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THE RIGHT TO VOTE IN NEW ZEALAND:  
A BILL OF RIGHTS PERSPECTIVE

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## ABSTRACT

This paper looks at the right to vote in New Zealand from the perspective of New Zealand's obligations under international law, particularly article 25 of the International Covenant on Civil and Political Rights. These obligations have been incorporated into New Zealand's domestic law by section 12 of the New Zealand Bill of Rights Act 1990.

Three main aspects of the right to vote in New Zealand are looked at. First, the paper considers the voting qualification required by New Zealand law. Second, some aspects of the voting procedure in New Zealand are examined. Third, the voting system is looked at. This is particularly relevant given the current debate between FPP and MMP.

It is argued that in some of these areas New Zealand is currently in breach of its international obligations. Recent changes to the electoral law in these areas are also considered. Where these Bills breach the Bill of Rights it is argued that the Attorney-General has breached section 7 of the Bill of Rights by not bringing these breaches to the attention of Parliament.

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## I INTRODUCTION\*

1993 seems to be a particularly appropriate year in which to investigate the right to vote in New Zealand. It is both the centenary of women's suffrage in this country, a fact no one living here can have failed to notice, and the year in which voters make one of their most important decisions ever at the General Election in November: whether to keep their existing electoral system: FPP,<sup>1</sup> or change to a form of proportional representation: MMP.<sup>2</sup>

Since its enactment in 1990, the New Zealand Bill of Rights Act 1990 (hereafter the "Bill of Rights") has been used by people charged with armed robbery,<sup>3</sup> drunk driving,<sup>4</sup> manslaughter,<sup>5</sup> drug offences,<sup>6</sup> and many other criminal offences. Early court decisions showed the Bill of Rights has the potential to become a "rogues' charter",<sup>7</sup> benefiting only criminals.

However, the Bill of Rights need not be a rogues' charter, and as lawyers and others become aware of its potential, its scope will continue to expand. It guarantees rights to individuals that the increasingly powerful state is constantly eroding. It has already been used, with mixed success, when considering indecent publications,<sup>8</sup> challenging rural postal charges,<sup>9</sup>

\* The author would like to acknowledge the assistance of Andrew S Butler, Lecturer in Law, Victoria University of Wellington, whose ideas, comments and criticism have strongly influenced this paper. He also wishes to thank Antony Shaw, Lecturer in Law, Victoria University of Wellington, Alex Blades, Caroline Hickman, Philippa Harray, and Melanie Bromley for additional ideas, comments and criticism which also proved useful.

<sup>1</sup> First Past the Post, New Zealand's current electoral system.

<sup>2</sup> Mixed Member Proportional Representation, first recommended in 1986 in Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) (also published as 1986 AJHR H3). The system is now contained in the Electoral Act 1993, due to come into force next year if MMP is approved at the referendum. See Electoral Act 1993 s 2, and further discussion below in part III D 6.

<sup>3</sup> *R v Butcher and Burgess* [1990-92] 1 NZBORR 59; [1991] 2 NZLR 257; *R v Mallinson* [1990-92] 3 NZBORR 5; [1993] 1 NZLR 528.

<sup>4</sup> *Noort v Ministry of Transport; Curran v Police* [1990-92] 1 NZBORR 97; [1992] 3 NZLR 260.

<sup>5</sup> *R v Goodwin* [1993] 2 NZLR 153 and *R v Goodwin (No 2)* [1993] 2 NZLR 390.

<sup>6</sup> *Flickinger v Crown Colony of Hong Kong* [1990-92] 1 NZBORR 1; [1991] 1 NZLR 439; *R v Musgrove* [1990-92] 1 NZBORR 414.

<sup>7</sup> David Paciocco "The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable" in Legal Research Foundation *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992), 1.

<sup>8</sup> *Re Penthouse (US) Vol 19 No 5* [1990-92] 1 NZBORR 429, [1991] NZAR 289 (Indecent Publications Tribunal). See W K Hastings "The New Zealand Bill of Rights and Censorship" [1990] NZLJ 384.



claiming a right to continued methadone treatment,<sup>10</sup> challenging a political party's nomination process,<sup>11</sup> where school students have been strip searched,<sup>12</sup> in contempt of court proceedings,<sup>13</sup> and against police officers performing illegal searches.<sup>14</sup>

This paper is intended to show that the Bill of Rights is not a rogues' charter and that it can be used to argue for positive rights for all New Zealanders. The right to vote is one of the most important rights guaranteed by the Bill of Rights. Section 12 provides:<sup>15</sup>

- 12. Electoral rights**-Every New Zealand citizen who is of or over the age of 18 years-
- (a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
  - (b) Is qualified for membership of the House of Representatives.

It seems that it is generally considered that section 12 only reinforces the rights that were already found in the Electoral Act 1956, and has no major impact. Indeed the White Paper says that the provision is "concerned with basic principles and is not designed to entrench the present law in its details."<sup>16</sup> The enactment of the Bill of Rights was apparently not expected

<sup>9</sup> *Federated Farmers of New Zealand Inc and Ors v New Zealand Post Ltd and Ors* (Unreported, High Court, Wellington Registry CP 661/92, McGechan J, 1/12/92).

<sup>10</sup> *Byers and Ors v Auckland Area Health Board and Ors* (Unreported, High Court, Auckland Registry CP 57/93, Anderson J, 16/2/93).

<sup>11</sup> *Peters v Collinge* [1993] 2 NZLR 554.

<sup>12</sup> *Re Strip Search at Hastings Boys High School* (Commissioner for Children) [1990-92] 1 NZBORR 480.

<sup>13</sup> *Police v O'Conner* [1990-92] 1 NZBORR 259; [1992] 1 NZLR 87.

<sup>14</sup> *Baigent v Police* (Unreported, High Court, Wellington Registry CP 850/91, Master Williams QC 17/12/92 and 7/4/93).

<sup>15</sup> Similar provisions are found elsewhere:

Section 3 of the Canadian Charter of Rights and Freedoms provides:

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

See Canada Act 1982 (UK); [1990-92] 1 NZBORR lxi.

Article 25 of the International Covenant on Civil and Political Rights provides:

Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; ...

See (1976) 999 UNTS 172, [1990-92] 1 NZBORR xliv.

Article 3 of the First Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms provides:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

See *The European Convention on Human Rights* (Directorate of Information, Council of Europe, Strasbourg, 1968).

<sup>16</sup> *A Bill of Rights for New Zealand: A White Paper* 1985 AJHR A6, 77. See also the approach of the Solicitor-General, criticised below, in parts III D 8 and III E 6.



to change the law at all, and the White Paper says that "detailed regulation is properly left to Parliament in the ordinary way."<sup>17</sup>

In this paper it will be argued that this view of section 12 is mistaken, and that the enactment of the Bill of Rights has several important consequences for the right to vote.<sup>18</sup>

The Bill of Rights has been enacted to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights,<sup>19</sup> (hereafter the "Covenant"). New Zealand has committed itself to various international obligations under the Covenant, and these obligations are binding in international law.

Material based on the Covenant, such as the work of the Human Rights Committee,<sup>20</sup> (hereafter the "Committee") can be used to help interpret the Bill of Rights. Indeed, in *R v Goodwin (No 2)*<sup>21</sup> the New Zealand Court of Appeal said:<sup>22</sup>

Whether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority.

Consideration of the proceedings of the Committee,<sup>23</sup> and other international material leads one to the conclusion that, contrary to the view

<sup>17</sup> Above n 16, 78.

<sup>18</sup> See Jerome Elkind and Antony Shaw *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (Oxford University Press, Auckland, 1986), 48.

<sup>19</sup> The long title of the Act includes the words:

An Act - ...

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

<sup>20</sup> The Committee is set up as part of the United Nations under the Covenant. Its task is to consider reports of State parties under the Covenant, and hear "communications" from individuals under the [First] Optional Protocol to the Covenant, where those individuals think their rights under the Covenant have been breached. The Committee also periodically issues General Comments of the Committee, which are "intended to promote co-operation between State Parties in the implementation of the Covenant, summarise the experience of the Committee in examining State Parties' reports and draw the attention of State Parties to matter relating to the improvement of the reporting procedure and the implementation of the Covenant": Alex Blades "Article 27 of the International Covenant on Civil and Political Rights: A Case Study on Implementation in New Zealand" (unpublished) LLB(Hons) Legal Writing, LAWS 489, Victoria University of Wellington, 1992, note 38; citing UN Doc CCPR/C/18 and M N Shaw *International Law* (3 ed, Grotius, Cambridge, 1991) 209-210.

<sup>21</sup> Above n 5.

<sup>22</sup> Above n 5, 393.

<sup>23</sup> See above n 20. The Committee has not yet issued a General Comment on article 25. The Summary Records of the meetings of the Committee, as well as the periodic reports of countries under the Covenant, and decisions based on communications under the Optional Protocol have been relied upon.



of the writers of the White Paper, the following aspects of the right to vote need to be reviewed:

- are some limitations on who has the right to vote in New Zealand unjustified? Do they violate New Zealand's international law obligations?
- should the right to vote be extended to permanent residents?
- are voting procedures in New Zealand unacceptable?
- are voting papers in New Zealand satisfactory?
- is the New Zealand voting system acceptable?
- are recent amendments to the electoral law satisfactory?

This paper will consider these issues, concluding that in order to satisfy our international obligations, some changes need to be made.

Throughout the discussion, the effect of section 4 of the Bill of Rights must be remembered. Section 4 means that where the rights under the Bill of Rights conflict with another statute such as the Electoral Act 1956, the Bill of Rights can not be used to strike down that other legislation. However, where section 4 is required, there will be international law ramifications.

The limitation may be a violation of New Zealand's responsibilities under the Covenant, which may have international law consequences. International law remedies and sanctions by the international community may be applied.

It is more likely that action would have to be taken by individuals. As New Zealand has ratified the [First] Optional Protocol to the Covenant,<sup>24</sup> the Committee can receive communications from individuals alleging violations. Where, as in the situations considered here, the domestic law itself is the problem, there is no need to appeal to the highest court first. No New Zealand court can give the individual a remedy, and individuals can go directly to the Committee.<sup>25</sup>

<sup>24</sup> 999 UNTS 302, 6 ILM 383 (1967). Entered into force for New Zealand 26 August 1989.

<sup>25</sup> See Jerome Elkind "The Optional Protocol and the Covenant on Civil and Political Rights" [1991] NZLJ 409.



There is also the possibility of going to a New Zealand court seeking a declaration that the rights in the Bill of Rights have been breached. This has not yet been attempted, and it is unclear what the government's response to such a declaration would be.<sup>26</sup>

One of the first issues that needs to be considered is what is the meaning, purpose and value of the right. This will directly affect the interpretation of any limits on the right, their justification, and help to identify what the right requires. What, then, does the right to vote give?

#### 1. The power to install and remove a government

Voting is the method by which we choose our government, and the power to do so through universal voting is what makes a democracy. One of the problems with FPP is that it is only through elections that we have this power. The rejection, by New Zealand voters in 1990, of the proposal to extend the parliamentary term to 4 years reflects the importance of this power.<sup>27</sup>

#### 2. A voice or representative in government

The immediate consequence of this is that those people elected to a Parliament are in some sense accountable to the voters. As those in Parliament can be removed the next time the voters exercise their vote, there is an incentive to perform so as to satisfy voters. This gives voters

<sup>27</sup> *Wasky v. Sanders* 375 U.S. 1 (1963), 77 Supreme Court. The case was cited by the Supreme Court of Canada in *Opinion of the Chief Justice (Attorney General)* (1985) 28 D.L.R. (4th) 247, (1985) 4 W.T.R. 293, 28 B.C.L.R. (2d) 273. "The right to vote and participate in the democratic election of one's government is one of the most fundamental of Charter rights."

<sup>26</sup> David Paciocco "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in Legal Research Foundation *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992), 40, 64-68.



## II WHAT IS THE RIGHT TO VOTE?

### A *Meaning, purpose and value of the right to vote*

No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined.<sup>27</sup>

Free elections [are] not only a fundamental right in themselves, but [are] also a guarantee of the uninterrupted enjoyment of all civil and political rights.<sup>28</sup>

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<sup>27</sup> *Wesberry v Sanders* 376 US 1 (1964), 17 (Supreme Court). This was echoed by the Supreme Court of Canada in *Dixon v British Columbia (Attorney General)* (1989) 59 DLR (4th) 247, [1989] 4 WWR 393, 35 BCLR (2d) 273: "The right to vote and participate in the democratic election of one's government is one of the most fundamental of Charter rights."

<sup>28</sup> Mr Tarnopolsky of the Committee, commenting on article 25 of the Covenant: UN Doc CCPR/C/SR.31, 9 para 39. Note CCPR/C/SR.19-44/Corrigendum.

<sup>29</sup> See Alan McRobie (ed) *Taking it to the People?: The New Zealand Electoral Referendum Debate* (Hazard Press, Christchurch, 1993), 9: 69.3% voted to retain the 3-year term.



some influence over their 'representatives' in Parliament in those periods between elections.

In Canada, it was held in *Reference re Electoral Boundaries Act, ss 14, 20 (Sask)*<sup>30</sup> that the aim of voting (and the relevant provision of the Canadian Charter) is not equality of voting power but the right to effective representation. This conflict is of direct relevance to our decision whether FPP or MMP is a preferable system.<sup>31</sup>

### 3 Assurance of popular support for Government action

Voting goes some way towards ensuring the actions of Parliament are supported by a majority of the people. Whether or not this is in fact an aim of the right is debatable. The fact is, however, that the current voting system does not require that a majority even vote for the government, let alone support any individual policies.<sup>32</sup> This is one factor in favour of proportional representation voting systems and more frequent referenda.<sup>33</sup>

### 4 A fair procedure for choosing government: the one person, one vote principle

The right to vote is fundamental to modern systems of government, so it is important that the procedure chosen is fair. The requirement that everyone have the right reflects this and the importance of equality.<sup>34</sup> Placing the right in constitutional and international law documents ensures that it can not be derogated from.

<sup>30</sup> (1991) 81 DLR (4th) 16, [1991] 2 SCR 158, [1991] 5 WWR 1.

<sup>31</sup> See below part V.

