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Inside outcasts: prisoners and the right to vote in Australia

Should prisoners have the right to vote? This question is being debated in the Australian Parliament in relation to a proposal to deny the vote to all prisoners. This Current Issues Brief considers the arguments commonly used for and against the disenfranchisement of prisoners, both in Australia and internationally. The question gives rise to a more fundamental one—whether, and to what extent, the right to vote is protected under the Constitution.

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Introduction

The denial of civil rights to convicted felons has ancient origin. It is a product of the idea that commission of an offence divests a person of property and legal rights.¹ Those felons who did not suffer death by execution would nevertheless suffer ‘civil death’, the idea of which was to:

emulate the results natural death would produce, e.g., succession would be opened. The ‘civilly dead’ could not transmit upon intestacy or by will, or receive gifts. All family and political rights were forfeited.²

Though the death penalty has been abolished in all Australian jurisdictions, a form of ‘civil death’ remains, for some, a consequence of conviction. Prisoners serving sentences of five years or longer in respect of convictions for offences against Australian federal, state or territory laws are prohibited from voting at federal elections.³ State jurisdictions also provide for disenfranchisement on varying grounds in state elections.⁴

The Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004,⁵ currently before the Commonwealth Parliament, proposes to remove the right to vote in federal elections from all prisoners ‘serving a sentence of full-time detention’.⁶ That definition would include all persons serving a sentence, except those serving periodic detention or parole or other early release schemes. It would not, by definition, include those being held on remand.

The removal of prisoners’ voting rights has been a controversial issue both in Australia and internationally. This paper traces the history of the Australian provisions and examines their effect. Arguments offered on both sides of the debate in Australia will be considered, before looking at similar debates, and their resolution in the constitutional provisions and courts, in Canada, Europe and the United States. The paper will then consider Australian law with particular reference to whether the Australian Constitution affords any protection to the right to vote, and, if so, whether that protection extends to the right of prisoners to vote.

Prisoner disenfranchisement in Australia

The *Commonwealth Franchise Act 1902* disqualified from voting those convicted and under sentence ‘for any offence punishable by imprisonment for one year or longer’.⁷ The provision remained substantially the same when the *Commonwealth Electoral Act 1918* was enacted, and so it stood until 1983, when the disqualification was amended to apply to persons ‘under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for five years or longer’.⁸ Note that this provision, and its predecessor, apply to offences *punishable by* a given period. That is not necessarily (in fact, is usually not) a reference to the actual period being served by the prisoner. For example, a prisoner might be serving a sentence of three months imprisonment, but in respect of an offence carrying a maximum penalty of five years or longer, in which case

they would not, under this provision, be entitled to vote. That changed in 1995 when the current provision was introduced, excluding from the franchise persons ‘*servi*ng a *sentence* of 5 years or longer’.⁹ The effect of the introduction of that provision was to reduce the numbers of prisoners disqualified from voting. Nevertheless, the current provision disenfranchises around 11 000 prisoners.¹⁰

The number of prisoners disqualified would increase to about 17 875 if the proposed provision—to exclude all prisoners serving a full time sentence—was enacted.¹¹ That is an increase of 6864 from the number currently affected. This does not include the indirect effect that the proposed amendment would have on the entitlement to vote in state and Territory elections. In Queensland, the Australian Capital Territory and the Northern Territory, entitlement to vote at elections is tied to qualification to vote at federal elections.

It should be noted that, because the over-representation of Indigenous prisoners in the Australian prison population, prisoner disenfranchisement has a disproportionate effect on them. Indigenous persons are 16 times more likely to be in prison than non-Indigenous persons.¹² The representation of Indigenous persons among Australian prisoners has increased from 15 per cent in 1993 to 20 per cent in 2003.¹³ In June 2003 there were around 1173 Indigenous prisoners denied the right to vote and, if the proposed provision had been in effect then, that number would have been 3747.¹⁴

Movements for reform

Broadly speaking, there are two opposing movements for the reform of the law regulating the entitlement of prisoners to vote. One group fosters an inclusive approach to prisoner involvement in the political process; the other, an exclusive or restrictive doctrine. In its report on the 1993 federal election, the Joint Standing Committee on Electoral Matters (JSCEM) adopted the recommendation of its predecessor to the effect that all prisoners, except those convicted of treason, be granted the right to vote.¹⁵ The reasons that the JSCEM found persuasive were:

