

**IN THE WAITANGI TRIBUNAL**

Wai 2472

**CONCERNING**

the Treaty of Waitangi Act 1975

**AND**

the Electoral (Disqualification  
of Sentenced Prisoners)  
Amendment Act Claim

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**DECISION  
ON APPLICATION FOR AN URGENT HEARING**

17 Hui-tanguru 2017

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## Introduction

1. On 9 December 2016, Joel McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde and Marissa Mathews, on behalf of themselves and Māori generally, filed an application for urgent hearing of the Wai 2472 claim concerning prisoners' voting rights.
2. The applicants allege the disqualification of prisoners' voting rights disproportionately affects Māori because of the high proportion of Māori in the prison system and is unlawful discrimination. They also argue that the disqualification of prisoners is a breach of Articles 2 and 3 of the Treaty, because it amounts to a breach of the fundamental citizenship right to political representation, which is a key expression of tino rangatiratanga and also a taonga which must be protected.
3. The applicants argue that the claim should be heard urgently because prisoners and Māori generally will be irreversibly prejudiced by not being able to vote in the upcoming 2017 general election.

## Background

4. The Electoral (Disqualification of Sentenced Prisoners) Amendment Act ("the Act") was enacted in 2010. Section 80(1)(d) of the Act prevents sentenced prisoners from being registered on the electoral roll. Prior to this amendment, the Electoral Act 1993 stipulated that only prisoners sentenced to a term of three years or more, or to preventive detention, were prohibited from voting.
5. Before it was passed, the Act was subject to a report by the Attorney-General under s7 of the New Zealand Bill of Rights Act (BORA) 1990. This report concluded that the legislation appeared to be inconsistent with BORA rights.

## Procedural History

6. On 10 July 2014, the Tribunal received the statement of claim, six supporting affidavits and an application for urgent hearing from Joel McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde and Marissa Mathews on behalf of themselves and Maori generally, concerning the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (Wai 2472, #3.1.1).
7. Following submissions from the parties, on 7 August 2014 I granted priority to Wai 2472 and advised that the Tribunal intended to hear the claim in mid-2015 (Wai 2472, #2.5.3).
8. On 9 September 2014, a panel was appointed, consisting of myself as Presiding Officer, and Tania Simpson, Erima Henare and Ronald Crosby as panel members (Wai 2472, #2.5.5).
9. A judicial teleconference was convened on 14 November 2014 to discuss the forward planning of the inquiry (Wai 2472, #2.5.6).
10. On 24 December 2014, claimant counsel filed applications seeking leave to amend and add claimants to the Wai 2472 claim. On 10 February 2015, I declined these applications (Wai 2472, #2.5.7). I directed the claimants to file a further amended statement of claim by 24 February 2015.
11. Claimant counsel, Mr Richard Francois, neither filed the amended statement of claim by the due date nor sought leave to file late.

12. On 3 March 2015, I issued memorandum-directions noting that the lack of a response from Mr Francois indicated that the claimants did not appear to be in a position to proceed as a matter of priority. I advised that I would consider whether to reverse my decision granting priority to this claim (Wai 2472, #2.5.9).
13. On 20 March 2015, I issued further memorandum-directions confirming that, again, no response had been received from claimant counsel (Wai 2472, #2.5.10). I stated that the hearing of this claim as a matter of priority had been compromised by counsel's failure to respond and that any further delay might cause significant prejudice to the claimants and impair the Tribunal's ability to report in a timely manner. I also noted that the proposed dates for hearing, 20-24 July 2015, were in jeopardy and directed claimant counsel to immediately file the amended statement of claim.
14. On 13 April 2015 I issued directions revoking priority to Wai 2472, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act Claim, as the claimants had not filed an amended statement of claim as directed (Wai 2472, #2.5.11).
15. On 22 September 2016 counsel for the applicants filed an amended statement of claim that complied with my directions of 10 February 2015 (Wai 2472, #1.1.1 (a)). The amended statement of claim was registered on 1 November 2016 (Wai 2472, #2.2.1).
16. On 9 December 2016 counsel for the applicants filed an application for an urgent hearing into Wai 2472, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act Claim.

## **Parties Submissions**

### *Applicants' Submissions*

17. In their amended statement of claim (Wai 2472, #1.1.1(a)) the applicants state that the disenfranchisement of Māori prisoners materially prejudices Māori voting rights by decreasing the number of Māori on the Māori Electoral Roll, which reduces the ratio of Māori on the Māori Electoral Roll to Māori on the General Electoral Roll and reduces the total Māori Electoral Population. This in turn reduces the number of Māori Electorates and decreases the political influence of Māori.
18. The applicants argue that the disqualification of prisoners disproportionately affects Māori because of the high proportion of Māori in the prison system and is unlawful discrimination. They also argue that the disqualification of prisoners is a breach of Articles 2 and 3 of the Treaty, because it amounts to a breach of the fundamental citizenship right to political representation, which is a key expression of tino rangatiratanga and also a taonga which must be protected.
19. The applicants seek recommendations from the Tribunal that:
  - the blanket ban on prisoner voting be repealed, and that this could be expeditiously achieved by amending the Electoral Act 1993 through a Supplementary Order Paper;
  - all prisoners be allowed to vote in general elections to remove any risk of prejudice and discrimination against Māori;
  - all prisoners who are entitled to vote be given an election to register and vote in the electorate where they are confined three months before the election or in the electorate where they were last registered to vote before being sentenced to a term of imprisonment; and

- Section 72(5) of the Electoral Act 1993 be amended to include the right of prisoners to elect which electorate they can register in and vote in general elections as per these recommendations.
20. The applicants also seek findings that:
- Māori are prejudiced by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010; and
  - The Act is inconsistent with the principles of the Treaty of Waitangi, and a breach of Articles 2 and 3 of the Treaty.
21. In their urgency application (Wai 2472, #3.1.8), the applicants argue that the claim should be heard urgently because prisoners and Māori generally will be irreversibly prejudiced by not being able to vote in the upcoming election this year.

