

## Ending Felon Disenfranchisement

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In his contribution to the debate about prisoners' rights, Richard Hasen considered two possible methods for ending felon disenfranchisement: litigation and legislation. He concluded that litigation seemed unlikely to produce the changes he desired, and that the best way forward, although very slow, was likely to be through legislative change.<sup>2</sup> Australia's history in this area suggests that this is a forlorn hope. Generally the disenfranchisement is an issue of such little public interest and widespread ignorance that instigation for change must come from within political parties. However, the usual arguments for and against enfranchisement fall so conveniently along party lines that, in the absence of some external pressure, the right of convicted prisoners to vote depends to a large extent on which party is in power. In any case, legislative change can easily be towards more exclusion rather than less, as the 2004 electoral amendments demonstrated and current government plans for further disqualification indicate.<sup>3</sup> Merely having the right to vote does not necessarily entail having the ability to exercise this right.

Currently, convicted prisoners serving sentences of three or more years are disqualified from voting in Commonwealth, Queensland, ACT, Tasmanian and Northern Territory elections. Prisoners serving sentences of twelve months or more are disqualified in New South Wales and Western Australia;<sup>4</sup> prisoners serving sentences of five years or more are disqualified in Victoria. Most people would be unaware of these disqualifications. They are not mentioned on enrolment forms, which list only qualifications, and the AEC (responsible for enrolment for federal, State and local elections under joint roll arrangements) wrongly implies that the

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<sup>1</sup> I wish to thank Professor Murray Goot, Marian Sawyer and the anonymous reviewers for their help and advice in preparing this article.

<sup>2</sup> Hasen, Richard, 2004, 'Ending Felon Disenfranchisement in the United States: Litigation or Legislation?' Democratic Audit of Australia. Canberra, Australian National University.

<sup>3</sup> Special Minister for State, Senator Eric Abetz has declared that legislation to disenfranchise all those serving a prison sentence will be introduced after 1 July, when the government gains a majority in the Senate (Breusch, John, 'Prisoners, tardy could lose right to cast a vote', *Australian Financial Review* 21 January, 2005, p. 13).

<sup>4</sup> Those in detention are also disenfranchised in Western Australia.

Commonwealth disqualification applies to all jurisdictions.<sup>5</sup> Even those directly affected may not know they have been disenfranchised, since the disqualification is not mentioned when a criminal is sentenced. Although the Howard Government began its campaign to extend the Commonwealth disqualification to all convicted prisoners in 1996, and although its amendments were routinely blocked by the Opposition and minor parties until 2004 when they were passed in a modified form,<sup>6</sup> what little debate there was rarely extended far beyond the Parliament. Even in Parliament, Australia rarely debates the issue. Of forty-five changes to the criminal disqualification over all jurisdictions between 1843 and 2002, Hansard indicates that twenty-four were passed without any discussion, let alone debate. Two others simply clarified points; debate was adjourned for a further two.<sup>7</sup>

Although prisoners serving sentences for crimes which were punishable by penalties of less than twelve months have always been enfranchised for Commonwealth and ACT elections, and were enfranchised in Western Australia, South Australia (and Northern Territory) in 1908, in Victoria in 1923, in New South Wales in 1928 and in Queensland in 1944, no prisoners were able to exercise their vote because no mechanism for voting was provided.<sup>8</sup> Nevertheless, it was not until the 1970s that this became an issue. During this time there were strikes over conditions by prisoners in nearly every state. Many resulted in riots. A number of associations formed, devoted to prisoners' rights. These associations included prisoner enfranchisement as one of their demands. Prisoners also petitioned parliament.<sup>9</sup> There were six major inquiries between 1973 and 1984, including the 1973 Criminal Law and Penal Methods Reform

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<sup>5</sup> The Prisoner Enrolment Form ERO16Pw\_0804, currently available from the AEC website, says that prisoners are eligible to enrol if serving sentences 'less than three years'.

<sup>6</sup> The disqualification trigger was reduced from five years to three years, rather than coming into effect on any conviction.

<sup>7</sup> Fitzgerald, Sandey, 2002, *Universal Franchise? Criminal Disqualifications in a Liberal Democracy*, Unpublished BA (Hons) Thesis, Dept. of Politics, Macquarie University. Hansard records were unavailable for a further nine changes to legislation during this period.