An offender once punished under the law should not incur the additional penalty of loss of the franchise. We also note that a principle aim of the modern criminal law is to rehabilitate offenders and orient them positively toward the society they will re-enter on their release. We consider that this process is assisted by a policy of encouraging offenders to observe their civil and political obligations.¹⁶

The JSCEM report on the 1998 election noted that the majority of the committee supported the previous recommendation, but it stopped short of making a recommendation to that effect on the basis that public support was lacking.¹⁷ Those supporting the removal of all restrictions on prisoners voting rights include the International Commission of Jurists,¹⁸ the Criminal Law and Penal Methods Reform Committee of South Australia,¹⁹ the Seventh International Congress of Criminal Law,²⁰ and the Report of the Royal

Commission into New South Wales Prisons (1978) (the 'Nagle Report').²¹ In the latter, Justice Nagle expressed the view that:

A citizen's right to vote should depend only on his ability to make a rational choice. Loss of voting rights is an archaic leftover from the concepts of 'attainder' and 'civiliter mortuus' and has no place within a penal system whose reform policies aim to encourage the prisoner's identification with, rather than his alienation from, the community at large. All prisoners should be entitled to vote at State and Federal elections. Necessary facilities should be provided for them to exercise their franchise.²²

The restrictive approach, however, also attracts much support. Bills to implement the JSCEM's recommendations that all prisoners be granted the right to vote have twice failed, once in 1989 and once in 1995.²³ In its report on the 1996 election the JSCEM, contrary to its two previous recommendations on this issue, recommended that all prisoners be denied the vote on the grounds that:

While rehabilitation is an important aspect of imprisonment, equally important is the concept of deterrence, seeking by the denial of a range of freedoms to provide a disincentive to crime. Those who disregard Commonwealth or State laws to a degree sufficient to warrant imprisonment should not be expected to retain the franchise.²⁴

It is this recommendation that the Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004 seeks to implement.²⁵ A previous attempt to give effect to this view (the Electoral and Referendum Amendment Bill 1998,) failed when it was opposed in the Senate by the Australian Labor Party, the Democrats and the Greens, and a 2002 Bill containing the measure has not been proceeded with.²⁶ In 2000 the JSCEM reverted to its 1994 position, that prisoners should be granted the right to vote, but stopped short of making such a recommendation, on the basis that it would not enjoy popular support.²⁷

Comparative overseas domestic provisions

United Kingdom

The judgment of the European Court of Human Rights (ECHR) in *Hirst v. United Kingdom (No.2)* of March 2004 has radically altered the position in the United Kingdom.²⁸ That case was concerned with the interpretation of Article 3 of the First Protocol to the European Convention of Human Rights, which reads:

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

The United Kingdom had a provision to the effect that: 'A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election.'²⁹ The validity of that provision was challenged.

When the matter was heard at first instance in the domestic English court, Lord Justice Kennedy held that the effect of Article 3 of the Convention was that, if a prisoner was to be disenfranchised, it must be 'in the pursuit of a legitimate aim'.³⁰ His Lordship found that the question of the legitimacy of the aims in the case was best left to the legislature. When the matter proceeded to the European Court of Human Rights, the court, comprising seven judges, agreed that the right to vote was subject to exceptions that were imposed in pursuit of a legitimate aim, but held that the English disenfranchisement provision violated Article 3. The UK had asserted two aims in the legislation: the first to prevent crime and punish offenders; the second to enhance civil responsibility and respect for the rule of law 'by depriving those who have seriously breached the basic rules of society of the right to have a say in the way such rules are made for the duration of their sentence.'³¹ With regard to the second of those objects, the court followed the reasoning of the Canadian Supreme Court in *Sauve v. Canada (Chief Electoral Officer)*:³²

With respect to the first objective of promoting civic responsibility and respect for the law, denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.³³

As to the object of punishment and deterrence, the court again favoured the *Sauve* judgment insofar as it found no evidence in support of the proposition that disenfranchisement deterred crime and that a 'blanket' removal of the vote from prisoners *per se* disclosed no rational link between the punishment and the offender.³⁴ The court conceded that the legislature might legitimately remove the vote in respect of particular offences, or might give a sentencing court a discretion to deprive a convict of his right to vote in certain circumstances, but found that an absolute bar on serving prisoners violated Article 3.

