMMISSION

6 May 2019

Human Rights Commission
Jaimee Paenga
Legal Officer
Phone +64 4 474 2713
PO Box 6751
Wellesley Street
AUCKLAND 1141
Email: jaimeep@hrc.co.nz

Counsel instructed
WHĀIALEGAL
Maia Wikaira
+64 27 646 7797
maia@whaialegal.co.nz
PO Box 38 902
LOWER HUTT 5045
www.whaialegal.co.nz

CONTENTS

INTRODUCTION

1. The Human Rights Commission (the **Commission**) derives its statutory mandate from the Human Rights Act 1993 (**HRA**); an Act "to provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights."[1]

2. Pursuant to section 5 of the HRA, the Commission's functions include promoting a better understanding of "the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law."[2]

3. The Commission's participation in this Inquiry is for the purpose of providing assistance to the Tribunal on the issues before it, having regard to the Commission's statutory functions and its substantial experience as New Zealand's national human rights institution.

4. To that end, the Commission's opening legal submissions are provided from its perspective as an advocate for human rights in a Tiriti context.

EXECUTIVE SUMMARY

5. Pursuant to its section 5 function, the Commission promotes Te Tiriti as New Zealand's own unique statement of human rights. Te Tiriti includes both universal human rights and the collective rights of Māori as tangata whenua.

6. There are a range of international human rights instruments that New Zealand has adopted, or endorsed, that reinforce the rights arising from Te Tiriti in the context of prisoner disenfranchisement.

7. Imprisonment, and consequently disenfranchisement, is unequal and Māori are imprisoned at higher rates than non-Māori.

8. Aotearoa's international human rights obligations reflect and codify the human rights affirmed by Te Tiriti, and provide interpretive guidance as to the full content of these rights.

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1 HRA, long title.

2 HRA, s 5(2)(d): This function has some synergy with the Tribunal's exclusive authority to determine the meaning and effect of Te Tiriti (Treaty of Waitangi Act 1975, s 5(2)) as distinct to the Tribunal's broader jurisdiction engaging Tiriti principles.

Applying relevant international human rights instruments to the interpretation and application of Tiriti principles, prisoner disenfranchisement is not consistent with the principles of Te Tiriti o Waitangi.

9. The Commission seeks the following findings and recommendations:

   (a) affirming the relevance of international and domestic human rights to the Crown's obligations under Te Tiriti;

   (b) applying the relevant international human rights instruments to the interpretation and application of Tiriti principles;

   (c) a finding that *any* prisoner disenfranchisement is inconsistent with the principles of Te Tiriti o Waitangi;

   (d) a recommendation that the Crown repeal section 80(1)(d) of the Electoral Act 1993 and reinstate voting for all prisoners;

   (e) a recommendation that the Crown work with Māori to design and implement a Māori-specific strategy to encourage and promote enrolment and voting among prisoners, former prisoners, and wider Māori communities.

PART 1: THE HUMAN RIGHTS DIMENSIONS OF TE TIRITI

10. At their core, human rights focus on individual and collective human dignity and equality. Pursuant to its international human rights obligations, the Crown is required to protect human dignity by safeguarding human rights and fundamental freedoms.[3]

11. Te Tiriti is New Zealand's founding constitutional document, our own unique statement of human rights, including both universal human rights and the collective rights of Māori as tangata whenua.

[3] New Zealand Bill of Rights Act 1990 (**BORA**), long title, the dual prongs of which confirm that BORA is the domestic manifestation of its international commitments under the International Convention on Civil and Political Rights.

Human rights and Te Tiriti principles

12. In the context of the Tribunal's jurisdiction involving Tiriti principles, the Commission submits that Aotearoa's international human rights obligations reflect and codify the human rights arising from Te Tiriti, and provide interpretive guidance as to the full content of these rights, including how they are reflected in the interpretation and application of Tiriti principles.[4]

13. Some of the human rights that most directly complement Tiriti principles can be found in the following international human rights instruments:

Right to self-determination *(Tino rangatiratanga)*	• United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) - Arts 3, 4, 5, 33, 34, 35. • International Covenant on Civil and Political Rights (**ICCPR**) - Art 1 • International Covenant on Economic, Social and Cultural Rights (**ICESCR**) - Art 1
Right to be free from discrimination *(Equity and Equality)*	• UNDRIP - Arts 2, 5, 18, 20, 39. • ICCPR - Art 26 • ICESCR - Art 2 • Convention on the Elimination of All Forms of Racial Discrimination (**CERD**)
Good governance *(Kāwanatanga)*	• UNDRIP – Arts 19, 38, 39, 46 • ICCPR – Art 2
Free prior and informed consent *(Partnership)*	• UNDRIP – Arts 18 & 19
Culture and property rights *(Tāonga)*	• UNDRIP – Arts 11 & 31 • ICCPR - Art 27 • ICESCR - Art 3
Civil and political rights *(Citizenship)*	• UNDRIP – Art 33 • ICCPR – Art 25

[4] In the New Zealand court context, decisions have repeatedly recognised the importance of international human rights obligations to assist the courts' development and interpretation of New Zealand law: *Takamore v Clarke* [2012] NZSC 116 at [12] and [35]; *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, at [91] to [92]; *Paki (No 2)* [2014] NZSC 118, at [158] and [164].

14. The Tribunal's mandate to consider Aotearoa's human rights obligations while carrying out its statutory functions, traces back to the introduction of the Treaty of Waitangi Act 1975 to the House. Then Minister of Māori Affairs, the Honourable Matiu Rata, stated:[5]

> While the Treaty can be regarded as the possession by the whole of our nation of an instrument of mutuality that has endured for the past 134 years, to the Māori people it is a charter that should protect their rights.

15. While Treaty principles rightly remain the bedrock of inquiry for the Tribunal, the Tribunal has drawn on domestic and international human rights norms, where relevant, to inform its past reports.

16. In Wai 1071, in considering the Crown's policy on the foreshore and seabed, the Tribunal tested the policy against "international human rights norms,"[6] viewing the policy as contravening BORA and the international human rights affirmed in that Act.[7] Further, in the Wai 1200 He Maunga Rongo Report the Tribunal remarked:[8]

> In some cases the Crown's Treaty obligations will be about protecting the customary rangatiratanga or autonomy and self-government of iwi and hapu over their property and taonga, consistent with the article 2 guarantee; and in other cases it will be about protecting Central North Island Maori in their individual property rights, **basic human rights, and fundamental freedoms**. The Treaty envisaged that Maori should be free to pursue either – or indeed both – options in appropriate circumstances.
>
> [Emphasis added]

17. The most frequent adoption of an international human rights instrument to inform the Tribunal's consideration of claims has been in respect of UNDRIP, which is particularly relevant to Te Tiriti. UNDRIP not only affirms and elaborates on fundamental human rights as they apply to Indigenous

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5 Hansard, Volume 395, 5725 – 5726.
6 Wai 1071: Report on the Crown's Foreshore and Seabed Policy, at page xiii and 81.
7 Wai 1071, Report on the Crown's Foreshore and Seabed Policy, at 4.3.3(4) on page 114.
8 Wai 1200 He Maunga Rongo Report, p 1247.

peoples, but also affirms Indigenous peoples' rights to observance and enforcement of their treaties with States.

18. The Tribunal has previously stated of UNDRIP:

    (a) It is "perhaps the most important international instrument ever for Māori people" and that it carries "moral and political force."[9]

    (b) "It is consistent with the Treaty of Waitangi Act 1975, the Commissions of Inquiry Act 1908 and the rules of natural justice for the Tribunal to adopt a hearing process that gives due recognition to the relevant articles of the UNDRIP whilst performing its functions in accordance with the law of New Zealand."[10]

    (c) UNDRIP is a tool that can be taken into account in assessing the Crown's actions against the principles of Te Tiriti.[11] It is "relevant to the manner in which the principles of the Treaty should be observed by Crown officials. This is particularly the case where the UNDRIP articles provide specific guidance as to how the Crown should be interacting with Māori or recognising their interests."[12]

19. In the Commission's submission, past Tribunal findings lay the foundation for an interpretive approach that recognises all international human rights instruments (not just UNDRIP) as tools that can be taken into account in assessing the Crown's actions against the principles of Te Tiriti by:[13]

    (a) interpreting Crown obligations in respect of Tiriti principles in accordance with the Crown's human rights obligations;

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9 Wai 262, Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, at page 233.

10 Wai 2200, #2.5.18, at page 13.

11 Wai 2417 Whāia te Mana Motuhake Report, at page 38.

12 Wai 2417 Whāia te Mana Motuhake Report, at page 39. In determining where the Treaty and UNDRIP interacted, the Tribunal set out the articles of UNDRIP that were relevant to the Treaty principles before it and expressed its opinion as to whether or not the Crown had acted consistently with those articles.

13 Wai 2417 Whāia te Mana Motuhake Report, at page 38.

(b) interpreting human rights in accordance with Te Tiriti; and

(c) where a breach is found, drawing on international human rights obligations in the recommendation of appropriate redress.

PART 2: VOTING AND PRISONER DISENFRANCHISEMENT

20. At the heart of this Inquiry are the issues of voting rights and prisoner disenfranchisement. To assist the Tribunal, this part provides a human rights analysis of both international and domestic case law and legislative developments with respect to these issues.

21. This part focuses on:

(a) the importance of the right to vote;

(b) international human rights instruments relevant to the right;

(c) international common law jurisprudence regarding prisoner disenfranchisement;

(d) the purpose of the New Zealand prison system; and

(e) prisoner disenfranchisement law in New Zealand.

The importance of the right to vote

22. Political participation is the basis of a functioning democracy and vital to the enjoyment of all human rights. The right to vote in elections, without discrimination, is of fundamental constitutional importance and is a manifestation of the principle of equality that underpins democratic governance.[14] It has always been recognised within New Zealand as "fundamental to a democracy".[15]

23. More recently, the New Zealand High Court in *Taylor v Attorney-General*[16] has held that "the right to vote is arguably

[14] The Court of Appeal recognised that the rights in the BORA are of constitutional significance in *Attorney-General v Van Essen* [2015] NZCA 22 at [89]. See also *R v Harrison* [2016] NZCA 381 at [111]. The right to vote is of particular constitutional importance.

[15] J McGrath "Opinion on consistency between NZ Bill of Rights Act and restrictions on prisoners' voting rights" (17 November 1992) at [13].

