Prisoner Voting and Rights Deliberation: How New Zealand’s Parliament Failed

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The question whether individuals sentenced to terms of imprisonment should be able to vote has arisen periodically in New Zealand, as well as other liberal democracies. In 2010, Parliament voted to take the right to vote from all sentenced prisoners. This decision was taken despite the Attorney-General indicating that the legislation imposes an unjustified limit on the right to vote contained in the New Zealand Bill of Rights Act 1990, and against the international trend to enfranchise prisoners. As such, we should expect to see parliamentarians give careful attention to the rights consequences of their action. However, only the most cursory discussion of the right to vote took place during the process of enacting this legislation. This failure to engage properly with questions of individual rights means that Parliament is falling short of its duty as sovereign lawmaker for New Zealand.

I Introduction

In December last year, New Zealand’s Parliament enacted the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010. This legislation disqualifies from registering on the electoral roll all persons serving any sentence of imprisonment imposed after its passage, thereby preventing them from voting in general or local body elections whilst they remain incarcerated. Its entry onto the statute books raises obvious issues about the nature of the vote and rationales for denying it to any group in society; issues that are somewhat generic and have had to be addressed in every democracy.

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Seen from this perspective, New Zealand's move to expand the number of prisoners deemed ineligible to vote is interesting mainly because it flies in the face of a general move in established liberal democracies away from applying blanket disenfranchisement rules to serving prisoners. However, beyond the substantive content of this new law, the process by which it came to be passed also is worthy of note. In particular, a majority of Members of Parliament voted to enact the measure despite the Attorney-General advising them of his opinion that it was inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA). The Select Committee scrutiny of the Bill was both cursory and deeply flawed, leading to a remarkable error whereby it recommended the House adopt an amendment that actually would have allowed all current prisoners to vote irrespective of their sentence, whilst disenfranchising every future prisoner. Finally, the debate during the Bill's final stages in the House was at best perfunctory, with the Government Members of Parliament (MPs) who voted to pass the Bill into law hardly bothering to provide any reasons for why they supported it.

This rather cavalier attitude displayed towards the right to vote of literally thousands of New Zealand citizens is indicative of a more general lack of legislative care exhibited by the nation's elected representatives. On a number of recent occasions, Members of Parliament have passed enactments that contain provisions limiting individual rights that do not appear to "be demonstrably justified in a free and democratic society". Or, rather, if they consider that the proposed limit on the relevant right can be justified, they repeatedly neglect to set out clearly their reasoning and explain why they believe the change to be so important. These events raise questions about New Zealand's present constitutional arrangements, in particular the complete lawmaking authority enjoyed by the legislative branch of government and the extremely weak influence that the NZBORA has over that institution. Insofar as parliamentarians fail to take seriously their role as lawmakers and ultimate decision-makers over what individual rights mean, their claim to have final authority over the law is undermined.

2 As of 15 June 2010, there were 2,733 prisoners serving sentences of less than three years who would have been disenfranchised if sentenced after the new blanket ban was enacted. A further 4,090 persons were already disenfranchised under the previous law as they are serving sentences of three years or more: see Department of Corrections Electoral (Disqualification of Convicted Prisoners) Amendment Bill: Initial Briefing for the Law and Order Committee (2010) at 14 <www.parliament.nz>.
3 New Zealand Bill of Rights Act 1990, s 5.
Part II outlines the history of prisoner voting in New Zealand to provide context for the recent legislative decision to disenfranchise all serving prisoners. Part III examines substantive problems with this decision; in particular, its quite arbitrary and disproportionate consequences and the inconsistency between these outcomes and human rights norms. It then goes on to explore the deeper question of whether it is ever justifiable to remove the vote from any prisoners. Part IV turns to look at procedural issues with how the disenfranchisement legislation was enacted into law, especially the failure of those Members of Parliament who supported the measure to provide public justification for their position. This failure is then set in the broader context of how the New Zealand Parliament addresses legislation that it has been informed unjustifiably limits one of the rights and freedoms guaranteed in the NZBORA. The article concludes with a warning about the impact that these shortcomings in legislative due process may have on Parliament’s status as supreme lawmaker for New Zealand as a nation.

II Prisoner Voting in New Zealand to the Present Day

Prisoners’ entitlement to vote is an issue that traces back to the first introduction of local representation into New Zealand. Along with all women and those men younger than 21 years or without sufficient property holdings, the New Zealand Constitution Act 1852 (UK) also excluded from the franchise those persons imprisoned for “any treason, felony, or infamous offence within any part of Her Majesty’s dominions”. While near-universal suffrage was achieved by 1893, when New Zealand extended the franchise to all adult women, prisoner disenfranchisement actually was widened in 1905 to include any person convicted of an offence punishable by death or a term of imprisonment of one year or more. Fifty years later it was extended still further, with all “[p]ersons detained pursuant to convictions in any penal institution” prohibited from registering on the electoral roll (and hence from casting a ballot at election time). This blanket ban on convicted prisoners voting whilst behind bars lasted until 1975, when it was repealed.
and all prisoners were permitted to vote. However, following a change of government at the 1975 election, the blanket ban was reinstated in 1977.

This state of affairs lasted until 1993, when New Zealand’s electoral laws were overhauled to accommodate the move to a mixed-member proportional (MMP) voting system. Whilst enacting these new electoral rules, Parliament also voted unanimously to relax the restriction on who may cast a ballot from behind bars. Consequently, s 80(1)(d) of the Electoral Act 1993 disqualified from enrolling to vote, and hence from casting a ballot, only:

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.[]

This new three-year-or-more threshold reflected the advice of the Royal Commission on the Electoral System, which addressed the issue of prisoner voting alongside the broader question of which voting system New Zealand should adopt. It concluded that while the existing blanket prisoner disqualification rule could not be justified, disenfranchising those guilty of particularly serious criminal offences was acceptable. Therefore, it recommended that only prisoners currently serving sentences of three years or more be denied the vote, to mirror an already existing rule that New Zealand citizens who remain outside the country for this period of time forfeit their right to vote until they return to the country. When the new legislative framework for MMP was being drawn up in 1992, the Solicitor-General affirmed the Commission’s recommendation on the basis that it would help to limit the arbitrary application of the disenfranchisement provision by restricting its effect only to serious criminal offending. Consequently, the Solicitor-General advised that s 80(1)(d) would represent a demonstrably justified limit on the right to vote recently guaranteed by s 12(a) of the NZBORA.

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8 Electoral Amendment Act 1975, s 18(2).
9 Electoral Amendment Act 1977, s 5.
11 Ibid, at [9.18]–[9.20].
12 Ibid, at [9.21] and recommendation 42. See also Electoral Act 1993, s 80(1)(a).
13 Letter from JJ McGrath, Solicitor-General, to the Secretary for Justice “Opinion on consistency between NZ Bill of Rights Act and restrictions on prisoners’ voting rights” (17 November 1992) at [26] <www.crownlaw.govt.nz>. This advice is discussed in Robins, above n 4, at 170–171.
The three-year-or-more disqualification rule quietly operated for some 17 years without attracting any particular comment before a backbench Member of Parliament from the governing National Party, Paul Quinn, felt the need to propose a Member’s Bill on the topic. Any Member who does not also hold a ministerial warrant can seek to place such Bills before the House of Representatives. However, the number of such Bills that the House may consider is limited.\textsuperscript{14} When a Member’s Bill is removed from the order paper either by passage through the House or being voted down, its replacement is found by the random drawing of lots. Hence, the House came to consider Mr Quinn’s Bill through fortune alone; his number just happened to be the one pulled from out of the hat.

Mr Quinn’s proposal was quite simple. It sought to return the law to its pre-1993 state by changing s 80(1)(d) from disqualifying those prisoners serving a sentence of three years or more to those serving any term of imprisonment. In support of this move, Mr Quinn claimed that the Royal Commission on the Electoral System simply had got it wrong when it recommended only “serious offenders” sentenced to significant terms of imprisonment ought to be disenfranchised. Instead, he claimed that anyone who ended up in prison had thereby demonstrated such contempt for societal norms that they did not deserve the right to vote.\textsuperscript{15}

... we are talking about people who have transgressed against society. They have abused the rights that the community values and that the people who fought in the wars commemorated by the memorials in this Chamber fought to defend. ... I believe that the community has the right to decide when it will no longer provide the protection that it offers when it protects people’s right to vote.