<sup>32</sup> In fact the system does not even require that more people vote for the government than any other one party. In New Zealand no government has had a majority of the votes since 1951, and the winning party (National) actually got fewer votes than the next party (Labour) in 1978 and 1981. In 1990 National only received 47.8% of the vote, but won 69.1% of the seats. See Alan McRobie "Electoral Districts under MMP" in G R Hawke (ed) *Changing Politics: The Electoral Referendum 1993* (Institute of Policy Studies, Wellington, 1993), 9, 33; and "FPP in Millwall" *The Evening Post*, Wellington, New Zealand, 25 September 1993, 8; "Beijing winner in first-past-post poll" *The Evening Post*, Wellington, New Zealand, 25 September 1993, 3.

<sup>33</sup> See Citizens Initiated Referenda Bill 1992, Royal Commission, above n 2, ch 7.

<sup>34</sup> See art 3 of the Covenant. The interrelationship of this article with s 12 of the Bill of Rights is not considered in detail here.



The one person, one vote principle is that everyone has a vote and all votes are roughly equal. Thus where there are electorates, it is a requirement that they contain roughly the same number of voters. The Committee supports the principle as will be seen shown below.

### 5 An Instrumental Approach

According to Baker,<sup>35</sup> liberalism is characterised by the view that "the reason for participation in politics is instrumental."<sup>36</sup> Participation in politics is not a goal in itself, rather it is a means to a goal or several goals. Political participation is valued instrumentally as a means to defend or further interests formed and defined outside of politics.

### 6 Principle of Affected Interests

In his book *After the Revolution*,<sup>37</sup> Dahl outlines a Principle of Affected Interests. According to this principle: "Everyone who is affected by the decisions of a government should have the right to participate in that government."<sup>38</sup> At some points in history, there have been certain requirements of voters, such as property ownership or paying of taxes.<sup>39</sup> The move towards "universal suffrage" is perhaps a recognition that many other people are affected by political decisions and should be able to have a say.

On its face this principle suggests an answer to two issues to be discussed: both children and permanent residents should be able to vote.<sup>40</sup>

<sup>35</sup> C Edwin Baker "Republican Liberalism: Liberal Rights and Republican Politics (1989) 41 Florida Law Review 491.

<sup>36</sup> Baker, above n 35, 492. See also Frank Michelman "Conceptions of Democracy in American Constitutional Argument: Voting Rights" (1989) 41 Florida Law Review 443, 451.

<sup>37</sup> Dahl *After the Revolution* (Yale University Press, New Haven and London, 1970). See also Michelman, above n 36, 460-469.

<sup>38</sup> Dahl, above n 37, 64.

<sup>39</sup> See Amendment XXIV, s 1 of the United States Constitution, and Elizabeth Mensch and Alan Freeman "Republican Agenda for Hobbesian America" (1989) 41 Florida LR 581, 609-610: "We proudly remember the American colonists refusal to be taxed without representation."

Others requirements such as literacy, being male and free are less defensible on the ground that those groups are more affected by decisions of government. See below part III A.

<sup>40</sup> See below part III F & G.



However, care needs to be taken, as the principle may also suggest that legal as well as natural persons, and people overseas affected by a country's decisions should also be able to vote. Thus the principle must be limited in some way. The principle does not tell us how it should be limited, and other factors must be used.<sup>41</sup>

### 7 *A means to preserve civil rights*

It has also been argued that the right to vote is a means to preserve civil rights and is more effective than other measures including anti-discrimination legislation. Lani Guinier sees the "ballot as an important tool for preserving a traditional civil rights agenda".<sup>42</sup> He quotes Dr Martin Luther King Jr:<sup>43</sup>

Give us the ballot, and we will no longer have to worry the federal government about our basic rights.

It is this view which is reflected by the description of the right to vote as one of the most fundamental rights in the Covenant:<sup>44</sup>

Article 25 [is] the corner-stone of the Covenant as far as political rights [are] concerned.

One member of the Committee has said:<sup>45</sup>

Free elections were not only a fundamental right in themselves, but were also a guarantee of the uninterrupted enjoyment of all civil and political rights.

### 8 *Social Contract Theory*

Philosophers have worried about how societies work and where ruling bodies' authority comes from for centuries. One theory about this is the social contract theory, as argued for by Hobbes.<sup>46</sup> On this theory:<sup>47</sup>

<sup>41</sup> If unlimited everyone could vote in the elections of every other nation. Nations with large populations could force their will on smaller nations. For example United States citizens could have voted for Nationals in 1984 to avoid labour's nuclear policy.

<sup>42</sup> Lani Guinier "Keeping the Faith: Black Voters in the Post-Reagan Era" (1989) 24 Harvard Civil Rights-Civil Liberties Law Review 393, 393.

<sup>43</sup> Guinier, above n 42, 393.

<sup>44</sup> Mr Opsahl, of the Committee, during consideration of Bulgaria's first Periodic Report: UN Doc CCPR/C/SR.132, 9, para 35.

<sup>45</sup> Sir Vincent Evans, of the Committee: UN Doc CCPR/C/SR.31, 9, para 39. See also UN Doc CCPR/C/SR.548, paras 34, 36.

<sup>46</sup> Thomas Hobbes (ed M Oakeshott) *Leviathan* (Oxford University Press, Oxford, 1960).

<sup>47</sup> Tichy and Oddie "Is the Treaty of Waitangi a Social Contract?" in Oddie & Perrit *Justice, Ethics and New Zealand Society* (Oxford University Press, Oxford, 1991).



the laws and morals of a society are grounded in the agreement, explicit or implicit, by the rational members of that society...

It could therefore be argued that only those who are members of a society have the right to vote. This approach can be used to explain the history of, and current approach of the law to the right: prisoners and those in other countries are not considered part of the society and are denied the right. Whether or not permanent residents are considered part of society will affect whether or not they should be able to vote.

### *B Meaning of "genuine"*

Section 12 of the Bill of Rights is fairly self-explanatory, but it includes the word "genuine". This word comes directly from the Covenant. This means that elections must offer voters a genuine choice. Elections where there was only one candidate, or where all the candidates represented the same party would not satisfy this. The candidates must represent different values and must be expected to do different things if elected.

During the Committee's consideration of the first periodic report of Romania, it was noted that Romanian voter only had a choice between different candidates for the same party, the Socialist Unity Front. Mr Bouziri (of the Committee) said:<sup>48</sup>

There was ... a choice between different individuals but not between different ideas. In his opinion, that was not compatible with the provisions of article 25 of the Covenant.

On one view of New Zealand politics in the last decade, this may not be satisfied. Some would argue it has become increasingly hard to distinguish the two main parties and voters have had a limited choice. Can it be argued that New Zealand's elections are not genuine ones?

Such an argument will face problems. There are many political parties in New Zealand, and few restrictions on the creation of new ones. Any

<sup>48</sup> UN Doc CCPR/C/SR.135, 8, para 34. See also UN Doc CCPR/C/SR.109, 16, para 72; UN Doc CCPR/C/SR.153, 9, para 35; UN Doc CCPR/C/SR.225, para 16; UN Doc CCPR/C/SR.272, para 16; UN Doc CCPR/C/SR.288, paras 6, 19; UN Doc CCPR/C/SR.565, para 41; UN Doc CCPR/C/SR.776, para 7; UN Doc CCPR/C/SR.1191, para 58.



viewpoint can be represented, and many are. If an individual feels strongly enough about a particular view, they can start up a party of their own to support that view.<sup>49</sup> The main problem in New Zealand arises from the FPP political system, which makes it hard for new parties to succeed.<sup>50</sup>

Accountability is a related problem. Sir Geoffrey Palmer has argued that the problem with New Zealand politics is that the parties feel they have to make expensive promises before elections, and then find they can not keep the promises when elected.<sup>51</sup> Whether MMP would solve this is debatable. The Campaign for Better Government argues that other measures would be more effective.<sup>52</sup>

In conclusion it can be said that while New Zealand's political processes could be improved, the freedom to form political parties means the Committee would be unlikely to declare a communication from New Zealand complaining about a lack of genuine elections admissible.<sup>53</sup>

<sup>49</sup> See the comments of Sir Vincent Evans, of the Committee: UN Doc CCPR/C/SR.65, 7, para 39.

<sup>50</sup> Whether or not FPP is an acceptable voting system is discussed in part V.

<sup>51</sup> Administrative Law lecture, LAWS 351, Victoria University of Wellington, 20 April 1993.

<sup>52</sup> See Campaign for Better Government *Options for Better Government in New Zealand* (Campaign for Better Government Trust, Auckland, 6/8/93).

<sup>53</sup> See below Part V.



### III VOTING QUALIFICATIONS IN NEW ZEALAND

#### A Introduction

This section is about who can vote. It looks at limitations on the right to vote, and the extension of the right to permanent residents. Historically, only some members of society have had the right. Requirements have included ownership of property,<sup>54</sup> payment of taxes,<sup>55</sup> literacy,<sup>56</sup> being male,<sup>57</sup> european,<sup>58</sup> and free.<sup>59</sup> However, over time, the right has been extended to more and more individuals. Thus all men, all women<sup>60</sup> have been granted the right, and only a few limitations remain.

#### B Limitations on the Right to Vote

There are several limitations on the right to vote in New Zealand legislation. Most of these are provided directly by the Electoral Act 1956. Others are less directly a result of the Electoral Act: immigration and citizenship rules affect who can vote.<sup>61</sup>

The Bill of Rights and the Covenant provide that "every citizen" has the right to vote, the Covenant also refers to "universal" suffrage.<sup>62</sup> There are no limitations in the Covenant, but there is an age restriction in the Bill of

<sup>54</sup> Constitution Act 1852, s 7.

<sup>55</sup> US Constitution Amendment XXIV, s 1:

The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or by any State by reason of failure to pay any poll tax or other tax.

<sup>56</sup> See *Lassiter v Northampton County Board of Elections* 360 US 45 (1959); UN Doc CCPR/C/SR.118, 4, para 18 ; UN Doc CCPR/C/SR.249, para 10 ; UN Doc CCPR/C/SR.703, para 23; UN Doc CCPR/C/SR.1118, para 53; UN Doc CCPR/C/SR.1199, para 35.

<sup>57</sup> Electoral Act 1893. US Constitution, Amendment XIX, s 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

<sup>58</sup> In New Zealand this was effectively true until the Maori Representation Act 1867, due to the wording of the property qualification, which excluded most Maori as their land was held communally on an iwi basis. See Royal Commission, above n 2, A-14, para 2,21. See also US Constitution, Amendment XV, s 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude."

<sup>59</sup> See US Constitution, Amendment XV, s 1, above n 58.

<sup>60</sup> Above n 57.

<sup>61</sup> These are not considered here.

<sup>62</sup> There is no obvious reason why the word "universal" is omitted from the Bill of Rights: perhaps it was felt that "Every citizen" was clear by itself. See Elkind and Shaw, above n 18, 47.



Rights. The starting point must be that prima facie there should be no limitations. This is the same as saying that any limitations need justification. If a limitation can not be justified then it breaches both the Bill of Rights and the Covenant. The remedies outlined in Part I will be available.

Section 5 of the Bill of Rights provides a test for whether a limitation is justified. This section is based on section 1 of the Canadian Charter, which will be discussed below. The Covenant makes allowance for reasonable restrictions (by disallowing "unreasonable" ones).

### *C Disqualification of citizens overseas long term*

Section 42(1)(a) of the Electoral Act 1956 denies the right to vote to most citizens who are overseas for more than three years.<sup>63</sup> This is prima facie a violation of the right to vote. Section 42(3) means that those working for the New Zealand Government overseas retain their right to vote.<sup>64</sup> This subsection was enacted in 1980.<sup>65</sup> It results from comments of the Committee when New Zealand presented its first periodic report to the Committee.<sup>66</sup> These same comments indicate that section 42(1)(a) is justified. The justification is provided by two of the purposes of the right to vote: the "Principle of Affected Interests" and "Social Contract Theory". Citizens outside a country are no longer sufficiently affected by the governments decisions, and are not part of the society which it is governing. There is also a practical consequence: having been out of a country for three years a voter will not have sufficient knowledge of the issues facing a country, and will be unable to make an educated vote.

<sup>63</sup> This is repeated in s 80(1)(a) of the Electoral Act 1993. The disqualification for permanent residents is considered below in part G.

<sup>64</sup> This is repeated in s 80(3) of the Electoral Act 1993.

<sup>65</sup> Electoral Amendment Act 1980 s 13(1).

<sup>66</sup> See Ministry of External Relations and Trade *Human Rights in New Zealand: the Presentation of New Zealand's Second Periodic Report to the Human Rights Committee under the International Covenant on Civil and Political Rights* Information Bulletin No. 30 (Ministry of External Relations and Trade, Wellington, 1990), 17, para 137.



D Disqualification of inmates in penal institutions

1 Introduction

Section 42(1)(d) of the Electoral Act 1956 denies the right to vote to any "person detained in any penal institution pursuant to a conviction".<sup>67</sup> This is not an unusual restriction and similar restrictions are found in many other countries.<sup>68</sup> The reasons for this limitation are largely historical. It was removed in 1975, and reinstated in 1977.<sup>69</sup> The right to vote has been extended over time to more and more classes of people, and prisoners are one of the few remaining classes that are still denied the right.<sup>70</sup>

Section 42(1)(d) is a prima facie breach of the right to vote, and of section 12 of the Bill of Rights. It needs justification in terms of section 5.

Section 5 provides:

**5. Justified limitations** - Subject to s 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It is submitted that the appropriate test of whether or not the limitation is justified is that used by the Supreme Court of Canada when considering section 1 of the Canadian Charter of Rights and Freedoms (hereafter "the Charter") (equivalent to section 5 of the Bill of Rights) in *R v Oakes*:<sup>71</sup>

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" ... It is necessary, at a minimum, that an objective relate to

<sup>67</sup> The provision was discussed in *Re Wairarapa Election Petition* [1988] 2 NZLR 74, 91.

<sup>68</sup> United Kingdom, Canada, United States, and Australia, amongst others. The international material suggests the restriction is found throughout the world.

<sup>69</sup> Suggesting Labour thinks that the majority of prisoners vote for them (the third Labour Government was from 1972-1975) and National (the third National Government was from 1975-1984) agrees? Compare the 1975 change by Labour to how the number of Maori seats is determined, quickly reversed by National in 1976: below part V.

<sup>70</sup> Above part III A.

<sup>71</sup> (1986) 26 DLR (4th) 200, 227 (references omitted, original italics). The *Oakes* test has been used in New Zealand in *Re Penthouse (US) Vol 19 No 5* above n 8, 465-468. (Indecent Publications Tribunal). In *Noort*, above n 4, NZBORR 160; NZLR 283 Richardson J (with whom McKay J agreed) cited with approval *Re A Reference re Public Service Employee Relations Act* [1987] 1 SCR 313, 373-374 where an indistinguishable test is outlined.



concerns which are pressing and substantial in a free and democratic society ...