[16] [2015] NZHC 1706.

the most important civic right in a free and democratic society."[17]

24. Many overseas jurisdictions share a similar philosophy on the significance of the right to vote:

(a) the Canadian Supreme Court identified the right to vote as the "very embodiment of democracy";[18]

(b) the Supreme Court of the United States has stated that "no right is more precious in a free country";[19]

(c) the High Court of Australia considers it a "fundamental political right";[20]

(d) the Constitutional Court of South Africa has affirmed that the right "lies at the very heart of our democracy;"[21]

(e) the Grand Chamber of the European Court of Human Rights referred to the right to vote as "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law",[22] and

(f) the UN Human Rights Committee has stated that article 25 of the ICCPR, which protects the right to vote (among other things), "lies at the core of democratic government based on the consent of the people".[23]

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[17] *Taylor v Attorney General* [2015] NZHC 1706 at [2]: This comment was left undisturbed in subsequent appeal decisions of the Court of Appeal and the Supreme Court.

[18] *Harvey v Attorney-General* [1996] 2 SCR 876 at 901.

[19] *Wesberry v Sanders* 276 US 1 (1964) at 17.

[20] *Roach v Electoral Commissioner* [2007] HCA 43, at [12].

[21] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* CCT 03/04, 25 February 2004 (SACC) at [110] per Madala J; the right is also one which must be "zealously guarded" (at [142] per Ngcobo J); and is "fundamental to democracy" in New National Party of South Africa v Government of the RSA and Others 1999 (3) SA 191 (CC) at [11].

[22] *Hirst v United Kingdom* (No 2) [2005] ECHR 681 (Grand Chamber), at [58].

[23] General Comment no 25 CCPR/C/21Rev1/Add 7 (1996), at [1].

International human rights instruments: the right to vote

25. The right to vote is recognised in Article 21 of the Universal Declaration of Human Rights (**Universal Declaration**):[24]

> (1) Everyone has the right to take part in the government of his country, directly or through chosen representatives.
> …
>
> (2) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by ***universal and equal suffrage*** and shall be held by secret vote or by equivalent free voting procedures.
>
> [Emphasis added]

26. The right of every citizen to vote is also protected by Article 25 of the ICCPR:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote … at genuine public elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

27. Other international human rights instruments emphasise the universality of the right to vote and the State's obligation to ensure that the right is enjoyed equally. CERD identifies the right to vote as part of equal and universal suffrage.[25] The Convention on the Elimination of all Forms of Discrimination against Women requires States Parties to ensure women have the right to vote on equal terms with men.[26]

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[24] Refer also, UNDRIP, Article 1.
[25] CERD, Article 5.
[26] CEDAW, Article 7.

28. New Zealand has ratified these international human rights instruments, committing itself to protecting domestically the rights they contain.[27]

29. There is some commentary from international human rights bodies on whether there are any circumstances in which it is acceptable for States to deprive citizens of the right to vote. A 1996 General Comment of the UN Human Rights Committee contemplates that there may be some circumstances where a temporary suspension of the right to vote might be a consequence of conviction for some offences:[28]

> … States 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 such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

30. In 2016 the United Nations General Assembly requested that the United Nations Office of the High Commissioner develop guidelines to improve implementation of the right to vote.[29] In 2018, the United Nations High Commissioner presented to the General Assembly the "Draft guidelines for States on the effective implementation of the right to participate in public affairs".[30] The draft guidelines stated that there should be no blanket ban on voting by people serving prison sentences:[31]

> States should not impose automatic blanket bans on the right to vote for persons serving or having completed a custodial sentence, which do not

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[27] New Zealand ratified the ICCPR in 1978, CERD in 1972 and CEDAW in 1985.

[28] Paragraph 14 of UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

[29] Human Rights Council, Resolution adopted by the Human Rights Council, 33rd Session, A/HRC/RES/32/22 (2016).

[30] Human Rights Council Report of the Office of the United Nations High Commissioner for Human Rights: Draft guidelines for States on the effective implmentation of the right to participate in public affairs, A/HRC/39/28 (UN Draft Guidelines).

[31] UN Draft Guidelines, at [42].

> take into account the nature and gravity of the criminal offence or the length of the sentence.

31. It should be noted that the guidelines provided "minimum essential conditions for the effective exercise of the right to participate in public affairs"[32] and the recommendations should "contribute to addressing the obstacles some individual groups … facing discrimination or marginalisation may encounter in the exercise of their right to vote".[33]

32. These draft guidelines, and the 1996 General Comment make clear that a blanket ban on prisoner voting is inconsistent with minimum international human rights standards.

33. However, international human rights standards do not closely examine or reach clear consensus on what narrower restriction (if any) on voting by prisoners could be consistent with the fundamental nature of the right to vote.

34. The Commission submits that any disenfranchisement of prisoners is unjustifiable; the reasons for which are discussed later in these submissions in relation to question 11 of the Statement of Issues.

35. Disenfranchisement is inconsistent with the human rights obligations the Crown must meet under the principle of kāwanatanga. This inconsistency is exacerbated in New Zealand where imprisonment, and consequently disenfranchisement, is unequal and Māori are imprisoned at higher rates than non-Māori.

International common law jurisprudence on prisoner disenfranchisement

36. A number of significant decisions in comparable jurisdictions have addressed the question of whether legislation can legitimately deny prisoners the right to vote and, if so, in what circumstances.

Canada

37. In 1992 in Canada, the Supreme Court in *Sauvé (No.1)*[34] unanimously struck down a federal legislative provision that placed a blanket ban on voting by convicted persons serving

[32] UN Draft Guidelines, at [18].
[33] UN Draft Guidelines ,at [29].
[34] *Sauvé (No.1)* [1993] 2 SCR 438.

sentences of imprisonment. The provision was struck down on the grounds that it infringed the Canadian Charter.

38. In response, the government introduced amendments that limited the ban to prisoners serving sentences of two or more years. This, in turn, was challenged and the Supreme Court again held that this could not be justified in *Sauvé (No.2)*.[35] The Chief Justice summarised that no sufficient reason had been explained for limiting the right:[36]

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

39. The majority Judges in *(Sauvé No.2)* considered that the reasons given by the government did not justify the infringement of this very fundamental democratic right. In particular, the proposed measure:

(a) did not promote "civic responsibility or respect for the law" but was more likely to undermine those values by excluding prisoners from participating in the democratic system;[37]

(b) there was no credible reason for denying a fundamental democratic right in the interests of additional punishment;[38]

(c) the punishment itself was arbitrary as it bore no relationship to the circumstances of individual offenders;[39] and

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[35] Although this time by a majority: *Sauvé (No. 2)* [2002] 3 SCR 519.
[36] *Sauvé (No. 2)* at [1].
[37] *Sauvé (No. 2)* at [40].
[38] *Sauvé (No. 2)* at page 522.
[39] *Sauvé (No. 2)* at pages 522 and 523.

(d) disfranchisement could not be said to serve a valid purpose as there was no evidence that it had a deterrent effect.[40]

40. The effect of this judgment is that the section of the Canada Elections Act 2000 that disqualifies prisoners from voting is of no effect, despite it still existing in the current legislation.[41]

South Africa

41. In 2004 in South Africa, the Constitutional Court found that legislation which disenfranchised prisoners serving sentences of imprisonment without the option of a fine, infringed the right to vote in Art.19(3)(a) of the Constitution.

42. In *Minister of Home Affairs v National Institution for Crime Prevention and the Re-Integration of Offenders and others*[42] the government justified its position largely on fiscal and logistical grounds, but these were not accepted by the majority, particularly because voting was being arranged in prison for prisoners awaiting trial and for people imprisoned for not paying fines. The Court was concerned that it had inadequate information to justify limitation of the right to vote.[43]

43. The Court made orders:[44]

(a) declaring the relevant sections of the Electoral Act inconsistent with the Constitution and invalid;

(b) ordering the Electoral Commission and the Minister of Correctional Services to ensure prisoners who were entitled to vote were afforded reasonable opportunity to register and vote in the forthcoming elections, the following month;

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[40] *Sauvé (No. 2)* at [49].
[41] The section at issue before the court was s 51(e) of the Canada Elections Act. Prior to the finding in this case, that section was repealed, but a provision which was substantially the same (s 4(c)) was included in the new Act.
[42] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* CCT 03/04, 3 March 2004 (SACC).
[43] At [67].
[44] At [80].

(c) ordering the Electoral Commission to prepare and administer a supplementary electoral roll by visiting prisons and registering prisoners;

(d) ordering the Electoral Commission to provide an affidavit to all relevant parties setting out the manner in which it would comply with the above orders; and

(e) ordering the Minister of Home Affairs to pay the costs of the application.

44. Orders (b)-(d) above were particularly relevant because registrations for voting in the upcoming election had already closed. However, the Court felt it just and equitable to not only declare the sections unconstitutional, but also provide an effective remedy, being to vote in the forthcoming election. [45]

United Kingdom

45. Also in 2004, in the United Kingdom, a blanket ban on sentenced prisoners voting was questioned in a case taken to the European Court of Human Rights.

46. In the seminal decision of *Hirst v United Kingdom (No. 2)*,[46] the court agreed that while the right to vote was subject to exceptions that were imposed in pursuit of a legitimate aim, the UK legislation violated Article 3 of the First Protocol to the European Convention of Human Rights.

47. The UK government had argued that the purpose of the legislation was twofold – to prevent crime by punishing to conduct of offenders, and to enhance civic responsibility and respect for the rule of law.[47]

48. A majority of the European Court dismissed this argument, holding of the blanket ban that:

(a) The right to vote is not a privilege. "In the twenty-first century, the presumption in a democratic State must be in favour of inclusion."[48]

(b) "Such a general, automatic and indiscriminate restriction on a vitally important Convention right

[45] At [76] – [79].
[46] *Hirst v United Kingdom* (No. 2) [2005] ECHR 681 (Grand Chamber).
[47] *Hirst* at [74].
[48] *Hirst* at [59].

must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be."[49]

49. In a joint concurring opinion, Judges Tulkens and Zagrebelsky went further, stating:[50]

> There are no practical grounds for denying prisoners the right to vote (remand prisoners do vote) and prisoners in general continue to enjoy the fundamental rights guaranteed by the Convention, except for the right to liberty. As to the right to vote, there is no room in the Convention for the old idea of "civic death" that lies behind the ban on convicted prisoners' voting.

50. The UK's failure to remedy the breach for more than 12 years became an ongoing issue in the context of the UK–Europe political relationship, with numerous additional challenges of the ban taken to the European Court.[51] By 2018, the UK had removed the blanket ban and returned the right to vote to some imprisoned persons.