<sup>8</sup> While it was recognized at least as early as 1915 that not all prisoners were disqualified under criminal disqualifications, residency qualifications were routinely used to deny all prisoners the vote. Queensland Hansard records for 1915 (page 917) and 1916 (page 1302) indicate this recognition. The Victorian Labor Opposition complained about the use of residential qualifications to prevent prisoners from voting in 1976 (see Victorian Hansard records for 1976, page 319); in 1979, in the course of a heated debate over prisoner enfranchisement, the NSW Liberal Opposition admitted knowing that this was also the case in NSW (see NSW Hansard records, pages 7307, 8076 and 8378). Mechanisms to enable prisoners to vote in federal elections were not introduced until 1983 (*Commonwealth Electoral Legislation Amendment Act No 144 of 1983*, Section 85).

<sup>9</sup> NSW Labor MLA, George Petersen (Illawarra) presented petitions seeking voting rights for prisoners to the NSW Assembly on 31/3/1977 and 13/9/1977.

Committee of South Australia under Justice Roma Mitchell and the influential 1978 Royal Commission into Prisons in New South Wales, headed by Justice J.F. Nagle. Most inquiries recognized the problematic nature of the disqualification, and it was on the basis of the Mitchell report that South Australia enfranchised its criminal population.

Clifford's 1982 paper 'Rights and Obligations in a Prison', prepared in collaboration with State prison administrators for a conference of ministers responsible for the prison system reveals the different kind of thinking and the desire for reform that emerged during this period.<sup>10</sup> Minimum Standard Guidelines for Australian Prisons were drawn up (with Clifford's involvement) in 1977 and it seems that these guidelines were still in place and being built upon, albeit sometimes reluctantly, at the time Clifford's paper was being prepared.<sup>11</sup> According to Clifford, New South Wales was taking steps to restore the right of prisoners to vote; this would have brought it into line with Victoria, South Australia and the Northern Territory. However, New South Wales did not take these steps, Victoria reversed its position and the Northern Territory reintroduced the disqualification when it adopted the Commonwealth franchise. By the 1980s, the flurry of activity on behalf of prisoners had died down and governments at both State and federal level had adopted strong 'law and order' positions and increased rates of incarceration.<sup>12</sup> Only South Australia continues to allow criminals to vote.

Criminologists point to the essentially ideological nature of penal philosophies. Research has long indicated that governments of the left favour rehabilitation whilst governments of the right favour retribution.<sup>13</sup> Even when both sides have been espousing a law and order rhetoric, Labor governments have been more likely than Coalition governments to provide training and rehabilitation programs in prisons and

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<sup>10</sup> Clifford, W. 1982, 'Rights and Obligations in Australian Prisons', Canberra, Australian Institute of Criminology

<sup>11</sup> Birtles, T.B. 1989, 'Prisoners' Rights in Australia', *Australian and New Zealand Journal of Criminology* 22, pp. 207-209.

<sup>12</sup> Graycar, Adam, 2001, 'Centenary Article – Crime in Twentieth Century Australia', *2001 Year Book Australia*, Canberra, Australian Bureau of Statistics, Cat. No. 1301.0.

<sup>13</sup> Barlow, H. D. (1987), *Introduction to Criminology*. Boston and Toronto, Little, Brown and Company; Morrison, W. (1995), *Theoretical Criminology: from modernity to post-modernity*. London, Cavendish Publishing Ltd.

support for ex-prisoners.<sup>14</sup> Arguments for and against prisoner enfranchisement fall along the same ideological divide. The left argues that democracy is diminished if some citizens are prevented from voting because the legitimacy of the government in a democracy depends on a full franchise. The right not only finds the disqualification in keeping with the principles of liberalism which seek to develop civic virtue in the citizenry,<sup>15</sup> but also that democracy is devalued when people who have ‘broken the social contract’ are allowed to vote.<sup>16</sup> These arguments, in which the left supports inclusion whilst the right supports exclusion, have been produced in virtually every debate on the issue since the beginning of franchise legislation in Australia. With the exception of the 1976 South Australian debate, when a Liberal opposition reluctantly agreed to support a Labor government’s enfranchisement legislation because of the ‘high esteem’ in which it held the Mitchell inquiry into prison reform, debate has consistently failed to produce a shift in this ideological division. The fundamental beliefs of conservative parties towards criminals need to undergo a significant and permanent change if this disqualification is to disappear forever.

### **Complications**

Every jurisdiction sets its own rules for the franchise. While some States currently adopt changes to the Commonwealth franchise as a matter of course (either automatically or through legislation), they are not obliged to do so. This gives rise to considerable variation in what is supposed to be a qualification pertaining to Australian citizenship. In Western Australia, short sentences can be added together to meet the one year trigger for disqualification for State and local elections, something which is not permitted for Commonwealth elections.<sup>17</sup> The Commonwealth

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<sup>14</sup> Brown, D. 1991, ‘The State of the Prisons in NSW under the Greiner Government: Definitions of Value’, *Journal for Social Justice Studies*, p. 4.