Canada

Canada has had, since 1982, an express right to vote, which is contained in its Canadian Charter of Rights and Freedoms. Section 3 provides that: 'Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.' This provision is subject, however, to section 1 of the Charter, which provides 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

This right to vote and the 'reasonable limits' to which it is subject were tested in 1992 in *Belczowski v. The Queen*.³⁵ There the applicant sought a declaration that s. 51(e) of the Canada Elections Act,³⁶ which denied 'every person undergoing punishment as an inmate in any penal institution for the commission of any offence' the right to vote, was invalid under s. 3 of the Charter. The relief sought was granted at first instance resulting in a

Crown appeal to the Federal Court of Appeal. The question for the court was whether disenfranchisement of prisoners brought about by the Canada Elections Act was ‘a reasonable limit demonstrably justified in a free and democratic society’. The State argued that the legislature was obliged to ‘balance the competing claims of inmates to vote with the claims of society at large to preserve the sanctity of the franchise and to sanction offenders for violating the social contract’.³⁷ In addition, it argued that the need to preserve the sanctity of the franchise was based on ‘the need for a liberal democracy to have a “decent and responsible citizenry” which will voluntarily abide by the laws, or at any rate most of them.’ The Court rejected all of the Crown’s stated objectives, stating:

If the purpose is to ensure a decent and responsible citizenry, the legislation is both too broad and too narrow. It is too broad in that the legislation catches not only the crapulous murderer but also the fine defaulter who is in prison for no better reason than his inability to pay... With regard to the alleged objective of punishment, the legislation bears no discernable relationship to the quality or nature of the conduct being punished. Indeed, on a reading of the text of s. 51(e) it is difficult not to conclude that, if it is imposing punishment, such punishment is for imprisonment rather than for the commission of an offence.³⁸

The court in *Belczowski* held that it was likely that the legislation was ‘nothing more than an historic holdover from the time when it was thought, for practical, security and administrative reasons, that it was quite simply impossible that prisoners should vote’.³⁹ The Crown had abandoned that ground as a justification for the legislation, but the court expressed the view that the ground would ‘in any event be unsustainable in modern conditions’.⁴⁰ The decision in *Belczowski* was challenged on appeal to the Canadian Supreme Court. The appeal failed.⁴¹

The legislature in Canada responded to *Belczowski* by introducing a new disqualification for which the criterion was imprisonment for a period of two years or more.⁴² This provision was tested in 1995 in *Sauve v. Chief Electoral Officer of Canada*.⁴³ This provision, like its predecessor, was struck down at first instance as being in breach of s. 3 of the Canadian Charter of Rights and Freedoms. A Crown appeal to the Federal Court of Appeal was successful, but the provision was eventually held invalid by a five to four majority decision in the Supreme Court of Canada.⁴⁴ The view of the minority was that, because the case rested upon ‘philosophical, political and social considerations which are not capable of “scientific proof”,’ the court should uphold the provision as constitutional because the social or political philosophy advanced by parliament reasonably justified a limitation of the right to vote.⁴⁵ The majority view is summarised in the reasons of the Chief Justice:

The right of every citizen to vote, guaranteed by s. 3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people—those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the Charter as a ‘reasonable limit demonstrably justified in a free and democratic society.’ I conclude that

it is not. The right to vote which lies at the heart of Canadian democracy, can only be trammled for good reason. Here, the reasons offered do not suffice.⁴⁶

In Canada therefore, it is likely that any ‘blanket’ provisions purporting to remove the right to vote from prisoners based simply upon the fact of, or the length of, imprisonment, will be struck down as contrary to the Charter of Rights and Freedoms. It is possible, however, that disenfranchisement attaching to particular offences, or a discretionary power given to courts to remove the right to vote as part of the sentencing process in *particular* cases, would be held to be consistent with the Charter.⁴⁷ For the moment, all prisoners in Canada are entitled to vote, and the Canada Elections Act contains various provisions to facilitate the prisoners’ franchise.⁴⁸

United States

In the United States the opposite view prevails. The leading case, *Richardson v. Ramirez*, was decided in 1974.⁴⁹ There the Supreme Court divided six to three in favour of upholding a Californian provision disenfranchising ‘persons convicted of an “infamous crime”.’ It should be noted that this provision applied, not only to those serving sentences, but to those who had completed their sentences and been released. The decision of the majority was based largely on a provision (Article 2) to the Fourteenth Amendment to the United States Constitution, which contemplated that persons who had participated in ‘rebellion or other crime’ might be disqualified from voting. The Australian Constitution has no such provision. Like the minority in *Sauve*, the majority in *Richardson v. Ramirez* regarded the question as one for the legislature:

Pressed upon us by the respondents, and by amici curiae, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.⁵⁰

The United States Supreme Court has also upheld a state provision imposing a literacy requirement as a qualification for voting.⁵¹ The constitutional provisions in the United States differ to those in Australia. The latter will be considered next.