Australia

51. In 2007, the Australian High Court addressed the issue of legislation that disqualified anyone from voting in a federal election anyone who was in prison when an election writ was issued; a blanket ban. In *Roach v Electoral Commissioner & Anor*,[52] the plaintiff challenged the ban on the grounds that constraints deriving from the text and structure of the Constitution rendered the blanket ban invalid.

52. By a 4-2 majority the Court upheld the challenge; the majority accepting that the blanket ban lacked the necessary nexus between the criterion leading to disqualification, and conduct that made it reasonable to exclude a person from participating in the electoral process.[53] The effect of the decision was to approve and reinstate the situation that

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[49] *Hirst* at [82].
[50] *Hirst* at page 26.
[51] European Court of Human Rights 'Prisoners' right to vote' Fact Sheet, April 2019: https://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf.
[52] Roach v Electoral Commissioner [2007] HCA 43.
[53] At [22]-[25] and [95].

existed before the change; that an individual serving a sentence of three or more years is unable to vote.[54]

Conclusion

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

54. The decisions also show serious reservations about the rational connection between the stated goals of prisoner disenfranchisement and the effects of the limitation of the important democratic right.

55. In the Commission's submission, the reasoning of the Canadian Supreme Court should be preferred as it thoroughly interrogates the rational connection between prisoner disenfranchisement and the aims pursued, and in the context of limited disenfranchisement of people in prison rather than a blanket ban. Prisoner disenfranchisement undermines civic responsibility; there is no credible reason for denying a fundamental democratic right in the interests of additional punishment; the punishment itself is arbitrary; and disfranchisement cannot be said to serve a valid purpose when there is no evidence that it has a deterrent effect.

Purpose of the New Zealand prison system

56. The Commission submits that prisoner disenfranchisement is incompatible with the rehabilitative purpose of New Zealand's prison system set out in the Corrections Act 2004 (**Corrections Act**) and international instruments.

57. Under Article 10(3) of the ICCPR, the essential aim of the prison system is the reformation and social rehabilitation of those detained within it. This aim is reflected in the purpose

[54] At [98] – [102].

of the corrections system set out in s 5(1) of the Corrections Act:[55]

> (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—
>
> …
>
> (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the **United Nations Standard Minimum Rules for the Treatment of Prisoners**; and
>
> (c) assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions; …
>
> [Emphasis Added]

58. The United Nations Standard Minimum Rules for the Treatment of Prisoners, identified above in s 5(1)(b), have as their guiding principles, rehabilitation and reintegration back to society.[56]

59. Removing the vote from prisoners is widely considered to serve no rehabilitative purpose.[57] Instead, the wholesale disenfranchisement of prisoners, at best, fails to recognise the reintegrative potential of the vote, and at worst, further

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[55] For completeness, section 5(1)(a) refers to ensuring that community based sentences are administered in a "safe, secure, humane and effective manner" and 5(1)(d) refers to providing information to the courts and New Zealand Parole Board to assist in decision-making.

[56] Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 57 – 61.

[57] Nora V. Demleitner "Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative" (2000) 84 Minn. L. Rev. 753, at 789; Greg Robins "The Rights of Prisoners to Vote: a Review of Prisoner Disenfranchisement in New Zealand" (2006) 4 NZJPIL 165, at 185; Sauvé, above n 18, at [38] and [49], as per McLachlin CJ; Alex Mackenzie "Lock Them Up and Throw Away the Vote: Civil Death Sentences in New Zealand" (2013) 19 Auckland U L Rev 197 at 203 – 204, at 212, citing the New Zealand Human Rights Commission, United Nations' International Human Rights Committee and the New Zealand Council for Civil Liberties.

alienates prisoners from society. Both outcomes are in direct contrast with the rehabilitative purpose of New Zealand's prison system under the Corrections Act, and its international obligations.

60. Of the denial of the right to vote in the context of rehabilitative law and policy, the Supreme Court of Canada in *Sauvé* has remarked:

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

61. Allowing prisoners to vote enables them to engage with law and order in a constructive, rather than a destructive, manner. It facilitates prisoners' re-entry to society, as they are more likely to identify with a society they have had a stake in creating. This analysis is consistent with a prison system that has as its objective social rehabilitation.

62. The Commission submits that it is inappropriate to impose disenfranchisement, in conflict with one of the corrections system's primary purposes of rehabilitation and reintegration to society. The effect also has the potential to do the very opposite of reintegration, by further isolating former prisoners from society.

Prisoner disenfranchisement in New Zealand

History of prisoner voting and disenfranchisement

63. Over the years, New Zealand legislation has taken varied approaches to prisoner voting, and reflected a range of philosophical views about voting and imprisonment. Some of these approaches are summarised below:[58]

    (a) New Zealand Constitution Act 1852 (Imp) prohibited prisoners incarcerated for "any treason, felony, or infamous offence, within any part of Her Majesty' dominions" from voting.

[58] See *Attorney General v Taylor* [2018] NZSC 104 at [7].

(b) Qualification of Electors Act 1879 extended the period of prohibition for 12 months after a prisoner's sentence was completed.

(c) Electoral Act 1905 widened the class of offence to which the prohibition applied and prohibited those sentenced to death or one or more years of imprisonment.[59]

(d) Electoral Act 1956 imposed a blanket ban on voting for those detained in a penal institution following a conviction.

(e) Electoral Amendment Act 1975 removed prisoner disenfranchisement until 1977 when the blanket ban on prisoner voting was re-introduced.

(f) 1981 Penal Policy Review Committee Report observed that "a prisoner retains the ordinary rights of a citizen, insofar as they are consistent with his loss of liberty and the requirements necessary for his proper containment and management in the institution."[60] The ban on prisoner voting appeared a remnant of an era when prisoners were believed to have no rights at all. By contrast, modern human rights demanded imprisonment impinge upon the rights of prisoners as little as possible. A majority of the Committee recommended that all prisoners should be eligible to vote.[61]

(g) 1986 Royal Commission established to report on the Electoral System noted that contemporary penal theory did not support the idea that imprisonment entailed a general suspension of citizenship rights.[62] However, proponents of prisoner disenfranchisement at the time promoted voting as a privilege rather than a right; and the loss of the vote a consequence associated with temporary loss of membership of the community associated with imprisonment.[63] The Royal Commission noted the arbitrariness of prisoner

[59] The post-conviction disqualification was also removed.
[60] Wai 2870, #A20(a), Exhibit E, page 101 at [9.18].
[61] Wai 2870, #A20(a), Exhibit E, page 101 at [9.18].
[62] Wai 2870, #A20(a), Exhibit E, page 101 at paragraph 9.18.
[63] Wai 2870, #A20(a), Exhibit E, page 101 at paragraph 9.17.

disenfranchisement, but nonetheless recommended disenfranchisement of prisoners serving sentences of three or more years, stating, "long-term prisoners can be viewed in the same way as citizens absent overseas".[64]

(h) 1989 Prison Review Te Ara Hou: The New Way Ministerial Committee of Inquiry into the Prisons System recommended enfranchisement of prisoners, and "…saw it as illogical to disenfranchise only convicted persons in prison when there was a range of other sentences available for dealing with offenders which would not lead to disenfranchisement, and furthermore was out of keeping with modern concepts of human rights".[65]

(i) Electoral Act 1993 disqualified serving prisoners detained under a sentence of life imprisonment, preventive detention, or a term of imprisonment of three years or more;

(j) Electoral Amendment Act 2010 re-introduced a blanket voting ban on prisoners.

Current law's clear inconsistency with BORA

64. There is no doubt that the current blanket ban on voting by sentenced prisoners under s 80(1)(d) of the Electoral Act 1993 is unjustifiably inconsistent with BORA.

65. This was the conclusion reached by the Attorney-General in 2010 when vetting the Bill for consistency with the BORA after its introduction to Parliament as a Member's Bill.[66]

66. In the leading *Taylor* line of cases on New Zealand prisoner voting, culminating in the Supreme Court in *AG v Taylor,*[67]

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[64] Wai 2870, #A20(a), Exhibit E, page 102 at paragraph 9.21.

[65] Electoral (Disqualification of Convicted Prisoners) Amendment Bill Initial Briefing for the Law and Order Committee, 26 June 2010: https://www.parliament.nz/resource/0000129281.

[66] Wai 2870, #A20(a), Exhibit B, page 86. Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill (2010) , paragraph 16.

[67] *Attorney-General v Arthur William Taylor and Others* (SC 65/2017) [2018] NZSC 104. Note also that the High Court considered a previous ban in place in 1993, and found the ban inconsistent with the section 12

there was no claim that the blanket ban was justifiable or consistent with the BORA.[68] The Courts in the *Taylor* cases largely accepted the reasoning of the Attorney-General's section 7 BORA report of unjustifiable inconsistency with the BORA.

67. In assessing the consistency of the blanket ban with the BORA, the Attorney-General had considered both:

    (a) that the blanket ban was inconsistent with the right to vote; and

    (b) that the blanket ban was *not* a reasonable limitation on that right, justifiable in a free and democratic society.[69]

68. In coming to the conclusion that the blanket ban was *not* justified, the Attorney-General had to consider "whether the [blanket ban] serves an important and significant objective, and whether there is a rational and proportionate connection between the provision and the objective."[70]

69. The Attorney-General described the objective of the Bill as "temporarily disenfranchising serious offenders as a part of their punishment",[71] and took the view that the objective of the Bill was not rationally linked to the blanket ban on prisoner voting".[72] The Attorney-General's report emphasised that the blanket ban covered people imprisoned for relatively short periods of time and for relatively minor offences (including fine defaulting).

70. There being no argument that the current law is justifiable, New Zealand courts have not been asked to determine whether *any* disenfranchisement of prisoners might be justifiable under the BORA; a matter that is relevant to

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BORA right to vote. The Court didn't consider whether the ban was justifiable under s5 of the BORA. *Re Bennett* (1993) 2 HRNZ 358 (HC).

68 The main issue was the ability of the New Zealand courts to issue declarations of inconsistency when legislation unjustifiably breaches the BORA. See for example at paragraph 73 in the Supreme Court judgment.

69 The assessment to be made under BORA, s5.

70 Wai 2870, #A20(a), at paragraph 10. This is a summary of the test set out in *Hansen v R* [2007] NZSC 7 and related cases.