With the support of Mr Quinn’s National Party colleagues and their ACT Party allies in government, the Bill received enough votes to pass into law. This article turns to consider first whether it should have done so, and then the process by which it was enacted.

III Prohibiting all Prisoners from Voting: Substantive Problems

The passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 means that any person who is detained in a prison under a sentence of imprisonment handed down after 16 December 2010

\textsuperscript{14} Only six Member’s Bills can appear on the House’s order paper for first reading at any time.
\textsuperscript{15} (21 April 2010) 662 NZPD 10350–10351.
along with any prisoner already disqualified under the previous law) will be unable to vote as long as they remain behind bars. However, this apparently simple policy objective is achieved by a more complex means. The actual effect of the new s 80(1)(d) is to disqualify sentenced prisoners from having their name included on the electoral roll whilst they remain incarcerated.16 Therefore, the registrar of electors must remove from the roll the name of any already enrolled sentenced prisoner,17 while any prisoner not enrolled will be prevented from doing so while in prison.18 This means of achieving the desired legislative end of stopping prisoners from voting has potential flow-on consequences once a prisoner leaves prison, as he or she will need to take the positive step of re-enrolling before regaining the right to vote. Given that prisoners predominantly come from social groups that are very hard to enrol even once,19 it is foreseeable that a significant number will not do so again and thus effectively remain disenfranchised. Admittedly, the majority of the House's Law and Order Committee recognised this possibility in its report on the Bill, noting:20

The Electoral Enrolment Centre has proposed working with the Department of Corrections to develop a national procedure to encourage prisoners to re-enrol upon release from prison. We are pleased that this proposal has the support of the department and expect the introduction of a re-enrolment procedure in due course.

Whether such a programme is developed, and how effective it will prove in practice, is yet to be seen.

A second practical point of note is that prisoners will be removed from the electoral roll only after they are sentenced to a term of imprisonment. Prisoners remanded to custody, whether before or after their trial, remain eligible to vote. Thus a person convicted of murder who is in jail on election day awaiting an inevitable sentence of imprisonment still will be able to cast a ballot, while a person sentenced the day before the election to a week's

16 Only validly enrolled electors are eligible to cast a ballot at election time: Electoral Act 1993, s 60.
17 Ibid, s 98(1)(f).
18 Ibid, s 87(1).
19 In particular, Māori are heavily overrepresented in the prison population. Despite making up only some 12.5 per cent of the general adult population, some 50 per cent of prison inmates are of Māori descent: see Department of Corrections Over-representation of Māori in the criminal justice system: An exploratory report (2007) at 6 <www.corrections.govt.nz>.
20 Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 (117-2) (select committee report) at 3.
imprisonment for breach of driving licence conditions will not be able to vote. The fact that disenfranchisement depends purely on whether a person happens to be serving a prison sentence on a particular date will result in further arbitrary outcomes. A recidivist burglar who receives a 30-month term of imprisonment the week after a general election will almost certainly be released in time to re-enrol to vote for the next election, even if she or he serves the sentence in full. However, a first-time burglar sentenced to just one month in jail the week before an election will not be able to vote in it.

The nature of sentencing also exacerbates the arbitrary consequences of the blanket disqualification provision. A judicial decision to sentence a person to a term of imprisonment depends upon a number of factors other than the seriousness of the offending and the offender's past criminal record. It also takes into account matters such as the ability to make financial reparation for the offence, the support structures that an offender has around him or her, and whether these permit a less restrictive sentencing outcome than imprisonment. In particular, persons who otherwise would be sentenced to a short period of imprisonment (ie less than two years) may instead receive a term of home detention, provided that the court is satisfied there is a suitable place available in which the offender can serve the sentence. Therefore, two offenders who commit the same crime may be given differing sentences depending on whether they own a house or have supportive family connections. The one with these things may receive a period of home detention, thus retaining her or his right to vote, while the one without may be imprisoned, thus losing it.

A Inconsistency with human rights norms

The arbitrary consequences of applying a blanket disenfranchisement rule to individual prisoners was the primary reason why the Attorney-General informed the House of his opinion that the original Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 was inconsistent with the

21 As of 15 June 2010, some 219 persons were serving prison sentences of less than three years for offences relating to driver licence and conduct; see Department of Corrections Electoral (Disqualification of Convicted Prisoners) Amendment Bill: Initial Briefing for the Law and Order Committee, above n 2.
22 Sentencing Act 2002, s 8(g).
23 Ibid, s 15A(1).
24 The title of the Bill as introduced to the House differs from that of the finally enacted legislation.
NZBORA. The Attorney-General noted that on its face a blanket ban on prisoner voting limits the right to vote guaranteed to all adult New Zealand citizens by s 12(a), which consequently requires justification under s 5. Whilst “assum[ing], without expressing an opinion, that temporarily disenfranchising serious offenders as a part of their punishment would be a significant and important objective” that may justify preventing some prisoners from voting, the blanket disenfranchisement of all sentenced prisoners cannot meet that justificatory test. In particular:

The disenfranchising provisions of this Bill will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or to the conduct of the prisoners whose voting rights are taken away. The irrational effects of the Bill also cause it to be disproportionate to its objective.

The Attorney-General’s conclusion echoes the views of the highest courts in Canada, South Africa, Hong Kong and Ireland, each of which have struck down under their relevant constitutional instruments laws that disenfranchise all prisoners. The Australian High Court also has concluded that the blanket disenfranchisement of prisoners is inconsistent with the text and structure of the Australian Constitution, in particular the requirement that Parliament be “directly chosen by the people”. Similarly, the European Court of Human Rights has ruled that the United Kingdom’s blanket disenfranchisement of prisoners is incompatible with the right to regular, free and fair elections contained in art 3 of the First Protocol of the European Convention on Human Rights. Admittedly, the United

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25 Under s 7 of the NZBORA, the Attorney-General is required to:

... bring to the attention of the House of Representatives any provision in [a] Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

26 Finlayson, above n 1, at [11].
27 Ibid, at [15].
29 August v Electoral Commission 1999 (3) SA 1 (CC); Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) 2005 (3) SA 280 (CC).
33 Commonwealth of Australia Constitution Act 1900 (UK) 63 & 64 Vict c 12, ss 7 and 24.
34 Hirst v The United Kingdom (No 2) (2006) 42 EHRR 41 (Grand Chamber, ECHR).
See also Greens and M.T. v The United Kingdom (60041/08 and 60054/08) Section
Kingdom’s Parliament so far has refused to change the law in response to this ruling, and the House of Commons has even passed a motion supporting the continuation of the present ban.\(^{35}\) However, it is unclear how much of this resistance is due to a genuine assessment that banning all prisoners from voting is a legitimate and desirable policy to pursue, and how much is the result of growing political disquiet at the role the Convention and European Court are playing in domestic policy.\(^{36}\) Furthermore, such domestic resistance likely will prove futile. The European Court’s Grand Chamber has rejected the United Kingdom’s final appeal against its judgment and given that country six months to change its law to be consistent with the Convention,\(^{37}\) in keeping with the Court’s consistent favouring of the right of prisoners to vote.\(^{38}\) Refusing to change domestic law to accord with the European Court’s judgment on this matter then opens the United Kingdom to damages claims by individual prisoners, which could amount to hundreds of millions of pounds.\(^{39}\)

Consequently, New Zealand’s move from a somewhat targeted disenfranchisement regime (ie only removing the right to vote from those serving three or more years behind bars) to the blanket disenfranchisement of all sentenced prisoners puts the country at odds with how the right to vote is understood and applied by the great majority of nations with which it usually compares its human rights record. It also means that New Zealand likely has acted in breach of its commitments under art 25(b) of the International Covenant on Civil and Political Rights.\(^{40}\) While the United

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\(^{35}\) (10 February 2011) GBPD HC 493. The recent debate over prisoner voting in the United Kingdom is outlined in Vaughne Miller and Isobel White Prisoners’ voting rights (SN01764 House of Commons Library 2011) <www.parliament.uk>.