Constitutional validity of the Australian provisions

Express right to vote

The Australian Constitution does not contain an *express* guarantee of universal suffrage. The Constitution does expressly provide a guarantee that persons who have or acquire a right to vote in state elections shall not be prevented from voting at federal elections.⁵² This provision could have had the effect of forcing the Commonwealth Parliament to prescribe qualifications for electors that were consistent with the most liberal of the equivalent state provisions. For instance, South Australia has no restriction on prisoner voting. On one interpretation of s. 41 of the Constitution, the federal disenfranchisement provision, because it purports to prevent South Australian prisoners from voting at federal elections, would be invalid. This is not, however, the effect of the section as it has been interpreted by the High Court. Rather, the provision has been rendered obsolete by a High Court decision to the effect that it applies only to those who had a right to vote in state elections at the time of federation.⁵³ The historical foundation for the court's decision in relation to this provision has been questioned, as has the reasoning of the court.⁵⁴ Because the decision has since been reaffirmed, however, it seems unlikely that the High Court would revise its view. If the Constitution is to have a bearing on prisoner disenfranchisement, therefore, it will be because it contains some relevant implied right or implied restriction on the legislative power of the Commonwealth.

Implied right to vote

The text and structure of the Constitution include provision for a system of representative government. Indeed, according to Justice Isaacs: 'the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution'.⁵⁵ This requirement for representative government is brought about, in no small part, by the fact that s. 7 of the Constitution, dealing with the composition of the Senate, and s. 24, providing for the composition of the House of Representatives, both require that the members of those houses are to be 'directly chosen by the people'. It is established that those provisions entrench in the Constitution a system of representative government.⁵⁶

In *Australian Capital Television Pty Ltd v. The Commonwealth* it was accepted by the High Court that representative government requires freedom of communication on matters relevant to public affairs and political discussion, and hence that such freedom was implied in the Constitution.⁵⁷ On one view, the act of voting might be seen as the ultimate mode of political communication, and hence it is arguable that a right to vote falls within the Constitutional implication discussed in *ACT v The Commonwealth*. It seems likely, however, that, given the phrase 'chosen by the people', the right to vote can itself be directly implied from the constitutional requirement for representative government. Consistent with the implication of a right to vote are the comments of Chief Justice Mason: 'The very concept of representative government and representative democracy signifies government by the people through their representatives',⁵⁸ and Justices Deane

and Toohey: ‘the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth’.⁵⁹ A current judge of the High Court, Justice Kirby, has written that: ‘it seems to me distinctly arguable that, in Australia, there may be a basic right to vote implied in the text of the Constitution itself’.⁶⁰

Any right to vote implied in the Constitution would not, however, be unqualified. This is because the Constitution quite clearly provides for the Commonwealth Parliament to legislate with respect to the ‘qualification of electors’.⁶¹ In addition the term ‘chosen by the people’ itself implies two qualifications: that electors will possess the ability to make a meaningful choice, and that they qualify as ‘people’ of the Commonwealth or, in the case of the Senate, of the relevant state. It might also be argued that the term ‘chosen by the people’ must be satisfied by less than universal suffrage because, at the time of federation, many persons were excluded from the franchise, including, in many states, women, and Aborigines. If that argument were accepted, then the parliament’s power to exclude voters would be very wide indeed. There are grounds, however, to suppose that the High Court might, in interpreting the phrase ‘chosen by the people’ accord it a more contemporary contextual setting:

The words ‘chosen by the people of the Commonwealth’ fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s. 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognised as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could now be described as a choice by the people.⁶²

Similar sentiments were expressed by a majority in *McGinty*⁶³ by Justice McHugh in *Langer v. The Commonwealth*⁶⁴ and Justice Gaudron has expressed the view that:

notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as ‘chosen by the people’ within the meaning of those words in ss. 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.⁶⁵

If the Court adopted this approach, in determining what constituted a choice by the people in contemporary terms, it might have regard to overseas domestic provisions, as discussed above, and also to relevant international laws and principles.

