

20 February 2015

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By email: registry@ohchr.org

Dear Ms Prouvez

Equal Participation in Political and Public Affairs – Response of the New Zealand Human Rights Commission

1. Thank you for your letter of 16 January 2015 seeking information from National Human Rights Institutions (NHRIs) relating to the right to participate in political and public affairs.
2. The response of the New Zealand Human Rights Commission ('the Commission') is set out below. We have focused our response on experiences and challenges arising from the following areas:
 - (a) Regarding participation in the conduct of public affairs (Section A) -
 - (i) Red-zoning of areas of Christchurch following the 2010 and 2011 earthquakes;
 - (ii) Redesign of the Canterbury health services
 - (iii) Legal challenges to the New Zealand Government's Family Care policy
 - (iv) The New Zealand Disability Strategy
 - (b) Regarding the right to vote and be elected (Section B) –
 - (i) Removal of prisoners voting rights as a result of the Electoral Amendment Act 2010
 - (ii) Accessible voting and parliamentary services for disabled persons

A. Participation in the conduct of public affairs

Red zoning of areas of Christchurch

3. Christchurch is the principal city located in the South Island of New Zealand. It has a population of approximately 342,000 people. On 4 September 2010 a major earthquake, magnitude 7.1, occurred some 40 km to the west of the central business district. The earthquake caused considerable damage to the city yet did not result in loss of life.

4. On 22 February 2011, a smaller magnitude but more destructive earthquake occurred approximately 10 km south of the city. The impact of this second earthquake was devastating; 185 people died and much more significant and widespread damage occurred throughout the city and the adjoining areas. On 13 June 2011, two more significant earthquakes caused further damage throughout the Christchurch area, including the central business district¹.
5. The earthquakes caused an amount of destruction without precedent in New Zealand. Over 90 percent of the housing stock in greater Christchurch was damaged, with over 24,000 homes requiring either rebuilding or major repairs². The government agency tasked with providing remedial relief to property owners, the Earthquake Commission (EQC), received nearly 750,000 exposures for land, buildings and contents in the Christchurch region³. The total rebuilding costs are estimated by the New Zealand Treasury to be approximately NZ\$40 billion, almost 20 per cent of New Zealand's annual Gross Domestic Product⁴.
6. In late June 2011, the New Zealand Government responded to this crisis by assigning areas of the city with different designations according to the level of damage. Areas designated as "red zone" experienced the highest level of damage to property, where repairs or rebuilding was not considered to be possible in the short to medium term because of the severe impact of the earthquakes.
7. The Government's declaration was a very significant element of its response to the earthquake sequence. It was a major strategic decision that certain parts of the city would not be rebuilt, with the consequence that entire communities would have to be relocated out of the red zone area.
8. In all there are approximately 8,000 households located in red zone areas throughout Christchurch, covering around six square kilometres in total. The financial impact of red zone designation on residents was significant. The Crown offered to purchase red zone properties below market rate at the 2007 rateable value (RV) if insured. Uninsured owners, however, were offered only half the 2007 RV of the land only, with no compensation for improvements to the land, such as the houses.
9. Residents within the red zone were therefore faced with either taking the offer or remaining in what were effectively abandoned communities, with degenerating services and infrastructure.
10. Despite the implications of the red zone policy, the Government did not undertake any public consultation prior to the decision being made, preventing red zone residents from having their views considered and effectively curtailing any process of transparency and contestability regarding the selection of properties falling inside and outside of the zone's boundaries.
11. The Commission considers that the manner in which red zone policy was implemented raises questions about its consistency with international human rights standards concerning civic participation in disaster relief. For example, the

¹ The Christchurch area continued to experience frequent aftershocks over the following years. Over 13,700 aftershocks were recorded between the September 2010 earthquake and 10 October 2013

² Environment Canterbury (2013) *Preliminary Draft Land Use Recovery Plan* page 36; Ministry of Business, Innovation and Employment (2013) *Housing Pressures in Christchurch: A Summary of the Evidence*, page 4

³ EQC (2013) *Scorecard, Home Repairs, 1 November 2013*

⁴ New Zealand Government, Minister of Finance Budget Speech 2013, <http://purl.oclc.org/nzt/b-1545>

Commission notes the General Principles of the revised 2011 *Inter-Agency Standing Committee Operational Guidelines for the Protection of Persons in Situations of Natural Disasters* place an emphasis on the importance of consultation and engagement with affected communities⁵.

