

WAITANGI TRIBUNAL

Wai 2472
Wai 2842

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Electoral (Disqualification of
Sentenced Prisoners)
Amendment Act Claim

AND

the Prisoners' Voting Rights
Claim

DECISION
ON APPLICATIONS FOR AN URGENT HEARING

17 December 2018

Introduction

1. This decision concerns two applications for an urgent inquiry into s 80(1)(d) of the Electoral Act 1993 (the Act), which disqualifies sentenced prisoners, including Māori prisoners, from being eligible to vote in the New Zealand general election. The applications are:
 - a) Wai 2472, the Electoral (Disqualification of Sentenced Prisoners) Act Claim brought by Joel McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde and Marisa Matthews on behalf of themselves, on 24 October 2018 (Wai 2472, #3.1.11); and
 - b) Wai 2842, the Prisoners' Voting Rights Claim brought by Carmen Hetaraka on behalf of Ngāti Wai prisoners, Māori prisoners and Māori generally, on 13 September 2018.
2. This is the third such application for an urgent inquiry into the Wai 2472 claim after the first two were declined in 2014 and 2016 respectively. This is the first urgency application for Wai 2842.
3. Counsel representing both applications requested to have these claims inquired into together and reported on in time to effect legislative change before the next general election in 2020.

Procedural History

4. On 24 October 2018, the Tribunal received a third application for an urgent inquiry into Wai 2472 (Wai 2472, #3.1.11). This application was opposed by the Crown in submissions received on 13 November 2018 (Wai 2472, #3.1.14).
5. On 13 November 2018, the Tribunal received a statement of claim and a further application for an urgent inquiry into prisoner's voting rights (Wai 2842, #1.1.1 and #3.1.1).
6. Counsel for Wai 2742 filed submissions in reply to those of the Crown on 27 November 2018 (Wai 2472, #3.1.15).
7. The Crown filed submissions on 30 November 2018, which sought to replace its earlier reply to Wai 2472 and place on record a substantive response to Wai 2842 (Wai 2842, #3.1.2 also referenced as Wai 2472, #3.1.16).
8. On 3 December 2018, counsel for Wai 2842 filed their reply submissions to those of the Crown (Wai 2842, #3.1.3).

Parties' Submissions

Applicants' Submissions

9. The applicants submit that Māori in prisons and Māori generally have suffered and are likely to continue suffering significant and irreversible prejudice as a result of s 80(1)(d) the Act, which disqualifies all prisoners, including all Māori prisoners, from being eligible to vote in the general election.
10. According to the applicants for Wai 2842, s 80(1)(d) of the Act breaches the principles of the Treaty by failing to actively protect:
 - a) the taonga of voting rights and exercise of tino rangatiratanga by Māori;
 - b) the right of Māori to vote; and
 - c) the effective exercise of the Māori Electoral Option.

11. The applicants submit that the disenfranchisement of Māori prisoners significantly reduces the Māori electoral population, resulting in the reduction of the number of Māori electorates. This in turn decreases the political influence of Māori. The prejudice is more apparent when considering Māori make up the majority of the prison population.
12. Counsel for Wai 2472 submit that the Tribunal's 1994 *Māori Electoral Option Report* found that the Crown have obligations to actively protect Māori citizenship rights, including the right to vote, and Māori representation in Parliament. Disenfranchising Māori prisoners breaches these obligations.
13. The Wai 2842 applicants further submit that there is likely to be lasting prejudice for prisoners who would be eligible to vote for the first time in the 2020 general election, but for s 80(1)(d) of the Act, as these prisoners are less likely to vote throughout their lives.
14. The applicants submit that the High Court in *Taylor v Attorney-General*¹ left it for the Tribunal to consider the Act and its consistency with the principles of the Treaty. According to counsel, the High Court declared that s 80(1)(d) of the Act was inconsistent with the New Zealand Bill of Rights Act 1990 (BORA). That decision was upheld by the Court of Appeal and not disturbed by the Supreme Court. Counsel for Wai 2842 submit that an unjustified breach of rights under the BORA, particularly one which disproportionately affects Māori, is inconsistent with the principle of active protection.
15. Both counsel requested to have these claims heard together and reported on in time to effect legislative change to allow Māori prisoners to vote. The applicants submit that their rights will be "irretrievably jeopardised" if this claim is not heard before the 2020 general election (Wai 2472, #3.1.11 at [18]).

