

ARTICLE

Disempowered to Disenfranchised: An Intersectional Legal Analysis of the Discriminatory Effects of Prisoner Disenfranchisement on Māori (Women)

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In 2015, Arthur Taylor and fellow prisoners challenged the legality of s 80(1)(d) of the Electoral Act 1993, which introduced a blanket ban on prisoners' voting rights, on numerous grounds. While the High Court and the Court of Appeal both declared the amendment inconsistent with s 12(a) of the New Zealand Bill of Rights Act 1990—the right to vote—neither were willing to go further and declare the amendment discriminatory on the grounds of race. Exploring this legislation using an intersectional lens, I seek to revive the discussion surrounding the legality of s 80(1)(d) by critically examining whether the legislation indirectly discriminates against Māori, and more specifically Māori women. By doing so, not only do I reach a different conclusion than the courts, I shine light on the relevance of systemic issues of structural discrimination and inequality in this context.

I Introduction

In 2015, Arthur William Taylor, Hinemanu Ngaronoa, Sandra Wilde, Kirsty Olivia Fensom and Claire Thrupp commenced legal proceedings in the High Court, challenging the legality of s 80(1)(d) of the Electoral Act 1993 on numerous grounds.¹ While the High Court and the

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1 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 [*Taylor* [2015] (HC)]. This article was written prior to the Electoral (Registration of Sentenced Prisoners) Amendment Act 2020, which comes into force on 30 June 2020. This Act amends s 80 of the Electoral Act 1993 to allow people serving a prison sentence of less than three years to vote. People imprisoned for three years or more continue to be disenfranchised while in prison. This amendment is a step in the right direction but it does not substantively address the concerns raised in this article.

Court of Appeal both declared the amendment inconsistent with s 12(a) of the New Zealand Bill of Rights Act 1990 (NZBORA) (the right to vote),² neither were willing to go further and declare the amendment discriminatory on the grounds of race.³ Exploring the Electoral Act 1993 using an intersectional lens, I seek to revive the discussion surrounding the legality of s 80(1)(d) by critically examining whether this legislation indirectly discriminates against Māori, and more specifically Māori women.⁴ By doing so, not only do I reach a different conclusion than the courts, this article is able to shine light on systemic issues of structural discrimination and inequality embedded within New Zealand society.

On 15 December 2010, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 was given royal assent, disqualifying all sentenced prisoners from registering on the electoral roll (thus voting), thereby imposing a blanket ban on all prisoners' voting eligibility.⁵ The amended s 80 reads:⁶

80 Disqualifications for registration

The following persons are disqualified for registration as electors:

...

- (d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 ...

Making no distinctions on the basis of the seriousness of the offending or the length of the sentence,⁷ this amendment becomes one of New Zealand's harshest stances on prisoner voting rights since 1977,⁸ reflecting the increasing prevalence of penal populism.⁹ Before the Amendment Act 2010, only prisoners serving sentences for three years or more were disqualified from voting.¹⁰ Comparatively, New Zealand's disenfranchising legislation is

2 At [79]; and *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [*Taylor* [2017] (CA)] at [185]–[186]. Subsequent to the completion of this article, the Supreme Court upheld the declaration made by the High Court in *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [70] and [121].

3 *Taylor v Attorney-General* [2016] NZHC 1706, [2016] 3 NZLR 111 [*Taylor* [2016] (HC)] at [152]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 [*Ngaronoa* (CA)] at [153]. Furthermore, the Supreme Court refused to grant leave to appeal on the ground of discrimination in *Ngaronoa v Attorney-General* [2017] NZSC 183 at [2]–[4]. The Waitangi Tribunal found, as a matter of fact, that the provision disproportionately affects Māori, see Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at [5.2].

4 This article does not consider the role of the Treaty of Waitangi/Te Tiriti o Waitangi, however, it recognises that this is another important avenue through which these issues have been challenged and explored, see Waitangi Tribunal, above n 3.

5 To be eligible to vote again, these prisoners must re-enrol once they are released from prison. For further discussion of these issues, see Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 65.

6 Electoral Act 1993.

7 This is with the exception of prisoners on remand or those sentenced to home detention, see Justice and Electoral Committee *Inquiry into the 2014 general election: Report of the Justice and Electoral Committee* (April 2016) at 28.

8 In 1977, the National government disenfranchised all prisoners under s 5 of the Electoral Amendment Act 1977.

9 For a discussion of the emergence of penal populism in New Zealand, see Liam Williams "Civil Death and Penal Populism in New Zealand" (2012) 20 Wai L Rev 111.

10 Prior to the 2010 amendment, s 80(1)(d) of the Electoral Act 1993 stated that "a person who, under ... a sentence of imprisonment for a term of 3 years or more,—is being detained in a

currently one of the more extreme stances—just behind Armenia, Chile and some states in the United States of America—that continue to disenfranchise prisoners even after they are released.¹¹

Although the Court of Appeal has already declared that s 80(1)(d) of the Electoral Act is inconsistent with the right to vote, it is still of great sociopolitical importance to analyse whether this legislation breaches the right to be free from discrimination, affirmed in s 19 of the NZBORA. The main purpose of NZBORA is “to affirm, protect, and promote human rights and fundamental freedoms in New Zealand”¹² and I argue, therefore, that any infringement on a protected right deserves proper and critical examination. Furthermore, while the new amendment deprives all prisoners of the right to vote, the disenfranchisement of Māori prisoners needs to be understood within the context of “Māori political marginalisation” to ensure that appropriate consideration is given to the social and historical background in which this legislation has been implemented.¹³

In Part II, I will describe the theoretical approach adopted in this article. In Part III, I will examine the decisions of New Zealand courts to date in determining the various legal challenges to this legislation. In Part IV and Part V, I will provide an overview of discrimination law as it currently stands in New Zealand. In Part VI to Part VIII, I will conduct a step by step examination of whether s 80(1)(d) indirectly discriminates against Māori.

II Theoretical Framework

This article takes an intersectional approach to discrimination law, drawing on the works of both critical race and feminist theorists. Kimberle Crenshaw coined the term intersectionality in 1989.¹⁴ Since then, it has been used to describe the ways in which a person’s actual lived experiences are shaped by the intersection of multiple systems of power operating on different spheres of their identity.¹⁵ These systems of power do not exist in isolation, rather they intersect to “produce unequal material realities and distinctive social experiences”.¹⁶ Thus, it is not possible to essentialise a universal person of colour’s experience of racism, for example, because these experiences are defined through a myriad of factors including gender and class. Shreya Atrey illustrates this idea using a Venn diagram, where the overlapping circles represent different identity

prison” is disqualified for registration. In 2003, the Department of Corrections determined that 2,571 of the 5,095 sentenced prisoners were imprisoned for three years or more and thereby affected by the provision, see Department of Corrections *Census of Prison Inmates and Home Detainees 2003* (Department of Corrections, Wellington, 2004) at 23; and Greg Robins “The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand” (2006) 4 NZJPL 165 at 165.

- 11 Brandon Rottinghaus *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform* (International Foundation for Election Systems, June–July 2003) at 25.
- 12 New Zealand Bill of Rights Act 1990, long title (emphasis omitted).
- 13 Kate Stone “(Re)claiming the Right to Vote: Prisoner disenfranchisement and Māori political equality” (LLM Thesis, University of Auckland, 2015) at 10.
- 14 Kimberle Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” [1989] U Chi Legal F 139.
- 15 Patricia Hill Collins and Valerie Chepp “Intersectionality” in Georgina Waylen and others (eds) *The Oxford Handbook of Gender and Politics* (Oxford University Press, Oxford, 2013) 57 at 58.
- 16 At 58–59.

categories.¹⁷ This helps show how a person's identity and position in society are shaped by features in the individual spheres—such as race, gender, class and sexuality—as well as having “unique features of its own” where the circles overlap.¹⁸

Within the discrimination law context, intersectionality refers to how “discrimination on the basis of multiple grounds signifies a distinct disadvantage which is both similar to and different from that based on individual grounds”.¹⁹ For example, contemporary American academics argue that in comparison to white women and Black men, Black women face distinct forms of discrimination that needs to be understood in the context of historical and ongoing oppression.²⁰ In this article, I will explore how ethnicity (Māori) and gender (women) intersect within New Zealand's electoral legislation, under a legal discrimination analysis.