71 Wai 2870, #A20(a), at paragraph 11. The Attorney General gave no opinion on whether that was a significant and important objective

72 Wai 2870, #A20(a), at paragraph 12.

Question 11 of the Statement of Issues, and which the Commission addresses in Part 3.

PART 3 – RESPONSE TO THE STATEMENT OF ISSUES

71. In this section, the Commission provides responses to Statement of Issues questions 1, 2, 4, 7.1 and 11.

72. Consistent with the Commission's participation in this Inquiry, responses to the Statement of Issues are provided from its perspective as an advocate for human rights in a Tiriti context.

Questions 1 and 2:

- **What Tiriti principles apply to the disqualification of Māori prisoners from registering as electors under section 80(1)(d) of the Electoral Act 1993?**
- **What Crown obligations arise from the principles articulated under question (1) and what do those obligations entail?**

73. In the Commission's submission, the Tiriti principles that apply to section 80(1)(d) are: kāwanatanga; tino rangatiratanga; partnership and good faith; active protection; and equity and equality. The following section identifies the Crown's international and domestic human rights obligations arising from the principles.

74. As an overarching position, the Commission submits that, from a human rights perspective, the fundamental obligation of the Crown is to promote and protect human rights and freedoms in Aotearoa. Enacting laws and measures to respect these rights and freedoms is the Crown's responsibility.

<u>Kāwanatanga</u>

75. Kāwanatanga, the Crown's right and responsibility to exercise good government, requires that the Crown comply with human rights obligations.[73]

76. This aligns with Article 2 of the ICCPR and Article 46 of UNDRIP, which call on States to respect human rights and

[73] Wai 2417 *Whāia te Mana Motuhak*e at 2.4.2(2), page 25: "It is a given that as part of the right to govern, it is the Crown's responsibility to comply with its own laws. This is an essential element of good government."

fundamental freedoms, and to only limit rights where non-discriminatory and strictly necessary. Domestically, this principle is found in sections 2 and 5 of BORA.

77. As a result, the Commission submits that the Crown's obligations are:

(a) In carrying out its kāwanatanga functions, the Crown must comply with its own domestic and international human rights obligations, including the purpose of the prison system under the Corrections Act and BORA.

(b) With respect to the Corrections Act, one of the purposes of the prison system is to appropriately assist with rehabilitation and reintegration of offenders.

(c) With respect to BORA, the Crown must ensure that human rights are only limited so far as can be demonstrably justified in a free and democratic society.[74]

(d) In accordance with its international and domestic obligations, the Crown must provide effective and appropriate remedies for breaches.[75]

Tino rangatiratanga

78. The Tribunal has interpreted tino rangatiratanga as absolute authority, including the freedom to be distinct peoples; rights to territory; the right to determine own destinies; and rights to autonomy and self-governance.[76] This aligns with the right to self-determination under the UNDRIP, ICCPR and ICESCR.[77]

79. The fullness of the right to self-determination at international law, and reflected in Treaty principles, has not yet been reflected in domestic legislation. Section 20 of BORA reflects

[74] BORA, section 5.
[75] Article 40 of UNDRIP; Article 2 of ICCPR; *Taylor v Attorney General* [2015] NZHC 1706, at [61]; *Taylor v Attorney General* [2018] NZSC 104 at [29] to [65].
[76] Wai 2417 *Whaia te Mana Motuhak*e at 2.4.2(2).
[77] UNDRIP Articles 3, 4, 5, 33, 34, 35; ICCPR Article 1; and ICESCR Article 1.

current domestic legislative commitments in a human rights context:

> **Rights of minorities**
> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

80. However, in the context of electoral processes, the Wai 413 Māori Electoral Option Report identified that the exercise of tino rangatiratanga entitled Māori to "qualified autonomy" consistent with Article 3 of Te Tiriti.[78] In so finding, the Tribunal remarked that the Māori seats have come to be regarded by many Māori as the principal expression of their constitutional position in New Zealand; as a limited exercise of their tino rangatiratanga.[79] While the reference is to the Māori Electoral Option, such an option is premised on the right of Māori to vote.

81. The Commission submits that this context demonstrates that the qualification on autonomy, or tino rangatiratanga, identified by the Tribunal goes beyond international and domestic standards of demonstrably justified limitation.[80] This is apparent from the Tribunal's articulation of the Crown's obligations in the Wai 413 Māori Electoral Option Report, which are supported by the Commission:[81]

    (a) the Crown is under a Treaty obligation to actively protect existing Māori rights to political representation conferred under the Electoral Act 1993;

    (b) the duty of protection arises from Te Tiriti generally and in particular from the provisions of Article 3;

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[78] Wai 413 *Māori Electoral Option* at [2.1].
[79] Wai 413 *Māori Electoral Option* at [3.1].
[80] The Tribunal does find that "The Crown in carrying out its obligations is not required, in protecting Maori citizenship rights to political representation, to go beyond taking such action as is reasonable in the prevailing circumstances." Wai 413 *Māori Electoral Option* at [3.8]. The Commission submits that this paragraph is coloured by the Tribunal's findings recorded at paragraph 80 of these submissions.
[81] Wai 413 *Māori Electoral Option* at [3.8].

(c) the partnership relationship the Treaty envisages should be founded on reasonableness, mutual co-operation and trust.

82. In this context, the Commission submits that the Crown's obligation, consistent with international human rights standards and norms, is not to encroach on tino rangatiranga beyond that which is strictly necessary.

Partnership and good faith

83. In describing the principle of partnership, the Tribunal has said:[82]

> At a fundamental level, the Treaty signifies a partnership between the Crown and the Māori people, and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other, and that in turn requires consultation.

84. This aligns with UNDRIP relating to the right of Māori to participate (Article 18); and be consulted and cooperated with in good faith, for the purpose of obtaining Māori free, prior and informed consent (Article 19); when adopting measures, or engaging in projects, affecting Māori.

85. The Commission submits that the Crown's partnership obligations are:

(a) to support its Treaty partner to effectively participate in kāwanatanga, including through the mechanism of voting;

(b) to undertake electoral reform in partnership with Māori.

Active Protection

86. The Tribunal has found that the principle of active protection requires the Crown to act honourably and ensure fair

[82] Wai 2417 *Whaia te Mana Motuhak*e at 2.4.3(2).

processes when dealing with Māori interests guaranteed under Article 2 of Te Tiriti, holding:[83]

> It follows that an omission in failing to provide that protection is as much a breach of the Treaty as a positive act that removes those rights.

87. The Tribunal has previously identified Articles 18 and 19 of UNDRIP as key to active protection.[84] The Commission also points to UNDRIP Article 8 as an example of one of numerous articles in UNDRIP that impose obligations on the Crown to take specific steps to provide effective mechanisms for the prevention of, and redress for, actions that undermine or destroy Māori rights. The Commission submits that these duties under UNDRIP, together with the Crown's obligations under BORA and ICCPR to promote and protect human rights, illustrate the human rights dimensions of the active protection principle.

88. Consistent with Wai 413 and Wai 2540 findings, the Commission submits that:

(a) the Crown has a Treaty responsibility to reduce inequities between Māori and non-Māori reoffending rates in order to protect Māori interests;[85] and

(b) the current inequity between Māori and non-Māori reoffending rates heightens the Crown's obligation actively to protect Māori interests.[86]

Equity and equality

89. The Commission endorses past findings of the Tribunal in respect of Crown obligations regarding equity and equality:[87]

(a) the principle of equity and equality emerges from Article 3 and Crown obligations of good governance;

(b) this principle requires not just the fair treatment of all groups without discrimination, but also requires the Crown to address disparities;

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[83] Wai 2417 *Whaia te Mana Motuhak*e at 2.4.4(2).
[84] Wai 2417 *Whaia te Mana Motuhak*e at 2.5.5(4), on page 43.
[85] Wai 2540 *Tū Mai Te Rangi* at x and 4.3.
[86] Wai 2540 *Tū Mai Te Rangi* at 5.1.2.
[87] Wai 2417 *Whaia te Mana Motuhak*e at 2.4.5(2), page 31.

(c) equity and equality do not mean treating all individuals or groups the same, particularly where they have different interests.

90. The right to be free from discrimination is recognised in multiple international instruments.[88]

(a) The right to vote in Article 25 of the ICCPR must be available without discriminatory restrictions.

(b) CERD obliges States to amend, rescind or nullify any laws that have the effect of creating or perpetuating racial discrimination, or of strengthening racial division.[89]

(c) UNDRIP recognises that indigenous people are free and equal to other peoples, but may have suffered historic injustices that have prevented them from exercising their rights fully.[90]

91. International and domestic human rights instruments also recognise that not all groups are equal and that measures taken to secure an equal place with other groups are sometimes necessary.[91]

Question 4 - Does the Crown have an obligation under the Treaty to ensure the right of Māori to vote is substantively equal to that of non-Māori?

92. The Commission submits that the Crown has an obligation under Te Tiriti to ensure that the right of Māori to vote is substantively equal to that of non-Māori, consistent with the obligations identified at paragraphs [89] to [91] above.

93. Further, in the Wai 2540 Tū Mai Te Rangi Report the Tribunal found that the Crown obligation under active protection can include remedial action against indirect cases of disparity between Maori and non-Maori, and called for affirmative action to reduce structural or historical disadvantage.[92]

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88 Article 2 of the Declaration, Article 26 of the ICCPR, Article 2 of the ICESCR and Article 2 of CERD.
89 CERD Article 2.
90 Preamble to UNDRIP.
91 CERD, Article 4, and Human Rights Act 1993, s 73.
92 Wai 2540 *Tū Mai Te Rangi* at 4.1.2.

94. The Tū Mai Te Rangi report clearly established that:

(a) The Crown's duty of active protection requires positive intervention by the Crown to address disparities.[93] This includes looking to equity of outcomes as much as equity of access.

(b) Where Māori have been disadvantaged, the principle of equity requires that active measures be taken to restore balance.

95. Section 80(1)(d) appears, on its face of it, to treat all prisoners equally. However, the disproportionate impact of prisoner disenfranchisement on Māori prisoners is made clear in the evidence of Robert Lynn. Mr Lynn states that following the implementation of s 80(1)(d):[94]

> Māori were 9.3 times more likely to be removed from that electoral roll than non-Māori in 2011, compared with a ratio of 2.1 in 2010. By 2018, Māori were 11.4 times more likely to have been removed from the electoral roll than non-Māori.

96. Section 80(1)(d) impedes the ability of Māori to vote on a substantively equal basis to that of non-Maori:

(a) On an individual basis the provision restricts participation of prisoners in the systems of accountability that underpin New Zealand's democratic processes.