<sup>15</sup> However, J.S. Mill’s classic texts on liberty and representative democracy do not recommend a disqualification from the vote on the basis of mere criminality. Mill believed that criminals ought to be punished (‘On Liberty’ p. 74), and he believed that illiterates, those in receipt of charitable relief, uncertified bankrupts and persistent tax avoiders ought not be entitled to vote (‘Representative Government’ p. 282), but he does not disqualify criminals *per se*.

<sup>16</sup> The debates over new electoral legislation in the Commonwealth Parliament during 1983 and 1988 provide a perfect example of this division, as do the reports of the Joint Standing Committee on Electoral Reform, and the more recent debates over the Howard government’s amendment to the Commonwealth franchise.

<sup>17</sup> Western Australia also has a bill (No. 253) before the Parliament to provide for increased voting rights for prisoners serving sentences of less than five years. The explanatory memorandum accompanying this bill claims this is to bring the legislation into line with Commonwealth enrolment

disqualifies criminals on the basis of their actual sentence. Until recently, Victoria disqualified them on the basis of the maximum sentence applicable to their crime anywhere in Australia.<sup>18</sup> The slippage between *criminal* (a convicted person completing a sentence whether in or out of prison) and *prisoner* (any person, convicted or not, who is in prison) in much of the literature on criminal disqualification adds to the confusion.<sup>19</sup> Whilst prisoners who have not been convicted are generally entitled to vote,<sup>20</sup> many criminals who are not entitled to vote are not in prison and cannot be readily identified.<sup>21</sup> The Commonwealth does not remove the vote from criminals serving their sentence outside prison or on a part time basis.<sup>22</sup> While South Australia allows all criminals to vote in State and local elections, South Australian criminals who are serving a sentence of three years or more in prison may not vote in Commonwealth elections. Much of the literature on the disqualification of prisoners spends little time discussing why such variability might be tolerated in the face of the enormous difficulties of implementation it presents.

There is some suggestion that the AEC has been attempting to harmonise enrolment procedures by presenting the Commonwealth franchise as if it applies to the States.<sup>23</sup> The Commission made several submissions to the 1986 Joint Select Committee on Electoral Reform suggesting improvements to the workability of the legislation, including recommending the enfranchisement of all criminals, and has continued to complain about the difficulty of administering such a variable disqualification. To date, the ideological deadlock between the left and right has meant that these complaints have generally fallen on deaf ears. Not only that, but, as its 2002

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provisions. In the mean time, however, Commonwealth enrolment provisions have been amended to three years, so further Western Australian legislation will be required.

<sup>18</sup> In 1983, the AEC advised the JSCER that it was generally not possible to ascertain the maximum sentence which might be applicable anywhere in Australia for a specific offence, and that it was obliged to use the actual sentence instead. On the basis of this, the Commonwealth moved to actual sentence in 1983.

<sup>19</sup> The report of Senator Abetz' proposed changes to the electoral law regarding the criminal vote (mentioned earlier) is typical in this regard. So also is Brian Costar's article 'Elections: Voters inside' posted to the *Australian Policy Online* 5 July 2004, in which it is stated that 'all voters who are currently in prison' were originally to be disenfranchised by the *Electoral and Referendum (Enrolment Integrity and Other Measures) Bill 2004*. Criminals (convicted prisoners) who are serving their sentences in prison are the target of the Howard government's amendments.

<sup>20</sup> WA also disenfranchises prisoners who are subject to detention orders.

<sup>21</sup> Joint Select Committee on Electoral Reform 1986, *The Operation during the 1984 General Election of the 1983/84 Amendments to Commonwealth Electoral Legislation Report No. 2*, p. 34.

<sup>22</sup> See AEC website: [http://www.aec.gov.au/\\_content/What/voting/prisoners.htm](http://www.aec.gov.au/_content/What/voting/prisoners.htm)

<sup>23</sup> Orr, Graeme, 1998, 'Ballotless and Behind Bars: the Denial of the Franchise to Prisoners', *Federal Law Review* 26, p. 60.

submission relating to its funding indicates, the AEC may itself end up a victim of the conservative urge to limit the franchise.<sup>24</sup>

### **Rights-talk**

The disenfranchisement of prisoners conflicts with a variety of international covenants to do with human and political rights. As a result, it is in the name of rights that the disqualification is usually opposed. For a right to have any meaning, it must be both achievable and enforceable. Although in 1928 New South Wales enfranchised prisoners who were serving sentences for crimes which attracted sentences of less than twelve months, it was not until 1977 that postal voting was extended to them to enable them to exercise their right. Even then it was only for those who were already enrolled: the unenrolled had to wait until 1987. Nor, as the heated debate in parliament in 1977 makes clear, was this a mere oversight.<sup>25</sup>