The influence of international instruments

One such relevant instrument is the *International Covenant on Civil and Political Rights* (ICCPR). While the ICCPR does not form part of Australian domestic law, it is at least arguable that international influences play an important part in the development of Australian constitutional law. The comments of Justice Brennan in *Mabo v. Queensland (No.2)* are apt in this regard:

The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.⁶⁶

According to Justice Kirby, that principle applies equally to the interpretation of constitutional law, as to common law.⁶⁷ Article 25 of the Covenant provides:

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

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

The distinctions mentioned in Article 2 are distinctions 'of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*' (italics added). The term 'other status' could arguably include persons serving sentences of imprisonment. The United Nations Human Rights Committee (UNHCR) has previously expressed a contrary view: that Article 25 does not prevent states from having a non-discriminatory disenfranchisement provision.⁶⁸ More recently, however, the UNHCR has commented, in relation to the UK provision (prior to *Hirst*):

The Committee is concerned at the State party's maintenance of an old law that convicted prisoners may not exercise their right to vote. The Committee fails to discern the justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner's reformation and social rehabilitation, contrary to article 10, paragraph 3, in conjunction with article 25 of the Covenant. The State party should reconsider its law depriving convicted prisoners of the right to vote.⁶⁹

Article 10(3) of the ICCPR provides: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' This is relevant in the present context because it affords primacy to the aim of rehabilitation,

whereas those opposed to voting rights for prisoners often assign punishment and deterrence as objects of equal importance.

Also of relevance is the *International Convention on the Elimination of All Forms of Racial Discrimination*, to which Australia is a party. The Convention requires states to guarantee to everyone, without distinction as to race, political rights, including the rights to participate in elections, to vote and to stand for election, on the basis of universal and equal suffrage.⁷⁰ The Convention also obliges states to amend rescind or nullify any laws that have the effect of creating or perpetuating racial discrimination, or of strengthening racial division.⁷¹ Because of the disproportionate effect that prisoner disenfranchisement has on Indigenous Australians, it is arguable that such disenfranchisement conflicts with Australia's obligations under the Convention.

The principles recognised in the international instruments here mentioned are consistent with the approaches taken in Canada and the United Kingdom (in light of the *Hirst* judgment), and that collective approach may lead the High Court toward a conclusion that the constitutional requirement for choice by the people is akin to a requirement for universal suffrage, subject to the exceptions mentioned above, and discussed below.

Is prisoner disenfranchisement a 'reasonable exception' to universal suffrage?

Australian laws that are inconsistent with rights implied by the text of the Constitution can nevertheless be valid if they satisfy two conditions. First, that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative government. Second, that the law is reasonably appropriate and adapted to achieving that legitimate object.⁷² This requirement is, in effect, similar to the test for reasonable exceptions to the Canadian right to vote, and to the 'legitimate aims' exception to the right in the United Kingdom and Europe. Hence in testing any Australian disenfranchisement provision, one can begin with an assessment of its object.

It is no easy task to establish the purpose or object of laws for the disenfranchisement of prisoners. As was discussed in relation to other domestic provisions above, some of the oft invoked reasons are 1) promoting civic responsibility and respect for the law, 2) punishment, and 3) deterrence. Punishment and deterrence appear to be the factors that motivated the JSCEM to make the recommendation that is being adopted by the current government.⁷³ The criticisms made of punishment and deterrence as objects in other jurisdictions apply equally to the Australian provisions. In the Canadian case of *Sauve v. Canada*, the majority held that disenfranchisement attaching to prisoners serving two years or more was not rationally connected to the object of punishment. That finding certainly seems true of the proposed Australian provision: to remove the right to vote from all those serving a sentence. Under the Australian provision, a person who commits a more serious offence and receives a suspended sentence of imprisonment for three years would retain the right to vote, yet a person serving two months full-time imprisonment for fine defaulting over a collection of parking offences would be disenfranchised. It also means that many persons sentenced to, say, two years imprisonment, might avoid an election

during the course of their imprisonment and hence effectively not lose their vote, whilst another prisoner sentenced to the same term but unlucky enough to have that term coincide with an election, would be denied a political voice. The criticism made in Canada in *Belczowski* is as true here:

a denial of a right to vote for persons convicted of treason or felony can readily be understood as a punishment for those crimes. A similar denial imposed only on those who are actually in prison looks more like a consequence of that condition than a sanction for the conduct which brought it about in the first place.⁷⁴

When considering punishment as an object, recall also the requirement in Article 10(3) of the ICCPR: ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their *reformation and social rehabilitation*.’ This is more consistent with placing rehabilitation above deterrence, and accordingly with an inclusive approach to prisoners in the context of political participation.