III Previous Litigation

New Zealand courts have previously considered the legality of blanket disenfranchisement of prisoners. In 1993, the High Court found that the provision prohibiting sentenced prisoners from voting “clear[ly] conflict[ed]” with the right to vote.²¹ However, it was still considered valid law because s 4 of the NZBORA enabled the supremacy of right-inconsistent provisions where no other interpretation was available.²² In making this determination, the Court did not contemplate “the substantive question of whether the prima facie infringement of the right to vote could be justified under the Bill of Rights Act's s 5 ‘balancing provision’”.²³

More recently, a group of prisoners challenged the legality of s 80(1)(d) of the Electoral Act on numerous grounds, including: whether the legislation was inconsistent with s 12(a) of the NZBORA (right to vote),²⁴ whether the legislation was invalid because it was enacted by a bare majority (instead of 75 per cent as required by s 268(1) of the Electoral Act)²⁵ and whether it amounted to indirect discrimination against Māori prisoners.²⁶ In 2015, the High Court issued a declaration of inconsistency, stating that the legislation was unjustifiably inconsistent with s 12(a) of the NZBORA,²⁷ which was subsequently upheld by the Court of Appeal.²⁸ This is New Zealand's first formal declaration of inconsistency. The Canadian Supreme Court, the Australian High Court and the European Court of Human Rights have all ruled that blanket disenfranchisement of prisoners is unjustifiable.²⁹ Yet none of these

17 Shreya Atrey “Comparison in intersectional discrimination” (2018) 38 LS 379 at 380.

18 At 380.

19 At 380.

20 See Atrey, above n 17.

21 *Re Bennett* (1993) 2 HRNZ 358 (HC) at 361.

22 At 361.

23 Geddis, above n 5, at 69.

24 *Taylor* [2015] (HC), above n 1; and *Taylor* [2017] (CA), above n 2.

25 *Taylor* [2016] (HC), above n 3, at [70]–[110]; and *Ngaronoa* (CA), above n 3, at [62]–[105].

26 *Taylor* [2016] (HC), above n 3, at [111]–[152]; and *Ngaronoa* (CA), above n 3, at [106]–[149].

27 *Taylor* [2015] (HC), above n 1, at [79].

28 *Taylor* [2017] (CA), above n 2, at [185]–[186].

29 *Sauvé v The Attorney General of Canada, the Chief Electoral Officer of Canada and the Solicitor General of Canada* 2002 SCC 68, [2002] 3 SCR 519; *Roach v Electoral Commissioner* [2007] HCA 43, (2007) 233 CLR 162; and *Hirst v The United Kingdom (No 2)* [2005] 9 ECHR 187 (Grand Chamber).

jurisdictions have directly considered whether their respective disenfranchisement provisions are discriminatory on the grounds of race.³⁰

Both the New Zealand High Court and the Court of Appeal have found that while s 80(1)(d) of the Electoral Act may have different effects for Māori prisoners, this did not amount to indirect discrimination because no “material disadvantage” was imposed.³¹ I argue that both these judgments failed to give proper weight and sufficient reasoning to the intricacies of this discrimination argument and the significant impact of s 80(1)(d) of the Electoral Act on Māori citizens. The remainder of this article offers a more detailed and considered analysis of these issues.

IV Discrimination Law

The Human Rights Act 1993 (HRA) and NZBORA work in unison to define and protect people from discrimination in New Zealand.³² Section 19(1) of the NZBORA declares that “[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” Section 21 of the HRA sets out the grounds upon which individuals or groups can claim they were discriminated. Yet these two Acts “operate in fundamentally different manners”.³³ The HRA prohibits actions in certain contexts that were “taken ‘by reason of’ the prohibited grounds of discrimination”, whereas the NZBORA “establishes a right to be free from discrimination on prohibited grounds”.³⁴ In the context of allegedly discriminatory legislations, pt 1A of the HRA requires the NZBORA to be used to assess discrimination complaints about public authorities. These claims may be made to the Human Rights Review Tribunal³⁵ or directly to the courts.³⁶

Quilter v Attorney-General, the previous leading authority, sets out different approaches to discrimination law³⁷ yet failed to provide one cohesive test.³⁸ This uncertainty was considered “unsatisfactory” as it did not provide “clear guidance” on the legal requirements of discrimination.³⁹ *Ministry of Health v Atkinson* resolved this contention by setting out a broad test for discrimination cases.⁴⁰ The Court of Appeal:⁴¹

30 The Canadian Supreme Court did consider the impact of prisoner disenfranchisement on aboriginals. However, this was not conducted under an indirect discrimination analysis; rather, the Court considered whether the grounds for discrimination could be widened to view prisoners as analogous. See *Sauvé*, above n 29, at [202]–[205].

31 *Taylor* [2016] (HC), above n 3, at [146]–[152]; and *Ngaronoa* (CA), above n 3, at [149].

32 *Ngaronoa* (CA), above n 3, at [111].

33 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Victoria, 2003) at 375.

34 At 375 (emphasis omitted).

35 Human Rights Act 1993, s 20K.

36 Rishworth and others, above n 33, at 396.

37 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

38 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [99].

39 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.9.1].

40 *Atkinson*, above n 38. The Court of Appeal affirmed the *Atkinson* test in *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 [CPAG (CA)] at [43].

41 At [109].

... consider[ed] that differential treatment on a prohibited ground of a person or group in comparable circumstances [would] be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against.

There are three stages in the *Atkinson* test:⁴²

- (1) Whether the legislation amounts to differential treatment between persons or groups in comparable situations on the basis of a prohibited ground: s 19 of the NZBORA.
- (2) Whether the differential treatment imposes a material disadvantage: s 19 of the NZBORA.
- (3) Whether this discrimination is demonstrably justifiable in a free and democratic society: s 5 of the NZBORA.

V Indirect Discrimination

Discrimination can be broken down into two forms: direct and indirect.⁴³ Direct discrimination refers to practices, rules or laws that differentiate between groups or people on the basis of the prohibited grounds.⁴⁴ Indirect discrimination results from ostensibly neutral practices, rules or laws that have “disproportionate impact[s] on a group (or person) because of a particular characteristic of that group (or person)”.⁴⁵ The concept of indirect discrimination acknowledges that equal treatment may in some cases have “disparate impact[s]”.⁴⁶ This distinction plays an important role in ensuring that less overt forms of discrimination can still be challenged in court. Cartwright J, in *Northern Regional Health Authority v Human Rights Commission*, held that discrimination under the NZBORA included both direct and indirect discrimination.⁴⁷ She did so by giving emphasis to “the broad and purposive manner in which BORA is to be interpreted and international jurisprudence”.⁴⁸

A Legal test for indirect discrimination

This article is only concerned with indirect discrimination. Section 65 of the HRA lays out a legal definition of indirect discrimination, which provides guidance for conducting an indirect s 19 NZBORA analysis. While direct discrimination requires there to be differential treatment between comparative groups, indirect discrimination requires differential effect from seemingly neutral treatment.⁴⁹ Therefore, the first stage of an *Atkinson* indirect discrimination analysis would ask whether the “neutral” legislation has the effect of treating groups in comparable situations differently, on the basis of a prohibited ground.⁵⁰

42 At [55], [109], [136], and [143]; and Butler and Butler, above n 39, at [17.10.42].

43 Butler and Butler, above n 39, at [17.4.1].

44 At [17.12.1].

45 At [17.12.1].

46 Sandra Fredman “The Reason Why: Unravelling Indirect Discrimination” (2016) 45 ILJ 231 at 231.

47 *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 [NRHA] at 235–238 as cited in Selene Mize “Indirect Discrimination Reconsidered” [2007] NZ Law Rev 27 at 59.

48 NRHA, above n 47, at 236–238 as cited in Butler and Butler, above n 39, at [17.12.4].

49 Mize, above n 47, at 28.

50 At 27–28.

Fredman observes that the focus of the inquiry is on the differential impact of the treatment, “rather than the treatment” itself.⁵¹

B Importance of indirect discrimination

In the United Kingdom, the distinction between these two forms of discrimination is important because direct discrimination is not justifiable whereas indirect discrimination can be justified in certain contexts.⁵² While both forms of discrimination can be justified in New Zealand under s 5 of the NZBORA, the recognition of indirect discrimination serves an important legislative purpose. As Selene Mize notes, it “ensure[s] that superficially neutral restrictions do not act as barriers to different groups in society”.⁵³ On this basis, I will assess whether s 80(1)(d) of the Electoral Act indirectly discriminates against Māori prisoners generally and more specifically, against Māori women prisoners.

VI Stage One: Differential Effect

In this section, I will consider whether this discrimination claim passes the first stage of the indirect discrimination test by considering the prohibited ground(s) on which the claim is made, the appropriate comparator group, and whether the legislation has differential effect for those in the comparator group.

A Prohibited ground(s)

Section 21 of the HRA lays out the exhaustive list of prohibited grounds of discrimination in New Zealand, which includes sex and race. Thus far, the courts have only considered whether the legislation is discriminatory on the grounds of race or ethnicity. I propose that sex should be considered as another ground of discrimination, particularly in relation to the intersection between gender and race for Māori women.

(1) Intersectional grounds

New Zealand courts currently approach the prohibited grounds using a “single-axis framework”, in which discrimination is viewed as occurring through only one ground.⁵⁴ This presumes that “each ground is isolated from any other” and that “a core experience of adverse treatment is common to all individuals sharing that particular social characteristic, regardless of any others possessed”.⁵⁵ This approach ignores the qualitatively different ways in which discriminatory treatment may impact women from racial minorities, for example.

