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

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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.

<u>Canada</u>

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]

<u>Equity and equality</u>

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