IN THE SUPREME COURT OF NEW ZEALAND

SC 65/2017

BETWEEN	ATTORNEY-GENERAL OF NEW ZEALAND
	Appellant / Cross-Respondent
AND	ARTHUR WILLIAM TAYLOR
	First Respondent / Cross-Appellant
AND	HINEMANU NGARONOA, SANDRA WILDE, KIRSTY OLIVIA FENSOM and CLAIRE THRUPP
	Second, Third, Fourth and Fifth Respondents
AND	HUMAN RIGHTS COMMISSION
	Intervener

SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION AS INTERVENER ON CROSS-APPEAL (STANDING)
9 FEBRUARY 2018

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especially so in DOI proceedings, given the relevance of policy-intensive legislative facts to s 5 BORA arguments.[51]

2.42 In any event, unmeritorious claims or those brought by busybodies can be sufficiently dealt with under existing judicial mechanisms:

(a) vexatious claims can be struck out before the substantive hearing;

(b) the public interest test itself, as it is already applied in public law and human rights litigation, also excludes vexatious litigants;[52] and

(c) the courts have always applied the test of BORA-consistency in s 5 BORA in a way that responds to whether a claim justifies serious consideration, as the Court of Appeal contemplated in this case.[53]

3. IT IS IN THE PUBLIC INTEREST THAT MR TAYLOR BE GRANTED STANDING

3.1 In the Commission's submission, a proper application of the public interest in the present case would see Mr Taylor granted standing. A number of aspects of the case are relevant to the public interest assessment.

Importance of the right

3.2 A central feature of the public interest in the present proceedings is the importance of the right it seeks to vindicate. The right compromised by the Electoral (Disqualification of Sentences Prisoners) Amendment Act 2010 ("**Amendment Act**") is the right to vote.

3.3 The right to vote is of fundamental constitutional importance. That importance has been consistently recognised by final appellate Courts in relevant jurisdictions.[54] The Court of Appeal

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51 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [9] per Elias CJ, [50] per Blanchard J, [132]–[133] per Tipping J, [230]–[232] per McGrath J.

52 In *Bourneville v Legal Services Commissioner* [2016] NZHC 1079, [2016] NZAR 1076 at [64] and [65] a person seeking to gain collateral advantage in a proceeding through judicial review was not granted standing. In *New Zealand Private Prosecution Service Ltd v Key* [2015] NZHRRT 48 at [104]–[106] the Human Rights Review Tribunal found that the New Zealand Private Prosecution Service Ltd was vexatious.

53 CA judgment at [170]. See, for example, *Trevethick v Ministry of Health* [2008] NZCA 397, [2009] NZAR 18 at [18]–[19].

54 The Canadian Supreme Court identified the right to vote as the "very embodiment of democracy" (in *Harvey v New Brunswick (Attorney-General)* [1996] 2 SCR 876 at 901 per La Forest J); the Supreme Court of the United States has stated that "[n]o right is more precious in a free country" (in *Wesberry v Saunders* 376 US 1 (1964) at 17); the High Court of Australia has described it as a "fundamental political right" (in *Roach v Electoral Commissioner* [2007]

was accordingly correct to recognise that the "the right to vote is a core prerogative of citizenship in a free and democratic society."[55] The franchise lies as the heart of our society and it is only through its exercise, and the democratic system that it supports, that all other civil and political rights may be realised.

3.4 The Crown's leave submissions were thus incorrect to contend that there is not a general or widespread public interest in examining the legislative impact on the right to vote in this case (in contrast, it was said, to the general public interest – in New Zealand rugby – in *Finnigan*).[56] There can be few things more important to a democratic society, and thus to the public interest, than the extent of, and intrusions on, the franchise.