In other jurisdictions, there has been a shift towards recognising a multi-axis framework for the grounds of discrimination. Intersectional discrimination describes a situation in which “multiple characteristics combine to create a distinct identity that is then

51 Fredman, above n 46, at 231.

52 For example, see Butler and Butler, above n 39, at [17.12.6].

53 Mize, above n 47, at 36.

54 Crenshaw, above n 14, at 139–140.

55 Sarah Hannett “Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination” (2003) 23 OJLS 65 at 69–70.

subject to a unique form of discrimination”.⁵⁶ This requires judges to take a “contextualized approach” to discrimination, by considering the historical and social context in which discrimination takes place.⁵⁷ The use of intersectional grounds for discrimination has yet to be expressly endorsed by New Zealand courts,⁵⁸ but an intersectional basis for claiming discrimination has been recognised by the Supreme Court of Canada.⁵⁹ I submit that New Zealand should follow the Canadian jurisprudence, by broadening the scope of discrimination claims, to ensure that the claims truly reflect the complexity of “intersectional oppression”.⁶⁰

B *Comparator group*

After determining the prohibited ground(s), the indirect discrimination test requires the court to conduct a comparative investigation to assess the appropriate comparator for the particular fact situation. The concept of equality is inherent within this comparative analysis, specifically in relation to the ways in which claimant groups are not equal to their comparative group. The use of comparators in a discrimination analysis is controversial, especially in terms of how comparators should be used and whether they should be used at all.

(1) Legal test(s)

The identification of a comparator, while at face value is seemingly straightforward, can entail a complex analysis of various factors involved in each differing case. Mize submits that there are two possible approaches to comparator analysis.⁶¹ The normative approach uses “a person [or group] in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground”.⁶² This approach is consistent with Cartwright J’s articulation that “the core of each group must be the very basis on which the discrimination is asserted”.⁶³ In *Northern Regional Health Authority*, the basis of the discrimination claim was national origin, thus the High Court compared qualified doctors of New Zealand origin to those of non-New Zealand origin.⁶⁴ In this case, the Court found that the Regional Health Authority’s policy, which limited eligibility to doctors with New Zealand medical qualifications, indirectly discriminated on the ground of national origin.⁶⁵

On the other hand, the High Court in *Vallant Hooker & Partners v Proceedings Commissioner* adopted a different approach.⁶⁶ In this case, an Indian national claimed that his law firm’s retention of his passport was discriminatory on the basis of national origin.⁶⁷

56 Butler and Butler, above n 39, at [17.17.1].

57 Carol A Aylward “Intersectionality: Crossing the Theoretical and Praxis Divide” (2010) 1 Journal of Critical Race Inquiry 1 at 32–33 (emphasis omitted).

58 Butler and Butler, above n 39, at [17.17.2].

59 *Law v Minister of Human Resources Development* [1999] 1 SCR 497 at [94].

60 Mary Eaton “Patently Confused: Complex Inequality and *Canada v Mossop*” (1994) 1 Rev Const Stud 203 at 229.

61 For example, see Mize, above n 47, at 41.

62 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [52].

63 *NRHA*, above n 47, at 241.

64 At 241.

65 At 245.

66 *Vallant Hooker & Partners v Proceedings Commissioner* [2001] 2 NZLR 357 (HC).

67 At [3].

The Court compared people experiencing the negative effect (the retention of their passports) to those who did not experience this effect, and found that there was no differential treatment between the different classes of clients.⁶⁸ Mize submits that the *Northern Regional Health Authority* approach is preferable because it directly focuses on the “distinctions that parallel the prohibited grounds for discrimination recognized by Parliament”.⁶⁹ Yet the application of this approach by the courts can still be unpredictable and “erratic”.⁷⁰ There is extensive literature on the inherent flaws of the comparative analysis.⁷¹ While the use of comparators within discrimination law is the orthodox approach, it is increasingly being regarded as inadequate in respect of more complicated fact situations.

(2) Intersectional tension

Finding a comparator is inherently problematic when conducting an intersectional analysis.⁷² Rather than comparing individual grounds in isolation, an intersectional approach requires the court to find a comparator for a group that claims discrimination on multiple intersecting grounds. Claimants often struggle under this approach as it is difficult to determine a single appropriate “‘mirror’ comparator”.⁷³ Therefore, the use of strict comparators “fails to explicate the intersectional nature of disadvantage based on multiple grounds”.⁷⁴ Further, this strict comparison approach is untenable in cases of intersectional discrimination because the selection of comparators is “too unprincipled and complicated”.⁷⁵ When dealing with intersectional claims, courts in overseas jurisdictions have either used a “single mirror comparator which did not share any of the personal characteristics of the claimant but was similarly situated otherwise”, or a “mirror comparator for each” individual ground.⁷⁶ Both options fundamentally disregard the complex nature of intersectional claims.⁷⁷

Degraffenreid v General Motors Assembly Division illustrates the complexities of intersectional discrimination complaints.⁷⁸ In this case, five African American women alleged that a “last hired-first fired” policy indirectly discriminated against them as Black females.⁷⁹ The Court held that this matter could only be considered on the basis of race or sex discrimination, “but not [a] combination of both”.⁸⁰ Therefore, the Court was only willing to compare Black women against white women or Black men. It is entirely conceivable that this policy would not discriminate against white women or Black men in the same way that does against Black women.⁸¹ However, the court, when conducting their

68 At [21] and [56].

69 Mize, above n 47, at 42.

70 Asher Gabriel Emanuel “To whom will ye liken Me, and make Me Equal? Reformulating the Role of the Comparator in the Identification of Discrimination” (2014) 45 VUWLR 1 at 2.

71 See Emanuel, above n 70; Suzanne B Goldberg “Discrimination by Comparison” (2011) 120 Yale LJ 728; and *Ngaronoa* (CA), above n 3, at [121].

72 Goldberg, above n 71, at 766.

73 At 736; and Atrey, above n 17, at 383.

74 Atrey, above n 17, at 382.

75 At 382.

76 At 383.

77 At 383.

78 *Degraffenreid v General Motors Assembly Division* 413 F Supp 142 (ED Mo 1976).

79 At 142.

80 At 143.

81 Atrey, above n 17, at 386.

analysis, did not treat the claimants as whole people.⁸² This case demonstrates that strict single-axis comparators in intersectional discrimination cases tend to render “the interactive nature of the sites of oppression ... invisible”.⁸³

South African jurisprudence lays out the most appropriate test for intersectional discrimination cases.⁸⁴ Courts in South Africa adopt a contextual approach, in which they:⁸⁵

... [use] a range of comparators to identify multiple grounds of discrimination and then [use] comparative evidence in relation to these to establish similar and differen[t] patterns of group disadvantage leading to unfair discrimination.

This ensures the group identities of the claimant are not fragmented but are rather viewed in a holistic manner. This can be done in two stages: first, find all possibly relevant comparators; and secondly, examine societal evidence of those comparators to determine the nature of the intersectional discrimination the claimants may have suffered.⁸⁶ Even in non-intersectional cases, the South African approach offers a more nuanced and contextual analysis of contemporary discrimination.

Adopting the South African approach, I will now turn to examine a range of possible comparator groups.

(3) Possible comparators

In this subsection, I will analyse four differing comparators: Māori prisoners and non-Māori prisoners, prisoners and non-prisoners, Māori and non-Māori, and an intersectional comparator. It is important to emphasise that, where possible, the claimants should have the prerogative to establish their chosen comparator over that of the Crown or the court.⁸⁷ This is because choosing a comparator is a “critical” exercise as it has the ability to determine the outcome of the case.⁸⁸

(a) Māori prisoners and non-Māori prisoners

This first comparator was utilised in both the *Taylor v Attorney-General* High Court judgment and *Ngaronoa v Attorney-General* Court of Appeal judgment.⁸⁹ In applying this comparator, the Court of Appeal found that there was no differential effect between Māori prisoners and non-Māori prisoners because all prisoners were affected by the legislation equally.⁹⁰ That is, all prisoners lost their right to vote. As Selwyn Fraser argues, under this comparison “[t]he statistics become immaterial: each individual Māori prisoner does not suffer more harm because there are more Māori prisoners; there are simply more Māori prisoners suffering the *same* harm.”⁹¹ While both judgments spent a greater proportion

82 Daphne Gilbert and Diana Majury “Critical Comparisons: The Supreme Court of Canada Dumps Section 15” (2006) 24 Windsor YB Access Just 111 at 134.

83 At 134.

84 *Hassam v Jacobs No* [2009] ZACC 19 as cited in Atrey, above n 17, at 390.

85 Atrey, above n 17, at 390.

86 At 393.

87 Emanuel, above n 70, at 22; and Selwyn Fraser “Māori qua what? A Claimant-Group Analysis of *Taylor v Attorney-General*” [2017] NZ L Rev 31 at note 80.

88 *Air New Zealand Ltd*, above n 62, at [34].

89 *Taylor* [2016] (HC), above n 3, at [145]; and *Ngaronoa* (CA), above n 3, at [132].

90 *Ngaronoa* (CA), above n 3, at [133]–[146].