Second, ... the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" ... There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. ... Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. ... Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.

This test will be applied to the arguments in favour of limiting the right to vote of prisoners and other groups considered later.

Denying prisoners the right to vote is often justified on one or more of the following bases:

(i) - security and safety (of those involved as electoral officers, or the public, depending on where prisoners are to vote),<sup>72</sup>

(ii) - practicality of allowing prisoners to vote,<sup>73</sup>

(iii) - as a deterrent to committing offences or as a means to reform offenders,

(iv) - in committing offences prisoners have "waived" the right,

(v) - the state and society need protection from the votes of unfit persons,<sup>74</sup>

(vi) - prisoners will not receive the necessary information with which to make an informed choice,<sup>75</sup> and

(vii) - to punish those who breach their duty to society.<sup>76</sup>

These reasons are largely unconvincing. (i), (ii) and (vi) are practical problems that can be solved with little effort. It is hard to believe that denying the right to vote is an effective deterrent: (iii). (iv) is also rejected: if criminals waive the right to vote, why have they not waived all their other rights? (v)

<sup>72</sup> *Belczowski v Canada* (1992) 90 DLR (4th) 330 (FCA).

<sup>73</sup> *Royal Commission*, above n 2, 236, para 9.17.

<sup>74</sup> *Re Jolivet and Barker and The Queen and Solicitor-General of Canada*, (1983) 1 DLR (4th) 604, 606 (BCSC).

<sup>75</sup> Above n 72, 340.

<sup>76</sup> Above n 72, 340.



might be arguable. However, the small number of prisoners in New Zealand means there is no practical possibility of them affecting an election in the way required by this argument.<sup>77</sup> Finally (vii) is a possible reason. However, it appears that the denial of the right to vote is only an incidental punishment to the real punishment of imprisonment imposed by the courts. There is no rational connection between the punishment and the offence, as required by *Oakes*.

The denial of the right to vote to prisoners is little more than a historical accident. Through the last 140 years, the right to vote has been extended to more and more people. Those still without it also include the mentally handicapped and children: those who have the least power to fight for it.<sup>78</sup>

The Royal Commission on the Electoral System (hereafter the "Royal Commission") discussed the voting disqualification of prisoners. They said:<sup>79</sup>

Its origins lie in the view that voting is a privilege rather than a right, to be extended only to people of substance and standing in the community. Even when voting became a right belonging to all adult members of the community, imprisonment could still be looked on as the temporary exclusion of a person from the community.

They also noted related problems:<sup>80</sup>

[(i)] It has also been held as illogical to disqualify someone convicted of a corrupt electoral practice and not also to disenfranchise someone convicted of a much more serious crime, such as murder. [(ii)] Practical and administrative difficulties have also been raised. Giving prisoners the right to vote, it has been argued, could entail allowing other rights, such as freedom of discussion and association, including visits from candidates and canvassers, which could pose administrative difficulties within the prison. [(iii)] Registering votes in prison would publicise their names and thus threaten the traditional anonymity of prisoners. [(iv)] There is also the question of which electorate should prisoners vote in - the one where they lived before imprisonment or the one where the prison is sited.

<sup>77</sup> During 1991 there were an average of 3752 sentenced inmates in prison at any one time, together with 430 remand inmates: Department of Statistics *New Zealand Official Yearbook 1993* (Department of Statistics, Wellington, 1993), 218

<sup>78</sup> These arguments are also weakened by the willingness of Parliament to allow some prisoners to vote: Electoral Act 1993 s 80.

<sup>79</sup> Royal Commission, above n 2, 236, para 9.17.

<sup>80</sup> Royal Commission, above n 2, 236, para 9.17.



It is submitted that none of these reasons hold much weight. (i) is explained by the fact that there is a much closer rational connection between corrupt practices and the right to vote. (ii) and (iv) are administrative difficulties. Their use to deny a right is inconsistent with the required rights-centred approach.<sup>81</sup> (iii) is a practical difficulty that is not hard to solve. If it is decided that prisoners should not be anonymous, there is no problem with publishing their names on rolls. If they should be anonymous, existing procedures can be extended to them. These procedures are designed so others, such as battered wives can vote, but need not be on a published roll.<sup>82</sup>

The Royal Commission rightly concluded that some prisoners should have the right to vote. It noted:<sup>83</sup>

contemporary penal theory is generally opposed to the view that imprisonment entails a general suspension of the rights of citizenship. According to the 1981 Report of the Penal Policy Review Committee, the fundamental principle relating to prisoners' rights "must be that a prisoner retains the ordinary rights of a citizen, insofar as they are consistent with his loss of liberty and the requirements necessary for his proper containment and management in the institution".

However, the Commission concluded that "we have some sympathy for the view, which we think is widely held, that punishment for a serious crime against the community may properly involve a further forfeiture of some rights such as the right to vote."<sup>84</sup> They recommended that the disqualification should apply to those serving sentences of three years or more. This limitation is criticised below.<sup>85</sup> It appears that this time length

<sup>81</sup> On Administrative difficulties, see *Noort*, above n 4, NZBORR 143; NZLR 274 (Cooke P); *Re Singh and Minister of Employment and Immigration* (1985) 17 DLR (4th) 422, 468 (SCC); per Wilson J: "No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s 1 [of the Charter, equivalent to s 5 of the Bill of Rights]". On the need for a rights-centred approach, see *R v Butcher and Burgess* [1990-92] 1 NZBORR 59, 70 (Cooke P); *R v Goodwin* [1993] 2 NZLR 153, 194 (Richardson J).

<sup>82</sup> See Electoral Act 1956 s 62A; Electoral Act 1993 s 115.

<sup>83</sup> Royal Commission, above n 2, 237, para 9.18.

<sup>84</sup> Royal Commission, above n 2, 237, para 9.21.

<sup>85</sup> Part 7.



was chosen because it is after 3 years that citizens overseas lose their right to vote.<sup>86</sup>

## 2 Canada

For ten years the Canadian courts have struggled with the issue of whether disqualification of prison inmates is justified. Some cases have found the disqualification to be a violation of the right to vote in section 3 of the Charter, justified by section 1 [equivalent to ss 12 and 5, respectively, of the Bill of Rights]: *Re Jolivet and Barker and The Queen and Solicitor-General of Canada*,<sup>87</sup> *Badger et al v Canada (Attorney-General)*.<sup>88</sup>

Other cases have held that the right to vote is violated by such a limit, and section 1 does not save the provisions: *Levesque v Attorney-General*,<sup>89</sup> *Badger et al v Attorney-General of Manitoba*,<sup>90</sup> *Grondin v Ontario (Attorney-General)*,<sup>91</sup> *Paul v Manitoba (Chief Electoral Officer)*,<sup>92</sup> *Belczowski v Canada*,<sup>93</sup> and *Sauvé v Attorney General*.<sup>94</sup>

In *Re Jolivet and Barker and The Queen and Solicitor-General of Canada*, Taylor J accepted that "disenfranchisement of criminal offenders is not justifiable by any supposed need to protect society from the votes of 'unfit persons' ",<sup>95</sup> or as a penalty for breach of the ordinary criminal law. However he said that it could be justified for "practical reasons", and held

<sup>86</sup> Royal Commission, above n 2, 238, para 9.21.

<sup>87</sup> Above n 74.

<sup>88</sup> (1988) 55 DLR (4th) 177 (Man CA).

<sup>89</sup> (1985) 25 DLR (4th) 184 (FCTD).

<sup>90</sup> (1986) 27 CCC (3d) 158, 30 DLR (4th) 108 (Man QB). However the Court ruled that the only remedy was a declaration and refused to order the prisoners to participate in the election, ruling that the Legislature must be left to solve the problem. An appeal to the Manitoba Court of Appeal was dismissed due to shortness of time available: (1986) 32 DLR (4th) 310. A further appeal to that Court by Government decided the disqualification was justified: (1988) 55 DLR (4th) 177.

<sup>91</sup> (1988) 65 OR (2d) 427 (Ont HCJ): "The right is so fundamental that, if the exclusion of inmates had been contemplated by the framers of the Charter, they would, like the framers of the US Constitution, have so provided explicitly". However it is hard to see that this can be right as those who wrote the legislation in question obviously saw the right differently.

<sup>92</sup> (1990) 72 DLR (4th) 396 (Man QB).

<sup>93</sup> Above n 72.

<sup>94</sup> (1992) 89 DLR (4th) 644 (Ont CA) following *Belczowski*. This reversed the trial Judge's decision that the limitation was justified by s 1: 53 DLR (4th) 595 (Ont HCJ).

In yet another case, *Attorney-General v Gould* (1984) 13 DLR (4th) 485 (FCA): the Court decided to avoid the issue, refusing an injunction and ruling that the issue must be decided at trial.

<sup>95</sup> Above n 74, 606.



that the right included the right to make "an informed electoral choice reached through freedom of belief, conscience, opinion expression, association and assembly".<sup>96</sup> He concluded that:<sup>97</sup>

[T]he restrictions imposed by imprisonment on freedom of the person, the close control which must be maintained by the State over association, assembly and discussion there, and inevitable interference in free inflow and circulation of information and ideas, all of which are necessary to preservation of prison order and discipline, render it impossible for prisoners to make the free and democratic electoral choice contemplated by the Constitution. The casting of a ballot under such conditions could not, in the context of the Charter, be described as an exercise of the "right to vote".

Imprisonment, as a punishment for breach of the criminal law, is clearly justifiable in a free and democratic society. It follows that denial to prisoners of those constitutional rights which, of necessity, cannot be exercised by persons serving a sentence of imprisonment is also justifiable...

The key words in this last paragraph are "of necessity". It is submitted that Taylor J has taken too wide a view of the necessary consequences of imprisonment. This is reflected in article 39 of the Standard Minimum Rules for the Treatment of Prisoners, reproduced below.

Taylor J's reasoning leads to absurd conclusions: if a state engaged in mass censorship, it could justify removing the right to vote from its citizens as they did not know enough to vote. The argument that the right to vote should be taken away from those who have breached their duty to society is also rejected. On this argument, all rights of prisoners could be removed (once it was proved that they have breached society's rules). Civilised society opposes the death penalty, and cruel treatment.<sup>98</sup> It is recognised that criminals are still human beings and such treatment is unacceptable.

In *Belczowski v Canada* the Federal Court of Appeal applied *Oakes* and came to a contrary conclusion. The Crown argued that there were three main objectives in denying prisoners the right to vote:<sup>99</sup>

- (a) to affirm and maintain the sanctity of the franchise in our democracy;
- (b) to preserve the integrity of the voting process; and

<sup>96</sup> Above n 74, 607.

<sup>97</sup> Above n 74, 608.

<sup>98</sup> Bill of Rights ss 8, 9; Covenant arts 6, 7.

<sup>99</sup> Above n 72, 339.



(c) to sanction offenders.

There was no argument based on practicalities of permitting prisoners to vote. However it was argued under (a) that prisoners could not participate in the democratic process of debate and discussion as they were removed from society. The Court described the objectives as "symbolic and abstract"<sup>100</sup> and doubted "whether a wholly symbolic objective can ever be sufficiently important to justify the taking away of rights which are themselves so important and fundamental...".<sup>101</sup> The Court said the legislation was:<sup>102</sup>

too broad in that the exclusion catches not only the crapulous murderer but also the fine defaulter who is in prison for no better reason than his inability to pay. ... the legislation bears no discernible relationship to the quality or nature of the conduct being punished. Indeed ... it is difficult not to conclude that, if it is imposing punishment, such punishment is for imprisonment rather than for the commission of an offence. ... A denial of the right to vote for persons convicted of treason or felony can readily be understood as a punishment for those crimes. A similar denial imposed only on those who are actually in prison looks more like a consequence of that condition than a sanction for the conduct which brought it about in the first place. ... it would appear to me that the true objective of [the section] may be to satisfy the widely held stereotype of the prisoner as a no-good almost sub-human form of life to which all rights should be indiscriminately denied. That, it need hardly be said, is not an objective which would satisfy s 1 of the Charter.

The Court went on to consider the second branch of the *Oakes* test, holding that the legislation failed at all three stages:<sup>103</sup>

The fact of being in prison is not, by any means, a sure or rational indication that the prisoner is not a decent and responsible citizen. ... imprisonment bears no necessary connection to inability to participate fully in the democratic process ... the legislation fails to exclude all manner of persons who are clearly not decent and responsible citizens ... [the section] is arbitrary, unfair and based on irrational considerations. ... the legislation makes no attempt to weigh, assess or balance the seriousness of the conduct which may have resulted in imprisonment ...

It is submitted that the reasoning in *Belczowski* is to be preferred to that in *Re Jolivet*. It gives effect to the rights-centred approach required by the Bill of Rights and the Covenant.<sup>104</sup>

<sup>100</sup> Above n 72, 340.

<sup>101</sup> Above n 72, 341.

<sup>102</sup> Above n 72, 341-342.

<sup>103</sup> Above n 72, 343-344.

<sup>104</sup> Above n 81.



The majority of Canadian cases have decided that denying the right to vote to prisoners is not justified. However, none are decisions of the Supreme Court of Canada, and it is unclear how that Court will determine the issue. If, or when, the question comes before it, the views of the Committee are likely to be relevant, as they are for New Zealand courts.<sup>105</sup> The Committee's views will now be considered.

### 3 *Human Rights Committee*

The Committee considers the rights in the Covenant in two situations: first, in communications made to it under the Optional Protocol of the Covenant; and second, during consideration of periodic reports to it from countries who have ratified the Covenant. Both show that the Committee considers that denying prisoners the right to vote breaches the Covenant.

In *CF v Canada*<sup>106</sup> the Committee admitted a communication from three prisoners complaining their right to vote was denied by Canadian law. The Committee then declared it inadmissible after the Solicitor-General agreed to make necessary changes and allow prisoners to vote.

The Committee has also made comments indicating its position during the presentation of periodic reports under the Optional Protocol. During consideration of Jordan's second periodic report, the Committee asked "whether detainees, whether charged or convicted, had the right to vote."<sup>107</sup> On another occasion Mrs Higgins, of the Committee, expressed the view that deprivation of the right to vote as part of a sentence constituted an

<sup>105</sup> *Goodwin (No 2)*, above n 22.