3.5 In this respect, the public importance of the right to vote issue posed in the present case is at least comparable to, or surpasses, that of other issues which have seen public interest standing extended in the case law, namely:

(a) whether the national image of rugby would be tainted by the All Blacks touring apartheid South Africa;[57]

(b) whether a hospital's licence under which abortions were carried out was valid;[58]

(c) whether a temporary prisoner-release scheme was lawful;[59] and

(d) whether Christchurch Cathedral could be deconstructed.[60]

Prisoners are a vulnerable and under-resourced group

3.6 It is in the public interest to apply the rules of standing generously when an under-resourced group is affected.

HCA 43, 81 ALR 1830 at [12] per Gleeson CJ); the Constitutional Court of South Africa has affirmed that the right "lies at the very heart of our democracy" (in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* CCT 03/04, 25 February 2004 (SACC) at [110] per Madala J; the right was considered "fundamental to a democracy" in *New National Party of South Africa v Government of the RSA and Others* [1999] ZACC 5, 1993 (3) SA 191 at [11] per Yacoob J); the Grand Chamber of the European Court of Human Rights referred to the right to vote as "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law" (in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR) at [58]); and the Human Rights Committee has stated that art 25 of the ICCPR, which protects the right to vote among other things, "lies at the core of democratic government based on the consent of the people" (in General Comment no 25 CCPR/C/21Rev1/Add 7 (1996) at [1]).

55 CA judgment at [185].

56 Attorney-General's submissions on leave dated 24 July 2017, at fn 71.

57 *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) at 179.

58 *O'Neill v Otago Area Health Board* HC Dunedin CP50/91, 10 April 1992 at 2.

59 *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094 at [3].

60 *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045, [2013] 2 NZLR 230 at [77].

3.7 Prisoners are a vulnerable class of persons who rarely have adequate resources to bring legal challenges before the court. They have been recognised to be generally "ignorant of their rights and might fear retribution if they challenge the prison authorities".[61] This Court has accordingly described prisoners as having "special vulnerability".[62] It is in the public interest to ensure the rights of vulnerable members of society are protected.

3.8 Additionally, in a practical sense, where the affected group is particularly vulnerable, allowing only the most directly affected standing is an "illusory" exercise as it is unrealistic to rely on those who are under-resourced to conduct proceedings.[63]

3.9 While the Commission recognises that in this case directly affected rights-holders have joined the proceedings, Mr Taylor's submissions describe the circumstances in which this occurred and the dynamic prevailing amongst the co-respondents in the litigation.[64] The presence of additional parties does not outweigh the generous approach to standing applicable to persons protecting the interests of one of the most vulnerable groups in society, particularly (as explained below from paragraph 3.20) given the corresponding lack of prejudice to the Crown.

3.10 Further, it is consistent with legislative policy in the New Zealand human rights environment not to view the presence of a directly affected litigant as an automatic barrier to wider standing. In this way, given the width of the term "complainant" under the HRA (see discussion from paragraph 2.10 above), the High Court in *Attorney-General v Human Rights Review Tribunal* afforded the Child Poverty Action Group standing despite more directly affected plaintiffs joining the proceedings.[65]

Mr Taylor is a member of the wider group affected by the legislation

3.11 Being a member of a wider group affected by the challenged conduct, even if not directly affected oneself, is a recognised source of standing in public law litigation.[66]

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61 *Irish Penal Reform Trust Limited & Ors v Governor of Mountjoy Prison & Ors* [2005] IEHC 305 at 14.

62 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [78] per Elias CJ (dissenting).

63 *Minister for Justice v Borowski* [1981] 2 RCS 575 at [597].

64 Cross-appellant's submissions on standing dated 15 October 2017, at [50], [79].

65 *Attorney-General v Human Rights Review Tribunal* (2006) 18 PRNZ 295 (HC) at [56]–[66].

66 In *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995 a participant in the fishing industry, Talley's, sought to judicially review the decision of the Minister of Immigration that permitted foreign crews for foreign joint venture fishing vessels. Although not directly affected, the Court found that the commercial reality was that Talley's was part of an overall affected group and that the proceeding was one of general public importance, justifying Talley's' standing at 46–47.