91 Fraser, above n 87, at 46.

of their analysis on this first group, this article contends that this is a self-serving and “circular” exercise as the conclusion is inevitable.⁹² Tipping J in *Air New Zealand Ltd v McAlister* states that “[a] comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry.”⁹³ Therefore, this comparator is of no utility.

(b) Prisoners and non-prisoners

While this comparison was considered in the High Court,⁹⁴ this article submits that the prisoners and non-prisoners comparator is inherently problematic because it does not centre on the prohibited ground under which the complainants are claiming discrimination. Therefore, with the exclusion of Māori from this comparison, there is no use in discussing this application further.

(c) Māori and non-Māori

Thus far, only the Court of Appeal has considered this third proposed comparator group: whether the Māori voting population is differentially affected by s 80(1)(d) in comparison to the non-Māori voting population.⁹⁵ Arguably, this was always the claimants’ intended comparator group, as they submitted that “the disenfranchisement of Māori prisoners materially prejudices Māori voting rights”.⁹⁶ Yet, ironically this comparator was given the least attention.⁹⁷ Situated within the constraints of traditional comparator analysis, I argue that it is only under this comparator that the differential effects become evident. That is because it provides enough breadth to assess the full extent of the discriminatory impact, while also recognising the collective experience of harm for Māori. Therefore, Māori compared with non-Māori will be one of the main focuses of the subsequent discussion.

(d) Intersectional comparison

Additionally, using the contextual South African approach laid out above, I submit that Māori women as a claimant group should be compared holistically to the range of comparators discussed above. This comparison should be set within the colonial history of Aotearoa and the social context of contemporary Māori. As will be discussed further on in this analysis, the number of Māori women prisoners are increasing at exponential rates. Therefore, the potential intersectional effects s 80(1)(d) on Māori women needs to be assessed separately to ensure that appropriate weight is given to distinct forms of discrimination they may face.

C Differential effect analysis

Once the appropriate comparator has been established, the next stage of the analysis requires an examination of the differential effect the legislation has on the claimant group in comparison to the comparator group. For differential effect to be proven, the claimants must show that s 80(1)(d) of the Electoral Act differentially affects the Māori voting

92 *Atkinson*, above n 38, at [67].

93 *Air New Zealand Ltd*, above n 62, at [51].

94 *Taylor* [2016] (HC), above n 3, at [148].

95 *Ngaronoa* (CA), above n 3, at [147].

96 *Taylor* [2016] (HC), above n 3, at [121].

97 See *Fraser*, above n 87, at 46.

population, in comparison to the non-Māori voting population. Mize lays out two approaches to the differential effects requirement: (1) “complete separation” or (2) “disproportionate negative effect”.⁹⁸

The “complete separation” approach requires the claimant group to demonstrate that the groups are treated completely differently and that there is “absolutely no overlap between groups”.⁹⁹ However, the “disproportionate negative effect” approach accepts that claimant groups do not have to establish “total exclusivity” between the groups, nor do they need to show that every member of the claimant group is disadvantaged.¹⁰⁰ Rather, this approach requires that “there is a significant difference in the proportion of each group experiencing the positive or negative effect”.¹⁰¹ Therefore, under this approach a significant percentage of the group needs to experience the effect (not every member of the group). For example, the Court in *Griggs v Duke Power Company* found that a company’s promotion requirements discriminated against Black people because a greater percentage of white people met the educational standard.¹⁰² The fact that some Black people could also meet this standard did not preclude a finding of discrimination.¹⁰³

The “disproportionate negative effect” is the favoured approach,¹⁰⁴ otherwise “it would be virtually impossible to establish indirect discrimination”.¹⁰⁵ I argue that as a result of the disproportionate incarceration of Māori, which stems from both the colonial state and structural racism, s 80(1)(d) differentially affects the Māori voting population.

(1) Court of Appeal

While the Court of Appeal did not find that s 80(1)(d) differentially affects Māori prisoners compared to non-Māori prisoners, they held that there was a differential effect between Māori voters and non-Māori voters.¹⁰⁶ Winkelmann, Asher and Brown JJ considered that:¹⁰⁷

... there is a difference in the effect of s 80(1)(d) on the number in proportional terms of persons who are prohibited from voting. This flows from the fact that a considerably greater percentage of the Māori population are in prison than the percentage for other groups. The effect is that proportionally, it deprives more Māori than non-Māori of the right to vote.

From the language used in the judgment, it is clear that the Court viewed Māori voters as a collection of individuals. I argue, rather, that it is necessary to view Māori voters as an entity within their own right, to fully appreciate the collective effects of s 80(1)(d) on Māori communities. The following sections will unpack this reasoning further through a statistical analysis of the correlation between overrepresentation and differential effect.¹⁰⁸

98 Mize, above n 47, at 37.

99 At 37.

100 At 37 and 39.

101 At 39.

102 *Griggs v Duke Power Company* 401 US 424 (1971) at 429–433 as cited in Mize, above n 47, at 40.

103 At 429–433 as cited in Mize, above n 47, at 40.

104 Mize, above n 47, at 41. This approach was supported by Cartwright J in *NRHA*, above n 47, at 236.

105 Stone, above n 13, at 101.

106 *Ngaronoa* (CA), above n 3, at [147].

107 At [147].

108 For the relevance of statistics, see *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] ICR 640 at [28].

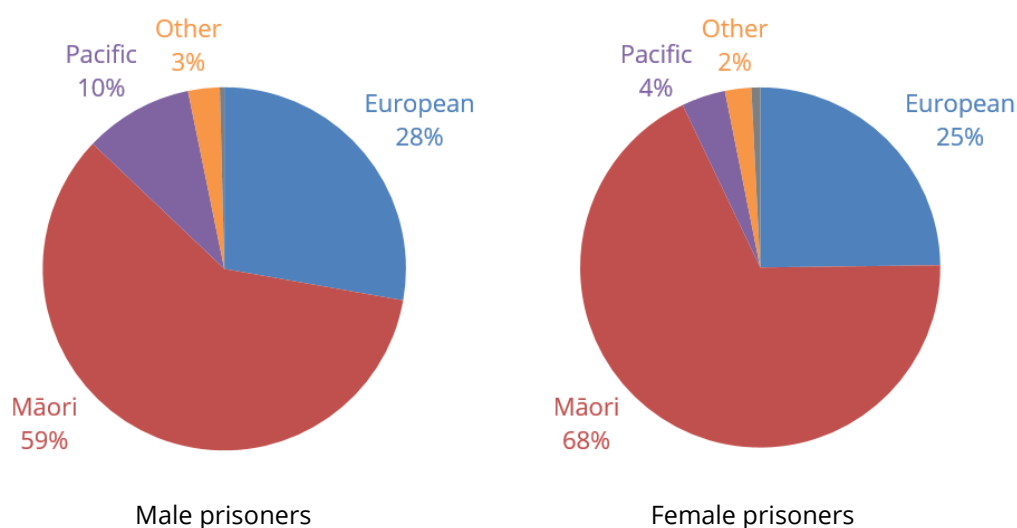
(2) Overrepresentation of Māori in prison

I submit that Māori are differentially affected by prisoner disenfranchisement because of the disproportionate number of Māori in prison. The basis for this claim lies in the overrepresentation of Māori within the criminal justice system.¹⁰⁹ The situation of overrepresentation of indigenous peoples in prison is not a new revelation, or even unique to the incarceration system in New Zealand.¹¹⁰ As of 2018, Māori made up 16.5 per cent of the New Zealand population,¹¹¹ yet recent statistics suggest they comprise over 50 per cent of the prison population.¹¹²

(a) Intersectional analysis

Figure 1 illustrates that these numbers are even more pronounced for Māori women.¹¹³ An ethnic and gendered breakdown of the annual sentenced prison population for the 2018/2019 fiscal year reveals that 68 per cent of female sentenced prisoners during that timeframe were Māori, as opposed to 59 per cent of male prisoners.

Figure 1: Ethnic and gendered breakdown of the annual sentenced prison population for the 2018/19 fiscal year



Furthermore, while the number of women in prison is significantly lower than that of men, this gendered and ethnic disparity is only increasing. Tracey McIntosh suggests that

109 Department of Corrections *Over-representation of Māori in the criminal justice system: An exploratory report* (September 2007) at 4.

110 For example, see Melinda Ridley-Smith and Ronnit Redman “Prisoners and the Right to Vote” in David Brown and Meredith Wilkie (eds) *Prisoners as Citizens: Human Rights in Australian Prisons* (The Federation Press, New South Wales, 2002) 283.

111 StatsNZ “New Zealand’s population reflects growing diversity” (23 September 2019) <www.stats.govt.nz>.

112 Department of Corrections “Prison facts and statistics — March 2020” <www.corrections.govt.nz>.

113 Data extracted from Statistics New Zealand “Annual Sentenced Prisoner Population for the latest Fiscal Years (ANZSOC)” <www.nzdotstat.stats.govt.nz>.