To use the removal of the franchise as a punishment or deterrent becomes more paradoxical when one considers the fact that Australia compels its citizens to vote, by making the failure to do so an offence.⁷⁵ The strange result is that persons who fail to vote on a number of occasions and refuse to pay the associated fines might, under the proposed provision, find themselves denied the right to vote while serving a period of default imprisonment. The ‘punishment’ would not *fit*, but would *be* the ‘crime’. For those reasons the proposed provision hardly seems proportionate or appropriate to the object of imposing additional punishment.

A provision that empowered courts to remove the right to vote as a part of the sentencing process in certain instances where the sentencing tribunal considered it necessary and appropriate might be regarded as appropriate because it would presumably be applied only where the court considered there to be a rational connection to the crime and that judgment would then be subject to review through the appeal process. This approach has been suggested by the Senate Standing Committee for the Scrutiny of Bills in response to the current proposal to disenfranchise all prisoners in Australia.⁷⁶

As to the assertion that prisoner disenfranchisement can ‘enhance civil responsibility and respect for the rule of law’,⁷⁷ that argument was rejected in Canada and Europe in *Sauve* and in *Hirst* respectively, both of the relevant courts noting that the provisions undermine respect for the rule of law by detracting from the legitimacy of the legislature from which they emanate. At least it can be said, where prisoners have the franchise, that their fate is sanctioned by a political process in which they continue to play a part. That is a situation more likely to inspire respect than one that separates the prisoner from political society. Again the provision fails to demonstrate a sufficient connection to the object.

Choice and citizenship

There is ample scope for the exercise of the Commonwealth's power to legislate with respect to the qualification of electors. Reasonable exceptions to the right to vote can, it is suggested, be discerned from the phrase 'chosen by the people of the Commonwealth'. There are, within that phrase, two criteria for the Commonwealth to quantify under section 30 of the Constitution. First, the very ability to make an informed, rational choice. Second, the demographic consideration as to what constitutes a person of the Commonwealth. The first allows for the Commonwealth to determine what level of maturity or soundness of mind a person must possess in order to be able to make a political choice. Representative government involves the notion of 'choice', and accordingly, those who are incapable of making a choice or of understanding the concept of voting, might validly be excluded. Perhaps this was what was envisaged by Justices Deane and Toohey when they said:

the general effect of the Constitution is, at least since the adoption of full adult suffrage by all the states, that all citizens of the Commonwealth *who are not under some special disability* are entitled to share equally in the exercise of those ultimate powers of governmental control.⁷⁸

The second criterion allows the Commonwealth to determine the degree of affiliation that a person must have with the country before they can be described as a 'person of the Commonwealth'. The parliament might make citizenship a required qualification for electors, or might include persons of other status with sufficient affiliation to the country to vote, such as permanent residents. This criterion might also allow the exclusion of persons who had demonstrated by certain conduct—such as treason—that they rejected their affiliation with the Australian political community and hence warrant exclusion from the franchise. But whether this criterion allows the exclusion of citizens of the Commonwealth merely because of their status as inmates of correctional facilities, is much less clear. To serve a term of imprisonment does not equate to a rejection of the political community. On the contrary, it connotes an acceptance of the consequences of one's actions within the rules of that community.

Conclusion

The requirements of the Australian Constitution for representative government are open to be interpreted so as to protect the right of Australians to vote in federal elections. The proposed provision to remove the right to vote from all prisoners serving a full-time sentence of imprisonment arguably conflicts with the Constitutional requirement, and according would be liable to be held invalid if challenged in the High Court.

Endnotes

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1. See E. Coke, *Institutes of the Laws of England*, vol. I n. 41a.