\(^{36}\) See Patrick Wintour “Lib Dems thwart Tory hopes of human rights convention withdrawal” The Guardian (United Kingdom, 14 March 2011) <www.guardian.co.uk>.

\(^{37}\) See Ben Quinn “Prisoners’ voting rights: government loses final appeal in European court” The Guardian (United Kingdom, 12 April 2011) <www.guardian.co.uk>.

\(^{38}\) See Frodl v Austria (2011) 52 EHR 5 (Section I, ECHR); Scoppola v Italy (No 3) (126/05) Section II, ECHR 18 January 2011.

\(^{39}\) Miller and White, above n 35, at 15–17.

\(^{40}\) International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976), art 25(b). This reads:

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

> (b) To vote and to 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[.]
Nations' Human Rights Committee accepts that a criminal conviction may provide grounds for removing an individual’s right to vote, it states: "The grounds for such deprivation should be objective and reasonable."\(^{41}\) In light of the Attorney-General’s conclusion about the arbitrary impact of blanket disenfranchisement, it is difficult to see how simply serving a prison sentence on the date of an election can be a "reasonable ground" for denying an individual’s right to vote.

Inconsistency with human rights norms does not affect the legal validity of the disenfranchisement provision. Even if Parliament’s blanket ban on sentenced prisoners enrolling to vote constitutes an unjustified limit on the NZBORA, s 12(a) guarantee of the right to vote, it is clear in its intent and so must be applied by the courts under s 4 of that legislation. The most a New Zealand court might possibly do in response to such an unjustified limit is issue a formal declaration of its existence, with even the availability of this remedy open to doubt.\(^{42}\) Furthermore, such a remedy is of debatable value in the present circumstances, given that a majority of MPs quite happily voted for the legislation in spite of receiving numerous warnings that it imposed an unjustified limit on the right to vote. Whether adding a judicial voice to this chorus would do anything to change their minds is open to doubt. In a similar fashion, the fact that the United Nations' Human Rights Committee might at some future point censure New Zealand for derogating from its commitments under the International Covenant on Civil and Political Rights represents at most a potential political embarrassment. While the Government likely would prefer not to face such censure, the domestic political benefit gained from appearing to be "tough on criminals" may well outweigh the cost associated with receiving it.

B \ Is prisoner disenfranchisement ever justified?

The fundamental problem with prohibiting all serving prisoners from voting is that it is both under- and over-inclusive, given its intended purpose. The measure’s intent is to mark society’s disapproval of “the worst” criminal offenders through denying them the opportunity to participate in the

\(^{41}\) Human Rights Committee General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) (CCPR/C/21/Rev1/Add7, General Comment No 25 (General Comments) Office of the High Commissioner for Human Rights 1996) at [14].

\(^{42}\) See Claudia Geiringer “On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act” (2009) 40 VUWLR 613.
communal practice of choosing the nation’s lawmakers. However, some persons found guilty of quite serious criminal offences will not be affected by this measure at all, if their time in prison happens to fall between elections. Conversely, any prisoner unlucky enough to be serving a short prison sentence on election day for relatively minor offending will be prohibited from voting. This lack of a rational connection between the basic objective of disenfranchising prisoners and the use of a blanket means to pursue it, along with the disproportionate impact it will have on some prisoners’ rights, lies behind the near universal rejection of the policy by those courts that have examined it from a human rights perspective. However, what of the basic intent behind prisoner disenfranchisement itself? Is it ever justifiable to remove the right to vote from any group of prisoners, no matter what their crime?

As has been noted above, some form of prisoner disenfranchisement has been the norm in New Zealand since 1852, aside from a brief period between 1975–1977. The Royal Commission on the Electoral System expressed:

... some sympathy with 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.

This sentiment was endorsed by the Solicitor-General in 1992. In his report on the original Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010, the Attorney-General also “assume[d], without expressing an opinion, that temporarily disenfranchising serious offenders as a part of their punishment would be a significant and important objective” that may justify stopping some prisoners from casting a ballot. So the belief that at least some forms of criminal offending warrant the loss of voting rights has significant historical resonance in New Zealand. That past practice would weigh heavily against any move to extend the vote to all of New Zealand’s prison population, making the full enfranchisement of prisoners an unlikely development in the foreseeable future.

Nevertheless, disenfranchising any individual purely because of her or his criminal offending still requires justification. Excluding any person, or group of persons, from voting is in tension with the basic structure of New Zealand’s electoral law. As previously noted, the NZBORA guarantees all New Zealand citizens aged 18 and over “the right to vote in genuine periodic
elections of members of the House of Representatives, which elections shall be by equal suffrage and secret ballott'; a right that the State should only limit where "demonstrably justified in a free and democratic society." The Electoral Act 1993 then confers a legal right to register to vote (and thus to cast a ballot) on all citizens and permanent residents who have lived for at least one year continuously in the country; indeed, such persons have a legal duty to place their names on the electoral roll (although not to actually cast a ballot). This right/duty is then removed from some persons on the basis that they lack the capacity to know their own best interests — that is, age — or because they have lost connection with the issues faced by New Zealand society due to an extended absence overseas. Although prisoners do not comfortably fit into either of these categories, academic commentaries have identified at least two other possible reasons for removing their right to vote. First, it constitutes a form of punishment that piggybacks on the general loss of liberty associated with imprisonment. Second, it marks out the prisoner as having breached the social contract with the rest of society.

The first claim, that disenfranchisement is just another form of punishment for committing a crime, treats the removal of an individual's fundamental rights and freedoms as a convenient retributive tool. Of course, a sentence

47 New Zealand Bill of Rights Act 1990, s 12(a).
48 Ibid, s 5.
49 Electoral Act 1993, s 74(1).
50 Ibid, s 82(1).
51 Ibid, ss 3(1), definition of "adult" and 74(1).
52 Ibid, s 80(1)(a)-(b). This ground of disqualification has been criticised by Sarah McClelland "The right to vote: Implications of New Zealand's International Legal Obligations and the New Zealand Bill of Rights Act 1990" (1996) 26 VUWLr 575 at 588.
54 See, for example, the remarks of David Garrett MP during the Bill's first reading debate at (21 April 2010) 662 NZPD 10342:

Although this is a member's bill, in my view it is part of a sea change that this Government has embarked upon in the law and order field. Along with measures to combat drug abuse and the other drivers of crime, the National-ACT Government is making it very clear that prison ought to be a place that people do not want to return to. Although it is incorrect to say our prisons are five-star hotels — I have visited seven or eight of them, and I know that is not the case — neither are they hellholes or particularly unpleasant. That is changing.

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of imprisonment is intended to sanction individuals for the wrongs they have committed whilst also protecting the community from their actions during their incarceration. And the very nature of prison itself involves the deprivation of a basic human right — the prisoner’s freedom of movement.\(^{55}\)

The administrative requirements of the prison regime may also entail additional limits on prisoners’ individual freedoms: those of expression,\(^ {56}\) or peaceful assembly,\(^ {57}\) or association.\(^ {58}\) But it is then another step to strip a person of rights \textit{unrelated} to the basic conditions of imprisonment, such as the right to vote, in order to impose an additional form of punishment. Simply put, would we contemplate punishing prisoners by taking away their right to manifest their religion,\(^ {59}\) or to speak their native language,\(^ {60}\) or to be free from medical experimentation\(^ {61}\) whilst they remain incarcerated; and if not, why is it legitimate to seek to further punish them by removing their right to vote?

Explaining why this last right is regarded as fair game from a punitive perspective in a way that other individual rights are not leads to the second argument: that losing the right to vote is a valid response to a criminal’s breach of the social contract.\(^ {62}\) This claim treats voting as a relational right, different in its nature from other purely individual rights that prisoners continue to possess whilst incarcerated. In other words, a person’s right to take part in deciding collectively how society will be run depends upon her or his preparedness to accept and live by the rules society communally lays down through the criminal law. Should an individual step outside those rules by committing a crime that is serious enough to justify imprisonment, especially imprisonment for a protracted period of time, then that individual

\(^{55}\) NZBORA 1990, s 18.