“the number of women in New Zealand’s prisons has increased at nearly double the rate of men”.¹¹⁴

(3) Key factors for overrepresentation

A myriad of factors play into these figures, and I will explore two main aspects: the colonial state and structural racism. In the alternative, some may consider that there is no causal link between the prohibited ground and the effect. More specifically, some may agree with Fogarty J, that it is mere “happenstance” Māori are overrepresented in prisons.¹¹⁵ In response, I argue that weight must be given to a recent United Kingdom Supreme Court decision, which held that in cases of indirect discrimination it was not necessary to prove causation.¹¹⁶ To be precise, indirect discrimination relies on the use of statistics to demonstrate correlation between the legislation and the disadvantage, rather than causation.¹¹⁷

(a) Colonial state

These statistics need to be read through a historical lens that recognises New Zealand’s colonial history and the impact of colonisation on Māori communities. The colonial state refers to “the underlying continuity of a colonial regime of governance, law, property rights, economy, and social structures that spans the formal assertion of Crown sovereignty in 1840 to the present day”.¹¹⁸ Globally, colonisation has constrained and restricted the lives of many indigenous peoples, for whom the European institution of the prison operates to further exclude and marginalise those that are most vulnerable.¹¹⁹ More broadly, the colonial state continues to disrupt Māori social structures. For example, using statistics from 2011–2012, the Ministry of Health found that 12.4 per cent of Māori experienced “unfair treatment on the basis of ethnicity” compared to 4.2 per cent of non-Māori.¹²⁰

(b) Structural racism

Aside from the existence of colonial inequality, the New Zealand criminal justice system is impacted by systemic institutionalised racism. As Moana Jackson explains, the criminal justice system does not “exist in isolation from the society it serves”¹²¹ and therefore, recognition of the structural racism embedded in this system is imperative in this legal analysis. At all stages within the criminal justice system, Māori are also disproportionately

114 Tracey McIntosh “Marginalisation: A Case Study: Confinement” in Tracey McIntosh and Malcolm Mulholland (eds) *Māori and Social Issues* (Huia Publishers, Wellington, 2011) 263 at 265.

115 *Taylor* [2016] (HC), above n 3, at [147].

116 *Essop*, above n 108, at [25].

117 At [25] and [28]; and see Fredman, above n 46, at 233–239.

118 Jane Kelsey “Māori, Te Tiriti, and Globalisation: The Invisible Hand of the Colonial State” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Victoria, 2005) 99 at note 2.

119 See McIntosh, above n 114, at 263–264.

120 Ministry of Health *Tatau Kahukura Māori Health Chart Book 2015* (3rd ed, Ministry of Health, Wellington, 2015) at 15.

121 Moana Jackson *The Māori and the Criminal Justice System: A New Perspective — He Whaipanga Hou* (Policy and Research Division Department of Justice, Wellington, 1987) at 10.

represented.¹²² Using the structural discrimination thesis, it becomes clear that this is not a coincidence.

First, there are more Māori in prison because they are structurally discriminated against by the police. Māori are 3.3 times more likely to be arrested in relation to an offence, 3.8 times more likely to be prosecuted, and 3.9 times more likely than non-Māori to be convicted of an offence.¹²³ An internal police report signals that there is “unconscious” bias towards Māori in policing,¹²⁴ which may be seen specifically in racial profiling and hyper-surveillance of certain neighbourhoods.¹²⁵ While this report is more than 20 years old, a recent Court of Appeal decision suggests that racial bias continues to be present in policing.¹²⁶ This decision also recognised that s 19 must be applied in the “real world” where unconscious bias “can lead to unstated collective assumptions that inveigle their way into strategic decisions and organisational culture”.¹²⁷

Secondly, there are more Māori in prison because they are structurally discriminated against by the courts. Māori are seven times more likely to be given a custodial sentence on conviction.¹²⁸ Furthermore, Māori are less likely than non-Māori to receive fines (and therefore more likely to be sentenced) for the same conviction because they represent a significant portion of “people who are unemployed or financially unstable”.¹²⁹ The granting of home detention serves as an illustration of the structural racism present with the criminal justice system. At sentencing, Māori are less likely to be granted home detention than non-Māori.¹³⁰ Therefore, two people who were convicted of the same offence could have vastly different penal outcomes, arguably on the basis of their ethnicity. One could be sentenced to home detention and retain their right to vote while the other could be sentenced to prison and consequentially be deregistered from the electoral roll.¹³¹

(4) Effects of the amendment

The following Figures 2 and 3 visually illustrate the effects of the Amendment Act 2010 on the Māori voting population.¹³² Figure 2 demonstrates a sharp increase in the percentage of Māori removed from the electoral roll after the introduction of the new

122 Khylee Quince “Maori and the criminal justice system in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 334.

123 At 334.

124 Gabrielle Maxwell and Catherine Smith *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri* (Institute of Criminology Victoria University of Wellington, March 1998) at 36.

125 Department of Corrections, above n 109, at 15.

126 *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [25].

127 At [24].

128 Quince, above n 122, at 334.

129 At 335.

130 Department of Corrections, above n 10, at 51 as cited in Department of Corrections, above n 109, at 24–25.

131 This issue was raised by Lianne Dalziel MP. See (10 November 2010) 668 NZPD 15185.

132 The data in Figures 2 and 3 came from two sources: R Gavey “Number of prisoners disqualified by s 80(1)(d)” (2 August 2018) (obtained under Official Information Act 1982 request to the Electoral Commission); and Letter from the Electoral Commission to Kate Stone (6 May 2015) (obtained under Official Information Act 1982 request to the Electoral Commission) as cited in Stone, above n 13, at 99–100.

blanket legislation at the end of 2010.¹³³ From 2011 onwards, on average, Māori represent 59 per cent of sentenced prisoners who are removed from the electoral roll. From this data, it is evident that a disproportionate number of Māori compared to non-Māori are disenfranchised by the legislation.

Figure 2: Māori as a proportion of all prisoners deregistered

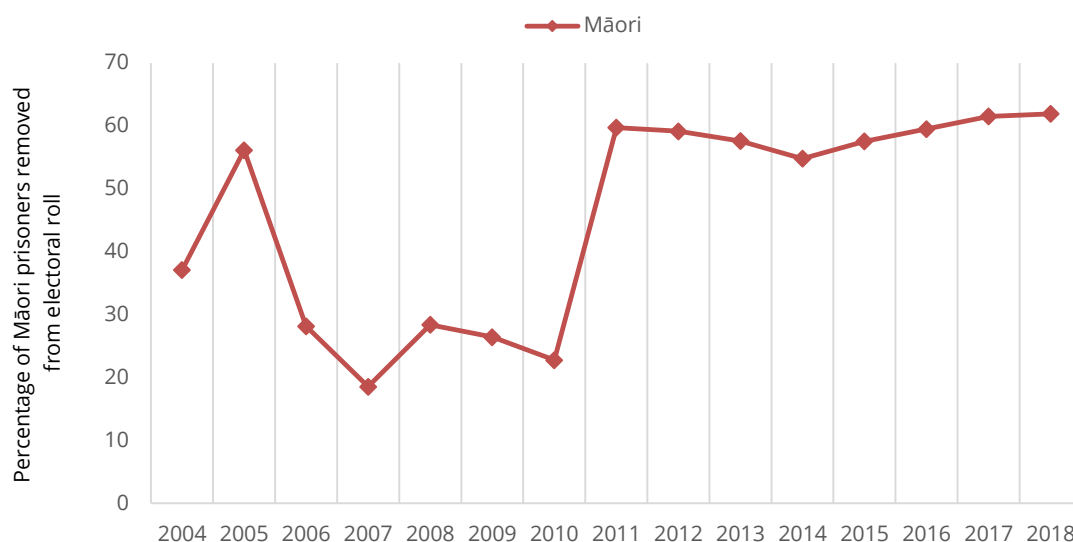
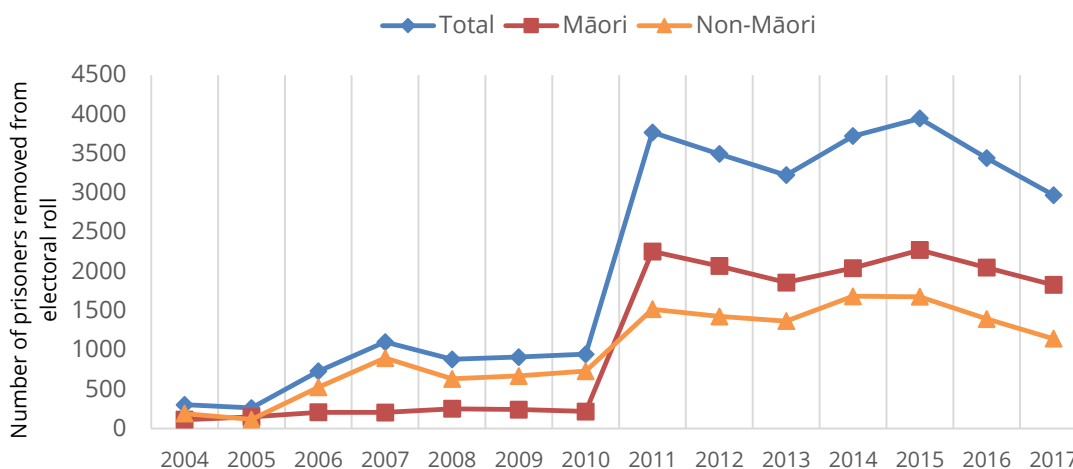


Figure 3 illustrates an ethnic breakdown of the number of prisoners removed from the electoral roll from 2004–2017. Before the Amendment Act 2010, there were hundreds of prisoners removed from the electoral roll and non-Māori were removed on a consistent basis. After the Amendment Act 2010, not only does the amount of prisoners affected by the legislation dramatically increase, so too does the proportion of Māori.