2. M. R. Damaska, 'Adverse legal consequences of conviction and their removal: A comparative study', in *Journal of Criminal Law, Criminology and Police Science*, vol. 59, 1968, p. 351.
3. Section 93(8)(b) of the *Commonwealth Electoral Act 1918*.
4. Parliamentary Electorates and Elections Act 1912 (NSW), s. 21(b) disqualifies any person who has been 'convicted of a crime or an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that crime or offence to imprisonment for 12 months or more and is in prison serving that sentence.' Electoral Act 1992 (Qld) s. 64 ties qualification to vote in state elections to qualification to vote under the Commonwealth Act, to vote in federal elections. Constitution Act 1975 (Vic) s. 48(2) disqualifies persons serving sentences of 5 years or more for offences against the laws of Victoria or the Commonwealth. Electoral Act 1907 (WA), s. 18 disqualifies any person who is 'serving or is yet to serve a sentence or sentences of detention... or imprisonment, totalling one year or longer.' Constitution Act 1934 (Tas), s. 14(2) disqualifies from voting any person in prison under any conviction. Electoral Act 1992 (ACT) s. 72 ties qualification to vote in ACT elections to qualification to vote under the Commonwealth Act, to vote in federal elections. Northern Territory (Self-Government) Act 1978 (Cwlth) s. 14 ties qualification to vote in ACT elections to qualification to vote under the Commonwealth Electoral Act. There is no restriction on prisoners voting in South Australia.
5. See Jerome Davidson, 'Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004', Bills Digest, no. 136, Parliamentary Library, Canberra, 2003—04.
6. Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004.
7. Section 4.
8. Act no. 144 of 1983 omitted subsection (4) and added the new subsection (6)(b) in these terms. The provisions was subsequently renumbered (by Act no. 45 of 1984) and became s. 93(8)(b).
9. By Act no. 166 of 1995. Section 109 of the *Commonwealth Electoral Act 1918* requires the Controller-General of state prisons to inform the AEC of the names of persons serving sentences of 5 years or more and s. 10 requires the AEC to act of that information – to remove the relevant names from the roll.
10. The Australian Bureau of Statistics figure for people serving sentences of five years or more is about 7341. This figure, however, includes only those persons serving their sentences in prison. Prisoners originally sentenced to five years or more but released on parole or similar early release schemes are deemed to be 'serving a sentence' and hence would be caught by the current provision. The approximate number of such persons has been previously estimated (see G. Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners', in *Federal Law Review*, vol. 26, 1998, p. 55 at p. 75) to be around half the number of those serving five years or more who are actually in prison. On this basis, the figure is 11 011.
11. According to the Australian Bureau of Statistics' *Prisoners in Australia 2003*, on 30 June 2003 there was a total of 23 555 prisoners in Australia. That is based on the definition of 'prisoner' adopted by the ABS: 'A person held in custody ... those whose confinement is the responsibility of a corrective services agency'. That definition includes prisoners on remand

awaiting trial. Such prisoners are not caught by the proposed amendment because they are not 'serving a sentence'. Persons serving periodic detention—for instance, two days per week in prison—are also not caught by the amendment because it relates to 'full-time' detention. Taking account of those matters has the result that the total number of prisoners that would have been denied the right to vote had the proposed amendment been in effect as at 30 June 2003 would be 17 875.

12. Australian Bureau of Statistics, *Prisoners in Australia*, *ibid.*, p. 5.
13. *ibid.*
14. *ibid.*, pp. 26–27.
15. Joint Standing Committee on Electoral Matters, *The 1993 Federal Election: Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, Commonwealth of Australia, November 1994, p. 143.
16. *ibid.*
17. Joint Standing Committee on Electoral Matters, *The 1998 Federal Election: Report of the inquiry into the conduct of the 1998 federal election and matters related thereto*, Commonwealth of Australia, June 2000, p. 89.
18. In a submission to the Joint Standing Committee on Electoral Matters, noted in *The 1996 Federal Election: Report of the Inquiry into the conduct of the 1996 Federal Election and matters related thereto*, Commonwealth of Australia, June 1997 p. 48.
19. *Sentencing and Corrections* (Report No. 1, 1973), p. 130.
20. Damaska, *op. cit.*, p. 358.
21. Justice Nagle, 'Report of the Royal Commission into New South Wales Prisons', March 1978, p. 304.
22. *ibid.*, p. 561.
23. See: Orr, *op. cit.*, p. 72.
24. *The 1996 Federal Election*, *op. cit.*, p. 48.
25. Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004 explanatory memorandum, par. 23.
26. Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2002.
27. JSCEM, *The 1998 Federal election*, *op. cit.*, p. 90.
28. 74025/01 ECHR 2004.
29. Representation of the People Act 1983 (UK), s. 3(1).
30. *Hirst v Attorney General* [2001] EWHC Admin 239, para. 40.
31. *Hirst*, *op. cit.*, para. 42.
32. [2002] 3 SCR 519.
33. *ibid.*, at para. 26, 42, 43, 46.