12. The absence of consultation in this case has led to considerable adverse public reaction. In 2012, a group of affected red zone residents calling themselves the 'Quake Outcasts' commenced judicial review proceedings in the High Court to challenge the legality of a number of aspects of the red zone policy. The claimants were successful at the High Court⁶, only to have the decision partially overturned on appeal at the Court of Appeal⁷. The case was ultimately heard, by way of further appeal⁸, in the Supreme Court on 29 and 30 July 2014. The Supreme Court decision is currently pending and will have a considerable impact on red zone residents⁹.

Redesign of Canterbury Health Services

13. Conversely, the redesign of the Canterbury health system provides evidence of consumer-inclusive approaches to public policy and service design in the post-earthquake environment. The redesign process commenced before the earthquakes occurred, due to projections that indicated unsustainable levels of financial and service demand. However, the unique demands of the post-earthquake environment created further impetus towards developing and embedding reforms.
14. The redesigned system is based on an integrated and patient-orientated health and social services approach, including localised agreements for best practice and integrated primary health care, community health and hospital services. Engagement of patients in the design of their care is also an important aspect, with a Consumer Council sitting within the District Health Board and reporting on a six-monthly basis on its activities and consumer representation on various leadership teams. The outcomes of the reforms have been reported as having a positive impact on patient care and reduced demand on hospital services.¹⁰

Legal challenges to the government's Family Care Policy

15. In 2005, legal proceedings commenced in the Human Rights Review Tribunal to challenge the Ministry of Health's blanket policy of not paying parents and resident family members to provide home and community supports to their disabled children. The case, *Atkinson v Ministry of Health*, concerned whether the Ministry's policy constituted unlawful discrimination on the basis of family status under the Human Rights Act 1993¹¹.

⁵ IASC *Operational Guidelines for the Protection of Persons in Situations of Natural Disasters*, General Principle 1.3

⁶ [2014] 2 NZLR 54

⁷ [2014] 2 NZLR 587

⁸ [2014] NZSC 51

⁹ The Commission has appeared as an Intervener in both High Court and Supreme Court hearings

¹⁰ Timmins and Ham (2013) *The quest for integrated health and social care: a case study in Canterbury, New Zealand*, The King's Fund, London, UK, accessed:

http://www.kingsfund.org.uk/sites/files/kf/field/field_publication_file/quest-integrated-care-new-zealand-timmins-ham-sept13.pdf

¹¹ Human Rights Act Part 1A, s21(1)

16. The *Atkinson* litigation proceeded for seven years, culminating in 2012 when the Court of Appeal¹² upheld earlier decisions made by the High Court¹³ and the Human Rights Review Tribunal¹⁴ that the Ministry's policy constituted unlawful discrimination. The Ministry of Health did not appeal the Court of Appeal's decision to the Supreme Court and undertook a degree of limited consultation on options for responding to the Court of Appeal's findings.
17. In May 2013, the Government ultimately resolved the impact of the *Atkinson* proceedings by enacting the New Zealand Public Health and Disability Amendment Act (No. 2). This legislation, with some limited exceptions, removed the rights of people to pursue complaints to the Human Rights Commission of unlawful discrimination in relation to the government's family care policy in the future. The Act was passed by Parliament under urgency, which circumvented the usual processes which enable both public input and parliamentary scrutiny, such as referral to a Parliamentary Select Committee.
18. The decision to pass the legislation under urgency in order to effect the removal of the rights of people to take future complaints to the Human Rights Commission was subject to strong criticism and statements of concern from disabled people's organisations and legal practitioners¹⁵.
19. In August 2013, at a forum at Parliament, the Disabled Persons Assembly launched a petition¹⁶ to repeal the legislation. The Petition is currently under the consideration of Parliament's Health Committee. The Commission has written to the Health Committee in support of the Petition's objective.¹⁷
20. In addition, in its second periodic report, New Zealand's Independent Monitoring Mechanism (IMM) of the Convention on the Rights of Persons with Disabilities¹⁸ recommended that the legislation be repealed¹⁹. This was reflected in the inaugural Concluding Observations on New Zealand of the UN Committee on the Rights of Persons with Disabilities, who recommended that the New Zealand Government *"reconsider the matter to ensure that all family members who are carers are paid on the same basis as other carers, and that other family members who are carers be entitled to make complaints or unlawful discrimination with respect to the family care policy."*²⁰

New Zealand Disability Strategy

21. Despite the impact and implications of the New Zealand Public Health and Disability Amendment Act (No. 2), the broader ongoing commitment of the Government to the implementation of the New Zealand Disability Strategy is encouraging and

