Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 261 of the Standing Orders of the House of Representatives

1. I have considered the Electoral (Disqualification of Convicted Prisoners) Amendment Bill for consistency with the New Zealand Bill of Rights Act 1990. I consider that the Bill appears to be unjustifiably inconsistent with the electoral rights affirmed by s 12 of the Bill of Rights Act.

The Bill

2. The apparent inconsistency with the Bill of Rights Act arises from cl 4 of the Bill, which amends the Electoral Act 1993 to disqualify from registration as an elector any person who, under detention pursuant to a conviction, is being detained in a prison. The effect would be a blanket disenfranchisement of convicted persons detained in prisons on election day.

3. The objective of the Bill appears to be that a person convicted for serious crimes against the community should forfeit the right to vote as part of their punishment.

Electoral rights

4. Section 12 of the Bill of Rights Act affirms that every New Zealand citizen who is over the age of 18 years has the right to vote and stand in genuine periodic elections of members of the House of Representatives.

5. The right to vote is not an absolute right. The Electoral Act disqualifies certain persons for registration as an elector. Electors must meet residency requirements. Electors must not be on the Corrupt Practices List or detained for a period exceeding three years in a hospital or secure facility in the context of a criminal process. The Act also disqualifies as an elector a person who is being detained in a prison under a sentence of imprisonment for life, preventive detention or for a term of three years or more.

6. Section 12 of the Bill of Rights Act affirms article 25 of the International Covenant on Civil and Political Rights. Article 25 recognises the right of citizens to vote in genuine periodic elections without unreasonable restrictions. The comments on article 25 provide that convicted persons may have their voting rights suspended on objective and reasonable grounds that are proportionate to the offence and the sentence.[1]

7. *Re Bennett* considered s 12 and prisoner voting.[2] The High Court found that there was a clear conflict between the blanket ban on prisoner voting in place at the time and the Bill of Rights Act. The Court did not, however, consider whether the ban was justified under s 5 of the Bill of Rights Act.

[1] Office of the High Commissioner for Human Rights *General Comment No. 25: The Right to Participate In Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)* (12 July 1996) CCPR/C/21/Rev.1/Add.7 at para 14.
[2] (1993) 2 HRNZ 358 (HC).

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8. Both the Supreme Court of Canada[3] and the European Court of Human Rights[4] have held that a blanket ban on prisoner voting is inconsistent with electoral rights.

9. I consider that a blanket ban on prisoner voting raises an apparent inconsistency with s 12 of the Bill of Rights Act.

Is the apparent inconsistency justified in a free and democratic society?

10. Where a provision is found to be apparently inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective, and whether there is a rational and proportionate connection between the provision and the objective.[5]

11. The Bill proposes a blanket voting ban on any convicted prisoner who is incarcerated on election day regardless of their offence. The explanatory note to the Bill appears to suggest that anyone sentenced to any period of imprisonment is a serious offender. The objective of the Bill appears to be that a person convicted for serious crimes against the community should forfeit the right to vote as part of their punishment. I will assume, without expressing an opinion, that temporarily disenfranchising serious offenders as a part of their punishment would be a significant and important objective.

12. The objective of the Bill is not rationally linked to the blanket ban on prisoner voting. It is questionable that every person serving a sentence of imprisonment is necessarily a serious offender. People who are not serious offenders will be disenfranchised. Fine defaulters may be sentenced to imprisonment as an alternative sentence. I doubt that this group of people can be characterised as serious offenders such that they should forfeit their right to vote.

13. Under the Bill, the Electoral Act would continue to disqualify electors being detained for a period exceeding three years in a hospital or secure facility in the context of a criminal process. An example of this is where a person has been found by a Court on conviction to be mentally impaired and is detained under an order made by the Court for a period exceeding three years. If the mentally impaired person was detained for less than three years, the Bill would not disqualify the person from registering as an elector. The Bill would therefore introduce irrational inconsistencies in the law where mentally impaired prisoners detained in a hospital or secure facility for less than three years could vote while all prisoners serving sentences less than three years in prisons would be disenfranchised.

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[3] *Sauvé v. Canada (Attorney General)* [1993] 2 SCR 438.
[4] *Hirst v the United Kingdom (No 2)* (6 October 2005) ECHR 74025/01.
[5] *Hansen v R* [2007] NZSC 7; *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 (CA), *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA); and the Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4th).

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14. The blanket ban on prisoner voting is both under and over inclusive. It is under inclusive because a prisoner convicted of a serious violent offence who serves a two and a half year sentence in prison between general elections will be able to vote. It is over inclusive because someone convicted and given a one-week sentence that coincided with a general election would be unable to vote. The provision does not impair the right to vote as minimally as reasonably possible as it disenfranchises in an irrational and irregular manner.[6]

15. The disenfranchising provisions of this Bill will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or to the conduct of the prisoners whose voting rights are taken away. The irrational effects of the Bill also cause it to be disproportionate to its objective.

16. I conclude that the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 of the Bill of Rights Act and that it cannot be justified under s 5 of that Act.

Hon Christopher Finlayson
Attorney-General

[6] *Belczowski v Canada* [1992] 90 DLR (4th) 330, 343-4.

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