

HE AHA I PĒRĀ AI?



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## *The Māori Prisoners' Voting Report*

WAI 2870

WAITANGI TRIBUNAL REPORT 2020



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Waitangi Tribunal  
Te Rōpū Whakamana i te Tiriti o Waitangi  
*Kia puta ki te whai ao, ki te mārama*

The Honourable Nanaia Mahuta  
Minister for Māori Development

The Honourable Andrew Little  
Minister of Justice

The Honourable Kelvin Davis  
Minister of Corrections

Parliament Buildings  
WELLINGTON

9 August 2019

E mihi ana ki ā koutou ngā Minita e tū nei ki te kei o te waka

*He Aha i Pērā Ai? The Māori Prisoners' Voting Report*

This is our report in relation to the Māori prisoners' voting rights claims. Under the current law, enacted in 2010, all sentenced prisoners are removed from the electoral roll and are unable to vote.

It is trite and obvious that the right to vote is a fundamental right in a modern democracy. That right is not to be hampered or diminished except where it is absolutely necessary because of something in the nature of an emergency. It becomes more serious when the restriction or removal falls disproportionately upon a particular group. The wrong is exponentially increased when that group has a treaty with the Crown that guarantees that a circumstance of this type will not happen. That is the basic finding of this report.

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Māori are hugely over-represented in prisons and in 2018 were 11.4 times more likely to be removed from the electoral roll than non-Māori.

During the course of the hearing, we tried to understand what this legislation hoped to achieve. Could it really be thought that this would deter those contemplating crime? Perhaps it was thought that this would chasten prisoners and so render them less likely to further offend. We asked the parties, including the Crown, to address this question but to no avail.

Our reading of the *Parliamentary Debates* during the course of the legislation did not assist. The question of what the Bill was intended to achieve at a practical level was not addressed. It seems unusual that an issue that would impact on such important matters as penal policy and electoral participation could be decided on this basis. We wondered how a Bill that had, it was said, popularity but no purpose and that also had obvious Treaty implications was progressed without those implications being examined and Māori being consulted. Perhaps this was because it was a member's Bill rather than the product of Government policy.

During the course of the passing of the legislation in 2010, the Attorney-General advised that the proposed blanket disenfranchisement of prisoners was inconsistent with section 12 of the New Zealand Bill of Rights Act 1990 and could not be justified under section 5 of that Act.

Also, officials pointed out that it would disproportionately affect Māori. What was not said was that the proposed legislation did not comply with Treaty obligations. That should have been included in the advice to the Government. A failure to consider Treaty implications was very properly conceded by a senior Crown officer at our hearing.

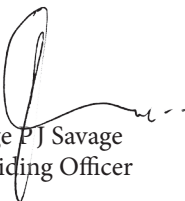
We were told that voting is a learned habit, once acquired likely to be repeated. Prisoners represent a captive audience, so there is a very real opportunity to inculcate them into the democratic process rather than to dislocate them from it, as this legislation does. We were told, and accept, that if a person votes once or perhaps twice they are likely to continue voting and that this could very probably have a ripple effect into their whānau. In this sense, voting could be used as an educational tool having a positive effect.

We can see no utility whatsoever in any restriction on prisoner voting and we recommend legislative change accordingly. In the knowledge that the Justice Select Committee will be considering electoral matters soon, this report is forwarded to you urgently.



We wish to thank the parties for their ability to meet time constraints and to be concise and focused. In particular, we would like to thank the Crown for making a series of very proper concessions that enabled us to reduce hearing time and to produce this report with dispatch.

Tēnā koutou, tēnā tātou katoa



Judge PJ Savage  
Presiding Officer

## ACKNOWLEDGEMENTS

The Tribunal would like to thank all the staff involved for their assistance with the report, most especially John McLellan, Joy Hippolite, Jane Latchem, and Dominic Hurley for their support. Also, those staff assisting with the inquiry and hearings, most especially Eleanor Rainford, Dr Christopher Burke, Raimona Tapiata, Jay Cameron-Hamiora, and Destinee Wikitoa.

## ABBREVIATIONS

ANZSOC	Australian and New Zealand standard offence classification
app	appendix
BCLR	<i>Butterworths Constitutional Law Reports</i>
CA	Court of Appeal
CanLII	Canadian Legal Information Institute
CC	Constitutional Court (South Africa)
ch	chapter
cl	clause
doc	document
ECHR	<i>European Court of Human Rights: Reports of Judgements and Decisions</i>
ed	edition, editor
EHRR	<i>European Human Rights Reports</i>
HCA	<i>High Court of Australia</i>
HCAL	<i>Constitutional Administrative Law List</i>
HKC	<i>Hong Kong Cases</i>
HKLRD	<i>Hong Kong Law Reports and Digest</i>
HRNZ	<i>Human Rights Reports of New Zealand</i>
IESC	Supreme Court of Ireland
L Ed 2d	<i>Lawyers' Edition</i> , second series
ltd	limited
memo	memorandum
n	note
no	number
NZCA	<i>New Zealand Court of Appeal</i>
NZHC	<i>New Zealand High Court</i>
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
NZSC	<i>New Zealand Supreme Court</i>
OPCAT	Optional Protocol to the Convention of Torture
p, pp	page, pages
para	paragraph
pt	part
ROI	record of inquiry
r, rr	rule, rules
s, ss	section, sections (of an Act of Parliament)
S Ct	<i>Supreme Court Reporter</i>
SA	<i>South African Law Reports</i>
SC	Supreme Court

## ABBREVIATIONS

SCC	<i>Supreme Court of Canada</i>
SCR	<i>Supreme Court Reports (Canada)</i>
sch	schedule
tbl	table
UNTS	<i>United Nations Treaty Series</i>
US	<i>United States Reports</i>
v	and
vol	volume
Wai	Waitangi Tribunal claim
ZACC	<i>Constitutional Court of South Africa</i>

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2870 record of inquiry, a select index to which is reproduced in the appendix. A full copy of the index is available on request from the Waitangi Tribunal.

## CHAPTER 1

### INTRODUCTION TO THIS INQUIRY

#### 1.1 THE URGENT INQUIRY

This report addresses three claims that seek the repeal of section 80(1)(d) of the Electoral Act 1993 ('the Act'). This section of the Act excludes sentenced prisoners, including Māori prisoners, from registering as electors. This then excludes them both from eligibility to vote in a general election and from participating in the Māori electoral option. We note this is also likely to have consequent implications for participation in local body elections, but this was not an issue raised with us in this inquiry.

In 2010, the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill was passed by Parliament, amending the Electoral Act 1993. Introduced as a member's Bill, the amendment extended an existing restriction preventing prisoners serving a sentence of three years or more from voting to all prisoners serving sentences of imprisonment at the time of a general election.

We heard the claims under urgency in May 2019. The common complaint of the claims is that section 80(1)(d) is inconsistent with the principles of the Treaty of Waitangi and has resulted in significant prejudice to Māori.

The Crown's views evolved as the hearing proceeded. In its closing submissions, the Crown formally made some important acknowledgements of fact and indicated it was willing to reconsider its position once the Tribunal had reported. The Crown accepts it has a duty to actively protect Māori citizenship and political representation.

#### 1.2 THE CLAIM PROCESS

On 10 July 2014, the Tribunal received a claim and an application for an urgent inquiry from Joel Twain McVay, Rhys Warren, and three others (Wai 2472).<sup>1</sup> The application was not granted urgency as the deputy chairperson of the Waitangi Tribunal, Deputy Chairperson Judge Patrick Savage, deemed it unlikely that the Crown would be able to make any legislative amendment before the general election on 20 September 2014. However, Judge Savage granted the claim priority status, given the claim raised an important constitutional issue deserving of consideration.<sup>2</sup>

---

1. Claim 1.1.1; submission 3.1.1

2. Memorandum 2.5.4

On 9 September 2014, the chairperson of the Waitangi Tribunal, Chief Judge Wilson Isaac, appointed Judge Savage presiding officer for the inquiry into the Electoral (Disqualification of Sentenced Prisoners) Amendment Act Claim (Wai 2472). The chairperson also appointed panel members Tania Simpson, Erima Henare, and Ronald Crosby.<sup>3</sup>

On 21 August 2014, the New Zealand Māori Council was granted interested party status to the inquiry.<sup>4</sup>

On 25 December 2014, claimant counsel Richard Francois filed an application to add three additional named claimants to the McVay and Warren claim. The request was rejected on 10 February 2015 and counsel was instructed by the Tribunal to file and serve an amended statement of claim within 14 days.<sup>5</sup>

On 13 April 2015, the status of priority for this claim was rescinded due to the failure to file an amended statement of claim and respond to the Tribunal's directions.<sup>6</sup> An amended statement of claim was not filed until 22 September 2016.<sup>7</sup>

On 9 December 2016, claimant counsel Mr Francois filed a second application for an urgent hearing for the McVay and Warren claim (Wai 2472).<sup>8</sup> This application was declined by Judge Savage on 16 February 2017 on the ground that insufficient time remained to hear the claim or to allow any possible legislative amendment to take place before Parliament dissolved on 22 August 2017 or before the general election on 26 September 2017.<sup>9</sup>

On 24 October 2018, Mr Francois filed a third application for urgency.<sup>10</sup> The Crown opposed the application on 13 November 2018.<sup>11</sup> On the same day, the Tribunal received a statement of claim and further application for an urgent inquiry into prisoner voting rights from Carmen Hetaraka on behalf of Ngātiwai prisoners, Māori prisoners, and Māori generally (the Prisoners' Voting Rights Claim, Wai 2842).<sup>12</sup>

On 27 November 2018, Mr Francois filed submissions in reply to the Crown's submission opposing urgency or priority.<sup>13</sup> The Crown filed further submissions on 30 November, seeking to replace its earlier opposition to McVay and Warren's application for urgency and provided a substantive response to the urgency sought by Mr Hetaraka. The Crown's submission was now 'neutral' in respect to both applications for urgency.<sup>14</sup>

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3. Memorandum 2.5.6

4. Memorandum 2.5.5

5. Memorandum 2.5.8

6. Memorandum 2.5.12

7. Submission 3.1.7

8. Submission 3.1.8

9. Memorandum 2.5.15

10. Submission 3.1.11

11. Submission 3.1.13

12. Claim 1.1.2; submission 3.1.12

13. Submission 3.1.14

14. Submission 3.1.15

On 17 December 2018, Judge Savage granted urgency for both applications.<sup>15</sup> In making his decision, Judge Savage advised that the claims concern ‘a serious constitutional and civil rights matter’, with ‘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’. Further, ‘previous reasons for revoking priority and declining urgency are no longer impediments for the Tribunal to inquire into these claims’.

On 23 January 2019, Chief Judge Isaac appointed Judge Savage the presiding officer for the Wai 2842 claim.<sup>16</sup> On the same day, Judge Savage issued a memorandum setting the filing dates for claimant and Crown evidence.<sup>17</sup> The next day, the two claims were consolidated into the combined Māori Prisoners’ Voting Rights inquiry (Wai 2870).<sup>18</sup>

On 4 February, the Tribunal received a new statement of claim from Dr Rawiri Waretini-Karena and Donna Awatere-Huata (Wai 2867).<sup>19</sup>

On 21 February, the Wellington Howard League applied for interested party status.<sup>20</sup> On 25 February, Judge Savage granted the league leave to participate by way of watching brief only.<sup>21</sup>

On 8 March, Chief Judge Isaac appointed Judge Savage the presiding officer for the Wai 2870 inquiry and Ronald Crosby and Kim Ngarimu the panel members.<sup>22</sup>

On 18 March, the chairperson consolidated the Wai 2867 claim as part of the Māori Prisoners’ Voting Rights (Wai 2870) inquiry.<sup>23</sup>

On 22 March, the Human Rights Commission applied for, and was subsequently granted, interested party status in the inquiry.<sup>24</sup>

On 25 March, Pirika Tame Hemopo was added as a named claimant to the Waretini-Karena and Awatere-Huata claim (Wai 2867).<sup>25</sup>

The hearings into this inquiry took place at the Waitangi Tribunal’s offices in Wellington from 20 to 22 May 2019.