¹² *Ministry of Health v Atkinson* [2012] 3 NZLR 456

¹³ *Ministry of Health v Atkinson* [2010] 9 HRNZ 47

¹⁴ *Atkinson v Ministry of Health* [2010] 8 HRNZ 902

¹⁵ Auckland District Law Society Mental Health and Disability Law Committee, *Concerns about Public Health and Disability Amendment Bill*, Law News, Issue 26, 26 July 2013, p3

¹⁶ Petition of Rachel Noble on behalf of the Disabled Persons Assembly and 1491 others that the House repeal the New Zealand Public Health and Disability Amendment Act 2013, Petition No 2011/122

¹⁷ Letter of Paul Gibson, Disability Rights Commissioner to Health Committee, 2 December 2014

¹⁸ The IMM consists of the New Zealand Human Rights Commission, the Office of the Ombudsmen, and the Convention Coalition (representing Disabled People's Organisations)

¹⁹ Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, June 2014, Recommendation G1, pp12, 14, 109

²⁰ CRPD/C/NZL/CO/1, paragraph 10

responds to one of the recommendations arising from New Zealand's 2013 Universal Periodic Review²¹.

22. The Strategy was developed in 2000 in partnership with disabled people and disabled people's organisations and has the objective of resulting in an inclusive society that provides for the full participation of disabled people. The Minister of Disability Issues is required to report to Parliament annually on progress made in implementing the Strategy. This function is supported by the Office of Disability Issues, which monitors the activities of government agencies²².

Summary

23. The Commission remains concerned at the absence of public consultation or meaningful participation in the legislative and policy processes that occurred in the Christchurch red-zone and family care policy cases outlined above, despite the clear impact the resulting laws and policies have, and will have, on the rights and welfare of thousands of people.
24. Our concerns are moderated somewhat, however, by the positive impact that the Canterbury health reforms and New Zealand Disability Strategy have had in providing models for people-centred service redesign and strategic policy.
25. The impact of the 2010 and 2011 earthquakes and aftershocks on the human rights of Christchurch and Canterbury residents is a continuing area of priority for the Commission. In December 2013, the Commission produced a major report *Monitoring Human Rights in the Canterbury Earthquake Recovery*,²³ which issued several recommendations to the Government of actions and strategies aimed at embedding human rights principles in the ongoing recovery work.

B. The right to vote and to be elected

Removal of prisoners' voting rights

26. In 2010, the Electoral (Disqualification of Convicted Prisoners) Amendment Act was passed, bringing into the effect a requirement that any prisoner who is serving a sentence of imprisonment is disqualified from registering as a voter²⁴. Prior to the amendment, only prisoners who had been sentenced to a term of imprisonment of three years or more were subject to this disqualification.
27. The legislation passed despite the Attorney-General reporting to Parliament that the proposed Act was inconsistent with the New Zealand Bill of Rights Act ('NZBORA') and the restrictions on prisoners' voting rights could not be justified in a free and democratic society²⁵. The Commission also strongly opposed the Bill in

²¹ Recommendation 105

²² <http://www.odi.govt.nz/nzds/>

²³ <http://www.hrc.co.nz/key-projects/canterbury-earthquake-recovery/monitoring-human-rights-in-the-canterbury-earthquake-recovery/>

²⁴ Electoral (Disqualification of Elected Prisoners) Amendment Act 2010, s5(1) – amending s81 of the Electoral Act 1993

²⁵ Section 7 of the New Zealand Bill of Rights Act requires that all proposed Acts of Parliament are vetted by the Attorney-General to consider their consistency with the NZBORA

submissions to Parliament's Law and Order Committee on a number of grounds, including:²⁶

- That it is inconsistent with international human rights standards and international jurisprudence;
 - That it disproportionately affects Māori, both men and women, given their disproportionate representation in penal institutions and therefore may amount to indirect discrimination
28. In September 2014, six prisoners who wished to vote in that month's general election, brought an application in the High Court for a declaratory judgement that the legislation is invalid²⁷.
29. The presiding High Court judge, Ellis J dismissed the application, commenting in conclusion that "*however constitutionally objectionable [the relevant section of the Electoral Act] might be, Parliament has (for now) spoken.*"²⁸ Ellis J also noted it was "*important to record that there is considerable and considered support for the position [the applicant] is advancing.*"²⁹ The judge made number of other critical comments about the impact of the legislation, noting that:
- Māori make up 51% of the male prison population and 60% of the female prison population.³⁰
 - the Supreme Court of Canada, the European Court of Human Rights, the Constitutional Court of South Africa, and the High Court of Australia have all held that disenfranchising *all* prisoners is an unjustifiable breach of individual rights³¹.
30. Five of the six prisoners filed a parallel application in the Waitangi Tribunal, requesting that the Tribunal consider the Treaty of Waitangi implications of legislation³². The Tribunal decided not to hear the application before the September 2014 General Election saying that was unrealistic given the applicants were effectively seeking legislative change. However, the Tribunal granted the claim application priority status. The Tribunal's Deputy Chairperson, Judge Savage commented:
- ... the claim raises very important issues that should be inquired into by the Tribunal as a matter of some urgency. I am aware that the same issue for prisoners in general is a live one in a number of western democracies. Māori form a large proportion of the New Zealand prison population. It is important that consideration be given to the Treaty implications of the present legislation*³³.

