

Electoral Amendment Bill

Submission

NZ Council for Civil Liberties

About the New Zealand Council for Civil Liberties

1. The New Zealand Council for Civil Liberties is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization that works through education and advocacy to promote a rights-based society and prevent the erosion of civil liberties.
2. We wish to appear before the Committee to make an oral submission.

Introduction

3. The primary intention of the Bill appears to be to make it easier for New Zealanders to vote in elections. It does this by allowing enrolment up to and including election day, and expanding the number of places where people can cast their vote. It also makes provisions to allow for future development of an electronic electoral roll (not an electronic voting system) and for managing polling day disruptions.
4. The Council supports the intention to make it easier for New Zealanders to vote. The right to vote is a key part of our democracy and is protected in section 12 of the New Zealand Bill of Rights Act 1990 (NZBORA). However, we are very disappointed to see that the Bill does not include a number of other initiatives to ensure that all New Zealanders can exercise their right to vote.

Summary of issues

5. This submission covers:
 - Voting rights for prisoners
 - Rights of overseas citizens to vote
 - Voting rights of people with disabilities
 - The age at which people should gain the right to vote

Voting rights for prisoners

6. The New Zealand Council for Civil Liberties is surprised by the bill's failure to address the High Court's 2015 declaration that section 80(1)(d) the Electoral Act 1993 (the Act) is inconsistent with NZBORA.

Voting is a Human Right

7. Article 21(3) of the United Nations Declaration of Human Rights, to which New Zealand is a signatory, states that:

"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."¹

8. Article 25 of the International Covenant on Civil and Political Rights, which New Zealand has ratified, states that "Every citizen shall have the right and the opportunity ... to vote."²
9. Section 12 of NZBORA states that "Every New Zealand citizen who is of or over the age of 18 years ... has the right to vote."³
10. The rights and freedoms set out in NZBORA may only be limited under section 5 of the Act where it is 'reasonable', 'prescribed in law' and where the limitation 'can be demonstrably justified in a free and democratic society.'

The Prisoner Voting Ban violates Human Rights

11. In 2010, the Electoral Act 1993 was amended by the Electoral (Disqualification of Convicted Prisoners) Amendment Bill, to add section 80(1)(d), the prisoner voting ban.
12. The Council opposed the prisoner voting ban before the Select Committee in 2010, on the grounds that it violated section 12 of NZBORA.⁴
13. The Attorney-General at the time, Chris Finlayson MP, declared the 2010 Bill inconsistent with the NZBORA, stating, "I consider that the Bill appears to be

¹ <https://www.un.org/en/universal-declaration-human-rights/index.html>

² <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

³ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225511.html>

⁴ https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCLO_EVI_00DBHOH_BIL_L9745_1_A53637/new-zealand-council-for-civil-liberties

unjustifiably inconsistent with the electoral rights affirmed by section 12 of the Bill of Rights Act.”⁵

14. In 2015 the High Court, in *Taylor v Attorney-General*, declared that:

“Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s5 of that Act.”⁶

15. In 2017, the Attorney General’s appeal of the High Court decision was dismissed by the Court of Appeal, indicating that the Court of Appeal agreed with the High Court.⁷

16. In 2018, the Attorney General appealed again to the Supreme Court, who also agreed with the High Court.⁸

17. In 2019, the Waitangi Tribunal ruled that:

“Section 80(1)(d) of the Electoral Act 1993 breached the principles of the Treaty. The Tribunal further found that the Crown has failed in its duty to actively protect the right of Māori to equitably participate in the electoral process and exercise their tino rangatiratanga individually and collectively.”⁹

Implication of the Declaration of Inconsistency for Future Elections and New Zealand’s Reputation

18. The Courts’ declaration that the prisoner voting ban is a breach of people’s rights under NZBORA is already a serious national issue worthy of parliament’s attention, and we are puzzled by this Government’s failure to use the present Bill as a vehicle to rectify the situation. We are doubly puzzled as such an amendment is consistent with the opinions expressed by a number of Labour members of the current Government at the time the 2010 Bill was

⁵ Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill
<https://www.justice.govt.nz/assets/Documents/Publications/BORA-Electoral-Disqualification-of-Convicted-Prisoners-Amendment-Bill.pdf>

⁶ *Taylor v Attorney-General*[2015] NZHC 1706, [2015] 3 NZLR 791 [Taylor(HC)] at [79]

⁷ *Attorney-General v Taylor*[2017] NZCA 215, [2017] 3 NZLR 24 (Kós P, Randerson, Wild, French and Miller JJ) [Taylor(CA)].