<sup>106</sup> Comm 113/1981; *Selected Decisions of the Human Rights Committee under the Optional Protocol Vol 2*, UN Doc CCPR/C/OP/2, 13.

<sup>107</sup> UN Doc CCPR/A/46/40, 146. While this is not explicit, the question has been asked regularly, indicating the Committee has formed the view that article 25 does guarantee prisoners the right to vote. There is a reason for the question. It shows, at least, that the Committee thinks it is arguable that the limitation breaches the Covenant. (The response to this particular question was that the new Electoral Act would give them the right to vote.)



unreasonable restriction.<sup>108</sup> The Committee has also given the following written comment to Luxembourg:<sup>109</sup>

The Committee ... suggests that the State party consider abolishing the deprivation of the right to vote as part of legitimate punishment.

If the Committee received a communication from a New Zealander under the Optional Protocol it would be likely to consider relevant international material, including article 5 of the Basic Principles for the Treatment of Prisoners,<sup>110</sup> and articles 39 and 61 of the Standard Minimum Rules for the Treatment of Prisoners.<sup>111</sup> Article 5 of the Basic Principles provides:<sup>112</sup>

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, and such other rights as are set out in other United Nations covenants.

Article 39 of the Standard Minimum Rules provides:

Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorised or controlled by the administration.

Article 61 of the Standard Minimum Rules (one of the "guiding principles") provides:

The treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it. ... Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interest, social security rights and other social benefits of prisoners.

The Standard Minimum Rules have been the source of many questions by the Committee during the presentation of periodic reports, suggesting that international material such as these are directly relevant

<sup>108</sup> UN Doc CCPR/C/SR.1188, para 52.

<sup>109</sup> UN Doc CCPR/C/79/Add.11, 3, para 10. See also UN Doc A/45/40, 38 para 85; UN Doc CCPR/C/SR.724, para 31.

<sup>110</sup> A/CONF.144/28/Rev.1, 27, 29. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, August-September 1990. The Basic Principles were adopted by the United Nations General Assembly on 14 December 1990: UN Res 45/111: see UN Doc A/45/49, 199-200.

<sup>111</sup> A/CONF.6/1, annex 1. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Adopted by a resolution of the United Nations General Assembly on 30 August 1955.

<sup>112</sup> Above n 110.



under the Covenant.<sup>113</sup> They are also mentioned in a general comment on article 10:<sup>114</sup>

State parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules ...

During consideration of Saint Vincent and the Grenadines' report, Mr Cooray, of the Committee said that he:<sup>115</sup>

realised that developing countries could not be expected to have ideal conditions, but the Standard Minimum Rules should be observed.

All this international material refutes the arguments advanced in *Re Jolivet*, and supports the conclusion that prisoners must be entitled to vote.

#### 4 Conclusion on the Electoral Act 1956

It is submitted that the reasoning of the Committee, and of the Canadian Federal Court of Appeal in *Belczowski* apply to New Zealand. Section 42(1)(d) violates the Bill of Rights and our obligations under article 25 of the Covenant.<sup>116</sup> It should be repealed. Even without repeal, some other remedy may be available. Individuals affected could go before the Committee, using their rights under the Optional Protocol.<sup>117</sup> The reasoning in *Belczowski* suggests that perhaps a limited interpretation of section 42(1)(d) should be adopted, in line with section 6 of the Bill of Rights. However, it is hard to see how this could be done without resorting to a strained interpretation, which section 6 does not authorise.<sup>118</sup>

<sup>113</sup> On receipt of second and third periodic reports, the Committee responded with lists of questions to be discussed at the reports presentation. Questions based on the Standard Minimum Rules were included in responses to the following reports: Romania: UN Doc CCPR/C/SR.742, para 7; Ecuador: UN Doc CCPR/C/SR.799, 4, para 11; Japan: UN Doc CCPR/C/SR.829, 11, para 46; Mexico: UN Doc CCPR/C/SR.850, 10, para 55; Chile: UN Doc CCPR/C/SR.943, 12, para 60; Dominican Republic: UN Doc CCPR/C/SR.968, 5, para 24; Zaire: UN Doc CCPR/C/SR.994, 5, para 17; Ukraine: UN Doc CCPR/C/SR.1029, 8, para 33; Morocco: UN Doc CCPR/C/SR.1034, 13, para 63; India: UN Doc CCPR/C/SR.1041, 4, para 13; Panama: UN Doc CCPR/C/SR.1052, 12, para 60; Sri Lanka: UN Doc CCPR/C/SR.1058, 14, para 73; Madagascar: UN Doc CCPR/C/SR.1074, 6, para 33; Jordan: UN Doc CCPR/C/SR.1078, 9, para 43; Belarus: UN Doc CCPR/C/SR.1149, 9, para 44 and UN Doc CCPR/C/SR.1152, 11, para 55; and Tanzania: UN Doc CCPR/C/SR.1189, 13, para 69. The Standard Minimum Rules have also been discussed during consideration of: Netherlands Second Periodic Report: see UN Doc CCPR/C/SR.863, 2, para 3; Uruguay's Second Periodic Report: UN Doc CCPR/C/SR.878, 6, para 9; and Cameroon's First Periodic Report: UN Doc CCPR/C/SR.898, 10, para 47.

<sup>114</sup> UN Doc CCPR/C/21/Rev.1/Add.3.

<sup>115</sup> UN Doc CCPR/C/SR.953, 8, para 31.

<sup>116</sup> Elkind and Shaw, above n 18, 48.

<sup>117</sup> See Elkind, above n 25.

<sup>118</sup> *R v Phillips* (Court of Appeal) [1990-92] 1 NZBORR 6, 9; [1991] 3 NZLR 175, 177.



5 *Electoral Act 1993*

The new Electoral Act 1993 has taken some of the above argument into account. Section 80 would replace section 42 of the 1956 Act. It provides:<sup>119</sup>

**80. Disqualification 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 penal institution

Under the new Act, the right to vote is only denied to those who are imprisoned for three years or more. There appear to have been two reasons for the change. First, it was made "in order to comply with the Bill of Rights".<sup>120</sup> A letter from the Department of Justice to the Chairman of the Electoral Law Select Committee reads:<sup>121</sup>

The Solicitor-General has advised that a restriction along the lines of that contained in the Bill is a justified limitation in terms of the New Zealand Bill of Rights Act but that a simple re-enactment of the present provisions would be inconsistent with the rights and freedoms conferred by section 12 of the New Zealand Bill of Rights Act.

It will be argued that the new provision fails to achieve this aim.<sup>122</sup> This quotation is another example of how the Government, the Solicitor-General and the Department of Justice are not concerned by whether or not New Zealand's present law is in violation of the Bill of Rights and international law. Their only concern is with the procedural requirements of section 7 of the Bill of Rights and the strict legal duties of the Bill of Rights as they have narrowly interpreted it.<sup>123</sup> This does not satisfy the rights-centred approach required. It is unacceptable.

<sup>119</sup> The change would require new procedures for enrolling prisoners and these are also provided in the Electoral Act 1993: Section 81 makes provision for the Registrar to be informed of which prisoners are thereby entitled to vote.

<sup>120</sup> Telephone consultation with Law Reform Division, Department of Justice, 11 August 1993.

<sup>121</sup> Letter from W A Moore, for Secretary of Justice to Chairman of Electoral Law Select Committee, 3/5/93, in Submissions to and Papers of the Electoral Law Select Committee: EL/93/655, J/11, 57, comment on cl 89 [which became s 80].

<sup>122</sup> Below part 7.

<sup>123</sup> See J J McGrath, QC, Solicitor-General "The Bill of Rights and the Legislative Process" in Legal Research Foundation *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992), 98.



Second, the change was made because it was recommended by the Royal Commission.<sup>124</sup> The Commission's influence is also seen in other changes made in the new Act. At this year's referendum voters choosing MMP are also voting for other recommendations made by the Royal Commission, some of which have not been publicly discussed.<sup>125</sup>

Two issues arise from this new provision. First, the commencement of the new Act needs to be considered. The provision will only take effect if MMP is approved at the referendum. Second, is it a justified limitation in terms of section 5? If not, the remedies outlined in Part I will be available.

#### 6 *Commencement of the Electoral Act 1993*

If Parliament decides that some prisoners should have the right to vote, it would be reasonable to expect them to change the law to achieve this. This could be achieved by amending the Electoral Act 1956, and repeating the new provision in the 1993 Act. Instead, only the 1993 Act contains the provision.<sup>126</sup> It will only come into force if MMP is approved.

#### 7 *Is this a justified limitation?*

The next question which needs discussion is whether or not the limitation in section 80 is justified in terms of section 5 of the Bill of Rights. Obviously it means that the right to vote is denied to fewer persons. It is an improvement on the current position. It is submitted that the new provision is

<sup>124</sup> See Royal Commission, above n 2, 236-8 paras 9.17-9.21, Recommendation 42; and Moore, above n 121, 57, comment on cl 89 [which became s 80].

<sup>125</sup> As well as the change to prisoners and mental detainees (see below part E), changes are made to the calculation of what Maori children are included in the Maori Electoral Population (s 2), and what % of the vote is needed for a candidate not to forfeit the required deposit (s 144). Other recommendations relating to MMP and FPP have not been implemented: for example the abolition of the Maori roll under MMP and, the method of calculating the number of Maori seats under FPP: see below part V.

<sup>126</sup> Section 19(5) of the Electoral Referendum Act 1993 provides that if the referendum approves MMP, the Chief Electoral Officer shall make a declaration to that effect. Certain parts of the Electoral Act 1993 (including s 80) shall come into force the day after the Chief Electoral Officer's declaration is published in the Gazette: s 2(2) of the Electoral Act 1993. Other parts will come into force on 1 July 1994: s 2(1) of the Electoral Act 1993. However, if the referendum does not support MMP, the Act will never come into force: s 2(3) of the Electoral Act 1993.



still unsatisfactory. The criticisms of the Court in *Belczowski* still apply: the denial of the right to vote is effectively an added punishment for being imprisoned. And while non-payment of fines may no longer result in loss of the right to vote,<sup>127</sup> there are a wide array of offences with maximum penalties of 3 years or more.<sup>128</sup>

International material supports the conclusion that this 3 year rule is a breach. On ratifying the Covenant, Australia made the following declaration:<sup>129</sup>

Australia declares that laws now in force in Australia relating to the rights of persons who have been convicted of serious criminal offences are generally consistent with the requirements of articles 14, 18, 19, 25, 26 and reserves the right not to seek amendment of such laws.

Netherlands officially noted its objection to Australia's declaration.<sup>130</sup> Mrs Côté-Harper, of the Committee, has said that the loss of citizenship because of a long sentence was a "serious violation" of the Covenant.<sup>131</sup>

The Royal Commission justified the limitation:<sup>132</sup>

Long-term prisoners can be viewed in the same way as citizens absent overseas who lose their right if they are away for more than a certain length of time.

However, this argument is flawed in two ways. First, citizens who leave are exercising a choice to be out of society, and join another society. Prisoners have no such choice. While it may be argued that they lose their right to choose when committing an offence, this seems no different from the arguments rejected above. Second, citizens who leave are no longer "sufficiently interested" in a government's decision, while prisoners are. The small number of prisoners could not affect an election to the extent that parties would deliberately try to catch their vote (by promising reduced

<sup>127</sup> Crimes Act 1961 s 19E(1).

<sup>128</sup> Examples include: attempting to do something impossible, such as attempting to induce a mute to take an oath purporting to bind that person to commit an offence: ss 72(1) and 80(1)(b) of the Crimes Act 1961; attempted piracy: s 95; attempted bribery of a judicial officer: s 101, or of an MP: s 103.

<sup>129</sup> UN Doc CCPR/C/2/Rev.3, 7. See also Australia's Periodic Report: UN Doc CCPR/4/Add.1, paras 414-415.

<sup>130</sup> UN Doc CCPR/C/2/Rev.3, 41.

<sup>131</sup> UN Doc CCPR/C/SR.548, para 44.

<sup>132</sup> Royal Commission, above n 2, 238, para 9.21.



sentences, increased parole etc).<sup>133</sup> Prisoners are still interested in how the government makes policy.

It is submitted that as there is no reason why prisoners should be denied the right to vote, there is no reason why serious offenders should be. *Oakes* requires a rational connection between the denial of the right to vote and the commission of the offence which has led to it. Only a few offences satisfy this test: the offence must relate to the voting process itself. They include Corrupt and Illegal Practices:<sup>134</sup> Personation, Bribery, Treating, Undue Influence. Any person convicted of a corrupt practice has their name place on the Corrupt Practices List and is disqualified from voting for 3 years.<sup>135</sup> The change in the Electoral Act 1993 does not satisfy the requirements of the Bill of Rights.

If Parliament truly believes that some prisoners should not have the right to vote, it may be possible to achieve this without violating international law. It is submitted that if Judges, when sentencing offenders for a narrow range of serious offences, were given a discretion to order their names to be removed from the electoral roll, the Committee might accept this as a reasonable restriction on the right. However, the discretion would need to be narrowly defined and only related to the individual facts of the case.<sup>136</sup> Even this might not be acceptable to the Committee.<sup>137</sup>

#### *8 Consequential breach of section 7 by the Attorney-General*

This conclusion leads inevitably to the further conclusion that when the Electoral Reform Bill<sup>138</sup> was introduced, the Attorney-General breached

<sup>133</sup> Of the 3794 sentenced prisoners on 14 November 1991, a total of 1565 were sentenced for 3 years or more: Department of Statistics *New Zealand Official Yearbook 1993* (Department of Statistics, Wellington, 1993), 220.

<sup>134</sup> These are provided for in Part V of the Electoral Act 1956 and Part VII of the Electoral Act 1993.

<sup>135</sup> Electoral Act 1956 s 59 and Electoral Act 1993 s 100.

<sup>136</sup> See Partsch "Freedom of Conscience and Expression, and Political Freedoms" in Louis Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981), 209, 243; UN Doc CCPR/C/SR.711, para 45: some rights could be deprived by a "legally valid court decision".

<sup>137</sup> UN Doc CCPR/C/SR.549, para 44.

<sup>138</sup> As it was then called.



section 7 by not bringing this breach to the attention of the House. Even if it is the above arguments are not accepted and it is concluded that the new provisions are justified under section 5, it is submitted that the Attorney-General still breached section 7. The Solicitor-General, J J McGrath QC argues that the Attorney-General only has to report where the provision is not justified,<sup>139</sup> but this interpretation is flawed. It means that Parliament is unable to debate whether or not there is justification, surely a main aim of section 7.<sup>140</sup>

### *E Disqualification of detainees of mental institutions*

#### *1 Introduction*

Section 42(1)(c) of the Electoral Act 1956 (as amended from 26 August 1993)<sup>141</sup> denies the right to vote to those detained in mental institutions.