3.12 Mr Taylor is well-acquainted with the directly affected group. He himself is a serving prisoner and is alive to the effect of the Amendment Act on prisoners.[67]

3.13 Further, Mr Taylor has a defensible interest in judicial decisions that affect prisoners' rights.[68] Indeed, given the political vulnerability of prisoners and the potential for intrusions on prisoner freedoms to accumulate in certain political climates, there is a real sense in which Mr Taylor, as a prisoner, has an ongoing interest in defending prisoner rights more generally. Mr Taylor would also have a real interest in any broader legislative reconsideration of prisoner voting restrictions that may follow a DOI remedy in this case.

3.14 The Courts have already recognised Mr Taylor's group status as a basis for standing in other litigation involving prisoners' rights. Despite Mr Taylor not being a smoker himself, his "legitimate interest" in decisions which affect prisoners' rights was enough to justify his standing when challenging a prohibition on inmates possessing or smoking tobacco.[69]

3.15 Finally, the proceedings brought by Mr Taylor are not of the highly abstract kind that may suggest a disinterested and unconnected litigant, remote from the facts. Such considerations are relevant to Canadian Charter public interest standing assessments,[70] and the striking abstraction of the claim in *Boscawen* prompted obiter reservations from the Court of Appeal.[71] By contrast, these proceedings are concrete[72] and Mr Taylor has demonstrated, in

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67 See Mr Taylor's explanation of how the burden of the argument was discharged in the cross-appellant's submissions on standing dated 15 October 2017, at [49]–[50] and fn 42. Mr Taylor's record of prisoner advocacy also speaks to his knowledge of prisoner concerns: see the examples listed in the submissions at paragraph 3.17 below.

68 Akin to the interest of those who were granted standing in *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) at 177-180.

69 See *Taylor v Attorney-General* [2013] NZHC 1659 at [15], where Mr Taylor was granted standing in proceedings challenging regulations that enforced a smoking ban in prison.

70 In *Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)* [2012] SCC 45, [2012] 2 SCR 524, the Court recognised at [51] that the public interest plaintiff's "capacity to bring forward a claim" may turn (inter alia) on "the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting". These are just some of the matters going to the third discretionary factor in the public interest standing assessment, namely whether the proposed lawsuit is a "reasonable and effective" means of bringing the challenge to Court: at [44]–[52].

71 *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229 at [38], [54]–[55]. See further Professor Geiringer's analysis of the abstract nature of the *Boscawen* claim in Claudia Geiringer "Declarations of inconsistency dodged again" [2009] NZLJ 232 at 233–235. The claim failed to plead particulars of the rights impact of the legislation and the Court of Appeal described it as lacking a "specific factual background": *Boscawen* at [54].

72 For example, the nature of the legislative rights deprivation is readily discernible in these proceedings, and specifics of the rights impact of the legislation is pleaded in the Statement of Claim, for example at [2.5]–[2.18], [5.3]–[5.4], [5.7], [5.10], [5.12], [5.16]–[5.18], [5.22].

Canadian Charter parlance, the qualifying "capacity to bring forward a claim".[73]

Mr Taylor is not a busybody, but rather a proven prisoner rights advocate

3.16 Mr Taylor is a successful prisoner rights advocate, and his record demonstrates his effectiveness in proceedings concerning the human rights of prisoners.