(b) Collectively, the burden of disenfranchisement that falls on Māori is such that the provision can be considered a fetter on the ability of Māori to participate in the electoral process on a substantively equal basis with non-Māori.

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[93] Wai 2540 *Tū Mai Te Rangi* at 4.1.3, page 27, citing Wai 2417 *Whaia te Mana Motuhake*, at page 31.

[94] Wai 2840, #A22, *Affidavit of Robert Donald Lynn* at [12].

Question 7.1 - How, if at all, are rates of Māori imprisonment relevant to the nature and extent of the Crown's Treaty obligations in the particular context of s80(1)(d)?

97. Over-representation of Māori in the prison system is a matter that has repeatedly caught the attention of Human Rights bodies:

(a) In 2010, the UN Human Rights Committee raised concerns with the disproportionately high incarceration rate of Māori, and the possibility of discrimination in the administration of justice.[95]

(b) In 2016, the UN Human Rights Committee recommended that the Government eliminate direct and indirect discrimination against Māori and Pasifika in the administration of justice.[96]

(c) In 2017, the UN Committee on the Elimination of Racial Discrimination expressed concern that Maori remain overrepresented in rates of arrest, prosecution, conviction, imprisonment and re-imprisonment and as victims. They made recommendations including partnership approaches.[97]

(d) In 2018, the Subcommittee on the Elimination of Discrimination Against Women observed the disproportionate incarceration of Māori women and recommended that Aotearoa implement the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders and provide alternatives to detention to reduce the high number of Māori women detainees.[98]

(e) Māori over-representation in the criminal justice system was also raised in the 2019 Universal Periodic Review, where the Minister of Justice recognised the issues with our justice system including high levels of

[95] CCPR/C/NZL/CO/5, 5 April 2010, at [11].
[96] CCPR/C/NZL/CO/6, 27 April 2016, at [23]-[26].
[97] CERD/C/NZL/CO/21-22, 22 September 2017, at [24]-[25].
[98] CEDAW/C/NZL/CO/8, 25 July 2018, at [44].

incarceration, and the "need to work constructively with Māori to find solutions."[99]

98. In Wai 2540 Tū Mai te Rangi, the Tribunal confirmed that the Crown has a Treaty responsibility to reduce Māori reoffending in order to address current inequities between Māori and non-Māori,[100] and that the extent of the disparity necessitates a more thorough exercise of partnership in doing so.[101]

99. The relevance to the Crown's Treaty obligations in respect of s 80(1)(d) is two-fold:

(a) first, the disproportionate impact of prisoner disenfranchisement is inconsistent with the Crown's obligations of equity and equality;

(b) second, the Treaty principles of tino rangatiratanga, partnership and active protection place an active burden on the Crown to positively intervene to address the disparities.

Question 11 - Having regard to any Tribunal findings on the Crown's Treaty obligations in this context, what would the Crown need to take into account if it were considering a different approach to the disqualification of sentenced prisoners from registering as electors?

100. In the Commission's view, relevant past Tribunal findings in this context are:

Wai 413 - Māori Electoral Option Report

(a) the Crown is under a Treaty obligation actively to protect existing Māori rights to political representation conferred under the Electoral Act 1993;

(b) the duty of protection arises from Te Tiriti generally and in particular from the provisions of Article 3;

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[99] Andrew Little, *Speech to the United Nations Human Rights Council for the third Universal Periodic Review* (21 January 2019) https://www.beehive.govt.nz/speech/andrew-little-speech-united-nations-human-rights-council-third-universal-periodic-review.

[100] Wai 2450 *Tū Mai te Rangi* at [5.1.1].

[101] Wai 2450 *Tū Mai te Rangi* at [5.1.3].

(c) the partnership relationship the Treaty envisages should be founded on reasonableness, mutual co-operation and trust.

Wai 2450 - Tū Mai te Rangi Report

(d) the current inequity between Māori and non-Māori heightens the Crown's obligation actively to protect Māori interests.

101. At present the blanket ban removes a fundamental human right from anyone sentenced to a term of imprisonment. The Commission submits that it is a retrograde step that cannot be justified on moral grounds, having already been declared inconsistent with the BORA by the High Court in *Taylor*.

102. The Commission does not support a return to the 2010 Amendment position, as the disproportionate effect of the limitation on Māori, in the context of the rights established and affirmed in Tiriti principles, undermines tino rangatiratanga. Further, the principle of active protection makes any disenfranchisement of prisoners unjustifiable. It is also inconsistent with the kāwanatanga obligation to comply with human rights norms when governing.

103. From a human rights perspective, the Commission submits that:

(a) a sentence of imprisonment should not deprive a person of civil rights, beyond those inherent in the sentence, namely freedom of movement and association;

(b) there is no rational connection between limited prisoner disenfranchisement and the articulated goal;

(c) limited prisoner disenfranchisement is inconsistent with, and indeed undermines, the purpose of the prison system being rehabilitation and reintegration;

(d) there is no credible reason for denying a fundamental democratic right in the interests of additional punishment; and

(e) disfranchisement cannot be said to serve a valid purpose when there is no evidence that it has a deterrent effect.

FINDINGS AND RECOMMENDATIONS

104. The Commission seeks the following findings and recommendations:

(a) affirming the relevance of international and domestic human rights to the Crown's obligations under Te Tiriti;

(b) applying the relevant international human rights instruments to the interpretation and application of Tiriti principles;

(c) a finding that *any* prisoner disenfranchisement is inconsistent with the principles of Te Tiriti o Waitangi;

(d) a recommendation that the Crown repeal section 80(1)(d) of the Electoral Act 1993 and reinstate voting for all prisoners;

(e) a recommendation that the Crown work with Māori to design and implement a Māori-specific strategy to encourage and promote enrolment and voting among prisoners, former prisoners, and wider Māori communities.

Dated 6 May 2019

M Wikaira and J Paenga

Counsel for the Human Rights Commission

APPENDIX ONE

GLOSSARY OF ACRONYMS

BORA	New Zealand Bill of Rights Act
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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INDEX TO EXHIBITS

AFFIDAVIT OF ROBERT DONALD LYNN
DATED 22 MARCH 2019

Exhibit	Description	Pages
A	Removals from the electoral roll	1
B	Imprisonment and non-imprisonment sentences for imprisonable offences	3

Figure 1: Number of persons removed from Electoral roll following sentence of imprisonment, and numbers removed from rolls per 100,000 population aged 18 plus, by year and ethnic group: 2004-2018

Year (A)	Number of persons removed from Electoral roll following sentence of imprisonment			Number of persons removed from Electoral roll per 100,000 population aged 18 plus (Rate per 100,000)			Ratio Māori to Non-Māori (H)
	Māori (B)	Non-Māori (C)	Total (D)	Māori (E)	Non-Māori (F)	Total (G)	
2004	112	190	302	32	7	10	4.4
2005	146	114	260	40	4	9	9.6
2006	205	523	728	56	19	23	2.9
2007	204	897	1,101	55	32	35	1.7
2008	250	631	881	66	23	28	2.9
2009	240	668	908	62	24	28	2.6
2010	215	730	945	54	26	29	2.1
2011	2,253	1,727	3,980	559	60	121	9.3
2012	2,068	1,427	3,495	504	49	106	10.3
2013	1,858	1,367	3,225	446	47	96	9.6
2014	2,041	1,683	3,724	480	56	109	8.5
2015	2,272	1,676	3,948	524	55	113	9.6
2016	2,048	1,393	3,441	462	44	96	10.4
2017	1,827	1,143	2,970	404	35	81	11.4
2018	1,635	1,025	2,660	354	31	71	11.4

This is the exhibit marked "**A**" referred to in the annexed Affidavit of **Robert Donald Lynn** affirmed at Wellington this 22nd day of March 2019 before me:

Charis Dixson Charis Dixson

Deputy Registrar of the High Court of New Zealand

Figure 2: Number of persons removed from Electoral roll following sentence of imprisonment per 100,000 population aged 18 plus, by ethnic group: 2004-2018

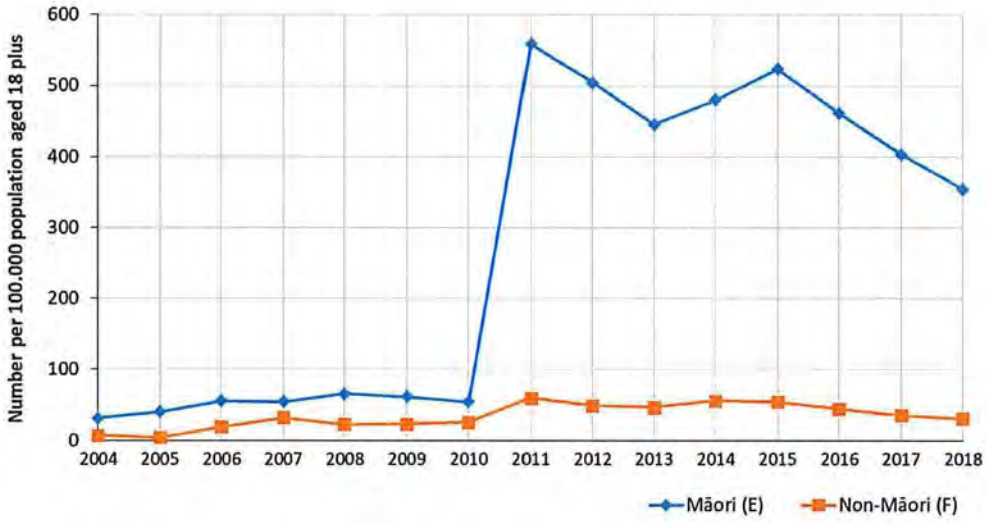


Table 1a: Number of people sentenced to imprisonment in a given year by Māori/Non-Māori for all imprisonable offences