Figure 3: Number Of Deregistered Prisoners



133 The Electoral Commission does not hold data on the number of prisoners affected by the legislation who were never enrolled on the electoral roll. Therefore, the data in both Figures 2 and 3 only plots the percentages of prisoners who were originally enrolled and then were subsequently removed from the roll after being imprisoned.

Considering an intersectional analysis, I argue that the Amendment Act 2010 disproportionately discriminates against wāhine Māori. This is because in 2012, 94 per cent of imprisoned women served sentences of less than three years, as opposed to 88 per cent of men.¹³⁴ Furthermore, “Māori women are even more disenfranchised with 58 per cent of the female prison population identifying as Māori”.¹³⁵ Therefore, Māori women are more affected by the Amendment Act 2010 because they “bear [the] disproportionate level of that disenfranchisement”.¹³⁶

From these figures, it is clear that the Amendment Act 2010 has a differential effect on Māori, in particular, Māori women. I agree with the Court of Appeal that the legislation differentially impacts the Māori voting population because of the overrepresentation of Māori in prison.¹³⁷

VII Stage Two: Material Disadvantage

The general acceptance of a differential impact on Māori leads onto the next stage of the inquiry: material disadvantage. To succeed in a discrimination case in New Zealand, claimants need to demonstrate that the differential effect has a material disadvantage on the claimant group.¹³⁸ In this case, the claimants need to demonstrate that the removal of prisoners’ voting rights materially disadvantages the whole Māori voting population. Material disadvantage means claimant groups must suffer disadvantage that is “real” or “more than trivial”.¹³⁹

The Court of Appeal considered that the blanket disenfranchisement provision did not materially disadvantage the Māori voting population because of the overall small number of people imprisoned.¹⁴⁰ The Court claimed that less than one percent of both the Māori and non-Māori voting community is imprisoned, therefore the impact of disenfranchisement on the electoral outcome is too small.¹⁴¹ While the Court claimed to analyse the “downstream effects of the policy on Māori voters”,¹⁴² little evidence of this analysis is apparent from the judgment. I submit that the Court of Appeal’s conclusion demonstrates two key points. First, a lack of understanding of the broader communal impacts of disenfranchisement within society and, secondly, that the materiality dimension of the requirement sets the standard too high at this stage in the inquiry.

134 Margaret Wilson and Julia Amua Whaipooti “Commentary on *Taylor v Attorney-General* Disengaging the Disengaged: The Case of Prisoner Voting” in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017) 53 at 59.

135 At 60.

136 At 59.

137 *Ngaronoa* (CA), above n 3, at [147].

138 *Atkinson*, above n 38, at [109] and [135]–[136].

139 *Child Poverty Action Group Inc v Attorney-General* (2011) 9 HRNZ 687 (HC) [*CPAG* (HC)] at [81]. This was affirmed in *Atkinson*, above n 38, at [109] and [135]–[136].

140 *Ngaronoa* (CA), above n 3, at [148]–[149].

141 At [148]. In 2017, the total number of Māori enrolled to vote was 474,798 and the number of Māori imprisoned was roughly 5,308. This is slightly above one per cent. See Department of Corrections “Prison facts and statistics - September 2017” <corrections.govt.nz>; and Electoral Commission “2017 General Election: Voter turnout statistics for the 2017 General Election” (2017) <elections.org.nz>.

142 *Ngaronoa* (CA), above n 3, at [148].

Given the requirement of material disadvantage is only Court of Appeal authority,¹⁴³ there is room to challenge whether this threshold is too onerous for claimants. There is disagreement about the extent of the disadvantage required to count as indirect discrimination.¹⁴⁴ Two possible approaches have been discussed within the New Zealand context. Some have argued for a “neutral” understanding of discrimination, in which claimants only need to show there was a differentiation made on a prohibited ground that causes disadvantage.¹⁴⁵ An example of this approach is s 19(2)(b) of the UK Equality Act 2010, which only requires proof of “particular disadvantage”.¹⁴⁶ The extent of the disadvantage would then only be assessed at the justification stage, to ensure that all claims receive due consideration before the courts entered into a proportionality analysis.

On the other hand, others have endorsed a “purposive” approach to defining discrimination, in which s 19 of the NZBORA only protects against invidious differential treatment.¹⁴⁷ Canada has adopted a purposive approach by requiring the differential treatment to violate “human dignity”.¹⁴⁸ Some commentators argue the purposive approach enables a “justification creep”.¹⁴⁹ In a New Zealand context this would mean factors that are meant to be considered at the s 5 stage of the inquiry would creep into the s 19 analysis, thereby ruling out discrimination claims before sufficient examination has occurred.¹⁵⁰

The Court in *Atkinson* favoured the neutral approach because of its “simplicity” and the importance given to “differentiation” in New Zealand’s statutory scheme.¹⁵¹ However, I argue that by requiring disadvantage to be material, New Zealand courts have, in effect, adopted a purposive approach to discrimination because it requires an assessment of the extent of the discrimination. This is apparent from the Court of Appeal’s reasoning in *Ngaronoa*. The requirement of materiality in practice operates to add a proportional element at this stage of the inquiry, which should instead be considered in the s 5 analysis.

As a result, I argue that we should adopt a truly “neutral” approach, similar to that of the United Kingdom, which only requires claimants to demonstrate “particular disadvantage” under s 19 of the Equality Act 2010. In New Zealand this disadvantage would then be qualified under the s 5 justification analysis, where the courts would conduct a proportional test to assess the extent of the discrimination that occurred. If this approach was adopted, I argue that the statistical analysis conducted in Part VI would be sufficient to demonstrate disadvantage. In the alternative, I argue that even with the *Atkinson* requirement, Māori are materially disadvantaged by the blanket ban on prisoner voting.

143 *Atkinson*, above n 38, at [109] and [135]–[136].

144 Tarunabh Khaitan *A Theory of Discrimination Law* (Oxford University Press, Oxford, 2015) at 75.

145 Julia Adams “Breaking the Constitution: Discrimination Law, Judicial Overreach and Executive Backlash After *Ministry of Health v Atkinson*” [2016] NZ L Rev 255 at 264; and the neutral approach is preferred by Butler and Butler, above n 39, at [17.10.42]–[17.10.46].

146 Khaitan, above n 144, at 75.

147 Adams, above n 145, at 264; and Rishworth and others, above n 33, at 385–386.

148 *Law v Minister of Human Resources Development*, above n 59, at [88]; and Daphne Gilbert “Time to Regroup: Rethinking Section 15 of the Charter” (2003) 48 McGill LJ 627 at 635–636.

149 See Hart Schwartz “Making Sense of Section 15 of the Charter” (2011) 29 NJCL 201 at 217.

150 Emanuel, above n 70, at 4; and *Atkinson*, above n 38, at [132].

151 *Atkinson*, above n 38, at [112] and [131].

A *Material disadvantage analysis*

I will explore two aspects that intersect to accumulate to material disadvantage: intergenerational impacts and the accumulative effects of deregistration.

(1) Intergenerational impacts

The central challenge to the Court of Appeal's conclusion is the recognition of the intergenerational effects disenfranchisement can have on communities, especially those who have already suffered under colonisation.¹⁵² Khylee Quince stresses the importance of recognising the collective nature of tikanga Māori, which means the entire community is also affected by the offending.¹⁵³ Therefore, to assume that disenfranchisement only affects the individual person sentenced to prison is culturally insensitive and fails to view Māori voters as a collective entity. The courts must comprehend that "individuals are not wholly autonomous beings who exist in a vacuum: they are also members of communities whose behavior and attitudes influence those around them".¹⁵⁴

Furthermore, a study of prisoner disenfranchisement in the United States demonstrated the significant effects of individual disenfranchisement on entire communities to which that individual belongs.¹⁵⁵ Voting is a habit that likely requires instigation at a young age. As children are influenced by the behaviours of those around them,¹⁵⁶ it follows that children of disenfranchised prisoners would be less likely to establish a habit of voting. Disenfranchising Māori prisoners, in particular, affects their wider whānau and works to further exclude Māori communities from democratic participation.¹⁵⁷

I submit that the "collateral effects" of incarceration "reverberat[e] along the radiating threads of social relationships and connections".¹⁵⁸ Individual incarceration should be viewed as a collective experience, in which prisoner disenfranchisement impacts their whole community. Once viewed within this context, the numbers game played by the courts becomes less relevant. The number of individuals disenfranchised does not illustrate the wider network of people affected by this legislation and the reverberating intergenerational impacts prisoner disenfranchisement will have on the electoral map.