According to the Royal Commission:<sup>142</sup>

The main rationale for the existing disqualification is ... not any supposed lack of mental competence or responsibility indicated by general committal to a mental hospital but the need to treat criminally convicted mental patients in the same way as other prisoners, *though its effects are wider than that.*

This view is supported by the fact that mentally defective people who live in the community are not barred from voting - there is no requirement of mental ability to vote. In fact, those people are allowed assistance with both enrolment and voting to such an extent that a guardian or personal representative may vote on their behalf even where they are completely unable to understand the process.<sup>143</sup>

<sup>139</sup> McGrath, above n 123, 103.

<sup>140</sup> See Fitzgerald "Section 7 of the Bill of Rights Act 1990: A Very Practical Power or Well Intentioned Nonsense?" (1992) 22 VUWLR 135.

<sup>141</sup> On that date it was amended by s 8 of the Electoral Amendment Act 1993. This amendment effectively revised the references from the Mental Health Act 1969 to the new Mental Health (Compulsory Treatment and Assessment) Act 1992. Additional issues related to this change are considered below.

<sup>142</sup> Royal Commission, above n 2, 238, para 9.22, (italics added).

<sup>143</sup> See Electoral Act 1956 ss 48A, 108 (note the Electoral Amendment Act 1993 s 25) and Electoral Act 1993 ss 86, 170.



It is submitted that the limitation in section 42(1)(c) is inappropriate. It should be repealed. This was recommended by the 1983 Legal Information Service/Mental Health Foundation Task Force.<sup>144</sup> This recommendation was noted and rejected by the Royal Commission. They concluded that consistency between prisoners and mental patients should be retained.

The provision does not come anywhere close to satisfying the test in *Oakes*. It does not even attempt to find a proportional limit. Instead an administratively efficient one is chosen.<sup>145</sup> The argument for consistency is based on the fact that some detainees would be in prisons were they not in mental institutions. However, the provision is applied both to criminals, detained under the Criminal Justice Act 1985, and to civil committals under the Mental Health (Compulsory Treatment and Assessment) Act 1992.<sup>146</sup> The provision goes much further than is necessary. According to official figures,<sup>147</sup> out of 7136 admissions in 1990, only 1043 were referrals from law enforcement agencies.

## 2 *Re M/ Re S*

The provisions of the Bill of Rights, as they apply to mental patients, have been considered in two recent High Court cases. In *Re M*, Gallen J said:<sup>148</sup>

the provisions of the [old] Mental Health Act continue to apply regardless of the passing of the New Zealand Bill of Rights Act, but they are to be interpreted as far as possible in the light of [it] and it may well be that earlier interpretations may no longer be appropriate.

<sup>144</sup> (M Abbot et al) Report of the Legal Information Service/Mental Health Foundation Task Force on the Revision of Mental Health Legislation *Towards Mental Health Law Reform* (Legal Information Service/Mental Health Foundation, Auckland, 1983).

<sup>145</sup> As we have seen, administrative efficiency is not a valid reason for violating the rights in the Bill of Rights: above n 81.

<sup>146</sup> Compare ss 8, 46, 47 of the Mental Health (Compulsory Treatment and Assessment) Act 1992 with Part VII of the Criminal Justice Act 1985. See Dawson, Anderson, McCarthy *Mental Health (Compulsory Treatment and Assessment) Act 1992* (New Zealand Law Society Seminar, Wellington, 1992), and Susan Fry *Civil Committal under the Mental Health (Compulsory Treatment and Assessment) Act 1992* (unpublished) LLM Research Paper, Law and Medicine, LAWS 546, Victoria University of Wellington, 1992.

<sup>147</sup> Health Statistical Services *Mental Health Data 1990* (Department of Health, Wellington, 1992), 41.

<sup>148</sup> [1992] 1 NZLR 29, 40.



In *Re S*, Barker J was considering the right to refuse medical treatment under section 11 of the Bill of Rights. He said:<sup>149</sup>

Everyone in respect of s 11 must mean 'every person who is competent to consent'

This interpretation, if correct, it could be extended to section 12 to deny mental patients the right to vote. However, Barker J's interpretation has been criticised by Paul Rishworth.<sup>150</sup> Barker J's reasoning would mean that mental patients can be tortured, abused, beaten and experimented upon.

Rishworth suggests that a better approach would be to have held that:<sup>151</sup>

'everyone' in section 11 meant literally everyone. If committed patients have their right to refuse medication overridden, then that is quite possibly a reasonable limit under section 5.

It is submitted that Rishworth's approach is to be preferred, and applies to the right to vote too. If the right to vote is denied to mental patients, this must be justified under section 5.<sup>152</sup>

### 3 *Human Rights Committee*

During Italy's report to the Committee, Mr Graefrath, of the Committee noted, in regard to article 25:<sup>153</sup>

Paragraph 102(b) of [Italy's report: find this again it says the right to vote is denied to] "persons of unsound mind." It was, however, necessary to distinguish between persons who were lucid, persons who were not, and persons who had alternating periods of lucidity and non-lucidity. Since the value of the votes of persons who had lost their power of reason was distinctly dubious, he would be grateful for some clarification in that regard.

This supports two points:

- 1 The Committee considers that a blanket ban on persons of unsound mind is a violation of the Covenant.

<sup>149</sup> [1992] 1 NZLR 363, 374.

<sup>150</sup> Rishworth "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" in Legal Research Foundation *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992), 29.

<sup>151</sup> Above n 150, 29.

<sup>152</sup> The Mental Health (Compulsory Treatment and Assessment) Act 1992 does contain some rights, including the right to legal advice (Part VI). It might be submitted that they are supposed to be a code, overriding the Bill of Rights. However, the Bill of Rights must still apply. Part VI may be used to show justified limits on the rights in the Bill of Rights. If the Bill of Rights did not apply, then mental patients' rights depend not on international standards, but the Parliament of the day.

<sup>153</sup> UN Doc CCPR/C/SR.257, 36, para 48. See also UN Doc CCPR/C/SR.131, 7, para 26; UN Doc CCPR/C/SR.133, 14 para 58; UN Doc CCPR/C/SR.251, para 29.



2 Some persons of unsound mind may be denied the right to vote, and such a limitation will be reasonable, but only where it is based on the mental ability of people.

On another occasion, Mr Lallah, of the Committee made the distinction between those detained upon civil and criminal grounds that has been noted above.<sup>154</sup>

The Committee is also likely to consider international material on the rights of the mentally defective. Relevant articles of the Declaration on the Rights of Mentally Retarded Persons include:<sup>155</sup>

1 The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.

7 Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and the right to appeal to higher authorities.

Also relevant are the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care:<sup>156</sup>

1.4 There shall be no discrimination on the grounds of mental illness.

...

1.5 Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognised in the ... International Covenant on Civil and Political Rights

...

The international material strongly supports the conclusion that section 42(1)(c) is a violation of our international obligations under the Covenant.

#### 4 Canada

In *Re Scott and Attorney-General of British Columbia et al.*<sup>157</sup> it was held that the right to vote is subject to reasonable restrictions including mental capacity. However, this was an obiter comment and the subject was not discussed at length as it was not in issue. In the more recent case of

<sup>154</sup> UN Doc CCPR/C/SR.1199, para 24.

<sup>155</sup> United Nations General Assembly res 28/56 (XXVI), 20 Dec 1971.

<sup>156</sup> United Nations General Assembly res 46/519, 17 Dec 91. UN Doc A/46/49, 189.

<sup>157</sup> (1986) 29 DLR (4th) 545.



*Canadian Disability Rights Council v Canada*,<sup>158</sup> it was held that a provision disqualifying any person who is detained because of mental illness infringed the right. The proviso was held to be too broad to be a reasonable limit.

#### 5 *Electoral Act 1993*

Section 80(1)(c) of the Electoral Act 1993 makes a change similar to that for prisoners. It means that mental patients will only lose their right to vote after three years detention. This change will only come into effect if MMP is approved at the referendum, and again the change appears to be a result of the Royal Commission's recommendations.<sup>159</sup> It is submitted that the change is another violation of the Bill of Rights, as the main reason for it was that it "seemed logical"<sup>160</sup> to have the provision consistent with the one for prisoners. The arguments above show that there is no rational connection between the aim and the limitation, and the *Oakes* test is not satisfied. Remedies are available,<sup>161</sup> and the Attorney-General has breached section 7.<sup>162</sup>

It is submitted that the only way to remove the right to vote from mental patients consistently with international law is to have the decision made by an independent body, based on the mental condition of the individual.

#### 6 *Electoral Amendment Act 1993*

Section 8 of this Act, which came into force on 26 August 1993, amended section 42(1)(c) so it referred to the new Act. It is submitted that a section 7 report should have been made. The Solicitor-General accepts that to re-enact the current law on prisoners would violate the Bill of Rights. According to his own arguments for consistency, the re-enactment by

<sup>158</sup> (1988) 21 FTR 268 (TD).

<sup>159</sup> Royal Commission, above n 2, 238, para 9.22.

<sup>160</sup> Telephone discussion with W A Moore, Department of Justice, 28/9/93.

<sup>161</sup> Above Part I.

<sup>162</sup> Above Part III D 8.



section 8 must also violate the Bill of Rights. The Solicitor-General would probably argue that a section 7 report was unnecessary because section 8 was added after the Bill was introduced.<sup>163</sup> This interpretation undermines the usefulness of section 7. It is unacceptable.

#### *F Disqualification of young persons*

In New Zealand, voting is restricted to those 18 years and over. This is provided by the definition of "adult" in section 2 of the Electoral Act 1956 and section 2 of the Electoral Act 1993. It is expressly provided for in section 12 of the Bill of Rights. It is not however, provided for under the Covenant, but age restrictions are implied as "reasonable limitations". They are common throughout the world.<sup>164</sup>

There is therefore no possibility of arguing a violation of the Bill of Rights. It is also highly unlikely that the Committee would accept such an argument.<sup>165</sup> It has been held in Canada that age restrictions are acceptable.<sup>166</sup>

However, it is submitted that there is no good reason for an age limit of 18 being included in the Bill of Rights. Adults need pass no tests of intelligence, understanding or ability to receive rights such as the right to vote. Neither would tests such as usefulness in society, paying tax, or political awareness allow the distinction. Some children have a greater reason to vote than some adults.<sup>167</sup> Drawing a line at 18 is arbitrary.

<sup>163</sup> McGrath, above n 123, 104; and Moore, above n 160.

<sup>164</sup> See the Report of the Ukrainian SSR: UN Doc CCPR/C/SR.160, 5, para 13. 18 is the age used in Australia, Canada, France, West Germany the United States and the United Kingdom: Royal Commission, above n 2, 234 para 9.8.

<sup>165</sup> Note that the Convention on the Rights of the Child (United Nations General Assembly res 44/25, 20 Nov 1989, UN Doc ST/HR/1/Rev.4) applies to those under 18. It contains no right to vote, although it does contain many other rights in the Covenant.

<sup>166</sup> Above n 157.

<sup>167</sup> David Geddis "Parental Autonomy and the rights of the Child" in Pat Shannon and Bill Webb *Social Policy and the Rights of the Child* (University of Otago, Dunedin, 1980) 47, 48; Freeman, *The Rights and Wrongs of Children* (Frances Pinter, London 1983), Prologue; J Holt *Escape from Childhood: The Needs and Rights of Children* (Penguin, Middlesex, 1974) 15-19.



The Royal Commission concluded that a strong case could be made for allowing 16 and 17 year olds to vote.<sup>168</sup> It recognised that public support for the measure was needed, and suggested Parliament regularly review the age.<sup>169</sup>

The effect of MMP on this issue should also be noted. Under the FPP system, electorate boundaries are based on total population.<sup>170</sup> To some extent at least then, children are represented by MPs. This accounts for some of the variation in number of voters per seat. Under MMP, the list vote will be most important. Children will have no effect on the distribution of seats among parties.

It is submitted that the age limit should be lowered. This conclusion can not be supported by international material, only by practical considerations. The Royal Commissions recommendations should be followed.

## *G A Right for Citizens: A Right for Permanent Residents?*

### *1 Introduction*

Section 12 of the Bill of Rights, and article 25 of the Covenant guarantee "citizens" the right to vote.<sup>171</sup> Is it acceptable to extend the right to other people? In New Zealand, permanent residents also have the right to vote.<sup>172</sup>

New Zealand is unusual in allowing people other than citizens to vote.<sup>173</sup> Permanent residents are permitted to vote here for historical reasons. British subjects have never been denied the right to vote in New

<sup>168</sup> Royal Commission, above n 2, 235, para 9.14 (Recommendation 41).

<sup>169</sup> The Royal Commission received only one submission on the issue, above n 2, 235, para 9.14; as did the Electoral Law Select Committee: Moore, above n 121, 57.

<sup>170</sup> See definitions of "General Electoral Population", "Maori Electoral Population", and the method used to fix electorate boundaries: Electoral Act 1956, ss 2, 16, 17, 23; and Electoral Act 1993 ss 3, 35, 36, 45.

<sup>171</sup> A second issue: whether or not the method by which citizenship is determined in New Zealand can be criticised in some way will not be considered here.

<sup>172</sup> Electoral Act 1956 s 39(1)(a); repeated in Electoral Act 1993 s 74(1)(a).

<sup>173</sup> Royal Commission, above n 2, 232, para 9.5, and Committee: see n 187.



Zealand.<sup>174</sup> In 1975,<sup>175</sup> it was decided that the right to vote should be extended to all permanent residents. A "person is a permanent resident ... if, and only if that person ... resides in New Zealand", and is not here illegally, or obliged to leave.<sup>176</sup>

It is submitted that discrimination between permanent residents on the basis of nationality is unacceptable and the issue is whether or not all permanent residents should be entitled to vote. There are some good reasons for wanting to restrict the right to citizens.

Any provision that increases the number of eligible voters, such as section 39(a) means that each voter has less effect overall in deciding the outcome of an election. It is therefore understandable that citizens might wish to challenge such a provision.

The White Paper clearly takes the view that the provision is acceptable,<sup>177</sup> but as has been seen, other authorities may be more persuasive.