### 1.3 THE CLAIMANTS IN THIS INQUIRY

The named claimants in this urgent inquiry are:

- ▶ Joel Twain McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde, and Marissha Matthews, for and on behalf of themselves (Wai 2472);

---

15. Memorandum 2.5.18

16. Memorandum 2.5.19

17. Memorandum 2.5.20

18. Memorandum 2.5.1

19. Claim 1.1.3

20. Submission 3.1.21

21. Memorandum 2.5.22

22. Memorandum 2.5.21

23. Memorandum 2.5.22

24. Submission 3.1.35

25. Memorandum 2.2.2

1.4

- Carmen Hetaraka, on behalf of Ngāti Wai prisoners, Māori prisoners, and Māori generally (Wai 2842); and
- Dr Rawiri Waretini-Karena, Donna Awatere-Huata, and Pirika Tame Hemopo, for and on behalf of themselves (Wai 2867).

**1.4 THE STRUCTURE OF THIS REPORT**

In chapter 2, we provide an overview of how section 80(1)(d) of the Act was amended, and we set out the positions of the parties. We also identify the issues in our inquiry.

In chapter 3, we identify and discuss the relevant Treaty principles that apply in this inquiry.

In chapter 4, we make findings of fact and analyse how the relevant Treaty principles apply to the circumstances of this inquiry.

In chapter 5, we summarise our findings and set out our recommendations.



## CHAPTER 2

### OVERVIEW OF THE AMENDMENT OF SECTION 80(1)(d) OF THE ELECTORAL ACT 1993

#### 2.1 INTRODUCTION

In this chapter, we provide an overview of how section 80(1)(d) of the Electoral Act 1993 was amended. We also set out the positions of the parties and we identify the issues in our inquiry.

#### 2.2 AMENDING SECTION 80(1)(d)

Before it was amended in 2010, section 80(1)(d) of the Electoral Act 1993 read:

##### **80. Disqualifications for registration**

(1) The following persons are disqualified for registration as electors:

- (d) A person who, under—
  - (i) A sentence of imprisonment for life; or
  - (ii) A sentence of preventive detention; or
  - (iii) A sentence of imprisonment for a term of 3 years or more,—is being detained in a prison.<sup>1</sup>

Section 80 was amended by section 4 of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, which had been introduced to the House as a member's Bill by Paul Quinn, a National Party list member, on 10 February 2010.

Following the Bill's introduction, the Attorney-General the Honourable Christopher Finlayson provided a report to Parliament under section 7 of the New Zealand Bill of Rights Act 1990. The Attorney-General reported that the blanket disenfranchisement of prisoners, as proposed by the Bill, was inconsistent with section 12 of the New Zealand Bill of Rights Act and that it could not be justified under section 5 of that Act.<sup>2</sup>

The first reading of what was then called the Electoral (Disqualification of Convicted Prisoners) Amendment Bill took place on 17 March and 21 April 2010.

---

1. Electoral Act 1993, s 80(1)(d) (as at 29 November 2010)

2. Document A20(a), pp 83–86

The Bill passed its first reading and was referred to the Law and Order Select Committee.<sup>3</sup>

Officials from the Department of Corrections were allocated the lead role in assisting the select committee's consideration of the Bill. They consulted the Ministry of Justice where necessary, including on court administrative matters and because the Ministry administers the Electoral Act 1993. The select committee received 55 written submissions: two (one of which was from Paul Quinn) indicated support for the Bill, 51 opposed the Bill outright, while two proposed amendments but stated they did not support or oppose the Bill.<sup>4</sup> A majority of the committee recommended changing the title to the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill, to align with the general policy statement.<sup>5</sup>

The Bill was read a second time on 20 October 2010. It passed, with the promise of a supplementary order paper, and proceeded to the committee of the whole House.<sup>6</sup>

Mr Quinn attached supplementary order paper 174 to the Bill, adding a new clause 6, which clarified that the law would not change for those persons currently detained in prison and disqualified for registration as electors, nor would it apply to those persons currently detained in prison and not disqualified for registration as electors. The Bill was debated as the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill during the committee of the whole House on 10 November 2010. During the committee stage, the amendment was agreed to as proposed by the supplementary order paper.<sup>7</sup>

The Electoral (Disqualification of Sentenced Prisoners) Amendment Bill was passed during its third reading on 8 December 2010<sup>8</sup> and received royal assent on 15 December 2010. It came into force the following day. Section 80(1), as it appears above, was amended by repealing the existing paragraph (d) and substituting the following paragraph (d):

- (d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

The amendment Act also made clear that the Act applied only to those people who were imprisoned after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

Under the amendments of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, section (80)(1)(d) of the Electoral Act 1993 provides that any person sentenced to prison after the Act commenced is unable

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3. Document A20(a), pp 2–23

4. Document A23(a), p 41

5. Law and Order Select Committee, 'Electoral (Disqualification of Convicted Prisoners) Amendment Bill', 17 September 2010, p 2

6. Document A20(a), p 40

7. Ibid, p 63

8. Ibid, p 82

to register as an elector. Prisoners on remand (to whom the presumption of innocence applies) retain their right to register as electors.

The 2010 changes saw the law revert to the provisions in the Electoral Act 1956. The 1956 Act had disqualified all '[p]ersons detained pursuant to convictions in any penal institution' from registering as electors.<sup>9</sup> The 1956 Act had been briefly repealed by the Electoral Amendment Act 1975, which returned the right to register as an elector to prisoners, but was reinstated by the Electoral Amendment Act 1977, before being repealed again by the Electoral Act 1993.<sup>10</sup> Under the 1993 Act, before the 2010 amendment, all prisoners serving sentences of fewer than three years had been allowed to register to vote.

## 2.3 THE PARTIES' POSITIONS

### 2.3.1 The claimants' position

The claimants say that the right to register as an elector, to exercise a vote, and to exercise the Māori electoral option are fundamental rights guaranteed to them under the Treaty both as a citizenship right granted under article 3 and as an expression of tino rangatiratanga granted under article 2.<sup>11</sup> They claim that any limitation on the ability for Māori to register to vote, to exercise their vote, or to exercise the Māori electoral option is a breach of those rights guaranteed to them, and therefore the blanket disenfranchisement of prisoners under section 80(1)(d) of the Electoral Act 1993 is a breach of the principles of the Treaty of Waitangi.<sup>12</sup>

The claimants argue that, because Māori are disproportionately imprisoned, they are disproportionately affected by the loss of prisoner voting rights, which impacts on both the individual and the community. Further, their counsel submits, disenfranchising sentenced prisoners affects the Māori electoral population, which may reduce the number of Māori electoral seats.<sup>13</sup>

Additionally, claimant counsel submits that the Crown failed to adequately consult Māori or consider the implications of the Treaty when amending the legislation and thereby disenfranchising a significant number of Māori.<sup>14</sup>

Finally, the claimants say the legislation is a breach of the Crown's obligation and duty to actively protect the constitutional rights of Māori and should be repealed.<sup>15</sup>

### 2.3.2 The Crown's position

The Crown has made several formal important acknowledgements in its closing submissions.

The Crown accepts that it has a duty to actively protect Māori political participation, which it defines as including the ability to register as an elector, exercise

9. Electoral Act 1956, s 42(1)(b)

10. Electoral Amendment Act 1975, s 18(2); Electoral Amendment Act 1977, s 5

11. Submission 3.3.6, p 2; submission 3.3.8, pp 5–6; submission 3.3.10, pp 4–6

12. Submission 3.3.6, pp 1–2; submission 3.3.8, pp 5–6, 9–10; submission 3.3.10, pp 2–10

13. Submission 3.3.6, pp 12–13; submission 3.3.8, p 4; submission 3.3.10, pp 10–11, 17–20, 23

14. Submission 3.3.10, p 3

15. Submission 3.3.6, pp 9–10, 13–15; submission 3.3.8, pp 9–10; submission 3.3.10, pp 3–4, 9–10, 33

## 2.3.3

the Māori electoral option, and vote.<sup>16</sup> The Crown also accepts that section 80(1)(d) of the Electoral Act 1993 was intended to operate as a temporary suspension of the right to vote, but the evidence now available indicates that the amendment actually operates as a de facto permanent disqualification, due to low rates of re-enrolment upon release.<sup>17</sup>

The Crown does not dispute the importance and significance of Māori political participation.<sup>18</sup> Neither does the Crown dispute that the enactment of section 80(1)(d) of the Electoral Act has had a significantly disproportionate impact on Māori. The Crown accepts that these factors both speak to the Crown's obligation of active protection.<sup>19</sup>

The Crown also accepts that the removal of the right to vote prejudicially affects those individuals from whom the right is removed and has the potential to disengage that person and their community from political discourse.<sup>20</sup> Further, the Crown accepts that it ought to be doing everything it reasonably can to ensure that released prisoners are able to re-enrol.<sup>21</sup>

However, the Crown asserts that it maintains the right to make laws and policies for the good governance of the country. Further, it submits that temporarily excluding from the franchise those who have offended against societal norms remains a legitimate exercise of kāwanatanga.<sup>22</sup>

### 2.3.3 The interested parties' positions

There were two interested parties in these proceedings, both of whom support claims that section 80(1)(d) is in breach of Te Tiriti o Waitangi and should be repealed.<sup>23</sup> The Wellington Howard League argues that the disenfranchisement of prisoners is an unfair and additional punishment, contributes to the acceptance of poor conditions in prison, and disproportionately affects Māori.<sup>24</sup>

The Human Rights Commission submits that the blanket disenfranchisement of all prisoners has also been found inconsistent on human rights grounds and that these rights are protected domestically by the New Zealand Bill of Rights Act 1990.<sup>25</sup>

## 2.4 THE ISSUES FOR THIS INQUIRY

Taking into consideration the Crown's acknowledgements of fact, we have limited our focus in this report to the following issues:

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16. Submission 3.3.9, p 1

17. Ibid, pp 3, 9

18. Ibid, p 7

19. Ibid, p 5

20. Ibid, p 8

21. Ibid, p 10

22. Ibid, p 2

23. Submission, 3.3.7, p 10; doc A28, p 3

24. Document A28, p 3

25. Submission 3.3.7, pp 2–10

- What Treaty principles apply to the disqualification of Māori prisoners from registering as electors under section 80(1)(d) of the Electoral Act 1993 and what Crown obligations arise from those principles?
- What does the Crown's obligation to actively protect the qualification of Māori to register as electors, as conferred by section 74 of the Electoral Act 1993, entail under the Treaty?
- What is the Tribunal's assessment of section 80(1)(d) of the Electoral Act 1993, considering relevant Treaty principles and the Crown's obligation arising from the principles?
- If section 80(1)(d) of the Electoral Act 1993 is inconsistent with Treaty principles, does any prejudice to Māori arise and, if so, what is the nature and extent of that prejudice?
- If section 80(1)(d) of the Electoral Act 1993 is inconsistent with any Crown obligations arising from the principles of the Treaty and Māori are prejudicially affected, what action, if any, should the Crown take?



## CHAPTER 3

## TREATY PRINCIPLES AND STANDARDS

**3.1 INTRODUCTION**

In this chapter, we briefly set out our jurisdiction to hear these claims. We then identify the relevant Treaty principles and standards.