\(^{56}\) Ibid, s 14.

\(^{57}\) Ibid, s 16.

\(^{58}\) Ibid, s 17.

\(^{59}\) Ibid, s 15.

\(^{60}\) Ibid, s 20.

\(^{61}\) Ibid, s 10.

\(^{62}\) See, for example, the comments of Simon Bridges MP during the Bill’s first reading debate at (21 April 2010) 662 NZPD 10347:

\begin{quote}
But with all rights, even with fundamental ones, go responsibilities. If we like, we can put it this way: there is a social contract between individuals and the State. The State makes the rules. It compulsorily takes taxes and does all manner of things. In return, we receive all sorts of things: warm shelter sometimes; hospitals, schools, and of course the power of the ballot to elect or “unelect”, and, in our privileged case in this House, to be elected. Prisoners, however, have opted out of that social contract. They have not gone just against the State’s and society’s basic rules, they have gone against the big ones, which means that incarceration has resulted.
\end{quote}
has renounced through her or his own actions any claim to be allowed to take part in society’s collective decisions.

An immediate problem with invoking a contractual underpinning to the right to vote is deciding just how serious a breach of this putative social contract must be to warrant removing that right. After all, no one would argue seriously that receiving a parking ticket should be grounds for disenfranchisement, even though it transgresses against society’s rules. However, any cut-off point above the trivial will result in a degree of arbitrariness. The problems with imposing a blanket disenfranchisement on all offenders sentenced to prison already have been discussed. Trying to distinguish between “serious” offenders and “not-so-serious” offenders in prison at election time then creates its own set of issues. Recall that New Zealand’s previous three-years-or-more threshold was based on the Royal Commission’s recommendation, which in turn simply picked up an already existing rule applying to New Zealand citizens who remain continuously outside the country rather than reflecting any careful analysis of the sorts of offending that attract this level of sentence. Furthermore, the “seriousness” of any given offence and thus the sentence it attracts may have little to do with an individual’s general attitude towards society and its rules. Pure luck will determine whether punching an opponent in a drunken brawl is an assault that warrants at the very most a short term of imprisonment, or an act of manslaughter that lands the perpetrator in jail for several years. Yet the underlying action, and the perpetrator’s basic attitude toward “the social contract”, is exactly the same.

Beyond the question of just when a criminal action so violates some putative social contract that it justifies the forfeiture of an individual’s right to vote lie deeper disputes over penal policy. In particular, is it wise to treat prisoners, or some set thereof, as being completely outside that contract whilst they are in jail and then expect them to rejoin society upon their release? Should society not instead seek to reconnect these disaffected individuals with their community and obligations thereto, rather than relegate them to the ranks of the civil dead? Such questions lead into hotly contested terrain. Suffice to say that there is a real tension between the goal of rehabilitating offenders and the desire for harsher retributive measures currently ascendant in the political realm.63 Furthermore, there is no one unarguably correct way to resolve that tension, given the existence of various viewpoints on how

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society ought to respond to criminal offending.\textsuperscript{64} For example, s 7 of New Zealand’s Sentencing Act 2002 states that the purposes for which a court may sentence an offender not only include holding the offender accountable for the harm they have caused\textsuperscript{65} and denouncing his or her conduct,\textsuperscript{66} but also “to assist in the offender’s rehabilitation and reintegration”.\textsuperscript{67}

The question of whether the basic purposes of imprisonment are served by denying any class of prisoner the right to vote has provoked as much disagreement in the judicial realm as the overtly political. Indeed, it split the Supreme Court of Canada five-to-four, with a bare majority striking down a ban on prisoners serving sentences of more than two years from voting on the grounds it unjustifiably infringed the right to vote guaranteed by the Canadian Charter of Rights and Freedoms: \textsuperscript{68}

\begin{quote}
Denial of the right to vote to penitentiary inmates ... is more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them. ... Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and rehabilitation acknowledged since the time of Mill, and it undermines correctional law and policy directed towards rehabilitation and integration. As the trial judge clearly perceived, [the denial of the vote] “serves to further alienate prisoners from the community to which they must return, and in which their families live”. (citations omitted)
\end{quote}

In contrast, the dissenting minority concluded that Canada’s Parliament could justifiably exclude those persons guilty of relatively serious crimes from voting.\textsuperscript{69}

Permitting the exercise of the franchise by offenders incarcerated for serious offences undermines the rule of law and civic responsibility because such persons have demonstrated a great disrespect for the community in their committing serious crimes: such persons have attacked the stability and order within our community. Society therefore may choose to curtail temporarily the availability of the vote to serious criminals both to punish

\begin{flushright}
\textsuperscript{65} Sentencing Act 2002, s 7(1)(a).
\textsuperscript{66} Ibid, s 7(1)(e).
\textsuperscript{67} Ibid, s 7(1)(h).
\textsuperscript{68} Sauvé v Canada (Chief Electoral Officer) 2002 SCC 68, [2002] 3 SCR 519 at [58]–[59] per McLachlin CJ.
\textsuperscript{69} Ibid, at [116] per Gonthier J.
\end{flushright}
those criminals and to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation.

While I personally share the views of the majority on the Canadian Supreme Court, it seems to me that the minority’s position is not so manifestly mistaken or wrongheaded that it can be rejected out of hand. In other words, quite reasonable and well-meaning people genuinely will believe that losing the right to vote is an appropriate response to at least some sorts of crimes, and this is a view that deserves respect even from those who disagree with it. We might then argue further over how best to determine what crimes should attract the consequence of disenfranchisement: do the often arbitrary outcomes of a blanket rule disqualifying from voting all serving prisoners, or even all prisoners serving a sentence over a threshold period, fatally undermine this rule’s basis? Ought this consequence instead be restricted only to offences that threaten the fundamental underpinnings or democratic character of New Zealand’s constitutional order? Or, should disenfranchisement as a consequence of criminal offending be imposed, as the European Court of Human Rights has argued, “not by operation of a law but by the decision of a judge following judicial proceedings”? However, as important as these arguments about the precise method of disenfranchisement are, the underlying issue — is censure or rehabilitation the appropriate response that society should adopt towards individuals who have engaged in criminal behaviour deserving of imprisonment? — is one that simply cannot be resolved in a universally acceptable, unarguably correct fashion.

C Conclusion

The decision by New Zealand’s Parliament to strip the right to vote from all current prisoners will create a range of quite arbitrary outcomes, with some relatively minor offenders being completely disenfranchised while comparatively more serious offenders face no such penalty. These arbitrary outcomes make it virtually impossible to “demonstrably justify” the limit

70 See, for example, Chris Manfredi “In defense of prisoner disenfranchisement” in Alec C Ewald and Brandon Rottinghaus (eds), above n 53, at 259.
71 That is, “corrupt practices” under the Electoral Act 1993, or offences such as treason, or corruption and bribery of a Minister of the Crown or Member of Parliament under the Crimes Act 1961, ss 102–103.
72 Frodl v Austria, above n 38, at [28]; citing Hirst v The United Kingdom (No 2), above n 34, at [77]–[78].
on the right to vote, meaning the legislation likely is inconsistent with both the NZBORA and New Zealand's international human rights obligations. While this inconsistency does not affect the legal validity of a parliamentary enactment — prison officials, registrars of electors and the courts will all have to apply it as "the Law" — it does call into question the moral desirability of such a measure. Beyond the immediate issue of whether the particular provisions of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 are defensible, the basic justification for preventing any criminal offender from voting also is questionable. It relies upon a contractarian model of the right to vote and particular views of the point and purpose of incarceration that are, if not inherently unreasonable or manifestly wrongheaded, deeply contentious.