Ethnicity	Sentence	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Māori	Imprisonment	4,274	4,171	4,654	4,530	4,384	4,226	3,988	4,009	4,147	4,751	4,872	4,164
	Not Imprisonment	20,455	24,052	25,363	24,916	24,006	22,883	21,474	19,930	18,819	19,235	19,466	19,132
	Total	24,729	28,223	30,017	29,446	28,390	27,109	25,462	23,939	22,966	23,986	24,338	23,296
Non-Māori	Imprisonment	3,848	3,491	3,852	3,926	3,541	3,362	3,208	3,212	3,176	3,477	3,473	2,985
	Not Imprisonment	31,653	38,037	42,573	41,407	38,785	36,327	32,638	28,977	26,062	26,004	25,694	24,523
	Total	35,501	41,528	46,425	45,333	42,326	39,689	35,846	32,189	29,238	29,481	29,167	27,508
Unknown	Imprisonment	504	199	257	266	244	178	176	178	168	208	174	137
	Not Imprisonment	8,256	6,238	4,295	4,096	3,683	3,578	3,521	3,635	3,409	3,519	3,909	4,062
	Total	8,760	6,437	4,552	4,362	3,927	3,756	3,697	3,813	3,577	3,727	4,083	4,199
Total	Imprisonment	8,626	7,861	8,763	8,722	8,169	7,766	7,372	7,399	7,491	8,436	8,519	7,286
	Not Imprisonment	60,364	68,327	72,231	70,419	66,474	62,788	57,633	52,542	48,290	48,758	49,069	47,717
	Total	68,990	76,188	80,994	79,141	74,643	70,554	65,005	59,941	55,781	57,194	57,588	55,003

This is the exhibit marked "**B**" referred to in the annexed Affidavit of **Robert Donald Lynn** affirmed at Wellington this 22nd day of March 2019 before me:

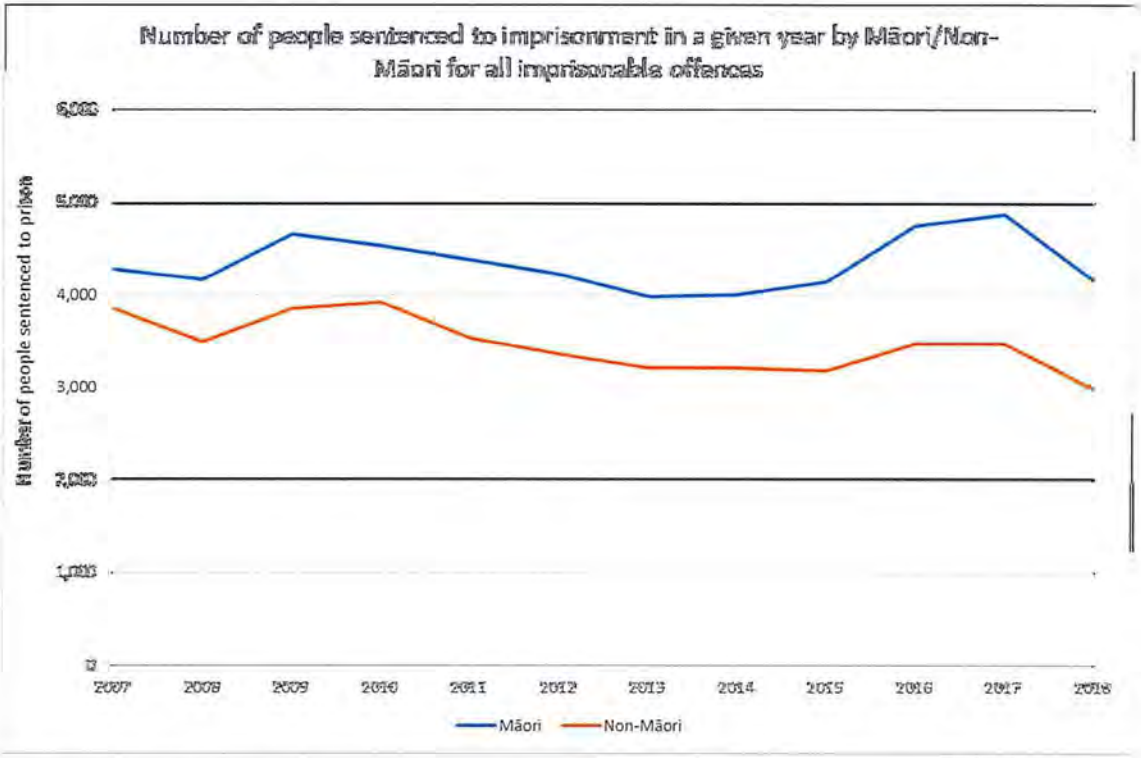
Charis Dixson Charis Dixson

Deputy Registrar of the High Court of New Zealand

Table 1b: Proportion of people sentenced to imprisonment in a given year by Māori/Non-Māori for all imprisonable offences

		2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Māori	**Imprisonment**	17%	15%	16%	15%	15%	16%	16%	17%	18%	20%	20%	18%
	Not Imprisonment	83%	85%	84%	85%	85%	84%	84%	83%	82%	80%	80%	82%
Non-Māori	**Imprisonment**	11%	8%	8%	9%	8%	8%	9%	10%	11%	12%	12%	11%
	Not Imprisonment	89%	92%	92%	91%	92%	92%	91%	90%	89%	88%	88%	89%

Figure 1



Key notes (applicable to all data in this Exhibit)
A person is counted for their most serious offence in a given year.
The Ministry of Justice does not collect ethnicity. Ethnicity is recorded by the charging agency which in the majority of cases is Police. Police record self-identified ethnicity where possible otherwise ethnicity is identified by the police officer.
Unknown ethnicity includes people where no ethnicity has been recorded either by Police or by another charging agency. It also includes organisations.
Non-imprisonment includes all people convicted who were not sentenced to imprisonment.
Only people 18 and over have been included in these figures

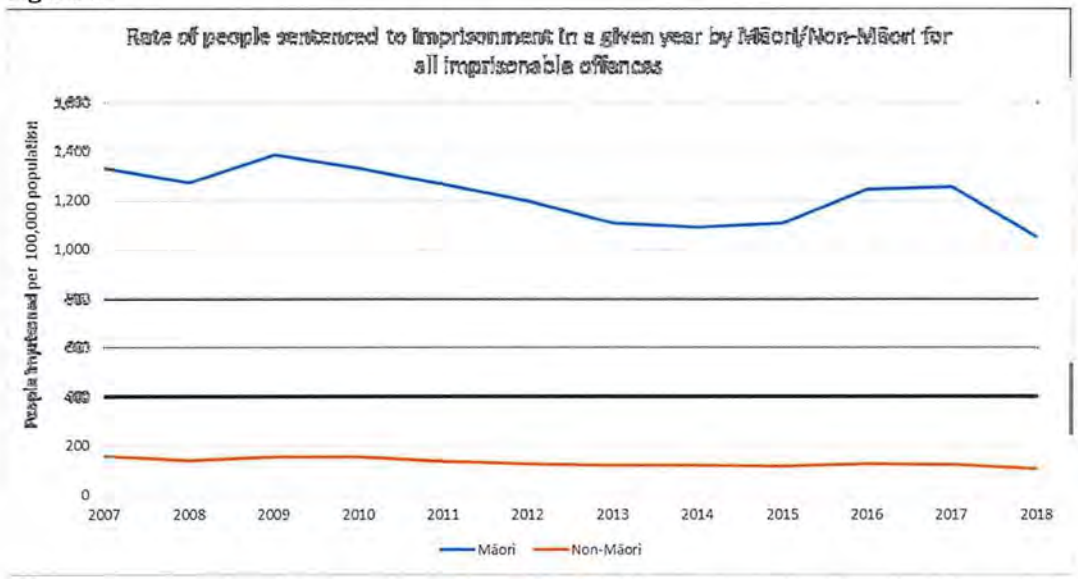
Table 1c: Rate per 100,000 people for people sentenced to imprisonment in a given year by Māori/Non-Māori for all imprisonable offences

		2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Māori	Imprisonment	1,330	1,272	1,388	1,330	1,264	1,195	1,105	1,091	1,109	1,246	1,254	1,051
	Not Imprisonment	6,366	7,337	7,562	7,316	6,922	6,472	5,953	5,422	5,030	5,045	5,011	4,829
Non-Māori	Imprisonment	156	140	154	154	136	126	119	117	115	125	123	104
	Not Imprisonment	1,279	1,530	1,702	1,622	1,484	1,366	1,211	1,059	943	932	910	858

Table 1d: Ratio between Māori and Non-Māori for people sentenced to imprisonment in a given year for all imprisonable offences

		2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Ratio of Māori to Non-Māori	Imprisonment	8.6	9.1	9.0	8.6	9.3	9.5	9.3	9.3	9.7	10.0	10.2	10.1
	Not Imprisonment	5.0	4.8	4.4	4.5	4.7	4.7	4.9	5.1	5.3	5.4	5.5	5.6

Figure 2



Appendix D
(i) Access to Health Care Services

1. This section of details specific concerns about NZ prisons, which have been raised at international and national level, regarding prisoner access to Health care services, specifically, observations and recommendations made by the UN Committee Against Torture (CAT), the UN Subcommittee for the Prevention of Torture (SPT), the HRC, and the NZ Ombudsman. The Annexure is confined to material that is publicly available from official reports.

2. For ease of reference, relevant excerpts from international and domestic law regarding prisoner access to health care services are as follows:

   a) The Corrections Act 2004 stipulates that "*A prisoner is entitled to receive medical treatment that is reasonably necessary*" (s75(1)) and that "*The standard of health care that is available to prisoners in a prison must be reasonably equivalent to the standard of health care available to the public*" (s75(2)). This is consistent with the SMR which states that "*Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status*" (Rule 24.1).

   b) The Corrections Regulations 2005 stipulate that "*The chief executive must ensure that ... the health needs of prisoners are promptly met, and that, as far as practicable, the physical and mental health of prisoners is maintained to a satisfactory standard*" (cl. 72(b)), and regarding dental care, that "*Any examination or treatment must be primarily concerned with the relief of pain, the maintenance of a reasonable standard of dental care relative to the dental and oral health of the prisoner concerned before the prisoner was admitted to the prison, or both*" (cl. 81(2)).