## 2 Ireland

The Supreme Court of Ireland considered this issue in *In the matter of Article 26 of the Constitution and in the matter of The Electoral (Amendment) Bill 1983*.<sup>178</sup> In this case a Bill that would have given British residents the right to vote in Ireland was referred to the Court for a decision on the question whether the Bill was repugnant to the Constitution. The Court ruled that Article 16 of the Irish Constitution restricted the right to vote to citizens, and the Bill would violate the Constitution.

<sup>174</sup> See The Qualification of Electors Act 1879 s 2(4); Electoral Act 1893 s 8; Electoral Act 1902 s 26(1)(a); Electoral Act 1905 s 26(1)(b); Legislature Act 1908 s 35(1)(b); Electoral Act 1927 s 28(2). These have generally required residency of one year.

<sup>175</sup> Electoral Amendment Act 1975 s 16(1).

<sup>176</sup> Electoral Act 1956 s 38; repeated in Electoral Act 1993 s 73.

<sup>177</sup> See above n 16.

<sup>178</sup> [1984] IR 268.



The Court held that the Constitution provided "a total code for the holding of elections to Dáil Éireann [the Irish House of Representatives]"<sup>179</sup> as far as who could vote, the voting system and time limits were concerned, leaving only minor matters for further regulation. The Court also noted that under the Irish Constitution "all powers of government derive under God from the [Irish] people... . It is not possible to regard this Article as contemplating the sharing of such powers with persons who do not come within the constitutional concept of the Irish people..."<sup>180</sup>

This decision resulted in an amendment to the Irish Constitution, (requiring a referendum), Article 16 of which now expressly provides for voting by British permanent residents.

### 3 *Human Rights Committee*

In giving the Federal Republic of Germany's first periodic report to the Committee, Mr Heilborn, a member of the German delegation, appears to have taken a view contrary to that of the White Paper. He said:<sup>181</sup>

In conformity with article 25 of the Covenant, some rights and duties, such as the right to vote and to be elected ... were enjoyed *only by citizens* of the Republic.

The Committee did not question this interpretation of article 25. Silence is equivocal, but as it is the Committee's task to pass judgment on the Convention, it seems fair to expect them to object when someone puts forward an interpretation of the Covenant which they disagree with.

There are in fact two possible readings of Mr Heilborn's statement:

1. Germany gives the right to vote only to citizens, as is required in order to conform with the Covenant.

2. Germany does not discriminate against aliens, except that the right to vote is restricted to citizens. However, this does not violate article 13 of the Covenant, as it is permitted under article 25.

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<sup>179</sup> Above n 178, 274.

<sup>180</sup> Above n 178, 275.

<sup>181</sup> UN Doc CCPR/C/SR.68, 6, para 17 (italics added).



If the second meaning was meant, or the Committee thought that it was, then their silence would be understandable.

The question whether aliens have the right to vote has been mentioned by the Committee on other occasions. These are not conclusive either. While considering the United Kingdom's report on Belize, Mr Graefrath, of the Committee, noted that the report said "all laws applied equally and without discrimination 'to all nationals and aliens'." He made the comment:<sup>182</sup>

That was rather loosely worded and could not be entirely true since there must be legal rights, such as the right to vote, which were exclusively enjoyed by nationals and not aliens, as was the normal practice.

Similarly during consideration of Sweden's report:<sup>183</sup>

Mr Sadi [of the Committee] agreed that not all the rights set forth in the Covenant were applicable to aliens, the right to vote was one example.

Australia allows British subjects to vote. This entitlement was contested by Mr Tarnopolsky, of the Committee, during the presentation of Australia's report, apparently because it discriminated against other aliens.<sup>184</sup> Another member Mr Tomuschat thought it was compatible with article 25.<sup>185</sup>

These passages are not conclusive. They show that the right to vote in the Covenant can be limited to citizens. This is hardly surprising, given the wording of article 25. However, there is no express statement by the Committee that extension to other people violates the Covenant. Mr Graefrath's comment was probably a criticism of the lack of detail in the report under consideration.

More recent evidence suggests that the Committee would not object to section 39(a). Sweden reported that foreigners living there for 3 years could

<sup>182</sup> UN Doc CCPR/C/SR.161, 10, para 49. See also Mr Graefrath's comments during the presentation of Finland's first Periodic Report: UN Doc CCPR/C/SR.170, 10 para 49. He noted, without criticism that certain political rights were guaranteed to citizens only. See also UN Doc CCPR/C/SR.732, para 21; UN Doc CCPR/C/SR.738, para 3.

<sup>183</sup> UN Doc CCPR/C/SR.188, 9, para 37. See also UN Doc CCPR/C/SR.198, para 26; UN Doc CCPR/C/SR.302, para 46, 53; UN Doc CCPR/C/SR.822, para 36.

<sup>184</sup> UN Doc CCPR/C/SR.402, para 8.

<sup>185</sup> UN Doc CCPR/C/SR.403, para 53.



vote in regional and local elections. No adverse comment was made.<sup>186</sup> During the Committee's consideration of Denmark's report, Mr Mommerstereg:<sup>187</sup>

said he was interested by the opportunity given to aliens residing for some time in the country to vote or be elected in local elections, a possibility that did not exist in all countries.

During the initial report of Saint Vincent and the Grenadines, one member of the Committee said:<sup>188</sup>

[S]ome of the rights enumerated in the Constitution seemed to go beyond those in the Covenant, which was commendable. Article 25 of the Covenant was limited to citizens, but sections 25 and 26 of the Constitution, if he understood them properly, were not so limited.

These last two quotations indicate the Committee would view New Zealand's law favourably.

New Zealand's reports to the Committee have noted the fact that permanent residents have the right to vote here. The Committee has not asked questions on this point. Article 13 of the Covenant prohibits discrimination against non-citizens, and questions are often asked by the Committee under this Article. It is probably only because of the wording of article 25 that discrimination against non-citizens is permitted. The wording recognises the fact that many countries would be unhappy about being ruled by "outsiders", or people representing "outsiders", and thus wish to retain political power in citizens.

It is submitted that the Committee would probably not accept an argument that the right is violated by extending it to permanent residents.

#### 4 *Justifying the right to vote for permanent residents*

Levison has written:<sup>189</sup>

Limiting the franchise to citizens may be a way of saying that only genuine members of the political community can vote. Even *resident* aliens cannot vote, whatever their "interest", because they are presumed not to be genuine members of the political community.

<sup>186</sup> UN Doc CCPR/C/SR.638, para 40.

<sup>187</sup> UN Doc CCPR/C/SR.781, para 12. See also UN Doc CCPR/C/SR.863, para 77 (Netherlands).

<sup>188</sup> UN Doc CCPR/C/SR.954, para 9.

<sup>189</sup> Sandford Levison "Suffrage and Community: Who Should Vote?" (1989) 41 Florida Law Review 545, 555.



However he goes on to criticise this argument:<sup>190</sup>

This presumption is not logically necessary...  
Citizenship ... is a purely formal category

There are other good reasons for retaining the current law. Many permanent residents may have been in New Zealand and voted regularly for decades. They have not taken the formal step of becoming citizens, but this may be for technical reasons.<sup>191</sup> They may nevertheless consider themselves New Zealanders and participate fully in society. By choosing to live here, all permanent residents become subject to New Zealand's laws. They pay taxes, have productive jobs, assist charities and community organisations, and even play for the All Blacks.

Permanent residents are affected by governments and their decisions in the same way that citizens are.<sup>192</sup> For these types of reasons the Royal Commission suggested no change to this part of the law.<sup>193</sup>

### 5 Conclusion

It is submitted that the reasoning of the Irish Supreme Court should not be followed, and the right to vote is to be given to people other than citizens if they have shown a commitment to New Zealand. While the Bill of Rights could be amended to provide for this it need not be.

<sup>190</sup> Above n 189, 555.

<sup>191</sup> Some countries discourage dual citizenship. Therefore by becoming a New Zealand citizen you might lose your right to live in your country of birth.

<sup>192</sup> See Elkind and Shaw, above n 18, 47.

<sup>193</sup> Royal Commission, above n 2, 232, para 9.5.



#### IV VOTING METHODS AND PROCEDURE

##### A *Voting Secrecy*

##### 1 *Problems with Secrecy*

Section 12 of the Bill of Rights and article 25 of the Covenant expressly provide that voting shall be secret. Historically this requirement was required to prevent voters being influenced by threats, unfair influence or bribery from those who were particularly interested in the result. In modern times the voting procedure has essentially eliminated these problems. In New Zealand voting takes place in a voting booth where the paper must be marked by the voter alone. No communication is allowed.<sup>194</sup>

However, it is still technically possible to find out how a person has voted after the event. Every voting form is numbered with an individual number, and every voter has a number on the electoral roll. When a voter goes into a polling booth the voter's number is put on the counterfoil<sup>195</sup> of the voting paper, which already has the voting paper number on it. A sticker is then placed over the number on the voting paper.<sup>196</sup> This means that how voters voted can be determined after an election, but only by removing stickers and matching up numbers. This will only be done where a person is subsequently found to have voted twice, voted claiming to be another person, or for some other reason a vote is ruled invalid.<sup>197</sup> Disputes over who was entitled to vote sometimes occur after elections.<sup>198</sup> Numbering voting papers is the only way votes found to be invalid can be identified and removed after election day.

<sup>194</sup> Electoral Act 1956 ss 103, 106; repeated in Electoral Act 1993 ss 165, 168. There is an exception for blind disabled, or illiterate voters: Electoral Act 1956 s 108 (as amended by Electoral Amendment Act 1993 s 25); repeated in Electoral Act 1993 s 170.

<sup>195</sup> The counterfoil is the 'stub' of the voting paper.

<sup>196</sup> See Electoral Act 1956 s 105 and Electoral Act 1993 s 167.

<sup>197</sup> See ss 106, 109, 140 of the Electoral Act 1956. No records are kept of how often it is in fact done, but the author estimates that about 300 votes are disallowed in this way every election. This will require about 35 000 votes to have their stickers removed. Estimates based on telephone discussions with Deputy Returning Officer 26 August 1993. This is a sizeable number: accurate records are required.

<sup>198</sup> See *Re Wairarapa Election Petition* [1988] 2 NZLR 74; *Re Hunua Election Petition* [1979] 1 NZLR 251.



## 2 Human Rights Committee

The Committee considers that secrecy is an important part of the right to vote.<sup>199</sup> However, this issue has not been discussed in detail, and it is unclear what the requirement of secrecy entails. It is therefore necessary to turn to other authority.

## 3 Ireland

In *McMahon v Attorney-General*,<sup>200</sup> the Irish Courts considered this issue. The plaintiff in the case argued that voting at an election for Dáil Éireann was not secret because, as in New Zealand, the name of the person voted for could be ascertained after the election. In the High Court, Pringle J held that the procedure did not give the "complete and inviolable secrecy"<sup>201</sup> which was required, and held the procedures were invalid. Alternative procedures would mean that while it would be possible to find out who had cast invalid votes, those votes could not be retrieved. Pringle J noted that if the number of invalid votes were higher than the winning candidates majority, a new poll could be held.

On appeal, by a 3-2 majority, the Supreme Court affirmed the High Court decision, and held that the process was a violation of the Constitution. O'Dálaigh CJ noted that South Australia had a system of absolute secrecy, and that in the 48 years Ireland had used its system there had never been an election petition, and personation agents rather than recourse to voting papers was used to prevent personation. He held that "[l]imited secrecy is not secrecy: it is something less than secrecy."<sup>202</sup>

<sup>199</sup> See the comments of Sir Vincent Evans, of the Committee: UN Doc CCPR/C/SR.65, 7, para 39. See also UN Doc CCPR/C/SR.319, para 66.

<sup>200</sup> [1972] IR 68.

<sup>201</sup> Above n 200, 84.

<sup>202</sup> Above n 200, 104.



#### 4 *New Zealand procedure*

It is submitted that the procedure used in New Zealand has several advantages, and should be retained. In New Zealand voters have the freedom to vote at any polling booth within their electorate, and may also cast special votes outside the electorate. This is in contrast to the situation in Ireland and other countries, where voters must vote at one designated polling booth. The New Zealand rule means that while voters can not vote at the same booth twice (as their name is crossed off the list) they can attempt to vote at different polling booths. It also makes personation easier, as you can vote for X a long way from their home, where no one will know X or you. However, where this happens, the offending votes can be identified and removed using the numbers on the voting papers when the electoral rolls are compared after election day.

These advantages mean that the New Zealand voting process maintains its status as fair and unbiased. Allowing voters the freedom and convenience of voting where they find it convenient, encourages them to exercise their right to vote, which is an important benefit.

In response to Pringle J's argument that a poll could be declared invalid it should be noted that there is no way to ensure that future polls would be any better. Thus a sitting candidate or his supporters could repeatedly deliberately invalidate an election to remain in power.

On the other hand, there may also be disadvantages if secrecy is not absolute. Some voters, not wanting their views to be known, and unwilling to take the risk, may choose not to vote. This problem is impossible to quantify and requires statistical research.



## 5 *Alternative procedures*

Obviously the ideal situation would be if we could have absolute secrecy and the advantages of New Zealand's procedure. But it seems that this is not possible. There are several options that need consideration.

### (a) Requirement of identification

At present, voters need produce no identification when receiving a voting paper. Requiring identification (and removing numbers from voting papers) would make it harder to vote for someone else.

However, even if voting under another person's name was eliminated, there would still be the possibility of one person voting twice (by voting at more than one polling booth). There would be no way of removing these invalid votes. This would increase the incentive to vote illegally, to forge, steal or use stolen documents. It would also create problem for people who have no identification documents, or do not normally carry them.

### (b) Sending out "voting authority identification"

Currently, when you enrol or re-enrol, you are sent notification that you are enrolled, and in which electorate. Suppose as well you were sent a small card with your name, authorising you to vote, and the card was required to be surrendered on receiving voting papers on election day. Then you could vote only once, and only those registered could vote. However, each card is worth a vote. Cards would be lost, creating huge difficulties. They may be marketable, and cards illegitimately obtained could be used.

### (c) Requiring identification and electronic rolls

If identification documents were required and rolls were electronic, it could be recorded electronically that voters had voted immediately they did



so. It would no longer be possible to vote twice. However the other problems in (a) remain. There would be additional problems of cost and technology, as well as the possibility of computer failure, which could have major implications.