Given that the law Parliament has chosen to make raises these quite fundamental substantive issues, we should expect to see certain explanations from those who voted to enact it. If a majority of Members of Parliament support legislation that appears to unjustifiably limit the right to vote even after being warned about this consequence, why did they nevertheless think it a good idea to do so? And if those Members believe that an individual's criminal offending is a sufficient basis for removing her or his right to vote, what is the basis for that belief and when does such offending reach the requisite level? We are, after all, talking about legislation that will remove a fundamental human right from some 2,700 people.73 Insofar as fundamental human rights are matters to be taken seriously, or are seen as involving claims that go beyond those of everyday policy-making, then taking such a right from a group of individuals should be one of the most carefully considered and closely weighed decisions that a legislative body can take.

IV Prohibiting all Prisoners from Voting: Procedural Problems

New Zealand's Parliament faces almost no formal procedural constraints when deciding what rules will govern the nation's electoral processes. Aside from a few "entrenched" provisions that require a 75 per cent majority of MPs or referenda vote to change,74 any part of New Zealand's electoral law can be amended or repealed by an ordinary Act of Parliament without the risk of subsequent judicial invalidation. This formal legislative freedom is part of a wider commitment to parliamentary sovereignty that continues

73 See Department of Corrections Electoral (Disqualification of Convicted Prisoners) Amendment Bill: Initial Briefing for the Law and Order Committee, above n 2.
to underpin the New Zealand constitutional order. Justice Fisher, giving judgment in the High Court in 1992, summarised this point in a way that remains pertinent some two decades later:

While most legal systems aspire to some form of internal logic in the sense that each rule is derived directly or indirectly from another, the authority of the legal system as a whole must obviously flow from some ulterior premise or premises. In this case the premises are simple: each Court will follow the rulings of a Court superior to it in the same curial hierarchy and all New Zealand Courts will recognise and act upon the Acts of their Parliament.

Of course, even if this description of New Zealand's constitutional fundamentals generally is accepted as factually accurate, it still may be asked why it is the case. What causes New Zealand's courts to accept Parliament's enacted text as representing "the Law", and is it desirable that they do so?

Explaining why parliamentary sovereignty remains a foundational concept of New Zealand's constitutional ordering requires a mix of historical narrative, cultural analysis and jurisprudential theorising. The historical account involves tracing the origins of parliamentary sovereignty to the turbulence of 17th-century United Kingdom society, following its passage to and development within the colony of New Zealand, and witnessing the defeat of efforts to replace it with a written constitution constraining the legislature's lawmaking authority. That is to say, New Zealand inherited the basic concept of parliamentary sovereignty from its colonial motherland, developed its constitutional arrangements around it, and has not as yet given it up. Understanding why it has not done so then requires some appreciation for how the concept meshes with New Zealanders' cultural traditions and self-understanding. As Matthew Palmer has noted:

76 Berkett v Tauranga District Court [1992] 3 NZLR 206 (HC) at 211.
80 See Mark Prebble With Respect: Parliamentarians, officials, and judges too (Institute of Policy Studies, Wellington, 2010) at 11–32.
Suspicion of judges’ ability to frustrate the will of a democratically elected government taps into a deep root in the New Zealand national constitutional culture. The egalitarian and apparently democratic ethic remains strong in New Zealand.

Simply put, with the appropriate qualifications of “for the most part” and “in the general case”, New Zealanders prefer to leave the final word on all the country’s laws with MPs that they get to choose for themselves, rather than a judiciary that deliberately is insulated from direct majoritarian pressures.

This ongoing preference runs somewhat counter to the notions of “legal constitutionalism” presently ascendant throughout most of the liberal-democratic world. In particular, suggesting that even the fundamental rights and freedoms of individuals can be limited (or even abrogated entirely) by a majoritarian legislature, subject only to the most minimal forms of judicial oversight, is tantamount to constitutional heresy in most such jurisdictions. Nevertheless, there are solid jurisprudential reasons for preferring such a state of affairs, as exemplified by Jeremy Waldron’s invocation of “the dignity of legislation.” At the risk of oversimplifying, Waldron argues that legislation emerging from elected legislative bodies is deserving of respect and obedience both by individual citizens and other societal institutions (including the courts) because the process through which it becomes law better reflects the basic right of every individual to participate in deciding how to resolve contested moral issues. Elected legislatures enjoy a procedural legitimacy when making law that the courts, which in the final analysis make decisions according to the moral views of a handful of selected ex-lawyers, do not.

This defence of legislative supremacy rests, of course, on the premise that the nation’s freely and fairly chosen representatives in Parliament actually engage with those contested moral issues, and that they debate what to do about them in a thorough and properly respectful manner. For example, if MPs were to legislate based on the flip of a coin or roll of the dice, then there would be no particular reason to ascribe any particular legitimacy to the outcome of that process. Consequently, Waldron explicitly concedes that if legislative behaviour fails to meet a certain minimal deliberative threshold, then the resulting enactments may not (but not necessarily do not) deserve the general respect of the citizenry and other social institutions (such as

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the courts). Recently, Waldron actually has suggested that New Zealand’s Parliament is falling short of this requisite standard when it legislates; or, to adopt his terminology, its behaviour when making law risks placing New Zealand outside those “core cases” in which his defence of legislative supremacy applies. His point is that legislative haste and inattention not only risks producing laws that contain significant flaws in application, but it undermines the very basis for ascribing legitimacy to the outcome of the parliamentary lawmaking process.

Unfortunately, the passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 provides another example of New Zealand’s Parliament failing in its basic legislative duty. Despite the importance of the proposal’s subject matter — a fundamental human right of thousands of individuals — the debate it received was so perfunctory as to not really merit that description. Furthermore, the supporters of the measure failed to adequately provide reasons for the limit on prisoners’ fundamental rights; eventually retreating to the claim “it’s just what the public wants”. Not only do these shortcomings in legislative process call into question the moral (albeit not the formal legal) status of the prohibition on prisoners voting, they undermine the very basis for the claim that Parliament ought to be the final lawmaking institution for society.

A Problems with the Bill’s enactment into law

Following its introduction and first reading, the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 was sent to select committee for further scrutiny. The select committee stage of New Zealand’s legislative process is the point at which Members of Parliament are meant to give a Bill its closest consideration and most detailed analysis. Almost every Bill that passes its first reading automatically receives some form of select committee scrutiny, with this process usually also incorporating the opportunity for the

87 That is, unless the House agrees to progress a Bill straight to its second reading stage under urgency: Standing Orders of the House of Representatives 2008, SO 280(1). Furthermore, appropriation Bills or imprest supply Bills do not receive select committee scrutiny as a matter of course.
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public to make submissions in both written and oral form. After reviewing these submissions, committee members then deliberate on the proposed legislation before reporting back to the House with their recommendation as to whether it should progress, along with any suggested amendments to its content. Such recommendations may be unanimous or by a majority, with the committee’s minority members almost always able to write a dissenting report on the matter. Consequently, the select committee stage is extremely important in terms of allowing the public direct input into the lawmaking process, scrutinising the rationale for the proposed legislation and ensuring that this proposal will properly achieve that policy goal.

However, the select committee process for the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 was faulty from the beginning. Rather than send the proposal to the House’s standing Justice and Electoral Committee, which usually considers matters relating to New Zealand’s electoral law, or to the specially constituted Electoral Legislation Committee, the Government chose to send it to the Law and Order Committee. Not only do the Members of Parliament on this Committee have no prior experience with matters of electoral law, but the officials who advise it are drawn from the Department of Corrections, rather than the Ministry of Justice responsible for administering the Electoral Act 1993. Furthermore, the Chair of the Committee, the National Party’s Sandra Goudie, refused a request by opposition MPs to allow Ministry of Justice officials to appear before the Committee and provide advice on the Bill.

The net result is that the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 received its close and detailed scrutiny from a set of

88 The House established this special purpose, all-party select committee in 2010 to consider legislation relating to campaign financing and the 2011 referendum on the Mixed Member Proportional electoral system. However, its terms of reference simply state that it is to “examine legislation referred to it and report back to the House with its recommendations on them”: New Zealand Parliament “Electoral Legislation Committee” (2010) <www.parliament.nz>. Consequently, there is no formal reason it could not also have considered the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010.