34. *ibid.*, at para. 45.
35. (1992) 90 DLR (4th) 330.
36. R.S.C. 1985, c. E-2
37. *Belczowski*, *op. cit.*, p. 336.
38. *ibid.*, pp. 341—42.
39. *ibid.*
40. *ibid.*
41. [1993] 2 S.C.R. 438
42. A later version of s. 51(e) of the Canada Elections Act, R.S.C 1985, c. E-2.
43. (1995) 132 DLR (4th) 136.
44. *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.
45. *ibid.*, para. 67.
46. *ibid.*, para. 1.
47. The decisive factor in *Sauve* was the arbitrary or ‘blanket’ application of the disenfranchisement provision. See for example paras. 51 and 52 of the judgement of the Chief Justice.
48. Division 5 of the Act relates to ‘incarcerated electors’.
49. 418 US 24 (1974).
50. *Richardson v Ramirez*, *op. cit.*, p. 55.
51. *Lassiter v. Northampton County Board of Elections* 360 US 45 (1959).
52. Section 41.
53. *R v Pearson; Ex parate Sipka* (1983) 152 CLR 254.
54. See A. Twomey, ‘The federal constitutional right to vote in Australia’, *Federal Law Review*, vol. 28, 2000, p. 125.
55. *Federal Commissioner of Taxation v. Munro* (1926) 38 CLR 153 at 178.
56. *Attorney-General (Cth) (Ex. Rel. McKinlay) v. The Commonwealth* (1975) 135 CLR 1, pp. 55—56 per Stephen J.; *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106, pp. 137—138, 150, 168, 184—185, 210—211, 229. *Langer v. The Commonwealth* (1996) 134 ALR 400; *Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96, p. 104 and generally.
57. (1992) 177 CLR 106, per Mason CJ at 140; Brennan J. pp. 149–50: ‘freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution’; Deane and Toohey JJ. p. 168: freedom ‘of communication about matters relating to the government of the Commonwealth’; Dawson J.

- p. 187: 'freedom of speech' 'during election time'; and Gaudron J., pp. 208–15: implied freedom of political discourse'.
58. *ACT v The Commonwealth*, op. cit., p. 137.
 59. *Nationwide News Pty Ltd. v. Wills* (1992) 177 CLR 1 p. 72.
 60. Justice Michael Kirby, 'Upholding the Franchise – Contrasting decisions in the Philippines, United States and Australia', in *Australian Bar Review*, vol. 21, no. 1, June 2001, p. 1.
 61. Sections 30, and 51(xxxvi).
 62. *Attorney-General (Cth) (Ex. Rel. McKinlay) v. The Commonwealth* op. cit., pp. 35–36 per McTiernan and Jacobs JJ.
 63. *ibid.*, per Gaudron J, and pp. 166–167 per Brennan CJ.; p. 201 per Toohey J., pp. 286–287 per Gummow J.
 64. (1996) 134 ALR 400, pp. 424–425.
 65. *McGinty*, op. cit., pp. 221–222.
 66. (1992) 175 CLR 1, at p. 42, quoted in Michael Kirby, 'Domestic implementation of international human rights norms', in *Australian Journal of Human Rights*, vol. 5, no. 2, 1999, p. 117.
 67. *Newcrest Mining v. The Commonwealth* (1997) 190 CLR 513, pp. 657-8.
 68. See M. Ridley-Smith and R. Redman, 'Prisoners and the Right to Vote', in D. Brown and M. Wilkie (eds), *Prisoners as Citizens*, Federation Press NSW, 2002, p. 293.
 69. United Nations, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*. CCPR/CO/73/UK; CCPR/CO/73/UKOT, 6 Dec 2001, para. 10.
 70. Article 5.
 71. Article 2.
 72. *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, p. 108
 73. JSCEM, *The 1996 Federal Election*, op. cit., p. 48.
 74. *Belczowski v. The Queen* (1992) 90 DLR (4th) 330 p. 342.
 75. Section 245 of the *Commonwealth Electoral Act 1918*, and note that a challenge to the validity of that section has failed, meaning that in Australia, there is no right not to vote: *Judd v. McKeon* (1926) 38 CLR 380.
 76. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 6, 12 May 2004, p. 13.
 77. *Hirst v. The United Kingdom*, op. cit. at para. 42.
 78. *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1, p. 72 per Deane and Toohey JJ. [emphasis added].