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<https://www.courtsfnz.govt.nz/cases/attorney-general-v-arthur-william-taylor/@@images/fileDecision>

⁹ https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_151635085

introduced. However an even bigger issue resulted from the Attorney General's appeal to the Supreme Court. The Supreme Court ruled that it had the power to declare laws "inconsistent" and that the restriction on voting rights for prisoners found in the Electoral Act 1993 was "inconsistent" with the rights set out in NZBORA.

19. There is some uncertainty where the High Court's (as endorsed by the Supreme Court) declaration of "inconsistency" leaves the Electoral Act. Although section 4 of NZBORA means that the Courts cannot strike down provisions they have found to be inconsistent, there is no doubt that section 80(1)(d) of the Electoral Act has no credibility from a human rights perspective. The framework created by NZBORA, as with the United Kingdom's Human Rights Act 1998, is that where the Courts find a statutory provision inconsistent with the rights described in the Act, it is expected that the Executive – i.e. the Government of the day – will bring proposals to the Legislature to remedy the situation and bring the law into alignment with the views of the Court. The Council believes that the Government and Parliament has an obligation to respond to the inconsistency ruling.
20. If Parliament fails to enact new legislation which specifically addresses the court's concerns on section 80(1)(d) before the next election, the public will be entitled to question the validity of the results of that election.
21. Furthermore, a failure by Parliament to act on the declaration of inconsistency will send a signal to the public that Parliament has little regard for the decisions of the Courts. The mechanism of NZBORA, while permitting Parliament to legislate in ways that create inconsistencies with the rights and freedoms in that Act, is also clearly intended to create a framework in which the Executive and Parliament will respond to judgments of the Courts in cases such as *Taylor*, by rectifying the problems identified by the judicial branch of the state. If these issues are not rectified, or worse still, not even debated when the opportunity arises (such as in the context of the present Bill), the public are likely to draw worrying conclusions about Parliament's respect for the role of the judiciary. It goes almost without saying that New Zealand will also face criticism internationally, not least when its performance on human rights issues is periodically reviewed by the United Nations.

Rights of overseas citizens to vote

22. New Zealand citizens who are out of the country, and have not been in the country for three years, are disqualified from registering to vote by section

80(1)(a) of the Electoral Act 1993. This broad exclusion is then narrowed by section 80(3), which ensures that citizens and permanent residents who are serving overseas (either as diplomats or in the Defence Force) and their families do not lose their right to vote.

23. The Council does not believe that this restriction is '*reasonable limit*' that can be '*demonstrably justified in a free and democratic society*', which is the test set out in section 5 of NZBORA. It believes that the right to vote should not be extinguished after so short a period, and notes that in 2012 Statistics NZ estimated that approximately 800,000 adult New Zealand citizens were living overseas.¹⁰

24. In contrast to New Zealand, the United Kingdom enables its citizens living overseas to register to vote until a period of 15 years has elapsed since they were last resident in the UK.¹¹ If the UK, which through its Human Rights Act 1998 incorporated the European Convention on Human Rights into domestic law, believes that the removal of the eligibility of its citizens' right to vote should only come into effect after 15 years of living outside the country, the Council believes that there can be no '*reasonable limit*' under NZBORA for any shorter period in relation to New Zealand citizens.

Voting rights of people with disabilities

25. Section 155(4) of the Electoral Act 1993 indicates that only 12 polling places per district require '*access that is suitable for persons who are physically disabled.*'

26. The Council does not believe that this provision is consistent with the requirements of section 21(1)(h) of the Human Rights Act 1993 (the HRA), which prohibits discrimination on the grounds of disability. Axiomatically, if only 12 polling places per district have to have access suitable for people who are physically disabled, then the remainder do not. These will therefore be inconsistent not only with section 21(1)(h) of HRA, but also with section 19(1) of NZBORA.