(2) Accumulative effects of deregistration

Once a person is sentenced to prison, they are removed from the electoral roll and the onus is placed on that individual to re-enrol upon their release. This is arguably an extra punitive burden on prisoners, in a society that already struggles to get people to enrol. The legislation, therefore, has a cumulative effect because as more prisoners get released, more of the eligible voting population becomes unenrolled. The process of re-enrolling

152 Quince, above n 122, at 335.

153 At 340.

154 Aman McLeod, Ismail K White and Amelia R Gavin "The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform" (2003) 11 Va J Soc Pol'y & L 66 at 71.

155 At 80-81.

156 At 71.

157 Pirini and Yarwood "*Taylor v Attorney-General*" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017) 62 at [121]-[122].

158 McIntosh, above n 114, at 273.

can be daunting and requires a certain level of political will, which may be uncommon among prisoners who may understandably distrust state and political processes.¹⁵⁹ Māori have a lower trust in the government than non-Māori (44 per cent as opposed to 29 per cent)¹⁶⁰ and therefore, their incentive to vote in elections is arguably already less. Additionally, a 2011 survey shows that 26.8 per cent of Māori, in comparison to 16.8 per cent of New Zealand Europeans, self-identified as non-voters.¹⁶¹

Figure 4: Proportion of Enrolled Population that Voted in 2017 General Election

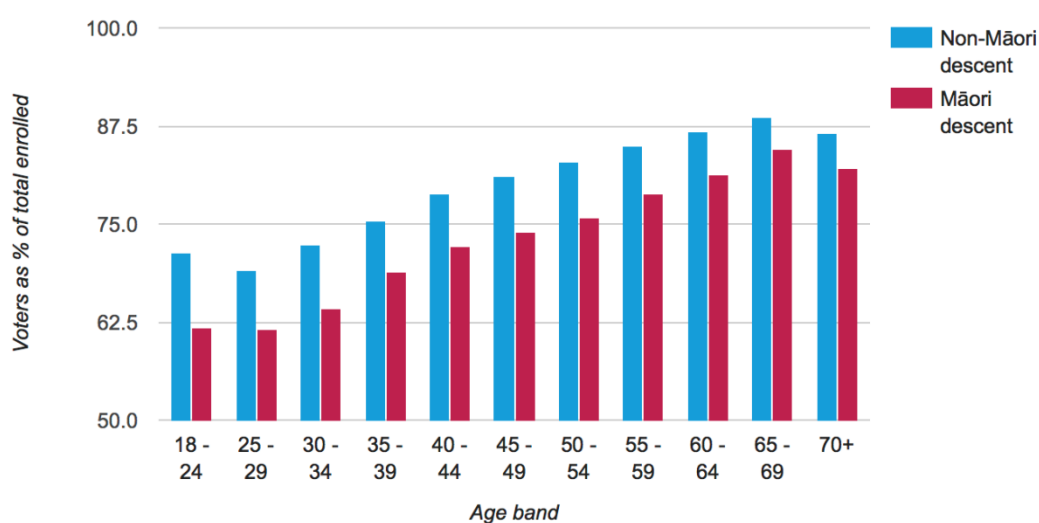


Figure 4 illustrates that at all ages brackets, Māori are less likely to vote than non-Māori.¹⁶² Some may argue that because Māori are already less likely to vote, they are not materially disadvantaged by the blanket disenfranchisement of prisoners. I argue in response that, as illustrated by Figure 2, a large number of Māori affected by this legislation had previously been registered on the electoral roll and would most likely have been ready to vote but for their disenfranchisement. Therefore, the main concern is that once released from prison, Māori may face barriers re-enrolling for numerous reasons. For example, Māori prisoners are more likely to have limited literacy skills compared to non-Māori prisoners, thereby making re-enrolling an even more onerous task.¹⁶³ I argue that this culminates in a disproportionately weakened Māori voting bloc,¹⁶⁴ and in turn, exacerbates the intergenerational effects.

159 See McLeod, White and Gavin, above n 154, at 70.

160 Stats NZ *Voting and political participation* (January 2018) at 7.

161 Statistics New Zealand *Non-voters in 2008 and 2011 general elections: Findings from New Zealand General Social Survey* (January 2014) at 9.

162 Electoral Commission, above n 141.

163 See *Taylor* [2016] (HC), above n 3, at [123].

164 Fraser, above n 87, at 47.

(3) Intersectional analysis

Māori women prisoners experience substantially different effects of the Amendment Act 2010, shaped by their “gendered role in society”.¹⁶⁵ For example, women are often the primary caregivers of children and therefore, play a crucial role in shaping their children’s expectations of societal practices.¹⁶⁶ In particular, within te ao Māori, Māori women are seen “as *whare tangata* (procreators) and as *whare mātauranga* (repositories of knowledge)”.¹⁶⁷ As the “primary nurturer”, they play crucial roles in transmitting knowledge to their children “as well as helping to shape and form their futures”.¹⁶⁸ If we accept this view of women as imparters of knowledge, disallowing women prisoners from voting risks material disadvantaging future generations, as they would not have been exposed to voting from an early age. Furthermore, Māori women tend to have less education than Māori men,¹⁶⁹ meaning the burden of re-enrolling could arguably be even greater for Māori women.

As it is a legal requirement for 18 year olds to be registered on the electoral roll,¹⁷⁰ young people are actively encouraged to do this when they are in secondary school or while living in their childhood home. Conversely, little to no emphasis has been placed on helping those released from prison to re-enrol. Therefore, it is likely only those with sufficient social capital and strong desire to participate will re-enrol to vote. Denying people in prison the right to vote may continue materially disadvantage groups who need this voice the most.

B Outcome of materiality assessment

I have argued that the material disadvantage requirement laid out in *Atkinson* places undue burdens and restrictions on potential claimants. I proposed that New Zealand courts should instead step in line with United Kingdom jurisprudence, which leaves an assessment of the extent of disadvantage to the justification analysis. Even if the courts continued to require material disadvantage, I have demonstrated that the discrimination occurring under s 80(1)(d) of the Electoral Act would meet this threshold because of its wider community and intergenerational impacts. This is not a radical proposition, indeed the Human Rights Commission, as well as other commentators, have also argued that the blanket disenfranchisement legislation materially disadvantages Māori communities.¹⁷¹ I will now consider whether the discrimination effects of s 80(1)(d) are justifiable under s 5 of the NZBORA.¹⁷²

165 Wilson and Whaipooti, above n 134, at 60.

166 At 60.

167 Paulé Aroha Ruwhiu “Ka haere tonu te mana o ngā wahine Māori: Māori women as protectors of te ao Māori knowledge” (MSW Thesis, Massey University, 2009) at ii.

168 At 8.

169 Quince, above n 122, at 349.

170 Electoral Act 1993, s 82.

171 Human Rights Commission “Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Bill” at [5.8]; and Stone, above n 13, at 102.

172 Neither the High Court nor the Court of Appeal conducted a s 5 analysis for this legislation.

VIII Stage Three: s 5 Justification

Section 5 of the NZBORA provides:

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

This means that any government action that discriminates on the basis of a prohibited ground needs to “be capable of objective justification”.¹⁷³ Tipping J, in *R v Hansen*, set out the orthodox approach to s 5 of the NZBORA:¹⁷⁴

- (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right ... ?
- (b)
 - (i) is the limiting measure rationally connected with its purpose?
 - (ii) does the limiting measure impair the right ... no more than is reasonably necessary for sufficient achievement of its purpose?
 - (iii) is the limit in due proportion to the importance of the objective?

The onus is on the Crown to demonstrate that the prima facie discrimination is justifiable in these circumstances.¹⁷⁵ I argue that the s 5 analysis needs to be used with awareness of the specific context of the particular right, in this case, freedom from discrimination. The standard of justification required should be “tailored” to the context and “invidious” discrimination should require greater justification.¹⁷⁶ Neither the High Court nor the Court of Appeal conducted a s 5 analysis of s 80(1)(d), instead they ended their judgments after concluding that the requirement for material disadvantage was not met.¹⁷⁷

A Purpose

The *Hansen* test requires that s 80(1)(d) serves a sufficiently important objective to justify infringing the right to be free from discrimination.¹⁷⁸ The main objective of the provision is to disenfranchise all people who have been convicted and imprisoned for a serious crime against their community,¹⁷⁹ thereby punishing those who have broken the social contract. Social contract theory describes the “obligations on citizens ‘to respect and obey the state, ultimately in gratitude for the stability and security that only a system of political rule can deliver’”.¹⁸⁰ Proponents of this theory would argue that disenfranchising

173 Butler and Butler, above n 39, at [17.10.45].

174 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

175 *CPAG* (HC), above n 139, at [130]; and *CPAG* (CA), above n 40, at [91].