Delaying access to health care

3. A frequent concern raised relates to delays receiving treatment.

4. In 2015 the UN's Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) stated that it was "*concerned that not all detainees received timely and adequate treatment*."[1]

5. Many reports from Ombudsman's inspections of NZ prisons since the 2015 SPT report also indicate long waiting times for health services. The Ombudsman has cited waiting times for medical health services of 1-3 weeks at Christchurch Men's Prison (2017)[2] and at Whanganui Prison (2018),[3] 2-3 weeks at Hawke's Bay Regional Prison (HBRP) (2017),[4] 3-4 weeks at Auckland South Corrections Facility (ASCF) (2019).[5] No indication of waiting times was reported on in the Spring Hill Corrections Facility (SHCF) report (2017), but the Ombudsman noted that "*The main issues raised [in a February 2015 patient satisfaction survey included] ... waiting times to see the doctor and dentist.*"[6] At Whanganui (2018): "*When asked how easy it is to see the doctor, 21 percent of survey respondents [62 prisoners] said it was very easy or quite easy,while 69 percent [203 prisoners] said it was quite difficult or very difficult*."[7]

6. Reported waiting times for dental care by the Ombudsman are often a matter of months. At ASCF (2019), the Ombudsman reported a waitlist of over six months to see a dentist.[8] At

[1] UN SPT CAT/OP/NZL/1 (10 February 2017) at [58].
[2] Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 38.
[3] Ombudsman OPCAT report (2018) Whanganui Prison p. 32.
[4] Ombudsman OPCAT report (2017) HBRP p. 34.
[5] Ombudsman OPCAT report (2019) ASCF p. 31.
[6] Ombudsman OPCAT report (2017) SHCF p. 31.
[7] Ombudsman OPCAT report (2018) Whanganui Prison p. 32.
[8] Ombudsman OPCAT report (2019) ASCF p. 31.

HBRP (2017), he described dental waiting times as *"lengthy, with some prisoners having to wait months. The waiting list at the time of the visit was 114.*"[9] At Whanganui (2018) again the dental "waiting list was long (90 patients), and too many patients were waiting to receive non-urgent treatment."[10] A similar complaint was made regarding Christchurch Men's Prison (2017).[11] At Arohata (2018), he stated that: "*Women were generally critical of dental services, and 61 percent of questionnaire respondents [45 prisoners] said it was difficult to access the dentist. The average waiting time for urgent referrals (priority one) was three months*."[12]

Mental Health

7. Inadequate mental health services have been a long standing issue in New Zealand prisons. In 2009, at the fifth periodic report of NZ on our undertakings under the UN Convention Against Torture, CAT stated that it was "*concerned at the inadequate provision of mental health care and legal services to mentally ill inmates in prisons*."[13]

8. In April and May 2013 the UN's SPT visited New Zealand to inspect prisons. The resulting report expressed concern that: "*there did not appear to be any national strategy on the provision of mental health care in places of detention*."[14] The SPT also observed that: "*detainees who have made multiple suicide attempts and those with acute or chronic mental health conditions are not being transferred to appropriate psychiatric facilities and are being held in "at-risk units", often for prolonged periods of time and in conditions akin to that of a disciplinary regime. The Subcommittee believes that* ***the denial of qualified psychiatric assistance under such circumstances and in such conditions may amount to ill-treatment***."[15]

9. SPT recommended that:
   a) "*the State party provide, as a matter of urgency, adequate and appropriate access to professional care services in order to meet the mental health needs of detainees.*"[16]

   b) NZ establish a "*comprehensive national policy and strategy be developed to ensure appropriate access to health care and mental health-care services across the criminal justice system. A significant increase in the provision of mental health-care services is required to cope with the high number of detainees with mental health problems*."[17]

10. In 2016, in its most recent periodic review of NZ, the CAT reiterated similar concerns: "*Bearing in mind its previous concluding observations (see CAT/C/NZL/CO/5, para.9) and the report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its visit to the State party, the Committee is concerned ... at reports that, in a number of such places, the material conditions and health-care services, in particular mental health-care services, are inadequate*."[18] It recommended that NZ ensure that "*adequate mental health care is provided for all persons deprived of their liberty*."[19]

11. In the most recent publicly available annual OPCAT report (2016/17), the Ombudsman identified "*[u]naddressed, or insufficiently addressed, mental health needs among prisoners is a major issue of concern. The Ombudsman has had occasion to highlight the inadequacy of specialist treatment and support for acutely unwell prisoners. Similarly, a large proportion of*

[9] Ombudsman OPCAT report (2017) HBRP p. 35.
[10] Ombudsman OPCAT report (2018) Whanganui Prison p. 32.
[11] Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 39.
[12] Ombudsman OPCAT report (2018) Arohata p. 27.
[13] UN CAT CAT/C/NZL/CO/5 at [9].
[14] UN SPT CAT/OP/NZL/1 at [58].
[15] UN SPT CAT/OP/NZL/1 at [64] (emphasis added).
[16] UN SPT CAT/OP/NZL/1 at [65].
[17] UN SPT CAT/OP/NZL/1 at [59].
[18] UN CAT CAT/C/NZL/CO/6 at [13].
[19] UN CAT CAT/C/NZL/CO/6 at [13(b)].

prisoners who enter prisons with mild to moderate mental health needs often receive little or no therapeutic intervention. In a stressful custodial environment where violence and intimidation are common features, and where At Risk Units (ARU) can house highly vulnerable prisoners in settings that are inadequate for their needs, mild or moderate mental illness can be exacerbated during incarceration. ***There is an urgent need to implement a comprehensive prisons programme for the identification and treatment of mental illness at all levels of severity and acuteness***."[20]

12. The NZ Human Rights Commission reported to the UN's Committee Against Torture in 2017 that "*The high prevalence of mental health issues amongst people in detention, and their access to care and treatment in detention are* ***longstanding issues****. Sixty to seventy percent of people in prison have either a learning disability or mental illness*."[21]

(ii) High Lock up hours.

13. This section details specific concerns about New Zealand prisons, which have been raised at international and national level, regarding the use of high hours of lockup and the wider impact of this. The section is confined to material that is publicly available from official reports.

High Lockup Hours

14. The consequences of high lock up hours (or in cell time) can include:

    a) reduced access to activities and facilities, including: cultural activities, rehabilitation and other programmes, education, work oportunities, the library, and the gymnasium,
    b) reduced access to whānau, including reduced access to communally-located telephones
    c) an inadequate physical environment affected by:
        i. double bunking in cells designed for one person
        ii. insufficient ventilation and sunlight
        iii. hunger and pain, due to the timing of evening meal times and the timing of the distribution of medicine

15. For ease of reference, relevant excerpts from legislation and regulations regarding lockup hours are as follows:

16. The Corrections Act (CA) 2005 and Corrections Regulations (CR) 2004 have no explicit maximum restrictions on lock up, but adopt the minimum requirements regarding exercise as defining a maximum allowable lock up hours of 23 hours per day: "*Every prisoner (other than a prisoner who is engaged in outdoor work) may, on a daily basis, take at least 1 hour of physical exercise*" (s70(1)). This subsection is consistent with the SMR Rule 23 on minimum exercise requirements which states "*Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits*" (Rule 23.1).

17. While the SMR also does not state specific maximum lockup hours, it does define solitary confinement as "*the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days*" (Rule 44).

18. In 2013, the SPT inspected New Zealand prisons. Its report recommended that "*the authorities improve the detention regime, in particular regarding out-of-cell time.*"[22] This recommendation emerged from observations that "*the information provided by the prison management on the daily regime of detainees differed markedly from what most detainees*

[20] NZ Human Rights Commission *2016/2017 Monitoring Places of Detention* p. 20. (emphasis added).
[21] NZ Human Rights Commission, Submission of the New Zealand Human Rights Commission to the Committee against Torture's 60th session, at [27] (emphasis added).
[22] UN SPT CAT/OP/NZL/1 at [84].

described and what the Subcommittee saw for itself. ... detainees are usually still in their cells until 8.30 a.m. and locked up well before 4.30 p.m., meaning that in reality many detainees are in their cells for 18-19 hours per day and even longer at weekends. The Subcommittee is ***concerned at the possible harmful effects of*** *being held in such* ***a strict regime for many years****, especially those held at the maximum security facilities in Auckland. It was also concerned that the cells themselves were comparatively small (for example, a block at Hastings prison where the cells measured approximately 2.25 x 2.85 m^2). When combined with the* ***lack of access to an adequate range of activities****, such* ***prolonged periods of incarceration in comparatively small cells could potentially constitute ill-treatment***."[23]

19. During the same visit the SPT expressed particular concern that "*extended lock-downs are often used as a form of collective punishment for all those in a block or unit where there has been an incident, regardless of their involvement in the alleged offence*."[24]

20. The Ombudsman has more recently observed long hours of lockup in New Zealand prisons. In the Management Unit at Christchurch Men's Prison (2017) he observed that "*Prisoners spent little time out of their cells—between one and two hours a day.*"[25] Likewise, he recorded an average out of cell for prisoners in HBRP's HM units as "*between two and five hours per day*"[26] and stated that: "*Typically, prisoners in the HM units did not spend much of the day out of their cells and only limited time out of the wings.* ***There was limited provision of purposeful activity and prisoners were bored and frustrated****.*"[27] At SHCF (2017) he noted that, following increased lockup over Christmas, "*low-security units did not revert to their previous unlock hours ... after the holiday period. Unlock times were further eroded on the weekends, with some prisoners locked as early as 3pm and not unlocked until 8.30am the following day [17.5 hours]. All high-security units were locked by 4pm on the weekend*."[28] In Whanganui (2018) "*The Prison did not monitor its performance in providing time out of cell. Thirty-four percent of survey respondents [100 prisoners] indicated that they spent between two and four hours out of their cell daily, and only 7 percent reported spending six hours or more out of their cell. Thirteen percent [38 prisoners] stated that they spent less than two hours out of their cell each day*."[29]

21. The Ombudsman's ASCF report (2019) attributed "*exceptional periods of extended lock*" to staff shortages, and the Ombudsman expressed his concern that "*prisoners, particularly on HB 1,* ***did not have sufficient time out of their cells to promote mental wellbeing***."[30] His report also noted that "*At the time of the inspection, 15 prisoners had been on the* ***restricted regime for over six months***,"[31] and that "*Thirty percent of survey respondents [167 prisoners] indicated that they spent between two and four hours out of the cell daily*."[32] He also observed, in relation to restricted regime, that**:** "*Inspectors reviewed a selection of prisoner's files and found limited evidence to support placement on a restricted regime. Event-based security classification reviews were also missing.* ***I believe this is contrary to the principles of natural justice****.*"[33]

22. At SHCF (2017) "*Time out of cell was limited for high-security prisoners; more so for prisoners on voluntary segregation and remand, with thirty-nine percent of questionnaire respondents [219 prisoners] reporting they had fewer than four hours out of cell a day. This was compounded by having two prisoners in cells originally designed for one, and prisoners*

[23] UN SPT CAT/OP/NZL/1 at [82] (emphasis added).
[24] UN SPT CAT/OP/NZL/1 at [37].
[25] Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 15.
[26] Ombudsman OPCAT report (2017) HBRP p. 48.
[27] Ombudsman OPCAT report (2017) HBRP p. 48 (emphasis added).
[28] Ombudsman OPCAT report (2017) SHCF p. 21.
[29] Ombudsman OPCAT report (2018) Whanganui p. 45.
[30] Ombudsman OPCAT report (2019) ASCF p. 45 (emphasis added).
[31] Ombudsman OPCAT report (2019) ASCF p. 18 (emphasis added).
[32] Ombudsman OPCAT report (2019) ASCF p. 45.
[33] Ombudsman OPCAT report (2019) ASCF p. 17.

being required to eat all meals in their cell."[34] The Ombudman made a similar observation in his report of Christchurch Men's Prison. This report stated that "***A cell that is acceptable for one prisoner to spend eight hours a night in is not adequate for two prisoners to spend 20 or more hours a day***."[35]

Access to telephones

23. The SMR states that "*Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means*" (Rule 58.1).

24. The Corrections Act 2004 stipulates that prisoners are "*entitled to make at least 1 outgoing telephone call of up to 5 minutes' duration per week*." (CA s77(3)).