²⁶ Human Rights Commission, Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Act, 11 June 2010

²⁷ *Taylor v Attorney-General* [2014] NZHC 2225

²⁸ *Ibid* paragraph 80

²⁹ *Ibid* paragraph 16

³⁰ *Ibid* paragraph 13 – NOTE: In 2013, 15% of the New Zealand population identified as being of Maori ethnicity

³¹ *Ibid*, paragraph 14

³² Wai 2472, 7 August 2014, per Waitangi Tribunal Deputy Chairperson Judge Savage

³³ *Ibid* paragraph 11

Accessible voting and parliamentary services for disabled persons

31. In its Second Report, the IMM of the Convention on the Rights of Persons with Disabilities reported on an Electoral Commission initiative to improve the accessibility of voting processes for visually impaired people through the introduction of a telephone dictation system at the 2014 general election.
32. The telephone dictation system was implemented at the 2014 election and furthers the Electoral Commissions implementation of their disability strategy *Access 2020*, which has been developed to support the objectives of the New Zealand Government's New Zealand Disability Strategy.³⁴
33. While welcoming this development, the IMM noted that voting processes for local government elections still require significant improvements to be made. The IMM accordingly recommended that the Department of Internal Affairs adopt accessibility as a key success measure for online voting systems to be trialed at 2016 local government elections.³⁵ A Cabinet Paper issued in December 2014 on the trial has subsequently noted the potential of online-voting to assist visually impaired and other disabled people to vote independently.³⁶
34. In May 2014, the Government Administration Committee of Parliament issued its findings of its *Inquiry into the accessibility of services to Parliament*. The Committee expressed concern that evidence indicated that Parliament is not regarded as accessible by disabled people³⁷. The Committee issued a suite of recommendations, including the development of a Parliamentary services policy and implementation plan and the introduction of new facilities, services and training for Parliamentary staff.³⁸
35. In response, the New Zealand Government has stated that it will consider funding requests made by Parliamentary Services and Office of the Clerk for the purposes of implementing the recommendations of the Inquiry.³⁹

Summary

36. The Commission welcomes recent initiatives aimed at improving disabled peoples access to electoral and parliamentary services and will monitor their implementation.
37. However, the Commission remains concerned at the human rights implications of the Electoral (Disqualification of Convicted Prisoners) Amendment Act which denies New Zealand prisoners the right to vote. The Commission is particularly concerned

³⁴

http://www.elections.org.nz/sites/default/files/bulkupload/documents/access_2020_disability_strategy.pdf

³⁵ Second Report of the IMM, June 2014 p 98

³⁶ Office of the Associate Minister for Local Government, *Trialling online voting in local elections*, 2 December 2014, paragraphs 2 and 57 accessed <http://www.dia.govt.nz/vwluResources/online-voting-Cabinet-Paper-Trialling-online-voting-in-local-elections.pdf>

³⁷ Government Administration Committee, *Inquiry into the accessibility of services to Parliament*, p 7 accessed <http://www.parliament.nz/resource/en-nz/>

³⁸ *Ibid* p 2

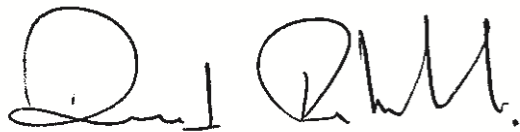
³⁹ Government Response to the Report of the Government Administration Committee on the Inquiry into the accessibility of services to Parliament, December 2014, accessed <http://www.parliament.nz/resource/en-nz/>

at the impact of the Act on Maori who are disproportionately represented in the prison population.

Conclusion

38. I trust that you have found this information helpful. Please do not hesitate to contact me should you require any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Rutherford'.

David Rutherford
Chief Commissioner