176 Adams, above n 145, at 278.

177 For a s 5 proportionality analysis in terms of the right to vote, see Pirini and Yarwood JJ, above n 157.

178 *Hansen*, above n 174, at [104].

179 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (Order of the House of Representatives, 2010) at [3].

180 Robins, above n 10, at 189.

prisoners can be justified because by committing a crime they have breached their social obligations.¹⁸¹

As the Human Rights Commission notes, s 80(1)(d) “can only be seen as punitive and is scarcely conducive to rehabilitation”.¹⁸² Prisoners should be encouraged to engage with the wider community to help rehabilitation. Instead, s 80(1)(d) works to silence prisoners’ voices and does not recognise that “[i]ncarceration does not insulate prisoners against the effect of the policies of the government of the day.”¹⁸³ In *Sauvé*, the Canadian government argued that the primary objectives of the blanket disenfranchisement of prisoners were civic responsibility and punishment.¹⁸⁴ The Court considered that these objectives were insufficiently particular to justify infringing the right to vote.¹⁸⁵ Furthermore, social contract theory “presuppose[s] that all members of society are treated equally by the state”¹⁸⁶ but this ignores the ways in which unconscious bias manifests in our legislation. Disenfranchising prisoners only serves to further exclude and alienate already disempowered members of society.¹⁸⁷ Additionally, deterrence could also be viewed as an apparent objective, yet this clearly does not meet the required threshold of “sufficiently important”¹⁸⁸ because as numerous commentators have noted, “disenfranchisement has no proven deterrent effect”.¹⁸⁹

B *Rational connection*

I submit that there is no rational connection between s 80(1)(d) and the purported objectives. A rational connection requires the Crown to prove that the legislation is rationally connected to the particular objective, and is therefore not based on irrational or arbitrary considerations.¹⁹⁰ Section 80(1)(d) denies all prisoners the right to vote, irrespective of their personal circumstances, the nature of their offending or the length of their sentence.¹⁹¹ This means that disenfranchisement is based not on the criminal offending, but rather on imprisonment itself. Heath J illustrates this point by stating that the decision to impose a sentence of imprisonment rather than “home detention depends on a judicial evaluation of a broad range of factors; not just the seriousness of the crime committed”.¹⁹²

Furthermore, it seems irrational that there are different effects of imprisonment for a person who is sentenced for one week during an election, and another person who is sentenced for two years between elections. People in prison during an election are “affected by the measure in a much harsher way purely because of the timing of their period of imprisonment”.¹⁹³ Therefore, I argue that the blanket disenfranchisement of prisoners is arbitrary and disproportionate to the purpose of punishing those who have

181 Alex Mackenzie “Lock Them Up and Throw Away the Vote: Civil Death Sentences in New Zealand” (2013) 19 Auckland U L Rev 197 at 200.

182 Human Rights Commission, above n 171, at [2.11].

183 Pirini and Yarwood JJ, above n 157, at [114].

184 *Sauvé*, above n 29, at [21].

185 At [28]–[53].

186 Pirini and Yarwood, above n 157, at [110].

187 Human Rights Commission, above n 171, at [6.5].

188 At [4.3].

189 At [2.10]; Robins, above n 10, at 185; and Mackenzie, above n 181, at 211.

190 *Hansen*, above n 174, at [104].

191 Human Rights Commission, above n 171, at [4.7].

192 *Taylor* [2015] (HC), above n 1, at [34].

193 Pirini and Yarwood, above n 157, at [94].

committed serious offences. The Attorney-General also reached the same conclusion in his s 7 report,¹⁹⁴ and the Canadian Supreme Court also deemed that blanket disenfranchising provisions are “not rationally connected to the goal of imposing legitimate punishment”.¹⁹⁵

C *Minimal impairment*

The next step in the s 5 analysis requires an assessment of whether the infringing legislation impairs the right to be free from discrimination, no more than is reasonably necessary to achieve its objective. It flows that courts must decide whether the limiting measure “fell within a range of reasonable alternatives”.¹⁹⁶ Tipping J states that the limiting provision must be “no greater than is reasonably necessary to achieve Parliament’s objective”.¹⁹⁷

The process through which the Amendment Act 2010 was passed is highly contentious. It is controversial whether this stage of the inquiry should consider deficiencies in the policymaking process. Some argue that when conducting a minimal impairment analysis, the absence of good legislative process is one “relevant factor” to be considered.¹⁹⁸ Whereas, others argue that s 5 focuses “on the substantive limits that government can impose on a fundamental right” rather than whether the limiting measure was passed with due process.¹⁹⁹ While recognising this debate, I argue that the legislative process provides the necessary background against which the justification assessment should take place. Furthermore, the legislative process should be a relevant factor to whether the court should give any deference to Parliament.

The Electoral (Disqualification of Convicted Prisoners) Amendment Bill was considered by the Law and Order Committee, instead of the Justice and Electoral Committee. This was regarded as unusual by opposing parliamentarians who believed the Department of Corrections lacked knowledge of electoral legislation.²⁰⁰ Furthermore, despite the fact that 51 out of the 53 submissions opposed the Bill, it passed 63 to 59, along the party line vote.²⁰¹

Throughout this legislative process various alternative options available to the government were not considered. Possible alternatives included a limited disenfranchising provision for only serious offences or a case-by-case approach determined by judges at sentencing.²⁰² However, it is important to note the Supreme Court of Canada found that even a limited ban did not meet the minimal impairment requirement because the cut off points—for example, three years or more—are often arbitrary.²⁰³ Furthermore, the resultant provision does not come under the range of reasonable alternatives because its effects are significantly more wide-reaching than necessary to achieve its intended purpose.

194 Finlayson, above n 179, at [15].

195 *Sauvé*, above n 29, at [51].

196 *Atkinson*, above n 38, at [151].

197 *Hansen*, above n 174, at [126].

198 *CPAG (CA)*, above n 40, at [108]; Max Harris “Justified discrimination” (2013) 10 NZLJ 363 at 365; and see *Hirst*, above n 29, at [79].

199 Adams, above n 145, at 285 (emphasis omitted).

200 (10 November 2010) 668 NZPD 15197.

201 Geddis, above n 5, at 68.

202 Stone, above n 13, at 106.

203 *Sauvé*, above n 29, at [55].

D *Proportionality*

The last step of the s 5 analysis asks the court to consider whether the infringing provision is in due proportion to the importance of the objective.²⁰⁴ This requires a weighing exercise, in which the impact of the law and right are balanced against each other.²⁰⁵ More specifically, the severity of the limit and the importance of the right need to be assessed against the importance and effectiveness of the limiting measure.²⁰⁶

While the Court of Appeal considered that s 80(1)(d) only affects a small proportion of voters, I argue that the extent of the disadvantage suffered by Māori, as set out in Part VII, has such profound intergenerational impacts, therefore, requiring a high level of justification. First, the blanket nature of s 80(1)(d) disproportionately affects those sentenced to prison for reasonably short periods (namely Māori women) compared to those who are granted home detention. Therefore, the objective of punishing those who commit serious crimes is not effective, as there is no correlation between disenfranchisement and the nature of the crime committed.

Secondly, blanket disenfranchisement cannot be justified, especially when considering the importance of New Zealand places on equality within the democratic process. Section 80(1)(d) hinders political participation, which is fundamental to a democracy. This is particularly important for Māori, and more specifically Māori women, whose voices are often silenced by the Pākehā majority. Thirdly, the right to be free from discrimination is a basic political right in a liberal democracy, and this right cannot be reasonably limited for the purpose of punishment or deterrence, both of which s 80(1)(d) fails to achieve. Therefore, I conclude that s 80(1)(d) is an unjustifiable limit on the right of Māori to be free from discrimination.

IX Conclusion

I have argued that s 80(1)(d) of the Electoral Act indirectly discriminates against Māori, and in particular, Māori women. Considering the historical context in which this legislation operates, I have argued that s 80(1)(d) differentially affects the Māori voting population because of the overrepresentation of Māori in prison, due to continuing existence of the colonial state and structural racism. This differential impact materially disadvantages Māori because of the profound intergenerational and accumulative effects of deregistration. Lastly, I have demonstrated that there is no rational justification for s 80(1)(d).

Further, I have illustrated how intersectional theory can be used to shine light on the complexities within discrimination law and, more importantly, how colonial and structural discrimination continues to affect Māori communities. I have argued that the disadvantage Māori women prisoners suffer through blanket disenfranchisement is qualitatively distinct and deserves separate analysis to fully unpack all the intersectional claims.

Throughout this article, I have also drawn attention to and commented some of the debated sections within discrimination law, namely, the use of comparators and the *Atkinson* requirement for material disadvantage. I have argued that New Zealand should

204 *Hansen*, above n 174, at [104].

205 *CPAG (CA)*, above n 40, at [136].

206 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 283–284.

use comparators within a more holistic framework and that the extent of the disadvantage should instead be assessed during the s 5 analysis. The aim of this article has been to generate further discussion on the validity of s 80(1)(d) and ultimately, encourage the government to reconsider this discriminatory and undemocratic policy.