89 Technically, it is the House that determines which of its committees will consider any given Bill. However, the Government’s numbers in the chamber mean that in practice the government gets to make this call. Exactly why it chose to send Mr Quinn’s Bill to the Law and Order Committee is unclear; my personal view is that it did so for purely political reasons. That is, it believed that the Committee’s members — especially the Government members — would be more sympathetic to the Bill’s purposes, while excluding officials from the Ministry of Justice from having any advisory role would lessen the critical scrutiny it received.

90 See Derek Cheng “Upset MPs stage walkout” The New Zealand Herald (New Zealand, 1 July 2010) <www.nzherald.co.nz>.
parliamentarians who were not particularly *au fait* with the issues it raised and who received information about the proposal from officials with no day-to-day experience of the particular area of law.

The Law and Order Committee’s report back to the House then exacerbated these initial problems.\(^{91}\) For one thing, the majority (made up of five National and ACT Party members) recommended that the Bill progress in spite of receiving 51 public submissions opposing the law change and only two favouring it.\(^{92}\) Amongst those who opposed the move were the New Zealand Law Society\(^{93}\) and the Government’s own Human Rights Commission.\(^{94}\) However, even after hearing this trenchant criticism of the Bill’s fundamental purpose and in the face of the Attorney-General’s s 7 notice proclaiming the proposal inconsistent with the NZBORA, the majority report provided no reasons whatsoever for why it believed the Bill’s content was justifiable. It merely recommended passage after changing the Bill’s title to the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill and amending the wording of the provision that disqualifies prisoners from enrolling to vote whilst incarcerated. Commentary on the justifications for the underlying policy was left to the Committee’s Labour and Green Party members, who penned minority reports opposing the Bill’s progress and listing the various ways in which it falls short of human rights norms in both domestic and international law.

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91 Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010 (117-2) (select committee report).

92 One of these supportive submissions was from the Bill’s sponsor, Paul Quinn.

93 New Zealand Law Society “Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010” at [18] concluded that the Bill:

... is retrograde legislation, which will erode the free and democratic nature of New Zealand society without justification. It is irrational and arbitrary and unreasonably impairs the right to vote more than is necessary. It is also not in due proportion to the objective of punishment.

94 Human Rights Commission “Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010” at [7.4] opposed the Bill on the grounds that:

Voting is a fundamental human right and [removing it] cannot be justified either as punishment or as a deterrent. The Bill itself is inconsistent with New Zealand’s international commitments and overseas jurisprudence. In the domestic context it contravenes the [New Zealand Bill of Rights Act 1990] and cannot be justified and the disproportionate impact on Maori amounts to indirect discrimination. Perhaps most importantly, however, it undermines the notion of New Zealand as a democracy where everyone has rights and responsibilities.
Not only did the majority’s report completely fail to address the need for any change to the law, its proposed amendments to the Bill contained a glaring error. The majority recommended that the Bill be changed to completely repeal the existing s 80(1)(d) that disqualifies prisoners serving sentences of three or more years from enrolling to vote, replacing this with a provision disqualifying “a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of [this legislation]”.95 While this change was intended to avoid retrospectively disqualifying current prisoners serving sentences of less than three years from registering to vote, the Committee neglected to include a transitional provision that continues to disqualify existing prisoners serving sentences of more than three years. Consequently, enacting the Committee’s recommended amendment would have allowed any current prisoner to enrol to vote no matter how serious the nature of his or her offence or term of imprisonment, whilst preventing all future prisoners from enrolling to vote.

Although this potential outcome clearly was an inadvertent mistake, one that was remedied later in the legislative process by way of a Supplementary Order Paper, the fact that it happened at all was not only politically embarrassing but also indicative of a lack of legislative care on this issue. This casual attitude then continued to be exhibited in subsequent stages of the renamed Electoral (Disqualification of Sentenced Prisoners) Amendment Bill’s passage into law. At the Bill’s second reading following the Law and Order Committee’s report, the only Government ill to give a substantive speech in favour of its passage was its sponsor, Paul Quinn. The Chair of the Law and Order Committee did not even attend the debate on its report, while her party colleagues gave only one- or two-sentence “speeches” to the House in support of its recommendations.98 The reason for the Government MPs minimal contributions was that they wished to speed through the “debate” on the measure, so as to leave sufficient time to complete the second reading of another Member’s Bill that same evening.

A similar failure to engage in debate was displayed at the Bill’s committee stage. At this point in the legislative process, MPs have the opportunity to

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95 Electoral (Disqualification of Sentenced Prisoners) Amendment Bill 2010 (117-2), cl 4.
96 The Bill’s sponsor, Paul Quinn, claimed that the error was the fault of the parliamentary counsel who drafted the amendment: see (20 October 2010) 667 NZPD 14679. However, it should be noted that parliamentary counsel work to drafting instructions provided by the Committee.
97 The Committee’s error received a large amount of media coverage: see, for example, Yvonne Tahan “‘Stupid’ legislation gives killers and rapists the right to vote” The New Zealand Herald (New Zealand, 21 September 2010) <www.nzherald.co.nz>; Radio New Zealand News “Snag over bill to stop prisoners voting” (2010) Radio New Zealand <www.radionz.co.nz >.
98 (20 October 2010) 667 NZPD 14679.
examine a Bill in detail and debate the wording and effects of particular provisions. However, of the 13 speakers who addressed the Bill’s content, only three came from the ranks of the National Party. The ACT Party, which provided the National Party with the votes needed for a parliamentary majority throughout this legislation’s passage, did not even put up a single MP to address the Bill’s content. Furthermore, during this debate Mr Quinn made a rather startling admission about his own legislation:99

[An opposition Labour Party MP] proceeded to go on to ask what the mischief was behind the bill. Well, there is no mischief; this legislation is what the overwhelming majority of people want. ... The overwhelming majority of the community want prisoners not to be able to vote.

We may put to one side the question of why, if the community really is so strongly opposed to prisoners voting, only one person besides Mr Quinn made a submission to select committee in support of his legislation. The real question instead is whether it is appropriate for an MP to propose legislation that removes the fundamental rights of individuals for no other reason than that it “is what the overwhelming majority of people want”. Or, rather, is it appropriate that an MP do so without being able to cogently explain and defend why “the people” are right to desire this course of action?

The Bill’s final, third reading debate was only slightly better. Although more National MPs did contribute to the debate — five in total, including the Minister of Defence; the sole Government minister to speak during the Bill’s entire passage — none spoke for more than three or four minutes. Mr Quinn opened the debate with a somewhat Freudian slip: “I have listened with care and intent to the arguments — or should I say the lack of arguments — that have been discussed in this House.”100 Furthermore, the ACT Party’s Hilary Calvert gave the following speech setting out her party’s “reasons” for supporting the measure’s passage into law:101

I rise to take a call on the third reading of the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill. I cannot pretend this bill is my favourite thing. [Labour MP] Trevor Mallard leaving the House earlier, and not being able to vote while he was away, could count as a favourite thing. Perhaps popping a ping-pong ball in the mouth of the honourable member over there who all day keeps turning his head from side to side with his mouth open could count as my favourite thing. This bill is not my favourite thing. However, Act is supporting National on this bill.

99 (10 November 2010) 668 NZPD 15194 (emphasis added).
100 (8 December 2010) 669 NZPD 15961.
101 (8 December 2010) 669 NZPD 15969.
When assessing this last contribution, it should be remembered that while her party’s five votes provided the parliamentary majority necessary to pass the measure into law, none of its members had given a substantive speech explaining the reasons for their support since the first reading debate.