Crown's Submissions

16. In the Crown's revised response to Wai 2472 and only response to Wai 2842, counsel submit it is neutral on the question of whether or not Wai 2472 and Wai 2842 ought to be inquired into urgently.
17. The Crown also provided a likely timeframe for implementing legislative change if the Government was to consider it. According to counsel, it would take nine to 10 months to enact, introduce and pass legislation and a further nine weeks to register eligible prisoners and make arrangements for polling in prisons.

Applicants' Reply

18. The applicant for Wai 2842 acknowledged the Crown's change of position. While the applicants accept that their claim may fall within the scope of the future Constitution, Self-government and Electoral System kaupapa inquiry, they submit that the issue of suffrage is too important to delay hearing for a kaupapa inquiry.
19. In relation to the timeframe for legislative change provided in the Crown's submissions, counsel for the applicant suggests that the Tribunal should hear and report on these claims between December 2018 – June 2019.
20. Counsel for Wai 2472 have made no submissions in response to the Crown's revised submissions (Wai 2472, #3.1.13).

¹ *Taylor v Attorney General* [2014] NZHC 2225 at [79].

Urgency Criteria

21. 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

22. These claims concern a serious constitutional and civil rights matter. The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 has already been the subject of a report by the Attorney-General, pursuant to s 7 of the BORA, and cases in the civil court. The Attorney-General concluded "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."² The High Court made a declaration of inconsistency that mirrored the Attorney-General's report³ which was upheld by the Court of Appeal⁴ and was not disturbed by the Supreme Court⁵
23. I agree with the applicants that the civil courts in *Taylor v Attorney-General* dealt only with the inconsistencies of the Act with the BORA. I see no proper alternative remedy available to the applicants, other than an urgent inquiry, that would address any possible inconsistencies of the Act with the principles of the Treaty.
24. On 7 August 2014, I granted priority for the Wai 2472 claim, recognising that the claim raised very important issues that ought to be inquire into by the Tribunal as a matter of some urgency. A panel was appointed on 9 April 2014 with me as the Presiding Officer (Wai 2472, #2.5.4) and the intention was to hear the claim in mid-2015 in order to produce

² 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 para 16.

³ *Taylor v Attorney-General* [2015] NZHC 1706 at [79].

⁴ *Taylor v Attorney-General* [2017] NZCA 215 at [188].

⁵ *Attorney-General v Taylor* [2018] NZSC 104 at [70]

a report so that it may be considered and if appropriate, acted upon prior to the next election in 2017. Priority status was only revoked due to a lack of response from counsel.

25. On 17 February 2017, I declined a second urgency application (Wai 2472, #2.5.14) as it became evident that the claim could not be heard in time to effect legislative change prior to the election. I noted in the decision, however, that the applicants may consider making another application for an urgent inquiry into these matters before the next general election in 2020.
26. My previous reasons for revoking priority and declining urgency are no longer impediments for the Tribunal to inquire into these claims. The last possible date for the next election to be held is 21 November 2020. With the timeframe provided by the Crown, it is still possible that these claims could be inquired into and reported on in time to be acted on by the Government, if necessary.

Decision

27. For the reasons detailed above, I grant both the Wai 2472 and Wai 2842 applications for an urgent inquiry.
28. Given counsel's failure to file submissions in previous proceedings, I have misgivings about how this inquiry will proceed. I therefore reserve the right to vary or revoke this grant of urgency.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification lists for:

- Wai 2472, the Electoral (Disqualification of Sentenced Prisoners) Act Claim; and
- Wai 2842, the Prisoners Voting Rights Claim.

DATED at Wellington this 17th day of December 2018



Judge P J Savage
Deputy Chairperson

WAITANGI TRIBUNAL