**3.2 JURISDICTION**

The Treaty of Waitangi Act 1975 established the Waitangi Tribunal and confers its jurisdiction. Section 6 of the Act provides that any Māori may make a claim to the Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policy, or practice of the Crown that is inconsistent with the principles of the Treaty of Waitangi. If the Tribunal finds that a claim is well founded, it may, having regard to all the circumstances of the case, make recommendations to the Crown to compensate for or remove the prejudice or to prevent others from being similarly affected in the future.<sup>1</sup>

**3.3 KĀWANATANGA AND TINO RANGATIRATANGA**

The Treaty established a relationship akin to a partnership and imposed on both Treaty partners the duty to ‘act towards each other reasonably and with the utmost good faith.’<sup>2</sup> The principle of partnership itself is expressed through the necessary balancing of the concepts of kāwanatanga and tino rangatiratanga expressed in articles 1 and 2 of the Treaty.<sup>3</sup>

The Māori text of the Treaty guaranteed Māori full authority, or tino rangatiratanga, over their lands, homes, and treasures (or ‘taonga’, which is not confined to just objects). As described in the *Ngati Awa Raupatu Report*, the usual word for authority was ‘mana’, but the Treaty coined a new word, ‘rangatiratanga’, taking into account ‘the equal association of mana with personal qualities’.<sup>4</sup>

In exchange for the guarantee of tino rangatiratanga, the Crown obtained the right of kāwanatanga, or the authority to govern. The Crown’s authority to govern

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1. Treaty of Waitangi Act 1975, s6

2. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA), 667

3. Waitangi Tribunal, *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wellington: Legislation Direct, 2017), pp 22–23; Waitangi Tribunal, *Maori Electoral Option Report* (Wellington: Brooker’s Ltd, 1994), pp 3–4

4. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 30

is not unfettered. It must be balanced by the guarantee of Māori tino rangatiratanga.<sup>5</sup> However, in the *Maori Electoral Option Report*, the Tribunal identified that the right of kāwanatanga includes the right of Parliament to legislate.<sup>6</sup> The Tribunal has previously recognised that in some exceptional circumstances the Crown may also need to balance its Treaty obligations to Māori against the needs of other sectors of the community, such as for peace and good order.<sup>7</sup>

The Tribunal found in the *Ngati Awa Raupatu Report* that the Māori text of the Treaty put beyond doubt the right of Māori to their own law – authority, the Tribunal said, ‘necessarily includes law’ – except for ‘cases where the Governor was obliged to intervene to ensure the maintenance of universal standards’.<sup>8</sup>

But, when exercising its kāwanatanga, the Crown needs to be fully informed about, and consider, the likely or unintended consequences of its actions. In the *Whakatōhea Mandate Inquiry Report*, the Tribunal identified that informed decision-making was a further duty that arises from the Crown’s partnership obligations.<sup>9</sup> In *New Zealand Maori Council v Attorney-General* (1987), Justice Richardson observed:

the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty.<sup>10</sup>

The Central North Island report, *He Maunga Rongo*, said that, if the Crown were to uphold the guarantee of Māori tino rangatiratanga, then it had to obtain Māori consent through partnership and dialogue, leading to a negotiated agreement.<sup>11</sup>

### 3.4 ACTIVE PROTECTION

We also see the Treaty principle of active protection applying to the circumstances of this inquiry. The principle also arises from the Treaty partnership, through the balancing of kāwanatanga and tino rangatiratanga.<sup>12</sup> The Tribunal has previously noted the Crown’s duty to actively protect Māori interests and has established that the range of Māori interests to be actively protected extends beyond specific Māori

5. Waitangi Tribunal, *Tū Mai Te Rangi!*, p 21; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 57

6. Waitangi Tribunal, *Maori Electoral Option Report*, p 3

7. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1239

8. Waitangi Tribunal, *The Ngati Awa Raupatu Report*, p 30

9. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Wellington: Legislation Direct, 2018), p 22

10. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 683

11. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 423

12. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 23



resources to Māori interests generally.<sup>13</sup> This includes the Crown's obligation to actively protect Māori tino rangatiratanga.

In *The Tāmaki Makaurau Settlement Process Report*, the Tribunal confirmed yet again that the Treaty continues to speak today: 'The Crown's guarantee of te tino rangatiratanga continues, even where today the guarantee lacks the original context and content.'<sup>14</sup>

The standard of Crown conduct required by this principle is described as 'active protection', in so far as can reasonably be expected in the circumstances, as opposed to a passive stance.<sup>15</sup> In the *Muriwhenua Land Report*, the Tribunal highlighted the significance of the principle of active protection. It described four Treaty principles as being important to the claims before it: protection, honourable conduct, fair process, and recognition – with the principle of protection encompassing the other three principles.<sup>16</sup>

### 3.5 EQUITY

The principle of equity arises from article 3 of the Treaty, which guaranteed all Māori the protection of the Crown and the full rights of British subjects. Thus, the principle of equity is closely linked to the principle of active protection. Alongside the active protection of tino rangatiratanga, the duty of good government obliges the Crown, when exercising its kāwanatanga, to actively protect the rights and interests of Māori as citizens. The Tribunal has established that these rights include the conferring of citizenship rights upon individual Māori.<sup>17</sup> The *Maori Electoral Option Report* found that the Crown's obligation of active protection also extends to the protection of Māori citizenship rights conferred under the Electoral Act 1993.<sup>18</sup> As part of the rights of citizenship actively protected by the Crown, Māori must have equal rights of participation with other Māori and non-Māori citizens during democratic election processes.<sup>19</sup>

Yet, as the Crown has acknowledged, the enactment of section 80(1)(d) of the Electoral Act 1993 has a significantly disproportionate impact on Māori, due to the disproportionate number of Māori imprisoned compared to non-Māori and

13. Waitangi Tribunal, *Tū Mai Te Rangi!*, pp 21–22; Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p 12; Waitangi Tribunal, *Te Whanau o Waipareira* (Wellington: Legislation Direct, 1998), pp xxiv, 16

14. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 6

15. Waitangi Tribunal, *The Offender Assessment Policies Report*, p 12

16. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 388

17. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 62; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 27–28; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 428–429

18. Waitangi Tribunal, *Maori Electoral Option Report*, p 15

19. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 478–480; Waitangi Tribunal, *Tū Mai Te Rangi!*, pp 27–28; Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 62

because it acts as a de facto permanent disqualification, due to low rates of re-enrolment upon release.<sup>20</sup>

The Tauranga Moana inquiry, when referring to the *Napier Hospital and Health Services Report*, concluded that the Treaty obligation of good governance means that the Crown is required to act fairly to all groups and citizens and not make arbitrary distinctions between groups or individuals that unjustly favour one over the other. 'Māori are entitled to the full rights and privileges of all other citizens, and the Crown is required to act fairly to all groups of citizens.'<sup>21</sup>

The Te Urewera inquiry found that the principle of equity applies regardless of the cause of disparity. Further, not only does the Crown have a duty to guarantee Māori freedom from discrimination but, under the principles of equity and active protection, it also has a duty to 'act fairly to reduce inequities between Māori and non-Māori'.<sup>22</sup> This includes an obligation to positively promote equity. Where Māori have been disadvantaged, under the principles of active protection and equity, the Crown is required to take measures to restore the balance.<sup>23</sup>

### 3.6 CONCLUSION

Having considered the claims before us, we have identified the following Treaty principles relevant to this inquiry:

- ▶ the principles of kāwanatanga and tino rangatiratanga and, in particular, the duty of informed decision-making;
- ▶ the principle and duty of active protection; and
- ▶ the principle of equity and the duty of good government.

20. Submission 3.3.9, pp 3, 5, 9

21. Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 24–25; Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 61–64

22. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 8, p 3773; Waitangi Tribunal, *Tū Mai Te Rangi!*, pp 27–28

23. Waitangi Tribunal, *The Offender Assessment Policies Report*, p 13; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 5–6; Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 61–64

## CHAPTER 4

## TREATY ANALYSIS AND FINDINGS

**4.1 INTRODUCTION**

In this chapter, we apply the principles we have identified to our analysis of section 80(1)(d) of the Electoral Act 1993 in order to address the issues arising in this inquiry.

**4.2 CONSULTATION AND INFORMED DECISION-MAKING**

In this section, we look at whether the Crown sufficiently consulted on, and was sufficiently informed about, the likely impact of the legislation on Māori before its advice was presented to Ministers and the select committee. We start with this because it seems to us that the fundamental lack of advice and lack of consultation as to the impact the amendment would have on Treaty principles affected many of the decisions made subsequently.

The claimants argued that the legislative amendments were developed and introduced in the absence of robust policy analysis, consultation, and advice, and with no consideration of Treaty principles.<sup>1</sup>

Further, the Bill was not subject to adequate consultation with Māori and was passed without sufficient consideration for the constitutional rights of Māori, including how disenfranchising Māori might impact on the number of Māori seats.<sup>2</sup> Counsel for Dr Rawiri Waretini-Karena and others (Wai 2867) argued that, as a responsible Treaty partner, the Crown should have ‘triggered a thorough and considered consultation period with both Māori and prisoners.’<sup>3</sup> No such consultation occurred to enable the Crown to see what effect the proposed legislation would have on the right of Māori to register and their right to vote.

Crown counsel submitted that it is within the Tribunal’s jurisdiction to ‘make findings and recommendations as to the manner in which Ministers and instruments of the Crown’ offer advice to Parliament and its select committees, ‘to ensure proper regard is had to the Crown’s obligations under [T]e Tiriti during the legislative process — especially as it relates to Member’s Bills’.<sup>4</sup>

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1. Submission 3.3.6, pp 7, 15–16; submission 3.3.8, p 4

2. Submission 3.3.6, pp 7, 15–16; submission 3.3.8, p 4

3. Submission 3.3.10, p 23

4. Submission 3.3.9(a), p 5

Crown witness Bronwyn Donaldson, the manager strategic policy at the Department of Corrections in 2010, provided evidence of the advice offered to the Law and Order Select Committee, which included an initial briefing in June 2010 and a further briefing in August 2010.<sup>5</sup> The June 2010 briefing advised that the 'extension of disqualification from voting of convicted and detained prisoners would extend an already disproportionately negative effect on Māori'.<sup>6</sup>

However, during our hearings, Ms Donaldson acknowledged that in retrospect the department did not provide adequate consideration in its reports, at the time, of the specific impacts the legislation would have on Māori and on the Crown's rights and obligations under the Treaty. Ms Donaldson went on to concede that her team should have ensured that the Treaty was adequately considered within the department's policy advice. In doing so, she explained that the knowledge of her departmental officers, and herself, of the importance of Treaty principles was now much improved on that held back in 2010.<sup>7</sup>

We were provided with no evidence that the Crown consulted with its Treaty partner over the likely implications of the legislation on Māori and their Treaty rights.

We find that, on the issue of consultation and informed advice, the manner in which Crown officials offered support and advice to the Law and Order Select Committee failed to provide sufficient information about the specific effect the legislation would have on Māori and Crown rights and obligations under the Treaty. By failing to consult with Māori and to provide adequate advice, the Crown failed to actively protect Māori rights under the Treaty and failed in its duty of informed decision-making under the principle of partnership. All that contributed to the Act as amended being in breach of the Treaty. We acknowledge Ms Donaldson's concession on the point of lack of informed advice and wish to express our appreciation for her frankness. As a senior Crown official, her actions demonstrate the honour of the Crown on this issue in a practical manner.

#### 4.3 THE IMMEDIATE IMPACT OF THE LEGISLATION

In this section, we look at the immediate impact that section 80(1)(d) of the Electoral Act 1993 has had on Māori.