The point of recounting in such detail the process by which this Bill was enacted is to highlight how badly Parliament failed in its lawmaking duty. I do not mean to overstate matters here. The test of parliamentary processes when making law ought not to be perfection, but rather “good enough”. After all, not every parliamentarian can rise to the oratory heights of Cicero, or will carefully frame her or his debate contributions to meet the Rawlsian “how would our argument strike us presented in the form of a supreme court opinion?” test of public reason. If we seek to hold Members of Parliament to such standards, then it is unlikely any debate on any measure will ever suffice to meet them. Nevertheless, where Members of Parliament are considering a legislative proposal that affects a fundamental individual right — especially where it affects that right in a way that they have been advised cannot be demonstrably justified in a free and democratic society — we should expect that at a minimum they will engage meaningfully with the issues at hand and take the opportunity to make a genuine effort at spelling out why the measure is nevertheless the right one to adopt into law. We certainly should not expect them to speed through the legislative process in order to get on to the next item of business, or to effectively refuse to take part in the debate at all. Because insofar as they do so, they undermine the reason for respecting their legislative judgements, which ultimately saps legitimacy from Parliament’s claim to be the sovereign lawmaking body for society as a whole.

B Wider problems with how Parliament legislates

If the passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 into law was an isolated incident that represents an unfortunate, but singular, lapse in legislative standards, then that would be one thing. However, Parliament’s recent treatment of other cases involving matters of fundamental individual rights indicates that there are


103 But equally, it is unlikely any other institution in society would be able to meet such a strict standard. Even courts on occasion issue poorly reasoned, incompletely argued and somewhat superficial judgments — which nevertheless remain binding on the parties to the proceedings and lower courts in the judicial hierarchy.
more widespread and systemic problems with respect to how Parliament is approaching its lawmaking duties.

An initial matter of note is the sheer regularity with which Members of Parliament vote to enact legislation to which the Attorney-General has attached a s 7 notice under the NZBORA. In a recent speech, the Minister of Justice observed that this has occurred on 20 occasions since 1990,104 or on average once a year. What he failed to record was that the rate at which such s 7 notices have been issued has increased substantially since 2000. Of the 28 government Bills to receive s 7 notices since the NZBORA’s enactment, 23 have been introduced into the House in the past decade. Of those 23 Bills, six sit before the House as of the time of writing, while 15 have been enacted with the apparently NZBORA inconsistent provisions intact. It may be, of course, that in recent years successive Attorney-Generals have become more assiduous in issuing s 7 reports with respect to Government Bills, hence skewing the data. However, the fact remains that Members of Parliament are expressly being told with increasing frequency that the legislation before them unjustifiably limits fundamental individual rights, yet still are proceeding to vote it into law.

Elected parliamentarians taking a different view to the Attorney-General about the justifiability of a particular legislative proposal does not in and of itself represent a failure of process. Reasonable people can and do disagree over whether a given limit on some right is “demonstrably justified”; witness the existence of split judicial decisions on such matters.105 The Attorney-General’s opinion on the justifiability of any given rights limit is based on advice from officials, which in turn reflects their analysis of what relevant court decisions on the issue have said. So it hardly is surprising that there will sometimes, perhaps even reasonably often, be a difference between the views of Members of Parliament and the Attorney-General’s judicially informed opinion as to the justifiability of any given limit on individual rights. Where such disagreement occurs, New Zealand’s strong

104 Simon Power, Minister of Justice “Speech to Bill of Rights Act Symposium” (Wellington, 11 November 2010) <www.beehive.govt.nz>. I have provided a slightly higher number of 24 enactments passed over a s 7 notice at Andrew Geddis “The Comparative Irrelevance of the NZBORA to Legislative Practice” (2009) 23 NZULR 465 at 477 [“Legislative Practice”]. The difference in numbers may be due to differing judgements as to whether Parliament has adequately amended particular Bills to remove the identified rights inconsistency.

105 See, for example, part IIIB above “Is prisoner disenfranchisement ever justified?” for a discussion of the Canadian Supreme Court’s five–four split in Sauvé v Canada (Chief Electoral Officer), above n 68. In the New Zealand context, the Supreme Court has divided three–two over the justifiability of particular limits on individual rights in Brooker v Police [2007] NZSC 30, [2007] 3 NZLR 91 and Siemer v Solicitor-General [2010] NZSC 54, [2010] 3 NZLR 767.
commitment to parliamentary sovereignty dictates that the majority of elected representatives’ view of the matter will prevail — a state of affairs that is expressly provided for through s 4 of the NZBORA. So the fact that Members of Parliament choose to enact legislation in spite of, or over the top of, the Attorney-General’s opinion as to its consistency with the NZBORA is part and parcel of a constitutional system that leaves the last word with those individuals directly elected by the nation’s populace. Insofar as there are sound reasons for maintaining such a decision-making system, Parliament’s decision to legislate in the face of s 7 notices is an inevitable and not necessarily undesirable outcome.

Having said that, the fact that Parliament almost always votes to enact measures\textsuperscript{106} that the Attorney-General has advised are inconsistent with fundamental individual rights raises questions about how seriously its members view such advice. Furthermore, if parliamentarians do not give any evidence that they are confronting, considering but ultimately rejecting that advice because they find alternative arguments to be more convincing, then they hardly can be said to be responding to it at all. Simply put, if Members of Parliament just ignore what the Attorney-General is saying instead of answering his claims with reasons of their own, they are failing to fulfil their proper function under the NZBORA. That legislation is intended to create a form of dialogue over matters of individual rights between parliamentarians and the courts,\textsuperscript{107} with the Attorney-General’s report serving as a conduit between these two branches of government. While the members of the elected branch still get the final say in the debate, the background assumption is that they will only reach their final judgement after seriously considering what the Attorney-General tells them the courts likely would think about the proposed rights limit.

Unfortunately, such serious consideration is not always evident during parliamentary debates on legislation where NZBORA consistency is at issue. Two examples serve to illustrate this point. First, on two recent occasions Parliament has acted to add new substances to the Misuse of Drugs Act 1975 in the face of s 7 notices.\textsuperscript{108} The Attorney-General’s advice on these

\textsuperscript{106} At least, measures that come before the House in the form of a government Bill. Some 90 per cent of such Bills attracting a s 7 notice have been enacted with the apparently inconsistent provision intact: see Geddis “Legislative Practice”, above n 104, at 477.


\textsuperscript{108} Misuse of Drugs (Classification of BZP) Amendment Act 2008; Misuse of Drugs Amendment Bill 2010 (126-2).
proposals reflects the Supreme Court’s finding in *R v Hansen*\textsuperscript{109} that a “reverse onus” provision in the Misuse of Drugs Act 1975,\textsuperscript{110} requiring persons possessing over a threshold amount of a classified substance to “prove” they do not intend to supply it to others, unjustifiably limits the accused’s right to the presumption of innocence.\textsuperscript{111} However, rather than independently assess this claim for themselves, Members of Parliament were content to accept a ministerial assurance that it is important to classify the new substances under the Misuse of Drugs Act 1975 (and hence bring them under its reverse onus provision), while leaving consideration of NZBORA issues to a future Law Commission report.\textsuperscript{112} The Select Committee report on the latest amendment legislation does not even mention the NZBORA, instead once again echoing the executive’s claim that the need for urgent action justifies the reclassification of the substance at issue.\textsuperscript{113}

There is, of course, something to be said for parliamentarians deferring to the Minister’s judgement as to whether a particular drug ought to be proscribed, given the Minister’s access to the advice of experts in the effects of the relevant substances. Equally, the field of drug policy is a complex one, so there is some wisdom in Members of Parliament seeking guidance on how best to structure the law in this area. The criticism is not, therefore, that parliamentarians should not look to advice from outside Parliament when considering how to respond to a particular rights issue. However, in respect to this issue, parliamentarians made *no effort whatsoever* to engage in an independent assessment of the rights issues involved. They instead simply rubber-stamped the relevant minister’s view that the need for quick action trumped all other concerns, while deferring to some future date the question of the rights of those accused of supplying the newly classified substance. This failure, it seems to me, represents an inexcusably complete abdication of responsibility for the rights consequences of their decision.

The second example is even more troubling. It involves the Parole (Extended Supervision Orders) Amendment Act 2009, which was introduced, debated and passed into law by the House in but a single day. This amendment legislation dealt with a law permitting “extended supervision orders” to be imposed on certain offenders convicted of serious sexual offending, effectively subjecting them to a system of intensive monitoring and control for up to 10 years after their term of imprisonment ends. The Government informed the House that the amendment legislation was intended to fix


\textsuperscript{110} Misuse of Drugs Act 1975, s 6(6).