3.17 Examples of Mr Taylor's successes include:

(a) A successful judicial review of a rule implementing a smoking ban promulgated by a Prison Manager under the Corrections Act 2004.[74]

(b) Another successful challenge to a prison smoking ban, contesting regulations made under the Corrections Act 2004.[75]

(c) A successful judicial review challenge, achieved on appeal, to a decision declining a media request to interview him.[76]

(d) Successfully obtaining an order allowing Mr Taylor and a fellow prisoner to appear in person in a substantive hearing relating to alleged unlawful strip-searching of prisoners.[77]

3.18 In the present proceeding, Mr Taylor's submissions have assisted the Courts below in a matter of constitutional significance. The Court of Appeal has previously recognised his "considerable skills" as an established "advocate for prisoners' rights".[78] Similarly, in a companion case to the present proceedings challenging the same legislation on a different basis, Fogarty J observed that:[79]

> counsel for the Crown did not object to Mr Taylor making submissions as a lay litigant in these proceedings, which

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73 *Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)* [2012] SCC 45, [2012] 2 SCR 524 at [51].

74 *Taylor v Manager of Auckland Prison* [2012] NZHC 3591 at [37]. The Court noted that the fact he may be less affected by the rule than other prisoners because he does not smoke is not a good reason for denying the normal relief that would follow a successful application for judicial review.

75 *Taylor v Attorney-General* [2013] NZHC 1659. At [15] the Court noted that Mr Taylor had a legitimate interest in decisions which affect prisoners' rights.

76 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [107]–[109].

77 *Taylor v Attorney-General* [2017] NZHC 2234 at [29].

78 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [106].

79 *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [31].

submissions the Court found very helpful to elucidate the issues of the case.

3.19 It is in the public interest to permit persons like Mr Taylor to act, as in the present case, as an advocate for fundamental human rights.

Adding a plaintiff does not prejudice the Crown

3.20 Recognising Mr Taylor's standing in the present proceedings causes no prejudice to the Crown.

3.21 This is a recognised ground for extending standing to further parties in multi-party litigation. In *Moxon v Casino Control Authority*, the Court noted that once one party has standing, considerations for additional applicants include whether granting them standing will enhance the quality of the proceeding, needlessly add to cost, or otherwise prejudice opposing parties.[80]

3.22 Mr Taylor's role in the proceeding has not needlessly added to its cost, nor has there been unjustifiable duplication in material presented to the Court. On the contrary, Mr Taylor's input into the proceedings has strengthened the robustness with which the issues have been argued and considered.

3.23 Indeed, it is difficult to see how any claim of prejudice could now plausibly be raised about Mr Taylor's standing, when the Crown neither questioned his standing in the High Court[81] nor in its notice of appeal to the Court of Appeal.[82]

4. CONCLUSIONS

4.1 The Court of Appeal's approach to standing in DOI proceedings incorrectly overlooked the possibility, in appropriate cases, that a litigant's standing may be grounded in the public interest.

4.2 Recognising a public interest limb to the test of standing in this context:

(a) responds to the wider societal interest in the vindication of BORA rights;

(b) strengthens the opportunity for vulnerable individuals or groups to initiate or participate in proceedings seeking vindication of their BORA rights;

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80 *Moxon v Casino Control Authority* HC Hamilton M324/99, 24 May 2000 at [106].

81 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [3]. This is despite the fact that the Crown had been on notice of potential standing issues since its earlier strikeout application: *Taylor v Attorney-General* [2014] NZHC 1630 at [84].

82 Notice of appeal to the Court of Appeal by the Attorney-General dated 20 August 2015.

(c) promotes consistency with the approach to standing in New Zealand's human rights and public law framework more generally;

(d) aligns with legal trends in analogous jurisdictions; and

(e) is justified on the basis of existing legal precedent, given the rule of law and constitutional implications of DOIs.

4.3 When the relevant aspects of the public interest are weighed in the present proceedings, the Commission submits that Mr Taylor's standing to seek a DOI should be recognised. The BORA right involved in the proceedings is of fundamental importance. Mr Taylor is acting in defence of prisoners, a particularly vulnerable group of which he is a member, and in circumstances where he has a proven track record of protecting prisoner rights in the public interest. No prejudice accrues to the Crown.

4.4 For these reasons, the Commission supports the cross-appeal on standing.