Counsel for the claimants in Wai 2472 and Wai 2842 submitted that Māori were disproportionately affected even prior to the Act being amended in 2010 because Māori were already disproportionately imprisoned. Since the 2010 legislation, the number of Māori removed from the roll has significantly increased, as has the number in proportion to non-Māori. The Crown, therefore, was asserted to have failed to act fairly between Māori and non-Māori.<sup>8</sup> Counsel for Carmen Hetaraka

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5. Document A23(a), pp 4–61

6. Ibid, p 24

7. Transcript 4.1.1, pp 159, 164, 168–169

8. Submission 3.3.6, p 11; submission 3.3.8, p 4

(Wai 2842) submitted that under the principle of equity the Crown is obligated to ensure that the legislation does not disproportionately affect Māori voting rights.<sup>9</sup>

Counsel for Dr Waretini-Karena and others (Wai 2867) further argued that the Crown was aware of the likely disproportionate impact that the 2010 amendment would have on Māori, as shown by the Department of Corrections' briefing papers. Counsel submitted:

The disproportionate number of Māori to be affected by this bill heightened the Crown's Treaty obligations, but rather than actively protect Māori citizenship rights and Māori rights to political representation, the Crown did not concern itself with any such Treaty considerations.<sup>10</sup>

The Crown, in closing, accepted that the enactment of section 80(1)(d) of the Electoral Act 1993 has had a significantly disproportionate impact on Māori and concedes that this speaks to the Crown's duty of active protection.<sup>11</sup>

The Electoral Commission and the Ministry of Justice provided us with tables and figures that show the extent of that impact, which we reproduce on the following pages.<sup>12</sup>

The 2010 amendment, which extended the disenfranchisement from prisoners serving sentences of more than three years to a blanket disenfranchisement of all sentenced prisoners, exacerbated the pre-existing and disproportionate removal of Māori from the electoral roll.<sup>13</sup> In 2010, the number of Māori per 100,000 over the age of 18 removed from the electoral roll was 54, compared to 26 non-Māori. This meant that Māori were 2.1 times more likely to have been removed from the electoral roll than non-Māori.

In 2011, following the passage of the legislation, Māori were 9.3 times more likely to be removed than non-Māori.

By 2018, the number of Māori per 100,000 over the age of 18 removed from the electoral roll had risen to 354, compared to 31 non-Māori. Māori were 11.4 times more likely to have been removed from the electoral roll than non-Māori.<sup>14</sup> Despite a downward trend in the number of prisoners being removed from the roll each year, the overall ratio of Māori to non-Māori being removed has been increasing since 2011 – from 9.3 (2011) to 11.4 (2018).<sup>15</sup>

Claimant witness Khylee Quince, Associate Professor and Director of Māori and Pasifika Advancement at the Auckland University of Technology School of Law, detailed her research, which shows how Māori continue to be disproportionately imprisoned and thus disproportionately affected by the legislation. Associate Professor Quince explained that disparities emerge through a combination of

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9. Submission 3.3.6, p 11

10. Submission 3.3.10, p 23

11. Submission 3.3.9, p 5

12. Document A19(a), pp 1–6; doc A22(a), pp 1–3

13. Document A22(a), pp 1–2

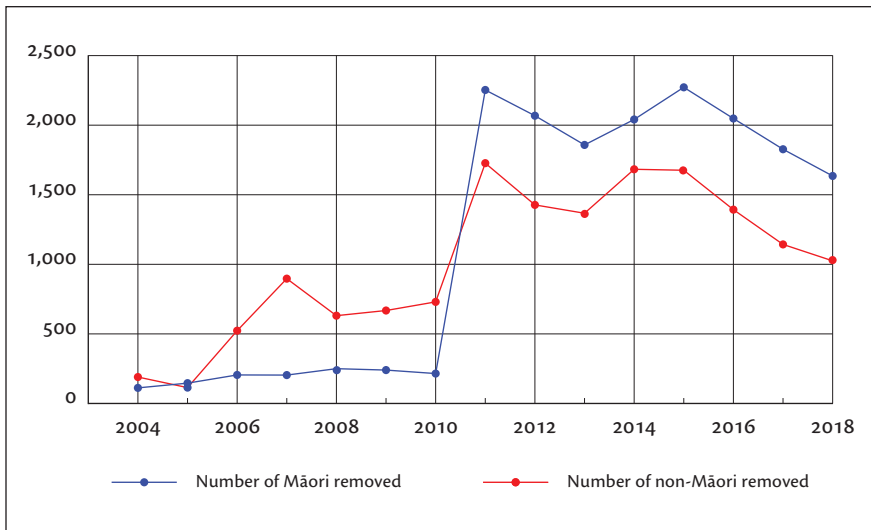
14. Ibid

15. Ibid, p 1

Year	Number of Māori removed	Number of non-Māori removed	Total number of persons removed
2004	112	190	302
2005	146	114	260
2006	205	523	728
2007	204	897	1,101
2008	250	631	881
2009	240	668	908
2010	215	730	945
2011	2,253	1,727	3,980
2012	2,068	1,427	3,495
2013	1,858	1,367	3,225
2014	2,041	1,683	3,724
2015	2,272	1,676	3,948
2016	2,048	1,393	3,441
2017	1,827	1,143	2,970
2018	1,635	1,025	2,660

**Table 1: Total number of persons removed from the electoral roll following a sentence of imprisonment**

Source: document A19(a), p 1; doc A22(a), pp 1–2



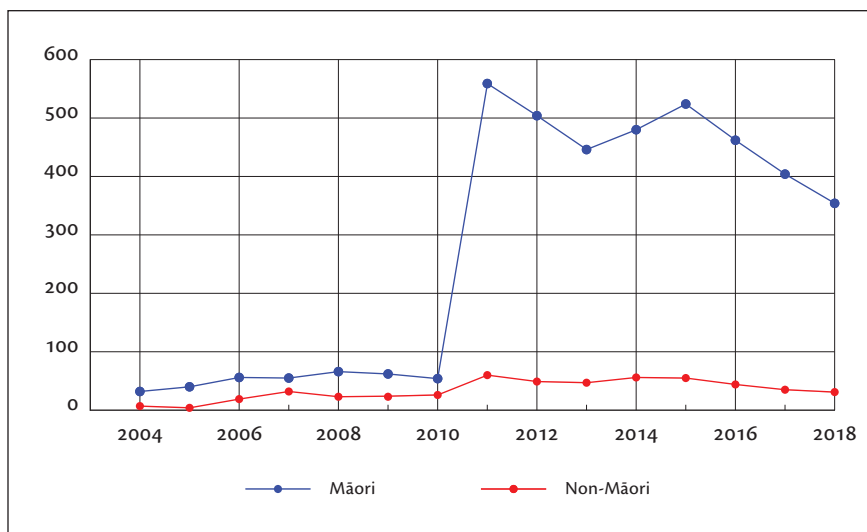
**Figure 1: Number of persons removed from the electoral roll following a sentence of imprisonment**

Source: document A22(a), p 1

Year	Number of Māori removed	Number of non-Māori removed	Total	Ratio Māori to non-Māori
2004	32	7	10	4.4
2005	40	4	9	9.6
2006	56	19	23	2.9
2007	55	32	35	1.7
2008	66	23	28	2.9
2009	62	24	28	2.6
2010	54	26	29	2.1
2011	559	60	121	9.3
2012	504	49	106	10.3
2013	446	47	96	9.6
2014	480	56	109	8.5
2015	524	55	113	9.6
2016	462	44	96	10.4
2017	404	35	81	11.4
2018	354	31	71	11.4

**Table 2: Number of persons removed from the electoral roll following a sentence of imprisonment per 100,000 population aged 18 plus**

Source: document A22(a), p1



**Figure 2: Number of persons removed from the electoral roll following a sentence of imprisonment per 100,000 population aged 18 plus**

Source: document A22(a), p2

over-policing, overcharging, and over-convicting of Māori. Further, Māori are more likely to be remanded in custody pending disposition and are seven times more likely than non-Māori to be given a custodial sentence upon conviction. Meanwhile, Māori are less likely to be granted leave for home detention or to receive a fiscal penalty. Once imprisoned, Māori are twice as likely as non-Māori to be denied parole and to serve out their entire sentence.<sup>16</sup>

The disproportionate number of Māori imprisoned has also been detailed in previous Tribunal reports, including *Tū Mai Te Rangi!* and *The Offender Assessment Policies Report*.<sup>17</sup> In September 2018, the disproportionate imprisonment of Māori meant that 51 per cent of the 10,052-strong prison population identified as Māori.<sup>18</sup> This can be compared to the 14.9 per cent of the general non-imprisoned population who identified as Māori at the 2013 census.<sup>19</sup> The overrepresentation of Māori in prison is even more prevalent in female inmate numbers, with 67 per cent of the female prison population identifying as Māori in 2017–18.<sup>20</sup>

Figure 2 shows a spike between 2010 and 2011, again showing that Māori have been more affected by the amendment than non-Māori. We are persuaded, having considered the evidence before us, that this spike is likely due to a higher proportion of Māori serving sentences of under three years. Under cross-examination, Crown witness Kristina Temel from the Electoral Commission agreed that it appeared from the evidence available that more Māori than non-Māori were being imprisoned for lower end offending and therefore were being removed from the electoral roll in higher numbers than non-Māori.<sup>21</sup>

Crown counsel, in closing, further agreed that it can be inferred from the evidence heard that Māori are significantly more incarcerated than non-Māori for short periods of time and arguably, therefore, for less serious forms of offending. Consequently, the blanket disenfranchisement of prisoners falls unequally on Māori.<sup>22</sup>

We find as a matter of fact that Māori have been disproportionately affected by section 80(1)(d) of the Electoral Act. By failing to ensure the potential consequences for Māori were recognised and taken into account in the select committee process or by failing to propose the repeal of the provision once those effects were recognised (or both), the Crown has failed in its duty to actively protect the right of Māori to equitably participate in the electoral process. We find this to be a breach of the principles of active protection and equity.

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16. Document A13, pp 16–21

17. Waitangi Tribunal, *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wellington: Legislation Direct, 2017), pp 9–14; Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), pp 19–21

18. Document A13, p 17

19. During the 2013 census, 17.5 per cent of the population identified as being of Māori descent: doc A27, p 4.

20. 'Annual Sentenced Prisoner Population for the Latest Fiscal Years (ANZSOC)', Stats NZ, <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7322>, accessed 23 July 2019

21. Transcript 4.1.1, pp 178–179

22. Submission 3.3.9, p 7



#### 4.4 THE ONGOING AND WIDER IMPACTS OF THE LEGISLATION

In this section, we look at the ongoing and wider impacts of the legislation on Māori.

Counsel for Joel McVay and others (Wai 2472) submitted that Māori are discriminated against by the automatic removal from the electoral roll of those individuals sentenced to imprisonment and by the lack of a subsequent automatic process to re-enrol those prisoners when they are released.<sup>23</sup> Claimant counsel further submitted that the prejudice Māori prisoners suffer from being disenfranchised continues after release and impacts on more than just the prisoners themselves.<sup>24</sup> '[T]here is a ripple effect in terms of a prisoner's voting behaviour when he [or she] leaves prison as well as on a prisoner's whanau, and wider community.'<sup>25</sup>

The Crown, in closing, explained that section 80(1)(d) was intended to act as a temporary suspension of the right to vote for prisoners but accepted that the evidence suggests that it actually operates as a de facto permanent disqualification due to low rates of re-enrolment upon release.<sup>26</sup> The Crown also accepted that the removal of the right to vote prejudicially affects those individuals from whom the right is removed and that it has the potential to disengage those people and their communities from political discourse.<sup>27</sup>

##### 4.4.1 A permanent disqualification?

Although all offenders sentenced to imprisonment are systematically removed from the electoral roll, they are not automatically re-enrolled on release. Under section 81 of the Electoral Act, the prison manager is required to notify the Electoral Commission of a prisoner's name when that person enters prison. The Registrar of Electors then removes the prisoner's name from the electoral roll. However, the Act does not contain any provision to ensure a released prisoner is re-enrolled.<sup>28</sup>

Crown witness Richard Symonds, manager custodial practice of the Department of Corrections, provided evidence on the extent of the department's powers to ensure that prisoners re-enrol. The department does not have the power to require a prisoner to complete an enrolment form when they are released; instead, all prisoners on release must be given an electoral pack (provided to the department by the Electoral Commission). Corrections staff are required to explain the purpose of the packs to each prisoner.<sup>29</sup>

Once a prisoner is released and becomes eligible to enrol, they have one month to complete the enrolment themselves. Section 82 of the Act requires all eligible individuals to be enrolled. If they fail to enrol within one month of becoming

23. Submission 3.3.8, p 5

24. Ibid, p 4; submission 3.3.6, p 12

25. Submission 3.3.6, p 12

26. Submission 3.3.9, pp 3, 9

27. Ibid, p 8

28. Document A19, pp 3–4

29. Document A29, p 3; doc A29(a), p 2

eligible, they may be liable for a fine of up to \$100, or \$200 for a second or subsequent such offence.