#### *Crown's Submissions*

22. The Crown opposes the claim being granted an urgent hearing on the basis that there is too little time for the applicants' aim of legislative change to be realistically achieved, the applicants have failed to demonstrate significant and irreversible prejudice, and that this claim would fit better within a kaupapa inquiry.
23. The Crown alleges that an urgent inquiry by the Waitangi Tribunal now would be unlikely to achieve the applicants' aim of legislative change before the 2017 general election. Even if the Tribunal heard this claim under urgency and found it to be well-founded, the Crown would then have to introduce legislation in time for Parliament to consider it and logistical arrangements would have to be completed in order for prisoners to vote. The Crown states the Electoral Commission has advised that the process of ensuring that all eligible prisoners are able to vote would take approximately nine weeks. The Crown therefore submits that it is already too late for this claim to be heard before the 2017 general election.
24. In regards to prejudice, the Crown submits that the applicants appear to have overstated the potential prejudice to Māori because their arguments are based on the flawed assumption that all Māori prisoners would elect to go on the Māori Electoral Roll.
25. The Crown argues that this claim would be better heard as part of the Tribunal's kaupapa inquiry programme as it relates to a nationally significant issue, and suggests that it would fit well within the proposed inquiry into constitutional, self-government and electoral system issues.
26. The Crown further asserts that it is already well appraised of the issues arising from the disqualification of sentenced prisoners due to the Attorney-General's report under s7 of the BORA as well as the High Court's declaration that s 80(1)(d) of the Electoral Act 1993 is inconsistent with s12 of BORA.
27. The Crown also argues that the applicants have already squandered their opportunity to have a timely hearing, and the failure of the applicants to comply with procedural requirements in 2015 foreshadows potential difficulties with their ability to proceed to an urgent hearing now.

#### *Applicants' Reply*

28. The applicants replied to the Crown's submission, arguing that there is still sufficient time to effect legislative change before the 2017 general election. The applicants rely on the schedule for their court proceedings as a basis for the assertion that the Court of

Appeal considers legislative change could be implemented following a May 2017 hearing, and argue that this is relevant and persuasive to Tribunal proceedings.

29. The applicants further allege that their difficulties in complying with the previously scheduled priority hearing were due to the disparity of resources between the applicants and the Crown, and the burden of litigation the applicants were under at the time.
30. The applicants also argue that the kaupapa inquiry programme is not a reasonable alternative because the broad, national focus of a kaupapa inquiry would fail to address the Māori prisoners who are directly affected by the legislation.

### Urgency Criteria

31. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

### Discussion

32. This claim concerns a serious constitutional and civil rights matter. It is important that it be heard with dispatch. It was for that reason that it was granted a priority hearing in 2014. That hearing was vacated because timetabling was not met and the applicants fell silent while their claim languished.
33. While that was lamentable, that should not and will not count against the applicants in this decision relating to urgency.
34. When the application for urgency was filed it would have been known that the last possible date for the election was 18 November 2017. It would also have been known that the possibility of an earlier election was by no means unlikely. In fact, the election date has now been fixed for 26 September 2017 and Parliament will be dissolved on 22 August 2017.

35. The applicants claim that this Tribunal could and should:
  - a) Set up a hearing panel;
  - b) Undertake all the logistical and procedural steps towards a hearing, with no doubt a number of interested parties seeking to be heard;
  - c) Conduct a hearing with submissions from multiple parties, opening and closing addresses and evidence. My guess is that this hearing would take at least one week and probably more; and
  - d) Consider the matter and then write and publish a report.
36. In the event that that report was favourable to the applicants and recommended amending legislation, the Crown would have to consider the matter and, if the Crown accepted any such recommendations, legislation would have to be drafted and then enacted.
37. There would then have to be time for the necessary logistical steps to be taken by the Electoral Commission to carry the matter forward in a practical way.
38. The Crown has said that the Electoral Commission advises that the process of ensuring that all eligible prisoners are registered to vote and making arrangements for polling in prisons on election day would take approximately nine weeks but if less than nine weeks was available it would do its utmost to maximise opportunities for prisoners to register and vote. The applicants did not contest this assertion in their reply submissions. For the purpose of considering the matter, I have reduced this period to five weeks.
39. There are therefore three hurdles that would have to be cleared to give an urgent process utility, namely:
  - a) The Tribunal process from the start to the issue of a report;
  - b) The political process from receipt of the report to the enactment of amended legislation; and
  - c) The process of registration and arrangements for polling by the Electoral Commission.
40. It will be apparent from the above that there is really no chance of clearing these hurdles before the General Election. While the claim is an important one, it cannot be heard as the applicants wish. The Crown is right in its assertion that this is a proper matter for a Kaupapa Inquiry hearing. Indeed, a constitutional Kaupapa Inquiry is under consideration for priority within the Kaupapa Inquiry programme.
41. As an alternative, the applicants may consider an application for an urgent hearing might have utility for the next scheduled General Election in 2020. I express no view on whether such an application might or might not be successful.

## **Decision**

42. I decline the application for urgency.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 2472, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act Claim.

**DATED** at Wellington this 16<sup>th</sup> day of February 2017



Judge P J Savage  
Deputy Chairperson

**WAITANGI TRIBUNAL**