(d) Permanently marking those who vote

This would prevent double voting, but not voting in the wrong electorate, or voting by people not entitled to vote. There are also problems finding a way to mark people of the 10 hours of voting day.<sup>203</sup>

(e) Postal Voting

This would prevent voting twice and solve the problem of identification documents. It may also encourage people to vote: as has occurred with New Zealand local government elections. However, problems may arise where voting papers are lost or misused. It would also increase the chance of voters being influenced. These possibilities are more likely in a general election where the stakes are (arguably) higher. The Royal Commission rejected postal voting for these reasons, also arguing it would not improve voter turnout (already high by international standards).<sup>204</sup>

(f) The Royal Commission's suggestion

The Royal Commission suggested that the stickers be on all ballot papers prior to distribution at polling places. This would mean that there was less chance of scrutineers discovering the number of a person's vote and subsequently identifying it.<sup>205</sup>

<sup>203</sup> People might object to having the nail on their left hand thumb removed, for example.

<sup>204</sup> Royal Commission, above n 2, 261-262, para 9.84. See below part F.

<sup>205</sup> Royal Commission, above n 2, 257-258, para 9.73-9.76.



6 *Conclusion: Balancing Perfect Secrecy with the advantages of New Zealand's procedure*

It is submitted that none of the above changes would solve the problems, but that the Royal Commission's suggestion is a slight improvement that should be adopted.

The technical possibility of discovery of how you voted has to be balanced against the improved means of exercising your right to vote. This is not an administrative efficiency argument. The advantages of New Zealand's system improve the exercise of the right to vote. The issue is how the right is most effectively given to voters.

It is submitted that the benefits outweigh the technical possibility that how a voter has voted will be disclosed, and New Zealand's failure to observe absolute secrecy is justified. This conclusion is tentative in that there is no research on whether the possibility of disclosure discourages people from voting. Given the high turnout in New Zealand it seems that this is unlikely to be a major factor. If research showed that this was not the case, the conclusion would need to be revised.

B *Order of Listing Candidates*

1 *Introduction*

In New Zealand the order candidates appear on the voting paper is determined by section 87(4)(a) of the Electoral Act 1956:<sup>206</sup>

(a) The names of the candidates shall be arranged alphabetically in order of their surnames:

There is evidence and research to suggest that candidates whose names appear first on ballot papers have a higher chance of winning than those who appear further down.<sup>207</sup> This is most likely to happen each voter can vote for more than one candidate, as under STV systems,<sup>208</sup> and some

<sup>206</sup> Repeated in Electoral Act 1993 s 150(6)(a).

<sup>207</sup> *O'Reilly v Minister for the Environment and Attorney-General* [1986] IR 143.

<sup>208</sup> STV stands for Single Transferable Vote: one of the Proportional Representation options New Zealand voters were given in the 1992 Referendum. It is the system used in Ireland.



New Zealand local government elections.<sup>209</sup> In such cases, many voters will mark names starting from the top of the ballot paper, and may run out of votes before they get to the bottom. Voters are also likely to pay little attention to voting papers where they are also voting in another election which they see as more important.<sup>210</sup> This is also likely to increase the chances of whoever appears first on the ballot paper. The problem is therefore unlikely to be serious in New Zealand general elections, but may have more importance in minor elections. Statistical research needs to be done to find out the extent of the problem.

## 2 *Irish Precedent*

In Ireland in *O'Reilly v Minister for the Environment and Attorney-General*,<sup>211</sup> Murphy J accepted that the system significantly favoured candidates who took alphabetical precedence and were higher on the ballot paper. However, he ruled that the bias reflected not a defect in the system, but indifference of the electorate, and held that the system did not violate the Irish Constitution. Murphy J's conclusion can be criticised. Once it has been established that a procedure is biased, it should be fixed if possible. Here there is a simple way to fix it, so it should be fixed.

## 3 *Possible Improvements*

Some jurisdictions do attempt to address the problem. In California, the order candidates are to appear on the ballot paper is determined by lot. Another suggestion has been that a random alphabet be used. Possibly the most satisfactory alternative would be to print several batches of voting

<sup>209</sup> This raises the separate issue of whether the Bill of Rights can be interpreted as applying to such elections. It is accepted that this is debatable, but assumed that it can: *San Antonio Independent School District v Rodriguez* 411 US 1, 93 S Ct 1278, 36 L Ed 2d 16 (1973) (United States Supreme Court).

<sup>210</sup> For example in New Zealand Local Government elections, along with voting papers for Mayor and City Council, voters may receive voting papers for Harbour Boards, Regional Councils, and Licensing Trusts.

<sup>211</sup> Above n 207.



papers for each electorate, each batch having the candidates in a different order, with different voters receiving different papers.<sup>212</sup> All these alternatives would add to the cost of running an election, but probably not by a significant amount. The last suggestion is the fairest, but also the most complicated and costly.

#### 4 Conclusion

Three submissions to the Electoral Law Select Committee suggested that the order be determined by lot. The Department of Justice commented that the Bill:<sup>213</sup>

repeats existing law [section 87(4)(a)] and is what voters are used to. We see no difficulty in making the change suggested although there appears to be no compelling reason to make it.

Overseas research suggests this is a legitimate problem. Research is required to find how important the problem is in New Zealand. Research may provide the compelling reason the Justice Department wants. Any of the suggested random systems is preferable to the present system.

#### C The Deadline for Enrolment

##### 1 Introduction

Section 50 of the Electoral Act 1956, (as amended by section 13 of the Electoral Amendment Act 1993)<sup>214</sup> and section 88 of the Electoral Act 1993<sup>215</sup> change the deadline for enrolment to writ day, rather than the day before election day.<sup>216</sup> There is an exception to this rule for recently qualified voters who may enrol during that time and then cast a special

<sup>212</sup> For example, if there were 5 candidates, A, B, C, D, E; five batches of voting papers could be produced with the following orders: 1: A, B, C, D, E, 2: B, C, D, E, A, 3: C, D, E, A, B, 4: D, E, A, B, C, 5: E, A, B, C, D. Equal numbers of each batch would be used.

<sup>213</sup> Moore, above n 121, 65, comment on cl 159.

<sup>214</sup> This Amendment took effect from 26 August 1993.

<sup>215</sup> Remember that this Act only takes effect if MMP is approved at the referendum later this year: see above part III D 6.

<sup>216</sup> There is a consequential amendment to who may vote in s 24 of the Electoral Amendment Act 1993, which amends s 99 of the Electoral Act 1956.



vote.<sup>217</sup> This change means that some people who would, under the previous law, have been able to enrol and vote will be unable to. This effectively denies them the right to vote.<sup>218</sup> Any change such as this, which will remove the right to vote from people needs justification.

There have been several changes to section 50 in recent years.<sup>219</sup> Until 1990, the law was much the same as it is now. Section 20(1) of the Electoral Amendment Act 1990 altered the law so that everyone could enrol up until the day before polling day. This followed a recommendation of the Royal Commission.<sup>220</sup>

## 2 *International Authority*

In Canada the British Columbia Supreme Court considered this issue in *Re Scott*.<sup>221</sup> In that case the petitioner argued that the right to vote was violated by a provision that gave him 8 days from writ day to register: meaning registration was required 20 days before the election. Macdonald J held that this was justified, accepting the Attorney-General's argument that a reasonable time was required to prepare voters' lists.

The issue was considered in the United States in *Rosario v Rockefeller*,<sup>222</sup> where the Supreme Court held that requiring registration 30 days prior to the election was acceptable.

## 3 *Application to New Zealand*

The new provision is a prima facie breach of the right to vote. It requires justification. It is submitted that only three objectives are arguable:

<sup>217</sup> Section 50(3), as amended by section 13 of the Electoral Amendment Act 1993. It applies to people who have qualified during the period commencing on the 31st day before write day and ending with the close of the day before polling day.

<sup>218</sup> Again this seems to be a political issue, with National believing the change will benefit them, as more Labour voters are late enrollers.

<sup>219</sup> See Electoral Amendment Act 1983 s 8; Electoral Amendment Act 1985 s 9(1); and Electoral Amendment Act 1990 s 20(1).

<sup>220</sup> Royal Commission, above n 2, 251 Rec 47. NZ Parliamentary debates, Weekly Hansard 70, 9 March 1993: 13780.

<sup>221</sup> Above n 157.

<sup>222</sup> (1973) 410 US 752, 93 S Ct 1245, 36 L Ed 2d 1.



- (i) to ensure voter lists can be prepared in time (as argued in *Re Scott*); and
- (ii) to encourage people to register;
- (iii) early registration means less people make mistakes when registering which result in their votes subsequently being ruled out.<sup>223</sup>

It is submitted that neither (i) nor (ii) satisfy *Oakes*. (i) is not satisfied on the facts. New Zealand has allowed voters who have recently qualified to enrol until the day before polling day without problems.<sup>224</sup> In 1990 all voters were able to vote enrol until that day and no problems were reported in constructing lists.

(ii) is an important objective, but there is no rational connection between it and the measures taken as required by *Oakes*. Closing the rolls early will not encourage people to register: it denies them the opportunity to do so. Measures such as advertising and mail outs do encourage enrolment.

(iii) is more debatable. It was the argument used by the National Party during debate in the House on the Bill.<sup>225</sup> Suppose it is correct. The aim of the law should be to ensure the maximum possible number of people can vote. According to the *Oakes* test, the "measures adopted must be carefully designed to achieve the objective in question" and they "should impair 'as little as possible' the right ... in question".<sup>226</sup> It is submitted that the new provisions do not satisfy this test. The aim is to have as many people as possible correctly enroled. The earlier they are enroled the more chance there is of finding errors in enrolment forms. There is a limit to how early enrolment is desirable: or otherwise people who move after enrolling may no longer be correctly enroled. However, a similar argument to that against objective (i) applies. Advertising and mail outs encourage people to enrol

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<sup>223</sup> For example, suppose you enroled in Wellington-Karori, when you should have enroled in Onslow. If you enrol well in advance of an election the mistake may be corrected before the election and you could cast a valid vote in Onslow. However, if you enrol on writ day (or election day itself if that was allowed) you will end up voting in Wellington-Karori, and may later have your vote ruled invalid.

<sup>224</sup> NZ Parliamentary debates, Weekly Hansard 70, 9 March 1993: 13784.

<sup>225</sup> NZ Parliamentary debates, Weekly Hansard 70, 9 March 1993: 13767-13790

<sup>226</sup> Above Part I.



early. A fixed rule like the new provisions denies some people the opportunity to enrol.

There is another way to make the same argument. Consider those people who are not enrolled on writ day. Under the old law, they had the opportunity to enrol and vote, but took the risk that errors in enrolment would lead to their votes being disqualified. Under the new law they will not even have the chance to cast a valid vote. The old law must be preferable. This argument assumes the number of people not enrolled on writ day to be the same under both laws. It is submitted that this assumption is valid, as similar methods of encouragement can be used under both.

#### 4 *Conclusion*

The new provisions breach the Bill of Rights, and New Zealand's international law obligations. The result of this is that the Attorney-General breached section 7 by not bringing this to the notice of Parliament, and remedies are available to anyone adversely affected by the change.<sup>227</sup>

#### *D Need to provide for absentee voting*

All eligible voters should be able to exercise their right to vote. Some voters will be overseas, absent from electorate on the day, or doing something on the day that means they can not vote. There need to be procedures to ensure these voters can still vote. In New Zealand this is achieved by means of the special vote. Section 100(1) of the Electoral Act 1956 reads:<sup>228</sup>

**100. Special voters** - (1) A person who is qualified to vote at any election in any district may vote as a special voter if-

(a) That person's name does not appear on the main roll or any supplementary roll for the district or has been wrongly deleted from any such roll:

(b) The person intends to be absent or is absent from the district on polling day:

<sup>227</sup> Above Part I.

<sup>228</sup> Repeated in s 61(1) of the Electoral Act 1993. Electoral Act 1956 s 110 and Electoral Act 1993 s 172 authorise regulations describing the procedure by which special voters shall vote.



(c) The person intends to be outside New Zealand on polling day or is outside New Zealand on polling day;

(d) The person is, by reason of illness, infirmity, pregnancy, or recent childbirth, unable to attend to vote at any polling place in the district;

(e) The person is, by reason of a religious objection, unable to attend to vote on the day of the week on which polling day falls;

(f) The person satisfies the Returning Officer or Deputy Returning Officer that on any other ground it will not be practicable for that person to vote at a polling place in the district without incurring a hardship or serious inconvenience.

This provision avoids the denial of the opportunity to vote that has resulted in litigation in Canada.<sup>229</sup> The Royal Commission recommended some simplification to the procedure for casting a special vote.<sup>230</sup> It is submitted that these should be adopted, but that no amendment to the law is required to ensure the right to vote.

## *E Compulsory Voting*

### *1 Introduction*

Section 12 of the Bill of Rights guarantees the right to vote. Can a duty to vote be implied from this? Some countries, including Australia have compulsory voting, and fine those who fail to vote:<sup>231</sup>

The main argument for making voting compulsory is that voting is a civic duty, like compulsory jury service, which citizens ought to perform.

The Royal Commission concluded that as we have a high voluntary turnout, the advantages of compulsory voting would not outweigh the disadvantages.<sup>232</sup>

### *2 Human Rights Committee*

In considering Ecuador's first periodic report, the Committee took the tentative view that Ecuador's law making it an offence for those eligible<sup>233</sup> not to vote might contravene the right to freedom of expression, as

<sup>229</sup> See *Re Hoogbruin et al and Attorney-General of BC* (1985) 24 DLR (4th) 718 (BCCA); *Clifford v Canada* (1992) 97 DLR (4th) 80.

<sup>230</sup> Royal Commission, above n 2, 258-262, paras 9.77-9.84.

<sup>231</sup> Royal Commission, above n 2, 254, para 9.70.

<sup>232</sup> Royal Commission, above n 2, 254, para 9.70.

<sup>233</sup> The Committee noted two requirements of eligibility: age 18 and literacy.



contained in the Covenant.<sup>234</sup> Ecuador's representatives responded by pointing out that while it was compulsory to go to the polls, there was no requirement to actually vote for a candidate, and voters could exercise their freedom of expression by voting informally.<sup>235</sup> Committee members made the same point on a number of other occasions.<sup>236</sup> Members have said "the right to vote implied a right not to vote".<sup>237</sup> This is strong evidence that the Committee did take the view that compulsory voting breaches the Covenant.

More recently, there has been a difference of opinion on the Committee on this point, with some members saying compulsory voting is acceptable.<sup>238</sup> However, it is clear that "no state is obliged to make voting compulsory".<sup>239</sup>

### *3 Conclusion*

New Zealand should not adopt compulsory voting. It is not required by the Bill of Rights or international law. The right to vote does not entail a duty to vote, and no such duty should be imposed.