We heard evidence that released prisoners have proven reluctant or unable to complete their electoral re-enrolment, although we were not provided with exact figures. Confusion about the provision of an address of residence of more than one month, trying to avoid debt collectors, poor literacy, and a lack of understanding of the electoral system were identified to us as some of the barriers to re-enrolment for ex-prisoners.<sup>30</sup> Another barrier identified was the overwhelming nature of prison release, in which a prisoner often faces more serious and pressing concerns, such as organising accommodation and employment or other financial support and reconnecting with their whānau and community.<sup>31</sup>

Ms Temel provided evidence that the Electoral Commission receives no notification when a prisoner has been released from prison and is not provided with an address or any means to communicate directly with them to provide them with an enrolment pack.<sup>32</sup> However, the commission endeavours to encourage the enrolment of those unenrolled Māori ex-prisoners during its routine attempts through public engagement to ensure all eligible Māori voters have access to information about enrolling and voting and access to the means to do so.<sup>33</sup>

Counsel for Mr Hetaraka and others (Wai 2842) acknowledged the work of the Electoral Commission but questioned the Crown's overall efforts, and specifically the Department of Corrections' efforts, in the re-enrolment of prisoners.<sup>34</sup>

The Crown accepted that it should be doing everything it reasonably can to ensure that ex-prisoners are able to re-enrol.<sup>35</sup> We acknowledge the Crown's previous efforts to enrol and re-enrol Māori, but we agree with the claimants that its efforts have been insufficient to overcome the effects of section 80(1)(d).

#### 4.4.2 Developing the voting habit

Where the ongoing disqualification is of most concern is in its impact on young Māori. Claimant witnesses Dr Ann Sullivan and Professor Janine Hayward gave evidence that early voting habits affect future voting habits. The Māori population is significantly younger than the non-Māori population, and this younger Māori population is less likely to vote than other young voters.<sup>36</sup> Additionally, young Māori are more likely to be imprisoned than non-Māori and, therefore, more likely to be removed from the electoral roll and prevented from voting whilst in prison and, in practical terms, afterwards through failure to re-enrol.<sup>37</sup>

Dr Sullivan and Professor Hayward's evidence shows that, if a young person

30. Transcript 4.1.1, pp 54, 186, 191–192, 225, 227, 233

31. Document A25, p 4

32. Document A19, p 8

33. Ibid, pp 1, 8–9; transcript 4.1.1, pp 175–177

34. Submission 3.3.6, p 8

35. Submission 3.3.9, p 10

36. Document A12, pp 10–12

37. Document A13, p 18

does not vote in their first eligible elections, they are less likely to vote in subsequent elections as the voting habit tends to be set during the first 10 years in which people are eligible to vote.<sup>38</sup>

#### 4.4.3 The 'ripple effect' of individuals not voting

As acknowledged by the Crown, removing an individual's right to vote has the impact of disengaging that person from political discourse, which can have a flow-on effect to their community.<sup>39</sup>

The voting habits and political engagement of an individual can influence those of their whānau and community. Dr Sullivan and Professor Hayward discussed evidence that showed

citizens who view themselves as opposed to the state or wronged by it (including prisoners) can see voting as something people do for the state or give to the state. If the state takes away the right to vote, that is likely to leave those citizens with a diminished identity as a voter long after they leave prison.<sup>40</sup>

Further, this disenfranchisement affects 'the political behaviour of non-disenfranchised members of the community as well'.<sup>41</sup>

Under cross-examination, Ms Temel agreed the evidence showed a 'ripple effect' on voting behaviour in New Zealand.<sup>42</sup>

The claimants also gave evidence of how disenfranchising Māori prisoners affected whānau and the wider community. Mr Hetaraka expressed his frustration about spending time teaching Māori prisoners who they are and the principles and values intrinsic to their whakapapa, only to have the Crown jeopardise these efforts by taking away 'a fundamental right'.<sup>43</sup> He continued:

Taking away Māori prisoners' right to vote affects all Māori. Individuals cast votes, but it's communities which elect governments. Māori prisoners have usually been subjected to the worst effects of Crown policies; a lot of them have been in state care as youths, and many of them were let down by state agencies during their lives. Leaving them out of the political conversation not only disempowers them individually but also affects our iwi as well as Māori generally.<sup>44</sup>

We find as a matter of fact that disenfranchising Māori prisoners has continued to impact on the individual following release from prison and that this impact extends beyond the individual to their whānau and their community. By failing to

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38. Document A12, p 11

39. Submission 3.3.9, p 8

40. Document A12, pp 17–18

41. Ibid, pp 18, 24

42. Submission 3.3.6, p 12; transcript 4.1.1, p 180

43. Document A7, p 2

44. Ibid, p 3

take sufficient action to enable and encourage released prisoners to re-enrol, the Crown has further breached its duty of active protection.

#### 4.5 REHABILITATION: A 'MISSED OPPORTUNITY'?

During our inquiry, counsel and witnesses highlighted the potential benefits that actively participating in the franchise can have on rehabilitation and on prisoner and whānau outcomes.

Counsel for Dr Waretini-Karena and others (Wai 2867) adopted the submissions of the Human Rights Commission.<sup>45</sup> Counsel for the commission submitted that the 'punitive philosophy' behind prisoner disenfranchisement is incompatible with the rehabilitative purpose of the corrections system, as set out in the Corrections Act 2004. The commission argued that allowing prisoners to vote enables them to engage with law and order in a constructive, rather than a negative or destructive, manner. Further, voting facilitates prisoner re-entry to society, as they are more likely to identify with a society they have had a stake in creating: 'It is inconsistent to impose disenfranchisement, which conflicts with a primary purpose of the prison system; rehabilitation and reintegration to society.'<sup>46</sup>

The claimants spoke of the rehabilitative opportunity that voting offers Māori prisoners. Claimant Awatea Mita said:

We have a missed opportunity here. We could be teaching our whānau who are in prisons about the history and Māori experience of voting in Aotearoa, and especially our Māori women who are mothers that will return to their families. To reintegrate into their community understanding the importance of voting could be a means for the intergenerational transmission of a voting culture within whānau that is fully participatory in the political futures of our nation.<sup>47</sup>

Ms Mita also said:

This is a protective measure for my whānau as I believe this will help them not to fall through the gaps like I did. My own personal experiences lead me to trust the research that says people who participate in voting are less likely to offend/reoffend. My hope for my whānau is that civic engagement will lead them one further step away from incarceration.<sup>48</sup>

As Mr Hetaraka said: 'Expecting Māori prisoners to integrate into society upon their release, while excluding them from political participation while in prison, is foolish.'<sup>49</sup>

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45. Submission 3.3.10, pp 2–3

46. Submission 3.3.7, p 6

47. Document A9, p 10

48. Ibid, p 6

49. Document A7, p 3

In our view, exclusion from the franchise is inconsistent with the purpose of the corrections system. Under section 5(1)(c) of the Corrections Act 2004, the purpose of the corrections system is to improve public safety and contribute to the nature of a just society by

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.

Counsel for the Human Rights Commission made the point that denying prisoners the right to vote loses an opportunity, and an important means, of teaching them about democratic and social values. Quoting international jurisprudence, counsel argued: 'It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration.'<sup>50</sup>

Crown witness Richard Symonds, under cross-examination, agreed that prison provides an opportunity to offer a targeted education programme that explains the electoral system and encourages Māori prisoners to vote.<sup>51</sup>

In our assessment of the evidence before us, Māori who are imprisoned and prevented from enrolling during their first elections are less likely to ever vote once released, to form a positive voting habit, or to foster active engagement in elections within their communities. In contravention of the stated purpose of the Corrections Act, the disenfranchisement of prisoners represents a failure to optimise the rehabilitative and reintegrative potential of the franchise. We find that section 80(1)(d) of the Electoral Act 1993 is inconsistent with, and in part undermines, the purpose of the corrections system under section 5 of the Corrections Act and thus prejudices the rehabilitation and reintegration of Māori prisoners. It is, therefore, in Treaty breach of the principle of active protection.

#### 4.6 THE MĀORI ELECTORAL OPTION

Māori can choose between the general roll or the Māori roll when they first enrol to vote. They also have the option of changing rolls during the Māori electoral option, normally held every five years. Counsel for Mr Heteraka and others (Wai 2842) submitted that Māori experience an additional consequence from being removed from the electoral roll, because removing Māori prisoners from the roll also excludes them from participating in the Māori electoral option.<sup>52</sup>

Counsel for Joel Twain McVay and others (Wai 2472) submitted that removing Māori prisoners from the electoral roll decreases the number of Māori on the Māori electoral roll and reduces the total Māori electoral population. This in turn has the effect of reducing the 'ratio' of Māori on the Māori electoral roll as

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50. Submission 3.3.7, p 6

51. Transcript 4.1.1, p 205

52. Submission 3.3.6, p 11

compared to Māori on the general electoral roll, which determines the number of Māori electorates.<sup>53</sup>

All claimant counsel made the point that the number of Māori on the Māori electoral roll has a major bearing on the number of Māori electorates. They argued that removing Māori from the roll impacts on the Māori electoral population and therefore may have reduced the likelihood of Māori gaining an extra Māori seat, potentially prejudicing all Māori now and in the future.<sup>54</sup>

The Crown accepted it has a duty to actively protect Māori political participation in the democratic system, which it acknowledged includes the exercise of the Māori electoral option.<sup>55</sup>

During our inquiry, Mr Hetaraka described the right to vote as a 'taonga'.<sup>56</sup>

Counsel for Dr Waretini-Karena and others (Wai 2867) adopting the view of the Tribunal in the *Maori Electoral Option Report*, also described the Māori electoral option as 'highly prized' and analogous to a 'taonga'.<sup>57</sup> Counsel asserted that the Crown, therefore:

is under a Treaty obligation actively to protect Maori citizenship rights and in particular existing Maori rights to political representation conferred under the Electoral Act 1993. This duty of protection arises from the Treaty generally and in particular from the provisions of article 3.<sup>58</sup>

Counsel for Mr Hetaraka (Wai 2842) submitted that, 'due to the importance of the Māori seats as a taonga, any prejudice, even if potential and small, is important'.<sup>59</sup>

The Crown does not dispute the importance and significance of Māori political participation but argued that the Tribunal has not received enough evidence to thoroughly consider and determine whether Māori political participation is a taonga. Neither has the Tribunal received sufficient evidence that disqualifying Māori prisoners from enrolling suppresses the number of Māori seats.<sup>60</sup>

Crown witness Eriko Kamikubo-Gould, a statistical analyst at Stats NZ, noted that it was not possible to calculate how the Māori electoral population would change if Māori prisoners could enrol and, more specifically, even if the Māori electoral population could be calculated in those circumstances, it is not possible to determine with certainty what impact that would have had on the number of Māori electoral seats.<sup>61</sup>

53. Submission 3.3.8, p 6

54. Submission 3.3.6, p 13; submission 3.3.8, p 4; submission 3.3.10, pp 24–25

55. Submission 3.3.10, p 1

56. Document A10, p 4

57. Submission 3.3.10, p 8

58. Waitangi Tribunal, *Maori Electoral Option Report* (Wellington: Brooker's Ltd, 1994), p 37

59. Submission 3.3.6, p 13

60. Submission 3.3.9, pp 6–8

61. Document A21, pp 1–5

Conversely, claimant witness Dr Lara Greaves, lecturer in New Zealand politics and public policy at the University of Auckland, provided evidence that it was possible to estimate the number of prisoners who were likely to choose the Māori electoral roll and how this could potentially affect the number of Māori electoral seats in the future.<sup>62</sup>

We accept the Crown's argument that we do not need to consider the possible taonga status of Māori political participation to articulate the extent of the Crown's duty of active protection. We note the evidence suggesting that, if more Māori prisoners enrol on the Māori roll, it may potentially lead to an increase in the number of Māori seats. However, we agree that we do not have sufficient evidence to determine whether disqualifying Māori prisoners from enrolling has, to date, suppressed the number of Māori seats, and we therefore make no finding on this issue.