27. Section 19(2) of NZBORA provides agencies for '*Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons*

¹⁰ 'At least 1 million New Zealanders live overseas', Statistics NZ, 22 June 2012. Accessed from: http://archive.stats.govt.nz/browse_for_stats/population/mythbusters/1million-kiwis-live-overseas.aspx

¹¹ See section 1 of the Representation of the People Act 1985 [UK]. People were eligible to be registered as overseas voters for 20 years until the enactment of s. 141 of the Political Parties, Elections and Referendums Act 2000 [UK]. See: <https://www.legislation.gov.uk/ukpga/1985/50/section/1>

disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993. This effectively provides protection against legal action alleging a breach of NZBORA, as long as efforts are made to enable people with disabilities to vote. It appears from the 2013 report of the Independent Monitoring Mechanism of NZ's compliance with the *UN Convention on the Rights of Persons with Disabilities* that there has been good work on this front.¹² However, we note that the Ombudsman, Human Rights Commission and New Zealand Convention Coalition still felt it necessary to recommend *'That the Electoral Commission ensure that the next general election in 2014 is conducted in a way that allows independent and secret voting for all eligible voters.'*¹³

28. The Council also notes that research conducted for the Electoral Commission shows that there has been an increase in the proportion of disabled people who had a poor understanding of what to do if they could not get to a polling place: 31 percent of disabled people surveyed said they had *'poor'* or *'little or no'* understanding of what to do.¹⁴ The same research also shows that of those that did not vote in the 2017 General Election, 10 percent of disabled respondents said that the problem was that they faced a practical access barrier, in that the voting place was too far away.¹⁵

The age at which people gain the right to vote

29. Section 3 of the 1993 Act and section 12 of NZBORA, restrict voting to persons 18 years or older. There is no stated reason for this limit.

30. The Council believes that the age at which people should become eligible to vote is 16 years old. This would remove the inconsistency between the voting age and many other legal indicators of adulthood, such as:

- The ability to leave school;
- The obligation to pay income tax;
- The age of consent for sex;
- The ability to get married;
- The ability to hold a driver's license; and

¹² Making disability rights real, Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, July 2012-December 2013. Pages 95-98 deal with Article 29 of the Convention.

¹³ Ibid, page 98, recommendation 30

¹⁴ Report into the 2017 General Election, Report by Kantar TNS for the Electoral Commission. April 2018. Table 12, page 20.

<https://elections.nz/assets/2017-general-election/voter-and-non-voter-satisfaction-survey-2017.pdf>

¹⁵ Ibid, page 62.

- The ability to hold to a gun license.¹⁶
31. The Council also notes that there is precedent for lowering the voting age: in 1969 the voting age was lowered from 21 to 20. In 1974 it was then lowered to 18 years.
 32. Some OECD countries have reduced their voting age to 16. In Austria and Norway voters ages 16 and 17 have higher turnout than older voters.¹⁷
 33. Reducing the voting age increases the coverage and diversity of the electorate, which appear to be the primary goals of this amendment bill.

Conclusion

34. The New Zealand Council of Civil Liberties believes that our society benefits from free and fair elections with the largest and most diverse electorate we can practically enable. We hope the Government and Members of Parliament from all political parties also believe this.

Recommendations

35. The New Zealand Council of Civil Liberties recommends that section 80(1)(d), the prisoner voting ban, be removed from the Electoral Act 1993.
36. The Council recommends that section 80(1)(a), the removal of voting eligibility for NZ citizens living overseas for more than three years, either be removed from the Act or significantly extended, and relevant consequential amendments be made.
37. The Council recommends that section 155(4) of the Act be amended so that the words '*At least 12*' are deleted and replaced with the word '*All*', so that people who use mobility aids are able to exercise their right to vote.
38. The Council recommends that the definition of 'adult' in section 3(1) of the Act be amended to lower the voting age to 16, and that the consequential amendment to section 12 of the NZ Bill of Rights Act is also made.

¹⁶ Community Law Manual Online 'Legal ages: when you can do what'. Community Law. Accessed from: <http://youthlaw.co.nz/rights/legal-ages/>

¹⁷ <https://www.tandfonline.com/doi/full/10.1080/17457289.2013.872652>