#### *F Postal Voting*

In Considering Ecuador's first periodic report, the Committee took the view that Ecuador's limitation in not allowing the armed forces the right to vote contravened the Covenant. It was suggested that postal voting would be a good idea.<sup>240</sup>

<sup>234</sup> UN Doc CCPR/C/SR.118, 6, para 30.

<sup>235</sup> UN Doc CCPR/C/SR.118, 7, para 35.

<sup>236</sup> UN Doc CCPR/C/SR.249, para 49 (Venezuela); UN Doc CCPR/C/SR.251, para 30 (Denmark); UN Doc CCPR/C/SR.785, para 3; UN Doc CCPR/C/SR.896, para 62; UN Doc CCPR/C/SR.969, para 54; UN Doc CCPR/C/SR.1199, para 51.

<sup>237</sup> UN Doc CCPR/C/SR.236, para 54 (Costa Rica).

<sup>238</sup> UN Doc CCPR/C/SR.900, paras 62-63; UN Doc CCPR/C/SR.1143, paras 64, 67.

<sup>239</sup> UN Doc CCPR/C/SR.1118, para 39.

<sup>240</sup> UN Doc CCPR/C/SR.118, 6, para 30. Ecuador's representatives argued that the limitation was justified as the armed forces have to ensure the orderly conduct of elections: UN Doc CCPR/C/SR.118, 7, para 35.



In New Zealand there is a high turnout at general elections, and the disadvantages of postal voting would outweigh its benefits.<sup>241</sup>

In this part FPP and MMP will be considered. It is argued that which gives better effect to the right to vote depends on what the most important aspect of the right to vote is seen as. It is argued that the referendum gives New Zealanders the opportunity to decide this. FPP is criticised because the number of Maori seats is not determined by the population those seats represent.

### *3 First Past the Post*

Section 12 of the Bill of Rights and article 25 of the Covenant require that elections are by "equal suffrage". This could be argued to mean that all votes must be of equal value.

Some evidence that the Committee favours this can be found. During Canada's report Mr Sedt made the comment:<sup>242</sup>

The equality of individuals implied equality of voting power, and the only way to achieve that equality was to give individuals equal voting power.

This would not be satisfied by FPP as votes in marginal electorates are more valuable than votes in other electorates. A form of proportion representation would be required. This argument has been made before and rejected by the European Court of Human Rights under the equivalent provision of the European Convention.<sup>243</sup>

It is submitted that proportional representation gives better effect to the right to vote than does FPP. However it is concluded that the Committee would not require proportional representation.<sup>244</sup>

<sup>241</sup> UN Doc CCPR/C/58/21, para 38. See also UN Doc CCPR/C/58/21, para 7.

<sup>242</sup> The Labour Party v UK [1990] 4 EHRR 528, 532. *Minister of Health and Family Services v United Kingdom* [1997] 23 EHRR 413.

<sup>243</sup> See above Part IV A and Royal Commission, above n 2, 261-262, para 9.84.



## V VOTING SYSTEMS

### A Introduction

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Section 12 of the Bill of Rights and article 25 of the Covenant require that elections are by "equal suffrage". This could be argued to mean that all votes must be of equal value.

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It is submitted that proportional representation gives better effect to the right to vote than does FPP. However it is accepted that the Committee would not require proportional representation.<sup>244</sup>

<sup>242</sup> UN Doc CCPR/C/SR.206, para 38. See also UN Doc CCPR/C/SR.322, para 7.

<sup>243</sup> *The Liberal Party v UK* (1980) 4 EHRR 106, 122; *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1, 17.

<sup>244</sup> See Partsch, above n 136, 240, and note 150, which refers to the drafting history.



FPP can be defended as giving better effect to the right than MMP, depending on the reason for the right.<sup>245</sup> FPP achieves representation better than MMP, if by representation is meant representation of a geographical area and the people within it. MMP gives better effect to the right to vote if the right is aimed at other things. The most important effect of voting is to decide who will govern the country. On this criteria, MMP provides equality better than FPP. Minorities would be better represented under MMP. Under FPP everyone has an equal right to vote, but "some [people] are more equal than others".<sup>246</sup>

Given we have an FPP system, what requirements must it meet? It is submitted that in order to satisfy our international law obligations, there must be approximately the same number of people per seat.

During the United Kingdom's first periodic report, Mr Sadi, of the Committee:<sup>247</sup>

asked whether the 'one [person], one vote' principle was applied in the United Kingdom and whether electoral districts were drawn up in such a way as to reflect that principle.

Mr Sadi asked a similar question of Romania:<sup>248</sup>

Did the principle of 'one [person], one vote' apply? He particularly wanted to know whether electoral districts reflected that principle, which was accepted by the United Nations and many member states.

This is satisfied in New Zealand as far as the General seats are concerned by Part II of the Electoral Act 1956.<sup>249</sup> Sections 16 and 17 provide that the number of people per seat shall be equal. Where it cannot be done consistently with the requirement that due consideration be given to existing boundaries, communities of interest, facilities of communications and topographical features, a variation of no more than 5% is permitted. This does not apply to Maori seats.

<sup>245</sup> Above Part II A.

<sup>246</sup> George Orwell *Animal Farm: A Fairy Story* (Secker & Warburg, London, 1961).

<sup>247</sup> UN Doc CCPR/C/SR.147, 5, para 14. The reply can be found at UN Doc CCPR/C/SR.147, 6, para 20.

<sup>248</sup> UN Doc CCPR/C/SR.136, 8, para 34. See also UN Doc CCPR/C/SR.211, para 50; UN Doc CCPR/C/SR.264, para 50; UN Doc CCPR/C/SR.292, para 8; UN Doc CCPR/C/SR.320, para 10; UN Doc CCPR/C/SR.1118, paras 43, 49.

<sup>249</sup> Under FPP there are 95 'General' seats and 4 'Maori' seats. Maori have the choice of being on the 'General' roll or the 'Maori' roll.



### C *Maori Representation under FPP*

Since 1867 Maori have been represented by 4 MPs. This number has been fixed by statute, except for a brief period between 1975 and 1976. The Labour Government enacted the Electoral Amendment Act 1975, section 8 of which made the number of Maori seats dependent on the number of voters on the Maori rolls and their children - so that the number of people per seat would be the same as for General electorates. The National Government which came to power in 1975 promptly reversed this change in the Electoral Amendment Act 1976, section 2 of which again fixed the number of Maori seats at 4.

Maori have thus been under represented for most of the period since 1867.<sup>250</sup> When first given 4 seats, there were 50 000 Maori, one seat for every 12 500 of population. At the same time, 250 000 Europeans had 72 seats in the House (one for every 3472 of population), as well as 20 members in the Legislative Council. At the time of the 1992 electoral redistribution there were 33 492 people for each of 95 General seats, and 45 196 for each of the 4 Maori seats.<sup>251</sup>

National's actions are understandable on a political level: Labour has held all four Maori seats since 1943, and they have been and are among the safest Labour seats in the country. An increase in Maori seats would almost certainly mean an increase in (safe) Labour seats. National has sought to defend their actions over the years. When in 1965, Sir Eruera

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<sup>250</sup> Between 1911 and 1931 those half-Maori or more fell below 5% of the population (5% being the proportion of Maori seats). However, it never fell below 4.5%. Since 1936 the proportion of those of Maori origin has tended to increase between 6% and 12%. However, the choice of rolls has only been available since 1975. (Calculations based on Department of Statistics *Demographic Trends 1991* (Department of Statistics, Wellington, 1992). (Note however, that the figures depend on the definition of Maori, which used to require person to be at least half-Maori). In the 1991 Census 511 278 people indicated they had some NZ Maori ancestry, while 323 998 indicated that NZ Maori was their sole ethnic origin. Department of Statistics *Census 1991: New Zealand Maori Population and Dwellings* (Department of Statistics, Wellington, 1992), 15.

<sup>251</sup> Alan McRobie, submission to the Select Committee: EL/93/45, 17, and McRobie, above n 32. Note that these figures are based on those who choose to enrol for Maori seats, together with their children.



Tirikatene (MP for Southern Maori) suggested that the number of Maori MPs should be determined on a Maori population basis,<sup>252</sup> the National Prime Minister, Keith Holyoake responded by arguing that "Maori representation had never been regarded as being on a population basis; that it was a special kind of representation, [and National believed] the next step in Maori representation would be complete integration".<sup>253</sup> It was also argued that there should be "complete integration" and "no special Maori seats",<sup>254</sup> and the reason for separate representation was "historical" and no more seats were required.<sup>255</sup> However, it is submitted that National's approach is indefensible and violates basic notions of fairness and equality.<sup>256</sup> It violates section 12 of the Bill of Rights and article 25 of the Covenant.

The Royal Commission recommended that Parliament and Government should enter consultation with Maori on a wide range of issues, relating to Maori rights, the Treaty, as well as Maori electoral representation.<sup>257</sup>

Recommendation 6 read:<sup>258</sup>

Should the Mixed Member Proportional system be rejected but no agreement be reached with the Maori people about the system of Maori representation, the separate Maori seats should be retained. Their number should be set ... using the same population quota as is applies to General seats. ...

This is how the Maori seats are to be determined under MMP as provided for by section 45 of the Electoral Act 1993. It is submitted that the approach should also be followed for determining seats should FPP be retained.<sup>259</sup>

<sup>252</sup> NZ Parliamentary debates Vol 344, 1965: 2714-2715.

<sup>253</sup> NZ Parliamentary debates Vol 344, 1965: 2708. See also Holyoake - NZ Parliamentary debates Vol 343, 1965: 1663.

<sup>254</sup> Pickering - NZ Parliamentary debates Vol 343, 1965: 1666.

<sup>255</sup> Muldoon - NZ Parliamentary debates Vol 343, 1965: 1684. The Labour Opposition opposed these arguments. See Rata (MP for Northern Maori) - NZ Parliamentary debates Vol 343, 1965: 1684-1687; Faulkner - NZ Parliamentary debates Vol 343, 1965: 1666.

<sup>256</sup> See also the arguments for a fixed number of seats in W A Moore, Department of Justice to Chairman, Electoral Law Select Committee, 18/5/93: EL/93/657, J/13, 8-9.

<sup>257</sup> Royal Commission, above n 2, recommendations 5 and 7, paras 3.99-3.111.

<sup>258</sup> Royal Commission, above n 2, 108. The approach was also supported by many submissions to the Select Committee, including 423W and 424W.

<sup>259</sup> This is another example of how the Government and the Solicitor-General are happy for New Zealand's law to remain in violation of the Bill of Rights and International Law, while recognising that



National has consistently opposed this change over the years. It was discussed in Parliament in 1990, and the National members again voiced their opposition to a change.<sup>260</sup> However, on 29 September 1993, the Prime Minister announces that a National government would change the law after the 1993 election if FPP was retained.<sup>261</sup> It is to be hoped that this promise is fulfilled.

#### D Canada

Canadian authority supports the approach taken in this paper. In *Dixon v British Columbia (Attorney General)*<sup>262</sup> it was held that Charter does not require absolute equality of voting power. Representation by population, though important, has never been an absolute requirement. Some deviation is possible, but population must be the dominant consideration. Deviations may be based on factors such as better government, regional issues, or geographical factors. The electoral boundaries considered were ruled to violate the Charter as the deviations from equality were of too great a magnitude.

In *Reference re Electoral Boundaries Commission Act, ss 14, 20 (Sask)*<sup>263</sup> it was held that the purpose of the right to vote is not equality of voting power but the right to effective representation. Departure from absolute equality could be justified by factors such as geography, community history, community interest and minority representation.

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when new laws are passed they should conform with those standards. This approach is unacceptable. See Moore, above n 121, comment on cl 89. See also Elkind, above n 25, and McGrath, above n 123. Alan McRobie, in his submission to the Select Committee, recommended that the Electoral Act 1956 needed revision before being presented as an alternative at the referendum: EL/93/45, 123.

<sup>260</sup> NZ Parliamentary debates Vol 357, 1990: 357-375, 446-451.

<sup>261</sup> "Nats make Maori-seats promise if FPP returned" *The Dominion*, Wellington, New Zealand, 30 September 1993, 2.

<sup>262</sup> Above n 27.

<sup>263</sup> Above n 30.



In *Reference re Electoral Boundaries Commission Act (Alberta)*<sup>264</sup> it was held that a rule permitting up to 25% population deviation in any given electoral district and up to a 50% deviation in 5% of the electoral districts was reasonable to deal with large, sparsely populated areas.

### *E Conclusion*

MMP would give effect to the right to vote better than FPP. However, it is unlikely that the Committee would require New Zealand to adopt a system of proportional representation. If there is a decision by the people of New Zealand that they wish to retain a system, the Committee is highly unlikely to interfere.<sup>265</sup> This year's referendum would probably satisfy the Committee that New Zealanders do not want a proportional system. However, the Committee would be even more likely to accept that conclusion if the choice at the referendum was less weighted against MMP. Factors such as differences in the number of MPs under the two systems weigh against such a conclusion.

<sup>264</sup> (1991) 84 DLR (4th) 447, (CA). See Morton and Knopf "Does the Charter Mandate "One Person, One Vote"?" (1992) 30 Alberta Law Review 669.

<sup>265</sup> Compare Mr Tomuschat's comments: UN Doc CCPR/C/SR.228, para 21.



## VI CONCLUSION

In this paper it has been argued that the right to vote is a very important right, and the enactment of the Bill of Rights has had an effect on the law in New Zealand. New Zealand's domestic law does not currently satisfy its international obligations.

Some limitations on the right to vote, currently found in the Electoral Act 1956 are unjustified. These include provisions denying the right to vote to prisoners and persons detained in psychiatric institutions. The changes in the Electoral Act 1993 are criticised as they do not go far enough. It is concluded that the extension of the right to vote to permanent residents is justified.

Voting procedures in New Zealand have also been examined. It has been argued that the lack of absolute secrecy is justified by the benefits it brings. Improvements to how candidates are listed on voting papers have been suggested. Our international obligations are also violated by changes to the deadline for enrolment and the fixed number of Maori seats. Various other aspects of New Zealand's electoral law have also been discussed.

It has been suggested that remedies are available for these breaches of our international law. It has also been argued that the Attorney-General has breached the Bill of Rights by not reporting some of these breaches to the House. Finally, it has been suggested that while MMP better gives effect to the right to vote, proportional representation is not required by international law.



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