We also accept from the evidence before us, and the Crown's acknowledgements, that Māori are disproportionately affected by section 80(1)(d) of the Act because:

- ▶ Māori are significantly more incarcerated than non-Māori, especially for less serious crimes;
- ▶ young Māori are more likely to be imprisoned than non-Māori, thus impeding the development of positive voting habits;
- ▶ the practical effect of disenfranchisement goes wider than the effect on individual prisoners, impacting on their whānau and communities; and
- ▶ the legislation operates as a de facto permanent disqualification due to low rates of re-enrolment amongst released prisoners.

#### **4.7 BALANCING TINO RANGATIRATANGA AND KĀWANATANGA**

In this section, we examine the Crown's claim that the right to remove offenders from the electoral roll is a reasonable exercise under its right of kāwanatanga. We also look at how this right is balanced by the Māori right to tino rangatiratanga and the Crown's obligation, under the Treaty, to protect tino rangatiratanga.

Counsel for Mr Hetaraka submitted:

the reasonable exercise of kāwanatanga places an obligation on the Crown to engage in rational and robust decision-making as well as the protection of human rights. In particular where the exercise of kāwanatanga infringes on the guarantees set out in Article 2, it should only be in exceptional circumstances in the national interest.<sup>63</sup>

Further, the legislation is not in the national interest and, therefore, introducing the legislation is not a 'reasonable exercise of kāwanatanga', neither is it consistent with international jurisprudence.<sup>64</sup>

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62. Document A27, pp 1–13

63. Submission 3.3.6, p 6

64. Ibid, pp 7–8

Counsel for Joel McVay and others submitted that limiting Māori voting rights in terms of article 2 qualifies Māori autonomy and breaches the Treaty guarantee of tino rangatiratanga. Section 80(1)(d) of the Electoral Act unjustifiably interferes with the claimants' right to assert their rangatiratanga at both a micro and a macro level. While the removal of the right to vote affects prisoners on an individual basis, it also impacts on the wider right of representation of the Māori community, as the political power of Māori is undermined by removing thousands of Māori prisoners from the Māori electoral roll.<sup>65</sup>

Similarly, counsel for Dr Waretini-Karena and others submitted that disenfranchising Māori prisoners removes from those prisoners 'the right to determine their own decision makers' and creates different classes of voters within and amongst Māori whānau and communities.<sup>66</sup> Counsel referred to the High Court in *Taylor v Attorney-General*, which held that the right to vote is the most important civic right in a free and democratic society.<sup>67</sup> The Crown, therefore, has an obligation under the Treaty to actively protect the right of Māori to register as electors and to vote, both under the Electoral Act 1993 and under the New Zealand Bill of Rights Act 1990.<sup>68</sup>

The Crown accepted that it has a duty to actively protect Māori citizenship and political representation and that this includes the ability for Māori to register to vote, exercise the Māori electoral option, and exercise the right to vote.<sup>69</sup> However, the Crown submitted that temporarily excluding those who have offended against societal norms remains a legitimate exercise of kāwanatanga.<sup>70</sup>

The Crown has not specifically agreed that it has an obligation under the Treaty to actively protect the right of Māori to vote as conferred by section 12(a) of the Bill of Rights Act. It submitted that serious criminal offending has been accepted as a legitimate ground for disqualification in similar jurisdictions. It considered the decision in *Taylor v Attorney-General* and submitted that the decision that section 80(1)(d) of the Electoral Act is unjustifiably in breach of the Bill of Rights Act was not based on a critique of the significance of the objective the provision sought to achieve but because the law was irrational and disproportionate. The Crown, therefore, accepted only that it needs to act to ensure the law has the effect of a temporary exclusion.<sup>71</sup>

But, as we have heard, in practice the disenfranchisement of Māori prisoners has acted not as a temporary exclusion of their right to vote but as a de facto permanent exclusion. The Crown agreed that in this case any such prejudice must be remedied, and it canvassed several options. The Tribunal could recommend:

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65. Submission 3.3.8, pp 5, 7

66. Submission 3.3.10, p 7

67. Ibid, p 8

68. Ibid, pp 9–10

69. Submission 3.3.9, p 1

70. Ibid, p 2

71. Ibid, pp 2–3



- the repeal of section 80(1)(d) of the Act in order to enfranchise all prisoners;
- a return to the law as it was before 16 December 2010; or
- a legislative change, short of repeal, to ensure the law acts only as a temporary disqualification.<sup>72</sup>

Claimant Pirika Tame (Tom) Hemopo made statements that agreed with the first option outlined by the Crown:

I want to see the entire legislation erased, not tinkered with, not amended, but erased altogether and all prisoners given the right to exercise their democratic rights to participate in the electoral process. For Māori, I want to see our Treaty rights honoured so Māori are not further disenfranchised and undermined, simply because they are serving time in prison for violating society's rules.<sup>73</sup>

We also agree with that option. In our view, any form of disenfranchisement of prisoners will continue to disproportionately impact on Māori.

We set out our recommendations in the next chapter of our report.

#### **4.7.1 Kāwanatanga and good government**

In its submission, the Wellington Howard League submitted that prisoner disenfranchisement is an unfair and additional punishment because it is arbitrary, disproportionate, and extra-judicial.<sup>74</sup> Arbitrary, because those people sentenced to home detention are not disenfranchised, while those who commit the same offence and are sentenced to imprisonment are. Disproportionate, because it is a blanket punishment applied regardless of the severity of the offence. Extra-judicial, because disenfranchisement is not a sentence available to judges under the Sentencing Act 2002 or a condition of imprisonment under the Corrections Act 2004.<sup>75</sup>

The Human Rights Commission similarly stated that 'prisoner disenfranchisement is not logically connected to the harm, wrongdoing or other principles and practices of punishment'.<sup>76</sup> The commission saw no credible reason for denying a fundamental democratic right in the interests of additional punishment. Further, disenfranchisement cannot be said to serve a valid purpose when there is no evidence that it has a deterrent effect.<sup>77</sup> The commission did not support a return to the law before its amendment in 2010.<sup>78</sup>

Counsel for Dr Waretini-Karena and others also made the point that

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72. Ibid, pp 3, 9

73. Document A17, p 4

74. Document A28, p 3

75. Ibid, pp 3-4

76. Submission 3.3.7, pp 5-6

77. Ibid, p 8

78. Ibid, p 7

disqualifying all convicted prisoners is an arbitrary ban disproportionate to the seriousness of the crimes committed.<sup>79</sup>

Claimant witnesses Ms Hayward and Ms Sullivan argued that ‘The right to vote is fundamental and sits at the heart of New Zealand’s constitution. Section 80(1)(d) which disqualifies prisoners from voting is excessively punitive in the context of New Zealand’s political culture and is not best international practice.’<sup>80</sup>

As we noted in the section on Treaty principles and standards, in an exchange for tino rangatiratanga the Crown obtained the right of kāwanatanga, including the right to pass laws, and that in some exceptional circumstances (such as for peace and good order) it may balance its obligations to Māori under the Treaty against the needs of other sectors of the community.<sup>81</sup>

Yet, as we have discussed above, disenfranchising prisoners is not aligned with their rehabilitation or their reintegration into society, as it disengages prisoners from political participation and can likewise disengage their whānau and wider community.

In our view, suppressing a substantial number of Māori from exercising their say in the country’s political future resulting in their own, and their community’s, disengagement cannot be said to be warranted to achieve the ‘peace and good order’ of the nation. Likewise, any practice known to discourage the rehabilitation and reintegration of thousands of prisoners cannot be said to be in the nation’s or any other sector of the community’s interests.

We have struggled to see any practical benefit to Māori, or the nation, from disenfranchising the prison population. We discussed this with all counsel and were no better advised. An examination of the *Parliamentary Debates* showed the Bill’s proponent claiming he had introduced it in response to ‘a large number of ordinary folk’ asking him: ‘They have discussed this matter with me and believe that that should be the case. I have to say that since the bill has become public knowledge, the level of support for it has been overwhelming.’<sup>82</sup>

Ascribing motives to actions is not part of our function. Instead, we note that under the principle of kāwanatanga the duty of good government obliges the Crown to protect the equal status that Māori hold with other citizens, without arbitrary distinctions between people or groups.<sup>83</sup>

Claimant witnesses stated that section 80(1)(d) breaches both local and international law.<sup>84</sup> For example, the New Zealand Bill of Rights Act 1990, which affirms

79. Submission 3.3.10, pp 20–21

80. Document A12, p 23

81. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1239; Waitangi Tribunal, *Maori Electoral Option Report*, pp 3–4; Waitangi Tribunal, *Tū Mai Te Rangi!*, pp 25–26; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 57

82. Document A20(a), p 2

83. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 25; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 61–64

84. Document A6, p 3; doc A8, pp 1–5; doc A13, p 24; doc A26, p 3

New Zealand's commitment to the International Covenant on Civil and Political Rights. Under article 25 of the International Covenant and section 12 of the Bill of Rights Act, all New Zealanders over the age of 18 have the equal right to vote by secret ballot at each election without unreasonable limitation. Section 5 of the Bill of Rights Act enables only 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

Several cases about the disenfranchisement of prisoners and the Bill of Rights Act have been heard in the New Zealand courts. In *Taylor v Attorney-General*, the High Court found that section 80(1)(d) is an unjustifiable limit on the right to vote under section 12(a) of the Bill of Rights Act.<sup>85</sup> However, the subsequent *Taylor v Attorney-General* High Court case and *Ngaronoa v Attorney-General* Court of Appeal case found the legislation is not an unjustifiable limit on the right to be free from discrimination on the grounds of race under section 19(1) of the Bill of Rights Act.<sup>86</sup> The Court of Appeal found that the legislation did act disproportionately on Māori, albeit that the impact was small. We note the Human Rights Commission's submission that the Court of Appeal did not have the benefit of Robert Lynn's evidence showing Māori were 11.4 times more likely to be removed from the electoral roll than non-Māori.<sup>87</sup>

We accept that the evidence is overwhelming that, since its amendment, the legislation has indeed disproportionately disenfranchised Māori. In doing so, it has created an arbitrary distinction between otherwise equal citizens; in particular between Māori and non-Māori but also between Māori prisoners and the wider Māori population. The legislation is punitive and breaches Māori citizenship rights. It undermines the Crown's good government obligations to reduce inequity.

#### 4.7.2 Political participation as an expression of tino rangatiratanga

The Crown questioned whether we have received sufficient evidence in this urgent inquiry to support a conclusive finding that Māori participation at an individual or collective level amounts to an exercise of tino rangatiratanga in terms of article 2 of the Treaty.