25. Most New Zealand prisons provide telephones in communal areas (ASCF is an exception in that most cells are provided with working telephones). Because of this lock up hours can adversely impact on access to telephones. For example, at Arohata (2018): "*Many women reported that **they could only call their children at weekends** as the unlock regime did not align with their children returning home from school. It was reported that there had been some 'friction' about using the phone at times of peak demand. It was suggested by senior staff that such difficulties could be addressed by providing more phones or extending unlock times to reflect the usual regime for low-security prisoners*."[36] A similar issue was identified at Whanganui (2018) where: "*There were some issues around access to telephones at times of peak demand. For high-security prisoners, and those low-security prisoners subject to an 8am to 5pm 'unlock', **there were no opportunities to contact family and friends after about 4pm***."[37]

Access to sunlight

26. In a particularly extreme instance, the SPT observes that "*At Mount Eden prison ... prisoners were very pale and were reportedly given vitamin D pills owing to their lack of exposure to daylight.*"[38] The SPT recommended that "*the authorities improve the detention regime, in particular regarding out-of-cell time. The State party should ensure the consistent application of rules on exercise and outdoor activities and allow adequate time for such activities for all prisoners. Furthermore, all accommodation provided for the use of prisoners, including at Mount Eden prison, should meet the requirements of natural light*."[39]

Insufficient ventilation and uncomfortable temperatures in cells

27. The SMR states that: "*All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation*" (Rule 13) and that "*General living conditions addressed in these rules, including those related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception*" (Rule 42).

28. The Corrections Regulations refer to "*Fresh or conditioned air*" as a mandatory item in cells (Sched 2, Pt A, Sched 3, Pt B, Sched 6, Pt A).

29. Long lockup hours can exacerbate insufficient cell ventilation causing extremely high internal temperatures. At HBRP (2017): "*One area of concern was excessive heat and a lack of ventilation in the cells, especially northfacing cells in summer. Prisoners were frustrated by*

[34] Ombudsman OPCAT Report (2017) SHCF p. 7.
[35] Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 31, ftnte 25 (emphasis added).
[36] Ombudsman OPCAT report (2018) Arohata p. 34 (emphasis added).
[37] Ombudsman OPCAT report (2018) Whanganui p. 39 (emphasis added).
[38] UN SPT CAT/OP/NZL/1 at [83].
[39] UN SPT CAT/OP/NZL/1 at [84].

*what they perceived to be **a lack of interest and action to address the issue** and voiced a degree of irritation that they were unable to purchase effective fans through the canteen (P119 system). It was reported that **cold water taps were often run for prolonged periods in an attempt to lower the temperature in the cells**, which occasionally resulted in flooding. The situation was expected to get worse over the Christmas and New Year period when the Prison operated a site-wide 8am to 5pm routine, meaning that low security prisoners would be locked up two hours earlier than normally*."[40]

30. Similar issues were observed at SHCF (2017), where: "*Inspectors took a sample of temperature readings during the day, which averaged 28 degrees Celsius. Vents were clearly not working and staff advised that this had been a problem for several months. ... Some prisoners described the heat in their cells as intolerable. The lack of ventilation is very concerning. This, combined with lengthy periods of lockup, (up to 22 hours a day) has the potential to increase prisoner unrest*."[41] At Whanganui (2018): "***Cell temperatures** in Te Moenga averaged **between 29 and 30 degrees Celsius at the time of the inspection. Staff and prisoners advised Inspectors that units had been far hotter in previous weeks**, and staff stated the temperatures in the prison over the past three months were the hottest they had known. The heat and ventilation problems had been raised with senior management, National Office, the unions, and recorded in the health and safety risk register. The ventilation system in the high-security units had been assessed by Spotless, who stated that the system was working as designed. It remained inadequate to the task.*"[42]

31. In the HBRP follow up inspection (2019) the Ombudsman noted that **no improvement to the ventilation in hut units had occurred, despite his 2017 recommendation**. This recommendation was rejected by Corrections. He wrote:

"*My Inspectors undertook cell temperature readings and were particularly concerned about high temperatures in the low security 'hut' units and the youth unit 'huts'. **Temperatures in cells ranged from 27 degrees Celsius to 30 degrees Celsius** [on 7 November 2018]. Several senior staff members as well as prisoners informed my Inspectors that **these temperatures were not reflective of how hot the cells could get in summer months**, particularly in the afternoons.*"[43]

One hour of fresh air

32. In his recent follow-up inspection of HBRP (2019), the Ombudsman observed that his recommendation that "*All prisoners are able to spend at least one hour each day in the fresh air*"[44] had not yet been achieved. In 2016 he had noted that "*my Inspectors identified 'clear evidence that when the At Risk Unit was full, **not all prisoners received their minimum entitlement to one hour exercise in the open air**'*."[45] During the 2018 follow up inspection, the Intervention Support Unit (ISU), previously known as the At Risk Unit, "*was operating at full capacity. My Inspectors could not be assured that all prisoners in the ISU had been offered their minimum entitlement to one hour exercise in the open air. The ISU did not have an established system for recording that prisoners had been offered daily access to fresh air.*"[46]

Hunger due to the timing of evening meal times

33. The SMR state that: "*Every prisoner shall be provided by the prison administration **at the usual hours** with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served*" (Rule 22.1, emphasis added) and that "*Drinking water shall be available to every prisoner whenever he or she needs it*" (Rule 22.2).

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[40] Ombudsman OPCAT report (2017) HBRP p. 19 (emphasis added).
[41] Ombudsman OPCAT report (2017) SHCF p. 21.
[42] Ombudsman OPCAT report (2018) Whanganui p. 26 (emphasis added).
[43] Ombudsman OPCAT report (2019) HBRP p. 9 (emphasis added).
[44] Ombudsman OPCAT report (2019) HBRP p. 10.
[45] Ombudsman OPCAT report (2019) HBRP p. 10 (emphasis added).
[46] Ombudsman OPCAT report (2019) HBRP p. 10.

34. The Corrections Act stipulates that: "*Every prisoner must be provided with a sufficient quantity of wholesome food and drink based on the food and nutritional guidelines for the time being issued by the Ministry of Health, and drinking water must be made available to every prisoner whenever he or she needs it.*" (s72(1)).

35. The early serving of dinner due to lockup hours is not unusual. For example, in 2013 the SPT observed in NZ prisons that: "*dinner was served around 3.30 p.m., leaving detainees without food until at least 8.30 a.m. the next day*."[47] The Subcommittee recommended that the "*times of meals be reviewed*."[48]

36. The Ombudsman has observed similar scheduling of the evening meal, with breakfast usually at 8.30am. At SHCF (2017) "*evening meals [were] being served as early as 3.15pm in some units. ... Notwithstanding the two slices of bread and margarine that are issued with the evening meal to serve as supper, **it was a long time [17.25 hours] between the evening meal and breakfast**.*"[49] At Arohata (2018) *"The evening meal, consisting of sandwiches, was distributed at 4pm*,"[50] and at Whanganui (2018) "*Evening meals ... were distributed to high-security prisoners by 4.00pm, and in some cases as early as 3.20pm (West 1). Breakfast was issued between 8.15am and 8.30am*."[51]

37. In the recent follow-up inspection of HBRP (2019), the Ombudsman observed that **his previous 2016 recommendation for the prison to standardise meals to normal hours had been rejected** by the Department of Corrections and was not achieved, stating that: "*Inspectors observed dinners being served to prisoners at 3.30pm in the high security units on each day of the inspection, and at 3.15pm to the prisoner serving three days cell confinement in the separates area. ... **I consider that the serving of evening meals at 3.30pm contravenes Rule 22 of the Nelson Mandela Rules**: Every prisoner shall be provided by the prison administration **at the usual hours** with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.*"[52]

Pain due to the timing of Medical rounds

38. In addition to experiences of hunger, prisoners on medicine can experience nocturnal pain due to the scheduling of medical rounds because, as reported in Christchurch Men's Prison (2017), "*Some night-time medications were given out as early as 3pm, which is unacceptable*."[53]

REFERENCES

[n.b. sometimes the urls to the UN documents redirect to their document database. On the search page "symbol" is the file document number (e.g. CAT/C/NZL/CO/6). These are highlighted in bold in UN references below].

Department of Corrections, Prison facts and statistics - March 2019 https://corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2019.html

New Zealand Human Rights Commission *2016/2017 Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT)* (1 July 2016 to 30 June 2017) https://www.hrc.co.nz/files/7915/3438/9045/201617_OPCAT_annual_report_-_final_1.pdf

[47] UN SPT CAT/OP/NZL/1 at [85].
[48] UN SPT CAT/OP/NZL/1 at [86].
[49] Ombudsman OPCAT Report (2017) SHCF p. 23 (emphasis added).
[50] Ombudsman OPCAT Report (2018) Arohata p. 23.
[51] Ombudsman OPCAT Report (2018) Whanganui p. 27.
[52] Ombudsman OPCAT Report (2019) HBRP p. 9, (emphasis added). The earlier HBRP report (2017) stated that: "*Meal times across the Prison did not reflect standard meal times. Inspectors observed breakfast being issued in HMA at 9.15am ...The evening meal was delivered to the units as early as 2.55pm and was issued and eaten on some units at 3.30pm. All meals in the HM units were eaten before prisoners were locked up by 4.25pm*." Ombudsman OPCAT Report (2017) HBRP p. 20.
[53] Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 40.

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