Theoretically voting rights are restored in Australia once the sentence of imprisonment ends. In practice, ex-prisoners must apply to re-enrol. Many ex-prisoners are homeless and cannot establish a stable address for the minimum one month required. Electoral legislation now allows people who cannot meet residency qualifications to enrol as itinerants, however, very small numbers of itinerants/homeless appear to take advantage of these special arrangements. The process of registration is said to be ‘quite complex’, requiring the person to be ‘literally homeless’. It has also been suggested that ex-prisoners (and other homeless people) are reluctant to enrol because the electoral roll can be used to locate them or

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<sup>24</sup> The report states that the AEC faces a ‘funding crisis’ which will severely restrict its ability to continue its work ([www.aec.gov.au/content/Why/committee/subs/sub166/sun166.htm](http://www.aec.gov.au/content/Why/committee/subs/sub166/sun166.htm)).

<sup>25</sup> The *Parliamentary Electorates and Elections (Amendment) Act 1928* (No. 55), dropped the extensive range of disqualifications which had been introduced in 1893 in favour of disqualifying those convicted and under sentence for a crime punishable by imprisonment for one year or longer. As indicated earlier, it was generally because prisoners were unable to fulfil residency requirements that they continued to be disenfranchised. There continues to be opposition to prisoners using the prison as their residential address because it is thought this might create a ‘prison vote’. Current legislation provides an hierarchical system of addresses to overcome this problem. NSW was the first jurisdiction to extend postal voting to prisoners, although it had been available since 1900 (see the debates surrounding the passage of the *Parliamentary Electorates and Elections (Amendment) Act No. 108, 1977*). The issue and legislation is covered in some detail in Fitzgerald, Sandey, 2002, *Universal Franchise?*

their families.<sup>26</sup> Disqualification and deregistration as a result of a conviction are thus likely to result in a permanent disqualification by default.

Evidentiary requirements (such as the provision of a driver's license) or the dependence upon witnesses who may in positions of power (prison or parole officers or other social authority officers who may be the only registered voters who can attest to an applicant's identity and residential status) can also work against the intent of enfranchising legislation. Ultimately, the ability of prisoners to vote depends not just on the existence of legislation and on mechanisms that give effect to it, but on the willingness of prison officials to allow it. All criminal codes give prison officials the authority to refuse access to party workers and electoral officials.

The issue of criminal disenfranchisement seems to be of some symbolic value and can provoke fierce, even intemperate debate. Historically, however, it has generally been low on the agenda of both sides of politics. There have been long periods where significant electoral change has taken place while the disqualification has remained untouched, and times when substantial changes to the disqualification have been passed in complete silence. When the issue has surfaced, its appearance has either been instigated by external forces as in the 1970s, or it has been used as a device of differentiation or trade. In 1988, amidst debates which appeared to have locked each side into an intractable position, proposed changes were abruptly dropped, sacrificed for other, more important reforms.<sup>27</sup> In 1995, it appeared to operate as a wedge issue, an opportunity to draw distinctions between the parties.<sup>28</sup> Its current revival also appears to be operating in this way.

Changes to the disqualification also seem to require either a sustained period in office or a majority in the Senate; yet the issue does not appear to be susceptible to claims that it is administratively unworkable, nor to the charge that it operates as a form of racial discrimination—despite repeated demonstrations that the disqualification falls disproportionately on indigenous people. Even when the criminal disqualification is

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<sup>26</sup> Deb Tsorbaris, Victorian Council to Homeless People, interviewed on *The Law Report*, 21 September 2004, ABC Radio National ([www.abc.net.au/rn/talks/8.30/lawrpt](http://www.abc.net.au/rn/talks/8.30/lawrpt)). The AEC is currently conducting research into how to overcome this reluctance.

<sup>27</sup> See Commonwealth Hansards for 1988 (Vol. S126, pp. 1207-1209) and 1989 (Vol. S133 pp. 3543).

<sup>28</sup> Orr, Graeme, 2003, 'Ghosts of the Civil Dead', *Democratic Audit of Australia*, May 2003.

lifted, legislative change can prove to be neither enabling nor permanent. A significant and wide-ranging cultural shift seems to be required to permanently overcome conservative opposition to criminal enfranchisement, such that it ceases to be ‘a classic political football’.<sup>29</sup>

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<sup>29</sup> Orr, Graeme, ‘Ghosts of the Civil Dead’.