Mr Hetaraka described the right of Māori to be enrolled, especially on the Māori roll, and to exercise their right to vote as 'one of the only ways left for us to exercise even a small degree of rangatiratanga'. 'Taking away this right', he said, 'especially where the offence is relatively minor, is wrong.'<sup>88</sup> Mr Hetaraka emphasised that the right of Māori to vote is part of the ongoing price the Crown pays to exercise kāwanatanga. He argued that, as 'sovereign people and rangatira under self-determination',<sup>89</sup> only Māori should make decisions about their voting rights as guaranteed under the Treaty:

85. *Taylor v Attorney-General* [2015] NZHC 1706, para 79

86. *Taylor v Attorney-General* [2016] NZHC 355; *Ngaronoa v Attorney-General* [2017] NZCA 351

87. Submission 3.3.7, p 8

88. Document A7, p 3

89. Document A10, p 5

But like all Crown injustices, our people throughout remain steadfast in retaining our rangatiratanga, which will never be taken away from us. The Treaty guarantees our right to vote, whether someone is in prison or not. The Crown does not have the authority to take this right away from us.<sup>90</sup>

Claimant witnesses Ms Hayward and Ms Sullivan maintained that protecting the right of Māori to choose which roll to be on under the Māori electoral option is 'an important expression of the Crown's Treaty obligation to guarantee Māori tino rangatiratanga'.<sup>91</sup>

In exchange for the Crown's right to exercise kāwanatanga, the Treaty guaranteed Māori their ongoing exercise of tino rangatiratanga and the rights and privileges of British subjects. The right to participate in the electoral system is exactly that – a right, not a privilege. Prisoners do not lose all their rights of citizenship when incarcerated. For example, prisoners are still entitled to their right to be protected from harm and torture. Incarceration is the punishment. Removing the right to vote is over and above the sentence of punishment and inflicts disproportionate prejudice on Māori prisoners.

By disenfranchising sentenced prisoners, we find that section 80(1)(d) of the Electoral Act 1993 has breached the Treaty right of Māori to equitably partake in elections and to exercise their individual and collective tino rangatiratanga in the appointment of their political representatives.

In our view, Māori voting as a population group can be an exercise of tino rangatiratanga; that is, a collective determining of their representatives. But, as a population group, tino rangatiratanga is prejudiced because with this amendment Māori are disproportionately affected by the law, and the effects of the law endure in practical terms beyond release and beyond the individual. We find this impact contributes further to the legislation being in serious breach of the principles of tino rangatiratanga, active protection, and equity.

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90. Document A10, p 8

91. Document A12, p 23

## CHAPTER 5

### FINDINGS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

In this chapter, we present a summary of our findings and we make our recommendations.

Before doing so, we wish to extend our appreciation to Crown counsel for the responsible manner in which their closing submissions were made, as they contained significant important acknowledgements informed by the evidence. We have found it refreshing to have the Crown formally step back from an adversarial stance and adopt the measured and constructive approach it has taken in this inquiry, from the withdrawal of its opposition to the urgency application right through to its closing submissions. Those actions reflect the honour of the Crown, which needs demonstration in this jurisdiction if Māori–Crown relations are to be strengthened into the future. The Tribunal has been able to report in a succinct and timely manner because of the Crown’s helpful stance. Accordingly, we encourage Crown counsel to consider following this approach in future inquiries, when warranted by the evidence or circumstances of an inquiry.

#### 5.2 SUMMARY OF FINDINGS

We find, on the issue of consultation and informed advice, that Crown officials failed to ensure adequate consultation with Māori and offered support and advice to the Law and Order Select Committee, which failed to provide sufficient information about the specific effect the legislation would have on Māori and Crown rights and obligations under the Treaty. By failing to consult Māori and providing inadequate advice, the Crown failed to actively protect Māori rights under the Treaty. It also failed in its duty of informed decision-making under the principle of partnership and contributed to the Act as amended being in breach of the Treaty.

We find as a matter of fact that Māori have been disproportionately affected by section 80(1)(d) of the Electoral Act 1993. By failing to ensure that potential consequences for Māori were recognised and taken into account in the select committee process or by failing to propose the repeal of the provision once those effects were recognised (or both), the Crown has failed in its duty to actively protect the right of Māori to equitably participate in the electoral process and to exercise their tino rangatiratanga individually and collectively. We find this to be a breach of the principles of active protection and equity and hence kāwanatanga obligations to reduce inequity.

We acknowledge the Crown's previous efforts to enrol and re-enrol Māori but find that its efforts in relation to released prisoners have been unable to overcome the effects of section 80(1)(d).

We find as a matter of fact that disenfranchising Māori prisoners has continued to impact on the individual following release from prison and that this impact extends beyond the individual to their whānau and their community. By failing to take sufficient action to enable and encourage released prisoners to re-enrol, the Crown has further breached its duty of active protection.

We find that section 80(1)(d) of the Electoral Act 1993 is inconsistent with, and in part undermines, the purpose of the corrections system under section 5 of the Corrections Act 2004 and therefore prejudices the rehabilitation and reintegration of Māori prisoners. It is thus in Treaty breach of the principle of active protection.

We find that the duty of active protection requires the Crown to take reasonable steps to actively protect the right of all Māori – including prisoners – to enrol and vote. By disenfranchising all sentenced prisoners, we find that section 80(1)(d) has breached Māori Treaty rights and that the Crown has failed in its kāwanatanga duty to actively protect the right of Māori to equitably partake in elections and to exercise their individual and collective tino rangatiratanga in the appointment of their political representatives.

Māori are disproportionately and prejudicially affected by section 80(1)(d) and therefore we find the Electoral Act is in serious Treaty breach because:

- ▶ Māori are significantly more incarcerated than non-Māori, especially for less serious crimes;
- ▶ young Māori are more likely to be imprisoned than non-Māori, thereby impeding the development of positive voting habits;
- ▶ the practical effect of disenfranchisement goes wider than its effect on individual prisoners, impacting on their whānau and communities; and
- ▶ the legislation operates as a de facto permanent disqualification due to low rates of re-enrolment amongst released prisoners.

### 5.3 RECOMMENDATIONS

Accordingly, having found that the Crown has acted inconsistently with the Treaty principles of partnership, kāwanatanga, tino rangatiratanga, active protection, and equity, and prejudicially affected Māori, we make the following recommendations:

- ▶ We recommend that the legislation is amended urgently to remove the disqualification of all prisoners from voting, irrespective of their sentence. We do not recommend a return to the law as it was before 15 December 2010 because even that law disproportionately affected Māori. All Māori have a Treaty right to exercise their individual and collective tino rangatiratanga by being able to exercise their vote in the appointment of their political representatives.
- ▶ We recommend that the Crown start a process immediately to enable and encourage all sentenced prisoners and all released prisoners to be enrolled in time for the next general election in 2020. This process needs to include

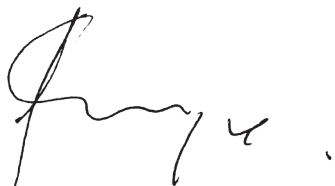
providing electoral information to all prisoners and, where possible, released prisoners through media accessible and appropriate to their needs, and in te reo Māori and English.

- We recommend that a process is implemented for ensuring that Crown officials provide properly informed advice on the likely impact that any Bill, including members' Bills, will have on the Crown's Treaty of Waitangi obligations. We recommend that when considering these likely impacts of a member's Bill the Crown ensures that it properly informs itself to an extent where its support of the select committee process is as informed as it should be. The Crown can achieve this by seeking advice from the appropriate Māori groups and other experts (including appropriately experienced Crown officials) who are best placed to ensure the Crown has a comprehensive understanding of any legislation's implications for its Treaty obligations.





Dated at *Wellington* this *9<sup>th</sup>* day of *August* 20*19*



Judge Patrick Savage, presiding officer



Ron Crosby, member



Kim Ngarimu, member





## APPENDIX

### SELECT INDEX TO THE RECORD OF INQUIRY

#### RECORD OF HEARINGS

##### PANEL MEMBERS

The panel members were Judge Patrick Savage (presiding), Ron Crosby, and Kim Ngarimu.

##### COUNSEL

Richard Francois appeared for the Wai 2472 claimants.

Alice McCarthy and Winston McCarthy appeared for the Wai 2842 claimants.

Annette Sykes, Rebekah Jordan, and Jordan Bartlett appeared for the Wai 2867 claimants.

Mihiata Pirini, Daniel Perkins, and Kate Peirse-O'Byrne appeared for the Crown.

Maia Wikaira and Jaimee Paenga appeared for the Human Rights Commission.

##### HEARING

The hearing was held at the Waitangi Tribunal's offices in Wellington from 20 to 22 May 2019.

#### RECORD OF PROCEEDINGS

##### 1. STATEMENTS

###### 1.1 Statements of claim

1.1.1 Richard Francois, first amended statement of claim for Joel McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde, and Marissha Matthews, 14 July 2014

(a) Richard Francois, third amended statement of claim for Joel McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde, and Marissha Matthews, 22 September 2016

1.1.2 Winston McCarthy, statement of claim for Carmen Hetaraka on behalf of Ngātiwai prisoners, Māori prisoners, and Māori generally, 13 November 2018

1.1.3 Annette Sykes, Rebekah Jordan, and Jordan Bartlett, statement of claim for Dr Rawiri Waretini-Karena and Donna Awatere-Huata on behalf of themselves, their whānau, hapū, and iwi and all Māori, 4 February 2019

###### 1.3 Statements of response

1.3.1 Geoffrey Melvin and Caitlin McKay, Crown statement of defence, 23 January 2015

**App**

**1.4 Statements of issues**

1.4.1 Tribunal statement of issues, 16 April 2019

**2. TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS**

**2.1 Registering new claims**

2.1.1 Judge Patrick Savage, memorandum directing registrar to register statement of claim

1.1.1 as Wai 2472, 21 July 2014

2.1.2 Judge Patrick Savage, memorandum directing registrar to register statement of claim

1.1.2 as Wai 2842, 16 November 2018

2.1.3 Judge Patrick Savage, memorandum directing registrar to register statement of claim

1.1.3 as Wai 2867, 13 February 2019

**2.2 Amending statements of claim**

2.2.1 Judge Patrick Savage, memorandum directing registrar to add statement of claim

1.1.1(a) to Wai 2472 record, 1 November 2016

**2.5 Pre-hearing stage**

2.5.1 Chief Judge Wilson Isaac, memorandum directing registrar to establish new record of inquiry and consolidate Wai 2472 and Wai 2842 into Wai 2870, 24 January 2019

2.5.2 Judge Patrick Savage, memorandum directing Crown and interested parties to respond to application for urgent hearing, 21 July 2014

2.5.3 Judge Patrick Savage, memorandum directing copy of claim be served on New Zealand Māori Council, 22 July 2014

2.5.4 Judge Patrick Savage, memorandum granting priority to Wai 2472, 7 August 2014

2.5.5 Judge Patrick Savage, memorandum granting New Zealand Māori Council interested party status, 21 August 2014

2.5.6 Chief Judge Wilson Isaac, memorandum appointing Judge Patrick Savage presiding officer and Tania Simpson, Erima Henare, and Ronald Crosby panel members for Wai 2472, 9 September 2014

2.5.8 Judge Patrick Savage, memorandum declining application to amend Wai 2472, declining application to join claimants, declining application to consolidate new claim, and directing claimants to file amended statement of claim, 10 February 2015

2.5.9 Judge Patrick Savage, memorandum directing registrar to send copy of Wai 2472 record of inquiry to Electoral Commission, 24 February 2015

2.5.13 Judge Patrick Savage, memorandum directing Crown and interested parties to file submissions and evidence in response to request for urgency, 20 December 2016