\textsuperscript{111} New Zealand Bill of Rights Act 1990, s 25(c).

\textsuperscript{112} Misuse of Drugs (Classification of BZP) Amendment Bill 2007 (146-1) (select committee report) at 6–7.

\textsuperscript{113} Misuse of Drugs Amendment Bill 2010 (126-2) (select committee report).
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an inadvertent and purely technical flaw in the legal regime, and on that basis the House gave its unanimous consent to suspend Standing Orders and expedite its passage into law. However, after that consent had been given, the Attorney-General tabled a s 7 notice advising the House of his opinion that the proposed legislation actually created a new control power over offenders which unjustifiably limits their rights against retrospective penalties and double jeopardy;\(^\text{114}\) and the right not to be arbitrarily detained.\(^\text{115}\)

As parliamentarians only were informed of this fact literally moments before they began to debate the measure, and because they already had agreed not to send the proposal to select committee for scrutiny, they had no opportunity at all to test the Attorney-General’s claims before the Bill’s enactment.\(^\text{116}\)

Of course, the main blame for this episode lies with the executive; in particular, the lack of communication between the Attorney-General and the Minister of Justice who introduced the legislation. However, irrespective of who is responsible for the House being misled on this matter, the consequence remains the same. As Claudia Geiringer noted at the time:\(^\text{117}\)

> What I am absolutely horrified to see ... is legislation being enacted following a section 7 report without being sent to a select committee at all, indeed, without even sitting on the order paper for three days so that MPs can read it and digest the AG’s report.

Furthermore, the response of parliamentarians to this issue was virtually complete silence. Only one MP raised any sort of complaint about the process at the time of the Bill’s passage,\(^\text{118}\) while the matter was not subsequently raised in the House. Again, one would like to think parliamentarians would be more concerned about the fact that they had passed a law that

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115 Ibid, s 22.
116 In fact, the only mention of the Attorney-General’s s 7 notice during debate was by Keith Locke, who noted, at (2 April 2009) 653 NZPD 2381:

> As there were only two speakers before I started speaking, I have not even finished reading properly the Attorney-General’s assessment of the bill in relation to the New Zealand Bill of Rights Act. I think the Green Party will have to cast an abstention, because we have not been given the full information to be able to consider, on behalf of the New Zealand public, exactly which course we should take.

118 See above, n 116.
may unjustifiably trench on individual rights without properly having been informed of that fact.

In highlighting these two examples, I do not mean to imply that New Zealand’s parliamentarians never pay proper attention to NZBORA issues. Not only are they quite capable of doing so in theory, there are numerous examples of them doing so in practice. The picture I wish to convey instead is a mixed one. On occasion Members of Parliament will closely scrutinise issues of individual rights and the justifications for any proposed limits on these; see the recent select committee report on the Search and Surveillance Bill 2009,119 or the debates in the House over the Civil Union Act 2004 that gave legal recognition to same-sex partnerships.120 Unfortunately, on other occasions Members of Parliament have failed to do so, either in part or completely. The passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 represents one such failure. However, it is not the only time that parliamentarians have neglected their legislative duty in this regard; they do so on a regrettably frequent basis.

V Conclusion: Preserving Parliament’s Claim to Sovereignty

New Zealand’s constitution continues to afford the nation’s Parliament almost complete legislative freedom on all matters, including those involving fundamental individual rights. The justification for doing so, in the final analysis, boils down to that institution’s greater claim to democratic legitimacy. The wide range of reasonable views as to what constitutes “the right answer” for any contested substantive matter, including matters involving individual rights, means that the least-worst solution is to allow the majority of representatives freely chosen by the general public to make that decision. These decision-makers not only are alive to the viewpoints of their constituents, but they may be held directly accountable for the choices that they make. Consequently, their preferred solutions remain contestable and can be reviewed and replaced at any future point in time by a new majority. This always provisional nature of parliamentary enactments means that debate over what is the “right answer” need not end and affords every individual the continuing opportunity to take part in deciding what that answer is; at least, as best as can be achieved in a community of some four million individuals.

However, any defence of Parliament’s supreme lawmaking status must incorporate not only an account of how its members are chosen via the election process, but also some standard of “proper” decision-making by

119 Search and Surveillance Bill 2009 (45-2) (select committee report).
120 (2 December 2004) 622 NZPD 17386.
that institution. To reiterate, that standard should be one of “good enough”, not perfection. There also will be a measure of disagreement about just what constitutes a “good enough” process of legislating. Different views will be held on issues such as should Members of Parliament be bound by the views of their constituents or exercise independent judgement on a given issue;\(^\text{121}\) when is the House justified in moving into urgency to consider and enact some measure; ought Members be required to be physically present in the debating chamber in order to vote on some particular matter;\(^\text{122}\) and the like. However, any standard of proper decision-making must \textit{at the least} require those engaged in the legislative process to actually acknowledge the issues before them, genuinely consider what is the best solution to those issues and explain why they are of that opinion. This especially is true when the issue before the House of Representatives is one that impacts directly upon the fundamental individual rights that underpin a free and democratic society. Unfortunately, the majority of New Zealand’s Members of Parliament failed to meet this minimal standard when enacting the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, just as they have on other legislative occasions.

At this point one might be tempted to take refuge in the cynical observation that: “Laws, like sausages, cease to inspire respect in proportion as we know how they are made.”\(^\text{123}\) However, the consequences of such a loss of respect are somewhat different in each case. If members of society no longer trust the way smallgoods are manufactured, they simply can stop eating sausages.\(^\text{124}\) That luxury of consumer choice is not available when it comes to the output of parliamentary processes. For so long as Parliament remains sovereign, its enactments continue to be universally binding and enforceable irrespective of how well or poorly they are made.\(^\text{125}\) The question


\(^\text{122}\) Something that is not required in the New Zealand Parliament. Under the Standing Orders of the House of Representatives 2008, the party whip may cast a Member’s vote provided that Member is within the parliamentary precincts or is absent on parliamentary business.

\(^\text{123}\) Commonly attributed to Otto von Bismarck, the observation actually was made in 1869 by the American lawyer-poet John Godfrey Saxe.

\(^\text{124}\) Alternatively, they might create an oversight body to ensure the quality of manufacture, such as the New Zealand Food Safety Authority.

\(^\text{125}\) See, for example, the judiciary’s refusal to examine the legislative process in \textit{British Railways Board v Pickin} [1974] AC 765 (HL); \textit{Te Runanga o Wharekauri Rekohu Inc v Attorney-General} [1993] 2 NZLR 301 (CA) at 307–308; \textit{Regina (Jackson) v Attorney General} [2005] UKHL 56, [2006] 1 AC 262; \textit{Boscawen v Attorney-General (No 2)} [2008] NZCA 12, [2009] 2 NZLR 229.
then becomes, *should* Parliament retain that status if it consistently fails to follow proper processes when making law? Or, rather, as Waldron has asked: "does Parliament take its legislative responsibilities seriously enough to make it inappropriate for Judges to undertake the sort of close scrutiny of statutes that gets attacked as ‘judicial activism’"?126

I am not claiming here that matters have gotten so bad in New Zealand that the only solution is for the courts to step in to replace an irredeemably fallen institution. Nor do I want matters to get that bad: my preference is that Parliament should retain its role as supreme lawmaker for New Zealand as a nation. However, unless Parliament improves its lawmaking behaviour, its role increasingly will be open to challenge on the basis that it is not to be trusted with important decisions about individual rights. And it becomes increasingly difficult for those of us who are in favour of parliamentary sovereignty to defend its retention as a foundational principle of New Zealand’s constitutional order when measures like the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 become the law of the land in the manner that they do. So this article ends with a plea to New Zealand’s parliamentarians. Whether by adopting new internal institutional procedures where rights issues are involved,127 strengthening the scrutiny mechanisms contained within the NZBORA itself,128 or at the very least simply taking rights seriously, please do your job properly.