- 2.5.15** Judge Patrick Savage, memorandum declining application for urgency for Wai 2472, 16 February 2017
- 2.5.16** Chief Judge Wilson Isaac, memorandum directing Crown and interested parties to file responses to application for urgency and applicants to file submissions in reply, 30 October 2018
- 2.5.17** Judge Patrick Savage, memorandum directing Crown and interested parties to file responses to application for urgency and applicants to file submissions in reply, 16 November 2018
- 2.5.18** Judge Patrick Savage, memorandum granting Wai 2472 and Wai 2842 applications for urgency, 17 December 2018
- 2.5.19** Chief Judge Wilson Isaac, memorandum appointing Judge Patrick Savage presiding officer for Wai 2842, 23 January 2019
- 2.5.20** Judge Patrick Savage, memorandum concerning number of witnesses, filing of briefs of evidence, need for an interpreter, and other procedural steps, 23 January 2019
- 2.5.21** Chief Judge Wilson Isaac, memorandum appointing Judge Patrick Savage presiding officer and Ronald Crosby and Kim Ngarimu panel members for Wai 2870, 8 March 2019
- 2.5.22** Judge Patrick Savage, memorandum concerning participation of parties, indicative hearing dates, and filing extensions, 18 March 2019
- 2.5.27** Judge Patrick Savage, memorandum concerning presentation of Tom Hemopo's evidence in te reo and granting leave to arrange an interpreter, 13 May 2019
- 2.5.28** Judge Patrick Savage, memorandum confirming presence of interpreter at hearing, 16 May 2019

### **3. SUBMISSIONS AND MEMORANDA OF PARTIES**

#### **3.1 Pre-hearing represented**

- 3.1.1** Richard Francois, memorandum seeking urgency, 8 July 2014
- 3.1.2** Geoffrey Melvin and Caitlin McKay, submissions opposing granting of urgency, 1 August 2014
- 3.1.3** Richard Francois, submissions responding to submission 3.1.2, 5 August 2014
- 3.1.4** Kathy Ertel, memorandum seeking joining of New Zealand Maori Council as a party, 19 August 2014
- 3.1.5** Geoffrey Melvin and Caitlin McKay, memorandum concerning possible recusal of presiding officer, 8 December 2014

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- 3.1.6** Caitlin McKay, memorandum concerning filing of statement of defence and seeking judicial conference, 23 January 2015
- 3.1.7** Richard Francois, memorandum seeking to amend statement of claim, 22 September 2016
- 3.1.8** Richard Francois, memorandum seeking urgency or priority and seeking directions requiring the Crown to file statement of defence, 9 December 2016
- 3.1.9** Geoffrey Melvin and Caitlin McKay, memorandum opposing granting of urgency or priority, 20 January 2017
- 3.1.10** Richard Francois, memorandum responding to submission 3.1.9, 3 February 2017
- 3.1.11** Richard Francois, memorandum seeking urgency or priority and directions requiring the Crown file statement of defence, 24 October 2018
- 3.1.12** Winston McCarthy, memorandum seeking urgency, 13 November 2018
- 3.1.13** Yasmin Moinfar-Yong and Mihiata Pirini, submissions opposing further application for urgency or priority, 13 November 2018
- 3.1.14** Richard Francois, submissions responding to submission 3.1.13, 27 November 2018
- 3.1.15** Yasmin Moinfar-Yong and Mihiata Pirini, submissions responding to memorandum 2.5.17, 30 November 2018
- 3.1.16** Winston McCarthy, submissions responding to submission 3.1.15, 3 December 2018
- 3.1.21** Christine McCarthy, Wellington Howard League, to registrar, Waitangi Tribunal, letter seeking interested party status, 21 February 2019
- 3.1.26** Richard Francois, memorandum concerning use of claimant affidavits, 28 February 2019
- 3.1.29** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum accompanying statement of claim 1.1.3 and document A14, 4 February 2019
- 3.1.30** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum accompanying document A15 and seeking leave to file brief of evidence of Donna Awatere-Huata, 22 February 2019
- 3.1.31** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum accompanying documents A17 and A17(a), 12 March 2019
- 3.1.35** Janet Anderson-Bidois and Maia Wikaira, memorandum seeking leave for Human Rights Commission to appear as intervener, 22 March 2019

- 3.1.37** Mihiata Pirini, memorandum accompanying document A24, 29 March 2019
- 3.1.41** Alice McCarthy and Winston McCarthy, joint statement of issues, 3 April 2019
- 3.1.42** Alice McCarthy, David McCarthy, Winston McCarthy, and Mihiata Pirini, joint memorandum accompanying statement of issues, 3 April 2019
- 3.1.43** Alice McCarthy and Winston McCarthy, memorandum of counsel responding to memorandum 2.5.24, accompanying document A25, and seeking leave for late filing of document A27, 24 April 2019
- 3.1.44** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum seeking leave for late filing of document A26, 2 May 2019
- 3.1.45** Alice McCarthy and Winston McCarthy, memorandum seeking leave for late filing of document A27, 2 May 2019
- 3.1.46** Mihiata Pirini and Kate Peirse-O'Byrne, memorandum seeking extension for filing of opening submissions, 3 May 2019
- 3.1.47** Christine McCarthy, Wellington Howard League, to registrar, Waitangi Tribunal, letter advising of intention to make written submission, 6 May 2019
- 3.1.49** Alice McCarthy, Winston McCarthy, and Mihiata Pirini, joint memorandum concerning joint hearing timetable, 6 May 2019
- (a) 'Wai 2870: Māori Prisoners' Voting Rights Inquiry – Hearing: 20–23 May 2019', table, no date
- 3.1.50** Winston McCarthy, memorandum setting out intended areas for cross-examination, 6 May 2019
- (a) 'Wai 2870: Māori Prisoners' Voting Rights Inquiry – Areas of Cross-examination of Crown Witnesses for Wai 2842', table, no date
- 3.1.51** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum setting out intended areas for cross-examination, seeking leave for late filing of opening submissions, and supporting Wellington Howard League joining as interested party, 6 May 2019
- 3.1.52** Mihiata Pirini, memorandum setting out intended areas for cross-examination, advising of unavailability of Crown witness, and seeking leave for late filing of closing submissions, 6 May 2019
- 3.1.54** Maia Wikaira and Jaimee Paenga, memorandum accompanying opening submissions and seeking leave to appear and present oral submissions, 6 May 2019
- 3.1.55** Christine McCarthy, Wellington Howard League, to registrar, Waitangi Tribunal, letter accompanying documents A28 and A28(a), 7 May 2019

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**3.1.56** Mihiata Pirini, memorandum accompanying documents A29 and A29(a), 10 May 2019

**3.1.57** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum accompanying submissions 3.3.3 and 3.3.3(a), 13 May 2019

**3.1.58** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum confirming appearance of Pirika Tame (Tom) Hemopo and seeking leave for an interpreter, 13 May 2019

**3.1.59** Kate Peirse-O'Byrne, memorandum accompanying corrected document A23(b), 13 May 2019

**3.1.60** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum concerning provision of interpreter, 14 May 2019

**3.1.61** Winston McCarthy, memorandum seeking leave for Dr Lara Greaves to appear via audio-visual link, 17 May 2019

**3.1.64** Mihiata Pirini, memorandum concerning ability of Caroline Greaney to answer questions about prisoner voting prior to 1993, 16 May 2019

**3.2 Hearing stage**

**3.2.1** Daniel Perkins, memorandum listing legislation inconsistent with New Zealand Bill of Rights Act 1990, 22 May 2019

**3.3 Opening, closing, and in reply**

**3.3.1** Maia Wikaira and Jaimee Paenga, opening submissions on behalf of the Human Rights Commission, 6 May 2019

**3.3.2** Winston McCarthy, opening submissions on behalf of Wai 2842 claimants, 13 May 2019

**3.3.3** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, opening submissions on behalf of Wai 2867 claimants, 13 May 2019

**(a)** 'Answers to the Tribunal Statement of Issues', typescript, no date, 13 May 2019

**3.3.4** Daniel Perkins and Kate Peirse-O'Byrne, opening submissions, 14 May 2019

**3.3.5** Richard Francois, opening submissions on behalf of Wai 2472 claimants, 15 May 2019

**3.3.6** Winston McCarthy, closing submissions on behalf of Wai 2842 claimants, 22 May 2019

**3.3.7** Maia Wikaira and Jaimee Paenga, summary of legal submissions on behalf of the Human Rights Commission, 21 May 2019



**3.3.8** Richard Francois, closing submissions on behalf of Wai 2472, 22 May 2019

**3.3.9** Mihiata Pirini, closing submissions on behalf of the Crown, 24 May 2019

(a) Daniel Perkins, closing submissions on behalf of the Crown concerning parliamentary privilege, 22 May 2019

**3.3.10** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, closing submissions on behalf of Wai 2867 claimants, 23 May 2019

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### **3.4 Post-hearing stage**

**3.4.1** Mihiata Pirini, memorandum accompanying written version of oral closing submissions, 24 May 2019

## **4. TRANSCRIPTS AND TRANSLATIONS**

### **4.1 Transcripts**

**4.1.1** National Transcription Service, transcript of Wai 2870 hearing (Waitangi Tribunal offices, Wellington, 20–22 May 2019), [2019]

*pp 50–58*: Questioning of Arthur Taylor, 21 May 2019

*pp 154–172*: Questioning of Bronwyn Donaldson, 21 May 2019

*pp 173–193*: Questioning of Kristina Temel, 21 May 2019

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**A2** Joel McVay, affidavit, 14 July 2014

**A3** Rhys Warren, affidavit, 14 July 2014

**A4** Hinemanu Ngaronoa, affidavit, July 2014

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**A5** Marissha Matthews, affidavit, 15 July 2014

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**A7** Carmen Hetaraka, affidavit, November 2018

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**A9** Awatea Mita, brief of evidence, 22 February 2019

**A10** Carmen Hetaraka, brief of evidence, 22 February 2019

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**A15** Dr Rawiri (David) Waretini Junior-Karena, second affidavit, 22 February 2019

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- pp 87–88: W A Moore to Minister of Justice, letter concerning compliance of Electoral Reform Bill with New Zealand Bill of Rights Act 1990, 19 November 1992
- pp 89–94: Solicitor-General to Secretary for Justice, letter concerning compliance of section 42(1)(d) of the Electoral Act 1956 with section 12(a) of the New Zealand Bill of Rights Act 1990, 17 November 1992
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- (a) Robert Lynn, comp, supporting documents to document A22, 22 March 2019
- p 1: ‘Number of Persons Removed from Electoral Roll Following Sentence of Imprisonment, and Numbers Removed from Rolls per 100,000 Population Aged 18 Plus, by Year and Ethnic Groups: 2004–2018’, table, no date
- p 2: ‘Number of Persons Removed from Electoral Roll Following Sentence of Imprisonment per 100,000 Population Aged 18 Plus, by Ethnic Group: 2004–2018’, graph, no date
- p 3: ‘Number of People Sentenced to Imprisonment in a Given Year by Māori / Non-Māori for All Imprisonable Offences’, table, no date
- p 4: ‘Proportion of People Sentenced to Imprisonment in a Given Year by Māori / Non-Māori for All Imprisonable Offences’, table, no date
- p 5: ‘Number of People Sentenced to Imprisonment in a Given Year by Māori / Non-Māori for All Imprisonable Offences’, graph, no date
- p 6: ‘Rate per 100,000 People for People Sentenced to Imprisonment in a Given Year by Māori / Non-Māori for All Imprisonable Offences’, table, no date
- p 6: ‘Ratio between Māori and Non-Māori for People Sentenced to Imprisonment in a Given Year for All Imprisonable Offences’, table, no date
- p 6: ‘Rate of People Sentenced to Imprisonment in a Given Year by Māori / Non-Māori for All Imprisonable Offences’, graph, no date

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